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Challenges to Wills: Part 2

Introduction

Last edition we introduced the topic of challenges to Wills which is a complex area.

This is particularly topical in Victoria as amendments made in 1998 to the Administration and Probate Act 1958 indicate anyone can now make a claim on an estate.

In considering such an application however, the court must consider a range of issues revolving around whether the deceased had a responsibility to make a provision for someone and if so, whether that was adequate. Continuing from our last edition, we look at more cases to see how these issues have been interpreted.

Can a sibling make a claim?

As mentioned anyone can make a claim, but will they be successful? In *Marshall v Spillane* [2001] VSC 371, a 66 year old brother made a successful claim against his 87 year old sister's estate.

She had died, without children and without a Will. Her estate went to her husband (of 65 years) and in turn when he died not long after, his estate went to his siblings and their children.

Although the brother was then married with four adult children, both he and his wife were in poor health and had limited financial resources. Importantly, the judge found their relationship was more like mother and son than siblings...

"He acted towards her as a dutiful son and she towards him as a loving mother over the whole period of his life... She certainly had no legal or financial obligations or responsibilities for him. But ...she had a moral responsibility towards him as might a parent, to acknowledge their mutual relationship in a practical way."

The judge found for the brother and decided he should get 1/3 of her estate and her husband the other 2/3.

"In the present circumstances, where the needs of the competing beneficiary are not great and the relationship of the claimant is ... some provision ought to have been made in his favour....".

Is there a responsibility to a second wife?

In *Gigliotti v Gigliotti* [2002] VSC 279 a life interest had been left in the matrimonial home to the widow. It was a second marriage and they had been married only 10 years. For a number of reasons she could not continue to live in the home so the court was asked to consider whether she should be provided for from the estate.

"The relevant considerations ... are the following: the age of Mrs Gigliotti; the fact that she has been a devoted wife for some 10 years and is now a widow with few assets and has as income only



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an age pension of \$427 per fortnight; she is in good health for a woman of her age; the competing beneficiaries have not demonstrated any particular want of financial resources; their moral claim upon the bounty of the deceased is minimal compared with that of the widow."

The judge decided the house could be sold (estimated \$225K net) and another bought for \$150K with \$50K provided as a "nest egg". The widow could then live in the house until her death when it would pass back to the deceased's children.

"...wisdom ... has dictated that a widow requires not only a roof over her head, but also what is called a "nest egg" to give her some comfort in facing the unforeseeable vicissitudes which lie ahead."

And step-children?

In *McKenzie v Topp*, a 67 year old stepson was successful in making a claim against his stepmother's estate, worth approximately \$700K.

The court decided he should share in the estate with her nephew and awarded him enough to purchase a modest house plus costs. In this instance it was \$275K.

"..the plaintiff established ... not only that he gave to the (deceased) assistance worthy of recognition (thus constituting a "special claim"), but also a "special need for maintenance or support", in that his financial resources are meagre and he is about to be evicted from his home. I am to some extent confirmed in my view as to the (deceased's) responsibility towards him

by the size of the estate which his father left to her.

This decision took into account the nature of the relationship (he had been her primary carer for a number of years), the amount his father had left her when he died, the size of the estate and the needs of the competing beneficiaries.

Some tips...

So what does this mean for your clients?

The category of people who can make a claim has certainly extended beyond immediate family although this has not necessarily resulted in a large increase in successful claims as the applicants must meet key criteria.

It is important however for your clients to understand their obligations when they prepare a Will.

Specifically, is there anyone they may have a moral obligation to support? A carer or step-child? And of course the most common - young children from prior relationships.

The right estate planning advice can be critical - legal challenges can be expensive both financially and emotionally. Don't take the risk with your clients, there can be too much at stake.

More information?

If you have any queries or have a client who needs help with a Will please call one of our lawyers on 03 8621 9000.