



Can I leave family members out of my Will?

It's a common assumption when making a Will that we enjoy the freedom to exclude some people because we feel their conduct towards us should disentitle them from receiving any of our assets on our death. However, this assumed right is not entirely unfettered as the NSW Succession Act allows certain family members and dependents of a deceased (eligible persons) to claim that provision be made for them from the estate notwithstanding their conduct towards the deceased.

Are Exclusions Clauses Effective?

If a person's relationship with a family member or dependent becomes estranged they will often include a notation in their Will explaining why they've either excluded the family member or dependent from receiving any benefit under their Will or why they have given them a reduced share of their estate. Examples include statements where:

- no provision has been made for a child in the Will because of their lack of concern or contact over a long period of time.
- a greater provision is made in the Will for one child comparative to the person's other children on the basis that the child has been of greater assistance to the person during their lifetime.

Including statements like the above in a Will do not however always operate in the manner intended and the Courts will often make provision from an estate for aggrieved eligible persons depending upon the nature of their relationship with the deceased over time.

Family Provisions Claims

Under the Succession Act, eligible persons are limited to the deceased's spouse or de facto partner, former spouse or de facto partner, child, grandchild who was at some time a member of the deceased's household and dependent on the deceased, or a person who was living in a close personal relationship with the deceased at the time of their death.

These eligible persons can make a Family Provisions claim against an estate if they've been left out of a Will or are unhappy with the amount that's been left to them. To be successful in their claim an eligible person must establish that the provision or lack of provision made under the deceased's Will was inadequate for their proper maintenance, education and advancement in life.

In determining whether the provision was inadequate the Court will consider amongst other things:

- the nature and size of the deceased's estate,
- the applicant's own financial position,



- the strength of the applicant's claim compared with other competing claims against the estate of the deceased and;
- the totality of the relationship between the applicant and the deceased.

Disentitling Conduct

In certain circumstances the claim may be successfully defended where the applicant behaved so poorly towards the deceased in the past that this should disentitle them from any provision under the deceased's Will. This behavior is often referred to "Disentitling Conduct". Determining what constitutes Disentitling Conduct is largely subjective and is ultimately at the discretion of the Court. More importantly the onus of proof of Disentitling Conduct is on the person who is resisting the application which will generally be the executor or administrator of the deceased's estate. The threshold set by Courts to prove Disentitling Conduct is quite high and it's clear from past decisions that that the following do not constitute Disentitling Conduct:

- Marrying someone who the deceased did not approve of;
- Ceasing to observe a religion;
- A child acting otherwise than in accordance with a parent's wishes such as in choice of lifestyle;
- Children refusing to see their parents;
- Estrangement caused by the conduct of the deceased;
- Leaving home against a parent's wishes.

What has been determined to be Disentitling Conduct is conduct that displays a positive ill-treatment of the deceased, or a criminal act directed towards them. Examples of this include:

- Where a child or spouse of the deceased has made continual threats of violence to the deceased or the deceased's assets;
- A failure to meet any needs of the deceased where the deceased was suffering ill health.

As with any legal matter each case involving what constitutes Disentitling Conduct will depend upon facts and circumstances of the matter before the Court but it is clear from decided cases that Courts appear loath to consider anything but the most extreme behavior to be Disentitling Conduct. The Courts have also held that the stronger a claimant's need for provision from the deceased's estate, the more reprehensible their conduct must have been to disentitle them from getting any share of it.

Transferring or Giving Away Your Assets Before You Die

Some of the strategies people have adopted to try and negate foreseeable Family Provisions claims being made against their estate include:

1. Structuring assets so they are not part of their estate such as transferring them to other entities like trusts; or
2. Transferring some or all of their assets to other parties while they're still alive;

However, these strategies are not always successful as the Succession Act also allows eligible persons to make a claim for provision out of the deceased's Notional Estate, which potentially consists of assets which are not directly owned by the deceased at the time of their death or which may have been distributed prior to their death. There are a



number of circumstances that need to be satisfied for an asset to be classed as forming part of a deceased's Notional Estate including whether valuable consideration was received by the deceased in return or transferring it to another entity and the period of time that elapsed between the date the asset was transferred or distributed and the date of the deceased's death. You can find out more information about Notional Estates by clicking on the link to the article "[If I Give Away My Assets Before I Die Will It Defeat Claims Against My Estate](#)".

If you would like further information about Family Provisions Claims, Disentitling Conduct, making a Will or having your current Will reviewed please contact [Lisa Delalis](#) or [Ken Gray](#) of our office 02 4731 5899 or email willsestates@batemanbattersby.com.au.