

Estate Planning

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Acorn Lawyers Monthly Estate Planning Update



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Estate Planning Offers

Do you fancy a coffee? I am always interested in catching up with referrers new & old to discuss the estate planning requirements of your clients and how Acorn Lawyers can be of assistance. I will even buy the coffee!

For those wishing to learn more about estate planning I offer free in house seminars for you and your staff. Seminars can also be arranged for your clients. On request, we can also send you free copies of our estate planning booklet which contains useful information on estate planning.

Contact Hannah Swindells to arrange.



Family Provisions Claims (Contested Wills) – Has your client been left out of a Will?

Problems with Wills

How often do you hear it said – “A Will is not worth the paper it is written on.”

Of course this is almost sheer idiocy. The Supreme Courts, especially in NSW, respect the Willmaker’s intentions unless the Will is:

- improperly drawn and requires reconstruction for validity; or
- was made under improper duress (hard to prove); or
- the Willmaker lacked testamentary capacity to make a Will. Here the Court applies an old test in the case of *Banks v Goodfellow* and again these are difficult cases; or
- a plaintiff has a claim under Part 3 of the *Succession Act 2006* – family provision.

A quality drafted Will is money well spent. An experienced estate planning lawyer may save your client’s beneficiaries tens of thousands of dollars in Court fees. This occurs too often and families can be torn apart by litigation.

Family Provisions Claims

A family provision claim is an application for “adequate provision for proper maintenance, education or advancement in life” by a person from the estate of the deceased.

The law recognises certain beneficiaries that would normally be provided for in a Will:

- Husband/wife of deceased
- De facto spouse of deceased
- Children of deceased
- Former husband/wife of deceased
- Grandchildren or household member wholly or partly dependent on deceased
- Person with close personal relationship to deceased

The Courts have recognised two competing principles at play, the freedom of a Willmaker to dispose of their assets as they choose and the moral obligation of a Willmaker to provide adequately for certain persons.

The claimant must prove 3 matters:

1. they are an eligible person (spouses and children are automatically eligible;
2. the moral ground that the claimant should have been provided for in the Will; and
3. financial need (but not poverty).

Estrangement

Estrangement is sometimes a ground for non-provision. But this defence requires great care. Firstly, this can be difficult to prove and evidence should be considered to accompany the Will. Secondly, the estranged person (usually a child) may have good reasons to have made no or limited contact with the deceased.

Some recent Family Provision Cases

1. A particularly interesting recent case with high level tax issues was a \$10 million estate where the deceased left shares in industrial private companies to his daughter, our client. Our client was retired and had no interest in the companies that were run by her brother and nephew. However, to simply transfer the shares to them would incur significant stamp duty and CGT. To avoid this, we commenced a family provision claim to transfer shares under the Will. First though, we had a difficult and costly task of proving the nephew was an eligible person. While CGT and stamp duty were saved, costs were significant.
2. Another recent case involved a niece (our client) who was childless. Our client had given considerable time caring for her also childless widow aunt. When this aunt passed away, she left a Will inadequately providing for our client. Our client’s close and personal relationship with the deceased aunt made her an eligible person for a family provision claim and she could demonstrate financial need. Costs involved are easily outweighed by the significant benefit she is entitled to.
3. A client and his late wife were named to inherit \$800,000 under a neighbour’s Will. She was a little odd and her closest current living relative is the spouse of a 2nd cousin. She drafted a later Will that left everything to this 2nd cousin and his late wife. Again, the Will was poorly drawn. During this time there were significant doubts as to her cognitive capacity. Contested probated cases such as these are difficult and expensive. The other side’s costs were about \$110,000 with a potential 5 day hearing. After a marathon of mediation, our client was happy to accept \$90,000 clear of our reduced legal cost. The costs in this matter diminished the estate.

If your client may have been left out of a Will or there are other issues with a Will, our experience with family provision claims and Will cases could ensure your client receives their fair entitlement.

- Lindsay Stoddart, Director