

Disinheritance - whose will is stronger?

Clients who wish to disinherit an estranged family member often react with incredulity when they are advised to consider that the courts have the power to vary their wishes and order that the excluded family member be adequately provided for from their estate. Often clients will exclaim, *'But it's my will, I can decide who gets my estate.'* And that statement is mostly correct, but with one important qualification.

Courts do not simply ride roughshod over the testator's intentions; rather, the power of the court to make an award that effectively alters the terms of a will is limited. When making an order in a [family provision application](#), it is to ensure that adequate provision is made for the proper maintenance, education, and advancement in life of the applicant, given all of the facts and circumstances.

Two recent cases highlight how those circumstances are taken into consideration.

In *Wilcox v Wilcox* (No 2) [2014] NSWSC 88, the application for family provision was made by a 46 year old single male against his grandfather's estate with the effect that, if successful, he would disentitle his mother from part of her father's estate. It did not help the applicant's case that he did not present evidence that he had tried to make his own way in life. The judge observed that the applicant possessed a 'highly developed and unhealthy sense of entitlement' to own and operate his grandfather's farming properties, which was a 'delusional insistence'. The judge found this resulted in a 'self-imposed impediment to his advancement of life' because of a lack of motivation. It is quite unusual for the courts to make such blunt observations about the parties, which probably explains the media's interest in the case. Nevertheless, the court ordered that provision be made for the applicant from the deceased's estate, in an amount that reflected a modest provision that a wise testator might have made, if they had knowledge of the applicant's circumstances at the date of the hearing.

This case is important because:

- The applicant was not a person typically considered to be beneficially entitled as of right, because there is no position at law that a grandchild has any claim to their grandparent's estate (unless they meet the [family provision criteria](#)); and
- Despite the applicant's delusional sense of entitlement and lack of motivation, he was partly successful in his claim against the estate.

In the case of *Hay v Public Trustee of Queensland* [2014] QDC107, two adult children who had not been provided for in their mother's will made a family provision application against her estate. If granted, it would have deprived the deceased's second husband, who was 70 years of age, of the gift in her will of the whole of her modest estate which consisted of little more than the couple's house. The court considered the testator's duty to a widow or widower as paramount whereby, if possible, they should be left with a secure home and income sufficient to permit them to live in the style to which they had become accustomed, and a fund from which to meet contingencies. The adult children attempted to paint their stepfather as a violent and abusive husband and stepfather, which was not supported by other evidence. The applicants also sought to have the contribution made by their father (the deceased's first husband) recognised, presumably on the basis that he contributed to the acquisition of the home, but that argument gained little support of the court. The court concluded that the gift made to the second husband represented a much stronger moral claim than the claim made by either of the children, despite their own modest financial circumstances. It was determined that the applicants still had the advantage of youth to provide for themselves which the elderly stepfather did not.

This case also highlights some unique estate planning challenges in second relationships or blended families.



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If an elderly person having either divorced or lost their first spouse or partner is fortunate enough to have formed a second relationship, then they should not be deprived of the opportunity to see out their twilight years with the comfort of someone to share that time with. But second relationships can often lead to disputes between the surviving spouse and any adult children from the first relationship.

This need not be case if appropriate steps are put in place to ensure an appropriately equitable distribution of the deceased's estate taking into account all the facts and circumstances.

Some measures can include:

- (a) The surviving spouse might be granted a life interest over the home where, upon the death of the spouse or if they enter into a new relationship themselves, that interest can revert to the adult children.
- (b) Assets can be held in a testamentary trust or a special disability trust if there are beneficiaries with a disability, with controls in place to prevent those assets being dealt with to the detriment of the intended beneficiaries.
- (c) An appropriate split up of the assets where payment of debt might be funded from insurances, or superannuation can ensure that appropriate beneficiaries are provided for adequately, to avoid the trouble and expense of a family provision application.
- (d) Sometimes mutual wills are intended to provide a benefit to spouses but also to beneficiaries who are not children of the relationship. Arrangements can be at risk of being revoked upon the death of one of the partners, and a contract for mutual wills can be entered into to discourage any later alteration to those mutual wills after death.
- (e) Where a testator genuinely intends to disinherit a beneficiary who might otherwise be lawfully entitled to adequate provision from their will, the circumstances behind the disentitlement ought to be recorded at the same time of making the will. This should be in the form of a sworn affidavit or statutory declaration, which might then be presented for the consideration of the court for a better insight into the true intentions of the testator.

Second relationships often create unique complexities which can be dealt with in an appropriate manner by documenting the true intentions of the testator in a manner that is consistent with relevant legal principles and the facts and circumstances. Once those steps are taken, clients with well drafted estate plans should have the comfort and security of knowing that they will leave no disputes or uncertainty behind them.



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