Can I leave a child out of my Will? Family Provisions

Article by Wills + Estates Lawyer, Cathy Fon

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For many people, making a Will is easy – they leave everything they own to their spouse and, once their spouse also passes away, everything is left to all their children.

For others, though, their Wills are much more complicated. This may be because of conflicts in the family such that a parent may not want to leave anything to an adult child they haven't seen in a decade. Blended families are also a factor – what if a person has a family that includes children from previous relationships and stepchildren from their current one? Who should be included in their will?

It is up to the testator (the person making a Will) to decide how to leave their estate, taking into account their own particular family and their own wishes. However, they should make this decision only after considering what might happen after they have passed away, if a disappointed family member decides to 'challenge' the Will.

The law provides a mechanism for family members to challenge a Will if they feel that they have been unfairly excluded. They can make an application to a Court for better provision from the testator's estate. This is called a Family Provision Application.

Queensland's *Succession Act* states that if a testator dies and does not make adequate provision for the 'proper maintenance and support' of a spouse, child or dependant, then the Court might order that such provision be made from the estate. Essentially, the Court has power to change what was intended by the testator and make different distributions of the estate.

Jointly owned assets don't form part of your estate. They pass 'by survivorship' to the surviving spouse or co-owner. Assets held by you as a tenant-in-common pass under your Will to your nominated beneficiaries.

Does a Court have to get involved?

Very few of these matters end up in front of a Judge, as most families come to some agreement before that happens. It is still useful, however, to use the same principles that the Court uses in resolving family disputes in this area.

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Who can apply?

Only the following relatives of a deceased person may make an application.

- A Spouse – a husband/wife, defacto or civil partner, a dependent former spouse. (A defacto partner is one who has been in a defacto relationship with the testator for at least two years up to and including the date of death.)
- A Child – natural children, step-children and adopted children.
- Dependants – someone who is wholly or substantially financially dependent on the deceased, being their parent, a parent of their child or a person under the age of eighteen (18) years.

Key points to note from this list are:

- An application cannot usually be made by a sibling, parent, cousin, nephew and so on, *unless* those people were financially dependent on the testator.
- To be considered a 'spouse', it is not necessary that the parties were married. Defacto partners are certainly covered by the law. Even former spouses might be able to apply if they were still dependent on the testator for financial support.
- A testator should consider their step-children, and not just their natural children, in making their Will.

What will the court consider?

A Court does not alter the terms of a person's Will lightly. It does so only if it is absolutely necessary in order to do justice to everyone.

Firstly, it is for the applicant to demonstrate that they need extra provision from an estate. After that, the Court will take into account many matters, such as:

- Whether adequate provision has already been made to the applicant, through the Will or during the life of the deceased.
- The financial position of the applicant, now and in the future.
- Special needs of the applicant due to physical, intellectual or mental disability.
- The size of the estate.
- Competing claims on the estate from other beneficiaries.
- An estranged relationship between the deceased and the applicant; and
- Any conduct by the applicant which disentitles them to a share in the estate.

There is no single answer to the question of what a Court will do in every situation. The Court considers every matter on its own facts and makes a decision based on the whole (and not just one part) of the circumstances.

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Estrangement

Estrangement between a testator and family members is often the most important factor in this area. These are some examples of statements made by Courts over the years:

- A court will consider what a 'wise and just testator' would have done.
- A state of estrangement between the applicant and the testator is not enough to always terminate the responsibility of the testator to provide for the applicant. The reason for the estrangement is usually relevant to the question. A Court will consider how both parties acted – was one party more responsible than the other for the estrangement?
- A testator is sometimes entitled to make no provision for children. In one case, the Court found that an adult child who treated their parent 'callously, by withholding … their support and love from them in their declining years' was not entitled to receive anything.
- However, the 'strong financial need' of an applicant might mean that even 'reprehensible' conduct does not disqualify him or her from further provision.
- All parties should remember that 'events viewed years later through the cold prism of the courtroom' may be viewed very differently to how they appeared at the time of the estrangement. An independent third party (like a judge) might see conduct quite differently to how the people in the middle of a family conflict see it.

The Courts try to balance an applicant's need for provision (but considering any misconduct by them) against a testator's moral duty to provide for their family (but also their right to deny provision to an applicant with whom there was an estrangement).

Who pays?

There is no hard-and-fast rule about which party will end up paying for the costs of an application. It is possible that the costs of an application for family provision will be borne by the estate and not the applicant, particularly in cases where the application has been successful. Legal costs are almost always a consideration in these matters. The question asked is: is it worth spending most, or a considerable portion of the estate assets on an argument about who gets those assets?

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Why do a Will then?

Knowing that a Will can be challenged, people often ask 'Why do a Will at all?' The short answer is that, if you do **not** do your own Will, then there is absolutely no chance of your wishes being carried out. Your estate will just be divided strictly in accordance with the laws of intestacy. Having a Will, on the other hand, means that your family and the Court know what your intentions were, and they use those as a starting point in distributing your estate.

What can a testator do to make sure their Will is not successfully contested?

There are a range of actions which a testator can take, either during their life or in their estate planning, to minimise the chances of a Family Provision application. These could be discussed with a lawyer when a testator is giving instructions for their Will.

Why have O'Shea Dyer Solicitors prepare your Will?

We have experienced lawyers who can advise and draft your Will and all other estate planning documents. We make the process as simple and affordable as possible.