Do I have to include my family in my Will?

Author: Kerry-Ann Smith
Email: kerryann@smithfamilylaw.com.au
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In Australia, unlike many other countries, when writing your Will, you can choose what happens to your property and your assets will ordinarily be distributed according to that Will. In this blog, we look at whether people are obligated to include family members (or if they can specifically exclude family members) in their Will and any restrictions imposed on a person's ability to choose who may benefit from their estate.

Many of us spend our lives saving for and acquiring property and building up our wealth. We have a right in Australia to own and possess property privately. It would therefore make sense that those rights be extended to a right to choose the beneficiaries of that property on our death.

Freedom of testation – dealing with your assets as you wish

A person can deal with their assets and make their Will in any way they choose. This is referred to as 'Freedom of Testation', a well-known concept in Australian succession law.

A Will-maker can be as nasty and vindictive as they like or for example, give nothing to a child who has acted poorly towards them. The law will give effect to the wishes of a Will-maker, provided that person understood what they were doing and had capacity to make their Will at the time it was made.

This differs to some countries, such as some European countries, where a Will-maker is forced to give certain shares in their estate to immediate family members. These shares cannot be challenged and the Will-maker is only free to choose who will receive part of their estate not subject to forced shares.

There are some restrictions on your Freedom of Testation

Whilst the laws in Australia allow ‘Freedom of Testation’, Part IV of the *Administration and Probate Act* 1958 (Vic), an Act of Parliament in Victoria, places restrictions on the complete freedom of a Will-maker to leave their estate in whichever manner they please.

The legislation gives the courts in Victoria a discretionary power to order ‘adequate provision’ for the ‘proper maintenance’ of certain dependants of the Will-maker. This comes into play if the Will (or the Intestacy Rules where the deceased person did not leave a Will) fails to make such provision.

This area of law, known as ‘Family Provision’, exists in some form in all Australian States and Territories.

Family Provision claims

Why make a Will if the court can change it due to Family Provision legislation?

Whilst only a small portion of Wills are challenged on the basis of inadequate provision, with most family members accepting the deceased’s Will, sometimes a Will, or the distribution of a person’s estate under the Intestacy Rules, can overlook a certain family member. If the family member is eligible to make a claim (that is, contest the Will) under the Family Provision laws, they can challenge the distribution in court.

Family Provision law in Australia recognises that, although people are free to give away their property by Will after they die or to not make a Will at all (which we do not recommend), people also have a responsibility to provide for the "proper maintenance and support" of certain people, usually family members.

Who can make a Family Provision claim in Victoria?

In 2015 legislation in Victoria was amended to restrict the categories of persons eligible to make claims against a person’s estate; in other words, able to contest a Will.

Prior to the amendments, any person could apply to the court for an order for provision out of the deceased person’s estate. When assessing the claim, the court was required to determine whether the deceased had a responsibility to provide for the applicant and whether the distribution under the Will or intestacy was adequate.

The amendments to the eligibility criteria now mean that a person’s Will or estate can only be challenged by certain people, including:

- children;
- step-children;
- assumed children (who are under 18 years or under 25 years and in full-time study or disabled); and

- current spouses.

Claims can also be made by adult, independent and non-disabled children, step-children or assumed children, but for these persons the court must consider the degree to which the applicant is not capable, by reasonable means, of providing adequately for their own ‘proper maintenance and support’.

However, for applicants in more distant relationships, such as:

- grandchildren;
- registered caring partners;
- members of the household; and
- a spouse of a child of the deceased who dies within 12 months of the deceased;

the applicant must show they were "dependent" on the deceased for their ‘property maintenance and support’.

Steps to minimise a Family Provision claim

It is important for a person making a Will to take the above considerations into account and to consider making a Will or structuring assets in such a way as to minimise the opportunity for someone to contest the Will.

In most instances, the costs associated with Family Provision claims, including the costs of both the claimant and the executor, in defending the estate, are generally paid from the estate.

A person can take certain steps to minimise the possibility of a challenge to their Will after their death. These steps include:

1. Structuring your assets in such a way that when you die, those assets do not form part of your estate. If certain assets do not form part of your estate when you die, a person eligible to make a claim against your estate will not be able to make a Family Provision claim to those specific assets. This includes owning assets in a discretionary trust or jointly with another person or making a binding death benefit nomination (for example, for your superannuation) to another family member directly, and not to your estate.
2. Transferring assets to another family member prior to your death in order to prevent those assets forming part of your estate when you die. However, such a transfer may be scrutinised by the courts and may create other issues for your family members, such as stamp duty implications.
3. Making some provision for the family member in your Will. The amount that you provide for a particular family member, whilst possibly not an amount a court would consider to be ‘adequate’ in the circumstances, could be just enough to prevent them from taking the step of bringing a claim. It may make them think twice about the risks, time, stress and costs involved in doing so. Making some provision for a family member may not however, prevent that person from making a claim against your estate and possibly that claim being successful in court.

How a Wills and Estates lawyer can help

Smith Family Law can assist you if you are a family member of the Will-maker or you were close to them and you have been left out of a Will completely, or the amount you have been left in the Will is not adequate.

We can also assist if a family member or other eligible person is contesting the Will or estate and you are the executor or administrator of the estate.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

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