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Wills need reviewing to prevent challenges

As part of any annual review of personal finances, the terms of any Will more than a couple of years old should be reviewed.

Ms Georgina Borg, specialist in wills and estates at publicly-listed financial services organisation Equity Trustees Ltd (EQT), said that courts are showing an increasing propensity to uphold challenges to a Will, particularly if they believe a dependant has not been adequately provided for.

“There have been a number of cases recently in which the court has upheld challenges and given a dependant significantly more than a Will specified,” she said.

For instance, a recent case in NSW saw adult children in their early 60s successfully challenge their father’s Will, despite the fact that he was estranged from them.

In his Will, the father left legacies to his son and daughter from his first marriage of \$50,000 each, with statements explaining this decision including estrangement over many years and aggressive behaviour from these children towards him, as well as their continued requests for financial assistance. After considering these statements, the financial position of the son and daughter making the claim, and the credibility of the evidence (amongst other things), the Court determined that the father had not made adequate provision for these children, and the daughter was given a cash lump sum in addition to the legacy and the son a life interest in a unit which would revert back to their father’s second wife or beneficiaries nominated by her.

Ms Borg said that while laws differ from state to state, they generally allow Wills to be challenged if a person can demonstrate that the deceased had an obligation to provide for them and they are in financial need.

“There have also been recent changes to state legislation that have extended the class of people who are eligible to challenge Wills – for example, in Victoria before 1997, only spouses, children and ex-spouses on support were able to challenge a Will for provision from the estate.

“Those able to challenge a Will now include a much wider range of people, including step-children and even neighbours.

“While they must demonstrate that there is an obligation to them, and they are in financial need, there is nothing to stop people challenging.”

Ms Borg said that even so, it is a much better option to have a Will than none at all.

“If a person dies intestate, each state has legislation governing who gets what, leaving the opportunity for someone that the deceased believes totally unworthy, or for whom they have already provided during their lifetime, getting a share of the estate.

"Second marriages can be a particular problem, and in a number of cases the increase in blended families has led to conflict and family members feeling hard done by," she said.

Ms Borg added that care also needs to be taken when explanations are given in a Will about why a person is omitted or treated in a particular way.

"According to how they are worded, explanations can themselves be used to justify a challenge.

"In another recent NSW case, a court ruled that a husband's provision in his Will for his wife, based on his claim she was an alcoholic, was unfair – largely because it was not proven, and evidence was given to the court that contradicted the claim. In this case, the court awarded the wife a significantly greater portion of the estate than left by the husband in his Will."

She said that there are no black and whites in this area of the law and each case is looked at on its own merits.

"It's difficult to point to a previous case and say "that's what happened there; therefore the same will happen here".

"Because of the increasing complexity of families, and courts being more willing to make awards in favour of the claimant, advice from a lawyer or a trustee company with experience in estate-planning is a good start to ensure your estate goes where you want.

"An expert in drawing up Wills can tell you whether something you wish to put in your Will is likely to cause problems after your death", she said.

Ms Borg said that it is a mistake to think that a Will is not needed or a simple Will from a newsagent will do.

"More and more people are leaving sizeable estates because of superannuation, property value increases and life insurance, and people need to do more than 'fill in the blanks' if they want to ensure their wishes are met."

She said choice of executor is another consideration.

"Choosing someone who is a friend is all well and good, but you need to consider whether you would trust their skills and competence in financial matters and whether they are likely to outlive you in order to manage trusts resulting from your will.

"An executor predeceasing you can cause problems – such as their executor becoming your executor – which is another good reason for reviewing Wills regularly."

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Using a professional service such as a trustee company or lawyer can be helpful, particularly if difficulties are anticipated, as they will stay objective and don't have a personal interest in the estate, or in the family's personal situation.

"It is always a good idea to speak to your executor about any potential problems. Also, it's worth considering managing expectations by telling the family what you propose to do about your estate so that it doesn't come as a shock later when people are feeling emotional.

"The cost of legal challenge, if it goes to trial, is usually paid for out of the estate and can easily be anything up to \$300,000 even for a relatively small estate.

"Common sense will help in writing a Will, in managing the family and beneficiaries, and in considering possible challenges," she said.

Ms Borg added that for some people, distributing assets in their lifetime can be an option when considering estate planning issues.

"Giving gifts, especially to charitable causes, is one way of ensuring that your money goes where you want it. Establishing a charitable foundation during your life time or through your Will can also be a consideration," she said.

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The company manages in excess of \$4 billion across its funds management, private client and superannuation businesses and has in excess of \$14 billion under responsible entity administration.

Equity Trustees employs over 160 people across its Melbourne, Sydney and Brisbane offices.

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