

One hundred years of challenging wills



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Challenging the adequacy of a gift in a will has a long history. In Roman times, certain persons could bring a querela inofficiosi testamenti - complaining of an undutiful or irresponsible will. Children could bring a complaint against a parent's will alleging that the child was passed over for no good reason, and parents could bring such a complaint against a child's will. Siblings could make such a complaint, but only if the will appointed a beneficiary who was turpis persona, namely a person whose occupation was disreputable, such as an actor, prostitute or brothel owner. (All of which proves that



challenging wills is not new. And that the categories of challengers may not be seen as universally sensible.)

Since 7 October 1915, similar rights have existed in NSW. Today, widows and children, as well as widowers, domestic partners (including same sex partners), former husband and wives, some dependants, carers, some grandchildren, in-laws, boarders and others may be able to bring a family provision claim. And the claim can be brought against property which a deceased does not own at death, as well as assets which form part of a deceased's conventional estate.

A wife's (dis)entitlement to superannuation death benefit

Usually a spouse is eligible to receive their partner's superannuation death benefit on the partner's death. But that's usually. Eligibility to receive a death benefit always depends on the terms of the trust deed which establishes the fund. The trust deed in a recent decision of the Superannuation Complaints Tribunal provided that a member's spouse was only eligible to receive the member's death benefit if the person

- was the spouse "for a continuous period of not less than 3 years

immediately before" the member's death,

- had lived with the member as husband and wife "on a permanent and bona fide basis", and
- was wholly or substantially dependant on the member at death.

The Tribunal was satisfied that there was a long and ongoing relationship between the complainant and the deceased member. However, it also considered that she did not meet the requirements in the trust deed to be the member's spouse and thereby become eligible to receive his death benefit. This was so even though she was recognised as a spouse under the relevant legislation and had been so recognised pursuant to the terms of the trust of another of the member's superannuation fund.

The message is: Assume nothing! When considering a person's entitlement to a superannuation death benefit, always check the terms of the trust deed.

How can you gift the right for someone to live in your home?

Occasionally a will maker will state that he or she wishes to leave their home (or something similar) to a specified beneficiary (SB) for his or her use "for as long as he/she needs it". Unfortunately, those words have been held to be legally ineffective because of uncertainty. So a lawyer will use other words to record the will maker's intentions. But there's the rub! What does the will maker really want to achieve by the gift? There are at least 3 options:

1. a right of residence - whereby SB may live in the home for as long as he/she desires (provided any conditions of residence are satisfied), but no one else can do so - meaning that SB cannot rent the home or sell the right of residence.
2. a right of occupation - whereby SB may live in the home for as

long as he/she desires (provided any conditions of occupation are satisfied), but may also allow others to do so - meaning that SB can rent the home (but cannot sell the right of occupation).

3. a life estate - whereby SB has the equivalent of a freehold interest in the home until SB's death. This means that SB can rent the home and sell the life estate (which estate will end on SB's death but which may, in the interim, be further sold or gifted (including by will or upon intestacy) by the purchaser of the life estate).

If either of the first 2 options is selected, the will maker must next decide whether there are any conditions that the beneficiary must satisfy. Usual conditions are that the beneficiary pays the rates and outgoings, keep the home adequately



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insured, and maintain it in good condition. There are then further decisions to be made. Firstly, what happens if the beneficiary doesn't comply with the conditions? Secondly, who makes that decision? Next, with either of the first 2 options a decision needs to be made as to whether the beneficiary can sell the home and use the funds to buy (or buy into) a replacement home - for instance, if the beneficiary wishes to downsize or move to a care facility. Other decisions flow from that decision.

All of this means, of course, that considerable care needs to be given, and attention paid to the detail, in drafting rights giving residence, occupation or a life interest in property.



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