

## Contesting a Will: Who can do it?



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There are a number of ways to contest a Will. The most common way is a claim under the *Family Provisions Act*. Certain persons, loosely described as “family”, may ask a Court to vary the Will to make some provision or greater provision for the claimant.

### Who is family?

Not everyone can make this type of claim although the categories of persons are reasonably wide.



**Spouse:** A spouse is such a person. "Spouse" includes a married spouse and de facto partner, whether of the same or opposite sex.

**Child:** A child is a second category of eligible person. This also has an expanded meaning to include (but not restrict to) biological, adopted, surrogate, donated (ie sperm or ovum) and presumed ‘children’.

**The Ex:** A former married spouse is the third category of eligible person. (There is often an ‘explosion’ when I mention this. The word “preposterous” is commonly mentioned.)

**Certain Dependents:** A person who was at any time wholly or partly dependent upon the deceased and at any time a member of the same household as the deceased is the fourth category of eligible person. This is the widest category and can include parents, siblings, step-children, former lovers, boarders and foster children. The fifth category is a dependent grandchild.

**Carer:** The sixth category includes adults who are living together in a close domestic personal relationship where one provides domestic support and personal care to the other.

### Different strokes for different folks

Because the categories of persons able to make a family provision claim is relatively wide, there is no single uniformly appropriate estate planning strategy that is available to resist every claims. Different strategies are available for different situations, depending on factors such as:

- the category of eligible person
- the potential claimant’s particular circumstances, so far as that can be predicted in advance
- the likelihood of a claim
- the size of the estate
- the age and health of the claimant



- the willmaker's intended beneficiaries and their particular circumstances
- provision made for the potential claimant during life
- contributions made by the claimant to the willmaker.

### Vive la résistance

Some strategies were discussed in a previous newsletter : [Building a Firewall \(vol 23 no. 3\)](#). To recap, the most common strategies are:

- a carefully prepared Will
- detailed reasons
- giving assets before death
- seeking a court approved release
- holding "assets" in a vehicle that the willmaker does not control.

Often, the strategy chosen by a client depends upon:

- the level of determination
- the time frame likely to be available to implement a strategy
- the ability and willingness to pay the costs involved.

## Who's a niece or nephew?

In newsletter Vol 22 No 1: "[What's in a name?](#)" I surveyed litigation involving badly described beneficiaries, and concluded:

**"The moral is that a Will needs to carefully describe the intended persons and property. Usually, with a person, that will occur by stating their full name."**

However, sometimes it may not be possible to fully name an intended beneficiary. This will occur where, for instance, the intended beneficiary is a child (and, most often, a grandchild) born after the date of the Will. In this situation, care

is needed to accurately refer to the person who should benefit.

This point is illustrated by the Supreme Court's decision in *Parry v Haisna*. The



deceased left her substantial estate to "my nephews and nieces" without further description. The issue before the Court was whether that description included:

- nephews and nieces of full blood i.e. children of her siblings by the same parents,
- nephews and nieces of half-blood, i.e. children of her step-siblings,
- nephews and nieces by affinity or courtesy, i.e. children of siblings of her partner.

Whilst uncontradicted evidence disclosed that the deceased referred to her partner's nephew and nieces as "nephew and niece", the Court held that the deceased did not mean to include them as beneficiaries in her Will.

The litigation could have been easily avoided by the deceased taking extra care in preparing her Will.



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