Browne Linkenbagh

CONTESTING *A DECEASED'S ESTATE*

THE BLUE MOUNTAINS' LEADING WILLS & ESTATES LAW FIRM

PROTECTING WHAT MATTERS MOST

CONTESTING A DECEASED'S ESTATE

1. HOW CAN A DECEASED'S ESTATE BE CONTESTED?

There are two bases for contesting an estate. The first type of estate litigation concerns contesting the grant. The second relates to distribution.

Contesting the grant involves the allegation that a testamentary act – whether will or codicil – is not valid. Grounds for this type of litigation are:

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1

That the deceased didn't have the mental capacity to make a valid will.

(Lawyers call this 'testamentary capacity).

2

That the deceased didn't know and approve the contents and affect of the will.

3

That the will wasn't made freely and voluntarily by the deceased (because of testamentary undue influence or fraud).

4

That the document did not comply with the final requirement for a will (such as a document signed by the will maker before 2 independent adult witnesses), but should not be treated as equivalent to a properly prepared will.

5

That the testator married after the date of the will.

6

That the last known will is missing in circumstances which give rise to the presumption of revocation

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Contest the distribution of the estate involves a challenge to the contents of the will. The main grounds for contesting the contents of the will are:

7 That a binding contract was mad determining inheritance

10 That the forfeiture rule applies

8 That a property recorded as being owned as joint tenants was really owned as tenants in common

11 That the testator and a beneficiary divorced after the date of the will

9 That it doesn't mean what is asserted (called a construction claim),

12 That the will doesn't accurately state the deceased's intention.

13 That the executor is liable to the beneficiaries for breach of his/her obligations. This type of claim is called devastavit.

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Other estate litigation can involve:

14 claims by creditors. These can be made against a deceased's estate in largely the same way that a creditor can make a claim against a living debtor.

15 action can be taken to remove an executor.

16 the executor can be called to account

2. WHAT IS A FAMILY PROVISION CLAIM?

State legislation allows persons, who come within specified relationships to a deceased, to claim a part, or a greater part than left by the will or upon intestacy, of the deceased's assets, and sometimes other property.

This is called a family provision claim.

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3. WHO IS ABLE TO BRING A FAMILY PROVISION CLAIM (CALLED AN "ELIGIBLE PERSON")?

3.1

The married spouse of the deceased

3.2

The unmarried partner of the deceased at the time of the deceased's death, whether of the same or opposite sex, provided the relationship is registered or the person was living with the deceased as a couple at the time of death

3.3

A child of the deceased (including by adoption or presumption

3.4

A child for whose long-term welfare the deceased had parental responsibility under State legislation

3.5

A former married spouse of the deceased

3.6

A person who was at any time wholly or partly dependent on the deceased and who was at any time a member of the same household as the deceased. These criteria can often be satisfied by siblings, parents, a boarder, step children, foster children, an in-law and a former lover

3.7

A grandchild of the deceased who was at any time dependent on the deceased

3.8

The surviving adult in a 'close personal relationship', where the adults lived together and one or each of them was providing the other with domestic support and personal care, at no cost and not on behalf of another, at the time of the deceased's death.

An eligible person by reason of categories 5 to 8 must also establish factors warranting the making of an application for provision, or increased provision, before a claim can be made.

4. THE LEGAL ISSUES INVOLVED IN A CLAIM

In considering a claim for family provision,

a court asks two questions:

4.1 has the claimant been left without adequate provision for his or her proper maintenance, education and advancement in life?

4.2 if the answer to 4.1 is yes, what provision ought to be made for the claimant out of the deceased's assets?

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5. WHAT FACTORS ARE RELEVANT TO A COURT DECIDING A CLAIM?

There are many factors which a court may consider when deciding whether to make provision for the eligible person. These include:

- the nature and duration of the relationship between the claimant and the deceased,
- the nature and extent of any obligations or responsibilities of the deceased,
- the nature and extent of the estate,
- the financial resources and financial needs of the claimant, any other applicant for family provision and any beneficiary,
- the financial circumstances of any person with whom the claimant is cohabiting,
- any disability of the claimant, any other applicant or any beneficiary,
- the age of the claimant,
- any contribution by the claimant to the deceased's estate or the deceased's welfare or that of the deceased's family,
- any other provision given to the claimant,
- the testamentary intentions of the deceased,
- the extent and basis upon which the claimant was maintained by the deceased,
- whether any other person is liable to support the claimant, and
- the claimant's conduct and character.

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6. WHAT ASSETS OR OTHER PROPERTY CAN BE SUBJECT TO AN ORDER MAKING FAMILY PROVISION FOR A SUCCESSFUL CLAIMANT?

If a court decides to make an order in favour of a claimant, the court can order that the claimant receive the whole or part of the deceased's estate. (The deceased's estate is the assets owned by the deceased at his or her death, less the deceased's debts as well as expenses involved in the administration of the estate.)

However, the court can also order that the successful claimant receive assets that the deceased doesn't strictly own, or no longer owns.

THESE INCLUDES:

- property owned as a joint tenants (where strictly the ownership passes automatically to the surviving owner)
- the deceased's death benefit from its superannuation fund (and similarly from its life insurance policy) and
- any property of a person to whom the deceased disposed of assets within three years before death, if the disposal of the assets was to limit or deny a claim for family provision.

7. IS THERE A TIME LIMIT ON BRINGING A CLAIM FOR FAMILY PROVISION?

Yes. A claim must be made within 12 months of the deceased's death if the death was on or after 1 March 2009, although the court can extend this time limit in some circumstances and the executor can agree to extend it.

8. WHAT CAN BE DONE TO PREVENT A COURT MAKING AN ORDER GRANTING FURTHER FAMILY PROVISION?

There are limited ways to fireproof an estate against a successful family provision claim. The **first** requires the deceased to die without any assets and without any other property against which a court can make an order. This involves careful estate planning and guaranteed longevity of life. This approach is not recommended.

Secondly, the court can approve an eligible person's release of a claim against an estate, either in advance of a person's death (which is preferable to ensure the success of this approach) or after death. This initially involves an eligible person entering into a contract releasing his or her claims for family provision. The court then needs to be satisfied that that release is appropriate. A release of this type is common in Deeds of Mutual Wills, cohabitation agreements, binding financial agreements and Deeds of Family Arrangement.

Thirdly, if the deceased is not domiciled in NSW at death, and there is no real estate in NSW (and preferably Australia), a NSW court cannot make a family provision order against the deceased's estate.

Fourthly, the deceased's use of a discretionary trust to own his or her 'assets', where the willmaker is not the controller of the trust, may impede a court's ability to make an order in favour of an eligible person.

The potential of a claim may be lessened by a will that is prepared having regard to family tensions and possible future problems. At the very least, a willmaker who proposes to exclude an eligible person from a will should make a comprehensive statement (preferably by a statutory declaration) explaining the reasons for that decision.

9. ARE THERE ANY FACTORS WHICH FORETELL A FAMILY PROVISION CLAIM?

Every situation is different, but there appear to be some factors which indicate an increased possibility of a claim. These include:

- a deceased not making extra provision for a family member with extra needs (whether financial, medical or otherwise), unless it is self-inflicted,
- a deceased being niggardly with the inheritance left to a surviving spouse,
- different treatment of children, especially if it is unexplained,
- a history of sibling rivalry,
- disinheriting an eligible person (especially a spouse or child) without warning, where the disinherited person could not be said to be morally undeserving, and
- disinheriting a step-child who satisfies the requirement of category 3.6 above.

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