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A test of wills

Eligible connection ... court rulings often ensure family members are looked after.

A broader range of claimants are ensuring a person's final wishes are no longer the last word, writes **John Kavanagh**.

We all know how a will works. Or do we? It is a legal declaration of our wishes concerning the disposal of our property after death. But there is more to it than that. So-called testamentary freedom (being able to give the family silver to whomever we want) is balanced by laws that allow the courts to see that family members are looked after with the proceeds of an estate.

Lawyers and academics say the number of complaints about wills, under family provision laws, is on the rise and the courts tend to favour claimants more often in their rulings with more generous allocations.

A partner at Bransgroves Lawyers, Lesa Richards, says recent court rulings have pushed things to the point where the sort of obligations parents are assumed to owe their children during the years when they are dependent have been extended into adult life and continue beyond the grave.

In *Rogers v Roe*, heard in the Supreme Court of NSW last year, Elizabeth Rogers contested being cut out of the will of her mother, Irene Clipsham. Rogers married a repeat offender and was estranged from her parents for almost 20 years. The court ordered that Rogers was in need and the estate of \$135,000 was to be divided equally

between Elizabeth and her sister, Susan Roe, who was described by her mother as a "loving and dutiful daughter".

The court's role in such a dispute is to weigh up the financial situation of a claimant and any "disentitling conduct". Richards says recent rulings have given much greater weight to the financial situation than to the conduct.

Under NSW law, the court has the power to determine whether provisions made by the deceased person are adequate "for the proper maintenance, education and advancement in life of the eligible person".



In Victoria, a court may order provisions be made from the estate “for the proper maintenance and support of a person for whom the deceased had responsibility to make provision”.

Similar provisions operate in other states and territories.

“Eligible persons” include the spouse, de factos (and, in some states, same-sex partners), children (including adopted children and stepchildren), grandchildren (if the relationship is dependent) and parents (also if the relationship is dependent).

Family provision extended

If a dispute arises, the court can consider the terms of the will, the contribution of the eligible person to the welfare of the deceased person, the character and conduct of the eligible person and the financial circumstances of the eligible person. In considering these issues, the court will look at the claimant’s earning capacity and needs in the future, the claimant’s age, health and prognosis, the size of the estate and whether the claimant received assistance from the testator (the maker of the will) while the testator was alive.

The legal services manager at State Trustees in Victoria, Paul Burdett, says the test for eligible claimants in Victoria is broader than what applies elsewhere.

Anyone who can establish a relationship with the deceased might be eligible to claim under Victoria’s “maintenance and support” provisions.

“Victoria has carte blanche. We have had carers and people who have been helpful to their elderly neighbours make claims against estates,” he says.

A study by the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology found that challenges to charitable bequests by the testator’s family members have become more common. The report, *Family Provision Applications and Bequests to Charity* says: “Courts are vigorous in upholding proper family provision as against charitable bequests, portraying the family provision as based on moral obligation. The original purpose of family provision law was to enforce the proper maintenance and support of a testator’s spouse and children.

“In the years since their introduction, family provision laws have had their influence extended through judicial interpretation. Testamentary freedom is now seriously challenged in Australia.”

Get good legal advice

The study set out to explain why there were more applications under family provision law and why the courts are extending the concept of family provision. It says contributing factors include multiple marriages, with partners and children of each blended family vying for a share of the estate.

Another factor is the change in what constitutes a family relationship, with

the recognition of de facto and same-sex partners. Cultural change has also had an impact. In a more litigious society, it is no longer considered inappropriate to challenge a will. Growing personal wealth means people leave bigger estates to be divided, so there is something worth fighting over. Burdett from State Trustees says that, despite all this, it is still worth making a will.

“A will is important because you get to determine where the estate goes, who looks after it and how it is managed,” he says.

“The lesson people have to learn from this trend in litigation is that when they are making their will, they have to think about the people who have the potential to make a claim and consider their obligations to those people.”

The assistant director of legal services at NSW Trustee and Guardian, Ruth Pollard, does not agree that there is a trend towards courts favouring the complainants. She says the position of the courts “waxes and wanes”.

Pollard says the role of the courts should not put off anyone writing a will but it should encourage them to get professional advice. “We see a lot of informal wills written on loose pieces of paper, or poorly drafted wills based on will kits. There are certain legal requirements to produce a legally valid will and it is easy to get things wrong. A legal expert can also help you state your intention as clearly as possible.”





She says people need to be practical. "It costs \$20,000 to \$40,000 to take a matter like this to court. It may be better for the testator to give the money to the family member and avoid the cost ..."

Pollard says one option is to put money in a trust if you want to set some rules or limits for how the money will be used.

Pushing the boundaries

Richards from Bransgroves says the courts are extending the range of people who are eligible to contest a will.

In a case before the Supreme Court of NSW last year, Thompson v the Public Trustee, a man who lived with the testator for a few years in the 1980s was considered eligible to make a claim on

her will.

Desmond Thompson met Maryse Mattei in 1984 and they began a relationship. When Mattei separated from her husband a year later, she and Thompson lived together. The arrangement lasted until 1992.

Thompson stayed in contact with Mattei (who died in 2006) but he always stated (such as in Centrelink documents) he was not in a de facto relationship.

Mattei left \$5000 to her "friend" Thompson out of an estate worth \$1.04 million. The court ruled that Thompson should have 7 per cent of the net distributable value of the estate, giving him more than \$65,000, even though the nature of the relationship remained in dispute.

Richards says that when it comes to making adequate provision, there are no definitions. She says the courts have pushed the boundaries.

"We have seen recent cases where judges have expressed the view that it is a community expectation that the estate can be used to assist adult children in retirement if they have no super, to provide them with a deposit on a home, to assist in the education of grandchildren and to provide a buffer against contingencies if family members fall on hard times.

"What we are seeing is a view in the courts that the responsibility of parents goes beyond the time when children are dependants."



Illustration: Rocco Fazzari



Strategies to get what you want

Make a will. According to NSW Trustee and Guardian, 45 per cent of adults in NSW do not have a will. If you die without a will, your estate will be divided according to a legal formula and not according to your wishes. Keep the will current.

Seek professional advice. The assistant director of legal services at NSW Trustee and Guardian, Ruth Pollard, says use a lawyer to draft the will and not use a DIY kit. There are certain requirements to produce a legally valid will and it is easy to get things wrong. A legal expert can help you state your intentions clearly.

Give gifts while you are alive. If you plan something out of the ordinary, such as give different amounts to different family members or leave a chunk of the estate to charity, it might be better to do those things

while you are alive. Amounts given away close to death can be classified as "notional estate" and be caught up in courts if there's a complaint.

Hold a family conference. Lesa Richards, who is a partner at Bransgroves Lawyers, says one way to minimise the risk of a complaint about your will going to court is to discuss the issue with family members before you die.

Put the inheritance in a trust. That allows you to establish some rules for the use of the money if you are dealing with a family member you don't trust to use their inheritance sensibly. A testamentary trust is a trust created by a will. One big advantage of a testamentary trust is that it protects the bequeathed assets from any financial difficulties the beneficiaries

may suffer. It also allows for tax-effective distribution of benefits.

Check your super arrangements. If you have made a valid binding death benefit nomination, the trustees of the fund will put the death benefit into the estate. If there is no binding nomination or it is invalid or has expired, the trustees will make the decision about what to do. Not all funds accept binding nominations. Where the trustees are making the decision, they will consult the will but they are not bound by it.

Make provision for assets you control as well as assets you own. The legal services manager at State Trustees in Victoria, Paul Burdett, says wills should include instructions about how your private company directorships and self-managed super trustee roles should be managed.



Win for the children

When Louis Kennedy died in 2008, aged 82, he left behind an estate worth \$5.5 million. In his will he left \$50,000 to each of his adult children, Judy Goldberg and Ronald Kennedy, and the balance to his widow, Martha – his second wife.

Judy and Ronald contested the will, arguing that \$50,000 each was an inadequate provision. The dispute went before the Supreme Court of NSW last year.

In his will, Louis Kennedy, who owned a business called LK Jewellery in Double Bay, wrote: "Since my divorce from my first wife some 20 years ago, my children from my first marriage have discounted me and the only times they have approached me is when they have needed financial assistance. I have assisted both my son and my daughter financially notwithstanding

their disgusting behaviour towards me and yet they have shown me no care, respect or friendship, nor any interest in my health or well-being.

"My son has been abusive and violent towards me and my wife. His behaviour was so bad that I was obliged to take out an apprehended violence against him.

"I have therefore come to the conclusion that I have nothing but contempt for my above named children ... I have fulfilled my obligations to them fully."

Kennedy was injured in a car accident in 1978 and spent the last 11 years of his life in a wheelchair. Martha looked after his care and the jewellery business, which she managed successfully.

Judy was made bankrupt in 2006 and discharged from bankruptcy in 2009.

Ronald, who was involved in the nightclub industry, was made bankrupt in 2004 and, since then, has not had income from any source other than Centrelink.

The court ruled that Judy should have \$800,000 as well as the \$50,000 already provided.

The judge said: "In coming to a conclusion as to what is adequate provision out of the estate for Judy, I regard the fact of paternity, the size of the estate and Judy's financial circumstances and poor health as significant in justifying a provision far in excess of what the testator provided."

For Ronald, the court said the appropriate provision was "a life estate on a one-bedroom unit. The unit should not exceed \$400,000."

