



Legal Update



Avoiding challenges to your Will

The most common type of “challenge” to a Will is a ‘**Family Provision Application**’ (“FPA”)

FPA’s are made under Part IV of the *Succession Act 1981* (Qld) (“**the Act**”). Section 41 of the Act provides that if any person (the “**deceased person**”) dies, whether with or without a Will, without making adequate provision for the proper maintenance and support of the deceased person’s spouse, child or dependant, the court may order that provision be made out of the estate of the deceased person for such spouse, child or dependant.

If you are making a Will and think it might be challenged, there are various strategies that you can implement to reduce the chances of a disgruntled beneficiary making a successful FPA claim against your estate.

Firstly, you need to consider the potential claims against your estate when you are making your Will. A disgruntled beneficiary can only make a claim if adequate provision is not made for them. If you wish to leave someone with a good claim out of your Will completely (such as a spouse or child), it may be more advisable to leave a smaller gift to them rather than nothing at all.

Statement of Reasons

You can also leave a Statement of Reasons with your Will outlining the reasons you have not made provision or made less provision for certain persons. These are often in the form of a statutory declaration held with your Will. The statement should be clear and concise and not contain any emotionally charged statements. If your Will is ever challenged, the statement will be accepted as evidence in court to assist the court in understanding your intentions. You need to be careful however to keep the statement current as a claimant can use the statement against you if it contains statements which have become factually incorrect.

Financial Agreements

As was seen in the case of *Kozak -v- Matthews*, having a binding financial agreement in place with a de facto partner or spouse will be taken into account by a court if that person makes an FPA claim against your estate on your death. These agreements can be a benefit in particular for second marriages where you want to ensure children by your first marriage are looked after.

Deed of Release

A person cannot “opt out” of the family provision legislation, meaning you cannot have a possible claimant sign a legally binding agreement not to make a claim on your death. If however you are gifting assets to a

beneficiary during their lifetime which is intended to be their inheritance, then you should have them sign an agreement acknowledging that they accept the gift as their full inheritance. This would be taken into account by the court. Alternatively, the gift could be advanced to the beneficiary as a loan, which is repaid on death by being deducted from their inheritance.

Reduce Value of Your Estate

As FPA claims can generally only be made against assets in your estate, one way to reduce or avoid the possibility of an FPA claim is to reduce the value of your estate. This can be done in a number of ways, such as:

1. Signing a Binding Death Benefit Nomination so that your superannuation benefits are paid directly to the beneficiary you want to benefit and not to your estate;
2. Ensuring any life insurance passes directly to the intended beneficiaries on your death and not to your estate;
3. Transferring assets into a family trust and hardwiring the succession provisions into the Trust Deed so that the right people take over control of the trust on your death; and
4. Transferring assets into joint names with your intended beneficiary so that on your death, the asset passes to the surviving beneficiary automatically pursuant to the law of survivorship.

The above strategies can be complex and there are numerous factors to consider such as transfer duty, Centrelink rules and compliance with various legislation. Gifting assets to your intended beneficiaries during your lifetime should not be undertaken lightly and, once done, cannot be undone.

If you are concerned about potential claims against your estate or whether someone might be an eligible applicant, it is important to seek legal advice to discuss your various options.

For further information contact Paul McHugh at mail@tml.com.au

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