

Wills And Second Relationships

Will making freedom

1. Under New Zealand law it is not compulsory for anyone to leave anything under their will to particular family members. In most circumstances the will maker will have complete freedom to leave their estate to whoever they wish, including the proverbial local cats' home.

Challenges to will

2. There is a "however" though. There are three Acts under which gifts made by a validly executed will can be challenged:

The Law Reform (Testamentary Promises) Act 1949

- (a) This Act covers the circumstances where the will maker has promised to make provision for someone under their will in return for services rendered or performed. For example if a mother promises her daughter that she will receive the house if the daughter stays at home to look after the mother. If the house is not gifted to the daughter in the mother's will, the daughter will be able to make a claim under this Act.
- (b) The services provided cannot be what are called the "normal incidents and consequence of life within a close family group". If the daughter lives with the mother but continues to work and merely provides the mother with an evening meal or cleans the home the claim is unlikely to be successful. This is what typically happens within families.

The Family Protection Act 1955 ("FPA")

- (c) Under this Act, if someone who is entitled to make a claim under the Act (see (d) below) has not under the will or intestacy of the will-maker received adequate provision for the "proper maintenance and support of the applicant" they can make a claim to receive a greater provision under the will or intestacy.
- (d) Those entitled to make a claim under the Act are the partner, children, and grandchildren of the will-maker and the step children or parents who were being supported by the will-maker at the time of death.
- (e) This does not mean that each child or member of the family in any way automatically receives equal provision under the Will. The approach of the Court under the Act is generally that provision is to be adequate for the "maintenance and support" of the family member depending on their circumstances. Support has been interpreted by the Court to include both emotional and physical support.

The Property (Relationships) Act 1976 ("PRA")

- (f) The PRA deals with the division of property at the end of a relationship. The PRA applies to marriages, civil unions and defacto partnerships. A relationship can end by either the death or separation of the parties. The PRA provides in most instances that relationship property is divided equally between the parties.

- (g) Generally where a couple have been living together for three or more years, all property acquired during their relationship will be deemed to be relationship property and divided equally.
- (h) For most purposes a defacto relationship of three or more years will result in the defacto partner being able to make a claim under the PRA if the relationship should end. There are some circumstances where relationships of a shorter duration will enable the partner to make a claim under the PRA.
- (i) On the death of one partner, the surviving partner has an automatic right to choose to make an application for division of the relationship property under the PRA or to take the gifts under the will. The PRA includes a presumption that all property that was owned by the deceased at the time of death is, in the absence of evidence to the contrary, relationship property.
- (j) In New Zealand at the present time the PRA is the greatest threat to a will maker's freedom.

Wills for those in second relationships

- 3. Wills for those who have entered into a second relationships, particularly where there are children from previous relationships, need to be drafted with particular care.
- 4. It is a balancing act to meet the new partner's rights under the PRA. The surviving partner's rights under the PRA will take precedence over what is provided for in the deceased partner's will, and the children's entitlement to inherit from their parents.
- 5. If, under the will, insufficient assets are left to the children, the children will be able to make a claim under the FPA; but, if the gifts under the will the surviving spouse receives are insufficient they can claim under both the FPA and the PRA.
- 6. The biggest issue that tends to arises in most simple estates is the family home. This may have been bought into the relationship by one of the parties, and may have been that partner's children's family home. The family home is, if personally owned, always relationship property. Therefore the surviving partner may make a claim to 50% of the family home, therefore the children may not receive what they considered to be their inheritance from their parents.
- 7. It is simply not possible to give generic advice in terms of doing wills for those in second relationships, but we would recommend where there are complex family structures that the couple enter into a contracting out agreement. This will provide that the surviving spouse will only be entitled to take under the provisions of the agreement and not make a separate claim under the PRA.

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