

What is a 'no contest' clause in a Will and is there a better option?

Author: Chris Alfonso
Email: chris@ealawyers.com.au
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We are frequently asked to include a 'no contest' clause in Wills. The client's aim is to avoid a challenge being made against the Will or their estate after their passing. However, a 'no contest' clause is unlikely to be the best protection against someone contesting a Will in NSW.

What is a 'no contest' clause

A 'no contest' clause would typically provide that:

- no challenge is to be made against the Will or the estate by any person; and/or
- if anyone contests the Will, any gift made to them under the Will is to be removed or to be reduced by the value of any additional amount they receive through the challenge.

These clauses are typically included in an attempt to avoid a Family Provision Claim (often referred to as contesting a Will or challenging a Will) being made; that is, avoid someone contesting the Will.

These clauses can be drafted into Wills, but they are not enforceable and would not prevent a claim from being made against the estate.

In some cases, we have witnessed 'no contest' clauses that went further into detailing how terrible one of the beneficiaries was as a person, and the reasons for which they were cut out of the Will entirely.

As a Will can become available to certain persons following death, under section 54 of the *Succession Act 2006* (NSW), including such a description may have unintended consequences. The clause could draw the potential for a claim, to the mind of the beneficiary identified, causing them to seek legal advice and investigate the availability of a claim.

What alternate options are there to a “no contest” clause?

1. Release under the Succession Act

The only binding way of preventing a Family Provision Claim from being made against an estate is for the Court to approve the release of a person's right to make a claim under section 95 of the *Succession Act 2006* (NSW).

A release approved by the Court could not be obtained without the knowledge and consent of the potential claimant. The Court can also revoke the approval of a release in certain circumstances under section 96 of the *Succession Act 2006* (NSW).

Before the Court could approve a release of rights to make a claim, the Court would need to consider the particular circumstances of the estate and the potential claimant.

This would include whether:

1. the release of rights is to the financial advantage or other advantage of the potential claimant at the time of any agreement to release their right to make a claim;
2. the release of rights is prudent for the potential claimant;
3. any agreement between the potential claimant and the Will-maker or estate to make the release fair and reasonable for the parties; and
4. the potential claimant has received independent advice from a lawyer in relation to the release, and has given due consideration to the advice received.

2. Recording your wishes externally to the Will in writing

If a Family Provision Claim is made, your Executor would be responsible for defending or settling that claim. One of the key issues here is that this would come at a time where you would not be able to provide evidence of why you have made no provision, or limited provision to the claimant.

Preparing a written statement or a statutory declaration explaining the reasons behind your decision, under your Will, can be useful for your Executor in the event of a claim. A well-drafted written statement that is placed before the Court can be useful in presenting your case and allowing your story to be heard at a time that you would otherwise be unable to do so.

This may either be a written statement by you, or your statement signed in the form of a statutory declaration. The difference between these two options is that the statutory declaration must be signed by you and witnessed by an eligible witness.

For this statement to be effective it must be accurate, be easily readable and it must properly communicate what it is that you are saying. If the statement contains inaccuracies or statements which could be disproved by the claimant, then it could affect the credibility of the statement. As it is not possible to know all of the issues that could be raised in the event of a claim, the statement should seek to cover as extensively as possible the matters that the Court may consider at the time of a claim.

By having this statement separate to the Will, it would not automatically be available to the persons noted under section 54 of the *Succession Act 2006* (NSW). It should be kept alongside your Will or provided to your Executor so that it is available to them if it ever has to be used. This way the claimant would not see the statement unless your Executor considered it preferable to do so, to dissuade a claim from being made or while defending a claim.

A statement or statutory declaration cannot prevent a claim from being made, but it could assist in limiting the potential success of a claim. We can assist you with drafting a statement in a form that could be used by your Executor to defend a claim.

3. Seeking advice from a lawyer specialising in Wills and Estates

Advice should be sought from a lawyer specialising in the area of Wills and Estates if you think that you need a 'no contest' clause in your Will, or if you would like to create a statement outlining your intentions.

A properly qualified and specialised lawyer will be able to assess your family's circumstances in order to assess the risk to your estate and provide solutions tailored to your circumstances to assist you in managing that risk and ensuring that your wishes are upheld.

Get help from a Wills and Estates lawyer

A 'no contest' clause in your Will does not prevent a claim from being made, but steps can be taken to minimise the risk of a claim, or reduce the potential success of a claim.

If you are concerned about a claim against your Will or your estate by a spouse, child, grandchild, other family member or beneficiary, then at E&A Lawyers, our estate planning team can assist you with reviewing your Will, and develop strategies to protect your wishes.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

02 9997 2111

info@ealawyers.com.au

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