How can I stop my kids from challenging my Will?

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When someone writes their Will, they choose who will receive what portions of their estate after they die. It's their choice who their beneficiaries will be, but they still need to give careful consideration if they are thinking about excluding someone, like a child, who may choose to challenge or contest the Will. This is a common issue that arises in families, particularly where one or more of the children are seen as the "black sheep".

In very general terms, kids might challenge the Will you make in three areas.

1. The claim is made that the Will was invalid because you did not understand what you were doing when you made the Will; that is, you did not have legal capacity at the time of writing the Will.
2. It is claimed that you were unduly influenced to make the Will by family members or others.
3. The "black sheep" believes they have not been adequately provided for in your Will.

A claim that you did not have capacity to make your Will

Unfortunately, as parents get older, the issue as to their mental capacity to understand their financial position, and to analyse who they believe ought to be provided for in their Will, can come into question. As lawyers, we have an obligation to assess whether you have the relevant capacity to make or revise your Will.

And where there is any doubt, we will take further steps to record your capacity at the time of making your Will by way of retaining clear records of discussions with you and, in some cases, referring you to a specialist geriatrician.

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A claim that you have been unduly influenced

The case law in this area seems to be developing. For a very long time, the chances of persuading a Court that you were influenced to the extent that your wishes (conveyed in your Will) were overborne by family, friends, neighbours and so on, were very limited.

This type of claim appears to be increasing, although still the chances of the claim being successful are somewhat limited.

Again, retaining clear records of the issues discussed with you at the time of making your Will, including who was in the meeting at the time, are kept by us. Usually, where there is any concern that others might be influencing you, any instructions we take from you would be without the presence of others in the meeting.

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A claim that your child has not been adequately provided for in your Will

This is a claim for family provision under the *Succession Act 2006* NSW, commonly referred to as challenging or contesting a Will.

If your child believes that adequate provision has not been made for their “proper maintenance, education or advancement in life” (these being the words used in the legislation), then an application may be made to the Court requesting that the Court make further provision from your estate for that child.

What does the Court consider when determining a family provision claim?

There are 16 items in the legislation that the Court may have regard to, with the last provision being “any other matter the Court considers relevant”. In summary, the primary issues tend to be:

- the relationship between you and your child;
- the nature and extent of your estate;
- the financial resources and needs of your child;
- the medical condition of your child and of others benefiting under your Will;
- any contributions your child may have made towards your property or your welfare;
- the character and the conduct of your child.

The relationship between you and your child

There is a tendency to believe that this issue of relationship will be a primary determinant of whether the “black sheep” should be able to challenge your Will and receive more from your estate. However, the Court will not look at the relationship issue in isolation, and the financial resources and needs of your child can be a significant issue taken into account by the Court.

From a legal perspective, even where the “black sheep” has been depending on you financially but has wasted the benefits you have provided, the fact of you providing financial assistance can be seen as a recognition that that child needs financial support from your estate. From a moral perspective, you may consider that the opposite applies.

The nature and extent of your estate

In general terms, your estate will be all the assets and financial resources you hold at your death and after paying liabilities.

But, peculiar to New South Wales, there is also provision in the legislation to consider other assets as being part of your estate under the concept of “Notional Estate”.

Notional estate assets include:

- assets disposed of by you for less than full market value in the period of three years prior to your death if the disposal was with the intention of denying or limiting provision for the “black sheep”;
- assets disposed of by you for less than full market value within one year of the date of death and was done when you have a moral obligation to make provision for the “black sheep”;
- assets disposed of on or after your death. A clear example of this is where real estate is held as joint tenants, meaning that the title to the real estate passes to the surviving owner on your death and it does not pass through your estate. Despite the title automatically passing to the surviving owner, the Court may designate the interest, so passing as notional estate. This can be complicated, and if you think this is relevant to your particular financial circumstances, we can provide you with some legal advice as to how it may apply to you.

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Providing evidence of the relationship with your child

From our experience, this can be the most challenging aspect of taking steps to limit a challenge to your Will by the “black sheep” of the family. It is a topic that may be embarrassing to you and also may not be fully known by other members of your family. And, in that situation, you would be the best witness to provide evidence to the Court as to the relationship, except for the fact that you would then have passed away.

Some lawyers take the view that the Will might include explanations as to why further provision has not been made for the child.

We do not share that view.

As Probate of your Will often has to be provided to banks or other financial institutions as part of administering the estate, you may not want to “air your dirty linen” to those third parties.

We prefer that a statement be kept separate to your Will, and it can be extensive in nature. But it needs to be accurate and objective. There is also the benefit in having a separate statement in that if, despite your concerns that your child may challenge the Will, that child chooses not to do so, then the statement might not be disclosed.

Get help from a Wills and Estates lawyer

Taking steps to prevent or limit your child challenging your Will requires a multifaceted approach. This includes:

- considering your capacity to make a Will;
- guiding you as to the potential of a family provision claim;
- considering your financial position generally to understand what would be comprised within your estate; and
- helping you in providing evidence to your Executor to use in any Court proceedings that might be brought by your child.

Our estate planning team has significant expertise in this area of law and will be able to assist you.

Contacting E&A Lawyers

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

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