TAX, STRUCTURES & PLANNING NEWS

CLIFFORD GOULDSON LAWYERS

Is it now safe to exclude those ungrateful children from your will?

It's long been a frustration to both will makers and estate planning lawyers alike just how hard it is to exclude certain people from a will without a court challenge overturning it. What's known as "testamentary freedom", or the ability to leave your assets to whoever you wish, seemed to be unattainable.

The combination of the Court's approach and the provisions of the *Succession Act* have made it nearly impossible to exclude certain people, particularly children of the deceased, from receiving money from an estate. This is often in spite of what many would feel were circumstances in which the particular child (this being an adult child, not a minor) had clearly already benefitted from the estate or behaved in such a way that excluding them seemed perfectly reasonable.

As a result, estate planning lawyers have instead moved to advising clients to make arrangements to limit the amount of assets likely to fall into an estate, thereby removing them from challenges to the will.

While it's probably too soon to say the tide has turned a recent case* in NSW shows that there may be a change in the air for willmakers dealing with estranged children.

A bit more background

Within the Queensland *Succession Act* (and similar Acts in other states) a will can be contested if it doesn't provide sufficient maintenance and support to a defined group of people related to the willmaker. This includes spouses, children and dependants of the deceased. If a claim was made it was then for the courts to determine how far the family provision can stretch especially in regards to estranged children.

Previous cases in all Australian jurisdictions have seen that the court did not consider the fact of mere estrangement between parent and child should result in disentitlement. Many cases saw a redistribution of assets to beneficiaries who a reasonable person might have thought were quite undeserving. When combined with a high probability that the Court would have the estate pay the legal costs of the claimant it became a low risk exercise to challenge a parent's will.

Against the trend

However, the case of *Gary Alan Wright v Keerri Lyn Wright as Executor of the Estate of Leslie Richard Wright** has gone against this trend. In this case an adult child of the willmaker was excluded from a will and the court has upheld that exclusion.

Critical to the decision was the court's consideration of the following matters:

1. conduct and character of the applicant
2. hostility by the applicant shown towards willmaker and family
3. financial circumstances of the applicant (which interestingly were not great)
4. statements written by the willmaker providing valid reason as to why the applicant has been

disentitled

5. length of estrangement from willmaker

It was established that the statement written by the willmaker, which was stored with the will, presented valid evidence to the court as to why the applicant had been disentitled.

In addition, the ongoing hostile conduct exhibited by the applicant to the willmaker and family over many years firmed the court's position on excluding the applicant from any provision under the will.

While this is just one case seemingly against the trend it provides some useful insights into how the courts may view supporting evidence and may open the door for more genuine cases of disentitlement to be recognised by the courts.

This case is certainly not enough for willmakers to feel completely safe when excluding their offspring from their will, but perhaps it's time for everyone to be a little nicer to mum and dad if they expect to receive something in the will....

**Gary Alan Wright v Keerri Lyn Wright as Executor of the Estate of Leslie Richard Wright* [2015] NSWSC 1333.

For more information contact our Tax, Structures & Planning Team.

Ben Gouldson, Director **Sheelagh Gray,** Senior Lawyer

Alison Cassidy, Paralegal

Contact Us

Phone 07 4688 2188

www.cglaw.com.au