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THE BUSINESS NEWSLETTER FROM AUSWILD & CO
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PROTECTING YOUR WILL FROM BEING CONTESTED

Your will is a vitally important document that allows you to communicate your wishes for your estate after your death, but it is not inviolate as it can be challenged or contested. More and more wills are being contested these days – in fact, it is estimated that up to half of all wills in Australia are contested – usually by family members who believe they deserve a larger share of the estate than what was stipulated.

We are currently at the start of the largest wealth transfer in Australia's history. It is estimated that $4.3 trillion in Australian assets must change hands between now and 2050, when the last of the baby boomers – those born between 1946 and 1964 – are expected to "shuffle off this mortal coil." This wealth is largely in the family home, in privately owned businesses, family trusts, investments and superannuation, and unless it's already spent before death, (which is a pretty legitimate strategy to avoid family disputes after you go), it must go down the line. The question then is who does it go down to? And how?

Each year the number of wills challenged or contested has increased from the year before, with the majority being contested under family provision legislation. Recent research reveals that more than 80% of claims against wills are brought by immediate family members – with more than 60% of those claims by adult children of the deceased and more than 20% by partners or ex-partners.

When a challenge does arise, research further reveals that 74% of cases succeed. Claims by partners and ex-partners were most successful with 83%, followed by children at 76%, and extended family at 73%.

Given how common it is for a will to be contested, how then can you protect your Will from being challenged or contested? Whilst it is unfortunately not possible to stop someone from contesting a will, it is possible to take steps to make it less likely for a will to be contested, and / or arrange assets so that they are not included in the deceased estate.

In what Circumstances can a Will be Contested?

Contesting a will is different from challenging a will. Challenging a will occurs when someone suggests that the will is not valid because it has not been executed according to formal requirements. Contesting a will, by contrast, occurs when someone asserts that they have not received adequate provision in the will.

To successfully contest a will, a person must demonstrate financial need, and establish that in light of this need, the deceased should have made greater provision for them. As a result, the applicant's financial situation is of particular importance to the application, as is his or her relationship with the deceased. The court will also consider the moral obligation of the deceased to support the applicant, and the provision made for other beneficiaries in the will. The ultimate test used by the court is what a "reasonably minded testator" would do.

Who is eligible to Contest a Will in Australia?

Every Australian state and territory have legislation that allows certain people to contest a will, but the criteria for eligibility differ across jurisdictions. For instance, in some states, a grandchild is automatically eligible to contest a will, while in other jurisdictions a grandchild can only contest a will if they have previously been financially dependent upon the testator.

There are a few shared commonalities across jurisdictions, such as the fact that a spouse and child of the deceased can always contest a will. Another similarity is that if someone is already a beneficiary, they can still contest the will in an effort to receive a larger percentage of the estate.

How do you minimize the chances of someone contesting a Will in Australia?

According to *Dr Nicola Bowes* of Armstrong Legal, the most straightforward way to minimize the prospect of someone contesting your will is to make adequate provision for anyone who might otherwise successfully contest the will. It is not necessary to make equal provision for all beneficiaries, only to do what a reasonable testator would do in the circumstances. It is also worthwhile including a written account of the consideration given to the needs of each beneficiary, and a justification of the allocation based on their current and future requirements. The true test is whether you have made reasonable provision for the child or family member, taking into account all the circumstances.

Of course, this approach may not work for every testator. Lawyers are sometimes asked to draft wills that completely exclude an estranged family member. The most common way to make your intention known is through a Statutory Declaration. This declaration is a legal document that allows you, the testator, to provide information and a statement as to why the estranged child has been eliminated as a beneficiary. It is important to include detailed information about the state of the estranged relationship over the period of years – but understand that even if you do take this precaution, it is still possible for an estranged individual to make a claim against your estate.

Other steps that can be taken during the testator's lifetime to reduce the number and/or value of assets in the deceased estate include nominating a beneficiary or beneficiaries for superannuation and life insurance payouts. Where there is a binding nomination in place, the payout is simply made to the nominee, and the policies never become part of the deceased estate.

Another strategy is to ensure that property is owned jointly with the person who is the intended beneficiary of that asset. In this case, when one joint owner dies, ownership of the asset will revert to the surviving owner and will not be part of the deceased estate. This approach also works for jointly held bank accounts. It is very important to flag that the concept of notional estate in New South Wales interferes with the simple transfer of ownership in the case of jointly owned assets, and as a result you should consult a solicitor for matters relating to estates in that state.

Perhaps the most effective way to reduce assets in a deceased estate, according to Dr Bowes, is to gift the asset during the testator's lifetime. This is certainly effective in that, in most jurisdictions, the asset will then not form part of the deceased estate and therefore cannot be redistributed if the will is successfully contested.

This is a very complicated area of law, and you should always consult a lawyer to assist you with your will and estate planning.