Thy Will be done –
The Ten Commandments of Will Disputes

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In the average family, there is a lot more money around to argue about. A death in the family can be a slow motion train wreck which has been coming for years. Different members of the family have diverse interests in the outcome.

Lawyers can sort it out in the end, one way or another, but it may be helpful for the family members to know in advance what will happen if they carry on down the track.

Here are the ten things you need to know:

1. **A person left entirely out of a Will is likely to make a claim**

   A Deceased's right to leave their money to whoever they please has been eroded. Close relatives can make a claim. It is best to make some payment to try and deter that person from making a claim.

2. **Mediations work. It is difficult to say why**

   When I started we did not do mediations. Ninety-nine per cent of matters settled a few days before the trial or on the steps of the court. Mediations are draining as they often take a full day. Success can turn on what time the car park closes or the traffic conditions. But they work.

3. **Bad conduct must be very bad to disentitle a person left out of a Will** –

   a) The family black sheep is often left out of the Will for good reason, but his behaviour may not be enough to have him disentitled completely. For instance, adultery will not usually disentitle a spouse whereas murdering the testator would qualify. Generally, a child not following a parent's wishes or a long absence by a black sheep, will not be disentitling conduct. Abuse and insulting

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behaviour to parents even on their death bed have been found not to be disentitling conduct. It will depend on the frequency and extent.

b) To be successful, the Testator should make a statutory declaration as he or she will not be around to give evidence. The lawyer of the Testator will carefully prepare the evidence, and this process should start when memories are fresh, and the Testator can give instructions as to the facts to collate.

4. **A Will is not always the answer; it can be the problem**

a) If there is no Will and you are the closest relative you are in pole position to inherit. A Will allows the Deceased to give your inheritance to someone else.

b) Intestacy - If a person dies without a Will the order in which your remaining relatives will inherit, if there is no spouse or issue (i.e. children or grandchildren) is, as follows: parents, siblings, nephews and nieces, grandparents, uncles and aunts, first cousins and the Crown - bona vacantia.

5. **Mental incapacity is much harder to prove than you think**

a) When someone is left out of a Will, this can seem a crazy decision, especially if the Deceased is of advanced in years. But suspicion is not enough; solid evidence is required. If the Will appears rational and correctly executed, the Court will presume that the Deceased was mentally competent unless there are suspicious circumstances.

b) The nature of the suspicious circumstances can depend on the inventiveness of the Deceased's family, friends, and neighbours, but here are seven examples from the case law:

i) Enfeebled physical and mental state e.g. medical evidence of significant cognitive impairment and continual deterioration. A doctor's letter should refer to the legal test to be effective.

ii) Evidence of confusion e.g. concerns by friends that the Deceased would sign anything put in front of him.

iii) Lack of care in preparation by the lawyer.

iv) A carer left a substantial benefit.

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v) Terms of the Will departed significantly from previous Wills e.g. it excludes persons who you would expect to inherit.

vi) Questions concerning the witnesses e.g. a doctor witnessing a Will should not only be satisfied as to the capacity and understanding of the Deceased but also make a record of his examination and findings.

vii) Beneficiary receiving substantial benefit was a controlling force behind instructions to make the Will e.g. took relative to a lawyer and was in the lawyer's office when the Will was signed.

c) Once, you establish circumstances supporting a well-grounded suspicion; the court will apply a four-part test to decide if the Deceased knew and approved of the contents i.e. an awareness by the Deceased:

i) That a Will was being made;

ii) Of the estate and its value;

iii) Of the persons who could be expected to receive an inheritance in the circumstances; and

iv) Of the strength of the claims of potential beneficiaries.

d) The Court must be satisfied that the Will reflects the real intention of the Deceased. However, the Deceased could have a lucid interval at about the time that the Will is made.

6. **The Will only covers the assets of the Estate**

Properties held as joint tenants, and trusts (including superannuation) are not part of the estate. This can have unexpected consequences. For instance, assets can be moved outside the estate to prevent a claim.

7. **Promises made outside a Will can be binding**

a) Anyone who has seen the film "Monty Python and the Holy Grail" may recall the Lord of the Manor taking his son to the window and saying "One day son, this will be all yours!" to which the son replied "What, the curtains, Father?". If the

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father reneged on that promise in his Will, his estate could be forced to honour it. Conditions apply.

b) When a person makes a promise causing another to act to his detriment due to that promise, it can be enforced under the doctrine of Equitable Estoppel.

c) From the cases, here are the situations to look out for:

i) A son works on a farm for low wages for years in reliance on a promise it will be left to him. It isn't.

ii) A person spends money, time, and effort on improving a property in reliance on a promise from the property owner that it will be left to him. It isn't.

iii) A niece cares for an elderly aunt relying on a promise that the house will be left to her. It isn't.

d) The Plaintiff must prove that:

i) He reasonably assumed that the person making the promise was serious;

ii) The defendant encouraged his expectation;

iii) He acted to his detriment as a result of that expectation; and

iv) It would be unconscionable for the promise not to be kept.

e) The promise should be "clear and unambiguous." Ideally, drink should not be involved. Minor expenditure by the Plaintiff is not enough.

f) The Court will not be a push over. "*It is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power, and from dropping hints as to their intentions, without any question of an estoppel arising*." ***Gillett v Holt [2001] Ch 210 at 228.***

8. **A Will can be changed after the maker loses capacity**

a) Most clients have Enduring Powers of Attorney so that money can be moved around even if they have lost capacity and this may be enough, but not always. A Court may authorise a Will to be made, altered or revoked for a person without testamentary capacity.

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b) In the case of ***Lawrie v Hwang [2013] QSC 289***:

i) An 82-year-old was suffering from dementia. When he was about 79 years old, he had met a Korean lady through a dating agency and married her.

ii) She transferred about $3M of his money to a Korean company and bought properties. She was eventually charged with fraud. A court ordered her to return the $3M, and when she did not do so, she was imprisoned for contempt of court.

iii) Marriage to this Korean lady cancelled his previous Will made in 2006.

iv) His son of that first marriage applied to the court to have the court make a new statutory Will reflecting the terms of the 2006 Will so that the Korean lady would not inherit under the rules of intestacy.

v) The application was granted.

9. **A Will no longer needs to be as formal**

a) In the old days, thieves had their hands cut off, and murderers were hanged, there were a few mistakes, but at least everyone had certainty. It was the same with Wills. If they were not in the correct form, they were thrown out. It is still a requirement for the Will to be formal and have say two witnesses present at the same time. However, the courts are more prepared to dispense with these formal requirements if there is a document, it sets out the testamentary intentions of the Deceased who intended it to be the Will. The following Wills have been admitted to probate:

i) An entry made by the Deceased on his iPhone which purported to be his Will.

ii) A DVD marked “my Will”.

b) Therefore, a formal Will supported by the beneficiaries under that Will, can be challenged by the beneficiaries under a less formal document.

10. **Have a thought for those left behind**

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If a death in the family results in a war zone with the attendant legal costs and bad feeling, something has gone badly wrong. The Deceased's memory will be tarnished. Try to keep it simple. Testators should not leave the Will to the last minute, especially if their judgement is declining.

Conclusion

The issues which lead to a Will Dispute are predictable and therefore could be avoided with the appropriate advice and timely action.

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