

Asset Protection

June 2016

When is the right time to make a will?

In an ideal world, our clients would come and see us at different stages in their lives to discuss their assets and how they would like their affairs structured to ensure that when they pass away, their assets go to friends and family in accordance with their wishes.

However, this is not always the case. A recent decision of the High Court, provides some interesting discussion on whether an unsigned will is valid.

Background

Mr Taylor died in December 2014. He had two children, a son Leonard and a daughter Anne. He signed a will in July 2014 (5 months before he died) appointing Anne his executor and leaving his estate equally to Anne and Leonard.

The day before Mr Taylor died, he created a document which was not signed setting out that he wanted to leave the bulk of his estate to Anne – no provision for Leonard was made.

Anne wanted the High Court to declare that the December document was the valid will of her father, Mr Taylor.

Leonard and his father did not have a positive relationship.

In November 2014, Leonard and his father reconciled. Leonard later took his father to see his lawyer to have his will changed and to have Leonard appointed as his attorney. The issue of capacity was raised at this time by Anne.

In December 2014, a payment was made to Leonard (and to Anne) to pay Leonard off, in the hopes that Leonard will leave his father alone.

Decision

The Court considered the lengthy background in this case and decided that the December 2014 document was the last valid will of Mr Taylor and that it reflected his intent at the time he died. If he had not passed away so suddenly, he would have signed a will to that effect. Leonard's solicitor made the point that Leonard intended to lodge a Family Protection Act claim challenging the will.

Commentary

This is an unfortunate situation for the family and it would be easy to assume that a lot of money was involved. The case indicates the estate was worth approximately \$450,000. The funds would not have been released to any of the beneficiaries – 1.5 years between Mr Taylor's death and the outcome here (with more litigation to come).

Lessons

Get in early. Meet with your solicitor as soon as possible particularly as your situation changes.

Preparing notes as to the reason behind your will can assist if there is a future dispute.

With the benefit of hindsight, there may have been other options for Mr Taylor to consider – making gifts during his lifetime or setting up a Trust to benefit Anne for example.

Be aware of your affairs!

Under the Property (Relationship) Act, two contemporaneous claims can be brought against a person for the division of relationship property. In this case, Mr Hutchison had an affair during his marriage, and his girlfriend also decided to lodge a relationship property claim,

Background

Mr and Mrs Hutchison were married for 47 years and towards the end of their marriage, Mr Hutchinson was having an affair with Ms Greig, an employee of Mr Hutchinson's company. Mr and Mrs Hutchison separated and Mrs Hutchinson filed a claim for the division of relationship property. Ms Greig also filed for her share of the relationship property, albeit four years after Mrs Hutchison had made her claim.

Finding

Ms Greig was unsuccessful in her claim as the Court found that Mr Hutchison and Ms Greig were not in a de facto relationship. The Court based this finding on the fact that the couple did not:

- Hold themselves out as a couple;
- Share finances; and
- Share any expenses when they travelled on 'business trips' together.

Another factor that the Court took into consideration was that Mr Hutchison had not made any provision in his will for Ms Greig, even though his will had been made three years after his separation from his wife. Similarly Ms Greig had also not made any provision for Mr Hutchison in her will.

The Court also commented on the credibility of Mr Hutchison's and Ms Greig's evidence. The Court found that their evidence suited a common purpose, where it was believed that the two of them were colluding together in order to reduce Mrs Hutchison's claim.

Commentary

This is an interesting case in that the Court found that the claim made by Ms Greig was only made to defeat Mrs Hutchison's claim. However, if in fact the Court had held that Ms Greig and Mr Hutchison were in a defacto relationship, Mrs Hutchison's claim would have been diminished in order to pay Ms Greig a share of the relationship property.

Can my will be contested?

It is important to seek legal advice about how your assets can be best protected as there is no guarantee that a court will validate a will if it is challenged down the track. A recent High Court decision provides evidence that a court can and will, override the deceased's wishes in some circumstances.

Introduction

This particular case was about an adult daughter who made a successful claim under the Family Protection Act 1955 from her mother's \$2.4 million dollar estate, where she had been left \$25,000 (1%).

Facts

There was a significant history of estrangement between AB and her mother and AB and her daughter, YZ, one of the main beneficiaries (receiving approximately \$864,000) along with the executors (RT, the deceased's cousin, and ST) who received approximately \$999,000 in total. AB claimed that her childhood was very difficult, isolated and abusive at the hands of her parents. In this case the executors

had also admitted making a partial distribution prior to the six month period from the date of grant of probate.

Decision

Whilst the High Court noted conflicting evidence in respect of the abuse, it found that AB's strongest support was in the medical evidence describing persistent abuse especially from her father and that this slightly elevated the extent of the moral duty owed to AB. The Court held that an award of \$335,000 (15%) would remedy the breach of moral duty without the undue intrusion into testamentary autonomy. In respect of the partial distribution by the executors, the High Court held that as a result they lost the protection of the statutory defence under the Administration Act 1969 and held the executors personally liable for the amount of the award in AB's favor (\$335,000).

Lesson

This case emphasises that although a Court will attempt to ensure as far as possible a deceased's wishes are fulfilled, there is no guarantee that the Court will validate a will. It is important that legal advice is sought from the outset to ensure your assets are protected.

The case also provides a lesson for the executors to wait the six month period from the date of grant of probate, particularly where a will does not provide for children equally. This reduces the risk of executors being held personally liable where a claim is successful.

Contact the team

Melissa Gibson, Managing Associate (07) 958 7440
melissa.gibson@mccawlewis.co.nz

Courtney Murray, Associate (07) 958-7437
courtney.murray@mccawlewis.co.nz

Ashlea Murphy, Solicitor (07) 958 7438
ashlea.murphy@mccawlewis.co.nz

UPDATE: The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every care has been taken in the preparation of this update, McCaw Lewis does not accept liability for any errors it may contain