

FAMILY PROTECTION CLAIMS

Do you have the freedom to put whatever you like in your Will and to leave your worldly goods to anyone you like?

You can obviously put whatever provisions you like in your Will, but you should be aware that, there are some circumstances, where the Court has grounds to vary your Will.

New Zealand led the world by passing wide ranging social legislation early last century. The Family Protection Act has its origins in legislation going back as far as 1900. New Zealand was approximately 40 years ahead of England in relation to this type of legislation which is now set out in the Family Protection Act 1955.

The effect of this legislation enables a claim to be made to the Court, to the effect that the claimant has not been in receipt of adequate provision for maintenance or support, under the Will of the deceased person.

Judges have developed a concept of moral duty over the years and this moral duty is both financial and sentimental, in which the wellbeing of the family is the priority, running through the decisions. The Court must decide, after considering all the circumstances, whether the claimant is entitled to either, a share or an increased share of the deceased's estate. Anyone making a Will that ignores a moral duty to provide for his dependants, makes that Will at his peril. Gifts to others may be reduced severely to meet the claims of a persons family. Any person leaving a Will is judged by the standards of a "wise and just testator". If there is a breach of that moral duty then the Court will disturb the Will only to the extent necessary to remedy that breach. The size of the estate and any other moral claims in relation to the estate are highly relevant.

The classes of people that may claim under the Act are as follows –

1. The widow or widower who have the first and strongest claim to provision out of the estate.
2. Children, including any adopted children and any other children born outside the marriage.
3. Grandchildren (some special conditions apply).
4. In some circumstances, stepchildren.
5. In some circumstances, parents.

In considering the claims of anyone in the classes above, the Court takes into account numerous factors including how the claimant conducted himself or herself during the lifetime of the testator, the size of the estate, the age and financial position of the claimant and other factors such as health or any assistance given by the claimant to the deceased.

Another piece of legislation that may limit a client's testamentary power is the Law Reform (Testamentary Promises) Act 1949. This legislation has the effect of ensuring that if a testator fails to honour a promise made during a lifetime then the person in receipt of that promise may make a claim under this Act. The classic case would be, for example, a housekeeper who may have continued working for a testator for many years on very low wages with the expectation that they would be provided for in the Will of the testator. If that person then finds that no provision was actually made in the Will, the Court has power to enforce that testamentary promise after the Court has considered all circumstances, and will make an award that it thinks reasonable.

In conclusion, a client needs to be extremely careful in preparing or giving instructions for a Will. It is important that professional advice is taken prior to the preparation of that Will, or there may be considerable inconvenience and delay in terms of administration, if either a Family Protection claim or a Testamentary Promises claim is made.

The above information is of a very general nature only and you should contact our firm regarding specific advice relating to the general information above.