

### **DISPUTING ESTATES**

Our property is ours to do with what we wish when we die. Or is it? While Queensland law recognises an individual's right to testamentary freedom, there are some constraints that prevent this freedom from operating in a completely unrestricted manner. Indeed, estates are often challenged for a variety of reasons. There may be some reason to doubt the validity of the will. Someone may feel that they have not been adequately provided for. Notwithstanding our freedom to distribute our property in any manner we see fit, a will setting out "who gets what" may not always be the end of the matter.

### **DISPUTES BASED ON VALIDITY OF THE WILL**

Estates are often challenged by people who believe there is reason to doubt the validity of the will. Specific concerns may include:

- doubts about the deceased's mental capacity at the time they made the will;
- doubts about whether the will was signed and witnessed properly;
- doubts about whether the deceased understood the effect of the will;
- indications that the parts of the will have been changed after the deceased signed it;
- indications that the will intended to be relied upon is not the last will of the deceased; or
- the will is unclear and/or cannot be understood.

Where such concerns arise, it is necessary for the Supreme Court of Queensland to determine the validity of the will. The Court will consider whether the will is the true will of the deceased, made freely and without influence. Where the Court finds the will to be invalid, the estate assets will not be distributed in accordance with the deceased's wishes, but rather according to the rules of intestacy.

### **DISPUTES BASED ON ADEQUACY OF PROVISION TO FAMILY MEMBERS**

Estate disputes can also arise where the deceased did not make adequate provision in their will for a particular person. An application for further and better provision from the estate of a deceased, known as a Family Provision Application, can be made to the Supreme Court of Queensland.

Those eligible to make an application are:

- spouses of the deceased (including de facto spouses and dependent former spouses);
- children of the deceased (including stepchildren and adopted children); and
- dependents who were wholly or substantially maintained or supported by the deceased (including grandchildren, parents of the deceased, members of the deceased's household and the parent of the deceased's surviving children who are under the age of 18).

### **WHAT HAPPENS WHEN AN ESTATE IS DISPUTED?**

In all estate disputes, the matters addressed by the Court will depend upon the particular factual circumstances of the application. It is at the discretion of the Court to vary the provisions of a will. There is no formula for any entitlement that a person should receive from an estate. Further, proof of eligibility does not automatically guarantee that the Court will vary the provisions of a will.

In general, the Court will compare the needs of the person who is making the claim (the applicant) with those of the other beneficiaries in order to determine whether the applicant has been left without adequate provision for their maintenance or support. In making this assessment, the Court will usually look at:

- the size of the estate;
- the financial needs and health of the applicant;
- the character and conduct of the applicant toward the deceased;
- whether the deceased had a responsibility to provide for the applicant;
- whether adequate provision has been made for the proper maintenance and support of the applicant; and
- any other relevant matter.

Where the Court finds that adequate provision has not been made for the applicant, it will then determine what, if any, provision ought to have been made for the applicant. In doing so, the Court is required to consider what provision the deceased would have made had they been "just and wise" at the time of making their will.

### **WHAT WILL WE DO FOR YOU?**

Whatever the origin of the dispute, the first step is to obtain a copy of the will. Our qualified Lawyers can then make an assessment about the likelihood of a dispute being successful. Often, disputes can be resolved quickly and cost effectively by negotiation. If that isn't possible, the dispute can be taken to Court.

If you have a concern in relation to an estate or are considering disputing an estate, you should seek legal advice from us as soon as possible, as time limits do apply for many Family Provision Applications. It is best to have a dispute addressed and resolved before the assets of the estate are distributed. This avoids any difficulties that may arise if it is necessary to redistribute estate assets where they have already been distributed and perhaps exhausted by beneficiaries. Ferguson Cannon can take action to make sure that the assets of the estate are protected while the dispute is being resolved.

Please contact Byron Cannon, Director should you have any queries.