Can a person be left out of a Will? A look at some cases on estrangement

By Matthew Hudspeth, Solicitor

Children of any age and other eligible persons (as defined under the Succession Act 2006) have the right to make a claim on an estate for provision (or more than they were left under the Will) for their maintenance, education and advancement in life. This is known as a family provision claim.

One of the many facts the Court must consider in deciding what, or if any, provision should be made for the claimant is the relationship between the claimant and the deceased person. A claim becomes considerably more complicated if the claimant's relationship with the deceased irretrievably had broken down, or if the claimant and deceased drifted apart, and there was no reconciliation before the deceased's death. In legal circles such a break down is often referred to as an estrangement.

If a relationship becomes estranged some testators include a notation in their Will, or in a separate document, to explain why they have excluded the person from their Will or reduced the share they might have expected. Some examples include:

- "I…do hereby declare that the reason [that my daughter]….has been omitted from the bulk of 'our assets' in our Will is that she has not acted as a daughter in our lifetime, and should not be remembered as our other children have, in the dispersal of our assets." (Andrew v Andrew [2012] NSWCA 308)
- "I HAVE made no provision in this my Will for my daughter….because of her complete lack of concern or contact with me and other members of my family over a long period of time." (Keep v Bourke [2012] NSWCA 64)
- "In the years since it had become quite clear that [my son] does not wish to have any contact with his family…This estrangement had caused a great deal of pain and upset to the entire family and given the length of time since our last contact I decided to divide my estate to reflect the fact that [my son] (through his own choosing) is no longer connected to my life…In closing; I trust that if you are being petitioned to alter the wishes set down in my last will and testament, that you will take this statement into account when making a decision." (Burke v Burke [2014] NSWSC 1015).

But does the inclusion of such a passage actually succeed in cutting someone out of a Will?

The short answer is often 'no'. There have been instances where the Court has made provision from an estate even if the estrangement was decades old. Rather than adhere strictly to the terms of the Will, the Court will consider all of the facts to determine whether the excluded person and the deceased were actually estranged, and it will review the role the excluded person and the deceased played in creating the estrangement. The Court will then consider whether this estrangement should prevent the excluded person from receiving anything from the estate (or at the very least reduce what they would have received if they are successful in establishing that they should be entitled to provision from the estate beyond the amount that was left to them).

As can be seen in the cases below, it is very difficult to determine the outcome of a family provision case when there has been an estrangement for a significant period of time. However, it seems that where the claimant was more active in creating or maintaining the estrangement they are less likely to succeed with their claim.

Andrew v Andrew – a 35 year separation not enough to block a claim

In Andrew, the daughter of the deceased, her mother, had lived with her parents until she was 17. For the last 35 years of her mother's life the daughter could only identify two occasions on which she had any contact with her mother (being a family funeral and her father's funeral). There was no actual falling out, but the daughter said she had no rapport with her parents, and she suspected that this was due to her parents disapproving of her homosexuality, or of the fact that she had a son out of marriage (though the daughter conceded that she had never actually discussed these issues with her mother).

The evidence of the daughter's sisters was that her mother had regularly enquired with the sisters about the daughter and her son's circumstances, and that the mother could not understand why the daughter would not talk to her or her husband. The mother conveyed to her other daughters that this caused great pain for her and her husband, and that she was simply perplexed by the daughter's behaviour.

The mother had subsequently left the daughter $10,000.00 from an estate that had a net value of approximately $800,000.00, and had included the abovementioned passage in her Will.

In the Supreme Court, Hallen AJ found that the mother had not engaged in any unreasonable conduct that caused the estrangement, and that the estrangement was long term (having lasted for 35 years). The mother's other children had been close to their mother, and provided both affection and support to her. It was in these circumstances where Hallen AJ said the estrangement was such that the mother was entitled to make little or no provision to her estranged daughter as the period of estrangement was long, the estate was not large, and there were competing claims on the bounty of the deceased (being the deceased's other children). On this basis Hallen AJ dismissed the daughter's claim.

The daughter subsequently appealed. The Court of Appeal found that although the mother's reaction was understandable, in that she did not wish to make any provision for the daughter having regard to her conduct, it was not persuaded that such a reaction justified the reduction of the daughter's share to a largely nominal sum. Furthermore, the daughter's need for assistance with raising her child created a real need, which was able to be met to some degree from a modest estate in a way that would not cause hardship to the other siblings.

As a result, the Court ordered that the daughter was to receive $60,000.00 in lieu of the $10,000.00 she was to receive under the Will.

Keep v Bourke – a 38 year old separation due to parents refusing to consent to their daughter's marriage

The daughter had been estranged from the deceased, her mother, for 38 years. The daughter had no contact with either of her parents since she left home to get married to someone they did not approve of. This was in circumstances were the daughter's fiancé was conscripted into the army and was to be stationed in Singapore during the Vietnam War. The army would not allow the daughter to follow her husband to Singapore unless she married him.

Unfortunately at that time the law restricted someone who was under the age of 21 from getting married, unless they obtained their parent's consent. The daughter was four months shy of her 21st birthday. Even though the daughter offered to pay for the wedding herself, her parents continued to withhold their consent. This was because they wanted their eldest daughter to marry first, and they were concerned about the risks the war presented to the fiancé.

However, the daughter was steadfast, and initiated proceedings against her parents to obtain their consent to the marriage, and whilst the parents did relent before the matter was heard they did not pay for, nor did they attend, the wedding. In fact, the invitation was "returned with a note to the effect that [the parents] wanted nothing more to do with [the daughter]" and a "neighbour gave her away at the wedding." The daughter did not have anything to do with her parents after the marriage.

The daughter was one of three children of the deceased. The other two children stood to share the estate equally under the deceased's Will. The estate had a net worth of approximately $620,000.00. All three children of the deceased had significant health problems and were on some form of pension. The daughter, who divorced in 2002 or 2003, and had 4 children who were all over the age of 20. The other two siblings had lived in their mother's home their entire lives, and had a good relationship with their mother.

In the trial the Supreme Court ordered that the sum of $200,000.00 be paid the daughter, being almost a third of the estate. The executors subsequently appealed, and argued that due to the length of the estrangement the amount of provision payable to the daughter should be reduced to nil.

The Court of Appeal found that the mother "must be seen as the instigator of the separation" and that the daughter "apparently took at face value her parent's decision – conveyed in hurtful terms – that by marrying as she wished, [she] had made herself unworthy of continuing as a member of the family." The Court of Appeal recognised that the daughter had contributed to the estrangement by failing to make proper efforts to reconcile with the deceased, though it decided that the reduction "should not be great" given the "hurtful way" she had been expelled from the family. On this basis the Court of Appeal reduced the legacy awarded in the first instance from $200,000.00 to $175,000.00 (though the daughter had to pay the estate's costs of the appeal in addition to her own costs).

Burke v Burke – Not everyone is able to overcome a lengthy separation

This recent decision was interesting as even though the deceased's estate was larger than the estates in Andrew and Keep. The Court upheld the deceased's wishes, being that her son receive nothing from her estate, by dismissing the son's summons.

A mother had left behind three children all of similar age. Under the Will the mother left nothing to her son, $100,000.00 to her grandson (being the claimant's son), and the remainder of the estate was to be divided amongst her remaining children.

The son had no superannuation, did not own a home and both he and his wife were bankrupt. He clearly needed a large provision.

However, it is clear from the letter that the mother had left with her Will (partially produced above) that she considered herself estranged from her son, and as a result she did not want him to receive any monies from her estate. The letter represented a far more detailed explanation of the estrangement than what was contained the Wills in Andrew and Keep, and it noted that the son had failed to invite the deceased to his wedding, and had the son had also failed to attend his own son's (from an early marriage) funeral (instead electing to send flowers only).

It is clear that issues arose when the son remarried shortly after divorcing his first wife, and the son alleged that his mother had snubbed him when they met at Ashfield bowling club (though this appears to have been a mutual misunderstanding at in the midst of some discontent regarding the new marriage rather than anything intentional by either party). The son subsequently had no contact with the deceased between 1993 and 2009.

The son made some attempts to contact the deceased in 2009, and tried to lay blame on his brother from warning him off contacting the mother's nursing home. However, it was the siblings view was that "the [son's] only concern was that he was facing bankruptcy and wanted to find out if his mother was still alive because he anticipated some benefit under the Will", and the Court was not "persuaded…that their perceptions were wrong." The Court also gave little weight to the incident at Ashfield Bowling Club, noting that the son had already withdrawn from his mother and her family prior to the incident.

The Court's concluded that:

"The evidence demonstrates that the deceased's view that the plaintiff had decided he wanted nothing to do with her or the rest of the family is made out. No rational cause has been identified other than a desire to create a new life without his family as a part of it."

and that:

"…the deceased was entitled, notwithstanding that the plaintiff was her son, to regard him as a person undeserving of any benefit from her estate whatever his financial circumstances at the time of this application... I do not think that members of the community would regard such a view by the deceased as not right or as inappropriate even were the deceased to be made aware that her son had fallen on hard times following the failure of his business. Accordingly, notwithstanding the poor financial circumstances and taking all matters favourable to him into account including the size of the estate I think no provision ought to be made out of the estate for him."

As a result the son's summons was dismissed.

Conclusion

It is clear that a lengthy period of estrangement will not necessarily prove fatal to a person bringing a family provision claim against an estate. However, if the person was the instigator of the estrangement it will much more difficult for them to succeed with their claim.

If you have been left out of a Will, or even left with something less than adequate, it is worth reviewing your rights to bring a claim against an estate, even if your relationship with the deceased may have suffered over the years. If you have found yourself in such a scenario, or if you wish to discuss the topic of estrangement further, please contact the specialists in our Wills & Estate team.

If you are interested in exploring whether you do have a family provision claim, you should contact us as soon as possible. This is because family provision claims that are brought more than 12 months after the date of death of the testator cannot proceed unless the claimant is successful in applying for the Court's leave.