Last Will and Testament

If you have a Will, your family is still not immune to conflict, and the outcome that transpires with your estate may actually be the opposite of your wishes.

The 62% rise in the number of contested Wills in Australia over the last 10 years prompted us to investigate the implications for parents looking to leave their resources to future generations. Disturbingly, not only is the number of cases increasing, the success rate is 75%.[1]

There are many legal complexities here. Australia's inheritance laws differ widely from state to state, which in itself creates confusion, especially if someone dies in one state with assets or family residing in another. Different family provision laws create different trends by state:

- 52% increase in NSW ('05 to '15)
- 73% increase in VIC ('05 to '15)
- the most rapidly growing form of litigation in WA

At first glance, this is an alarming data set that validates many of the risks we see first-hand, namely, that wealth has the potential to become a burden and cause conflict amongst family members.
It probably doesn't take long to identify where the potential conflict exists within your own family. Certain relationships, at various times, are always going to be strained. Unsurprisingly, the distribution of family resources after death is one of those times. It places significant pressure on any small cracks in the family system. This intensifies where significant wealth is involved, and where beneficiaries have not had the opportunity to practise working together.

The cause for this unrest comes down to the fact that it is not simply a financial or legal exercise (although it is often set up as one). The transition of resources between generations can cause emotional challenges, from a slight shift in family dynamics to very public realignments of relationships and hierarchies. This of course plays out while the family comes to terms with the loss of a family member.

When we ask families whether the wealth in the family has the potential to cause conflict amongst future generations, they often retreat to their formal structures. It

is common to hear, ‘we have a very clear Will, with explicit intentions to guide the executors and recipients within the family.’

This is an important first step, one that has served the wishes of the deceased since the Ancient Greeks. It is true that the easiest way to trigger a contest around your estate (potentially with the State) is to fail to draw up a Will. However, when we analysed the contested Will cases in more detail, it became clear that having a Will is not enough to protect your family from conflict.

Everyone is familiar with the Rhinehart story, which perhaps blinds us to the fact that small estates are not immune. 60% of contested estates were valued below $1 million and just over half of those estates were worth less than $500,000.[2]

It is also important to note the court process does not simply deliver small adjustments. ‘There are at least eight instances from last year in the NSW Supreme Court where judges rewrote Wills and, in some of them, made provision for people who had been specifically excluded by the deceased.’[3]

We must acknowledge that there have been some underlying legal revisions in the past two decades that have facilitated the growth in contested Wills, in particular:

- The definition of eligible persons to challenge a Will has been widened in many States (note that 86% of claims were still brought by immediate family[4]).
- The Estate pays the legal costs of a challenge, whether successful or not.

It is natural to see how allocating costs to the estate promotes wasteful litigation. The average cost to take a matter to court is $20,000 to $40,000,[5] so it is likely that the number of contested Wills is just the tip of the iceberg, with many families simply saving the cost (and potential embarrassment) to pay whoever raised the objection.
Digging into the stories, it’s easy to see why families would prefer to resolve the cases quietly. There are many accounts of very public emotional drama in the courtroom. You can read about Louis Kennedy who decided to leave each of his children $50k from his $5.5 million estate, as a result of ‘their disgusting behaviour towards me’. A wish that was overturned to provide $850k and $440k for his daughter and son respectively.

Or follow the story of Franks v Franks, where the deceased claimed her son had ‘abused and harmed her’ and so left the vast bulk of her estate to her other son. Nonetheless, the court awarded a property, valued at $400,000, to her husband from whom she was separated, and thereafter equal shares to her two sons. Legal costs in this instance were just shy of $100,000.[6]

These stories quickly paint a picture of dysfunction and conflict, which of course makes for a good news story, and perhaps again gives us a false sense of security. It’s true that if you haven’t experienced divorce (63% of claims are current Partner vs. Child of another relationship) and have a strong relationship with your children, the risk of a protracted legal battle is slim.

While your family dynamics may be much healthier than the cases we’ve touched upon, there is still an emotional risk to your family. Once opened, divisions can run through generations, and tear families apart. ‘Brothers and sisters stop talking to each other, so their kids don’t engage or socialise and the family just fractures. All because of some perceived slight.’[7]

In all of these cases, it is easy to focus on the financial cost of failure, which can quickly squander a life’s hard work. The emotional cost though can be far more significant and long lasting than the financial settlement.

Minimise the Risk

Regardless of how strongly you assess the risk to your family, taking action will only strengthen your likelihood of a successful legacy. Here are five recommendations for mitigating the risk in your family:

1. Carry out a number of legal safeguards, update your Will regularly, make adequate provision for family members and take the time to document your decisions clearly.
2. We know there is a tendency to avoid talking about the money, but it is the single most effective way to ensure your Will is upheld.
3. Use your family conversations to work through potential issues. The fewer unresolved issues there are, the less likely a legal challenge.
4. For beneficiaries who have to transition or work together in a business context, focus on dynamics and governance structures. When the Akubra

family were managing the inheritance of the family business, the successor Stephen Keir focused squarely on the relationship with his siblings. He noted that ‘we’re making sure that everyone’s open and honest and we all know what’s going on so we’re all on the same page – because once you lose any trust, you’re struggling from then on’[8]

5. Bring the process forward. Give gifts while you are alive and share in the experience with your family.

In short, productive communication in a safe, well-governed environment is the greatest antidote to conflict within a family. This applies to almost all facets of family life but is a particularly valuable means to protect your Last Will and Testament. Take action today, to avoid adding to the growing list of fractured families, especially those that end up in the courtroom.

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[1] Estate Contestation In Australia: An Empirical Study Of A Year Of Case Law, UNSW Law Journal, Volume 38

[2] Ibid.

[3] Where there’s a will, there’s a chance for wasteful litigation, Sydney Morning Herald, 2012

[4] Estate Contestation In Australia: An Empirical Study Of A Year Of Case Law, UNSW Law Journal, Volume 38

[5] A test of wills, Sydney Morning Herald, September, 2011

[6] Where there’s a will, there’s a chance for wasteful litigation, Sydney Morning Herald, 2012

[7] It’s a battle of wills when estates are contested, The Australian, March 2016

[8] Family Business, Qantas, The Australian Way, July 2013