



By Eugene Collins

eugene@collinsmay.co.nz
DD: 576 1407

Lloyd Collins

lloyd@collinsmay.co.nz
DD: 576 1404

Paul Whitmarsh

paulw@collinsmay.co.nz
DD: 576 1409

Davina Rowan

davina@collinsmay.co.nz
DD: 576 1411

Amy Haste

amy@collinsmay.co.nz
DD: 576 1412

Michael Moohan

michael@collinsmay.co.nz
DD: 576 1417

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CHALLENGING A WILL

It is a relatively common misconception that you can give away what you like how you like when completing a Will.

This is only true to a point.

The law in New Zealand imposes a duty on a Will Maker to provide for certain persons to whom they owe a moral duty. This is normally a spouse and children.

The law specifies that you must provide for those persons to whom you owe a moral duty only to the extent that you satisfy that moral duty.

The difficulty with this particular concept is that if you went to five different lawyers and asked them to explain to them what your moral duty to your family was when it comes to making a Will you will get five different variations of answer.

The reason for this is the law cannot define exactly what your moral duty is without first undertaking an examination of your relationship with their spouse/or children (whichever is applicable).

For example an examination in the case of a moral duty of a parent to their children, if they have not been treated the same under the Will will involve an analysis of the children's financial position and assets that they own at the time of death of the parent to see exactly what their needs are.

The needs of the children is one of the factors that the Court will consider in order to determine what that moral duty is and how it can be met.

An example of this is the case of Donald Peters. Donald had three sons David, Simon and Richard. Donald had a successful importation business and David and Simon followed Donald into the business. Richard however pursued a career in teaching. All three sons had a similar upbringing but when Richard was 28 he entered into a relationship his father did not approve of and as a result they

became estranged.

Richard developed a medical condition at the age of 35 that caused him to give up work and go on a benefit. He had no assets of any significance. Meanwhile David, Simon and their father built up substantial wealth as a result of the importation business.

When Donald died at the age of 72 his Will had cut Richard out other than providing a couple of items of jewellery that Donald gave him. The rest of Donald's estate was given to David and Simon.

Richard filed proceedings to challenge the Will on the basis that his father owed him a moral duty which his father breached by only providing him with a couple of items of jewellery whilst his significant estate of \$2.8 million was essentially given to David and Simon.

Richard's case was successful and he was awarded just under \$500,000.

There is no magic formula and the Court simply exercises its discretion after analysing the relationship between the deceased and the children and the needs of those children. In this particular case David and Simon were independently wealthy whereas Richard had no assets.

This may seem unfair but there is a duty imposed on all of us. Of course Donald could have ensured that Richard had no ability to challenge this Will if all his assets were in a Family Trust as a Will does not apply to assets in a Family Trust.

If you would like to discuss your own Will or if you are considering challenging a Will please do not hesitate to contact Eugene Collins.

Next Issue:

The Police Diversion Scheme and its Alternative