

Challenging a will can be a tricky business

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Many clients who seek advice on challenging a will do so in the belief that the will is unfair, often because they have been left out altogether or not treated equally to their siblings.

However, our laws on challenging a will are not based on equal sharing between the children of the deceased but rather on the deceased moral duty to provide for the various members of their family.

In a Family Court decision two of three surviving children made a claim under the Family Protection Act against their mother's will.

They claimed that their mother had breached her moral duty to them by leaving the bulk of her estate – the family farm – to their brother, her only son.

The Family Protection Act allows a court to make provision from an estate in favour of certain family members when a deceased's will fails to make adequate provision for their proper maintenance and support.

In the case, the Family Court

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upheld the sisters' claim, and divided the farm in equal shares between the three siblings.

On appeal the High Court reversed the Family Court decision, finding the judge had erred in her application of the law in relation to amount of relief.

The High Court held the judge had essentially rewritten the will based on the concept of fairness.

In doing so, the Family Court had in effect disregarded the deceased's wishes, in favour of a presumption of equal sharing.

The High Court noted that the focus must not be on what the



judge thinks is 'fair', but rather on what provision is necessary to provide for an applicant's proper maintenance and support, taking into account their financial position and their entitlement to be recognised as a member of the family.

The High Court awarded the sisters a 30 and 25 per cent share of the estate to reflect the care and support they gave to their mother until her death, the hardships suffered by them throughout their childhood, and their financial need.

It is important to remember that there is no presumption of equal sharing amongst children, as people are at liberty to do what they like with their estate, and

can treat their children differently, so long as any provisions made discharge their moral duty.

Children treated unequally under a will, even by being left out altogether, cannot simply assume that they have been treated unfairly and will be able to make a successful claim.

It comes down to the particular circumstances of each estate, and each claimant, as this case clearly demonstrates.

If you do not want to provide equally between your children or you want to leave a particular child out of your will it is often helpful to the court to leave instructions in the will as to why those decisions were made.

For example one child may have received "their share" during their life time by way of gifts from the parents when others of the children did not.

That would help the court to understand the deceased was evening out the ledger by leaving unequal shares in their will and the deceased had considered their moral duty to each child and felt they had already provided for one during their lifetime.

Colman courtesy of RAINEY COLLINS LAWYERS phone 0800 733 484.

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