Is my Will worth the paper it is written on?

By Robert C. Minter*

For starters, a will can be challenged, as of right, by a spouse, an ex-spouse, a de-facto partner (including of same sex), a child (including an adult child) and, conditionally, dependents, such as grandchildren and step children. These are called eligible persons.

Regardless of this, if I have all my marbles, shouldn't everyone be bound by what I say in my will?

Well, yes, the courts say your will should stand, provided you have not forgotten someone to whom you owe a "duty".

So what is this duty?

The courts say that it is what the "community" would consider a person owes to an eligible person.

Clearly a person owes a duty to his or her spouse and to young children but, for others, the existence of a "duty" can be very unclear. The courts have said time and time again that they really don't know what community expectations are in the more grey areas such as adult children and step children.

Nevertheless, the courts are charged with the responsibility of weighing up all the circumstances in every case and coming to an "evaluative" decision on what they think the community would have expected. This evaluative process is the first factor that makes predicting determinations in this jurisdiction so hard.

Judges are cautious about allowing legal principles to be created that might in future cases bind their evaluation process. They have gone so far as to say that past court decisions provide only a guide. That is, what might be considered precedent in other jurisdictions should not be given that status in family provisions cases.

The recent August 2017 case of *Kohari v NSW Trustee* provides a good example of how the courts deal with differing levels of "duty" in claims by adult children, when pitted against the primary rights of a surviving widow.

Mr Kohari left his whole estate (which was not large) to his widow, a de-facto partner of 26 years. He made no provision for his 39 year old son from a previous relationship, with whom he had had little or no contact but who was in somewhat needy circumstances.

Mr Kohari, as it turned out, wrongly considered the son not to be his own because he thought his wife at the time was having an affair. He even held this view despite paternity being proven by a DNA test. Because of his views, he refused to provide for his son during his childhood, let alone in his will.

In assessing the situation the court applied two basic principles; firstly, that the court must be cautious in overturning an apparently responsible decision by a will-maker, and secondly a principle which has been already mentioned, namely that a will may be overturned by the court if the will-maker owed a duty to another person and that duty had not been discharged.

The courts take the view that a parent does not necessarily owe any duty to an adult child; there is only an obligation on a

parent to raise and educate their children "while they remain children".

What swayed the court to depart from this basic principle and to assist Mr Kohari's son, at the expense of the widow was the fact that the father had failed to make proper provision for the son's education and advancement when he was a child, and "his deprived circumstances (in later life) could be traced to the conduct of the deceased". Consequently, the son received a favourable order and the widow's entitlement was correspondingly reduced.

This case was preceded a year earlier by a similar case, *Stone v Stone*, where the court made an order entitling a daughter to displace to some degree the primary entitlement of a longstanding third wife.

Like in *Kohari*, the court found that the deceased father had disregarded his parental obligations to his daughter during her childhood, and it was said that the "denial of opportunities in childhood may found an obligation to make provision for her in later life".

These two cases indicate that the obligation to children in their earlier years may be so strong in some cases to displace the primacy of a widow's entitlement even where there are minimal estate assets to go round.

The *Succession Act 2006* (NSW) gives the court discretionary powers to make "adequate" and "proper" provision for persons found to be eligible. While these terms are not defined, the word "adequate" essentially means the amount necessary in dollar terms to meet a claimant's needs. This however must be tempered by what is "proper", or perhaps in another word, appropriate.

What is proper requires weighing up a potentially large number of factors, and it is for this further reason that the outcomes of family provisions claims are so difficult to anticipate. The court will consider not only the will-maker's intention but also the size of the estate, competing claims, obligations and responsibilities of the testator, the applicant's needs and any other issue it considers relevant.

In *Kohari*, the court found that the failure to make provision for the son's advancement in the will, given his treatment as a child, was not "proper". While the court felt that this failure needed to be redressed this is not to say that in coming to this conclusion the court did not also take into account the widow's own assets and numerous other factors. Family provisions cases are very much centred around the level of need of the parties.

Another factor that affects predictability in these cases is the lack of certainty regarding how s 60(2) of the Act operates. This section sets out sixteen matters that the court "may", but does not have to, consider in determining what might be proper and adequate provision.

While these matters are said by Judges to be only a checklist, many are in reality fundamental principles that ought to be applied as such. For example, while testamentary intention is listed in subsection 60(2)(j) as something the court only "may" consider, it has in numerous cases been said that the will-maker's wishes are a core principle of our judicial system and are to stand unless certain specific criteria warrants otherwise. Namely, the will-maker's wishes are only to be overturned if the deceased owed a

duty to the applicant and that duty had not been discharged in the will and/or during the person's lifetime.

Even the will-maker's "duty" is listed, in subsection (b) ("obligations and responsibilities"), as being in the "may" and not "must" be considered category. This further inconsistency between the legislation and the case law is not easily reconciled.

Why this is of particular concern is because s 60(2) says that the court "may" also consider any number of matters including the applicant's needs, age and health. It would be a worrying situation if the court were to consider an applicant's needs without first deciding whether the will-maker had any duty at all to address those needs.

For example, an adult stepson may well not be considered by the "community" as being owed any duty by a stepmother even though he may be quite needy, and yet adult stepchild claims are quite common and often successful.

The final issue that affects the outcome of claims is a practical one. In more cases than not claimants, once found eligible, can expect their legal costs to be paid by the estate. This encourages even marginal claims to be made in the expectation that the proceedings are likely to be free of any expense. This often forces the estate's trustees to settle even unjustified claims through mediation which is always required by the court. Settlements are common simply to avoid the cost, delays and uncertainties of litigation even where the claim may have little substance.

* Robert Minter is a senior consultant with the law firm Garland Hawthorne Brahe. He practices in the fields of estate planning and will disputes and has given presentations at the College of Law on trusts. He was a partner of a major law firm for many years. He holds BA LLB degrees from the University of Sydney, has carried out post graduate studies at Duquesne University in Pittsburgh Pennsylvania USA and holds a graduate diploma of Business from the Australian Institute of Management subsequently lecturing at Bond University School of Management on Business and the law in China.