

Disinheriting Family Members

By Mindy Menke, J.D.

The recent death of Leona Helmsley -- “the Queen of Mean” -- has grabbed the attention of the media and the public. Specifically, people are fascinated that that Mrs. Helmsley bequeathed \$12 million to be held in trust for her dog, Trouble, while disinheriting two of her four grandchildren “for reasons that are known to them.” While some may believe that Mrs. Helmsley’s choices are unconscionable and mean, they are perfectly legal.

You have the right to disinherit anyone except your spouse. If the surviving spouse is not provided for in a deceased spouse’s will, § 5-1.1-A of New York’s Estate, Powers and Trusts Law gives a surviving spouse a personal right of election of the greater of \$50,000 or one-third of the net estate. This is true even if the testator’s will or trust emphatically states that the spouse is to receive nothing. If the surviving spouse is left a bequest that is less than one-third of the estate (in an estate worth more than \$50,000), this bequest is an offset to his or her elective share. The historical basis of the public policy behind the spousal right of election is that the State did not want husbands disinheriting their wives on their deathbeds, thereby making the widows wards of the state.

There is no law that requires a person to provide for their children or grandchildren upon their death. Because there is no duty to support a child (after they have reached 18) or a grandchild in life, the State will not impose one at death.

Before disinheriting children or grandchildren, one must carefully consider the emotional impact of such a choice. Once a decision to disinherit has been reached, there are several strategies to consider. First, a living trust is often the appropriate planning tool. A living trust is contract that is not submitted to probate, making it difficult to contest. A will must always go through probate, thereby requiring notification of all potential distributees (i.e., those who would take if decedent died intestate, typically spouse, children, and issue of deceased children, if any), which often includes the disinherited parties, and is under court supervision. The next strategy to consider is leaving the persons you wish to disinherit enough to make the contest of the will or trust risky. Wills or trusts should typically contain a “no contest” clause (also known as “in terrorem” clause), which states that if a beneficiary contests the will or trust, he or she gets absolutely nothing. By leaving the beneficiary something, he or she has something to lose by bringing a contest that may or may not be successful. And finally, it is important to anticipate any likely challenges and take steps to prevent their success. One of the most common reasons to challenge a will or trust is the testator’s or trustmaker’s lack of mental capacity to form the requisite intent to enter into the will. Having a physician, psychologist, or psychiatrist examine you and provide a written report of your mental

capacity can provide valuable evidence of competency. Another common challenge is that of undue influence by the person or persons receiving more under the will or trust due to the disinheritance. To thwart this type of challenge, you should not have any of your beneficiaries present when you speak to your attorney about your wish to disinherit, nor should they be present when you sign your estate planning documents.

Leona Helmsley had the legal right to disinherit her two grandchildren. But you can assume that, with millions at stake, there will be a will contest – and the tabloids will be there every step of the way.

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