



hamilton  
duncan

We see all the angles.

# How to Successfully Cut Someone Out of Your Will

Presented by Tara Britnell

Partner, Hamilton Duncan



“Now read me  
the part again  
where I  
disinherit  
everybody.”

*“Now read me the part again where I disinherit everybody.”*

# Roadmap

1. How a disinheritance is challenged
2. How to guard against successful challenges
3. Mechanisms other than a Will



# How Disinheritance is Challenged

## 1. Variation of the Will

- Spouse and children can apply to court
- Test: “adequate, just and equitable”

## 2. Undue Influence

- Will-maker did not really intend to disinherit someone
- Unduly influenced by some rogue

# How Disinheritance is Challenged

## 3. Mutual Wills

- Will-maker makes a binding contract to benefit someone in their Will
- Will-maker changes mind → breach of contract & benefit restored

## 4. Mistakes

- Drafter of Will makes a mistake
- Rectification application to court
- Cannot plan ahead – so get a good lawyer for the Will

# How to Guard Against Successful Challenges

## Strategy:

Explain to the court or opposing parties what really happened.



## Problem:

The most important witness is **dead!**

# How to Guard Against Successful Challenges – **Wills Variation**

Valid and rational reason for disinheritance more likely to succeed.

- Ask what the reason is; check that it's true
- Leave a signed record – a paragraph in the Will, a letter in a safe place, copies of loan documents or gifts made
- Start recording evidence now – an affidavit of the history, a journal of ongoing bad behaviour, interviews of independent witnesses
- Easier to protect unequal gifts than a complete disinheritance



# How to Guard Against Successful Challenges – Undue Influence

Evidence of will-maker's intention will rebut presumption.

- Advice up front: Will-maker should consult experienced independent legal professional
- Stay away: The care-giver or child should not choose the lawyer, drive the will-maker, or be at the meeting
- Mental frailness: Perhaps talk to the doctor or get a letter
- Warning signs: See BC Law Institute's recommended practices paper: <http://www.bcli.org/publication/61-recommended-practices-wills-practitioners-relating-potential-undue-influence-g>

# How to Guard Against Successful Challenges – Mutual Wills

Professional's file is the most important evidence.

- Keep detailed notes when discussing plans or taking instructions
- If there's any hint that this is an agreement, talk to the parties separately. Ask if they intend to be bound by this Will or if they feel they are allowed to change their Will. Document response.
- Then clarify with both parties at the same time.

# Mechanisms Other Than a Will

1. Essentially making a gift before death
2. Sometimes the will-maker has the use of the asset until death
3. Examples:
  - Outright gift
  - Joint title
  - Trusts



# Mechanisms Other Than a Will

## Gift and Joint Title

- Not caught by the Will but can be considered in variation claim
- Resulting trust is the big problem
- Document that the will-maker truly intends to make a gift instead of avoiding probate
- Deed of Gift is the best evidence of intention

# Mechanisms Other Than a Will

## Trusts

- Alter ego or joint partner trusts common because the settlor wants to use the asset until they die
- In that case, can include terms identical to Will for disposition after death
- Other forms of non-testamentary trust when settlor doesn't need the asset
- Difficult to legally challenge but more expensive than other alternatives

# Final Protection

- Can't prevent litigation
- Perhaps leave a “fight fund” to the person you're trying to protect
- Designated beneficiaries for an investment or life insurance policy are almost bullet proof and seldom attract litigation

A group of people in a meeting, with the Hamilton Duncan logo overlaid. The logo consists of the word "hamilton" in white and "duncan" in green, both in a lowercase sans-serif font. The background is a dark, semi-transparent image of a meeting in progress.

hamilton  
duncan

Tara Britnell, Partner

604.580.4745

[trb@hdas.com](mailto:trb@hdas.com)