Mitchells SOLICITORS

# Can my Will be challenged?

A Will can be pulled apart or challenged in a number of ways:

1. If the will maker lacked ‘testamentary capacity’ to make the Will;
2. If the will maker was ‘unduly influenced’ to make the Will; or
3. If the will maker failed to make ‘adequate provision’ for a person whom they should have (an ‘eligible applicant’)

Problems 1 and 2 can usually be addressed by obtaining independent, qualified and specialised legal advice. Most estate claims are made by people who have not been left anything or haven’t been left enough. These claims are called ‘Family Provision Claims’

## Family Provision Claims

STEP 1 - Who can make a claim? Only ‘eligible applicants’ (spouse, child, dependant)

STEP 2 - Has the applicant been left without ‘adequate provision’ and if so, what provision should be made?

What is ‘Adequate Provision’? - A weighing-up of a number of factors, including: financial and personal position of applicant, relationship with deceased, size of estate, financial positon of other beneficiaries, disentitling conduct

Important to note that these factors are weighed up at time of death, not time of making the Will

## How can I prevent a claim for further provision?

If a claim for further and better provision is made then such provision comes from the estate of the deceased at the date of death. You can avoid this if you make adequate provision (a beneficiary who is a discretionary object of a discretionary trust which they don't control does not constitute adequate provision). You can also avoid this if you die with no assets in your estate (make intervivos transfers, transfer assets to other entities, do a binding nomination for super, put assets in joint names, enter into a gift and loan arrangement).

## What doesn't work to prevent a claim for further provision?

- Giving a beneficiary a token amount – the $1 bequest
- Writing vitriolic statements in your Will as to why you haven't provided for someone
- Creating testamentary trusts in your Will – it's all in the timing
- Where a beneficiary is vulnerable, giving their inheritance to others (so as not to mess with pension entitlements) and asking them to 'look after' the vulnerable beneficiary.