



# Hull & Hull LLP

## Addressing Estate Litigation Through Will Drafting: Part 2

### Disinheritance Clauses

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Returning to last month's topic of terms included in Last Wills and Testaments intended to address and/or prevent litigation, disinheritance clauses are another estate planning tool that can be used to potentially discourage estate litigation. Rather than simply exclude a person who would normally be considered an heir from a client's will, a disinheritance clause can be used to explicitly disinherit that person. For example, the following disinheritance clause was used in [Spence v BMO Trust Company, 2016 ONCA 196](#):

I specifically bequeath nothing to my daughter as she has had no communication with me for several years and has shown no interest in me as her father.

It is also possible to use a catch-all disinheritance clause if a client wishes to disinherit multiple individuals. See [Wright Estate \(Re\), 1988 CanLII 4818 \(ON SC\)](#) – the will in this case stated:

I have intentionally omitted all my heirs who are not specifically mentioned herein and I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs-at-law ...

### Disinheritance Clauses - Drafting Considerations

When drafting a disinheritance clause, we recommend keeping a few points in mind:

- In the event of estate litigation, a disinheritance clause may be more useful if it explains why the person is being disinherited.
- That said, when explaining the reason for a disinheritance, only a general statement, approximately one sentence in length, ought to be provided. A will is not the right place to provide a detailed explanation as to why no bequest was left to a potential heir for several reasons. If the explanation demonstrates some kind of a misunderstanding or violates public policy, a disinheritance clause could actually end up encouraging litigation and providing a basis to challenge the disinheritance. Alternatively, if the clause is particularly harsh, the affected person may commence a claim against the estate for libel.
- Open family discussions as to the testator's rationale for excluding certain individuals under their will may go further in preventing estate litigation than a statement included in a will that leaves disinherited family members surprised, confused, and unable to obtain a fulsome and responsive explanation from the testator.

### Disinheritance Clauses & Will Challenges

Failure to provide a reason for disinheriting a potential heir could pose the basis for a will challenge. For example, in [Johnson v Johnson, 2021 ONSC 6415](#), a disinherited daughter

challenged her mother's will on the basis that she had been "inexplicably" disinherited. While the court found that "the evidence ... disclosed a rational and entirely understandable reason ... to remove the applicant as a beneficiary," the will challenge may have been prevented altogether if the mother had simply included a disinheritance clause in her will.

Even if a disinheritance clause indicates that the testator's choice to disinherit a beneficiary was rational but not reasonable, as occurred in [Palichuk v Palichuk, 2021 ONSC 7393](#), the clause still may be useful for establishing testamentary capacity. In this case, the clause demonstrated that the testatrix was fully aware that the effect of her will was to fully disinherit one daughter who would "normally" be considered an heir. Ultimately, the court found that the testatrix had testamentary capacity at the time that the will was made.

Also, relatively little harm should result from a disinheritance clause if it eventually becomes apparent that the testator's choice to disinherit a potential heir was not reasonable (again, see *Palichuk*). As noted by the Court of Appeal in *Spence v BMO Trust Company*, "[a] testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle" that can only be limited by legislation and "public policy considerations in some circumstances." If the testator's choice to disinherit an heir is not entirely reasonable, this should not justify a will challenge, as long as the reason for disinheritance is not based on a delusion or a product of the testator being misled or unduly influenced by another party.

## **Conclusion**

If a client wishes to disinherit a prospective heir, a disinheritance clause can be considered. This is likely a better choice than simply not leaving any bequest to a person who would normally be considered an heir. Such a clause could prevent the disinherited person from being able to claim that the testator mistakenly excluded that person from the will, or simply forgot who may have expected to be heirs of the estate, but may not serve as a replacement for an open discussion regarding the estate plan during the testator's lifetime.