

Departing Shot: How to Disinherit Neatly

Keeping Provisions of a Will On Solid Legal Ground Can Save Heirs Time and Grief

By **KAJA WHITEHOUSE**
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A man marries a much younger woman and dies not long afterward. There's no mention of his new bride in his estate documents. His son -- the main beneficiary and trustee -- says his dad didn't want to give her anything beyond what she was entitled to by law. The wife says he promised her more and charges foul play.

Former Playboy playmate Anna Nicole Smith's long-running dispute over her late billionaire husband's estate may seem like the stuff of tabloids. But the underlying issue -- how best to disinherit a family member -- isn't just a problem for the rich and famous.

We don't yet know if oil tycoon J. Howard Marshall wanted to keep Ms. Smith from inheriting more than her legal right; just this month, the Supreme Court gave the 38-year-old model the green light to continue her court battle with her husband's youngest son, E. Pierce Marshall. But if that was his intent, there is a lesson to be learned: If you are going to cut someone out, do it right.

Dow Jones Newswires personal-finance reporter Kaja Whitehouse outlines how to disinherit someone in this excerpt from her new book, "What Your Lawyer May Not Tell You About Your Family's Will."

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It's your right to disinherit someone -- or just leave him or her less than they expected. But many states protect close family members from being shut out completely.

You can't entirely disinherit a spouse, for example, unless he or she has abandoned you or has agreed to be disinherited in a legal contract. Most states have rules that protect the spouse from losing everything when the partner dies. Often a spouse is entitled to half of your property, or at least half of what you acquired during your marriage.

Most states do not provide children with automatic rights to your property. There are a few exceptions, however. In Florida, for example, the head of household must leave the residence to a spouse or child, if either one exists. Before disinheriting a child, it's best to

review the rules of your state to make sure you are not breaking any laws and, thereby, creating a problem for your heirs.

Will contests are becoming more common because people have more to leave behind, says Philip Bouklas, an estate planning attorney in New York.

At least \$41 trillion will be passed on before the middle of this century, according to a study by two Boston College economists. Last year, in fact, saw a record number of millionaire households: 8.9 million, compared with 4.9 in 1996, according to research group TNS Financial Services.

Consider using the following safeguards to protect your heirs from a long, costly court battle. Even if the jilted heir doesn't win, a will contest or lawsuit can place an estate in limbo and deplete money from the rightful beneficiaries for legal fees.

- **State your reasons.** Many states require that you specifically mention each of your children in your will. If you want to disinherit any of them, you should name them and then disinherit them. Even if you use a living trust, you should also have a will to make the disinheritance legal.

The bottom line: If you want to disinherit a child, it's best that you state clearly in your will that you are disinheriting this person and he or she gets nothing. Some attorneys suggest that clients write a letter to be attached to the will explaining why they chose to cut out the targeted heir.

Even if you are disinheriting your child through a living trust or other means, be sure to go through this process. A disinherited child can still bring a lawsuit against a living trust.

- **Get it on tape.** Lawyers might also suggest that you videotape the will signing if you're worried about a will contest. You would need to hire a professional videographer and, in the presence of an attorney, explain why you chose to distribute your assets in this manner.

If you plan to videotape the signing, just be careful that you're not setting yourself up for another challenge. If you look confused or befuddled, the videotape could provide support for a case that you lacked "testamentary capacity," which just means you weren't clearheaded enough to draft a legitimate will.

- **Add a no-contest clause.** A no-contest clause is a legal instrument that can prevent heirs from fighting over what they get. It's a good technique to use when you're planning to give unequally. It essentially lets you say, If you go against my wishes, you will be cut out.

Remember: A no-contest clause needs to have "teeth." In other words, you need to leave your heirs enough to make them think twice about taking the risk that they might lose everything. A no-contest clause doesn't prohibit the heirs from challenging the will, or even from winning. It just means that if they challenge it and lose, they also stand to lose

their share of the inheritance. If they challenge it and win, on the other hand, the no-contest clause fails along with the rest of the will.

- **Prove competency.** A common tactic for contesting a will is to claim that the deceased lacked the ability to draft a legally binding will. It can be very hard to win a case based on this standard, though, since all that's really needed in order to be of sound mind to draft a will is an understanding of the assets, the heirs involved and the plan for disposition of the property.

Still, it's best that the lawyer hired to draft the will test for competency if any doubt might be cast on the mental capacity of the deceased. How an attorney will test for capacity will vary. Some may request that the testator see a doctor and have the doctor assess capacity; others will ask a series of questions and record the answers.

- **Avoid the perception of undue influence.** A will can also be set aside if it is deemed to be the result of undue influence, or pressure and coercion.

Say, for example, a daughter is taking care of her father. One day she reads his will and learns that he is leaving the house, where they both live, equally to all the children. She threatens to leave him to care for himself unless he changes his will so that she alone gains control of the house. She even goes with him to the lawyer's office to redraft the will.

This daughter probably wouldn't believe her actions constitute undue influence. She would think she was demanding that her father do the right thing. The state, however, may see it differently if the other children bring her actions to the court's attention.

It's always best, when drafting a will, to avoid the appearance of undue influence.

If you're planning, for example, to give the bulk of your assets to your daughter, at the expense of your other children, you should avoid hiring your daughter's lawyer to consult with you on your estate plan, having her present when you draft or sign the will, or -- some attorneys would say -- even allowing her to drive you to the attorney's office.

Write to Kaja Whitehouse at kaja.whitehouse@dowjones.com

Philip V. Bouklas
Agins, Siegel & Reiner, LLP
386 Park Avenue South - Suite 1200
New York, NY 10016
(212) 447-5599 (tel.)
(212) 447-5549 (fax)
pbouklas@asrlaw.com