A Guide to

Challenging a Will

- Understand on what grounds you can challenge a Will.
- Understand the process of challenging a Will.
- Understand about Inheritance Act claims.

This Guide has been designed to assist you in understanding the basic principles and general issues surrounding challenging a Will. This Guide is only intended to be a general overview of the law in relation to contentious probate. Legal advice should always be obtained from Leonard Gray in application to a particular case.

Section 1

Introduction

This Section of the Guide sets out the types of claims which can be made when challenging a Will.

The death of a loved one is always a difficult time. The situation can unfortunately be made even more stressful if it is discovered that the deceased's last Will is not as family members and friends may have expected, particularly if it is felt that the Will does not reflect the deceased's true wishes as they had previously expressed them.

A disappointed beneficiary may wish to consider challenging the deceased's last Will. This area of law is known as 'Contentious Probate'.

The two typical types of claim are where:

- There is suspicion that the Will is invalid for some reason (a 'validity' claim); or
- A dependant of the deceased feels they have not been adequately provided for in the Will and wants the estate distributed differently (an 'Inheritance Act' claim).

Careful consideration should always be given to the merits of a challenging a Will before starting legal action.

If the last Will is successfully set aside for lack of validity, and the deceased had made an earlier Will, that prior Will shall be admitted to probate. If there is no earlier Will the deceased will be deemed to have died intestate. Would you stand to benefit from such a result? There is no merit in incurring the significant cost of challenging a Will if there is little or nothing to be gained.

Likewise with Inheritance Act claims thought has to be given as to the wide discretion of the Court in what orders it may make and the fact that much of the estate could end up being dissipated in legal fees.

You should therefore always seek legal advice before considering challenging a Will.

The next Section of the Guide sets out the grounds for challenging a Will.

Section 2

Grounds for Challenging a Will

This Section of the Guide considers the four main grounds for challenging a Will.

A Will can be challenged for any one or more of the following reasons:

- Lack of proper formalities
- Lack of capacity
- Lack of knowledge and approval
- Fraud or undue influence

1. Lack of Proper Formalities

In order for a Will to be valid it must meet the requirements of section 9 of the Wills Act 1837 meaning that:

- it must be in writing;
- it must be signed;
- the testator must have intended for his signature to give effect to the Will;
- it must have been signed in the presence of two witnesses present at the same time;
- the witnesses must have afterwards signed the Will in the presence of the testator.

If any of these formalities have not properly been adhered to the Will can be challenged and potentially set aside.

In particular, Wills that have been homemade or prepared by a Will Writer and sent out to the testator for signature without clear instructions as to execution are often incorrectly witnessed and therefore come under challenge.

2. Lack of Capacity

The test for capacity at common law is set out in the case of Banks v Goodfellow [1870] which states that:

> *"It is essential that a testator shall understand the nature of his act and its affects; the extent of the property of which he is disposing; and shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made".*

The Mental Capacity Act 2005 also sets out certain principles which apply, including section 2(1) which states:

> "*For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain".*

In order to challenge a Will for lack of capacity it is necessary to obtain evidence of the testator's state of mind at the time the Will was made. This can be done by obtaining copies of the testator's medical records and, where a solicitor prepared the Will, asking the solicitor to answer questions about the circumstances surrounding the Will being made. This is known as a '*Larke v Nugus'* request.

Lack of capacity challenges are very common in cases where the testator suffered with dementia or Alzheimer's disease. However suffering from one of these progressive conditions does not automatically mean that the testator's Will is invalid. A recent example of this is the case of Lloyd v Jones [2016] where it was recognised that it is possible for a testator to have quite a number of symptoms of dementia, but still retain capacity to make a Will.

In circumstances where you have doubts over the deceased's capacity to have made a Will it is important to seek legal advice and investigate all the circumstances.

3. Lack of Knowledge and Approval

A testator must know and approve the contents of any Will executed. This may seem obvious and where a Will has been signed by the testator there is a presumption of knowledge and approval of its contents.

However a challenge to a Will may be mounted on this ground where, for example, the testator is blind, deaf or illiterate or where there are certain circumstances surrounding the execution of the Will which invite suspicion.

These claims are common when very little is known about the precise circumstances in which a Will was made and where a beneficiary has seemingly prepared the Will for the testator to sign. Where a person seeks to prove a Will that he has prepared and under which he is the main or only beneficiary, he must provide proof that the testator knew and approved of the content of the Will.

4. Fraud or undue influence

An allegation of fraud or undue influence is one of the most difficult allegations to prove and should not be undertaken lightly.

Persuasion alone does not amount to undue influence but if the testator is overpowered somehow then this can amount to undue influence. In the case of Hall v Hall [1868] it was stated:

"Persuasion is not unlawful, but pressure of whatever character if so exerted to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force has been either used or threatened".

Where there are serious concerns that the testator was coerced into making their last Will and/or that they did not act of their own volition in making the Will then legal advice should be sought and an investigation should take place as to the circumstances surrounding the making of the Will.

The next Section of the Guide considers the process of challenging a Will.

Section 3

The Process of Challenging a Will

This Section of the Guide considers the steps that should be taken when challenging a Will.

1. Entering a Caveat

The first step that should be taken when it appears there is likely to be a dispute regarding the deceased's Will, because its validity is doubted, is to lodge a Caveat.

A Caveat prevents a Grant of Probate being issued until it is removed. This means that the executors of the deceased's Will can't administer the deceased's estate until the dispute is resolved.

This step should be taken as soon as possible for tactical reasons.

It is a simple application made to the probate department of the Principle Registry of the Family Division or a district registry. A small fee is payable (currently £20).

The Caveat remains effective for 6 months and can keep being extended by a further 6 months until it is no longer necessary.

2. Pre Action Protocol

Before Court proceedings can be issued it is important that a Letter Before Claim is sent to the executors of the estate, and the beneficiaries, informing them that you intend to challenge the validity of the deceased's last Will.

The letter should set out clearly the grounds on which you intend to challenge the Will and what evidence you have to support your assertions.

The letter should also invite them to consider early settlement and ask them to respond within 21 days stating whether or not they accept the claim.

If matters cannot be resolved between the parties then a claim will need to be issued at Court.

3. Court Proceedings

The first step is to issue a Claim Form and serve Particulars of Claim setting out the nature of the claim. Any written evidence relied on should also be filed at the same time (i.e. a witness statement).

The Defendants must then file a Defence within 28 days of service of the Particulars of Claim.

The Court will then provide directions as to the case management of the claim. This will include disclosure of all documents on which the parties intend to rely.

Eventually a Trial will be held and Judgment will be handed down.

4. Costs

The general rule in litigation is that the loser pays the winners costs unless the Court orders otherwise. It is a common misconception that in probate litigation all costs come out of the deceased's estate but this is no longer the norm.

Generally speaking executors will have the right to have their costs paid from the estate. However this is not the case if they are also a beneficiary and are unsuccessful in the claim.

Other parties may have their costs paid from the estate, where for example it is considered that they had reasonable grounds for questioning the validity of the Will. However there is no guarantee that this will happen and legal costs in these types of claim are significant.

Serious consideration must be given to the size of the estate and if costs do come out of the estate what will be left? Is it worth fighting for or will the whole estate be dissipated?

At all times thought should be given to how litigation can be avoided and the matter settled to avoid disproportionate costs, particularly when the estate is not particularly high value.

The next Section of the Guide considers the possible applicants and the considerations of the Court for Inheritance Act claims.

Section 4

Inheritance Act Claims

This Section of the Guide considers the possible applicants and the considerations of the Court for Inheritance Act claims.

Generally speaking, under English Law, a testator has 'testamentary freedom' meaning they may leave their estate to whoever they wish and exclude from their Will anyone they don't want to inherit their estate, even a spouse or child. There is no system of 'forced heirship' unlike many countries in Europe where a testator is compelled to leave a certain proportion of their estate to close relatives.

However this testamentary freedom is counterbalanced by the Inheritance (Provision for Family and Dependants) Act 1975.

The Inheritance (Provision for Family and Dependants) Act 1975 allows certain people to apply to the Court for an order that the deceased's last Will (or the intestacy rules if so applicable) failed to make reasonable financial provision for them. If they are successful in arguing this point they will receive a portion of the estate after all.

1. Entitled Applicants

The following people may make an Inheritance Act claim:

- A surviving spouse or civil partner
- A former spouse or civil partner who has not remarried
- A child of the deceased
- Any person (not being a child of the deceased) who was treated as child of the deceased
- Any person (not included in the above) who immediately before the death of the deceased was being maintained either wholly or partly by the deceased

- Any person who lived in the same household as the deceased as their husband, wife or civil partner for the whole two year period immediately before the deceased's death

2. Time Period

An application must be made within 6 months of the Grant of Probate or Letters of Administration to the estate. The Court does have discretion to allow out of time applications in some cases.

3. Matters the Court considers

There are a variety of guidelines the Court will consider in each case when deciding whether the provision made in the deceased's Will for the applicant was reasonable and, if not, whether and in what manner it shall exercise its powers.

In particular the Court will consider:

- The financial resources and financial needs of the applicant and weigh these up against the financial resources and financial needs of the beneficiaries of the estate.
- What obligations and responsibilities the deceased had for the applicant and the beneficiaries.
- The size of the estate
- Any other matter, including the conduct of the applicant, which the Court considers relevant.

4. Possible Orders

The Court has a very wide discretion in terms of orders it may make in Inheritance Act claims.

For example, the Court may:

- Order that the applicant receive a lump sum of money from the estate;
- Order that a property belonging to the deceased be transferred to the applicant; or
- Order that the applicant receive periodical payments.

As with validity claims, discussed earlier in this guide, it is important for the parties to try to resolve matters as early and cost effectively as possible since the costs can be significant.

The normal practice is that costs follow the event meaning that if the applicant is successful and is awarded the whole estate the defendants will be ordered to pay costs. However an executor acting in their capacity as executor will have their costs paid from the estate. This could significantly reduce the size of the estate available to the applicant and any other beneficiaries.

Conclusion

Challenges to Wills and Inheritance Act claims are on the increase and becoming more widely known about and reported on in the press.

If you have any concerns regarding the validity of a loved one's last Will or if you do not feel you have been adequately provided for in their Will please contact our team.

Equally if you are the executor or beneficiary to an estate which is being challenged by a third party we can advise you on how to respond.

The next Section of the Guide will look at how to make an appointment.

Section 5

Making an Appointment

If you would like to discuss the issues raised in this Guide further then please contact **Maria Orfanidou** who will be happy to do so.

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We are based in Chelmsford town centre, a two minute walk from Chelmsford Rail Station with car parking and disabled access at the rear of our office for the use of clients.

Open Monday to Friday, 9:00am to 5:30pm. Alternative times by arrangement.

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