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GROUNDS TO CHALLENGE A WILL

GUIDANCE NOTES

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This notes sets out the grounds to challenge a Will and the factors to consider.

Testamentary Capacity

The test of testamentary capacity is set out in the case of *Banks v. Goodfellow (1870):*

"It is essential…that a Testator shall understand the nature of the Act and its effects, shall understand the extent of the property which he is disposing, shall be able to comprehend and appreciate the claims to which it ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties"

If the Deceased does not have testamentary capacity, the Will is invalid. To prove this ground, the Deceased must have failed to:

a) Understand they were making a Will and its effect.
b) Understand the extent of the property they are disposing of.
c) Appreciated the claims upon their Estate.
d) Was subject to any disorder or delusion which acted to bring about a disposal which the Deceased would not otherwise have made.

If any of the above are proven to exist, the Will is invalid and the estate will pass in accordance with the most recent earlier will or if there is no will the laws of intestacy apply.

As you are challenging the Will, the burden of proof is upon you to prove the Will is invalid. The burden is on the balance of probabilities (i.e. what is more likely than not).

Each case is decided on its own facts. The evidence the Court will consider is:

a) The Will writing file.
b) Evidence from the Will Writer who took instructions for and executed the Will. This is also known as a *Larke v. Nugus* statement.
c) Medical evidence. This will include the medical notes and/or evidence from the GP or capacity expert.
d) Witness evidence.
e) Any other relevant evidence.

The Courts have in recent years emphasised that each case turns on its own facts save that capacity cases carry a high level of risk.

- In *Hawes v. Burgess [2013]*, the Court of Appeal pronounced in favour of a will prepared by a lady with vascular dementia. The Court of Appeal considered that the Trial Judge should have given greater weight to the evidence of the solicitor who took instructions and thought the Deceased was "*entirely compos mentis*".

- In *Ashkettle v. Gwinett [2013]* the Deceased was suffering from dementia caused by Alzheimer's. The Trial Judge felt that the solicitor who had taken instructions for the will had not asked the right questions and failed to 'pierce the social façade' to get to the fact that she lacked testamentary capacity. The assessment by the Will Writer was not sufficiently detailed such that the will was invalid.

- In *Simon v. Byford [2014]* the 88 year old Testatrix suffering from confusion and symptoms of dementia. The will was a homemade will after her birthday party. The Court of Appeal pronounced in favour of that will.

- In *Burns v. Burns [2015]* the Court surprisingly pronounced in favour of the will were there was considerable evidence the Deceased lacking testamentary capacity.

Each case turns on its own facts. Much will hinge on the state of the will file and whether the will writer has observed proper precautions e.g. by obtaining medical reports etc.

Lack of Knowledge and Approval

The Testator should know and approve the contents of the will. The approach is set out in the leading case of *Fuller v. Strum [2002]* which outlines that where the Deceased's knowledge and approval are put in issue by a person seeking to challenge the will, the Court must be satisfied on the balance of probabilities, that the Deceased did not know and approve its contents.

Where there are "*suspicious circumstances"* the Court will require the person preparing the will to prove that the will represents the wishes of the Deceased. The following are examples of suspicious circumstances:-

i. Where a solicitor is instructed by a person other than the Deceased.
ii. When a will is not prepared by an independent solicitor.
iii. When a will represents a radical departure from the terms in the earlier will.
iv. The will contains spelling errors or uses language unusual for the Deceased.
v. The will contains untrue statements or uncharacteristic features.
vi. The relationship between the Testator and Beneficiary was not close.
vii. The will is evidence of unusual behaviour of the Deceased.
viii. The will is prepared when mental impairment or confusion was evident.

In cases where a will has been drafted by a solicitor and has been read over to the Deceased it will often be difficult to prove that they lacked knowledge and approval.

Undue Influence

A will is not valid if it is made with undue influence. This means coercion, not necessarily force.

In the case of *Hall v. Hall [1868]* the Court set out that:-

"persuasion is not unlawful, but pressure of whatever character … if so exercised as to overpower the volition without convincing the judgment of the Testator" will amount to undue influence. The issue is whether if the Testator was alive they would say '*This is not my wish but I must do it'*

In order to succeed in a claim it must be proved that:-

i. The Defendant was in a position to exercise influence.
ii. The Defendant did exercise influence.
iii. The influence was undue.
iv. The undue influence was exercised in relation to the will.
v. It was by means of exercising that undue influence that the disputed will came to be executed.

The facts of the execution of the will must be inconsistent with any hypothesis other than undue influence. In short, the will was only executed in the form it was as a result of that undue influence.

In the case of *Edwards v Edwards*, the Court found that the elderly Testator who was frail, vulnerable and frightened had changed her will leaving her Estate to her son. There was no reason other than undue influence to justify the change in the earlier will which had left it amongst family members in more equal shares.

Lack of due execution

For a will to be valid, it must meet the formalities in the Wills Act 1837. This requires a Will to be:

- In writing;
- Signed by the testator or by someone else in his/her presence and by his/her direction;
- When signing, the testator intended by his/her signature to give effect to the will
- The will is witnessed by two or more witnesses which were present at the same time.
- In most cases, the testator must also be 18 years or older to make a will.

If any of the above formalities are not met, then the will shall be declared invalid.

Forgery

Forgery cases are rare and there are few cases of this nature which have been heard at court. Most will forgery cases are based on arguments that:

- The testator's signature on the will is not genuine
- Changes are made to the will after signature without the permission of the testator.

Forgery is a serious allegation as it attacks the character and reputation of a person. The burden of proof is still on the balance of probabilities (i.e. what is more likely than not), but the court will be vigilant and jealous and take great care to assess the quality of the evidence adduced to establish the arguments. The more serious the allegation the more cogent the evidence must be before the court will make a finding on the balance of probabilities.

Often cases of this nature will depend on expert handwriting evidence to demonstrate whether the Deceased's signature was genuine. As a general rule, cases of this nature are very hard to prove.

Summary

If any of the above grounds are proven to exist, the Will is invalid. It is very important to note that the estate will then pass in accordance with the terms of the most recent earlier will or if there is no will the laws of intestacy apply. As such, it is important to check that you actually benefit from challenging a will.