

## The Validity of Wills

When a will is made, the person making the will (“testator/testatrix”) will have decided who is to benefit from his/her property. However, for a number of reasons the will they have made may not in fact represent their “last will and testament” and it may not be valid or worded in such a way that it is not clear as to what the testator/testatrix meant. If this is the case it is possible that the will can be contested.

## Contesting a Will

Briefly, the ways in which a will can be contested are:

- i) it can be judged invalid and set aside altogether;
- ii) there can be an argument over what is intended and some or all of the bequests may fail;
- iii) a dependent can make a claim to the court if the will doesn’t provide for them.

### Grounds for disputing the validity of a will:

#### **Capacity**

For a will to be valid, the testator (the person making the will) should be 18 or over (except in respect of privileged wills which apply to members of the armed forces in actual military service or a seaman at sea) and of sound mind memory and understanding. The required mental capacity is greater than that required to enter into other day-to-day transactions.

A will made by a person of full capacity is not revoked by the fact that he subsequently becomes incapable of making a will, and a will made by a sane person is not revoked by his subsequent insanity. In addition, the recovery of a testator’s sanity will not validate a will (or codicil) made during a period of testamentary incapacity.

To have testamentary capacity, a testator must understand:

- (a) that s/he is making a will and that the effect of their wishes is that they will be carried out at their death;
- (b) the extent of the property of which s/he is disposing – i.e. s/he knows what s/he has to leave; and
- (c) the nature and extent of the claims on their generosity – both of those whom s/he is including in his will and those s/he is excluding – i.e. s/he knows the people s/he should provide for.

S/he must have this testamentary capacity at the time when s/he executes the will or gives instructions for its preparation.

There are numerous decided cases on these elements and each case will depend upon its own facts. We can advise you upon this.

It is worth noting that simply because a person is deemed to be suffering from mental disorder within the meaning of the Mental Health Act 1983, or even if he is being detained under powers within that Act, doesn't necessarily mean that that he is not competent to make a will. In other words, someone who is not of sound mind can make a valid will so long as the unsoundness of mind doesn't prevent them from understanding the will. As stated above, each case depends upon its own facts.

In summary, the question as to whether someone has testamentary capacity is often an extremely difficult and complex one. Evidence of testamentary capacity will need to include much more than just the testator's medical history. To enable the court to rule on the testator's testamentary capacity it will have to understand the mind of the testator. In order to do this, the court will require evidence of the testator's relationships with family and friends, their motivations in life and desires and prejudices - i.e. what makes the testator "tick".

In this respect, if the testator has made previous wills then their "will-making pattern" can prove to be significant. The court will look into why the testator made the will/s that they did prior to making the will that is being questioned and, if the will that is under attack is significantly different, the court will look to see what has happened in the testator's life in the meantime so as to cause the testator to revise their testamentary dispositions. This is no separate test as such.

Tip – to try to minimise the risk of a claim for lack of mental capacity in dubious cases, you should ensure that the GP for the person making the will witnesses it (ensuring that they have treated the person for some time) and ask the GP to provide a statement of mental capacity.

### **Intention**

At the time that the testator/testatrix signs the will s/he, must have the intention that the document should be a will – in other words that the provisions set out in the will should be binding after death.

### **Duress/Undue influence**

If the testator/testatrix is forced to sign the will, it will be invalid. The question as to what comprises force is not always straightforward. If the testator/testatrix is threatened that they will be harmed if they don't sign, they will be deemed to have been forced. In other circumstances, each case will turn on its own facts and once we have considered the facts we can advise further.

### **Fraud**

If the testator/testatrix was tricked into signing the will, it won't be valid. For example, if they had been asked to sign a piece of paper without knowing what it is.

### **Will must be in proper form**

Briefly, the following are necessary:

- It must have been written down and signed and witnessed correctly
- There must have been two independent witnesses, who were not beneficiaries of the will, or married to a beneficiary or the civil partner of a beneficiary. If a beneficiary has witnessed the will it will only invalidate the gift to them.

- The witnesses must have seen the testator/testatrix and sign after him/her. They do not need to have known the contents of the will, they were witnessing the fact of the testator/testatrix's signature. For this reason, a blind person cannot sign.

### **Marriage**

Entering into a civil partnership or getting married will have invalidated any will made before the wedding or civil partnership; unless the will specifically states that it is made in contemplation of either of these two events.

If the testator/testatrix divorced after making the will, only the bequest to the ex-spouse is invalidated and not the whole will.

### **Inheritance Act Claims**

Please see our separate fact sheet in this respect.

\* NOTE: Our fact sheets are intended as general guides only. Each case turns upon its facts and legal advice should be sought upon those specific facts.

If we can be of any further assistance, please do not hesitate to contact:

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