



CONTENTIOUS PROBATE

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YOUR GUIDE TO CONTENTIOUS PROBATE

When a person dies, their estate is administered and all of their assets are distributed to the beneficiaries in accordance with the deceased's last Will. If the deceased did not leave a Will, the person is deemed to have died intestate and a legal formula is then used to dictate the distribution of the assets. In most cases, the administration of estate is handled without any issues. However, there are occasions when legal disputes arise. When that happens, the process becomes contentious and requires specialist advice in the area of "contentious probate".

Disputes can occur for a variety of reasons such as the belief that the Will is fraudulent or has been forged; that the testator lacked the required mental capacity to make will or the suspicion that the deceased made the Will while under "undue influence".

The growing prevalence of second marriages has made family structures more complex when making a will and has become one of the most common areas of contentious probate cases seen over the last few years. The Court's have the power to overturn the terms of a will if it is satisfied that the testator failed to make "reasonable financial provision" for a surviving spouse, child, or other party connected to the deceased.

Furthermore, as property prices rise, most home owners will leave a relatively sizable estate even without any other assets. This has been cited as a reason why more and more family members are contesting Wills.

WHO CAN CONTEST A WILL?

The rules governing contentious probate claims are extremely complex, and one of the most frequently asked questions is who can contest a Will?

In general, any person who would be entitled to receive a share of the testator's estate, but for the existence of the testator's Will (meaning the testator's "heirs at law"), should be legally entitled to challenge the Testator's Will.

- THE SPOUSE
- A FORMER SPOUSE WHO HAS NOT REMARRIED
- CHILDREN
- STEP-CHILDREN
- A PARTNER WHO LIVED WITH THE DECEASED FOR MORE THAN TWO YEARS
- ANY OTHER DEPENDENTS

GROUNDS OF CHALLENGING A WILL

Contentious probate is far more complex than simply contesting or disputing a Will. Inheritance law provides a wide range of cause of actions depending on the circumstances the case. These could include:

- LACK OF PROPER FORMALITIES
- LACK OF TESTAMENTARY CAPACITY
- LACK OF KNOWLEDGE AND APPROVAL
- UNDUE INFLUENCE AND FRAUD

LACK OF PROPER FORMALITIES

There are certain legal requirements which must be met for a Will to be valid. It must be:

- In writing and signed by the testator, or signed by someone else in their presence who has been directed to do so by the testator;
- Clear that the testator intended by their signature to give effect to the Will;
- Signed by the testator, or be signed by another person with the full acknowledgment and approval of the testator, in the presence of at least two witnesses present at the same time; and
- Attested and signed by each witness, or be signed with the acknowledgment of each witness in the presence of the testator, but not necessarily in the presence of any other witness.

If the Will does not meet these requirements, or it is suspected that the Will does not meet these requirements, then it could be challenged on the grounds of a “lack of valid execution” (also known as “lack of due execution”). However, the starting point will always be a presumption of due execution meaning that everything has been carried out correctly. Accordingly, the burden is strongly on those attempting to challenge the Will to prove that it should not be considered a valid Will.

LACK OF TESTAMENTARY CAPACITY

For a person to make a legally valid Will they must be of sound mind. Effectively, this means that a person must:

- Understand that they are making a Will and understand the effect of that Will;
- Realise the nature and value of their estate;
- Understand the consequences of including and excluding certain people in their Will; and
- Not be suffering from any “disorder of mind” which could potentially influence their views and decisions.

LACK OF KNOWLEDGE & APPROVAL

For a Will to be valid, the testator must have knowledge of, and approve of, the content of their Will. They must be fully aware that they are signing a Will, approve of its contents and understand the implications of their Will. It is possible to launch a contentious probate case on the basis of a lack of knowledge and approval - even if the Will appears to be validly executed and the testator was of sound mind when the Will was drafted. However, it must be clearly demonstrated that the testator was unaware of the content of the Will or that there are suspicious circumstances surrounding the drafting of the Will, such as when a substantial gift is bequeathed to a person who helped prepare the Will.

UNDUE INFLUENCE & FRAUD

The law does not automatically presume that, because one person in a position of trust has received assets from another person, it is as a result of undue influence. To prove that a person was unduly influenced, coerced or under duress when making a Will, the burden of proof is on the person challenging the Will to prove that “actual undue influence” has occurred.

The evidence required in order to prove undue influence must be of an exceptionally high standard, to the extent that there is no other reasonable explanation for the terms of the Will.

As forgery is a form of fraud, a higher level of proof will be required than usual when challenging the validity of a Will. Therefore such a challenge action should not be commenced without strong and sufficient evidence to back up the claim.

CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY & DEPENDENTS) ACT 1975

A separate and distinct category of dispute is where a party claims that the Will (or the provision under intestacy) fails to make reasonable provision for the claimant. This area of law has seen large growth as a result of extra marital affairs and secondary families. Initially it was known as the lover’s charter.

OUR CONTENTIOUS PROBATE EXPERTISE

We are specialists in contentious probate, property litigation and trust law; all of which are often required to resolve Will disputes.

We see our role as being to help you to resolve your dispute. We will try to avoid going to Court. This is particularly so given the very personal and emotional nature of contentious probate. We give firm, commercial transparent advice - we advise against pyrrhic victories. However, if it is necessary to go to Court we will represent you in a highly efficient and proactive manner. We regularly instruct barristers from the top Chancery Chambers.

Our team includes solicitors accredited by The Association of Contentious Trust & Probate Specialists, The Society of Trust & Estate Practitioners and The Property Litigation Association.

If you have any questions about Contentious Probate please contact the BBS Contentious Probate Team



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