
A Test of Wills - How a Will can be Challenged

You may have been disappointed about an expected inheritance. A relative has written his Will in a way which you think is unfair: he has given his estate to a charity or mainly to your brother or sister – or perhaps he has not made a Will at all.

You may be intending to make a Will which you think may upset someone. Fights over Wills are very expensive and form a growth area of litigation

In what circumstances can a Will be challenged and how can you avoid the challenge?

We have dealt with a number of cases where either a Will is defective in the way it came to be signed or in its ambiguous wording, or where it fails because of some other successful challenge.

This note outlines some important points (for you while you are alive and for your challengers when you are dead!).

The formality of a Will

A Will must be in writing rather than just spoken and it must be properly signed and witnessed.

If you are disabled or infirm, it is sufficient that you make a mark where your signature should formally be, but you must have two independent witnesses (not beneficiaries or closely related to a beneficiary), who must see you sign the Will (therefore a blind man cannot witness a will), and then sign after you do.

The wording of a Will

You may think that Wills drafted by lawyers are unnecessarily complicated, but then so is the engine of a car to the driver who does not have to look under the bonnet: the words we use are necessary and have precise legal meanings. We have come across several examples of badly drafted Wills where the words used have been ambiguous or imprecise. The result often is that somebody is left with the cost of correcting the Will or having it interpreted by a court.

If you intend to leave money to charity and get the name of the charity wrong, this can cause costly difficulties later. Do you for instance know the difference between the *Royal Air Force Association* and the *Royal Air Force Benevolent Fund* ?

On the other hand, some bequests can give rise to much hilarity, e.g:

"The National Society for Protection of Cruelty to Children"

"The National Rust"

and

"Dr Bananas"

Intention to make a Will

This seems obvious but when you sign a Will you must intend it to be a Will, i.e. that what you say is intended to take effect after your death.

If you get married or enter into a civil partnership

Any Will you made before that event is invalidated unless your Will was specifically expressed to be in contemplation of your marriage or civil partnership.

Mental capacity to make a Will

Some people think that someone who appears to be a bit dotty at the time of making a Will, or who makes a Will which is eccentric, cannot make a valid Will. This is wrong. Even someone who is suffering from a serious illness can make a valid Will.

Every case has to be considered on its own facts. In a case in 1840 the Judge said:

"By the laws of this country, every Testator, in disposing of his property, is at liberty to adopt his own nonsense".

The fact is that the maker of a Will can be both arbitrary, capricious and eccentric. Most of us have heard of people who have left all their money to a cats home (or a home for bemused solicitors). Provided such a body exists an apparently odd bequest may be perfectly valid, but if the Will is irrational on the face of it, it is easier to set it aside.

Sir Joseph Jekyll (the senior judge in the Court of Appeal at the time and an ancestor incidentally of the famous gardener Gertrude Jekyll), left his fortune to pay the National Debt. A judge set aside the Will, remarking that the bequest was *"a very foolish one. He might as well have attempted to stop the middle arch of Blackfriars Bridge with his full-bottomed wig."*

The test whether a Testator is "of sound disposing mind" consists of three elements, each of which must be satisfied:

1. He must understand that he is giving his property to one or more objects of his regard.
2. He must recollect and understand the extent of his property.
3. He must also understand the nature and extent of the claims on him, both of those whom he is including in his Will and those whom he is excluding from his Will.

These are some factors which may be relevant:

- dementia, whether senile or any other form of mental illness,
- serious illnesses
- a new Will which is contrary to the Testator's previous Will,
- a Will written by a beneficiary

The Mental Capacity Act 2005, which came into force on the 1st April 2007, provides that a person lacks capacity 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".

A person is said, by Section 3(1) of that Act, to be unable to make a decision if he or she is unable to understand the information relevant to the decision, to retain that information, to use or weigh that information as part of the process of making the decision, or to communicate his or her decision.

The Golden Rule

The "golden if tactless rule", laid down in a case in 1975, is that

"when a solicitor is drawing up a Will for an aged testator, or one who has been seriously ill, it should be witnessed and approved by a medical practitioner, who ought to record his examination of the testator and his findings."

It is of course always a challenge for a solicitor to persuade his client to have his Will witnessed by a doctor but it is the correct thing to do.

Lack of knowledge or approval

It is relatively hard nowadays to pursue a claim based on lack of knowledge and approval, but such claims can arise if a Testator has not had an opportunity to read the Will before signing it and if it is complicated.

In an 1838 case it was said, perhaps rather obviously,

"If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and cause it to be vigilant and jealous in examining the evidence in support (of it)".

The degree of suspicion will vary with the precise circumstances of the case.

Undue influence

Consider Hilaire Belloc's famous cautionary verse¹:

*JOHN VAVASSOUR
DE QUENTIN JONES
Was very fond of throwing stones
At horses, people, passing trains,
But 'specially at window panes*

¹ "ABOUT JOHN, WHO LOST A FORTUNE BY THROWING STONES" from *COMPLETE VERSE* by Hilaire Belloc (Copyright c The Estate of Hilaire Belloc 1970) is reproduced by permission of PFD (www.pfd.co.uk) on behalf of the Estate of Hilaire Belloc

*Like many of the upper class
He liked the sound of broken glass²*

*It bucked him up and made him gay:
It was his favourite form of play
But the amusement cost him dear*

My children, as you now shall hear

JOHN VAVASSOUR DE QUENTIN had an uncle, who adored the lad:

*And often chuckled; "wait until
You see what's left you in my Will!"*

*Nor were the words without import
Because this uncle did a sort
Of something in the city, which
Had made him fabulously rich
(Although his brother, John's papa,
Was poor, as many fathers are)*

*He had a lot of stocks and shares
And half a street in Buenos Aires³
A bank in Rio, and a line
Of steamers to the Argentine
And options more than I can tell
And bits of Canada as well;
He even had a mortgage on
The house inhabited by John
His Will, the cause of all the fuss,
Was carefully indited thus:*

*"This is the last and solemn Will
Of Uncle William – known as Bill
I do bequeath, devise and give
By execution mandative
The whole amount of what I've got
(It comes to a tremendous lot!)
In seizin to devolve upon
My well-beloved nephew John
(And here the witnesses will sign
Their names upon the dotted line)".*

*Such was the legal instrument
Expressing uncle Bill's intent*

*As time went on declining health
Transmogrified this man of wealth
And it was excellently clear
That Uncle Bill's demise was near*

*At last his sole idea of fun
Was sitting snoozling in the sun*

So once, when he would take the air

² A line I stole with subtle daring from Wing-Commander Maurice Baring

³ But this pronunciation varies. Some people call it Bu-enos Airés

They wheeled him in his patent chair

*(By "They", I mean his nurse, who came
From Dorchester upon the Thame:
Miss Charming was the nurse's name)
To where beside a little wood
A long abandoned green-house stood
And there he sank into a doze
Of senile and inept repose
But not for long his drowsy ease!*

*A stone came whizzing through the trees
And caught him smartly in the eye*

*He woke with an appalling cry
And shrieked in agonizing tones:
"Oh! Lord" Whoever's throwing stones!"*

*Miss Charming, who was standing near,
Said: "That was Master John, I fear!"*

*"Go, get my ink-pot and my quill
My blotter and my famous Will"*

*Miss Charming flew as though on wings
To fetch these necessary things*

*And Uncle William ran his pen
Through "well-beloved John" and then
Proceeded, in the place of same
To substitute Miss Charming's name*

*Who now resides in Portman Square
And is accepted everywhere*

In our experience it is a common event that a carer in the last stages of a person's life may become a beneficiary to the detriment of others who had been named in an earlier Will.

In an old case it was said that
"persuasion is not unlawful, but pressure of whatever character if so exerted so as to overpower the volition without convincing the judgment of the Testator, will constitute undue influence, though no force is used or threatened".

The mere proof of motive and the opportunity to exercise such coercion coupled with the fact of benefit is insufficient: there must be positive proof of coercion overpowering the volition of the Testator.

Whilst undue influence is more easily inferred in cases where the Testator is of weak or impaired mental capacity or in failing health, it is difficult successfully to contest a Will on the ground of undue influence.

The test laid down in a case in 1857 still stands:

The Testator's act in making the Will or gift must be inconsistent with any hypothesis but undue influence.

It may have been unkind or unmerciful of Uncle Bill to exclude his stone-throwing nephew from his Will, but the fact that his nurse was charming in more ways than one would not be regarded as undue influence, since there was an obvious reason for Bill to change his Will.

Claims under the Inheritance (Provision for Family & Dependents) Act 1975

If you do not make "reasonable" provision in your Will for certain members of the family or other dependants, they can make claims against your estate.

A spouse or civil partner can expect to be awarded reasonable provision as if at the date of death he or she had been divorced from the deceased. This often means such people can claim much more than just enough to live on.

On the other hand, children or other people claiming dependency on the deceased must prove their dependency and will receive no more than "reasonable provision" from the estate.

If you are making a Will and you think for instance that you have already made sufficient provision for one or more people who might be expecting to benefit from your Will, it would be wise for you to write a statement, not part of the Will, which records why you have specifically excluded those people from your Will.

If you are worried about an existing Will or if you wish to consider challenging somebody else's Will, please speak to us in confidence.

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