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Factsheet

Sibling Rivalry, ways to dispute a will

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Sibling Rivalry, ways to dispute a will

There are a number of grounds upon which a Will can be disputed as follows:-

- **Lack of mental capacity**
- **Lack of knowledge and approval**
- **Incorrect attestation**
- **Undue influence/fraudulent calumny**

We will look at each briefly in turn:

Testamentary Capacity

For a will to be valid, the testator must have sufficient mental capacity. Testamentary capacity is the legal term used to describe a person's legal and mental ability to make or alter a valid will.
If the person making the will lacks testamentary capacity at the time that the will is executed, the will is invalid.
The Mental Capacity Act 2005 (MCA) applies to individuals who lack the mental capacity to make decisions for themselves, from what they want for lunch, to who they want their estate to go to when they pass away. People with Dementia, Alzheimer's, a brain injury and those with severe learning disabilities would all be applicable to the Mental Capacity Act. It Is there to keep these individuals safe and to ensure they are not taken advantage of.

More specifically to Wills and Probate, a person's legal and mental ability to make amendments and alterations to their Will is described as Testamentary Capacity which is based on case law as mentioned above .

The legal test for mental capacity is set out in the case of Banks v Goodfellow (1870) and is:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect 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 - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, If the mind had been sound, would not have been made".

Therefore, in order to make a valid Will, the deceased must:

a. Understand the nature and effect of making a Will;
b. Understand the extent of his Estate;
c. Comprehend and appreciate the claims to which he ought to give effect; and
d. No disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties.

Therefore, if there is concerns a person lacked mental capacity at the time of making their will, it could be argued that it is invalid.

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Lack of Knowledge and Approval

There can be a number of circumstances in which this ground could be argued and we will provide a few examples:-
• In a case where a blind person who has executed a Will, the attestation clause should specifically state the person was blind but that the will was read over to them or provided in braille and fully explained to them in the presence of the two witnesses.

• If a person does not speak English very well or cannot read English, an independent translator should assist to read over to will to them in their first language and there should be opportunity for amendments to be made or for clauses to be explained. The attestation clause should then state it was translated to them (including who by and in what language) and that they indicated and agreed the contents.

• If a person is deaf, again, it should be stated in the attestation clause the procedures that took place to ensure they understood the will. Was someone present to sign and if they were able to read was it established that they fully understood the contents of what they read.

• In cases where a person cannot write and marks with a cross or is not able to sign due to a physical problem then again this should be documented together with the steps that were taken to ensure they properly understood the document.
If there is reason to believe a person signed a will without being fully aware of the contents or understanding exactly what the implications of signing the will would be, then there are grounds to argue it is invalid.

Incorrect attestation

For a will to be valid it must be signed by the testator in the presence of two witnesses at the same time. For example, if the testator signs in the presence of one witness and then goes next door and asks another witness to sign, the Will is invalid.
If the will is not correctly witnessed then it will be invalid – it is best to seek the assistance of a professional will writer to ensure documents are signed and witnessed correctly. A beneficiary cannot be a witness or else their gift will be invalid.
A will document should also be kept exactly as it is – for example, if it is stapled together do not remove the staple or remove pages as this may render the will invalid if there is concern it has been tampered with. Wills should not be written on and simply striking through gifts etc does not remove them unless done properly by amending the will or by codicil.

Undue Influence

If a person is coerced into making a will, it can be deemed invalid. However, there is a heavy burden of proof and it would need to be clearly evidenced that such undue influence took place. Simply persuading someone to change their will is not enough – they have to have been forced or frightened into doing so. Fraudulent calumny is an even higher standard of proof and it has to be evidenced that the person who made the will had their mind poisoned by the perpetrator to such an extent they changed their will.

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