Bywaters Timms
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DISPUTING INHERITANCES AND WILLS IN AUSTRALIA—CHALLENGING A WILL

GENERAL EXPLANATION ABOUT WILL DISPUTES IN AUSTRALIA

There is often confusion among the general public about the concept of "contesting" or "challenging" or "disputing" a Will or probate. In law, these terms have different meanings in relation to Wills and Estates. It follows that before a solicitor can determine whether you have a right to make a claim against a deceased person's estate it is necessary to have a clear idea of what type of action it is.

All States and Territories in Australia have their own legislation with regard to challenging, contesting and disputing Wills, although there are many similarities. Reference in this article to legislation or law, unless it says otherwise, means a Queensland Act. However, it is not just legislation that governs the law in this area but cases which have already been decided in the courts in all states and territories (and sometimes in other commonwealth countries) may also be analyzed and considered.

We have prepared a series of articles. This article will deal with a challenge to the validity of a Will. See our other articles on:

- Contesting a Will/disgruntled beneficiary—Family Provision Applications
- Disputing a Will

A CHALLENGE TO A WILL

This means a challenge to the actual validity of the Will. It means you are saying the Will itself is invalid. The main reasons that a will can be challenged based on invalidity are that:

- it was either not signed properly in accordance with the Act (although this does not always mean it is invalid); or
- the Will maker did not have the necessary testamentary capacity at the time the Will was signed; or
- at the time the Will was signed another person exerted "undue influence" on the Will maker, or it was signed under suspicious circumstances.

Wills can also be challenged on the basis of fraud or forgery. If you are thinking of challenging a Will then you need to seek legal advice to find out what to do to prevent Probate being granted. You would begin the process by lodging a Caveat against the Probate. *[note: Caveats will be the subject of a separate article on this website]*.

Each of those reasons for challenge will now be explained in a little more detail.

Contact : Janice Bywaters
E:jbywaters@btlaw.com.au

Contact : Trudy Jardine
E:tjardine@btlaw.com.au

or contact us using the details below

Challenging a Will that is not signed strictly in accordance with legislation

Wills should be in writing and signed by the person making the Will in the presence of 2 other persons who act as witnesses to the signing. Those people must not be named in the Will or be potential beneficiaries. The witnesses must also sign. A Will that does not strictly comply with these requirements may need to be lodged in the court so that a judge can decide whether the Will is valid or not.

Challenging a Will on the basis that the Will maker lacked testamentary capacity

Generally, a person has to be over the age of 18 years and have the mental capacity to create a Will. A married minor (a person under 18) may also make a Will. If a solicitor suspects that a person may not have the required mental capacity to make a Will then the solicitor should take detailed notes about the person's behaviour and perceived understanding of:

- the size and nature of their estate; and
- who should reasonably be expected to benefit under their Will.

If the solicitor has any doubts about capacity then they should get a medical certificate from the person's medical practitioner.

At the time of applying to the court for probate of the Will, the Registrar of the Court will be looking for any obvious signs of incapacity, particularly if the deceased person was of an advanced age. For example, if a cause of death is stated to be "dementia, duration 3 years" and the Will was prepared close to that or within that time, then it will alert the Registrar to the possibility of a lack of capacity to make the Will. The Registrar may ask for evidence of capacity by way of a medical certificate given at the time of making the Will or a sworn Affidavit by the solicitor who drew up the Will.

Challenging a Will on the basis of 'undue influence'

This can happen where, for example, someone discovers after a close relative has died that they have been effectively cut out of the latest Will of their deceased relative. They might feel hurt and confused as to why that relative would change their Will and leave them out. This is very common where an elderly and vulnerable person is befriended by someone who later turns out to be a major beneficiary.

Undue influence cases are difficult to prove and successful outcomes are rare. However, there have been about 3 successful cases in the last century, the most recent being decided in New South Wales in 2011.

To be successful you need to produce supporting details and evidence surrounding the circumstances of the creation of the Will, generally in the form of:

- reliable witnesses present at the time of making the Will;
- diary notes of attendances, telephone discussions etc; and
- the file of the solicitors who drew the Will.

The court will look to see whether there was any form of:

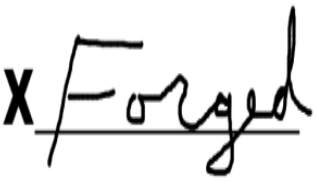
- pressure, threat, force, trickery or fear involved at any time during the Will-making process; or
- suspicious circumstances surrounding the creation and signing of the Will

and would need to be satisfied that the deceased's mind and thought processes were coerced such that the Will would seem to be contrary to the deceased's reasonable and true intentions.

Where a claim of this nature is successful the court will set aside the affected Will and may grant probate in relation to the Will made immediately prior to that one.

Challenging a Will on the basis of 'fraud'

In these cases you have to show the court that the deceased Will maker was actually tricked into signing the Will. For example, the alleged fraudster may have deliberately made false statements to the deceased, or suppressed material facts, or represented that the Will put before the deceased to sign was actually some other form of document, like a power of attorney, deed or simply a list of wishes. If you believe you may have been robbed of your expected "inheritance" through fraud, then it is recommended you consult our lawyers experienced in Will disputes.



Challenging a Will because you believe the signature was forged

From time to time family members of a deceased person do not believe that their deceased relative was actually involved in the creation of the Will – they believe that it was actually signed by someone else claiming that the signature was that of the deceased person. There are a number of "professional fraudsters" who target the elderly and vulnerable in this way.

The onus of proving a Will was forged is on the person making the allegation and it is difficult to prove. Evidence such as:

- the testimony of a handwriting expert who is able to detect and prove discrepancies between the deceased's usual signature and the signature on the Will; or

- a statement by a reliable person who was present at or around the time of the signing

If you suspect the Will of a relative was forged a solicitor experienced in Will disputes can assess your situation and the likelihood of success.

The best way of making sure your hard earned assets go to your intended beneficiaries after you die is to get good legal advice at the time of making your Will. Remember, your Will is the most important document you will ever sign.

For further information contact Trudy Jardine or Janice Bywaters.