

# Guide to contesting a will



# On what ground can a will be contested?

## Lack of Mental Capacity

Someone who wishes to challenge a will must raise real suspicion that the deceased lacked mental capacity. If this is achieved, it then becomes the responsibility of those looking to prove the will to establish that the deceased did have capacity.

### Test for wills before 1st April 2007

Generally, the test states that, when making a will, the deceased understood:

- The nature of making a will and its effect
- The extent of his/her property
- The claims to which he/she ought to give effect
- They should also have no disorder of the mind which 'shall poison his affections, pervert his sense of right, or his will in disposing of his property'

### Test for wills made after 1st April 2007

Capacity will be judged in relation to Sections 1 to 3 of the Mental Capacity Act 2005. It should be understood that under the act, it is initially presumed that the person has capacity. A person will lack capacity if, at the time in question, he is unable to make a decision for himself because of an impairment of the functioning on the mind or brain.

## Lack of Knowledge and Approval of the Terms of the Will

If the court's suspicion is aroused, it is for those seeking to prove the will that the deceased fully understood its contents.

Example of suspicious circumstances could be where the deceased:

- Was hard of hearing, or had a speech impediment
- Was visually impaired
- Had low levels of literacy
- Was frail, unwell or otherwise vulnerable, and the will is particularly complex or unusual
- Is alleged to have directed that the will be signed by someone else



## **Undue Influence**

When making a will, there is no presumption of undue influence. If a will is found to be invalid, it must be established that undue influence occurred. It is for those challenging the will to produce sufficient evidence in court to prove their claims and satisfy the court.

A claim of this nature should be pursued cautiously. For such a claim to succeed, the court will expect to be satisfied that there is no other reasonable explanation for the deceased's actions other than undue influence.

It must be proved that the deceased acted against their own volition, and that they were coerced into making a will that they did not wish to create.

Due to the nature of this allegation being equal to fraud, the burden is high, and if the claim fails, there are likely to be serious cost consequences.

Also, bear in mind, that if coercion was exercised, the chief witness (i.e. the deceased) won't be able to testify, and it will usually have taken place behind closed doors with no other witnesses.

This means that it can be extremely difficult to gain sufficient evidence to convince a court that undue influence has occurred.

## **Will Not Properly Executed**

A will may not reflect the wishes of the deceased due to a clerical error, or a failure to understand the deceased's intentions.

A clerical error is where a mistake is made in recording the deceased's wishes. If either scenario occurs, the court will rectify the will to reflect the deceased's true intentions. A claim of this nature must be issued within six months of a grant of probate being issued.

If it's believed that there has been a mistake in the drafting of the will, the first steps should be to obtain and review the solicitor's file, together with a statement of the solicitor's understanding of the deceased's wishes.

If it becomes apparent that the will writer understood the instructions, but incorrectly applied the law, then the will is still valid, but there may be a claim for professional negligence.

## **Fraud and Forged Wills**

If it can be proved that a will has been forged then it will automatically be invalid. At the outset, it is advisable to obtain the opinion of a handwriting expert as to whether the deceased's signature/handwriting is genuine. The expert will need to see a considerable number of original samples of the deceased's writing and signatures. If the expert produces a conclusive report, it is unlikely that a claim would succeed.

It is possible, though rare, for a will to be challenged on the basis of fraud, i.e. an intentional deception made for personal gain, or to damage another individual. An example of such a claim that has succeeded is where a person impersonated the deceased.

These claims will be few and far between as there are usually more suitable grounds for challenge.

# What to do if a will has been lost, damaged or destroyed?

## Damaged or Destroyed Wills

Where a will has been lost, damaged or destroyed an application can be made to court for evidence of the will's contents to be accepted in place of the original will.

A will does not take effect until death and generally speaking, can be changed or revoked at any time. A will can be revoked by destruction by the person making the will.

Therefore, when a will which was known to be in the deceased person's possession cannot be found upon their death it raises the question: has it been lost or destroyed? In these circumstances there is a presumption that the will has been destroyed with the intention to revoke it. However, in some circumstances evidence of the person's intentions can be put forward and accepted in place of the will. An example of this is where a will was destroyed in a property fire and there was evidence remaining of its contents.

It is up to those seeking to benefit under the lost will to prove that the person did not intend to revoke it.

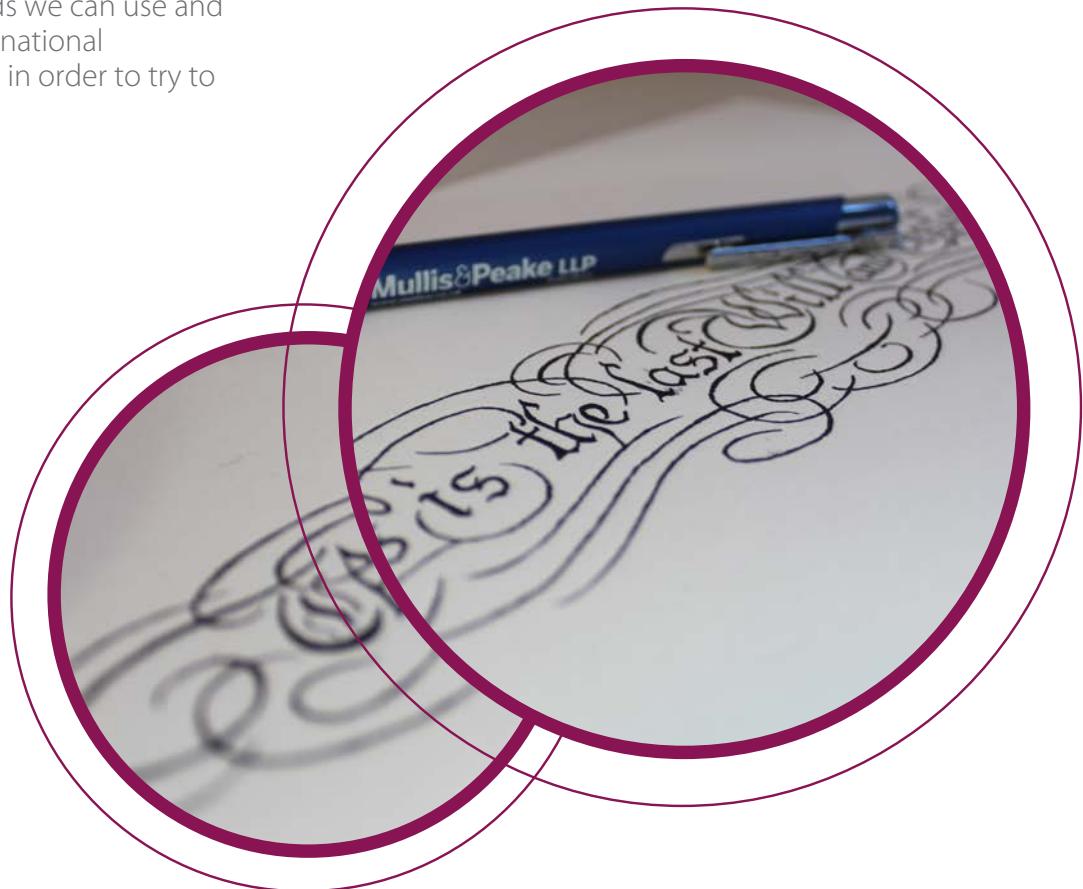
Where a will has been lost, or destroyed for some other reason, for example if it has been lost by a solicitor accidentally, an application can be made to the Court for documentary evidence of its contents to be accepted in place of the original document.

This evidence can include, but is not limited to, a copy or completed draft.

## Lost Wills

We are frequently instructed by people who know there was a will, but cannot find it.

There are various methods we can use and various places (including national databases) we can check, in order to try to find the will.



# How can I obtain information about the **drafting of a will**?

Where a solicitor has prepared a will and that will is disputed, there are various ways to obtain further information.

Often the information needed to properly understand the circumstances surrounding the drafting of a will may be in the hands or memory of the solicitor who drafted the will. Different ways to obtain information surrounding the circumstances of drafting the will include:

Larke v Nugus [2000] WTLR 1033 – This case provided that where a serious dispute arises as to the validity of a will, then a solicitor should make available a statement of evidence regarding the execution of the will and the circumstances surrounding the will.

Senior Courts Act 1981 - A solicitor preparing a will has knowledge that makes him or her a material witness if the will is disputed. The court has power under the Senior Courts Act 1981 to order a person with knowledge of any document that is or purports to be a testamentary document to attend court and answer questions relating to the document.

Civil Procedure Rules - The court has power to order pre-action disclosure of documents. In practice however, the court rarely allows pre-action disclosure. The court could also order third party disclosure against the solicitor.

## **What to do if a will is poorly drafted, there is a mistake or improper administration?**

Where a will does not reflect the deceased's wishes, or where an estate is not properly administered, you may be able to claim.

Some of the most common issues arise where wills do not reflect the deceased's wishes, or when an estate is not properly administered. Quite often, these mistakes are not realised until after the person making the will has died.

There are three main ways to deal with poorly drafted wills, mistakes in wills and improper administration:

### **Rectification**

An application can be made to court to put right a clerical error or failure by a solicitor or will writer to understand a person's wishes.

### **Construction Summons**

When the terms of a will are not clear, then an application to court for the court to determine the proper interpretation of the will may be made.

This is a relatively straight-forward application to court, but all parties to the will and all parties affected by the court's decision will need to be made part of the application.

A construction summons can be brought prior to, or as part of, a professional negligence claim.

### **Professional Negligence Claim**

Often, mistakes in wills and improper administration of an estate come about as a result of negligence by a solicitor or will writer.

It may be necessary to make a professional negligence claim against the solicitor or will writer. A claim may be made by a disappointed beneficiary (i.e. someone who doesn't inherit, but had the will been properly drafted, would have inherited).

# Is a promise or a gift made before death enforceable?

In some cases, a promise made by a person before death can be enforceable, even if that promise is not provided for in a will. This is known legally as "proprietary estoppel".

To establish this type of claim there must be:

## Promise

Party A must assure Party B that Party B will obtain a benefit after Party A dies

## Reliance

Party B must reasonably rely on Party A's representation or assurance

## Detriment

Party B must incur a detriment as a result of his reliance on Party A's representation or assurance.

Often, this includes providing care for the person before they die, or spending money on a property.

There are also gifts made shortly before death, known as "deathbed gifts". There are four conditions which must exist for a gift to qualify as a deathbed gift and be enforceable:

- Gift must be made when the donor believes he/she is going to die.
- Gift must be made on the condition that the donor dies.
- Donor must part with the gift in some way.
- Gift must be capable of being given away in this manner.

# Can a gift made before death be challenged?

It sometimes happens that a person makes a significant gift prior to their death. A beneficiary who receives less, or nothing, as a result, may want to challenge the gift.

There are a number of ways to challenge a gift made before death, including:

## Mental Capacity

If a person was not of sound mind when making the gift, the gift can be challenged. Evidence will need to be produced to show this, and we can advise you on exactly what you will need and how to obtain it.

## Undue Influence

If a person made the gift as a result of coercion or pressure from another, then the gift can be challenged. Again evidence will be needed, and we can advise you on exactly what you will need and how to obtain it.

## Attorney acting outside of powers

There are instances where a person has power of attorney over another and makes gifts. Attorneys only have the power to make small gifts to charity or birthday or seasonal gifts of a similar value to those made by the person concerned when they had capacity. If more substantial gifts are made, without the approval of the court, they can be challenged.

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Our contentious wills, probate and estates team has specialist experience in dealing with all types of disputes. We act for beneficiaries, executors and trustees – including individuals, and other organisations such as charities.

We will advise on the options available to reach a solution at what is often an emotionally difficult time. We will provide detailed information on costs. We can offer practical solutions to diffuse conflict, and approach cases with sensitivity and care to ensure that family relationships are maintained.

For more information about Contested Wills and  
Financial Provisions, contact **Martyn Trenerry**  
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