



DURAL LEGAL
CENTRE

Experience Excellence!

WILLS

Can my Will be contested?

In our system of Succession there is a general principle that people should have testamentary freedom, i.e. the right to leave their property to whomever they wish. However until Probate has been granted in “solemn” form (as opposed to “common” form) every Will is open to challenge under either the Wills Probate and Administration Act or the Family Provision Act.

The provisions of those Acts are very different and often a challenge is available under both of them. To assist you to understand the principles involved we will divide this series into two parts. This month we will look only at challenges made under the Probate and Administration Act.

Why would someone contest my Will?

Challenges under the Probate and Administration Act are made to defeat a Will which is proposed to be admitted to Probate, and to then either: -

- ⇒ admit to Probate a previous Will; or
- ⇒ cause the deceased is to have died intestate.

The purpose of course is to obtain for the applicant a more favourable distribution of the estate.

How do you contest a Will?

Under Section 144 of the Act, at any time prior to a grant of Probate any person may lodge a Caveat as a notice to the Court that it should not issue the grant. Generally speaking, it is necessary for the Caveator to demonstrate that he or she has a relevant interest in the estate and if they fail to do so costs can be ordered against them.

If a caveat has been lodged the Executor must apply for a grant of Probate in solemn form so that there is no possibility of revoking the grant by further proceedings. Any person who knew of his or her possible interest in the suit and failed to join in the proceedings will then be prevented from later contesting the result.

On what grounds can the Court reject my Will?

The most common grounds are: -

- ⇒ **Testamentary intention.** If a document appears to have been executed as required by the Act there is a presumption that it is intended to be a Will. If however it is intended that a document take effect immediately rather than from the testator’s death, that document is not a Will.

- ⇒ **Minority.** A minor can only execute a valid Will with the leave of the Court or if the minor has been married.
- ⇒ **Soundness of mind, memory and understanding.** This area of the law is unfortunately of growing concern. It is possible for a person who suffers from Alzheimer's disease or other forms of dementia to have lucid intervals, and if the Will is executed during one of those intervals then it is valid.

The test is in four parts. It is essential that the person making a Will:-

- (a) understands the nature and effect of making a Will;
- (b) understands the extent of the property to be disbursed by the Will;
- (c) considers each of the claims of relatives and others which should be considered; and
- (d) has no disorder of the mind which poisons his or her affections or prevents the exercise of natural facilities.

- ⇒ **Fraud.** From time to time it is alleged that the signature on the Will is not that of the deceased.
- ⇒ **Undue Influence.** The test of undue influence is very high, and essentially what is required is coercion, not just overpressure to make a Will in a particular way. There must be such overbearance that the Will does not truly reflect the wishes of the testator, and this is a very difficult matter to prove.

For instance there was found to be no undue influence when a very elderly testator was taken to a solicitor to change a Will in favour of the person accompanying her, even though that person remained in the room whilst the instructions were given and when the Will was signed.

What if I haven't signed my Will properly?

While it is the general case that a Will must be executed in accordance with the Act, there is a provision which allows certain documents to be admitted to Probate even if strictly speaking they do not comply. Sometimes this Section of the Act can be invoked when the testator has made alterations to a Will after its execution but has not had the alterations properly witnessed.

The Court must be satisfied that the deceased intended the document to constitute that person's will or amendment.



DURAL LEGAL CENTRE

5/500 Old Northern Road, Round Corner, NSW

Phone: (02) 9653 9666