

Contesting a Will

Introduction

Historically, to "contest" a Will meant to call the validity of the Will into question – that is to assert that it was invalid or to assert that there was a later alternative Will. In more recent times, however, it is more likely to mean that a person is going to contest the Will by taking proceedings to have the provisions of the Will varied by a Court pursuant to the provisions of what is usually called Testator's Family Maintenance legislation. These provisions are contained in the Administration & Probate Act, and have been dramatically widened in recent times.

Probate

The jurisdiction to grant Probate of the Will of a deceased person was originally the province of the ecclesiastical Courts, and was conferred on the Supreme Court of Victoria in 1852, and is generally governed by the Administration & Probate Act.

A Grant of Probate in respect of a Will of a deceased person is, in effect, a declaratory judgment of the Court confirming the Executor's title at law to deal with the Estate of the deceased person and to exercise the deceased person's wishes in relation to his assets. This "judgment" can, however, be revoked in certain limited circumstances for instance, if a later Will is located.

Although the Probate might be revoked, anything properly done by the Executor prior to the Grant of Probate being revoked cannot be challenged. Probate of the Will needs to be obtained from a Court of competent jurisdiction, having regard to the location of the assets of the deceased person. Strangely enough, in Australia, all of the other States are regarded as foreign jurisdictions and it is quite common to have to get a Grant of Probate recognized in another State, where there are significant assets in that other State.

Caveat

A person may lodge a Caveat against an Application for a Grant of Probate at any time before Probate is granted. The person lodging the Caveat must, of course, have some interest in the Estate. For instance, if a potential beneficiary felt that the deceased person had made a Will as a result of undue influence, or while the Testator, that is the person making the Will, was of unsound mind, and that person would have been a beneficiary of a previous valid Will, or that person would have been a beneficiary if the Testator had died without making a Will, then that person has standing to lodge a Caveat.

This is how actions would normally commence in cases where undue influence was alleged, or where it is alleged that the person making the Will did not have the capacity to make the Will. When a Caveat is lodged, the Registrar of Probates would grant an Order Nisi for a Grant of Probate and call upon the Caveator to show cause why Probate should not be granted. The Caveator is then required to state generally his grounds for objection to the granting of Probate, and the Court then gives directions for the trial of the issues raised by these objections

The Grounds

1. Later Will

The person lodging the Caveat may allege that there is a later Will. If the Executor of that later Will is unwilling to or simply fails to prove the later Will, the Court may require that Executor to obtain a grant of Probate or to renounce Probate. If the Executor renounces Probate, one of the beneficiaries can then apply for a Grant of Letters of Administration of the Estate of the Testator with the Will annexed, and the administration of the Estate can then proceed without the person named as Executor continuing to be involved

2. Revocation

It may be claimed that the Will has been revoked by a subsequent marriage, unless the Will made prior to marriage was made in contemplation of marriage, in which case it would not be revoked. As a result of a recent change to the Wills Act, it may be possible to argue that a Will is not revoked by marriage if it is clear from the terms of the Will that it was intended that it should continue to take effect after marriage.

It may be argued that a Testator intended to revoke a Will by destroying it. There is a presumption that a Will found destroyed or mutilated in a place in which the Testator would naturally put it if he thought he had destroyed it, that the Testator had destroyed the Will with an intention of revoking it. However, there can be arguments as to the circumstances in which the Will was destroyed, and obviously this is not a very safe course for a Testator to follow.

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3. Formal Validity

The formal validity of a Will is governed by the provisions of the Wills Act.

Read Section 4 of the Wills Act.

"All property may be disposed of by Will"

Generally speaking, a Will must be in writing signed by the Testator and by two witnesses, all of whom are in the presence of each other at the time the Will is made.

The formal requirements of the Wills Act are strictly interpreted by the Courts so as to render invalid any purported testamentary dispositions which do not appear valid in form. It seems that almost every possible fact situation relating to the execution or non execution of testamentary documents has been litigated at some time or another.

4. Lack of Testamentary Capacity

A person may lack the capacity to make a valid Will by reason of age (eg too young) or by reason of unsoundness of mind. To make a valid Will, the Testator must be of sound mind, memory and understanding. These words consistently have been held to mean sound disposing mind and to have sufficient capacity to deal with and appreciate the various dispositions of property to which he is about to affix his signature. In order to be of sound disposing mind, a Testator must not only be able to understand that he is by his Will giving his property to one or more persons whom he wishes to benefit, but he must also have the capacity to comprehend and to recollect the extent of his property and the nature of the claims of others who, by his Will, he is excluding from participating in that property. He must have that capacity at the moment of executing the Will, and also at the moment of giving instructions for the Will. The cases on these issues use words like "delusions", "dementia", "imbecility" and "insanity" as if they represented some discreet and different form of mental disability. However, it is suggested that the diagnosis or label which might be applied to any particular mental condition is irrelevant to the question which has to be answered in determining whether or not a person had testamentary capacity so as to render a Will valid or invalid. Generally speaking, the law presumes sanity and no evidence is required to prove that. However, where any dispute or doubt exists as to the capacity of the Testator, testamentary capacity must be established and proved affirmatively. Where it appears that the Testator had been

subject to previous unsoundness of mind, the burden of proof might be said to be increased, particularly where the Testator's Will by its terms suggests some failure to properly comprehend either the nature and extent of his property or the proper objects of his bounty

5. Undue Influence

A Will executed as a result of coercion, or under duress, may be invalid by reason of undue influence.

However, there have always been provisions which prevent a witness to a Will from benefiting from the Will, although these provisions have been softened a little in recent times.

Revocation of Probate

As noted previously, a Grant of Probate can be revoked. The clearest case is where it is subsequently discovered that the Testator was living at the date of the original Grant. However, discovery of a later Will or Codicil, or fraud in obtaining the original Grant, may be used as a basis for having a Grant revoked. It is only in very recent times that it has become necessary to produce a Death Certificate to obtain a Grant of Probate.

On the assumption that the Will has survived the onslaughts made upon it in a contested Probate Application, the last hope of the disappointed beneficiaries lies in their being able to convince the Court that they may be entitled to relief under the Testator's Family Maintenance provisions of the Administration and Probate Act.

Testator's Family Maintenance

While Section 4 of the Wills Act confers upon a Testator the right to leave his property as he thinks fit, Section 91 of the Administration and Probate Act provides for the Court to intervene where a Testator fails by his Will or by intestacy or both, to make adequate provision for the proper maintenance and support of those he is expected to provide for. Until quite recently, the potential applicants were limited to the spouse and children of the Testator. However, these provisions have been widened quite dramatically in recent times.

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Such an application has to be made within six months of the Grant of Probate. However, this time may be extended provided that the final distribution of the Estate has not occurred, but this power to extend the time is within the discretion of the Court and it would be necessary to give very good reasons as to why the application has not been made within time and to establish that such delay was "excusable". Delay due to an oversight of the applicant's Solicitor has held to be excusable, as has the delay incurred by a proposed applicant in negotiating with members of the family in an attempt to settle litigation.

If an Estate has been distributed by an Executor who has not been given any notice of a claim, then that distribution of the Estate is protected, and a claim cannot be made. However, any distribution of an Estate prior to the expiration of six months from the Grant of Probate can only be made at the Executor's peril and will, if it threatens any proposed application for relief under Part IV, be liable to be restrained by injunction.

In order to attract the jurisdiction of the Court, the applicant must first demonstrate that the Testator's Will (or the operation of the intestacy legislation) is such as not to make adequate provision for his proper maintenance and support. Unless this condition precedent is satisfied, the Court has no jurisdiction to interfere with the provisions of the Testator's Will. No matter how apparently unfair a Testator has been, unless he has failed to make adequate provision as required by the legislation, his wishes as expressed in his Will will be carried out.

It has been said that each of the words "adequate" and "proper" must be given proper consideration. The first relates to the applicant's needs. The second relates to some abstract notion of propriety, quite aside from the question of adequacy. In considering adequacy and propriety, the Court looks at all the surrounding circumstances, such as the size of the Estate, the age, sex and health of the applicant, the applicant's own means and financial responsibilities, the reasonable expectations of the applicant brought about by the standard of maintenance to which the Testator may have accustomed him during his lifetime, promises made to the applicant by the Testator (this is often relevant in relation to farming situations where a child may have devoted his or her life to running a farm in the expectation that the farm will be

left to him or her), services rendered by the applicant to the Testator and the closeness of the relationship between the applicant and the Testator. Any benefits advanced to the applicant by the Testator during his life and the so called "moral duty" of a Testator to provide for members of his family are also taken into account.

If the applicant establishes the Condition Precedent to having the Will altered, then the Court must act as if it were a "wise and just", rather than a "fond and foolish" spouse or parent in granting to the applicant proper provision from the deceased's Estate.

The Act specifically provides that the Court may refuse any application if the character or conduct of the applicant is such as to disentitle him or her from the benefit of any provision. Moral turpitude, ingratitude towards the Testator and character or conduct which shows that the applicant's need for maintenance is his own fault have all been held to be conduct which disentitles the applicant. Statements made by a Testator as to the reasons he made his Will in the way he did may be admitted, but not to prove the factual basis upon which such reasons were based. Disentitling conduct by the applicant can be a basis for the Court to refuse the application. It can also be the basis for the Court making a smaller provision than it might otherwise have done where such conduct did not exist.

Costs are in the discretion of the Court. A successful applicant will normally have his costs paid by the Estate and an unsuccessful applicant who had some merit in making his claim may also receive his costs from the Estate. It is otherwise, however, if the claim is totally unmeritorious or vexatious.

Email the Litigation Department for more information.

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