NOCKOLDS

Guide to Contesting a Will

Introduction

Wills can be contested on a number of grounds and at Nockolds we have an extensive track record of successful claims and defences based on:

- Mental capacity;
- Lack of knowledge and approval;
- Fraud or undue influence; and
- Failure to observe proper formalities.

To contest a Will, or indeed defend such a challenge, there are several legal issues to consider in advance; such as the proper use of a caveat, a standing search, *Larke v Negus* enquiries, the legal effects of a Will being declared invalid and costs.

Our Team of specialists is led by Daniel Winter, who is a Certified Contentious Trusts and Probate Specialist with ACTAPS, the recognised association of legal specialists in this complex area of law.

We have been described in the Legal 500 as '*an excellent regional firm with a strong offering*' (2019) which '*obtains excellent results for clients across a range of trusts, probate and Court of Protection matters*' (2018).

The Grounds for Contesting a Will

1. Challenges to the Will on the Grounds of Mental Capacity

It is essential that the maker of a Will understands the nature of the document and what effects it will have. A common source of disputes is where there is a history of memory problems, such as Alzheimer's or dementia, or another medical condition that affects the mind.

There are several key principals and steps applicable to contesting a Will due to a perceived lack of mental capability; or to use the correct legal terminology, 'testamentary capacity'.

The Test According to *Banks v Goodfellow*

The test applicable to determine testamentary capacity was laid down in the case of *Banks v Goodfellow* (1870) LR5 WB 549, as follows:

'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; and 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 dispoal of it which, if the mind had been sound, would not have been made.'

Ultimately, this will be a question of medical evidence and if there is a suggestion that capacity is doubted, we will obtain and then carefully review copies of medical records, social care records and any other relevant files to see whether any capacity issues were recorded by the GP, treating medical consultants and social services.

The Golden Rule

'The Golden Rule' as it is known in law, is not actually a cast-iron rule as such, but it rather more a code of guidance as to best practice for solicitors.

When dealing with the elderly or people with a history of mental capacity issues, it is best practice to ask a medical practitioner to witness the Will or provide an opinion on mental capacity. The solicitor would normally also discuss the terms of the Will and the reasons for any changes to them, and to take instructions from the maker of the Will in the absence of any of the beneficiaries.

However, it is important to note that just because 'the golden rule' may not have been followed in a particular case, does not automatically mean that the Will is invalid. Careful and informed scrutiny of all the facts, circumstances and evidence will still be necessary.

Consideration must also be given to the general issues that apply to most Will disputes set out in this guide.

2. Challenges to the Validity of Wills on the Grounds of Lack of Knowledge and Approval

It is accepted law that the maker of a Will must know and approve of the contents of any Will executed. This will have much to do with the circumstances under which the Will was executed.

Examples of cases where individuals may not have known or approved the content of a Will are where it has been prepared under the instruction of somebody other than the deceased and that they simply signed it without really knowing what it contained.

It also covers instances where a physical impairment may prevent the Will maker from properly understanding the content of the Will, such as poor eyesight or illiteracy.

If there is good evidence of sufficient mental capacity and proper execution of the document, then knowledge and approval of the contents will automatically be presumed. However, if there is suspicion that any of the above circumstances exist, the burden will shift to the persons seeking to rely on the Will to demonstrate that the deceased knew and approved of the contents.

3. Challenges to the Validity of Wills on the Grounds of Undue Influence and Fraud

It is essential that any Will reflects the wishes of the Will maker and not somebody else.

It is up to whoever alleges undue influence or fraud to prove their claim. An allegation of undue influence in relation to the making of a Will is one of the most difficult allegations to prove since the main witness, the deceased, is no longer with us and therefore cannot give evidence to assist the court.

Therefore, such a claim should not be undertaken lightly. For there to be a claim under this heading worth pursuing, there must be clear evidence of coercion, intimidation or trickery.

We have also come across several cases of forgeries where people have attempted to pass off a fake signature or fabricated document as genuine. Such cases are not common, but do occasionally occur and it is necessary to consult closely with document analysts in addition to carrying out the other wider enquiries and investigations, as there are normally also suspicions and allegations touching on one or more of the other grounds for disputing the validity of a Will.

4. Challenges to the Validity of Wills on the Grounds of Failure to Observe Proper Formalities

For a Will to be valid, it must pass certain formalities. For example, no Will shall be valid unless:

- The maker is over the age of 18;
- It is in writing and signed by the maker;
- The maker's signature is made or acknowledged by the maker in the presence of two or more witnesses present at the time; and
- Each witness either signs the Will or acknowledges their signature in the presence of the Will maker.

It is surprising just how many Wills fail this test, and this is usually a result of Wills being prepared and / or executed at home rather than a solicitor's office where proper guidance is available.

> I wish to take this opportunity to thank Daniel Winter for his patience and understanding with this unnecessarily difficult case.

The Procedure for Contesting a Will

There are several factors to consider when either contesting a Will or defending a claim where the validity of a Will is questioned.

1. What is the Result of a Successful Challenge?

The key question is: 'who stands to substantially benefit from challenging the Will?'

It is essential that you think through the result should you successfully challenge or defend a Will. It is the previous Will which will then become the matter of probate (subject, of course, to the preceding Will being valid). If the preceding Will is also invalid then this process keeps on going until an earlier valid Will is found.

If there is no prior Will, then the rules of intestacy will apply. These rules arbitrarily divide the estate between various classes of relatives. If you require further advice on these rules, please contact us.

2. *Larke v Nugus* Enquiries

Additional evidence that will be required is evidence from the solicitors who prepared and witnessed the Will. In the case of *Larke v Nugus* (1979) 123 S.J. 337, the Court of Appeal (Civil Division) upheld advice given by the Law Society, that when a serious dispute arises as to the validity of a Will, the solicitor who prepared the Will should make available a statement of his or her evidence regarding the execution of the Will and the circumstances surrounding it to anyone concerned in the proving or challenging of that Will.

Larke v Nugus enquiries are an important part of the preliminary investigations and it is necessary to ask appropriate questions of the Will draftsperson, analyse the answers received thoroughly, and assess what further information may be required.

3. Caveats

If it appears that there is reasonable cause to doubt the validity of the last Will, a caveat is usually issued as a preliminary step.

A caveat prevents the executors from obtaining a Grant of Probate, and whilst the caveat remains in force the estate is effectively frozen, allowing the claim to be investigated in more detail, and hopefully lead to resolution.

The caveat will remain effective for six months, and can be extended indefinitely by written application for a further six months at a time.

However, a caveat has no effect if the Grant of Probate has already been issued. In cases where a Grant is already in place, the person challenging the Will needs to consider taking steps to put the distribution of the estate on hold, and applying to revoke the Grant.

4. Warning Off

A party who believes the Will to be valid and who wants the probate to proceed can issue a 'warning' from the Leeds District Registry on the person who entered the caveat. On receipt of the warning, the person who entered the caveat has 14 days to react and enter an 'appearance' by notice. If an appearance is not entered, the caveat can be permanently removed. If an appearance is entered, the caveat becomes permanent and can then only be lifted by consent or court order.

5. Settlement

As soon as the merits of the claim are known and prospects of success are assessed, the parties can enter into discussions to try and reach a resolution. Court proceedings should be the last resort, but are sometimes necessary.

The aim will always be to achieve a satisfactory settlement bringing an early end to the dispute thereby providing certainty, peace of mind and keeping costs down.

It is now an obligation of all parties to a dispute to at least consider settling the dispute outside of court. If a party fails to enter into negotiations or other alternative dispute resolution procedures without good cause, the court has wide-ranging powers to punish that party with a costs order, even if that party is ultimately successful in the dispute.

Alternatives to court include mediation, which can be a particularly effective method of resolving a dispute whilst retaining the possibility of preserving relations. This is often appropriate in probate and trusts disputes that involve family members.

6. Costs

We always provide our clients with clear information about the likely cost of their claims and are happy to discuss a variety of funding options.

In the vast majority of cases it is possible to reach a conclusion before it is necessary to issue court proceedings, and in cases where court proceedings have been issued, cases can be settled at any time before trial.

You may be surprised to note that a very small percentage of probate disputes actually ever reach a trial. This means that even if the size of the estate is modest, provided there are clear grounds for a challenge with good evidence, a resolution can be reached with costs kept in proportion.

However, it is vital to consider the impact of costs before you embark on a claim. We have come across many parties to a dispute who have

begun a probate claim in the mistaken belief that all of the legal costs will automatically be paid out of the estate.

This is not the case. If the case is decided in court, costs will normally be borne by the unsuccessful party, although the court has a wide discretion when it comes to deciding who will pay costs, and will usually try to ensure that the question of costs is dealt with fairly and with reference to each party's conduct during the dispute.

We are able to offer various flexible options to fund claims and defences in Will disputes, which can include a traditional pay-as-you-go retainer, or deferred payment which means you will not need to pay until your case has been concluded, or conditional fee agreements where you only pay if your case is successful.

Here to Help

Daniel Winter
Partner

Peter King
Consultant

Pete Dodd
Partner

Gemma Dudmish
Senior Associate

Our Contentious Probate Team has extensive legal expertise in the complex areas surrounding contentious probate, including challenges to the validity of Wills, inheritance disputes and claims relating to the duties of executors and trustees.

We have built a strong reputation for delivering practical and helpful advice to clients in addition to robust representation through all stages of a dispute.

In addition, owing to our international expertise, we frequently act in disputes for non-UK clients and also where there are cross-border issues.

Our Accreditations

The **Association of Contentious Trusts and Probate Specialists (ACTAPS)** is an association of solicitors, barristers and legal executives who specialise in contentious trusts and probate matters. **Our full ACTAPS member is:** Daniel Winter. Gemma Dudmish is an Associate member.

Solicitors for the Elderly (SFE) is a national association of independent lawyers who specialise in law for older and vulnerable clients. **Our SFE members are:** Peter King, Sarah Lockyer, Sarah Browne and Laura Hartley.

The **Society of Trust and Estate Practitioners (STEP)** is a professional association for practitioners who specialise in family inheritance and succession planning. **Our STEP members are:** Peter King, Sarah Lockyer, Sarah Browne and Laura Hartley.

The **Customer Service Excellence** is a government-backed standard that assesses the areas of service which have been identified as a priority to customers, including service delivery, timeliness, information, professionalism and staff attitude.

Lexcel is the Law Society's quality mark for excellence in legal practice management and client care. Nockolds was awarded the Lexcel Accreditation in 2003 and undergoes independent annual assessment to ensure continuing compliance with this quality standard.

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