

# What You Must Know About **CONTESTING A WILL**

## **PART TWO: CAPACITY, UNDUE INFLUENCE & SUSPICIOUS CIRCUMSTANCES**



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# 1 Capacity

## CONTESTING A WILL: CAPACITY

Testamentary capacity can be impacted by many factors, including illness, high dosages of medication, mental health issues, or cognitive impairments. If the deceased did not have testamentary capacity at the time of making their Will, then that Will is not valid. If a Will is held to be invalid, then the Court will look to an earlier Will of the deceased (if they have one). If the deceased did not have an earlier valid Will, then the estate will pass under the *Rules of Intestacy* (ie. legislation that prescribes how an estate is to be distributed when there is no Will).

### What is testamentary capacity?

At the time of making their Will, the testator must be of sound mind, memory and understanding. This is known as the test for testamentary capacity which comes from well established case law. To have “sound mind, memory and understanding”, the testator must:

1. understand the nature of making their Will; and
2. be aware of the extent of property they are disposing of; and
3. appreciate the moral claims against their estate; and
4. be of sound mind.

All four of the above limbs must be satisfied to prove testamentary capacity. The testator must have testamentary capacity at the time of making their Will for that Will to be valid (ie. the relevant time is when making the Will, not the date of death).

It is not necessary to show that the testator understood each and every clause of their Will, but that they knew that they were making a Will. The testator is only required to have a general knowledge of the property they own, not necessarily recall each and every item of property.



# 1 Capacity

The moral claims against the estate are the testator's spouse/s, child/ren, and dependant/s. The testator may take into account any estrangement or disentitling conduct by those potential beneficiaries towards the testator when considering what gifts to make in their Will.

Limb 4 is concerned with the testator's frame of mind at the time of making their Will. For example, if the testator suffers from an illness or insane delusions which affect their testamentary capacity. This may be dementia or some other form of cognitive impairment.

## How do I prove it?

The type of evidence required will depend on what capacity issues may have been suffered by the testator at the time the Will was signed. Generally, medical evidence will be required that states an opinion that the testator had capacity at the time that the Will was signed. It is important to remember that the relevant timeframe for assessment of capacity is when the Will was signed, not at the date of death.





## 2 Undue Influence

### CONTESTING A WILL: UNDUE INFLUENCE

Undue influence is conduct that overbears the will of the testator so that they make a Will without intending or desiring the gift made by the Will. To satisfy the Court that the Will was made under undue influence, it must be proven what pressure or influence was placed upon the testator and how that caused the testator to make the Will that they did.

#### What level of pressure constitutes “undue influence”?

There is no scale of pressure or influence that must occur to constitute undue influence. Each matter will turn on its own facts and circumstances. However, in all cases of undue influence the gift by the testator is not considered as the free and voluntary act of the testator. The will of the testator must be overpowered to the extent that the gift in the Will does not reflect the mind of the testator.

The influence must extend to coercion of the testator, and not simply the influence of love, affection or attachment to the beneficiary by the testator. The motivation by the testator to make the gift must be equal to force and fear. Examples of legitimate and lawful forms of motivation by the testator to make a specific gift include affection between the testator and the beneficiary, or the gratitude of the testator for past services received from the beneficiary.

If suspicions of undue influence are raised then it is up to the person seeking to uphold the Will to prove that the testator was not unduly influenced in making their Will. The Court will usually look at the circumstances surrounding the making of the Will, and the relationship between the testator and the beneficiary alleged to have been influencing the testator. The assessment by the Court and the evidence required will depend on the particular facts and circumstances of each case.

## 2 Undue Influence

### Undue influence differs from fraud

Undue influence is different to fraud. Whilst undue influence is concerned with overpowering the will of the testator, fraud occurs where there is misleading or deceptive conduct that misleads the testator into making a gift in their Will.

If suspicions of fraud are raised then the onus rests on the person seeking to uphold the Will to satisfy the Court that there was no misleading or deceptive conduct which caused the testator to make a certain gift in their Will.





## 3 Suspicious Circumstances

### CONTESTING A WILL: SUSPICIOUS CIRCUMSTANCES OR LACK OF KNOWLEDGE AND APPROVAL

Suspicious circumstances exist where a testator may not have known or approved of the contents of their Will. One common example is where a beneficiary of the estate has participated in drafting the Will. However, suspicious circumstances will be triggered in any circumstance where there is suspicion that the Will does not express the intentions of the testator.

#### Suspicious circumstances

Where a testator that otherwise has capacity has signed their Will in accordance with the formalities prescribed by the legislation then it is presumed that the testator knew and approved of the terms of their Will.

However, where there is evidence that raises suspicion that the Will does not express the intentions of the testator then the Will will not be admitted to Probate by the Court until it is satisfied that the testator knew and approved of the terms of their Will.

#### What is categorised as “suspicious circumstances”?

There are no prescribed categories or limitations to what circumstances will constitute suspicious circumstances. Each matter will turn on its own facts and circumstances. A common example of suspicious circumstances is the conduct of a beneficiary in the lead up to the testator finalising and signing their Will. It may even be the conduct of a person known to the testator whose spouse, partner or relative is to take a benefit under the Will.





If the testator was illiterate, blind or enfeebled then the Court may not admit the Will to Probate unless it is satisfied that the testator either read the Will or had the Will read aloud to them, or that the testator otherwise knew and approved of the contents of the Will at the time of signing.

#### What happens if there are suspicious circumstances?

If suspicion over the validity of the Will has been aroused, then the Court must be satisfied that the testator knew and approved of the contents of their Will before the Court will admit the Will for Probate. That means, before the Court declares the Will to be the last valid Will of the deceased.

Depending on the particular circumstances of the case, it is usually the Personal Representative of the estate who has the burden of removing the suspicion. If the Personal Representative is seeking to have the Will propounded by the Court and wants the Will admitted to Probate, then they must prove that the testator knew and approved the contents of their Will.



## Common Terms

Administration of the estate:	the process of calling in the estate assets and payment of estate liabilities, and finalising a distribution of the estate to the beneficiaries. Administration of the estate is managed by the Personal Representative. Only the Personal Representative has the authority and power to deal with estate assets and liabilities, and to authorise a distribution from the estate.
Beneficiary:	a person taking a benefit or gift from the estate.
Grant of Letters of Administration:	issued by the Supreme Court when the deceased did not leave a valid Will. The Grant of Letters of Administration is issued in favour of an administrator/s of the estate who are responsible for the administration of the estate.
Personal Representative:	the Personal Representative of the estate is responsible for managing the administration of the estate. The Personal Representative may also be called the executor of the estate where a Grant of Probate has been issued, or the administrator of the estate where a Grant of Letters of Administration has been issued
Probate:	issued by the Supreme Court which annexes the last valid Will of the deceased. The Probate is proof that the Will annexed to the Grant is the last valid Will of the deceased. The Grant of Probate is issued in favour of an executor/s who are responsible for the administration of the estate.
Testator:	the person who has made the Will.
Will:	the document containing the testator's intentions for how their property is to be distributed and dealt with upon their death.

# Now where to from here?

For assistance with Estate Administration, please  
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