



## Challenging a Will

***In most cases Will challenges occur because people feel the testator (Will maker) did not sufficiently provide for them in their Will.***

A challenge to a Will is different to a Family Provision Claim. Only certain people called 'eligible persons' can make a Family Provision Claim and such a claim must be made within 12 months of the deceased's death. 'Eligible Persons' are spouses, former spouses, children, grandchildren or members of the deceased person's household who were dependent on the deceased at any time, or persons in a close personal relationship with the deceased, and living with the deceased at the time of death. A Family Provision Claim does not seek to challenge the validity of the Will but rather is an application to the court for a share of the deceased person's estate, notwithstanding the Will.

A challenge to a Will, on the other hand, seeks to have the Will itself declared invalid so that either a prior Will takes effect, or the person is deemed to have died intestate (without a Will) so that the person's estate is distributed in accordance with the laws of intestacy.

Some of the grounds to challenge the validity of a Will are:

- Undue Influence;
- Fraud;
- Forgery;
- The Will maker lacked mental capacity.

Undue Influence occurs where a person assisted the deceased in drawing up the Will and stands to gain a substantial benefit from doing so. However, there are forms of persuasion that the Court won't deem to be unlawful. The Court will only allow the Will to be successfully challenged on the ground of Undue Influence if it is satisfied that the deceased's mind and thought process were coerced to the point of making the resulting Will a contradiction of what would have been the deceased's true intentions. The person who assisted the Will maker may be required to prove to the Court that there was no form of pressure, threat, force, intimidation, treachery or fear involved at any time during the Will making process.

Fraud occurs when the Will maker has been tricked into signing the Will. Examples of fraud include the making of deliberately false statements, or suppressing material facts. Fraud can also occur in situations where the Will maker is presented with a document that they believed is a Power of Attorney or deed, when in actual fact it is the Will, and they sign it. Proving fraud is quite difficult and can depend on a number of factors.

Forgery differs from the other circumstances because in cases of forgery the deceased is generally not involved in the creation of the Will at all. In Will challenge cases that involve forgery, the Will itself can be forged, but so can the



signature of the deceased. For example, the Will might actually be valid, but the signature on it has been forged - which then invalidates the Will.

When you challenge a Will on the basis of fraud or forgery the burden will be on you to prove it with supporting details and evidence. Challenging a Will on the basis of forgery is notoriously hard to prove and will typically involve the testimony of an expert in handwriting who is able to detect and prove discrepancies between the signatures. In cases where the Will is what has been forged, not the signature, you will need to prove that the deceased/testator expressed their wishes elsewhere - by finding an earlier Will, a draft, or reliable witnesses.

A Will can be challenged if you can prove that the Will maker lacked the mental capacity (testamentary capacity) required to create a valid Will.

In order to challenge a Will on the basis that the Will maker lacked mental capacity, you must first prove that they suffered either from:

- Senility
- Some other form of medical condition which would result in them having a reduced mental capacity
- The influence of drugs, alcohol or other substances which are capable of altering a person's mental state at the time of executing the Will

However, old age or illness is not of itself considered conclusive evidence of incapacity to make a Will.

Proving that the Will maker lacked the mental capacity required to create a valid Will requires that you can show that they did not understand the consequences of creating a Will at the time of its creation. Specifically, anyone who creates a Will must understand:

- the value and extent of their property/estate;
- who they are expected to provide for in the Will, and who the beneficiaries will be;
- how their property/estate will be distributed
- the disposition he or she is making at the time, and what a Will actually means.

If you can successfully prove that a Will is invalid (using any of the circumstances mentioned above) the Court will set aside the Will you challenged. This Will will then be treated as though it never existed. Instead, the deceased person's estate will be distributed in accordance with their previous valid Will. If the deceased person had no prior valid Will their estate will be distributed according to the "intestacy laws".

***If you have been left out of a Will or received an inadequate amount under a Will and wish to challenge the Will or make a Family Provision Claim, please contact either [Ken Gray](#) or [Lisa Delalis](#) on 02 4731 5899 or email us at [willsestates@batemanbattersby.com.au](mailto:willsestates@batemanbattersby.com.au).***