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Notary Public*

The Personal Law Firm

CHALLENGING WILLS

INTRODUCTION

There are a number of situations which may arise when a Will may be challenged. Some of these involve a challenge before the Grant of Probate, and some involve a challenge after the Grant of Probate has been made.

First, a short introduction to Wills & Estate Administration.

A Will is a legal document by which a person appoints an Executor to administer his or her Estate (the Will maker's property) after death, in accordance with the instructions set out in the Will.

Upon the death of the person who made the Will ("the Testator"), the Executor named in the Will is responsible for obtaining a Grant of Probate (which gives the Executor the legal authority to deal with the deceased's property), gathering together the property of the deceased, paying off all debts and finally distributing the residue (balance) of the Estate in accordance with the instructions set out in the Will.

If a person dies without a valid Will, then he or she dies "intestate", and in such a situation, the deceased's property will be distributed in accordance with the law set out in the Administration Act 1903. While it is possible to challenge the distribution, even in cases of intestacy, this handout deals with the situation where a Will has been made, but is open to dispute.

Situations which may arise when a Will may be challenged include the following:

1. When the Testator did not have the legal capacity to make a Will (usually because he or she did not have the mental capacity to understand what he or she was doing or was subjected to undue pressure),
2. When it is believed that the Will is forged,
3. When the instructions to the Executor in the Will are unclear, vague or ambiguous,
4. When a dependant of the Testator makes a claim under the Family Provision Act 1972.

www.butlers.com.au

Email: legal@butlers.com.au

All mail to:
PO Box 460
Nedlands WA 6909

Nedlands (Head Office)
83-85 Stirling Hwy
Nedlands
WESTERN AUSTRALIA

Fremantle
3/18 Parry Street
Fremantle
WESTERN AUSTRALIA

Bunbury
119 Beach Road
Bunbury
WESTERN AUSTRALIA

Visiting Asia incl. China,
Malaysia & Singapore.

Associated firm
Malaysia
Jerald Gomez & Associates
Penthouse, D2-U6, Solaris Dutamas
1 Jalan Dutamas
50480 Kuala Lumpur
MALAYSIA

Telephone calls
answered 24 hours
Telephone: (08) 9386 5200
Country calls: 1800 675 200
International: 618 9386 5200
Facsimile: (08) 9386 4650
International
Facsimile: 618 9386 4650

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TESTAMENTARY CAPACITY

It is a principle of the Law that a person who makes a Will must understand what he or she is doing in the sense that the Testator is required to be of “sound mind, memory and understanding” and makes the disposition in his or her Will freely and responsibly.

Situations where there may be a question as to whether the Testator made his or her Will with the requisite understanding and intention include the following:

- When the Testator suffered from some form of mental illness,
- When the Testator was drunk or under the influence of drugs when making the Will,
- When the Testator did not appear to understand the extent of the property he or she was disposing of by Will,
- When the Testator did not appear to understand the identity of the beneficiary he or she named in the Will,
- When there was evidence that the Testator was affected by the undue influence, misrepresentation or fraud of another person to make the Will.

When a Will is challenged on the grounds above, we suggest that the person challenging the validity of the Will obtains the advice of their lawyer, before making an Application to the Supreme Court challenging the validity of the Will. We also recommend that anyone contemplating such a course of action should act quickly to obtain professional advice, as there are time limits which apply.

If such a challenge is successful and the Court finds that the Testator did not make the Will freely with a sound mind, memory and understanding, then the Court may set aside the Will (declare that the instructions are not to be followed by the Executor/Administrator), in whole or in part.

FORGERY

The forging of Wills is a serious criminal offence. If there is an allegation that a Will tendered to the Court in support of an Application for a Grant of Probate is nothing more than a forgery and there is evidence which shows that this may be the case, then the Court will often have to consider evidence from expert witnesses such as document examiners.

If a Will is to be challenged as to its validity on the basis of forgery or where there are doubts about whether the Will was properly signed and witnessed (such as where the Testator is illiterate etc), it is important that a Caveat requiring proof of the Will in Solemn Form is lodged at the earliest opportunity. Again, we recommend that anyone having doubts as to the validity of a Will seeks professional advice at the earliest opportunity.

CONSTRUCTION AND RECTIFICATION

Sometimes, the instructions contained in a Will for the Executor may be unclear, ambiguous or clearly a mistake. Unlike the other situations where a Will is challenged, in this situation, it may be the Executor who brings an action in the Supreme Court

seeking guidance from the Court as to the legal effect of the words and instructions contained in the Will. At other times, where the Will is unclear as to its instructions, an Executor's interpretation may be challenged.

Finally, it may sometimes be something as simple as a typing or writing mistake. Where it can be established that a word or words have been included in a Will which should not be there, the Court has the power to grant Probate of the Will which specifically omits the word or words so inserted. However, the Court does not have the power to grant Probate of a Will by "filling in the gaps".

Given that the above basis for challenging a Will is a highly technical area which often involves the application and sometimes argument regarding legal principles of construction, we highly recommend that legal advice should be obtained where there is any doubt as to the meaning of a Will.

INHERITANCE ACT CLAIMS

While a Testator has a right to determine who benefits from his or her Estate, if a Will is unfair in that a Testator who has a duty to provide for his or her dependant does not do so, the Will may be challenged.

Upon the Application of the deceased's dependant who has not been adequately provided for by the Will, the Court has the power to order the Executor/Administrator of the Estate to distributed a share / or a greater share of the Estate, to the dependant.

In Western Australia, the Family Provision Act 1972 ("the Act") enables the Supreme Court of Western Australia to change, override or vary the terms of a Will (or the terms of the Administration Act where there is no Will).

To be eligible to apply under the Act, a person must be one of the following:

- The spouse of the deceased;
- The de facto partner of the deceased;
- A former spouse or de facto partner who was receiving or is entitled to receive maintenance payments from the deceased (eg. under Family Court Orders);
- A child of the deceased;
- A grandchild of the deceased;
- A step-child of the deceased; or
- A parent of the deceased.

Further, the eligible dependant must convince the Court that it should interfere with the free exercise of the Testator's will and intervene because the deceased has not provided for "the proper maintenance, support, education or advancement in life" of the eligible dependant.

When such an Application is made, and the Court is satisfied that the person applying is an eligible dependant, the Court will then consider the merits of the Application by taking into account various factors including:

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- The nature of the property in the Estate,
- The value of the Estate,
- The financial circumstances and needs of the person applying,
- The relationship between the person applying and the deceased and the conduct of the person applying,
- The financial circumstances and needs of any other dependants of the deceased,
- The relationship between the deceased and other dependants of the deceased, and
- How the proposed changes would affect the other Beneficiaries of the Estate.

If the Court decides that the person applying is an eligible person, and then determines that the deceased failed to make adequate provision (whether by totally excluding the person applying or by providing an insufficient amount), then the Court may make an Order in favour of that person specifying the changes to the distribution of the deceased's Estate.

An Inheritance Act claim should be commenced as soon as possible and **within 6 months** of the Grant of Probate issuing from the Court.

Because the discretion of the Court in these matters is very wide, it is important that anyone seeking to make such a claim obtains advice from a lawyer who is experienced in this area of law, before commencing proceedings. An experienced lawyer will be able to advise a potential applicant whether their claim is likely or unlikely to succeed. In addition, such matters are sometimes settled out of Court between the various Beneficiaries of a deceased's Estate and competent legal representation will assist in exploring the possibility of resolving such a dispute.

Please note that the information provided in this Handout is general in nature and may not be applicable to your particular case. We strongly recommend that professional advice is obtained as soon as possible, and before a Will is challenged.