Challenging an English Will

By Jessica Bermingham

When a loved one dies, it is a hugely emotional and challenging time. Family tensions often run high, and where the deceased has left behind a Will that is not as expected, creates disappointment or jealousy, or perhaps even arises suspicion as to the circumstances surrounding its creation, the situation can become all the more difficult.

Generally speaking, where there is an English domiciled deceased, with assets in England or an English Will, the English laws of succession apply. There are a number of routes that may be available to those who wish to challenge an English Will made by an English domiciled testator.

Validity of the Will

The main way to challenge the Will of the deceased is to contest whether it is actually a valid document. If a Will is found to be invalid then the most recent valid Will would take its place. If there is no previous valid Will then the deceased will have died 'intestate' (ie without a Will) and the estate passes under the 'intestacy' rules. The intestacy rules are enshrined in statute, and dictate that the estate will pass to the next of kin, in a specified order and proportions. Where, for example, there is a surviving spouse and children then the spouse will take the personal belongings of the deceased, a fixed sum of £250,000 plus interest and half of the residue of the estate. The children will take the other half share of the residue.

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When considering whether to challenge a Will, regardless of the circumstances surrounding its execution and the perceived strength of the case, the ultimate consequence of a successful claim should first be considered. Would the potential claimant be in any better position should they be successful at Court and a previous Will is declared valid or if the intestacy provisions apply? There are other considerations too. It may be for instance that many of the deceased's assets are in another jurisdiction. A finding of invalidity by an English Court could be persuasive when considering validity in relation to Wills made in another jurisdiction at around the same time. Under Section 9 of the Wills Act 1837 there are certain formal requirements a Will or testamentary document must comply with. It must be in writing and signed by the testator in the presence of two or more witnesses. If it is not clear whether or not the formalities have been complied with, obtaining affidavits from those witnesses present at the execution can assist.

The deceased must have had 'testamentary capacity' in order to make a valid Will. This is a legal test not a medical test. It has recently been clarified by the English Court in Walker v Badmin [2014] that the applicable legal test for testamentary capacity comes from the case law rather than the Mental Capacity Act 2005. The test comes from Banks v Goodfellow [1869-70] which states that the testator must understand the nature, meaning and effect of making a Will, the extent of the property they are disposing of, and appreciate any potential claims against the estate. If reasonable suspicion is raised as to the testator's capacity, it is for the person seeking to prove the Will is valid to prove on the balance of probabilities that the deceased had testamentary capacity.

There is a general presumption that a testator knew and understood the terms of their Will and approved its contents. The strength of this presumption depends on, for example, whether the Will was prepared by a solicitor, and whether it was read by the testator. However where, for example, the testator was blind or illiterate, or a beneficiary was involved in the preparation or execution of the Will, this presumption does not normally arise. A Will can be challenged on the basis that the testator did not know and approve its contents and this often ties in with allegations relating to testamentary capacity.

Another way of challenging the validity of a Will is by alleging 'undue influence'. With lifetime gifts, in certain circumstances a presumption of undue influence can apply. This does not arise in the context of Wills and undue influence in the context of Wills is notoriously difficult to prove. To establish undue influence it would need to be proved that a testator was forced into making

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a Will that went against their wishes. Persuasion is not enough, there has to be something akin to coercion. Where certain individuals encourage and draw up a Will, and stand to benefit under it, this could indicate undue influence, but is not always enough.

Inheritance (Provision for Family and Dependants) Act 1975 Claims

This involves an application for provision out of the deceased's estate rather than a challenge to the will itself. The claim would be on the basis that the Will (or lack) failed to adequately provide for applicant. An application can also be made where there is an intestacy.

Those who can apply include the spouse, children, and cohabitees of the deceased. The categories of applicant also include those who were being maintained by the deceased immediately before their death. Where a claim is not by a spouse, the amount that could be awarded relates to what is required for their maintenance. This limit does not apply in relation to spouses. Instead the test that would be applied is akin to that which would be applied in a divorce; this is termed 'the divorce hypothesis'.

Caveat

Where a challenge to the validity of an English Will is being contemplated, a 'caveat' should be lodged. This essentially tells the Court there are some concerns over the supposed last Will of the deceased and prevents the Executors from taking out probate and administering the estate. This means that validity issues can often be resolved prior to the estate being administered, which helps simplify matters. If a validity claim is contemplated it is therefore important to act promptly to ensure a caveat is lodged.