

TESTAMENTARY FREEDOM



The reasons for possibly challenging a Will.
 By **Debi Godwin**, Director - Independent Executor &

The phrase "testamentary freedom", i.e. the freedom to leave your property to whomever you wish in your Will, is well known, but what can you do if you have been written out of a Will or want to challenge the wishes of a recently departed family member?

It is surprisingly common for individuals to try to disinherit their families and leave it all to the proverbial cats' home. The more unusual cases make the papers – remember the case of Golda Bechal, an 88-year-old widow living in the UK, whose relatives challenged her Will after she left most of her £10m fortune to the owners of her favourite Chinese restaurant.

As people are now living longer many often decide to change their Wills later in life without the assistance of a professional. This can lead to family members suspecting foul play if they have been written out of the Will. Challenges to Wills are costly and difficult to win, not least because the principal party one might want to obtain evidence from is no longer with us!

Legally-speaking, it is possible to challenge a Will for one or more of the following reasons:

- Lack of proper formalities
- Lack of testamentary capacity
- Lack of knowledge and approval
- Undue influence and fraud

Lack of proper formalities

A Will must be made in writing, preferably not handwritten, and signed by the testator on every page, in the presence of two witnesses who must each also attest and sign the Will in the presence of the testator. If any of these requirements are missing the Will is invalid.

Lack of testamentary capacity

To make a valid Will the testator must have the

requisite mental capacity. The testator must be capable of understanding that they are making a Will and disposing of their assets on death. The testator must also be capable of understanding the extent of their estate and appreciate the claims on that estate to which he ought to give effect.

The difficulty with proving this ground is that you must produce evidence of the testator's capacity after their death. When a Will is drawn up by a professional and if there are doubts about a person's capacity, the professional should ask a doctor to assess capacity before a Will is made.

Lack of knowledge and approval

A testator must know and approve the contents of the Will. If a Will has been properly executed, it is presumed that the Will is valid on this ground and, generally-speaking, you will have to prove (on the balance of probabilities) that the testator did not know and approve the contents of the Will.

Undue influence and fraud

A presumption of Undue Influence usually arises when the beneficiary had actively participated in the preparation and execution of the Will and had disproportionately benefited from it. Undue influence means coercion, but no physical force is necessary. This is not the same as persuasion. Reminding the testator of their family obligations or what you have done for them in the past is not undue influence. It is essentially down to the person alleging undue influence to show that the testator was coerced into making the Will. Given that the testator is no longer around and that they have often been isolated by the person against whom undue influence is alleged, it is one of the most difficult allegations to sustain - there may be lots of suspicion, but relatively little hard evidence! ⊕



At Independent Executor & Trust we are committed to personalized service and individual attention. With combined experience of 65 years, we specialize in the Drafting of Wills, Administration of Estates & Testamentary Trusts.

49 Beach Road, Nahoon, East London, 5241 | PO Box 8081, Nahoon, 5210
 Telephone: (043) 735 4633 Fax: 086 693 3356 / (043) 735 3942 | e-mail: iet@iet.co.za

