



DAWSONS  
SOLICITORS

## Contentious Trust & Probate

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Given the strength of the firm's private client department, it is unsurprising that Dawsons also have a wealth of experience of dealing with disputes over the contents or validity of wills.

Contentious probate claims arise with some frequency, possibly as a result of the increasing wealth of individuals which can then justify the cost of mounting a legal challenge to testamentary dispositions. The increases in property values over the last 20 - 30 years has also meant that contributions to equity can lead to significant battles over the rights to property upon the death of the owner. In addition, clients have become more sophisticated legally and are more likely to seek legal advice on their ability to mount such challenges.

**Our advice may be sought on any of the following:**

### Incapacity of the Testator

At Dawsons, we have acted both for Claimants and Defendants on a number of legal cases challenging the validity of wills on grounds of undue influence or incapacity. Very often these challenges are mounted in conjunction with each other.

To effect a valid will, the testator must be of sound mind which means that he must:

"understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect" (*Banks v Goodfellow* (1870) LR 5 QB 549).

Although there is an initial presumption that the testator was of sound disposing mind, if the issue of his sanity is questioned, then the onus rests upon the person propounding the will to demonstrate that the testator was of sound disposing mind at the time the will was made.

Oral and documentary evidence can be put forward to prove the mental capacity of the testator. The evidence of attesting witnesses will be relevant as will the evidence of the solicitor who drew up the will and arranged its execution.

The Courts will consider the terms of the will and although capriciousness and foolishness are not sufficient to show incapacity, the Courts will consider whether the terms of the will accord with past and future declarations of intention. Where a will

is in a radically different form to previous wills or declarations by the testator, the Courts will look more closely at its terms and the circumstances surrounding its execution.

### Undue Influence Claims

The difficulty in establishing incapacity in the absence of a medically diagnosed mental illness, has meant that cases have often been combined with claims of undue influence. A plea of undue influence amounts to a claim that the testator was coerced or pressurised into executing a will in particular terms. Simple persuasion or advice does not amount to undue influence, the test is whether the testator acted freely and did what he or she desired to do.

There is no presumption of undue influence and therefore a plea of undue influence must generally be proved by the person who puts forward the allegation. In cases where it is shown that a beneficiary was instrumental in procuring or arranging the execution of the will under which he or she benefits substantially, then the burden will pass to the beneficiary to remove the taint of suspicion surrounding the execution of the will and show that the testator did understand and freely consent to its terms.

A plea of undue influence is treated very seriously by the Courts and whilst the standard of proof is still a civil one (balance of probabilities), the Courts will require cogent evidence and the plea is viewed by some as a form of fraud. Accordingly that claim must be carefully pleaded and substantiated. Although it is not impossible for a claim for undue influence to succeed in circumstances where a testator was of sound health and mind, it is far more usual for an undue influence claim to succeed where a testator was weak mentally or has failing health.

Claims to set aside wills on grounds of either incapacity or undue influence are now brought in accordance with the Civil Procedure Rules which has meant that the Courts exercise a tighter control over the procedural timetable. The scope for disputes dragging on for years has thankfully declined.

## Financial Provision

Applications under the Inheritance (Provision for Family and Dependents) Act 1975 can be made by spouses, civil partners, children or individuals treated as such, ex-spouses who have not re-married, co-habitees (a partner who was living as husband or wife with the deceased for at least two years prior to the death of the deceased) or other individuals who were maintained either wholly or partly by the deceased immediately prior to his or her death.

The Application is based upon a claim that the deceased's will or intestacy provisions fail to make reasonable financial provision for the applicant. Applications for financial provision must be made promptly and there are a number of factors which the Court may take into consideration when determining whether provision should be made and the amount of such provision.

We have advised and acted on a number of these cases, for executors defending claims and for former dependents of the deceased who are applying for financial provision.

## Estoppel/Trust Claims

Claims may also be brought by those who have a right to property disposed of under a will. For example, if a property was promised by the deceased to someone who has relied upon that promise and acted to his or her detriment, such a promise may give rise to a claim for proprietary estoppel or constructive trust.

Claims often arise where family members have made contributions towards the equity on a house purchase. As a consequence of this being a "family" arrangement, there may be little or no documentation of the intention of the parties. A dispute subsequently arises as to whether the contribution was a gift, a loan or the acquisition of a percentage share in the property purchased. Rising property values mean the distinction is often worth in excess of 6 figures.

## Resolution

With these types of disputes, litigation should be a last resort. If it is possible to resolve matters through negotiation or mediation, we do our best to effect a settlement without the expense and stress of court proceedings. Will disputes, by their nature, involve family members taking opposing sides and emotions inevitably run high. We combine a sympathetic approach with an honest assessment on merits so that the client's strength of feeling can be tempered, if necessary, by a realistic and pragmatic approach to reaching resolution.

If you require any assistance in this area, please contact Catherine Ledger, partner, Litigation Department.

### **Catherine Ledger - Litigation**

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