

5 Stone Buildings

An Introduction to
Contentious Probate: a
guide for those starting
out

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- 1. Challenges to the formal validity of a will.
- 2. Challenges to the substantial validity of a will.
- 3. Other ways in which you might be able to undermine a will.

Formal validity

- 1. Statutory requirements:
 - S.9 Wills Act 1837.
 - Writing.
 - Signed by T (or T directs someone present to sign on his behalf).
 - Witnessed by two or more people, who each sign the will.
 - The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020.

Formal validity

- 2. Forgery.
 - Also goes to the substantial validity of the will.
 - Form of fraud:
 - Must be specifically pleaded.
 - Strong evidence needed.
 - High standard of proof (but not criminal standard).
 - Handwriting experts, ink analysis, special equipment.

Substantial validity

- 1. Lack of testamentary capacity.
 - Banks v Goodfellow (1870) 5 Q.B. 549.
 - *It is essential to the exercise of such a power that a testator shall understand the nature of the 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; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties— that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*
 - Clitheroe v Bond [2020] EWHC 1185 (Ch).

Substantial validity

- 2. Want of Knowledge and Approval.
 - Ordinary circumstances.
 - Once proof that testator had capacity and duly executed the will → rebuttable presumption of knowledge and approval.
 - If presumption rebutted → need affirmative proof of knowledge and approval.
 - Testator blind / illiterate / couldn't speak, or had someone else sign the will on his behalf.
 - No presumption: always need affirmative proof of knowledge and approval.
 - Will prepared and executed in circumstances that would excite the suspicion of the court.
 - No presumption: always need affirmative proof of knowledge and approval.

Substantial validity

- 3. Undue influence.
 - Testator coerced into making will he doesn't want to make.
 - Not the same as lifetime undue influence.
 - No presumption of undue influence.
 - Need evidence of actual coercion.
 - Evidence about the mental and physical vulnerability of the testator is likely to be important.
 - Persuasion is not enough.

Substantial validity

- 4. Fraudulent calumny.
 - Re Edwards [2007] EWHC 1119 (Ch) [47]: “*The basic idea is that if A poisons the testator’s mind against B, who would otherwise be a natural beneficiary of the testator’s bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside*”.
 - Serious claim, needs strong evidence.
 - Other difficulties:
 - Must be false.
 - Must have caused the decision about the will.
 - Might not catch everything (?)
 - Potential cast iron defence open to the one accused.

Other ways of undermining a will

- Proprietary estoppel.
 - Thorner v Major [2009] UKHL 18:
 - (i) an assurance about an interest in land made to the claimant;
 - (ii) reliance on the assurance by the claimant; and
 - (iii) detriment to the claimant as a result of his or her reasonable reliance.
 - The court will then decide whether or not it would be unconscionable to refuse the claimant relief.
 - Detriment and countervailing benefits.

Other ways of undermining a will

- Inheritance (Provision for Family and Dependants) Act 1975.
 - Significant encroachment on the principle of English law that a person can choose how he leaves his property on death.
 - Only for certain categories of people (essentially, family members and those who were dependent on the deceased) who can show that a will or intestacy does not make reasonable financial provision for them.

Other ways of undermining a will

- Equitable doctrines:
 - Donatio Mortis Causa.
 - Deathbed gifts.
 - The rule against double portions.
 - Presumption that a parent will seek to treat children equally.
 - Secret trusts.
 - For secret beneficiaries.
 - The rule in *Strong v Bird*.
 - Where donee of imperfect lifetime gift becomes executor / administrator of the estate.

- Which claim(s) to bring?
 - End results can be quite different.
 - Is it really in your client's interests to have the will declared invalid?
 - Blunt instrument vs a more pinpointed claim.

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Thank you,
any questions please email
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