

A guide to

Contested Probate



## Your guide to Contested Probate

Contested probate is a complex area of law frequently giving rise to a number of disputes, alas usually involving family members following a person's death. This is often coupled with the high emotion and stress when parties have suffered a bereavement.

Pengillys LLP's Family and Litigation Teams are well experienced in dealing with these matters. We are committed to resolving matters as quickly, smoothly and efficiently as possible, often using [Alternate Dispute Resolution](#).

There are usually three areas of dispute commonly known as [Contentious Probate](#), concerning the following:-

1. Disputes regarding the validity of Wills;
2. A claim relating to financial provisions made under the Will under The Inheritance (Provision for Family and Dependents) Act 1975;
3. Disputes between Executors within the estate.

### Disputes regarding the validity of Wills

Disputes concerning the validity generally fall into a number of subcategories which include (but not exhaustively) issues regarding the preparation and/or execution of the Will.

To execute a valid Will the testator (the person making the Will) must be over 18 and there are formal statutory requirements as prescribed by Section 9 of The Wills Act 1837, subsequently amended by Section 17 of The Administration of Justice Act 1982. Requirements for valid execution are as follows:-

- The Will must be in writing, and signed by the testator, or by some other person in his or her presence and by his or her direction; and
- It appears the testator intended his signature to give effect to the Will; and
- The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- Each witnesses either attests and signs the Will or acknowledges his or her signature.

[Please note that there are exceptions to the above general rules.](#)

### Lack of testamentary capacity

Claims for lack of testamentary capacity will require the Court to determine whether or not the testator had or lacked testamentary capacity determined by his or her [state of mind](#).

Claims arising from lack of testamentary capacity have been subject to significant legal scrutiny over the years which generally require the following:-

- Did the testator understand the nature of the act and its effect?
- Did the testator understand the extent of the property of which he or she was disposing?
- Was the testator able to comprehend and appreciate the claims to which he or she ought to give effect?
- Was the testator's mind effected by any disorder or disillusion which was active in bringing about a disposal which the testator would not of otherwise made?

The question of capacity is ultimately a matter for the Court to determine as it is a legal question. It should be noted that a "disorder of the mind" will not be relevant unless it is active in bringing about a disposal in which the testator would not otherwise have made.

### Knowledge and approval

The testator having requisite knowledge and approval are considered in tandem with the issue of capacity. Once the Court is satisfied that the testator had capacity to understand what he or she was doing it is accepted by the Court that they did indeed understand.

Questions of testator capacity give rise to a number of enquiries to be made including enquiries to the professional Will draftsman.

## Undue influence

In probate cases any allegation of undue influence must be proven as opposed to be presumed. This requires the Claimant to prove affirmatively the allegation of undue influence. This gives rise to an evidential hurdle for the Claimant that is difficult to surmount. In alleging undue influence the Claimant will be required to provide evidence to persuade the Court that the explanation for what has occurred is that the testator's Will had been overborne by coercion rather than there being some other explanation.

## Claims under The Inheritance (Provision for Family and Dependents) Act 1975

Claims under The Inheritance Act are not validity challenges to the Will. There are prescribed time limits for pursuing an Inheritance Act claim with proceedings having to be issued within six months of Grant of Probate (the Court does retain a discretion to extend that time frame).

There are a number of parties who have the ability / class of persons entitled to bring claims under The Inheritance Act. They are:-

1. The testator's surviving spouse;
2. A former spouse who has not remarried;
3. A person who has co-habitated with the testator for a period of at least two years immediately prior to his or her death;
4. A child of the testator;
5. A child of the family;
6. Any of other person treated as dependant with certain exceptions / clarification required for this type of person.

## Disputes between Executors

Reasons for this can be many, and often include claims seeking the removal of Executors, and substitution of Executors. These would revolve around the Executors' failure to comply with obligations arising.

Any proceedings are governed by the Civil Procedure Rules 1998 (as amended). There are strict obligations with regard to procedure and protocols. Strict time limits apply.

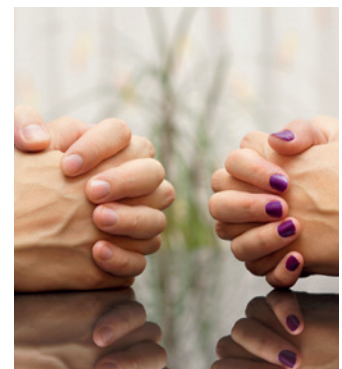
We would be pleased to meet with you to discuss any questions that you may have.

Please call us on **01305 768888**

We will then put you in touch with a member of our experienced Litigation Team.

Please visit [www.pengillys.co.uk](http://www.pengillys.co.uk) where full details of our Litigation Team are available.

For further details about Pengillys and how we work, please refer to our Terms of Business and Privacy Policy which are available on our website or on request as printed documents.



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