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Can my will be challenged?

A guide to help you protect your estate.

Making a will is personal and requires careful thought. We know family life can be complex, and there may be good reasons for not including a close relative in your will or giving more to one person than another. It is your right to decide who benefits from your will.

Identifying potential challenges can help you protect your wishes and reduce conflict.

GROUNDS FOR CHALLENGING THE VALIDITY OF A WILL

Execution of the will – Was the will signed and witnessed legally? Failing to have a will witnessed properly can automatically make it void.

Capacity – Did the person making the will have testamentary capacity? Testamentary capacity means understanding that you are making a will, knowing the value of your estate, who may have a claim against it, and being free of mental disorder that affects decision-making. Claims about capacity most often arise when the will-maker is elderly or if there are concerns about memory, dementia, etc.

Knowledge & Approval – Did the person making the will understand what they signed, and did the content reflect their wishes?

Undue Influence – Was the person coerced into making the will?

Forgery and Fraud – Was the will forged? Did the person make the will based on false information about a person's character or behaviour?

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Can my will be challenged? (page 2)

WHO MAKES CLAIMS?

Most claims are by people who have been left out of a will or think the terms of a previous will should apply.

If a court decides a will is invalid, the deceased's last known (valid) will shall apply. If there is no valid will, the intestacy rules shall apply instead.

Even if there is no challenge to the validity of a will, the Inheritance (Provision for Family and Dependants) Act 1975 enables the following categories of people to make a claim.

- Spouse / Civil Partner
- Former spouse / civil partner who has not remarried
- Children of the deceased (this includes biological and adopted but excludes step-children)
- Any person who has been treated as a child of the family (including step-children)
- Cohabiting partner if he/she lived with the deceased for at least two years
- Any person maintained by the deceased

It's important to say that just because someone can make a claim doesn't necessarily mean they will do or be successful; however, if they do bring a claim, the estate's beneficiaries will need to defend this, which can cause significant expenses. The court will consider the needs of a spouse/ civil partner more highly than the other category of claimants.

What will the court consider in an IPFDA case?

The IPFDA only applies if the deceased dies domiciled in England and Wales. The time limit for IPFDA claims is six months after the Grant of Probate. The court will consider the claimant's financial circumstances at the time of the claim, financial prospects, any disability, the impact of awarding money from other beneficiaries, conduct and any other relevant matters. The courts' primary purpose is to provide financial provision for any eligible claimants that need it.

Can my will be challenged? (page 3)

WHAT CAN YOU DO TO PROTECT YOUR ESTATE?

Choose a professional to prepare your will. Your will is a valuable legal document that will be relied upon by your loved ones when you are gone. We can give impartial, professional advice relevant to your circumstances and ensure your will is technically correct. A professionally drafted will is also more difficult to contest, and if you have had professional advice, you can deal with issues before they arise.

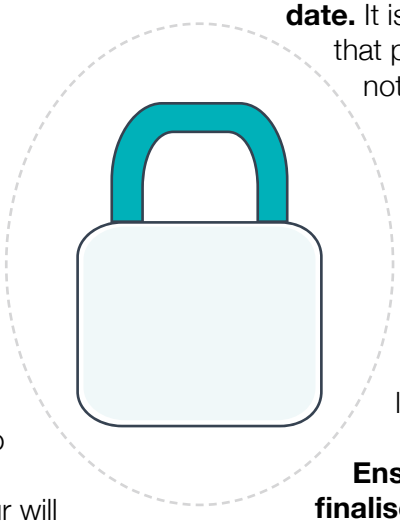
Ensure your will is signed and witnessed legally. The safest option is for us to witness your will. If this is not possible, you must follow the signing instructions.

Consider discretionary trusts. You may rightly be worried about leaving inheritance directly to a loved one due to addiction, disability, financial management or other issues. Leaving a share of your estate or sum of money to a discretionary trust is an alternative to excluding a beneficiary entirely from your will or only leaving them a small or fixed amount. The flexibility of a discretionary trust means trustees can decide how to use the trust fund based on the circumstances of beneficiaries at the time. You can write a letter of wishes to your trustees about how you would like the trust fund to be used and express any concerns.

Have a testamentary capacity assessment. Confirming your capacity to make a will can help stop validity claims from progressing beyond an early stage. It is a robust way to protect your wishes, especially if there are any contentious aspects to your will, you are elderly, or you have any health issues that someone could later claim affected your decision-making. We can assist you in obtaining a testamentary capacity report from a qualified professional.

Write a Letter of Wishes. If you are excluding someone who may potentially make a claim, we recommend that you write a letter to explain your reasons. *See the final page for some tips.*

Review your will regularly and keep it up to date. It is the best way to ensure fairness and that people who depend on you now are not overlooked by mistake.



Be clear about what is a loan and what is a gift. Keep records. Have agreements drawn up if substantial or one child has received more than another. Your will can include clauses to waive loans or to bring into account gifts made during your lifetime.

Ensure financial arrangements are finalised officially following divorce. The actual divorce and the financial aspects of a divorce are separate. A financial agreement between yourselves that is not approved by the court is not legally binding. A court order is required to prevent potential claims by former spouses/ civil partners who have not remarried. Don't ignore any financial commitments that you are obliged to make.

Beware of making promises. If a person can prove you made a promise they relied upon to their detriment, they may be able to make a Proprietary Estoppel claim.

Can my will be challenged? (page 4)

Formalise property arrangements. Estate disputes can arise in cohabiting couples where one person legally owns the property, but both pay the mortgage and for renovations.

Use of trusts, pensions or lifetime gifts. You can provide for people outside your will through trusts, pensions, and making gifts whilst alive.

Be open about your wishes with your loved ones if possible. It's your chance to explain your wishes and hopefully reduce the risk of conflict and claims following your death.

WHAT SHOULD I INCLUDE IN A LETTER OF WISHES?

A letter of wishes helps your voice to be heard when you are no longer here. It's your chance to explain your reasons and can be very helpful if a dispute arises.

You should include whatever information you think will help to explain your reasons for leaving less to a beneficiary or excluding them from your will.

Your letter of wishes should be written in your own words and kept up-to-date.

It should be honest and factual and include details of when you were last in contact and details of any gifts or financial support you have given.

If a person may claim that they have been financially dependent on you, providing details of the amount and ways you supported them, when and why this stopped can be helpful if a claim is made.

You can also include any positive reasons you have for giving other beneficiaries more.

A handwritten letter of wishes could be seen as more authentically coming from you.

Whether you write or type your letter, you should add your signature and date.

If you are separated from or divorced from a spouse or civil partner, it would be useful to include the reasons why you are not providing for him/her and the details of any agreement reached.

The letter of wishes does not need to be witnessed by another person.

You should store your letter of wishes with your will. Often people put this in a separate envelope marked 'private and confidential – only to be opened by my executors'.