

HarrisLieberman
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CHALLENGING A WILL



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Who can challenge a will?

Only a person with a legitimate interest in the Estate can bring proceedings to have a will declared invalid.

If you were named in a previous Will or if you would be entitled to a share of the Estate in the intestacy (i.e. if there was no Will) you are likely to be entitled to challenge the validity of a Will.

What are the grounds for challenging the validity of a will?

The most common ground for a challenge is that the testator lacked testamentary capacity. This means the person making the Will did not have the ability to understand the Will making process. A lack of testimony capacity may be caused by illness, injury or an underlying condition affecting the person's ability to properly comprehend what they are doing or how the changes they are making will impact on the administration of their Estate.

Testamentary capacity must be assessed as at the time the Will was made. If there is any doubt the solicitors file notes and other records, as well as any contemporaneous medical records, will be taken into account.

The relevant principles were summarised by Judge Habersberg in the Victorian Supreme Court in the matter of the Will of Dimitra Giofches as follows.

- a. When there are circumstances which give rise to suspicion about the will maker's testamentary capacity the person wishing to uphold the will assumes the burden of affirmatively proving, to the satisfaction of the Court, that the will maker had the requisite capacity to make the will, that is, that the will maker was of sound mind, memory and understanding when the will was executed or, if instructions for the will preceded its execution, when the instructions were given.
- b. The standard of proof is upon the balance of probabilities that is, it is more likely than not, after consideration of all the relevant evidence.
- c. To prove that the will maker was of sound mind, memory and understanding at the relevant time, the person wishing to uphold the will must satisfy the Court that the will maker:
 - i. understood the nature and effect of making a will;
 - ii. was aware of the general nature and value of the estate;

- iii. was aware of those who would have a legitimate claim to the estate; and
 - iv. was able to evaluate and discriminate between such claims.
- d. Although it needs to be shown that the will maker understood that they were executing a will and the practical effect of the central clauses in the will, including the dispositions of property made, it is not necessary to establish that they was capable of understanding every clause of the will.

In this case a family member who was left out of the last will tried to have it declared invalid on the grounds that the will maker lacked testamentary capacity due to dementia. After considering all the evidence the court determined that the will maker did have testamentary capacity at the time the will was made and the will was upheld.

By contrast in the Supreme Court matter of the Will of Daniel Duggan the Court found that the will maker was suffering from delusions at the time he made his will and that these delusions influenced the changes that he made. In that case the Will maker had changed his will to leave the bulk of his estate to charity as he had come to believe that his family were conspiring against him. Of significance in this case were letters that had been written by the deceased which clearly showed that the change in his attitude towards his family was the result of a mistaken belief that the family had taken his licence from him and “imprisoned” him in an aged care facility. The family were successful in having the will declared invalid and the previous will reinstated.

A Will can also be challenged on the basis that the testator was subjected to undue influence. If the testator was pressured, coerced or black mailed into making the Will, the Will could be declared invalid.

Other grounds include fraud, forgery and of course the testator simply not knowing what was in the will.

What happens if a challenge is successful?

If the validity of a will is successfully challenged the Will is null and void. The most recent previous Will, if not otherwise revoked, will then become the “last” Will for the purpose of the administration of the Estate. If there was no other Will, the administration of the Estate will be determined by the rules of Intestacy.



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