



Will, trust and estate disputes

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Introduction

Contesting a Will or bringing a claim over a trust or an estate can be distressing and complicated. Our specialists in this field have dealt with just about every conceivable difficulty that might arise and are ready to help you, whether bringing or defending a claim.

We have one of the largest and most experienced teams in the country dealing with contesting Wills and other trust and estate claims. The two partners who lead the team have over 40 years' experience between them of this kind of work and all of the team are members of the Association of Contentious Trust and Probate Specialists (ACTAPS), the only organisation that recognises experts in this field.

Each case is handled by a qualified solicitor who is there to guide you every step of the way. We understand that, for most people, challenging a Will or disputing a trust or an estate will be the last resort. Our aim is to find solutions for our clients, quickly and with as little worry as possible. We never lose sight of the fact that you may wish to stay in touch with the people involved, long after the dispute.

Disputes can arise in a number of ways following a person's death. Whilst this document explains potential claims, we also act for defendants in these types of dispute. We discuss the key areas below.

Types of Claim

Is the Will valid?

A Will or codicil can be challenged on a number of grounds:

Non compliance

If a Will is to be valid it must satisfy some specific requirements. In particular, it must be signed by the testator (the person making the Will) in the presence of two witnesses (who are not beneficiaries) who must be present at the same time. Each witness must then sign the Will.

If any of the specific requirements are not met the Will may be found to be invalid.

Incapacity

If it can be shown that the testator did not have mental capacity when signing the Will it will be invalid. A previous Will may take effect instead unless it can be shown that the testator revoked it irrespective of whether the new Will is valid; or the testator has married since the previous Will was made. Medical and witness evidence will be needed to prove or disprove the testator's capacity. If there is no earlier valid Will, the estate will be administered in accordance with the intestacy rules (standard rules on how an estate must be shared out if there is no Will).

Lack of knowledge and approval

It may be that a testator does not understand the extent of his or her estate or the effect of making a Will and in this situation the Will may be challenged on the ground of lack of knowledge and approval. This can be difficult to prove.

Undue influence or fraudulent calumny

Sometimes a testator makes changes to a Will, or makes a new Will, favouring a person who is in a position of trust with the testator. If it can be shown that the person coerced or pressurised the testator into making those changes or making certain provisions in a new Will, the Will can be challenged on the ground of undue influence.

On other occasions, a person close to the testator gives the testator false information. Believing it to be true, the testator amends the Will in light of those representations, usually to the detriment of others. In those circumstances the Will can be challenged on the grounds of fraudulent calumny.

The nature of the evidence required means these claims can be difficult to prove. Witness evidence is usually very important in these cases.

Inheritance Act claims

If someone dies and, either under a Will or under the intestacy rules, an eligible person has not been left sufficient provision from the deceased's estate, that person can bring a claim against the estate under the Inheritance (Provision for Family and Dependents) Act 1975. These claims are often referred to as 1975 Act or Inheritance Act claims.

The 1975 Act specifies who is eligible to claim. The categories include spouses, co-habitants (if they have lived together for more than 2 years), children or persons treated as children of the deceased, or anyone financially dependant on the deceased at the time of their death.

The court will take into account a lot of different factors when considering first, whether a party is an eligible claimant, and secondly what, if anything, they should be awarded. The courts will take particular note of the size of the estate and the financial circumstances of all of those involved.

Promissory or proprietary estoppel

Where a person has made a promise during their lifetime, to benefit another on their death, and that promise has been broken, it is possible to bring a claim for failure to fulfil that promise. The claim can arise from a promise for a sum of money or non specific benefit (promissory estoppel) or for property or land (proprietary estoppel).

The key requirements for this kind of claim are:

- a promise was made
- the promise was relied upon by the person to whom it was made (the promisee)
- that reliance has resulted in detriment to the promisee

For example, if a person gives up their job to care for a testator, relying on the testator's promise to provide for them when the testator dies, but the Will does not provide the promised benefit, the carer can claim against the estate to place them in the position they would have been in had the promise been fulfilled.

The court will often look at the proportionality of the promise and may only reimburse the claimant to return them to the position they would have been in had the promise not been made, i.e. if the carer had retained their job.

Trustee/executor disputes

If an executor or trustee is not acting in accordance with their duties, and beneficiaries are unhappy with the running of a trust or the administration of an estate, the beneficiaries can ask the court to intervene.

The court can order removal of executors or trustees, or give directions as to how the trust or administration should proceed.

In cases where a trust or estate has been mishandled and this has led to a loss, trustees and executors can be pursued for losses suffered by the beneficiaries.

Important considerations

Proportionality

Proportionality is a key concept throughout the life of a claim. It is a question of balancing the size and importance of the claim against the cost of pursuing it. There may be a number of complex issues, relatively weak grounds for a claim or a real likelihood that the claim will be defended. These will inevitably increase legal costs.

A claimant should think carefully about the likely costs of pursuing a claim versus the likely value of the claim itself. We always keep proportionality firmly in mind and will help you to decide the best way to proceed. Courts have voiced their disquiet on a number of occasions where the legal costs have become disproportionate to the amount in dispute. In any event, a successful claimant is extremely unlikely to recoup all of his or her costs incurred in pursuing a claim. Therefore the costs which the claimant ultimately has to pay may significantly reduce or eliminate the damages obtained.

Funding

Will, trust and estate disputes can be complex and therefore the legal costs of pursuing them can be high. A potential claimant should always check whether he has the benefit of legal expenses insurance (often included as part of household or motor vehicle insurance) for this type of claim. Some firms, including Cripps, offer a range of funding options alternative to standard hourly rates. Those options include:

- Conditional fee agreements ('no win no fee' where you pay no solicitors' costs if you lose but pay a success fee in addition to the standard fees if you win)
- Concessionary fees (you pay our fees at a concessionary rate in any event but if you win the standard rate plus a success fee is payable)

- Cash flow assistance (where the projected costs are paid in equal instalments over the anticipated life of the claim)

Please contact us if you would like more information about funding options.

Time limits for bringing claims

There are different time limits for bringing different types of claim. The time limit is known as the 'limitation period'. Claimants should always act as swiftly as possible and seek legal advice as to the limitation period which will apply to their claim.

Invalid Will

There is no specific time limit within which to pursue a claim against the validity of a Will. However, it is advisable to take steps to stop an invalid Will from being admitted to probate. An estate can be protected by entering a 'caveat' with the probate registry. If this is applicable we will supply you with further details.

Although there is no strict time limit, it is best to act quickly to protect the estate and to investigate the position as soon as possible. If the questionable Will has already been admitted, and a grant of probate obtained, a claim can still be made but if the estate has already been distributed, it may be more difficult and more expensive to recover property or funds which would be the subject of the claim. The longer a claimant waits to pursue a claim, the greater the risk that the court will find that the claimant accepted the validity of the Will and lost their chance to dispute it; this is a principle called 'laches'. Claimants should take steps to progress any claim in a reasonable time.

Inheritance Act claims

A time limit does apply to a claimant under the 1975 Act. **A claim of this kind must be issued within six months from the date of the grant of probate.** It is not impossible to bring a claim after six months but it requires an application to the court for approval and there must be extenuating circumstances.

Promissory and/or proprietary estoppel

There is no set time limit for claims of this kind but the principle of 'laches' applies (see 'Invalid Will' above). Again, clients would be advised to take steps as soon as possible to ensure that executors are aware of their claim and that the estate is not administered until any claim has been dealt with.

Executor/trustee disputes

If an executor or trustee is appointed to act under the Will of a deceased and it is clear that they are not an appropriate person to act, an application to the court should be made without delay to ensure that they are not granted executorship. Any claim against an executor or trustee for damages for breach of their duties must be brought within six years of the date of the breach.

Pre-action protocol procedure

Once a potential claim has been investigated, and it appears to be worthwhile pursuing, the claimant should not simply issue court proceedings straightaway (unless the relevant limitation period is about to expire). A procedure known as the 'Pre-Action Protocol' should be followed. This provides a framework for an early exchange of information with the aim of dealing with matters quickly and cost effectively, and is designed to encourage parties to settle a dispute without the need for court proceedings.

The courts look to the parties to undertake these pre-action steps in accordance with the recognised guidance. The guidance is produced by the Association of Contentious Trust and Probate Specialists (ACTAPS).

The ACTAPS Practice Guidance for the Resolution of Probate and Trust Disputes ('The ACTAPS Code') and Preliminary Note can be found on their website:

www.actaps.com/index.cfm.

We summarise the key points below:

Preliminary Notice

As soon as the claimant decides there is a reasonable chance that a claim will be brought, he or she should notify the relevant parties (usually the executor and/or beneficiaries) in writing with a brief outline of the claim. The recipients should acknowledge this letter within 21 days.

Letter of Claim

Once the potential claim has been investigated, the claimant should send a detailed Letter of Claim to the relevant parties, identifying the parties involved and setting out the facts upon which the claim is based. Supporting documentation should be enclosed if possible.

Letter of Response and Letter of Settlement

The recipients of the Letter of Claim should send a Letter of Response, within 21 days of receipt of the Letter of Claim, setting out their responses to the claimant's claim(s).

A Letter of Settlement (normally a 'without prejudice' letter – which is one that will not be shown to the court in the course of any court action but which is aimed at trying to reach a settlement) should make a settlement proposal or identify further information required before a proposal can be made.

If the claim is denied in its entirety and there is no Letter of Settlement, a claimant may commence court proceedings. Often, however, further correspondence and negotiations will follow between the parties.

Alternative Dispute Resolution (ADR)

Both parties should consider whether some form of ADR would be more suitable than litigation. This may include:

- Discussion and negotiation
- Early neutral evaluation by an independent third party
- Mediation

Court proceedings

If the parties fail to solve the dispute by following the Pre-Action Protocol, then the claimant will need to decide whether or not to issue court proceedings. The claimant should bear in mind that there is a risk of an adverse costs order (being ordered to pay the defendant's legal costs) if the claim is unsuccessful. It may be possible to obtain 'after the event' insurance to protect against this risk and a claimant should discuss this with their legal advisers.

The first stage in commencing court proceedings is to prepare a claim form, and particulars of claim or a witness statement in support of the claim. The particulars of claim or witness statement in support set out the claim in detail, i.e. the relevant facts. These documents are often best prepared by specialist barristers (counsel) and it is therefore advantageous for the claimant to instruct solicitors who themselves specialise in this kind of work and have good links with barristers who specialise in these cases, as we do.

Once a claim has been issued it must be served upon the defendant(s) or solicitors authorised to accept service on behalf of the defendant(s). It is relatively rare for cases to proceed all the way to trial. However, there are a number of stages before trial and it is not unusual for claims to take over a year to reach that stage. In the meantime, the parties will have to deal with matters such as disclosure of documents, exchange of witness statements, expert evidence (if applicable) and preparation for trial.

The rules and procedures (The Civil Procedure Rules) are complex and it is certainly advisable for claimants to have legal representation. Typically, solicitors will deal with the day to day handling of the claim and may instruct counsel to attend court hearings. Sometimes counsel will also be instructed at an early stage to give advice on the strength or merits of a claim.

Contact information

Will, trust and estate disputes may seem daunting, but the specialist solicitors at Cripps LLP have a great deal of experience in handling and resolving these disputes and we would be happy to assist you.

If you would like an initial, no obligation discussion with a solicitor to review your particular circumstances, please use our contact details below.



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