

Challenging Wills

Many disappointed beneficiaries have threatened to “challenge the will”. The idea that a will can be challenged has given rise to a great deal of imagination, and has probably inspired a fair amount of worry—most of it unnecessary.

Probate is an administrative procedure the Court uses to authenticate a document that purports to be the last will of a deceased person. Anyone who wishes to question the authenticity of the document can, in effect, challenge the will.

Some challenges are over formal matters. For instance, the document may not have been properly witnessed. Changes may have been made to the original document without the proper formalities of execution having been observed. Or perhaps the original will has been lost and only a photocopy can be located.

Other challenges are more substantial. Lack of mental capacity, for instance. A person, when making a will, must appreciate the nature of their actions; they must appreciate the nature and size of their estate; and they must be able to consider who it is who might have a moral claim to share in their estate. (Whether they choose to leave anything to those people is another matter.)

Duress and undue influence can also give rise to a challenge. A will made under threat or compulsion is not the free expression of a sound disposing mind. A will made under such circumstances cannot stand. Although wills are rarely made under threats of physical coercion, it is not unheard of for a care-giving child to dictate the terms of an ailing parent’s will. Dependent upon their child for their welfare, how can the parent refuse? Duress and undue influence can be subtle, but improper nonetheless.

There are also legal limits on testamentary freedom. You have an obligation to provide for your spouse or common law partner. You have an obligation to provide for your minor children. And you have an obligation to provide for your adult children who, because of a mental or physical disability, cannot earn a living. If you fail to make adequate provision in your will for any of these people, the Court can make it for you. What is “adequate” in any situation will depend on the individual circumstances.

It is important to understand, however, that not all dissatisfactions with the content of a will can give rise to a challenge. In Alberta, a person has very broad testamentary freedom, subject to the limits mentioned above. Unless one or more of these limitations apply, a person can include—or exclude—anyone they wish from their estate. There is no obligation in Alberta to include an adult child in your estate, provided he or she is not prevented from earning a living by reason of mental or physical disability. A person so excluded cannot challenge the will on the grounds that it is “just not fair”. If there is evidence of diminished

mental capacity, duress or undue influence, they may be successful in challenging the will on those grounds. But “unfairness” alone will not suffice.

There are a number of legitimate grounds upon which wills can be challenged. It may be of some comfort for people to know that the vast majority of wills submitted for probate go unchallenged. Estate law practitioners can usually help you decide if you have grounds for a challenge and more importantly, whether a challenge is worth pursuing.