
Safeguarding Charitable Legacies



By Paul Maddock

Charity Fundraising - Recent Issues



“Poppy Collector “Olive Cooke” exhausted by charity requests”

“Elderly couple at wits’ end as charities bombard them with cash appeals”



“Increased publicity of Dependency Act Claims – Supreme Court rebalance in favour of testator’s wishes, as against interests of disinherited children”



Disputing entitlement ...



How a dispute arises ...

Falls within 4 main areas;

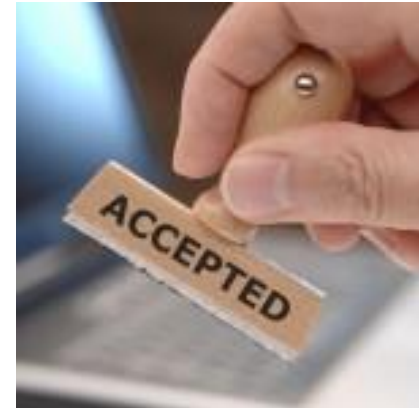
1. Formalities/Validity
2. Undue Influence/Duress
3. Capacity of the testator
4. Dependency/Inheritance Claims



1. Validity - Formalities



- No will is valid unless it is in writing and signed in a particular manner - **Wills Act 1837**
- The person making the will (testator) must sign at the end of the document in the presence of two or more witnesses who then sign the will in the presence of the testator.



Common examples of validity arguments are;

- **Forgery** – Signature of testator has been forged
- **Presence** - Witnesses not present when the testator signed the will
- **Beneficiary** - Witness is a beneficiary under the will
- **Certainty** – The three certainties;
 1. **Intention** – must intend to make the gift
 2. **Subject matter** – property intended to be in the trust must be specified. E.g. *“my house at the time of my death”*
 3. **Object** – beneficiaries of the trust must be certain – must know who is in receipt of the object

Top Tips – Certainty



Certainty of Subject Matter...

- May be a situation where the subject matter does not exist/isn't easily identifiable, for example,

“Number 1 St Pauls Square”

- The testator may not own that property/may have sold that property and have moved somewhere else, but not updated the will. Ideally you would want to say something like;

“My house at the time of my death”

Certainty of Object...

- You may encounter a situation where it is hard to identify who the intended beneficiary is, for example,

“the remainder of my estate to cancer research”

- In order to make sure that the charity is easily identifiable, make sure that the will specifically refers to the **Full Charity Name** and **Number** so that there is no ambiguity.
- Further, if a charity was to merge, the gift may still be valid if the following phrase is used;

“or any amalgamation of”

2. Undue Influence/Duress



- Where the testator has executed an otherwise valid will as a result of some **undue influence or duress**.

E.g. *Re Edwards, deceased*,

A frail and vulnerable testatrix, who was frightened of one of her sons. In the period before the testatrix made a new will, the son deliberately poisoned the testatrix' mind by making deliberately untruthful accusations against her other son and his wife. The effect of his doing this was to cause the testatrix' own discretion and judgment to be overborne, which is undue influence.



- In the case of undue influence, the burden of proof shifts onto the **person making the allegation**.

TOP TIP: To avoid allegations of undue influence or duress, try and ensure that anyone making a legacy in their will has taken independent legal advice, especially if the person is vulnerable/it is a sensitive situation.



3. Capacity



A Will made by someone who lacks mental capacity is not valid.

However, just because someone is elderly or suffering from a mental illness does not automatically mean that they lack capacity to make a Will.



Test for Capacity is defined under [s2 Mental Capacity Act 2005](#),

“a person lacks capacity in relation to any matter if at the material time he is unable to make a decision for himself in relation to it because of an impairment of, or a disturbance in the functioning of, the mind or brain, whether the impairment or disturbance is permanent or temporary.”

There is a very strong legal presumption that everyone does have capacity unless it can be proved otherwise. This means that if someone wants to challenge a Will on the basis of lack of capacity then it is up to that person to prove it.



Capacity cont'd...



Legal test: *Banks v Goodfellow* , the testator must:

- understand the nature of the will and its effect;
- have some idea of the extent of the property of which they are disposing under the will; and
- be aware of the persons for whom the testator would usually be expected to provide (even if he chooses not to) and be free from any delusion of the mind that would cause him reason not to benefit those people.

Capacity cont'd...



E.g. Window Cleaner case - *Re The Estate of Julie Spalding (deceased)*

A Will which disinherited an elderly lady's devoted nephew in favour of her window cleaner was overturned because she lacked mental capacity.

The testatrix's nephew (B) spent 10 years caring for his mother. He gave up his job to do so and, in return, she promised that she would leave her bungalow to him.

In 2005 the testatrix (S) suffered a head injury and her personality was said to have changed. She turned on her son and accused him of conspiring against her. She banished him from her home for the last six years of her life.

Her window cleaner (P) then took over as her sole carer and in December 2007, S made a Will leaving everything to P.

After her death, B successfully challenged this Will on this basis that S had lacked mental capacity when she made it.

TOP TIP: Disputes about the capacity of an elderly/seriously ill testator can be avoided or reduced if a medical practitioner can confirm that the testator has the requisite capacity and makes a record of the findings/examination.



4. Dependency/Inheritance Claim



- Relatives, dependents and others can challenge someone's will by going to court and claiming 'reasonable financial provision' from the estate.
- Equally, if someone dies 'intestate' (i.e. they don't have a will) and beneficiaries are not happy about their inheritance (or lack of), they may be able to make a claim under intestacy rules.
- Relevant factors when determining 'reasonable financial provision' are as follows;
 - the **size** and **nature** of the estate
 - the **needs, means and resources** of the **person** making the claim
 - the **needs, means and resources** of the **other beneficiaries**;
 - in the case of marriage, **the length of the marriage** and the contribution towards the marriage.



Dependency Claim/Inheritance cont'd...



- Who is entitled to claim?

Inheritance (Provision for Family and Dependents) Act 1975 - 4 categories of claimant:

1. The surviving spouse
2. A cohabitee who lived with the deceased for at least two years
3. Children; legitimate, illegitimate or adopted; and any other child, such as a stepchild, supported by the deceased and treated as her or his own
4. Others supported by the deceased such as an elderly relative, or anyone receiving regular maintenance from the deceased.

TOP TIP: Check that family have been informed/know the wishes of the Testator and contents of the will so that there are no surprises at a later date.



Dependency Claim/Inheritance cont'd...



Recent case law has meant increased publicity for people making Inheritance Act Claims. Generally the court will only make an award to an adult child in circumstances where the adult child was financially dependent on his or her deceased parent. The Supreme Court decision in [Ilott](#) is likely to be a welcomed rebalance between the testator's wishes and disinherited children.

Case against an estranged parent. [Ilott v Mitson](#)

- *Heather Ilott's mother, Melita Jackson, died in 2004 at the age of 70 leaving her estate (valued at £486,000) to three animal charities. Mrs Jackson made no provision at all for Mrs Ilott, who was her only child.*



Mrs Heather Ilott was 54 years old. She had left home at the age of 17 to live with a boyfriend which caused a rift. Mrs Ilott had five children and was dependent on state benefits. She rented her home from a HA and had no pension. Mrs Ilott challenged the will under the 1975 Act, saying that insufficient provision had been made for her

This case was appealed to the Supreme Court, where a final decision reverted to the original trial decision. The Court held that charities need not demonstrate "need or expectation", being named as a beneficiary in the will is enough. The Court highlighted the importance of the testator's wishes and considered estrangement may be a key factor.

Other ways a will/gift can become invalid...



- 1. Marriage/Civil Partnership** - *Marriage revokes any previous wills that have been made – Marrying or entering into a civil partnership after making a will immediately revokes a will unless it is stated that the will is made with the intention of marrying or entering into a civil partnership with a particular individual.*
- 2. Destruction** - *If a will is destroyed, it won't be valid (s20 Wills Act 1837)*
- 3. Fraud** – *e.g. A false representation made to the testator about the character of another person inducing him to revoke, by codicil, a gift made to the other person in the testator's will.*
- 4. Forfeiture** - *A beneficiary cannot take under a will if he has unlawfully killed the testator, or unlawfully aided, abetted, counselled or procured his death.*

Top tip – Make it easy to create a legacy!



- Use your website to make it easy for a person to make a legacy!
- Make sure they fully understand what it means to make a legacy and what it involves;
 1. Provide more information about what the charity does
 2. Show how the legacies make a difference
 3. Explain how to make a legacy
- Bear in mind the ways a will may become invalid and perhaps provide suggested wordings that can be used in a persons will.

After a Claim has been made – Next Steps



What to do if a will is challenged...



The current economic climate has meant that the **ability of charities to protect legacy income has become even more challenging** – coupled with **a general rise in contentious probate claims**. The following steps are recommended;

- 1. Check Smee and Ford**
- 2. Check Constitutional documents**
- 3. Obtain the Solicitor's File**
- 4. Consider your Causes of Action**
- 5. Apply for a caveat on the estate until the issue is resolved**
- 6. Instruct Solicitors Early Doors**

1. Check Smeed and Ford... <http://smeedandford.com/>



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- UK's leading provider of trusted legacy information. They also provide subscription and bespoke data services to help charities analyse legacy income and make informed decisions to drive activities. Provide the following services;

1) Legacy Spotlight – provides information on a charity's legacy performance versus that of their peers, their causal area and the sector as a whole.

2) Legacy View – provides a comprehensive overview of legacy giving in the UK. This online tool provides insight into the type of individual who is most likely to leave a gift to a charity, in order to successfully build targeted legacy marketing campaigns.

3) Notification Service - ensure that charities receive timely information on specific legacies left to them, or notification of money left in wills or trusts for unspecified charitable purposes.

2. Constitutional documents



- A charity's Constitutional documents should define the **PURPOSE** of the Charity and you will need to make sure that **pursuing the legacy is in line with its objectives** and that paying out money for litigation costs is an **acceptable risk** to take.
- When deciding whether to pursue litigation, you should consider the **impact of spending charity funds on litigation**, given that this may have the effect of **depriving the charity of these funds to carry out its purposes**.
- Further, the following need to be taken into consideration;
 - Mishandling litigation can damage public perception of the charity
 - The consequences for the charity if it does not engage in litigation
 - Whether the charity has sufficient funds to meet the costs incurred
 - The relative strengths of the case in any potential defence and counterclaim
 - Carry out a Cost-Benefit Analysis and check doing your best for the Charity



3. Obtain Solicitors File



- Make a *Larke v Nugus* request to obtain the Solicitors file.
- By obtaining the file, you can pick out anything unusual and investigate straight away
- The earlier you get the file, the earlier you can start to investigate the circumstances within which the will was made and identify any points of dispute that may arise

4. Consider your Causes of Action

- Rectification Claims
- Requests for a declaration
- Removing an executor
- Reconstitute a will

5. Apply for a caveat on the estate



- *A caveat is the entry of a notice, in writing, to show that the grant should not be issued for the estate of a deceased person.*
- *Caveat is lodged with the Principal Probate Registry.*
- *The entry of the caveat prevents the grant of probate or letters of administration without notice to the caveator.*
- *Warning off*



Instructing a Solicitor – Costs

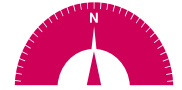


There is a variety of Cost Arrangements available when instructing a solicitor. These are the following;

- 1. Fixed Costs** – *Where costs are agreed/capped at a certain figure that is pre-arranged and to suit your budget.*
- 2. CFA [Conditional Fee Arrangement]** – *“an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances”*
- 3. DBA [Damages Based Agreement]** - *The lawyer's fee will be an agreed percentage of the client's recovered damages, rather than based on an hourly rate.*
- 4. Hourly Rate** - *The lawyer will charge you for each hour (or portion of an hour) that the lawyer works on your case.*

Lawyers working in large firms typically have different fee scales with more senior members charging higher fees than young associates or paralegals.

Alternative Forms of Dispute Resolution (ADR)



Methods of resolving a dispute other than by contested court proceedings and is seen as being cheaper and provides an opportunity to escape going through the more formal court process.

Most common forms of ADR in probate proceedings;



"I'm glad we settled our conflict this way.
War is expensive."

- 1. Without Prejudice Meeting** – *meeting with the other side to agree a compromise.*
- 2. Offers by Correspondence** – *writing to the other side in attempts to create a settlement/compromise.*
- 3. Mediation** – *a flexible and confidential form of ADR in which a neutral third party assists parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision whether or not to settle and on what terms.*

Any questions...?



Contact Details



**Paul Maddock, Associate, paul.maddock@dwf.law
0151 907 3398**

