



Will Challenges

INFORMATION AND INSTRUCTION KIT

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Will Challenges

There are only a very few grounds that a Will in Ontario can be successfully contested through the Courts.

Judges do not have discretion to set aside Wills simply on the basis that they are unfair or unexpected or do not leave the Estate to the children of the deceased.

The basic rule in Ontario is that a Will that is validly made will be enforced. Wills that are not validly made will be set aside. Also, there are exceptions to the basic rule that a validly made Will will be enforced, for instance for married spouses who may elect to take under the Family Law Act rather than under the Will.

CLAIMS BY MARRIED SPOUSES AND DEPENDENTS

A completely different matter from an actual Will challenge is a claim by a person who was financially dependent on the deceased and/or a legally married spouse of the deceased, that the deceased did not make adequate provision for them in the deceased's Will or Estate.

LEFT OUT BUSINESS PARTNERS AND 'CONTRIBUTORS'

Another different class of claims are made by people who contributed (usually funds or effort) to the 'farm, business, investment ...' of the deceased and who were promised something in return by the deceased (re-payment, share of gains, co-ownership, compensation for effort) ... and who now find themselves left out of the Will. Sometimes this is because the deceased did not make a Will, or the Will was made before the promise was made, or the deceased has forgotten or broken the promise. Normally the claimant says they were promised something and yet this something is not mentioned at all in the Will.

These claims are usually framed as 'constructive trust' or 'unjust enrichment' claims and strictly speaking are not 'Will challenges'. As equitable claims they are more like claims for repayment of a debt, which must be paid before the Will deals with the remaining Estate. Trust claims like these are often not easy to prove, but they are usually more straightforward than an actual attack on the validity of the Will itself. The key to success lies in proving the original 'deal' that led the contributor to contribute to the benefit of the deceased. If there is documentary evidence (emails, letters, agreements even) that makes a large difference to the strength of the claim.

SETTING ASIDE INVALID WILLS: IS THE WILL A VALID WILL?

Grounds for contesting a Will on the basis that it is invalid or revoked:

- The Will was not signed by the Testator (the deceased) or the Will was not properly signed.
- The Will was not witnessed or not properly witnessed.
- The Will was voided, for instance by a subsequent marriage (if you marry after signing a Will, that Will is void unless it was clearly made "in contemplation of marriage").
- The Will was revoked, for instance by the Testator making a subsequent Will (only a person's last Will usually governs their Estate – therefore, it is very important to determine if a Will really was "the last Will and Testament").
- The Will was 'procured' by undue influence: if a Beneficiary exerts undue influence over the Testator, especially someone who is vulnerable or infirm, it may be possible to have the Will set aside. Classic cases that give rise to concern are when, for instance, an elderly person suddenly bequeaths their Estate to their much younger new caregiver. Caution: it is difficult to prove undue influence, although obvious factors such as the Beneficiary drafted the Will (or told the drafter what to write) are significant; less compelling but plausible evidence can be such things as the Beneficiary made all arrangements for the Testator to make a Will, instructed the Testator what the Will should say, etc.).

POSSIBLE BUT NEVER EASY

Will challenges in Ontario are possible, but never easy. This is especially true of Wills which, on their face, are validly made and executed, but which are challenged on the basis that they were made under undue influence by someone close to the deceased, such as a common law spouse or caregiver adult child. These cases are highly fact dependent, and the burden of proof that must be met by the challengers is difficult to meet unless they have unusual evidence, especially documentary or video evidence.

Please consult us for analysis of your situation and advice on whether to contest a Will and if so how to proceed.



Want more information?

**ARE YOU INTERESTED IN A CONSULTATION WITH PETER R. WELSH?
CONTACT ME AT [PETER@SMARTWILLS.CA](mailto:peter@smartwills.ca) BY TELEPHONE 416-526-3121
REGISTER FOR OUR BLOG TO GET VALUABLE TIPS AND UP-TO-DATE ALERTS.**

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