

What grounds are there for challenging a will?

There are many reasons why you might be able to challenge a will. For example:

1. There are doubts about the testator's mental capacity at the time he or she made the will.
2. Someone might have pressured the testator into leaving their assets to certain people.
3. There are suspicions of forgery.
4. There are doubts about whether the will was signed and witnessed properly.
5. You are doubtful about whether the testator understood the effect of a clause in the will.
6. There is concern that the testator has not provided adequately for dependants.
7. A later will that comes to light.

CHALLENGING WILLS

To understand the process it is important to consider the usual steps that are taken in dealing with wills.

In some but not all cases, the executor named in the will must obtain probate of the will by making application to the relevant court. A grant of probate gives the executor authority to act. After obtaining probate an executor will be recognised at law as the person who has the right to deal with the assets of the deceased after death.

The usual procedure is that the executor lodges certain documents in the Supreme Court with the Will. If the Court Registrar is satisfied that the

documents are in order and that the will is formally valid, a grant of probate is made "in common form".

This may be contrasted with a grant "in solemn form". This type of grant is made as a result of contentious proceedings that is proceedings in which the Court determines the validity of a will after hearing the evidence. Contentious proceedings arise where there is an application for a grant in common form to be revoked or as a result of a caveat.

From this you can see that there are two main ways to get the Court to hear your side of the story:

- If a grant in common form has not yet been made you can lodge a caveat.
- If a grant in common form has already been made you can apply to have it revoked.

Caveats

In simple terms, a caveat is a warning. It is an entry made in the books of the Court Registry to prevent the Court from issuing a grant of probate without first notifying the caveator or person who lodged the caveat.

There are different types of caveats to be used in different circumstances:

1. Caveats seeking proof of the will in solemn form. These would be appropriate if there were concerns about forgery of the will or doubt about whether the will had been properly signed and witnessed. This type of caveat would also be used where you want to defend a will which is being challenged by someone else. These types of caveats are rarely used in practice.
2. General caveats. These would be appropriate if you wish to challenge a will where there are:

- Doubts about the testator's capacity to make a will.
 - Doubt about the identity of the intended beneficiary.
 - Doubt about the testator's understanding of the content of the will or its effect.
 - Possibly, where there are allegations of duress or someone exercising undue influence over the testator when he or she made the will.
 - Possibly where there are concerns about forgery of the will or whether the will was properly signed or witnessed.
3. Caveats forbidding grants in respect of informal documents. In some circumstances the Court has the power to treat informal documents as wills even though they have not been properly signed or witnessed. This third type of caveat prevents a court from making a grant in respect of such documents without first hearing from a caveator about whether those documents should be treated as a will.

Who can lodge a caveat?

A person who wished to lodge a caveat must have "an interest in the estate". This means that they have to stand to lose or gain something as a result of the Court hearing about the will.

How do I lodge a caveat?

This document is not only lodged with the court but also served on any person who the caveator knows is making or intending to make an application for probate.

A caveat remains in force for six months unless the Court orders otherwise. It is possible to apply for the Court to extend this time.

A caveat may be withdrawn at any time with the permission of the Court.

What happens next?

Where a caveat is in force, a person who is applying for probate is faced with three options:

1. To wait until the caveat lapses. Usually there is little point in doing this because a fresh caveat can be lodged.
2. Commence contentious proceedings.
3. Apply for an order that the caveat cease to be in force. This would be the appropriate procedure if the caveator does not have the requisite "interest in the estate" (See above "Who can lodge a caveat?") or if the person seeking probate is satisfied that the allegations behind the caveat cannot be established by the caveator.

If you are a caveator you should seek legal advice about the technical legal steps which will follow. It is important that you are in a position to give evidence about your interest in the estate and about the allegations you are making, otherwise you could lose the opportunity to have the Court hear your argument and costs could be ordered against you.

REVOKING A GRANT OF PROBATE:

If a grant of probate in common form has already been made the Court has the power to revoke that grant. An example of where you might wish to apply for revocation of a grant is where a later will is found after probate of an earlier will has already been granted. The grounds for revoking a will are very limited. If you have concerns about a will the appropriate time to act is before a grant of probate has been made.

If you wish to have a grant revoked we recommend that you seek legal advice about the technical legal steps involved and the documentation required.

On what grounds could I apply for a grant of probate to be revoked?

There are three main grounds on which a grant of probate can be revoked:

1. Where the grant has been made to the wrong person such as where a later will is discovered.
2. Where the grant is irregular such as where a grant was made even though there was a caveat in force.
3. Where the grant has become ineffective such as where the executor has become mentally ill.

Who can apply to revoke a grant?

Any interested party can apply for a grant to be revoked. Such persons might include:

1. Persons who would be entitled to the estate if there was no will (the law sets out certain categories of persons who are entitled to the estate if the deceased dies without having made a will)
2. Beneficiaries named in the will admitted to probate or a previous will
3. An executor named in the will. (Brett Davies, LawCentral.com.au)