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Challenging or Contesting a Will

Frequently when people learn of the contents of a family member's Will they are upset and disagree with the intentions expressed in that Will. As a result, it is common for lawyers to be asked "How can I challenge or contest this Will?".

There are two fundamental grounds for challenging or contesting a Will. One is that the maker of the Will lacked the capacity to make a Will – legally known as testamentary capacity. Testamentary capacity is defined as the requirement that the maker of a Will understand the nature and extent of his or her assets; and also understand his or her family members and family situation. The older cases referred to an understanding of the natural claimants on the Will maker's bounty.

Testamentary capacity is not an especially high standard and a general understanding of the person's assets and family members is all that is required. In addition, the person must have general mental capacity in terms of an absence of delusions and a very basic level of common sense. It is permissible to be eccentric but not mentally ill.

The other main ground for challenging a Will is undue influence. The Will maker must not have been coerced into drafting his or her Will. While the law will allow pestering or advancing claims by potential beneficiaries; the free will of the Will maker cannot be overcome by coercion as that constitutes undue influence.

Assuming capacity and the absence of undue influence, in Ontario we generally have what is known as "testamentary freedom" to dispose of our estates in any manner we see fit. The exceptions are the Will maker must provide certain minimum benefits to a legally married spouse under the provisions of our *Family Law Act*. Generally speaking a spouse must be treated at least well on death as that spouse would have received on separation and divorce.

The next exception is the obligation of an individual to provide for his or her dependants in his or her Will. If the dependants are not adequately provided for, Part V of the *Succession Law Reform Act* allows dependants to make claims against the estate to receive adequate support. Dependant is defined as immediate family members who the person in question was either providing support to or was under a legal obligation to provide support to before his or her death.

The final exception is that it is possible by way of contract or agreement to obligate one to make a Will a certain way or with certain provisions for the benefit of the other parties to the contract.

So taking into account those above exceptions, once a person's debts, funeral expenses and taxes have been paid, his or her estate can be distributed in accordance with that individual's Will in any manner her or she chooses.



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