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Will Disputes

You have made a valid Will. You now believe your Executor is capable of responsibly administering your Estate and fairly distributing the assets to your beneficiaries according to *your* wishes when the time comes. You believe that this will prevent any dispute over your Will. Unfortunately this may not be the case. Having a Will does *not* mean that there will never be a dispute about your Will.

It is important to keep your Will up-to-date as circumstances change in your life. Consider the following scenarios:

She left me for a younger man

Tom at 60 is financially secure, having sold off a successful franchise business for a handsome profit. However Tom has spent most of his time running the business and Bianca, his wife of 30 years has left him for her younger tennis coach.

Tom and Bianca divorce. Tom makes a new Will after the divorce. He leaves his whole estate to his only grandchild. He feels he has not been supported during this difficult time by his two daughters so he omits them from his new Will.

Tom decides to move on with his life and learn new computer skills. He attends training sessions and develops a relationship with Jane, one of the trainers. They marry a year later. Tom and Jane are involved in a freak car accident, Jane survives but Tom dies.

Can Tom's Will be challenged?

As we know Tom made a new Will after he and Bianca divorced. However, although this may have been a valid Will, as soon as he married Jane this Will was automatically revoked. As far as Jane is aware Tom did not make a Will in contemplation of their marriage, or after their marriage.

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So the answer is no, Tom's Will cannot be challenged because there is no valid Will in existence to challenge.

Without a Will Tom's estate will be distributed according to the rules of intestacy. Tom's children and his second wife, Jane, will inherit shares of the estates as prescribed by state law. The granddaughter will not receive anything.

Under the Family Provision Act 1982 a claim may be made on an estate with or without a Will in existence. Applicants must meet the definition of 'eligible persons' under the Act. The needs of the applicant are taken into account by the Court at the time of hearing evidence showing how the testator left inadequate or no provision out of the estate for the applicant's maintenance, education or advancement. Tom's granddaughter, 2 adult daughters and/ or his widow, Jane may obtain legal advice on the merits of making a Family Provision Act claim.

The years roll on

Tom is now 80, he and Jane are separated (we hope she didn't take up tennis as well) and Tom has employed young Bill to do the gardening, drive him to appointments and attend to his general care. Tom relies more and more on young Bill as his health falters. He has no contact with his 2 daughters and his granddaughter lives in Perth.

Tom makes another Will leaving a life estate to Jane, a legacy of $40,000 to help his granddaughter clear her HECS debt to the government and the rest of his estate to young Bill who is always there for him. However Tom is becoming forgetful.

Shortly after Tom is admitted to a nursing home. Signs of early dementia are recorded. Young Bill makes daily visits to him. Tom dies from complications with. pneumonia.

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Is this Will made recently by Tom valid?

Execution of the Will is checked and it appears to have been properly signed by Tom and two independent witnesses. However it raises two important questions:

- whether young Bill exercised any undue influence over Tom, and
- whether Tom had the necessary capacity to make a Will at all.

Where someone stands to inherit substantially they may have to prove to the Court there was no trickery or pressure put on the testator. Testamentary capacity must be carefully noted at the time of making the Will if there is any doubt on this point. Statements by examining medical staff would assist clarify the question of capacity.

Any challenge to a Will on the grounds of undue influence or lack of mental capacity on the part of the testator may be made before the Will is presented for a grant of Probate in the Supreme Court.

In the actual case of Tonkiss & Anor v Graham & Ors [2002]NSWSC891 the testatrix, Marjorie Thompson, died in 1997 aged 97 years. Her husband, parents and 7 siblings all predeceased her and she had no children.

The Court found that:

- although the testatrix had some history of delusions (concerning people getting into her home) before she moved into a nursing home, there is nothing to show that these delusions impacted on her testamentary capacity.
- The testatrix knew and approved of the gift (even though to the spouse of an attesting witness) and consequently the gift was not void.

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A testator must always make his Will freely. This will not be the case if the testator was subject to any coercion. This does not have to go so far as actual bodily harm.

In the very old case of Winton v Winton it was confirmed that the degree of coercion sufficient to constitute 'undue influence' may vary with the circumstances – and in fact could be very little in the case of an old and feeble testator.

We accept instructions in this area of will disputes from:

1. Will makers seeking advice on making their Will 'dispute-resistant'
2. The Executor of an estate defending a challenge to the Will
3. Clients who believe a Will:
    - has been made by a testator or testatrix lacking mental capacity, or
    - was not made freely but was made under the undue influence of another person
    - may possibly be overturned and wish to discuss the merits of a challenge to the validity of a Will

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