How to challenge a will

This paper is intended to provide practitioners with a roadmap to use when considering the various ways in which a client can look to challenge a will. The paper will look at:

1. the validity of a will;
2. capacity of the testator;
3. undue influence;
4. legal right share of spouses;
5. applications by cohabitants;
6. section 117 claims;
7. claims in estoppel;
8. limitation periods; and
9. costs.

The legal validity of a will

The first step must be to ensure that a will has been validly executed. A will must be in writing and signed by the testator in the presence of two witnesses, who must also sign the will in the presence of the testator. Where witnesses are beneficiaries under the will (or spouses of beneficiaries), the gift will be null and void under s82 of the Succession Act 1965.

Where a will is written partly in pen and partly in pencil, those parts in pencil may be considered to be deliberative only and not intended to form part of the will itself.[1]

A will may be signed by a testator using his or her normal signature, initials or mark.[2] The signature cannot be before a disposition or that disposition will not be admitted to probate.[3] The execution of a will may not be rendered invalid where the signature is on a side or page or other portion of the paper continuing the will on which no part of the will is written above the signature.[4]

Section 78(4) provides:

> *"No such will shall be affected by the circumstances –*
>
> > *(a) That the signature does not follow or is not immediately after the foot or end of the will;*

[1] *In the Goods of Adams* (1872)
[2] *In the Goods of Blewitt* (1880) LR 5 PD 116
[3] Section 78(5) of the Succession Act 1965
[4] *In Re Boylan* [1942] Ir Jur Rep 2

(b) That a blank space intervenes between the concluding word of the will and the signature; or

(c) That the signature is placed amongst the words of the testimonium clause or the clause of attestation, or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, or under, or beside the names or one of the names of the attesting witnesses; or

(d) That the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or

(e) That there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature;

and the enumeration of the above circumstances shall not restrict the generality of rule 1."

It is not necessary for both witnesses to be present together.[5] Where a testator signs before the witnesses are present, he or she can later acknowledge their signature in the joint presence of the witnesses.[6] It can be difficult to challenge the due execution of a will on the grounds that a witness does not remember signing the will because the courts will employ the maxim *omnia praesumuntur rite esse acta* which presumes that all things are presumed to be done in due form.

Capacity of the testator

A testator must be at least 18 years of age or is or has been married and must be of sound disposing mind pursuant to s77 of the Succession Act 1965. Where a dissatisfied beneficiary or claimant wishes to challenge the capacity of the testator, he or she bears the burden of proof of establishing that the testator was not of "*sound disposing mind*" at the time of making the will.

The courts following the test in *Banks v Goodfellow*[7] which prescribes that the testator must:

- understand the nature of the act and its effect:
- understand the extent of the property of which he or she is disposing; and
- be able to comprehend and appreciate the claims to which he or she ought to give effect.

Laffoy J in *Scally v Rhatigan*[8] described the test as:

[5] Section 78(2) of the Succession Act 1965
[6] Section 78(2) of the Succession Act 1965
[7] (1870)LR 5QB
[8] [2011] 1 IR 639

> "…*a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities, whether a testator was of sound disposing mind when the testamentary document which is being propounded was executed."*[9]

On the particular facts of *Scally v Rhatigan,* Laffoy J was satisfied that the testator had testamentary capacity at the time the will was executed despite his severe physical disability and the cognitive limitations.

Undue influence

Where a claimant asserts that the testator made a disposition under a will by reason of undue influence being exercised over him or her, the claimant bears the burden of proof of establishing that the testator's will was coerced so that it overpowered the volition of the testator.

Unlike inter vivos transfers, there is no presumption of undue influence in respect of testamentary dispositions when a presumption of undue influence will arise out of the existence of a fiduciary relationship between the parties.

The evidence of coercion must be strong and clear. Furthermore, without the leave of the court, no evidence can be given of any other instance of undue influence or delusion or mental incapacity at the trial of the action save and except that pleaded before the case set down for trial.

In *Elliott v Stamp*[10]*,* Murphy J decided the nature of the proof to be established and referring to the judgment of Gillen J in *Potter v Potter*[11] stated:

> *"Proof of motive and opportunity for the exercise of undue influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator."*

Legal right share

Sections 111 and 111A of the Succession Act 1965 make provision for the legal right share of a surviving spouse or civil partner. The extent of this legal right share depends on whether or not there are children also surviving the deceased.

[9] Ibid at 647
[10] [2006] IEHC 336
[11] (Unreported, High Court of Justice of Northern Ireland, 5th February 2003)

Where a testator leaves a spouse and no children, the spouse is entitled to one-half of the estate. If a testator leaves a spouse and no children, then the spouse is entitled to a one-third share. S111A confers the same rights on civil partners. However, there is one difference between the legal right share of a civil partner and a spouse; where a child issues a claim under s117 of the Succession Act 1965, s117 (3A) permits a court to disregard a civil partner's legal right share where the child's s117 claim is, in effect, more compelling and it would be "*unjust*" not to make an order under s117 in favour of the child.

Section 112 of the Succession Act 1965 provides that the legal right share of a surviving spouse ranks in priority to all other devises and bequest under a will or shares on intestacy.

The Supreme Court[12] has held that where no provision is made for a spouse in a will, the legal right share is an automatic and the this right vests immediately on the death of the spouse and the surviving spouse does not need to assert his or her right in that regard.

A claim to enforce a legal right share can be brought by way of an administration suit requiring the legal personal representative to administer the estate in accordance with law, and in particular discharging the legal right share. The action is instituted by way of a Special Summons in the High Court or by Equity Civil Bill in the Circuit Court. Any such action must be brought within six years upon which the right to receive the share or interest accrues. Where no provision is made in a will for a spouse, the date of the accrual of the cause of action is the date of death. Where a will does make provision for a spouse but the spouse chooses to elect for his or her legal right share, then the cause of action accrues on the date of election.

A spouse can make an election to a legal right share pursuant to s115 of the Succession Act 1965 within six months of receipt of the notification or one year from the date of the grant, whichever is later.

Applications by cohabitants

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the **Cohabitants Act**) allows a qualified cohabitant to make an application to court for provision out of the estate of his or her deceased partner when the deceased partner has not made any such provision, or any adequate provision, under his or her will or where, by virtue of the rules of intestacy (which do not include cohabitants), the cohabitant has not benefited from the estate of the deceased.

The application may be brought pursuant to s194 of the Cohabitants Act and requires a court to consider certain factors in ascertaining whether or not provision should be made out of the deceased's estate for the surviving cohabitant.

[12] *O'Dwyer v Keegan* [1997] 2ILRM 401

A "*qualified cohabitant*" is defined by s172(1) of the Cohabitants Act as:

> *"…one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other."*

Section 172(5) of the Cohabitants Act provides that where a couple has no children, the Cohabitants Act will only apply to relationships of five years or more. In ascertaining whether or not two adults are qualified cohabitants, a court must also have regard to a number of factors set out in s172(2) of the Cohabitants Act including:

- the length of the relationship;
- the basis on which the couple live together;
- the degree of financial dependence of either adult on the other and any agreements in respect of their finances;
- the degree and nature of any financial arrangements between the adults;
- whether one of the adults cares for and supports the children of the other; and
- the degree to which the adults present themselves to others as a couple.

Once an applicant establishes that he or she is a "*qualified cohabitant*" a court has power to make provision for the qualified cohabitant derives from s194(3) which provides:

> *"The court may by order make the provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard."*

In deciding whether or not to make a provision for a "*qualified cohabitant",* the Court must also have regard to the provisions of s172(4) of the Cohabitants Act and in particular have regard to a number of factors including: whether an order has already been made in favour of the cohabitant under the Cohabitants Act (e.g. an order for financial support); whether the deceased made any provision for the cohabitant under his or her will; the cohabitant's own financial position and the course of financial dealings between the cohabitant; and the deceased during the deceased's lifetime. There is no requirement in the legislation that an applicant seeking relief under the section show that he or she was financially dependent on the deceased.

This application must be brought within six months after representation is first granted under the Succession Act 1965.[13]

The recent High Court decision of Ms Justice Baker in *DC v DR*[14] is the first reported judgment on such an application and provides a detailed overview of the factors that a court must consider in ascertaining whether or not such a provision should be made.

The Court was first required to consider whether or not DR was cohabiting with the deceased. In answering that question, Baker J stated that while the definition of "*qualified cohabitant*" required "*an intimate and committed relationship*" a relationship did not cease to be an intimate relationship merely on account of the fact that it was no longer sexual in nature. It was however a requirement that a relationship had been sexually intimate at one stage.

The Court considered in detail the various criteria outlined in s172(2) of the Cohabitants Act and heard evidence on the nature of the relationship between the parties. The Court found that it was relevant that DR had never made provision for his own accommodation needs outside of the arrangement he had with the deceased and that he commenced a "*committed and long term relationship*" with the deceased in 1995 or 1996. The Court also found that DR and the deceased presented themselves as a couple and that while DR was not financially dependent on the deceased, the deceased had inherited a significant sum in the course of their relationship which resulted in both the deceased and DR leading a fuller life. The deceased and DR played golf together and joined a health club, they ate out in restaurants most evenings and all of these expenses were borne by the deceased. The deceased paid for their holidays and bought each of them new cars. Baker J considered this as a "*relationship cost"* which the deceased incurred:

> *"[It was the deceased] who paid for these extras, which she wished to enjoy and would best enjoy in his company. This is a financial interdependence, albeit it is not a dependence for the basics of life, and the financial interdependence was one that evolved in the context of a significant discrepancy between the income and financial resources of each of the parties"*[15]

The Court was satisfied that there was a degree of financial dependence which arose by virtue of the discrepancy between DR's resources and those of the deceased and that DR was dependent on the deceased for his accommodation needs.

Baker J concluded her analysis by applying what she considered to be the relevant test in determining whether or not the parties were cohabiting:

[13] Section 194(1) of the Cohabitants Act
[14] [2015] IEHC 309
[15] Ibid at paragraph 102

> *"…the test requires the court to determine whether a reasonable person who knew the couple would have regarded them as living together in a committed and intimate relationship, and that the individual and many factors in how they are perceived must be taken into account."*[16]

On the facts, Baker J was satisfied that DR and the deceased were cohabitants and that DR was a "*qualified cohabitant*" for the purposes of the Cohabitants Act.

The Court then went onto consider DR's application for provision out of the estate of the deceased.

Although the deceased did not have any will, she had created a document in which she expressed her desire as to how she wanted her estate distributed. The Court felt that although this document was not a valid will, it did demonstrate her intent.

In ascertaining what provision should be made, Baker J considered that she was required to look at whether or not any provision had been made for the cohabitant on the death of the deceased and view any such a provision against what provision a court would consider to be appropriate in the circumstances of a surviving cohabitant. Baker J also considered the Cohabitants Act as forming *"part of the nexus of family and succession legislation and that some assistance can be derived from the jurisprudence of the courts under s.117 of the Succession Act 1965"*.[17] The Court was restricted by the provisions of s194(7) of the Cohabitants Act which restricted the amount of any provision to a "*qualified cohabitant*" to that which he or she would have received had they been married. In this instance, as the deceased had died intestate, if DR had been married to the deceased, he would have inherited the entire of her estate.

The Court placed weight on the document that the deceased had prepared prior to her death where she indicated that she wished to give her dwelling house, which had been her family home, to her brothers and wished to give her investment properties and a cash gift to DR, with other gifts to the remainder of her family. The Court felt that it was just and equitable to have regard to the wishes of the deceased although the Court did highlight that this was only one of a number of factors guiding its discretion.

The net effect of the decision of Ms Justice Baker was to award DR approximately 45% of the deceased's estate. Ms Justice Baker was careful to emphasise that her decision did not amount to a rule of thumb as to the percentage to be applied in deciding what was "*proper provision*" and that a greater or lesser percentage may be appropriate in other circumstances.

Section 117 claims

[16] Ibid at paragraph 107
[17] Ibid at paragraph 128

The essence of a s117 claim is that the "*testator has failed in his moral duty to make proper provision for the child in accordance with his means*"[18] and a court must consider the "*application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the Court may consider of assistance in arriving at a decision that will be as far as possible to the child to whom the application relates and to the other children*"[19].

The test for determining a s117 application is that as set out by Kenny J in *FM v TAM*[20]:

> *"It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to the surviving spouse or the value of the legal right if the survivor selects to take this, (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death, (c) the means of the testator, (d) the age of the child whose case is being considered and his or her financial position and prospects in life, (e) whether the testator has already in his lifetime made proper provision for the child. The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."*

The courts face most difficulty in determining whether there was failure of moral duty on the part of the testator. The Supreme Court in *In the Estate of I.A.C.*[21] stated:

> *"It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty must be established."*

Kearns J in *In the Estate of ABC deceased XC, YC & ZC v RT, KU & JL*[22] set out very detailed guidelines that might apply in determining a s117 application:

> *"(a) The social policy underlying s117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents against the failure of parents, who are unmindful of their duties in that area.*

[18] Section 117(1) of the Succession Act 1965
[19] Section 117(2) of the Succession Act 1965
[20] [1972] 106 ILTR 82
[21] (1989) I.L.R.M. 815
[22] [2003] 2 IR 250

(b) What has to determined is whether the testator, at the time of his death, owes any moral obligation to the applicants and if so, whether he has failed in that obligation.

(c) There is a high onus of proof placed on an applicant for relief under Section 117 which requires the establishment of a positive failure in moral duty
(d) Before a court can interfere there must be clear circumstances and a positive failure in moral duty must be established.

(e) The duty created by Section 117 is not absolute.

(f) The relationship of parent and child does not itself and without regard to other circumstances create a moral duty to leave anything by will to the child.

(g) Section 117 does not create an obligation to leave something to each child.

(h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.

(i) Financing a good education so as to give a child the best start in life possible, and providing money, which if properly managed, should afford a degree of financial security for the rest of one's life does amount to making proper provision.

(j) The duty under Section 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.

(k) A just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations e.g. to aged and infirm parents.

(l) In dealing with a Section 117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm he will ultimately become the owner of it thereby causing him to shape his upbringing, training and life accordingly.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers both as to when to make provisions for an applicant child and as to the nature of such provision such powers must not be construed as giving the court a power to make a new will for the testator.

(q) The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff.

(r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."[23]

The Supreme Court has held that the moral duty extends only to the child of the testator and not to the grandchild of the testator; *EB v SS*[24].

As mentioned above, any order by a court under s117 must be made after a spouse's legal right share has first been discharged but this is not the position for the legal right of a surviving civil partner.

Claims in estoppel

A claim in proprietary estoppel arises where a representation is made to a person that they will be entitled to property if they act in a certain way and the person then acts in this way, to his or her detriment.

The conditions necessary for establishing a claim in proprietary estoppel as set down by *Snell's Equity* applied here are as follows[25]:

1. Detriment.
"There is no doubt that for proprietary estoppel to arise the person claiming must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment."

2. Expectation or Belief.
"A must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest."

[23] Ibid at 263
[24] [1998] 4 IR 527
[25] *Haughan v Rutledge* [1988] IR 295 and *McDonagh v Denton* [2005] IEHC 127

3. Encouragement.

"A's belief must have been encouraged by O or his agent or predecessor in title."

4. No bar to the equity.

"No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty."

Limitation periods

- Section 126 of the Succession Act 1965 provides that an action in respect of any claim to an estate of a deceased person or to any share or interest in an estate, whether under a will or intestacy, must be brought within six years from the date the right to receive the interest accrues. Where fraud or mistake is alleged, the cause of action does not accrue until the fraud or mistake was, or could with reasonable diligence, been uncovered.[26]

- A s117 application must be made within six months from the date of the extraction of a grant of probate or a grant of administration with the will annexed, rather than the date of a limited grant[27].

- A spouse can make an election to a legal right share pursuant to s115 of the Succession Act 1965 within six months of receipt of the notification or one year from the date of the grant whichever is later.

- An application brought pursuant to s194 of the Cohabitants Act must be brought within six months after representation is first granted under the Succession Act 1965.

- The accrual of a cause of action in promissory estoppel begins when all of the necessary elements of a claim for promissory estoppel are present. A claim in promissory estoppel arising out of an enforceable promise by a person to leave property by will, is a claim which can properly be characterised as one which survives against the estate of that person under s9 of the Civil Liability Act 1961; *Cavey v Cavey & ors*[28].

- A claim which exists against the estate of a deceased person at the date of his or her death must be brought within the period of limitation for that claim, or within two years of the date of death of the deceased, whichever first expires.[29]

[26] Sections 71 and 72 of the Statute of Limitations Act 1957
[27] Section 117(6) and In the Matter of the Estate of F. Deceased (High Court, Laffoy J, 23 August 2013)
[28] [2014] IESC 16
[29] Section 9 of the Civil Liability Act 1961

Costs

As long as the case is stateable and not frivolous or vexatious, then the applicant will be entitled to his or her costs from the estate. The Supreme Court in *Elliot v Stamp*[30], which concerned a challenge to the testamentary capacity of the testator and that the will was procured by the duress or undue influence. The plaintiff withdrew the claim in relation to testamentary capacity and proceeded on the claim of undue influence only. The High Court upheld the will and held that the deceased was of sound mind and that no undue influence or duress had been exercised on the testator. However, the High Court awarded the plaintiff one third of her costs, to be paid out of the deceased's estate. On appeal from the Supreme Court, the plaintiff argued she should have received her full costs from the estate. In reply, the defendants argued that the Court had discretion not to award costs to an unsuccessful plaintiff when an executor has disclosed all relevant information to that Plaintiff prior to hearing. The Supreme Court stated that in the first instance, in considering whether an unsuccessful litigant could recover his or her costs from the estate, the questions to be considered were:

(a) Was there reasonable ground for litigation? and
(b) Was it conducted bona fide?

The Supreme Court also stated that a special jurisprudence in relation to costs was developed in this jurisdiction for the reasons so eloquently expressed by Budd J in *Vella v Morelli*[31], whereby he stated:

> *"In our country the results arising from the testamentary disposition of property are of fundamental importance to most members of the community and it is vital that the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion. Accordingly, it would seem right and proper to me that persons having real and genuine grounds for believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy costs. It would seem to me that the old Irish practice was a very fair and reasonable one and was such that, if adhered to, would allay the reasonable fears of persons faced with making a decision upon whether a will should be litigated or not. If there be any doubt about its application in modern times, these doubts should be dispelled and the practice should now be reiterated and laid down as a general guiding principle bearing in mind that, as a general rule, before the practice can be operated in any particular case the two questions posed must be answered in the affirmative."*[32]

[30] [2008] IESC 10
[31] [1968] IR 11
[32] Ibid at 35-36

The Court went on to hold that following an action challenging the validity of a will, the Court had a discretion to award an unsuccessful plaintiff her full costs out of the estate of the deceased, provided that there were reasonable grounds for the litigation and provided the action was conducted bona fide. The Supreme Court went to on state that should a court decide to award only partial costs to an unsuccessful plaintiff in such matters, the basis for such decision should be clearly stated.

The same principles do not apply to costs in administrative actions. In *O'Connor v Markey & Markey*[33] Herbert J considered the appropriate test for the award of costs in an administrative action as that applied by Kekewich J in *Buckton v Buckton*[34], and in doing so identified different categories of claims and whether costs should be awarded in each:

(1) An application made by personal representatives asking to answer a question which arises in the course of the administration of the estate; in such circumstances, the costs of all parties, which are necessarily incurred for the benefit of the estate, should be paid out of the estate;

(2) An application made by the beneficiaries as a result of difficulty of construction or administration of the will, which would have justified an application by the personal representatives; as the application is necessary for the administration of the estate, the costs of all parties, which are necessarily incurred for the benefit of the estate, should be paid out of the estate.

(3) An application made by beneficiaries adverse to the claims other beneficiaries. Such litigation is adversarial in nature and, subject to the Court's discretion, the unsuccessful party bears the costs of those whom he or she brings to Court.

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[33] [2006] IEHC 219
[34] [1907] 2 Ch. 406