

WILL CHALLENGE/TRADITIONAL GROUNDS

- 1. Lack of Testamentary Capacity**
- 2. Undue Influence**
- 3. Non-compliance with requirements of due execution (signed, two witnesses in presence of testator)**
- 4. Lack of knowledge and approval**
- 5. Forgery of Fraud (less common)**

SUSPICIOUS CIRCUMSTANCES

Not a separate ground for challenging Will:

“The effect is to rebut a presumption that with due execution, the testator knew and

**approved of contents of Will and had the
necessary capacity”**

TESTAMENTARY FREEDOM

A Will does not have to be fair:

Exception - Dependant Support Claim

- FLA Spousal Election

Query: Is testamentary freedom a myth?

WILL INTERPRETATION APPLICATIONS

- 1. Will is not challenged per se**
- 2. Competing or contrary provisions**
- 3. Nonsensical provisions/impossible to
understand**

4. How do the courts approach a “broken down” Will?

Process

- 1. Executor applies to the court for opinion, advice and direction of court in interpreting offending provisions**
- 2. Executor takes neutral stance - Presents facts and law to the court**
- 3. Beneficiaries argue their respective positions**

GENERAL PRINCIPLES

Traditionally – the courts asked:

“What are the *expressed intentions* of the testator?” Strict constructionist approach adopted. What is the meaning of the words used by testator having regard to the whole of the Will (“Four Corners of the Will”)

Modern Approach

Courts have become more lenient. Willing to consider extraneous evidence (i.e. outside of Will), as an aid in interpreting a Will

Cautionary Note: If after the process of interpretation and all relevant evidence has been admitted, the meaning of the provision cannot be determined... the provision fails for uncertainty

ORDINARY OR PLAIN MEANING OF WILL (Starting Point)

“Ordinary” or “plain” meaning of the words used:

“In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the courts in the interpretation of other wills.

It is to be remembered that such rules of construction are not rules of law and that if their application results in attributing to the testator an intention which appears inconsistent with the scheme of the will as a whole, then they are not to prevail.”

WHOLE WILL READ IN CONTEXT

The intention of the testator is to be collected from the Will as a whole

Particular words and phrases are not to be read in isolation from the entire context of the Will

EFFECT TO BE GIVEN TO ALL WORDS

When interpreting an ambiguous or uncertain clause, the court will:

- strive to give effect to all the words used by the testator in the clause**
- unless the result is contrary to the testator's plain expressed intentions in other parts of the Will**

PRESUMPTION AGAINST INTESTACY

The testator is presumed to have intended to die testate (with a Will)

The court will read a Will so as to avoid an intestacy

If Will is capable of two constructions, the court will prefer the construction that avoids intestacy

PRESUMPTION OF RATIONALITY

A testator is entitled to be capricious in disposition of property. Nevertheless, the court presumes that the testator did not intend capricious, arbitrary, unjust or irrational consequences to flow from disposition

This presumption is frequently relied on in finding an error or omission that the court is willing to correct

EVIDENCE OF SURROUNDING CIRCUMSTANCES

Courts will now admit evidence of surrounding circumstances immediately (traditionally last resort)

The courts “sit in the testator’s armchair” so as to better assign to the words used the meaning the testator intended the words to bear (as opposed to testator’s intention)

Surrounding circumstances fleshes out meaning (see Case Study)

EVIDENCE OF TESTATOR’S INTENTION

Evidence of the testator’s actual intention will not be admitted unless there is a latent ambiguity:

- Written or oral statements, memorandum giving instructions for the will, or a prior will excluded

Latent ambiguity = two or more subjects or objects of a gift which the description to the Will applies equally (car example)

CASE STUDY OF A "BROKEN DOWN WILL"

Principal Beneficiaries

- 1 Son**
- 2 granddaughters**
- 3 great-grandchildren (minors/OCL)**

Great-Grandchildren

Issue: Whether testator intended to include all of his great-grandchildren in his Will

Paragraph 7 of the Will reads as follows:

“Any reference in this my Will, or in any Codicil hereto, to a person in terms of a relationship to another person determined by blood or marriage shall not include a person born outside marriage nor a person who comes within the description traced through another person who was born outside marriage...”

Granddaughter # 1

Her only child born “outside marriage”

- Michael excluded?

Granddaughter # 2

Two children: Chasin was born “outside marriage”; Cierra born after parents married

- Chasin excluded?

- Cierra included?

However, Michael (outside marriage) referred to directly in Will. So... is he included or excluded from Will?

Issue before the Court

“Having regard to the provisions and the language of the Will as a whole, did the testator intend to include all of his great-grandchildren living at his death as beneficiaries of his estate?”

Result

1. The drafting solicitor admitted, under x-examination, that the “outside marriage”

**clause was a standard clause in his Will
template:**

- included mechanically**
- impact on the gifting provisions on the
great-grandchildren not considered**

Court considered clause drafting error

- struck out (discretion)**

**2. Looking at the Will in its entirety (not
evidence of outside intention):**

**Reference to great-grandchildren is replete
throughout Will**

Michael referred to directly

**Chasin excluded & Cierra included/non-
sential**

Intended to include all great-grandchildren

(3) Surrounding Circumstances

**Sitting in the “armchair of the testator” and
looking at the “surrounding circumstances”**

What did the court see:

**Two of the testator’s grandchildren
born “outside of marriage”, including
Michael**

**Michael specifically referred to in the
Will**

Brother/Sister at odds

**Meaning to be ascribed to “great-
grandchildren”?**

- born inside or outside of marriage.