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Cash

Bitter legacy

Family squabbles beyond the grave

Challenging a will has never been easy, but more recent cases have offered some hope. Nick Kettles reports

Sunday February 15, 2004

[The Observer](#)




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When Joan's frail father dies her half brother will inherit his entire estate, including her late mother's personal belongings. 'I have tried many times to resolve my differences with both of them,' says Joan. 'But it's hard not to sound bitter or avaricious. I can live without his money, but I am sure my mother would have wanted me to have some of her personal effects, including her family jewellery.'

Joan's predicament is not uncommon. It is possible the executor of her mother's will may look favourably on a request to pass over her mother's personal papers and photos. Any claim for assets of monetary value however, would require her to undertake legal proceedings as defined by the 1975 Inheritance (Provision for Family and Dependents) Act unless her half brother was prepared to vary the will in her favour.

Until recently, the Act did not provide people like Joan with much hope of success in challenging their parents' will, even if the reasons for their exclusion were acrimonious, or simply neglect. The simple fact is English law recognises that a testator (the person who makes a will) can leave his estate to whomsoever he wishes. Provided that a will was valid and the testator was of sound mind, unless the will has been revoked (either by the testator or, for example, by his later marriage) it continues to be effective even if the testator becomes mentally incapable after making the will.

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Whereas the 1975 Act often offered minor children a good chance of making a claim, it required excluded adult children to prove they were partly or totally financially maintained by the person who has died, leaving little room for independent adult children.

However, the precedent set by a series of cases during the Nineties has offered some hope. Julie Marson, senior partner at Moody and Woolley, a firm of solicitors in Derby, says: 'One now has to look at each case on its merits, paying particular attention to the guidance given by the judges via Section Three of the Act, which sets out the matters to which the Court should have regard. By going back to the original the judges have narrowed its interpretation and widened its application, making it more possible for an adult child to claim.'

For example, a 25-year-old illegitimate child who was excluded from his father's will was given £50,000 for housing on top of £9,000 for a plumbing course, on the grounds he had not had any assistance when he left school, and, that he also now had a co-habitee and dependent child of his own.

Claimants should consider their position carefully though, before they instruct a solicitor. When coming to a decision a court will also consider the financial position of other parties who would be affected, the size and nature of the estate of the deceased, any physical or mental disability of the applicant and any other matter, including the conduct of the applicant, which the court thinks is relevant.

Indeed, there is a thin line between exclusion and mere greed. Special circumstances might not be looked on favourably if the claimant is simply trying to increase their share of the estate.

In 2003 a 45-year-old daughter failed when she sought further provision from her deceased mother's estate. The will had divided the estate equally between herself and her nephew, but her entitlement had been reduced to take into account £200,000 advanced under an Order of the Court of Protection during the mother's lifetime.

She claimed she had developed anorexia at boarding school, which had disrupted her career and impelled her to spend money on cosmetic procedures. The judge said she hadn't been able to establish that the disposition under the will was not reasonable as she had been adequately provided for by the advance. He said her problems were of her own making.

People risk having to foot the bill if their challenge is unsuccessful - far better to seek a resolution before parents die. If this cannot be done, potential claimants will have to rely on the goodwill of other beneficiaries, to ensure their parents do not succeed in exerting control from beyond the grave.



Christopher Green, a solicitor with Eddowes, Simm and Waldron of Ashbourne, cites an example when two out of five children were excluded from their parents will: 'The three beneficiaries were unanimous that the other two had been unfairly left out. They signed a deed of post-death variation to include them as equal beneficiaries.' A deed of post-death variation, if made within two years of death, can also be entered into to alleviate Inheritance and Capital Gains Tax.

And for parents considering excluding a child from their will, possibly on the grounds of diminished responsibility, or feckless behaviour? It might just be better to set up a discretionary trust fund instead, with trustees who can decide how much is given and when, if at all. After all, the noblest vengeance is to forgive.

How - and when - to fight the good fight

You can lodge a 'caveat' at a probate registry to stop probate or letters of administration being granted if:

- you think there is something wrong with the will; or
- someone is applying for letters of administration when they don't have the right to.

It is difficult to prove the will is invalid because the person was mentally incapable when they made the will; or they made the will under undue influence from some other person. You would normally need medical evidence to show they were mentally incapable.

Other potential claimants include:

- any person who was living in the same household as the deceased throughout at least two years prior to death;
- a child who was treated as a child of the family (normally stepchildren);
- any person who immediately before the death of the deceased was being maintained by the deceased.

Claims must usually be made within six months of the grant of probate.

More information

www.legal-advice.co.uk

www.thewillsite.co.uk

[The Law Society](#)

Names have been changed.



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