



# A Conversation About Estate Disputes: Part 1 – Knowledge and Approval

## **Disputing a Will: Knowledge and Approval in Estate Litigation**

Every person is allowed the freedom to distribute their assets according to their wishes documented in a Will before they die. This is called “testamentary freedom”. Despite this freedom, there are also many ways a Will can be challenged. One way a Will can be challenged is by contesting its validity on the basis that the testator (the person making the Will) did not understand or approve the Will. This article specifically focuses on contesting the knowledge and approval required by a testator for a valid Will.

### **What is knowledge and approval?**

Knowledge and approval refers to a mental test of a testator when making a Will. This must not be

confused with capacity. Rather than considering whether the testator had general capacity to make a Will, the test for knowledge and approval is much narrower and can be answered by considering:

1. **Did the testator *know* what they were gifting under their Will?**
2. **Did the testator *approve* of the gifts made under their Will?**

This test is two-fold.

A testator considered to have sound testamentary capacity can still fail the two-fold test of knowledge and approval in circumstances such as:

- Complex gifts made under the Will that the testator didn't understand;
- Poor drafting of the Will leading to general confusion; and
- A testator being vision impaired.

This list is not exhaustive.

### **The presumption of knowledge and approval**

A presumption exists that if a Will was read by a testator, or read to a testator, then the testator knew and approved of the contents of their Will. This presumption can only be rebutted by compelling evidence.

The burden to prove that a testator did not have knowledge and approval of the contents of the Will resides with the person challenging the validity of the Will. If you are challenging a Will, this means that you will have to show that the testator did not have knowledge and approval of the contents of their Will, subsequently making the Will invalid. If you are defending a claim, it is up to the other side to rebut this presumption.

### **What evidence can rebut the presumption?**

The presumption of knowledge and approval can be rebutted by evidence showing suspicion or doubt as to whether the Will expresses the true intention of the testator. A Court may consider the following evidence in making such a determination:

- The circumstances surrounding the preparation of the Will;
- Whether a beneficiary under a Will was involved in the preparation of the Will;
- The extent of any physical or mental impairment of the testator;
- Whether the Will significantly deviates from a prior Will; and
- Whether the Will is logical.

This list is not exhaustive.

If the presumption of knowledge and approval is rebutted by evidence arousing suspicion, the onus will shift to the other side to rebut the suspicion. The other side will need to prove that the testator

did in fact know and approve of the contents of the Will.

### **How is knowledge and approval usually established?**

The best evidence to prove knowledge and intention is to show that a Will was read by or to the testator, and that the testator confirmed their understanding of its contents and effect.

The following can also assist in establishing knowledge and approval:

- Instructions from the testator were obtained;
- A draft Will was prepared;
- An opinion on the testator's capacity was formed.

### **What are the consequences of failing to prove knowledge and approval?**

Failing to prove knowledge and approval can result in a Will being deemed invalid by a Court, or severance of particular parts of a Will that a Court considered did not have the knowledge and approval of the testator.

If a Court finds that a testator knew and approved of only part of a Will, then a Court will sever the parts not known and approved by the testator. If severing these parts results in the Will not reflecting the intentions of the testator, then severance will not be permitted and the Will not admitted to probate. If a grant has already been applied for, this will be revoked.

If a Will is declared invalid and there is an older valid Will, the Court may order that this Will is validated. If there is no other Will, the Court may declare the deceased estate be distributed according to the laws of intestacy.

### **How can Andersons help?**

Andersons Solicitors have an experienced [Wills and Estates team](#) to advise you should you wish to contest a Will, or if you are defending a claim made against an estate. Please contact us to make an appointment or call to discuss your legal needs.

### **Want to find out more about disputing a will?**

Over the coming weeks, we will be publishing a series of articles titled 'A Conversation about Estate Disputes', Stay tuned for the next article in the series, Part 2 - Undue influence and what occurs when it's believed that a Will was executed under undue influence.

Or you can [read more about contesting or disputing a Will here.](#)