



# Contesting a Will: Legal Grounds and Proceedings

Produced in partnership with Alfred Ip of Hugill & Ip



The law in Hong Kong confers testamentary freedom, which means we are free to leave our estates to anyone we choose, be it family, friends, or even total strangers and charities. While there is testamentary freedom in Hong Kong, the law also recognizes the need for an individual to make financial provisions from his/her estate for surviving spouses or individuals who were dependent on the testator during their lifetime. It is also often that we see disappointment among those who expected to inherit more from the testator, or are disinherited completely. In such situations, it is possible to contest the Will, but what are the grounds on which a Will may be contested, and what is the procedure and legal grounds behind it?

## Common Grounds

There are several grounds on which the validity of a Will may be contested, including:

**Want of due execution** – pursuant to [Section 5 of the Wills Ordinance \(Cap. 30\)](#), a Will is only valid if:

1. the Will is in writing and signed by the testator, or by another, pursuant to his/her directions in his/her presence;
2. the testator intended for his/her signature to give effect to the Will;
3. at least two witnesses must be present at the time of the testator signing his/her Will;
4. the two witnesses must also attest and sign the Will, or acknowledge their signature.

It is important to note that beneficiaries to the Will and their spouses should not be witnesses to the Will, as the gift intended for them will be forfeited.

We have also discussed in a previous article "[Pitfalls of Homemade Wills](#)", that homemade Wills can often be contested on their validity for the want of due execution.

The importance of due execution was challenged in the case of *Marley v Rawlings and Anor* [2014] UKSC 2. In the case, a married couple wrote and signed identical Wills, with the intention of leaving their estates to each other, or in the event of the other having already died, to Mr. Marley as the residuary beneficiary. The problem arose when both testators had died, and the validity of the Wills were challenged by the two sons of the testators, who would have inherited the estate on intestacy. Due to an oversight from their solicitor, the testators had signed each-others' Will;

the testators themselves had not signed their own Wills. The UK Supreme Court allowed the appeal, holding that the formality requirements of the Wills Act 1837 - equivalent to the Wills Ordinance in Hong Kong - was met (i.e. the Wills were signed by the testator in the presence of two witnesses and unambiguously intended by the testator to be his/her Will) and therefore could be rectified. While the judgement may have widened the definition of a “clerical error” and introduced an element of uncertainty into probate, the Court placed emphasis on ascertaining testamentary intention.

**Lack of testamentary capacity** – the testator should be of sound mind, memory and understanding. The 1870 case *Banks v Goodfellow* remains the classical approach in determining testamentary capacity, inquiring into whether:

1. the testator understood the nature of the act of making a Will and its effects;
2. whether he/she understood the extent of the property of which he/she was disposing; and
3. whether he/she was able to comprehend and appreciate the claims to which he/she ought to give effect.

We have discussed in depth the view of the Hong Kong Court of Final Appeal in [a previous article, regarding the Estate of Au Kong Tim](#) (FAMV No. 47 of 2018).

**Undue influence** – where a testator was actively coerced into making a Will. The Supreme Court of Hong Kong High Court in the case *Ma Po Chim & Ors v Mar Lok Shan & Ors* [1992] HKCU 335, citing *Williams’ Laws Relating to Wills (6<sup>th</sup> Edn)*, that the party bringing such a claim must have “positive proof of coercion overpowering the volition of the Testator.” However, “the person who affirms the validity of the Will must show that there was no force or coercion depriving the testator of his/her judgement and free action and that what the testator did was what he/she desired to do” and that “the act of the testator in making the Will or gift must be inconsistent with any hypothesis but undue influence.”

**Fraud** – where a testator has been deceived into signing his/her Will. Similarly, to undue influence, the burden of proof rests on the party bringing the claim.

**Forgery** – where the Will of the testator has been forged either in whole or by their signature, it can be contested to be invalid. It differs from fraud as the testator will likely not have been involved in creation or signing of the Will. Again, the burden proof if alleged is on the party contesting the Will, and is difficult to prove.

## Contentious Probate proceedings: How to contest the validity of a Will

### Common Form vs Solemn Form

You may have heard of the terms ‘common form’ and ‘solemn form’ when referring to the grant of probate. But what does it really mean? In essence, once the executor of the deceased’s estate has applied to the Probate Registry for a Grant of Probate of the Will, and completed the relevant steps, the Will is considered to be proved in **common form**. Once a grant of probate has been contested in Court, the Will becomes proved in **solemn form**. The distinction between the two lies in the fact that a grant in common form is revocable, whereas a grant in solemn form is not revocable, save for two instances – where the grant was obtained by fraud, or if the existence of a later Will becomes known.

### Entering a Caveat

Typically, an individual who is opposing a Will shall enter a preliminary caveat in the Probate Registry. To launch a caveat means that an official probate cannot be completed and issued without first notifying the caveator and resolving the dispute. A caveat remains in force for six months and can be renewed.

## Action for the Revocation of a Grant

Where a Will has been proved in common form, an action for the revocation of the grant may be lodged on the abovementioned grounds by issuing a writ, indorsed with a statement of the nature of the interest of the plaintiff and the defendant in the estate of the deceased. A statement of claim may be attached to the writ, or may be filed later on. All beneficiaries under the Will, in addition to the administrator/administratrix must be named as parties to the action. It is important to note that apart from lodging an action on the grounds of fraud, which has no time limit, all of the abovementioned common grounds for contesting a Will have a time limit of 12 months from the date of death.

All parties who have acknowledged the service of the writ must swear an affidavit that:

1. describes any known Will of the deceased; and
2. where any known Will of the deceased is not in possession or control of the individual swearing the affidavit, he/she must give the name and address of the individual who he/she knows to be in possession or control of the Will.

The burden of proof rests with the party that seeks to propound the Will in question, even if probate in common form has been granted.

## Summing up

Regardless of your situation – whether you are looking to contest the validity of a Will or looking to claim reasonable financial provisions – it is very likely that it will be a highly complex issue, so it is important to discuss all possible courses of action in full with your Probate lawyer before proceeding with any claim.



## AUTHOR

### Alfred Ip

Partner, Hugill & Ip

A qualified solicitor in Hong Kong since 2000, Alfred's speciality is dispute resolution, an area in which he is ranked by Chambers & Partners Asia Pacific as a 'Leading Individual'. Until recently he was partner in the Dispute Resolutions team and head of Private Client at a leading Hong Kong law firm.

Alfred is skilled in helping individuals and their families manage personal and wealth-related matters, including trust and probate (both contentious and non-contentious), family office, and mental capacity issues.

He is vastly experienced in all areas of probate and can help clients with estate planning, ranging from the proper drafting of a will to constructing complicated trusts, airtight from any potential perils.

Alfred is appointed by court as an administrator in estate disputes, and advises professional administrators on legal aspects of estate administration, both in Hong Kong and internationally.

In contentious cases, he acts for clients in probate actions, ranging from propounding the Will to having an executor removed. For clients requiring help in estate administration problems such as declaratory relief or disclosure of account, Alfred will apply to Court for the necessary directions and orders.

Alfred's professional skills are enhanced by his membership of the Society of Trust and Estate Practitioners ("TEP"), and of the Chartered Institute of Arbitrators. He is a CEDR accredited Mediator and a Notary Public.

In 2012, he won the Law Society of Hong Kong's Gold Award for services to the community for his pro bono initiative, "FreeWill", and he has received several pro bono service awards since.

In addition to his Private Client practice, Alfred has 20 years of experience in commercial litigation and dispute resolution. Moreover, he helps clients with issues regarding family law.

In March 2017, Alfred was appointed to sit as a Deputy District Judge.

Alfred is Director of Pink Alliance.

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