


# Contesting a Will without a Lawyer

The DIY guide for Canadians




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**Self-Counsel Press**  
*(a division of)*  
International Self-Counsel Press Ltd.  
Canada USA

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Self-Counsel Press acknowledges the financial support of the Government of Canada for our publishing activities. 

Printed in Canada.

First edition: 2018

### Library and Archives Canada Cataloguing in Publication

Butler, Lynne, author

Contesting a will without a lawyer : the DIY guide for Canadians / Lynne Butler.  
(Legal series)

Issued in print and electronic formats.

ISBN 978-1-77040-305-5 (softcover).—ISBN 978-1-77040-498-4 (EPUB).—

ISBN 978-1-77040-499-1 (Kindle)

1. Wills—Canada—Popular works. 2. Probate law and practice—Canada—Popular works.  
I. Title. II. Series: Self-Counsel legal series

KE808.B88 2018

346.7105'4

C2018-904033-5

KF755.B88 2018

C2018-904034-3

### Self-Counsel Press

(a division of)

International Self-Counsel Press Ltd.

Bellingham, WA  
USA

North Vancouver, BC  
Canada

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## Introduction

There are hundreds of ways in which the estate of a deceased person can end up in a fight. Sometimes a complex legal issue comes up and can only be resolved by a judge. In other cases it's a matter of people not being able to settle specific but important issues. Despite there being so many ways for estates to fall apart, there are not many ways to resolve the disputes. There is no government estate department or agency whose job it is to ensure that estates run properly. Many estate disputes end up in court.

The purpose of this book is two-fold. One is to inform you about the types of lawsuits that touch on estates and what is involved in each of them, to help you decide whether or not you want to begin the process of suing someone due to an estate dispute. Starting a lawsuit is a serious matter and you need to think it through with the facts at hand. The other purpose is, for those who decide to go ahead with litigation, to help you navigate the paperwork and the courts.

In this book, I do not encourage people to sue each other, nor do I attempt to talk anyone out of it. Estate litigation is an enormous undertaking that is not to be taken lightly. It's expensive, time consuming, and often ugly. However, I fully understand that sometimes it is necessary or advisable to sue an estate or contest a will.

In this book, I strive to be straightforward and factual. I was first called to the bar 31 years ago and have always practiced in the area of wills and estates. I have handled many estate lawsuits in that time and I hope to lend my experience to those of you who are working on such cases without a lawyer. Even those of you who are working with lawyers will find this book useful as it will explain things that your lawyer won't have the time to explain. It will show you samples of the documents used in such cases with explanations of why those documents are being prepared. This should help you save a great deal on your legal fees as you will be better

prepared for your meetings with your lawyer and will use less of his or her time.

While there will be discussion of the idea of suing an estate that is intended to guide you through a sensible decision-making process, this book will also provide specific help. There will be samples of the forms needed in each province and territory to get matters into court, and checklists to ensure you stay on track.

This book does not cover defending against someone who is contesting an estate. This book is about launching the lawsuit and how to approach the various steps you will

need to take to move your lawsuit through the legal system. However, the information in this book will be helpful to anyone, either launching a lawsuit or defending one, to understand the legal process and to anticipate next steps.

In this book, I don't include information about estates in Quebec. This is because all provinces and territories in Canada use a common-law legal system except for Quebec, which has a civil code. Quebec's laws, processes, and forms are all very different from those in the rest of the country.



# 1

## The Why: Pros and Cons of Suing an Estate

Before getting started on a lawsuit, read this section about the upside and the downside of starting litigation. What is it that you want from the will challenge? What can you expect to achieve, and what will it cost you in terms of time, money, and emotional strain to reach that goal? Be realistic about your situation, your motivation, and your prospects for a positive outcome. Though estate litigation is among the most emotional litigation you will ever experience, do your best to take the emotion out of the equation and look at the situation as objectively as you can.

In this chapter, you will find some of the most often-heard reasons that people commence lawsuits against estates. Some of them will apply to you and some will not. You will also find a list of what many people find to be the downside of estate litigation. Again, many will apply to you. We are discussing these topics here to help you clarify what you can expect from suing an estate and decide whether it is the best way for you to go.

### 1. Potential Upsides of Suing an Estate

#### 1.1 Principles

Many people feel that whatever has happened to derail an estate is the result of someone acting in a way that is selfish, greedy, or even criminal. They believe that they cannot live with themselves if they do not attempt to right the wrong that has been done. Often litigants will say that even if they lose the case, they will have done all they can to put things right. In other words, they are not trying to gain financially; they are trying to stop someone from taking something that does not belong to him or her or from acting in a way that should not be tolerated. They have to act according to their conscience.

For example, an executor might take charge of an estate but then not distribute the estate for years. The executor moves into the deceased's home without paying rent,

drives the deceased's car, and won't tell anyone what's happening with the estate. After months or even years of this, the beneficiaries get fed up and want the executor to stop abusing the estate. At that point, the beneficiaries just want the executor to be fair and to give answers. Cases like this are not usually about whether the beneficiaries get anything themselves — or at least are not just about that — but are about forcing the executor to do the job he or she is supposed to be doing.

In cases like this, whether it is the executor or a beneficiary or some other party who is acting improperly, it gives the other parties closure and peace if they personally take steps that result in a positive outcome.

## 1.2 Stopping abuse or fraud

There are tens of thousands of cases in our country of adult children taking advantage of aging parents and grandparents. This affects estates because the abuse often takes the form of joint bank accounts, names added to property, or wills changed to favour someone in a position of influence. Many of these cases, sadly, go undetected. Even some of those that are discovered are let go because other family members don't know what to do about it or can't afford to do anything to put a stop to it. For those who do choose to challenge an estate where there appears to have been elder financial abuse, there is immense satisfaction in stopping the fraudulent person from doing further damage.

## 1.3 Carrying out the wishes of the deceased

Many a lawsuit is launched against an executor who is not carrying out the instructions left in the will. It is a more common cause of estate litigation than most people realize. This is partly because a startling number of executors work on estates with no guidance

whatsoever and are doing things incorrectly. Most people who take on the role of executor have never done so before and are not familiar with how wills work. They think they know what they are doing and believe they are acting in good faith, but they make mistakes that they refuse to correct. There are also dishonest and greedy executors who use the estate as their personal windfall, but they are not the majority.

The impetus behind the legal challenge in these cases is simply to ensure that the executor carries out the will as the deceased instructed and not as the executor personally chooses as a perceived better or fairer arrangement.

## 1.4 Financial support

When certain family members such as certain types of dependants are left out of a will or are given only a small gift from the estate, they may contest the will to gain a larger share of the estate, as discussed in Chapter 3. The upside of estate litigation in those cases is that the beneficiary may receive financial support that is crucial to his or her lifestyle and in fact may be his or her only financial resource. Had the person not sued the estate, he or she would have nothing to live on.

## 1.5 Closure

There is a lot to be said for finally having an upsetting, distracting issue settled once and for all. By the time a lawsuit winds to an end, everyone is happy for it to be over.

# 2. Potential Downsides of Suing an Estate

## 2.1 Length of time

If an estate issue goes all the way to trial, you can expect it to take up to five years to wrap up everything. That five years is not a waiting period by any means; during that time

you would participate in some combination of trial-related activities that might include filing paperwork, motions before the court, cross-examinations (also called discoveries or depositions), case management sessions, mediation, settlement discussions, witness preparation, finding expert witnesses, and eventually the trial itself.

The vast majority of disputes do not make it all the way to trial. Most are settled one way or the other before reaching that stage. A settlement can be proposed by either side at any time. In such case, it would likely not take five years to conclude matters, but it could still take one or two years. Alternatives to carrying out a lawsuit are discussed in Chapter 14.

Before starting a lawsuit, be aware that it will be a part of your life for a long time. You will likely end up taking time off work or other activities. If you are not working with a lawyer, you can expect the lawsuit to take longer simply because you will make mistakes that lead to delays and adjournments.

## 2.2 Cost

Lawsuits can be horribly expensive if they drag on for a long time. Many readers of this book are considering launching a lawsuit without using a lawyer while others are working with lawyers but are referring to this book for additional information. I will look at both situations in this section.

If you have hired a lawyer to conduct the lawsuit for you and the matter goes all the way to a trial, you should expect to pay tens of thousands of dollars. In 2016, *Canadian Lawyer* magazine took a survey of legal fees charged by lawyers for trials across Canada and published the results. The average legal fee for a seven-day trial was \$86,000. Because this is an average, you can assume that

some trials cost less and others cost more. As mentioned in the previous section, holding a trial includes a lot of preliminary steps so presumably this price quoted by *Canadian Lawyer* magazine includes the fees for those steps. Keep in mind that this number is for legal fees only; it does not include court fees, witness fees, expert fees, accounting fees, or other similar disbursements you might need to make.

Most lawyers charge an hourly fee for their services. You will find that the contingency fee — the kind where the lawyer charges a percentage of the amount won — is almost never used in estate litigation. Most estate-related lawsuits simply don't lend themselves well to that type of arrangement.

Traditionally, the lawyers involved in estate litigation were paid out of the estate. Those days are gone. Today, not many lawsuits are funded by the estate itself, so costs must always be factored in if you are considering suing. For a thorough discussion about legal costs, see Chapter 13.

High legal fees are one of the main reasons that individuals decide to try to sue on their own without legal help. If you are considering doing so, please realize that you must be completely committed to the lawsuit and all that it entails. While you may not have to pay legal fees, you may still have to pay probate fees, court fees, witness fees, filing fees, and expenses such as photocopying and printing.

## 2.3 Stress on you and your immediate family

Hopefully your spouse or partner is supportive of your involvement in the lawsuit. With some good luck and some sensible management, you may be able to keep the impact of



the lawsuit to a minimum. That's not always the case, particularly if family finances are involved.

## 2.4 Damage to family relationships

Most of the time, the people who are being sued on an estate or who are opposing each other on a dispute are family members, often even siblings. This results in family relationships being so badly damaged that they can never be repaired. You will likely find it impossible to share a Christmas dinner or a summer picnic with someone who has just finished suggesting in court that you are a greedy liar.

The emotions experienced by individuals involved in estate litigation are intense and varied. At the beginning, there is usually some shock and disbelief at what is happening and dismay that the dispute cannot be amicably resolved. This tends to harden into anger and resentment as people become entrenched in their opposing positions. As time goes by, the anger deepens and frustration begins to tinge everything. There may be shame at the way family members are behaving, or embarrassment because of the airing of family matters that should be private. There is also a profound sense of loss and grief since you will have lost not just the person who passed away but also the family members who are on the opposite side of the dispute.

Even family members who are not directly involved will probably take sides. Often clients tell me that it is not the lawsuit that created the damage, but the underlying action taken by someone that caused the need for a lawsuit. However you see this, and no matter where you stand in the family circle, be aware that it will be a monumental disruption for your extended family.

## 2.5 A steep learning curve

As you will find as you go through this book, there is an enormous amount of information that you must digest and work with. Conducting your own lawsuit will be like taking a crash course in litigation. Even if you are working with a lawyer, it can be tough to understand the vocabulary, the procedures, and the reasons why certain parties can and cannot do certain steps.

## 2.6 There might be less than you think in the estate

It's possible to begin a lawsuit against an estate only to find that it is valued at much less than you thought. The reasons for this might be that legal costs are eating up the estate, that property values have dropped, or that the deceased had a lot of debt. It could also be that by the time you brought your lawsuit, the executor had already distributed a large part of the estate to the beneficiaries. If that was done before you launched your lawsuit and the executor was following the will, you likely will have no recourse towards the part of the estate that has already been distributed.

## 3. What Is Your Motivation?

Before reading the rest of this chapter, I suggest that you take a moment to do something that you will find very useful. Pretend for a moment that you have walked into a lawyer's office and you want to tell the lawyer in one brief sentence what you want him or her to do about your dispute. Don't worry about the facts and details right now; assume that the lawyer knows who has passed away and what has happened. Just state in one brief question or statement what you want to do about it. Once you've done that, read on.

Was your initial, one-sentence statement something like these?

- I'm furious with him or her for doing this.
- Can I call the police on the executor?
- There's no way I'm putting up with this crap.
- I don't care what it costs, I'm putting a stop to him or her.
- I want you to make him or her sorry he or she ever crossed me.

Or, was your initial statement more like this?

- Should I be contesting this or leaving it alone?
- How can this be resolved?
- Do I really need to drag this thing through the courts?
- It's not about the money; it's about following someone's wishes.

The point of going through this exercise is for you to see more clearly what your motivation really is for wanting to challenge the estate. It is essential that you understand your motives and use that awareness to clarify your overall goals. Though you may not realize it at first, your initial statements and questions are very revealing about what you really want from the lawsuit and how things are going to go for you during the course of disputing the estate.

For example, let's say that one of your siblings had been helping himself to some of your aging mother's money before your mother passed away. Nobody knew that your brother was taking money from her until she was deceased and her bank accounts showed just how much they were depleted. How do you feel about the situation? You'll probably find that your emotions run the spectrum from fury with the brother to guilt about not

protecting your mother to sadness about the current situation.

Now channel those emotions into what you'd like to see happen. What is your number one goal? Is it to have the money replaced so that your mother's wishes can be carried out? Or is it a burning desire to punish your brother for what he did? Do you want the world to know the story so that everyone around him will feel contempt for him? Or would you just like to get everything quietly back on track and distribute your mother's estate?

Your motivations and goals are absolutely essential to the question of whether you should contest the will. If what you want is just to get things back on track and replace the money, there may well be another way to attain the goal. Mediation might work, or perhaps there is a way for the executor of the estate to negotiate some kind of settlement. Creative solutions can often be found if everyone stays calm and focused.

If, on the other hand, your goal is to punish and embarrass your brother, you need to take some time to ponder whether using the courts is really the best way to go. Suing someone will not make you feel better. The court won't act as a hammer for you to hit someone. Taking court action out of spite will bounce back on you eventually.

When you are driven by emotion your judgment is off and your decisions will reflect that. You will be disappointed with the results of the lawsuit no matter what happens because you are expecting something that the courts can't deliver.

## 4. Conflicts of Interest

In estate matters, family members often have more than one role. For example, a child of the deceased might be named as the executor



of the will as well as one of the beneficiaries of the estate. Normally this is not a problem, as it is legal and workable for a person to be all of those things.

However, the multiple roles become problematic when what works best for the person in one role is not the same as what works best for him or her in another role. You cannot attack the will and defend the will at the same time. This is known as a conflict of interest. This is something you must consider carefully if you are considering suing an estate but you are named as the executor of the estate.

The conflict arises because suing an estate when you are the executor is just like taking both sides in an argument. You cannot fully commit to the battle on both sides of it and you would end up letting down one side. This is just common sense. An executor's primary task is to follow the will while doing everything he or she can to protect and maximize the estate. If you were, for example, suing the estate as the wife of the deceased, asking for a greater share than the will gives you, it is simply impossible for you also to act as the executor who is upholding the will.

This does not mean that a person who is named as an executor is forever barred from asking the court for assistance in changing the estate. Far from it. But it does mean that you will have to give up the job of executor if you choose to sue the estate. If you tried to contest the will while continuing on in your role as executor, you would find that the other people involved in the issue would not stand for it, nor would the judge be likely to stand for it.

## 5. Deadlines for Starting Your Lawsuit

There are a number of time limits or limitation dates that apply in estate situations, depending on the facts of your case. If you are

a spouse who wants to claim a greater share of the estate, the time limit in most places is six months from the time probate or administration is granted. In Ontario, the time limit is six months from the time the person died. In British Columbia, a person who wants to apply for variation of a will must apply within 180 days of the date of death. Since this is such a short time period in every jurisdiction, it is a good idea to get started on that claim as soon as possible.

Note that the deadlines mentioned above are specifically for the kind of challenge known as dependant's relief, as discussed in Chapter 3. As a general rule, individuals who wish to contest a will on the usual grounds such as undue influence or lack of mental capacity must begin their lawsuit within two years of the death of the testator. Grounds for contesting a will are discussed in Chapter 2.

## 6. Before You Start a Lawsuit, Consider a Demand Letter

Every lawsuit should be preceded by a demand letter. This is a letter to the person you intend to sue that tells him or her what you are going to sue about and gives you both a chance to settle it before you go to court. The letter is intended to accomplish a few goals, all of which may help you resolve your dispute.

A demand letter opens the discussion. In your letter, you will explain to the recipient what he or she has done wrong, and why his or her actions are in contravention of the law. You will explain how it affects your legal rights. A demand letter also includes your statement of how you want the matter to be resolved. You tell the person you're suing (the defendant) what you want. For example, you might say that you intend to ask the court to remove him or her as executor. You might say that you intend to contest the validity of

the will. Once you've said what the issue is, you go further and say what would satisfy you in terms of settlement. For example, you might say that you believe you are entitled to \$50,000 from the estate. You might say that the joint bank account should be shared among all of the deceased's children. Obviously these are just examples and the specific content will depend on the facts of your case.

Sometimes the demand letter results in a willingness by the other person to discuss the issue and try to settle. Perhaps there will be no need to resort to the court at all and by writing a letter you will have saved months or years of litigation. In other cases, the demand letter elicits a response that makes it perfectly clear that the person you want to sue is more than willing to battle it out in court. At least you will know where you stand.

A demand letter is more formal than most letters you would write. It can be very difficult to stay on track because it is tempting to use the letter to insult or blame the other person, or to vent your frustrations. None of that is appropriate, nor will it do anything but aggravate and inflame the other person. Your

letter should be businesslike, calm, organized, polite, firm, and straightforward. It must stay on point and not include insults or threats.

Sample 1 is a demand letter that will demonstrate the sort of language you should use, and shows the various components of an effective letter.

Here are some tips to build an effective demand letter:

1. Make sure you send it to the right person.
2. Mark it "without prejudice."
3. Indicate on the letter the method of delivery you will use.
4. State why you are writing the letter.
5. Describe the problem or issue.
6. Tell the person what you want.
7. Indicate what steps you'll take if settlement isn't reached.
8. Set a time limit for the person to respond to your letter.

## SAMPLE 1 DEMAND LETTER

October 10, 2019

WITHOUT PREJUDICE

Delivered by courier

Joseph Wickham  
125 Maple Street  
Canadian City, ON  
A1A 1A1

Dear Mr. Wickham,

Re: The Estate of Jeanne Amherst

This letter is written to you as the executor of the estate of Jeanne Amherst. As you are aware, I am a residuary beneficiary of the estate and as such I am entitled to a share of the household and personal belongings of Mrs. Amherst.

It has come to my attention that you have distributed personal possessions including jewellery and a vehicle from the estate to people who are not beneficiaries under the will. I understand that you have given some of Mrs. Amherst's jewellery to your daughter and you have given Mrs. Amherst's car to your son. By delivering these items to these people you have breached your duty to the estate.

As executor, your responsibility is to distribute the items according to the will. The items in the estate belong to the beneficiaries and you have no legal right to give the items to anyone else. Despite my verbal request that you reverse these gifts, you have not done so.

If these items are not returned to the estate within 14 days of the date of this letter, I will have no choice but to take steps to protect the estate and see that Mrs. Amherst's wishes are carried out. I will apply to the court for the following:

1. to have you removed as executor,
2. to request that you receive no executor's fee,
3. to compel the return of the items to the estate, and
4. for an order that you must pay my legal costs.

I look forward to confirmation from you that the items have been returned within the stated time.

Yours truly,

Janet Silver