TAB 12

Part 5: Influence – "Due" and "Undue"

Undue Influence and Suspicious Circumstances

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Special Lectures 2010
A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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CONTINUING LEGAL EDUCATION

Undue Influence and Suspicious Circumstances[1]

"A Whole Ball of Wax"

BY

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"The interrelation of suspicious circumstances, testamentary capacity and undue influence has perplexed both the courts and litigants..."

- Sopinka J., Supreme Court of Canada, *Vout v. Hay*, 1993

"...judgments dealing with litigation of this kind abound in language that is hazy, obscure, and extremely difficult to reconcile. While paragraphs can be taken from judgments setting out in convenient form an exposition of the existing law, it is an altogether different matter to apply that law to a given set of facts..."

- Canadian Bar Review Article cited by the Supreme Court of Canada in ***Vout v. Hay***

THE COURT: Well I remember some of those cases about suspicious circumstances and the attempt to make a distinction between that and undue

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[1] The purpose of this paper is to provide a brief contextual background of the legal issues for the presentation by Justice Thomas Lederer on "Understanding the Court Approach to Allegations of Undue Influence and Suspicious Circumstances". For more in depth discussions of the issues see, for example: Rodney Hull and Ian Hull, "Suspicious Circumstances in Relation to Testamentary Capacity and Undue Influence" in Special Lectures of the Law Society of Upper Canada 1996: Estates (Toronto: Carswell, 1996); Brian A. Schnurr, "Mental Capacity and Undue Influence - Accessing the Client's Independence" (Paper Presented to the CBA Conference: Righting Wills, October 1995); "Undue Influence" Dietrich, Bernadette (Six Minute Estates Lawyer, Law Society of Upper Canada)

influence, but I must confess I never understood them. It always seemed to me that ...

MR. HULL: It's all wrapped up in a ball of wax.

THE COURT: How did this will get signed? What did this fellow know when he signed it? Who was present when he signed it? That seems to me, are the factual things you want to find out about.

MRS. BURNS: Yes, but undue influence is separate from suspicious circumstances. If you want to get into suspicious circumstances you allege that with the undue influence.

MR. HULL: I've never done it, Your Honour.

THE COURT: She says your book says you're supposed to. [Rodney Hull, Q.C., "Contested Wills and Proof in Solemn Form" (1979), 5 Est. & Tr. Q. 49, at p. 57.]

MR. HULL: Well it's wrong.

MRS. BURNS: Your Honour, this is repeated in the Bar Admissions course.

MR. HULL: It's all copied out of that article.

MRS. BURNS: That's right.

MR. HULL: If I'm wrong once, I'm wrong a hundred times.

- Exchange among counsel and the Court in *Vout v. Hay*

The Legal Analysis

Undue Influence:

"Undue Influence" obviously not only requires the existence of "influence", but that the influence be "undue".

It is settled law that undue influence sufficient to invalidate a will extends a considerable distance beyond an exercise of significant influence - or persuasion

- on a testator.[2] Thus, an "acceptable degree of persuasion" does not amount to undue influence.

> To be undue influence in the eye of the law there must be - to sum it up in a word - coercion. It must not be a case in which a person has been induced by [strong relationships] to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. [3]
>
> Undue influence is not bad influence, but coercion. Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded. Appeals to the affections or ties of kindred, to the sentiment of gratitude for past services, or pity for future destitution or the like may fairly be pressed on the testator. The testator may be led but not driven and his will must be the offspring of his own volition, not the record of someone else's. There is no undue influence unless the testator if he could speak his wishes would say "this is not my wish but I must do it."[4]

The testator does not have to be threatened or terrorized; effective domination of his or her will by someone else is sufficient.[5]

Suspicious Circumstances:

The test is that suspicious circumstances may be raised by:

> (a) circumstances surrounding the preparation of the will;
>
> (b) circumstances tending to call into question the capacity of the testator; or

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[2] Scott v. cousins
[3] (Wingrove v. Wingrove (1885), 11 P.D. 81 (Eng. Prob. Ct.), at page 82.
[4] Wingrove Esate
[5] Crompton v. Williams, [1938] O.R. 543 (Ont. H.C.), at page 583.

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[6,7]

Where a will is prepared under circumstances which raise a suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed, and it certainly should not deal with the issue summarily.[8,9]

The test for knowledge and approval is that the propounder of a will must first establish testamentary capacity and that there were no circumstances that arouse suspicion in connection with its execution.[10,11]

The interaction between Undue Influence and Suspicious Circumstances

Justice Cullity in *Scott v. Cousins* succinctly set out the basic interaction among, testamentary capacity, undue influence, and knowledge and approval as follows:

1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.

2. A person opposing probate has the legal burden of proving undue influence.

3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.

4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.

> Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. (at page 227)

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[6] Rodney Hull, Ian Hull, 1996, MacDonell, Sheard and Hull on Probate Practice, (Carswell: Toronto) pgs. 43-44, [Probate Practice]
[7] Scott, supra at 123-124.
[8] Probate Practice, supra, at pg. 41.
[9] Scott, supra, at 122-125.
[10] Probate Practice, supra, at pg. 47.
[11] Scott, supra, at 39 and 111.

5. This presumption "simply casts an evidential burden on those attacking the will." (*ibid.*)

6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances - namely, evidence:

> "...which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder."
>
> "excites the suspicion of a court";
>
> " to "raise an issue" of knowledge and approval or testamentary capacity"

7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.

8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the will:

> It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will.

The Burden of Proof

Although the existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities, Sopinka J. and Cullity J. state that the extent of the proof required is proportionate to the gravity of the suspicion.

However, this concept was recently criticised in an Ontario case.[12] His Honour cited the recent decision of C. (R.) v. McDougall, 2008 SCC 53 (S.C.C.) and stated that the Court made clear that there is now only one civil standard of proof at

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[12] Henry v. Henry 48 E.T.R. (3d) 128, 96 O.R. (3d) 437

common law and that is proof on a balance of probabilities. In the course of his reasons, he stated:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

The Factual Analysis

A. Undue Influence

Common Indicia of Undue Influence

The test for undue influence requires coercion.[13] Thus:

- the timing[14,15] and
- circumstances

of the gift are often relevant to prove undue influence.[16]

Indicia of coercive behaviour[17,18,19] include

- assuming control and management of another's affairs,[20,21,]
- being present at execution,
- reviewing drafts of and directing provisions for another's will,
- attending to self-dealing transactions,[22,23,24,25,26,27,28,29]

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[13] Scott v. Cousins, (2001) 37 E.T.R. (2d) 113 (Ont. S.C.J.) at pg. 142-143 [Scott], Book of Authorities, Tab 24;
[14] Dmyterko Estate v. Kulikowsky, (1992) 47 E.T.R. 66 (Ont. S.C.J.) at 94
[15] Streisfield v. Goodman (2001), 40 E.T.R. (2d) 98 (Ont. S.C.J., Carnwath J.)
[16] Dmyterko Estate, supra at ¶ 115 and 116.
[17] Scott, supra at pg. 114, 123 and 124.
[18] Tucker v. Tucker Estate, (2009) 45 E.T.R. (3d) 238 (Ont. S.C.J.)
[19] Wheeler v. Wheeler (1978), N.B.J. No. 36 at ¶. 22 (S.C.), affirmed by the Court of Appeal (1978) 1978 CarsNB 91
[20] Dmyterko Estate, supra
[21] Hutchison v. Hutchison, (2006) 2006 CarswellOnt 4874 (S.C.J.)
[22] Hodgkinson v. Simms, [1994] 3 S.C.R. 337
[23] Soulos v. Korkontzilas, (1997) 17 E.T.R. (2d) 89 (S.C.C.)
[24] Trophy Foods Inc. v. Scott, (1995) 23 D.L.R. (4th) 509 (N.S. C.A.)
[25] Kee v. Kee (1995), Carswell Ont 3015 (Sheard J.)
[26] Del Grande v. Sebastian (1997), 17 E.T.R. (2d) 211 (Ont. S.C.J., Ground J.)
[27] McLeod v. Harnett,(2008) CanLII 11363 (Ont. S.C.J.)

- poisoning the mind of the testator against a potential beneficiary[30]
- threatening to withdraw assistance to one in complete dependence[31] and
- completely controlling their environment (going so far as to even listen in and monitor private conversations).

Other Factual Issues

- Circumstantial evidence

Undue influence is a subtle thing, almost always exercised in secret, and usually provable only by circumstantial evidence.[32]

- Opportunity

Opportunity to exercise undue influence or the relative relationship between the parties is not sufficient to prove undue influence. "..it must be shown that the overbearing power was actually exercised and because of its exercise the will was made."[33]

- Vulnerability and reduced mental capacity

Even where it is established that a testator was vulnerable, and susceptible to the undue influence of another person, the evidence must justify an inference that the influence was probably exercised and that the will was executed by reason of this.[34] However, the testator may have been subject to undue influence even though he or she had testamentary capacity[35]; but unsoundness of mind will be a factor in determining the degree of influence sufficient to set aside the will.[36]

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[28] Frame v. Smith, [1987] 2 S.C.R. 99 at 60-64 (S.C.C.)

[29] See David J. Hayton, Underhill and Hayton, Law of Trusts and Trustees, 17th ed., (Marham: LexisNexis Butterworths, 2006) at pgs. 806-807,

[30] Pocock v. Pocock, [1950] O.R. 734 (H.C.)

[31] Marsh Estate, Re (1991), 104 N.S.R. (2d) 266, 283 A.P.R. 266, 41 E.T.R. 225, 1991 CarswellNS 95 (N.S. C.A.)

[32] Atkinson on Wills (2nd edition, 1953), at page 638.

[33] Pascu v. Benke [2005 CarswellOnt 200 (Ont. S.C.J.)], CanLII 1086 at para. 26

[34] Mitchell v. Mitchell (2001), 2001 CarswellOnt 4289, 57 O.R. (3d) 259, 42 E.T.R. (2d) 295 (Ont. S.C.J.)

[35] Vout v. Hay at page 891, "[a] person may well appreciate what he or she is doing but be doing it as a result of coercion or fraud".

[36] Tucker v. Tucker Estate (2009), 2009 CarswellOnt 277 (Ont. S.C.J.)

- Influence is a two way street

Courts may recognize that the use of influence is a two-way street. A testator is entitled to his estate to attract the help, comforts and tenderness of the [neighbours] in his old age; he used it to influence their behaviour toward him and to obtain the support he wanted in his remaining years. Evidence of a pattern of such behaviour by the testator can dissuade the Court from finding that the beneficiaries unduly influenced the testator.[37]

B. Suspicious Circumstances:

By definition evidence of suspicious circumstances is circumstantial. "any evidence from which a lack of knowledge and approval, or testamentary incapacity, can be inferred". A relevant fact is one that "excites the suspicion of a court informed by human experience gained in cases decided over the years."

Some factual examples of Suspicious Circumstances

- Involvement in the preparation of the Will[38]
- Exclusion of a beneficiary for first time.[39]
- Lack of independent legal advice.[40]
- Medical evidence of diminished capacity[41]

Strategic Considerations

Undue Influence is a species of fraud.[42] Pleading undue influence can result in distress, humiliation and embarrassment to the person against whom it is being alleged[43]. For that reason, the courts deal harshly with parties who allege but

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[37] Pascu v. Benke, supra

[38] E.g. Sader v. Zembik Estate (2008), 2008 CarswellSask 166 (Sask. Q.B.) Connell v. Connell (1904), 4 O.W.R. 360 (Ont. C.A.); affirmed (1906), 37 S.C.R. 404 (S.C.C.)

[39] Tucker v. Tucker Estate (2009), 2009 CarswellOnt 277 (Ont. S.C.J.)

[40] Brydon v. Malamas (2008), 2008 CarswellBC 1293 (B.C. S.C.)

[41] Wilson v. Mack Estate (1998), 1998 CarswellOnt 3531 (Ont. Gen. Div.).

[42] Boutzios Estate, Re, 2004 CarswellOnt 175, 5 E.T.R. (3d) 51; Oosterhoff on Wills and Succession

[43] Stewart v. McLean (2003), 2003 ABQB 205, 2003 CarswellAlta 302, 49 E.T.R. (2d) 294, [2003] A.J. No. 289 (Alta. Q.B.)

do not prove undue influence.[44] Solicitor client costs against the unsuccessful party are not uncommon.[45]

Before pleading undue influence, counsel should be cautious to consider a number of points:

1. Is there a legitimate chance that a court will find that the testator had knowledge and approved of the contents of the Will, but was unduly influenced? It is an unusual case, where both testamentary capacity and undue influence are proven. The challenger has a much stronger chance of winning the testamentary incapacity issue than of proving undue influence.

2. By alleging undue influence, your client is apportioning blame on the other party. Unlike a lack of testamentary capacity, where no blame is necessary, undue influence requires a party to be found to have committed an illegal (and likely viewed as an immoral) act. Settling a case where undue influence has been alleged can sometimes be more difficult because of the emotional impact that such allegations carry.

3. The costs consequences can be devastating if the allegations are not proved. In at least one case, costs were awarded against the solicitor personally for pursuing a claim of undue influence.[46]

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[44] Marshall Estate, Re, [1998] O.J. No. 258 (Ont. Gen. Div.) and Riva v. Robinson, [2000] A.J. No. 681 (Alta. Surr. Ct.).

[45] Kerner v. Fioreli (1990), 37 E.T.R. 60 (Ont. Surr. Ct.), Orleski v. Reid (1985), 18 E.T.R. 305 (Sask. Q.B.), aff'd. [1989] 3 W.W.R. 186 (Sask. C.A.), Schweitzer v. Piasecki (1998), 1998 CarswellOnt 135, 20 E.T.R. (2d) 233, [1998] O.J. No. 177 (Ont. Gen. Div.)

[46] Bisyk (No. 2), Re [(1980), 32 O.R. (2d) 281 (Ont. H.C.)],