Substantive Law Relating to Will Challenges:

The Foundational Principles: Vout v. Hay

The Supreme Court of Canada in *Vout v. Hay [1995] 2 S.C.R. 876* set out the principles of law which apply generally to will challenges. In that case, the deceased was an 81 year old man who left a will under which the appellant was the executrix and major beneficiary. The appellant was 29 years old at the time of the trial and had been a friend of the testator in the last few years of his life and assisted him with various chores on his farm. The surviving members of the testator's family challenged the validity of the will. The will had been prepared by a legal secretary in the office of the appellant's parents' lawyer. The secretary who had prepared the will had testified that she had received instructions from a woman who had telephoned several times and who identified herself as the appellant. The secretary she testified she read the will to the testator in front of the appellant and at some point he hesitated and looked at the appellant who said "Yes, that's what we discussed, that's what you decided" and he nodded to continue. A number of witnesses testified at trial as to the testator's capacity and character which was described as being eccentric, but alert, smart, independent, determined and not easily influenced. The will was admitted into probate. The family appealed claiming that there were suspicious circumstances sufficient to render the will invalid. The Supreme Court of Canada held that where suspicious circumstances are raised, a civil standard of proof on the balance of probabilities applies. The evidence must be scrutinized in accordance with the gravity of the suspicion. The court noted that suspicious circumstances could be raised by:

a) circumstances surrounding the preparation of the will;
b) circumstances tending to call into question the capacity of the testator; or
c) circumstances tending to show that the free will of the testator was overborne by acts of coercion and fraud.

The Supreme Court held that although the propounder of the will has the legal burden with respect to due execution, knowledge and approval and testamentary capacity, the propounder is aided by a rebutable presumption. Upon proof that the will was duly

executed with the requisite formalities, and after having been read over by a testator who appeared to understand it, it will generally be presumed that a testator knew and approved of the contents and had the necessary testamentary capacity.

However, where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances related to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard.

The Supreme Court also held that the burden of proof with respect to fraud and undue influence always remains on those attacking the will.

Applying this law, the first question which must be faced is whether there are objectively possible "suspicious circumstances" raised by the will challenger. Bald assertions alone without detailed supporting evidence is not enough.

In the absence of solid evidence on the part of the will challenger, or further evidence that can be gleaned from the medical records and witness statements, etc. that have been gathered through an investigation one must determine if there appears to be "suspicious circumstances" discussed by the Supreme Court of Canada in *Vout v. Hay*.

It should be noted that the Supreme Court of Canada went on to address the overlap between proof of knowledge and approval of the contents of the will by the testatrix with disproving undue influence:

> *"29. I may be thought that proof o knowledge and approval will go a long way in disproving undue influence. Unquestionable there is an overlap. If it is established that the testator knew or appreciated what he was doing, in many cases there is little room for a finding that the testator was coerced. Nonetheless there is a distinction. this distinction was aptly expressed by Ritchie J. in Re martin. At pages 765-66, he stated:*
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> > *There is a distinction to be borne in mind between producing sufficient evidence to satisfy the Court that a suspicion raised by the*

> *circumstances surrounding the execution of the will have been dispelled and producing the evidence necessary to establish an allegation of undue influence. The former task lies upon the proponents of the will, the latter is a burden assumed by those who are attacking the will and can only be discharged by proof of the existence of an influence acting upon the mind of the testator of the kind described by Viscount Haldane in Craig v. Lamoureux … at p. 357 where he says:*
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> > *Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean."*

Further on in paragraph 29, Justice Sopinka cites a case, *Riach v. Ferris* for the following quote:

> *"Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator."*

In the end, the Supreme Court of Canada upheld the decision which admitted the will into probate as being the proper last will and testament of the testator.

There are therefore four (4) grounds on which a will could be successfully challenged:

1. Non-compliance with the requirement of due execution;

2. Lack of testamentary capacity;

3. Lack of knowledge and approval of the contents (suspicious circumstances);

4. Presence of undue influence or fraud.

Non-Compliance with the Requirement of Due Execution

Genreally speaking, this fact is not usually difficult to prove. Where affidavits or other evidence could be obtained from the witnesses to the execution of the wills, it can be shown that the wills meet the requirements of due execution as provided in the *Succession Law Reform Act, R.S.O. 1990, c. S.26*.

Lack of Testamentary Capacity

The classic statement of law concerning the test to establish testamentary capacity is from *Banks v. Goodfellow (1870), L.R. 5 Q.B. 549 at 556*:

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties; that no insane delusions shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise."*

In another case cited by Justice Granger in *Ostrander v. Black [1996] O.J. No. 1372 at para. 24*, citing Hudson in *Leger v. Poirier [1944] 3 D.L.R. 1 S.C.C.:*

> *"Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called into question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity."*

In *Scott v. Cousins [2001] O.J. No. 19*, Cullity, J. dealt with a case where it was shown that the testatrix lacked testamentary capacity. He found as a fact in that case the testatrix

suffered from a form of dementia that involved significant cognitive impairment. It affected her ability to make rational decisions. While she was able to converse with other people and respond to their remarks in a superficial manner, and she was able to convey an impression of alertness and comprehension for short periods, here condition fluctuated. The testatrix was only occasionally able to comprehend the extent of her assets. The court found that the testatrix lacked the ability to revoke the longstanding bequests she made to other close relatives to her family under previous wills. The court also found in the circumstances of the case the existence of undue influence, due to the weakened mental state of the testatrix, and the exercise of coercion and influence by a nephew.

At paragraph 72 of the *Scott v. Cousins* decision, Justice Cullity cites *Leger v. Poirier [1944] S.C.R. 152, at pages 161-2*, where Rand, J. states:

> *"… there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters; that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; merely to be able to make rational responses is not enough, nor to repeat a tutored formula if simple terms. there must be a power to hold the essential field of the mind in some degree of appreciation as whole, …".*

Knowledge and Approval

For a will to be valid, the propounders of the will must demonstrate requisite knowledge and approval by the testatrix of the contents of the will. *Vout v. Hay*, cited above, is the leading case on this principle, and how it is affected by the existence or non-existence of "suspicious circumstances". In *Ostrander v. Black*, Justice Granger at paragraph 46 of his decision laid out a list of 22 factors which persuaded him that there were "suspicious circumstances" surrounding the will of the testator in that case, all of which were sufficient to show that the testator knew and approved the contents of the will. Some of those facts included the age and addiction to alcohol of the deceased; the documented

confusion of the deceased arising from his consumption of alcohol and age; the fact that a former solicitor would not draft a new will for the deceased; the fact the deceased was lonely and isolated; the fact that the initiative to change the deceased's will came from the major beneficiary under the impugned will; the fact that the solicitor who drafted the impugned will had not previously drafted any will on behalf of the deceased; the fact that the major beneficiary under the impugned will was present at the time instructions were given to the solicitor who prepared the new will and was present at every meeting at which the will was discussed with the solicitor.

In weighing evidence of testamentary capacity in general, including knowledge and approval of contents of a will, the court will place a great deal of emphasis on the evidence of lay persons who give evidence because they had interacted with the testatrix at relevant times. In *Marquis v. Weston (1993), 49 E.T.R. 262, (NBCA)*, the New Brunswick Court of Appeal held that too much emphasis must not be placed upon medical evidence who provided medical opinions but had never met the testator as opposed to evidence of lay persons who were able to give evidence because they had interacted with the testator at relevant times. The appellate court overturned the judgment of the trial judge and concluded that the actual observations of lay witnesses were more significant that opinion evidence of physicians who had never met the testator.

The courts have generally taken a liberal position in wills cases and admit evidence of statements made by a testator indicating his state of mind or intention whether such statements were made before or after the will was executed: *Stewart v. Walker (1903), 6 O.L.R. 495 (C.A.)*.

Undue Influence

In *Vout v. Hay*, Justice Sopinka refers to quote from *Craig v. Lamoureux [1920] A.C. 349 at 357* which describes undue influence:

> *Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's*

> *mind, but which really does not express his mind, but something else which he did not really mean*."

In *Scott v. Cousins*, Cullity J. at paragraph 112 of that decision noted that 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. He also noted that it was clear that the possibility of its existence is not excluded by a finding of knowledge and approval. Citing at paragraph 112 of his decision from a case called *Wingrove v. Wingrove (1885), 11 P.D. 81 (P.D.) at p. 82*:

> *"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*."

In paragraph 113, of the *Scott v. Cousins* case, Cullity J. again citing from *Wingrove v. Wingrove*, adopts the following statement:

> *"Thus 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 or 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.""*

Justice Cullity states in paragraph 113 of his decision as follows:

> *"The presumptions in favour of undue influence that arise out of certain family relationships and that are applied to various kinds of transactions inter vivos play no part in the law of wills. The persons against whom the presumptions arise in such transactions are typically those that a testator might naturally wish to share in the estate. such persons are entitled to press what they perceive to be their moral claims. …*"

And further at paragraphs 114:

> *"In determining whether undue influence has been established by circumstantial evidence, courts have traditionally looked to such matters as the willingness or disposition of the person alleged to have exercised it, whether an opportunity to do so existed and the vulnerability of the testator or testatrix. The degree of pressure that would be required to coerce a person of Reta's age and state of mental confusion is likely to be significantly less than that which would have the same effect on persons in full possession of their faculties. Dr. Shulman testified to Reta's vulnerability in this respect. The testatrix does not have to be threatened to terrorized; effective domination of her will by that of another is sufficient: … this, I believe, is a consideration of no little importance in the present case as well as in the increasing number of those involving wills made by persons of advanced age. Other matters that have been regarded as relevant, within limits, are the absence of moral claims of the beneficiaries under the will or of other reasons why the deceased should have chosen to benefit them. The fact that the will departs radically from the dispositive pattern of previous wills has also been regarded as having some probative force."*

These statements of applicable principles concerning proof of undue influence demonstrate the very heavy burden which would fall upon the will challenger to prove undue influence.

The Nature and Effect of the Available Evidence

The most common forms of evidence that are placed before the courts in this kind of case include the following types of evidence:

1. Notes and memorandum of the solicitor who took instructions, prepared and supervised the execution of the will;

2. Oral evidence of the solicitor with respect to his observations regarding the behaviour and mental capacity of the testator;

3. Oral evidence of the solicitor regarding statements made by the testator to the solicitor;

4. Hospital records reflecting medical history and observations of health care providers, including doctors, nurses, social workers, physiotherapists, etc.;

5. Medical records and medical reports prepared by physicians who provided medical services to the testator;

6. Oral evidence of lay persons, including the witnesses to the will regarding the behaviour of the testator and statements made by the testator;

7. Medical opinions prepared by physicians who never met the testator, but are providing an expert opinion at the request of a party to the litigation, based on material and information provided to them.

However, as noted above, the most important evidence is that offered by those who interacted with the testator close to the time when the instructions for the will were given and at the time of the execution of the will.