Wills & Estates
Winter Term 2025

Lecture Notes – No. 7

VI. WILL-MAKING

A. THE BAR ON DELEGATION OF TESTAMENTARY POWER

It is worthwhile unpacking the non-delegation rule and its application in various contexts. Thus in respect of agency and administrative law both, we look to the maxim *delegatus non potest delegare* ("a delegate can not delegate"). Hudson J. explained some time ago in *Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto*, [1943] SCR 1 (S.C.C.) as follows:

> The general principle is stated in *Broom's Legal Maxims* at page 570, as follows:
>
> > This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari*, that is, one agent cannot lawfully appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.
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> The principle thus stated is somewhat qualified by *Broom*, at page 572, as follows:
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> > Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.
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> And again :
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> > The rule as to delegated functions must, moreover, be

> understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be either express or implied by the recognised usage of trade.
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> The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority…

Thus, as a basic proposition, we seek to maintain the integrity of decision-making in certain sensitive contexts to ensure the person who is trusted is the person who exercises his or her discretion is making the decision in question. It is the *quality* of the decision that is at issue and we seek to foster circumstances that will yield a proper decision being made by the proper decision-maker. However, as with all things, context is everything.

In the testamentary context, the non-delegation rule is "fundamental." In ***Easingwood v. Easingwood Estate*, 2013 BCCA 182 (B.C.C.A.),** Saunders J.A. held:

> [45] ... **The "rule" is famously expressed in *Chichester Diocesan Fund v. Simpson*, [1944] A.C. 341. In the context of powers of appointment, Lord McMillan said, in *obiter dicta*:**
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> > **... the law, in according the right to dispose of property *mortis causa* by will, is exacting in its requirements that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides.**
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> **[46] And Lord Simonds said:**
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> > **... It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries.**
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> [47] A useful compendium of earlier cases is found in D.M. Gordon's article, "Delegation of Will-Making Power" (1953) 69 L.Q. Rev. 334, although his strict conclusions are not unanimously

> accepted: see, for example, I.J. Hardingham, “The Rule Against Delegation of Will-Making Power” (1974) 9 Melb. U.L. Rev. 650. A more complete list of articles on the topic may be found in Re Nicholls (1987), 1987 CanLII 4398 (ON CA), 57 O.R. (2d) 763, 34 D.L.R. (4th) 321 at 323-4 (Ont. C.A.).
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> [48] **Mr. Justice Krever, in *Nicholls*, in the context of powers of appointment and after review of authorities and literature, acknowledged a general prohibition against delegation of testamentary power**. An application of this understanding is found in *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695 (CanLII), 42 E.T.R. (2d) 192 (appeal allowed on different grounds, 2002 BCCA 640 (CanLII)). There, Mr. Justice Clancy found the change of a designated beneficiary of an RSP account was testamentary in nature and therefore invalid.
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> [49] It is clear, I consider, that an attorney may not make a testamentary disposition. As expressed in the authorities just cited, amongst other problems encountered, doing so runs afoul of the *Wills Act*, R.S.B.C. 1996, c. 489. Lawson fairly explains this rule as safeguarding the true wishes of the testator as to dispositions after death.

Re Nicholls
(1987), 57 OR (2d) 762 (S.C.J.); cb., p.157

per Krever J:

> **Would any contemporary societal interest be prejudiced by permitting a general power of appointment created by will to be treated by the law in the same way as a general power of appointment created by an inter vivos instrument? I am unable to see how that question can be answered in the affirmative.** I do not rest my answer on the general principle that prefers a construction that will avoid an intestacy. More appropriate, and a better guide, is the principle expressed correctly and succinctly in the Report of the Ontario Law Reform Commission on The Proposed Adoption in Ontario of the Uniform Wills Act, 1968, at p. 9:
>
> > The right of an individual to own and dispose of his assets is basic to our law. Any effort to restrict or circumscribe that right should only be permitted where the necessity for restriction clearly justifies interference with the basic freedom of the individual to dispose of his property.

> I am not persuaded that the formal requirements of Pt. I of the Succession Law Reform Act, formerly the Wills Act, are a sufficient justification. Indeed, the amendment in 1977 by c. 40, s. 6, making holograph wills valid is evidence of the existence of a less formalistic attitude towards testamentary disposition of property.
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> **It has been suggested that it is unrealistic or artificial to regard the giving of a completely unfettered discretion to the holder or donee of a general power of appointment, including, therefore, the power to appoint to himself or herself, as, in essence, not materially different from the gift of property. I do not agree with that criticism. It may be true that it is not clearly evident from the testatrix's language in this case that the testatrix contemplated that the donee of the power would ever direct that the residue be given to him. That, however, is not a complete answer. There is equally nothing in her language that indicates that she would have any objection to his direction that he be given the residue. Her words show that she intended an unfettered discretion, a discretion, so it seems to me, that an absolute owner would have. That, as I interpret his reasons, is what Mr. Justice O'Leary concluded. I have not been persuaded that he was wrong.**

I would suggest that this sort of arrangement – a power of appointment to give to someone other than the done – ought not be used. It will almost certainly result in litigation. I would suggest a testamentary trust instead.

B. PUBLIC POLICY AND WILL-MAKING

Spence v. BMO Trust Company
2015 ONSC 615 (Ont. S.C.J.); cb, p.168, Note 2

This was a shocker when the trial judgment was released. The testator apparently disinherited an adult child due to his racist attitude to her child born of a father of a different race. Regardless of the fact that there were no provisions in the Will that spoke to race or were patently objectionable, Justice Gilmore said:

> [48] In Professor Bruce Ziff's article, Welcome the Newest Unworthy Heir, 1 ETR-CAN-ART 76, Estates and Trust Reports (Articles) 2014 he raises important questions with respect to the application of the doctrine of public policy when it comes to private gifts made through wills. Professor Ziff specifically grapples with the issue in McCorkill, with respect to whether or not a will should be set aside where the granting document itself does not contain any impugned terms. Professor Ziff acknowledges that fixing on stipulations such as terms which expressly recite discriminatory preferences are important but that such elements

were not necessary in the McCorkill case because the racist preferences were found memorialized in the published works of the donee. Professor Ziff concludes that despite issues with respect to litigation floodgates and the necessity of having specifically recited terms in the granting document, that there was something absolutely correct about the holding in the McCorkill case.

[49] Were it not for the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the will. However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist principle. Does it offend public policy that the deceased's other daughter, Donna, should receive the entire estate simply because her children were fathered by a black man? That, in my view, offends not only human sensibilities but also public policy.

On appeal, **2016 ONCA 196 (Ont. C.A.);** Leave to appeal refused, 2016 CanLII 34005 (SCC), Cronk J.A. held in allowing the appeal:

1 Is it open to the courts to scrutinize an unambiguous and unequivocal residual bequest in a will, with no discriminatory conditions or stipulations, if a disappointed beneficiary or other third party claims that the bequest offends public policy? Is third-party extrinsic evidence of the testator's alleged discriminatory motive for making the bequest admissible on an application to set aside the will on public policy grounds?

…

(2) Testamentary Freedom

29 I begin my analysis of the issues on appeal with consideration of the important principle of testamentary freedom.

30 A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle. As this court emphasized in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), at p. 495, citing *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.):
The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law.

31 The Supreme Court has also recognized the importance of testamentary autonomy, holding that it should not be interfered with lightly,

but only in so far as the law requires: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.), at p. 824.

32 The freedom to dispose of her property as a testator wishes has a simple but significant effect on the law of wills and estates: no one, including the spouse or children of a testator, is entitled to receive anything under a testator's will, subject to legislation that imposes obligations on the testator.

33 *Tataryn* is a case in point. In *Tataryn*, the Supreme Court was concerned with the principles to be applied to s. 2(1) of the British Columbia *Wills Variation Act*, R.S.B.C. 1979, c. 435. Under that section, if a testator failed to make adequate provision for the proper maintenance and support of a surviving spouse and children, including independent adult children, the court was authorized to order provision from the estate that it considered "adequate, just and equitable in the circumstances" for the claimant.[2]

34 In considering the purposes and scheme of the British Columbia statute, the Supreme Court held that the legislation protected two interests: i) adequate, just and equitable provision for the spouses and children of testators; and ii) testamentary autonomy. With respect to testamentary autonomy, the Supreme Court observed, at p. 816:
The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances".
[Emphasis in original.]

35 *Tataryn* holds that, in British Columbia, a testator's broad right of testamentary freedom is constrained by, but only to the extent of, the specific obligation imposed by the British Columbia legislature on testators to provide what is "adequate, just and equitable in the circumstances" for the testator's wife, husband or children after the testator's death.

36 Even when required to enforce a statutory requirement of this kind, *Tataryn* instructs, at pp. 823-24, that the courts should be cautious in interfering with a testator's testamentary freedom:
In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. *Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by*

reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. *In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate* in the best interests of the persons and institutions closest to him. *It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires*.
[Emphasis added.]

37 I note at this point that, unlike the legislation addressed in *Tataryn*, in Ontario there is no statutory duty on a competent testator to provide in her will for an adult, independent child, whether based on an overriding concept of a parent's alleged moral obligation to provide on death for her children or otherwise: see *Verch v. Weckwerth*, 2013 ONSC 3018 (Ont. S.C.J.), at paras. 43-44, aff'd 2014 ONCA 338 (Ont. C.A.), at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288 (S.C.C.). Adult independent children are not entitled to dependant's relief protection under the *SLRA* because they do not meet the definition of "dependant" under that statute. Ontario law accords testators the freedom to exclude children who are not dependants from their estate distribution.

38 Notwithstanding the robust nature of the principle of testamentary freedom and its salutary social interest dimensions, the courts have recognized that it is not an absolute right. Apart from limits imposed by legislation, it may also be constrained by public policy considerations in some circumstances.

…

(3) Unavailability of a Public Policy-Based Inquiry Regarding the Validity of the Will

51 Three factual aspects of this case are especially significant. First, as I have already emphasized, under Ontario law Verolin and A.S. have no legal entitlement to share in Eric's estate. This is not a case like *Tataryn*, where a statutory constraint on a testator's testamentary freedom is in play. In order to share in her father's estate, Verolin must succeed in setting aside the Will.

52 Second, this is not a wills construction case. The terms of the Will gifting the residue of Eric's estate to Donna and her sons and disinheriting Verolin are unequivocal and unambiguous. No interpretive question arises concerning the meaning of the Will.

53 Third, unlike *Canada Trust*, the Will imposes no conditions that

offend public policy. It provides unconditionally for the distribution of the residue of Eric's estate to Donna and her sons and states, at clause 5(h), that no provision was made for Verolin because "she has had no communication with me for several years and has shown no interest in me as a father". Although this may reflect the sentiments of a disgruntled or bitter father, it is not the language of racial discrimination. The application judge held that clause 5(h) of the Will "does not, on its face, offend public policy". I agree, and would add that the same may also be said of clause 5(f) of the Will, the residual bequest provision.

54 In these circumstances, was a public policy-based inquiry regarding the validity of Eric's Will available? Was judicial interference with his testamentary freedom warranted? I conclude that they were not, for the following reasons.

55 The fact that Eric's residual bequest imposes no conditions or stipulations is significant. The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift. These include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, *e.g.*, conditional bequests that seek to induce celibacy or the separation of married couples;[3] ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent;[4] iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation;[5] and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law.[6]

56 The pivotal feature of these cases is that the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will, or obliged the executors or trustees of the will to act in a manner contrary to law or public policy in order to implement the testator's intentions. In these circumstances, the courts will intervene to void the offending testamentary conditions on public policy grounds.

57 In this case, however, no such condition appears in Eric's Will. Eric's residual beneficiaries are not obliged to act in a manner contrary to law or public policy in order to inherit the residue of his estate. Nor is BMO Trust required to act in a manner contrary to law or public policy in order to implement Eric's intentions. This case, therefore, is markedly different from those in which judicial interference with a testator's wishes has been justified on public policy grounds.

58 Verolin and A.S. rely heavily on the recent decision of the New Brunswick Court of Queen's Bench in *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (N.B. Q.B.), aff'd 2015 NBCA 50 (N.B. C.A.), leave to appeal

to S.C.C. requested [2015 CarswellNB 479 (S.C.C.)], to argue, in effect, that the courts have overarching authority to examine the validity of a testamentary residual bequest on public policy grounds. On their argument, this authority extends to cases where the terms of the bequest do not include discriminatory conditions but evidence is tendered that a testator's alleged motive in making the bequest offends public policy. I see no support in the established jurisprudence for the acceptance of such an open-ended invitation to enlarge the scope of the public policy doctrine in estates cases.

59 In *McCorkill*, the testator left the residue of his estate to the National Alliance, a neo-Nazi organization in the United States. The testator's sister, supported by numerous interveners, challenged the validity of the will, arguing that the residual bequest was void as "illegal and/or contrary to public policy". The executor and another intervener defended the bequest. They argued that only facially repugnant testamentary conditions could be set aside on public policy grounds and that the nature or quality of the intended beneficiary was irrelevant.

60 The application judge disagreed. In his view, the 'worthiness' of the residual beneficiary was a central consideration. On the basis of extensive extrinsic evidence regarding the residual beneficiary, much of it generated by the beneficiary itself, he held, at para. 75, that the National Alliance's entire purpose was contrary to the public policy of Canada because it stood for "anti-Semitism, eugenics, discrimination, racism and white supremacy". The effect of the testator's gift to such an organization was to finance hate crimes, contrary to s. 319 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 and Canadian human rights legislation and international commitments. As a result, the application judge held, at para. 89, that voiding the gift was justified on the ground of illegality, as well as public policy, because the beneficiary's "*raison d'être* is contrary to public policy". In so holding, the application judge expressly accepted that voiding the residual bequest based "on the character of the beneficiary is, and will continue to be, an unusual remedy".

61 The Court of Appeal for New Brunswick, in brief reasons, upheld the application judge's ruling, stating that it was "in substantial agreement with the essential features" of his reasons: *Canadian Assn. for Free Expression v. McCorkill Estate*, 2015 NBCA 50 (N.B. C.A.), at para. 1.[7]

62 The decision in *McCorkill* is significant in at least two respects. First, prior to *McCorkill*, public policy-based justification for judicial interference with a testator's freedom to dispose of her property had been advanced only in respect of conditional testamentary gifts. In *McCorkill*, as in this case, the testator's residual gift was absolute, not conditional.

63 Second, before *McCorkill*, Canadian law recognized two kinds of "unworthy heirs": i) beneficiaries who claimed entitlement to a testator's property after having killed the testator; and ii) terrorist groups who, contrary to ss. 83.02 and 83.03 of the *Criminal Code*, sought to benefit from a testator's financial support. *McCorkill*, however, recognizes a third kind of "unworthy heir": a beneficiary whose self-declared reasons for existence involve activities that constitute offences under Canadian criminal law and run contrary to Canadian public policy against discrimination.

64 *McCorkill v. McCorkill Estate* has been the subject of academic scrutiny and some criticism. Professor Bruce Ziff, in an article entitled "Welcome the Newest Unworthy Heir" (2014) 1 E.T.R. (4th) 76 , argues that *McCorkill* is but the latest judicial attempt "to find the proper demarcation between acceptable and intolerable discriminatory private conduct". He suggests that the extension of public policy to void absolute gifts is warranted in certain circumstances, *e.g.* when, as in *McCorkill*, it would be illegal to donate money to an unworthy heir because of its status as a hate organization.

65 However, Professor Ziff also acknowledges that, even in unworthy heir cases like *McCorkill*, the invocation of public policy considerations to void an unconditional testamentary bequest may overreach the proper ambit of the public policy doctrine. He observes:
The more challenging problem with McCorkill is that it may be overbroad. That is so because this gift, uniquely, was invalidated even though it involved an unqualified and absolute transfer of legal and beneficial title. As noted above, all previous cases in which the doctrine of public policy was applied involved terms embedded in the granting document.
Fixing on such stipulations is important for several reasons. Such terms expressly recite the discriminatory preferences and thereby provide cogent proof of the predilection. The stipulations also give the stated preferences teeth, for failure to comply can have legal consequences. Moreover, as an incidental effect, a focus on such stated terms will necessarily limit the number of cases in which challenges can be brought; the litigation floodgates do not open.
[Emphasis added.]
I agree.

66 In this case, relying on *McCorkill*, the application judge held, at para. 44, that notwithstanding the clear terms of the Will, "the matter bears further scrutiny". She went on to conclude, at para. 49, that in view of the Extrinsic Evidence, Eric's motive for disinheriting Verolin was based "on a clearly stated racist principle" that violated public policy as well as "human sensibilities".

67 With respect, the application judge's reliance on *McCorkill* for this purpose was misplaced. *McCorkill* must be understood in the context of its unique factual circumstances. In *McCorkill*, the implementation of the testator's intentions would have facilitated the financing of hate crimes, contrary to Canada's criminal and human rights laws, by funding an organization dedicated to such illegal and discriminatory ends - an unworthy heir. In contrast, nothing in this case indicates that Eric's residual beneficiaries are unworthy heirs, or that they would use their bequest for purposes contrary to law. Verolin and A.S. do not suggest otherwise.

68 Further, I underscore that the Will does not require BMO Trust to engage in discriminatory or unlawful conduct in order to carry out Eric's testamentary intentions. In *Canada Trust*, this court's interference with the settlor's right to dispose of his property as he saw fit was triggered by blatantly discriminatory conditions in the trust indenture that required the trust administrators, in carrying out the settlor's intentions concerning the operation of a public charitable trust, to engage in discriminatory conduct in the selection of scholarship candidates and eligible academic institutions. It was this requirement for discriminatory action on the part of the trust administrators in the operation of a public charitable trust that triggered the public policy-based intervention of the court.

C. REQUIREMENTS FOR A VALID WILL AND ONUS PROBANDI

In **Scott v. Cousins (2001), 37 E.T.R. (2d) 119, para. 39 (Ont. Sup. Ct.),** Cullity J. summarized the law:

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.

5. This presumption "simply casts an evidential burden on those attacking the will."

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."

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 and fraud and undue influence remains with those attacking the will.

D. SUSPICIOUS CIRCUMSTANCES

Barry v Butlin
(1838), 12 ER 1089 (Ch); cb., p. 236

Baron Parke held that the rules for admitting a Will to probate are two:

. . . the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party wrote or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

Vout v Hay
[1995] 2 SCR 876 (S.C.C.); cb., p. 238

The Will was made by the testator, age 81, in favour of a friend (defendant), age 29. The Will was drawn by a secretary in the office of the defendant's parents' lawyer. There was conflicting evidence as to how much involvement the defendant had in the preparation of the Will, and to what extent she influenced the testator. The trial judge found that there was no undue influence and in favour of the defendant; the Court of Appeal reversed, holding that the trial judge ought to have inquired further into matters that were disputed. The SCC restored the verdict as the trial judge was satisfied that the testator was competent and exercising an independent will. Per Sopinka J:

> 23 Any discussion of the role of suspicious circumstances must start with
> the statement of Baron Parke in *Barry v. Butlin*, supra, at p.1090:
>
> [F]irst ... the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.
>
> [S]econd ... if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.
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> 24 At least two problems are raised by this statement:
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> (1) whether suspicious circumstances impose a standard of proof that is higher than the ordinary civil standard; and
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> (2) whether the reference to a free and capable testator requires the propounder of the will to disprove undue influence.
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> 25 With respect to the first problem, in accordance with the general rule applicable in civil cases, it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 766:

The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

26 With respect to the second problem, although *Barry v. Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry v. Butlin* extends to any "well-grounded suspicion" (per Davey L.J. in *Tyrrell v. Painton* (1893), [1894] P. 151 (C.A.), at pp. 159-160). This was reaffirmed in this court by Ritchie J. in *Re Martin*, supra. The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, supra, and Rodney Hull, Q.C., *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

27 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval.
The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. 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 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.

28 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 relate 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. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative

knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

29 It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the presence of suspicious circumstances as to that issue. See Wright, supra, and Hull, *Macdonell, Sheard and Hull on Probate Practice*, supra, at p. 33. Indeed the reference in *Barry v. Butlin* to the will of a "free and capable" testator would have supported that view. Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, 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. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, supra.

E. KNOWLEDGE AND APPROVAL

What of the significance of the testator or testatrix reading the Will, or having the Will read aloud to him or her, prior to execution? Some cases have seemingly attempted to elevate an evidential presumption of ‘knowledge and approval’ to a deemed conclusion.

In **Guardhouse v Blackburn (1866), [LR] 1 P&D 109** the Court held:

After much consideration, the following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper:- First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient

> proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, **the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.** Sixthly, that the above rules apply equally to a portion of the will as to the whole.

This strict form of the rule (that the reading of the Will is conclusive proof of knowledge and approval) was never really as strict as the dicta above suggest. Thus, in *Fulton v Andrew* (1875), LR 7 HL 448, the House of Lords held that evidence could still be admitted on the point. **The modern practice is to regard the reading of the will as presumptive proof but not conclusive proof that the testator knew and approved the contents of the will.**

Garwood v. Garwood
2017 MBCA 67 (Manitoba C.A.)

What is required of the solicitor who drafts a Will for a visually impaired solicitor and supervises its execution? “[P]roof of a verbatim reading of a Will is not a prerequisite to establishing knowledge and approval. In many cases, it will be sufficient to show that the lawyer summarized and explained the contents of the Will to the testator prior to execution. Ultimately, it is a question of fact as to whether the particular words in question were brought to the attention of the testator and adopted by him as his words.”

F. TESTAMENTARY CAPACITY

- Testamentary capacity is not age-dependant. Here the law looks to the circumstances and evidence to prove that the deceased was capable of the rational thought required to make a Will.

- The Will itself need not reflect rational decision-making. The testator or testatrix can act whimsically aside from restrictions of testamentary freedom either agreed-to *inter vivos* (e.g. provision of a gift to a former spouse as agreed-to in a separation agreement and chargeable against the estate if not honoured) or that arise by statute (dependants' relief claims) – but must do so where he or she was mentally competent.

- Testamentary capacity is a question of fact, which is presumed upon a duly-executed Will being proven. Where the testator made a Will that meets formalities requirements, it is presumed that the testator knew and approved of the contents, and, had the necessary testamentary capacity to make the Will. Where there is evidence that the Will was made in 'suspicious circumstances' (in respect of the preparation of the Will, or the testator's mental capacity, or the presence of coercion or fraud), the presumption is spent and the party propounding the Will must prove testamentary capacity and knowledge of the contents of the will on the normal civil standard; ***Vout v Hay*** **[1995] 2 SCR 876, para. 27; cb, p.238.**

- Testamentary capacity means that the testator or testatrix is of 'sound mind, memory and understanding' when the Will was made in the sense that he or she: (1) understands the nature and effect of a Will l; (2) recollects the nature and extent of his or her property; (3) understands the extent of what he or she is giving under the Will; (4) remembers the people he or she might be expected to benefit under his or her Will; and, (5) understands the nature of the claims that may be made by persons he or she is excluding under the Will; see *Re Martin*, [1965] S.C.R. 757.

- Many of the principles set out in the older cases were developed at a time when psychiatric science was unknown or immature. Now expert evidence of the deceased's capacity are the best evidence and the Court will resist reliance on broad presumptions respecting incapacity developed in the older cases. Thus, for example, the totality of the evidence might establish that the deceased was 'a cranky, garrulous, crotchety, somewhat eccentric old man... suffering from mild cognitive impairment and a slight deterioration in mental acuity... [but] He was not mentally ill..." sufficient to make him incapable of making a Will; see *Royal Trust Corp. of Canada v. Saunders* [2006] O.J. No. 2291 (Sup. Ct.), para. 87. One might wish to obtain a mental status assessment by a certified capacity assessor under the Substitute Decisions Act 2002. The Capacity Assessment Office within the Ministry of the Attorney

General makes available current guidelines, forms, and lists of approved assessors.

- It is mandatory that the solicitor drawing the Will inquire into testamentary capacity to ensure validity of the Will and as a matter of professional competence. In *Hall v. Bennett Estate* (2003), 64 O.R. (3d) 191 (C.A.), Charron JA held:

> 24 For a useful review of cases that have considered the solicitor's duty to ascertain and substantiate testamentary capacity, see the article written by M.M. Litman & G.B. Robertson on "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" (1984), 62 Can. Bar Rev. 457. The authors note how courts have stressed the particular importance of the solicitor's duty in cases of suspicious circumstances. They state the following, at p. 470:
>
> The solicitor's duty to substantiate capacity is particularly important in cases of suspicious circumstances. By suspicious circumstances is meant any circumstances surrounding the execution or preparation of a will which individually or cumulatively cast doubt upon the testator's capacity to make a will or his knowledge and approval of the will's contents. Suspicious circumstances are innumerable in form and cannot be listed comprehensively.
>
> 25 The authors conclude their review of cases of suspicious circumstances by saying, at p. 474:
>
> ‘In the context of testamentary capacity cases, serous illness in a testator, especially where the testator is elderly and his illness is capable of affecting his mental state, is one of the most extreme of suspicious circumstances. Few other circumstances demand of the solicitor greater care and caution.’
>
> 26 The authors then identify solicitors' common errors that have been either the subject of criticism by the courts or the basis of liability for professional negligence in the preparation of a will. These include:
>
> • the failure to obtain a mental status examination,
>
> • the failure to interview the client in sufficient depth,
>
> • the failure to properly record or maintain notes,

> • the failure to ascertain the existence of suspicious circumstances,
>
> • the failure to react properly to the existence of suspicious circumstances,
>
> • the failure to provide proper interview conditions (e.g., the failure to exclude the presence of an interested party),
>
> • the existence of an improper relationship between the solicitor and the client (e.g., preparing a will for a relative), and
>
> • failing to take steps to test for capacity.

The Will must be the product of a person having the capacity to understand the nature of the act of making a will and its effects, and, have knowledge of the contents of the will and approve those contents. Failure to have knowledge of, and give approval to, the will or its individual provisions will render the will ineffective in whole or in part.

The classic statement in respect of testamentary capacity is set out in *Harrison v. Rowan* 11 Fed. Cas. 658, 663 (C.C.D.N.J. 1820) in a jury charge on the point by Washington Circ J:

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.

This statement was cited with approval in **Banks v. Goodfellow [1870] 5 Q.B. 549; cb, p.212,** (which is usually cited for the passage set out above). Here the testator

was subject to delusions (and had been hospitalised due to his mental illness). There was evidence that the testator was somewhat lucid at times and could do some of his own business, but the evidence was quite consistent with insanity. The *Banks* case is striking for its support of a broad vision of testamentary freedom, which must be exercised by a rational will unaffected by 'general insanity' or 'insane delusions' in respect of the ability to comprehend the nature of the act of making the will and its effects. **The test of a sound and disposing mind and memory is certainly good law in Ontario; e.g. *Re Schwartz* [1970] 2 O.R. 61, 78 (C.A.).**

Leger v Poirier
[1944] SCR 152; cb, p.218

The testatrix was kept isolated by her son, who influenced her decision-making. Evidence was lead at trial in respect of the testatrix's memory and possible senile dementia at the time that the Will was made; she suffered experienced a rapid deterioration in her health, memory and mental functioning less than two months prior to the will being made. Rand J held in respect of the test:

> Now, in the majority judgment below, it is clear that both Baxter C.J. and Grimmer J. were powerfully influenced by the view that a pronouncement against the will necessarily involved a reflection upon the integrity of Robichaud, which was repelled by both his standing as a solicitor and the finding of the trial judge. But 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; this has been recognized in many cases:
>
> *Marsh v. Tyrrell and Harding* (1828) 2 Hagg. Ecc. R. 84, at 122:
>
> It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.
>
> Quoting from the *Marquess of Winchester's Case* 6 Coke's Rep. 23, Sir John Nicholl adds:

> By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.
>
> *Murphy v. Lamphier* (1914) 31 Ont. L.R. 287, at 308:
>
> Again the words of Sir John Nicholl are apposite: "To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence": *Dodge v. Meach* (1828) 1 Hagg. Ecc. 612, 617.
>
> *Menzies v. White* [(1862) 9 Gr. 574:
>
> Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

Delusions: a delusion is a belief in a state of facts which no rational person would believe. The testatrix may be mentally ill causing her to hear voices from her deceased spouse's grave, and might even have been held incapable of managing his or her affairs by such a disease. This itself does not mean that he or she was incapable of making a Will; **O'Neil v Royal Trust Co. [1946] SCR 622; cb, p.225**. In this case, the testatrix had changed her will when hospitalized and suffering from delusions and was declared incompetent in respect of her financial affairs.

Relevant Date of Capacity

The usual date that capacity is required is the date of the execution of the will. Thus, lucidity at the time of execution notwithstanding mental illness, delusions, etc. will allow the will to be regarded as valid.

There is an exception. A will is also valid if the testator is competent when he or she instructs the solicitor drawing the will, and, is capable of knowing that the will that is being executed is a will and is made in accordance with earlier instructions and gives assent to the making of the will.

Re Bradshaw Estate
(1988), 30 ETR 276 (NBPC); cb, p.248

The testator signed a codicil but was so ill that he signed with a few strokes of his pen rather than signing the will; he died that same day. The solicitor who drew the

will had been instructed two weeks prior by the testator, to the effect that the codicil to the will was necessary to set out gifts to two friends. The testator was 96 years old at his death. Jones J held:

> Testamentary capacity has been referred to as "a disposing mind and memory". In the case of *Leger v. Poirier* [1944] 3 D.L.R. 1 at pp. 11-12 Rand, J. stated as follows:
>
> 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: this has been recognized in many cases.
>
> On the evidence before me I am satisfied that certainly at the time Mr. Bradshaw gave instructions with respect to the final codicil that he had a disposing mind and memory sufficient to take in the necessary elements referred to above. In fact while it is clear that Mr. Bradshaw was very frail on April 15, 1988 the evidence given indicates that his mind was alert and that he had testamentary capacity at that time. He certainly understood what he was doing. There is authority to the effect that the capacity of a person at the time of execution of a will need only go to the extent of his understanding of what he is doing and that he is completing that which he has previously instructed... *Feeney The Canadian Law of Wills*, third edition, Volume 1, page 39:
>
> The relevant time for having capacity to make a will is when instructions are given. If a person has capacity then, he may make a good will later, so long as he knows that he is executing a will for which he has previously given instructions and is physically capable of showing his assent thereto.
> See also *Parker v. Felgate* (1883), 8 P.D. 171.
>
> I am satisfied that the testator had the requisite testamentary capacity both at the time that he gave Mr. O'Connell the original instructions with respect to the codicil of April 1988 and at the time it was presented to him for signature.

G. UNDUE INFLUENCE AND FRAUD

Undue influence is an important equitable doctrine that applies to testamentary instruments as well as to *inter vivos* transactions such as gifts and contracts. In the testamentary context, undue influence is not presumed (based on the power differential inherent in the nature of the relationship between the parties); **actual undue influence must be proven on the normal civil standard**.

Thus, where it is proven that the testator made the Will, or certain dispositions in the Will, and acted based coercion, threats, or exploitation of special vulnerabilities, the Will or disposition, as the case may be, will be set aside**.**

It has been said that '**undue influence is only one of the instances of fraud**;' *Symons v Williams* (1875), 1 VLR (Eq) 199, 206 (Vict Ct Eq). While courts of equity and law have for some time had concurrent jurisdiction to deal with actual fraud in the sense of dishonest acts, the equitable jurisdiction pre-dates the common law jurisdiction (for example, in the form of the action of deceit) and is a wider concept. The concept of *equitable fraud* or *constructive fraud* allowed a court of equity to relieve against an act that was neither intended as dishonest or committed recklessly. Lord Haldane LC said in *Nocton v Lord Ashburton* [1914] AC 932, 954 (HL):

> … it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes upon him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent…

The concept of equitable fraud is rooted in a pragmatic view of equity as being able to respond to an infinite variety of offensive acts and has accordingly been left as a fluid rather than rigidly defined concept as a matter of judicial policy. Lord Macnaghten once said that '[f]raud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it;' *Reddaway v Banham* [1896] AC 199, 221 (HL).

Undue influence reflects the law's general distrust of gifting in suspicious circumstances. Wilson J once said that 'it seems to make sense that the process leading up to the gifting should be subject to judicial scrutiny because there is something so completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity;' *Geffen v. Goodman Estate,* [1991] 2 SCR 353, 376. In this case, the Supreme Court of Canada reviewed the operation of the *presumption of undue influence* in the context of an Alberta case respecting a mentally ill woman who conveyed property in trust on certain terms. Though there were three concurring judgements in the case, the common theme

that was adopted was that presumptive undue influence continues to operate as a doctrine that seeks to protect a person who is vulnerable against manipulation. Thus it is the *potential for domination that inheres in the relationship gives rise to the operation of the presumption*, rather than the relationship per se, and such matters as the absence of independent legal advice in matters where the mental disability of a parent who is party to a transaction with a child has been isolated as particularly important in the past. This is a traditional view based on the special tenderness that the court may feel for an aged or infirm person. Please note that the presumption does not operate in a testamentary context.

Undue influence in the testamentary context connotes something akin to coercion and not merely persuasion or the ability to persuade. See the dicta in **Wingrove v. Wingrove (1885), 11 P.D. 81, 82 (Eng. Prob. Ct.); cb, 251** which is approved and seemingly applied in all the cases below:

> We are all familiar with the use of the word "influence"; we may say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against these contingencies. A man may be the companion of another, may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence. **To be undue influence in the eyes 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 means such as I have suggested to you 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 it 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.**

Re Marsh Estate
(1991), 41 ETR 225 (NSSC – AD); cb, p.255

Here the Will was held invalid seemingly out of deference to the trial judge's findings in circumstances where the testatrix felt compelled to leave a gift in the Will to her sister lest her brother-in-law cease to help her with her physical needs and in managing her financial affairs. Chipman JA (in an oral judgement) held:

> In early November 1988, word reached Frank Fryer by way of Raymond McGill of the provision in Mrs. Marsh's will regarding her residence. He confronted her about it and, with her agreement, contacted the Royal Trust Corporation regarding a change in the will.
>
> The record is silent as to whether Mrs. Marsh or Mr. Fryer informed the trust company of the desired change, but Jane Holmes, a barrister, received instructions from David Green of Royal Trust to prepare a codicil changing the devise of the home from the respondents to Hilda Fryer. Solicitor Holmes was asked to make sure that there was no undue influence involved, and she attended upon Mrs. Marsh, explained the effect of the codicil, and oversaw its execution. On that occasion, Mrs. Marsh told solicitor Holmes that her brother-in-law, Mr. Fryer, had been very good to her and had done her banking and come once a month for this purpose. Solicitor Holmes was satisfied that Mrs. Marsh had testamentary capacity. Solicitor Holmes was accompanied by her then articled clerk, Elizabeth Whelton. Both Ms. Holmes and Ms. Whelton prepared memoranda of the meeting with Mrs. Marsh. Ms. Whelton made particular note of the fact that Mrs. Marsh had told them that she was making the change because her brother-in-law did so much for her.
>
> Frank Fryer testified that on learning of the devise of the house to the respondents, he told Mrs. Marsh that he was not happy about it. He said that since she had left the property to the respondents she had better get the respondent Ronald Harris to make up a power of attorney and let him do the work that he, Fryer, had been doing, that she should let him go to City Hall and fight with them about her taxes, and fight with the federal government about her pensions and so forth. According to Mr. Fryer, she thereupon said that she needed him and could not do without him, that she had to have his services. She said she wished to change her will, whereupon Mr. Fryer contacted the trust company and left the matter in its hands.
>
> **Mr. Fryer was confronted with previous discovery examination wherein he said that if she wished Ronald Harris to inherit, that he should do the work, and that he, Mr. Fryer, would not be doing it. He denied having said that.**

Judge Bateman found that there was testamentary capacity at the time of the execution of the codicil, but that the respondent Frank Fryer had exerted undue influence on the testatrix. The codicil was set aside.

The finding of testamentary capacity is not disputed, and there is no question as to the relevant principles governing undue influence as a ground for setting aside a testamentary devise. Influence, to be undue influence, must amount to coercion. What is coercion in any given case depends on the circumstances. The burden of establishing undue influence rests upon those who attack the impugned transaction. See *Wingrove v. Wingrove* (1885), 11 P.D. 81; *Re Harmes; Harmes and Custodian of Enemy Property v. Hinkson*, [1946] 2 W.W.R. 433, [1946] 3 D.L.R. 497 (P.C.). After expressing concern as to Frank Fryer's credibility, Judge Bateman said [at p. 232, 99 N.S.R. (2d)]:
There is no question that Mr. Fryer exerted influence, nor any question that the exercising of that influence resulted in the change in bequest consistent with Mr. Fryer's wishes. The question is whether the influence was undue in this case.

Mr. Fryer presents as a very opinionated, confident and outspoken man. He clearly felt that Reverend Harris had inappropriately procured the bequest and thus was justified in speaking strongly against it. Had he only spoken against the bequest to the Reverend Harris I would have had more difficulty in finding undue influence. On the facts before me, however, Mr. Fryer went farther than that. He implicitly, if not expressly, threatened to withdraw his assistance from Mrs. Marsh if the Will was not changed. In Mrs. Marsh's poor physical situation resulting in her complete dependence on Mr. Fryer for her business affairs and her minimal contact with other support systems, I find that the influence exercised by Mr. Fryer was undue, even accepting his version of the exchange between him and Mrs. Marsh.

Having reviewed the record, consisting of exhibits and the testimony of the witnesses, we are satisfied that there was no palpable error made by Judge Bateman in her finding that undue influence exerted by Frank Fryer brought about the execution of the codicil. This is so, even though her finding that Mr. Fryer gave specific instructions as to the change in the will is not supported by direct evidence. **The evidence, particularly that of Mr. McGill, Mr. Fryer, and Ms. Whelton supports the conclusion that the testatrix was dependent upon Frank Fryer, and that there was an implied, if not expressed threat by him to withdraw the assistance that he had been giving her. His testimony, as well as that of the other witnesses, must be considered in the context of an unwell, elderly lady who was dependent upon her brother-in-law for the assistance which he**

> **had been giving her. All the evidence supports the finding of a threat to withdraw assistance, which in the circumstances amounted to coercion.**

Pascu v. Benke
2005 CanLII 1086 (Ont Sup Ct)

Here the testator had 3 step-sons. He had a previous Will in favour of one of them (Kurt Benke) He had no 'relationship with the other two. The testator's wife died in 1997 and he met an older couple (Mr & Mrs Mechicis) with whom he became friendly – they were all of Romanian heritage and birth, and the couple was very helpful to the testator. A second Will was prepared in their favour in 2002. Day J held:

> Undue influence is another ground which may be applied to invalidate a will. To constitute undue influence in the eyes of law, there must be *coercion*. The burden of proof of undue influence is on the attackers of the will to prove that the mind of the testator was overborne by the influence exerted by another person or persons such that there was no voluntary approval of the contents of the will. The burden is the civil burden on the balance of probabilities. Undue influence sufficient to invalidate a will extends a considerable distance beyond an exercise of significant influence or persuasion on a testator; as indicated above, coercion is required. Essentially, the testator must have been put in such a condition of mind that if he could speak he would say, "This is not my wish, but I must do it." A testamentary disposition will not be set aside on the ground of undue influence unless it is established on a balance of probabilities that the influence imposed by some other person or persons on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased testator. Further, it is not sufficient to simply establish that the benefiting party had the power to coerce the testator, it must be shown that the overbearing power was actually exercised and because of its exercise the will was made. References: Mackenzie, James in Feeney's Canadian Law of Wills, 4th ed. (Butterworths Canada Ltd., 2000), at paras. 3.1.3; 3.5; 3.6; 3.7 and 3.13; Mitchell v. Mitchell (2001), 57 O.R. (3d) 259 (Ont. S.C.J.); Banton v. Banton (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.); and Vout v. Hay (1995), 7 E.T.R. (2d) 209 (S.C.C.).
>
> *Wingrove*, *supra*, illustrates what the court means by coercion. Clearly, in the present facts, the Mechicis curried favour with Mr. Boghici. They succeeded in obtaining substantial financial favours from him during his lifetime and, in my view, succeeded in persuading him to leave his estate to them. It could well have been

that he did not want them to know that his previous will was in favour of his stepson, Kurt, which, if so, would reinforce the conclusion that Mr. Boghici purposely refrained from advising Mr. Pascu of its existence at the time he gave instructions for the subject will.

Basically, Mr. Boghici used his estate to attract the help, comforts and tenderness of the Mechicis in his old age; he used it to influence their behaviour toward him and to obtain the support he wanted in his remaining years. **As the evidence indicates, this was consistent with his behaviour towards others; he offered up his estate to at least three other people in hopes of securing that same kind of support and comfort. Specifically, he named Kurt as beneficiary of his 1997 will presumably on the basis that Kurt would take care of him for the rest of his life. He asked Kurt's spouse, Bogda Detembel, to move in and then he would leave her his "testament". He offered his estate to Elizabeth Silva, a neighbour who looked after him following his wife's death, if she would come and live with him. Mr. Boghici offered another neighbour, Wytold Kowalski, his home if he would agree to take care of him.**

The deceased constantly undertook to offer his assets to those who would look after him. Without question, the Mechicis gave him more care and companionship than anyone else in his late years and he rewarded them. This is not to say that Kurt was anything less than completely dutiful to his stepfather, but he lived in Midland and did not have the capability of spending the amount of time with Mr. Boghici that the Mechicis were able to do.

The foregoing indicates the pattern followed by the deceased in offering his assets to those who cared for him. In terms of remembering the persons who might be expected to benefit under his will, I do not conclude that he had forgotten about Kurt. Rather, the indications are that he went with those who had been looking after him most completely at the late part of his life. I would expect that Mr. Boghici's motivation was not so much to be good to those who were good to him, but rather to improve his own life.

In such circumstances, the Mechicis did not unduly influence Mr. Boghici to leave his estate to them in the sense that there is no evidence of coercion by them. It would appear that there is good evidence to indicate persuasion, but that is not sufficient to vitiate the will. It is only undue influence that will catch the interest of the court. As indicated above, it is clear in the case law that undue

> influence is more than just an influence or persuasion; it must amount to actual coercion. Therefore, the fact that the Mechicis were currying favour with the deceased in order to benefit from his will is of no consequence because it simply does not amount to coercion.
>
> The case law also makes clear that the burden lies on Kurt Benke to prove on a balance of probabilities that Mr. and Mrs. Mechici unduly influenced the deceased to the point of coercion. I conclude there is no evidence of coercion and that there is, therefore, no undue influence.

In this case, the estate was offered rather than demanded but there still remains an issue as to undue influence and the propriety of demanding favours for care. Traditionally the law has not interfered in such circumstances and in that sense **Re Marsh** seems somewhat over-protective of the testatrix's estate.