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Unusual Ways to Attack the Validity of Wills

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Unusual Ways to Attack the Validity of Wills

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Estates practitioners are likely to be very familiar with the traditional grounds of attacking the validity of wills. Typically, wills are challenged on the grounds of i) testamentary incapacity, ii) undue influence, iii) lack of knowledge and approval of the will, and iv) failure to comply with the formality requirements or due execution that are found in legislation. The concept of suspicious circumstances may also be considered in the context of these grounds for a will challenge.

This paper seeks to examine some less common ways that parties have sought to challenge a will and provide an overview of how the courts have decided such challenges. This paper will consider the following "challenges": i) mistake on the part of the testator; ii) public policy considerations; iii) violation of a mutual wills agreement; and iv) non-compliance with some other contractual obligation. This paper will also briefly identify litigation risks in light of the changing legislative landscape in the area of wills and estates.

Mistake on the part of the testator

At first glance, someone may think that "lack of knowledge and approval of the will" is the same as a mistake on the part of the testator, however, the two challenges may be very different. The propounder of the will has the onus of proving that the will is valid. To be a valid will, the following criteria are required: i) the will was duly executed; ii) the testator had knowledge and approved of the contents of the will; and iii) the testator had the requisite mental capacity to make a will.[1] If the testator read the will and seemed to understand it, then a rebuttable presumption of knowledge and approval applies.[2] The presumption is rebutted if the objector establishes that the testator did not understand the contents of the will, and the challenge to the validity of the will would be successful based on "lack of knowledge and approval of the will".

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[1] Calderaro v. Meyer, 2011 ONSC 5395 (CanLII)

[2] Vout v. Hay [1995] 2 S.C.R. 876.

Rather than "lack of knowledge and approval", in the case of *Re: Estate of Blanca Esther Robinson*[3], the issue was that the testator had a mistaken belief about the legal effect of the words in the will that he reviewed and approved. In *Robinson*, a beneficiary applied for an order to set aside the grant of probate and to rectify a Canadian will by deleting its revocation clause. Although the proceedings were framed as a rectification application, the findings would apply to a will challenge that is based on a "mistake" by the testator.

In *Robinson,* the testator owned property in Canada, England and Spain, and had executed two wills. Her will executed in Spain dealt with her property in Europe while her will in Canada dealt with her Canadian property. Several years later, the testator revised the Canadian will, however, the solicitor was never informed by the testator that she had another will in Spain. The testator never provided instructions to the Canadian lawyer that the revised will was only to deal with the testator's Canadian property. The solicitor included in the revised will a standard clause that revoked all previous wills, and carefully reviewed the will with the testator. The evidence of the drafting lawyer was that he reviewed the will clause by clause with the testator, including the revocation clause, and that she approved and signed the revised will. After the testator died, the solicitor was advised of the existence of the Spanish will and was informed that the English court would not issue probate for the Spanish will unless the Canadian will was rectified to make clear that the Spanish will had not been revoked. The Canadian lawyer brought an application seeking the advice and direction of the court regarding the interpretation of the will and a beneficiary brought an application seeking to rectify the will to remove the revocation clause.

At the Ontario Superior Court, the Court held that "if a mistake was made, it was made by the testator"[4]. The testator mistakenly believed that the revocation clause would revoke only the earlier Canadian will but not the Spanish will. The testator therefore misunderstood the legal effect of the words in the revocation clause. The Court held that it could not rectify a will to correct the testator's mistaken belief about the legal effect of the revocation clause, which the testator had reviewed and approved. The Court determined that while "[t]here may be a patent mistake as to the legal effect of the words, … if the unfortunate word or phrase was used knowingly by the testator, nothing can be done by the court of probate to correct the mistake"[5]. The Court of Appeal

[3] *Re: Estate of Blanca Esther Robinson*, 2010 ONSC 3484, affd 2011 ONCA 493, leave to appeal refused [2011] S.C.C.A. No. 536.
[4] *Ibid* at para 29.
[5] *Ibid* at para 30.

noted that the words of the 2006 will were clear and that the drafting lawyer prepared the will in accordance with the direction of the testator to deal with the entire residue of her estate. Likewise, the Court of Appeal noted that the testator reviewed and approved of the content of the will before signing it.

The Court of first instance elaborated further that in the area of estates law, the courts' equitable power of rectification serves mainly to prevent the defeat of the testator's testamentary intention due to errors or omissions on the part of the will drafting lawyer (i.e. clerical or typographical errors). Courts are therefore more comfortable with admitting and considering extrinsic evidence of the testator's intention when it comes from the solicitor who drafted the will, made the error, and can swear directly about the testator's instructions, rather than evidence from putative beneficiaries who purport to know what the testator truly intended.

Since in this case there was no error on the part of the solicitor in transcribing the testator's instructions; the testator reviewed and approved the revocation clause; and the testator simply did not realize that those same words would also revoke the Spanish will, the testator was operating on a mistaken belief about the legal effect of the words used. Consequently, no judicial intervention could assist the beneficiary in deleting the revocation clause to save the Spanish will from being revoked. The testator's misunderstanding of the legal effect of the words in the revocation clause did not permit the court to rectify the will. I think it is also safe to say that such a misunderstanding would not amount to lack of knowledge and approval either, because the testator had in fact reviewed the will and approved of it. The *Robinson* decision included a good summary of what is required for a challenge on the grounds of lack of knowledge and approval:

(i) Hull and Hull (ed.) *Macdonell, Sheard and Hull on Probate Practice* (1996, 4th ed.) at 48: "What is meant by saying that the testator "must know and approve" the contents of the will…Clearly it is not necessary that he should understand the words used in the same sense that the Court will choose if called upon to interpret them. The real question is: Are the words of the will the testator's words? If the testator knows the contents of the paper executed by him, it is immaterial that…owing to a mistake as to the effect of the words, the document will fail to accomplish the result intended."

(ii) *Halsbury's Laws of Canada* (2007) at 407: "There may be a patent mistake as to the legal effect of the words, but if the unfortunate word or phrase was used knowingly by the testator, nothing can be done by the court of probate to correct the mistake. This is so although it can be shown that the testator…misunderstood the legal effect of the words".

(iii) *Theobold on Wills* (16th ed. 2001) at para. 3.19: "…the mistake must relate to the words used in the will and not to their legal effect. It is therefore essential to analyse the nature of the mistake which was made because a mistake as to the legal effect of the words used is irrelevant to knowledge and approval."[6]

Public Policy

Although courts are usually reluctant to interfere with bequests made pursuant to the terms of a duly executed will, testamentary autonomy is by no means absolute. In some cases, the validity of a will has been challenged on the basis that its terms offend public policy (often on the grounds that the bequests made are discriminatory).

In *Spence v. BMO Trust Co*[7], the Ontario Court of Appeal considered a will that the lower court held was discriminatory based on race and void for contravening public policy. The appellate court upheld the will, noting that there was nothing in the will that was expressly discriminatory. A brief summary of the facts of this case is helpful.

The daughter in *Spence* alleged that her father disinherited her based on race, and as such, her father's will should be set aside on public policy grounds. The father had expressly stated in his will that he was leaving nothing for his daughter because she had no communications with him for several years and had shown no interest in him as her father. The daughter applied under Rule 75.06 and sections 58 and 60 of the *SLRA*, inter alia, for a declaration that the will was void, in whole or in part, because it was contrary to public policy. The daughter alleged that the exclusion in her father's will was racially motivated and she used extrinsic evidence in the form of two affidavits to support her allegation.

The lower court looked behind the words of the will and concluded that the father's specific reason for disinheriting was actually "based on a clearly stated racist principle"[8]. The lower court considered extrinsic evidence and found that the daughter had married a man of a different race and had a child together, but the father was opposed to her having a child of a different race.

At the Court of Appeal level, the lower court's ruling was reversed. The Court of Appeal noted that testamentary freedom to distribute property as the testator chooses is a deeply entrenched common law principle and, in Ontario, there is no statutory duty on a competent testator to provide for an adult, independent child.

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[6] *Ibid* at para 30.
[7] *Spence v. BMO Trust Co.*, 2016 ONCA 196.
[8] *Ibid* at para 19.

The Court of Appeal held that it was inappropriate for the lower court to admit extrinsic evidence to contradict the testator's expressed stated intent in the will. The testator's will was unambiguous. As such, inquiring into the testator's motives was erroneous. The Court of Appeal also held that the disinheriting clause on its face was not discriminatory and did not run afoul of public policy. The will made no mention of race, or the fact that the daughter's spouse was a different race. There was no indication in the text of the will to suggest that the testator was acting with racial motivations. The court held that it was inappropriate to contradict the "lawful motive for the bequest disclosed by the plain language of the Will and to substitute, in its stead, a different and allegedly unlawful motive"[9].

The *Spence* decision is instructive for parties considering a will challenge on the grounds of public policy. The Court of Appeal noted that the pivotal feature in cases where public policy has been invoked to void a conditional testamentary gift is that the condition at issue requires 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 a will to act in a manner contrary to law or public policy in order to implement the testator's intentions.

The Court of Appeal indicated that the bequest made by the testator was of a private, rather than a public or quasi-public, nature. Due to its private nature, even if the testamentary bequest had been repugnant in the sense that it disinherited the daughter for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property. The appellate court found that the application judge erred by admitting extrinsic evidence since the Will was clear, unambiguous, and unequivocal. For the law of testamentary autonomy going forward, the Court of Appeal also made clear that "the scope for judicial interference with a testator's private testamentary dispositions is limited. … The court's power to interfere with a testator's testamentary freedom on public policy grounds does not justify intervention simply because the court may regard the testator's testamentary choices as distasteful, offensive, vengeful or small-minded"[10].

[9] *Ibid* at para 110.
[10] *Ibid* at para 111.

Mutual Wills – Constructive Trust

As a practitioner, something that I am seeing more frequently recently is the inclusion a challenge to a will on the basis that the will violates a mutual wills agreement. Mutual wills exist where two people make wills on terms upon which they both agree and they make a further agreement that after the death of the one person, the surviving person is not entitled to change his or her will. It is often spouses who enter into a mutual wills agreement and make wills whereby each testator gifts the assets in his or her estate to the other, followed by a gift over to their children upon the surviving spouse's death. Accompanying the wills is an agreement between the two spouses that the surviving spouse would not later change the gifts in his or her will. Absent this agreement, the wills are called "mirror wills" and can be changed at any time by the testator.

Will challenges involving mutual wills are often brought by a beneficiary, usually one of the children of the spouse who predeceased, alleging that the putative will made by the surviving spouse was invalid, because the surviving spouse had breached a mutual wills agreement. As a result of the breach, the beneficiary seeks an equitable constructive trust to enforce the original mutual will agreement against the surviving spouse or the estate[11].

In general, non-compliance with a mutual wills agreement is not a ground upon which the validity of a will can be challenged if none of the other traditional grounds for the will challenge apply. Instead, rather than challenging the validity of the will, if the only issue is non-compliance with the mutual wills agreement, then the appropriate recourse would be an action against the estate. If, however, the non-compliance with the mutual wills agreement is accompanied by allegations of testamentary incapacity, undue influence, lack of knowledge and approval, and/or a formality problem, it may be possible to address the mutual wills issue in the context of a will challenge.[12]

In a Saskatchewan case, *Burke Estate (Re)*[13], the Saskatchewan Court of Queen's Bench followed two Ontario cases that considered a mutual wills allegation in the same proceeding that contested the validity of the will based on testamentary capacity and undue influence. The Court found it was appropriate to consider the issues at the same time since the issues of whether there was a prior mutual will agreement and whether the testator had mental capacity were intertwined.

[11] *See Hall v. McLaughlin Estate*, [2006] O.J. No. 2848.
[12] *See Trotman v. Thompson*, [2006] O.J. No. 681; *Cassin v. Cassin*, [2007] O.J. No. 652.
[13] *Burke Estate (Re)*, 2007 SKQB 314.

The Court remarked that "[s]o as to prevent the necessity of calling the same evidence in two separate actions concerning the same issues with perhaps different outcomes, it would be preferable to have all issues determined at one time and in the same action"[14]. As such, an allegation of the existence of a mutual will may be raised in a notice of objection in cases where there is also a challenge based on the usual will challenge grounds (i.e. undue influence, testamentary capacity, fraud, due execution), however, if the only issue is the mutual wills agreement, a notice of objection challenging the validity of the will is likely not the appropriate route.

As for the judicial test for finding that a mutual will agreement exists, the court will require the following: i) there must be an agreement between the individuals who made the wills, which amounts to a contract at law; ii) the agreement must be proven by clear and satisfactory evidence; and iii) it must include an agreement not to revoke wills[15]. Courts have made clear that "a loose understanding or sense of moral obligation will not suffice"[16]. While it is not necessary that the agreement be written or that the will itself identify that it is a mutual will, it does help reduce ambiguity and litigation down the road. When there is no written agreement, courts will look to extrinsic evidence to see if a binding verbal mutual will agreement could be found[17].

Conflict With Other Contractual Obligation

The validity of a will has also been attacked on the basis that it contravenes a contractual obligation undertaken by the testator. However, it is unclear how efficacious this mode of attack would be. The Ontario Court of Appeal held in *Frye v. Frye Estate*[18] that although a share agreement in a company would constrain the testator and the ability of the testator's estate to dispose of the shares, it does not constrain the testator's ability to bequeath property by means of a will. The Court of Appeal concluded that a breach of the obligations set out in a shareholder's agreement may give rise to action for breach of contract, it does not mean that the will itself is invalid.

[14] *Ibid* at para 10.
[15] *Edell v. Sitzer*, [2001] O.J. No. 2909 at para 58.
[16] *Lavoie v. Trudel*, 2016 ONSC 4141 at para 22.
[17] *Rammage v. Roussel Estate*, 2016 ONSC 1857 at para 20.
[18] *Frye v. Frye Estate*, 2008 ONCA 606.

In *Frye*, there was a dispute between feuding siblings over whether a will, which bequeathed shares in a family business, was valid given that the bequest contravened the shareholder agreement and the letters patent of the family business. The judge at first instance found that the testator's bequest of his shares to a beneficiary was prohibited by the shareholders' agreement and that the bequest was therefore null and void and severable from the rest of the will. The judge also ordered that the estate sell the shares in accordance with the shareholders' agreement. The trial judge concluded that the meaning of the shareholders' agreement was clear and that the words in the agreement referring to the transfer of shares were broad enough to apply to a transfer by testamentary bequest. The court found that the testator was bound by the provisions of the shareholders' agreement and that the letters patent of the corporation required the directors to approve any transfer of shares. Accordingly, the court of first instance concluded that the testator had no right to transfer his shares in the corporation to the beneficiary specified in the will.

While the Ontario Court of Appeal agreed with the Ontario Superior Court that the language in the shareholder agreement was broad enough to encompass a transfer by testamentary disposition, the Ontario Court of Appeal did not agree that the bequest itself would be rendered void. As such, the Court of Appeal allowed the appeal. The Court of Appeal reconciled the seeming contravention of the shareholders' agreement by concluding that once the testator died, legal title over the shares transferred to the estate trustees as a matter of law. The estate trustees would still have to comply with the shareholder agreement before being able to distribute the shares from the estate to the beneficiary. However, this requirement does not render the bequest void.

Furthermore, by this structure, the beneficiary could still in effect control how the shares are exercised. This is because the estate trustees would effectively be holding the shares in trust for the beneficiary as bare trustees. The estate trustees would have to exercise the rights associated with the shares as the beneficiary directs. This case seems to lead to two conclusions. First, it is perhaps prudent to draft shareholder agreements that provide specifically for how shares should be disposed upon death. Secondly, "contractual obligations do not constrain a person's ability to bequeath property by means of a will"[19].

[19] *Ibid* at para 19.

What's Next?

The law and practice of wills and estates is continually evolving. With the announcement of new provincial legislation, Bill 245 (Accelerating Access to Justice), which is to be proclaimed by the Lieutenant Governor on a date no earlier than January 1, 2022, there will likely be novel ways to challenge the validity of wills. The explanatory note that is available on the website of the Legislative Assembly of Ontario includes the following summary of the changes that are being made to the *Succession Law Reform Act*:

(i) The Act is amended to provide for the remote witnessing of wills through the means of audio-visual communication technology for wills made on and after April 7, 2020.

(ii) Section 16 of the Act, which provides that a will is revoked by the marriage of the testator except in specified circumstances, is repealed.

(iii) Section 17 of the Act provides that if the marriage of the testator and the testator's spouse is terminated or declared a nullity, the testator's will shall be construed as if the former spouse had predeceased the testator. The section is amended to add other specified instances of spousal separation between married spouses that would have the same result, but as of the testator's death.

(iv) A new section 21.1 is added to give the Superior Court of Justice authority to, on application, make an order validating a document or writing that was not properly executed or made under the Act, if the Court is satisfied that the document or writing sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased.

(v) A new section 43.1 is added to provide that the spousal entitlements under Part II of the Act if a person dies intestate in respect of any or all property do not apply if the person and the spouse are separated, as determined under the section, at the time of the person's death. A complementary amendment is made to section 6 of the *Family Law Act*.[20]

As indicated, one of the mentioned changes in the Bill revises the *Succession Law Reform Act*, to vest the court with the power to validate executed wills that do not satisfy the usual formality requirements if the court is satisfied that the document adequately sets out the testamentary

[20] Bill 245, Accelerating Access to Justice Act, 2021 - Legislative Assembly of Ontario (ola.org)

intentions of the deceased. This may effectively change Ontario from a strict compliance regime to a substantial compliance province with respect to satisfying all the formalities of a duly executed will. This paradigm shift could potentially open the floodgates for more litigation and spur creative new ways to challenge the validity of wills.