

WHAT IS IT GOING TO TAKE? A REVIEW OF THE BURDEN OF PROOF FOR SUSPICIOUS CIRCUMSTANCES

By Crista Osualdini, Estates, Trusts & Taxation



After the death of a loved one, clients will often seek advice when they believe that the last Will of the deceased does not reflect his or her true intentions. As counsel, we often hear our clients tell us of the health ailments suffered by the deceased that must have prevented them from truly being able to execute a last Will or even allegations of others trying to influence the contents of the Will. Meetings of this nature usually culminate in the client asking what it will take to challenge the Will. In order to answer this question, we will need to advise our clients as to what grounds upon which a Will can be challenged and what burdens of proof they must meet in order to be successful. This article will provide an overview of the burden of proof that must be met by clients who wish to challenge a Will on the basis of suspicious circumstances.

As set out by the Supreme Court of Canada in *Vout v. Hay*, there are three categories of suspicious circumstances. They include circumstances surrounding the preparation of the Will; circumstances tending to question the capacity of the testator; and circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. An explanation of each category follows.

First, the Executor, as the propounder of the Will, has the burden of proving on a balance of probabilities the required formalities of the Will, that is that the Will was read over by or to the testator who appeared to understand it and the Will was duly executed. If the propounder is able to do this, there is a rebuttable presumption that there was testamentary capacity.

Second, the challenger to a Will may raise suspicious circumstances to negative testamentary capacity. Evidence of suspicious circumstances is evidence which, if accepted, would tend to negate knowledge and approval or testamentary capacity. Here, the challenger must raise enough evidence to satisfy the Court of suspicious circumstances before the burden shifts again to the propounder, the Executor, to prove testamentary capacity on a balance of probabilities. Testamentary capacity or “sound disposing mind” is demonstrated when the testator understands the nature and effect of a Will. They must also recollect the nature and extent of their property and understand the extent of what they are giving under the Will. Lastly they must also remember the persons that they might be expected to benefit under their Will, and, where applicable, understand the nature of the claims that may be made by persons they are excluding from the Will.

With respect to the third category of suspicious circumstances, that being that the testator’s free will was overborne by coercion or fraud, the burden lies on the challenger to show undue influence or fraud on a balance of probabilities. With respect to the third category of suspicious circumstances, the challenger must show that the freewill of the testator was overborne by acts of coercion or fraud. If this can be established, the Will would be declared

invalid. The challenger would have the burden of proving that the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the Will. It is not enough to show that a person is in a position to exert persuasion on the testator to execute a Will in their favour or to show that such Will was executed in their favour as a result of persuasion. In fact, influence is permissible so long as it does not amount to undue influence. Undue influence must amount to coercion or victimization and be so overpowering as to be clear that the Will is not the Will of the testator but that of another person. Essentially the challenger must show that the Will is that of another's intention and not the testator's.

If the challenger is able to raise evidence of suspicious circumstances that satisfies their burden of proof, the propounder of the Will must prove testamentary capacity on a balance of probabilities or rebut the evidence of coercion or fraud. Whether the testator has the necessary mental capacity to make a Will is a question of fact to be determined by the trial judge in all the circumstances. The testamentary wishes of the testator must be the product of a sound and disposing mind. 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 consider, revocation of existing dispositions, and the like. Grounds that could be looked to in order to establish testamentary capacity are the family background and medical evidence.