

The grinch who stole my inheritance

Wills and undue influence



'The Grinch hated Christmas! The whole Christmas season!

Now, please don't ask why. No one quite knows the reason.

It could be his head wasn't screwed on just right.

It could be, perhaps, that his shoes were too tight.

But I think that the most likely reason of all

May have been that his heart was two sizes too small.¹¹

Christmas, a time we tend towards sentiment.

We muse on our relationships and the achievements of the year. Some are great, some not so. For many of us, age brings fragility and vulnerability. Life comes full circle – once we were carers for our children, then as we age they often become carers for us.

In these years of fragility, our affections, sentiment and gratitude can soften a once-hardened viewpoint, and these changes in our attitudes are frequently reflected in our testamentary intentions. But where is the line, the line between gratitude and undue influence?

When this question arises, families may query the validity of a will through the process of filing a caveat against the issue of a grant of probate. In doing this it is important for the parties to understand the law that the court must apply. Importantly, each matter turns on its own facts.

Montalto v Sala [2016] VSCA 240, delivered on 7 October, is a Victorian Court of Appeal decision addressing the issue of testamentary undue influence.

It was an unsuccessful appeal from the primary decision of McMillan J in which she found the particulars in support of a caveat against probate of the deceased's 2013 will were insufficient to sustain the caveat.



with Christine Smyth

One of the deceased's sons filed a caveat challenging the validity of his mother's last will on the grounds of lack of testamentary capacity, undue influence and suspicious circumstances. His mother was 89 at the time of her 2013 will, in which she left disproportionate shares to her three sons.

Filing a caveat alone is insufficient. Clients must also identify the grounds of the claim and they must address the law with sufficient particularity to convince the court that the claims ought to be examined by the court in greater detail.

In this case the applicant's material included claims of exclusion from his mother by his brothers, by failing to advise him of the care home into which she was placed, a history of cognitive decline, and suspicious circumstances citing a substantial departure from prior testamentary dispositions coupled with a level of control over his mother by his brothers at the time of her will.

The primary judge struck out most of the particulars relating to testamentary capacity and suspicious circumstances on the basis they were "ambiguous, obscure or inadequate".

This left for determination the quality of the particulars addressing the claim of undue influence. The primary judge affirmed that, for this "equitable species of fraud" to be sustained "there must be coercion". Her Honour found the particulars did "not raise a reasonable suspicion that the testatrix was coerced" and struck out the claim.

The applicant appealed, contending: "that his particulars gave the respondents sufficient notice of the issues for determination at trial", and that "the test was not different under the Probate Rules as those that applied in the Supreme Court generally".

The Court of Appeal discussed testamentary freedom, observing that not all influences are unlawful and citing *Hall v Hall*² – noting affections, sentiment and gratitude as an acceptable persuasion, contrasted with pressure brought about through fear exertion and overpowering, which results in failed courage to resist and yielding "for the sake of peace and quiet" and "escaping from distress of mind or social discomfort", with the result that the testator's will is overborne.

The court affirmed *Trustee for the Salvation Army (NSW) Property Trust v Becker*³ in which the court found that "[T]he basic point is that, to prove undue influence, it must be shown that the testatrix did not intend and desire the disposition. It must be shown that she has been coerced into making it."

The Court of Appeal determined that the primary judge was right to query the sufficiency of the particulars, finding at [31]-[32]:

"31. If the applicant were to adduce evidence at trial that supported these particulars, his allegation of undue influence would be dismissed. The allegations do not satisfy any test of undue influence such as that set out above. There is no allegation of influence let alone that the influence was undue. There is no allegation that, in making the dispositions under the 2013 Will, the testatrix was coerced or that her will was overborne in circumstances that her judgment was not convinced.

"The fact that an allegation of undue influence is a serious allegation does not mean that, in an appropriate case, it should not be made. But, the respondents to any such allegation are entitled to be given notice of how the allegation is to be advanced. Fairness demands no less. Particulars which are consistent only with the opportunity to influence a testator or testatrix are insufficient. Undue influence will not be presumed."

This case highlights the difficulty in sustaining a claim for probate undue influence. In dismissing the appeal, the court cautioned at [34]: "Particulars supporting an allegation of testamentary undue influence will vary considerably; comparisons between the particulars advanced in different cases will rarely be helpful."

If you consider that there has been undue influence or suspicious circumstances in the making of a will, it is important to act quickly and for the client to gather their evidence in an efficient and thorough manner.

As we head into Christmas I confess a leaning towards sentiment. Merry Christmas to all who have been so incredibly supportive and kind throughout the year, especially my partners and staff at Robbins Watson and all of the QLS staff. I wish each and every reader of *Proctor* a wonderful Christmas filled with kindness and love. May I leave you with this musing:

"I have always thought of Christmas time, when it has come round, as a good time; a kind, forgiving, charitable time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow passengers to the grave, and not another race of creatures bound on other journeys." – *Charles Dickens*

Christine Smyth is deputy president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute. Christine recently retired her position as a member of the QLS Succession Law Committee however remains as a guest.

Notes

¹ *How the Grinch Stole Christmas* by Dr Seuss.

² [1868] LR 1 P&D 481.

³ [2007] NSWCA 136.