

WILLS AND UNDUE INFLUENCE

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Age brings fragility and vulnerability. Life comes full circle – once we were carers for our children, then as we age they often become our carers for us. In these years of fragility, our affections, sentiment and gratitude can soften a once hardened view point. These changes in our attitudes are frequently reflected in our testamentary intentions. But where is the line, between gratitude and undue influence? Where this question arises, families may query the validity of a will through the process of filing a caveat against a grant of Probate issuing. In doing this is it important for the parties to understand the law the court must apply. Importantly each matter turns on its own facts.

Montalto v Sala [2016] VSCA 240 delivered 7.10.16 is a very recent Victorian Court of Appeal decision addressing the issue of Undue Influence.

It was an unsuccessful appeal from 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. 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."

Leaving 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 noting that no all influences are unlawful, citing *Hall v Hall* – noting affections, sentiment and gratitude as an acceptable persuasion, contrasted with pressure brought about through fear exertion and overpowering, resulting in failed courage to resist

yielding “*for the sake of peace and quiet*”, “*escaping from distress of mind or social discomfort*” resulting in the testator’s will being overborne. Affirming, Trustee for the Salvation Army (NSW) Property Trust v Becker where 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 gather your evidence in an efficient and thorough manner. Please call our Estate Disputes Team on : (07) 5576 9999 for assistance and advice.



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