

## Wills, Trusts & Estates

# Undue influence and testamentary fraud: Both sides of the coin

By **Richard Worsfold and Tara Vasdani**



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(December 7, 2018, 10:20 AM EST) -- Where a parent has changed their will late in life to benefit one sibling over others there can often be resentment leading to allegations of impropriety by the disappointed beneficiaries.

An estate litigator will occasionally hear that the deceased parent has been isolated while being cared for by the favoured child during their later years. This isolation, particularly where deliberately caused, can give rise to allegations of undue influence if the parent has made a will that favours the caregiver over others.

The Ontario Court of Appeal in the recent decision of *Seguin v. Pearson* 2018 ONCA 355 confirmed, however, the difficulty in making a case of undue influence to invalidate a will.

In its decision, the court confirmed that testamentary undue influence requires a finding of the "outright and overpowering coercion" of the testator. The court further confirmed that the party attacking the will bears the onus of proving undue influence on a balance of probabilities.

Establishing outright and overpowering coercion is an extremely high hurdle. A parent, particularly in a weakened condition, may genuinely intend to favour one child over the other. An issue to consider, however, is whether that intention has been brought about through improper means.

Estate practitioners considering a possible case of undue influence should never overlook the possibility of testamentary fraud, which is a subset of undue influence.

Testamentary fraud arises where false statements are made to induce a person into making a will or other testamentary gift that would not otherwise have been made and may arise in situations where one sibling has isolated a parent while caring for them, as demonstrated in the 2017 Nova Scotia decision of *Re: Patterson Estate* 2017 NSSC 221.

In *Patterson*, the parents of four children had long established mirror wills which generally benefited the four children equally. Following the death of the father in February 2016, the mother, Joan Marie Patterson, moved in with one of the children, Marlene, who acted as her mother's caregiver until her mother's death in June 2016.

While the mother was staying with Marlene, Marlene required her siblings to call ahead before visiting. She generally would insist upon being present when any of her siblings visited. The mother's telephone number was forwarded to Marlene's own telephone. The allegation was made that she was seeking to isolate her mother from the siblings.

Mrs. Patterson signed a new will in May 2016 which benefited Marlene and excluded her siblings. The lawyer who prepared the new will was concerned about his instructions and asked Mrs. Patterson to prepare a letter setting out why she was making the changes. The evidence surrounding the making of the letter provided a basis for an allegation of testamentary fraud at trial.

In the letter to her lawyer, Mrs. Patterson stated that her other children had abandoned her and that Marlene was left to care for her without assistance. The evidence, however, was that the other

children had been excluded from assisting despite their efforts to maintain contact with their mother. The evidence was that Marlene knew her mother had written this letter but did not take any steps to disabuse her mother of these false beliefs. The implication was that Marlene had fostered and created these false beliefs within her mother.

The court found that the May 2016 will was made as a result of testamentary fraud. The court accepted that Marlene told her mother falsely that her siblings had abandoned her and that she was the only one who cared. The will was set aside.

The court in *Patterson* referred to the 1961 Ontario Court of Appeal decision in *Re: Kaufman* [1961] O.R. 289. The testator in the Kaufman estate was alleged to have made his will in reliance upon false statements made by a caregiver that his daughter wished him to be placed in a nursing home. Although the Court of Appeal did not find the facts supported the plea, the doctrine of testamentary fraud was affirmed.

A challenge on the basis of traditional undue influence may not have been successful in *Patterson* as there was no evidence for the existence of outright and overpowering coercion. Nevertheless, the will was found to be the product of improper actions by Marlene amounting to testamentary fraud and accordingly was set aside.

Estate practitioners be mindful in examining all aspects and arguments in these unfortunate cases to properly present the concerns of disappointed beneficiaries to the court.

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