

## **Hull on Estates Podcast #10**

### Knowledge and Approval continued

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Ian Hull: Welcome to Hull on Estates. It's Tuesday, May 31<sup>st</sup>, 2006.

*Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by estate solicitors, Ian Hull and Suzana Popovic-Montag, the podcast will touch on some key considerations when planning estates and Wills. Now, here are Ian and Suzana.*

Ian Hull: Welcome to our podcast today, it's Ian Hull. We have some technical difficulties and as such, we have not been able to co-host as we typically do. Suzana is going to do our Hull on Estate and Succession Planning and I'm doing the Hull on Estates podcast. So we're going to cut down our podcast duration a little bit because it's not nearly as much fun listening to me alone, as it is to listening to both of us, as far as I'm concerned. However, we didn't want to miss a week and here we go. The issues that we've been working through on Hull on Estates tie into the question of testamentary capacity. And where we had left off was the discussion on knowledge and approval and the whole idea that before a document can be called probate, the court must be satisfied that the testator knew and approved of the contents at the time that he signed it. And different types of problems arise when words have obviously been inadvertently omitted from a clause. They result in a sense that is different from what the testator intended to convey. And although there can be difficulties with the interpretation of the document itself, it also creates issues in the context of knowledge and approval because essentially the courts will take the position that if the words don't make sense, then presumably the person who wrote the Will or signed the Will anyway didn't know and understand the terms of the Will.

Now the more difficult class of cases is that where the draftsman unquestionably intended to use the words in dispute but selected that word to carry it out but the intent was not the intention of the testator, the type of words that he used. So some of the results that arise are as a result of the improper drafting. And there is case law to suggest that in all cases where there is no suggestion of fraud, the intention of the draftsman must be taken to have been approved and adopted by the testator when he signs the Will, even though he may not have read it or the provisions of the question effectively called in his inattention. And so what the courts seem to be getting at there is is that a distinction needs to be made between cases in which the draftsman or the lawyer typically, has attempted to carry out the instructions of the testator, but simply has chosen inappropriate words. And those in which the words are not selected by the draftsman, for the purpose of carrying out the intentions of the testator at all, but to carry out some other purpose which the draftsman mistakenly supposed to be the testator's real intentions. So it's all about drafting and it's a question of whether or not the mistake in the drafting really ties in to an effect on the actual intention of the testator. So in the circumstances where the testator is simply suffering, or the Will simply suffers from a mistake on the

part of the draftsman, then the words must stand, but the unfortunate result is that it becomes a question of construction and we will get into a little bit more of construction and those issues in interpretation issues at a later time. But I think it's important to know that the court has some flexibility.

Now moving on, we are dealing with this whole question of knowledge and approval, one way in which the question seems to have arisen, and it is quite often in England, but not as much in Canada for some reason, is by a client going first to a solicitor who draws a Will and possibly a Codicil which are executed. And then later, that client goes to a different solicitor to prepare a new Will revoking the previous testamentary instruments. But then later still the client returns back to the first solicitor, solicitor A we'll call him, tells him nothing about the Will drawn up by solicitor B, but has him prepare a Codicil in which (a) the solicitor naturally confirms that the only Will he knows anything about, of course, is the Will that he drew some time ago and which is in fact not the testator's last Will. And in this case where there is sort of a crossover of Wills essentially, where the client has gone to two different lawyers and the Codicil ends up cross-referencing essentially the wrong Will, the cases on these kinds of facts within this kind of pattern are difficult to reconcile because some of them, the courts seem to have deleted the words which reference I guess essentially the mistaken intention, and some have simply not adopted the words and struck them out. So it's important to note, though, that a court of probate may strike words out of a Will when acting in accordance with these kinds of principles. But it cannot substitute fresh words. And there seems to be no doubt that in cases of mistake, and that's obviously a cornerstone of the knowledge and approval problem, evidence of the deceased's statements of his testamentary intentions including his instructions to the person who drafted the Will can be admitted. And that is supported by a decision, a historic decision of *Guardhouse v. Blackburn* and we'll note that in our podcast notes, the cite for that. But it's also further supported by the decision of *Re Morris*, which is a decision of 1971 of the British courts and *Re Reynette-James*. These last two cases, *Re Morris* and *Re Reynette-James* are cornerstone cases in terms of how the court will deal with the problem of a mistake, as opposed to anything else.

So these rules as to the admissibility and the like, while they can be complex, they are something that the courts will look at. The principles in which a court of construction act in supplying words was dealt with in the decision of *Re Follett* and again, it is a good illustration of the types of cases where there is quite honestly some flexibility that is brought into the process to that extent.

Now I think at the end of the day, what I'd like to do really at this point is now just work through into the undue influence area. And we'll touch on the question of fraud because this is such an important aspect of the whole question of capacity. I am going to work through it in part in this podcast and then Suzana and I, when we are back on technologically, can work through some of the distinctions. But the question of undue influence has been described many ways, and at the end of the day, it really is, I guess, lots of the cases have described it, as essentially an off-shoot of testamentary capacity. Fundamentally though, the question of onus and the shift of the onus is crucial to the whole determination of undue influence. But the courts will typically look for coercion.

And I say coercion because it has to be something more than arm-twisting and the like to give it the characteristic of undue influence. It's been said that there are six factors which can effect the character of the legal advice that is given to an individual in rebutting the presumption of undue influence in a question of situations where there is gifting, and I am going to leave that for another time. But the proposition that a beneficiary's gift can be lost or set aside as a result of the behaviour of an individual unduly influencing and coercing the testator, is fundamental to the whole understanding of testamentary capacity. It's another ground that will suffice to invalidate a Will and that is that it's a product of undue influence, and it's probably unfortunate to describe the degree of importance that this concept will have on the courts of probate, because the expression of undue influence seems to be something probably less than what it really is. And that is, if a court finds undue influence, it is, in my view, a much stronger word could be used to describe the behaviour of an individual who improperly coerces an individual into doing something that they do not have a free will and free mind to do.

One of the classic demonstrations of the concept of undue influence comes from the decision of *Wingrove v. Wingrove* and it's a British case where the court really sort of set out the parameters of the whole context of the undue influence process. And the court described it as follows. They said "there is no subject upon which there is a greater misapprehension than that of undue influence". And that misapprehension, it seems to me, arises from the particular form of that expression of the term. Because we are typically used to the term "influence" and we say one person has influence or control over another. We can then have to speak of what are essentially called evil influences, and balance those against what could be seen as good influences. But it's not because one person has influence over another that it's necessarily a bad thing that is undue influence. But that the undue influence has to go that step further. And as I say, into the evil or improper conduct as the courts have described it.

To be undue influence in the eye of the law, there must be, as the courts have said, in a word, coercion. And it must not be the case where a person has been induced by means of such as improper conduct on the part of the undue influencer. And the coercion, can of course, come in different ways. In its grossest form, it can be things like confinement or violence, where someone will not give access to an individual or something of that nature. And violence, of course, can be another aspect of coercion, but the question is usually not considered in such sort of dramatic factual circumstances. So, while those illustrations bring home in our minds anyway the sort of immoral considerations on the part of someone who is pressuring a testator, it's not always the case. The courts want to really ask, as they did with knowledge and approval, is would the testator be able to say that this is my wish, or is the testator saying I must do this because of the circumstances around me. So if the act can't be shown to be the wish and the will of the testator at that time, but it is not a question of fraud which is a whole other aspect of it, then the whole idea of undue influence and falling in this middle range seems to me to have some real merit. It's obvious that the cases really turn on questions of degree, and it's going to be very difficult to make these kinds of decisions without careful consideration of the facts.

One of the commonest techniques of persuasion is what is called, or has been described as salesmanship. And it's to place the object in a position where he cannot refuse without appearing to be discourteous to the persuader, I guess, is a good way of putting it, in the sense the acquiescence is obtained, but not acquiescence of someone who is said to be in complete control of their circumstances. There is a case which is sort of a classic case in the area of undue influence, *Boyse* where the court said the following: "the question is whether the evidence shows that though not under actual duress or coercion, he would not have executed the Will, but from fear of the consequences which might result to him if she should discover that he had given his property to anyone but himself." So the right to be the target of blandishments or ingratiating of those who harbour great expectations seems to be one of the valued if insidious prerequisites to wealth and power. And we've got to live with that reality and so if it's a matter of will and ability to understand what your circumstances are, and power to essentially respond to the overbearing circumstances, then that is where we are getting into undue influence. And it's necessary to prove that in a particular case where there is a power that is being exercised, that the exercise of that power is such that in order to set aside the Will of a person who might, on the face of it, have sound mind, it's not sufficient to show that in the circumstances, you just attended to the execution and all is well. You must show that there are inconsistent acts on the part of the testator and the evidence to show that is, if you are going to go as far as to show undue influence, to simply show that in fact there is corroborative evidence, outside support and outside conduct that can show the undue influencing and improper behaviour.

It seems to me, anyway, in my experience, and we are going to spend some more time in a future podcast on some of the leading cases recently in Ontario, which have had some great comment on the areas of testamentary capacity and undue influence, but my experience is with undue influence that it is simply not for the faint of heart. And to prove undue influence is a significant battle and a significant onus that the courts, at the end of the day, are expecting those who make the claim to be almost like a scenario where it is a fraud situation. And as we know, the courts look for a very high standard of the evidence and expectations when making a finding of fraud. And undue influence is pushing toward fraud. So we have to really talk about the kind of rules that tie into admissibility of the evidence and where we are going to get our third party evidence or our corroborative evidence to support the claim.

So I think at this point, given our technology problems and the fact that we don't have our co-host for this podcast today, I'd like to wrap it up. I appreciate our listeners suffering through this different format, because we will be back on track for our next podcast next week. Thank you very much.

*This has been Hull on Estates with Ian Hull and Suzana Popovic-Montag. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.*

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