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A Year in Review: Various Topics in Trusts and Estates

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TRUSTS AND TRUSTEES

DUCA Financial Services Credit Union Ltd. v. Bozzo[1]

The Ontario Court of Appeal recently released a decision that draws into question the validity of a trust where the settlor maintained control of the underlying assets. Coming on the heels of *Antle v. Canada*[2], which reinforced the importance of the formality of a trust, *Bozzo* indicates that it may be easier to set aside a trust because it represents a sham as opposed to a fraudulent conveyance. The key for the party attacking the validity of the trust is the settlor's control.

(i) Facts

The case originated from bankruptcy proceedings against the defendant, Mr. Bozzo, and his wife and co-defendant, Mrs. Bozzo. The claim was made by the plaintiff, DUCA Financial Services Credit Union Ltd. ("DUCA"), over a $1,200,000.00 loan from DUCA to Joco Investments Inc. ("Joco"). Joco was a wholly-owned subsidiary of The Abbas Group Inc. ("Abbas"), of which Mr. Bozzo owned 51% and Mrs. Bozzo owned 49%. Through Abbas, the Bozzos also owned 18.75% of another corporation ("Mapleco"), which had been formed with the purpose of developing lands in Maple, Ontario (the "Maple Lands") with several other individuals and corporations. On January 26, 1988, the shareholders of Mapleco entered into a shareholder's agreement to develop the Maple Lands. Three days after the execution of the agreement, Mr. Bozzo executed a trust declaration that "declared and confirmed" that he was holding his 51% stake in Abbas for his wife. Under section 8.01 of the Mapleco shareholders' agreement, Mr. Bozzo maintained that he owned at least 51% of Abbas giving him *de facto* control and that he would not alienate those shares during his lifetime in any way that might change his *de facto* control of the corporation.

As part of the plans to develop the Maple Lands, Joco applied for and received $1,200,000.00 in financing in exchange for a second mortgage and a personal guarantee from Mr. Bozzo. As part of the financing application, Mr. Bozzo provided a personal net worth statement which included his interest in the Maple Lands. Mr. Bozzo subsequently provided DUCA with a second net

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[1] (2011), 79 C.B.R. (5th) 110, 204 A.C.W.S. (3d) 212 (Ont. C.A.) [*Bozzo*]
[2] [2010] 4 C.T.C. 2327, 2009 D.T.C. 1305 (T.C.C.), affd 61 E.T.R. (3d) 13, 2010 D.T.C. 5172 (F.C.A.)

worth statement, which again referenced an ownership interest in the Maple Lands and another development project in which Abbas had an interest.

The Maple Lands project eventually failed and the secured property was eventually sold at a loss by DUCA in 2001. DUCA petitioned Mr. Bozzo into bankruptcy and later obtained an assignment from the trustee in bankruptcy, allowing it to bring a claim for the loan in question.

(ii) The Trial Decision

DUCA challenged the trust declaration on three fronts:

1. It came into existence after DUCA became Mr. Bozzo's creditor;
2. It was a sham trust; and,
3. Under s. 2 of the *Fraudulent Conveyances Act*[3] (the "*FCA*"), it was void against creditors.

After an evidentiary finding that the trust declaration had indeed been signed prior to DUCA's loan, the trial judge considered the argument that the trust was a sham. Justice Cumming noted that the three certainties must exist to create a valid trust: (i) the certainty of intention, (ii) the certainty of subject matter and (iii) the certainty of objects. The "certainty" in question in this matter was that of intention: DUCA alleged that the trust was created to indicate the disposition of assets when, in fact, the intent was to maintain control of the assets and merely block potential creditors in a bankruptcy situation. Justice Cumming disagreed. He found that this intent was sufficient to fulfill the first certainty as it is common for a person to control a family business through a corporation and have their spouse or children own the equity and that, although he maintained control over Abbas, his intent was to "separate himself from the beneficial interest of the shares." Based on this reasoning, Justice Cumming found that Mr. Bozzo did intend to establish the trust.

DUCA similarly failed to prove a fraudulent conveyance. Justice Cumming did not find, on a balance of probabilities, that the transaction was intended to defeat creditors.

Most significantly, DUCA did not have the opportunity to plead damages for fraudulent misrepresentation. Notwithstanding the facts of the case, DUCA's statement of claim did not plead fraudulent misrepresentation and it was statute-barred from amending. Had this not been

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[3] R.S.O. 1990 c.F29

the case, the Court likely would have found a fraudulent misrepresentation: Mr. Bozzo was found to have misrepresented his estimated net worth in his financing application by including assets of Abbas in his personal net worth statements.

(iii) The Appeal

The Court of Appeal overturned the lower Court's decision by finding that Justice Cumming had failed to consider evidence that Mr. Bozzo maintained control over the company before and after the execution of the trust declaration. The court quoted from Mr. Bozzo's oral testimony at trial:

> **Q:** *So, again, you're saying in your mind the control of the company didn't change either before the Trust Declaration or after the Trust Declaration?*
> **A:** *No sir.*

Purely on this basis, the Court concluded that Mr. Bozzo considered himself to retain control the assets he purportedly held in trust for his wife. In his mind, he "had not separated himself from the beneficial interest of the shares" and therefore, "there was no intention to create a valid trust as one of the three certainties was missing and the trust is therefore void." It is important to note that the Court of Appeal did not differentiate between legal and beneficial interests in coming to the conclusion that the trust was a sham. Furthermore, they did not distinguish between the motive behind the settling of the trust and the intention to do so.

Some have posited that the Court of Appeal's decision was a means to remedy an injustice in the absence of the availability of fraudulent misrepresentation. In order to get around this dilemma and find in DUCA's favour, the appellate court needed to find a way to invalidate the trust. This finding, however, is of concern for lawyers advising their clients in trusts and estate matters as a properly executed trust declaration may no longer sufficiently represent the intention to create a trust. Lawyers now have to be very careful in advising clients as to how much control they can retain in their planning. They should remain wary that Canada Revenue Agency, creditors, dependants and others appear to now have another avenue to attack their clients' planning.

TAXATION OF TRUSTS AND ESTATES

Ongoing Compliance Initiative

The Canada Revenue Agency ("CRA") continues to be concerned with tax compliance issues regarding trusts and estates and has enhanced its compliance program accordingly. In 2010, the CRA created the position of Ontario Region Trust and Estate Coordinator. This coordinator is tasked with organizing and prioritizing the estates and trusts related tax issues that concern the province. The coordinator is also responsible for developing technical support and training programs for the Agency's compliance staff across Ontario. This position was created pursuant to the CRA's domestic trust audit initiative which saw the creation of a "regional trust team" for the Golden Horseshoe region, focusing on Mississauga, Hamilton, Kitchener, London and Windsor. This team is currently engaged in substantial audit activity in the region.

The CRA has also introduced the Related Party Initiative (the "RPI") which focuses on high net-worth individuals and families that have net assets of $50 million or more, and who have 30 or more related economic entities. These entities include, but are not limited to: trusts, corporations, partnerships, joint ventures and private foundations.

In the past, there were very few audits of *inter vivos* trusts. Now, with the implementation of the domestic trust audit program, Canadians and their lawyers should be aware of the increased number of CRA trust audits.

Based on the decision in *Antle v. Canada*, auditors will be concerned with the particulars of how a trust was set up. In *Antle*, the Federal Court of Appeal held that the trust in question lacked validity because of irregularities in the documents relating to the trust's creation and its ability to accept transfers of property. The trust was also deemed invalid because parties involved in business dealings with the trust were blind to its existence.

The CRA is also concerned with trusts being properly maintained on an ongoing basis. In particular, it will be looking at whether or not a trust's tax returns are being filed within the requisite timeframes and if the provisions of the *Income Tax Act* are being diligently followed. In the event of infractions, the CRA may perform reassessments of trusts and beneficiaries for income tax, interest and penalties.

POWERS OF ATTORNEY

Koperniak v. Wojtowicz[4]

In *Koperniak*, the applicant, Helen Koperniak ("Ms. Koperniak") sought an accounting from her brothers over their mother's ("Mrs. Wojtowicz") finances. The brothers were Mrs. Wojtowicz's joint attorneys for property.

In support of her application, Ms. Koperniak made several accusations about the improper handling of her mother's finances and personal care. Most of these accusations were in regard to the sale of the family farm owned by Mrs. Wojtowicz and the distribution of the proceeds. After the farm was sold, the brothers each received $500,000.00, another sister received $100,000.00, and Ms. Koperniak received nothing.

Evidence was put to the court however, that Ms. Koperniak and her other sister had received many gifts throughout their lives and that the brothers had not. The brothers had also taken care of Mrs. Wojtowicz and the farm for many years while not receiving compensation. There was also evidence showing Mrs. Wojtowicz was happy with her sons' handling of her finances and personal care and that she wanted them to continue doing so.

Justice MacPherson accepted the brothers' evidence and noted that no evidence was advanced to show that Mrs. Wojtowicz lacked capacity to make decisions or that the sale of the farm and subsequent gifts to three of her children were against her wishes and intentions.

Justice MacPherson then considered s. 42(4) of the *Substitute Decisions Act*[5] which lists the persons who may apply to have attorneys pass their accounts. The "basket clause" states that "any other person, with leave of the court" can apply to have attorneys' accounts passed. Ms. Koperniak submitted she ought to be granted leave, advancing several cases supporting her position that courts have a tendency to lean toward full transparency of an attorney's dealing with a grantor's assets. She argued that this was particularly the case when there are "suspicious circumstances" and when gifts are given to the attorney using the power of attorney.

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[4] (2010), 57 E.T.R. (3d) 234, 187 A.C.W.S. (3d) 583 (Ont. S.C.J.) [*Koperniak*]
[5] S.O. 1992, CHAPTER 30

Justice MacPherson disagreed. In his view, Ms. Wojtowicz was indeed capable and able to confirm her wishes. Furthermore, no evidence had been advanced displaying the necessity to pass accounts.

There was also evidence that the brothers had used their powers of attorney to sign a small number of cheques. Justice MacPherson held that this fact did not automatically give rise to an entitlement to a passing of accounts. Justice MacPherson also noted in his decision that there is nothing at law that imposes an obligation to treat one's children equally. The application was denied.

JOINT FAMILY VENTURES POST-*KERR*

The Supreme Court of Canada's ("SCC") decision in *Kerr v. Baranow ("Kerr")*[6] provides a clear framework for the application of the principles of equity to property claims by unmarried spouses. Through *Kerr*, the SCC explored and clarified resulting trusts and various remedies for unjust enrichment. It appears that *Kerr's* most significant contribution is to clearly set out the analysis for Joint Family Ventures ("JFV") and offers more flexible remedies to unmarried spouses.

Hillier Estate v. McLean[7]

One of the few unjust enrichment estates cases rendered post-*Kerr* is that of *Hillier Estate v. McLean*. In this case, the deceased Mr. Hillier's daughter (Ms. Beck) brought an action in the Newfoundland and Labrador Superior Court of Justice to have Ms. McLean, the former common-law partner of Mr. Hillier, removed from a house owned and built by Mr. Hillier. Ms. McLean had ended her relationship with Mr. Hillier prior to his death. Ms. Beck advanced the argument that Ms. McLean had no claim to the property in question because the parties had not been married and a settlement had been reached following the termination of their relationship whereby she received several vehicles and title to a cottage property.

The trial judge made the following finding of facts: Mr. Hillier and Ms. McLean's relationship began in 1992. The couple lived separate and apart for the bulk of their relationship. Ms. McLean had lived in a house with Mr. Hillier immediately prior to him being incarcerated on a drug charge in 1993. It is unclear how long they lived together in this house. In 2004, Mr. Hillier

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[6] (2011), 328 D.L.R. (4th) 577, [2011] 1 S.C.R. 269 [*Kerr*].
[7] (2011), 203 A.C.W.S. 678, [2011] N.J. No. 208 (Nfld & Lab. S.C.T.D. (General)) [*Hillier*].

began building a new house. Ms. McLean made no financial contribution to the construction of this new house. She also made little other contribution to the construction of the new house despite being a carpenter by trade. When not living with Mr. Hillier, Ms. McLean and her young daughter were on social assistance. Ms. McLean did however contribute to the design of the house, assisted with the painting of the main floor, the construction of the deck, the maintenance of the vegetable garden, and the selection of the furnishings.

In 2004, Ms. McLean and her daughter moved into the new house with Mr. Hillier. She enjoyed sporadic employment at various jobs and testified that she passed her limited earnings from these jobs onto Mr. Hillier, as she did not have her own bank account. Mr. Hillier provided for Ms. McLean and her daughter, providing them with vehicles and paying for family vacations. The relationship was described as "on and off" until the final separation in 2009. Mr. Hillier died three months after.

Following Mr. Hillier's death, Ms. McLean moved back into the home. Ms. Beck then commenced an action to have her removed from the home and Ms. McLean responded by claiming a half interest in Mr. Hillier's estate.

The trial judge (Justice Stack) applied *Kerr* and found that a JFV had been established, although it was limited to the duration of their cohabitation and not the duration of their relationship. At paragraph 30, Justice Stack finds that because Ms. McLean's daughter's care "did not require Ms. McLean's full-time attendance at their residence", such care did not factor her into his JFV equation. Justice Stack also found that Mr. Hillier was not in *loco parentis* to the daughter despite her residing in the house after the end of the relationship between her mother and Mr. Hillier.

In finding that a JFV had been established, Justice Stack relied on the following facts:

- The couple only had one bank account and it was in Mr. Hillier's name;
- Ms. McLean had been on social assistance in the early stages of the relationship;
- Living with Mr. Hillier allowed Ms. McLean to maintain her desired lifestyle in her desired community without the need for social assistance;
- Ms. McLean's limited contributions to the property represented some benefit to Mr. Hillier and a corresponding deprivation to her; and,

- The property was planned together with the intention that Mr. Hillier, Ms. McLean and her daughter would live in it as a family.

After finding the establishment of a JFV, Justice Stack found that Ms. McLean was entitled to more than what she had received following the 2009 separation. However, he found that she was only entitled to 10% of the equity of the house, and not the 50% she had been seeking. Justice Stack's reasoned that this was the appropriate remedy because Ms. McLean had not made an equal contribution to the acquisition of the property. Although she was a trained carpenter, she did not pursue work in this field in order to contribute financially to the family. Ms. McLean and Mr. Hillier also shared he house work equally and Mr. Hillier managed all of the family's assets.

Although a JFV allows for a claim to all wealth amassed during a relationship, Justice Stack's award only focused on the property in question and none of the other assets of the Hillier estate. In order to make a claim on all wealth amassed, a link must be established between the party's contributions and that wealth. Justice Stack found that this link only existent, and in a limited way, to the property in question. Ms. McLean was precluded from claiming any interest in a cabin and a shed, as she had not made any contributions to their acquisitions.

Before *Kerr*, after making a finding of unjust enrichment, Justice Stack would have been faced with two options: awarding Ms. McLean a 10% proprietary interest in the house Mr. Hillier built, or, awarding Ms. McLean a monetary award based on the services she provided to Mr. Hillier. The first option would give Ms. McLean a proprietary interest, which does not seem to be appropriate given the facts. The second option would have required an overly-complex "value-received" calculation.

Having found a JFV, *Kerr* allowed Justice Stack to award Ms. McLean a percentage of the house's value, which would appears to be an equitable solution to the dispute.

PASSING OF ACCOUNTS

Damm Estate (Re)[8]

At the outset of his decision in *Damm*, Justice Brown advances the question central to the case: "What form of accounts must a guardian of property use when filing an application to pass accounts?"

In order to answer this important question, Justice Brown looked to s. 42(6) of the *SDA*, which states that accounts filed by a guardian of property shall be filed with the court "and the procedure in the passing of the accounts is the same ... as in the passing of executors' and administrators' accounts." Justice Brown also notes that Rule 74.17 of the *Rules of Civil Procedure*[9] contains the detailed formal requirements that accounts must meet. Furthermore, a practice has developed amongst estates practitioners to divide accounts into capital receipts and disbursements, revenue receipts and disbursements, and statements of assets, along with an explanation of any fiduciary's claim for compensation.

In his decision, Justice Brown notes that the *Rules* require such detail so that a Respondent may "properly understand the conduct for which the fiduciary seeks court approval" and so that a judge may "link the particulars of the judgement sought – e.g. approval of a specific amount of revenue receipts – with the evidence contained in the filed accounts."

Based on the facts before him, Justice Brown rejected the application to pass accounts by the guardian of property because they were not in the proper form. Justice Brown found that the accounts, as presented, were very general in their form and did not have "the detail and itemization required by the *Rules*.

In *obiter*, Justice Brown suggests that it may be a good idea to allow smaller estates to use a simple form of accounts instead of subjecting them to the rigours of the Rule 74.17 format. He does, however, state that unless the Rules Committee and the Legislature take steps to amend this, accounts must comply with the format prescribed by the *Rules*.

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[8] (2010), 61 E.T.R. (3d) 160, 192 A.C.W.S. (3d) 1359 (Ont. S.C.J.) [*Damm*].
[9] R.R.O. 1990, Reg. 194.

LIMITATION PERIOD FOR DEPENDANT SUPPORT CLAIMS

Section 61(1) of the *Succession Law Reform Act*[10] (the "*SLRA*") prescribes the limitation period for a dependant's relief application, disallowing one from being brought "after six months from the grant of letters probate of the will or of letters of administration." S. 61(2) however, allows the court, "if it considers it proper, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application." It appears then, that the court's decision to allow a claimant to bring a relief claim after the six months has passed hinges on what it deems to be "proper." Although the following cases are from 2005, they provide good examples of when the court will exercise its discretion in extending the six month limitation period.

McGelligott Estate v. Damecour[11]

In *McGelligott*, the dependant's mother brought an application against the deceased's estate for the support of her and her dependent children. Although the application was brought well after the limitation period had expired, the court weighed all of the surrounding circumstances and allowed the claim to be brought. Of particular importance was the fact that the mother had continued to rely on an existing temporary support order which had survived the death of the testator. Also, counsel had contemplated how to bring the claim under other statutes and was also involved in settlement discussions, adding to the delay.

Ivanic v. Ivanic Estate[12]

In *Ivanic*, the court allowed an application to be brought even though it had exceeded the limitation period by 15 days. The central issue was the testator's testamentary capacity at the time of making his will and, thus, whether or not the will was valid. The application was brought by the testator's widow. While they remained legally married at the time of death, they had been estranged for many years. The claimant was not provided for under the deceased's will. She advanced two arguments. The first was that the will was invalid for lack of capacity and she should be provided for on the basis of intestacy. In the alternative, she sought dependent's relief under Part V of the *SLRA*. Justice Herold exercised his discretion and allowed the widow's claim to be brought after the expiry of the limitation period. He noted, at paragraph 7,

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[10] R.S.O. 1990, c. S. 26, ss. 57 to 79.
[11] (2005), 142 A.C.W.S. (3d) 792, [2005] O.J. No. 3982 (S.C.J) [*McGelligott*].
[12] (2005), 139 A.C.W.S. (3d) 964, [2005] O.T.C. 468 (S.C.J.) [*Ivanic*].

that "[t]he limitation period was never raised in pleadings and only arose for the first time very late in the course of submissions." This is an important reminder to always consider any possible limitation period issues that may arise in litigation and to address them as early as possible and include them in pleadings.

WILL CHALLENGES

Undue Influence

The concepts of undue influence sufficient to overturn a will, and how to prove the existence of undue influence, were analyzed in several trial and appellate decisions.

Factually speaking, undue influence arises in circumstances where an individual takes unfair advantage of someone, who relies on that individual for his or her daily needs, or takes unfair advantage of that individual's weakness of mind where there is the existence of mental frailty.

Smith Estate v. Rotstein

In *Smith Estate*,[13] the question of undue influence arose in circumstances where a series of wills were challenged by the daughter of the deceased and the Notice of Objection filed was set aside by way of a Motion for Summary Judgment by the brother. In this case, in the context of the allegation of undue influence, the court looked at circumstances where the daughter objected to the issuance of a Certificate of Appointment of Estate Trustee of her late mother who died in 2007, at 92 years of age. The testatrix's husband predeceased her in 1993, and the testatrix was survived by the objector (her daughter) and one son.

The testatrix had made several wills and codicils during her lifetime, and the objector was challenging those wills dating back to the mid-1970s. In this case, while all of the general grounds for challenging a will were pursued, including lack of testamentary of capacity, suspicious circumstances and undue influence, the court undertook a careful review of the question of whether or not the testatrix was subject to undue influence when she made her 1987 will and two subsequent codicils.

In undertaking its analysis, the applicable legal principles were considered and the Court reiterated the fact that proof of undue influence requires proof of coercion, such that the mind of

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[13] 2010 Carswell Ont. 2282, 2010 ONSC 2117, 56 ETR (3rd) 216; affirmed by 2011 ONCA 491, 2011 Carswell Ont 5677 [*Smith*]

the testatrix was overborne by the influence exerted by another person so that there was no voluntary approval of the contents of the wills.[14] The court highlighted the decision of Cullity J. in *Banton v. Banton*, where he stated:

> *A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will–making power to another person.*[15]

In further enhancing the definition of undue influence, the court in *Smith Estate* went on to say:

> *It follows that the degree of influence is greater than that required to set aside inter vivos dispositions other than, perhaps, gifts mortis causa. In the words of Sir James Hannen in Wingrove v. Wingrove (1885), 11 P.D. 81:*
>
> > *"To be undue influenced in the eye of the law, there must be – to sum it up in word – coercion" at page 82.*[16]

After carefully defining the concept of undue influence, the court in *Smith Estate* proceeded to identify the role of the Court in matters where the question of undue influence is pursued. The Court noted that, where an objector claims the disputed testamentary document was made as a result of undue influence, it is the Court's role to inquire whether the testatrix, in giving instructions for, and executing, her Wills was acting under the influence of another. This influence needs to be sufficient to the extent that the Court should regard the Will as not an expression of her intentions, but that of others.[17]

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[14] *Smith* at para. 176
[15] *Smith* at para. 176
[16] *Smith* at para. 176; See also: *Scott v. Cousins*, [2001] O.J. No. 19 (ONSC)
[17] *Smith* at para. 178

While the undue influence evidence at the time of execution is a vital component of the inquiry by the Court, in *Smith Estate*,[18] the Court again highlighted the *Banton* decision, where Cullity J. stated that post-execution evidence may also be relevant to the inquiry, to a certain extent:

> *The relevance of the evidence with respect to the relationship between George Banton and Muna is, of course, confined to the presence or absence of undue influence at the times of the execution of the wills. I believe, however, that the following passage from the judgment of the court of appeal delivered by Arnup J.A. in Eady et al the Waring (1974)2 O.R.(2nd) 627 (C.A.) is as applicable to the issue of undue influence in this case as it was to the question of testamentary capacity the court was considering:*
>
> *While the ultimate probative fact which a probate Court is seeking is whether or not the testator has testamentary capacity at the time of execution of his will, the evidence from which a Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proved incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself. At p. 639 (emphasis added).*

In *Smith Estate*, the court had to consider an allegation of undue influence that spanned over many years. The objector asserted that, since the 1970s, her brother had exerted undue influence on their mother, and such influence continued until her mother's death in 2007.[19]

Ultimately, both the court at first instance and the Court of Appeal[20] found that there simply was not sufficient evidence to support a will challenge on the basis of lack of testamentary capacity or undue influence in the circumstances.

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[18] *Smith* at para. 178
[19] *Smith* at para. 188

While the test for, and definition of undue influence is paramount to any full understanding of the role of this concept in will challenge cases, the type of evidence of use for such cases and the timing of that evidence in the context of the deceased's lifetime is equally important. However, the third component to any will challenge on the basis of lack of testamentary capacity is the whole question of the burden of proof in respect of a claim of undue influence.

In *Smith Estate*, the court cited the two leading decisions on this topic of the burden of proof in respect of a claim of undue influence, namely, *Vout v. Hay*[21] and *Scott v. Cousins.*[22]

In *Smith Estate*, the court noted:[23]

> *In Vout v. Hay, the Supreme Court discussed the relationship between the concept of suspicious circumstances and the burden of proof in respect of a claim of undue influence. Cullity J. provided a nice summary of the principles which emerged from Vout and his decision in Scott v. Cousins:*
>
> *The principles that I believe are established by the decisions of the court and are relevant here, can be stated as follows:*
>
> 1) *The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.*
>
> 2) *A person opposing probate has the legal burden of proving undue influence.*
>
> 3) *The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.*
>
> 4) *In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.*

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[20] 2011 ONCA 491, 2011 Carswell Ont 5677
[21] [1995] 2 SCR 876
[22] [2001] O.J. No. 19 (ONSC)
[23] *Smith* at para. 180

Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appears to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

5) *This presumption "simply casts an evidential burden on those attacking the will".*

6) *The evidential burden can be satisfied by adducing evidence of suspicious circumstances – namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder."*

7) *The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.*

8) *A well-grounded suspicion of undue influence will not, per se, discharge the burden of proving undue influence on those challenging the will:*

... it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will.