

VOUT v. HAY et al
Supreme Court of Canada, June 22, 1995

"Undue Influence" in a probate action means that a testator has been put in a position where, if he could speak his wishes, he would say: "This is not my wish but I must do it". Sir J. Hannen P. (to the jury) in Wingrove v. Wingrove (1885) 11 P.D. 81.

In June of this year the Supreme Court of Canada has again demonstrated its ability to render a decision in an area of interest to wills and estate practitioners that sends mixed messages. In Vout v. Hay they had an opportunity to clarify an often misunderstood area of the law, suspicious circumstances of undue influence, but when the Court applies the law to the facts the precedential value of the decision is compromised.

The Facts

It is not often that one can review more of the evidence given at the trial by reviewing the Supreme Court of Canada decision than by perusing the trial and Court of Appeal decisions, however this is the case in Vout.

Clarence Hay was 78 when he made his last Will. Mr. Hay was an Ontario farmer whose closest next of kin were his brother and nephews and nieces with whom he enjoyed a good relationship. At the date he made his Will, Sandra Vout was a 24 year old woman who helped on Mr. Hay's farm and "spent time" with him. There is no suggestion of any romantic involvement between the two. The Trial Judge relied on photographs of them together as evidence of their relationship.

Mr. Hay's Will left small cash legacies to his brother, nephews and nieces, one farm to a nephew and one of his farms as well as the residue of his \$320,000 estate to Ms. Vout making her the major beneficiary. He was murdered three years later. Although Ms. Hay was suspected and questioned by the police, another man eventually confessed to the crime.

Mr. Hay's family were unaware of Ms. Vout's involvement with Mr. Hay and were very surprised to learn of the contents of the Will. They challenged the validity of the Will. Mr. Hay had made a Will 20 years before leaving everything to his brother and (now deceased) sister.

There were two diverse stories regarding the circumstances surrounding the creation of the Will. Ms. Vout said she had recommended her parents' sole practitioner lawyer to Mr. Hay and met him in town and went with him to the lawyer's office. Interestingly, she told police that she had driven him to the lawyer's office, but at trial she explained this discrepancy by saying she was under stress during the police interrogation.

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The "other" story was relayed by the two legal secretaries that were involved with the Will. No lawyer was ever involved in any way with the Will!

One of the secretaries testified that Ms. Vout had called to make the appointment for Mr. Hay to

make his Will and gave instructions on the Will contents over the phone. The secretary then prepared the Will. No file or notes were made. When Ms. Vout and Mr. Hay attended at the office, the secretary read the Will to Mr. Hay. At some point he hesitated and looked at Ms. Vout. Ms. Vout said "Yes, that is what we discussed. That is what you decided" and he nodded to continue. After she finished reading it, another secretary attended and the Will was executed. Ms. Vout instructed them not to send the bill to the farm and Ms. Vout later came in and paid it.

Several witnesses testified that Mr. Hay was eccentric but alert, smart, independent and not easily influenced.

The Judgements

Mr. Justice Byers of the Ontario Court of Justice - General Division found in favour of Ms. Vout and upheld the validity of the Will. He was surprised that the secretaries could remember this Will but accepted their evidence with respect to testamentary capacity as well as with respect to due execution. He recognized that Ms. Vout had some influence on Mr. Hay and that she wanted the benefit under the Will. He held that Ms. Vout's assistance in getting Mr. Hay to the lawyer's office was not relevant. He held Mr. Hay's motives for making this Will were immaterial. Unfortunately, the Judge did not make a determination as to which version of the two stories regarding the circumstances surrounding the creation of the Will was correct. He merely held, in a general manner, that the suspicions of the Hay family were not well grounded. The Judge seemed to place much reliance on the fact Mr. Hay was able to live alone for three years after he made the Will.

The Ontario Court of Appeal held, in brief reasons, that the Trial Judge had erred in basing his decision entirely on the mental competency of the Deceased and that the Judge failed to consider whether there had been suspicious circumstances that cast the onus of disproving undue influence on Ms. Vout. The Court of Appeal ordered a new trial.

The Supreme Court of Canada in a unanimous five person panel overturned the Court of Appeal and restored the trial judgment. Mr. Justice Sopinka gave the reasons for judgment.

The primary issue was: who has the burden of proof of undue influence when suspicious circumstances are present in a proof in solemn form action?

The Court recognized the problem in a quotation from a 1938 Canadian Bar Review article:

Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are, in the writer's opinion, second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known" [*Riach v. Ferris*, S.C.R. 725, at p. 726], the fact remains that judgments dealing with litigation of this kind abound in language that is hazy, obscure, and extremely difficult to reconcile. While paragraphs can be taken from judgments setting out in convenient form an exposition of the existing law, it is an altogether different matter to apply that law to a given set of facts."

Some of these issues have been clarified over the years but the confusion regarding suspicious circumstances remained. The Supreme Court has clearly settled the matter with respect to undue influence. The Court held that the person alleging undue influence, whether by direct evidence or raising suspicious circumstances, has the onus of proof on a balance of probabilities. How they reached this conclusion is less clear.

The Court held that there are three situations where suspicious circumstances may be raised:

- 1) circumstances surrounding the preparation of the Will;
- 2) circumstances regarding testamentary capacity ;
- 3) circumstances tending to show the free will of the testator was overborne by acts of fraud or coercion.

These circumstances will affect the burden of proof regarding knowledge and approval of the Will. This burden is on the propounder of the Will.

The Court referred to the rebuttable presumption that on proof the Will was duly executed and was read by or to the testator, it is presumed the testator knew and approved the contents and had testamentary capacity.

If suspicious circumstances regarding knowledge and approval are present then the presumption of knowledge and approval is spent and the propounder reassumes the burden of proof. Similarly, if suspicious circumstances regarding testamentary capacity are present then the presumption of testamentary capacity is spent.

However, if suspicious circumstances regarding undue influence are present then the presumption of knowledge and approval and testamentary capacity is spent and the propounder reassumes the burden of proof on those two issues. The burden of proof for undue influence remains with the person alleging it.

The Court recognizes there is an overlap and a distinction between knowledge and approval and undue influence. Unfortunately, however, the Court gives no guidance on how to deal with the overlap.

The Supreme Court of Canada held that the Trial Judge's decision was consistent with the application of these legal principles to the facts in this case. The Court wished the Trial Judge had made express findings of fact between the two stories but was satisfied the Trial Judge had scrutinized the evidence to the degree required. In effect, the Supreme Court of Canada said the Hay family had not met the burden of proof regarding undue influence.

The SCC held that Ms. Vout's costs be paid from the estate on a solicitor and client basis and that the Hay's costs be paid from the estate on a party and party basis.

Analysis

It is difficult to comprehend how the Trial Judge could have accepted Ms. Vout's story. He accepted the secretaries' evidence of capacity and execution. There was only one meeting so it is likely the instructions were given by telephone. The secretaries would have no reason to make up the story regarding Ms. Vout's involvement as I submit it would show malpractice or negligence on their part.

If the secretaries' story is correct then one cannot help but wonder if the only way to meet the burden of proof regarding undue influence is to get a confession out of the person doing the influence. That is not likely to occur very often.

I submit that the issue of the overlap between knowledge and approval and undue influence will continue to give rise to creative arguments until there is some clear direction on this point.

On the other hand, if faced with an undue influence allegation, check for photographs to prove the relationship! As well it appears evidence following the execution of the Will is relevant and should not be ignored.

With respect to the award of costs, normally, if one alleges undue influence and is unsuccessful in that regard, that person would have to pay costs. It remains to be seen if this is a new trend.

Finally, no wills practitioner should be delegating the taking of Will instructions, drafting and execution of the Will to staff.(Note: the B.C. Law Society Handbook Chapter 12, paragraph 8(c), frowns on this practise, for good reason, as we have seen! Perhaps Ontario has a different standard. see attached excerpt.)