



Undue influence and coercive behaviour towards a Will-maker

Date: Monday October 26, 2020

All too prevalently we receive enquiries from family members who are suspicious that a vulnerable or elderly family member has been influenced or even bullied by a close relative or family member, to change their Will.

What is ‘undue influence’?

Undue influence refers to situations where a Will-maker is under pressure to write a Will in a way that actually goes against their true wishes. Manipulative behaviour such as blackmail, threats, lies and flattery may be used to unduly influence a Will-maker.

Proving undue influence

The issue of undue influence being used by a family member or beneficiary in relation to a person making or changing their Will is very difficult to prove.

Only actual coercion will invalidate a Will. Persuasion, influence or indeed opportunity is not sufficient.

In the leading case of *Wingrove v Wingrove* (UK), endorsed by Australian courts, Sir James Hannen explained in his direction to the jury about the different kinds of coercion, in terms that may be particularly pertinent to older people:

“The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage or illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness’ sake, to do anything. This

would equally be coercion though not actual violence.”

Thus, even though influence may be bad, it is not undue influence unless this essential element of coercion is established.

Advice and persuasion do not amount to undue influence if the Will-maker is free to accept or reject them. Some pressure is seen as acceptable and will not amount to undue influence.

The general principle is that the court must distinguish between legitimate influence, persuasion and pressure on the one hand and coercion on the other; which deprives the Will-maker of free will.

There is no presumption of undue influence

Unsurprisingly, with this standard required in order to establish undue influence and the fact that the onus of proof lies with the person alleging undue influence (eg, another family member, a friend or even the Will-maker themselves), there are not many cases where this has been upheld by the courts.

Standard and onus of proof

The standard of proof required to prove an allegation of undue influence requires the court to be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.

It is not enough to establish that the person has the power unduly to oversee the Will. It must be shown that the power was actually exercised, and the result of that exercise was the executed Will.

The fact that there are circumstances which arouse the court's suspicion does not affect the issue of undue influence. The onus remains on the party alleging undue influence.

What if undue influence can be proven?

If it can be proved that the whole Will made by the Will-maker was induced by undue influence, then the Will is invalid and cannot be admitted to probate should the Will-maker die. If only part of the Will is affected, then that part only may be excluded.

Leading Queensland case

The question of whether undue influence was applied to a Will-maker was determined in the Queensland Supreme Court decision of Lyons J in [*Birt and Anor v The Public Trustee of Queensland and Anor \[2013\] QSC 13.*](#)

- In this case, the will Will-maker was survived by two daughters and a son.
- There were two Wills. The latest Will left the entire estate to the son with a gift over to one of the daughters.

- The prior Will left the estate to the three children equally.
- It was contended by the daughters that the Will was not valid on the grounds the Will-maker lacked testamentary capacity (suffering dementia) and experienced undue influence by the son.
- One of the issues to be determined in this case was whether the Will-maker was subjected to undue influence at the time she executed the latter Will.
- It was found that the son was verbally abusive and bullying to the Will-maker, with whom he lived. He would bring his friends around and they would smoke drugs, drink alcohol and come into the house and take her food.
- The son had managed to convince the Will-maker of what he believed; that his sister was taking over the house and wanted to remove him.

It was found there was no evidence that he convinced the Will-maker to change her Will so that she left the entire estate to him on her death.

In finding no evidence of undue influence by the son on the Will-maker, Justice Ann Lyons said that:

“There is no evidence that Bill (the son) wanted a particular result other than to remain in the house at that point in time. There is simply no evidence that Bill was the stimulus for Mrs Brooks (the Will-maker) to actually change her will. There is simply no evidence that he wanted that particular outcome.”

This practical case highlights the difficulty in succeeding in proving undue influence under the present state of the law.

Get help from a Wills & Estate lawyer

Anyone who [suspects that they have been left out of a Will due to coercion being applied](#) to the Will-maker should seek legal advice from one of our [Wills and Estates lawyers](#).

Even during COVID-19, we continue to provide our client services to the highest standards.

Most of our teams have now returned to their respective offices with others remaining fully equipped to work remotely, where necessary.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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