



ANTHEA LAW
Partner
Suite 1050, 10201 Southport Road S.W.
Calgary, Alberta T2W 4X9
Telephone: 403.255.2636

Fax: 403.253.8036
www.vogellawyers.com

THE VALIDITY OF WILLS

by Anthea Law, with assistance from Lauren Baldwin

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While it is commonly stated that it is important to have a will when you pass away so that your estate can be distributed in the manner that you wish, it should be clarified that it is important to die with a valid will. This is because the validity of a will can be challenged in a number of different ways.

I. Legislative Requirements

The *Wills and Succession Act*, SA 2010, c W-12.2 (the "WSA") sets out the requirements for a valid will as follows:

14 To be valid, a will

- (a) must be made in writing,
- (b) must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator's will, and
- (c) subject to any order made under section 37, must be made in accordance with section 15, 16 or 17.

A valid will can be a formal will pursuant to section 15 of the WSA, a holograph will pursuant to section 16 of the WSAⁱ, or a military will pursuant to section 17 of the WSA.ⁱⁱ The requirements for a formal will are as follows:

15 A will may be made by a writing signed by the testator if

- (a) the testator makes or acknowledges his or her signature in the presence of 2 witnesses who are both present at the same time, and
- (b) each of the witnesses signs the will in the presence of the testator.

However, if a will is not valid because the requirements for a formal will, a holograph will, or a military will have not been met, the WSA now provides the Court with the curative authority to validate a non-compliant will. Section 37 of the WSA states as follows:

37 The Court may, on application, order that a writing is valid as a will or a revocation of a will, despite that the writing was not made in accordance with [section 15](#), [16](#) or [17](#), if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will.

It is important to note that the Court's ability to validate a non-compliant will is constrained by the fact that pursuant to section 14(b), the will must still be signed by the deceased. As such, unlike similar legislation in other jurisdictions, the Court's power to validate a non-compliant will does not apply if the deceased did not sign the will in question.ⁱⁱⁱ

In *Woods Estate (Re)*, 2014 ABQB 614, the testatrix met with a solicitor concerning her instructions for her will, and the solicitor completed a Questionnaire. The testatrix unexpectedly died twelve hours after meeting with her solicitor. The beneficiaries who would have inherited had the testatrix lived long enough to sign a will that her solicitor prepared in accordance with instructions, applied to the Court to have the Questionnaire admitted to probate as the testatrix's will. The Court found that the WSA did not authorize the Court to grant an Order validating the Questionnaire as the deceased's will, as she did not intend for the Questionnaire to be her will.

In *Curtis, Re*, 2014 ABQB 745, an executrix applied to a non-compliant handwritten will of the deceased, written in the executrix's handwriting, but signed by the deceased, admitted to probate. The deceased was the executrix's spouse. In finding that the will could be admitted to probate as it set out the deceased's "deliberate, fixed and final expression of intention as to the disposal of his property on death," the Court discussed the threshold for the curative authority under section 37, finding that the term "clear and convincing evidence" implied the standard of burden of proof, being proof on a balance of probabilities. The Court was able to exercise its validation power in this case because the testator had signed the will.

II. Testamentary Capacity

Section 13 of the WSA states clearly that an individual who is 18 years of age or older may make a will if the individual has the mental capacity to do so.^{iv} The leading case on testamentary capacity is *Banks v. Goodfellow*, (1870) All ER Rep 47 (QB), which Courts in Canada have continued to apply, and which states that in order to establish testamentary capacity:

- (a) the testator must understand that the testator is making a will and that the will disposes of their assets on death;
- (b) the testator must understand the nature and extent of their assets;
- (c) the testator must consider their obligation to their dependents, being those who "have an appropriate claim upon their bounty". While a testator may not agree with those obligations, the testator must be able to consider such moral and legal obligations, for example, to those people who meet the definition of a "family member" under the WSA for the purposes of an application for family maintenance and support;^v
- (d) the testator must be free of any delusions which may affect their decision. Having a mental disorder alone is not sufficient to find that a testator lacks testamentary capacity. What is required is that the disorder affects the testator's capacity, such that the testator was not able to make rational choices when making testamentary dispositions. In *Banks v. Goodfellow*, the testator harboured some strange delusions, but it was found that those delusions did not affect his ability to make testamentary dispositions.

Should the Court find that only a particular portion of a will is invalid because of a lack of testamentary capacity, then that tainted portion may be severed. In *Re Bohrmann*, [1938] 1 All ER 271, the Court found that while a will that the testator had executed was valid, a codicil that he had executed in a subsequent year was invalid as it was the product of a delusional mind that appeared later in the testator's life, which affected his ability to make a testamentary disposition then.

III. Knowledge and Approval - Suspicious Circumstances

In addition to a challenge based solely on lack of testamentary capacity, certain wills can also be challenged based on suspicious circumstances. In *Petrowski v Petrowski Estate*, 2009 ABQB 196 (*Petrowski*), the son challenged his father's will, alleging that his father lacked testamentary capacity. The Court set out the three steps involved when a will is challenged on the basis of testamentary capacity, illustrating the shifting burden of proof:

1. The propounder of a will has the legal burden of proving that the formal requirements of a will have been met, and that the testator reviewed, understood, *and* duly executed the will. This is done on a balance of probabilities. If this is established, then a rebuttable presumption arises that the testator had testamentary capacity.
2. To rebut this presumption, the challenger of a will has an evidentiary burden to show that suspicious circumstances exist. Relying on *Vout v Hay*, [1995] 2 SCR 876 (*Vout*), the Court noted that suspicious circumstances can arise as follows:
 - (a) with respect to the preparation of the will;
 - (b) with respect to the capacity of the testator; and
 - (c) if there have been acts of coercion or fraud.

Establishing evidence of suspicious circumstances would negate the testator's purported knowledge and approval of the will and its contents, or testamentary capacity:

3. If the challenger can adduce evidence of suspicious circumstances, the onus will shift back to the proponent of the will, and the propounder must now establish that the testator had testamentary capacity and knowledge and approval of the will. *Popke v Bolt*, 2005 ABQB 214 has added to this requirement that the proponent must also prove the testator had knowledge of and approved of the contents of the will, *and* that the will was formally executed.

Courts have consistently held that testamentary capacity is a question of fact, determined when the testator provided instructions and executed their will. Further, the degree of proof required to prove testamentary capacity is directly correlated to the gravity of the suspicious circumstances that have been established.

III. Undue Influence and Fraud

According to *Vout*, fraud can be treated as a separate issue to challenge the validity of a will; however, it is often in practice joined with a challenge based on undue influence. The influence must be "undue" in that it is not merely persuasion; it must amount to force or coercion, and it must take away the testator's free agency, such that the will does not amount to the true intentions of the testator. The example that comes to mind is that of a caregiver withholding medication from a testator that is needed to sustain the testator's life, unless the testator executes a will naming the caregiver as a beneficiary.

While proof of the coercion is required, other relevant factors to proving that there was undue influence on the testator include who the alleged influencer is, what the suspicious circumstances are, and who would benefit if there had been no alleged undue influence.

Vout confirmed that when a person alleges that there has been undue influence and/or fraud on a testator, the burden of proof falls on the person making the allegation, and the undue influence and/or fraud must be proved on a balance of probabilities. Fraud is a very narrow area, as an allegation of fraud can only succeed if the benefit given to an individual was because of a relationship with the testator, and the testator was deceived as to the nature of that relationship by that individual. In *Wilkinson v. Joughin* (1866) L.R. 2 Eq. 319, a testator left his estate to his alleged wife in his will, but the testator did not know she was still married to her husband. She deceived the testator and perpetrated the fraud during their relationship.

Often, fraud and undue influence are used to challenge testamentary capacity when establishing suspicious circumstances. For example, in *Petrowski*, the son alleged that suspicious circumstances existed as the father was unduly influenced, coerced and there was fraud when he made his will. The burden of proof lay with those attacking the will by alleging fraud and undue influence. However, it is important to note, as the Court did in *Vout*, that a testator may know and approve of their testamentary wishes, but knowingly approve of what they are doing due to coercion or fraud.

IV. Practical Considerations

From a solicitor's perspective, challenges to the validity of a will put a great onus on the wills solicitor to ensure that the client has testamentary capacity, has knowledge of and approves the contents of the will, and that the will is duly executed in accordance with the requirements for a formal will pursuant to the WSA. Care must be taken to not only be diligent in taking instructions, but also to generally being alert to the fact that any will could be contested on its validity and that undue influence may exist.

From a barrister's perspective, a will can be fertile ground for a challenge. Notwithstanding the Court's relatively new ability to validate a non-compliant will, the testator or testatrix's testamentary capacity and knowledge and approval of the will, and whether there was undue influence or fraud remain tools available to the barrister to challenge the validity of a will. The case law has shown that challenges to wills are interrelated and often used simultaneously, and consideration should be given to choosing the best route to challenge a will, taking into account whether the burden of proof lies with the propounder of the will or the person attacking the will. While a challenge based on undue influence causes the burden of proof to lie with the challenger, a challenge to the testator's testamentary capacity, with undue influence raised in the context of suspicious circumstances, will result in the burden of proof remaining with the propounder of the will.

Over a century has passed since *Banks v. Goodfellow* was decided and the issue of testamentary capacity remains more relevant than ever, given people's longer lifespans, the various and multiple diseases that can affect a person's memory and capacity, and the amount of wealth that will be devolving as the generation known as the "baby boomers" starts passing away. Whether a successful challenge to the validity of a will results in a prior valid will being admitted to probate or the deceased being deemed to die intestate, and who ultimately benefits from a successful challenge to the validity of a will, will be based on the facts of the case.

ⁱ Section 16 of the WSA: A will may be made by a writing that is wholly in the testator's own handwriting and signed by the testator without the presence or signature of a witness or any other formality.

ⁱⁱ Section 17 of the WSA: A member of the Canadian Forces while placed on active service pursuant to the National Defence Act (Canada), or a member of any other naval, land or air force while on active

service, may make a will by signing it, without the presence or signature of a witness or any other formality.

ⁱⁱⁱ It is to be noted that the WSA contains separate provisions concerning the validation of non-compliant alterations in section 38, and the rectification of wills in section 39. These sections are not discussed in this article.

^{iv} Section 13(2) of the WSA: An individual who is under 18 years of age may make, alter or revoke a will if the individual has the mental capacity to do so and if the individual

- (a) has or has had a spouse or adult interdependent partner,
- (b) is a member of
 - (i) a regular force as defined in the National Defence Act (Canada)
 - (ii) another component of the Canadian Forces and is, at the time of making the will, placed on active service under the National Defence Act (Canada),
- or
- (c) is authorized by an order of the Court under section 36.

^v Section 72(b) of the WSA: "family member" means, in respect of a deceased,

- (i) a spouse of the deceased,
- (ii) the adult interdependent partner of the deceased,
- (iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive,
- (iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,
- (v) a child of the deceased who, at the time of the deceased's death,
 - (A) is at least 18 but under 22 years of age, and
 - (B) is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the Family Law Act and its regulations, and
- (vi) a grandchild or great-grandchild of the deceased
 - (A) who is under 18 years of age, and
 - (B) in respect of whom the deceased stood in the place of a parent at the time of the deceased's death;