

What is undue influence towards a Will-maker?

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Will-makers (testators) can be at risk of testamentary undue influence from others such as family members, carers or friends, when drafting a Will. If you have suspicions that a vulnerable or elderly family member has been unduly influenced in drafting or changing their Will, you may wish to challenge the Will's validity on this basis.

What is 'undue influence' in relation to Wills?

Testamentary undue influence, in general, refers to situations where a Will-maker is coerced to draft a Will in a way that they did not intend or that goes against their true wishes.

For example, coercion could result in a significant portion of their estate or other items of value being left to a certain beneficiary, contrary to the Will-maker's true intentions.

Undue influence occurs most commonly when the Will-maker is vulnerable, isolated and dependent on others for their care and residence, such as a person that is ill or elderly. Testamentary undue influence often involves an element of elder abuse. You can read more about elder abuse in our blog "What is elder abuse and how to prevent it".

How to prove undue influence and coercion of a Will-maker?

A Will can be challenged on the grounds of undue influence and if proven, the Will or part of the Will, shall be held to be invalid. In order to prove a Will is invalid on the grounds of undue influence, the crucial element is to establish that coercion by some other person against the Will-maker has been applied.

In the leading British case of *Wingrove v Wingrove,* which has been endorsed by Australian courts, the classic statement of the law as to undue influence was summarised as:

"To be undue influence in the eye of the law there must be – to sum it up in a word – coercion… The testator is in such a condition that if he could speak his wishes to the last, he would say, "This is not my wish but I must do it…"

Moreover, the court explained that:

"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."

Therefore, some pressure such as advice and persuasion from a family member, carer or other person against the Will-maker is deemed acceptable and will not amount to undue influence if the testator is free to make a decision and is not deprived of their free will.

Whilst undue influence may be exerted through manipulative behaviours such as:

- blackmail;
- lies;
- threats; and
- flattery,

actual violence, force or threats is not required to prove coercion.

The test that is used in the courts to satisfy whether undue influence has occurred is 'actual coercion', not merely persuasion, influence or opportunity.

Undue influence can be difficult to prove

The issue of whether undue influence has been used by a family member or beneficiary on a Will-maker is notoriously difficult to prove. This is because one party, the deceased Will-maker, will not be present to testify. In order to satisfy the high evidentiary bar in proving undue influence, the following must be considered.

Onus and standard of proof

Firstly, the onus of proof for establishing testamentary undue influence lies with the person alleging it at all times.

Secondly, undue influence cannot be presumed. In order to establish undue influence to invalidate a Will, it is not sufficient to establish that there was an opportunity to unduly coerce the testator. Rather, the person making the allegation must show, on the balance of probabilities, that coercion was actually exercised and the execution of the Will by the Will-maker was a result of that coercive conduct.

Due to the difficulty in satisfying the evidentiary requirements to prove undue influence, it is often coupled with other claims that challenge the validity of a Will, such as loss of testamentary capacity by the Will-maker. You can read our blog, "What is testamentary capacity and how is it assessed?"

Case example: Victoria

In the Victorian case of *Nicholson v Knaggs (2009),* the Will of 84 year old testator Betty Dyke, who was suffering dementia and died in 2004 leaving almost $16 million in assets, was examined.

She made a Will in 1985 which left the majority of her estate to charities. In 1999 and 2000, she made two subsequent Wills which left the majority of her estate to three couples who were her neighbours and reduced the money to be donated to her nominated charities.

These later Wills were considerably different from the 1985 Will and the challengers sought to overturn these Wills and have the 1985 Will admitted to probate. You can read more about probate in our blog, "Grant of Representation when dealing with a deceased estate".

The court ruled that two of the Will-makers' neighbours had exerted undue influence over her when she created the later Wills by overbearing her will. Accordingly, the clause in the Will providing a benefit to these neighbours was removed and the rest of the Will was considered valid.

How a Wills and Estates lawyer can help

In order to minimise the risk of testamentary undue influence, or if you have concerns that a Will might not be valid due to testamentary undue influence, it is imperative to seek legal advice. The team at Smith Family Law can help.

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