At What Point Does Familial Pressure On A Testator Become Undue Influence?

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Poitras v. Poitras Estate

In *Poitras v Poitras Estate*[1], the Honourable Justice James examined whether certain pressures exerted on a testator by his children warranted setting aside his will on the basis of undue influence.

An application was brought by a stepmother against four of her five step-children after the death of her husband, who made significant changes to his will and investments shortly before his death. The stepmother alleged that these changes were made at the urging of his children. The changes resulted in a considerable disadvantage to his spouse and corresponding benefit to them. The applicant argued that the changes were made as a result of undue influence by the children and that the will should be set aside. The applicant also advanced a dependant's support claim under Part V of the *Succession Law Reform Act*[2], in the event the will challenge was unsuccessful.

Facts

Gilles Poitras ("**Gilles**") died of cancer on September 5, 2013, at the age of 77. The applicant, Pamella Poitras ("**Pamella**") was 82 years old at the time the application was brought. Gilles and Pamella had been married for over 26 years. It was a second marriage for both of them and they each had children from their prior marriages. Pamella had a good relationship with her step-children prior to Gilles' death.

The respondents to the application included four of Gilles' adult children, Mariette Delorme ("**Mariette**"), Chantal Davey ("**Chantal**"), Louise Gougeon ("**Louise**") and Dany Poitras ("**Dany**"). Gilles' fifth child, Jacquelin Poitras ("**Jack"**) was aligned with Pamella in the litigation and was not named as a respondent.

Gilles' Estate (the "**Estate**") consisted of the matrimonial home (the "**Home**") valued at $176,000, GICs worth $180,000 and a RIF worth $68,000, all of which were held in his name alone at his death.

[1] *Poitras v Poitras* Estate, 2016 ONSC 5049 [*Poitras*].
[2] *Succession Law Reform Act*, RSO 1990, c S-26 as am [*SLRA*] at Part V.

Gilles made a will in 2010, prepared by a local lawyer, naming Pamella as the Estate Trustee and giving her a life interest in the Home. All household expenses, taxes and utilities were to be paid out of the income or capital of the Estate and she was entitled to receive the income of the Estate for her lifetime. Pamella was also empowered to sell the Home and use the proceeds to purchase another home of her choosing. Gilles' household and personal property was left to Pamella outright. Upon her death, the Home (or subsequently purchased home) would fall into the residue of the Estate, which was to be distributed to Gilles' children.

Less than two months before Gilles' death in 2013, he made a new will (the "**2013 Will**"). He used a different lawyer, named Ken Conroy ("**Conroy**"). In the 2013 Will, Dany and Chantal were named as the Estate Trustees. Pamella was still entitled to a life interest in the Home, with all expenses paid by the Estate. However, Pamella's right to the income of the Estate was removed and she could not longer purchase a new home with the Estate funds. The 2013 Will provided instead that if Pamella could no longer reside in the Home, it was to be sold and she was to receive $50,000 from the sale.

Although Gilles' health had been declining for many months, he took a turn for the worse in the summer of 2013. Pamella's evidence was that Chantal called her in mid-July and said that Gilles needed a note from his doctor so that he could make a new will. This surprised Pamella because Gilles had not discussed making a new will with her.

In contrast, it was Chantal's evidence that Pamella called her to advise that Gilles had noticed an error in his previous will and wanted to change it. Chantal suggested he go to a new lawyer to change the will and asked Dany to set up an appointment.

There was further conflicting evidence from Pamella and Chantal over Gilles' health and state of mind when he attended Conroy's office, as well as whether Chantal had been pressuring Gilles to make certain changes to his will, which were detrimental to Pamella's interests.

It was Conroy's evidence that Gilles, Pamella and Chantal attended his office twice in July 2013. On the first visit, Gilles brought a note from his family doctor and Conroy was satisfied that he was competent to make a new will. Pamella and Chantal were present while Gilles discussed the changes he wanted to make with Conroy. Chantal was not present in the room on the second visit, when Gilles signed the 2013 Will. It was Conroy's evidence that Pamella was clear that she did not object to the changes that Gilles made to his will.

Prior to making the 2013 Will, Gilles' GIC investments were held jointly with Pamella and his RIF designated her as the sole beneficiary. The day after Gilles signed the 2013 Will, he attended at the banks to change the investments from joint ownership into his name alone and changed the beneficiary designation from Pamella to the Estate. An interesting fact in this case is that Pamella was present at the time the changes were made and signed off on them. It was her evidence that she did not know why Gilles made these changes and when she pressed Gilles, he would not give her an explanation. Titular ownership to other small, jointly-owned accounts and investments, were not changed.

Gilles became very ill in August and became bedridden. His children stayed by his bedside 24 hours a day. Conflicts arose during this time between Pamella and Gilles' children, with the exception of Jack. Pamella and Jack respectively deposed that Gilles' other four children excluded Pamella from the bed-watch and made unfavourable comments about her behind her back.

After Gilles' death, Dany told Pamella that it was her personal responsibility to pay the funeral costs. Pamella's relationship with Mariette, Chantal, Louise and Dany deteriorated significantly after that point.

The Presence of Suspicious Circumstances

Justice James' analysis regarding suspicious circumstances in this case begins by outlining the applicable principles from *Scott v Cousins*[3] which relate to the burden of proof and rebuttable presumption on those propounding and those attacking a will:

> *The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.*
>
> *In attempting to discharge the burden of proof… the propounder of the will is aided by a rebuttable presumption. This presumption simply casts an evidential burden on those attacking the will. The evidential burden can be satisfied by introducing evidence of suspicious circumstances, namely evidence which if accepted to tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.*

[3] *Scott v Cousins*, [2001] OJ No 19 (Sup Ct J).

> *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.*[4]

Justice James found that Pamella was successful in invoking the doctrine of suspicious circumstances regarding undue influence, but not with respect to Gilles capacity to make a new will. Although Pamella argued that Gilles did not have testamentary capacity due to his illness, Justice James found that there was an "absence of evidence that Gilles suffered from mental confusion, delusions or was disoriented as to time and place leading up to and on the day that he made the new will".[5] Further, both his family doctor (via the medical note) and Conroy were satisfied that he had capacity to make a new will.

In this case, the following factors were considered as "suspicious circumstances" on the issue of undue influence and which Justice James found to "raise red flags":

- the timing and circumstances surrounding the making of the 2013 Will;
- the change in ownership of the investments and the new beneficiary designation for the RIF when nothing had changed in Gilles' relationship with Pamella;
- the change in ownership occurred without explanation by Gilles or discussion with Pamella, altering a long established status quo;
- it was Gilles' children who made the selection of the new lawyer in place of the lawyer who made Gilles' previous will;
- it was Gilles' children who made the appointment; and
- the suggestion by Dany that Pamella, rather than the Estate should pay the funeral expenses.[6]

[4] *Ibid* at para 39
[5] *Poitras*, *supra* note 1 at para 36.
[6] *Ibid* at para 31.

Undue Influence

As Pamella had successfully demonstrated the presence of suspicious circumstances, the analysis turned to whether those circumstances were sufficient to meet the burden of proving undue influence. Citing Cullity J. in *Banton v Banton*[7], Justice James outlined this burden as follows:

> *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.*[8]

Justice James found that although there was sufficient evidence to support a reasonable contention that Gilles' children attempted to influence him, the evidence must show that this pressure amounted to coercion, overpowering Gilles' "true intentions". His specific findings on this point are summarized as follows:

- Gilles was not isolated by or dependent on his children prior to the changes;
- Gilles continued to live independently with Pamella in his own home;
- Pamella was his primary caregiver;
- Pamella accompanied Gilles to Conroy's office and to the banks;
- Gilles' children did not sit in on his discussions with Conroy; and
- there was no pattern of pre-death transfers of assets to Gilles' children.[9]

One fact that Justice James found strange under the circumstances was that Gilles inadvertently triggered additional tax consequences on his death, by changing the beneficiary designation on his RIF. This change went against common sense and logic, because the tax consequences would have been avoided with a rollover to Pamela.

Ultimately however, Justice James found that this evidence fell short of establishing that the pressure exerted by Gilles' children was so great that it did not reflect his true intentions in a manner sufficient to set aside the 2013 Will.

[7] *Banton v Banton*, 1998 CanLii 14926 (Ont Sup Ct J).
[8] *Ibid at para 89.*
[9] *Poitras*, *supra* note 1 at para 42.

Analysis Under Section 62(1) of the *SLRA*

As Justice James declined to set aside the 2013 Will, the analysis turned to the merits of Pamella's dependant's support claim. In assessing a claim for dependant's support, the court must consider all of the circumstances of the application. In addition, Section 62(1) of the *SLRA* sets out a list of specific factors for the court to consider as part of this assessment. The chart below sets out the factors which were considered by Justice James and his findings for each with regards to Pamella's claim:

Section 62(1) Factor	**James J.'s Findings**[10]
(a) the dependant's current assets and means;	*"Pamela has adequate current assets and means to meet her present needs;"*
(b) the assets and means that the dependant is likely to have in the future;	*"Her asset base will not increase significantly in the future;"*
(c) the dependant's capacity to contribute to her own support;	*"Pamella can contribute to her own support;"*
(d) the dependant's age and physical mental health;	*"Pamella is 82 years old and enjoys good health at present;"*
(e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living	*"Her present needs are being met;"*
(f) the measures available for the dependant to become able to provide for her own support and the length of time and cost involved to enable the dependant to take those measures;	*"She has no capacity to earn an income;"*
(g) the proximity and duration of the dependant's releationship with the deceased; and	*"She was married to Gilles for 26 years and during that time was a dedicated homemaker, assisted in the upbringing of Gilles' youngest child and took take of Gilles in his waning years. Her entitlement to ongoing support is at a high level;"*
(o) the claims that any other person may have as a dependant.	*"Pamella was Gilles' only dependant. He was legally required to make adequate provisions for her future care after his death. Gilles does not have any other legal obligations."*

[10] *Ibid* at para 46.

Justice James found that Gilles had both a legal and moral obligation to support Pamella as a dependant. While her present needs were adequately protected under the 2013 Will, it was found that her "unascertained future needs" were not. Although Pamella was entitled to live cost free in the Home and receive $50,000 upon its sale, the cost of assisted living can be substantial.

Justice James determined that Pamella was "entitled to a more secure financial future than that which was provided by her husband"[11]and ordered that she be paid an additional lump sum of $85,000 in satisfaction of her claim. He was also ordered that Pamela was entitled to receive the contents of the Home, something not addressed under the 2013 Will.

Conclusion

The decision in this case demonstrates the high burden associated with proving undue influence in the context of a will challenge. It was acknowledged by Justice James that Gilles' children attempted to pressure him to make changes in their favour, but this pressure did not amount to the level of coercion needed to set aside a will.

The fact that Pamella was present when the 2013 Will was made attended at the banks with Gilles and signed off on the investment changes strikes as factors which were particularly detrimental to her case. Her evidence was that she did not think it was improper for Gilles to remove the joint ownership from his investments, as they had existed before she and Gilles were together. This is not usually the circumstance in cases where there have been pre-death joint ownership transfers and is an interesting point which sets this case apart.

[11] *Ibid* at para 56.