Citation: Drewniak v Smith, 2024 MBCA 86
Date: 20241106
Docket: AI23-30-10018

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

	)	***A. M. Friesen*** *and*
	)	***E. A. Rempel***
	)	*for the Appellant*
	)	
KATHERINE ISABEL DREWNIAK	)	***I. B. Scarth*** *and*
	)	***A. C. Derwin***
(Applicant) Appellant	)	*for the Respondent*
	)	*M. E. Smith*
- and -	)	
	)	***No appearance***
MARGARET ELEANOR SMITH and	)	*for the Respondent*
MARGARET GABRIELLE SMITH	)	*M. G. Smith*
	)	
(Respondents) Respondents	)	*Appeal heard:*
	)	***May 8, 2024***
	)	
	)	*Judgment delivered:*
	)	***November 06, 2024***

On appeal from *Drewniak v Smith*, 2023 MBKB 109 [*Drewniak*]

PFUETZNER JA

[1] The principal issue on this appeal is whether a presumption of undue influence can arise at law in respect of the granting of an enduring power of attorney under *The Powers of Attorney Act*, CCSM c P97 [the *Act*]. The law is unsettled in Manitoba and this case provides an opportunity for this Court to provide clarity.

[2] The applicant, Katherine Isabel Drewniak (referred to in the Court below and hereafter as Katherine), asserts that the judge made reversible errors in finding that the enduring power of attorney made on November 29, 2016 (the 2016 POA) by the respondent, Margaret Gabrielle Smith (the Donor), in favour of the respondent, Margaret Eleanor Smith (referred to in the Court below and hereafter as Margaret), was valid.

[3] As I will explain, the equitable doctrine of undue influence applies to the granting of an enduring power of attorney (which I will also refer to as a power of attorney). As a result, an evidentiary presumption of undue influence can arise if the person attacking the power of attorney establishes that there was a relationship with the potential for domination and that the granting of the power of attorney is immoderate and irrational. The evidentiary presumption does not arise on the facts in the present case. Moreover, the judge made no palpable and overriding errors in finding that the Donor had capacity to grant the 2016 POA and that she was not subjected to undue influence. Accordingly, I would dismiss the appeal.

Background

[4] I will briefly summarize the relevant facts, which are carefully addressed by the judge in her reasons. Further details will be provided later, where relevant.

[5] The Donor is the mother of both Katherine and Margaret. At the time of the appeal hearing, the Donor was ninety-two years old and residing in an assisted living facility in Winnipeg. She was, at the time of the application hearing, incapable of managing her financial affairs or of granting a power of attorney.

[6] In 2003, the Donor granted a general power of attorney in favour of Katherine. Margaret was named as the alternate attorney.

[7] In around 2005, the Donor began to have "some cognitive impairment and memory issues" as a result of a stroke (*Drewniak* at para 5). However, the Donor continued to be actively involved in the management of her financial affairs with the support of Katherine, her investment advisors and her accountant.

[8] The Donor became frustrated with what she perceived as Katherine exercising excessive control over her personal and financial affairs. In the fall of 2014, Katherine and Margaret had a falling out over what Katherine described as a misunderstanding regarding a proposed advance of the Donor's funds to a relative. Tensions between Katherine and Margaret and between Katherine and the Donor continued, including over a "Gifting Plan" that the Donor had previously approved for the transfer of funds to her children and grandchildren (*ibid* at para 15).

[9] Between September and November of 2016, Margaret assisted the Donor to meet with her former solicitor, John Poyser (Poyser), and with a new solicitor, Elona McGifford (McGifford), to review her power of attorney. Ultimately, the 2016 POA was prepared by McGifford.

[10] After learning of the existence of the 2016 POA, Katherine questioned its validity and brought an application seeking, among other relief, a declaration that the 2016 POA was invalid. The judge dismissed the application in its entirety.

[11] Katherine has not sought an accounting of Margaret's actions under the 2016 POA. Indeed, at the hearing of the appeal, the parties advised that for the last eight years, the Donor's assets have been managed effectively by her investment advisors and accountant, with information and input from both Katherine and Margaret. Despite having this efficient arrangement in place, Katherine asks this Court to intervene and "invalidate the 2016 POA".

Issues

[12] Katherine cites nine grounds of appeal. However, in my view, there are three main issues on the appeal.

[13] The first issue is whether the judge erred in finding that the Donor had the requisite capacity to grant the 2016 POA. Katherine asserts that the judge failed to apply the correct legal test for determining capacity, failed to give sufficient weight to evidence of the Donor's diminished capacity and failed to recognize the suspicious circumstances surrounding the preparation and execution of the 2016 POA.

[14] The second issue is whether the judge erred in failing to find that the 2016 POA was procured by Margaret exercising undue influence over the Donor. Resolution of this ground of appeal will involve a discussion of whether the judge was correct in finding that an evidentiary presumption of undue influence cannot arise at law in respect of an enduring power of attorney under the *Act*.

[15] The final issue is whether the judge made palpable and overriding errors in the following two findings of fact—misidentifying who made a statement about a "changing of the guard" and mistaking whether the Donor

told Poyser that her mail was being withheld. Even if these were palpable errors, they were not determinative of the outcome of the application. In my view, there is no merit to this ground of appeal and I would summarily dismiss it.

[16] I will now turn to the first issue on the appeal.

Analysis—Capacity

Presumption of Capacity and Statutory Test

[17] At common law, an adult is presumed to have the mental capacity to enter into a contract and other legally binding arrangements unless found otherwise (see *McLeod Estate v Cole*, 2022 MBCA 73 at para 21 [*McLeod*]; Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 4.11). The presumption of capacity includes the granting of a power of attorney (see *Lewis v Lewis*, 2019 ONCA 690 at para 3; *LeBouthillier v LeBothillier*, 2014 NBCA 68 at para 20).

[18] Section 10(3) of the *Act* sets out the capacity required in order to grant a valid enduring power of attorney. It states: "An enduring power of attorney is void if at the time of its execution the donor is mentally incapable of understanding the nature and effect of the document."

[19] The judge made the following key findings regarding the 2016 POA. First, she found that the threshold under section 10(3) was not met on the evidence, stating, "I am not satisfied that the Donor was mentally incapable of understanding the nature and effect of the 2016 POA at the time of its

execution for the purposes of s. 10(3) of the ***Act***" (*Drewniak* at para 56). In other words, she found that the Donor had capacity. Secondly, the judge found that Katherine had "not met the onus of proving . . . that suspicious circumstances existed relative to the Donor's capacity" (*ibid*).

History and Jurisdiction of Probate Courts

[20] The judge's reference to the doctrine of suspicious circumstances and its relevance to the determination of capacity to grant a power of attorney warrants comment. The doctrine has its historical origins in the English ecclesiastical courts, which had jurisdiction over, amongst other matters, the granting of probate of Wills in respect of personal property (see *McLeod* at para 12). As church courts, the judges and lawyers practising therein were trained primarily in canon law and Roman civil law. The laws and procedure that arose in the ecclesiastical courts and their successors (the probate courts) had their origins in these branches of the law and developed separately from both the laws of equity applied in the Court of Chancery and the substantive and procedural law of the common law courts.

[21] Through successive statutory reforms, the probate courts were, over time, merged with the common law courts and courts of equity. However, the laws and procedure that developed in the probate courts have, to a great extent, continued to be applied as received law to probate proceedings in Canada (see Albert H Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" in *Law Society of Upper Canada 19th Annual Estates and Trusts Summit* (3 November 2016) at 6-9; *Otis v Otis*, 2004 CanLII 311 at para 22 (ONSC) [*Otis*]; *The Court of King's Bench Act*, CCSM c C280, s 8).

[22] As Cullity J observed in *Ettorre v Ettorre Estate*, 2004 CanLII 22087 (ONSC), modern court rules relating to probate proceedings "reflect not only its historical background but, more fundamentally, certain special aspects of probate practice" (at para 41). One such aspect is that a grant of probate operates *in rem* and affects not only the parties to the proceeding but anyone having involvement with the estate of the deceased or his or her property. The function of the probate courts "is not merely to adjudicate upon a dispute between the parties. It has always had inquisitorial features" (*ibid*).

[23] Oosterhoff at 12 explained the primary function of the probate courts as follows:

> [T]o determine that a person had died and whether the document or documents presented to it constituted the person's will. If the will appeared to comply with the statutory requirements of age and formalities and looked to be unexceptional on its face, probate in common form would readily be granted as an administrative matter. However, the court would try issues such as compliance with formalities, capacity, undue influence and fraud, and knowledge and approval of the contents, if interested persons raised them. If these were resolved in favour of the will, the court would grant probate in solemn form, or probate *per testes*.
>
> [footnote omitted]

The Burden of Proof in Probate Proceedings

[24] A discussion of the procedure to prove a Will in either common or solemn form is not complete without identifying which party bears the burden of proof—a matter that continues to create lingering confusion due to the imprecise use of two meanings of the phrase "burden of proof" (Lederman at para 3.6).

[25] The first sense in which "burden of proof" is used is in reference to the *persuasive legal burden*, which is the onus to prove certain facts on the civil standard of the balance of probabilities. If the person with the persuasive legal burden on an issue fails to convince the trier of fact to a balance of probabilities, that person will lose on the issue. Substantive law governs who has the persuasive legal burden (see *ibid* at paras 3.8, 3.13).

[26] The other sense in which "burden of proof" is used is in respect of the *evidential burden*. The relevance of the evidential burden arises most often in jury trials, where a party must point to a minimum threshold of evidence before the trial judge will put an issue to the jury for its determination as the trier of fact. Indeed, "[t]he evidential burden is a product of the jury system" (Lederman at para 3.19). The evidential burden is described as "the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue to be considered by the fact-finder" (*ibid* at para 3.7). The evidential burden is, in other words, a burden of adducing or pointing to evidence. It is not measured on the higher standard of proof on a balance of probabilities.

[27] The persuasive legal burden and the evidential burden are usually, but not always, aligned in a proceeding (see *ibid* at para 3.27). The burdens diverge on certain issues in contested probate proceedings.

[28] *Vout v Hay*, 1995 CanLII 105 (SCC) [*Vout*] is the leading Canadian case on the burdens of proof in contested Wills matters and its statement of the law is consistent with the law's historical origins in the probate courts. The propounder of a Will has the persuasive legal burden to prove due

execution, knowledge and approval and testamentary capacity. In a common form proceeding, this persuasive legal burden is typically discharged by the propounder of the Will filing affidavit evidence that the Will was read over by the testator who appeared to understand it and the Will was executed with the requisite legal formalities. Upon establishing these facts, capacity and knowledge and approval are presumed (see *Vout* at para 26). I will refer to this rebuttable presumption as the *evidentiary presumption arising from due execution*.

[29] If a person seeks to attack a Will on the basis that the testator did not in fact execute the Will, lacked capacity or lacked knowledge and approval of the Will's contents, that person has the evidential burden to point to some evidence that, if accepted, would establish those facts (see *Otis* at para 49; *Vout* at para 27). One way that this evidential burden can be satisfied is by pointing to suspicious circumstances surrounding the origins of the Will. In *Vout* at para 25, Sopinka J noted that:

> The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

[30] If the attacker is successful in discharging their evidential burden, the propounder can no longer rely on the evidentiary presumption arising from due execution to satisfy their persuasive legal burden. The propounder must lead sufficient evidence to prove due execution, capacity and knowledge and approval, as the case may be, on a balance of probabilities. If the person attacking the Will has pointed to evidence that the Will was the product of fraud or undue influence, they have the persuasive legal burden of proving

fraud or undue influence on a balance of probabilities. Undue influence will be explored later in these reasons.

[31] Traditionally, once an attacker has discharged their evidential burden, the propounder of the Will would seek to prove it in solemn form with *viva voce* evidence on notice to anyone with an interest in the estate. As noted in Rodney Hull & Ian M Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed (Toronto: Carswell, 1996) at 312, it was the past practice in England, on request, to set a jury trial on contested issues of testamentary capacity, undue influence and fraud (see also JHG Sunnucks, JG Ross Martyn & KM Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 16th ed (London, UK: Stevens & Sons, 1982) at 398).

[32] The distinction between the routine nature of proof in common form and the contentious nature of proof in solemn form continues to this day, although that nomenclature is not always used.

[33] Section 1 of *The Court of King's Bench Surrogate Practice Act*, CCSM c C290 [the *Surrogate Practice Act*] defines "common form business" to mean:

"common form business" means the business of obtaining probate or administration where there is no contention as to the right thereto including the passing of probate and administration through the court when any contention as to the right thereto has been determined	**« procédure ordinaire »** La procédure non contestée quant au droit d'obtenir une homologation ou une administration, y compris le fait de soumettre l'homologation et l'administration au tribunal lorsque toute contestation relative à ce droit a été

and all business of a non contentious nature to be taken in the court in matters of testacy and intestacy not being the lodging of caveats against the grant of probate or administration;	réglée, et toute affaire de nature non contentieuse devant être soumise au tribunal à l'égard des successions avec ou sans testament, à l'exception des oppositions à l'homologation ou à l'octroi de l'administration.

[34] Section 40 of the *Surrogate Practice Act* refers to proof of a Will in solemn form (without defining that term):

Notice of contentious matters **40** Where proceedings are taken for proving a will in solemn form, or for revoking the probate of a will, or in any contentious cause or matter, all persons having or claiming to have an interest in the property affected by the will may be summoned to attend the proceedings and may be permitted to become parties, subject to the rules and to the discretion of the court.	**Avis d'affaires litigieuses** **40** Lorsqu'une instance est engagée afin d'homologuer un testament en la forme solennelle, afin de révoquer l'homologation d'un testament ou à l'occasion de toute cause ou affaire litigieuse, toutes les personnes ayant ou prétendant avoir un droit dans les biens visés par le testament peuvent être sommées d'être présentes à l'instance. Il peut leur être permis d'être constituées parties à l'instance, sous réserve des règles et à la discrétion du tribunal.

[35] To summarize, the persuasive legal burden to prove the validity of a Will never shifts from the propounder in either a common or solemn form proceeding. However, upon the attacker satisfying their evidential burden to raise a question regarding the Will's validity, the propounder can no longer

meet their persuasive legal burden by simply relying on the evidentiary presumption arising from due execution. The propounder must lead evidence to satisfy the trier of fact of due execution, capacity and knowledge and approval on a balance of probabilities. A person seeking to attack a Will based on fraud or undue influence has the persuasive legal burden to prove those allegations. The respective persuasive legal burdens of proof do not change. An evidentiary presumption of undue influence does not arise in probate proceedings (see *Vout* at para 28; Hull at 43).

Application to Powers of Attorney

[36] It is apparent from a review of the jurisdiction of the probate courts that powers of attorney were not part of this legal history. At its core, a power of attorney is a form of agency relationship. Agency has somewhat murky origins, however, most of its principles were developed in the common law courts and the Court of Chancery (see GHL Fridman, *The Law of Agency*, 7th ed (London, UK: Butterworths, 1996) at 7-10). Modern powers of attorney legislation arose to address the inadequacy of the traditional power of attorney structure to provide for ongoing personal care and property management. This led to sophisticated substitute decision-making regimes, such as the *Act*, that can survive mental incapacity[1].

[37] The legal framework developed in the probate courts for proving due execution, capacity and knowledge and approval of Wills has been extended in Manitoba to apply to powers of attorney. See *Young v Paillé*, 2012 MBQB 3 at para 33 [*Young*], where the judge noted that the case was

[1] See CD Freedman, "Misfeasance, Nonfeasance, and the Self-Interested Attorney" (2010) 48:3/4 Osgoode Hall LJ 457, online (pdf): <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?params=/context/ohlj/article/1088/&path_info=27_48OsgoodeHallLJ457_2010_.pdf>.

argued on the basis that the probate rules should apply—a proposition that she accepted without further analysis. The same approach is taken by the courts in Ontario (see *Hollinger v Marshall*, 2024 ONSC 404 at para 56). I am not convinced that there is a compelling reason to propose a change in what the courts have effectively adopted as a policy choice by analogy to Wills—nor has such a change been suggested to this Court.

[38] The person propounding a power of attorney can, in the normal course, rely on evidence of due execution of the document and the common law presumption of capacity to satisfy their persuasive legal burden to prove the validity of the power of attorney.

[39] The person attacking the validity of a duly executed power of attorney may ground their attack on lack of capacity and assert that the power of attorney is void as the donor was mentally incapable of understanding the nature and effect of the document at the time of its execution (see the *Act*, s 10(3)).

[40] As is the case regarding challenges to the validity of Wills, if the person attacking the validity of a power of attorney is able to point to evidence of suspicious circumstances regarding the capacity of the donor to grant the power of attorney, the evidentiary presumption arising from due execution is spent and the party seeking to uphold the power of attorney would be required to lead evidence sufficient to prove capacity on a balance of probabilities (see *Young* at paras 33-34).

[41] As noted by the judge, the nature of the capacity required to grant a power of attorney is generally considered to be lower, or different, than what is required to execute a Will (see *Drewniak* at para 41). Ultimately, the person

must understand the nature and effect of executing the document (see e.g. the *Act*, s 10(3)). This includes that the attorney will have full authority (subject to any limitations set out in the power of attorney) to act on behalf of the donor in all financial matters, that the attorney will have the power to do anything that the donor could do, and that the power of attorney will continue in force and will effectively become irrevocable if the donor loses capacity (see *Dubois v Wilcosh*, 2007 MBQB 20 at para 16; *Re W*, [2001] 4 All ER 88 at paras 18-19 (CA (CD)).

Positions of the Parties

[42] While Katherine accepts the judge's statement of the legal principles relevant to the capacity to give a power of attorney, she argues that the judge "failed to afford appropriate weight to the preponderance of evidence" of diminished capacity and suspicious circumstances. She contends that the judge should have found that McGifford did not sufficiently assess the Donor's capacity or recognize the "red flags" present. Katherine asserts that "[g]iven the suspicious circumstances", the judge "erred in failing to shift the burden of proof onto Margaret to establish" that the Donor had capacity to execute the 2016 POA. Moreover, she maintains that Margaret would have failed to meet that burden on a balance of probabilities.

[43] Margaret submits that the judge applied the correct legal principles and made no palpable and overriding errors in her assessment of the evidence. She asserts that "[b]eing elderly and having memory issues do not alone constitute suspicious circumstances." Accordingly, Margaret's position is that the judge did not err in finding that "Katherine bore the onus to prove that" the Donor lacked capacity "and failed to adduce sufficient evidence."

Discussion

[44] In my view, the judge's statement of the legal principles applicable to the assessment of capacity to grant a power of attorney is consistent with the approach taken in Manitoba, with one exception that did not affect the result.

[45] Relying on *Young*, the judge stated that "the standard of proof applicable to both the establishment of suspicious circumstances and the establishment of the requisite mental capacity is a balance of probabilities" (*Drewniak* at para 40). However, as I have explained, suspicious circumstances sufficient to rebut the evidentiary presumption arising from due execution can be established "by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity" (*Vout* at para 27). Suspicious circumstances need not be established on a balance of probabilities (see also Lederman at para 3.28; *Scott v Cousins*, 2001 CarswellOnt 50 at para 41, [2001] OJ No 19 (ONSC); *Banton v Banton*, 1998 CanLII 14926 at paras 82-83 (ONSC)).

[46] Had the judge applied the correct evidential burden, she might have found that Katherine had adduced or pointed to some evidence that would tend to negative capacity. However, the outcome would have been the same, as the judge's decision did not rest merely on Katherine having failed to establish suspicious circumstances. Rather, the judge found that Margaret had discharged the persuasive legal burden of proving capacity on a balance of probabilities. The judge stated that she was "satisfied, based upon the evidence . . . that the Donor understood, at all material times, that the 2016 POA would grant to [Margaret] the complete authority to act in all financial

matters, including the power to do anything that the Donor could have done, and that the 2016 POA would continue if the Donor became incompetent" (*Drewniak* at para 57). Moreover, the judge "concluded that the Donor had the requisite capacity to make the 2016 POA" (*ibid* at para 59).

[47] The judge carefully reviewed the evidence that Katherine pointed to as showing lack of capacity or, at minimum, suspicious circumstances. This included the Donor's history of medical issues that began in 1996, when she had a stroke. After that time, she suffered a heart attack, a broken hip and pelvis, a seizure disorder and some cognitive impairment.

[48] The judge also considered McGifford's evidence on cross-examination regarding the two telephone conversations and the meeting she had with the Donor to take instructions for and execute the 2016 POA. She found that McGifford's assessment that the Donor had both capacity and knowledge and approval of the 2016 POA was supported by the report of a neurologist, Dr. Peter Hughes (Dr. Hughes), dated January 17, 2017.

[49] Prior to meeting with the Donor, Dr. Hughes was provided with a letter from Katherine indicating that she was "in the process of gathering the medical documentation needed to argue that [the Donor] did not have the capacity" to grant the 2016 POA. Dr. Hughes stated in his report:

> Having interviewed [the Donor] a couple of times, my impression is that her cognitive deficits principally relate to short-term memory. Her insight and her judgment appear to be relatively preserved. In particular, she was able to explain to me the rationale for having assigned financial POA to her younger daughter. I can see no reason why [the Donor] would lack the decision-making capacity to assign POA to family members of her choosing.

[50] In my view, the judge made no palpable and overriding error in finding that the Donor had capacity to grant the 2016 POA. Her findings are amply supported by the record.

Analysis—Undue Influence

[51] The legal issue for resolution on this ground of appeal is the proper way to analyze a claim that an enduring power of attorney has been procured through the exercise of undue influence.

[52] The law on this point is unsettled in Manitoba (and in other provinces), as indicated by the judge (see *Drewniak* at para 62). It appears that most courts in other provinces (and the judge here) favour the approach taken by the probate courts and described in *Vout*. As I have indicated, in the probate courts, the party alleging undue influence has the persuasive legal burden of proof and no evidentiary presumption of undue influence arises on the basis of suspicious circumstances or otherwise (see *McLeod* at para 19; *Vout* at para 28). I will refer to this as *probate undue influence*.

[53] Katherine argues that this Court should endorse the approach to undue influence developed in the Court of Chancery (which I will refer to as *equitable undue influence*). As I will explain, in equitable undue influence, an evidentiary presumption of undue influence can arise in certain circumstances.

[54] Undue influence is, at its core, coercion—whether in probate or equity. A person may have capacity but nonetheless enter into a transaction that they do not approve of because their free will has been overborne by pressure that has been exerted upon them. In other words, "[u]ndue influence

involves the domination of the will of one person by another" (*Trotter v Trotter*, 2014 ONCA 841 at para 58).

[55] The judge framed her decision as a choice between applying probate undue influence and adopting equitable undue influence as it applies to *inter vivos* gifts. She succinctly listed her reasons for adopting probate undue influence (*Drewniak* at para 72):

> I agree with the courts in ***Vanier*** and ***Rudin-Brown*** that the testamentary undue influence test should apply in the context of granting a power of attorney, for the following reasons:
>
> a) both a power of attorney and a will are legal directives reduced to writing, which are often (but not always) prepared and executed with the assistance of counsel and in the presence of witnesses. Conversely, an *inter vivos* gift can be made without any written document or other corroborative context or evidence. For example, an *inter vivos* gift can be given by handing over physical possession of cash or other personal property;
>
> b) a power of attorney imposes ongoing, fiduciary obligations upon an attorney that are similar to the obligations imposed upon an executor named in a will. That is so because both attorneys and executors are obligated to perform their obligations pursuant to legislation and the common law, and must account for their actions. Conversely, the recipient of an *inter vivos* gift owes no fiduciary duty and has no ongoing obligations to the donor;
>
> c) a donor may change their power of attorney or their will at any time prior to incapacity, while an *inter vivos* gift, once given, cannot be revoked; and
>
> d) neither the granting of a power of attorney nor the naming of an executor bestows a benefit upon the attorney or executor,

> whereas the recipient of an *inter vivos* gift by definition receives a benefit.
>
> [footnote omitted]

Equitable Undue Influence and the Evidentiary Presumption

[56] As I have mentioned, equity is the branch of law that was developed and applied in England by the Court of Chancery. Equity has been described as "the body of rules which evolved to mitigate the severity of the rules of the common law" (Harold Greville Hanbury & Ronald Harling Maudsley, *Modern Equity*, 13th ed (London, UK: Stevens & Sons, 1989) at 4).

[57] Before beginning a discussion of the nature of equitable undue influence, it is important to distinguish between the equitable doctrine of undue influence (a substantive legal principle) and the evidentiary presumption of undue influence (a rule of evidence). For example, in the leading case of *Geffen v Goodman Estate*, [1991] 2 SCR 353, 1991 CanLII 69 (SCC) [*Geffen*], Wilson J refers to "the doctrine of undue influence and its evidentiary companion, the presumption of undue influence" (at 367).

[58] As is the case with probate undue influence, the party seeking to attack a transaction on the basis of equitable undue influence has the persuasive legal burden to prove undue influence on a balance of probabilities (see *Royal Bank of Scotland v Etridge*, [2001] UKHL 44 (BAILII) at para 13 [*Etridge*]). However, if certain facts are established, the evidentiary presumption of undue influence can assist the party alleging equitable undue influence to satisfy their persuasive legal burden (see *ibid* at para 14). The function of the presumption of undue influence, in other words, is to assist the

attacker, in the absence of compelling evidence to the contrary, to satisfy their persuasive legal burden to prove undue influence.

[59] The focus of this discussion is on the evidentiary presumption of undue influence. However, the law is clear that a plaintiff can succeed in a claim of undue influence—in respect of an enduring power of attorney or some other transaction—even where the evidentiary presumption is not in play. Viewed in this sense, "presumed undue influence" and "actual undue influence" are no more than different ways of proving the same thing (*Thompson v Foy*, [2009] EWHC 1076 (Ch) (BAILII) at para 100). In the former case, undue influence is proved with the aid of an evidentiary presumption. In the latter, it must be proved without any such presumption and the plaintiff must satisfy their persuasive legal burden to prove undue influence on a balance of probabilities by leading evidence in the normal course as in any civil proceeding.

[60] There are some circumstances "in which equity readily presumes undue influence" (Hanbury at 789). This includes in certain defined relationships, such as parent and child, guardian and ward, solicitor and client, trustee and beneficiary or doctor and patient (see *Geffen* at 370).

[61] There is somewhat of a divergence between English and Canadian law as to when the evidentiary presumption of equitable undue influence will arise. Under English law, even within the defined relationships mentioned above, the evidentiary presumption will not be applied to certain transactions—such as those made on commercial terms or with independent legal advice. Even in respect of gifts, the evidentiary presumption will generally "not operate unless the gift is so large or the transaction so

improvident" that it cannot reasonably be attributed to other innocent motives (Hanbury at 790).

[62] In *Etridge*, Lord Nicholls described two prerequisites to the evidentiary presumption of undue influence. First, that "the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant" (*ibid* at para 21). Second, that "the transaction is not readily explicable by the relationship of the parties" (*ibid*). The second factor is also described as "a transaction which calls for explanation" (*ibid* at para 14), "immoderate and irrational" (*ibid* at para 22) and "explicable only on the basis that undue influence had been exercised to procure it" (*ibid* at para 25).

[63] The reason for requiring that the nature of the transaction be examined is to ensure that *de minimis*, routine or unexceptional transactions do not raise the evidentiary presumption of undue influence. Lord Nicholls wrote: "It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved" (*ibid* at para 24).

[64] However, in Canada, the evidentiary presumption of equitable undue influence is more easily triggered. After considering the pre-*Etridge* English jurisprudence and academic writing on the topic, Wilson J explained, in *Geffen*, that the inquiry into whether the evidentiary presumption is raised begins with an examination of the relationship between the parties to the impugned transaction. In doing so, the court must ask "whether the potential for domination inheres in the nature of the relationship itself" (*ibid* at 355).

This embraces the traditional defined categories, "as well as other relationships of dependency which defy easy categorization" (*ibid*).

[65] The second stage of the inquiry into whether the evidentiary presumption is triggered is to examine the nature of the transaction. Justice Wilson noted that the substantive doctrine of equitable undue influence applies to "a wide variety of transactions from pure gifts to classic contracts" (*ibid* at 354).

[66] For gifts, the courts will scrutinize the *process* leading up to the gifting for "coerced or fraudulently induced generosity" (*ibid*). Justice Wilson concluded that the English requirement of manifest disadvantage from *National Westminster Bank Plc v Morgan*, [1985] 1 UKHL 2 (BAILII), "is a wholly unrealistic test to apply to a gift" (*Geffen* at 377), although she conceded that it is "perhaps appropriate in a purely commercial setting" (*ibid*). Ultimately, *Geffen* held that, in situations "where consideration is not an issue, e.g., gifts" (at 378), a plaintiff does not need to show that they were unduly disadvantaged or that the defendant was unduly benefitted. Justice Wilson wrote: "In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship" (*ibid*).

[67] Accordingly, under Canadian law, the establishment of undue disadvantage or its inverse, undue benefit, is not required for the evidentiary presumption of undue influence to arise in respect of a gift or an analogous act of "beneficence" where there is a dominant relationship. Importantly, however, Wilson J noted, "that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised" (*ibid*

at 379). In other words, while disadvantage or benefit does not need to be established to raise the evidentiary presumption of undue influence in respect of a gift, it is nonetheless relevant evidence in the ultimate determination of whether the plaintiff has satisfied their persuasive legal burden to prove equitable undue influence.

[68] With respect to contracts, something more than a tainted process must be shown (see *ibid* at 376). In a commercial transaction, the plaintiff must show both the required relationship with potential for influence and "that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it" (*ibid* at 378).

[69] A recent case of the Ontario Court of Appeal touched on the question of whether probate undue influence or equitable undue influence should apply to powers of attorney. In *Vanier v Vanier*, 2017 ONCA 561 [*Vanier*], the appellant challenged the validity of a continuing power of attorney for property (given to one of the donor's sons to the exclusion of the other) on the basis that it was procured by undue influence. The appellant argued that the analysis should be undertaken within the framework of equitable undue influence, while the respondent submitted that the correct approach was probate undue influence. The motion judge applied the probate undue influence regime, where no evidentiary presumption can arise.

[70] On appeal, the Ontario Court of Appeal agreed that no evidentiary presumption of undue influence arose in that case for two reasons. The first was that the argument that equitable undue influence applies had not been made before, or considered by, the motion judge. Second, Epstein JA found

that the evidentiary presumption of equitable undue influence in any event did not arise on the facts. In doing so, she applied the two-part test articulated in *Etridge*. The parties conceded that the first part of the test was met—the donor reposed trust and confidence in her son, the attorney. Justice Epstein found that the second part was not met as the appellant could not establish that the granting of the impugned power of attorney was "immoderate or irrational" (*Vanier* at para 52). Moreover, Epstein JA described it as "far from being 'immoderate'" and conferring "little, if any, benefit" on the named attorney (*ibid* at para 53). Curiously, Epstein JA made no reference in her analysis to *Geffen*.

Positions of the Parties

[71] Katherine argues that the judge should have taken the approach described by Wilson J in *Geffen* in respect of *inter vivos* gifts and as further explored by the Ontario Court of Appeal in *Vanier*. Her submission is that a rebuttable presumption of undue influence arises if it is shown that the donor of the power of attorney reposed "trust and confidence" in the attorney and the transaction is not "readily explicable." She asserts that if the judge had applied this approach, the evidence would have raised the presumption that Margaret procured the 2016 POA through undue influence—specifically "Margaret's misinformation campaign against Katherine." Katherine argues that the Donor clearly had trust and confidence in Margaret and that there is "no ready explanation for why [the Donor] would depart from her long-standing pattern of trusting Katherine to be her primary substitute decision-maker . . . and instead appoint Margaret", who had previously been designated as the alternate attorney. Ultimately, Katherine submits that

Margaret would not have been able to prove that "the 2016 POA was not the product of her undue influence".

[72] Margaret's position is that the judge was correct in law to apply probate undue influence to powers of attorney. She asserts that the test for equitable undue influence in respect of *inter vivos* gifts is not applicable to powers of attorney by analogy, as the test "focuses on financial harm to the donor due to the actual transfer of wealth during life" and the consequent "inherent potential for harm." She argues that none of this applies to the granting of a power of attorney.

Decision

[73] There is no question that it is possible for a power of attorney to be granted as a result of undue influence exerted on a donor. Whether the approach of the probate courts or of equity is applied, the persuasive legal burden of proving coercion amounting to undue influence is on the person attacking the power of attorney.

[74] The difficulty with adopting probate undue influence in respect of enduring powers of attorney is that, doctrinally and historically, powers of attorney were not part of the jurisdiction of the probate courts. As I have explained, the probate rules relating to testamentary capacity have been applied to capacity to give an enduring power of attorney in Manitoba by analogy and without substantive analysis.

[75] It is similarly challenging to neatly pigeonhole powers of attorney into either of the two main types of transactions described by Wilson J in *Geffen*. Powers of attorney are not commercial contracts, although they have

their origin in contracts of agency. As Margaret aptly points out, a power of attorney is quite dissimilar to a gift or an act of "beneficence" (*ibid* at 378). I agree with the judge that powers of attorney are more analogous to Wills than to gifts (see *Drewniak* at para 72).

[76] Having said that, it is clear that equitable undue influence applies to "a wide variety of transactions"—not merely commercial contracts and gifts (*Geffen* at 354). In my view, powers of attorney, with their origins in agency and contractual principles of the common law and equity, are within the variety of transactions to which equitable (as opposed to probate) principles of undue influence apply.

[77] The question becomes, in what circumstances will the evidentiary presumption of equitable undue influence arise on the granting of an enduring power of attorney?

[78] In *Geffen*, Wilson J established the test for two types of transactions—commercial contracts and gifts. In my view, the distinction between a power of attorney and a gift is clear. There is no benefit given to the attorney pursuant to a power of attorney—neither legal nor beneficial ownership of the donor's property is transferred and the attorney has the potential to acquire significant statutory and fiduciary duties. The arrangement has more similarities to a contract, albeit one of utmost good faith.

[79] In my view, for the evidentiary presumption of undue influence to apply to the granting of an enduring power of attorney, there must first be a relationship with the potential for domination (see *ibid* at 355). In addition, something more must be shown. That something more does not need to be as

much as the "manifest disadvantage" (*ibid*) that *Geffen* considered appropriate to be demonstrated for the evidentiary presumption to arise in respect of a contract. Rather, I would adopt the test from *Etridge*, referred to in *Vanier*, that in addition to the relationship with a potential for domination, the plaintiff must demonstrate that the granting of the power of attorney was "immoderate and irrational" (at para 50).

[80] Wills and powers of attorney are often executed together as part of an estate plan, with the power of attorney sometimes treated as an afterthought. I am aware that the result of the adoption of this test may mean that an evidentiary presumption of undue influence could arise with respect to a power of attorney but not with respect to a Will that was executed at the same time. However, the adoption of equitable undue influence as the proper test respects the origin and nature of powers of attorney and their distinct nature and function as compared to Wills.

[81] At the end of the day, most contested power of attorney litigation will not rise or fall on the basis of the evidentiary presumption of undue influence. The evidentiary presumption will only win the day in the absence of evidence to the contrary. It will be a rare case where the evidence led by both parties is so evenly balanced that the evidentiary presumption will determine the result.

[82] In the vast majority of cases, issues surrounding powers of attorney will be resolved by courts as part of their supervisory function over the actions of attorneys, rather than by inquiring into the validity of the power of attorney itself. It will obviously be the very rare case where a person procures a power of attorney through undue influence but then exercises their powers in strict

compliance with their statutory and fiduciary duties. While uncommon, it is possible that the person who exerted the undue influence was nevertheless acting perfectly honestly and without any intention of taking advantage of the donor of the power of attorney (see *Niersmans v Pesticcio*, [2004] EWCA Civ 372 (BAILII) at para 20).

[83] In summary, the person seeking to attack an enduring power of attorney on the basis of undue influence has the persuasive legal burden to prove undue influence on a balance of probabilities. That person can, if certain facts are established, rely on an evidentiary presumption of undue influence to satisfy their persuasive legal burden, in the absence of evidence to the contrary. The evidentiary presumption of undue influence will arise in respect of the granting of an enduring power of attorney if (a) the relationship between the person alleged to have exercised undue influence and the donor is one with the potential for domination, and (b) the granting of the enduring power of attorney was immoderate and irrational. If the person seeking to uphold the enduring power of attorney leads evidence tending to refute the existence of undue influence, it will be for the trier of fact to determine if the party attacking the enduring power of attorney has satisfied their persuasive legal burden to prove undue influence on a balance of probabilities.

Application to the Present Case

[84] On the facts of the present case, the evidentiary presumption of undue influence does not arise. Assuming for purposes of the appeal that the Donor and Margaret were in a relationship with the potential for dominance, the granting of the 2016 POA was, as found by the judge, a far cry from being "immoderate or irrational" (*Drewniak* at para 88). The Donor had a close

relationship with Margaret and trusted her. Margaret was named as the alternate attorney in the Donor's previous power of attorney. Both McGifford and Dr. Hughes were satisfied that the Donor gave rational reasons for wishing to appoint Margaret as her attorney in place of Katherine.

[85] Ultimately, the judge's resolution of the present case did not depend on whether the presumption applied but, rather, on whether Katherine had met her persuasive legal burden to prove undue influence on a balance of probabilities. The judge carefully considered Katherine's arguments but concluded that she had failed to establish undue influence (see *ibid* at para 91). The judge made no palpable and overriding errors in this finding.

Conclusion

[86] In my view, the granting of an enduring power of attorney to a family member with whom the donor has a positive relationship is not a transaction that should be regarded as prima facie evidence of the exercise of undue influence by the named attorney—even if there is the potential for dominance in the relationship. To do so would throw a wrench into virtually every basic estate plan. Such a transaction does not call for an explanation—it is readily explicable by the relationship of the parties.

[87] For these reasons, I would dismiss the appeal with costs.

Pfuetzner JA

I agree: Monnin JA

I agree: Cameron JA