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Wills, Trusts & Estates

The beneficiary witness: Pitfalls of 'do it yourself' will

By **James Dunphy**

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(July 7, 2020, 1:09 PM EDT) -- This two-part series will examine one of the most common mistakes made by people using Do It Yourself homemade wills — asking a beneficiary to witness the execution of the will.

A growing practice in Ontario is for people to download a will kit and make their own wills. At first glance it's a less expensive alternative to using lawyers. But only at first glance. The mistakes made by people drafting and seeing to the execution of their own wills can and sometimes do lead to litigation. One example of how this might happen surrounds the rules about who may be a witness to a will.

The witness requirement

Section 4 of the *Succession Law Reform Act* provides that a testator must sign a will in the presence of two or more witnesses who are both present at the same time, and those two witnesses must sign the will in the presence of the testator. Non-compliance with these rules can lead to the will being set aside.

Imagine this scenario. Fred lives alone. He does not want to waste any money on lawyers especially when it seems so easy to download a will kit. He has two children. One is a good for nothing son who spends his day sunning in the backyard and smoking dope. The other is his angelic daughter who juggles a full-time job, a family and still finds time to take care of dear old dad. So, Fred downloads an online will kit. He then proceeds to make his own will and bequeaths everything to his daughter. Fred calls his daughter over and signs the will in front of his daughter and her husband. They sign as witnesses. Is there a problem? Maybe. The good for nothing son goes to an estate litigator who points to s. 12 of the *Succession Law Reform Act*. Section 12(1) of the Act provides:

"Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,

(a) the person so attesting;

(b) the spouse; or

(c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity."

Section 12(1) makes it clear that the entire will does not become invalid simply because a beneficiary has witnessed the will. Rather, the devise, bequest or other disposition to the beneficiary witness under the will is void. What happens to the "void" gift under the will? If the testator did not include a "gift-over" to another beneficiary, the gift will fall into the residue of the estate and will be divided as per the terms of the residue clause. If the beneficiary/witness is included as a residuary beneficiary, unfortunately this gift is also void and the remaining (non-witness) residuary beneficiaries may be

entitled to a share in that gift. Where the beneficiary/witness is the sole residuary beneficiary, the entire residue may fail and be distributed in accordance with the rules of intestacy.

Saving provisions

However, the analysis does not stop at s. 12(1). Under s. 12(3) of the Act, a gift to the beneficiary/witness may still be valid under what the court in *Grey v. Boyd* 2011 ONSC 7288 referred to as the "saving provisions." Section 12(3) provides:

"Where no undue influence

(3) Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.

Exception

(4) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection."

Section 12(3) provides for two ways in which the gift to the beneficiary/witness may still be valid. The first is where the beneficiary/witness can establish that they did not exercise any undue influence over the testator. The court in *Frye v. Frye Estate* [2006] O.J. No. 2081 stated that s. 12(1) creates a rebuttable presumption of undue influence. The rebuttable presumption operates to place the onus on the beneficiary/witness to establish that, on the balance of probabilities, they did not exercise improper or undue influence over the testator. Where the court is satisfied that the beneficiary/witness has successfully rebutted the presumption, the gift will be valid. The second instance where a gift to a beneficiary/witness may be valid is where at least two other persons witnessed the will in addition to the beneficiary/witness.

Order to beneficiary witness

A beneficiary who has witnessed the will may be called upon to prove to the court that they did not exercise any undue influence over the testator. Rule 74.15 of the *Rules of Civil Procedure* provides that "any person who appears to have a financial interest in an estate" may move:

"**Order to beneficiary witness**

(f) for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;"

When a beneficiary/witness is served with such an order, and they wish to claim the benefit in the will, they must bring a motion to the court and ask the court to find that there was no undue or improper influence exerted on the testator. Where the beneficiary/witness does not bring such a motion, the estate trustee may proceed to probate the will, which will have a note attached to it stating that the benefits to the beneficiary/witness under the will are void under s. 12 of the *Succession Law Reform Act*.

This is part one of a two-part series.

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