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Wills, Trusts & Estates

The beneficiary witness: Relevant cases

By **James Dunphy**

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(July 10, 2020, 8:38 AM EDT) -- As we discussed in the first article in this series, a growing practice in Ontario is for people to download a will kit and make their own wills, which may result in common mistakes. This article will discuss relevant cases dealing with a beneficiary witness.

The court in *Grey v. Boyd* 2011 ONSC 7288 was asked to declare as void certain bequests made by a dying testator to her partner, William Grey. Grey was the sole beneficiary under her will who had arranged for a visiting clergyman to write the will on the testator's behalf. Grey witnessed the will. It was argued that Grey exercised undue influence over the testator given his input when the testator was writing the will and given the testator's failing health. The court did not ultimately decide the matter, however, it commented on the saving provision as follows:

"[39] Under s. 12 (1) of the SLRA [*Succession Law Reform Act*] where a person is a witness to a Will and who is receiving a bequest or other disposition of property, the devise or bequest to that person is void. However, s. 12(3) is a saving provision which provides that where the court is satisfied that the person so witnessing the Will did not exercise any improper or undue influence upon the testator, then the devise or bequest is not void. If there are more than two persons attesting to the Will in this case, then s. 12 (4) applies."

In *Frye v. Frye Estate* [2006] O.J. No. 2081, a testator left shares in the family business to his sister, and his sister's husband witnessed the will. A brother of the testator contended that his sister exercised undue influence over the testator. The court heard that the testator asked his sister "if you were me what would you do?" to which she responded "You're not married, you don't have a wife and you don't have children […] If I were you, I would leave my shares equally to my siblings [...] You do what you want to do [...] but you have to do how you feel." The court found that these words did not constitute undue influence. In addition, the court heard that the testator was a headstrong individual who did what he wanted. Friends of the testator testified that he expressed an intention to leave the shares to his sister. The trial judge's decision was set aside by the Court of Appeal for Ontario, however, the Court of Appeal did not consider the beneficiary/witness issue.

In the 1993 case *Warren Estate, Re,* the testator was looked after in his final years by his two sisters. The testator's two sisters were witnesses to his will and were also the only beneficiaries under the will. The court found that the sisters did not exercise any undue influence over the testator. The court considered that the testator was of rational and sound mind when he executed the will, he intended to benefit his sisters, the sisters provided comfort and companionship to the testator after his wife died and no dominant-servient relationship existed between either of the sisters and the testator.

Conclusion

The logic behind invalidating a bequest, where the witness is either the beneficiary or a spouse of a beneficiary, is based on the idea of having objective witnesses. Justice Clare MacLellan in *Kyte Estate (Re)*, [1998] N.S.J. No. 164, stated that a beneficiary (or their spouse) has a vested interest in upholding the validity of the will. But, as indicated in a review of the cases and articulated by the author of *Feeney's Canadian Law of Wills*, Fourth Edition, the "... courts have expressed a dislike for the rule and, while it stands, courts are likely to strive to get around its application." Nonetheless, at first blush, bequests to people who are also witnesses are void unless the beneficiary can show no

undue influence was exerted on the testator.

In our fictional scenario in part one of this series, Fred saved thousands of dollars by not going to a lawyer to draft his will. But even if Fred's daughter wins in court the legal fees to defend the bequest will likely cost far more money. Moreover, even though the cases dealing with this situation seem to consistently use the saving provision under s. 12(3) of the SLRA to uphold these bequests, every case turns on its own facts. It could be that in the next case the court will find that the beneficiary who witnessed the will did exercise improper or undue influence over the testator and the bequest will be void, or simply that the beneficiary could not meet the onus of providing that he or she did not exercise undue influence on the balance of probabilities.

The bottom line is that where a beneficiary witnesses the will, the court will have an interest in hearing whether or not the testator gave the benefit freely and in the absence of undue influence. A beneficiary/witness must be prepared to come to court to prove this if required. This is so because one of the statutory safeguards in the preparation of a valid will, the attestation of two persons with no interest in the will, is no longer present.

Perhaps paying a lawyer to draft a will and seeing to its proper execution might be worth it if that expenditure saves the intended beneficiary the greater expense of litigation.

This is part two of a two-part series. Read part one: The beneficiary witness: Pitfalls of 'do it yourself' will.

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