

Adopt presumption of undue influence: lawyer

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For Law Times

Ontario legislators should consider following B.C.'s lead by adopting a presumption of undue influence in will challenges, according to a leading estate litigator in this province.

"It depends which side of a case you're arguing, but on balance, I think a presumption of undue influence would be helpful," says Justin de Vries, the principal at estates and trusts boutique de Vries Litigation LLP.

"Families are complex things, with lots of moving pieces, and the law can be a bit of a strait-jacket. Maybe it needs to loosen slightly," he adds.

In 2014, amendments to B.C.'s Wills, Estates and Succession Act introduced a presumption of undue influence in cases where the person challenging the will could show that another person was "in a position where the potential for dependence or domination of the will-maker was present."

The onus then shifts to the person defending the will to show that they did not exercise undue influence over the testator.

Elsewhere in Canada, the

burden of proof never shifts in challenges based on allegations of undue influence, leaving plaintiffs facing such a high bar to prove their case that de Vries has labelled it a "Herculean task."

"It's extremely difficult to prove," de Vries says. "The biggest problem is that the deceased has no voice."

"They are dead, and there were no flies on the wall to watch what was going on. In these cases, the deceased was often isolated or cut off from their family, which makes it difficult to gather evidence."

Lisa Haseley, a lawyer with Hull & Hull LLP in Toronto, says the task for plaintiffs is complicated by the fact that the law allows for beneficiaries to exert influence over testators during their lifetime, so long as their efforts fall short of coercion.

"Part of the reason the threshold is so high is because, typically, the assertion of undue influence is made by a person who would likely benefit from the will being overturned," she says. "We always want to make sure that the testator's wishes are followed and observed."

However, de Vries says any presumption could help to level the playing field for plaintiffs

without needing to be "overly strong."

"You should be able to rebut the presumption fairly easily, because you want to avoid the danger that you end up with a result

that is not correct," he says.

According to de Vries, plaintiffs can often boost their case for undue influence by calling medical evidence about the susceptibility of a particular testator

to coercion.

"That's usually one of the production orders we get early on," de Vries says.

"Vulnerability to undue influence grows as you age." **LT**