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Undue influence – "beware of the economic benefits"

I was recently approached by a client to guide him and his brother on the possibility of challenging the Will of their late uncle, albeit that, in this instance, they averred "*forgery*" and "*undue influence*". Their initial view was that their uncle's signature on the Will, differed markedly from the signature that they had on other documents they had on file. Expert analysis was obtained, the result was inconclusive. So, their final stab at having the Will declared invalid was on the basis of "*undue influence*". This is what prompted me to pen this article, although I choose to change the circumstances, to illustrate "*undue influence*".

The loss of a loved one is traumatic enough, compound that with being advised that you have been "disinherited", and that your step-father will inherit the fruits of your Mom and biological Fathers labour during their marriage, over the preceding 50 years. This double heartbreak can often be unbearable. Foolishly or otherwise, natural instinct often tells one to challenge the validity of that Will. For the record, historically, these are the main (but not the only) reasons why the validity of a Will, can be challenged: -

- Undue Influence;
- Failure of formalities;
- Forgery; and
- Testamentary capacity

This article will deal specifically with "*undue influence*".

Before discussing the tenets of "*undue influence"*, lets understand who can make a Will, whether there was an intention to create a Will and the mental capacity to make a Will as set out in the Wills Act 7 of 1953.

- Who can make a Will?

  Competency to make a Will – Section 4 of the Wills Act

  Every person of the age of sixteen years or more may make a Will unless at the time of making the will he is *mentally incapable* of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.

- Intention to make a Will

  Formalities required in the execution of a Will – Section 2(3) of the Wills Act

  If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was *intended to be his Will or an amendment of his Will*, the court shall order the Master to accept that document, or that document as

amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a Will, although it does not comply with all the formalities for the execution or amendment of Wills referred to in subsection (1).

On the premise that the above facets are regular, and the Will is in all other respects accepted by the Master as a valid Will of the Testator, you should take heed and consider the following:

- "*Undue influence"* should not be mistaken with the capacity to make a Will;
- The onus of proving that the testator did not sufficiently exercise their right to freedom of testation, rests with you;
- You must be able to prove with certainty that, what is reflected in the disputed Will, was not of the testator's own wishes; and
- The contents of the disputed Will are, in fact, the wishes of a person other than the testator.

If these burdens of proof are credible and the court agrees with your assertions, the Will could be declared invalid.

Having been in the fiduciary business for some 34 years, when asked by an aggrieved stakeholder whether they should challenge the validity of a Will, I advise the person, as a first step, to apply the following equation before coming to a final decision: -

$$Decision = \frac{Benefit}{Current\ Emotion} \text{ X } Future\ Emotion$$

Where:

Benefit = What you stand to gain financially if, you are successful in your application
Current emotion = How you currently feel (possibly angry at being disinherited)
Future emotion = What you envisage your emotions will be, whether you are successful or not in your application

Having applied your mind logically and economically, your next important step is to reconcile why you think the Will should be challenged and, decide which one of the above reasons is likely to help your cause. Remember that, challenging a Will has many dimensions and brings with it hefty costs that you need to be aware of upfront. Should you decide to follow the route of challenging the Will, you should, as a first port of call, establish what the estimated cost of such a challenge is likely to be (I stress estimated cost, as it is difficult to be definitive on the final cost at an early stage). Having established a ball park cost, you should put on your proverbial "logical cap" and, consider that, against the estimated net value of the estate. Armed with this information do the math to work out what your inheritance could be, then, go back to the equation above and reconcile your initial thoughts with, your current thinking!

Should your analysis indicate that it will be economically viable to challenge the validity of that Will, then you're, faced with the next decision, on what basis will you challenge the Will?

Should you decide to challenge the Will on the basis of "undue influence", which attacks the very roots of "*freedom of testation*" (that said "*freedom of testation*" in its own right has certain "limitations" but, this is a subject for another time) then, read further: -

The Cambridge English dictionary defines undue influence (in law) as: -

undue influence noun [U] LAW. a situation in which someone uses their power or authority in an unfair way in order to **influence** a legal decision, a decision about who gets a contract, etc.: Government officials denied there had been any **undue influence** in the award of the renewal contract.

The litmus test for you, as an applicant should be measured against the decision made by the courts, in the case, *Spies NO v Smith en Andere* 1957 (1) SA 539 (A).

To illustrate the thinking on the subject we quote below, from a well written article by:

- Johann Jacobs BA HDip Ed (Pg)(Wits) BEd MEd BProc (Unisa)
- Leigh Lambrechts BSc (UCT) LLB (cum laude) (Unisa)

published in De Rebus in October 2013.

Undue influence[1]

The expression of a testator's last wishes must be the result of the exercise of his or her own volition. Any impairment to the free expression of the testator's wishes at the time the will is made may result in a will being declared invalid. In *Spies NO v Smith en Andere* 1957 (1) SA 539 (A) Steyn JA pointed out that acts such as flattery, professions of extraordinary love or respect, meek tolerance of continual humiliation, direct requests or unusual affection do not necessarily constitute undue influence.

To have a will declared invalid on this ground certain principle factors must be considered and conduct akin to coercion or fraud is required. The question in the *Spies* case was whether a person who was 'mentally retarded' was unduly influenced by his uncle, who was also his *curator bonis*, in the making of a will in which the uncle's children benefited. The court commented as to what constituted undue influence, by holding that '… a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated … to the exercise of coercion or fraud to make a bequest that he would not otherwise

[1] Valid or not? General principles for challenging a will." DR, October 2013:30 [2013] DEREBUS 196

have made and which therefore expresses another person's will … . In such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition …'.

The key question therefore is whether there has been a displacement of volition and thus whether the will contains the wishes of someone other than the testator. The testator's mental state, his or her ability to resist prompting and instigation; and the relationship between the people concerned, are all factors to be taken into account. The mere existence of a relationship of a particular kind does not give rise to a presumption that the will of another has been substituted for the testator's will.

In *Katz and Another v Katz and Others* [2004] 4 All SA 545 (C), it was alleged that the testator had been improperly influenced by his second wife to make a new will. The court emphasised that an allegation that one or more of the factors was present had to be supported with evidence and that unfounded suspicion and speculation were not sufficient. The fact that the testator was dependent on his wife after his stroke was not sufficient proof of undue influence. Further, the amount of pressure resulting in invalidity may vary from case to case. In the *Katz* case it was held that if, after the execution of a will, a period of time elapses during which the testator could have altered the will should he or she have wished to do so, the failure to take advantage of this opportunity is a circumstance from which it may be inferred that the will was not made against the testator's wishes.

Finally, don't' let your emotions prevail over the economic benefits, when making your decision, as Oscar Wilde said:-

"I don't want to be at the mercy of my emotions. I want to use them, to enjoy them, and to dominate them."