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Wills, Trusts & Estates

B.C. decision offers clarification of Saputo test, how it applies to presumptions on undue influence

By **Ian Burns**

(June 21, 2018, 11:21 AM EDT) -- The B.C. Court of Appeal has ruled a lower court judge incorrectly weighed evidence in making a determination on whether a complaint in an estate case was a triable issue, saying proving undue influence in the making of a will is difficult and can be established through circumstantial evidence.

The case in *Kerfoot v. Richter* 2018 BCCA 238, deals with the estate of Bernice Richter, who passed away in May 2016 at the age of 97. She left three adult children: the appellant Mary Anne Richter and the respondents John Richter and Janet Chapman. Mary Anne Richter is disputing the validity of her mother's will, in which the bulk of the estate, valued at approximately \$3 million, was left to her siblings. The estate's executor, Barry Kerfoot, brought a petition to prove the will in solemn form, but Mary Anne Richter sought to convert the petition to an action, arguing her mother lacked testamentary capacity and the will was procured as a result of undue influence by her two siblings.

Kerfoot said he had no suspicions Bernice Richter was being unduly influenced by John and Janet, and the reason Mary Anne was accorded less in the will was due to estrangement from her mother. But Mary Anne denied this, saying she was not estranged and gave her mother support in her old age.

In determining whether the petition should be converted to an action, the test put before Justice Mark McEwen of the B.C. Supreme Court was *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.* 2017 BCCA 247, which said proceedings brought by petition should be referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose. Justice McEwen said Mary was bound to lose on the issue of Bernice's mental capacity. He said he considered Mary's evidence to be speculative and insufficient to raise a suspicion and dismissed the application, directing the will be executed.

On appeal, Mary Anne Richter submitted Justice McEwen did not apply the test as required under *Saputo* but rather weighed the evidence before him, choosing between conflicting versions and making findings of fact. She said a determination of whether she was bound to fail was limited to deciding whether material facts had been pleaded, supported by evidence, sufficient to raise suspicious circumstances to meet the presumption in s. 52 of the B.C. *Wills, Estates and Succession Act*, which says if it is argued a will resulted from undue influence then the party seeking to defend the will has the onus of establishing no influence was exercised.



Randall Kaardal, Hunter Litigation Chambers

Justice Barbara Fisher, who delivered the Court of Appeal's decision, said in her view the *Saputo* test precludes a judge from weighing evidence.

"This court [in *Saputo*] confirmed that the test is akin to the test to be applied for summary judgment — whether, on the relevant facts and applicable law, there is a bona fide triable issue," she said. "In the context of this case, where there are factual disputes, the chambers judge was to determine whether Mary, as the party requesting the trial, was bound to lose; more particularly whether there was a triable issue with respect to Bernice's testamentary capacity or the issue of undue influence."

Justice Fisher said, from her review of the transcript, Justice McEwen focused too extensively on the issue of testamentary capacity, weighed Mary Anne Richter's evidence against that of Kerfoot, and failed to consider the circumstantial evidence raised in Mary Anne Richter's materials that was relevant to the issue of undue influence.

"I appreciate the chambers judge's concerns about the weakness of Mary's evidence, as some of it went no further than mere allegations. However, the fact that Mary had no first-hand knowledge of the events leading up to the making of the impugned will is hardly surprising given the nature of the issues," she said. "Proving undue influence is not easy ... [and] may be established through circumstantial evidence. [Mary Anne Richter's] pleadings and evidence contain conclusory statements about many of the events leading up to the execution of the impugned will, but they also raise factual issues from which inferences of undue influence could be drawn."

Justice Fisher said the materials were sufficient to establish a triable issue and ordered the proceedings be converted into an action. She was joined by Justices Harvey Groberman and Mary Newbury in her decision, which was issued June 7.

Randall Kaardal of Hunter Litigation Chambers, who represented Mary Anne Richter, said he felt the court applied the appropriate law to the facts and came to the right conclusion, and the decision offers clarification in terms of the *Saputo* test and how it applies to the presumptions on undue influence in s. 52 of the Act.

"We were there to argue that we couldn't be bound to lose because a number of facts that were undisputed would be at least not bound to lose in raising that presumption," he said. "And if we raised that presumption then the other side would have to put evidence in to rebut it, and they're welcome to do that in the trial. But because you can't weigh evidence at the outset of an application like this, you couldn't be bound to lose."

Kaardal said this is the first time that the presumption under s. 52 has had the *Saputo* test applied to it.

"So I think there will be some guidance because some of the factors that the court relies upon, such as the age of the testator and the change in the will, while seeming neutral on their face, can be seen as factors that would go towards to raising the presumption," he said. "So I think the court hasn't decided that it has met the test, just that the chambers judge couldn't have found on those facts that it was bound to lose."



Amanda James, Richter Trial Lawyers

Amanda James of Richter Trial Lawyers, who represented John Richter in his appeal (Richter is senior partner at Richter Trial Lawyers), said she was "a little bit disappointed" in the Court of Appeal's decision.

"When I read *Saputo* for the first time I didn't see where the court talked about weighing evidence in deciding whether something can be converted to an action," she said. "So being silent on that decision I thought maybe there was some discretion, especially when you're talking about estate and family law. I was hoping that the court would give a little more wiggle room in determining whether it would be a triable issue."

James said the court's finding that undue influence could be established through circumstantial evidence is a reversal of onus and agreed undue influence is a very hard thing to prove.

"It's very subjective and a lot of estate law is essentially hurt family feelings. These are family feuds brought to the surface," she said. "The sense I get ... from this decision is when you're talking about undue influence, if there's a reverse onus situation, it's always going to be a triable issue."

Ron Argue of Munro & Crawford, who represented Kerfoot in the appeal, declined comment, saying he was "really on the sidelines" with respect to the dispute between the estate's beneficiaries.

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