

# Newsletter



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## Can the burden of proof be reversed in matters of annulment of will for incapacity or undue influence?

*In Brusenbauch c. Young, 2019 QCCA 914, the Court of Appeal analyses the onus of proof applicable in proceedings seeking the annulment of a will for cause of incapacity or undue influence. Despite a contradictory legal trend, the Court confirms that there is no reverse onus and that the party who seeks the nullity of a will bears the burden of establishing its allegations on a balance of probabilities.*

In this case, the testator, an 86-year-old lady with a poor health, had instituted separation from bed and board proceedings after 39 years of marriage and signed a will disinheriting her husband, the appellant, in favour of her nephews, the respondents. She died a few months later. Some troubling circumstances are related by the tribunal, namely many episodes of confusion and disorientation, a quick deterioration of her mental capacity shortly after signing the will, the diversion of funds by the new heirs and their generalized contempt against the appellant.

The appellant argues that in presence of *prima facie* evidence of incapacity or undue influence, the heirs bear the onus of proving that the late testator had the capacity to understand the nature and consequences related to the execution of the will.

After a careful review of an inconsistent case law on that subject, which created confusion amongst the legal community, the Court of Appeal settled: the existence of *prima facie* evidence does not shift the onus of proof on the respondents in favour of the appellant. This be-



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ing said, the party who alleges the nullity of the will, whether for reasons of incapacity or undue influence, must prove all the elements in support of its claim on a balance of probabilities, in accordance with the civil burden of proof laid out at articles 2803 and 2804 of the *Civil Code of Quebec*.

In matters of undue influence, the party that alleges as such must prove the existence of fraudulent tactics, a defect of consent and causation. The Court recognizes that in many cases, this proof will be administered by way of circumstantial evidence, through presumptions of facts – improper schemes, disgraceful devices, lies, slander, deceit and trickery, or deliberate misrepresentations.

In matters of testamentary capacity, the same rule is applicable. Considering the presumption of capacity pursuant to article 4 of the *Civil Code of Quebec*, the party who alleges that the will is null must prove on a balance of probabilities the incapacity of the testator at the time of signature of the will. Again, the party may discharge that burden both by way of direct or circumstantial evidence.

In this case, the Court of Appeal observes that the trial judge was confronted with highly contradictory evidence. However, after analyzing all the evidence and testimonies as a whole, he concluded that neither incapacity nor undue influence had been established. Since this is a finding of facts, a high de-

gree of deference must be shown with regards to that conclusion.

It is acknowledged that many troubling circumstances are recounted in this case. However, the Court takes note that no expert evidence is presented in support of the allegation according to which the testator's physical ailments and her prescribed medication would have given rise to a lack of capacity or a weakened mental state making her receptive to the undue influence of her nephews. In that regard, the Court places special emphasis on the representations of independent witnesses, such as the family doctor, the social worker, the lawyer who instituted the separation from bed and board proceedings and the notary who executed the will.

Moreover, the fact that the late testator's nephews did not try to dissuade her to put her plans into actions and rather assisted her eagerly is not sufficient, per se, to create a situation of undue influence. The Court reaffirms that if a testator is deemed capable, his or her wishes must be respected, despite the fact that they may appear unreasonable or arbitrary.

For these reasons, the Court of Appeal concludes that the appellant did not demonstrate in what way the trial judge erred by concluding that he did not prove the incapacity or undue influence. The appellant had the onus to prove his pretensions on a balance of probabilities and he did not meet that burden. Therefore, the appeal is dismissed.

