The Difference between the 'Knowledge and approval' Doctrine and the Undue Influence Doctrine — Why the Knowledge and Approval Doctrine is Redundant to Australian Succession Law?

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Abstract: *The 'knowledge and approval' doctrine and the testamentary doctrine of undue influence are vitally important principles in determining the validity of a will, and they share the same objective of protecting testamentary freedom. However, these two principles are not identical. This article distinguishes between these two doctrines regarding the allocation of the burden of proof, the perspective to protect testamentary freedom, and whether there is coercion on the testator and analyses the two doctrines' characteristics and values. It also focuses on the role of knowledge and approval in Australian succession law and argues that it has become redundant because of the potential risks to lead to the refusal to admit to the probate of legal wills in judicial practice and its relevance to the content of testamentary capacity.*
Keywords: *knowledge and approval, undue influence, testamentary freedom*

Introduction

A legally valid will is made up of a lot of influencing factors. The validity of a will depends not only on whether it satisfies the formal requirements but also on whether the person making the will is capable. Litigation relating to the validity of a will may arise from these issues: (a) whether the testator had the capacity to make a will; (b) whether the testator knew and consented to the terms of the will; (c) whether undue influence was exerted on the testator to sign the will; (d) whether fraud has occurred. Of these, the knowledge and approval doctrine and the undue influence doctrine are the doctrines that need to be applied to constitute a valid will.

What is the ‘knowledge and approval’ and ‘undue influence’?

Before discussing the difference between the knowledge and approval doctrine and the testamentary doctrine of undue influence, it is necessary to clarify the meaning and scope of these two concepts. The two doctrines are both based on the theory of testamentary freedom and the aim of protecting the freedom of will, safe-

guarding the testator's free will and choice to the greatest extent possible under the premise of legality, and preventing the testator's freedom of will and right to dispose of property from being compromised.

The definition of ‘knowledge and approval’ doctrine

Knowledge and approval doctrine is one of the critical elements of a valid will. To fully safeguard the testator's testamentary freedom and ensure the will’s main contents are the testator's true intention, the will's provisions must be known and recognized by the testator exercising his or her free will. Only a will's main contents, known and approved by the testator, can be considered a valid will and executed. In the will-writing process, the drafter must ensure that the testator understands and approves the will. Windeyer J held that “reading wills aloud to testators and pausing to clarify phrases ensures that the testator understands them and that the will is carried out according to the testator's intentions (Robinson v. Spratt, 2002).” Not the issue of testamentary capacity, but whether the deceased was knowledgeable and approved of the provisions of her will, is the primary problem in this case.

The application of the knowledge and approval doctrine often requires triggering conditions, namely the existence of suspicious circumstances. In Astridge v Pepper, the suspicious circumstance was that Mrs McCarthy, as beneficiary, was also the appointer of Mr Astridge, the solicitor and executor. More importantly, Mr Astridge drafted the will under the arrangement of Mrs McCarthy. In this circumstance, it is challenging to ensure that the main contents of the will were known and approved by the testator, Mrs Bowen. As Helsham J held that “not the issue of testamentary capacity, but whether the deceased was knowledgeable and approved of the provisions of her will, is the primary problem in this case (Astridge v. Pepper, 1970).”

The definition of testamentary doctrine of undue influence

Undue influence is an essential concept in equity and common law. In cases when a third party successfully influenced the donor's will through force, manipulation, or abuse of power, the courts may invalidate or set aside specific transactions or testamentary papers under the equitable doctrine of undue influence.

However, it is worth noting that there are differences in applying the principle of undue influence in various law sectors. In contrast to the field of contract law, the court does not directly assume that the testator is subject to undue influence based on a specific relationship in succession law. This is due to the unique relationship between the testator and the beneficiary is often established in advance in succession law. The testator often gives the beneficiary the gift based on the latter's identity, conduct, and relationship to the testator. It is difficult for a person to be a beneficiary if there is no relationship between him or her and the testator. For instance, a person with a legitimate claim to the deceased person's state based on past services rendered because he or she has assisted the testator might legitimately claim with the testator. In other words, a person's moral claim to provisions in the testator's will is not undue influence. Not all pressure which may be brought to bear on a testator is regarded as undue. In Hall v Hall, Sir JP Wilde said: “To make a good will, a man must be a free agent; but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, pity for future destitution, or the like — these are all legitimate and may be fairly pressed on a testator (Nicholson v. Knaggs, 2009).”

Common ground and aims: protecting testamentary freedom

The principle of testamentary freedom is the basis for the doctrine of both knowledge and approval and undue influence in the field of succession law. For common law jurisdictions, the right of freedom of testation, namely the right of an individual to decide who would take property after death, has a long history. The principle of primogeniture, i.e. the right of freehold (inheritance) to be inherited by the eldest son, was established as early as 1066 after the Norman Conquest. However, this institution did not give the deceased the right to freely dispose of his or her estate. The gentry had gained the ability to pass land by will by the time the Statute of Wills was enacted in 1540, which broke through the restrictions on the testator's free will imposed by the principle of primogeniture. The Statute of Frauds, enacted in 1677, required the transmission of personal property by writing at death. Since then, the concept of written will have been firmly established as a legal way of controlling the distribution of property after death.

Freedom of will, as a protection of the property rights and free will of the deceased, is a fundamental principle of succession law. Scholars have argued that freedom of will, although not a constitutional right, is widely regarded as a fundamental human right of citizens in many common law jurisdictions, and it is a basic assumption of the Anglo-Australian legal system. This shows the fundamental importance of the principle of testamentary freedom. Both the knowledge and approval doctrine and the testamentary doctrine of undue influence were created to protect the freedom of will. In the case of the former, the doctrine protects the testator's testamentary freedom from outside manipulation by ensuring that the testator knows and approves the main contents of the will. In the latter case, it aims to prevent others from exercising undue influence over the testator and interfering with the testator's freedom of will, thereby threatening his or her testamentary freedom.

How is the ‘knowledge and approval’ doctrine different from the testamentary doctrine of undue influence?

Although both the 'knowledge and approval' doctrine and the testamentary doctrine of undue influence have the same purpose of safeguarding testamentary freedom, there are significant differences in their focus and perspective. The main differences lie in three dimensions: the allocation of the evidential burden, perspective on the protection of testamentary freedom and whether it is coercion.

Allocation of the evidential burden

The knowledge and approval doctrine places a proof burden on the propounder. The propounder needs to prove that the testator had knowledge and approval of the will's contents. In Barry v Butlin, Parke B held that “the onus prodandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator (Barry v. Butlin, 1838).” Previously, there was a presumption that a testator with testamentary capacity who duly executes a will has known and approved of its contents. This means that if the testator has testamentary capacity, then the propounder does not have the burden of proving that the testator had understood and approved the will's

provisions. However, the presumption in this perspective has steadily altered from being conclusive to being rebuttable, and finally to having no presumption at all. There is no longer a necessary causal link between the testator's testamentary capacity and whether he or she has understood and approved the will's contents. In summary, at the level of the knowledge and approval doctrine, the burden of proof is on the propounder.

Unlike knowledge and approval, the absence of undue influence is not part of the propounder's burden of proof. On the contrary, the will's challenger who thinks that the will should be put aside must prove the existence of undue influence. This is because the law of wills takes the position that undue influence is not presumed based on a particular relationship and that a Beneficiary often receives a gift on the basis of a particular relationship between him or her and the testator. As long as this particular relationship does not impair the testator's free will and testamentary freedom, it cannot be presumed that the relationship resulted in undue influence. Therefore, the burden of proof as to undue influence should be on the person who believes that the influence exists.

Perspective on the protection of testamentary freedom: internal protection and external protection

Although the 'knowledge and approval' doctrine and the testamentary doctrine of undue influence both aim to protect the testator's testamentary freedom, their perspectives are distinct. The former is the "internal protection", which is concerned with the testator's understanding and approval of the contents of the will from within the testator's mind. Meanwhile, the latter is the "external protection", which is concerned with protecting the testator's will from undue influence and interference from outside by external relations that may have an illegal impact on the testator.

In Astridge v Pepper, Helsham J held that the deceased wished to have a new will drawn up in favour of Mrs McCarthy, and she asked Mrs McCarthy to obtain a new will for this purpose. Mrs McCarthy found a solicitor who drew up a new will under this wish of the deceased. Moreover, based on the available evidence, it can be established that the deceased's intention to dispose of the property was apparent (Astridge v. Pepper, 1970). This suggests that, based on the knowledge and approval perspective, the judge's focus is not on whether there is outside interference with the testator's will but rather on the testator's true intentions. Whether the testator intended to dispose of the property and whether there was an intention to include someone as a beneficiary. These questions are relevant to the will and its core content and require exploring the testator's intent during his or her lifetime based on the available evidence. This internal exploration is the unique perspective of knowledge and approval doctrine to protect the freedom of the will.

In contrast, undue influence places more emphasis on protecting the testator's will from interference by undue outside influences. In cases involving undue influence, the testator's knowledge and approval are compromised by the improper conduct of an outside party. The undue influence, therefore, focuses on protecting the testator's testamentary freedom from an external perspective. This external protection is premised on whether the testator has testamentary capacity and the knowledge and approval of his or her will. Consideration of testamentary capacity and knowledge and approval is a prerequisite for the existence of undue influence. In order to be unduly influenced per se, the testator must have both testamentary capacity and knowledge and

approval of the will (Poole v. Everall, 2016). Kerridge held that if a beneficiary prepares a will and the testator does not know and approve its contents, there must be undue influence or fraud. This view reveals not only the purpose of undue influence in protecting the testator from unlawful external influence, but also the relationship between undue influence and knowledge and approval. In summary, knowledge and approval and undue influence focus on safeguarding testamentary freedom from different perspectives, the former being an essential prerequisite for the latter's existence.

Whether there is coercion on the testator

As noted before, the existence of undue influence cannot be assumed based on a particular relationship. The significant difference between undue influence and persuasion is that there must be coercion for the undue influence to be severe enough to invalidate the will, influencing the testator to act against their free will. It must be proven that the power from the beneficiary to overbear the testator's own will was exercised and that it had a crucial impact on the will that was written. In Winter v Crichton, James Hannen P held that “to be undue influence in the eye of the law there must be — to sum it up in a word — coercion (Winter v. Crichton, 1991).”

Compared to undue influence, knowledge and approval do not show the characteristics associated with coercion. This is because coercion may influence a change in the testator's final decision about the will, but it cannot change the testator's knowledge and approval of the will's contents. The doctrine of knowledge and approval concerns the testator's inner understanding and agreement with the will's provisions, which is an expression of the testator's inner free will. The Beneficiary may be able to influence the testator's final decision through coercion. However, they cannot influence the testator's knowledge and approval through coercion because it is about the testator's innermost thoughts. Once the testator is subject to coercion from another person, he or she will be fully knowledgeable about the will's contents.

In short, at the level of coercion, knowledge and approval are clearly distinguished from undue influence. The testator's lack of knowledge and approval of the will's contents does not mean that he or she suffered coercion, but the undue influence on the testator often means coercion.

The doctrine of knowledge and approval is redundant to Australian succession law

The doctrine of knowledge and approval plays an essential role in ensuring that the testator knows and understands the contents of the will. However, it is worth reflecting on whether, in practice, this principle is as effective in protecting testamentary freedom as it was intended to be.

The law should only support challenging a will on limited grounds. A doctrine that starts by protecting testamentary freedom could end up undermining it if the law wrongly assumes that the testator did not have knowledge and approval of the will's contents. As an essential principle in challenging the validity of a will, the knowledge and approval doctrine is based on the idea that if the testator is not fully knowledgeable about the will's contents, then the decisive elements of the will do not reflect the will of the testator, but potentially

the desires of other non-testators such as the drafter of the will. In this view, the practice of setting aside a will on the basis that the testator lacked knowledge and approval of the will may seem reasonable, but it faces some problems.

First, the court should not lightly set aside a will. In Gill v Woodall, Lord Neuberger suggested that when a claim that a will is susceptible to challenge is made, a court should proceed with extreme caution (Gill v. Woodall, 2010). He was also conscious that if the court set aside a will, the result would either be that the earlier will would prevail or that the rules of intestacy would apply: in either case, this could lead to a result that seemed to be in accordance with the testator's wishes but which was actually even less favorable than the contested will (Gill v. Woodall, 2010). This view also challenges the doctrine of knowledge and approval. Suppose the court set aside a will because the testator lacked knowledge and approval of the will. How can it be guaranteed that the circumstances following the setting aside of the will, will be in accordance with the testator's will? Setting aside a will does not seem to guarantee the testator's testamentary freedom. When the court incorrectly applies the doctrine of knowledge and approval to set aside a will, it can even undermine the testator's testamentary freedom and contradict the original purpose of the doctrine to protect testamentary freedom.

Furthermore, in Astridge v Pepper, although the outcome of the case was that the main contents of the will were still held to be valid, a point worth discussing was that the deceased was almost 100 years old. Therefore the judge found it reasonable to suspect that she could not read the text of the will and understand the legal terms used in it. This circumstance provides the possibility for knowledge and approval to be applied. It is interesting to assume an alternative outcome to this case: the judge found that the deceased was too old to read and understand the contents of the will and therefore failed to know and approve the contents of the will. It is interesting to assume an alternative outcome to this case: the judge found that the deceased was too old to read and understand the contents of the will and therefore failed to know and approve the contents of the will. Does this mean that the testator's knowledge and approval of the will's contents are still evaluated and based on the testator's testamentary capacity? The necessity of the independent existence of the doctrine of knowledge and approval is then undermined, and it could be considered a part of the testamentary capacity.

In summary, the doctrine of knowledge and approval adds uncertainty to the probate and execution of wills. In some cases, the court's setting aside a will based on this doctrine does not protect the testator's testamentary freedom. Moreover, the doctrine relies heavily on determining the testator's testamentary capacity. Therefore, the doctrine of knowledge and approval is redundant to Australian succession law.

Conclusion

The analysis in this essay shows how is the knowledge and approval doctrine different from the testamentary doctrine of undue influence. First, the burden of proof is on the propounder in the former doctrine; in the latter case, the burden of proof is on the person challenging the will's validity; Second, the principle of testamentary freedom is protected from internal and external perspectives by the two doctrines, respectively. Thirdly, the external coercive power does not affect whether the testator lacks knowledge and approval of the will's contents. However, others often exert undue influence on the testator by coercion. In addition, the doc-

trine of knowledge and approval is superfluous to Australian succession law because of the substantial possibility in the practice of revocation of wills and consequent impairment of testamentary freedom. Since this study was limited to the difference between the two concepts, it lacks research into many cases, particularly those in Australian jurisdictions. There is potential for further research in those areas.

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