Revue générale de droit

Vulnerability and Volition in the Testamentary Law of Undue Influence and *Captation*

Angela Campbell

Volume 51, Number 1, 2021

URI: https://id.erudit.org/iderudit/1081837ar
DOI: https://doi.org/10.7202/1081837ar

See table of contents

Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Campbell, A. (2021). Vulnerability and Volition in the Testamentary Law of Undue Influence and *Captation*. *Revue générale de droit*, *51*(1), 67–95. https://doi.org/10.7202/1081837ar

Article abstract

This article examines how contemporary analyses of vulnerability theory are reflected in legal approaches to undue influence and captation *in the Canadian common law of wills and estates and in the* Civil Code of Québec *in the law of succession. Critical theorists point to the risks of assuming that vulnerability lies exclusively with the elderly and persons with disabilities. The equation risks oversimplifying matters, which could compromise the equality and dignity of members of these groups. There is also a risk of overlooking the harm that may be suffered by those who are victims of social or economic oppression. A more nuanced approach posits that vulnerability is a common human trait that cuts across social identities and experiences.*

Due to prevailing assumptions about vulnerability, this article hypothesizes that challenges to wills based on undue influence and captation *will most often occur when the testator is elderly and/or has a disability at the time of execution of the will. Canadian common law and Quebec civil law jurisprudence are examined to assess this hypothesis. This analysis reveals that certain conditions do give rise to triggers heightened judicial scrutiny of wills, but that they do not in and of themselves determine legal outcomes. The case law thus suggests a moderate—but tempered—risk that courts will draw presumptions about age and capacity when assessing the presence of undue influence or* captation. *Perhaps more significant is the absence of challenges to wills involving young and healthy testators. Jurists might therefore wonder whether we are at risk of overlooking some cases of untoward conduct due to the conceptual associations we make between age, incapacity and vulnerability.*

Vulnerability and Volition in the Testamentary Law of Undue Influence and *Captation*

Angela Campbell*

ABSTRACT

This article examines how contemporary analyses of vulnerability theory are reflected in legal approaches to undue influence and captation *in the Canadian common law of wills and estates and in the* Civil Code of Québec *in the law of succession. Critical theorists point to the risks of assuming that vulnerability lies exclusively with the elderly and persons with disabilities. The equation risks oversimplifying matters, which could compromise the equality and dignity of members of these groups. There is also a risk of overlooking the harm that may be suffered by those who are victims of social or economic oppression. A more nuanced approach posits that vulnerability is a common human trait that cuts across social identities and experiences.*

Due to prevailing assumptions about vulnerability, this article hypothesizes that challenges to wills based on undue influence and captation *will most often occur when the testator is elderly and/or has a disability at the time of execution of the will. Canadian common law and Quebec civil law jurisprudence are examined to assess this hypothesis. This analysis reveals that certain conditions do give rise to triggers heightened judicial scrutiny of wills, but that they do not in and of themselves determine legal outcomes. The case law thus suggests a moderate—but tempered—risk that courts will draw presumptions about age and capacity when assessing the presence of undue influence or* captation. *Perhaps more significant is the absence of challenges to wills involving young and healthy testators. Jurists might therefore wonder whether we are at risk of overlooking some cases of untoward conduct due to the conceptual associations we make between age, incapacity and vulnerability.*

KEYWORDS:

Vulnerability, undue influence, captation, *estates, succession, testators.*

* Professor, Faculty of Law, McGill University. The author is grateful to Adelise (Addie) Lalande and Vincent Yagayandi for superb research assistance. She also thanks them as well as the anonymous peer reviewers of this paper for feedback that enhanced this text, and McGill University for research funding support.

(2021) 51 R.G.D. 67-95

RÉSUMÉ

Le présent article examine comment les analyses contemporaines de la théorie de la vulnérabilité transparaissent dans les approches juridiques en cas d'influence indue et de captation, respectivement, dans la common law du Canada en matière de testaments et de successions et dans le Code civil du Québec *quant au droit des successions. Les théoriciens critiques mettent en évidence les risques de présumer que la vulnérabilité est exclusivement associée aux personnes âgées et aux personnes en situation de handicap. Cette équation risque de simplifier les choses à l'extrême, ce qui pourrait compromettre l'égalité et la dignité des personnes appartenant à ces groupes. Il y a également un risque de négliger les préjudices que peuvent subir ceux qui sont victimes d'oppressions sociales ou économiques. Une approche plus nuancée postule que la vulnérabilité est une caractéristique commune à tous les humains, qui transcendent les identités et les expériences sociales.*

En raison des postulats qui existent au sujet de la vulnérabilité, cet article émet l'hypothèse que les contestations de testaments fondées sur l'influence indue et la captation se produiront le plus souvent lorsque le testateur est âgé ou en situation de handicap au moment de l'exécution des volontés testamentaires. Nous examinerons la jurisprudence de la common law du Canada et du droit civil québécois afin d'évaluer cette hypothèse. Cette analyse révèle que les conditions présumées donnent lieu à une vulnérabilité qui déclenche effectivement un examen judiciaire accru des testaments, mais qu'elles ne déterminent pas en soi les résultats juridiques. La jurisprudence propose donc un risque modéré — mais tempéré — que les tribunaux tirent des présomptions sur l'âge et la capacité lorsqu'ils évaluent la présence d'une influence indue ou d'une captation. Ce qui est peut-être plus significatif, c'est l'absence de contestations de testaments rédigés par des testateurs jeunes et en bonne santé. Les juristes pourraient donc se demander si nous ne risquons pas de négliger certains cas de conduite fâcheuse et indésirable en raison des associations conceptuelles que nous établissons entre l'âge, l'incapacité et la vulnérabilité.

MOTS-CLÉS :

Vulnérabilité, influence indue, captation, testaments, successions, testateurs.

SOMMAIRE

INTRODUCTION

Testamentary freedom has long served as the conceptual cornerstone of the law of wills and successions within Western legal traditions; it has been characterized as an estates court's "duty" and "the golden rule, the fundamental principle" of estates law.[1] The primacy of testamentary freedom, although restricted by certain modern succession law doctrines,[2] persists in contemporary law. While central to the common law tradition,[3] it exists also in Quebec civil law, with the *Quebec Act of 1774* having preserved in that jurisdiction full freedom of testation.[4]

1. See, respectively, *In re Tyhurst Estate, Deceased*, [1932] SCR 713 at 716, 4 DLR 173, and *In re Estate of Brown Estate (deceased)*, [1934] SCR 324 at 330, 2 DLR 588. Beyond relying on testamentary intent as a beacon for the construal of wills, a broad authority is ascribed to testamentary freedom across the law of successions. See Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill LJ 511 at 513–14; Joseph Gold et al, "Freedom of Testation" (1938) 1:4 Mod L Rev 296; Joseph Laufer, "Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation" (1955) 69:2 Harv L Rev 277; Nicole M Reina, "Protecting Testamentary Freedom in the United States by Introducing Into Law the Concept of the French Notaire" (2002–2003) 46 NYL Sch L Rev 797 at 797.

2. See e.g. Melanie B Leslie, "The Myth of Testamentary Freedom" (1996) 38 Ariz L Rev 235; Ray D Madoff, "Unmasking Undue Influence" (1997) 81:3 Minn L Rev 571; Carla Spivack, "Why the Testamentary Doctrine of Undue Influence Should Be Abolished" (2009–2010) 58:2 U Kan L Rev 245.

3. See Leslie, *supra* note 2.

4. See Lionel Smith, "Intestate Succession in Quebec" in Kenneth G C Reid, Marius J de Waal & Reinhard Zimmermann, eds, *Comparative Succession Law: Intestate Succession*, vol II (Oxford: Oxford University Press, 2015), c 3; Jacques Beaulne, Christine Morin & Germain Brière, *Droit des successions*, 5th ed (Montréal: Wilson & Lafleur, 2016) at 215; Joseph Dainow, "Unrestricted Testation in Quebec" (1936) 10:3 Tul L Rev 401. Hence, there is no forced share or reserve requirement

While various legal doctrines might limit or counter this principle of testamentary freedom, one of these is undertheorized in the context of wills and successions law. Undue influence in the common law, comparable to *captation* (sometimes referred to, in its English translation, as "fraudulent capture") in the civil law, refers to situations in which the person who makes a will—the testator—acts according to the wishes, and pursuant to the coercive pressure, of another. In such instances, because the operative force driving the juridical act does not reflect the testator's volition, a court will be justified in voiding the will. Testamentary freedom is not viewed as unduly compromised since, in such scenarios, the law perceives testamentary intent as having been overtaken by the acts of another.

Undue influence and *captation* can have a critical impact on a will's outcome, and there is no shortage of case law addressing the topic. Yet, while these doctrines have been the subject of judicial analyses, as well as considerable attention in common law doctrinal analyses of contract law,[5] scholars have not paid it extensive heed in connection with wills and successions. Similarly, relatively little has been written on the concept of *captation* by civil law theorists.[6]

---

in Quebec, as is the case in many civil law systems around the world. Elsewhere, the reserve requirement ensures that particular family members of the deceased benefit from an inheritance regardless of what the will of that person might provide. This requirement is found in France, the Netherlands, Germany, and Italy, for example. See Ray D Madoff, "A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems" (2014) 37 Boston College Intl & Comp L Rev 333 at 334, 342–43; Ralph C Brashier, "Disinheritance and the Modern Family" (1994) 45:1 Case W Res L Rev 83; Ian Summer & Caroline Forder, "Proposed Revisions of Matrimonial Property Law. A New Inheritance Law and the First Translation of the Dutch Civil Code, Book 1 (Family Law) Into English" (2004) Intl Survey Family L 337 at 337, 366; Ryan McLearen "International Forced Heirship: Concerns and Issues with European Forced Heirship Claims" (2011) 3:2 Estate Planning & Community Property LJ 323 at 323, 327.

5. See e.g. Frederick Pollock, *Principles of Contract at Law and in Equity* (Cincinnati: Robert Clarke & Co, 1885) at 591; M H Ogilvie, "No Special Tenderness for Sexually Contracted Debt? Undue Influence and the Lending Banker" (1996) 27 Can Bus LJ 365; Alexander J Black, "Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada" (2012) 40:1 Adv Q 80; Rick Bigwood, "Undue Influence: Impaired Consent or Wicked Exploitation" (1996) 16 Oxford J Legal Stud 503; Mark Pawlowski, "Undue Influence: Towards a Unifying Concept of Unconscionability" (2018) 30:1 Denning LJ 117.

6. But see Christine Morin, "Revue de la jurisprudence 1994–2019 en droit des successions : la capacité de tester et la captation sous le *Code Civil du Québec*" (2020) 122:1 R du N 75; Pierre Ciotola, "Le testateur et son clone inavoué, le juge : clone difforme ou conforme dans la recherche des intentions du testateur" (2005) 39 RJT 1; Beaulne, Morin & Brière, *supra* note 4 at 245; Marie-Claude Armstrong, Catherine Gendron & Élisabeth Pinard, "L'annulation de testaments pour motif de captation et caducité de legs pour motif d'indignité", Service de la formation continue, Barreau du Québec, vol 269 (Cowansville: Yvon Blais, 2007) 49 at 51–54.

In this article, we set out to examine the concepts of undue influence and *captation*, respectively, within the Canadian common law of wills and estates and within the law of successions in Quebec civil law.[7] While not purporting to undertake a comprehensive analysis of the case law on this topic, the analysis here is intentionally transsystemic, in that it provides a reflection on a juridical issue with the frames of two different legal orders. We explore how social conceptualizations of human vulnerability operate to affect juridical approaches to this area of law. We conclude that dominant social norms associated with vulnerability—notably, norms that associate ageing and disability with a state of being vulnerable—are reflected in the law's appreciation of when and how undue influence and *captation* arise. While the application of these norms does not have a decisive impact on juridical outcomes, they nonetheless feature consistently through legal analyses of undue influence and *captation*, notably in cases where these grounds are invoked to contest wills. This article invites reflection on whether a more refined understanding of vulnerability might facilitate the pursuit of twin goals in the law of wills and successions—which must be "delicately balanced"—namely, upholding testamentary freedom and protecting the interests of those whose volition is compromised by exogenous pressures.[8]

To be precise, then, this article considers how contemporary analyses of vulnerability theory are reflected in juridical approaches to undue influence and *captation*. As the analysis here will demonstrate, conventional presumptions between vulnerability, on the one hand, and seniority and disability, on the other, are to some extent borne out in the law of undue influence and *captation*. Yet this is principally on account of the fact that nearly all cases in this area involve challenges to wills made by very old and/or infirm testators. By and large, judges have been vigilant to avoid synonymies between vulnerability age and disability, looking instead to factors beyond the testator's physical state to consider whether undue influence or *captation* were present. What is perhaps most intriguing about this area of law, however, are the cases that do not appear. These are the cases that involve wills made by young and healthy testators, which seem rarely—if ever—to be challenged for undue influence or *captation*. This

7. Throughout this article, we will refer to this area of law in both of traditions together as "the law of wills and successions."

8. See Christine Morin, "Libéralités et personnes âgées : entre autonomie et protection" (2013) 59:1 McGill LJ 141 at 164 [Morin,"Libéralités et personnes âgées"].

suggests, then, that such testators are autonomous and could never have their intentions captured or directed by the will of another. All of this invites us, as jurists, to consider whether and to what extent the law of wills and successions might shift—especially insofar as the doctrines of undue influence and *captation* are concerned—were we to embrace a refined understanding of vulnerability that resists basic presumptions. Such an approach would instead appreciate that we are each—regardless of age and ability—potentially vulnerable to the coercion and misuse of power and dependencies.

Following a brief introduction to the law of undue influence and captation (Part I), we examine (in Part II) critical approaches to vulnerability developed by legal theorists who underline the risks of equating vulnerability with two particular social classes: the elderly and persons with disabilities. This discussion exposes this equation as a potential oversimplification that might compromise the fundamental equality and dignity rights of these groups. Moreover, conventional vulnerability theory risks neglecting the harm that might attend others who, while not aged or disabled, face other social or economic oppressions. A more textured approach posits that vulnerability is a shared human trait that cuts transversally across social identities and experiences. Accordingly, susceptibility to undue influence and *captation* might not always be plain and obvious.

Understanding vulnerability as socially transversal or universal provides a foundation on which to develop a critical analysis of the law's engagement with the doctrines of undue influence and *captation*. Part III thus tests the following hypothesis: given prevailing social understandings of vulnerability as inherent to disability and ageing, will challenges based on undue influence and *captation* are most likely to occur, and succeed, when the testator was of old age and/or disabled at the time of the will's execution. To test this presumption, Part III examines representative case law from common law Canada and civil law Quebec. As the discussion will show, courts have taken a nuanced approach to undue influence and *captation*, resisting simple presumptions about vulnerability and susceptibility to coercion based on age or ability. Largely this stems from the centrality of testamentary freedom as a principle in the law of wills and successions. But it appears also to be rooted in the goal of protecting individual autonomy and dignity. Hence, rather than drawing a direct line between perceived personal vulnerability and the inability to make a valid will, judges in both legal traditions have integrated analyses of other factors to assess

the presence of undue influence or *captation*. Two such factors emerge with notable frequency, one in the common law and one in Quebec civil law. Common law cases show a preoccupation with perceived social force or control exerted at the hands of the defendant beneficiary,[9] notably through manoeuvres that isolated the testator or rendered the latter dependent. In the civil law, the key consideration is the presence of deceit or fraud that had a determinative impact on testamentary dispositions.

Overall, an analysis of relevant jurisprudence reveals that conditions presumed as giving rise to vulnerability (old age, disability) will trigger heightened judicial scrutiny of testamentary instruments. But by themselves, these conditions do not determine legal outcomes, nor do they even give rise to a legal presumption of undue influence or *captation*. In other words, even where a testator was very old or disabled, courts will look for clear evidence of undue influence in fact before coming to a conclusion. As mentioned, these facts will normally pertain to social isolation and dependence in the common law and deceit in the civil law. This means that cases that involve either very old or disabled testators are more likely to yield judicial findings of undue influence or *captation*, yet at the same time, the vast majority of such claims are raised vis-à-vis elderly or disabled testators. As indicated, wills made by young, healthy people are not challenged for undue influence or *captation*. A question for juridical consideration, then, is whether we miss cases where this untoward conduct has actually occurred because of the conceptual associations we draw between age, disability, and vulnerability. Were we to perceive vulnerability as socially transversal, we might spot situations of undue influence and *captation* in varied populations, not just those who are aged or disabled. As such, current approaches reflect a risk of underreach. There is also a risk of overbreadth, albeit seemingly diluted by the fact that courts have been scrupulous in their analyses of undue influence and *captation*. This risk arises from the possibility that current cases potentially capture and invalidate the wills of older or disabled testators who in fact were capable of resisting outside pressures and influences on their testamentary decisions.

9. We use the term "defendant beneficiary" throughout this article to refer to the party/parties who are the subject of juridical scrutiny in an evaluation of undue influence or *captation*. Often, this party will be a prime beneficiary in the impugned testamentary instrument. But this is not always the case; undue influence and *captation* can be carried out by someone who does not benefit directly from the testamentary dispositions in question.

While judicial analyses have, for the most part, been careful about resisting simple presumptions about age and ability, there remains room for building a more fulsome understanding of vulnerability into legal approaches to undue influence and *captation*. Some reflections to this end are offered in the article's conclusion, specifically in the context of relationships between parties who have unequal bargaining power. Before launching into the substance of this article, some preliminary work is needed to situate the reader in connection with the law of undue influence and *captation*. The discussion that follows takes up that task.

I. UNDUE INFLUENCE AND *CAPTATION*

In the common law, undue influence is understood as arising in situations where testamentary intent was overridden by the influence of another who stands to benefit—directly or indirectly—from subsequently executed testamentary dispositions. As such, a testator's free will is said to have been vitiated by the power that another individual exercised over the testator in relation to the execution of the latter's will. The equitable doctrine of undue influence was thus established to prevent the "unconscientious use of any special capacity or opportunity that may exist or arise of affecting the donor's will or freedom of judgment."[10] At the same time, that doctrine's roots in probate law within the common law predated and were distinct from the equitable doctrine that developed in relation to *inter vivos* transfers.[11] To establish undue influence within testamentary contexts in common law, it is not necessary to demonstrate malfeasance or bad faith by the defendant beneficiary, even though the latter is normally perceived as someone who manipulates or coerces a testator with a view to advancing their own interests. Undue influence has thus been associated with the notion of "moral guilt."[12] It has also been likened to duress, in that the testator's actions while under the testator's control are not

10. Matthew Tyson, "An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and *Inter Vivos* Dispositions" (1997) 5 Aust Prop 38 at 43.

11. See *ibid* at 55 ("The probate doctrine of undue influence was not a creature of equity and good conscience, but was instead the progeny of the ecclesiastical courts.")

12. See Louise M Mimnagh, "Probate Actions and 'Suspicious Circumstances': A Third Standard of Proof for Allegations Involving Moral Guilt" (2014) 19 Appeal 95.

aligned with the testator's own intentions or choice.[13] As explored below, cases where undue influence is found have typically involved manipulative and self-serving conduct, even if not reaching the threshold for fraud. Rather, it is enough for the party who challenges a will to show that the nature of the relationship between the testator and the defendant beneficiary was such that it was possible for the latter to "dominate" the former's will, and that such domination did in fact occur.[14] While the moral implications of undue influence can raise concerns about justice, the path taken to address this challenge within *The Restatement (Second) of Torts* (*Restatement*) strikes this author as ill-advised. There, "interference-with-inheritance" is framed as an actionable civil wrong.[15] Not surprisingly, this entanglement of tort law and estates law engendered controversy, since it raised to the level of a private law right a would-be beneficiary's interest in an estate, which in fact remains a simple hope or expectation until the testator's death and the probate of the latter's will. The *Restatement* has also been critiqued as attempt to create, within tort law, a "rival," "less structured" alternative to the law of probate and restitution, erroneously deploying torts to "[play] the role of equity" where the regimes meant to address the problems in question yield seemingly unsatisfactory or unjust results.[16]

The question of the applicable standard and burden of proof in the common law of undue influence in testamentary contexts has generated, over many decades, considerable uncertainty,[17] some of which

13. See Tyson, *supra* note 10 at 70–71. For a thorough discussion of the origin and historic and contemporary jurisdiction of probate courts, see Albert H Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017) 46 Adv Q 316.

14. *Geffen v Goodman Estate*, [1991] 2 SCR 353 at 377–78, 81 DLR (4th) 211 [*Geffen*].

15. Restatement (Second) of Torts § 774B (1979): "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to a liability to the other for the loss of the inheritance or gift."

16. John C P Goldberg & Robert H Sitkoff, "Torts and Estates: Remedying Wrongful Interference with Inheritance" (2013) 65:2 Stan L Rev 335 at 365, 392.

17. Writing in 1938, Cecil A Wright stated: "Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are, in the writer's opinion, second to none in difficulty" ("Wills — Testamentary Capacity — Suspicious Circumstances — Burden of Proof"), Case Comment, (1938) 16:5 Can Bar Rev 405 at 406). Sopinka J cited this passage in support of the following statement: "The interrelation of suspicious circumstances, testamentary capacity and undue influence has perplexed both the courts and litigants since the leading case of *Barry v Butlin* […]" (see *Vout v Hay*, [1995] 2 SCR 876 at para 16, 125 DLR (4th) 431

was clarified by the Supreme Court's decision in *Vout v Hay*.[18] There, Justice Sopinka for the Court affirmed that the common law's presumption of a will's validity benefits the party who defends it in the face of a judicial challenge ("the propounder"). Even where there is evidence of "suspicious circumstances" that call a will's validity into question, this presumption persists where such circumstances pertain to potential undue influence.[19] In other words, there is no presumption of undue influence in testamentary contexts even where suspicious circumstances of undue influence are present.[20]

In contrast to undue influence in the common law of wills and estates, the notion of *captation* in civil law successions is anchored to the concept of fraud. Specifically, fraudulent acts that directly prompt testamentary decisions will be deemed to have "captured" the testator's free will. Accordingly, they will invalidate the resultant dispositions. The legal elements of *captation* set a high bar for the party who advances this claim; it will not be enough for the will's challenger to show that a defendant beneficiary curried favour with the testator

---

[*Vout*]). *Barry v Butlin*, [1838] 12 ER 1089, 12 WLUK 52 is an 1838 decision rendered by the Judicial Committee of the Privy Council.

18. See Wright, *supra* note 17.

19. In *Vout*, *supra* note 17, the Court identified three types of circumstances that might be deemed "suspicious" in testamentary contexts: those related to the context of will's formation or preparation, those related to the testator's capacity, and those related to the possible presence of fraud or of undue influence. In the former two contexts (will's formation and capacity), evidence of suspicious circumstances "spends" the presumption favouring the will's propounder and the onus then shifts to them to prove that the will was legitimately executed and/or that testamentary capacity existed. The onus does not, however, shift where undue influence is in question; it rests throughout with the party attacking the will's validity (at paras 16–29). See also John E S Poyser, *Capacity and Undue Influence*, 2th ed (Toronto: Thomson Reuters, 2019) at 247–48.

20. In Quebec civil law, the Quebec Court of Appeal has refrained from deciding whether such a presumption exists, leaving us to infer, on the basis of principles of civil procedure, that the burden must be shouldered by the party who challenges the will:

> *De plus, on s'accorde généralement, sur la base des explications du juge Beetz dans l'arrêt Stoneham, sur le fait que la jurisprudence n'admet pas de déplacement du fardeau de la preuve en matière de captation. Dans cette affaire, la Cour suprême rejette l'application en droit québécois d'un principe issu de la jurisprudence anglaise, la* doctrine *of righteousness, parfois qualifiée de théorie des circonstances suspectes. Bien qu'on puisse se demander si le refus de transposer la présomption du droit anglais en matière de circonstances suspectes notée dans Stoneham — un arrêt décidé sous le* Code civil du Bas Canada *et pour lequel l'article 48 de la Charte ne s'appliquait pas — devrait être revu par la Cour, j'estime que la preuve au dossier ne nécessite pas de trouver réponse à cette question.*

(Kasirer JCA, as he then was, for the Court in *Larocque c Gagnon*, 2016 QCCA 1237 at para 105).

or appealed to the latter's affections.[21] Instead, the court will call for evidence of deceit and manipulation that induced the testator into a mistaken belief of fact. Moreover, to establish *captation*, the evidence must show that such deceit and manipulation had a clear and direct effect on the expressions made in the will. Ultimately, the court will be called upon to assess the circumstances under which the testator executed the will, and the reasonableness of the will in light of the testator's life circumstances and family relationships.[22]

Although the *Civil Code of Québec* (CcQ) does not define *captation*, it integrates a reference to the concept in article 761.[23] Here, the legislator makes clear that testamentary gifts to persons delivering care in a health and social services facility—who are not the testator's spouse or any other close relative—are void if made during the time that the testator received services in that setting. Similarly, gifts to foster family members are without effect if made by the testator while living with that family. While no similar doctrine exists in the common law, some jurisdictions have passed legislation comparable to article 761 CcQ,[24] which arguably gives effect to presumptions about a testator's lack of autonomy when reliant for their care on persons who are not family members. In this way, these legal provisions are animated by the theme discussed in Part I below. Article 761 applies to a narrow set of circumstances (i.e. testamentary acts made by persons living in permanent

---

21. See François Terré, Yves Lequette & Sophie Gaudemet, *Droit civil : les successions, les libéralités*, 4th ed (Paris: Dalloz, 2014) at para 283: "*lorsqu'il y a eu seulement flatterie des goûts ou des manies du disposant, ou manifestations de dévouement — sincère ou simulé — de nature à susciter l'affection*."

22. See *Brusenbauch c Young*, 2019 QCCA 914 at para 33; *Stoneham and Tewkesbury v Ouellet*, [1979] 2 SCR 172, 28 NR 361 [*Stoneham*]; Beaulne, Morin & Brière, *supra* note 4 at para 690; Marie-Claude Armstrong, Catherine Gendron & Élisabeth Pinard, "L'annulation de testaments pour motif de captation et caducité de legs pour motif d'indignité", *supra* note 6 at 51–54.

23. Art 761(1) CcQ: "A legacy made to the owner, a director or an employee of a health or social services establishment who is neither the spouse nor a close relative of the testator is without effect if it was made while the testator was receiving care or services at the establishment"; art 761(2) CcQ: "A legacy made to a member of a foster family while the testator was residing with that family is also without effect." Art 761 is a specific reflection of the fundamental right that the *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, s 48 [*Quebec Charter*] extends to the elderly and to disabled persons:

> Every aged person and every handicapped person has a right to protection against any form of exploitation. Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead.

24. See also Robert Barton, Lisa M Lukaszewski & Stacie T Lau, "Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us" (2015) 29:3 Probate & Property 1 (citing similar legislation in California, Maine, Nevada, and Illinois at 2–3); *Bernard v Foley*, [2006] 39 Cal 4th 794.

care facilities). Cases of alleged *captation* or undue influence, however, arise in a broader range of settings and, as explored in Part II, more nuanced judicial analyses are brought to bear on testamentary acts in these cases.

Ultimately, undue influence and *captation* are strongly overlapping juridical concepts developed within separate legal traditions. Their principal distinction lies in the fact that the latter is more explicitly anchored to the notion of fraud. Hence, *captation* requires evidence of pernicious intent and outcome, whereas the same is not true, at least in theory, of the concept of undue influence in the common law of wills and estates. Yet, even in cases where *captation* is raised before a Quebec court, judicial evaluations may refer to the language and concept of undue influence.[25] Likewise, although malevolent intent is not a required element of undue influence in the common law, the conduct and motives of the party said to have engaged in undue influence are typically impugned by the will's challenger on a moral basis, and common law courts will evaluate these claims accordingly.[26]

II. VULNERABILITY AS SOCIALLY TRANSVERSAL

Social presumptions about ageing and disability, which find reflection in juridical conceptions of undue influence and *captation*, drive the hypothesis underlying this article, namely, that will challenges based on undue influence and *captation* will be most likely to occur, and to succeed, in situations involving old or disabled testators. Conventional perceptions of "vulnerability" drive this hypothesis. Whereas some groups (such as the elderly, the disabled, and children) are presumed vulnerable and in need of external sources of protection, adults who have yet to reach "old age" and who appear to be of sound mind and body are understood to be autonomous. Thus, the latter group is far less susceptible than the former to having their legal undertakings challenged on the basis of undue influence or *captation*.

Over the last decade, some legal theorists have challenged this binary understanding of personal vulnerability and autonomy, and the

---

25. See e.g. *Gardiner (Estate of) v Young*, 2016 QCCS 5978 at para 70; *Baptist c Baptist*, [1894] 23 SCR 37 at para 57; *Collin-Evanoff c Cadieux*, 1988 CanLII 524 (QC CA), J.E. 88-689 (CA) [*Cadieux*]; *Phillips c Douek*, 2020 QCCS 1048 [*Douek*].

26. See e.g. *Banton v Banton*, 1998 CanLII 14926 (ON SC), [1998] 164 DLR (4th) 176 at 189 [*Banton*]; *Elder Estate v Bradshaw*, 2015 BCSC 1266 at para 93; *Tribe v Farrell*, 2003 BCSC 1758 at para 9 [*Tribe*], aff'd 2006 BCCA 38.

conditions typically associated with each state.[27] Specifically, the presumption of vulnerability tied to ageing and disability has been understood as compromising the fundamental dignity of persons, essentializing these groups, and failing to account for variances in capacities among the aged and disabled. Conventional presumptions of vulnerability are therefore said to be dehumanizing, especially in the case of persons with disabilities, as their capacities are measured against a perception of the "ideal" or "perfect" human who is understood as physically and mentally robust and unencumbered by dependencies. This notion, however, rests on "false ideas,"[28] what personhood constitutes. Those who are not fully autonomous and thus fall short of this benchmark can encounter barriers that can undermine dignity, risk social exclusion, or situate them within "a separate category of human existence."[29]

As recent vulnerability theorists underline, actual human realities do not reflect social suppositions of vulnerability. In fact, each of us can and will experience vulnerability at different moments in time, and in varying contexts. In this way, vulnerability—similar to disability (that is, reduced abilities in contrast to the norm)—should be understood as "inherent" to the human condition rather than as a "negative characteristic."[30] The law's oversight of human interactions and agreements, especially in private law, could thus benefit from an understanding of vulnerability as universal and a "fundamental" human condition.[31]

---

27. See e.g. Martha Albertson Fineman, "'Elderly' As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility" (2012–2013) 20 Elder LJ 71; Inger Marie Lid, "Vulnerability and Disability: A Citizenship Perspective" (2015) 30:10 Disability & Society 1554; Catriona Mackenzie, Wendy Rogers & Susan Dodds, eds, "Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?" in *Vulnerability: New Essays in Ethics and Feminist Philosophy* (New York: Oxford University Press, 2013) 1; Titti Mattson & Mirjam Katzin, "Vulnerability and Ageing" in Ann Numhauser-Henning, ed, *Elder Law: Evolving European Perspectives* (Cheltenham, UK: Edward Elgar, 2017) 113; Nina A Kohn, "Vulnerability Theory and the Role of Government" (2014) 26:1 Yale JL & Feminism 1.

28. Lid, *supra* note 27 at 1563.

29. Mattson & Katzin, *supra* note 27 at 129 (examining vulnerability theory in relation to the elderly). See also Lid, *supra* note 27; Martha Nussbaum, *Hiding from Humanity*: *Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004) at 308.

30. See Lid, *supra* note 27 at 1565–66 (critiquing Nussbaum and Fineman's approaches).

31. See *ibid* at 1564.

While vulnerability might be a shared human characteristic, our experiences of vulnerability are not identical, nor do they overlap in time or space. Vulnerability exists on account of a range of circumstances that may heighten or reduce dependencies. Mackenzie's work on this point is instructive, creating a "taxonomy" that illustrates how vulnerability can result from inherent human traits (e.g. because we are embodied and have social and affective needs), from particular contexts (e.g. economic, geopolitical, or personal situations), or be "pathogenic" (e.g. disability that heightens exposure to abuse by others). These three sources of vulnerability can coexist; they may be permanent or endure for just a short period of time.[32]

While this socially transversal understanding of vulnerability is appealing for the light that it can shine on the myth of full autonomy that only some people enjoy, it is susceptible to (at least) two principal critiques. The first is that the claim that everyone can be vulnerable risks masking degrees of dependence and susceptibility to abuse or harm. A theory of vulnerability as foundational or universal to the human condition is at risk of being both under and overinclusive, drawing on scarce resources to advance the interests of those who are more than capable of doing so without public supports. Further, understanding vulnerability as transversal could hinder efforts to concentrate on the needs of those who face the greatest risk of having their interests neglected or subverted. It is therefore necessary to avoid an absolutist, all-or-nothing approach to vulnerability—wherein we are either "constantly dependant [...] or not dependent at all."[33] This calls for refined understandings of the factors and conditions that might trigger dependence and give rise to vulnerability, as well as an assessment of whether the law can or should extend measures to protect individuals against the harm that may arise on account of these factors.

This point leads to the second challenging aspect of understanding vulnerability as inherent to humanity, which is especially important to jurists. While we might acknowledge that each of us—at least transiently—can be or become vulnerable, it is not clearly desirable or possible for legal actors and doctrines to start from the premise that everyone needs protection and that this protection should come in

32. See Catriona Mackenzie, "The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability" in Mackenzie, Rogers & Dodds, *supra* note 27 at 38–41.

33. Mattson & Katzin, *supra* note 27 at 120.

the form of juridical oversight and intervention. While this approach might be lauded as a challenge to neoliberalism,[34] it would also engender compelling critiques about paternalistic interference by state authorities in private decisions and transactions.

Scholars engaging with the concept of vulnerability have recognized these challenges to its universalist framings. Much of this work expresses concern over the potential for claims about shared dependencies to transform into justifications for state or private action that would undermine individual autonomy and dignity.[35] Thus, some have argued for a more tailored approach that would aim to build resilience as a way to boost individual capacities and resist exploitation and harm. In other words, rather than presuming that a public approach to vulnerability requires intervention in private ordering, an understanding of vulnerability becomes reconcilable with an effort to respect individual dignity and autonomy by focusing on proactive measures that build personal resilience and capacity to withstand opportunism or exploitation by others. In this vein, Mackenzie, Rogers & Dodds have sought to bridge the notion of relational autonomy—recognizing that autonomy can be achieved *because* of healthy relationships, rather than *instead* of them—with efforts that privilege the dignity of the individual.[36]

Thus, rather than justifying "unwarranted paternalistic interventions"[37] that override expressions of intent and free will, a more nuanced juridical engagement with the notion of vulnerability could instead strive to deepen our individual capacities to spot and resist situations of vulnerability. As will be explored below, this should not translate into an individual's burden; the responsibility for spotting and resisting vulnerabilities can and should be shared. Where vulnerability is claimed as a basis for intervening in private decision-making or ordering, juridical actors would be called to evaluate whether the evidence presented reflects harm, unmet needs, and/or exploitation rather than drawing on simple presumptions tied to age and ability. In this way, the law's focus would be on building and recognizing resilience and abilities, rather than defaulting to presumptions that too often leave the elderly and persons with disabilities with "a troubling

34. See *ibid* at 117.
35. See Kohn, *supra* note 27.
36. See Mackenzie, Rogers & Dodds, *supra* note 27 at 16.
37. *Ibid*.

sense of powerlessness, loss of control, or loss of agency."[38] Such an approach aligns with Mattson and Katzin's analysis of vulnerability among the elderly, who—in pointing out how ideals of autonomy offset the burden of care responsibilities to private actors—remind us that recognition of shared vulnerability "cultivates the virtues of compassion and cooperation" whereas "full autonomy and self-sufficiency are neither attainable nor desirable."[39]

How might these recently advanced theories of vulnerability inform analyses of undue influence and *captation* in the law of wills and successions? Some insight can be drawn from Herring's analysis of vulnerability in the law of contracts.[40] Herring skilfully demonstrates how contract law already acknowledges, at least to some extent, our shared susceptibility to vulnerability. He advances this claim through examples of contractual doctrines centred on the protection of the ostensibly weaker bargaining party (e.g. *non est factum*, duress, and undue influence). At the same time, Herring stresses that these doctrines are exceptions to the general principle of freedom of contract, which itself is "premised on the ideal of the self-sufficient, informed, autonomous businessman who should be free to make his business deals for himself." [41] Herring challenges this benchmark that we use to evaluate a contract's validity, noting that "real people, not the people in contract law's imagination, are sentimental and not entirely driven by rationale."[42] He thus calls for an alternate approach to contract law that would integrate a duty for parties to recognize and account for each other's vulnerabilities rather than seeking exclusively to promote ideas tied to free will, market, and exchange.[43]

Like contracts, wills are private juridical acts rooted in an ideal of individual freedom. But, unlike contracts, wills are unilateral instruments and thus depend on the decisions of solely one person, sometimes recorded without anyone else present or having knowledge of the act

38. *Ibid* at 9, 15.

39. Mattson & Katzin, *supra* note 27 at 128.

40. See Jonathan Herring, *Vulnerable Adults and the Law* (Oxford, UK: Oxford University Press, 2016), c 8.

41. *Ibid* at 226.

42. *Ibid* at 235.

43. See *ibid* at 257–58, 261.

until long after its execution.[44] Herring's analysis, which establishes how vulnerability can and should be taken into account in a more robust way within private ordering, can be extended from contract law to the law of wills and successions. That said, the application of this principle will necessarily take a different form in the law of wills and successions, since—as there is no co-contracting party—legal approaches in this realm cannot depend on expecting that "[parties] look out for the vulnerabilities each other have and share."[45]

The question of who, in Herring's words, can or should "look out" for a testator's interests will be picked up further in the conclusion to this article. For the moment, though, it is important to consider how we might expect the law of wills and successions to engage with undue influence and *captation* based on the foregoing discussion about vulnerability.

Despite the critiques of vulnerability set out in more recent literature, we might assume that the law's understanding of this concept remains based on differentiation rather than universality. We would thus expect that courts would be more inclined to make presumptions about an elderly or disabled testator's dependencies and susceptibility to external pressures. This being said, because of the primacy that is placed on the principle of freedom of testation—in a manner that is closely aligned with Herring's characterization of the orthodox approach to freedom of contract—it is also predictable that marshalling evidence of undue influence or *captation* would be a formidable endeavour for a party challenging a will on this ground. One would reasonably anticipate that, in most cases, wills are likely to be left untouched, without interference by a judge. Hence, we might reasonably expect that—because of conventional ideas about vulnerability—claims for the judicial override of freedom of testation (especially successful claims) are most likely where testators are old and/or disabled, and thus presumed to be dependent and vulnerable. The discussion that ensues reflects the extent to which this expectation bears out in case law developed in the law of wills and successions in common law Canada and Quebec civil law.

---

44. Many provinces and territories recognize the holograph will, that is, a will that the testator handwrites and signs, without witnesses and without registering it in any public office. See e.g. *Succession Law Reform Act*, RSO 1990, c S 26, s 6 (Ontario); *Wills and Successions Act*, SA 2010, c W-12.2, s 16 (Alberta); art 726 CcQ. In British Columbia, however, a handwritten will is invalid unless attested by witnesses (see *Wills, Estates and Succession Act*, SBC 2009, c 13, s 37).

45. Herring, *supra* note 40 at 261.

III. VULNERABILITY AND TESTAMENTARY VOLITION

Considering the foregoing discussion, it is not surprising that the case law on undue influence and *captation* in testamentary contexts involves testators cast as vulnerable, at least according to dominant social norms. The jurisprudence is consistent for its focus on the testamentary dispositions of persons who are old and/or disabled. Rare are the cases that involve young testators; where they occur, the testator was a person in a weakened state of health at the time of will-making.[46] This suggests, then, that a testator's social entourage—family or friends—is unlikely to claim undue influence or *captation* when that testator was young and of sound mind and body, further reflecting presumptions of who is or is not capable of will-making. Conventional vulnerability theory thus underpins judicial approaches to undue influence and *captation*; in each case on point, judicial reasoning will turn on an assessment of whether the testator was in fact "vulnerable" at the time of making a will.[47] Just the same, the ostensible presence of a state of vulnerability on the testator's part will not by itself ground a conclusion of undue influence or *captation*. Rather, courts generally have shown "solicitude" in their analyses,[48] upholding testamentary autonomy unless and until there is compelling evidence demonstrating that the will reflected the intentions and wishes of someone other than the testator. Hence, while a connection is made in this jurisprudence between old age and disability, on the one hand, and the conception

---

46. See e.g. *Lamontagne v Lamontagne*, 1996 CarswellSask 658 at para 42, 67 ACWS (3d) 417 (SK QB), involving a will made by a testator at age 18. While the court did not conclude undue influence was exerted by his brother, the latter was found to be "in a position to attempt to exert undue influence" given his role as a caregiver to his brother, who was a quadriplegic.

47. Although vulnerability is, today, predominantly a social rather than a legal concept and thus not defined in juridical sources, the concept is central to judicial decision-making throughout the jurisprudence related to undue influence and *captation* in testamentary contexts. See e.g. in Canadian common law, *Ross-Scott v Potvin*, 2014 BCSC 435 ("The question is whether Mr Groves was a vulnerable person and in a state of incompetence and unable to resist pressure improperly directed on them by the other spouse" at para 229), and *Maronda v Colliton*, 2010 ABQB 354 ("I also accept that Mrs Colliton was a vulnerable woman. She was elderly, had recently undergone fairly major surgery, was on medications and was far more dependent than she was used to being" at para 79).

In Quebec civil law, see e.g. *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, 2010 QCTDP 10 ("[L]*e testament est préparé dans un contexte où monsieur Poirier est dans un état de vulnérabilité, de dépendance, d'isolement. Il est sous l'emprise des Défendeurs, dans une situation de mise à profit de leur part à son détriment*" at para 81), and *Filion c Desmarais*, 2015 QCCS 338 ("*Certains témoignages portent à conclure que Rock Filion, diminué physiquement, s'est isolé et s'est retrouvé en situation de vulnérabilité qui a pu affecter ses choix testamentaires*" at para 63).

48. See Morin, "Libéralités et personnes âgées", *supra* note 8 at 154.

of vulnerability, on the other, courts have remained scrupulous in their analyses to determine whether, on the facts, undue influence or *captation* was present.

A review of judicial analyses reveals that two particular factors shape judicial outcomes. The first is whether the defendant beneficiary created circumstances giving rise to the testator's social isolation and dependence. The second is whether the defendant beneficiary engaged in deceit to mislead the testator in a manner that affected testamentary decisions. Whereas the common law has focused on the first of these factors (social isolation and dependence), the second factor (deceit) is central to Quebec civil law cases evaluating the presence of *captation*. The discussion that ensues examines each of these factors in turn.

A. Social Isolation and Dependence

Will challenges on the basis of undue influence are most likely to convince a court where the evidence demonstrates that the testator, at the time of will-making, had few or no social connections beyond the defendant beneficiary. In most such cases, the testator's isolation and reliance on that beneficiary would have occurred by the latter's design.

A case widely cited in the Canadian law of undue influence in the context of wills and estates, *Banton*,[49] offers a prime example. Here, Justice Cullity found that the testator had fallen subject to the "overwhelming and irresistible" influence of his new wife who was fifty-seven years his junior.[50] Critical to this conclusion was the judge's finding of measures the defendant beneficiary took to sever the testator's relationships with his children. Justice Cullity found that the testator's "contact with his family virtually ceased" once he began cohabiting with his new spouse, who intercepted calls and visits from his children.[51] The result was to render the testator "a mere puppet" in guardianship proceedings, "easy prey" for a woman whom the court

49. *Banton*, *supra* note 26.

50. *Ibid* at para 124.

51. *Ibid* at para 89.

cast as having "designs on his property."[52] In these circumstances, undue influence was found to have overtaken testamentary intent and the will was consequently set aside.

The facts of *Tribe* are comparable.[53] The testator made a will that benefitted his live-in caregiver, who was four decades his junior. In contrast to *Banton*, the couple in *Tribe* did not have a conjugal relationship, but the evidence indicated that they regularly expressed their affection or love for one another. The testator's son successfully contested the will on the basis of undue influence showing that, although he maintained some connection with his father until the latter's death, the testator was nonetheless "socially isolated."[54] Justice Cohen further found that the defendant beneficiary had operated to render the testator dependent on her, enabling her "domination" over his intentions and financial affairs and wealth transfers. This, in turn, drove wealth transfers that the testator had made both *inter vivos* and through his will, which were to the advantage of the defendant beneficiary.[55]

Akin to *Banton* and *Tribe*, *Re Kozak Estate*[56] provides a third example of a court in common law Canada overriding a will following the interventions of a younger woman affecting the estate planning of an older, infirm testator. In *Kozak*, the court, finding the testator to be "unhealthy" and "naïve" at the time he made the impugned testamentary dispositions, concluded that the defendant beneficiary had duped him into believing that she would one day marry him.[57] She had further intervened to limit the testator's contact with his family. For Justice Renke,

---

52. *Ibid* at para 124. *Vout*, *supra* note 17, where the judicial finding of the testator's independence despite his senior age (81 years old) in comparison with the defendant beneficiary, a 29-year-old woman who lived with and carried out chores for them, led to conclusion that undue influence was not present:

> Clarence Hay, on the evidence, was not a befuddled, senile old man whose mind had been captured by Sandra Vout and who, like the testatori in *Eady v Waring* […], was physically and emotionally controlled and isolated by those persons who stood to benefit. In fact, the reverse is true. Clarence Hay was self-reliant and independent, was not easily influenced, lived alone and visited all members of the Hay family regularly, and he was all these things both before and for three years following the execution of the Will (at para 30).

This is the decision of the trial judge that was cited to by Sopinka J for the Supreme Court of Canada, which upheld the trial decision.

53. *Tribe*, *supra* note 26.

54. *Ibid* at para 30.

55. *Ibid* at para 91.

56. *Re Kozak Estate*, 2018 ABQB 185.

57. *Ibid* at para 187.

these efforts at social control and isolation reflect "a hallmark of undue influence."[58] Having so concluded, the will was voided.

Not all cases wherein a court concludes that undue influence overrode testamentary intent involve younger women beneficiaries and male testators decades their senior.[59] *Re Morash Estate*[60] involved a reversal of gender roles, calling upon a court to determine the validity of a will that benefitted the testator's husband and his extended family while disinheriting her only child. Finding that the defendant "dominated" decisions regarding the testator's health and legal affairs during her lifetime such that the latter was fully reliant on him, Justice Hall denied probate.[61] Similarly, the court in *Marsh Estate*[62] examined the validity of a will made by a senior testatrix benefitting the defendant beneficiary, who had looked after her business affairs. Here, a factual finding was made that the defendant beneficiary's communications to the testator "implicitly, if not expressly, threatened to withdraw his assistance from [the testator] if the Will was not changed" to his advantage.[63] Such communications were deemed to constitute undue influence, particularly given the testator's "minimal contact with other support systems."[64] As such, *Marsh* further underscores the centrality of social isolation and dependence to judicial analyses.

While circumstances of social dependence can arise in a number of contexts, they are most likely to occur in the context of relationships marked by a power differential. The Supreme Court of Canada in *Geffen* thus determined that analyses of undue influence—whether in testamentary or other legal contexts—must always begin by examining the parties' relationship, inquiring "whether the potential for domination

58. *Ibid* at para 179.

59. Some legal scholars have written about this phenomenon of relatively young women manipulating, for personal gain, their spouses' testamentary under the banner of "predatory" relationships or marriages. While beyond the scope of this paper, the gendered implications of such analyses merit critical scrutiny, given their potential to propagate stereotypes about the frailty and vulnerability of seniors, especially senior men, and of younger women using sex as power to serve their own ends. See Dorota Miller, "Elder Exploitation Through Predatory Marriage" (2012) 28:1 Can J Fam L 11; Albert H Oosterhoff, "Predatory Marriages" (2013) 33:1 Est Tr & Pensions J 24.

60. *Estate of Flora Evangeline Morash*, 2002 NSSC 244.

61. *Ibid* at paras 47–52.

62. *Marsh Estate, Re*, [1990] 99 NSR (2nd) 221 [*Marsh Estate*], aff'd 1991 CanLII 2566 (NS CA).

63. *Marsh Estate*, *supra* note 62 at para 53.

64. *Ibid*.

inheres in the nature of the relationship itself."[65] This would include relationships that the law characterizes as premised on trust (e.g. parent-child, solicitor-client), as well as those that reveal dependencies and power imbalances pursuant to specific fact-based analyses. While the latter types of relationships "defy easy categorization,"[66] the potential for exploiting the weaker party tracks that which exists in formal fiduciary contexts. Although the Court in *Geffen* suggested that the presence of a relationship of dependence might trigger a presumption of undue influence, it later affirmed in *Vout v Hay*[67] that such presumption does not arise in testamentary contexts.[68]

Yet even if a state of isolation or dependence does not give rise to a legal presumption of undue influence, it will—when coupled with a state of vulnerability—shape judicial outcomes. This means that circumstances of dependence and vulnerability—particularly in relation to our social environments and relationships—matter more to our ability to make autonomous decisions than our age or physical abilities. This recognition is in line with Justice Wilson's acknowledgement in *Geffen* that each of us has the potential to be rendered relationally dependent.[69] This line of thought coheres with the argument of recent vulnerability scholars, described above, which positions vulnerability as transversal and inherent to the human condition. Such an understanding of vulnerability, particularly in its intersection with testamentary contexts, calls for a more refined understanding of when and how undue influence might occur. This point is explored later in this discussion, following the analysis of Quebec civil law jurisprudence, to which the discussion now turns.

B. Deceit

Whereas common law jurisprudence on undue influence has been premised on examinations of whether a testator was isolated or dependent, analyses within Quebec civil law in relation to *captation* have concentrated on whether a defendant beneficiary's manipulative efforts induced testamentary decision-making. So, while the common law asks whether a defendant beneficiary created circumstances

65. *Geffen*, *supra* note 14 at 378.

66. *Ibid* at 378–79 (per Wilson J).

67. *Vout*, supra note 17.

68. See discussion in *Karpinski v Zookewich Estate*, 2018 SKCA 56 at paras 28–32.

69. See *Geffen*, *supra* note 14 at 377.

leading to the testator's isolation or dependence, Quebec civil law is most interested in whether the defendant beneficiary duped or deceived the testator to advance their own interests. Doctrine and jurisprudence in the civil law hence focus the *captation* inquiry on whether the evidence can establish fraudulent conduct that had a determinative impact on testamentary outcomes. This is aptly summed up by Justice Roy in her decision in *Gatti c Barbosa Rodrigues*:

> *Il n'est pas contraire à la loi, en soi, de s'attirer les faveurs d'un testateur. La captation n'entraîne la nullité d'un testament qu'en présence de fraude ou de manœuvres dolosives. Le Tribunal doit être convaincu de l'existence d'un dol et que ce dol a été déterminant sur la volonté du testateur exprimée dans le testament attaqué*.[70]

While Quebec civil law pivots on fraud, an analysis of doctrine and jurisprudence indicates that the circumstances which lend themselves to finding *captation* will often not differ significantly from those that common law courts have assessed when adjudicating undue influence claims. Acts by which the defendant beneficiary renders a testator isolated or socially dependant might be considered fraud leading to *captation*.[71] Thus, intercepting contact and communication between a testator and family members could amount to *captation* before a Quebec court.[72] But this will only be the case where that court finds that the conduct was grounded in deception; "schemes," "diversions," or "lies" that actively seek to mislead a testator with a view to influencing testamentary outcomes are a *sine qua non* of *captation* in Quebec Civil law.[73]

As in the common law, the civil law does not ascribe to a simple correlation between old age and disability, on the one hand, and a

---

70. *Gatti c Barbosa Rodrigues*, 2011 QCCS 6734 at para 186.

71. See e.g. *Cadieux*, *supra* note 25. See also Beaulne, Morin & Brière, *supra* note 4 at 245–46.

72. See Germain Brière, *Droit des successions*, 3rd ed (Montréal: Wilson & Lafleur, 2002) at 182. This is one example of a "*pratique artificieuse*" (deceitful practice) that crosses the line between efforts that seek to win a testator's affection or favour and those that constitute a fraudulent act that vitiates free intent.

73. See *Lago c Lachaîne*, 1996 CanLII 12033 at para 87, [1997] RL 136 (where the Court stated: "*La captation est une forme particulière de dol, soit un vice de consentement qui résulte de mensonges, de manœuvres frauduleuses ou de manigances de la part de bénéficiaires potentiels, utilisant des pressions, des détournements ou de l'influence indue sur le testateur.*") See also *Hogue (Succession de) c Sigouin*, 2014 QCCQ 2936 at para 87 (where Landry J stated: "*la 'captation' est synonyme de ruse, de tromperie, de mensonge et/ou de manœuvres dolosive.*")

presumption or conclusion of *captation,* on the other.[74] Rather, concrete evidence that a testator's volition was "captured" is necessary before a court will be prepared to annul a testamentary act. Just the same, Quebec civil law reflects the view that old age and disability can reduce a testator's ability to resist fraudulent tactics aimed at effecting testamentary outcomes.[75]

Specifically, where a testator is frail or elderly, they can be more readily cast as impressionable and pliable. Thus, the will of a sick and elderly testator favouring her "*aviseur spirituel*"—whose relation the Court described "*comme une cire molle entre les mains d'un homme énergique parlant au nom de la religion*"—was invalidated as the product of "artifices" and fraud.[76] This reasoning echoes the Supreme Court's leading decision on *captation*. In *Stoneham*,[77] Justice Beetz affirmed the judgment at first instance holding that the defendant beneficiaries engaged in what, in the English translation of the reasons for judgment, was called "undue influence,"[78] notably by pressuring a frail testator into making a new will on the premise of deliberate misrepresentations. The Court further affirmed that, when considered individually, a testator's ill-health does not typically suffice to invalidate a will.

---

74. See e.g. *Thibault c Guibault*, 1999 CanLII 13631 (QC CA); *Desharnais c Belleau*, 2008 QCCA 123.

75. See Châteauguay Perrault, *Les mélanges Bernard Bissonnette* (Montréal: University of Montréal, 1963) ("*L'âge, l'état de santé, la condition sociale du testateur pourront avoir joué un rôle quant au degré de résistance qu'il pouvait opposer aux manœuvres dont il était l'objet*" at 458–59), as cited with approval in *Laroque c Gagnon*, *supra* note 20 at para 97 (Kasirer JA, as he then was, for the Court).

76. *Barbeau c Feuiltault*, [1908] 17 BR 337 at paras 45–54.

77. *Stoneham*, *supra* note 22.

78. Although a case arising from within Quebec civil law, the claim at issue is framed as "undue influence." While the term is used in the English version of the judgment, Beetz J rightly insisted that "undue influence" as understood in this case was not the same as the concept developed at common law:

> The Court was referred by both sides to a large number of English decisions or decisions in cases from other provinces, for the reason that the unfettered freedom to devise or bequeath one's property by will comes from English law, and that there are analogies between the concept of undue influence in English law and undue influence (*captation*) in the civil law. The case at bar does not concern the unfettered freedom to devise any more than it concerns a will in the form derived from the laws of England. Moreover, undue influence applies to gifts *inter vivos* as it does to wills, and gifts are purely a matter for the civil law. In such circumstances, I not only hesitate to use decisions from other provinces in a civil law matter, I am not in any way bound by a decision of this Court which was cited by counsel for the respondent (*ibid* at 204).

However, referring to Mignault,[79] Justice Beetz underscored the relevance of deceit to the *captation* analysis and concluded that, when applied to a person in ill-health, deceit that drives testamentary decisions amounts to *captation*.

Much more recently,[80] Justice Bachand reasoned that deceit at the hands of a testator's daughters captured the will-maker's intentions, resulting in bequests produced by fraud rather than the testator's own volition. While the court did not refer expressly to manipulation or control by the defendant beneficiaries, these elements were at the core of the decision, which concluded that "deceitful actions" had a direct impact on the testator's decisions.[81] Even more pertinent to this article's thesis, Justice Bachand's reasoning illuminates how disability and old age enhance vulnerability. While this state will not, by itself, yield a finding of *captation* it can render a testator "not as impervious to undue influence."[82]

Although social isolation is a characteristic that appears to be less central to analyses of *captation* than it is to common law courts' evaluations of testamentary undue influence, its presence can contribute to finding *captation*. For example, in *Lafortune c Bourque*,[83] the court found a defendant beneficiary's efforts to isolate a testator from her family—notably through disparaging the latter in order to alienate the testator—was a reflection of "pure cynicism" and "much bad faith."[84] Similarly, in a case involving a claim based on article 48 of the *Quebec Charter*,[85] the Court accepted a will challenge in light of evidence of a defendant beneficiary's efforts to bar a testator's contact with his

79. *Ibid* at 197, citing Pierre-Basile Mignault, *Le droit civil canadien*, vol 4 (Montréal: C Théoret, 1899) at 52–53.

80. See *Douek*, *supra* note 25.

81. *Ibid* at para 57.

82. *Ibid* at para 51. See also *Savoie c Savoie*, 2002 CanLII 41797 (QC CS) (where a testator's daughter was found to have engaged in fraudulent *captation* through "machinations" baselessly disparaging her siblings' moral character, which in turn caused her father to amend his will to her advantage). A similar fact pattern arises in *Théroux c Théroux*, 2010 QCCS 407, aff'd 2012 QCCA 418.

83. *Lafortune c Bourque*, 2000 CanLII 18883 (QC CS).

84. *Ibid* at para 202 ("*Évoquer les agissements de la famille pour justifier l'isolement de Mme Lévesque constitue, dans les circonstances, du pur cynisme et démontre beaucoup de mauvaise foi*.")

85. See *Quebec Charter*, *supra* note 23, s 48.

family, which in turn affected his testamentary decisions.[86] Likewise, in *Rioux c Babineau*, the court distinguished simple and fraudulent *captation*, finding that only the latter would invalidate a will. In that case, the court found fraudulent *captation* where a defendant beneficiary isolated the testator and hid his affairs from other family members.[87]

The foregoing discussion illuminates how, as in the common law, cases in Quebec civil law in which a testator may be viewed as vulnerable on account of age or disability will not necessarily yield conclusions of *captation*. However, where testators in such circumstances are subject to fraudulent manoeuvres by a defendant beneficiary, their testamentary acts will be annulled. In this way, much like the jurisprudence that Canadian common law courts have developed, case law in Quebec reflects conventional social interpretations of vulnerability, as testators whose wills are challenged for *captation* are those who are aged or disabled. Recalling the critical approach to vulnerability theory developed in Part I, we might ask how judicial outcomes might differ if law understood vulnerability as socially transversal rather than as restricted to particular groups. Some thoughts on this question are offered in the conclusion that ensues.

CONCLUSION

This paper explores how social conceptions of vulnerability find reflection within juridical approaches to undue influence and *captation* in testamentary contexts. Critical interrogations demonstrate the pertinence of understanding that we all—at one point or another—are vulnerable. This universalist approach calls for jurists to move away from preconceptions that some social groups are especially vulnerable, meriting our exclusive focus in relation to the question of who deserves particular vigilance and support. Care must be taken to protect those who face risks of harm while avoiding encroachments on their autonomy and dignity. At the same time, effort is needed to identify circumstances of vulnerability that might not be obvious, that is, in cases where the vulnerable person or group might appear to be a member of an "empowered" social group.

---

86. See *Commission des droits de la personne (Succession de Poirier) c Bradette Gauthier*, 2010 QCTDP 10.

87. See *Rioux c Babineau*, 1998 CanLII 9716 (QC CS), aff'd 2000 CanLII 6877 (QC CA).

A review of the case law developed by courts in Canada and Quebec demonstrates how social understandings of vulnerability factor into judicial analyses of testamentary challenges based on claims of undue influence or *captation*. Jurisprudence in both legal traditions reflects social expectations and norms about vulnerability, in that wills challenged on these bases are nearly always made by very old or infirm testators. When faced with facts demonstrating that a will was executed by an ostensibly vulnerable testator, courts will engage in careful analyses to discern the presence of undue influence or *captation*, and—centring the principle of testamentary freedom—will resist simple presumptions about that testator's susceptibility to the pressures of a self-serving defendant beneficiary.

Consider, though, what such cases might look like if the law drew on a more textured understanding of vulnerability in the face of claims that a will is marred by undue influence or *captation*. Such an approach would be premised on an understanding that every testator, regardless of their age or abilities will, at some point or another, experience vulnerability and dependence. This should not prompt a presumption that everyone who makes a will is at risk of having their intentions overtaken by the acts of another. Rather, the analysis would call for all actors—both juridical (lawyers, notaries, judges) and social (those who challenge or defend wills)—to resist presumptions about who is or is not vulnerable, focusing instead on facts and evidence revealing whether an impugned will was driven by exogenous pressures amounting to coercion or fraud. In many cases, age and ability will remain relevant, but not always. A testator who presents as wholly self-sufficient may lean heavily, financially, socially, or emotionally, on a third party, resulting in "relational" rather than personal vulnerability.[88] Within families, particularly spousal relationships, the idea that competent persons of full age have equal bargaining power has long been critiqued.[89] We can imagine, therefore, that pressure may be undue or result in deceit in such contexts. Again, the point is not to dilute the law's commitment to testamentary freedom and autonomy, but instead to consider how presumptions about vulnerability may

88. Margaret Isabel Hall, "Capacity, Vulnerability, Risk and Consent: Personhood in the Law" in Deborah O'Connor & Barbara Purves, eds, *Decision-Making, Personhood and Dementia: Exploring the Interface* (London, UK: Jessica Kingsley, 2009) 119 at 127.

89. See e.g. David G Duff, "The Supreme Court and the New Family Law: Working Through the *Pelech* Triology" (1988) 46:2 UT Fac L Rev 542; Robert Leckey, "Contracting Claims and Family Law Feuds" (2007) 57:1 UT Fac L Rev 1; Mary Jane Mossman, "Running Hard to Stand Still: The Paradox of Family Law Reform" (1994) 17:1 Dal LJ 5.

lead to heightened scrutiny in a way that might compromise the autonomy of some testator, to the legal and social neglect of situations where undue influence or *captation* might have occurred even though the players concerned were young and abled. Hence, where there is evidence that one person shaped the intentions that ultimately find expression in a testamentary instrument (for example, by being the principal point of contact with a lawyer or notary who drafted the instrument), undue influence or *captation* can arise, regardless of the testator's age or state of ability.

Aside from thinking about litigation involving will challenges on the basis of undue influence or *captation*, it is also worth thinking about how law and policy can reflect for greater sophistication in their engagement with vulnerability. Here, it is opportune to recall Herring's discussion of vulnerability in contracts, and his proposal for a legal approach that acknowledges universal dependencies and weaknesses, while incorporating a duty on parties to "look out" for one another's shared and individual vulnerabilities.[90] Since a will involves just one legal party (the testator), who could be charged with "looking out" for their interests? Aside from judges called to intervene after the testator's death, the obvious contenders are parties who have a hand in drafting a will, notably lawyers and notaries.[91] While the extension of a legal duty to witnesses to a will's execution would seem inopportune, witnesses are often called upon in probate or homologation proceedings.[92] An enumeration of the precise duties that could be warranted in this context (such as interrogating the testator's actual relationships with named beneficiaries) lies beyond the scope of the present paper, yet some helpful discussion has emerged on the responsibilities of legal professionals in regard to vigilance against undue influence.[93] Some authors have also astutely noted that jurists called upon to oversee the execution of testamentary instruments can play a key role in assessing whether a testator's intentions are

90. See *Hall*, *supra* note 88.

91. Admittedly, this analysis could not extend to cases of holograph wills, where lawyers and witnesses are not present. In those cases, the only possibility for "looking out for" the testator can occur after death, when the will is opened and circumstances are analysed to discern whether the instrument veritably represents testamentary intent.

92. Hence testamentary gifts to witnesses are void. See e.g. art 760 CcQ; *Succession Law Reform Act*, RSO 1990, c S.26, s 12 (Ontario).

93. See e.g. "Recommended Practices for Wills Practitioners Relating to Potential Undue influence: A Guide" (October 2011), online:
<lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/guide-wills.pdf>.

being driven by undue influence. In this regard, the latter's vulnerability is not to be presumed, but rather might be indicated by factors such as "age, infirmity, disability, language barriers, or involvement in abusive relationships."[94] This recognition of a broadened array of social conditions that might induce vulnerability to juridical acts driven by pressure rather than by free choice is important to the thesis of this article, namely, that undue influence and *captation* can occur in a range of circumstances that include—but are not relegated to—those involving old age and/or infirmity.

As the law in this domain advances, a commitment to integrating an understanding of vulnerability as socially transversal promises a richer analysis of undue influence and *captation* in testamentary contexts. Notably, it calls upon jurists to recognize that even those ordinarily presumed as vulnerable merit legal analyses that presume and further autonomy[95] while awakening us to the possibility that even seemingly autonomous testators might succumb to strong external pressures. In this way, a more textured approach to vulnerability should facilitate juridical efforts to achieve the "delicate balance" of preserving testamentary freedom while also protecting the interests of all those whose interests and volition have been overtaken by undue influence or *captation*.[96]

94. Kimberley A Whaley & Kate Stephens, "A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability Are at Issue in a Retainer" (2018) 48 Adv Q 385 at 397.

95. See Kohn, *supra* note 27 at 15.

96. See Morin, "Libéralités et personnes agées", *supra* note 8 at 164 ("*un exercice de pondération délicat entre autonomie et protection.*")