ARTICLE

PROBATE ACTIONS AND "SUSPICIOUS CIRCUMSTANCES": A THIRD STANDARD OF PROOF FOR ALLEGATIONS INVOLVING MORAL GUILT

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PROMOTION OF A THIRD STANDARD OF PROOF

When a will is challenged as being executed under suspicious circumstances, Canadian courts have historically sought clear, compelling, and cogent evidence to demonstrate the will's validity. The associated standard of proof has been described as one residing *beyond* a balance of probabilities, and is conceptualized as the 'third standard of proof' in addition to the civil and criminal standards. This third standard of proof is also particularly appealing when allocating the risk of error in an estates context in which testators are deceased and no longer available to clarify their intentions or perspectives. However, after the 2008 Supreme Court of Canada decision, *FH v McDougall* ("*McDougall*"), it was resolutely pronounced that only two standards of proof operate in Canada, with the third standard of proof dismissed for the practical problems of its application.[1] As conceded below, there are compelling and valid reasons to disregard a third standard of proof for typical will challenges investigating circumstances such as the execution of the will or the testamentary capacity of the testator. However, this paper argues that for challenges that involve allegations of *moral guilt,*[2] and in cases of fraud or undue influence over the testator, then something *more* then a balance of probabilities is desirable, and the more demanding third standard of proof should be utilized.[3]

To demonstrate the advantage of applying a third standard of proof for probate actions involving alleged moral guilt, Part I of this paper will begin with a brief review of the two traditional standards of proof, and Part II will introduce the rationale for a third

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1 *FH v McDougall*, 2008 SCC 53, 3 SCR 41 [*McDougall*] (WL Can).

2 For the purposes of this paper, *moral guilt* specifically refers to the conduct associated with undue influence or fraud in will challenges, behaviour which is quasi-criminal in nature, and carries an element of moral blameworthiness. It is not the intention of this paper to attempt to categorize the moral nature or stigma of any other civil actions.

3 Please note that challenging the validity of a will through allegations of undue influence requires demonstrating an element of coercion over the testator. In contrast, fraud or forgery are separate grounds of contesting a will, yet they are often closely associated with and often are raised during an undue influence challenge.

standard. Part III of the paper will address the structure of will challenges involving "suspicious circumstances" as outlined in *Vout v Hay*,[4] and the *McDougall* decision determining that only two standards of proof operate in Canada. Part IV of the essay will then provide commentary on the strengths and weaknesses of engaging either two or three standards of proof, and suggest that the current structure of will challenges may covertly import a silent third standard. In close, this paper will argue that a third standard of proof is preferable when addressing accusations of moral guilt as it protects those accused of fraud or undue influence from incurring a significant loss of reputation or social stigma upon an otherwise disproportionately low threshold.

I. STANDARDS OF PROOF

Significant insight into society's perception of the civil action or offense at bar can be derived by assessing the standard of proof that is assigned. Specifically, as noted in the 1979 landmark United States Supreme Court decision of *Addington v Texas*, the "standard serves to allocate the *risk of error* between the litigants and to indicate the *relative importance* attached to the [trier of fact's] ultimate decision."[5]

For example, the risk of error after an individual is charged with an offense, either criminal or regulatory, can be particularly dire for the accused. A conviction may include an individual's loss of liberty through imprisonment, and a criminal record can carry "connotations of corruption, illegality […] a significant loss of reputation and the social effects and stigma of such a sanction."[6] In light of such severe consequences, our legal system has determined that the prosecution must establish guilt beyond a reasonable doubt or to a near certainty.[7] In Canada, this standard of proof is inextricably linked to section 11(d) of the *Canadian Charter of Rights and Freedoms,* which ensures that any person charged with an offense may rely upon the presumption of innocence.[8]

Within a civil proceeding penalties tend to emphasize monetary damages, and judicial errors "are thought to be not nearly as serious" as those for a criminal or regulatory offense.[9] As a result, the risk of error is balanced between the parties, and the standard of proof in this context requires the plaintiff to establish their case on a balance of probabilities so that their position is determined to be "more likely correct than not."[10]

II. THE THIRD STANDARD OF PROOF

The rationale for differentiating between actions involving criminal or regulatory offences and civil suits, and their respective standards of proof, often reflects society's perception of the alleged *moral guilt* of the accused's conduct. For example, criminal offences such as assault[11] or weapons trafficking[12] are commonly associated with the

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4 *Vout v Hay* [1995], 2 SCR 876, 125 DLR (4th) 431 [*Vout v Hay*] (WL Can).

5 *Addington v Texas* (1979), 441 US 418, 99 SCt 1804, online: Justia <http://supreme.justia.com/cases/federal/us/441/418/case.html> [*Addington*].

6 David C McPhillips, "The Two Civil Standards of Proof in Employment Cases: An Argument for Formal Recognition" (1997) 5 Canadian Lab & Emp LJ 139 at 141 citing *British Columbia Telephone Co v TWU* (1978), 18 LAC (2d) 225 (British Columbia Arbitration) [*British Columbia Telephone*].

7 *R v Starr,* 2000 SCC 40 at para 230, 2 SCR 144.

8 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(d).

9 McPhillips, *supra* note 6 at 141.

10 *Ibid*.

11 *Criminal Code*, RSC 1985, c C-46, s 265(1).

12 *Ibid,* s 99(1).

moral blameworthiness of the accused; by contrast, civil actions involving a breach of contract or a contested property line likely are not.

Yet this well-defined paradigm is disrupted when civil actions intermingle with allegations that engage some level of moral blameworthiness.[13] For example, allegations or a finding of *civil fraud* are similar to criminal offences as there may be a resulting loss of reputation and significant social stigma from any judicial sanction—despite the absence of a criminal record.[14] As a result, a determination must be made about what standard of proof should be adopted in a civil action engaging moral guilt to "properly recognize the seriousness of the accusation."[15]

In response, some jurisdictions have found that an intermediate standard, which is beyond the balance of probabilities, properly allocates the risk of error between the parties. For example, Chief Justice Burger of the United States Supreme Court described this 'third standard' as follows:

> The intermediate standard, which usually employs some combination of the words 'clear', 'cogent', 'unequivocal' and 'convincing', is less commonly used but nonetheless 'is no stranger to the civil law' […] One typical use of the standard is in civil cases involving allegations of fraud or some other *quasi-criminal wrongdoing* by the defendant. The *interests at stake in those cases are deemed to be more substantial* than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.[16]

In Canada, the courts have also intermittently and openly engaged with a third standard of proof. For example, in the 1985 decision of *Jory v British Columbia (College of Physicians & Surgeons)* ("*Jory*"), an action regarding professional misconduct, Justice McLachlin (as she then was) stated:

> The standard of proof in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt but it is something more than a bare balance of probabilities [...] The evidence must be sufficiently cogent to make it *safe* to uphold the findings *with all the consequences* for the professional person's career and status in the community.[17]

Therefore, while the presumption of innocence is not fully engaged in these civil actions, the common thread of moral culpability is still evident. As a result, in light of such allegations of moral guilt, judicial intuition has periodically required "a degree of probability which is commensurate with the occasion"–or a third standard of proof.[18]

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13 Ennis McBride, "Is the civil 'higher standard of proof' a coherent concept?" (2009) 8 Law, Probability and Risk 323 at 325.

14 McPhillips, *supra* note 6 at 141, citing *British Columbia Telephone*, *supra* note 6.

15 McBride, *supra* note 13 at 325.

16 McPhillips, *supra* note 6 at 149, citing *Addington*, *supra* note 5 [emphasis added].

17 *Q v College of Physicians & Surgeons (British Columbia)* 2001 BCCA 241 at para 21, 198 DLR (4th) 250 [*Q v College of Physicians & Surgeons*] (WL Can), citing *Jory v British Columbia (College of Physicians),* [1985] BCJ No 320 [*Jory*] [emphasis added].

18 *Bater v Bater*, [1950] 2 All ER 458 at 459, 66 TLR (Pt 2) 589 (ON CA) [*Bater*] (WL Can).

III. ESTATE LITIGATION CONTEXT: PROBATE ACTIONS

Within the estate context, a probate action seeks a court order "pronouncing for or against the validity of an alleged testamentary paper."[19] When the validity of a will is contested in regards to "suspicious circumstances," such allegations typically centre on events surrounding the preparation of the will, the capacity of the testator to know and understand the contents of the will, or circumstances that question whether the testamentary freedom or free will of the testator was corrupted by the fraud or undue influence of another party.[20]

A. Confusion regarding the Third Standard

However, in the Ontario Superior Court decision of *Scott v Cousins,* Justice Cullity highlighted the unique evidentiary issues encountered during will challenges alleging suspicious circumstances. According to Justice Cullity, "a deceased person's knowledge and approval, testamentary capacity or capitulation to undue influence is often indeterminate."[21] In other words, even after a review of the deceased's testamentary documents, contemporaneous memorandums created by their solicitor, or testimony from family members and others close to the testator, the 'best' witness regarding any suspicious circumstances around the will is still ultimately the deceased. Evidence from other sources may never be able to fill in the gaps and confidently confirm or disprove a nexus between the deceased's testamentary capacity and any suspicious circumstances. Similarly, as outlined by Brian A. Schnurr, a leading author and specialist in estate litigation in Canada, confusion has also existed amongst the estates bar regarding the proper burdens and standards of proof for these probate actions:

> Statements in earlier decisions [had] left it unclear as to whether the presence of suspicious circumstances imposed upon those propounding the will an onus higher than the general civil standard of proof on the balance of probabilities.[22]

For example, mixed signals emerged in the 1965 decision of *MacGregor v Ryan*, where the Supreme Court of Canada noted that a more onerous standard for *all* undue influence allegations would be a mistake, but that such a heavy burden may *sometimes* be warranted so "the extent of the proof required is proportionate to the gravity of the suspicion."[23] Similarly, in the 1974 Ontario Court of Appeal decision of *Re Bailey*, the court addressed the "bleak disaster" of circumstances surrounding the will's execution, and noted that the standard of proof would be *more demanding* "where suspicious circumstances are shown to exist" than in an ordinary dispute regarding testamentary capacity.[24]

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19 M Scott Kerwin, "Estate Litigation Basics – 2010 Update: Probate Actions" in Practice Made Perfect (Vancouver: Continuing Legal Education Society of British Columbia, 2010) at 7.1.4 citing *Supreme Court Rules*, BC Reg 221/90, R 21-4(1)(c).

20 *Vout v Hay, supra* note 4 at para 25.

21 *Scott v Cousins*, 37 ETR (2d) 113 at para 37, [2001] OJ No 19 [*Scott v Cousins*] (WL Can).

22 Brian A Schnurr, *Estate Litigation,* loose-leaf (consulted on January 20, 2013) (Toronto: Thomson Canada Limited, 1994) ch 2 at 12.

23 *MacGregor v Ryan*, [1965] SCR 757 at para 24, 53 DLR (2d) 126 [*MacGregor*]; please also see *Maw v Dickey* (1974), 6 OR (2d) 146 at para 68, 52 DLR (3d) 178 (Surrogate Court) for Justice Shapiro's description of the *MacGregor* decision and "the *heavy burden* resting on the proponents of the will" due to the fact that the proponents were also found to be "instrumental in the preparation and execution of the will" [emphasis added].

24 *Re Bailey* (1974), 4 OR (2d) 315 at paras 4-9, 47 DLR (3d) 670 [*Re Bailey*] (WL Can).

B. Clarification under *Vout v Hay*

However, in the 1995 decision of *Vout v Hay,* the Supreme Court of Canada directly addressed this confusion, and clarified both the burdens and standards of proof utilized in an action alleging suspicious circumstances.[25] In this case, an elderly testator had previously left his entire estate to his brother and sister in equal shares.[26] However, in 1985 and at the age of 81, the testator executed a new will in which Vout, a 29-year-old friend, became the major beneficiary.[27] Upon the testator's death, his family contested the validity of the 1985 will due to various suspicious circumstances, including Vout personally giving instructions for the will over the telephone, Vout attending the lawyer's office with the testator for execution, and the visible confusion of the testator when the contents of the will were read aloud to him at the time of signing.[28]

In a unanimous judgment, Justice Sopinka outlined the structure for a will challenge.[29] First, while a will that appears to adhere to all formalities is presumptively valid, this presumption is easily rebutted and extinguished upon introducing evidence of suspicious circumstances.[30] Second, if the will challenge involves suspicious circumstances regarding the execution of the will or the testamentary capacity of the testator, then the legal burden of proof remains with the *propounder* of the will. [31] However, if the suspicious circumstances are raised in regard to allegations of fraud or undue influence over the testator, then the burden of proof is *reserved* and upon the party *challenging* the validity of the will.[32] Third and most importantly, Justice Sopinka also directly clarified that suspicious circumstances do not impose a standard of proof beyond the balance of probabilities, and that the *same civil standard* is adopted for both the propounder and challenger of the will.[33]

However, despite the decision of the Supreme Court in *Vout v Hay,* some uncertainty still remained. For example, in the will challenge of *Brydon v Malamas*, Justice Halfyard noted that in light of the "very strong suspicion" that the testatrix lacked testamentary capacity, "the proponent must prove testamentary capacity to a higher degree of certainty than a mere fifty-one percent probability."[34]

C. Reinforcement in *McDougall*

As a result of such lingering comments suggesting a third standard after *Vout v Hay*, the 2008 Supreme Court of Canada decision of *McDougall* again sought to determinedly

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25 *Vout v Hay, supra* note 4.

26 *Ibid* at para 2.

27 *Ibid* at para 1.

28 *Ibid* at paras 3-4.

29 Please note that in jurisdictions such as British Columbia, the onus of proving undue influence also traditionally rested upon the party challenging the validity of the will and mirrored the procedure in Ontario as described in *Vout v Hay*. However, once the *Wills, Estates and Succession Act*, SBC 2009, c 13 [*WESA*] comes into force on March 31, 2014 (see BC Reg 148/2013) this onus will be altered in certain instances. Specifically, under section 52 of *WESA*, after the party challenging the will has shown suspicious circumstances, the onus will now remain with the propounder of the will to prove that undue influence was *not* present—rather than rest upon the party challenging the will to show that undue influence *was* present.

30 *Vout v Hay, supra* note 4 at paras 26-27; Kerwin, *supra* note 19 at 7.1.5. As described in *Scott v Cousins, supra* note 21 at para 41, the level of evidence required to introduce the possibility of suspicious circumstances needs only to "excite the suspicion of the Court."

31 *Ibid* at paras 19-20, as per the *Succession Law Reform Act*, RSO 1990, c S.26.

32 *Ibid* at para 21. As noted at para 28, this reversal reflects the "policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established."

33 *Ibid* at paras 23-24.

34 *Brydon v Malamas,* 2008 BCSC 749 at paras 51, 158, 41 ETR (3d) 104 [*Brydon*] (WL Can).

address this longstanding tension between the "balance of probabilities and cases in which allegations made against a defendant are particularly grave."[35] The court's finding on the inapplicability of a third standard was particularly clear:

> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. *However, these considerations do not change the standard of proof.*[36]

Similarly, the court clarified that the distinction between the civil and criminal standards of proof is based only on the latter engaging the presumption of innocence, before outlining the "practical problems" associated with utilizing a third standard.[37]

IV. COMMENTARY AND CRITIQUE

The following commentary and critique will investigate questions and concerns about identifying exactly where the third standard of proof resides on a spectrum of probabilities, and when this additional standard of proof should apply in probate actions. In addition, the unique structure of will challenges will be reviewed, as well as a brief discussion about the persistence of the judiciary's desire and intuition to reference a third standard of proof despite the Supreme Court of Canada's decision in *McDougall*. Finally, this section will discuss the evidentiary demands upon the party challenging the contested will, before concluding with recommendations on how to accurately convey the location of the third standard of proof to a finder of fact.

A. Where the Third Standard Resides

As noted above, there are various practical and procedural problems and concerns with utilizing a third standard of proof. First, it would be necessary to clearly identify *where* the standard resides, and confidently convey this location to the finder of fact.[38] Certainly, operating on a balance of probabilities, or deciding that something is more likely than not, is much easier to conceptualize than trying to describe the precise location of the third standard on a spectrum of certainty.[39] This argument against the third standard is also linked to the law's preference for utilizing a non-mathematical approach to describe probability, as according to the Baconian school of thought, and explicit judicial concerns that a lay juror cannot readily understand the concept of sixty percent or seventy percent probability.[40]

However, some proponents of the Pascalian, or mathematical, approach have argued that this blanket refusal to utilize percentages undermines both the competence of the finder of fact and the historical faith in the jury in Canada, as it has been adopted in other jurisdictions, and speaking of a sixty percent or seventy percent probability "would not

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35 *McDougall*, *supra* note 1 at para 26. The particularly grave allegations in this case involved accusations that McDougall, a school supervisor, had repeatedly sexually assaulted FH when he was a ten year old student at the Sechelt Indian Residential School between 1968-1969.

36 *Ibid* at para 40 [emphasis added].

37 *Ibid* at paras 41, 43.

38 McBride, *supra* note 13 at 327, citing Lord Nicholls in *Re H & Ors (minors)* [1995] UKHL 16, [1996] AC 563 [*Re H & Ors*].

39 *McDougall*, *supra* note 1 at para 43, citing Linda R Rothstein, Robert A Centa & Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" in *Special Lectures 2003: The Law of Evidence* (Irwin Law: Toronto, 2004) at 466.

40 *Ibid* at para 43; McPhillips, *supra* note 6 at 150-151.

give even the most uneducated gambler any difficulty whatsoever."[41] In addition, when conceptualized along a spectrum in reference to proof beyond a reasonable doubt and the civil balance of probabilities, describing the location of the third standard of proof will hardly occur in an inaccessible or vague conceptual vacuum.

Similarly, due the infrequent use of civil juries throughout Canada, the third standard may not even regularly be conveyed to the laymen of the jury. For example, in British Columbia, civil juries are only utilized in approximately three to ten percent of trials.[42] Although the use of civil juries has increased in Ontario to about twenty-two percent, the Ontario Law Reform Commission report on civil juries found that approximately seventy-five percent of these civil jury trials were for tortious actions regarding motor vehicle accidents.[43] Yet even for the rare cases in which a civil jury is utilized during a will challenge involving moral guilt in Canada, taking the time to carefully and cautiously instruct the jury about the location of a third standard of proof is certainly no more daunting or challenging than conveying the criminal standard of proof beyond a reasonable doubt—a standard which judges regularly and successfully convey during their instructions or charge to the jury.

B. When the Third Standard Applies

Second, applying a third standard would also require a clear determination of *when* this standard applies.[44] Indeed, there are procedural benefits to utilizing a strict dichotomy between civil actions on a balance of probabilities and offences requiring proof beyond a reasonable doubt so that the type of action is directly linked to what standard of proof will be utilized. It has also been argued that as the presumption of innocence is not engaged, a lower standard of proof is acceptable since "society is indifferent" to which party wins a civil suit, thus making it "unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities."[45]

Yet in reality, society is hardly indifferent to the results of all civil suits, or probate actions where the burden of proof rests on the party challenging the will. For example, a judicial finding that an individual engaged in fraudulent behaviour surrounding a will, or placed a coercive and undue influence upon a testator, is certainly linked to a significant loss of reputation and social stigma within one's family and broader community. Similarly, allegations of being the "officious adult child", "nefarious caregiver" or "predatory spouse" carry deep connotations suggestive of the unethical nature of the individual under scrutiny.[46] Therefore, despite not being categorized as an offense, such allegations of the defendant's moral blameworthiness are still present in civil will challenges. As a result, the presence of an intermediate and third standard of proof, when the moral character of an individual is in question, is certainly beneficial in consideration of the overall allocation of judicial error and potential negative impact upon the party facing such allegations.

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41 McPhillips, *supra* note 6 at 156.

42 W A Bogart, "Guardian of Civil Rights… Medieval Relic: the Civil Jury in Canada" (1999) 62(2) Law & Contemp Probs 305 at 311-312. Please note that the Ontario Law Reform Commission report relies on data collected in 1994-1995, and more recent data was not located.

43 *Ibid* at 312, 317.

44 McBride, *supra* note 13 at 327, citing *Re H & Ors*, *supra* note 38.

45 *McDougall*, *supra* note 1 at para 42, citing John Sopinka, Sidney N Lederman and Alan W Bryant, *The Law of Evidence in Canada,* 2d ed (Butterworths: Toronto, 1999) at 154.

46 David M Smith, "The Challenge of Detecting Undue Influence" 17:1 *The Probator* (March 2012) online: Hull & Hull LLP Barristers and Solicitors <http://www.hullandhull.com/Media-Centre/March-2012-Probater-Final.pdf >.

C. Unique Structure of Will Challenges

Yet the above discussion implies that the propounder of the will is also the party facing allegations of fraud or undue influence: for example, in *Vout v Hay*, the executor and propounder of the will was also the major beneficiary accused of corrupting the testamentary freedom of the deceased. As a result, Vout was present and deeply engaged in the litigation to defend herself against the social stigma of the allegations.

While the executor and propounder of the will is often the party facing such allegations of moral guilt, this is not always the case. Rather, the executor and propounder of the will may simply be seeking a certified or "probated" copy of the will to assume control of the testator's assets to administer the estate.[47] Therefore, the party facing allegations of fraud or undue influence may not fit into the clear and traditional dynamic of will challenger and propounder, or the traditional division of plaintiff and defendant. Consequently, the alleged fraudster may have a more remote engagement with the proceedings and will challenge as a whole, such as being the spouse of the propounder of the will or the son-in-law of the testator. While more remote parties may be called as witnesses, unlike traditional defendants, they are not guaranteed the same control and engagement with the defense strategy assessing their moral guilt.

Therefore, while the latter dynamic takes on the appearance of assessing the validity of the testamentary *document* on a balance of probabilities, in reality the action is ultimately discerning the moral guilt of an *individual* within this same lower standard of proof. Certainly, discerning the moral guilt of an individual with a more remote engagement on a mere balance of probabilities is particularly concerning. As a result, the protection of this remote individual from judicial error and stigma favours the utilization of a standard of proof beyond the balance of probabilities due to their inability to provide a traditional defendant's right to fully participate in their own defense.

D. Legal Reality of a Silent Third Standard

Yet regardless of *McDougall's* pronouncement that there are only two standards of proof, the intuition of judges and of the court still seems to desire something *more* than the balance of probabilities in the face of allegations of moral guilt. As a result, the language of the court seems to illustrate attempts to preserve a silent third standard into deliberations of fraud or undue influence. For example, commentary that the burden of proof is "proportionate to the gravity of the suspicion" still appeared in recent judicial decisions, including the 2013 decision of *Laszlo v Lawton* regarding undue influence from the testatrix's husband.[48] Similarly, the 2013 decision of *Wassilyn v Rick Zeron Stables Inc* ("*Wassilyn*") stated:

> Where allegations are framed in fraud, and have criminal or quasi-criminal undertones, the Plaintiff is required to prove such allegations on a standard of proof *higher* than the common civil standard or balance of probabilities. The evidence must be scrutinized in a manner commensurate with the gravity of the allegation.[49]

Other recent actions also approvingly cite references to "a strong balance of probabilities," and the consideration of something *beyond* a balance of probabilities when questions of

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47 Howard S Black, *Wills and Estates: Cases, Text and Materials* (Toronto: Edmond Montgomery Publications, 2009) at 38.

48 *Laszlo v Lawton*, 2013 BCSC 305 at para 205, 226 ACWS (3d) 911(WL Can).

49 *Wassilyn v Rick Zeron Stables Inc*, 2013 ONSC 127 at para 67, 225 ACWS (3d) 275 [*Wassilyn*] (WL Can) [emphasis added].

moral guilt are at issue.[50] As a result, despite *McDougall* stating that there should only be two standards of proof in Canada, various finders of fact are still clearly communicating their desire for a standard of proof beyond a balance of probabilities when addressing allegations of moral guilt. In addition, judgments such as *Wassilyn* demonstrate the ability and competence of the court to clearly express not only the general location of this third standard of proof, but also highlight the need for such a standard when allegations of moral guilt such as fraud arise.

E. Implication of Rebutting Presumption of Validity and Reversed Onus

Despite *McDougall,* a silent third standard also continues to exist due to the manner that will challenges precede, and the distance that evidence alleging fraud or undue influence must travel to persuade the trier of fact.

For example, as noted above, a will that complies with the formalities of execution under Ontario's *Succession Law Reform Act* benefits from an initial presumption of validity.[51] To rebut this presumption of validity, the party challenging the will must first submit evidence sufficient to "excite the suspicion of the court" that suspicious circumstances were present.[52] If the court is intrigued, and the suspicious circumstances involve fraud or undue influence, the burden of proof for these allegations rests with the party challenging the will. As a result, in addition to their preliminary evidence, the party challenging the will must then submit *additional* evidence sufficient to satisfy the finder of fact on a balance of probabilities. Therefore, when the initial evidence to overcome the presumption of validity is *combined* with the additional evidence needed to satisfy the civil standard, the evidential distance travelled by the challenging party can be interpreted as going *beyond* the civil standard and into the realm of a third standard of proof.

F. Recommendations for Describing the Third Standard in Canada

While this paper has argued for both the acknowledgement of what is currently described as a silent third standard, as well as the endorsement of this third standard in cases involving moral guilt, the precise location of this standard must still be solidified. For practical purposes, identification of the location of the third standard would enable it to be confidently and consistently applied by the finder of fact. This author would advocate for a Pascalian or mathematical approach to clearly communicate the precise location of this third standard; surveys of the American judiciary have typically described it as residing in the range of seventy to eighty percent probability.[53]

However, utilizing percentages to communicate legal probabilities would be a radical change within the Canadian legal system. As a result, perhaps the most eloquent manner of communicating the location of this third standard in non-mathematical terms was the above-cited decision of *Jory* by Justice McLachlin (as she then was). Justice McLachlin described the third standard as an intermediate standard, not quite proof beyond a reasonable doubt and yet "something more than a bare balance of probabilities," which rests upon evidence that "must be sufficiently cogent to make it safe to uphold

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50 *W (KRM) v Nova Scotia (Minister of Community Services),* 2010 NSFC 27 at para 11, 297 NSR (2d) 248 (WL Can), citing *H(P) v H*, 72 NSR (2d) 104 at para 28, 173 APR 104.

51 *Succession Law Reform Act*, RSO 1990, c S.26.

52 Kerwin, *supra* note 19 at 7.1.5.

53 David L Schwartz & Christopher B Seaman, "Standards of Proof in Civil Litigation: An Experiment from Patent Law" (2013) 26(2) Harv JL & Tech 429 at 430, 439. Please see references to "clear and convincing evidence," also described as the "intermediate standard" by the authors. The authors' summary of these surveys also noted that the civil balance of probabilities was anything beyond fifty percent probability, while respondents stated that beyond a reasonable doubt required "at least 80% probability."

the findings with all the consequences" for the individual's reputation.[54] However, such a non-mathematical determination would certainly benefit from a detailed report and review by both the Law Reform Commission of Canada and the Canadian Bar Association's Legislation and Law Reform Committee. Such a review should also include an assessment of the language and descriptions utilized by jurisdictions that currently employ a third standard of proof. This would allow the description of the third standard of proof to quickly mature to a similar level of clarity that the current civil and criminal standards currently enjoy in Canadian jurisprudence.

CONCLUSION

As noted above, there are various practical and procedural reasons for utilizing only two standards of proof. For example, it can be difficult to clearly communicate to the finder of fact where the precise location of a third standard of proof resides, and the judicial system benefits from the procedural simplicity of automatically allocating a lower standard of proof to civil actions and a higher standard of proof to offenses and situations clearly engaging moral blameworthiness.

However, despite these concerns, compelling arguments still persist for employing something beyond a balance of probabilities when allegations of moral guilt, such as fraud or undue influence, are present in a probate action. After all, once such allegations of moral guilt arise, the danger of an individual incurring a significant loss of reputation or social stigma through a finding against them also emerges. In such situations, it is no longer appropriate to equally allocate the risk of error between parties on the civil balance of probabilities. As a result, when such allegations of moral guilt are present, the need to protect an individual from both judicial error and social stigma benefits from embracing a third standard of proof that is beyond the civil balance of probabilities and yet less than a finding beyond a reasonable doubt.

Similarly, notwithstanding *McDougall*, a silent third standard still informally continues due to the court's intuitive desire for clear and compelling evidence when addressing claims of fraud or undue influence. In addition, the cumulative evidential demands of a third standard of proof also linger by requiring the party challenging the will to first overcome the presumption of validity and then to also succeed on a balance of probabilities.

While utilizing this third standard of proof may be more challenging in a judicial system weary of percentages, such additional procedural effort will help offset the risk of unwarranted social stigma being assigned to parties facing allegations of moral guilt, and therefore necessitates our continuing consideration. The third standard of proof acknowledges this need to carefully allocate the risk of error in civil actions involving allegations of moral guilt due to the significant loss of reputation and social stigma that follows such a judicial sanction or finding, and would therefore be a powerful addition to the manner in which we address probate actions alleging suspicious circumstances and moral guilt.

54 *Q v College of Physicians & Surgeons*, supra note 17 at para 21, citing *Jory*.