



**18th ANNUAL ESTATES AND TRUSTS SUMMIT
LAW SOCIETY OF UPPER CANADA**

October 7, 2015

UNDUE INFLUENCE

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UNDUE INFLUENCE

Introduction

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, and planning and testamentary documents where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney and to *inter vivos* gifts.

This paper will review the historical context of the doctrine of undue influence, undue influence in both testamentary and *inter vivos* gifts situations, as well as the burden of proof, indicators and evidence, and a survey of recent case law across Canada. At the end of the paper is a helpful Undue Influence Checklist and Guidelines for drafting lawyers.

1. Courts' Historical View

In 1885, Sir James Hannen in *Wingrove v. Wingrove* provided the classic statement of undue influence:

*To be undue influence in the eye of the law there must be – to sum it up in a word – coercion. . .it is only when the will of the person who becomes coerced into doing that which he or she doesn't desire to do that it is undue influence.*¹

¹ *Wingrove v. Wingrove* (1885), 11 P.D. 81 at 82.

Another historical characterization of undue influence was expressed in the seminal decision of, *Hall v Hall*:

*To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,— these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made.*²

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,³ stated:

*Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not mean.*⁴

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”.

2. Undue Influence in Testamentary Context

The modern approach in undue influence in the testamentary context was set out in *Banton v. Banton*:

*A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will-making power to the other person.*⁵

² (1968) LR 1 P&D.

³ *Craig v Lamoureux*, [1919] 3 WWR 1101.

⁴ *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

⁵ *Banton v. Banton*, 1998 CanLII 14926 (ONSC) at para. 89.

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.⁶ In making such determinations, courts will look at whether “the potential for domination inheres in the nature of the relationship between the parties to the transfer.”⁷

Burden of Proof

The onus of proving undue influence lies with the party attacking the testamentary document. Therefore, while the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer of the will, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.⁸ Evidence of undue influence may even rebut the presumption of capacity that would usually apply.⁹

Unlike *inter vivos* transfers, (discussed below) the burden never shifts and there is no presumption of undue influence in the testamentary context,¹⁰ except in British Columbia, under *Wills, Estates and Succession Act*,¹¹ (“WESA”) which came into force on March 31, 2014. The WESA creates a presumption of undue influence in that Province in a testamentary context where certain types of relationships exist. Section 52 of WESA sets out this legislative presumption:

In a proceeding, if a person claims that a Will or any provision of it resulted from another person,

(b) being in a position where the potential for dependence or domination of the Will-maker was present, and

(c) using that position to unduly influence the Will-maker to make the Will or the provision of it that is challenged,

⁶ *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

⁷ *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).

⁸ *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.

⁹ *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

¹⁰ *Banton v. Banton* 1998 CanLII 14926 (ONSC) at para. 91.

¹¹ SBC 2009, Chapter 13.

and establishes that the other person was in a position where the **potential for dependence or domination of the Will-maker was present, the party seeking to defend the Will** or the provision of it that is challenged or to uphold the gift **has the onus** of establishing that the person in the position where the potential for dependence or domination of the Will-maker was present did not exercise undue influence over the Will-maker with respect to the Will or the provision of it that is challenged. (Emphasis added)

Therefore, in British Columbia where a testamentary disposition is being challenged on the grounds of undue influence a presumption of undue influence will arise where certain types of relationships exist and the burden will shift to the propounder of the Will to prove that no undue influence was present.

Standard of Proof

Although the leading Supreme Court of Canada case of *Vout v Hay* held that “*the extent of proof required is proportionate to the gravity of the suspicion*,”¹² the more recent Supreme Court of Canada case of *C(R) v McDougall*¹³ held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*¹⁴ elicited the principles that apply to the standard of proof relating to undue influence:

*The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be “the offspring of his own volition and not the record of someone else’s.”*¹⁵

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party

¹² *Vout v Hay* at para 24.

¹³ 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

¹⁴ (1993), 90 Man R (2d) 245 (Man QB) at para 38.

¹⁵ (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall*, *supra*.

dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid.¹⁶

Furthermore, in cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his or her planning documents to benefit the child he or she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.¹⁷

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.¹⁸ For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.¹⁹

It should be noted that dependency is not always an indicator of undue influence. As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.²⁰

It has also been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a

¹⁶ *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.

¹⁷ See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

¹⁸ See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

¹⁹ *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

²⁰ See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.²¹

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*²² provided a (non-exhaustive) list of indicators of undue influence:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.²³

In *Tate v. Gueguegirre*²⁴ the Divisional Court noted that the following constituted “significant evidence suggesting that [a] Will was a product of undue influence”:

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator’s dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator’s failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;

²¹ *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

²² *Gironda v Gironda*, 2013 CarswellOnt 8612.

²³ *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

²⁴ 2015 ONSC 844 (Div. Ct.)

- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.²⁵

Indirect and Circumstantial Evidence

Justice Cullity noted in *Scott v. Cousins* that “*Undue influence is a subtle thing, almost always exercised in secret, and usually provable only by circumstantial evidence.*”²⁶ What amounts to coercion will differ, depending on the circumstances. There is no need for actual threats or physical violence to find coercion, the court can infer undue influence from all of the facts.

In the U.K. case of *Shrader v Shrader*²⁷ the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator’s vulnerability and dependancy of the influencer, including consideration of the influencer’s “physical presence and volatile personality.” The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

In determining whether undue influence has been established by circumstantial evidence, courts will consider: the willingness or disposition of the person accused of asserting undue influence on the testator; whether that person had an opportunity to do so; whether the testator fell within the class of someone frail or vulnerable; the absence of moral claims of the beneficiaries under the will or of other reasons why the deceased

²⁵ *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

²⁶ Cullity J. in *Scott v. Cousins*, [2001] OJ No.19 at para. 48 citing Atkinson on Wills (2nd edition, 1953) pg. 638

²⁷ *Shrader v Shrader*, [2013] EWHC 466 (ch)

would have chosen to benefit them; and whether the provisions of the will depart radically from the testator's previous testamentary intentions.²⁸

3. Undue Influence and *Inter Vivos* Gifts

Undue influence in the *inter vivos* gift context is usually divided into two classes: 1) direct or actual undue influence; and 2) presumed undue influence or undue influence by relationship.²⁹

It has been held, in the context of gifts, where the potential for domination exists in the relationship, a presumption of undue influence is found and the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention: that the transaction was made as a result of the donor's "*full, free and informed thought*."³⁰

As noted above, testamentary undue influence is different than *inter vivos* undue influence.³¹ For testamentary undue influence to exist the conduct must amount to coercion and there is no presumption of undue influence (except in British Columbia under *WESA*).³² However, courts have imported the principles of testamentary undue influence where the person making the gift or wealth transfer is on his or her deathbed.³³

Furthermore, "conduct necessary to set aside a gift or other *inter vivos* wealth transfer on the grounds of actual undue influence is broader and more amorphous than the narrow band of conduct that is necessary to set aside a will or other testamentary wealth transfer."³⁴

²⁸ *Scott v. Cousins* 2001 OJ No. 19 (QL) at para. 114 (Sup. Ct.) and *DeWitt v. Williams, DeWitt and Nason* 2005 NBCA 69 at para. 8.

²⁹ *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171. Poyser at p.473. Note also that there is a distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity, see Poyser at p.478.

³⁰ *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.

³¹ Poyser at p.529.

³² Poyser at pp.306, 325, and 529.

³³ Poyser at p. 529; *Keljanovic Estate v. Sanservino* 2000 CarswellOnt 1312 (C.A.).

³⁴ Poyser at p.489.

Actual Undue Influence

This is where intent to gift is secured by unacceptable means. No relationship is necessary between the person making the gift and the person receiving it to attack a gift on the grounds of actual undue influence.

Actual undue influence in the context of *inter vivos* gifts or transfers has been described as “cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . .”³⁵ Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.³⁶ The conduct amounting to actual undue influence however, often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence.³⁷

Presumed Undue Influence

This second class does not depend on proof of reprehensible conduct. Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.³⁸

Relationships that qualify as a ‘special relationship’ are often determined by a ‘smell test’.³⁹ Does the “potential for domination inhere in the relationship itself”?⁴⁰ Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization.”⁴¹ However, even these close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is

³⁵ *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.

³⁶ *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.

³⁷ Poyser at p.492.

³⁸ *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.

³⁹ Poyser at p.499.

⁴⁰ *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 (“Geffen”).

⁴¹ *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

necessary to closely examine the specific relationship for the potential for domination,⁴² such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.⁴³

Once a presumption of undue influence is established, the onus moves to the person alleging a valid gift to rebut it. The giftor must be shown to have entered into the transaction as a result of his or her own “full, free and informed thought”.⁴⁴ It is often difficult to defend a gift made in the context of a special relationship. The gift must be from a spontaneous act of a donor able to exercise free and independent will. In order to be successful in attacking a gift based on presumed undue influence the transaction or gift must be a substantial one, not a gift of a trifle or small amount.⁴⁵

The presumption of undue influence can be rebutted by showing⁴⁶:

- a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;⁴⁷
- b) the donor had independent legal advice or the opportunity to obtain independent legal advice;⁴⁸
- c) the donor had the ability to resist any such influence;⁴⁹
- d) the donor knew and appreciated what she was doing;⁵⁰ or
- e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.⁵¹

⁴² See *Elder Estate v. Bradshaw* 2015 BCSC 1266 where the Court found that the simple existence of a relationship between a younger caregiver and an older adult was not sufficient to raise a presumption of undue influence: “The generic label caregiver does not necessarily denote a fiduciary relationship of potential for domination. . . The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship” at para. 108.

⁴³ *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

⁴⁴ *Geffen v. Goodman Estate* at para. 45.

⁴⁵ Poyser at p.509.

⁴⁶ From *Zeligs v. Janes* 2015 BCSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97.

⁴⁷ *Geffen* at p.379; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121

⁴⁸ *Geffen* at p. 370; *Longmuir* at para. 121.

⁴⁹ *Calbick v. Warne*, 2009 BCSC 1222 at para. 64.

⁵⁰ *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29.

⁵¹ *Longmuir* at para. 76.

4. Interplay with Capacity and Suspicious Circumstances

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.⁵²

In *Leger v Poirier*,⁵³ the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a “*disposing mind and memory*” without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.⁵⁴

⁵² See for example the case of *Gironde v Gironde*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman’s will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.

⁵³ *Leger v Poirier*, [1944] SCR 152.

⁵⁴ *Vout v Hay*, [1995] 2 SCR 876 (SCC).

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly “unnatural” dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.⁵⁵

Confusion between undue influence and suspicious circumstances arises as usually the same evidence to prove undue influence sets up a case for suspicious circumstances. When a party presents evidence of suspicious circumstances while trying to prove undue influence both parties will have a burden to discharge. The person who alleges undue influence and is attacking the will has the onus. However, where suspicious circumstances are also raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly “*free and unfettered*.”⁵⁶

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence demonstrating that the requisite formalities have been complied with and that the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

⁵⁵ Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.

⁵⁶ Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

5. Case Law: 2014-2015

What follows, is a survey of undue influence cases (both in the context of *inter vivos* gifts and testamentary documents) for the years 2014 and 2015.

a) Undue Influence Found

In the first cases reviewed, the Courts made a finding of undue influence:

***Cowper-Smith v. Morgan* – British Columbia**

This case⁵⁷ provides helpful guidance on what to do (and not to do) as a lawyer asked to provide independent legal advice in the estates context, and red flags for undue influence. The facts relate to the estate of Elizabeth Cowper-Smith who died in 2010 at the age of 86. She had three children and before her death she transferred her major assets (her house and investments) into joint names with her daughter. The plaintiffs, her two sons, alleged (among other things) that the transfer of the property and investments into joint names was the result of undue influence by the daughter.

It was the mother's brother-in-law (who was clearly supporting the daughter's position) who first contacted the lawyer who drafted the transfer documents. The drafting lawyer met with both the mother and the daughter, with the daughter present "for much of the meeting".⁵⁸ Subsequently, the daughter called the drafting lawyer with revised instructions from the mother. The drafting lawyer then met with the mother alone, where the mother advised that she wanted everything to go to her daughter. While the drafting lawyer was satisfied that the instructions and wishes were the mother's and not the

⁵⁷ 2015 BCSC 1170 ("*Cowper-Smith*")

⁵⁸ *Cowper-Smith* at para. 29.

daughters, she arranged to have the mother meet with another lawyer for independent legal advice (ILA).⁵⁹ The ILA lawyer did not recall meeting with the mother but gave evidence on his usual practice, stating that if he had been concerned that the mother was being unduly influenced he would not have signed the documents.⁶⁰ However, the ILA lawyer did not ask about the mother's assets or if she understood the financial implications of the transfers.

The Court found that the daughter was an unreliable and unbelievable witness, and that she was hostile, argumentative and evasive.⁶¹ The Court also found that the relationship between the mother and daughter "was one in which there was a potential for domination" and one which gave rise to a presumption of undue influence.⁶²

- The mother relied on the daughter's judgment, especially after her husband died;
- the daughter had a dominant personality "people did what [the daughter] wanted";
- The daughter had to teach the mother how to write a cheque as the father was responsible for the finances when he was alive;
- The mother would ask the daughter advice about letters she wanted to write to her sons, the letters were written jointly between the mother and daughter and sometimes in the daughters handwriting and signed by both or the daughter would write "on behalf" of the mother. The daughter would keep copies of the letters;
- The mother would never contradict the daughter and would "nod along with [the daughter's] views";
- The daughter paid her mother's bills and looked after her investments, prepared her tax returns and the mother would rely on the daughter and said that she was "always there to help".

The daughter argued that the presumption could be rebutted as she did not understand that the transfer meant that all assets would be shared equally. As she had no understanding of the documents then she could not have unduly influenced her mother. The daughter also argued that the mother had ILA. However the evidence did not

⁵⁹ *Cowper-Smith* at para. 34.

⁶⁰ *Cowper-Smith* at para. 38.

⁶¹ *Cowper-Smith* at para. 67

satisfy the Court on a balance of probability that the transfer of the property and investments into joint names was the result of the mother's "full, free and informed thought"⁶³:

- Not only was the daughter an unreliable witness, the daughter was present for much of the interaction between the mother and her lawyer;
- both the daughter and brother-in-law provided the drafting lawyer with information and instructions;
- the ILA lawyer was not aware of the extent of the mother's assets and did not discuss the financial implication of placing all of her assets jointly with her daughter;
- the ILA lawyer did not ask the mother about other family members who might have benefited if the transaction did not take place and the ILA lawyer did not discuss with the other the wisdom of the proposed transaction or other options where she could achieve her objective with less risk.⁶⁴

The Court concluded that the transfers completed were as a result of undue influence and were ordered to be set aside.⁶⁵

Verwoord v. Goss – British Columbia

Testamentary capacity, destruction of a will and undue influence with respect to the wills and an *inter vivos* transfer, were all addressed in this British Columbia case.⁶⁶ Shortly before his death, the deceased had executed more than one will and had transferred his family home into a joint tenancy with his eldest daughter.

While the court found that some facts of this case suggested *actual* undue influence by the eldest daughter and her husband, it was Justice Power's view that the case was "better determined under the dominant relationship [presumptive] branch of undue influence" as the will and *inter vivos* gifts were of considerable magnitude and the deceased's relationship with his daughter and son-in-law was one of "dependency". The

⁶² *Cowper-Smith* at para.86 & 91.

⁶³ *Cowper-Smith* at para. 91

⁶⁴ *Cowper-Smith* at para. 102.

⁶⁵ *Cowper-Smith* at para. 105.

⁶⁶ 2014 BCSC 2122.

evidence “robustly support[ed]” the fact that the relationship was one of dominance and dependency: the father was in a state of diminished capacity, and requested help with the arrangement of his affairs; the son-in-law managed the father’s relationship with his lawyer; the son-in-law became his attorney under a power of attorney, the son-in-law also had some legal training and the daughter took on a significant role in supporting her father.

The court did not find that the defendants could discharge their burden and prove that the will and *inter vivos* gifts were the result of the deceased’s own will, informed and exercised freely.⁶⁷ The daughter at various times isolated the father from his other daughter, reinforced his erroneous beliefs that his mental faculties were intact and supported his delusions respecting his other daughter’s alleged misbehaviour. Once the defendants took charge of the deceased’s affairs, his estate began to be dissipated at an alarming rate. The court found that while the deceased consulted a lawyer, the advice received could not be considered independent as the son-in-law managed his relationship with his lawyer. The lawyer accepted the son-in-law’s characterizations of the other’s daughter’s actions and despite the deceased’s advanced age, his diminished capacity, his tendency towards vacillation in the arrangement of his affairs and the vast differences in his 2008 and 2009 wills, the lawyer did not contact his doctors or take any further steps to ensure his interests were protected. As the lawyer’s advice was predicated on the deceased’s delusions as related to her by the deceased and his son-in-law the court found that the advice could not truly be said to be independent.

The *inter vivos* transfer was set aside and the grant of probate for the last will was revoked.⁶⁸

***Servello v. Servello* - Ontario**

Presumed undue influence was found (but not rebutted) in this case in the context of an *inter vivos* transfer of a mother’s property to her son.⁶⁹ Shortly after the death of his

⁶⁷ *Verwoord v. Goss* 2014 BCSC 2122 at para. 213.

⁶⁸ *Verwoord v. Goss* 2014 BCSC 2122 at para. 230.

father, a son attended a registry office with his mother, and with the assistance of a conveyancer, the title to his mother's house was transferred to himself as sole owner. The mother's first language was Italian and her comprehension and reading in English was limited. Her understanding at the time was that she was attending a court house so that her son could sign a document which would give him "the power to look after her" as she grew older. Thirteen days later the son returned to the office and he transferred the property to himself and his mother as joint tenants.⁷⁰

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that her son had acquired a right of survivorship in her home. The son refused to restore title to the property to his mother. She sought an order from the court restoring her as the property's sole owner.

At the time of the transfer, the son was living in his mother's house, the mother was recently widowed, English was not her first language and the family had always used the same lawyer for all of their legal dealings. The son chose however to take his mother directly to the registrar's office, did not use the family lawyer, and used a conveyancer who was a stranger to the mother and who did not speak Italian. The son who received the benefit of the transaction was by her side throughout.⁷¹ The court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that:

The law is clear that in the case of gifts or other transactions *inter vivos*, the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence.

This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. [The mother] did not receive independent legal advice, and accordingly the two deeds which gave [the son] an interest in the land should be set aside on this basis as well.⁷²

⁶⁹ 2014 ONSC 5035, upheld on appeal 2015 ONCA 434.

⁷⁰ 2014 ONSC 5035 at paras. 1-4.

⁷¹ *Servello v. Servello* 2014 ONSC 5035 at para. 47.

⁷² *Servello v. Servello* at paras.??-?.

The decision was upheld on appeal.⁷³

b) No Undue Influence Found

The courts did not find undue influence based on the evidence presented in the following cases:

Re Churstie - Manitoba

Two daughters challenged a codicil to their father's will alleging, among other things, that their father was unduly influenced by their step-mother in its execution.⁷⁴ The codicil included their brother as an equal beneficiary in his estate, while previous wills had disinherited him. The deceased had however reconciled with his son, after a falling out. The step-mother kept the codicil and the reconciliation of the father and son a secret from the daughters.

The deceased had limited ability to communicate (due to a condition called aphasia) and had some cognitive impairment, but could speak some words and nod or shake his head. The court was presented with evidence from expert witnesses, as well as the staff of the nursing home at which the father resided, and family members. The court was satisfied that it was not the step-mother's idea to include the son as a beneficiary, that it was solely the father's idea, and she "merely facilitated" it by calling the son to visit and calling the lawyer to draft the codicil. The lawyer met with the father and went through every page and paragraph of the codicil and the father communicated with the lawyer by nodding his head. The lawyer was satisfied that the deceased was communicating his wishes and understood what he was doing.⁷⁵ Furthermore, the step-mother's decision to keep the son's visits and the codicil a secret from the daughters was so that her husband "could live out his final months in peace."⁷⁶ The step-mother's evidence

⁷³ 2015 ONCA 434.

⁷⁴ *Re Churstie* 2015 MBQB 25

⁷⁵ *Re Churstie* at para. 52.

⁷⁶ *Re Churstie* at para. 56.

was corroborated by other witnesses and Justice found her to be an honest and truthful witness. No undue influence was found and the codicil was admitted to probate.

Thorsteinson v. Olson – Saskatchewan

An elderly mother gifted land to her adult son (not biological son, but someone she had raised) and subsequently desired to revoke that gift. The mother argued (before her death during the litigation) that when she transferred her farmland into joint tenancy with her son she was vulnerable due to her age (81) and health ailments and that her son, who stood in a position of trust and confidence to her improperly took advantage of her dependence on him for his own personal gain.

The court concluded from the evidence that there was no actual undue influence: it was the mother who initiated the transaction and the gifting process and that as a de facto mother and in recognition of their long-standing bonds of love and devotion to each other the transaction viewed objectively was untainted by any sign of manipulation, coercion or even subtle influence exercised by the son.⁷⁷ The court also concluded that there was no presumption of undue influence even though there was a parent / adult child relationship. There was no evidence of any domination of will or that the mother's actions were in any way out of character, widely erratic or unusual. Her acts were consistent with her testamentary intentions. While her physical condition had deteriorated there was no evidence of diminished mental capacity. There were several examples of the mother's continued self-reliance and strength of character: she chose to rebuild her farmhouse after a fire; she arranged the legal work, contractors, purchases of fixtures and furnishings; she continued to bank and manage her finances; and the mother's solicitors saw no suggestion of undue influence by the son.⁷⁸ The court noted that if the conclusion that there was no presumption of undue influence was incorrect, the presumption was rebutted in this case.⁷⁹

⁷⁷ *Thorsteinson v Olson* 2014 SKQB 237 at para. 70

⁷⁸ *Thorsteinson* at para. 78

⁷⁹ *Thorsteinson* at para. 87.

***Zeligs v. Janes* – British Columbia**

In this case⁸⁰ the Court found that there was a presumption of undue influence between an adult daughter and her mother in the context of the transfer of the mother’s valuable property and house into joint tenancy with her daughter. The mother was ninety-four, the daughter was living with the mother at the time, the transfer was gratuitous, and the daughter was the mother’s attorney under a Power of Attorney.⁸¹ The daughter however, rebutted this presumption by showing that there was no evidence of actual influence, the mother obtained independent legal advice, and that despite her physical frailties the mother was “lucid”, “capable of doing things like getting her driver’s licence while in her 90s”, “she was assertive about her interests” and had the ability to resist undue influence.⁸²

***Wittenberg v. Wittenberg* – Nova Scotia**

In this Nova Scotia Court of Appeal case,⁸³ a mother relied on her son after her husband passed away for both her personal and financial affairs. In May of 2007 the mother and son had a falling out. In 2008 when she was 89 the mother executed a new will which removed her son as a beneficiary. She died in February of 2012. The son brought proceedings to set aside his mother’s will alleging lack of testamentary capacity and undue influence.

The son offered the following as examples of undue influence: money was withdrawn from his mother’s account “without explanation”; his sister discussed the disposition of his mother’s assets and the sale of her house with the mother’s lawyer; the lawyer’s

⁸⁰ 2015 BCSC 7.

⁸¹ *Zeligs v. Janes*, 2015 BCSC 7 at para. 114.

⁸² *Zeligs v. Janes*, 2015 BCSC 7 at para. 157. This is an interesting case as, while the court found that the daughter rebutted the presumptions of resulting trust and undue influence, the Court found that the daughter severed the joint tenancy while the mother was still alive when she used the sale proceeds of the property to pay off mortgages on the property (used for her benefit) and transferred the balance into an investment for the sole benefit of her and her husband. This transfer destroyed the unity of possession. The Court found that “the right of survivorship in favour of [the daughter] that would have followed on the death of Dorothy ended with the severance of the joint tenancy” and the sale proceeds were ordered to be distributed under the mother’s will. At paras. 191-192.

⁸³ 2015 NSCA 79

retainer agreement was “in care of” the daughter’s name; and the daughter and granddaughter were the principal beneficiaries so “they must have exercised undue influence to thereby benefit”.⁸⁴

Neither the application judge, nor the appellate court when the son appealed, was persuaded by these arguments. The Court of Appeal noted that there was an explanation for the removal of the money (the deceased assisted her granddaughter with tuition and other expenses) and it was hardly surprising that the daughter who was an attorney under a POA would discuss the mother’s financial affairs with her lawyer or that she completed the retainer agreement for her mother.⁸⁵

The application judge did note however that on the evidence it appeared that it was *the son* who was heavy-handed and self-motivated. The evidence showed that the son attempted to convince his mother to sell her house to his son (her grandson) for \$50,000.00 when it was really worth \$160,000.00. This transaction was only stopped when the sister convinced the mother to consult a lawyer.

The Court of Appeal awarded costs against the son, noting the

serious allegations of undue influence for which there was literally no factual foundation. At the very least, [the son] should not have appealed this ground to this Court and probably should have withdrawn it after pre-hearing disclosure in the court below. . .[The son] has lost again, essentially asking this Court to reweigh the evidence. This has imposed a substantial burden on the residuary beneficiaries. Indeed the executrix submits that this was [his] intention. **In any event, he has repeated the serious allegation of undue influence, without any foundation for doing so. This alone should result in an increased award of costs.**⁸⁶ [emphasis added]

The Court ordered costs of \$10,000 against the son payable to the executrix for the benefit of the Estate.

Kavanagh v. Lajoie - Ontario

⁸⁴ 2015 NSCA 79 at paras. 81-84.

⁸⁵ 2015 NSCA 79 at paras. 81-84.

⁸⁶ At para. 107 & 109.

The Court of Appeal agreed with the application judge's finding that there was no undue influence in the context of an *inter vivos* transfer of property from a father to a daughter. In its assessment, the court asked the following questions:

- 1) Did the daughter's relationship with the father contain tools or capacity capable of exerting undue influence on him?
- 2) Whether there existed a potential for domination or persuasive influence by the daughter over her father?
- 3) Did the daughter within that relationship have a persuasive or dominating influence over the will of her father?
- 4) If the answer to the above questions is affirmative, had the daughter rebutted the resulting presumption?⁸⁷

The court, answered the questions in the negative, based on the evidence presented. While the daughter was interested in owning the property this motivation, even given the opportunity she had to unduly influence her father does not give rise to a finding of undue influence.⁸⁸ Furthermore, while the daughter drove her father to the lawyer's office, the lawyer met with the father alone. The lawyer was also sensitive to the family dynamics, why the property was not going to his son (the applicant) and that the father wanted to show his appreciation to his daughter for her support.⁸⁹

The court did not find a presumption of undue influence but also concluded that if this conclusion was incorrect "such presumption has been rebutted by the same facts and analysis set forth above. . ."⁹⁰ This decision was upheld on appeal.⁹¹

Foley v. McIntyre – Ontario

The court was asked to determine (among other things) whether a father was unduly influenced to gift monies from certain investments to his daughter (who was also his attorney under a power of attorney) prior to his death. After the father's death, his son

⁸⁷ *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 133, upheld on appeal 2014 ONCA 187.

⁸⁸ *Kavanagh v. Lajoie* 2014 ONCA 187 at para. 22

⁸⁹ *Kavanagh v. Lajoie* at para. 23.

⁹⁰ *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 150.

⁹¹ 2014 ONCA 187.

contested the *inter vivos* transfers. At the time of the transfers, the father was living in a nursing home, had suffered from multiple ischemic attacks, suffered transient delirium, needed assistance with daily living and was prone to falls.⁹² However, no medical diagnosis was ever made of dementia nor were there any mental or cognitive diagnoses or evidence in his medical records of any concern of a dementing illness. Also, the father (not a substitute decision maker) consented on his own behalf to the advance directive of a do-not-resuscitate order.⁹³

The trial judge concluded that as the daughter was “strictly speaking, in a fiduciary relationship to her father” after she became his attorney under a power of attorney, “a presumption of undue influence should be applied to the circumstances under which she received significant financial gifts from her father.”⁹⁴ Two expert witnesses conducted retrospective assessments, however, Justice Mullins preferred the daughter’s expert who opined that the father was not particularly susceptible to undue influence at the time the gifts were made. The trial judge concluded that the evidence presented by the daughter rebutted the presumption of undue influence and that she met “the burden of proof that may apply, by any standard.”⁹⁵

On appeal, the court agreed with the trial judge. There was no evidence that the daughter was in any way involved in influencing the deceased to make the gifts in question. The daughter was not present at the meetings with the investment advisor who executed the transfer of the investments, and did not have any discussions with the investment advisor before the gifts were made. The Court of Appeal noted that it was “unfortunate” that the advisor did not ask the deceased many of the questions one would expect an independent advisor to ask when an elderly individual is making a significant gift to his child and power of attorney. However, it was open to the trial judge

⁹² *Foley v. McIntyre*, 2014 ONSC 194 at paras. 92-93; upheld on appeal 2015 ONCA 382.

⁹³ *Foley v. McIntyre*, 2014 ONSC 194 at para. 130.

⁹⁴ 2014 ONSC 194 at para. 181.

⁹⁵ 2014 ONSC 194 at para. 183.

to find that the deceased received independent financial advice.⁹⁶ The appeal was dismissed.

Trotter Estate (Re) - Ontario

The Court of Appeal overturned a summary judgment order dismissing a will challenge claim that involved allegations of undue influence, finding that the motion judge did not use the correct approach to determining that there was no “genuine issue requiring a trial” as set out by the Supreme Court of Canada in *Hyrniak v. Maudlin*.⁹⁷ As there were highly contested facts, a weighing of the evidence and a credibility analysis should have been completed in determining that a trial was not required, rather than a simple recitation of the evidence.

In *Trotter Estate*,⁹⁸ a married couple signed mirror wills in 1995, prepared by their local family lawyer. The wills left each of their children an equal share of their assets, excluding certain shares in their family company which were left to one son, John.

The father died in 1996. After her husband’s death the mother (Audrie) executed four more wills. The first in 1999 was drafted by the same local family lawyer, Mr. Gordon, who was also John’s close friend. Two wills executed in 2000 and 2002 were drafted by a lawyer not known to John. She switched lawyers as she was concerned that Mr. Gordon was not keeping her matters confidential. She told her new lawyer that John was trying to manipulate her and was being selfish, but was taking good care of her. The final will in 2005 was once again drafted by Mr. Gordon. In this will she left the entire residue of her estate to John and no real or personal property to her other children. Meanwhile earlier wills had divided the majority of the personal property between all of her children.

Also, in 2001, the mother transferred her house to herself and John as joint tenants and the family farm to herself and John as joint tenants in August 2003. Mr. Gordon acted as the lawyer for both *inter vivos* transfers.

⁹⁶ 2015 ONCA 382 at para. 39

⁹⁷ 2014 SCC 7.

⁹⁸ 2014 ONCA 841.

John had also spent 18 months renovating a small barn on the family farm. He billed his mother \$740,000.00 for the renovation. The entire farm was worth only between \$500-600,000.00. John claimed that the *inter vivos* transfers of the residence and farm were in lieu of payment of the invoices for the barn renovation.

The mother died on March 6, 2008. The siblings brought a claim challenging the will and the *inter vivos* transfers, alleging undue influence from John and John brought a summary judgment motion to dismiss his siblings' claim. Evidence on the motion included affidavits, cross-examination transcripts and documentary exhibits however no oral evidence was heard. The motion lasted over six days.

The motion judge concluded that the claim of undue influence was based on "bald allegations" and summarily dismissed the will challenge. She also concluded that the invoices for John's work were valid invoices for money he spent and that the challenge to the *inter vivos* transfers was subsumed within the challenge to the will and therefore failed along with the wills action.

The Court of Appeal concluded that the motion judge's approach to her conclusion was fundamentally flawed. If the motion judge rejected the evidence on undue influence, she needed to explain why. This required a credibility analysis pursuant to expanded judicial powers under rule 20.04(2.1) of the *Rules of Civil Procedure* to weigh the evidence, evaluate the credibility of the appellants' deponents and draw reasonable inferences.

While the motion judge referred to "bald allegations" a review of the record, however, reveals that the allegations were not bald, according to the Court of Appeal:

There was evidence concerning John's anger, his temper, his efforts to keep Audrie isolated from Kate, Audrie's fear of him, her dependency upon him, his attempts to manipulate her and her fear of being sent to a nursing home. There was evidence that Audrie transferred the farm property to John because she felt indebted to him for money he put into the barn. He sent her invoices for an amount that was approximately \$200,000 more than the value of the property itself. **The invoices alone support the appellants' claims of undue influence and fraud.**

There was evidence of control and domination on the one hand and fear and vulnerability on the other. **These are key components of an allegation of undue influence.** . . . The motion judge's conclusion that the evidence raised by the appellants – standing on its own – consisted only of bald allegations and did not give rise to the requirement for a trial reflects a misapprehension of the evidence.⁹⁹

The motion judge's conclusion that there was no undue influence was summed up at paras. 145 and 180 of her judgment:

The inescapable finding that does not require a trial to fully appreciate is that Audrie was nobody's fool. I find that the record before me gives a full appreciation of what Audrie wanted for herself and how she went about making it happen.

However, the Court of Appeal found that these conclusions did not address the circumstances that were potentially indicative of undue influence:

Audrie's vulnerability and dependency, the allegations that Audrie felt she had to please John despite her own wishes, the allegations of domination and control, questions about the confidentiality and independence of her legal advice and instructions, and Audrie's statements to an independent lawyer that John was trying to manipulate her: *Scott v. Cousins*, at para. 114; *Gironda v. Gironda*, 2013 ONSC 4133, 89 E.T.R. (3d) 224, at para. 77.

Nor do the motion judge's conclusions accurately capture the law of undue influence. **Audrie could be "nobody's fool" and want certain things for herself, yet still be subject to undue influence.** Audrie could falsely believe that she was heavily indebted to John as a result of his inflated invoices and thereby feel obliged, contrary to her wishes, to do what he wanted. A person may appreciate what she is doing but be doing it as a result of coercion or fraud: see *Vout v. Hay*, [1995] 2 S.C.R. 876, per Sopinka J., at para 29.¹⁰⁰

Credibility assessments, a weighing of the evidence and possibly oral evidence were required in this case. The motion judge's conclusory findings do not provide the analysis or reasoning necessary to support her ultimate conclusion that there was no undue influence.¹⁰¹ The Court of Appeal made an order setting aside the summary judgment determination and directed a trial before a new judge. No trial decision has been release to date.

⁹⁹ *Trotter* at paras.51-53.

¹⁰⁰ *Trotter* at paras. 60-62.

¹⁰¹ *Trotter* at para. 79.

Concluding Comments

As can be seen from the cases reviewed, proving undue influence may be quite difficult. While the facts may seem clear to clients that undue influence was present, it will be necessary for the court to review and weigh that evidence, circumstantial or otherwise, to determine if, at law, undue influence actually existed.

Likewise, it might be difficult for a drafting lawyer to detect undue influence. A drafting lawyer ought however to be cognizant of the potential for undue influence in the context of testamentary planning, as well as respecting *inter vivos* transfers. An appendix to this paper, attaches an Undue Influence Checklist.

These materials are intended for the purposes of providing information only and are to be used only for the purposes of guidance, and not intended to be relied upon as the giving of legal advice. These materials do not purport to be exhaustive. Please visit our website publications at <http://www.whaleyestatelitigation.com>

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September 2015

APPENDIX

UNDUE INFLUENCE CHECKLIST

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present. In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate undue influence. In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Indicators of Undue Influence from Case Law:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.¹⁰²
- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;

¹⁰² *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.¹⁰³

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some guidelines to assist in minimizing the risk of the potential of undue influence:

- Interview the client alone and take comprehensive notes;
- Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
- Is there conflict in the family?
- Is the client well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- If the client is isolated, does he/she live with one particular individual?
- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

¹⁰³ *Tate v. Guegueirre* 2015 ONSC 844 (Div. Ct.) at para.9.

- Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- Consider and make note of indicators of undue influence (as outlined above);

- Address recent health changes and determine whether the client has any physical impairment? Hearing, sight, mobility, limitations?

- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence. Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

- Determine intentions. Consider evidence of intention and indirect evidence of intention.

- Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;

- Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator,

speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;
- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;¹⁰⁴
- ❑ Be mindful of the *Rules of Professional Conduct*¹⁰⁵ which are applicable in the lawyer's jurisdiction.

Involvement of Professionals

- ❑ Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?

¹⁰⁴ For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", <http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf>

* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

¹⁰⁵ *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>

- Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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September 2015