



## UNDUE INFLUENCE CHECKLIST

### UNDUE INFLUENCE: SUMMARY

- The doctrine of undue influence is used by courts to set aside certain *inter vivos* gifts/wealth transfers, 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. 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.<sup>1</sup>

### TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires **coercion**. It is only where the will of the person who becomes coerced into doing that which he or she does not desire to do, that it is undue influence.<sup>2</sup> Common law has continued to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”. Persuasion is allowed, but 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 will be found.<sup>3</sup>
- **Burden of Proof:** While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence.<sup>4</sup>

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<sup>1</sup> *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

<sup>2</sup> *Wingrove v Wingrove* (1885) 11 PD 81 at 82

<sup>3</sup> *Dmyterko Estate v. Kulikovsky* (1992) CarswellOnt 543

<sup>4</sup> Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.

- **Standard of Proof:** *C(R) v McDougall*<sup>5</sup> 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. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.<sup>6</sup>
- **Indirect Evidence:** In the U.K. case of *Schrader v Schrader*<sup>7</sup>, 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 dependency 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.
- **Relationship:** Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develops 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.<sup>8</sup>
- **Multiple Planning Documents:** 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/her her planning documents to benefit the child he/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.<sup>9</sup>
- **Language:** 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.<sup>10</sup> For instance, where the only translation of the planning document was

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<sup>5</sup> 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

<sup>6</sup> *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38

<sup>7</sup> *Schrader v Schrader*, [2013] EWHC 466 (ch)

<sup>8</sup> See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 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.

<sup>9</sup> 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.

<sup>10</sup> See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.<sup>11</sup>

- **Indicators of Testamentary Undue Influence:** The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*<sup>12</sup> 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.<sup>13</sup>

In *Tate v. Gueguegirre*<sup>14</sup> 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;
- 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.<sup>15</sup>

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<sup>11</sup> *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.).

<sup>12</sup> *Gironda v Gironda*, 2013 CarswellOnt 8612.

<sup>13</sup> *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

<sup>14</sup> 2015 ONSC 844 (Div. Ct.)

<sup>15</sup> *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

## 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.<sup>16</sup> Evidence of undue influence may even rebut the presumption of capacity that would usually apply.<sup>17</sup>
- *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.<sup>18</sup>

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.<sup>19</sup>

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<sup>16</sup> See for example the case of *Gironda v Gironda*, 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. In *Leger v. Poirier*, [1944] SCR 152 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.

<sup>17</sup> *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

<sup>18</sup> *Vout v Hay*, [1995] 2 SCR 876 (SCC).

<sup>19</sup> Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.

## **INTER VIVOS GIFTS: UNDUE INFLUENCE**

- ***Distinct from Testamentary Undue Influence:*** Testamentary undue influence arose from common law courts while *inter vivos* gift undue influence was developed by the courts of equity in the 1700s and 1800s. It is available against a broader spectrum of conduct and renders the gift of wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void).

### ***Two Classes of Undue Influence: Actual and Presumed***

- ***Actual Undue Influence:*** 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. . .”<sup>20</sup> Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.
- ***Presumed Undue Influence:*** This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or “special” relationships from being abused.<sup>21</sup> These relationships are determined by a “smell test”: does the potential for domination inhere in the relationship itself?

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”. However even close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination.

*Shift in Evidentiary Burden:* Once a presumption of undue influence is established there is a shift in the onus to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden not a legal one. The legal burden is always on the person alleging undue influence.

The presumption of undue influence can be rebutted by:

- No actual influence was used in the particular transaction or the lack of opportunity to influence the donor;

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<sup>20</sup> *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181

<sup>21</sup> *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

- The donor had independent legal advice or the opportunity to obtain independent legal advice;
- The donor had the ability to resist any such influence;
- The donor knew and appreciated what she was doing; or
- There was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

## LAWYERS' 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 that undue influence is present. In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

### *Checklist*

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client's family?
- 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?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- 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 numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependant on another? Is the client vulnerable?
- 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?

### ***Involvement of Professionals***

- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?
- 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?
- Is the client making a marked change in the planning documents as compared to prior documents?
- Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

### **Guidelines for Lawyers to Avoid and Detect Undue Influence**

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

- Interview the client alone;



- Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.
- 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);
- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability. Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- Address recent health changes and determine whether the client have any physical impairment (hearing, sight, mobility, limitations)?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

### **Practical Tips for Drafting Lawyers - Checklist**

- 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;
- Determine Intentions;

- ❑ 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);
- ❑ 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;<sup>22</sup> and
- ❑ Be mindful of the *Rules of Professional Conduct*<sup>23</sup> which are applicable in the lawyer's jurisdiction.

*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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<sup>22</sup> 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](http://www.whaleyestatelitigation.com)

<sup>23</sup> *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>

