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UNDUE INFLUENCE CHECKLIST: ESTATES AND RELATED MATTERS

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Undue Influence: Summary

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, 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.

The Courts' Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968):¹

“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.”

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,² 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.”*³

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”. We see in *Hall v Hall*, influence of a more subtle characterization which when read together with more recent cases, arguably the application and scope of the doctrine is broadened.

¹ (1968) LR 1 P&D.

² *Craig v Lamoureux*, [1919] 3 WWR 1101.

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

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

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.⁴

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.”⁵

Relationships Where There is an Imbalance of Power

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 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.⁶

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.⁷

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.⁸ 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.⁹

Other factors indicative of undue influence

⁴ *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

⁵ *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).

⁶ *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.

⁷ 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.

⁸ See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁹ *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.).

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.¹⁰

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property.¹¹

Not All Relationships of Dependency Lead to Findings 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.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the genuine willingness of the grantor to effectuate an otherwise questionable transaction in favourable manner.¹²

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has 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 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.¹³

Indicators of Undue Influence

¹⁰ *Juzumas v Baron*, 2012 ONSC 7220.

¹¹ *Covello v Sturino*, 2007 CarswellOnt 3726.

¹² 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.

¹³ *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.

The Court in the 2013 decision of *Gironda v Gironda*¹⁴ 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.¹⁵

Burden of Proof for Undue Influence

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 on a balance of probabilities.¹⁶

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.¹⁷

Although the leading Supreme Court of Canada (“SCC”) case of *Vout v Hay* held that “*the extent of proof required is proportionate to the gravity of the suspicion*,”¹⁸ the more recent SCC case of *C(R) v McDougall*¹⁹ 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*²⁰ 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

¹⁴ *Gironda v Gironda*, 2013 CarswellOnt 8612.

¹⁵ *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

¹⁶ *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.

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

¹⁸ *Vout v Hay* at para 24.

¹⁹ 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

²⁰ (1993), 90 Man R (2d) 245 (Man QB) at para 38.

*intervene but as had been said, the will must be “the offspring of his own volition and not the record of someone else’s.”*²¹

It has been held, in the context of gifts, where the potential for domination exists in the relationship that 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*.”²²

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*²³ recently reported, 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.

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

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.²⁴

In *Leger v Poirier*,²⁵ the SCC 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.

²¹ (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall*, *supra*.

²² *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.

²³ *Shrader v Shrader*, [2013] EWHC 466 (ch)

²⁴ 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.

²⁵ *Leger v Poirier*, [1944] SCR 152.

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.²⁶

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.²⁷

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are 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*.”²⁸

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.

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.

²⁶ *Vout v Hay*, [1995] 2 SCR 876 (SCC).

²⁷ Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.

²⁸ Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.²⁹

Lawyer's Checklist of Circumstantial Inquiries

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?

²⁹ Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, <http://whaleyestatelitigation.com/blog/published-papers-and-books/>

- 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?
- 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?
- Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependant on another?
- Is the client vulnerable?

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;
- Address recent health changes;
- 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;
- 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;³⁰ and
- Be mindful of the Rules of Professional Conduct³¹ 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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³⁰ 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

³¹ *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>