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INDEPENDENT LEGAL ADVICE: RISKS ASSOCIATED WITH "ILA" WHERE UNDUE INFLUENCE AND CAPACITY ARE COMPLICATING FACTORS

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INTRODUCTION

A lawyer will consider in certain circumstances when, or if, it is appropriate to require or recommend independent legal advice ("ILA"). Situations such as where a conflict of interest arises or exists in joint retainers, or when engaging in certain types of transactions, or upon discovery of an error or omission, constitute more familiar instances where ILA may become relevant. As well, ILA is often required where an individual is borrowing money from a financial institution with, for instance, a third party offering a guarantee for a loan. In this situation, the borrower has all of the benefit and the

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third party has the obligation. Another more relevant scenario would include, for example, where an elderly parent owns a house with an adult child seeking to obtain a business loan from a financial institution requiring security. If that child seeks to use the parent's house as a form of security for that loan, the parent arguably ought to receive ILA. However, ILA is not necessary in every situation and is indeed a fact specific consideration.

Another type of transaction involving older adults and the outright requirement of ILA involves "reverse mortgages". A reverse mortgage is a type of loan that is designed specifically for homeowners 55 years of age and older. Such a mortgage is secured by the equity in the home itself that is the portion of the home's value that is debt-free. It permits a homeowner to obtain cash without having to sell the home. However, unlike ordinary mortgages, there are no regular or lump sum payments. The interest accumulates and the equity in the older adult's home decreases with time. When the house is ultimately sold, the loan is repaid with interest. While this loan vehicle can have its advantages when used appropriately, it can nevertheless be a risky proposition for those older adults with diminished capacity who may also be vulnerable to undue influence, or pressure in accessing the equity in their home for unscrupulous opportunists. Financial institutions require ILA in entering into these types of transactions.

A lawyer who agrees to provide ILA must not take on the role lightly. The duty of care, especially in certain demographics and circumstances, requires a high degree of integrity and professionalism. Providing legal advice under a limited scope retainer with respect to only one particular transaction can have its challenges, especially when a lawyer is meeting the client for the first time, knows little about the client, has little background information, and the client is older and possibly vulnerable and dependant and possesses physical and or cognitive impairments.

This monograph will therefore focus on ILA in the context of undue influence and incapacity. I will examine the standard of care when providing ILA generally so as to delineate the further complexity where capacity and undue influence issues exist or are suspected. As well, I will review select court decisions where the quality or sufficiency of ILA was questioned.

Of course, although ILA is not necessary in every instance, it nevertheless appears to remain the best way of rebutting the presumption in undue influence cases.

INDEPENDENT LEGAL ADVICE

Since ILA is not always required, knowing when to require it is an important consideration. ILA is usually the best evidence to prove free will is not disputed. Indeed, in the case of *Csada*,¹ the court determined that ILA was the “best way” to rebut the presumption of undue influence. In *Allcard v. Skinner*,² Kekewich J. stated in the context of a gift where undue influence exists:

... [t]he law does not prohibit gifts to sisterhoods by members any more than it prohibits gifts by wards to guardians or by children to parents; but where the paramount influence presumably exists it casts on the possessor of such influence the burthen of proving that the gift was free, and it holds an essential part of that proof to be that the donor had “competent independent advice.” It was urged in argument that such advice must be “legal.” I pointed out to Sir Charles Russell that this was not the language of some, at least, of the authorities, and that, in particular, it was not the language of the considered judgment of Lord Justice Turner, in *Rhodes v. Bate* [Law Rep. 1 Ch. 252], on which reliance was placed. The answer was that in a large number of cases (and, of course, it was intended to include the present one) the only competent advice was “legal.” To that I do not assent. *The advice which is more urgently required is that of a man of the world – a man of common sense – who, without despising emotion, does not rank it among the virtues, but also finds a place there for prudence. Such a man, especially if in a general way conversant with the administration of property, and capable of expressing his views clearly and strongly, would be a far better adviser than a solicitor or counsel, who did not possess these qualifications.*

Even more recently, in the Saskatchewan Court of Appeal decision of *Thorsteinson Estate v. Olson*,³ the court summarized the purpose of ILA and stated that:

... whether it emanates from an accountant, lawyer, financial advisor, a trusted and knowledgeable friend, or someone else, it is to provide evidence that the donor knew what he or she was doing, was informed, and was entering into the transaction of their own free will.

The Saskatchewan Court of Appeal, noting that the estate’s position was that ILA was to be considered a requirement whenever

1. *Csada v. Csada* (1984), [1985] 2 W.W.R. 265, 35 Sask. R. 301, 29 A.C.W.S. (2d) 70 (Sask. C.A.) at para. 29, leave to appeal refused (1985), 37 Sask. R. 80 (note), 58 N.R. 236, [1985] S.C.C.A. No. 209 (S.C.C.).
2. (1887), 36 Ch. D. 145, 56 L.J. Ch. 1052, [1886-90] All E.R. Rep. 90 (C.A.) at pp. 158-159.
3. 2016 SKCA 134, 404 D.L.R. (4th) 453, 20 E.T.R. (4th) 178 (Sask. C.A.) at para. 51.

an individual in similar circumstances made a deed of transfer, did not however agree in their analysis of the cases relied upon by the estate, including *Csada*. The court stated:

... that independent legal advice is not necessary, but is one of the best ways of rebutting the presumption of undue influence. *St. Pierre*⁴ was silent as to the effect of the failure to obtain independent legal advice and *Sawchuk Estate*⁵ did not discuss the need for such advice, though the court clearly considered the fact that there was no such advice in the circumstances of that case, as a factor in deciding whether the presumption of undue influence had been rebutted. Finally, while *MacKay*,⁶ decided independent legal advice was necessary, the case dealt with a relationship between a bank and its client, which raised fiduciary obligations, as I will explain later in these reasons, do not exist in the cases at hand. Accordingly, I do not view it as applicable to the circumstances of this case.⁷

The Saskatchewan Court of Appeal referred to the trial judge's decision in *Thorsteinson*,⁸ stating that it had properly considered the issue of what independent advice was required to have been received when determining the presumption of undue influence, which according to the court, had been rebutted. Interestingly however, the Court of Appeal referred to the trial judge's finding that the solicitor had "failed to discuss other estate planning options opened to Marjorie to benefit William", and had also: "failed to inform her of potential difficulties she might encounter if she subsequently changed her mind about the gift" (this was a case about a gift of real property). The trial judge had concluded those omissions meant Marjorie was independently informed, yet went on to conclude:⁹ "lack of adequate, independent legal advice is not a ground unto itself to justify overturning a gift. As previously noted, the presence

4. *St. Pierre (Litigation Guardian of) v. St. Pierre*, 2008 SKQB 350, 325 Sask. R. 159, 2008 CarswellSask 945 (Sask. Q.B.), affirmed 2010 SKCA 20, 487 W.A.C. 100, 350 Sask. R. 100 (Sask. C.A.).

5. *Sawchuk Estate v. Evans*, 2012 MBQB 82, 76 E.T.R. (3d) 262, [2012] 11 W.W.R. 330 (Man. Q.B.).

6. *MacKay v. Bank of Nova Scotia* (1994), 20 B.L.R. (2d) 304, 41 R.P.R. (2d) 244, 20 O.R. (3d) 698 (Ont. Gen. Div.).

7. *Thorsteinson Estate v. Olson*, 2016 SKCA 134, 404 D.L.R. (4th) 453, 20 E.T.R. (4th) 178 (Sask. C.A.), at para. 52. Ryan-Froslic J.A.:

The majority of the cases cited by the estate – *Moloney* at para. 24; *Zed* at para. 26; *Csada* #2 at para. 29; *Dell'Aquila* at para. 40 – all refer to the same quote from *Inche Noriah v. Shaik Allie Bin Omar*, [1928] 3 W.W.R. 608, to the effect that *independent legal advice is not necessary*, but is one of the best ways of rebutting the presumption of undue influence.

8. *Thorsteinson Estate v. Olson*, *supra*.

9. *Supra*, at para. 86.

or absence of ILA is but one way in which to rebut the presumption of undue influence. Other circumstances may be considered".¹⁰ The court went on to state that such remedies would be available to those who receive negligent or imprudent legal advice and the court relied on *Geffen v. Goodman*¹¹ on this issue.

In *Juzumas v. Baron*,¹² an elderly and vulnerable man was unduly influenced into signing over his only major asset, his home, to the son of a much younger woman who had already duped him into marrying her. At the time he executed the transfer, the then 91-year-old was in failing health. He was vulnerable and in fear of being abandoned to a nursing home. He signed the transfer under the domination, control, and intimidation of his significantly younger wife/housekeeper, as well as under the influence of her son. While the older adult had met with a lawyer, it was a lawyer chosen by the influencer, the lawyer never met with him alone (the influencer was always present), the lawyer spoke in Polish for part of the conversation (which he did not understand) and the lawyer never explained the advantages or disadvantages of the transfer. Justice Lang found that the lawyer "was clearly not in Kazys' camp. He was not his lawyer" and that:

[t]he transfer in my view resulted from the undue influence of a vulnerable elder. Kazys did not have the benefit of legal advice or any understanding of the irrevocable nature of the document he signed. In addition, the inequality of the bargaining power and the unfairness of the transaction render it unconscionable. The transaction must be set aside.¹³

In terms of professional conduct expectations, reference ought to be made in Ontario to the Law Society of Upper Canada (LSUC) which has defined ILA in s. 1.1 of the *Rules of Professional Conduct*: ("Rules")

"independent legal advice" means a retainer where:

10. *Supra*, at paras. 53.
11. 1989 ABCA 206, 61 D.L.R. (4th) 431, 34 E.T.R. 132 (Alta. C.A.), additional reasons (1990), 67 D.L.R. (4th) 765, 37 E.T.R. 288, [1991] 5 W.W.R. 385, reversed [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.); and *Thorsteinson Estate v. Olson*, *supra*, footnote 7, at para. 54. Wilson J. stated at p. 390 of *Geffen*: "that any imperfection in the legal advice obtained is not, in my view, fatal to the appellant's case".
12. 2012 ONSC 7220, 225 A.C.W.S. (3d) 515, 2012 CarswellOnt 16785 (Ont. S.C.J.), additional reasons 2012 ONSC 7332, 225 A.C.W.S. (3d) 334, 2012 CarswellOnt 16786.
13. *Supra*.

- a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
- b) the client's transaction involves doing business with
 - i. another lawyer,
 - ii. a corporation or entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
 - iii. a client of the other lawyer,
- c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
- e) *the retained lawyer has explained the legal aspects of the transaction to the client, and*
- f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view. [Emphasis added.]

The Commentary in the *Rules* related to this definition states:

[1] Where a client elects to waive independent legal representation but to rely on independent legal advice only, *the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.* [Emphasis added.]

Additionally, the requirement for ILA in the context of third party guarantees or mortgagors has also been addressed at common law, suggesting it is a way for financial institutions to gain some protection. When a borrower defaults on a loan and the financial institution in turn attempts enforcement of its remedies, the guarantor/mortgagor frequently argues lack of understanding of the transaction, and too, lack of awareness of the risk of loss. In other words, there would be a plea of *non est factum* ('it is not my deed'), duress, unconscionability, or other defences. Many financial institutions insist on ILA as a means of attacking such defences and for protection from liability purposes.

For a lawyer providing ILA, there is substantial risk, with little reward. A lawyer simply cannot charge an amount of money reflective of the risk in such a limited scope retainer. Still, the ILA lawyer must understand and meet the lawyer's duty and standard of care when providing ILA.

DUTY OF CARE

Clearly, lawyers owe a duty of care to their clients. Even if they are not providing representation, they still owe a duty respecting the giving of ILA. If a lawyer who has been retained to provide ILA does not provide adequate advice, that lawyer may be exposed to liability in negligence from the guarantor who may in turn be found liable to the financial institution, or to the bank itself if the mortgage or security is not upheld as a result of failure to provide adequate ILA in the examples cited.

STANDARD OF CARE

Looking back to the Commentary in the Rules, which states that the “retained [ILA] lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged”, there is some guidance that can then be expanded when reviewing the court decisions on point.

The standard for providing proper ILA generally has been discussed in a number of decisions, including the oft-cited cases of *Goodman v. Geffen*,¹⁴ *Inche Noriah v. Shaik Allie Bin Omar*,¹⁵ and *Tulick v. Ostapowich*.¹⁶

In *Inche*, for example, an elderly woman gave a rather substantial gift to her nephew of almost the entire amount of her estate, leaving next to nothing to support herself. It was alleged that the nephew had unduly influenced the woman and the gift should therefore fail. The legal issue became whether the presumption of undue influence was rebutted by ILA.

Lord Hailsham in the Privy Council stated:

Nor are their lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon further than to say it must be given *with a full knowledge of all relevant circumstances and must be such that a competent and honest advisor would give if acting solely in the interests of the donor*. [Emphasis added.]

14. (1989), 61 D.L.R. (4th) 431, 34 E.T.R. 132, [1989] 6 W.W.R. 625 (Alta. C.A.), additional reasons (1990), 67 D.L.R. (4th) 765, 37 E.T.R. 288, [1991] 5 W.W.R. 385, reversed [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.).

15. [1928] 3 W.W.R. 608, [1929] A.C. 127, [1928] All E.R. Rep. 189 (Straits Settlements P.C.).

16. (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381, 12 A.C.W.S. (3d) 190 (Alta. Q.B.).

In the present case, their lordships do not doubt that [the lawyer] acted in good faith; but he seems to have received a good deal of his information from the respondent [nephew]. He was not made aware of the material facts, that the property which was being given away constituted practically the whole estate of the donor and he certainly did not seem to have brought home to her mind the consequences to herself of what she was doing or the fact that she could more prudently and equally effectively have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their lordships view, the facts proven by the respondent are not sufficient to rebut the presumption of undue influence. [Emphasis added.]¹⁷

This case is authority for the proposition that in providing ILA, a lawyer must not only explain the nature and effect of a guarantee (or other contract) to the client, but must also have a broader understanding of the client's assets, the risk of the transaction and any alternatives for accomplishing the transaction without risk.

The Supreme Court of Canada importantly observed that ILA addresses two primary concerns, namely, that a person *understands* a transaction and that a person enters into a transaction *freely and voluntarily*. In *Gold v. Rosenberg*¹⁸ the court noted that:

Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. *The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.*¹⁹

The adequacy of ILA is a situation-specific inquiry. In refusing to give effect to a contractual waiver of maintenance in *Brosseau v. Brosseau*,²⁰ the Alberta Court of Appeal stated:

The term "independent advice" is not one of precision. It may cover the situation in which a lawyer explains, independently, the nature and consequences of an agreement . . . It may extend, as it does in cases of undue influence, to the need to give informed advice.

We doubt that any hard and fast rule can be laid down and the peculiar circumstances of this case are not appropriate for the formulation of such a rule, in any event.²¹

17. *Supra*, footnote 15 at p. 614.

18. [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 385, 35 B.L.R. (2d) 212 (S.C.C.).

19. *Supra*, at para. 85.

20. 1989 ABCA 241, 63 D.L.R. (4th) 111, 23 R.F.L. (3d) 42 (Alta. C.A.), leave to appeal refused [1990] 1 S.C.R. v, 65 D.L.R. (4th) vii, 23 R.F.L. (3d) xli (S.C.C.).

In *Goodman Estate v. Geffen*, the court evaluated the validity of a trust agreement executed by an elderly grantor distributing her real property among children, nieces and nephews after her death, while reserving the property for her own use during her lifetime. In considering the question as to whether the solicitor's role met the test of ILA, the majority in the Alberta Court of Appeal decision,²² citing earlier English authority, determined that:

... it is not enough for the adviser to ask if the donor understands and acts of her own will and volition, because competent advice can only be given by someone who knows what the means and prospects of the donor are.²³

This passage articulates that the role of the ILA lawyer is not limited to simply inquiring whether the client is aware of and understands the nature and effect of the proposed transaction, but clearly must also obtain sufficient information to advise the client on the transaction itself with a full understanding of all of the facts. Indeed, the majority in the Court of Appeal decision of *Goodman Estate* went on further to state:

Lord Hailsham in *Inche Noriah*, 193, says . . . the advice must be given with knowledge of all the relevant circumstances such as would be given solely in the interests of the donor. An independent adviser must be in a position to satisfy himself that a gift is right and proper.²⁴

The court concluded that the ILA lawyer did not give advice that met this standard. In part, this finding was as a result of the fact that he did not have sufficient information, including the value of the property and the donor's other income and assets. The court relied upon the principle that "when independent legal advice is put forward, it must be competent and informed".²⁵ On appeal, the Supreme Court of Canada found, however, that on the evidence presented, any presumption of undue influence was rebutted. There was no evidence that the trial judge had misapprehended the evidence or otherwise erred in making his findings of fact. Wilson J.

21. *Supra*, at paras. 22-23.

22. *Goodman Estate v. Geffen*, 1989 ABCA 206, 61 D.L.R. (4th) 431, 34 E.T.R. 132 (Alta. C.A.), additional reasons (1990), 67 D.L.R. (4th) 765, 37 E.T.R. 288, [1991] 5 W.W.R. 385 (Alta. C.A.), reversed [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.).

23. *Goodman Estate v. Geffen*, 1989 ABCA 206, 61 D.L.R. (4th) 431, 34 E.T.R. 132 (Alta. C.A.) at para. 26.

24. *Supra*, at para. 27.

25. *Supra*, at para. 26.

noted that "any imperfection in the legal advice obtained is not, in my view, fatal to the appellant's case".²⁶ The Supreme Court restored the trial judge's decision finding that the trust agreement was valid.²⁷

Notably, also, the court emphasised that ILA must obviously be independent. A lawyer acting for both parties involved cannot be truly said to be independent. In the case of *Bertolo v. Bank of Montreal*²⁸ the court found that the purported ILA provided by a law partner in the same firm as the lawyer who had represented the other parties in the transaction, was not truly "independent" and he should not have agreed to have provided ILA. Ancillary note should be taken of the fact that this too would raise questions of a conflict in the retainer.²⁹

Even if legal advice is deficient in some manner, it may not be enough to warrant a court setting aside a contract, especially where the signor was aware of his rights and signed the agreement voluntarily.³⁰

It is not for the ILA lawyer to approve of the transaction if the ILA client understands the nature and effect of the transaction and has freely chosen to enter into the transaction. As noted by the court in *Coomber v. Coomber*.³¹

It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.³²

In summary then, a lawyer providing ILA must make sure that the client understands the nature and effect of the transaction, is entering the transaction freely and voluntarily and that the ILA lawyer is providing advice with the knowledge of all of the relevant circumstances. This is especially true of lawyers advising older adults where capacity and undue influence factors are at play. Instructively, the Law Society of British Columbia has stated:

26. *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.) at p. 390.

27. *Supra*, at p. 389.

28. (1986), 33 D.L.R. (4th) 610, 57 O.R. (2d) 577, 18 O.A.C. 262 (Ont. C.A.).

29. *Rules of Professional Conduct*, section 3.4 "Conflicts".

30. *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117, 1975 CarswellBC 45 (B.C. S.C.).

31. [1911] 1 Ch. 723 (C.A.).

32. *Supra*, at p. 730.

When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences. *You must consider whether the client has capacity and whether the client may be subject to undue influence by a third party.* Further, if the client has communication issues (e.g. limited knowledge of the English language), you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter. [Emphasis added.]³³

It is reasonable for ILA lawyers to proceed cautiously and protect themselves where there are capacity concerns in an ILA retainer. In his article, "Independent Legal Advice – A Practical Guide",³⁴ Brian Bucknall states:

The question of who can receive ILA can be solved with the types of safeguards that the profession has used concerning parties competent to sign wills. The solicitor offering ILA will discuss the general nature of the transaction with the mortgagor. If the mortgagor is unable to enter into such a discussion in relatively simple English, the mortgagor should be asked to return with an interpreter. The document to be signed should be read to a blind mortgagor; instructions in writing can be given to a deaf mortgagor. A solicitor who concluded that a mortgagor was apparently incapable of understanding the transaction, or its risks, would have to advise the borrower that it was impossible to provide ILA.

None of these suggestions with regard to "who can receive ILA" should be taken as suggesting that the solicitor might be turned into some form of doctor or psychiatrist. *The standard to which a solicitor would be held with regard to the provision of ILA would be the standard of a reasonable business person dealing with other business people. Legal education would not train a solicitor to identify any particular neurosis or mental incapacity – the solicitor's judgment would be the same as that of other people in the business world.* [Emphasis added.]³⁵

Bucknall does not cite any source for his particular view that the standard is that of a "reasonable business person". If the lawyer is providing legal advice, arguably it is likely the standard as set out by the Supreme Court of Canada in *Central Trust Co. v. Rafuse*.³⁶

33. Law Society of British Columbia, Practice Resources, Independent Legal Advice Checklist, available at <https://www.lawsociety.bc.ca/docs/practice/resources/checklist-ila.pdf>.

34. (1996), 49 R.P.R. (2d) 49.

35. Brian Bucknall, "Independent Legal Advice – A Practical Guide" (1996), 49 R.P.R. (2d) 49 at 51.

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken . . . The requisite standard of care has been variously referred to as that of the *reasonably competent solicitor*, the *ordinary competent solicitor* and the *ordinary prudent solicitor*. [Emphasis added.]³⁷

To meet the standard of a reasonably competent lawyer, it is somewhat trite to say that an ILA lawyer must determine whether the ILA client has capacity to enter into the transaction for which the ILA is being provided. Equally important, consideration of the fact that the ILA client is instructing free of undue influence must occur. In order to determine this, the ILA lawyer must be live to issues of influence and incapacity. A general understanding of the complexity of "capacity" and "undue influence" issues and the red flags to be aware of is essential. In many circumstances it is not easy to ascertain whether or not a client has the requisite decisional capacity to instruct a lawyer. Capacity issues are complex and not necessarily obvious. Great care must be taken in situations that demand extra scrutiny. Justice Cullity in *Banton v. Banton*:³⁸

Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking. A *very high degree of professionalism* may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.³⁹

CAPACITY

A few words then on capacity: It is important to understand that there is no single legal definition of "capacity". In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.⁴⁰

36. [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 34 B.L.R. 187 (S.C.C.), varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv, 1988 CarswellNS 601 (S.C.C.).

37. *Supra*, at p. 208.

38. (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161, 1998 CarswellOnt 3423 (Ont. Gen. Div.), additional reasons (1998), 164 D.L.R. (4th) 176 at 244, 1998 CarswellOnt 4688.

39. *Supra*, at para. 90.

40. *Palahnuik v. Kowaleski* (2006), 154 A.C.W.S. (3d) 996, 2006 CarswellOnt 8526, [2006] O.J. No. 5304 (Ont. S.C.J.); *Brillinger v. Brillinger-Cain* (2007), 158 A.C.W.S. (3d) 482, 2007 CarswellOnt 4011, [2007] O.J. No. 2451 (Ont. S.C.J.); *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216, 2004 CarswellOnt 1228 (Ont. S.C.J.), affirmed (2005), 14 E.T.R. (3d) 27, 137 A.C.W.S. (3d) 1076, 2005 CarswellOnt 877 (Ont. C.A.) See also Kimberly A.

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable standard or criteria required to determine capacity.⁴¹ Notably, some refer colloquially to “tests” for capacity. In referring to “tests” it is important to understand that there is no “test” so to speak, rather there are factors/criteria to consider in assessing requisite decisional capacity. There are standards to be applied, or factors to be considered, in the assessment of requisite decisional capacity to make a certain decision at a particular time. Accordingly, all references to “test” should be read with this in mind and noted that the reference simplifies the concept for a lay person.⁴²

Capacity is an area of enquiry where medicine and law have a shared responsibility, in that legal practitioners are often dealing with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal concepts in their clinical practices, and even to review evidence retrospectively to determine whether at a particular time an individual had the requisite decisional capacity to complete a specific task, or make a specific decision.

The assessment of capacity is a less-than-perfect science, both from a legal and medical perspective. Capacity determinations can be complicated. In addition to professional and expert evidence, lay evidence is relevant to assessing capacity in certain situations.⁴³

Capacity is *decision, time and situation-specific*. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. A person is not globally “capable” or “incapable” and there is no “one size fits all” determination for general capacity. Rather, decisional capacity is determined on a case-by-case basis in relation to a particular task or decision, at a moment in time.⁴⁴

Common law precedent suggests that the ILA lawyer should be satisfied that the client has the requisite capacity to give instructions for and execute the document in question, or task undertaken notwithstanding the presumption of capacity. This duty is particularly significant if the client is elderly, vulnerable, dependent, infirm, or has illnesses and/or impairments relevant to the circumstances of the decision being made. ILA lawyers are wise to exercise additional

Whaley and Ameena Sultan, “Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity” (2013), 32 E.T. & P.J. 215-250.

41. *Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722, 225 D.L.R. (4th) 385 (S.C.C.).

42. Whaley and Sultan, *supra*, footnote 40.

43. *Ibid.*

44. *Ibid.*

caution in circumstances where a third party who may benefit from the transaction brings the client to the office, and appears overly involved in the process. ILA lawyers must be adept to red flags in the retainer. In that regard, red flags to consider are listed for consideration.

RED FLAGS FOR INCAPACITY

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place.
- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension.
- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia).
- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns.
- Comprehension problems: difficulty repeating simple concepts and repeated questions.
- Calculation or financial management problems, *i.e.* difficulty paying bills.
- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.
- Intellectual impairment.
- Cannot readily identify assets or family members.
- Experienced recent family conflict.
- Experienced recent family bereavement.
- Lack of awareness of risks to self and others.
- Irrational behaviour or reality distortion or delusions: may feel that others are "out to get" him/her, appears to hear or talk to things not there, paranoia.
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed.
- Lack of responsiveness: inability to implement a decision.
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.

- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependent and vulnerable.
- Poor living conditions in comparison with the client's assets.
- Changes in the client's appearance.
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns.
- Being overcharged for services or products by sales people or providers.
- Socially isolated.
- Does the substance of the client's instructions 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?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation.
- Keep in mind issues related to capacity including *undue influence*.⁴⁵ Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag.⁴⁶
- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives.⁴⁷
- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia.⁴⁸
- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia.⁴⁹

45. See WEL's Undue Influence Checklist.

46. Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre.

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*

- A deathbed will where there is a strong likelihood that the testator may be delirious.⁵⁰
- Complexity or conflict in the milieu of a vulnerable individual.⁵¹

In considering capacity and red flag indicators so as to elicit best practices, it is apparent that it is part of the obligation of the ILA lawyer to interview the client for the purpose of determining requisite legal or decisional capacity. If the lawyer is confident that the client is capable to instruct on the subject matter retained, then it should be clearly indicated in the file notes. If there is doubt, other considerations may need to be considered and employed for the protection of the client and the lawyer. An ILA lawyer's notes should be thorough as well as carefully recorded and preserved.

A lawyer may wish to consider taking more time than ordinarily employed in asking the client probing questions. Clients should be provided with as much information as possible about the legal consequences of the matter and respecting future proceedings. All questions and answers should be carefully recorded in detail. A lawyer should also consider corroboration of answers given by the client relating to the extent of the client's assets by seeking appropriate directions, taking care of course to preserve solicitor-client privilege.

If the lawyer has serious concerns about the client's capacity, the ILA lawyer should consider declining the retainer. The approach ought to be direct, yet sensitive.

If the ILA lawyer wishes, a capacity assessment can be discussed, providing the client with advice on the merits and value of such an assessment, yet replete with the risks of same. Requests to Assessors for capacity assessments should be clear and should concisely outline the legal criteria to be applied in assessing the specific decisional capacity that is to be met for the particular task sought. A capacity assessment that is not carefully written and that does not apply the evidence to the appropriate legal standard will be deemed deficient and unhelpful should a legal challenge arise in the future. Moreover, the findings should correlate with the conclusions ultimately made. A quality assessment must be thorough, objective, well considered and unbiased. Assessors should proceed cautiously and be alive to issues of undue influence.

50. *Ibid.*

51. *Ibid.*

Capacity to Contract

Since ILA is usually sought for entering into a contract or transaction such as a mortgage, guarantee or transfer of title, the ILA lawyer should be aware of the required factors to determine requisite decisional capacity.

There are no statutory criteria for determining the requisite capacity to contract. A cogent approach for determining requisite capacity to contract is at common law as set out in the Prince Edward Island, Supreme Court decision of *Bank of Nova Scotia v. Kelly*.⁵² Capacity to enter into a contract (including real estate transactions) is defined by:

- a) the ability to understand the nature of the contract; and
- b) the ability to understand the contract's specific effect in the circumstances.⁵³

In undertaking an analysis of the requisite capacity to contract, the determining factor is the person's ability to understand the nature and consequences of the specific contract. A person capable of entering into a contract has the ability not only to understand the nature of the contract but the impact on their interests.

In *Bank of Nova Scotia v. Kelly*, the court emphasized that a person entering into a contract must exhibit an ability to understand all possible ramifications of the contract. In the ruling, Nicholson J. concluded:

It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests*.⁵⁴

The criteria to be applied for determining the requisite capacity to contract are based on the principle that a contract requires informed consensus on the part of the contracting parties.

In *Royal Trust Co. v. Diamant*,⁵⁵ the court stated:

52. (1973), 41 D.L.R. (3d) 273, 5 Nfld. & P.E.I.R. 1, 1973 CarswellPEI 31 (P.E.I. S.C.).

53. *Supra*.

54. *Supra*, at p. 284 (D.L.R.) (emphasis in original).

The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.

The degree of mental incapacity which must be established in order to render a transaction *inter vivos* invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches v. Trimborn* (1946), 115 L.J.K.B. 305.⁵⁶

All persons who are 18 years of age or older are presumed to be capable of entering into a contract.⁵⁷ A person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract".⁵⁸

Capacity to Make a Gift

If an ILA lawyer has been asked to provide ILA with respect to a transaction that involves an *inter vivos* gift, the lawyer should be confident that the requisite capacity to make a gift is also met.

There are similarly no statutory criteria for determining the requisite capacity to make a gift. The common law factors that are applicable depend in part on the size and nature of the gift.

In general however, the criteria to be applied are the same as that applied to determine the capacity to enter into a contract. Therefore, the capacity to make a gift requires the:

- (a) ability to understand the nature of the gift; and
- (b) ability to understand the specific effect of the gift in the circumstances.

The law on capacity to make a gift has developed from the 1953 decision of *Royal Trust Co. v. Diamant*. In that case, the court held that an *inter vivos* transfer is not valid if the donor had "such a degree

55. [1953] 3 D.L.R. 102, 1953 CarswellBC 204, [1953] B.C.J. No. 126 (B.C. S.C.).

56. *Supra* at p. 6 (D.L.R.).

57. *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 at s. 2(1) (SDA).

58. SDA, s. 2(3).

of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction".⁵⁹

This approach was further supported in the case of *Re Bunio (Estate of)*.⁶⁰

A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it.

Citing earlier case law on the capacity to make a gift, the court in *Dahlem (Guardian ad litem of) v. Thore*⁶¹ stated:

The transaction whereby Mr. Dahlem transferred \$100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore. *On the authority of Kooner v. Kooner (1979), 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.* [Emphasis added].⁶²

Nature and Extent of Gift – A Factor

The determination of the requisite capacity to give a gift changes if the gift is significant in value, in relation to the donor's assets. In such cases, the applicable capacity criteria applied changes to that required for capacity to make a will, that is to say, testamentary capacity.

In the English case of *Re Beaney*,⁶³ the judge explained the difference in approach regarding the capacity to give gifts, or to make gratuitous transfers as follows:

At one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on an intestacy, then the degree of

59. *Royal Trust Co. v. Diamant*, [1953] 3 D.L.R. 102, 1953 CarswellBC 204, [1953] B.C.J. No. 126 (B.C. S.C.).

60. 2005 ABQB 137, 15 E.T.R. (3d) 81, 138 A.C.W.S. (3d) 199 (Alta. Q.B.) at para. 4, additional reasons 2005 ABQB 258, 15 E.T.R. (3d) 89, 138 A.C.W.S. (3d) 627.

61. (1994), 2 E.T.R. (2d) 300, 47 A.C.W.S. (3d) 440, [1994] B.C.J. No. 809 (B.C. S.C.), additional reasons (1994), 50 A.C.W.S. (3d) 392, 1994 CarswellBC 1903.

62. *Supra*, at para. 6.

63. [1978] 2 All E.R. 595 (Eng. Ch. Div.).

understanding required is as high as that required to make a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.⁶⁴

While the judge in *Re Beaney* imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. In an even earlier case, *Mathieu v. Saint-Michel*,⁶⁵ the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value.⁶⁶ The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it be less than the entirety of the estate, then the standard for capacity required reaches testamentary capacity in order for the gift to be valid.

The law on *testamentary capacity* is established in common law. The legal criteria for determining the requisite capacity to make a will was established in the 1800s by the English case of *Banks v. Goodfellow*.⁶⁷ Testamentary capacity is defined as the:

- (a) ability to understand the nature and effect of making a will;
- (b) ability to understand the extent of the property in question; *and*
- (c) ability to understand the claims of persons who would normally expect to benefit under a will of the testator.⁶⁸

In order to make a valid will, a testator need not have a detailed understanding of the factors required. The testator requires a "disposing mind and memory", which is defined as a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like".⁶⁹

However according to Shulman et al.⁷⁰ (Kenneth I. Shulman,⁷¹ Susan G. Himel,⁷² Ian M. Hull,⁷³ Carmelle Peisah, Sean Amodeo and Courtney Barnes), the following is a list of the proposed criteria

64. *Supra*.

65. [1956] S.C.R. 477, 3 D.L.R. (2d) 428, 1956 CarswellQue 36 (S.C.C.).

66. *Supra*, at p. 487 (S.C.R.).

67. (1870), 39 L.J.Q.B. 237, [1861-73] All E.R. Rep. 47, L.R. 5 Q.B. 549 (Eng. Q.B.).

68. *Banks v. Goodfellow*, *supra*, at pp. 566-567 (L.R. 5 Q.B.); *Leger v. Poirier*, [1944] S.C.R. 152 at p. 153, [1944] 3 D.L.R. 1, 1944 CarswellNB 11 (S.C.C.).

69. *Leger v. Poirier*, *supra*, at p. 153 (S.C.R.).

70. "Banks v. Goodfellow (1870): Time to Update the Test for Testamentary Capacity" (2017), 95 Can Bar Rev. 251.

for an updated test of testamentary capacity that assesses whether a testator with a specific level of cognitive abilities has the capacity to execute a particular will, in a particular life context at a particular time:

The testator must be:

1. capable of understanding the act of making a will and its effects;
2. capable of understanding the nature and extent of their property relevant to the disposition;
3. capable of evaluating the claims of those who might be expected to benefit from his estate, and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator's life situation;
4. capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wishes or prior wills; and
5. free of a mental disorder, including delusions, that influences the distribution of the estate.

UNDUE INFLUENCE and ILA

The doctrine of undue influence is an equitable principle used by courts to set aside certain *inter vivos* transactions, that, because of the influence on the mind of the donor, the mind falls short of being wholly independent.

Lawyers, including ILA lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions about 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.

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.⁷⁴

71. M.D., F.R.C.P.C., Professor of Psychiatry, Sunnybrook HSC, University of Toronto.

72. Justice, Ontario Superior Court of Justice.

73. B.A., LL.B., Partner, Hull & Hull LLP.

74. *Allcard v. Skinner* (1887), 36 Ch. D. 145 at p. 171, 56 L.J. Ch. 1052, [1886-90] All E.R. Rep. 90 (C.A.). See also John Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) ("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.

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 evidentiary 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".⁷⁵

Actual Undue Influence

Actual undue influence occurs where intent to make a 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 those "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating".⁷⁶ Actual undue influence would occur where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.⁷⁷ 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 proved by circumstantial evidence.⁷⁸

Presumed Undue Influence

This second class of influence does not depend on proof of reprehensible conduct. Under this class, equity will intervene as a matter of public policy to prevent the influence that exists in certain relationships from being abused.⁷⁹

Relationships that qualify as a "special relationship" are often determined by a "smell test".⁸⁰ Does the "potential for domination inhere in the relationship itself"?⁸¹ Relationships where presumed undue influence has been found include solicitor and client, parent

75. *Fountain Estate v. Dorland*, 2012 BCSC 615, 214 A.C.W.S. (3d) 653, 2012 CarswellBC 1180 (B.C. S.C.) at para. 64 citing in part *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.) at para. 45.

76. *Allcard v. Skinner*, *supra*, footnote 74 at p. 181 (Ch. D.).

77. *Allcard v. Skinner*, *supra*; *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.) at para. 6.

78. Poyser, *supra*, footnote 74 at p. 492.

79. *Ogilvie v. Ogilvie Estate* (1998), 21 E.T.R. (2d) 237, 172 W.A.C. 55, 49 B.C.L.R. (3d) 277 (B.C. C.A.) at para. 14.

80. Poyser, *supra*, footnote 74 at p. 499.

and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization”.⁸² However, even close, traditional relationships (such as parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination,⁸³ such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.⁸⁴ The relationship between the degree of influence exerted and the extent of the cognitive or emotional vulnerability must be examined.

Once a presumption of undue influence is established, the onus moves to the person alleging a valid gift to rebut it. The donor must be shown to have entered into the transaction as a result of his or her own “full, free and informed thought”.⁸⁵ 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 her 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.⁸⁶

The presumption of undue influence can be rebutted by showing that:⁸⁷

81. *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.) at para. 42.
82. *Supra*, at para. 42.
83. See *Elder Estate v. Bradshaw*, 2015 BCSC 1266, 12 E.T.R. (4th) 73, 256 A.C.W.S. (3d) 498 (B.C. S.C.) at para. 108, additional reasons 2015 BCSC 1807, 12 E.T.R. (4th) 109, 259 A.C.W.S. (3d) 38, 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”.
84. *Stewart v. McLean*, 2010 BCSC 64, 54 E.T.R. (3d) 59, 184 A.C.W.S. (3d) 1024 (B.C. S.C.); *Modonese v. Delac Estate*, 2011 BCSC 82, 65 E.T.R. (3d) 254, 196 A.C.W.S. (3d) 1211 (B.C. S.C.) at para. 102, affirmed 2011 BCCA 501, 73 E.T.R. (3d) 159, 534 W.A.C. 33 (B.C. C.A.), additional reasons 2012 BCCA 21, 73 E.T.R. (3d) 163, 534 W.A.C. 33 at 34, additional reasons 2012 BCCA 74, 73 E.T.R. (3d) 165, 534 W.A.C. 33 at 35.
85. *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.) at para. 45.
86. Poyser, *supra*, footnote 74 at p. 509.
87. From *Zeligs Estate v. Janes*, 2015 BCSC 7, 248 A.C.W.S. (3d) 727, 2015 CarswellBC 6 (B.C. S.C.), affirmed 2016 BCCA 280, 402 D.L.R. (4th) 88, 70 R.P.R. (5th) 183 (B.C. C.A.), citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64, 54 E.T.R. (3d) 59, 184 A.C.W.S. (3d) 1024 (B.C. S.C.) at para. 97.

- a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;⁸⁸
- b) the donor had *independent legal advice* or the opportunity to obtain independent legal advice;⁸⁹
- c) the donor had the ability to resist any such influence;⁹⁰
- d) the donor knew and appreciated what she was doing;⁹¹ or
- e) undue delay in prosecuting the claim was a factor, or acquiescence or confirmation by the deceased.

The presumption of undue influence may also be rebutted by the presence of ILA as noted in *Inche Noriah v. Shaik Allie Bin Omar*.⁹²

It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing.⁹³

COURT DECISIONS, ILA AND THE LAWYER'S STANDARD OF CARE

While there are several cases discussing solicitor's negligence for failing to *recommend* ILA, there is little jurisprudence in the area of negligence arising from the failure to provide *adequate* ILA.⁹⁴ I will now canvass some case law discussing the adequacy of ILA purported to be given. The summaries focus on actions taken by the lawyers.

88. *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 at p. 379, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.); *Longmuir v. Holland*, 2000 BCCA 538, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29 (B.C. C.A.) at para. 121.

89. *Goodman Estate*, *supra*, at p. 370; *Longmuir*, *supra*, at para. 121.

90. *Calbick v. Wolgram Estate*, 2009 BCSC 1222, 181 A.C.W.S. (3d) 196, 2009 CarswellBC 2359 (B.C. S.C.) at para. 64.

91. *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431, 7 E.T.R. (2d) 209 (S.C.C.) at para. 29.

92. (1928), [1928] 3 W.W.R. 608, [1929] A.C. 127, [1928] All E.R. Rep. 189 (Straits Settlements P.C.).

93. *Supra*.

94. *Lenz v. Broadhurst Main* (2004), 129 A.C.W.S. (3d) 206, [2004] O.T.C. 94, 2004 CarswellOnt 333 (Ont. S.C.J.), affirmed (2005), 142 A.C.W.S. (3d) 345, 2005 CarswellOnt 4416, [2005] O.J. No. 3903 (Ont. C.A.).

Clements v. Mair⁹⁵

A claim was brought by executors of an estate to set aside certain transfers of land made by the deceased prior to her death. The transfers were signed in the presence of a lawyer while she was a patient in a hospital, when she was 87 years old. A doctor testified that she “was mentally competent to the extent that she would understand the consequences of a business transaction to which she was a party” despite the fact that she was at times in a confused state, had poor vision, and was heavily medicated. Nurses’ notes in the hospital also had several references to “confusion” or “confused”.

The lawyer retained to provide ILA asked the woman’s daughter about the extent of her mother’s illness and then asked the daughter to leave the hospital room. The deceased gave the lawyer the legal description of the land she wanted to transfer and produced the required duplicate certificates of title. The lawyer and client discussed the effects of the transfers in provisions in her will. On his second visit to the hospital, the lawyer had the land transfers signed by the deceased. The lawyer read and explained the documents to the deceased. The lawyer described the deceased as “particularly cheerful” and “a spry 87-year-old determined person who was very much in charge of her own affairs”. It was the lawyer’s view that during his visits the deceased had capacity to discuss her affairs and to understand the nature of the documents which she executed. She not only knew the lands that she owned but was also clear in what she wanted to do with those lands. The lawyer was not acquainted with any of the family members before he met the deceased.

It was the court’s view that the lawyer conducted his dealing with the deceased in a very careful manner and that the deceased received independent legal advice that was capable of rebutting the presumption of undue influence as alleged. The court found that the nurses’ notes regarding “confusion” only showed that the severity of the deceased’s confusion would appear and disappear. Based on the lawyer’s evidence the court was not prepared to find that she was in a state of confusion when she executed the documents.

Gammon v. Steeves⁹⁶

An elderly couple in their 80s conveyed their home to their niece and her husband as well as a vehicle and some furniture. Later, the couple brought an action to have all of the items returned to them.

95. (1980), 2 Sask. R. 1, 2 A.C.W.S. (2d) 53, 1980 CarswellSask 239 (Sask. Q.B.).

At first instance, the court found that there was a presumption of undue influence and that that presumption had not been rebutted. At the time the documents related to the transfer of the deed to the house were signed, the elderly wife was suffering from senile dementia and the husband had cognitive impairments. The couple was brought by the niece from the nursing home to the niece's house to sign the documents. Evidence from a geriatrician was that the elderly wife would not have been able to understand the nature of the transaction. A lawyer was present at the home, arranged for by the niece, and who also acted for the niece and her husband. No effort was made by the lawyer to explain the exact nature of the deed. The lawyer smoked and had a coffee with the wife and had a "general" conversation for about 45 minutes but did not discuss the transaction. When the niece and her husband joined them, along with the elderly woman's husband, the lawyer simply said that the niece would be getting the property and then the elderly couple signed the document. The lawyer testified that they knew what they were signing; he "had no question at all" even though he did not speak to the couple alone.

The trial judge was not satisfied that the nature and effect of the transaction had been explained by an independent and qualified person. There was a failure on the part of the lawyer to explain the true nature of the transaction. The concern of the lawyer's lack of explanation was compounded by the age and health of the couple. The court noted that a lawyer must take sufficient steps to enable him or herself to satisfy the court that the grantor was fully aware of the circumstances and consequences of the act and that there was no undue influence. The transaction was set aside and this decision was upheld on appeal. On appeal the court stated:

The Courts are becoming increasingly, some may say overly, vigilant in protecting persons who dispose of property in such circumstances. The increasing number of such cases reflects, perhaps, the increasing institutionalization of the elderly as opposed to traditional methods of caring for them. *Whatever the cause, the frequency with which such transactions are now being attacked should remind the legal profession that those who act in such situations must not only satisfy themselves that those grantors are acting in the absence of undue influence, but that they may later have to satisfy others as well.* [Emphasis added.]

In cases such as this much depends upon the impression which the various witnesses make on the trial judge and it is important for us to remember that he had the advantage, which we do not, of observing witnesses while testifying.

96. (1987), 212 A.P.R. 397, 83 N.B.R. (2d) 397, 1987 CarswellNB 326 (N.B. C.A.).

Thus, I would not interfere with the trial Judge's disposition of the real property.⁹⁷

Bertolo v. Bank of Montreal⁹⁸

To assist her son in obtaining a loan from a bank in order to buy a restaurant, an elderly widow, Mrs. Bertolo, signed a promissory note and mortgaged her home. Mrs. Bertolo was not fluent in English and was unable to read and understand such documents as promissory notes. The bank insisted that the mother receive ILA.

Her son's restaurant failed a year later and the bank demanded that she pay the loan. Mrs. Bertolo sought an order declaring that the promissory note and mortgage were invalid. At trial Ms. Bertolo's order was granted. The bank appealed.

On appeal, the court examined the events surrounding the ILA which the mother received. She was asked by her son to accompany him and his wife to his lawyer's office concerning the restaurant. His lawyer (who was also the bank's lawyer) was instructed that the mother was to receive ILA. He then called in one of his law partners to give her the ILA. The partner made no notes and had no memory of his conversation with Ms. Bertolo. He could testify only as to what he would "usually do". He drafted a letter to the bank, which Ms. Bertolo signed, that stated that he had informed her of her legal obligations and she seemed to fully understand his advice and was participating in the loan of her own free will. Before she signed the note and mortgage she was told by the lawyer acting for her son and bank, "Don't worry, everything will be fine". At no time did anyone, either the bank manager or the lawyer or his partner, ever say she might lose her home and she got the impression that the business her son was buying was a good deal.

The Court of Appeal determined that the law partner who purported to give ILA should not have been asked to and should not have undertaken the responsibility. Adequate ILA was not provided to Mrs. Bertolo. In the absence of ILA, it could not reasonably be concluded that the transaction was adequately explained to her or that she fully comprehended its terms or that she made an informed decision to enter into it. In fact, she was not adequately advised of, and did not fully comprehend, the terms and potential consequences of the transaction.

97. *Supra*, at paras. 30 to 32.

98. (1986), 33 D.L.R. (4th) 610, 57 O.R. (2d) 577, 18 O.A.C. 262 (Ont. C.A.).

Bank of Nova Scotia v. Shaw⁹⁹

A wife acted as guarantor for certain business loans incurred by her husband's business. The husband defaulted on those loans and the bank sued and obtained a judgment against the wife pursuant to the guarantee. The wife appealed.

At the time the wife executed the guarantee, the bank provided a form of a certificate of legal advice to be executed by Mrs. Shaw and the lawyer advising her. Ultimately, this certificate was returned to the bank, signed by Mrs. Shaw and her lawyer, who had also acted as solicitor for the husband and his business (which was known to the bank). The lawyer attested that he had fully explained the nature and effect of the guarantee and that it was signed freely and voluntarily.

When the business collapsed and a lawsuit was commenced by the bank, the wife initially denied having any knowledge about the guarantee and denied having met the lawyer in connection with the documents. At trial the wife argued she was incapable of understanding the nature and effect of the guarantee owing to her limited command of English. She also claimed she lived in fear of her husband and signed the document under duress.

The trial judge found that the wife had in fact attended the lawyer's office and signed the guarantee and that she was "innocently confused" and "at the very least mistaken and in error". He did not consider her English skills to constitute a serious impediment to her ability to understand the nature and effect of the guarantee.

On appeal, the wife contended that it was not enough that she received advice, it had to be "independent" and in absence of that, the bank's claim was not enforceable. The Court of Appeal noted:

The purpose of obtaining "independent" advice is to purge the possibilities of a subsequent assertion of no consensus *ad idem*, or fraud, or duress, or unconscionable transaction. Those elements may well exist. In spite of independent advice it is conceivable that a guarantor might sign a document without understanding its import. But in a subsequent contest between the lender and the guarantor, the lender would be in a position to say, - we did all that was possible, and if the guarantor did not understand the fault lies with either the guarantor or the independent advisor. In that circumstance the claim based on the guarantee would ordinarily be valid, leaving it to the guarantor and the independent advisor to settle responsibility between them in separate litigation.

99. (1988), 52 Man. R. (2d) 129, 9 A.C.W.S. (3d) 412, 1988 CarswellMan 272 (Man. C.A.).

The Court of Appeal concluded that while the advice given to the wife was not independent, the trial judge was convinced that the advice was complete and proper. The wife claimed she was not given any advice at all, but the trial judge found on the evidence that she did receive advice, as he accepted the content of the certificate of legal advice.

Tulick Estate v. Ostapowich¹⁰⁰

In this case, an elderly man with questionable capacity made an *inter vivos* gift to a long-time friend and neglected to provide for his daughter who had special needs. Mr. Tulick had suffered a stroke and according to medical notes, showed signs of confusion, agitation and partial paralysis plus an earlier history of epilepsy. His doctor noted that he was agitated and displayed marked emotional instability. Mr. Tulick was confused at times but did have lucid periods. During these lucid periods he would give the impression that he was competent and able to function normally. It was the doctor's opinion that he would not have had the mental capacity to understand the nature and significance of making a substantial gift of property, or that he had capacity to appoint someone to look after his financial affairs. After the Public Guardian and Trustee had been appointed as his guardian of property, the PGT challenged the gift.

In discussing ILA, the court adopted the following passage from Halsbury as follows:

The duty of the independent advisor is not merely to satisfy himself that the donor understands the effect of and wishes to make a gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all circumstances of the case and if he cannot so satisfy himself, he should advise his clients not to proceed. If in fact such advice is given, it is not necessary however to prove that it was acted upon in order to rebut the presumption of undue influence.¹⁰¹

The court referred to *Inche Noriah* and noted that "[o]ne of the key tests laid down in the *Inche Noriah* case is to be satisfied that the adviser has ascertained all of the relevant background and facts before giving the advice".¹⁰²

100. (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381, 12 A.C.W.S. (3d) 190 (Alta. Q.B.).

101. 18 Halsbury, 4th ed., at para. 343.

102. *Tulick*, *supra*, footnote 100 at para. 29.

The lawyer satisfied himself that Mr. Tulick wanted to make the gift, that he "knew exactly what he was doing and that he had been thinking about this course of action before he had come to [the lawyer's] office". The lawyer also questioned Mr. Tulick as to whether anyone was exerting any pressure upon him to transfer the property and was satisfied with the answers that no one, and in particular, not his nephew, was pressuring him. However, the lawyer made no attempt to find out the nature and extent of any assets Mr. Tulick owned, what percentage of his assets he was giving away, and what effect such a gift might have on his ability to cope with future unexpected contingencies. He also made no attempt to determine how Mr. Tulick's daughter might be affected.

The court could not find that the lawyer "met the required tests of an independent adviser in that he did not make a full and complete inquiry into all of the relevant facts". The court did "not consider that [the lawyer's] conduct of the matter amounted to negligence in his role of a solicitor but . . . Tulick did not receive independent advice from [the lawyer]".¹⁰³ The court concluded:

In applying the requirements of independent advice to the facts in this case, the first point to make is that I have no doubt that the solicitor, Kawulich, was acting in good faith when he carried out the transfer of the property. However, the high standards still must be met if the public policy concern in this type of situation is to have any meaning.

With respect to the issue of capacity, the court noted that the doctor could not state from personal observation or the use of hospital records that Mr. Tulick was not capable to make a gift on the day he entered into the transaction. What the court had was evidence in the form of the testimony of the lawyer and the nephew as to his capacity to gift that day.¹⁰⁴

While the nephew was not able to rebut the presumption of undue influence by arguing that his uncle received ILA, he was able to rebut the presumption on other grounds and with evidence of other witnesses and the gift was upheld.

Canadian Imperial Bank of Commerce v. Dzeryk (Public Trustee of)¹⁰⁵

In this case, the trial raised the issue of whether guarantees signed by a deceased person were invalid because at the time of execution

103. *Tulick*, *supra*, footnote 100 at para. 29.

104. *Tulick*, *supra*, footnote 100 at para. 40.

she lacked the capacity to enter into a contract. Other issues included the defence of *non est factum* and undue influence.

The deceased had signed personal guarantees for loans made by the bank to her son and his wife. They defaulted on the loans and the bank sought to enforce the guarantees against the mother's estate as she had passed away. Another son of the deceased argued that the guarantees should be set aside as his mother lacked capacity to enter into the guarantees. The mother had very little financial experience as her husband had taken care of all of the finances for the family before he passed away. A few years prior to her signing the guarantees, the mother's mental condition deteriorated and she was taking large amounts of medication for diabetes and other ailments. She suffered from Alzheimer's disease and showed signs of progressive mental deterioration. Several medical experts testified but the court preferred the testimony of one doctor who stated that at the times the documents were presented to her she was still capable of understanding the documents she was signing.

The deceased had signed the guarantee before a lawyer and he signed a certificate as required by the *Guarantees Acknowledgement Act* of Alberta which stated: "I satisfied myself by examination of her that she is aware of the contents of the guarantee and understands it."¹⁰⁶ The lawyer's recollection of the circumstances in which the deceased came to see him was not good. He recalled acting for her, but his files had been destroyed for that period. He testified that he did not have any concern about her mental condition and that she "appeared to understand" the guarantee. He went through the guarantee with her and had no concern about her ability or that she was being coerced or pressured. His usual practice was to ask what a guarantee was and then explain the nature of a personal guarantee and of the possible consequences of default. He would have asked about her assets but not about her debts and would have told her that the bank, on default, could take her personal assets. He testified that she always knew who he was and why she was there. He testified that he would not have had her sign if he had had any concern and that she seemed "alert".¹⁰⁷

Based on all of the evidence, the court could not conclude that the deceased lacked capacity to sign the documents and had no criticism of the lawyer's actions.

105. (1993), 8 Alta. L.R. (3d) 86, 137 A.R. 352, 38 A.C.W.S. (3d) 672 (Alta. Q.B.).

106. *Supra*, at para. 49.

107. *Supra*, at paras. 49-51.

Scott v. Clancy¹⁰⁸

Wilbert Scott and his neighbours and friends, Kenneth and Lovane Clancy, consulted a lawyer because Wilbert wanted information concerning a transfer of his land to the Clancys. Wilbert left the meeting, having been given the options to think about it. The lawyer was initially advising and acting for both parties. On Wilbert's second visit, Wilbert was advised to consult another lawyer. The lawyer made such an arrangement. Overall the first lawyer was convinced that Wilbert wanted to sell his land, that he knew what he was doing and that he "did not perceive anything unusual about Wilbert's mental capability".

The lawyer who gave ILA advised Wilbert that he could get more money for his land and proceeded to give him his "King Lear warning", how he gave his kingdom away and was then thrown out. Wilbert told the lawyer that the Clancys had been good to him, had treated him very well and he wanted them to have his land. The lawyer discussed the price with him and stated categorically at trial that Wilbert knew he was selling the land. The ILA lawyer had been advised by Wilbert's sister that he had suffered a stroke but he did not perceive any problem with Wilbert's mental ability. He noted his physical impairment but found that it was not related to his mental ability. The lawyer stated: "despite his age and the stroke I felt he knew what he was doing" and "he was quite capable of telling me what he wanted". He described Wilbert as "strong willed". Wilbert told him he was concerned with his nephew's farming ability and was concerned that he would get his land. It was one of the reasons he was selling the land to the Clancys. The lawyer said he discussed with Wilbert the "moral issue" of having relatives to whom he could leave the land. And while he did not make any notations of this, the lawyer was also adamant that he discussed the consequences of non-payment and that cancellation proceedings concerning an agreement of purchase and sale were very expensive. He did not, however, raise or discuss issues of tax and he failed to ascertain Wilbert's financial circumstances except in a cursory way.

With respect to providing adequate ILA, the court concluded that the lawyer's "advice to Wilbert fell short of meeting the standards enunciated" in *Goodman, Inche Noriah and Tulick Estate*.¹⁰⁹

108. (1998), 16 R.P.R. (3d) 146, [1998] 6 W.W.R. 446, 164 Sask. R. 108 (Sask. Q.B.).

109. *Goodman Estate v. Geffen*, 1989 ABCA 206, 61 D.L.R. (4th) 431, 34 E.T.R. 132 (Alta. C.A.), additional reasons (1990), 67 D.L.R. (4th) 765, 37 E.T.R. 288, [1991] 5 W.W.R. 385 (Alta. C.A.), reversed [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97 (S.C.C.); *Inche Noriah v. Shaik Allie Bin*

Nonetheless, the court also found that there was no question that Wilbert understood the nature and terms of the agreement and the court was satisfied that the lawyer explained to Wilbert the consequences of the agreement. The lawyer's advice with respect to tax was deficient. The court went on to find that despite the deficient ILA it was nonetheless adequate in having Wilbert understand the nature and terms of the agreement and that he was acting of his own will and volition. The evidence established that when he executed the agreement of purchase and sale, Wilbert's "mental ability was fine and he acted with proper deliberation and as a free agent".

Orlando v. Toronto Dominion Bank¹¹⁰

In Orlando, a husband took out a loan with the bank to start a second business. The loan was secured by the matrimonial home which was solely in the wife's name. At no time did the bank contact the wife or speak to her about the nature of the loan, its purpose, or the proposed security. The bank forwarded the documentation to the husband's lawyer. The husband and wife attended the lawyer together where the document was reviewed and signed. The loan went into default and the bank took steps to realize on its security.

The court concluded there was no question that the wife did not receive ILA. But here the wife felt comfortable with the lawyer and the firm itself as it was the family's law firm. She never complained that the advice was improper and never objected to signing. Most importantly, she understood the nature and effect of the document. The court noted that while the wife did not have ILA:

it is difficult to understand where the unconscionability lies in these facts, because the wife understood the nature of the transaction and its consequences. The wife was not vulnerable and was not susceptible because of age, language, culture or education. Judgement against the wife stood. Therefore, she was liable.

The court concluded that "[p]eople are free to take risks and make bad deals, as long as they are aware of those risks and the possible adverse consequences".¹¹¹ Also that:

The purpose of requiring independent legal advice is to assure that there is an appreciation of the nature and consequence of completing

Omar (1928), [1928] 3 W.W.R. 608, [1929] A.C. 127, [1928] All E.R. Rep. 189 (Straits Settlements P.C.); and *Tulick Estate v. Ostapowich* (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381, 12 A.C.W.S. (3d) 190 (Alta. Q.B.).

110. (2001), 13 B.L.R. (3d) 268, 102 A.C.W.S. (3d) 1094, [2001] O.J. No. 349 (Ont. S.C.J.).

111. *Supra*, at para. 34.

a transaction with potential adverse results. However, where the understanding is complete without independent advice, the objective is still achieved and the purpose of the rule satisfied.¹¹²

Brandon v. Brandon¹¹³

This was a dispute over a family island. In brief, a mother set up a trust giving her entire 50% share of the island to one of the children of her son, James, despite the fact that all parties had agreed (or assumed) that her two sons would inherit the island in equal parts.

James and the mother's ILA lawyer argued that the mother set up the trust competently and of her own will and on the lawyer's ILA. The other son argued that the mother was unduly pressured by James. At trial the trust was declared invalid as James failed to rebut the presumption of undue influence. While the mother had legal advice, her lawyer failed to inquire fully into the underlying circumstances. When the idea of the trust first came up the mother was at the lawyer's office with James and his wife. The lawyer discussed the idea with all three present, and then with the mother alone for 30 minutes and then with all three again. The mother signed the trust document.

The lawyer testified (after a review of his notes) that the mother was mentally alert, healthy, somewhat deaf, and she lived in her own home. However, the lawyer was not aware of the degree to which she was dependent on her son James. For example, she suffered from some blindness and all of her mail was sent to James and was read by him. He did not make any inquiries as to her personal relationship with her children, daughters-in-law and grandchildren. Nor did he inquire into her current and future financial situation, which would have been reasonable in view of her age, and her physical infirmities (high blood pressure, congestive heart failure, blindness and deafness). It was clear, however, that he confirmed with her the details of the trust concept and ensured that she understood them. He testified that he was certain that mental incapacity was not an issue, and therefore no medical examination was considered. He did not inquire nor did he know how the mother's legal bills were being paid.

The trial judge was not satisfied that the ILA given to the mother was "of the breadth and depth sufficient" to rebut the presumption of undue influence:

112. *Supra*, at para. 35.

113. (2003), 6 E.T.R. (3d) 210, 127 A.C.W.S. (3d) 549, 2003 CarswellOnt 4828 (Ont. C.A.), leave to appeal refused (2004), 197 O.A.C. 399n, 331 N.R. 396n, 2004 CarswellOnt 2294 (S.C.C.).

In this case, Frederick Hacker is a respected and able solicitor of many years' experience. Yet in a situation where he knew of the potential for undue influence, his legal advice went only so far as to see that Clara Brandon understood what she was doing. Despite the warning signs conceded by him, he failed to inquire into her circumstances fully so as to understand the degree to which even information reaching her was under another's control.¹¹⁴

The trial decision was upheld on appeal, however on dissent Justice Abella had this to say with respect to the ILA lawyer:

... it was an error to find that [the ILA lawyer's] duty included making enquiries of others to see if there was a sound factual basis for her views. This raises the threshold too high. [The lawyer] who had been introduced to her by [her non-influencing son, Gordon] several months earlier, spent an appropriate amount of time with [the Mother] and satisfied himself that she understood the terms of the documents. He also concluded that her reasons for the disposition to her grandson were genuine and independently made, particularly her concern that the island remain in the Brandon name, that Gordon could lose his share of the island to creditors, and that Gordon might dispose of his share to his friend, a Midland Business man. [The lawyer] was not obliged to do any more than he did.

.....

[The mother] was entitled to divide the property as she saw fit. In the absence of any evidence rebutting her evidence, or any adverse finding of credibility, it was, with respect, a reversible error for the trial judge to disregard her evidence or that of [the lawyer]. Just because James was her more attentive son and she had a closer relationship with him, does not, in these circumstances, disentitle her to favour his family over her other son's. I am satisfied any presumption has been thoroughly rebutted.¹¹⁵

Cope v. Hill¹¹⁶

A 72-year-old man, who suffered from clinical anxiety and depression and limited cognitive capacity (along with other undiagnosed and ongoing physiological illness that created additional mental confusion) sold some property to another couple that he knew. Later, he brought an action to have the transaction set aside.

114. *Brandon v. Brandon*, *supra*, at para. 119.

115. *Supra*, at paras. 4-6.

116. 2005 ABQB 625, 2005 CarswellAlta 1514, [2005] A.J. No. 1413 (Alta. Q.B.), affirmed 2007 ABCA 32, 155 A.C.W.S. (3d) 1240, 2007 CarswellAlta 86 (Alta. C.A.), leave to appeal refused (2007), 438 W.A.C. 399n, 440 A.R. 399n, [2007] S.C.C.A. No. 138 (S.C.C.)

The couple defended the action saying he had ILA, there was no undue influence, and the transaction was not unconscionable. The trial judge agreed with the couple.

The trial judge stated that the "function of independent legal advice is to remove a taint. A lack of independent legal advice does not in itself invalidate a transaction". The judge also said that the:

nature and circumstances of a situation will dictate what constitutes adequate independent legal advice for purposes of that situation. The case law identifies two types of independent legal advice a) advice as to understanding and voluntariness; and b) advice as to the merits of a transaction. The two types may overlap such that advice as to understanding the nature and consequence of a transaction may well constitute, at least in part, advice as to the merits of the transaction.¹¹⁷

The trial judge found that the ILA lawyer provided independent and impartial legal advice. The lawyer met with Cope and went over the details and discussed the purchase price and Cope advised him that he was comfortable with the price. The lawyer had known Cope for several years and that from a health perspective he looked the same as he always did, he was never a robust man.

The lawyer also satisfied himself that Cope was competent to make the sale (although the decision does not say how he satisfied himself), and that he was acting voluntarily and understood and agreed with the terms of the sale transaction. He also provided some "objective advice" on the merits or prudence of the sale transaction.

The trial decision was upheld on appeal with the Court of Appeal noting in that the trial judge:

considered that Cope's counsel discussed the transaction with Cope to ensure that he voluntarily entered into it and that he understood that the price was for less than fair market value. Neither Cope's lawyer nor his accountant observed any evidence to suggest that Cope suffered from disability such that he did not properly comprehend the nature of the transaction . . . These determinations are all supported by evidence and, mindful of the burden of proof, the trial judge did not err palpably in making them.¹¹⁸

Webb v. Tomlinson¹¹⁹

The issue in *Webb* was the extent of a lawyer's obligation in providing ILA to a client who mortgaged her home in order to lend money to her ex-husband for his business venture. The ex-wife

117. *Supra*, at para. 209.

118. *Supra*, at paras. 19-20.

sought and obtained ILA before entering into the transaction. The ex-husband's business venture did fail and the ex-wife was forced to sell her home. She sued her ILA lawyer.

The court asked:

Is it sufficient that the client understands the nature and consequence of the mortgage agreement and, in particular, that she may lose her home if her ex-husband fails to make the mortgage payments? Or is the lawyer also required to make clear that business ventures are inherently risky and her ex-husband's business venture could fail?¹²⁰

Justice Belobaba discussed ILA in this context:

Banks typically require mortgagors to obtain ILA in order to prevent later claims of *non est factum*, undue influence or unconscionability. The lawyer that is retained to provide ILA is required to ensure that *the mortgagor fully understands the nature and consequences of entering into a mortgage transaction and is doing so voluntarily*. Once the mortgage is explained and the risks of non-payment and the possibility of losing the property that is being secured are understood, and the mortgagor signs the ILA Certificate, she is free to do as she wishes. [Emphasis added.]¹²¹

With respect to the ILA lawyer, Justice Belobaba was satisfied with his actions and accepted his evidence over that of the applicant. The lawyer had used a checklist for ILA recommended by the lawyers' professional indemnity company (LawPro); he took notes; met with her alone; and was fully satisfied that she was signing the documents of her own free will and that she understood the consequences of doing so, in particular that she might lose her home:

. . . I accept the evidence of [the lawyer] as based on his Checklist and his hand-written notes. I find that [the lawyer] fully satisfied all of the requirements for ILA . . .

The case law is clear that lawyers providing ILA in the execution of a mortgage loan are generally not required to go beyond the mortgage transaction to assess the financial feasibility of how the mortgage funds will be used. Lawyers giving ILA are required to explain the prospective mortgagors the legal responsibilities and liabilities arising from the execution of the mortgage. They are not required to give business advice: see *Fasciani v. Banca Commerciale Italiana of Canada*, [1996] O.J. No. 2631 (Gen. Div.) at para. 26 and *Accurate Fasteners Ltd. v. Gray* [2005] OJ No 4175 (S.C.J.) at para. 11.¹²²

119. 2006 CarswellOnt 3327, [2006] O.J. No. 2172 (Ont. S.C.J.), additional reasons 2006 CarswellOnt 4259

120. *Supra*, at para. 1.

121. *Supra*, at para. 24.

.....

In these cases, if ILA is provided to the mortgagor and the latter fully understands the nature and consequences of what she is about to do, and is clearly acting on her own free will, then the job of the independent legal advisor is done. As was said many years ago by the English Court of Appeal in *Coomber v. Coomber*:¹²³

"It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing."¹²⁴

There was nothing further that the ILA lawyer could or should have done. He did not breach the standard of care in providing ILA.

Cowper-Smith v. Morgan¹²⁵

This case provides helpful guidance on what to do (and not to do) when a lawyer is asked to provide ILA in the estates context, and red flags for undue influence are raised. 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 title with her daughter. The plaintiffs, her two sons, alleged (among other things) that the transfer of the property and investments into joint tenancy 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". 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

122. *Supra*, at para. 34.

123. [1911] 1 Ch. 723 (C.A.) at p. 730.

124. *Webb v. Tomlinson*, 2006 CarswellOnt 3327, [2006] O.J. No. 2172 (Ont. S.C.J.) at para. 37, additional reasons 2006 CarswellOnt 4259 (Ont. S.C.J.).

125. 2015 BCSC 1170, 10 E.T.R. (4th) 218, 255 A.C.W.S. (3d) 798 (B.C. S.C.), reversed in part 2016 BCCA 200, 400 D.L.R. (4th) 579, 19 E.T.R. (4th) 225 (B.C. C.A.), additional reasons 2016 BCCA 509, [2017] 5 W.W.R. 288, 93 B.C.L.R. (5th) 244, leave to appeal allowed (2016), 2016 CarswellBC 3418 (S.C.C.).

the daughter's, she arranged to have the mother meet with another lawyer for ILA. 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. However, the ILA lawyer did not ask about the mother's assets or whether she understood the financial implications of the transfers.

The court found the daughter was an unreliable and unbelievable witness, and that she was hostile, argumentative and evasive. 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:

- 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 for advice about letters she wanted to write to her sons, the letters were written jointly by the mother and daughter and were sometimes in the daughter's 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, looked after her investments, and 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, she could not have unduly influenced her mother. The daughter also argued that the mother had ILA. However the evidence did not satisfy the court on a balance of probabilities that the transfer of the property and investments into joint names was the result of the mother's "full, free and informed thought":

- 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 into joint tenancy 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 lawyer the wisdom of the proposed transaction or other options where she could achieve her objective with less risk.

The court concluded that the transfers completed were as a result of undue influence and ordered them to be set aside.¹²⁶

On appeal to the British Columbia Court of Appeal, in upholding the lower court's finding that the presumption of undue influence was not rebutted by the ILA provided (or otherwise), the Court of Appeal noted that:

Assessing the adequacy of the legal advice given is a fact-specific inquiry. It does not reduce to any precise test. In some circumstances, it may require advice on only the nature and consequences of the transaction. However, where concerns or allegations of undue influence arise, generally there will be a need to give "informed advice" on the merits of the transaction.¹²⁷

The court agreed that the ILA lawyer in this case did not give the type of "informed advice" that is required when there is a concern about undue influence, namely that "[the mother] should have carefully considered proceeding with this course of action, which in the absence of any rationale reasons, might be found after her death not to be just and fair to the respondents".¹²⁸

Despite the Court of Appeal agreeing with the trial judge with respect to the undue influence ruling, the appeal was allowed in part

126. *Supra*, at para. 105.

127. See *Cope, supra*, footnote 116 at paras. 213-215, citing *Brosseau v. Brosseau*, 1989 ABCA 241, 63 D.L.R. (4th) 111, 23 R.F.L. (3d) 42 (Alta. C.A.) at paras. 22-23; *Coomber v. Coomber*, [1911] 1 Ch. 723 (C.A.); and *Wright v. Carter* (1903), [1900-03] All E.R. Rep. 706, [1903] 1 Ch. 27 (C.A.) at pp. 57-58 (Ch.) (emphasis added).

128. *Cowper-Smith v. Morgan, supra*, footnote 125, at para. 65.

with respect to a claim for proprietary estoppel. Leave to appeal this decision to the Supreme Court of Canada was recently granted.¹²⁹

CONCLUSIONS

In providing ILA a lawyer must meet the standard of a competent lawyer and ensure the client understands the nature and effect of the transaction and its consequences, and is entering the transaction freely and of their own volition. An ILA lawyer must be satisfied, or take steps to sufficiently determine, that the client has the capacity to enter into the transaction and is doing so free of any undue influence.

Some best practices as gleaned from the decisions reviewed:

- Take notes during your meeting with the client and make a written record of your meeting.
- Consider writing a brief reporting letter that covers the essential matters that you discussed, including the nature, extent and scope of services that you have provided.
- To give proper ILA you need proper, full and adequate information: Be sure to cover the reasons for the transaction, your client's financial situation, and relevant family dynamics.
- Ask your client for their understanding of the effect of the transaction or agreement, so that you can correct any inaccuracies.
- If your client is elderly or vulnerable, take appropriate care to satisfy yourself that they understand the nature and consequences of what they are signing.
- Do they have capacity to enter into the transaction? Make notes of any concerns and refuse to act if you do not believe they have capacity. Consider a referral to a qualified assessor of capacity and not a general practitioner, who is often and likely not aware of the criterion for assessing decisional capacity at law.
- Are there age, language, sight, hearing or physical limitations? Do accommodations need to be made?
- Also, remember that even if someone is mentally capable, they still might be vulnerable to undue influence by a relative, friend, caregiver, acquaintance, church member, accountant, and neighbour, amongst others.
- No one else should be present in the meeting but the client. Meet with ILA client alone.

129. (2016), 2016 CarswellBC 3418, 2016 CarswellBC 3419 (S.C.C.).

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