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INTER VIVOS VERSUS TESTAMENTARY UNDUE INFLUENCE: ORIGINS, DIFFERENCES, AND RECENT DEVELOPMENTS

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I. INTRODUCTION

This article will examine the historical developments, current law, and modern developments applicable to undue influence in two contexts:

(1) the rules that developed in courts of probate applicable to testamentary instruments; and
(2) the equitable doctrine of undue influence that developed in the courts of Chancery applicable to gifts and other *inter vivos* wealth transfers.

II. HISTORICAL CONTEXT AND OVERVIEW

1. Evolution of Two Sets of Rules

Two very different sets of rules developed dealing with "undue influence," one set applicable to wills and other testamentary dispositions, and a second set applicable to gifts and other *inter vivos* dispositions. These rules evolved in two different court systems. One set developed in the courts of equity; the other, in the courts of probate.

2. Clear Rationale for Differing Approach

There is clear rationale for the differing approach. Gifts during life are very different from gifts at death. Put simply, you cannot impoverish a dead person. Food, shelter, and financial security become non-issues after a person draws his or her last breath. Everyone must give away all of their assets at death. It is inevitable. The only choice is to do so testate or intestate. The power to confer wealth tempts family and peers to jockey for testamentary position. Doing so may not be pretty, but it is completely natural. Probate judges were willing to allow active

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pressure in efforts to press and persuade testators. Probate judges were indulgent with prospective heirs who were enthusiastic. The natural tendency to jockey for position was in fact treated as a coin with two sides. On one side, a son who was poor could legitimately argue for a larger share of inherited wealth, or a faithful neighbour, helping a shut-in, could suggest a bequest instead of accepting pay. On the other side of the coin, testamentary freedom amounted to a form of power during life. That power would be wielded by elderly will-makers to get better and more attentive treatment from family, friends and neighbours hoping to inherit.[1]

By contrast, a living person can be impoverished. A person stripped of assets is generally a person stripped of financial security. That was particularly the case in England in the 1800s before the onset of government pension plans and modern welfare regimes.[2] Further, unlike the inevitable situation at death, no one has to give away all of their assets during life. Doing so is very rare. It cries out for an explanation in a way that making a will does not. Where a person gives away all, or, substantially all of his or her wealth, the person receiving it comes, accordingly, under close scrutiny. Pressure and enthusiasm in persuading a living person to impoverish themselves was readily viewed by the courts of equity as predatory. Thus, while probate courts came to be permissive with wills, courts of equity came to be restrictive with gifts. Probate was indulgent, equity was guarded. Judges in equity viewed potentially impoverishing gifts with suspicion. Gifts were readily declared voidable when caused by over-enthusiastic pressure exerted by persons wanting to become rich at the expense of making his or her gift-maker poor.[3]

1. *Laramée v. Ferron*, 1909 CarswellQue 20, 41 S.C.R. 391 (S.C.C.), at para. 56, where the court stated, cynically perhaps, that:

   > To deprive lightly the aged . . . of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

   It has become a cultural trope, with extended family struggling to curry favour with the wealthy dowager aunt.
2. The ability to send people to debtors' prison was not abolished in England until *The Debtors' Act, 1869*, 32 & 33 Vict. c. 62. A vivid picture of the terrible conditions in debtors prison in England in the 1800s was painted by Charles Dickens in the novel *Little Dorritt* (London: Bradbury and Evans, 1855-1857).
3. The treatment given to the topic here is brief. A broader and more detailed effort can be found in John E.S. Poyser, *Capacity and Undue Influence*, 2nd

3. Chancery Protected the Living From Victimization

Courts of Chancery expressly adopted the role of protecting the living and championing the vulnerable. It was a role taken seriously. By 1875, the courts of Chancery had developed several tools to set aside major gifts. Those tools included unconscionable bargain (where the gift was the product of weakness),[4] unconscionable procurement (where the gift was the product of imperfect understanding),[5] equitable fraud (where the gift was the product of breach of equitable duty),[6] and, under discussion here, equitable undue influence (where the gift was the product of unconscionable pressure, manipulation, or trickery). Wealth transfers survived impeachment on those grounds in the courts of equity only where the wealth transfer

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ed. (Toronto: Thomson Reuters Canada, 2019), in chapters 5 ("Undue Influence as a Challenge to Wills") and 8 ("*Inter Vivos* Undue Influence"). This paper deals with the voluntary transfer of wealth from one person to another, without consideration, to be contrasted with mutual exchanges of value, dealt with in the law of contract. The legal rules applying to wealth transfer are not the same as rules applying to wealth exchange.

4. Unconscionable bargain involves a significant transaction made by a party suffering from a "special disadvantage" (such as failing mental powers in old age or other diminished capacity, English as a second language, unsophistication in business, illiteracy, etc). Canadian cases apply it to contracts for undervalue ("I transfer my house for $10,000.00"), but have hesitated to apply it to gifts ("I transfer my house for natural love and affection"). Courts have not been bashful to apply unconscionable bargain to outright gifts in the United Kingdom, Australia, and New Zealand. The correct legal view is that it applies to outright gifts. The Supreme Court of Canada just released a decision dealing with unconscionable bargain: *Uber Technologies Inc., et al. v. David Heller*, 2019 CarswellOnt 8196, [2019] S.C.C.A. No. 58 (S.C.C.). It deals with a contract for full value, not a contract of undervalue or an outright gift. It heralds a willingness to deploy unconscionable bargain in a flexible way.

5. An equitable tool recently resurrected for modern Ontario use in *Gefen v. Gaertner* (2019), 148 O.R. (3d) 229, 52 E.T.R. (4th) 42, 2019 CarswellOnt 17360, 2019 ONSC 6015 (Ont. S.C.J.) (appealed on grounds not impacting unconscionable procurement), and considered and positioned for modern use in Alberta in *Wasylynuk v. Bouma* (2018), 70 Alta. L.R. (6th) 288, 2018 CarswellAlta 384, 2018 ABQB 159 (Alta. Q.B.), affirmed 2019 CarswellAlta 1109 (Alta. C.A.), leave to appeal refused 2020 CarswellAlta 86, 2020 CarswellAlta 87 (S.C.C.) (appealed on grounds not impacting unconscionable procurement).

6. For a modern Canadian example of equitable fraud see *Roach v. Todd* (2018), 46 E.T.R. (4th) 49, 2018 CarswellOnt 14991, 2018 ONSC 5289 (Ont. S.C.J.). For an effort to deal with equitable fraud in expanded form, along with efforts to deal with all of the other equitable challenges referred to here, see chapters 8 and 9, Poyser, *supra*, footnote 3.

could be defended with evidence that the transaction was, in the final weighing, fair, just, and reasonable. There was no law against generosity, only against victimization. A donor was allowed to give away his or her wealth provided the donor was capable of entering the transaction fairly and had a real understanding of what he or she was doing. When those requirements were met, the gift-maker was left to his or her fate and suffered impoverishment without judicial intervention. Put another way, equity protected against victimization, not folly.[7]

The current law applicable to modern *inter vivos* equitable undue influence had been clearly roughed out if not locked down as early as 1887 when the English Court of Appeal issued its decision in *Allcard v. Skinner*.[8] Coercion was not required to set aside *an inter vivos* wealth transfer, only unfair pressure or improper conduct that tricked or mislead a gift-maker.[9] The language was broad and flexible. It was clear from the facts of that case that the merest puff of unfair pressure would be sufficient to declare a major gift to be voidable and reverse it.[10]

The English legal system was not alone in looking at major

7. A point made several times at a high level. See *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), per Lord Justice Lindley, stating that the core principle behind both branches of undue influence was not to save potential gift-makers from "folly" but instead to protect them "from being victimised by other people" at pp. 182-183, a policy statement repeated and endorsed by the Supreme Court of Canada by Wilson J. in *Goodman Estate v. Geffen* (1991), (*sub nom. Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353, 42 E.T.R. 97, [1991] 5 W.W.R. 389, 80 Alta. L.R. (2d) 293, 127 N.R. 241 (S.C.C.), at para. 99.
8. *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.).
9. *Allcard v. Skinner*, *supra*, footnote 8, at p. 181 (requiring only "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating.") and pp. 182-183 ("to protect people from being forced, tricked or misled in any way").
10. *Allcard v. Skinner*, *supra*, footnote 8. A woman joined a cloistered religious order that included a vow of poverty. If she wanted to join, she had to give away all of her worldly goods. She had inherited well and was wealthy. She could give her wealth to anyone she wanted but had to give it away. Like many others who had joined the order before her, she made a gift of her assets to the order itself to foster its charitable endeavours. Her fortune was used to build a hospital, with her knowledge and approval. Some of the fortune was left when she decided to leave the order and asked for the remainder back. Everyone had been honest with her. She was mentally capable. No one personally took advantage — the funds were truly used for laudatory charitable ends. Still, the order had rules: the sister superior spoke with the voice of God; everyone joining had to give away all they owned; and no one was allowed to seek advice from any lawyer or other person who was not a member of the order. The conduct of the religious order in formulating

inter vivos gifts with suspicion. Most modern legal systems have developed and deploy measures to control improvident gifting during life.[11] It grows out of a long legal tradition. Ancient Rome imposed a presumption of insanity around a person who gifted his or her wealth outside of the bloodline during lifetime.[12]

By the mid 1800s, gifts could be attacked in a variety of ways in England. Some attacks had been developed in Chancery, as noted above, while others had been developed in the common law courts. The requirements for a valid gift were capacity, intention, delivery and acceptance. A gift could be attacked in a common law court by alleging that any one or more of those elements were not present. A gift could also be attacked in a common law court by alleging coercion or fraud. All of those attacks were based in the common law and rendered a gift void. A gift immune to attacks at common law could still be attacked on equitable grounds in the Court of Chancery. Equitable attacks rendered gifts voidable. The suite of attacks in Chancery, listed earlier, included equitable undue influence, unconscionable bargain, unconscionable procurement, and equitable fraud. Equitable undue influence was just one

and imposing those rules was enough, by itself, to declare the gift voidable and reverse it.

11. That topic is given extensive treatment in Richard Hyland, *Gifts, A Study in Comparative Law* (Oxford: Oxford University Press, 2009), a textbook containing several hundred pages dealing with the law and sociology applicable to gifting in England, the United States, France, Italy and various other countries, full of examples of laws operating to restrict potentially impoverishing gifts. Hyland states (at p. 7):

    > Gift giving and Western law have been in conflict from the beginning. Since the first gift legislation . . . jurists have seen in gift giving a danger to family and society.

12. The Roman laws on point are given extensive treatment in the text by Hyland referenced above (he taught a law school half-course on the laws of ancient Rome). The rules enunciated here were summarized in *Bridgeman v. Green* (1757), 97 E.R. 22, Wilm. 58 (Eng. K.B.), at pp. 60-61 (Wilm.), at pp. 23-24 (E.R.). The Romans had a second reason to curtail *inter vivos* gifts. They had an inheritance tax (described in Edward Gibbon's six-volume tome *The History of the Decline and Fall of the Roman Empire* (London: Strahan & Cadell, 1776-1789)). It was surprisingly similar to the U.S. estate tax and the U.K. inheritance tax that survive today. The tax rate on assets was based on a percentage (just as the case with the modern variants), which ranged from 5% to 10% at various points in Roman history. There was an exemption fixed in an amount of gold or silver coins (similar again to the current exemptions fixed in U.S. dollars or British pounds). There does not appear to have been a gift tax. Ergo, a good reason to limit gifts — they eroded the tax base.

ground of attack in that larger suite. Each equitable attack had its particular bounds. Equitable defences such as laches and acquiescence could be argued across the board.

Independent advice has always been recognized as an effective measure to dispel the spectre of victimization. A lawyer or other person would meet with the gift-maker. A discussion would ensue around the basic operation of the wealth-transfer transaction and, more importantly, the risks it entailed, the objectives it served, and whether other means existed to achieve the same ends with lesser or no risk. The gift-maker would display the ability to understand all of those factors. All of this assumes that the common law hurdle of capacity had been cleared and left behind. The prospective gift-maker then had three basic choices. First, the gift-maker could balk. Second, the gift-maker could announce the intention to proceed. Third, the gift-maker could ask that the transaction be restructured to include protections.[13] The presence of intent was not at issue. A gift was intended. The question explored in the independent advice process was whether the gift was understood. If so, the risk of impoverishment was weighed out and voluntarily assumed. A wealth transfer in those circumstances might be folly, but was no longer seen to be victimization. Independent advice also shielded the person about to receive the gift. Otherwise, a large and impoverishing gift was a time bomb. The gift-maker might have a change of mind and demand the gift back.[14] The gift-maker might die and his or her heirs might impeach the gift. In either of those events, proof of independent advice, particularly from a lawyer, helped to defend the gift.[15] Most of the equitable attacks featured a presumption that placed an evidentiary burden on the gift-recipient, and

13. For example, a wealth transfer proposed as a gift "to avoid probate" might be restructured to couple it with an interest-free promissory note back, or an agreement for future support and assistance. The gift transaction might be replaced with an alter ego or other trust with a power to call back capital.
14. As was the case in *Allcard v. Skinner*, *supra*, footnote 8. The charity that received the gift was left with the costs of ligation, at trial and appeal, and a court order forcing it to return the gift to the maker. Add on a reputational injury — the Sisters of Mercy did not want to be known as an organization that takes financial advantage of young women. No charity wants that type of press.
15. The lack of independent advice was framed as a tipping point in *Allcard v. Skinner*. The religious order had a rule prohibiting the young woman from seeking independent advice. She testified that she would have sought advice from her brother if she had been able. The rule imposed by the religious order stopped her.

independent advice was useful in meeting the evidentiary burden. In the case of unconscionable procurement, the party attacking the gift would prove, first, that the gift was large and potentially impoverishing, and second, that the person who benefitted from it had been actively instrumental in causing it to be made. Upon proof of those two elements an evidentiary burden was placed on the gift-recipient to show that the gift-maker had a fair and conscionable understanding of the wealth-transfer transaction. Proof of independent legal advice fit the bill perfectly. In the case of unconscionable bargain, the party attacking the contract at undervalue, or gift, would prove, first, that the wealth transfer was large and potentially impoverishing, and second, that the transfer-maker suffered from some special disadvantage, whether it be low intelligence, inexperience, anxiety, or other factor making them unable to participate in the wealth transfer on an even footing. Upon proof of those two elements, an evidentiary burden fell on the person who took the advantage of the transaction to prove that it was fair, just and reasonable. Again, independent legal advice fit the bill perfectly. In the case of equitable undue influence by relationship, the party attacking the gift would prove, first, that the wealth transfer was large and potentially impoverishing, and second, that there was a relationship of trust and confidence between the gift-maker, who was subservient in the relationship, and the gift-recipient who was dominant. Upon proof of those two elements, an evidentiary burden fell on the person who took the advantage of the transaction to prove that it was fair, just and reasonable. Again, independent legal advice fit the bill perfectly. Independent legal advice, done properly, provided evidence of actual understanding and awareness as to the risks and options, both taken in context with the gift-maker's assets and future prospects. Independent advice has to be broad and probing to be effective in this context.[16] But done properly it amounted to a repellant that protected against a range of equitable attacks.

Only large and improvident transactions attract equitable

16. A point well-made in *Cope v. Hill*, 2005 CarswellAlta 1514, 2005 ABQB 625 (Alta. Q.B.), affirmed 2007 CarswellAlta 86, 2007 ABCA 32 (Alta. C.A.), leave to appeal refused (2007), 440 A.R. 399 (note), 2007 CarswellAlta 1192, 376 N.R. 394 (note) (S.C.C.). For another instructive case dealing with ILA in this context, see *Fowler Estate v. Barnes* (1996), 13 E.T.R. (2d) 150, 445 A.P.R. 223, 142 Nfld. & P.E.I.R. 223, 1996 CarswellNfld 169 (Nfld. T.D.), at paras. 45 and 46.

attention. Probate principles and common law principles are more mechanical. A want of capacity is a want of capacity regardless of the size of the transaction. Testamentary undue influence is testamentary undue influence regardless of the size of the transaction. The same is true of common law coercion, want of intention, or want of due execution.[17]

4. Probate Courts Protected the Testamentary Wishes of the Dead

While equity protected people during their lifetime, courts of probate protected their testamentary wishes after they died. If those wishes were thwarted, the dead person could not object when the wealth was devolving to the wrong heirs. Courts of probate adopted a self-sought and inherent jurisdiction to ensure true heirs inherited. A probate court could block a will or pronounce it valid at its own instance, even when no living person stepped forward to seek a grant of probate or object to one issuing.[18] The focus was on the protection of testamentary wishes, not protecting heirs *per se*, but the effect was the same. Only valid testamentary instruments were allowed to go to probate, and to be valid those instruments had to reflect the true intention of persons who made them. Testamentary undue

17. The principles applicable to knowledge and approval described elsewhere in this paper are also sensitive in some measure to the significance of the testamentary wealth transfer under consideration.

18. As expressions of this principle see oft-quoted remarks by Cullity J. in *Otis v. Otis* (2004), 7 E.T.R. (3d) 221, 2004 CarswellOnt 1643, [2004] O.J. No. 1732 (Ont. S.C.J.), at paras. 22-28 (extensively reviewing the law on point including current English cases), which remarks were endorsed by the Ontario Court of Appeal in *Neuberger Estate v. York* (2016), 395 D.L.R. (4th) 67, 129 O.R. (3d) 721, 16 E.T.R. (4th) 1 (Ont. C.A.), additional reasons 2016 CarswellOnt 6303 (Ont. C.A.), leave to appeal refused *York v. Neuberger*, 2016 CarswellOnt 14408 (S.C.C.). The Court of Appeal added its own commentary at para. 118:

> Probate is an *in rem* pronouncement that the instrument represents the testator's true testamentary intentions and that the estate trustee has lawful authority to administer the estate. Because of this, the court has a responsibility to ensure that only wills that meet the hallmarks of validity are probated. It owes that duty to the testators, whose deaths preclude them from protecting their own interests, to those with a legitimate interest in the estate, and to the public at large.

See *Adams Estate v. Wilson* (2020), 445 D.L.R. (4th) 484, 57 E.T.R. (4th) 1, 2020 CarswellSask 137, 2020 SKCA 38 (Sask. C.A.), at para. 42, leave to appeal refused *Charles Murray Wilson v. Daniel Peter Staples, in his capacity as the Executor of the Estate of Nellie Elizabeth Adams, Deceased, et al.*, 2020 CarswellSask 564, 2020 CarswellSask 565 (S.C.C.).

influence developed as one protective measure that could be employed to set aside wills and other testamentary instruments that failed to reflect that intention. Protecting testamentary wishes amounted to protecting true heirs.

There was no jurisdiction in courts of probate to use equitable tools. The courts of probate evolved not from the common law courts, and not from the courts of Chancery, but out of the ecclesiastical courts where the intersection between law and religion was regulated.[19] That separate lineage, by itself, is sometimes tendered as an explanation for the exclusion of the laws of equity from application to attacks on wills and for the different tools that were shaped to deal with *inter vivos* gifts versus testamentary ones. The functional explanation: gifts are very different from wills (a point discussed above). The historical explanation: the validity of wills was not the province of equity but dealt with in different courts. The functional explanation remains preferable. Even after the fusion of law and equity, when superior court judges came to enjoy two quivers, common law and equity, equitable attacks on gifts were never ported by judges across the legal divide between testamentary and *inter vivos* wealth transfers. Equitable attacks were not used to overturn a will in any authoritative case.[20] The best view is that the law treats *inter vivos* and testamentary gifts differently because they are different, not as an artifact of history.

Compared to gifts, there were fewer styles of attack that could be brought in an effort to overturn a will. The requirements for a valid will were capacity, knowledge and approval, and due execution. The absence of any of those

19. For an effort to outline the history of the probate courts, see Poyser, *supra*, footnote 3, at p. 138 *et seq*.

20. The precise principles used to define the divide being laid down with authority, in both England and Canada, by *Cock v. Cooke* (1866), L.R. 1 P.D. 241 (Eng. Prob. Ct.), at p. 243:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

In Canada, see *MacInnes v. MacInnes* (1934), [1935] 1 D.L.R. 401, [1935] S.C.R. 200, 2 I.L.R. 14, 1934 CarswellOnt 139 (S.C.C.). As additional Canadian authority on point see *Re Rogers* (1963), 39 D.L.R. (2d) 141, 42 W.W.R. 200, 1963 CarswellBC 51 (B.C. C.A.). For a more recent treatment of the topic at a high appellate level in England see *Baird v. Baird*, [1990] 2 All E.R. 300, [1990] 2 W.L.R. 1412, [1990] 2 A.C. 548 (Eng. P. C. (Trin. and Tobago).

ingredients made the will void. A will could be attacked in a court of probate by alleging that one or more of those ingredients were not present. A will could also be attacked by alleging that it was the product of testamentary undue influence. All of those methods of attack rendered a will void. Wills were never rendered voidable in courts of probate, and that treatment has continued to this day.

Independent legal advice has little role and is rarely mentioned in the law of probate.[21]

5. Two Spheres Kept Separate

The two types of wealth transfers, probate and *inter vivos*, can be thought of as two different spheres. Generally speaking, there was no comity — legal constructs in one did not cut across and apply in the other. The lone exception to that was mental capacity. Commencing in the early 1800s and continuing to the present, courts in England have repeatedly stated that the general approach and principles governing capacity apply equally in both spheres. The capacity test for a will, from *Banks v. Goodfellow*, may look different from the capacity test for a gift, from *Re Beaney*,[22] but both are variants of the same core test derived from *Ball v. Mannin*. That commonality was

21. For an example where ILA was discussed as a potentially beneficial step in the will making process see *Re McWilliams; Lidstone v. McWilliams* (1930), 1 M.P.R. 350, 1930 CarswellPEI 2 (P.E.I. C.A.), affirmed [1931] 3 D.L.R. 455, 1931 CarswellPEI 10 (S.C.C.). A person had been instrumental in causing a will-maker to make a will in his favour. ILA was raised as a way of defending the gift, to the advantage of the beneficiary (not the will-maker), from an attack on the will based on the doctrine of righteousness. The discussion on point is at paras. 23-28 of the Court of Appeal decision. ILA is necessary under professional codes of conducts where the will-maker wishes to confer a benefit on the drafting lawyer.

22. *Re Beaney*, [1978] 2 All E.R. 595, [1978] 1 W.L.R. 770 (Eng. Ch. Div.). The *Re Beaney* test has been adopted as the test for gifts in a variety of textbooks in both England and Canada. The court in *Re Beaney* is express in stating that the test is an extension of the test from *Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer). The flagship case in Canada for the *Re Beaney* test may be *MacGrotty v. Anderson* (1995), 9 E.T.R. (2d) 179, 1995 CarswellBC 825, [1995] B.C.J. No. 1857 (B.C. S.C.), at para. 20. Also see *Quallie v. Vandervelde* (2009), 45 E.T.R. (3d) 307 (B.C. S.C. [In Chambers]), at para. 9; *Lynch Estate v. Lynch Estate* (1993), 8 Alta. L.R. (3d) 291, 138 A.R. 41, 1993 CarswellAlta 301 (Alta. Q.B.), at para. 108; and *Egli (Committee of) v. Egli* (2004), 7 E.T.R. (3d) 308, 28 B.C.L.R. (4th) 375, 2004 CarswellBC 843, 2004 BCSC 529 (B.C. S.C.), at para. 25, additional reasons 2005 CarswellBC 1056 (B.C. S.C. [In Chambers]), affirmed 2005 CarswellBC 3014 (B.C. C.A.).

clear in the 1800s[23] and has been reinforced on a modern basis by several decisions in England over the last two decades, including two by the English Court of Appeal.[24] Various authors in Canada have suggested that capacity tests have no commonality — in essence taking the position that there is a patchwork of different capacity tests, applying to different acts, but without any unifying principle. It is not, with respect, the better view.[25]

While the capacity concept is properly viewed as unitary, and overarches both spheres, the other legal constructs are not. The law governing knowledge and approval is different than the law governing intent. One, knowledge and approval, is required as an element of a valid will or other testamentary wealth transfer. The other, intent, is required as an element in a valid gift or other *inter vivos* wealth transfer. The requirements for due execution are also different in the two spheres. For wills, execution requirements were set by wills legislation in the 1800s and involved *jurats* and witnesses. The mechanical requirements for the due execution of a gift or other *inter vivos* wealth transfer were developed by judges at common law and involved deeds, delivery, acceptance and seals. Wills had to be in writing, not so for gifts.

As discussed here, testamentary undue influence has almost no common features when compared to *inter vivos* equitable undue influence. The onus in each is on the party attacking the wealth transfer. After that similarity is considered, few common features remain, if any. This should be no surprise. There is little purpose in attempting the comparison. The equitable doctrine of *inter vivos* undue influence is not the counterpart for the

23. *Boughton v. Knight* (1873), L.R. 3 P.D. 64 (Eng. Prob. Ct.), at pp. 71-72 (a decision of Sir James Hannen).

24. *Masterman-Lister v. Brutton & Co. (No. 1)*, [2003] 1 W.L.R. 1511 (C.A.), at paras. 57 and 58, and *Hoff v. Atherton*, [2004] EWCA Civ 1554, [2005] W.T.L.R. 99, 2004 WL 2582631 (C.A. (Civ. Div.)). Canadian cases tend to steer away from this point. It is a useful conceptual addition and we await a bold court in Canada to follow the English lead.

25. For the general tests see *Ball v. Mannin*, *supra*, footnote 22, at p. 21 (cited to 3 Bli NS): a person has the capacity to perform a juridical act if they have the powers of mind to understand its nature and effect of the act if given the benefit of a general explanation. The concept of an overarching test is canvassed at Poyser, *supra*, footnote 3, at chapter 10 "Overarching Capacity Principles", p. 675. Deficiencies in the patchwork approach are outlined. The trend of appellate authority supports the overarching test model. This article is not the place to expand on any debate on point. The authors of this paper have been converts to the unitary test explanation.

testamentary doctrine. That point deserves attention but is rarely brought into sharp relief.

Testamentary undue influence does have parallel legal constructs across the divide in the sphere of *inter vivos* wealth transfers. Those constructs are common law coercion, and common law fraud, not equitable undue influence. Each of the two renders an *inter vivos* gift void. Common law coercion overbears the gift-maker's free will in the same way as testamentary undue influence by coercion. Common law fraud is based on intentional falsehood in the same way as testamentary undue influence by fraud. Those two common law constructs, taken together, are very similar to and arguably co-extensive with testamentary undue influence. Having said that, courts have never ported those legal constructs between the two spheres despite their commonality. They look and work the same, but are sourced differently and carry different labels. Unlike capacity, courts have not stated that any unitary construct is in play that overarches both spheres. Thus, cases in one sphere are best applied only within the sphere in which they developed.

As an aside, contracts do not fall squarely into either of the two spheres posited here. A voluntary transfer of wealth from one person to another with no or nominal consideration (a "wealth transfer" in the language of this article), is not the same as an exchange of property where the effort is to pass or exchange consideration both ways in roughly equivalent amount (a "wealth exchange").[26] The basic rules relating to *inter vivos* wealth transfers tend to apply to contracts, but differences are frequent enough that cases dealing with wealth transfer are dangerous if the effort is made to apply them to wealth exchange, and *vice versa*.

III. THE CURRENT LAW OF *INTER VIVOS* EQUITABLE UNDUE INFLUENCE

Equitable undue influence is an attack on a gift based not on an absence of intent, but on flawed intent. The person making

26. No effort is made here to canvass the differences in rules when a contract is under consideration. Unconscionable bargain developed to deal with contracts first, and only more recently has been applied to gifts. Capacity is only a ground where the capable person in the formation of the contract is aware that the other contracting party is incapable.

the wealth transfer intends to make it, but the attacker, seeking to overturn the wealth-transfer, attempts to convince the court that the transfer should be set aside as unconscionable or unfair. Equitable undue influence applies and renders a gift voidable given the presence of conduct that is wrongful or improper in some way. Expressed in terms suggesting culpability, courts describe the conduct as pressuring, misleading, cheating, or overreaching. Expressed in terms focused on outcome, courts speak of conduct that operates to preclude the gift-maker from the fair exercise of his or her independent judgment or free will.[27] The net is cast broadly and captures a wide range of behaviour, far wider than the narrow band of behaviour comprising the direct and overbearing coercion necessary to ground a claim of common law coercion. The leading Canadian cases on point remain the two treatments by the Supreme Court of Canada in *Bradley v. Crittenden*,[28] and in *Goodman Estate v. Geffen*,[29] both of which draw heavily on the English decision in *Allcard v. Skinner*.[30]

The net is cast even more broadly still if the transaction operates in the context of a relationship of trust and confidence. The presence of a special relationship of that character has three effects.[31] First, the relationship may make the barest whiff of predatory behaviour on the part of the dominant party or the smallest trace of unfairness on the part of the transaction sufficient for a finding that it is "undue" in the eyes of the law. Second, a relationship of trust and confidence can give rise to equitable duties, and duties can be breached by omission as well as commission. Thus, a dominant party who passively accepts a gift can be guilty of undue influence if he or she was under a duty to protect the vulnerable gift-maker and, failing in that duty, does not urge protective steps such as independent advice. Third, the presence of such a relationship also gives rise to an evidentiary presumption of undue influence. The presumption is a systematic willingness by the courts to presume that undue influence was exerted until the courts are satisfied by other evidence that undue influence was not in fact exerted or,

27. Older cases tend to use semantics involving culpability, and newer ones, outcome.
28. *Bradley v. Crittenden*, [1932] 3 D.L.R. 193, [1932] S.C.R. 552, 1932 CarswellAlta 75 (S.C.C.).
29. *Goodman Estate v. Geffen* (S.C.C.), *supra*, footnote 7.
30. *Allcard v. Skinner*, *supra*, footnote 8.
31. For a full development of this point see Poyser, *supra*, footnote 3, at p. 552.

alternatively, until satisfied that the gift itself can be defended as the voluntary act of a gift-maker able to exercise free and independent will.

At the end of the day, there is one weighing of evidence, regardless of whether a relationship is present. The transaction is voidable if the court, after that weighing, concludes on a balance of probabilities that the transaction was the product of undue influence. The legal onus to prove equitable undue influence is always on the attacker. The presumption, where available, merely assists the attacker in achieving that proof. The defender, in response, has to add evidence to the deliberative pot to strip the presumption of its inferential force in the face of a relationship that would otherwise, by its basic presence, allow the attacker to tip the scales and carry the day. That is an evidentiary onus, not a legal one.

Equitable undue influence has historically been divided into two types: actual undue influence; and undue influence by relationship (also called presumed undue influence).[32] That dichotomy has continued in Canada. It changed in England with *Royal Bank of Scotland Plc v. Etridge*.[33] The House of Lords made it clear that there was only one type of undue influence, just two different ways to prove it. The evidentiary presumption kicked into operation given the presence of a relationship of dependence, but the legal onus started with the attacker, who had to prove that undue influence was present, and remained on the attacker throughout the case. The party alleging equitable undue influence occurred had to prove it. The party defending the gift would, if the special relationship was present, run the risk that the existence of the relationship was enough, by itself, to prove that undue influence had in fact occurred. That created the practical demand to point to evidence that no undue influence was exerted or that the gift or other wealth transfer transaction was nonetheless fair, just and reasonable. The legal onus never shifted. The House of Lords made it clear that this was not viewed as a change in the law, just a better and clearer explanation of the law as it had always stood. The authors of *Snell's Equity*[34] engaged in extensive revisions to reflect the new conceptual approach. The summary

32. *Allcard v. Skinner*, *supra*, footnote 8, at p. 181.
33. *Royal Bank of Scotland plc v. Etridge* (2001), [2002] 2 A.C. 773, [2001] UKHL 44 (Eng. H.L.).
34. John McGhee, S. Elliott, S. Bridge, *et al.*, eds., *Snell's Equity*, 34th ed. (London: Sweet & Maxwell, 2020).

at the beginning of this section reflects this new conceptual approach. Canadian courts are free to follow the same conceptual refinement, but have yet to do so. We remain squarely in the "two-types" model. It is not helpful. The *Etridge* approach simplifies the law in this area.

To determine whether a given relationship triggers those effects, the test is determining whether the "potential for domination" naturally inheres in the relationship.[35] It is highly fact specific, and needs to be assessed on a case-by-case basis. The law in the 1800s focused on specific types of relationships that would normally qualify. Examples included solicitor and client, parent and child, and guardian and ward, but also included "other relationships of dependency which defy easy categorization."[36] However, even these close, traditional relationships do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination,[37] such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[38]

IV. THE CURRENT LAW OF TESTAMENTARY UNDUE INFLUENCE

Sir James Hannen provided a classic statement of testamentary undue influence in the 1885 decision *Wingrove v. Wingrove*:[39]

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

35. *Goodman Estate v. Geffen* (S.C.C.), *supra*, footnote 7.
36. *Goodman Estate v. Geffen* (S.C.C.), *supra*, footnote 7, at para. 42.
37. See *Elder Estate v. Bradshaw*, 2015 BCSC 1266 (B.C. S.C.), at para. 108 where the court found that the bare 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.
38. *Stewart v. McLean*, 2010 BCSC 64 (B.C. S.C.); *Modonese v. Delac Estate*, 2011 BCSC 82 (B.C. S.C.), at para. 102, affirmed 2011 CarswellBC 3463 (B.C. C.A.).
39. *Wingrove v. Wingrove* (1885), 11 P.D. 81 (Eng. Prob. Ct.), at p. 82.

The Privy Council made that the law of Canada in *Craig v. Lamoureux*,[40] and the Courts of Appeal in various provinces added their voices to the same effect.[41] A wealth of lower-level Canadian cases correctly identified and applied the law. Subject to one ripple (discussed below), the law applicable to testamentary undue influence was as settled and well known as the tenets of *Banks v. Goodfellow* applicable to testamentary capacity.

The anatomy of testamentary undue influence is simple and easy to understand. The legal burden is always on the person alleging testamentary undue influence. For a court to find testamentary undue influence, the conduct must amount to outright and overpowering coercion, forcing the will-maker to make a will containing gifts that he or she would otherwise not make. The conduct must overcome the free will of the will-maker. It can amount to actual force, or the threat of force, or other pressure, but must be irresistible. Some will-makers are able to resist coercion better than others. A person of strong and stubborn will is less likely to cave in. At the other extreme, a person who is weakened or debilitated for some reason is more likely to be coerced.[42]

As a nuance to that, coercion is distinct from persuasion. As noted earlier, courts of probate were willing to allow persuasion, even where the persuasion caused the will to be made, and even where the effort to persuade was earnest, hotly pursued, or "immoral" when considered by a person of fine conscience.[43] In

40. *Craig v. Lamoureux* (1919), [1920] A.C. 349, 1919 CarswellQue 2 (Jud. Com. of Privy Coun.).

41. In Ontario, see *Anderson v. Walkey* (1961), 27 D.L.R. (2d) 178, (*sub nom. Re Kaufman*) [1961] O.R. 289, 1961 CarswellOnt 91 (Ont. C.A.), at para. 25. In British Columbia, *Longmuir v. Holland* (2000), 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 81 B.C.L.R. (3d) 99, 2000 CarswellBC 1951, 2000 BCCA 538 (B.C. C.A.), at para. 71.

42. *Wingrove*, *supra*, footnote 39, at pp. 82-83:
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything.

43. *Wingrove*, *supra*, footnote 39, at p. 83:
> [E]ven very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, "this is not my wish, but I must do it".

other words, a prospective heir can suggest, advise, advocate, implore, beg, and even threaten, but no testamentary undue influence will be found unless those actions have overborne the will of the testator. A testator who decides that a proposed last will and testament is acceptable, and wants to sign it, has not been the victim of testamentary undue influence. Harbouring reservations changes nothing if there has been a weighing and a decision based on that weighing to embrace the contents of the will. A grudging decision is still a decision. It is only where the testator rejects the content of the will, as inappropriate and wrongful, but feels compelled to sign it anyway, that testamentary undue influence can be said to be made out. A seminal and widely cited expression of those principles was penned in 1868 by Sir J.P. Wilde in *Hall v. Hall*:[44]

> Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made … In a word a testator may be led not driven …

Testamentary fraud is a separate branch of undue influence. Testamentary undue influence by coercion, dealt with above, involves forcing a person to make a will that he or she does not want to make. Fraud operates differently. The will-maker is persuaded, and embraces the content of the proposed will, but that persuasion is the product of a fabric of lies. A will can be set aside when a person creates a web of falsehoods around a will-maker and then employs those falsehoods to persuade a testator to make or change his or her will. Put another way, persuasion is improper and not permitted if it is based on a foundation of intentional lies.[45] The two types of testamentary

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Also see *Boyse v. Rossborough* (1857), 10 E.R. 1192, 6 H.L. Cas. 2, 26 L.J. Ch. 256 (C.A.), per Lord Cranworth at p. 1212 (E.R.); *Hall v. Hall* (1868), L.R. 1 P.D. 481, 37 L.J.P. & M. 40 (Eng. P.D.A.); *Re McWilliams*, *supra*, footnote 21; *Parfitt v. Lawless* (1872), L.R. 2 P.D. 462 (Eng. P.D.A.).

44. *Hall v. Hall*, *supra*, footnote 43, at p. 482. The statement of law in *Hall v. Hall* joins that in *Wingrove*, *supra*, footnote 39, despite the antiquity of the two cases, in being quoted repeatedly and correctly in modern decisions as the settled statement of law in this area.

45. For the leading cases amounting to the foundation on point see: *Barry v. Butlin* (1838), 12 E.R. 1089, 2 Moo. P.C. 480 (England P.C.), at p. 484 (Moo. P.C.); *Allen v. McPherson* (1847), 1 H.L. Cas. 189 (Eng. H.L.), at pp. 207 and

undue influence are awkwardly drawn together as two variants of the same legal construct under the label "testamentary undue influence" by the purportedly unifying principle that, in each instance, the signed will is not a record of the volition and desires of the will-maker but instead a record of the volition and desires of the person exerting the influence. It would be just as easy to label them as two different types of attacks on a will, each distinct and without overlap. That has not, however, been the taxonomy adopted by the courts, which have historically described testamentary undue influence by coercion and testamentary undue influence by fraud as two variants of the same thing.

Testamentary undue influence by coercion has a narrow scope and, even within that scope, is hard to prove. While insinuation and manipulation are common, they do not trigger the doctrine. Outright and irresistible threats are rare. It is hard to prove that a will was caused by threats. Coercion happens in private and the testamentary predator makes every effort to hide it. The evidence necessary to prove it is rarely found. After litigation starts, cost consequences are threatened. Litigators plead it regularly, and almost as regularly retire from the field and withdraw it leading up to trial.

Testamentary undue influence by fraud is the easier of the two variants to prove. The will-maker carries a head-full of lies, and generally repeats the lies to friends and family. The predator is generally seen attempting to isolate the will-maker to hide the lies, but the worm of falsehood easily finds its way into evidence. Litigators would do better to regularly plead undue influence by fraud, but they do not. It remains the easier to prove variant of testamentary undue influence but the one rarely attempted. Part of the reluctance may be due to the fear that pleading "fraud" opens up the potential for enhanced costs if fraud cannot be proven.

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233 (H.L. Cas.); *Boyse v. Rossborough*, *supra*, footnote 43, per Lord Cranworth at p. 1212 (E.R.). The Supreme Court of Canada adopted the law of England on point and made it clear that testamentary fraud was a Canadian variant of undue influence in *Mayrand v. Dussault* (1907), 38 S.C.R. 460, 1907 CarswellQue 112 (S.C.C.), at para. 2. For other cases expanding the Canadian backbone to the principles under discussion see: *Anderson v. Walkey; Re Kaufman* (1961), 27 D.L.R. (2d) 178, (*sub nom. Re Kaufman*) [1961] O.R. 289, 1961 CarswellOnt 91 (Ont. C.A.), at para. 25; and *Re Timlick Estate; Timlick v. Crawford* (1965), 53 W.W.R. 87, 1965 CarswellBC 86 (B.C. S.C.), at paras. 48 and 49. For an effort at an expanded discussion on testamentary fraud see Poyser, *supra*, footnote 3, at p. 339.

Even considering both variants together, the scope of offending conduct is narrow. That conclusion stands out when the conduct is compared to the broader band of conduct captured by *inter vivos* equitable undue influence.

That narrow scope has been identified by some legal commentators as creating a ripe field for predatory behavior. Outright coercion rarely occurs and is relatively easy to hide. Thus, testamentary undue influence by coercion serves as poor protection against testamentary predators. Short of outright lies, testamentary undue influence by fraud is no help**.** Cloistering a will-maker, intentionally toadying, talking poorly of other heirs, fake tears and complaints of destitution are all measures that appear to fall short of the reach of testamentary undue influence. A different tool, the requirement for mental capacity, is poor protection as well. The fact that a will-maker might be failing mentally does no good unless they fail to the point where the will-maker is unable to attain the threshold posed by *Banks v. Goodfellow*.[46] That threshold has been purposively set at a low level by a history of probate courts striving to ensure that the elderly can make wills.[47] As a policy point, the courts support testamentary autonomy.[48] The

46. *Banks v. Goodfellow* (1870), [1861-73] All E.R. Rep. 47, 39 L.J.Q.B. 237, [1871] L.R. 11 Eq. 472, L.R. 5 Q.B. 549, 22 L.T. 813 (Eng. Q.B.). Despite its vintage, *Banks* remains the most authoritative statement of the test for testamentary capacity.

47. The case law is full of examples stating that a person with a diminished mind can still make a will. It was stated no less than three times by the court in *Banks,* at pp. 566 and 567, and most pointedly, at p. 568 (L.R.):

> But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will.

As a more modern Canadian example, the point was repeated by the British Columbia Supreme Court in *Woodward v. Roberts Estate (Trustee of)* (2007), 34 E.T.R. (3d) 26, 2007 CarswellBC 1842, 2007 BCSC 1192 (B.C. S.C.), at para. 125, additional reasons 2007 CarswellBC 2517 (B.C. S.C.):

> Such things as imperfect memory, inability to recollect names and even extreme imbecility, do not necessarily deprive a person of testamentary capacity. The real question is whether the testator's mind and memory were sufficiently sound to enable him or her to appreciate the nature of the property he was bequeathing, the manner of distributing it and the objects of his or her bounty . . .

threshold for testamentary capacity does not rise to a higher level with the presence of a predator hoping to take advantage. Thus, the traditional requirement for testamentary capacity is a poor protection. That suggests to some commentators that there is a gap in the law of probate allowing predators to divert wealth to themselves by unconscionable means.

Different reforms have been proposed to fill the purported gap. Some commentators take the position that the principles applicable to *inter vivos* equitable undue influence should be imported, by judges or by legislatures, to operate in the context of wills.[49] The most popular idea urged by commentators advocating for the reform of testamentary undue influence is to change the law such that the presumption of undue influence that is applicable to equitable *inter vivos* undue influence be imported and applied to testamentary undue influence.[50] Other commentators urge that changes be made to the law of capacity, not undue influence, in order to fill the gap.[51]

48. The policy point was more recently repeated in *Scramstad v. Stannard* (1996), 40 Alta. L.R. (3d) 324, 188 A.R. 23, 1996 CarswellAlta 604 (Alta. Q.B.), at para. 132, additional reasons 1996 CarswellAlta 671 (Alta. Q.B.), leave to appeal refused 1997 CarswellAlta 1215 (Alta. Q.B.):

    > However, what is also made clear in *Goodfellow*, and in my opinion, of equal and perhaps greater significance, is that the adoption of an overly strict test could and probably would result in many testators, especially the elderly, being stripped of the right to dispose of their assets as they see fit.

49. The debate on point was struck by Pauline Ridge, "Equitable Undue Influence and Wills" (2004), 120 L.Q.R. 617, at pp. 618-619 (laying out arguments for and against), followed by Lee Mason, "Undue Influence and Testamentary Dispositions: An Equitable Jurisdiction in Probate Law" (2011), 2 Conv. 115 (taking the position that testamentary undue influence should be reformed to allow the application of equitable undue influence and the presumption of undue influence), and Roger Kerridge, "Undue Influence and Testamentary Dispositions: A Response" (2012), 2 Conv. 129 (taking the position that the doctrine of righteousness is available to fill the gap and that the reforms suggested by Mason go too far).

50. That change has now been introduced in British Columbia by a statutory enactment recommended through the law reform process.

51. Kenneth I. Shulman, Susan G. Himel, Ian M. Hull, Carmelle Peisah, Sean Amodeo, and Courtney Barnes, "Banks v. Goodfellow (1870): Time to Update the Test for Testamentary Capacity" (2017), 95 Can. Bar Rev. 251. The learned authors of that paper propose a new element be added to the test, requiring that the will-maker be:

    > 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.

    The Manitoba Law Reform Commission recently considered the addition of

The better view is that while there might be a perceived gap, it is largely, if not entirely, filled by a different tool that already exists in the law relating to wills — the "doctrine of righteousness." It is part of the law of knowledge and approval. The doctrine of righteousness is the modern culmination of a long and authoritative series of cases in England and Canada, continuing to the present day, overturning wills in circumstances where a person is actively involved in arranging for a will that gives them a significant testamentary gift.[52] While it is sometimes called the "doctrine of righteousness", it is also called the "rule from *Barry v. Butlin*", and might be best relabeled as "the requirement for true and informed approval." Where a party procures or is otherwise instrumental in causing another person to prepare a will under which that party benefits, or any other circumstance presents that causes the court to be concerned over whether the will-maker truly understood the will and its operative effect, the court shall refuse probate unless given affirmative evidence that the will-maker did, in fact, truly know and approve of the will

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that element as part of a statute-based test for testamentary capacity. Judges, so far, have been unwilling to make the leap and add the new element without legislative direction on point.

52. *Barry v. Butlin* (1838), 12 E.R. 1089, 2 Moo. P.C. 480 (England P.C.); *Fulton v. Andrews* (1875), L.R. 7 H.L. 448 (U.K. H.L.); *Tyrrell v. Painton* (1893), [1894] P. 151, 1893 WL 9231 (C.A.); *Wintle v. Nye* (1958), [1959] 1 All E.R. 552, [1959] 1 W.L.R. 284 (U.K. H.L.); *Fuller v. Strum*, [2002] 1.W.L.R. 1097, [2002] 2 All E.R. 87 (C.A.), at p. 1107 (W.L.R.); *Adams v. McBeath* (1897), 27 S.C.R. 13, 1897 CarswellBC 16 (S.C.C.); *British & Foreign Bible Society v. Tupper* (1905), 37 S.C.R. 100, 1905 CarswellNS 105 (S.C.C.); *Connell v. Connell* (1906), 37 S.C.R. 404, 1906 CarswellOnt 745 (S.C.C.); *Riach v. Ferris* (1934), [1935] 1 D.L.R. 118, [1934] S.C.R. 725 (S.C.C.); *Re Timlick Estate*, *supra*, footnote 45; *Russell v. Fraser* (1980), 118 D.L.R. (3d) 733, 8 E.T.R. 245, 1980 CarswellBC 533 (B.C. C.A.); *Sloven v. Ball* (1996), 14 E.T.R. (2d) 309, 4 O.T.C. 257, 1996 CarswellOnt 2153 (Ont. Gen. Div.), affirmed 1997 CarswellOnt 4128 (Ont. Div. Ct.); *Johnson v. Pelkey* (1997), 17 E.T.R. (2d) 242, 36 B.C.L.R. (3d) 40, 1997 CarswellBC 1450, [1997] B.C.J. No. 1290 (B.C. S.C.), affirmed 1999 CarswellBC 1247 (B.C. C.A.), additional reasons 2000 CarswellBC 1089 (B.C. S.C.); *Laszlo v. Lawton*, [2013] 8 W.W.R. 747, 45 B.C.L.R. (5th) 125, 2013 CarswellBC 492, 226 A.C.W.S. (3d) 911, 2013 BCSC 305 (B.C. S.C.), at para. 243; *Melendy v. Drodge* (2016), 22 E.T.R. (4th) 63, 2016 CarswellNfld 343, 270 A.C.W.S. (3d) 675, 2016 NLTD(G) 140 (N.L. T.D.), affirmed on appeal (without any commentary on the doctrine of righteousness or the case law dealing with the doctrine), cross appeal as to remedy allowed, at 2017 CarswellNfld 325, 2017 NLCA 46 (N.L. C.A.); *Coombs v. Walsh*, 2017 CarswellNfld 181, 2017 NLTD(G) 83 (N.L. T.D.); and *Geluch v. Geluch Estate* (2019), 55 E.T.R. (4th) 92, 2019 CarswellBC 3806, 314 A.C.W.S. (3d) 897, 2019 BCSC 2203 (B.C. S.C.).

and understand its operative effect. The phrase "any other circumstance present that causes the court to be concerned over whether the will-maker truly understood the will and its operative effect", casts a wide net. It does not demand a procurer. Any circumstance sufficient to cast doubt on point, or, excite the suspicion of the court concerning knowledge and approval will suffice.[53] When invoked, the doctrine demands that the predator produce evidence of actual understanding on the part of the will-maker, and not just an understanding of what the will says but an understanding of the operative effect of the will at the time of death.

The Supreme Court of Canada has endorsed the use of the doctrine of righteousness on at least four occasions making it binding law across Canada.[54] No provincial court of appeal has narrowed or criticized it. It is popular in British Columbia, where it is intermittently invoked,[55] but underutilized or ignored in other Canadian jurisdictions. It remains in popular use in England. Lawyers in Canada simply fail to plead it. They prefer instead the twin darlings of modern will-attack, being lack of capacity and testamentary undue influence.

The doctrine of righteousness is broad and flexible. The court has a discretion to invoke it. It will generally fill the gap left by the narrow scope of testamentary undue influence. Like *inter vivos* equitable influence, it features an evidentiary presumption that, once triggered, is difficult for a predator to meet. Unlike *inter vivos* equitable undue influence, it was purpose-built to deal with testamentary giving and better fits that type of wealth transfer. Because the testamentary doctrine of righteousness was broad, testamentary undue influence could be narrow.

Lower courts in Canada have made a misguided effort over the last three decades to use *inter vivos* equitable undue influence to set aside wills. It was triggered by *obiter* remarks made in

53. An effort to deal with the doctrine of righteousness on a comprehensive basis as it stands in England and Canada is attempted in Poyser, *supra*, footnote 3, chapter 5.

54. *Adams v. McBeath* (1897), 27 S.C.R. 13, 1897 CarswellBC 16 (S.C.C.); *British & Foreign Bible Society v. Tupper* (1905), 37 S.C.R. 100, 1905 CarswellNS 105 (S.C.C.); *Connell v. Connell* (1906), 37 S.C.R. 404, 1906 CarswellOnt 745 (S.C.C.); and *Riach v. Ferris* (1934), [1935] 1 D.L.R. 118, [1934] S.C.R. 725, 1934 CarswellOnt 136 (S.C.C.).

55. The following cases arising in British Columbia: *Re Timlick Estate* (1965), *supra*, footnote 45; *Russell v. Fraser* (1980), *supra*, footnote 52; *Johnson v. Pelkey* (1997), *supra*, footnote 52; *Laszlo v. Lawton* (2013), *supra*, footnote 52; and *Geluch v. Geluch Estate* (2019), *supra*, footnote 52.

1991 by the Supreme Court of Canada in *Goodman Estate v. Geffen* suggesting that the presumption of undue influence found in the *inter vivos* context might apply to undue influence in the testamentary context:[56]

> By way of contrast, in situations where consideration is not an issue, e.g. gifts *and bequests*, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. In these situations, the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

The word "bequests" created the confusion. A storm of lower courts attempted to apply equitable *inter vivos* undue influence to attacks on wills. The doctrine of righteousness was largely ignored. The courts were attempting to fill the falsely identfied gap with a legal principle that had inadvertently been bent out of shape.

The Supreme Court of Canada circled back and clarified and confirmed the law in 1995 while deciding *Vout v. Hay*.[57] The court in *Vout* conspicuously ignored the *obiter* comments in *Goodman Estate v. Geffen*. Instead, the Supreme Court restated the traditional and long-standing line of authorities on this issue,[58] confirming that the presumption of undue influence that arises in *inter vivos* gift situations does not arise and is inapplicable in the case of testamentary wealth transfers. Unlike the earlier decision, *Vout v. Hay* dealt with wills — the expression of law was *ratio* and binding. The earlier expression of law mentioned "be-quests" in passing and was *obiter*. Justice Maurice Cullity weighed in to provide additional clarification of the law while deciding *Banton v. Banton*:[59]

> This has long been settled law and I do not believe that the general references to bequests by Wilson J. in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.) and, particularly, at pp. 377-378 were intended to

56. *Goodman Estate v. Geffen* (S.C.C.), *supra*, footnote 7, at para. 45 (emphasis added).
57. [1995] 2 S.C.R. 876 (S.C.C.).
58. The point had been unequivocally established in 1857 by the House of Lords in *Boyse v. Rossborough*, *supra*, footnote 43, and by Lord Penzance in *Parfitt v. Lawless* (1872), L.R. 2 P.D. 462 (Eng. P.D.A.) and endorsed and adopted in Canada by the Supreme Court in *Adams v. McBeath* (1897), 27 S.C.R. 13, 1897 CarswellBC 16 (S.C.C.) and the Privy Council in *Craig v. Lamoureux* (1919), [1920] A.C. 349, 1919 CarswellQue 2 (Jud. Com. of Privy Coun.).
59. (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161, 1998 CarswellOnt 3423 (Ont. Gen. Div.), at paras. 59-61.

> unsettle it. Nor do I believe that there is any scope for the presumption of undue influence that has traditionally been held to arise from particular relationships when the validity of *inter vivos* dispositions or transactions is in issue. The burden of proof, both legal and evidential, is and remains on the persons alleging undue influence ... this was affirmed with some emphasis in *Vout v. Hay* ...

The efforts to clarify were largely ineffective. Confusion continues to reign. Lower courts continue to focus on the *obiter* passage from *Goodman Estate v. Geffen* and apply *inter vivos* equitable undue influence to will-challenges.[60] As discussed below, appellate courts continue to try to pile on additional clarification. Some would argue that the widespread effort to apply equitable undue influence to wills is fueled by the need to fill the perceived gap discussed above. The answer to that argument is to advance the doctrine of righteousness into the gap.

As noted earlier, the legislature in British Columbia has introduced the presumption of undue influence into its laws of wills following a law reform process accepting the premise that the law of probate was deficient. With due respect to the efforts of the various players involved, the legislative effort is submitted here to be misguided. Section 52 of the *Wills, Estates and Succession Act*[61] provides as follows:

> *Undue Influence*
>
> *52* In a proceeding, if a person claims that a will or any provision of it resulted from another person
>
> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

60. Examples include *Stiles Estate v. Stiles* (2003), 1 E.T.R. (3d) 120, [2003] 9 W.W.R. 496, 17 Alta. L.R. (4th) 295, 2003 CarswellAlta 698 (Alta. Q.B.), affirmed 2004 CarswellAlta 1405 (Alta. C.A.); and *Straus v. Bainbridge* (1998), 38 E.T.R. (2d) 110, 1998 CarswellOnt 4845 (Ont. Gen. Div.), at paras. 19-21, affirmed 1999 CarswellOnt 2562 (Ont. C.A.). Also see *Dansereau Estate v. Vallee* (1999), 33 E.T.R. (2d) 71, 247 A.R. 342 (Alta. Q.B.); and *Kaczmarczyk v. Kaczmarczyk* (1997), 72 A.C.W.S. (3d) 1281 (Ont. Gen. Div.), affirmed (1998), (*sub nom. Re Kaczmarczyk Estate*) 116 O.A.C. 343, 84 A.C.W.S. (3d) 1026 (Ont. C.A.). These cases do not make any effort to address the issue, and fail to cite *Vout* or the effort to clarify in *Banton*. These appear to be judges poorly served by counsel.

61. S.B.C. 2009, c. 13.

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

The flaw alleged here is driven by a failure to recognize the differences between gifting during life and gifting at death. Those differences are discussed at length above. Another difference bears consideration. It comes into focus by considering the hypothetical of a kindly niece. Imagine a niece helping her failing uncle. She cleans. She mows. She shops for him. She does his banking. He trusts her and so much so that he stops opening his bank statements. The trust is well-founded. She serves him honestly, without taking a penny. Of his own volition, he contacts his lawyer and changes his estate plan. He revokes an older will that would have left the residue of his estate to charity, and signs a newer will dividing his fortune between the kindly niece and her brother, the will-maker's nephew. The nephew is cut from different cloth. He never helps. He never visits. He dislikes the uncle. He talks derisively behind his uncle's back. When the uncle dies, the nephew challenges the provision of the new will giving his sister her 50%. The presumption of undue influence appears to operate against the generous and kindly niece, but will not operate against the selfish and mean-spirited nephew. The statutory provision can be weaponized against the kindly niece. This is particularly egregious when considering the drive people feel to reciprocate. When someone does something nice for us, we want to do something nice in return. Most people feel the need to reciprocate after someone gives us something. If they buy us lunch, we feel we have to buy lunch next time. The urge to reciprocate is part of the reason that politicians and judges cannot accept gifts. But in the case of a failing uncle, he may not be able to pay his niece wages or make gifts to her *inter vivos*. She might refuse the gesture. A testamentary gift is often the only way to pay off a debt of gratitude. A testamentary presumption of undue influence operates against that. It becomes a statutory hurdle against a common motive driving will-makers.

V. RECENT DEVELOPMENTS

1. Hope Instead of Fear Driving Testamentary Undue Influence

Re Kozak Estate was decided by the Alberta Court of Queen's Bench.[62] A younger woman promised to marry an ill and elderly man. He desperately wanted to marry her. He met with a lawyer who took instructions for a new will leaving everything to his potential wife. Capacity was not at issue. Undue influence was. He was a life-long bachelor, weighed 400 lbs., and had just sold a farm property. He was cash-heavy and vulnerable to her charms. While he ultimately signed two wills in her favour, the marriage never took place. He died a bachelor. The wills were challenged on the grounds that they were the product of testamentary coercion. She made no threats. At issue was whether coercion could be driven by hope instead of fear. The trial judge said yes and invalidated both of the wills signed in favour of the predatory fiancée:[63]

> These wills represented not Ted's will but Maryann's, her desire to acquire his assets and spend his money. These wills were the result of a deliberate manipulation of Ted, 72 years old but naïve, an unhealthy man, with false promises of marriage and companionship. She drove him to do her will by twisting his hope into a goad.

For authority the court relied on a portion of the statement by Sir James Plaisted Wilde (quoted in full earlier in this paper) from *Hall v. Hall*:[64]

> [P]ressure of whatever character, whether acting *on the fears or the hopes*, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. [emphasis added]

That judicial seed appears to have lain dormant until *Kozak*.[65] The statement that "you should leave everything to me as we are going to be married" is generally fair. Normally

62. *Re Kozak Estate*, 2018 CarswellAlta 483, 2018 ABQB 185 (Alta. Q.B.).
63. *Kozak Estate*, *supra*, footnote 62, at para. 187.
64. *Hall v. Hall*, *supra*, footnote 43, discussed above as a leading case in this area. Cited at para. 7 of *Kozak*. No other authority was cited dealing with hope as a goad instead of fear.
65. Research by the authors in both Canada and England failed to uncover a case on point prior to *Kozak Estate*.

that kind of pitch will not render a will void where the will-maker is convinced at the end of the day that the will is the right one to make. It is not coercion if the will-maker is won over, even if won over with reservations. In the *Kozak* fact-pattern, the will-maker wanted to be married to the woman at all costs, even if it meant his wealth went to the wrong people at his death. He would have signed anything, right or wrong, to achieve that outcome.

2. No Presumption of Testamentary Undue Influence

Various courts of appeal across Canada have recently rallied to the defense of the correct and traditional view expressed earlier: there is no place in Canadian law for a presumption of testamentary undue influence. This amounts to a wave of rejection for the collection of trial level decisions mistakenly applying the *obiter* Supreme Court of Canada comments from *Goodman Estate v. Geffen*.

Most notable is the 2018 decision of the Ontario Court of Appeal in *Seguin v. Pearson*.[66] *Seguin* confirms that the equitable presumption of undue influence has no application to wills and applies only where *inter vivos* wealth transfers are under consideration.

Two daughters sought to invalidate a will executed by their father. They alleged that his common-law spouse unduly influenced him to make her the principal beneficiary of his estate. The trial judge correctly relied on the leading cases dealing with wills, including *Scott v. Cousins*,[67] *Craig v. Lamoureaux*,[68] and *Hall v. Hall*.[69] The trial judge then veered off course and mistakenly relied on the *obiter* remarks from *Goodman Estate v. Geffen* suggesting a presumption might be in play. The trial judge quoted the following passage from *Goodman Estate v. Geffen*:

66. *Seguin v. Pearson* (2018), 36 E.T.R. (4th) 1, 2018 CarswellOnt 5617, 290 A.C.W.S. (3d) 898, 2018 ONCA 355 (Ont. C.A.). For another discussion of this case, see "*Seguin v. Pearson*: Due Clarity on Undue Influence" (2019), 38 E.T.P.J. 220. WEL Partners acted for the appellant at the Ontario Court of Appeal in *Seguin v. Pearson*.
67. *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113, 2001 CarswellOnt 50 (Ont. S.C.J.).
68. *Craig v. Lamoureux* (1919), [1920] A.C. 349, 1919 CarswellQue 2 (Jud. Com. of Privy Coun.).
69. *Hall v. Hall*, *supra*, footnote 43.

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.[70]

On appeal, the Ontario Court of Appeal identified the application of those principles as an error:[71]

> We agree that the trial judge erred in his articulation of the test for undue influence applicable to testamentary gifts. When determining the validity of Mr. Paterson's March 11, 2011 will, the trial judge appears to have erroneously conflated the test for undue influence that applies to *inter vivos* transfers with the relevant test in relation to testamentary gifts.

The Ontario Court of Appeal very clearly stated the law: "The rebuttable presumption of undue influence arises only in the context of *inter vivos* transactions that take place during the grantor's lifetime."[72] The Court of Appeal went on to confirm that testamentary undue influence requires outright coercion and not simply persuasion: "In the case of wills, it is testamentary undue influence, amounting to outright and overpowering coercion of the testator, which must be considered."[73] All of that is correct law and entirely in line with longstanding legal principle.

The same appellate clarification given by *Seguin v. Pearson* in Ontario has been given in Saskatchewan with the 2018 Court of Appeal decision in *Karpinski v. Zookewich Estate*.[74]

VI. CONCLUSION

In summary, the law as it relates to undue influence is still

70. *Goodman Estate v. Geffen* (S.C.C.), *supra*, footnote 7, at para. 43.
71. *Seguin v. Pearson*, *supra*, footnote 66, at para. 12.
72. *Seguin v. Pearson*, *supra*, footnote 66, at para. 10.
73. *Seguin v. Pearson*, *supra*, footnote 66, at para. 11.
74. *Karpinski v. Zookewich Estate*, 2018 CarswellSask 344, 2018 SKCA 56 (Sask. C.A.), at para. 29:

> It is clear . . . that the party alleging testamentary undue influence has the onus of proving its existence and the rebuttable presumption of undue influence, as it exists in the context of *inter vivos* gifts, is not applicable.

developing, but slowly. The rules applicable to testamentary undue influence have no application to *inter vivos* undue influence, and vice versa.