UNDUE INFLUENCE IN INTER VIVOS TRANSACTIONS AND TRANSFERS

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1. INTRODUCTION

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

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

This paper will review the historical context of the doctrine of undue influence, the nature and origin of undue influence in *inter vivos* gift situations (and how it differs from testamentary undue influence), as well as the burden of proof, indicators and evidence, and a survey of recent case law in Ontario and across Canada. An "Undue Influence Checklist" is also included for your assistance.

2. COURTS' HISTORICAL VIEW

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

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

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

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

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

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

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

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

3. UNDUE INFLUENCE: TESTAMENTARY

Testamentary undue influence developed as a probate principle, unlike *inter vivos* gift undue influence (discussed below) which developed in equity. The modern approach to undue influence in the testamentary context was set out in *Banton v. Banton*:

> *A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more*

[2] (1968) LR 1 P&D.
[3] *Craig v. Lamoureux*, [1919] 3 WWR 1101.
[4] *Craig v. Lamoureux*, [1919] 3 WWR 1101 at para. 12

effective than if he or she simply delegated his will-making power to the other person.[5]

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[6] In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[7] For conduct to amount to testamentary undue influence it must amount to coercion, forcing the will maker to make a will containing gifts that he or she would otherwise not make.[8]

Burden of Proof

The onus of proving undue influence lies with the party attacking the testamentary document. Therefore, while the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer of the will, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.[9] Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[10]

Unlike *inter vivos* transfers, (discussed below) the evidentiary burden never shifts and there is no presumption of undue influence in the testamentary context,[11] except in British Columbia, under the *Wills, Estates and Succession Act*,[12] ("*WESA*") which came into force on March 31, 2014. The *WESA* creates a presumption of undue influence in BC in

[5] *Banton v. Banton*, 1998 CanLII 14926 (ONSC) at para. 89
[6] *Dmyterko Estate v. Kulikovsky* (1992), CarswellOnt 543
[7] *Fountain Estate v. Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para. 64 citing in part *Goodman Estate v. Geffen*, [1991] 2 SCR 353 (SCC)
[8] *Wingrove v. Wingrove* (1885), 11 PD 81 (Eng. Prob. Ct.) at pp. 82-83
[9] *Goodman Estate v. Geffen* (1991), 42 ETR 97; *Hoffman v. Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para. 63
[10] *Nguyen Crawford v. Nguyen*, 2009 CarswellOnt 1877 *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.)
[11] *Banton v. Ban*ton 1998 CanLII 14926 (ONSC) at para. 91, *Sequin v. Pearson*, 2018 ONCA 355.
[12] SBC 2009, Chapter 13.

the testamentary context where certain types of relationships exist. Section 52 of *WESA* sets out this legislative presumption:

> In a proceeding, if a person claims that a will or any provision of it resulted from another person,
>
> (b) being in a position where the potential for dependence or domination of the will-maker was present, and
>
> (c) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the **potential for dependence or domination of the will-maker was present**, **the party seeking to defend the will** or the provision of it that is challenged or to uphold the gift **has the onus** of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged. (Emphasis added)

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

Standard of Proof

Although the leading Supreme Court of Canada case of *Vout v. Hay* held that "*the extent of proof required is proportionate to the gravity of the suspicion*,"[13] the more recent Supreme Court of Canada case of *C(R) v. McDougall*[14] held that there is a single standard of proof in civil cases — the balance of probabilities — and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

[13] *Vout v. Hay* [1995] 2 SCR 876 (CanLII) at para. 24.
[14] 2008 SCC 53 (SCC) cited in *Hoffman v. Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para. 34

The case of *Kohut Estate v. Kohut*[15] elicited the principles that apply to the standard of proof relating to undue influence:

> *The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's."*[16]

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid.[17]

Furthermore, in cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[18]

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[15] (1993), 90 Man R (2d) 245 (Man QB) at para. 38

[16] *Kohut Estate v. Kohut* (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall,* (1968) LR 1 P&D at para. 38.

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

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

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[19] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[20]

It should be noted that dependency is not always an indicator of undue influence. As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[21]

It has also been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[22]

Indicators of Undue Influence

The Ontario Superior Court of Justice in the 2013 decision of *Gironda v. Gironda*[23] provided a (non-exhaustive) list of indicators of testamentary undue influence:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;

[19] See for example *Kohut Estate v. Kohut*, *Nguyen Crawford v Crawford*, *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[20] *Nguyen Crawford v. Nguyen*, 2009 CarswellOn 1877; *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[21] See for example *Hoffman v. Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was “scrupulous” in helping her manage her finances and encouraged her to buy things for herself.
[22] *Hoffman v. Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.
[23] *Gironda v. Gironda*, 2013 CarswellOnt 8612.

- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[24]

In *Tate v. Gueguegirre*[25] the Ontario Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.[26]

Indirect and Circumstantial Evidence

Justice Cullity noted in *Scott v. Cousins* that "*Undue influence is a subtle thing, almost always exercised in secret, and usually provable only by circumstantial evidence*."[27] What amounts to coercion will differ, depending on the circumstances. There is no need for

[24] *Gironda v. Gironda*, 2013 CarswellOnt 8612 at para. 56.
[25] 2015 ONSC 844 (Div. Ct.).
[26] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[27] Cullity J. in *Scott v. Cousins,* [2001] OJ No.19 at para. 48 citing Atkinson on Wills (2nd edition, 1953) pg. 638

actual threats or physical violence to find coercion, the Court can infer undue influence from all of the facts.

In the U.K. case of *Schrader v Schrader*[28] the Court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the Court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The Court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the Court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

In determining whether undue influence has been established by circumstantial evidence, courts will consider: the willingness or disposition of the person accused of asserting undue influence on the testator; whether that person had an opportunity to do so; whether the testator fell within the class of someone frail or vulnerable; the absence of moral claims of the beneficiaries under the will or of other reasons why the deceased would have chosen to benefit them; and whether the provisions of the will depart radically from the testator's previous testamentary intentions.[29]

4. UNDUE INFLUENCE: *INTER VIVOS* WEALTH TRANSFERS AND GIFTS

Distinct from Testamentary Undue Influence

As noted above, testamentary undue influence is distinct from *inter vivos* undue influence.[30] Testamentary undue influence arose from common law courts (not a product of equity) and is only available where overbearing coercive pressure has been brought to bear that effective overcomes the free will of the will-maker.

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[28] *Shrader v Shrader,* [2013] EWHC 466 (ch)
[29] *Scott v. Cousins* 2001 OJ No. 19 (QL) at para. 114 (Sup. Ct.) and *DeWitt v. Williams, DeWitt and Nason* 2005 NBCA 69 at para. 8
[30] John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p. 529 ["Poyser"], see also *Sequin v. Pearson*, 2018 ONCA 355 at paras. 10-12.

Inter vivos undue influence is a judicial tool developed in the courts of equity during the 1700s and the 1800s. It is available against a broader spectrum of conduct and renders the gift or wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void). The differences may be based on the fact that a gift by will is fundamentally different than a gift made during one's lifetime. As explained by John Poyser, in his text *Capacity and Undue Influence*:

> Everyone loses ownership of all of their property at death. That turns the making of a will into a common and ordinary event. . .In contrast, very few people voluntarily divest themselves of their wealth while they are alive. . .Thus, a substantial *inter vivos* gift demands an explanation in a way a will does not. . .It is for those reasons that persuasion is allowed in the case of a will, even earnest persuasion and pressure, but persuasion is not allowed, unless comparatively mild, in the case of a substantial *inter vivos* gift.[31]

While there is a distinction between testamentary and *inter vivos* undue influence, courts have imported the principles of testamentary undue influence where the person making the gift or wealth transfer is on his or her deathbed.[32] Furthermore, the presumption of undue influence (discussed in more detail below) is applicable to gifts but not applicable to testamentary wealth transfers.

Unlike testamentary undue influence (where the influence must amount to outright and overpowering coercion of the testator)[33] Undue influence in the *inter vivos* gift context is usually divided into two classes.[34] As noted by Lord Justice Lindley in *Allcard v. Skinner*:

> First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating,

[31] Poyser at pp. 302-303.
[32] Poyser at p. 529; *Keljanovic Estate v. Sanservino* 2000 CarswellOnt 1312 (C.A.).
[33] See *Seguin v Pearson*, 2018 ONCA 355.
[34] *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171; Poyser at p.473. Note also that there is a distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity, see Poyser at p.478.

> and generally, though not always, some personal advantage obtained by a done placed in some close and confidential relation to the donor. . .
>
> The second group consists of cases in which the position of the donor to the done has been such that it has been the duty of the done to advise the donor, or even to manage his property for him.[35]

The first class of cases can be characterized as cases of "actual undue influence" and the second class as "presumed undue influence" or "undue influence by relationship".

Actual Undue Influence

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

Actual undue influence in the context of *inter vivos* gifts or transfers has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[36] Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[37] The conduct amounting to actual undue influence often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence.[38]

Actual undue influence is not reliant on any sort of relationship, instead it is based in equity on the principle that "no one shall be allowed to retain any benefit arising from his own fraud or wrongful act."[39] It is similar (but distinct) from the common law's duress doctrine.

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[35] *Allcard v. Skinner* (1887), L.R. 36 CH. D. 145 at 181 (Eng.C.A., Ch.Div.) [*Allcard*].
[36] *Allcard* at p. 181.
[37] *Allcard*; *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.
[38] Poyser at p.492.
[39] *Allcard, supra* note 37 at 171.

The onus to prove actual *inter vivos* undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities. No higher standard is ever applicable.[40]

Presumed Undue Influence/Undue Influence by Relationship

This second class, presumed undue influence, does not depend on proof of reprehensible conduct. It is important to note however that the presumption of undue influence is an evidentiary tool while the doctrine of undue influence is a substantive challenge originating in the courts of equity.

Under this second class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being abused.[41] Relationships that qualify as a 'special relationship' are often determined by a 'smell test'.[42] Does the "potential for domination inhere in the relationship itself"?[43] Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, "as well as other relationships of dependency which defy easy categorization."[44] However, even these close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination,[45] such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[46] *Geffen v. Goodman Estate*[47] remains the leading Supreme Court of Canada decision on presumed undue influence.

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[40] *C(R) v. McDougall*, 2008 SCC 53
[41] *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14
[42] Poyser, *supra* note 33 at p.499
[43] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 [*Geffen*]
[44] *Geffen v. Goodman Estate*,[1991] 2 S.C.R. 353 at para. 42
[45] See *Elder Estate v. Bradshaw* 2015 BCSC 1266 where the Court found that the simple existence of a relationship between a younger caregiver and an older adult was not sufficient to raise a presumption of undue influence: "The generic label caregiver does not necessarily denote a fiduciary relationship of potential for domination. . .The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship" at para. 108.
[46] *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102
[47] [1991] 2 SCR 353

Once a presumption of undue influence is established, there is a shift to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden, not a legal one. The legal burden is always on the person alleging undue influence but the party defending the gift can bring evidence to convince the court not to make a factual inference against the gift. The person alleged to have exerted such influence can produce evidence to rebut the presumption of undue influence.

The giftor must be shown to have entered into the transaction as a result of his or her own "full, free and informed thought".[48] It is often difficult to defend a gift made in the context of a special relationship. The gift must be from a spontaneous act of a donor able to exercise free and independent will. In order to be successful in attacking a gift based on presumed undue influence the transaction or gift must be a substantial one, not a gift of a trifle or small amount.[49]

The presumption of undue influence can be rebutted by showing[50]:

a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;[51]

b) the donor had independent legal advice or the opportunity to obtain independent legal advice;[52]

c) the donor had the ability to resist any such influence;[53]

d) the donor knew and appreciated what she was doing;[54] or

e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.[55]

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[48] *Geffen v. Goodman Estate* at para. 45
[49] Poyser at p.509
[50] From *Zeligs v. Janes* 2015 BCSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97
[51] *Geffe*n at p.379; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121 [*Longmuir].*
[52] *Geffen* at p. 370; *Longmuir, supra* note 53 at para. 121.
[53] *Calbick v. Warne*, 2009 BCSC 1222 at para. 64.
[54] *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29
[55] *Longmuir, supra* note 53 at para. 76

5. INTERPLAY WITH CAPACITY AND SUSPICIOUS CIRCUMSTANCES

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[56]

In *Leger v Poirier*,[57] the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing mind and memory*" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

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

Suspicious Circumstances

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

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[58]

[56] See for example the case of *Gironda v. Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.
[57] *Leger v. Poirier*, [1944] SCR 152.
[58] *Vout v. Hay,* [1995] 2 SCR 876 (SCC)

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly "unnatural" dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.[59]

Confusion between undue influence and suspicious circumstances arises as usually the same evidence to prove undue influence sets up a case for suspicious circumstances. When a party presents evidence of suspicious circumstances while trying to prove undue influence both parties will have a burden to discharge. The person who alleges undue influence and is attacking the Will has the onus. However, where suspicious circumstances are also raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[60]

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

[59] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11
[60] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

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

6. RECENT CASE LAW: 2014-2018

Below is a selection of undue influence cases both in the context of *inter vivos* gifts and testamentary documents from Ontario and from across Canada:

A) UNDUE INFLUENCE FOUND IN INTER VIVOS TRANSFERS

In the following cases the Courts made a finding of undue influence:

Verwoord v. Goss 2014 BCSC 2122

Testamentary capacity, destruction of a Will and undue influence with respect to the Wills and an *inter vivos* transfer, were all addressed in this British Columbia case.[61] Shortly before his death, the deceased had executed more than one Will and had transferred his family home into a joint tenancy with his eldest daughter.

While the Court found that some facts of this case suggested *actual* undue influence by the eldest daughter and her husband, it was Justice Power's view that the case was "better determined under the dominant relationship [presumptive] branch of undue influence" as the Will and *inter vivos* gifts were of considerable magnitude and the deceased's relationship with his daughter and son-in-law was one of "dependency". The evidence "robustly support[ed]" the fact that the relationship was one of dominance and dependency: the father was in a state of diminished capacity, and requested help with the arrangement of his affairs; the son-in-law managed the father's relationship with his lawyer; the son-in-law became his attorney under a power of attorney, the son-in-law also had some legal training and the daughter took on a significant role in supporting her father.

The Court did not find that the defendants could discharge their burden and prove that the Will and *inter vivos* gifts were the result of the deceased's own will, informed and

[61] 2014 BCSC 2122.

exercised freely.[62] The daughter at various times isolated the father from his other daughter, reinforced his erroneous beliefs that his mental faculties were intact and supported his delusions respecting his other daughter's alleged misbehaviour. Once the defendants took charge of the deceased's affairs, his estate began to be dissipated at an alarming rate. The Court found that while the deceased consulted a lawyer, the advice received could not be considered independent as the son-in-law managed his relationship with his lawyer. The lawyer accepted the son-in-law's characterizations of the other's daughter's actions and despite the deceased's advanced age, his diminished capacity, his tendency towards vacillation in the arrangement of his affairs and the vast differences in his 2008 and 2009 Wills, the lawyer did not contact his doctors or take any further steps to ensure his interests were protected. As the lawyer's advice was predicated on the deceased's delusions as related to her by the deceased and his son-in-law the Court found that the advice could not truly be said to be independent.

The *inter vivos* transfer was set aside and the grant of probate for the last Will was revoked.[63]

Servello v. Servello **2015 ONCA 434**

Presumed undue influence was found (but not rebutted) in this case in the context of an *inter vivos* transfer of a mother's property to her son.[64] Shortly after the death of his father, a son attended a registry office with his mother, and with the assistance of a conveyancer, the title to his mother's house was transferred to himself as sole owner. The mother's first language was Italian and her comprehension and reading in English was limited. Her understanding at the time was that she was attending a court house so that her son could sign a document which would give him "the power to look after her" as she grew older. Thirteen days later the son returned to the office and he transferred the property to himself and his mother as joint tenants.[65]

[62] *Verwoord v. Goss* 2014 BCSC 2122 at para. 213.
[63] *Verwoord v. Goss* 2014 BCSC 2122 at para. 230.
[64] 2014 ONSC 5035, upheld on appeal 2015 ONCA 434.
[65] *Servello v Servello*, 2014 ONSC 5035 at paras. 1-4

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

At the time of the transfer, the son was living in his mother's house, the mother was recently widowed, English was not her first language and the family had always used the same lawyer for all of their legal dealings. The son chose however to take his mother directly to the registrar's office, did not use the family lawyer, and used a conveyancer who was a stranger to the mother and who did not speak Italian. The son who received the benefit of the transaction was by her side throughout.[66] The Court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that:

> The law is clear that in the case of gifts or other transactions *inter vivos*, the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence.
>
> This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. [The mother] did not receive independent legal advice, and accordingly the two deeds which gave [the son] an interest in the land should be set aside on this basis as well.[67]

The decision was upheld on appeal.[68]

[66] *Servello v. Servello* 2014 ONSC 5035 at para. 47
[67] *Servello v. Servello* 2014 ONSC 5035 at paras.48-49
[68] 2015 ONCA 434.

Cowper-Smith v. Morgan 2016 BCCA 200, 2017 SCC 61[69]

This case[70] provides helpful guidance on what to do (and not to do) as a lawyer asked to provide independent legal advice in the estates context, and red flags for undue influence. Elizabeth Cowper-Smith died in 2010 at the age of 86. She had three children and before her death she transferred her major assets (her house and investments) into joint names with her daughter. The plaintiffs, her two sons, alleged (among other things) that the transfer of the property and investments into joint names was the result of undue influence by the daughter.

It was the mother's brother-in-law (who was clearly supporting the daughter's position) who first contacted the lawyer who drafted the transfer documents. The drafting lawyer met with both the mother and the daughter, with the daughter present "for much of the meeting".[71] Subsequently, the daughter called the drafting lawyer with revised instructions from the mother. The drafting lawyer then met with the mother alone, where the mother advised that she wanted everything to go to her daughter. While the drafting lawyer was satisfied that the instructions and wishes were the mother's and not the daughter's, she arranged to have the mother meet with another lawyer for independent legal advice (ILA).[72] 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.[73] However, the ILA lawyer did not ask about the mother's assets or if she understood the financial implications of the transfers.

The Court found that the daughter was an unreliable and unbelievable witness, and that she was hostile, argumentative and evasive.[74] The Court also found that the relationship

[69] Rvs'd on other grounds 2017 SCC 61.
[70] 2015 BCSC 1170, 2016 BCCA 200, rev'sd in part 2017 SCC 61.
[71] *Cowper-Smith v. Morgan* 2015 BCSC 1170 at para. 29 [*Cowper-Smith*].
[72] *Cowper-Smith* at para. 34.
[73] *Cowper-Smith* at para. 38.
[74] *Cowper-Smith* at para. 67.

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:[75]

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

The daughter argued that the presumption could be rebutted as she did not understand that the transfer meant that all assets would be shared equally. As she had no understanding of the documents then she could not have unduly influenced her mother. The daughter also argued that the mother had ILA. However the evidence did not satisfy the Court on a balance of probability that the transfer of the property and investments into joint names was the result of the mother’s “full, free and informed thought”[76]:

- Not only was the daughter an unreliable witness, the daughter was present for much of the interaction between the mother and her lawyer;

[75] *Cowper-Smith* at paras. 86 & 91.
[76] *Cowper-Smith* at para. 91.

- both the daughter and brother-in-law provided the drafting lawyer with information and instructions;

- the ILA lawyer was not aware of the extent of the mother's assets and did not discuss the financial implication of placing all of her assets jointly with her daughter;

- the ILA lawyer did not ask the mother about other family members who might have benefited if the transaction did not take place and the ILA lawyer did not discuss with the other the wisdom of the proposed transaction or other options where she could achieve her objective with less risk.[77]

The Court concluded that the transfers completed were as a result of undue influence and were ordered to be set aside.[78]

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.** See Cope at paras. 213-215, citing *J.B. v. L.B*., 1989 ABCA 241 at paras. 22-23, *Coomber v. Coomber*, [1911] 1 Ch. [723] and *Wright v. Carter* (1902), [1903] 1 Ch. 27 (C.A.) at 57-58.[79] [emphasis added]

The Court of Appeal 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,

[77] *Cowper-Smith* at para. 102.
[78] *Cowper-Smith* at para. 105.
[79] *Cowper-Smith v. Morgan* 2016 BCCA 200 at para. 53.

which in the absence of any rationale reasons, might be found after her death not to be just and fair to the respondents".[80]

Despite the Court of Appeal unanimously agreeing with the trial judge with respect to the undue influence ruling, the majority allowed the appeal in part with respect to a claim for proprietary estoppel.

The case was then appealed to the Supreme Court of Canada on the proprietary estoppel issue only (an appeal on the undue influence finding was not brought) where the Court allowed the appeal.[81]

B) NO UNDUE INFLUENCE FOUND IN INTER VIVOS TRANSFERS

The courts did not find undue influence in the following cases:

***Seguin v Pearson,* 2018 ONCA 355**

This is another case where children from a first marriage commenced litigation against a subsequent spouse of the deceased alleging undue influence. This case confirms the distinction between the analysis for testamentary undue influence and undue influence in the context of an *inter vivos* transaction.

The deceased had made his new spouse the principal beneficiary under his Will and had made an *inter vivos* transfer of his house into joint tenancy with his new spouse. His daughter brought an application seeking to invalidate the Will and *inter vivos* transfer alleging undue influence by the spouse. The trial judge rejected the daughter's argument and found on the basis of "all of the evidence" that the daughter had failed to prove the spouse exerted dominance over the deceased.[82]

On appeal the daughter argued that the relationship between her father and his spouse (who also acted as his caregiver near the end of his life) gave rise to a presumption of undue influence which the spouse failed to rebut. In response the Court of Appeal clarified

[80] *Cowper-Smith v. Morgan* 2016 BCCA 200 at para. 65
[81] *Cowper-Smith v Morgan*, 2017 SCC 61.
[82] *Seguin v Pearson*, 2016 CarswellOnt 17438 (SCJ) at para. 456.

that the rebuttable presumption of undue influence arises only in the context of *inter vivos* transactions that take place during the grantor's lifetime. For wills, it is testamentary undue influence that amounts to "outright and overpowering coercion of the testator, which must be considered".

The Court of Appeal went on to find though that the trial judge erred in the articulation of the test for testamentary undue influence. The trial judge erroneously conflated the test for undue influence that applies to *inter vivos* transfers with the relevant test in relation to testamentary gifts. However, the Court went on to find that this error "did not affect the reasonableness of his conclusions" and that the "trial judge's finding that there was no undue influence using the *inter vivos* standard would necessarily be the same had the trial judge applied the correct standard applicable to testamentary dispositions."[83]

The Court observed that under either test the trial judge was required to examine all of the relevant surrounding circumstances, including: medical and lay evidence of the deceased's state of mind and overall health; the nature and length of his relationships with his spouse and his children; and his instructions to his solicitors, which indicated that he had thought deeply and thoroughly about the disposition of his property. The wills and *inter vivos* transfer were "not the result of rash or emotional action but followed several months of [the deceased's] deliberate reflection, coupled with the meticulous and comprehensive legal advice that he received from two experienced practitioners." The daughter's appeal was dismissed.

***Jansen v Niels Estate,* 2017 ONCA 312**

There were several issues at play in this case including whether there was a severance of a joint tenancy, *inter vivos* gifts between parents and adult children, and undue influence. For the purposes of this paper I will focus on the undue influence aspect of this case.

[83] *Seguin v Pearson* 2018 ONCA 355 at para. 14.

This story is not uncommon. A mother made a Will that divided her estate equally between her three children. One of the children, her daughter, had a strained relationship with her mother and one of her brothers. Things came to a head when the daughter saw that her mother was selling her house. She wrote an unkind letter to her mother claiming that the mother had always said the house belonged to her and her brothers and it was wrong for the mother to sell her house. Understandably the mother was upset and the mother and daughter never spoke again. The mother executed a new Will removing her daughter as an executor but continued to leave one-third of her estate to her. The mother purchased a new house solely in her name. Then a few months later she transferred title to herself and her son in joint tenancy. Then a few years later, they transferred title to the mother, son and the son's wife as joint tenants. They built an addition onto the house and the son and daughter-in-law lived in the addition.

Subsequently, the son and daughter-in-law signed a separation agreement they found on the internet (without legal advice). In it the son agreed to transfer his interest in the property to his wife following the death of the mother.

After the mother became ill, she called her lawyer's legal assistant seeking assurance that the house would go to her son and daughter-in-law when she died. She was assured this was true. After her mother died, the daughter brought an application seeking a declaration that the property formed part of the mother's estate.

The application judge concluded that the mother intended to gift the property to her son and daughter-in-law. The presumption of resulting trust that arises when a parent makes a gratuitous transfer to an adult child was rebutted.

The application judge "flatly rejected" the daughter's allegation that the daughter-in-law had taken advantage of the mother and deprived the daughter of her inheritance.[84] The application judge found that the presumption of undue influence was rebutted and that the mother was "cognitively engaged, unfettered by persuasion and did what she wanted.

[84] *Jansen v. Niels* 2017 ONCA 312 at para. 17 [*Jansen*].

The evidence is clear on this point. There is simply no evidence to suggest otherwise."[85] Also, the mother had legal advice when creating the joint tenancy.

The daughter appealed. However, the Court of Appeal also agreed that the presumption of undue influence was rebutted. The application judge had emphasized the independence of the mother. He found that her advanced age was not a trigger for domination. This was not a case in which a totally new estate plan had been entered into by a person facing a terminal illness. She was "pursuing an intention to gift the property that she developed in 2004 and never wavered from. She was cognitively engaged and unfettered by persuasion."[86] The Court dismissed the daughter's appeal.

Vanier v Vanier, 2017 ONCA 561

In this case the issue before the court was whether a continuing power of attorney for property was valid or should be set aside on the basis of undue influence. The question before the court was which test applies in relation to powers of attorney. One of the parties argued that the *inter vivos* undue influence test, and not the testamentary undue influence test, should apply to granting a power of attorney. The Court concluded that the *inter vivos* equitable undue influence test had no application to the facts of the case[87] and there was no undue influence in any event.[88]

Morreale v Romanino 2017 ONCA 359

In this case the court[89] concluded that a daughter did not unduly influence her parents when they gifted to her their equity in the family home. The daughter never left home and lived with her parents her whole life, first on her own and later with her husband. The parents and the daughter owned the family home, 2/3 held by the parents and 1/3 by the daughter. When they sold the home, the parents gifted their portion of the sale proceeds to the daughter to buy a new home, which they all lived in as well. However, title to the new home was in the name of the daughter and her husband alone. The parents died a

[85] *Jansen* at para. 19
[86] *Jansen* at para. 48
[87] *Vanier v Vanier*, 2017 ONCA 561 at para. 50.
[88] *Vanier v Vanier*, 2017 ONCA 561 at para. 55.
[89] *Morreale v. Romanino* 2017 ONCA 359

few years later. A second daughter, who moved away from home at an early age, alleged that her sister unduly influenced their parents into gifting their only major asset.

The trial judge found that the circumstances and the daughter's relationship with her parents had the capacity to create undue influence. However, she found that the presumption of undue influence did not arise because it was not possible "to find any specific act of coercion or domination that would lead to a presumption of undue influence". She further concluded that if the presumption did arise based on her findings of fact, the presumption was rebutted. The second daughter appealed arguing that the trial judge erred by concluding that a presumption did not arise because she found "no specific act of domination or coercion" and that the trial judge gave inadequate analysis of why, if the presumption did arise, it had been rebutted.

On appeal the Ontario Court of Appeal noted that the trial judge made numerous factual findings, all of which were solidly grounded in the evidence. However, the Court of Appeal also found that it was an error in law for the trial judge to conclude that there needed to be a finding of a "specific act of coercion or domination" in order for the presumption of undue influence to arise. The trial judge conflated the presumption of undue influence and actual undue influence. Nevertheless, "despite the impugned statement" in light of the trial judge's findings, the Court of Appeal decided not to interfere with the trial judge's determination that the presumption did not arise in this case. The trial judge was aware of the family dynamics and saw that the father was the driving force behind the transaction. The father was a strong-willed individual who made all of the financial decisions and was meticulous in respect of his personal financial affairs. The Court also found that there was significant analysis on why the presumption would have been rebutted had it been found.

On a final note, the Court observed that the trial judge did not err by failing to draw an adverse inference from the daughter's failure to call the lawyer who acted for the parents and herself on the transaction, noting that ILA is not required in order to rebut the presumption of undue influence: *Bank of Montreal v. Duguid* (2000), 47 OR (3d) 737 (CA) at paras. 26-27.

Thorsteinson v. Olson 2016 SKCA 134

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

The Court concluded from the evidence that there was no actual undue influence: it was the mother who initiated the transaction and the gifting process and that as a *de facto* mother and in recognition of their long-standing bonds of love and devotion to each other the transaction viewed objectively was untainted by any sign of manipulation, coercion or even subtle influence exercised by the son.[90]

The Court also concluded that there was no presumption of undue influence even though there was a parent / child relationship. There was no evidence of any domination of will or that the mother's actions were in any way out of character, widely erratic or unusual. Her acts were consistent with her testamentary intentions. While her physical condition had deteriorated there was no evidence of diminished mental capacity. There were several examples of the mother's continued self-reliance and strength of character: she chose to rebuild her farmhouse after a fire; she arranged the legal work, contractors, purchases of fixtures and furnishings; she continued to bank and manage her finances; and the mother's solicitors saw no suggestion of undue influence by the son.[91] The Court noted that if the conclusion that there was no presumption of undue influence was incorrect, the presumption was rebutted in this case.[92]

The trial decision was upheld on appeal.[93] However, the Court of Appeal would have found a presumption of undue influence, as Justice Ryan-Froslie opined that:

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[90] *Thorsteinson v. Olson* 2014 SKQB 237 at para. 70 ("*Thorsteinson*")
[91] *Thorsteinson*, at para. 78
[92] *Thorsteinson*, at para. 87.
[93] *Thorsteinson Estate v. Olson* 2016 SKCA 134 (CanLII).

> *In my view, given Marjorie's age, physical condition and her reliance on William, he had the potential to dominate her will and therefore the presumption of undue influence arose." The determination of the presumption of undue influence, however, did not affect the overall correctness of the trial judge's conclusion, as based on the trial judge's factual and credibility findings which were amply supported by the evidence, the presumption was "clearly rebutted in this case".*[94]

With respect to independent legal advice, the Court summarized the purpose of independent advice 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.*[95]

The estate's position was that ILA was to be considered a requirement whenever an individual in similar circumstances made a deed of transfer. The Court did not agree and in an analysis of the cases relied upon by the estate, including *Csada*[96], the Court stated*:*

> *independent legal advice is not necessary, but is one of the best ways of rebutting the presumption of undue influence. St. Pierre*[97] *was silent as to the effect of the failure to obtain independent legal advice and Sawchuk Estate*[98] *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,*[99] *decided independent legal advice was necessary, the case dealt with a relationship between a bank and its client, which raised fiduciary obligations, as I*

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[94] *Thorsteinson Estate v. Olson* 2016 SKCA 134 (CanLII) at para. 45.
[95] *Thorsteinson Estate v. Olson* 2016 SKCA 134 (CanLII) at para. 51.
[96] *Csada v. Csada*, 1984 CanLII 2403 (SK CA).
[97] *St. Pierre (Litigation Guardian of) v. St. Pierre*) 325 Sask. R. 159, 2008 CarswellNB 206 (QB).
[98] *Sawchuk Estate v Evans*, (2012), 2012 MBQB 82, 2012 CarswellMan 164, [2012] M.J. No. 120, 76 E.T.R. (3d) 262, 279 Man. R. (2d) 293, [2012] 11W.W.R. 330 (Man. Q.B.)
[99] *MacKay v Bank of Nova Scotia* (1994), 20 OR (3d) 698 (Div Ct)

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. [100]

The Court of Appeal referenced the trial judge's decision stating that the trial judge had properly considered the issue of what independent advice was 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 referenced 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). However, went on to conclude:[101]

That said, lack of adequate, independent legal advice is not a ground unto itself to justify overturning a gift. As previously noted, the presence or absence of independent legal advice is but one way in which to rebut the presumption of undue influence. Other circumstances may be considered.[102]

Zeligs v. Janes 2016 BCCA 280

In this case[103] the Court found that a presumption of undue influence was rebutted in the context of a transfer of a mother's valuable property and house into joint tenancy with her adult daughter. The mother was ninety-four, the daughter was living with the mother at the time, the transfer was gratuitous, and the daughter was the mother's attorney under

[100] *Thorsteinson Estate v. Olson,* 2016 SKCA 134 (CanLII), para 52. Ryan-Froslie 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'Aquilaat* para 40 – all refer to the same quote from *Inche Noriah v Shaik Allie Bin Omar*, [1928] 3 WWR 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."

[101] *Thorsteinson Estate v. Olson,* 2016 SKCA 134 (CanLII) at para 86.

[102] *Thorsteinson Estate v. Olson,* 2016 SKCA 134 (CanLII) at para 53.

[103] 2015 BCSC 7, upheld on appeal 2016 BCCA 280.

a Power of Attorney.[104] The daughter however, rebutted this presumption by showing that there was no evidence of actual influence, the mother obtained independent legal advice, and that despite her physical frailties the mother was "lucid", "capable of doing things like getting her driver's licence while in her 90s", "she was assertive about her interests" and had the ability to resist undue influence.[105]

This case was appealed on the grounds that the trial judge erred with respect to finding a severance of a joint tenancy, but not on the undue influence finding. The appeal was dismissed.[106]

Donis v Georgopoulos, 2016 ONCA 194

The Ontario Court of Appeal upheld[107] a trial judge's finding that the transfer of an elderly mother's home to her adult daughter was a valid *inter vivos* transfer without any undue influence. This case touched on the importance of the role of the drafting or advising solicitor's evidence in these situations.

An elderly mother executed a memorandum of agreement ("MOA") that transferred the ownership of her house to one of her three children for $100,000 and a promise that the mother could live in the house for the remainder of her life. Unfortunately, the mother died shortly after the MOA was executed and the transfer of the house substantially reduced the inheritance to her other children, one of whom (the son), challenged the validity of the transfer. The son argued that as the mother mainly spoke Greek and Macedonian, and could not read the MOA which was in English, the document she signed was of a different nature than what she thought she was signing. Therefore the transfer was invalid under

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[104] *Zeligs v. Janes*, 2015 BCSC 7 at para. 114.
[105] *Zeligs v. Janes*, 2015 BCSC 7 at para. 157. This is an interesting case as, while the court found that the daughter rebutted the presumptions of resulting trust and undue influence, the Court found that the daughter severed the joint tenancy while the mother was still alive when she used the sale proceeds of the property to pay off mortgages on the property (used for her benefit) and transferred the balance into an investment for the sole benefit of her and her husband. This transfer destroyed the unity of possession. The Court found that "the right of survivorship in favour of [the daughter] that would have followed on the death of Dorothy ended with the severance of the joint tenancy" and the sale proceeds were ordered to be distributed under the mother's will. See paras. 191-192.
[106] *Zeligs v. Janes* 2016 BCCA 280
[107] *Donis v. Georgopoulos* 2016 ONCA 194 ("*Donis*").

the doctrine of *non est factum*. He also argued the daughter unduly influenced the mother.

The MOA was drafted by the mother's own lawyer. The lawyer did not speak Greek or Macedonian but the trial judge found that the lawyer was able to communicate with the mother in English. While the daughter brought the mother to the meetings, the lawyer always met with the mother alone over several meetings. He also took an additional step of having the mother see a Macedonian-speaking lawyer to confirm that she intended to transfer her house to her daughter. However, the Macedonian-speaking lawyer did not review the MOA document with the mother as it had not been drafted at that time.

The son argued that trial judge erred in finding that the MOA was not invalidated by *non est factum*. The Court of Appeal concluded however that the trial judge's findings of fact were an "unsurmountable hurdle" to the claim of *non est factum*.[108] The trial judge found that: the mother had sufficient English ability to read and understand the MOA; the mother understood her lawyer's explanation of the MOA; and the daughter explained the terms of the MOA in Macedonian. These findings were entitled to deference.

In the alternative, the son argued that his sister unduly influenced the mother to sign the MOA. The trial judge found that while there was no *actual* undue influence, there was sufficient evidence to raise the *presumption* of undue influence as the mother was dependent upon the daughter for her basic needs and she was in a relationship of trust and confidence. The trial judge went on to find however that the daughter was able to rebut this presumption of undue influence. The trial judge placed great emphasis on the solicitor's evidence and that the mother received independent legal advice ("ILA") from the Macedonian-speaking lawyer. On appeal the son argued that the solicitor was in a conflict of interest and that the Macedonian speaking lawyer was not really providing ILA, as he did not go over the terms of the MOA with the mother as it had not been drafted yet.[109]

[108] *Donis* at para. 22.
[109] *Donis* at para. 35.

The Court of Appeal dismissed both of these arguments. There was no conflict of interest as the solicitor was the mother's solicitor and was acting for her alone. He met with her on several occasion and the MOA was the product of her instructions.

However, Miller J.A. of the Court of Appeal, had a slightly different characterization of the consultation with the Macedonian-speaking lawyer than the trial judge. Miller J.A. found that the solicitor was the mother's lawyer and it was his responsibility for providing her with ILA. He engaged the Macedonian speaking lawyer to assist him in carrying out his duties to his client. He referred the mother to the second lawyer "out of an abundance of caution to ensure that it was her intention to transfer her house."[110] The second lawyer did not need to provide ILA to rebut the presumption of undue influence as the mother's solicitor was already providing ILA.[111]

The Court relied heavily on the lawyer's evidence in this case. He took appropriately cautious steps given the circumstances and potential red flags that would arise when dealing with an elderly and ill woman who wished to transfer her largest asset to a daughter who was also her main caregiver. He interviewed the mother alone, ensured she understood the document she was signing, and engaged the services of a lawyer to assist with the language barrier.

Wittenberg v. Wittenberg 2015 NSCA 79

In this Nova Scotia Court of Appeal case,[112] a mother relied on her son after her husband passed away for both her personal and financial affairs. In May of 2007 the mother and son had a falling out. In 2008, when she was 89, the mother executed a new Will which removed her son as a beneficiary. She died in February of 2012. The son brought proceedings to set aside his mother's Will alleging lack of testamentary capacity and undue influence by his sister.

The son offered the following as examples of undue influence: money was withdrawn from his mother's account "without explanation"; his sister discussed the disposition of his

[110] *Donis,*at para. 43.
[111] *Donis,*at para. 44.
[112] 2015 NSCA 79

mother's assets and the sale of her house with the mother's lawyer; the lawyer's retainer agreement was "in care of" the daughter's name; and the daughter and granddaughter were the principal beneficiaries so "they must have exercised undue influence to thereby benefit".[113]

Neither the application judge, nor the appellate court when the son appealed, was persuaded by these arguments. The Court of Appeal noted that there was an explanation for the removal of the money (the deceased assisted her granddaughter with tuition and other expenses) and it was hardly surprising that the daughter who was an attorney under a POA would discuss the mother's financial affairs with her lawyer or that she completed the retainer agreement for her mother.[114]

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

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

> serious allegations of undue influence for which there was literally no factual foundation. At the very least, [the son] should not have appealed this ground to this Court and probably should have withdrawn it after pre-hearing disclosure in the Court below. . .[The son] has lost again, essentially asking this Court to reweigh the evidence. This has imposed a substantial burden on the residuary beneficiaries. Indeed the executrix submits that this was [his] intention. **In any event, he has repeated the serious allegation of undue influence, without any foundation for doing so. This alone should result in an increased award of costs**.[115] [emphasis added]

[113] *Wittenberg v Wittenberg* 2015 NSCA 79 at paras. 81-84
[114] *Wittenberg v Wittenberg* 2015 NSCA 79 at paras. 81-84
[115] *Wittenberg* at para. 107 & 109.

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

Foley v. McIntyre 2015 ONCA 382

The Court was asked to determine (among other things) whether a father was unduly influenced to gift monies from certain investments to his daughter (who was also his attorney under a power of attorney) prior to his death. After the father's death, his son contested the *inter vivos* transfers. At the time of the transfers, the father was living in a nursing home, had suffered from multiple ischemic attacks, suffered transient delirium, needed assistance with daily living and was prone to falls.[116] However, no medical diagnosis was ever made of dementia nor were there any mental or cognitive diagnoses or evidence in his medical records of any concern of a dementing illness. Also, the father (not a substitute decision maker) consented on his own behalf to the advance directive of a do-not-resuscitate order.[117]

The trial judge concluded that as the daughter was "strictly speaking, in a fiduciary relationship to her father" after she became his attorney under a power of attorney, "a presumption of undue influence should be applied to the circumstances under which she received significant financial gifts from her father."[118] Two expert witnesses conducted retrospective assessments, however, Justice Mullins preferred the daughter's expert who opined that the father was not particularly susceptible to undue influence at the time the gifts were made. The trial judge concluded that the evidence presented by the daughter rebutted the presumption of undue influence and that she met "the burden of proof that may apply, by any standard."[119]

On appeal, the Court agreed with the trial judge. There was no evidence that the daughter was in any way involved in influencing the deceased to make the gifts in question. The daughter was not present at the meetings with the investment advisor who executed the transfer of the investments, and did not have any discussions with the investment advisor

[116] *Foley v. McIntyre*, 2014 ONSC 194 at paras. 92-93; upheld on appeal 2015 ONCA 382.
[117] *Foley v. McIntyre*, 2014 ONSC 194 at para. 130.
[118] 2014 ONSC 194 at para. 181.
[119] 2014 ONSC 194 at para. 183.

before the gifts were made. The Court of Appeal noted that it was "unfortunate" that the advisor did not ask the deceased many of the questions one would expect an independent advisor to ask when an elderly individual is making a significant gift to his child and power of attorney. However, it was open to the trial judge to find that the deceased received independent financial advice.[120] The appeal was dismissed.[121]

Kavanagh v. Lajoie 2014 ONCA 187

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

1) Did the daughter's relationship with the father contain tools or capacity capable of exerting undue influence on him?

2) Whether there existed a potential for domination or persuasive influence by the daughter over her father?

3) Did the daughter within that relationship have a persuasive or dominating influence over the will of her father?

4) If the answer to the above questions is affirmative, had the daughter rebutted the resulting presumption?[122]

The Court, answered the questions in the negative, based on the evidence presented. While the daughter was interested in owning the property this motivation, even given the opportunity she had to unduly influence her father does not give rise to a finding of undue influence.[123] Furthermore, while the daughter drove her father to the lawyer's office, the lawyer met with the father alone. The lawyer was also sensitive to the family dynamics, why the property was not going to his son (the applicant) and that the father wanted to show his appreciation to his daughter for her support.[124]

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[120] 2015 ONCA 382 at para. 39.
[121] 2015 ONCA 382.
[122] *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 133, upheld on appeal 2014 ONCA 187.
[123] *Kavanagh v. Lajoie* 2014 ONCA 187 at para. 22.
[124] *Kavanagh v. Lajoie* 2014 ONCA 187 at para. 23.

The court did not find a presumption of undue influence but also concluded that if this conclusion was incorrect "such presumption has been rebutted by the same facts and analysis set forth above. . ."[125] This decision was upheld on appeal.[126]

Trotter Estate (Re) 2014 ONCA 841

The Court of Appeal overturned a summary judgment order dismissing a Will challenge claim that involved allegations of undue influence (and undue influence allegations with respect to *inter vivos* transfers) finding that the motion judge did not use the correct approach to determining that there was no "genuine issue requiring a trial" as set out by the Supreme Court of Canada in *Hyrniak v. Maudlin*.[127] As there were highly contested facts, a weighing of the evidence and a credibility analysis should have been completed in determining that a trial was not required, rather than a simple recitation of the evidence.

In *Trotter Estate*,[128] a married couple signed mirror Wills in 1995, prepared by their local family lawyer. The Wills left each of their children an equal share of their assets, excluding certain shares in their family company which were left to one son, John.

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

[125] *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 150.
[126] 2014 ONCA 187.
[127] 2014 SCC 7.
[128] 2014 ONCA 841 ("*Trotter*").

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

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

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

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

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

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

> There was evidence concerning John's anger, his temper, his efforts to keep Audrie isolated from Kate, Audrie's fear of him, her dependency upon him, his attempts to manipulate her and her fear of being sent to a nursing home. There was evidence that Audrie transferred the farm property to John because she felt

> indebted to him for money he put into the barn. He sent her invoices for an amount that was approximately $200,000 more than the value of the property itself. **The invoices alone support the appellants' claims of undue influence and fraud.**
>
> There was evidence of control and domination on the one hand and fear and vulnerability on the other. **These are key components of an allegation of undue influence. . .** The motion judge's conclusion that the evidence raised by the appellants – standing on its own – consisted only of bald allegations and did not give rise to the requirement for a trial reflects a misapprehension of the evidence.[129]

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

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

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

> Audrie's vulnerability and dependency, the allegations that Audrie felt she had to please John despite her own wishes, the allegations of domination and control, questions about the confidentiality and independence of her legal advice and instructions, and Audrie's statements to an independent lawyer that John was trying to manipulate her: *Scott v. Cousins*, at para. 114*; Gironda v. Gironda*, 2013 ONSC 4133, 89 E.T.R. (3d) 224, at para. 77.
>
> Nor do the motion judge's conclusions accurately capture the law of undue influence. **Audrie could be "nobody's fool" and want certain things for herself, yet still be subject to undue influence**. Audrie could falsely believe that she was heavily indebted to John as a result of his inflated invoices and thereby feel obliged, contrary to her wishes, to do what he wanted. A person may

[129] *Trotter* at paras.51-53.

appreciate what she is doing but be doing it as a result of coercion or fraud: see *Vout v. Hay*, [1995] 2 S.C.R. 876, per Sopinka J., at para 29.[130]

Credibility assessments, a weighing of the evidence and possibly oral evidence were required in this case. The motion judge's conclusory findings do not provide the analysis or reasoning necessary to support her ultimate conclusion that there was no undue influence.[131] The Court of Appeal made an order setting aside the summary judgment determination and directed a trial before a new judge. No trial decision has been released to date.

8. CONCLUSION

The sampling of court decisions reviewed demonstrate that proving undue influence in the context of *inter vivos* transactions may be difficult. While the facts may be clear to your clients that undue influence was present, it will be necessary for the court to review and weigh that evidence, circumstantial or otherwise, to determine if, at law, undue influence actually existed.

Likewise, it might be difficult for a drafting or transaction lawyer to detect undue influence. Lawyers ought to be cognizant of the potential for undue influence in the context of testamentary documents and estate planning, as well as *inter vivos* transfers. Appended to this paper, is an **Undue Influence Checklist** designed as a Guideline for Drafting Lawyers.

[130] *Trotter* at paras. 60-62
[131] *Trotter* at para. 79

APPENDIX

9. UNDUE INFLUENCE CHECKLIST

UNDUE INFLUENCE: SUMMARY

- The doctrine of undue influence is used by courts to set aside certain *inter vivos* gifts/wealth transfers, transactions, and planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent. Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[1]

TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires **coercion**. It is only where the will of the person who becomes coerced into doing that which he or she does not desire to do, that it is undue influence.[2] Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". Persuasion is allowed, but where one person has the ability to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power, undue influence will be found.[3]

- ***Burden of Proof****:* While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence.[4]

- ***Standard of Proof****: C(R) v McDougall*[5] held that there is a single standard of proof in civil cases— **the balance of probabilities**—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.[6]

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[1] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[2] *Wingrove v Wingrove* (1885) 11 PD 81 at 82
[3] *Dmyterko Estate v. Kulikovsky* (1992) CarswellOnt 543
[4] Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.
[5] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[6] *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38

- ***Indirect Evidence***: In the U.K. case of *Schrader v Schrader*[7], the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

- ***Relationship***: Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develops health issues it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[8]

- ***Multiple Planning Documents***: In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[9]

- ***Language***: In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[10] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[11]

[7] *Shrader v Shrader, [2013] EWHC 466 (ch)*
[8] See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 65: a brother who was close to his sister could have accessed her fuds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.
[9] See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.
[10] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[11] *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; Grewal v Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

- ***Indicators of Testamentary Undue Influence***: The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*[12] provided a (non-exhaustive) list of indicators of undue influence:

    - The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
    - The testator is socially isolated;
    - The testator has experienced recent family conflict;
    - The testator has experienced recent bereavement;
    - The testator has made a new Will that is inconsistent with his or her prior Wills; and
    - The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[13]

    In *Tate v. Gueguegirre*[14] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

    - Increasing isolation of the testator, including a move from his home to a new city;
    - The testator's dependence on a beneficiary;
    - Substantial pre-death transfers of wealth from the testator to the beneficiary;
    - The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
    - The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
    - The beneficiary conveyed the instructions to the lawyer;
    - The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
    - There were documented statements that the testator was afraid of the respondent.[15]

INTERPLAY WITH CAPACITY AND SUSPICIOUS CIRCUMSTANCES

- Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[16]

[12] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[13] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[14] 2015 ONSC 844 (Div. Ct.)
[15] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[16] See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on

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

- *Suspicious Circumstances*: Typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

    - Circumstances surrounding the preparation of the Will or other planning instrument;
    - Circumstances tending to call into question the capacity of the testator/grantor, and;
    - Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[18]

  Examples of suspicious circumstances include:

    - Physical/mental disability of the testator;
    - Secrecy in the preparation of the Will;
    - Seemingly "unnatural" dispositions;
    - Preparation or execution of a Will where a beneficiary is involved;
    - Lack of control of personal affairs by the testator;
    - Drastic changes in the personal affairs of the testator;
    - Isolation of the testator from family and friends;
    - Drastic change in the testamentary plan; and
    - Physical, psychological or financial dependency by the testator on beneficiaries.[19]

INTER VIVOS GIFTS: UNDUE INFLUENCE

- ***Distinct from Testamentary Undue Influence*:** Testamentary undue influence arose from common law courts while *inter vivos* gift undue influence was developed by the courts of equity in the 1700s and 1800s. It is available against a broader spectrum of

grounds of incapacity and undue influence. In *Leger v. Poirier*, [1944] SCR 152 the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "disposing mind and memory" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

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

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

[19] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

conduct and renders the gift of wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void).

Two Classes of Undue Influence*: *Actual and Presumed

- ***Actual Undue Influence***: Has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[20] Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.

- ***Presumed Undue Influence*:** This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being abused.[21] These relationships are determined by a "smell test": does the potential for domination inhere in the relationship itself?

  Relationships where presumed undue influence has been found include: **solicitor and client**, **parent and child**, and **guardian and ward**, "as well as other relationships of dependency which defy easy categorization". However even close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination.

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

  The presumption of undue influence can be rebutted by:

  - No actual influence was used in the particular transaction or the lack of opportunity to influence the donor;
  - The donor had independent legal advice or the opportunity to obtain independent legal advice;
  - The donor had the ability to resist any such influence;
  - The donor knew and appreciated what she was doing; or
  - There was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

[20] *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181
[21] *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

LAWYERS' CHECKLIST

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

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?

- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?

- ❑ Is there conflict within your client's family?

- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

- ❑ If the client is isolated, does he/she live with one particular individual?

- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

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

- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?

- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?

- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

- ❑ Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?

- ❑ Is the client physically dependant on another? Is the client vulnerable?

- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?

- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

- ❑ Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

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

- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?

- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?

- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?

- ❑ Is the client making a marked change in the planning documents as compared to prior documents?

- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

Guidelines for Lawyers to Avoid and Detect Undue Influence

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

- ❑ Interview the client alone;

- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

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

- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability. Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;

- ❑ Address recent health changes and determine whether the client have any physical impairment (hearing, sight, mobility, limitations)?

- ❑ Consider evidence of intention and indirect evidence of intention; and

- ❑ Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers - Checklist

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

- ❑ Determine Intentions;

- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[22] and

- ❑ Be mindful of the *Rules of Professional Conduct*[23] which are applicable in the lawyer's jurisdiction.

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

Kimberly A. Whaley, Whaley Estate Litigation Partners September 2018

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

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

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