



**NATURE AND ORIGIN OF
THE LAW OF UNDUE INFLUENCE:
ATTACKING WEALTH TRANSFERS**

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UNDUE INFLUENCE

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 both testamentary and *inter vivos* gift situations, as well as the burden of proof, indicators and evidence, and a survey of case law in Alberta, and recent cases across Canada. An Undue Influence Checklist is also included.

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*:

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

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

*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 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

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

⁵ *Banton v. Banton*, 1998 CanLII 14926 (ONSC) at para. 89

⁶ *Dmyterko Estate v. Kulikovsky* (1992), CarswellOnt 543

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

In Alberta, testamentary undue influence has been defined as follows:

To constitute undue influence in the eyes of the law there must be coercion; pressure if exerted so as to overpower the volition without convincing the judgment is a species of undue influence which will invalidate a will.⁹

Also the Alberta Court of Appeal case of *Keller v. Luzzi Estate* described undue influence as:

. . . a defence to knowledge and approval where the testator was fully aware of what she was doing, but had her independence overborne by the influence of another person such that there was no voluntary approval of the will. The test for undue influence is effectively coercion. To succeed, the Plaintiffs in this case must prove on a balance of probabilities that [the testator] was in fact coerced into doing something that she did not want to do: *Wingrove v. Wingrove* (1885), 11 PD 81 (Eng Prob Ct); J. Mackenzie, Feeney’s Canadian Law of Wills, 4th Ed (Markham: Lexis Nexis Canada, 2000) at 3-2.2 to 3-6; *McCardell’s Estate v. Cushman* (No. 2), (1989) 107 AR 161, [1989] AJ no 1394 (QB) at para 191, citing *Re Sample Estate* (1955), 15 WWR(NS) 193 at 198 (Sask CA), *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para 370.¹⁰

Notably, pursuant to the *Alberta Rules of Court*, the particulars of the allegations of undue influence must be included in the pleadings pursuant to Rules 13.6(3) and 13.7.¹¹

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

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 *McCardell’s Estate v. Cushman* (No.2) (1989) 107 AR 161 at para. 191 citing *Re Sample Estate* (1955), 15 WWR(NS) 193, at 198, quoted in *Re Cosgrove Estate* (1988), 73 Sask.R. 42 at page 48

¹⁰ 2010 ABCA 127 at para. 20

¹¹ *Alberta Rules of Court*, Rule 13.6(3)(k) and 13.7(e)

of the planning document to prove undue influence on a balance of probabilities.¹² Evidence of undue influence may even rebut the presumption of capacity that would usually apply.¹³

Unlike *inter vivos* transfers, (discussed below) the evidentiary burden never shifts and there is no presumption of undue influence in the testamentary context,¹⁴ except in British Columbia, under the *Wills, Estates and Succession Act*,¹⁵ (“WESA”) which came into force on March 31, 2014. The WESA creates a presumption of undue influence in BC in 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.

¹² *Goodman Estate v. Geffen* (1991), 42 ETR 97; *Hoffman v. Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para. 63

¹³ *Nguyen Crawford v. Nguyen*, 2009 CarswellOnt 1877 *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.)

¹⁴ *Banton v. Banton* 1998 CanLII 14926 (ONSC) at para. 91

¹⁵ SBC 2009, Chapter 13

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,”¹⁶ the more recent Supreme Court of Canada case of *C(R) v. McDougall*¹⁷ held that there is a single standard of proof in civil cases – the balance of probabilities – and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v. Kohut*¹⁸ 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.”¹⁹

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.²⁰

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.

¹⁶ *Vout v. Hay* [1995] 2 SCR 876 (CanLII) at para. 24

¹⁷ 2008 SCC 53 (SCC) cited in *Hoffman v. Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para. 34

¹⁸ (1993), 90 Man R (2d) 245 (Man QB) at para. 38

¹⁹ *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.

²⁰ *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

A court may then look to the circumstances of the planning document to determine evidence of influence.²¹

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.²² 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.²³

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.²⁴

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.²⁵

Indicators of Undue Influence

The Ontario Superior Court of Justice in the 2013 decision of *Gironda v. Gironda*²⁶ 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;

²¹ 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

²² See for example *Kohut Estate v. Kohut*, *Nguyen Crawford v Crawford*, *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

²³ *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.).

²⁴ 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.

²⁵ *Hoffman v. Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

- The 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.²⁷

In *Tate v. Guegueirre*²⁸ 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.²⁹

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.*”³⁰ What amounts to coercion will differ, depending on the circumstances. There is no need for 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*³¹ 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

²⁶ *Gironda v. Gironda*, 2013 CarswellOnt 8612

²⁷ *Gironda v. Gironda*, 2013 CarswellOnt 8612 at para 56

²⁸ 2015 ONSC 844 (Div. Ct.)

²⁹ *Tate v. Guegueirre* 2015 ONSC 844 (Div. Ct.) at para.9

³⁰ Cullity J. in *Scott v. Cousins*, [2001] OJ No.19 at para. 48 citing Atkinson on Wills (2nd edition, 1953) pg. 638

³¹ *Schrader v Schrader*, [2013] EWHC 466 (ch)

“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.³²

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

Distinct from Testamentary Undue Influence

As noted above, testamentary undue influence is distinct from *inter vivos* undue influence.³³

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 effectively overcomes the free will of the will-maker.

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

³² *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

³³ John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p. 529 [“Poyser”]

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.³⁴

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.³⁵ Furthermore, the presumption of undue influence (discussed in more detail below) is applicable to gifts but not applicable to testamentary wealth transfers.

Undue influence in the *inter vivos* gift context is usually divided into two classes.³⁶ 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, and generally, though not always, some personal advantage obtained by a donee 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 donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him.³⁷

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

³⁴ Poyser, *supra* note 33 at pp. 302-303

³⁵ Poyser, *supra* note 33 at p. 529; *Keljanovic Estate v. Sanservino* 2000 CarswellOnt 1312 (C.A.)

³⁶ *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.

³⁷ *Allcard v. Skinner* (1887), L.R. 36 Ch. D. 145 at 181 (Eng.C.A., Ch.Div.) [*Allcard*].

overreaching, some form of cheating. . .”³⁸ 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.³⁹ 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.⁴⁰

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.”⁴¹ It is similar (but distinct) from the common law’s duress doctrine.

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.⁴²

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.⁴³ Relationships that qualify as a ‘special relationship’ are often determined by a ‘smell test’.⁴⁴ Does the “potential for domination inhere in the relationship itself”?⁴⁵ 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.”⁴⁶ 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,⁴⁷ such as

³⁸ *Allcard*, *supra* note 37 at p. 181.

³⁹ *Allcard*, *supra* note 37; *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.

⁴⁰ Poyser, *supra* note 33 at p.492

⁴¹ *Allcard*, *supra* note 37 at 171.

⁴² *C(R) v. McDougall*, 2008 SCC 53

⁴³ *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14

⁴⁴ Poyser, *supra* note 33 at p.499

⁴⁵ *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 [*Geffen*]

⁴⁶ *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42

⁴⁷ 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

where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.⁴⁸ *Geffen v. Goodman Estate*⁴⁹ remains the leading Supreme Court of Canada decision on presumed undue influence.

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”.⁵⁰ 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.⁵¹

The presumption of undue influence can be rebutted by showing⁵²:

- a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;⁵³
- b) the donor had independent legal advice or the opportunity to obtain independent legal advice;⁵⁴
- c) the donor had the ability to resist any such influence;⁵⁵
- d) the donor knew and appreciated what she was doing;⁵⁶ or
- e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.⁵⁷

relationship must be examined in each case to determine if the potential for domination is inherent in the relationship” at para. 108.

⁴⁸ *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

⁴⁹ [1991] 2 SCR 353

⁵⁰ *Geffen v. Goodman Estate* at para. 45

⁵¹ Poyser, *supra* note 33 at p.509

⁵² From *Zeligs v. Janes* 2015 BCSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97

⁵³ *Geffen* at p.379; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121 [*Longmuir*]

⁵⁴ *Geffen* at p. 370; *Longmuir, supra* note 53 at para. 121

⁵⁵ *Calbick v. Warne*, 2009 BCSC 1222 at para. 64

⁵⁶ *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29

⁵⁷ *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.⁵⁸

In *Leger v Poirier*,⁵⁹ 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.⁶⁰

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly “unnatural” dispositions;

⁵⁸ See for example the case of *Gironde v. Gironde*, 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.

⁵⁹ *Leger v. Poirier*, [1944] SCR 152

⁶⁰ *Vout v. Hay*, [1995] 2 SCR 876 (SCC)

- 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.⁶¹

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*.”⁶²

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

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

6. CASE LAW

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

A) Undue Influence Found

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

⁶¹ Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11

Archer v. St. John – 2008 - Alberta

While the Court in this case⁶³ found that a daughter failed to rebut the presumption of resulting trust when her father transferred a portion of his property into joint tenancy with her, had the Court found that a valid gift had been made, it would have set aside the gift as having been procured as a result of undue influence. The Court relied on the following evidence to support a finding of undue influence sufficient to negate the gift:

- There was a special relationship between father and daughter;
- The father had a history of signing documents placed in front of him (as his deceased wife had looked after all of the financial paper work);
- No one discussed with the father that he had already given the property to his son in his Will;
- The sister failed to discuss the transfer with her siblings (especially the brother who was supposed to have inherited it under the Will or her sisters who were their father's attorney under a power of attorney for property);
- There was no independent legal advice;
- The daughter used her personal friends as commissioner of oaths and witnesses to the transfer;
- The transfer was executed in the daughter's home and she controlled who was present ; and
- The father was vulnerable and dependant on others.⁶⁴

Verwoord v. Goss – 2014 - British Columbia

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.⁶⁵ 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.

⁶² Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

⁶³ 2008 ABQB 9

⁶⁴ *Archer v. St. John* 2008 ABQB 9 at para. 77

⁶⁵ 2014 BCSC 2122

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 exercised freely.⁶⁶ 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.⁶⁷

Servello v. Servello – 2015 - Ontario

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.⁶⁸ 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

⁶⁶ *Verwoord v. Goss* 2014 BCSC 2122 at para. 213

⁶⁷ *Verwoord v. Goss* 2014 BCSC 2122 at para. 230

⁶⁸ 2014 ONSC 5035, upheld on appeal 2015 ONCA 434

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.⁶⁹

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.⁷⁰ 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.⁷¹

The decision was upheld on appeal.⁷²

Cowper-Smith v. Morgan – 2016 - British Columbia

This case⁷³ 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-

⁶⁹ *Servello v Servello*, 2014 ONSC 5035 at paras. 1-4

⁷⁰ *Servello v. Servello* 2014 ONSC 5035 at para. 47

⁷¹ *Servello v. Servello* 2014 ONSC 5035 at paras.48-49

⁷² 2015 ONCA 434

⁷³ 2015 BCSC 1170 (“*Cowper-Smith*”)

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".⁷⁴ 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).⁷⁵ 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.⁷⁶ 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.⁷⁷ The Court also found that the relationship between the mother and daughter "was one in which there was a potential for domination" and one which gave rise to a presumption of undue influence:⁷⁸

- 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;

⁷⁴ *Cowper-Smith v. Morgan* 2015 BCSC 1170 at para. 29 [*Cowper-Smith*]

⁷⁵ *Cowper-Smith*, *supra* note 74 at para. 34.

⁷⁶ *Cowper-Smith*, *supra* note 74 at para. 38.

⁷⁷ *Cowper-Smith*, *supra* note 74 at para. 67

⁷⁸ *Cowper-Smith*, *supra* note 74 at paras. 86 & 91.

- 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”⁷⁹:

- Not only was the daughter an unreliable witness, the daughter was present for much of the interaction between the mother and her lawyer;
- both the daughter and brother-in-law provided the drafting lawyer with information and instructions;
- the ILA lawyer was not aware of the extent of the mother’s assets and did not discuss the financial implication of placing all of her assets 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.⁸⁰

The Court concluded that the transfers completed were as a result of undue influence and were ordered to be set aside.⁸¹

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:

⁷⁹ *Cowper-Smith*, *supra* note 74 at para. 91

⁸⁰ *Cowper-Smith*, *supra* note 74 at para. 102.

⁸¹ *Cowper-Smith*, *supra* note 74 at para. 105.

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 57-58.⁸² [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, which in the absence of any rationale reasons, might be found after her death not to be just and fair to the respondents”.⁸³

Despite the Court of Appeal agreeing with the trial judge with respect to the undue influence ruling, the appeal was allowed in part with respect to a claim for proprietary estoppel. Leave to appeal this decision to the Supreme Court of Canada was recently granted.⁸⁴

B) NO UNDUE INFLUENCE FOUND

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

Johnston (Estate of) v. Gemmil – 2007 – Alberta

In this case⁸⁵ the deceased died at the age of 92 and she had never married, nor did she have children of her own. She left an estate of over \$400,000.00, the residue of which was to be divided equally between her niece and two nephews. During the period of 1979-2001 the deceased Aunt was characteristically generous, with amounts given to each niece and nephew as “special occasion gifts” roughly equivalent at just under \$50,000.00. It was alleged by the niece that one of the nephews received funds *in addition* to special occasion gifts totaling over \$100,000.00 and that these gifts were a result of undue influence he had exerted on his Aunt.

The plaintiff argued that the case was one of presumed undue influence and not actual undue influence. The plaintiff produced evidence seeking to show that the Aunt was highly dependant upon

⁸² *Cowper-Smith v. Morgan* 2016 BCCA 200 at para. 53

⁸³ *Cowper-Smith v. Morgan* 2016 BCCA 200 at para. 65

⁸⁴ *Cowper-Smith v. Morgan* 2016 CanLII 82913 (SCC)

⁸⁵ *Johnston (Estate of) v. Gemmill*, 2007 ABQB 235

the nephew to run errands and perform daily tasks which she was too frail to perform herself and that the dependency increased over time. There was also some concern over “baby-talk” between the two and that the nephew would call the Aunt “kiddo”. It was alleged that the nephew was assuming a “parent-like” role over the Aunt.⁸⁶

The Court did not find a presumption of undue influence:

Not every relationship of an aged aunt or uncle to a defendant should automatically give rise to the presumption of undue influence . . . The assessment of the relationship is one that must be done considering the specific facts which are before the Court.⁸⁷

Justice MacLeod found that the Plaintiff did not introduce sufficient evidence to show that the relationship between the Defendant and the Aunt was such that there was the potential for him to dominate her will.

What the plaintiff had shown was that the nephew struggled with his career and during this time his primary sources of income was room and board from his mother and monetary support from the Aunt. In exchange, it is clear that he was of assistance by providing support and services in return. The “mere fact that the Defendant received money from the Aunt while she at the same time relied upon his assistance in some of her daily needs is not sufficient on its own to raise the presumption of undue influence”.⁸⁸ The Aunt relied on the nephew but not to the extent where this reliance was such that the nephew was in a position to control or manipulate her. There was no evidence at the time of the gifts that the Aunt’s health or faculties were compromised. With respect to “baby-talk” it was found to be nothing other than “playful banter”.⁸⁹ The claim was dismissed.

Petrowski v. Petrowski Estate - 2009 – Alberta

While this lengthy case⁹⁰ mainly dealt with allegations of lack of testamentary capacity, it also touched on undue influence. The son of the deceased alleged that his father lacked testamentary capacity when he executed his Will and that his sister unduly influenced him in his execution of the Will and with respect to certain *inter vivos* transfers of property. In the Will the father left all of his

⁸⁶ *Johnston (Estate of) v. Gemmill*, 2007 ABQB 235 at para. 22

⁸⁷ *Johnston (Estate of) v. Gemmill*, 2007 ABQB 235 at para. 30

⁸⁸ *Johnston (Estate of) v. Gemmill*, 2007 ABQB 235 at para. 34

⁸⁹ *Johnston (Estate of) v. Gemmill* 2007 ABQB 235 at para. 35

⁹⁰ *Petrowski v. Pertowski Estate*, 2009 ABQB 196 [*Petrowski*]

property to his daughter. Also, three months before his death he executed a transfer of all of his farm and mineral titles into joint names with his daughter. When their mother died, the daughter had moved in with her father and looked after her father and assumed a major role in managing the farm. New cattle bought on the farm were put in the daughter's name but the revenue for the cattle was always claimed by the father on his income tax. After finding that the father had testamentary capacity, the Court considered whether the daughter unduly influenced the father.

The son argued that there was a relationship of dominance by the daughter over the father. He stated that there should be a presumption of undue influence found in the relationship based on the fact that the daughter was the only beneficiary under the Will; she was an adult child who lived with her elderly father, and she in essence ran the farm, controlled bank accounts and the racing operation on the farm towards the end of her father's life.

The Court noted that in the case of an old and sick parent, a child may assume a relationship of dominance over that parent citing *Canadian Imperial Bank of Commerce v. Ohlson*, [1997] AJ No. 1185 (CA) and *Stewart v Book* [1992] AJ No. 539 (QB). In this case however the Court found that the father was not sick, unwell mentally or otherwise. The Court did not find that the relationship was one that amounted to a presumption of undue influence.⁹¹ Aside from some minor evidence about a couple of times that the daughter yelled at her father, there was no evidence to establish a relationship of dominance. The Court stated: "It cannot be the law that simply because a child had lived with and cared for a parent that the child should be denied benefits under a will for simply that reason alone."⁹²

With respect to the land transfers, the Court relied on the same evidence and found that there was no undue influence on the father when he gave instructions to the lawyer and executed the *inter vivos* transfers. While the daughter arranged for the lawyer to attend at the house, there was no one else present when the father executed the transfers with his lawyer, who reviewed the documents with him and the lawyer was satisfied that the father understood and approved the documents before they were executed.

***Christensen v. Bootsman* – 2014 – Alberta**

⁹¹ *Petrowski*, *supra* note 90 at para. 383.

⁹² *Petrowski*, *supra* note 90 at para. 390

This case⁹³ was concerned with a holograph Will. Three of the deceased's children challenged the validity of the Will alleging lack of capacity and undue influence by a fourth child, Sandra. The deceased had executed a Will in 1976 and appointed her daughter Yvonne as executrix. When Yvonne submitted the 1976 Will for probate, Sandra brought forward a handwritten document dated June 28, 2010 by the deceased which she submitted was the last valid Will of their mother.

Sandra had taken on the primary responsibility for looking after her mother. She had a very close and loving relationship with her. She was dedicated, respectful and committed to her well-being. None of the other children complained or had issues with the relationship. They all acknowledged that Sandra was the one designated by the family to take responsibility for their mother. Sandra was in charge of her income taxes and finances. The mother paid Sandra \$800.00 a month. Sandra was suffering financial issues as she was not working. Under the Holograph Will Sandra inherited the mother's house and the vast majority of her estate. The 1976 Will split her estate equally among her children.

The parties agreed to the technical validity of the Holograph Will. The Court found that the evidence dispelled any suspicious circumstances argued by the respondents including that the content of Holograph Will differed drastically from the 1976 Will, that the mother never would have used the words used in the Holograph Will, the secrecy of the Holograph Will, and the close relationship with Sandra. Based on the medical evidence presented and the testimony of all children, the Court found that the mother had testamentary capacity at the time that she wrote the Holograph Will.

The Court noted that the respondent children could not point to any one specific event or incident to support undue influence. None of the siblings saw Sandra "do anything inappropriate". While it was clear that Sandra had influence on her mother, that influence was not enough to establish coercion. Furthermore, none of the children suggested that Sandra was unduly influencing the mother while she was alive. The Court found Sandra to be a very credible witness and that she provided real value to her mother. Of note was Sandra's personal circumstances compared to her siblings: she had been unemployed for several years; her personal relationship had ended; she lived on her RRSPs and assistance from her mother and used her time to help other family members, including her grandfather. The mother had also discussed with Yvonne the possibility of leaving the house to Sandra, and Yvonne had no concerns and told her to do what she thought was fair. The Court concluded that there was no evidence supporting a finding of testamentary undue influence.

⁹³ *Christensen v. Bootsman*, 2014 ABQB 94

***Czajkowski v. Czajkowski* – 2016 – Alberta**

Two brothers filed claims against another brother, Donald, for a share in their mother’s estate,⁹⁴ alleging that Donald had exerted undue influence on their mother and pressured her to execute an Enduring Power of Attorney and Personal Directive in favour of Donald, transfer her home into joint names with Donald and change her Will. The Will disinherited the two plaintiffs for “alleged discourtesy and a lack of forthrightness” as set out in a specific paragraph in the Will. The Will appointed Donald as executor, left personal effects to grandchildren and great-grandchildren and residue to Donald.

The drafting lawyer was contacted by Donald to assist his mother with Power of Attorney documents. The lawyer was satisfied that the mother understood the effects of the documents. He testified that he was satisfied as to her capacity from his conversation and her input to the discussion with him, which was one-on-one. She was aware of her surroundings, was competent and exercised her free will to the sign the papers which he presented and explained.

A few months later the lawyer met with the mother at her house to take instructions on the Will. The lawyer told Donald to leave the house, which he did. The mother looked bright, alert and remembered the lawyer from the previous meeting. The lawyer took six pages of detailed notes from the meeting. For his notes, the lawyer testified that Donald had told his mother (and she told the lawyer) that it was up to her to do what was best. The mother was aware of the assets of her estate and it was the lawyer’s understanding that she was executing the Will voluntarily and was not influenced by Donald. He prepared the Will as requested and returned with his assistant on a later date. The lawyer specifically explained the wording in the Will to the mother regarding why she was disinheriting her other two sons. He prepared a memo the same day, which he does not normally do, but he does as a matter of prudence when some of a client’s children are being disinherited. The assistant also took notes, which stated that the mother approved of the words disinheriting her sons, saying “Exactly!” and that the wording covered the reasons why she was disinheriting her sons. She also noted that the mother was “chatty, alert and on top of her game”. On cross-examination the

⁹⁴ *Czajkowski v. Czajkowski*, 2016 ABQB 242

lawyer acknowledged that he had acted for Donald a few years earlier but he made it clear he was acting only for the mother in the present circumstances.

After looking at all of the evidence (including medical evidence) the Court concluded that “[b]y any measure, the evidence clearly establishes that [the mother] had testamentary capacity”. With respect to undue influence the Court found the following factors spoke most clearly against any basis for undue influence: the brothers did “not even hint that Donald restricted regular access to his mother”, whom they were able to see on a regular basis; Donald never took any steps under the POAs granted to him; and the evidence was clear that there was a basis for the mother to disinherit the two sons. No undue influence was found.

Re Chrustie – 2015 – Manitoba

Two daughters challenged a codicil to their father’s Will alleging, among other things, that their father was unduly influence by their step-mother in its execution.⁹⁵ The codicil included their brother as an equal beneficiary in his estate, while previous wills had disinherited him. The deceased had however reconciled with his son, after a falling out. The step-mother kept the codicil and the reconciliation of the father and son a secret from the daughters.

The deceased had limited ability to communicate (due to a medical) and had some cognitive impairment, but could speak some words and nod or shake his head. The Court was presented with evidence from expert witnesses, as well as the staff of the nursing home at which the father resided, and family members. The Court was satisfied that it was not the step-mother’s idea to include the son as a beneficiary, that it was solely the father’s idea, and she “merely facilitated” it by calling the son to visit and calling the lawyer to draft the codicil. The lawyer met with the father and went through every page and paragraph of the codicil and the father communicated with the lawyer by nodding his head. The lawyer was satisfied that the deceased was communicating his wishes and understood what he was doing.⁹⁶ Furthermore, the step-mother’s decision to keep the son’s visits and the codicil a secret from the daughters was so that her husband “could live out his final months in peace.”⁹⁷ The step-mother’s evidence was corroborated by other witnesses and the Court found her to be an honest and truthful witness. No undue influence was found and the codicil was admitted to probate.

⁹⁵ *Re Chrustie* 2015 MBQB 25

⁹⁶ *Re Chrustie* at para. 52.

⁹⁷ *Re Churstie* at para. 56.

***Thorsteinson v. Olson* – 2016 – Saskatchewan**

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.⁹⁸

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.⁹⁹ The Court noted that if the conclusion that there was no presumption of undue influence was incorrect, the presumption was rebutted in this case.¹⁰⁰

The trial decision was upheld on appeal.¹⁰¹ However, the Court of Appeal would have found a presumption of undue influence, as Justice Ryan-Froslic opined that: "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".¹⁰²

⁹⁸ *Thorsteinson v. Olson* 2014 SKQB 237 at para. 70 ("*Thorsteinson*")

⁹⁹ *Thorsteinson*, *supra* note 98 at para. 78

¹⁰⁰ *Thorsteinson*, *supra* note 98 at para. 87.

¹⁰¹ *Thorsteinson*, *supra* note 98 *Estate v. Olson* 2016 SKCA 134 (CanLII)

¹⁰² *Thorsteinson Estate v. Olson* 2016 SKCA 134 (CanLII) at para. 45

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.¹⁰³

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*¹⁰⁴, the Court stated:

independent legal advice is not necessary, but is one of the best ways of rebutting the presumption of undue influence. St. Pierre¹⁰⁵ was silent as to the effect of the failure to obtain independent legal advice and Sawchuk Estate¹⁰⁶ 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,¹⁰⁷ decided independent legal advice was necessary, the case dealt with a relationship between a bank and its client, which raised fiduciary obligations, as I will explain later in these reasons, do not exist in the cases at hand. Accordingly, I do not view it as applicable to the circumstances of this case. ¹⁰⁸

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:

¹⁰³ *Thorsteinson Estate v. Olson* 2016 SKCA 134 (CanLII) at para. 51

¹⁰⁴ *Csada v. Csada*, 1984 CanLII 2403 (SK CA)

¹⁰⁵ *St. Pierre (Litigation Guardian of) v. St. Pierre* 325 Sask. R. 159, 2008 CarswellNB 206 (QB)

¹⁰⁶ *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.)

¹⁰⁷ *MacKay v Bank of Nova Scotia* (1994), 20 OR (3d) 698 (Div Ct)

¹⁰⁸ *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'Aquila* at 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."

“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:¹⁰⁹

*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.*¹¹⁰

Zeligs v. Janes – 2016 - British Columbia

In this case¹¹¹ 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 a Power of Attorney.¹¹² 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.¹¹³

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.¹¹⁴

Wittenberg v. Wittenberg – 2015 - Nova Scotia

In this Nova Scotia Court of Appeal case,¹¹⁵ 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

¹⁰⁹ *Thorsteinson Estate v. Olson*, 2016 SKCA 134 (CanLII) at para 86

¹¹⁰ *Thorsteinson Estate v. Olson*, 2016 SKCA 134 (CanLII) at para 53

¹¹¹ 2015 BCSC 7, upheld on appeal 2016 BCCA 280

¹¹² *Zeligs v. Janes*, 2015 BCSC 7 at para. 114

¹¹³ *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

¹¹⁴ *Zeligs v. Janes* 2016 BCCA 280

¹¹⁵ 2015 NSCA 79

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 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".¹¹⁶

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.¹¹⁷

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.**¹¹⁸ [emphasis added]

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

¹¹⁶ *Wittenberg v Wittenberg* 2015 NSCA 79 at paras. 81-84

¹¹⁷ *Wittenberg v Wittenberg* 2015 NSCA 79 at paras. 81-84

¹¹⁸ *Wittenberg* at para. 107 & 109

***Donis v Georgopoulos* - 2016 – Ontario**

The Ontario Court of Appeal recently upheld¹¹⁹ a trial judge’s finding that the transfer of an elderly mother’s home to her adult daughter was a valid *inter vivos* transfer. 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 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*.¹²⁰ 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

¹¹⁹ *Donis v. Georgopoulos* 2016 ONCA 194 (“*Donis*”).

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.¹²¹

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 occasions 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."¹²² 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.¹²³

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.

Kavanagh v. Lajoie - 2014 - Ontario

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?

¹²⁰ *Donis, supra* note 119 at para. 22

¹²¹ *Donis, supra* note 119 at para. 35

¹²² *Donis, supra* note 119 at para. 43

¹²³ *Donis, supra* note 119 at para. 44

- 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?¹²⁴

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.¹²⁵ 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.¹²⁶

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. . ." ¹²⁷ This decision was upheld on appeal.¹²⁸

Foley v. McIntyre – 2015 - Ontario

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.¹²⁹ 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.¹³⁰

¹²⁴ *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 133, upheld on appeal 2014 ONCA 187

¹²⁵ *Kavanagh v. Lajoie* 2014 ONCA 187 at para. 22

¹²⁶ *Kavanagh v. Lajoie* 2014 ONCA 187 at para. 23

¹²⁷ *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 150

¹²⁸ 2014 ONCA 187.

¹²⁹ *Foley v. McIntyre*, 2014 ONSC 194 at paras. 92-93; upheld on appeal 2015 ONCA 382

¹³⁰ *Foley v. McIntyre*, 2014 ONSC 194 at para. 130

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.”¹³¹ 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.”¹³²

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 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.¹³³ The appeal was dismissed.¹³⁴

***Trotter Estate (Re)* – 2014 – Ontario**

The Court of Appeal overturned a summary judgment order dismissing a Will challenge claim that involved allegations of undue influence, 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*.¹³⁵ 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*,¹³⁶ 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.

¹³¹ 2014 ONSC 194 at para. 181

¹³² 2014 ONSC 194 at para. 183

¹³³ 2015 ONCA 382 at para. 39

¹³⁴ 2015 ONCA 382

¹³⁵ 2014 SCC 7

¹³⁶ 2014 ONCA 841 (“*Trotter*”)

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.

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.¹³⁷

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

¹³⁷ *Trotter* at paras.51-53

wishes, to do what he wanted. A person may 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 29.¹³⁸

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.¹³⁹ 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 release to date.

7. A CAUTIONARY NOTE ABOUT COSTS WHERE UNDUE INFLUENCE ALLEGED BUT NOT FOUND

There is a line of cases in Alberta that deals specifically with costs in situations where undue influence has been alleged but not found. Traditionally, stricter costs are imposed where allegations of misconduct fail, particularly when little evidence of weight is adduced to support them.¹⁴⁰ Alberta case law (*Babchuk v Kutz*¹⁴¹; *Zahn v Taubner*¹⁴²; *David v Foote Estate (Re)*; *Foote Estate, Re*¹⁴³) has identified a number of factors that influence whether the Court should award costs to an unsuccessful party in estate litigation and one of those factors is whether there were any unproven allegations of undue influence.

In *Petrowski v. Petrowski*, the brother alleged that his sister had unduly influenced her father and he was wholly unsuccessful at trial in proving his claims. After ordering that the successful sister was entitled to her costs, another issue before the Court was whether the unsuccessful brother should have his costs paid out of the estate. Weighing all of the evidence, it the Court rejected the plaintiff's application for his costs to be paid from the estate:

[T]he Plaintiff's argument that I should find a presumption of undue influence was entirely unreasonable. Joan and Nick were close, and Joan managed Nick's farm and sometimes assisted him with his daily routine. If the courts were to find a presumption of undue influence in these circumstances, this could lead to a travesty in our families where persons would refuse to assist aging parents because of the possibility that any legacy from that

¹³⁸ *Trotter* at paras. 60-62

¹³⁹ *Trotter* at para. 79

¹⁴⁰ *McCullough Estate v. Ayer*, 1998 ABCA 38 at para. 29

¹⁴¹ *Babchuk v Kutz*, 2007 ABQB 88 at para 8

¹⁴² *Zahn v Taubner*, 2012 ABQB 504 at para 16

¹⁴³ *David v Foote Estate (Re)*; *Foote Estate, Re*, 2010 ABQB 197 at paras 21-46

aging parent would be consistently challenged because of a perception of undue influence. This challenge was certainly not reasonable.¹⁴⁴

8. CONCLUSION

The sampling of court decisions reviewed demonstrate that proving undue influence 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 lawyer to detect undue influence. A drafting lawyer 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.

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

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March 2017

¹⁴⁴ *Petrowski v. Petroski* 2009 ABQB 753 at para. 41