UNDER THE INFLUENCE?

The risks associated with independent legal advice where undue influence and capacity are complicating factors

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ABSTRACT

- *In certain circumstances, a lawyer will consider when, or if, it is appropriate to require or recommend independent legal advice (ILA). While ILA is not always required, certain situations involving older adults may arguably necessitate the need for ILA.*
- *A lawyer who agrees to provide ILA must not take on the role lightly. The duty of care requires a high degree of integrity and professionalism. Providing legal advice under a limited scope retainer with respect to only one particular transaction can have its challenges. This is especially so when a lawyer is meeting the client for the first time, knows little about the client and has little background information, and also when the client is older and possibly vulnerable/dependent, with physical and/or cognitive impairments.*
- *This article will, therefore, focus on ILA in the context of undue influence and incapacity. I will examine the standard of care when providing ILA generally, so as to delineate the further complexity where capacity and undue influence issues exist or are suspected. I will also review selected court decisions where the quality or sufficiency of the ILA provided was questioned.*

Independent legal advice (ILA) is usually the best evidence to prove free will. Indeed, in the case of *Csada* v *Csada*, the court determined that ILA was the 'best way' to rebut the presumption of undue influence.[1] This is well established in the prevailing jurisprudence.

In *Allcard* v *Skinner, per* Judge Kekewich, the court stated that, in the context of a gift where undue influence exists:

> '...[t]he law does not prohibit gifts to sisterhoods by members any more than it prohibits gifts by wards to guardians or by children to parents; but where the paramount influence presumably exists it casts on the possessor of such influence the burthen of proving that the gift was free, and it holds an essential part of that proof to be that the donor had "competent independent advice." It was urged in argument that such advice must be "legal." I pointed out to Sir Charles Russell that this was not the language of some, at least, of the authorities, and that, in particular, it was not the language of the considered judgment of Lord Justice Turner, in *Rhodes* v *Bate* [Law Rep 1 Ch 252], on which reliance was placed. The answer was that in a large number of cases (and, of course, it was intended to include the present one) the only competent advice was "legal." To that I do not assent. The advice which is more

1 1984 CanLII 2403 (SK CA) at para 29

urgently required is that of a man of the world – a man of common sense – who, without despising emotion, does not rank it among the virtues, but also finds a place there for prudence. Such a man, especially if in a general way conversant with the administration of property, and capable of expressing his views clearly and strongly, would be a far better adviser than a solicitor or counsel, who did not possess these qualifications.'[2]

The Saskatchewan Court of Appeal in *Thorsteinson Estate* v *Olson*[3] held that the purpose of independent advice was '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.'[4] The Court of Appeal referenced the trial judge's decision in *Thorsteinson*,[5] where, despite finding that the client was independently informed, the trial judge went on to conclude: '... 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.'[6]

Justice Lang, in *Juzumas* v *Baron*,[7] found that a vulnerable and elderly man's transfer of property to the son of a much younger woman, who had already duped the elderly man into marrying her, resulted from undue influence and was set aside. The lawyer involved was chosen by the influencer and 'was clearly not in [Mr Juzumas'] camp. He was not his lawyer.'[8]

Lawyers in Ontario are governed by the *Rules of Professional Conduct*, which defines ILA.[9] Helpful practice resources are available to guide ILA lawyers in meeting their obligations.[10]

DUTY OF CARE

Lawyers giving ILA owe a duty of care to their clients, even if they are not providing representation. If a lawyer who has been

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retained to provide ILA does not provide adequate advice, that lawyer may be exposed to liability in negligence from the guarantor, who may, in turn, be found liable to the financial institution, or to the bank itself, if the mortgage or security is not upheld as a result of failure to provide adequate ILA.

STANDARD OF CARE[11]

Inche Noriah v *Shaik Allie Bin Omar* is the authority for the proposition that, in providing ILA, a lawyer must not only explain the nature and effect of a guarantee (or other contract) to the client, but must also have a broader understanding of the client's assets, the risk of the transaction and any alternatives for accomplishing the transaction without risk.[12]

In *Gold* v *Rosenberg*, the Supreme Court of Canada noted that: 'Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.'[13]

The ILA lawyer must obtain sufficient information to advise the client on the proposed

2 (1887) 36 Ch D 145 Eng CA at pp158–159
3 2016 SKCA 134 (CanLII) at para 51
4 *Ibid*
5 *Thorsteinson Estate* v *Olson*, 2014 SKQB 237 (CanLII)
6 2016 SKCA 134 (CanLII) at para 53
7 2012 ONSC 7220
8 *Id* at para 90
9 *Rules of Professional Conduct*, s1.1-1
10 Law Society of British Columbia, *Practice Resource: Independent Legal Advice Checklist*, bit.ly/2m5Mr21

11 The standard for providing proper ILA generally has been discussed in a number of decisions, including *Goodman* v *Geffen*, [1989] 6 WWR 625 (Alta CA) rev'd [1991] 2 SCR 353; *Inche Noriah* v *Shaik Allie Bin Omar*, [1929] AC 127 (PC); and *Tulick* v *Ostapowich* (1988), 62 Alta LR (2d) 384 (Alta QB)
12 [1929] AC 127 (PC) at p614
13 [1997] 3 SCR 767 at para 85

'The ILA lawyer must not only determine whether the client has capacity to enter into the proposed transaction, but must also consider whether the client is instructing free of undue influence'

transaction itself, with a full understanding of all of the facts.[14] It is not for the ILA lawyer to approve of the transaction if the ILA client understands the nature and effect of the transaction, and has freely chosen to enter into it.[15] The adequacy of ILA is a situation-specific inquiry. In refusing to give effect to a contractual waiver of maintenance in *JB* v *LB*, the Alberta Court of Appeal stated:

> 'The term "independent advice" is not one of precision. It may cover the situation in which a lawyer explains, independently, the nature and consequences of an agreement... It may extend, as it does in cases of undue influence, to the need to give informed advice...'[16]

ILA must obviously be independent. A lawyer acting for both parties involved cannot truly be said to be independent.[17]

To meet the standard of a reasonably competent lawyer as set out in *Central Trust Co* v *Rafuse*,[18] the ILA lawyer must not only determine whether the client has capacity to enter into the proposed transaction, but must also consider whether the client is instructing free of undue influence. To determine this, the ILA lawyer must be live to issues of influence and incapacity. Capacity issues are complex and not necessarily obvious. Great care must be taken in situations that demand extra scrutiny, and a high degree of professionalism is required.[19]

CAPACITY

There is no single legal definition of 'capacity'. In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[20]

Capacity is defined or determined upon factors of mixed law and fact, and by applying the evidence available to the applicable standard or criteria required to determine capacity.[21] Notably, some refer colloquially to 'tests' for capacity. While there is no 'test', so to speak, there are, rather, factors/criteria to consider in assessing for the requisite decisional capacity to make a certain decision at a particular time. Accordingly, all references to 'test' should be read with this in mind, while noting that the reference simplifies the concept for a layperson.[22]

Capacity is an area of inquiry where medicine and law have a shared responsibility, in that legal practitioners often deal with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal concepts in their clinical practices, and even to review evidence retrospectively to determine whether, at a particular time, an individual had the requisite decisional capacity to complete a specific task, or make a specific decision. The assessment of capacity is a less-than-perfect science, from both a legal and medical perspective.[23]

Capacity is decision, time and situation specific. A person, therefore, is not globally 'capable'

14 *Goodman Estate* v *Geffen*, 1989 ABCA 206, rev'd [1991] 2 SCR 353, at para 26
15 *Coomber* v *Coomber*, [1911] 1 Ch 723 at 730
16 1989 ABCA 241 at paras 22–23
17 In *Bertolo* v *Bank of Montreal* [1986] 57 OR (2d) 577 (CA), the Court found that the purported ILA, provided by a law partner in the same firm as the lawyer who had represented the other parties in the transaction, was not truly 'independent', and he should not have agreed to have provided ILA
18 *Central Trust Co* v *Rafuse* [1986] 2 SCR 147 at para 58
19 *Banton* v *Banton* [1998] 164 DLR 176 (ONCJ GD) at para 90
20 *Palahnuk* v *Palahnuk Estate*, [2006] OJ No 5304 (QL), 154 ACWS (3d) 996 (SCJ); *Brillinger* v *Brillinger-Cain*, [2007] OJ No 2451 (QL), 158 ACWS (3d) 482 (SCJ); *Knox* v *Burton* (2004), 6 ETR (3d) 285, 130 ACWS (ed) 216 (Ont SCJ). See also Kimberly A Whaley and Ameena Sultan, 'Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity', *Estates, Trusts and Pensions Journal*, Vol 32 No 3 (May 2013), p215
21 *Starson* v *Swayze* [2003], 1 SCR 722
22 Whaley and Sultan, 'Capacity and the Estate Lawyer'
23 *Ibid*

'A person capable of entering into a contract has the ability to understand not only the nature of the contract, but the impact on their interests'

or 'incapable', and there is no one-size-fits-all determination for general capacity. Rather, decisional capacity is determined on a case-by-case basis in relation to a particular task or decision, at a moment in time.[24]

Common-law precedent suggests that the ILA lawyer should be satisfied that the client has the requisite capacity to give instructions for and execute the document in question, or task undertaken, notwithstanding the presumption of capacity. This duty is particularly significant if the client is elderly, vulnerable, dependent, infirm, or has illnesses and/or impairments relevant to the circumstances of the decision being made. ILA lawyers are wise to exercise additional caution in circumstances where a third party who may benefit from the transaction brings the client to the office, and appears overly involved in the process. ILA lawyers must be alert to red flags in the retainer.[25]

The ILA lawyer is obligated to interview the client to determine requisite legal or decisional capacity. File notes should be thorough and clearly indicate if the lawyer is confident that the client is decisionally capable of instructing on the subject matter retained.

If there is doubt as to the client's capacity, the lawyer may need to make other considerations for the protection of the client and the lawyer. When interviewing the client, the lawyer should ask probing questions and provide the client with as much information as possible about the legal consequences of the matter and about future proceedings. If the solicitor has serious concerns about the client's capacity, the ILA lawyer should consider declining the retainer.

The ILA lawyer may choose to advise a client on the merits and risks of a capacity assessment. Requests to assessors for capacity assessments should be clear and concisely outline the legal criteria to be applied in assessing the specific decisional capacity that is to be met for the particular task sought. A quality assessment must be thorough, objective, well considered and unbiased. Moreover, the findings should correlate with the conclusions ultimately made.

CAPACITY TO CONTRACT

While there are no statutory criteria for determining the requisite capacity to contract, the determining factor is the person's ability to understand the nature and consequences of the specific contract. A person capable of entering into a contract has the ability to understand not only the nature of the contract, but the impact on their interests.[26]

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

> 'The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.
>
> 'The degree of mental incapacity which must be established in order to render a transaction *inter vivos* invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches* v *Trimborn* (1946), 115 LJKB 305.'[27]

All persons who are 18 years of age or older are presumed to be capable of entering into a

24 *Ibid*
25 Kimberly A Whaley, 'Solicitor's Negligence: Estate and Trust Context', 19th Annual Law Society of Upper Canada Estates and Trusts Summit, 3 November 2016

26 *Bank of Nova Scotia* v *Kelly* (1973), 41 DLR (3d) 273 (PEI SC)
27 [1953] 3 DLR 102 (BCSC) at 6

'The determination of the requisite capacity to give a gift changes if the gift is significant in value in relation to the donor's assets'

contract.[28] A person is entitled to rely on that presumption of capacity to contract unless there are 'reasonable grounds to believe that the other person is incapable of entering into the contract'.[29]

CAPACITY TO MAKE A GIFT

There are similarly no statutory criteria for determining the requisite capacity to make a gift. The common-law factors that are applicable depend in part on the size and nature of the gift. Not unlike the capacity to enter a contract, the capacity to make a gift requires:

- **the ability to understand the nature of the gift, and**
- **the ability to understand the specific effect of the gift in the circumstances.**

The law on capacity to make a gift has developed from *Royal Trust*, where the court held that an *inter vivos* transfer is not valid if the donor had 'such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction'.[30]

This approach was further supported in the case of *Re Bunio (Estate of)*: 'A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it...'[31]

Citing earlier case law on the capacity to make a gift, the court in *Dahlem (Guardian ad litem of)* v *Thore* stated: 'The transaction whereby Mr Dahlem transferred $100,000 to Mr Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr Thore. On the authority of *Kooner* v *Kooner* (1979), 100 DLR (3d) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.'[32]

NATURE AND EXTENT OF GIFT – A FACTOR

The determination of the requisite capacity to give a gift changes if the gift is significant in value in relation to the donor's assets. In such cases, the applicable capacity required changes to that required to make a will – that is to say, testamentary capacity. The common-law principle is that, once the gift is 'significant', relative to the donor's estate, even if it is less than the entirety of the estate, the standard for capacity required reaches testamentary capacity in order for the gift to be valid.[33]

The law on testamentary capacity is established in common law. The legal criterion for determining the requisite capacity to make a will was established in the 1800s by the English case of *Banks* v *Goodfellow*.[34] Testamentary capacity is defined as the ability:

- **to understand the nature and effect of making a will;**
- **to understand the extent of the property in question; and**
- **to understand the claims of persons who would normally expect to benefit under a will of the testator.**[35]

To make a valid will, a testator need not have a detailed understanding of the factors required. The testator requires a 'disposing mind and memory', which is defined as a mind that is 'able to comprehend, of its own initiative and volition, the essential elements of will making, property,

28 *Substitute Decisions Act, 1992*, SO 1992, c 30 at subsection 2(1)
29 *Id*, subsection 2(3)
30 [1953] 3 DLR 102 (BCSC) at p6
31 2005 ABQB 137 at para 4
32 [1994] BCJ No 809 BCSC at p9 (para 6)
33 *Re Beaney*, [1978] 2 All ER 595 (Ch D); *Mathieu* v *Saint-Michel* [1956] SCR 477 at 487
34 (1870) LR 5 QB 549
35 *Id* at pp566-7; *Leger et al v Poirier* [1944] SCR 152 at p153

'Actual undue influence would occur where someone forces a person to make a gift, or cheats, manipulates or fools them to make such a gift'

objects, just claims to consideration, revocation of existing dispositions, and the like'.[36]

UNDUE INFLUENCE AND ILA

The doctrine of undue influence is an equitable principle used by courts to set aside certain *inter vivos* transactions where, because of the influence on the mind of the donor, the mind falls short of being wholly independent. When taking instructions, lawyers, including ILA lawyers, must be satisfied that clients are able to freely apply their minds to making decisions about related transactions.

Although historical cases address undue influence in the context of testamentary capacity, undue influence in the *inter vivos* gift context is usually divided into two classes:

- **direct or actual undue influence, and**
- **presumed undue influence or undue influence by relationship.**[37]

In the context of gifts, it has been held that, where the potential for domination exists in the relationship, a presumption of undue influence is found, and the evidentiary onus shifts to the recipient of the gift to rebut the presumption with evidence of intention: that the transaction was made as a result of the donor's 'full, free and informed thought'.[38]

ACTUAL UNDUE INFLUENCE

Actual undue influence occurs where intent to make a gift is secured by unacceptable means. No relationship is necessary between the person making the gift and the person receiving it to attack a gift on the grounds of actual undue influence. In the context of *inter vivos* gifts or transfers, actual undue influence has been described as those 'cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating...'[39] Actual undue influence would occur where someone forces a person to make a gift, or cheats, manipulates or fools them to make such a gift.[40] The conduct amounting to actual undue influence, however, often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proved by circumstantial evidence.[41]

PRESUMED UNDUE INFLUENCE

This second class of influence does not depend on proof of reprehensible conduct. Under this class, equity will intervene as a matter of public policy to prevent the influence that exists in certain relationships from being abused.[42]

Relationships that qualify as a 'special relationship' are often determined by a 'smell test'.[43] Does the 'potential for domination inhere in the relationship itself'?[44] 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'.[45] However, even close, traditional relationships (such as parent and child) do not always attract the presumption, and it is necessary to closely examine the specific relationship for the potential for domination,[46] such as where the parent is vulnerable through age, illness, cognitive decline

36 *Leger* at p153
37 *Allcard* v *Skinner* (1887), 36 Ch D 145 at 171. John Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at p473 (Poyser). 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
38 *Fountain Estate* v *Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64, citing in part *Goodman Estate* v *Geffen*, [1991] 2 SCR 353 (SCC) at para 45
39 *Allcard* at p181
40 *Allcard*; *Bradley* v *Crittenden*, 1932 CarswellAlta 75 at para 6
41 Poyser at p492
42 *Ogilvie* v *Ogilvie Estate* (1998), 49 BCLR (3d) 277 at para 14
43 Poyser at p499
44 *Geffen* v *Goodman Estate* [1991] 2 SCR 353 at para 42
45 *Ibid*
46 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

or heavy reliance on the adult child.[47] The relationship between the degree of influence exerted and the extent of the cognitive or emotional vulnerability must be examined.

Once a presumption of undue influence is established, the onus moves to the person alleging a valid gift to rebut it. The donor must be shown to have entered into the transaction as a result of their 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 a spontaneous act of a donor able to exercise their free and independent will. 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 small amount.[49]

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

- **no actual influence was used in the particular transaction, or there was a lack of opportunity to influence the donor;[51]**
- **the donor had ILA or the opportunity to obtain ILA;[52]**
- **the donor had the ability to resist any such influence;[53]**
- **the donor knew and appreciated what they were doing;[54] or**
- **undue delay in prosecuting the claim was a factor, or that there was acquiescence or confirmation by the deceased.**

The presumption of undue influence may also be rebutted by the presence of ILA, as noted in *Inche*:

> 'It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing.'[55]

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

There is little jurisprudence in the area of negligence arising from the failure to provide adequate ILA.[56] The following is an outline of the relevant cases, with brief descriptions as they relate to ILA and the lawyer's standard of care.

CLEMENTS v *MAIR*[57]

The court held that the lawyer conducted his dealing with the deceased in a very careful manner and that the deceased received ILA, such that the presumption of undue influence was rebutted. Based on the lawyer's evidence, the court was not prepared to find that she was in a state of confusion when she executed the documents.

GAMMON v *STEEVES*[58]

The trial judge found a failure on the part of the lawyer to explain the true nature of the transaction. The court noted that lawyers must take sufficient steps to enable themselves to satisfy a court that a grantor was fully aware of the circumstances and consequences of an act, and that there was no undue influence. The transaction was set aside and this decision was upheld on appeal.[59]

47 *Stewart* v *McLean*, 2010 BCSC 64; *Modonese* v *Delac Estate*, 2011 BCSC 82 at para 102
48 *Geffen* v *Goodman Estate* [1991] 2 SCR 353 at para 45
49 Poyser at p509
50 From *Zelig*s v *Janes*, 2015 BCSC 7, citing Justice Punnet in *Stewart* at para 97
51 *Geffen* v *Goodman* [1991] 2 SCR 353 at p379; *Longmuir* v *Holland*, 2000 BCCA 538 at para 121
52 *Geffen* v *Goodman* [1991] 2 SCR 353 at p370; *Longmuir* at para 121
53 *Calbick* v *Warne*, 2009 BCSC 1222 at para 64
54 *Vout* v *Hay*, [1995] 2 SCR 876 at para 29
55 *Inche Noriah* v *Shaik Allie Bin Omar* [1929] AC 127 at p135
56 *Lenz* v *Broadhurst Main*, 2004 CanLII 5059 (ON SC)
57 1980 CanLII 2011 (SK QB)
58 [1987] NBJ No 1046 (CA)
59 *Gammon* v *Steeves*, [1987] NBJ No 1046, 212 APR 397, (NB CA) at para 30

BERTOLO v BANK OF MONTREAL[60]
An elderly widow signed a promissory note and mortgaged her home to assist her son in obtaining a loan from a bank in order to buy a restaurant. The Ontario Court of Appeal determined that adequate ILA was not provided, and that she was not adequately advised of, and did not fully comprehend, the terms and potential consequences of the transaction.

BANK OF NOVA SCOTIA v SHAW[61]
A wife acted as guarantor for certain business loans incurred by her husband's business. The husband defaulted on those loans, and the bank sued and obtained a judgment against the wife pursuant to the guarantee. The wife appealed. The Court of Appeal concluded that, although the advice given to the wife was not independent,[62] the trial judge was convinced that the advice was complete and proper. The wife claimed she was not given any advice at all, but the trial judge found, on the evidence, that she did receive advice, as he accepted the content of the certificate of legal advice.

TULICK ESTATE v OSTAPOWICH[63]
The court could not find that the lawyer 'met the required tests of an independent adviser in that he did not make a full and complete inquiry into all of the relevant facts'. However, despite not providing independent advice, the court did not find that the lawyer's conduct amounted to negligence.[64]

CIBC v DZERYK[65]
Based on all the evidence, the court could not conclude that the deceased lacked capacity to sign the guarantees at issue and had no criticism of the lawyer's actions.

SCOTT v CLANCY[66]
With respect to a transfer of land, the court concluded that the lawyer's 'advice to Wilbert fell short of meeting the standards enunciated' in *Goodman*, *Inche* and *Tulick Estate*.[67] The court went on to find that, despite the deficient ILA, it was nonetheless adequate in having the client understand the nature and terms of the agreement, and that he was acting of his own will and volition. The evidence established that, when he executed the agreement of purchase and sale, his 'mental ability was fine and he acted with proper deliberation and as a free agent'.[68]

ORLANDO v TORONTO DOMINION BANK[69]
The court noted that, although the wife, who took out a second mortgage to provide security on her husband's line of credit, did not have ILA, she understood the nature of the transaction and its consequences. The court concluded that: 'People are free to take risks and make bad deals, as long as they are aware of those risks and the possible adverse consequences.'[70]

BRANDON v BRANDON[71]
In a dispute over a family island, the trial judge found that sufficient ILA was not given to the mother to rebut the presumption of undue influence.[72] This decision was upheld on appeal. However, on dissent, Justice Abella said, with respect to the ILA lawyer, that:

'The court concluded that: "People are free to take risks and make bad deals, as long as they are aware of those risks and the possible adverse consequences."'

60 1986 CanLII 150 (ON CA)
61 (1988) 52 Man R 129 (CA)
62 *Id* at para 17: the Court explains the purpose for obtaining 'independent' advice
63 1988 CanLII 3537 (AB QB)
64 *Id* at para 29
65 1993 CanLII 7018 (AB QB)
66 (1998) 16 RPR (3d) 146 (Sask QB)
67 *Goodman Estate v Geffen*, 1989 ABCA 206, rev'd [1991] 2 SCR 353; *Inche Noriah v Shaik Allie Bin Omar*, [1929] AC 127 (PC); and *Tulick v Ostapowich* (1988), 62 Alta LR (2d) 384 (Alta QB)
68 *Scott v Clancy* (1998) 16 RPR (3d) 146 (Sask QB)
69 [2001] OJ No 349 (SCJ)
70 *Id* at para 34
71 2003 CanLII 30482 (ONCA)
72 *Id* at para 119

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

...

'[The mother] was entitled to divide the property as she saw fit. In the absence of any evidence rebutting her evidence, or any adverse finding of credibility, it was... a reversible error for the trial judge to disregard her evidence or that of [the lawyer]. Just because James was her more attentive son and she had a closer relationship with him, does not, in these circumstances, disentitle her to favour his family over her other son's. I am satisfied any presumption has been... rebutted.'[73]

COPE v HILL[74]

The trial judge found that the ILA lawyer provided independent and impartial legal advice. The judge stated that:

'... [the] nature and circumstances of a situation will dictate what constitutes adequate independent legal advice for purposes of that situation. The case law identifies two types of independent legal advice: a) advice as to understanding and voluntariness; and b) advice as to the merits of a transaction. The two types may overlap such that advice as to understanding the nature and consequence of a transaction may well constitute, at least in part, advice as to the merits of the transaction.'[75]

The trial decision was upheld on appeal.[76]

WEBB v TOMLINSON[77]

The court discussed ILA in the context of a client who mortgaged her home in order to lend money to her ex-husband for his business venture:

'Banks typically require mortgagors to obtain ILA in order to prevent later claims of *non est factum*, undue influence or unconscionability. The lawyer that is retained to provide ILA is required to ensure that the mortgagor fully understands the nature and consequences of entering into a mortgage transaction and is doing so voluntarily. Once the mortgage is explained and the risks of non-payment and the possibility of losing the property that is being secured are understood, and the mortgagor signs the ILA Certificate, she is free to do as she wishes.'[78]

With respect to the ILA lawyer, Justice Belobaba was satisfied with his actions and accepted his evidence over that of the applicant.[79]

COWPER-SMITH v MORGAN[80]

An elderly woman had three children and, before her death, transferred her major assets into joint title with her daughter. The lawyer who drafted the transfer documents arranged to have the mother meet with another lawyer for ILA.

The court found that the relationship between the mother and daughter gave rise to a presumption of undue influence,[81] and concluded that the transfers completed were as a result of undue influence and ordered them to be set aside.[82]

Despite the British Columbia Court of Appeal agreeing with the trial judge with respect to the undue influence ruling,[83] 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]

CONCLUSIONS

In providing ILA, a lawyer must meet the standard of a competent lawyer and

73 *Id* at paras 4–6
74 2005 ABQB 625 aff'd 2007 ABCA 32, leave to appeal ref'd [2007] SCCA No 138
75 *Cope* v *Hill* 2005 ABQB 625 at para 209
76 *Cope* v *Hill* 2007 ABCA 32 at paras 19–20
77 2006 CanLII 18192 (ONSC)
78 *Id* at para 24
79 *Id* at para 34
80 2015 BCSC 1170, varied 2016 BCCA 200, leave to appeal to SCC granted 2016 CanLII 82913 (SCC)
81 *Id* at para 72
82 *Id* at para 105
83 See *Cope* at paras 213–215, citing *JB* v *LB*, 1989 ABCA 241 at paras 22–23, *Coomber* v *Coomber*, [1911] 1 Ch [723] and *Wright* v *Carter* (1902), [1903] 1 Ch 27 (CA) at 57–58
84 *Cowper-Smith* v *Morgan*, 2016 CanLII 82913 (SCC)

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

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

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BEST PRACTICES

Here are some best practices, as gleaned from the decisions reviewed:

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

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