Undue Influence

- Equitable principle
- Set aside transactions
- Exertion of influence
- Mind falls short of wholly independent
Courts’ Historical View

- Not all influences are unlawful
- “overborne” and “lacking independence”
- Overpower volition
- *Wingrove v Wingrove; Hall v Hall; Craig v Lamoureux*
Distinction:

**Testamentary**
- Common law courts
- Coercion
- Void

**Inter vivos**
- Courts of Equity
- Available against broader spectrum of conduct
- Voidable
Two Classes – *Inter Vivos*

1) Actual

2) Presumed or undue Influence by relationship
   - *Allcard v. Skinner*
Actual Undue Influence

- Intent secured by unacceptable means
- No relationship necessary
- Difficult to produce direct evidence
- Can be proven by circumstantial
- Onus on person alleging undue influence
Morley v. Loughnan [1893] 1 Ch. 736 (Eng. Ch. Div.)

- Young man, poor health, poor judgement
- Travelling companion
- Dependent, malleable, sequestered
- Actual undue influence found
Sandberg v Sandberg Estate (1986) CarswellSask 383 (QB)

- Vulnerable farmer, clinical depression, easily upset
- Son repeatedly asked father: sell farm
- “constant state of agitation”
- Actual undue influence found
*Drew v. Daniel* [2005] EWCA Civ 507

- Pressured aging aunt: resign
- No yelling/threatening, but manipulation
- Aunt was vulnerable; nephew was “forceful”
- Upheld on appeal
Presumed

- Does not depend on reprehensible conduct
- “special” relationships w/ smell test
- Potential for domination?
- Solicitor / client; parent / child; guardian / ward & others
Legal burden remains with person alleging undue influence

Evidentiary burden shifts to rebut the presumption with evidence

Difficult to defend
Presumed (cont.)

- Rebut by showing:
  - No actual influence
  - ILA
  - Ability to resist or knew what they were doing
  - Undue delay
Archer v St. John 2008 ABQB 9

- Transfer to joint names
- Special relationship
- Signed w/o looking
- No discussion or ILA
- Controlling daughter & vulnerable father
Verwood v. Goss 2014 BSCS 2122

- Some suggestion of actual
- Isolated father, reinforced erroneous beliefs
- Diminished capacity
- Inadequate ILA
Servello v Servello 2014 ONSC 5035

- Son lived with Italian speaking elderly widowed mother
- Signed a document: “power to look after her”, but really transfer of house to son
- Textbook example – needed ILA
Cowper-Smith v Morgan 2015 BCSC 1170

- Transfer of assets to joint names
- Turned on credibility – dominant daughter
- Presumption not rebutted
- ILA did not ask about assets or understanding of financial implications – not “informed advice”
Testamentary Undue Influence

- Probate principle
- Must amount to coercion
- Alberta decisions on definition:
  - *Keller v. Luzzi Estate* 2010 ABCA 127
Testamentary Undue Influence (cont.)

- Burden: Onus on attacker
- Standard of Proof: balance of probabilities
- Level of scrutiny of evidence does not vary depending on seriousness of allegations
Testamentary Undue Influence (cont.)

- Evidence?
- Relationship that exists - imbalance of power?
- Dependency not always an indicator
- “Suggestions” are okay
Testamentary Undue Influence (cont.)

- Usually only provable by circumstantial evidence
- *Schrader v Schrader* [2013] EWHC 466 (ch) – lack of direct evidence
- Weight to indirect evidence where suspicious circumstances
Testamentary Undue Influence (cont.)

- Other evidence to consider:
  - Multiple planning instruments
  - Language or communication issues
Indicators

_Gironda v. Gironda_ 2013 ONSC 4133

- Dependent
- Socially isolated
- Recent family conflict / bereavement
- Inconsistency in planning documents
Tate v. Gueguegirre 2015 ONSC 844 (Div.Ct)

- Isolation / dependency
- Substantial pre-death transfers
- No explanation for disinheriting
- Lawyer chosen by beneficiary
- Testator afraid
Christensen v. Bootsman 2014 ABQB 94

- Holograph Will – left house to sister only – kept a secret
- Sister primary care-giver but had $ issues
- Sister had influence but not coercion
Red Flags & Best Practices

- Individual who comes to all appointments with client?
- Familial circumstances?
- Well-supported?
- Relationship of dependency?
Red Flags & Best Practices

- Gifts?
- Changes in planning documents?
- Recent medical events? Medical opinions?
- Vulnerable?
- Language barriers?
Red Flags & Best Practices

- Planning seem rational?
- Property owned by client?
- Marked changes to that of previous documents?
- Other contemporaneous planning documents?
Red Flags & Best Practices

- Interview alone
- Probative open-ended questions
- Proper notes
- Obtain comprehensive information
- Indicators of undue influence?
Red Flags & Best Practices

- Consider declining to act (trust your gut!)
- Be mindful of Rules under Alberta’s Code of Conduct (Rule 3.3 - confidentiality, Rule 3.2 - clients with diminished capacity etc.)
THANK YOU!