Undue Influence: Identify, Minimize the Risk, Document the File

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Capacity and Influence

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INTRODUCTION

> Mary telephones your office to make an appointment with you. She tells your assistant that the appointment is for her mother, Betty, who needs a new will. They arrive at the scheduled appointment and you meet them in the waiting room. Mary wants to come in with Betty, and says that Betty is hard of hearing and that Betty relies on her help.
>
> Or perhaps you have a little more information. Perhaps when Mary telephones to make the appointment she tells your assistant that she has been looking after Betty for the last couple of years and that Betty wants to leave her the family home. Again, when they arrive, Mary wishes to sit in on the meeting.

Is Mary unduly influencing Betty?

Based on this information, we cannot properly assess whether Mary is exercising undue influence over Betty.

If Mary is in a care-giving relationship with Betty, and Betty says she wishes to benefit Mary, which would provide her with a significantly greater share of her wealth than she proposes to leave to her other children, Betty may very well be acting freely and spontaneously. If Mary is her mother's caregiver, and Betty is hard of hearing, it is logical that Mary is the one who telephoned your office to make the appointment, and it is no more untoward for Mary to bring Betty to her appointment with her lawyer than to her doctor's appointment. Betty may wish to show her gratitude to Mary for her love and care by providing her with a significant benefit.

Or, Mary may be controlling Betty, isolating her from other family. Betty may instruct you to draw up a will significantly favouring her daughter over her other children, or perhaps even transferring her house into a joint tenancy with her daughter because of threats, either expressed or implied, made by Mary that she would withdraw her care. Betty may fear that she will have to go into a nursing home rather than stay in her own home if she does not do as Mary wishes.

The focus of this paper is on practical steps that we, as lawyers, may take to recognize circumstances in which our clients may be subject to undue influence, to avoid unwittingly assisting perpetrators of undue influence, and to provide helpful evidence to the court if a will we have drawn, or a transaction we have assisted with, is later challenged on the grounds of undue influence.

WHAT IS UNDUE INFLUENCE?

Although this paper is not intended to provide an in-depth analysis of the substantive law of undue influence, logically, it makes sense to start with an understanding of what undue influence means. A very succinct statement of undue influence was offered by Madam Justice Southin (dissenting on other grounds) of the British Columbia Court of Appeal in *Longmuir v. Holland*, 2000 BCCA 538 at paragraph 71, in which she defined undue influence in the context of a challenge to a will:

> "It is influence which overbears the will of the person influenced so that in truth what she does is not his or her own act."

Many of the cases equate undue influence with coercion. But the coercion need not be physical or overt.

For example, in *Tribe v. Farrell,* 2006 BCCA 38, psychological pressures were sufficient to establish undue influence where the will-maker feared that his caregiver would leave him if he did not make certain testamentary as well as *inter vivos* gifts to her.

A much earlier statement recognizing the nuances of undue influence is that of Sir James Hannen in *Wingrove v. Wingrove* (1885) 11 P.D. 81.(Eng. Prob. Ct.) at 82-3:

> "To be undue influence in the eye of the law there must be - to sum it up in a word - coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.
>
> The coercion may of course be of different kinds, and may be the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence."

The cases suggest that the distinction between influence and undue influence is not always a bright line. The distinct circumstances of the person whose mind is allegedly overborne is a key element to determining if undue influence is present. The level of coercion required to affect the conduct of a healthy, strong-willed person is likely to be quite different than that required to affect the conduct of

someone who is frail and highly vulnerable. This adds to the challenge we face in recognizing whether undue influence may be present.

DISTINCTION BETWEEN *INTER VIVOS* UNDUE INFLUENCE AND TESTAMENTARY UNDUE INFLUENCE

John E.S. Poyser, in his text *Capacity and Undue Influence*[1], makes a persuasive case that there are significant differences in doctrine and policy underlying equitable undue influence in respect of *inter vivos* transfers of wealth on the one hand, and testamentary undue influence on the other.

One significant difference is that in most jurisdictions the burden of proving that a will, or gift in a will, was procured by undue influence is always on the person alleging undue influence.[2] The burden of proof was confirmed by the Supreme Court of Canada in *Vout v. Hay*, 1995 CarswellOnt 186 [1995] 2 S.C.R. 876. Apart from statute, there is no presumption of testamentary undue influence.

In contrast, in some circumstances a person challenging a gratuitous *inter vivos* wealth transfer may be aided by a presumption of undue influence. The presumption arises where the person attacking the transaction establishes that the relationship between the person alleged to have exercised undue influence and the transferor is such that there is a potential for domination of the transferor. The presumption may apply as a result of certain traditional relationships of confidence, such as solicitor and client, and doctor and patient. The courts will also apply a principled approach to determining whether the relationship has the potential for domination. There are no closed set of categories of relationships in which the presumption may be applied. Once the person challenging the transfer establishes such a relationship, then the onus is on the person alleged to have exercised undue influence to establish that the transferor acted on the basis of his or her own "full, free and informed thought." A leading case is *Goodman Estate v. Geffen*, 1991 CarswellAlta 557 (SCC).

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[1]Toronto: Carswell 2014, chapters 5 and 8.

[2] British Columbia is an exception. Section 52 of the Wills, Estates and Succession Act, which came into effect March 31, 2014, provides that if there is a potential for dependence or domination of the will-maker the burden shifts to the person seeking to defend the will, or provision in it, to establish that no undue influence was exercised. This is similar to the presumption in respect of *inter vivos* wealth transfers. Section 52 reads as follows:

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

When the presumption of undue influence applies, there are a number of different factors that the courts may consider when determining if that presumption has been rebutted. In a British Columbia case, *Stewart v. McLean*, 2010 BCSC 64, Mr. Justice Punnett summarized some of the factors at paragraph 97 as follows:

> "To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own 'full, free and informed thought': *Geffen* at 379. A defendant could establish this by showing:
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> a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
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> b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
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> c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
>
> d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
>
> e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76)."

A second difference between *inter vivos* undue influence and testamentary undue influence as relevant to our discussion is that the consequences are different. The victim of *inter vivos* undue influence may be deprived of substantial wealth during his or her lifetime. The nature of the relationship with the person who has exercised undue influence and the victim's vulnerability are often such that the victim does not have the ability to redress what has happened. In the case of testamentary undue influence, the will-maker is not deprived of property during his or her lifetime, and those persons who would benefit if the will or gift in it is declared invalid are more likely to have the ability to challenge it.

Conceptually, undue influence is quite distinct from incapacity. One may know the nature and effect of her act, but not be acting voluntarily. In practice, the two may be interrelated. Persons suffering from cognitive or psychological decline are more vulnerable than one whose faculties remain unimpaired. While the focus of this paper is on undue influence, we need to be alert to both undue influence and incapacity and develop an integrated process to control for both.

LAWYER'S EVIDENCE

Lawyers are also often called upon to give evidence of their client's instructions when a will or *inter vivos* transfer is attacked on the basis of undue influence. The communications between the lawyer

and the client are privileged, but the client, or the client's personal representative after the client's death, may waive that privilege. Furthermore, there is an exception, referred to as the "wills exception" to solicitor and client privilege, pursuant to which a lawyer may give evidence when the validity of a will is challenged on the basis of undue influence (or testamentary capacity). The wills exception is not restricted to wills and may apply to other transactions, including settling and transferring assets into an *inter vivos* trust.[3]

In those cases where a presumption of undue influence arises from the nature of the relationship, the lawyer's evidence may be critical in rebutting the presumption if she has provided independent advice, and done a thorough job interviewing and advising her client. Even in those circumstances where the presumption does not apply, the lawyer's evidence will be helpful to the court in determining whether the alleged perpetrator has exerted undue influence.

Mr. Justice Rooke's reasons for judgment in *Cope v. Hill*, 2005 ABQB 625, appeal dismissed 2007 ABCA 32, provide a good analysis of the functions of independent legal advice at paragraphs 208 through 216 as follows:

> "208 The function of independent legal advice is to remove a taint. A lack of independent legal advice does not in itself invalidate a transaction. In *Corbeil v. Bebris* (1993), 141 A.R. 215 (Alta. C.A.) at para. 13, the Court, per Kerans J.A., ruled:
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> > [N]o rule in equity or contract invalidates an agreement simply on account of a lack of independent legal advice. The function of the advice, in that context, is to remove a [taint] that, left unremoved, might, according to contract or equity law, invalidate the contract. Judges cannot therefore simply say that an agreement is unenforceable for lack of independent legal advice. At the very least, they must first find a taint.
>
> 209 The nature and circumstances of a situation will dictate what constitutes adequate independent legal advice for purposes of that situation. See Wright v. Carter (1903), [1903] 1 Ch. 27 (Eng. C.A.); Coomber, Re, [1911] 1 Ch. 723 (Eng. C.A.); Brosseau v. Brosseau (1989), 100 A.R. 15 (Alta. C.A.), leave to appeal refused [1990] 1 S.C.R. v (note) (S.C.C.); Geffen; Corbeil and Gold v. Rosenberg, [1997] 3 S.C.R. 767 (S.C.C.).
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> 210 The case law identifies two types of independent legal advice:
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> > (a) advice as to understanding and voluntariness; and
> >
> > (b) advice as to the merits of a transaction.

[3] A leading authority is *Goodman Estate, supra*, and in particular, Madam Justice Wilson's concurring reasons at paragraphs 51 through 66.

> The two types may overlap such that advice as to understanding the nature and consequences of a transaction may well constitute, at least in part, advice as to the merits of the transaction.

211 Focusing on the first type of independent legal advice, in Gold , a majority of the Court, per Sopinka J., observed that independent legal advice addresses two primary concerns, namely, that a person understands a transaction and that a person enters into a transaction freely and voluntarily. Sopinka J. stated at para. 85:

> 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.

212 Focusing on the second type of independent legal advice, in Corbeil , Kerans J.A. reasoned at paras. 12-14:

> I distinguish attendance on execution from advice about the wisdom of entering into the agreement. The term "independent legal advice" has a very specific meaning in law. The duty of advising counsel has been summarized in *Halsbury's Laws of England* (4th Ed.), vol. 18, para. 343, at p. 157:
>
> > The duty of the independent adviser is not merely to satisfy himself that the donor understands the effect of and wishes to make the gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all the circumstances of the case, and if he cannot so satisfy himself he should advise his client not to proceed.
>
> Henceforth, when I use the term independent legal advice, I mean to use it in the sense thus described....
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> > .... [T]he s. 38 certificate ... offers some evidence of a lack of unconscionability. It requires that the signor acknowledge to the lawyer that she enters into the agreement "freely and voluntarily". But that does not go as far as independent legal advice. The other party, to make a better case for later enforcement of the agreement, might also arrange for independent legal advice.... Lawyers cannot offer true independent legal advice unless they are fully informed about all the relevant factors. A stranger to a transaction will not know enough to give that sort of advice in all but the most straightforward cases. It follows that a lawyer asked to attend on execution by a stranger would be well advised to explain to the signor this inability. And suggest the retention of counsel, particularly in any case where it is obvious that an equal division is not the thrust of the agreement.

213 However, the adequacy of independent legal advice, or primacy of one type of independent legal advice over the other, is a situation-specific inquiry. In

refusing to give effect to a contractual waiver of maintenance in Brosseau , the Court, in distinguishing between the two types of independent legal advice, stated at paras. 22-23:

> 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....
>
> We doubt that any hard and fast rule can be laid down and the peculiar circumstances of this case are not appropriate for the formulation of such a rule, in any event.

Ruling, at para. 20, that the lawyer approached for independent legal advice "did not know ... enough to remedy the fiduciary breach", the Court held that independent legal advice approximating advice as to the merits should have been, but was not, received by the waiving party. The Court reasoned at paras. 29-30, 34:

> No question of "independence" arises, the real issue is the nature of the advice.... The question is not simply one of whether the signatory understands the nature and effect of the agreement, but whether the underlying agreement has been reached with adequate advice.
>
> We do not say that the independent advice obligation is the same as that required in a case of presumed undue influence. That is, however, a fair analogy where a fiduciary obligation exists....
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> . . . . .
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> Mr. Frohlich stressed the comment in In re Coomber; Coomber v. Coomber, [1911] 1 Ch. 732, to the effect that independent advice does not mean independent approval. Again, we agree. While we stress this is not a case of presumed undue influence ..., we agree with what is said in Wright v. Carter (1902), 87 L.T. 624, at 634 that is not enough for an independent solicitor to be called in merely "to carry out the proposal which had been previously settled".

214 In finding the first type of independent legal advice adequate in upholding a gift in Coomber , the Court found that the donor gave the gift of her own motion and that there was no evidence of undue influence, misrepresentation or any other improper conduct leading to the making of the gift. Fletcher Moulton L.J. rejected the need, in the circumstances of that case, for independent legal advice on the merits of the gift, finding independent legal advice as to the nature and consequences of the gift sufficient. He ruled at 729-730:

> Again and again we have had it said, the lady did not have competent and independent advice; and it seems to be based on the fact that the solicitor did not say to her, I advise you to do it, or I would not advise you to do it. In my opinion that is not by any means necessary for the purpose of advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequences of that act. He is not bound to say "I will advise you to do it"; or "if I were

> you I would do it"; or "if I were you I would not do it." Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice should be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing. [Emphasis added.]

215 In contrast, in Wright , Stirling L.J. held that independent legal advice directed at rebutting a presumption of undue influence must be advice on the merits of a transaction. He reasoned at 57-58:

> I think ... that the ... solicitor called in to advise in such a case takes upon himself no light nor easy task. The duties of the adviser have been considered by Farwell J. in the recent case of Powell v. Powell, and in the course of his judgment he says this: "The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."
>
> With that view of a solicitor's duty I agree. I think a solicitor would fail in his duty if he neglected to inform himself of the circumstances in which the transaction was taking place.

216 However, in Goodman Estate , a presumption of undue influence was rebutted in part by the settlor's receipt of imperfect independent legal advice. Wilson J., Cory J. concurring, ruled at 389-390:

> [I]t is also relevant that the evidence establishes that the deceased received some independent advice from Mr. Pearce and that the agreement ultimately concluded was in accord with her wishes....
>
> It does cause me some concern that the solicitor did not inquire in any detailed way into Mrs. Goodman's financial position.... However, any imperfection in the legal advice obtained is not, in my view, fatal to the appellants' case."

Some of the factors a court may consider when assessing the strength of the lawyer's evidence are neatly outlined in the Newfoundland case, *Coish v. Walsh*, 2001 NFCA 41, as set out at paragraph 23 of Chief Justice Wells' decision:

> 23 The trial judge also correctly set forth the law respecting the manner in which such a presumption may be rebutted. In particular, he identified, from the

comments of Green J., in Fowler Estate [(19960, 13 E.T.R. (2d) 150 (Nfld T.C.),] factors to be taken into account in considering whether or not evidence of legal advice given to the granting party is sufficient to rebut the presumption. At paragraph 24 of Fowler Estate, Green J. identified factors which may affect the character of legal advice to be as follows:

1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed: *Goguen et al. v. Goguen et al.* [(1988), 92 N.B.R. (2d) 158]; *Green v. Perley* [(1989), 103 N.B.R. (2d) 181].

2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence: *Burrell v. Burrell* [(1991), 106 N.S.R. (2d) 171].

3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor: *Donnelly v. Jesseau* [(1936), 11 M.P.R. 1 (N.B.S.C.)].

4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place: *Green v. Perley* [(1989), 103 N.B.R. (2d) 181].

5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her: *Donnelly v. Jesseau* [(1936), 11 M.P.R. 1 (N.B.S.C.)]."

Unfortunately, it is too easy to find illustrations of how not to do it. The British Columbia case of *Modonese v. Delac Estate*, 2011 BCSC 82, appeal dismissed, 2011 BCCA 501, provides one such illustration. Before her death, Regina Delac had transferred her home into a joint tenancy with her son, Marko Delac. Her daughter, Helena Modonese, challenged the transfer on the basis that Marko unduly influenced their mother to procure the transfer. Mr. Justice Groves found that the nature of the relationship between Marko and his mother was such that he was in a position to dominate her, and held that the presumption of undue influence applied to the transfer. The transfer was witnessed by a notary public and Mr. Justice Groves considered whether the notary's evidence was sufficient to rebut the presumption. He described the notary's evidence at paragraphs 39 through 47 as follows:

"39 Michael Tin, a notary public, gave evidence for the defence. He indicates that on the 23rd of May 2003, following instructions received, he arranged for the signing of a transfer for the Royal Oak property, which was previously in the name of Regina Delac alone, to be transferred into the name of Regina Delac and Marko Delac, as joint tenants. He testified that Marko Delac is a long time client of his and that Marko approached him about doing the transfer.

He indicated that he would have had to receive instructions from Regina to effect the transfer; he further indicated that between the 19th of May 2003 and the 23rd of May 2003, he spoke to Regina two or three times.

40 He testified that he arranged with Marko to have his mother brought to his office. Marko drove Regina and called from downstairs. Michael Tin was clear that he asked Marko to wait outside and that she spoke to Regina alone with just himself in the car. He indicated that he went over joint tenancy and tenancy-in-common with Regina and explained the difference between the two. He said that Regina had indicated that she wanted a joint tenancy arrangement.

41 Michael Tin was clear that Marko was not present and not visible during this signing. Michael Tin indicated that he felt Regina was capable of providing instructions and that she knew what she was doing. In cross examination it became clear that Michael Tin had, for the most part, relied on information he received from Marko to draw up the transfer. It was further clear that the appointment with Regina was arranged through Marko that Marko had brought Regina to his office and that Marko had arranged for Michael Tin to go downstairs to meet them.

42 In cross examination he confirmed that issues which never came up included a general discussion of assets, a discussion of debts, a discussion of estates, Regina's level of health, other funds advanced by Regina, or any inquiry as to Regina and Marko's personal relationship.

43 The fee for services was also discussed in cross examination. The total bill was approximately $200, of which only $32.93 was for fees. Michael Tin indicated that that was the price he charged for a transfer at the time. Michael Tin confirmed that Marko paid the account.

44 Michael Tin's evidence stands alone in regards to who was present during the transfer.

45 Helen indicated that Regina had told her that Marko was in the car when the transfer was signed.

46 Marko also said in his evidence, which will be discussed later, that he was in the car when the transfer was signed.

47 Michael Tin was adamant that Marko was nowhere to be seen. I did not accept this evidence."

Mr. Justice Groves applied both *Coish* and *Cope* and found that the notary's evidence was insufficient to rebut the presumption of resulting trust. He wrote at paragraph 125 as follows:

"125 In this case, each of the 5 factors from Coish suggests that the advice Mr. Tin provided to Regina was completely inadequate and insufficient to rebut the presumption of undue influence. Marko was either nearby or in the car at the time the advice was given. He orchestrated and oversaw the entire process. Mr. Tin asked very few questions, did not know Regina had a daughter or a

> will, and provided no "objective advice" on the merits of the transaction. He did not inform himself of the circumstances in which the transaction was taking place nor of the motivations behind it."

NOTICING UNDUE INFLUENCE

As our fact pattern with Mary and Betty illustrates, the challenge is recognizing undue influence. As noted above, it may be subtle. It would be rare for a person exercising undue influence to be both bold enough--and dumb enough--to exercise it in your presence:

Meet with your client alone

> "The cardinal common-sense practice for averting undue influence is to take the will instructions and an interview with the will-maker alone."

The above quotation comes from a report of the British Columbia Law Institute, entitled *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*.[4] The report was prepared by a multidisciplinary group of professionals, including lawyers, notaries public, a registered social worker and a professor of geriatric psychiatry, and was made in contemplation of a change in the law in British Columbia in which the burden of proof of undue influence in procuring a will or a benefit under a will is shifted to the person who has alleged to have exercised undue influence if dependency or the potential for domination can be shown (similar to the law in respect to gratuitous *inter vivos* transfers). The recommended practices apply irrespective of the law in respect to the onus of proof and most of them will also apply in respect of *inter vivos* transfers. This report is available online at this address: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf. I will refer to the report as the "BCLI Recommended Practices."

There are a number of readily apparent reasons it is the "cardinal common-sense practice" to meet with your client alone. Using our example, here are a few:

1. If Mary is in the meeting with Betty, Mary may very well do the talking. The lawyer will not know whether she is receiving instructions of Betty's wishes, of what Mary thinks Betty wishes, or of what Mary wishes.
2. Even if Betty is doing the talking, how does the lawyer know whether Betty is saying what she truly wishes, or what she believes Mary wishes to hear?

[4] Vancouver, British Columbia Law Institute, 2011. The quotation is at page 29.

3. Betty may not be as candid with the lawyer if Mary is present. This may be because of pressure from Mary, or it may simply be that Betty may be embarrassed or does not wish to offend Mary. Apart from undue influence, this may hamper good estate-planning. If, for example, Mary has a gambling problem, it may be more appropriate to create a trust for Mary than an outright gift, but it is doubtful that Betty will disclose her concerns in Mary's presence.

4. It may not be apparent to Betty that the lawyer is acting for her, and that she may speak with the lawyer in confidence. Mary may also not appreciate that the lawyer is not her, Mary's, lawyer.

5. The lawyer will not realistically be able to explore whether there are indicia of undue influence, and if so, to take steps to counter the undue influence, or alternatively to satisfy herself that Betty is acting freely and voluntarily.

The BCLI Recommended Practices recognizes that there may be occasions where it is appropriate to have other disinterested professional advisors or disinterested interpreters present. Even when professional advisors are disinterested, it is important for the lawyer to satisfy herself or himself that the fundamental estate plan is coming from the client, and questions should be directed to the client. It may be appropriate for a tax advisor to advise on a tax efficient structure to carry out the client's intentions, but it should be clear that the client is determining the "who-gets-what" instructions. It is a good idea, even in complex estate-planning, to meet initially with the client alone and then bring in the other advisors as required.

I do not think that any of these points are controversial. Yet, in my estate litigation practice, I have frequently come across lawyers' files in which it is clear that the lawyer allowed the main beneficiary of a will, or a person receiving a gratuitous transfer of a significant asset, such as the transferor's house, to be present throughout the interview. If the will or transaction is challenged, the lawyer's evidence in such circumstances is not going to meet the criteria in the *Coish* decision set out above.

Nor, in my view, is it adequate for the lawyer to take instructions from the will-maker or transferor in the presence of the main beneficiary, and then subsequently meet alone with the lawyer's client in order to confirm those instructions. One of the difficulties is that the lawyer is less likely to have clearly communicated to the client the confidential nature of the client and solicitor relationship. Will Betty truly appreciate that the lawyer will not discuss any changes in the instructions with Mary? Furthermore, the client may be reluctant to make substantial changes to the instructions she has provided perhaps a few minutes earlier.

Until the lawyer has gone through a screening process for potential undue influence, and is satisfied that there is no undue influence taking place, the lawyer should meet alone with the client. When satisfied that there is no undue influence, and the lawyer has received permission from her client, it may then be appropriate to bring other family members into the conversation. For example, if the client has named a family member as the donee of a power of attorney, the lawyer may then meet with the donee and explain the donee's responsibilities, or if the lawyer determines it more appropriate in the circumstances, to refer the donee for independent advice.

Why do some lawyers allow a significant beneficiary of an estate plan to be present during much of or throughout the estate-planning process? In many cases, it is likely because it is awkward to exclude that person from the room.

When you go out to the meeting room to greet Betty and Mary, Mary may be quite insistent in attending with her mother. Betty may say "why can't my daughter come in? She always comes with me."

In many cases, a short explanation will be sufficient. You may say "in my wills practice, I always meet with the person who is making the will alone. That way, I know for sure that I am following her wishes." Sometimes you may need to go further and say, "if some day somebody challenges one of the wills that I draw up, it will more likely be upheld if I can say that I met with the will-maker alone, and this is what she told me that she wanted to do."

I also keep in my waiting room a pamphlet entitled "Why Am I Left In the Waiting Room? Understanding the Four C's of Elder Law Ethics." It was prepared by the American Bar Association Commission on Law and Aging, and it is available at http://elder-clinic.law.wfu.edu/resources/elder-law-resources/

I sometimes hand the pamphlet to the person who wishes to be present during my meeting with my client. The pamphlet is written in plain language, and explains some of the reasons it is important for a lawyer to meet alone with his or her client. The Four C's are:

1. Client Identification. The pamphlet notes that "all lawyers have an ethical obligation to make it very clear who their client is."
2. Conflicts of Interest. This is described as "lawyers have an ethical obligation to avoid conflicts of interest."

3. Confidentiality. In other words, “lawyers have an obligation to keep information and communications between our client and us confidential.”

4. Competency. To quote the pamphlet, “lawyers have special ethical responsibilities in working with clients whose capacity for making decisions may be diminished.”

I like to start explaining the process before my clients attend their appointments with me. I send, either by email or by mail, a letter providing them with an overview of my process for estate-planning and that I generally charge by the hour. I include in my letter the following:

> “I will then meet with you alone, without other family members or others that may anticipate receiving an inheritance or other benefit from you present during at least the first part of my meeting. I do this because I consider it very important that each of my clients understand that everything he or she tells me may be kept confidential from other family members or anyone else. I want to be satisfied that each of my clients is telling me what he or she wishes. I want to make sure that you feel absolutely free to confide in me. In addition to my experience in estate-planning, I also have experience in both challenging and defending wills and other documents in court proceedings. It is far easier to defend a will if the lawyer who drew it met alone with the will-maker than if one of the beneficiaries was present during the interview.”

I also ask my staff that if someone makes an appointment on behalf of another for an estate-planning meeting to advise that I will be meeting alone with my client.

It seems that no matter what steps you take, there will still be occasional awkward moments in the waiting room when someone insists on attending with their mother, uncle or third cousin once removed. It is essential to remain firm. If anything, it is especially important to meet with your client alone if the person accompanying your client is insistent on being present during the meeting, and is resistant to your efforts to exclude her. The fact that a person who may benefit is insisting on attending the meeting is itself a red flag which should enhance the lawyer’s alertness.

Joint spousal retainers present unique challenges. A spouse may exercise undue influence over another. From the perspective of controlling for undue influence, it would be preferable for each spouse to retain separate counsel in estate-planning. But many lawyers (including the writer) consider that the advantages of accepting joint retainers and developing a coherent estate plan for the spouses outweigh the risk of undue influence. When conducting an interview with spouses in a joint estate-planning retainer, it is important to direct questions to each of them to attempt to gauge whether both agree on their instructions. If there are indicia that one is exercising undue influence over the other, then each should be referred out for independent legal advice to separate lawyers.

Basic Questions to Ask your Client

Once you are meeting with your client alone, the first step in identifying whether there are any indicia of undue influence is to have a thorough process for asking questions.

Most lawyers have a checklist or a questionnaire they use to formulate questions for their estate-planning clients. A comprehensive set of questions serves several purposes, apart from identifying undue influence, including forming the basis for estate and tax planning advice, outlining options for accomplishing your client's goals, assisting your client to identify the provisions she wishes to make, and establishing capacity. The answers your client gives to you, and sometimes her reactions to the questions, may raise red flags that may indicate the presence of risk factors for undue influence, or conversely may assist in satisfying you that your client is acting freely and voluntarily.

The types of questions should include:

1. Questions to identify your client's family, friends or charities or others whom your client wishes to benefit;
2. Your client's assets and liabilities, and how assets are held;
3. Your client's current will;
4. Whether your client or her family have any disabilities;
5. Your client's occupation, and if retired, her former occupation;
6. Your client's previous gift giving if she has made significant gifts in the past;
7. Your client's personal circumstances. For example, is she living alone? And if not with whom? Does she have care givers?
8. The financial and personal circumstances of immediate family members.

I like to get a significant amount of background before discussing what the client wishes to do. The background information provides the context for the client's plan.

These types of questions are just as important where the client advises that the purpose of her appointment is to make a large *inter vivos* gift, as for making a new will. If Betty tells you that she wishes to transfer her house to Mary as a gift, it will be critical to know what other assets she has for her financial security, as well as how it will affect her existing estate plan, in order to advise her on the merits of the transactions. If her house is her sole significant asset, then this fact will alert you to the potential of undue influence.

If the instructions represent a significant departure from the distribution under her will and other estate-planning, or if the instructions represent a significant departure from what one usually encounters in the circumstances, such as a substantial preference for one child over others, then it is critical to ask, "why?"

A marked departure from a previous estate plan should heighten alertness to undue influence. If Betty's will had previously provided for an equal division among her three children, but now wishes to give 90% of her wealth to Mary, what reasons does she have? If she is able to articulate clearly rational reasons for making the change, this will tend to alleviate concerns of undue influence (although it should not be the end of the inquiry). On the other hand, if Betty appears to be unable to give any reasons for the change and remains silent or says something to the effect of "that's what I want," then her response (or lack thereof) should heighten concerns.

You may also ask your client about whether anyone suggested any changes to her estate plan, or whether anyone suggested she make a large *inter vivos* gift. The answers, or the clarity of the answers, may tend to either heighten or alleviate concerns of undue influence.

Observe your client in how she answers. Is she able to answer your questions independently? In response to some of your questions, Betty may say "go ask Mary." If the question is about Mary's postal code, or perhaps the middle name of one of Mary's children, Betty's response is not likely to be of concern. Obviously, it is a different matter if your question is "how do you want to divide the residue of your estate?" and Betty's response is "ask Mary."

Throughout the interview, be alert to some signs that your client may be any of the following:

1. Isolated from family or others;
2. Dependent;
3. Fearful; and
4. Vulnerable.

Discuss Consequences and Alternatives

In the case of an *inter vivos* gift, discuss with your client her other goals and resources. If she makes the gift, will she have sufficient assets for her potential long-term care needs? How will it affect the other beneficiaries of her estate plan?

Provide your client with options. This is especially important if your client is proposing a transaction that may leave her with few resources. For example, if Betty is proposing to transfer her house to Mary now, discuss the alternative of a gift of the residence, or a larger share of the residue in her will. You may also discuss an *inter vivos* trust pursuant to which Betty retains control during Betty's lifetime, with the remainder passing to Mary. Or perhaps Betty retains a life estate. Good independent advice requires that you advise your client of reasonable alternatives to weigh her options.

Red Flags

By the time you have completed asking your basic questions, as well as specific questions concerning your client's reasons and motivations, you will likely be in a position to consider whether there are risk factors, or "red flags," for undue influence.

The BCLI Recommended Practices includes a comprehensive list of red flags. It is important to consider each one, although any one or two may be insignificant in themselves, and you may (depending on the circumstances) be satisfied that your client is acting freely and voluntarily based on your observations and the answers to your questions. However, multiple red flags will likely be of significant concern. I cannot express the red flags any better than the BCLI Recommended Practices:

> **"Someone in whom the will-maker invests significant trust and confidence is – or is connected to – a beneficiary**
>
> - Someone having a confidential or fiduciary relationship with the will-maker, such as that of a lawyer, doctor, member of clergy, financial advisor, or accountant.
> - A formal or informal caregiver, or a health care provider.
> - A member of the same family, other than a spouse, who benefits disproportionately.
> - An overly helpful neighbour or friend.
> - A perception that a person professing emotional attachment to the will-maker is actually pursuing the will-maker for material benefit, and may or may not become a de facto partner or spouse. Such a 'suitor' is usually significantly younger than the will-maker and cognitively intact.
>
> **Physical, psychological and behavioural characteristics of the will-maker**
>
> - Physical factors that may make the will-maker more dependent on others and possibly increase the opportunity for undue influence, including impairment in vision, hearing, mobility and speech.

- Physical characteristics that may indicate illness.
- Signs of neglect or self-neglect such as emaciation, inappropriate clothing, bruising or untreated injuries. This could also be a sign of the onset of some form of cognitive impairment.
- Physical characteristics indicating an abused or controlled adult such as bruises, black eyes, and untreated injuries.
- Impaired mental function arising from a psychiatric condition or a non-psychiatric cause such as trauma or a stroke.

  Here is a brief summary of signs that a will-maker may be suffering from a condition that typically results in impaired mental function, which in turn can cause a will-maker to be more vulnerable to undue influence:

  - The sudden onset of confusion (disorientation to time, place, or person) and/or the sudden or recent onset of difficulties in making decisions may indicate delirium.
  - Short-term memory problems, disorientation, and difficulty with managing finances may suggest signs of early dementia.
  - Irritableness, agitation, feelings of helplessness or difficulty in making decisions may point to a person being depressed. Other physical symptoms of depression can include a sad face, a bowed head or general lethargy.
  - Delusions that result in firm, fixed, or inappropriate beliefs are often associated with psychosis.
  - An extreme sense of well-being, continuous speech, inability to concentrate, poor judgment, extravagance and delusions of grandeur are typical of manic behaviour.
  - Apprehensiveness, or an appearance of being worried, distressed, overwhelmed, or an inability to concentrate may indicate a person is suffering from anxiety.
  - A will-maker who is intoxicated while in the practitioner's office or who reveals a history of excessive alcohol consumption or other substance use during conversation may be suffering from substance abuse.
  - Presence of Down's Syndrome, autism or another developmental disorder.
  - An inability to answer open-ended questions. An example would be where the will-maker is asked to tell the practitioner about his or her assets and is unable to do so.
- Illiteracy.
- A state of shock following a very stressful situation or after receiving some bad news, such as the death of a spouse or a loved one. This can trigger a dramatic change in behaviour, lifestyle or decision-making.
- Non-specific psychological factors such as loneliness, sexual bargaining, end of life issues that tend to make someone emotionally vulnerable and open to influence by others.

- Cultural influences and culturally conditioned responses. Examples might be subservience to the wishes of traditional authority figures within an extended family or yielding out of fear of revealing conflicts within the family that could lead to a loss of face within the cultural community.

Isolation resulting in dependence on another person to meet physical, emotional, financial, and other needs.

Isolation might arise from:

- Having few, or no, immediate family, or other relatives or friends.
- Relatives who keep others away from the will-maker and/or have relocated the will-maker to a different community where the will-maker has fewer or no connections.
- Living in a remote community with restricted access to services.
- Physical disability.
- Cultural, religious and language barriers.
- Recent immigration, especially when the immigrant has been sponsored and is financially and socially dependent on the sponsor.

Circumstances relating to the making of the will and the terms of the will

- Unusual gifts in a will such as a gift to a recent or casual acquaintance.
- A sudden change in a will or will instructions for no apparent reason, *e.g.* instructions to remove a beneficiary from the will without a rational explanation or under suspicious circumstances.
- Frequent changes being made to a will.
- Instructions to make a new will that is markedly different from previous wills.
- Will instructions from a third party that appear to benefit the third party.
- A beneficiary, either an individual or an organization, offering to pay for preparation of the will.
- Beneficiary or another speaks to will drafter on behalf of the will-maker.
- Will-maker is provided with notes and/or information by another.
- Will-maker relies exclusively or to an unusual extent on notes to provide the will instructions.
- Spouses, particularly in second marriages, seek a joint retainer, but one spouse provides instructions and the other is relatively silent.
- Family member has recently died and other family members appear to be influencing will-maker to change terms of existing will.

Characteristics of influencer in testator's family or circle of acquaintances

- Being overly helpful.

- Insistence that he or she should be present when the practitioner meets the will-maker.
- Contacting the practitioner persistently regarding the will after instructions are taken.
- Someone known to the practitioner to have a history of abuse, including violation of court orders.
- A negative attitude towards the will-maker observed by the practitioner.
- A controlling attitude towards the testator observed by the practitioner.
- Someone known to the practitioner to be in difficult financial circumstances.
- Someone who, to the knowledge of the practitioner, engages in substance abuse.

One's 'gut-feeling' that undue influence is going on

- Body language / mannerisms of will-maker indicate fear, anxiety, insecurity, reticence, evasiveness, or embarrassment.
- A person (potential influencer) who is off-putting or difficult to deal with accompanies the will-maker to the appointment with the practitioner.
- A person (potential influencer) accompanying the will-maker is rude to staff when in the office or over the telephone. Alternatively, he or she may be overly solicitous." [5]

To this list, I add that the client has seen other lawyers or notaries public in respect of the new will or the proposed transaction. The person exercising undue influence may be taking the client to several different professionals who have declined to act because of concerns about undue influence.

If several red flags are present, what next?

DEALING WITH RED FLAGS

Explain your concerns to your client and ask more questions

Poyser writes, and I agree:

> "Once the lawyer has discovered the concern, and taken a few moments to assess it, the lawyer should express it to the client. These discussions are only awkward when they are made awkward. Getting permission to deal with it head-on opens doors that otherwise remain closed or awkward to squeeze through. No one wants to leave a legacy of litigation. When warned of that possibility, a client will generally commission a series of steps to deal with the underlying concern." [6]

[5] BCLI, ibid. pp. 23 through 27

[6] Poyser, ibid. pp. 732

Poyser also suggests that it is appropriate to ask blunt questions. He uses illustrations of the following:

- Is this your idea?
- Did your son suggest it?
- Did your son try to convince you to do this?
- How?
- Do you feel under any pressure to do this?
- Will anything happen to you if you do not?
- Have you promised to do this?
- Why are you doing this?[7]

Get information from third parties, if your client agrees

You may ask your client's consent to contact her physician, and if she agrees, ask her to sign an authorization for her physician to release information to you. A physician is not in a position to opine as to whether another is exercising undue influence over her patient, but she may be able to provide an assessment of medical, psychological and cognitive vulnerabilities. In many cases, you may have concerns about both capacity and undue influence, and Poyser provides a number of precedent letters in chapter 12 of his book. The letter to the physician will be more helpful if you outline what your client is proposing to do, and a brief outline of the legal criteria. Consider requesting an initial telephone call with the physician which could be followed up with a written report for your file. The physician may have had opportunities to observe the relationship between your client and the person who may be taking advantage of your client, and the physician may be more forthcoming over the telephone.

You may also contact other parties with your client's permission, such as financial advisors, accountants and social workers. Your client may have a long-term relationship and frequent interaction with a trusted financial advisor who may have insights into the relationship. Perhaps the person whom you are concerned about has in the past sought to be added as a joint account holder over investment accounts.

[7] Poyser, ibid., pp. 733-34

If your client has consulted other lawyers concerning the will or proposed transactions, you may request your client's authorization to speak to the other lawyers (who will also need authorization from the client to speak to you). They may have additional information or concerns.

The Confidential Replacement

Poyser suggests offering the client the option of signing both a will benefitting the person who is suspected of exercising undue influence and a confidential replacement codicil revoking the new will and republishing the client's former will.[8]

The idea is that if the client is acting voluntarily, then she will go ahead with her new will and decline to sign the codicil. She might write on the codicil that she has chosen not to sign it because she genuinely wants to make the provision that she has made in her new will. This could be kept as evidence if undue influence is alleged.

On the other hand, if she is subject to undue influence, she may sign the will benefitting the person exercising undue influence over her, and then subsequently, sign the codicil. The codicil remains confidential, perhaps held by a third party in an envelope to be opened on the will-maker's death, while the client may take the new will (which she has just revoked) home and show it to the person coercing her to make it.

To Sign or Not To Sign?

Inter vivos Transfers

The lawyer should have a fairly high degree of confidence that her client is acting freely and voluntarily before completing an *inter vivos* transfer, or other documents such as a power of attorney, that may be used to deplete the client's wealth or otherwise harm her security. As Poyser writes:

> "*Inter vivos* transactions have immediate effect, and that effect is often potentially victimizing for the client. The lawyer should err on the side of the person they are obliged to protect."[9]

Testamentary Undue Influence

Where the lawyer is in doubt as to whether undue influence is being exercised over their client, the BCLI Recommended Practices provides as follows:

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[8] Poyser, ibid. pp. 734-736

[9] Poyser, ibid. pp. 755-56

> "If Index of Suspicion Remains High After Reasonable Investigation, Decline Retainer to Draft Will
>
> In a case where there are several red flags and the practitioner's suspicions are not laid to rest after as much investigation as is reasonable to make under the circumstances, or if the will-maker resists the practitioner's inquiries, the practitioner needs to weigh the seriousness of the level of suspicion against the prospect that a will drafted according to the instructions given may subsequently be held invalid. If the practitioner's assessment is that it is more probably than not that the will or portions of it would be invalid for undue influence, the practitioner *should not proceed with preparing the will*. Consciously drafting a will tainted by undue influence would be to assist the influencer to achieve the influencer's objectives and bring into being a fundamentally false and deceptive document, in contravention of the ethical standards of both the notarial and legal professions."[10]

Poyser, however, notes that there is an important distinction between an *inter vivos* transaction and a will, because the consequences to the client are different.[11]

If the lawyer is unsure as to whether the client's instructions represent the client's true wishes, and declines to proceed with the execution of the will, the client may be deprived of her ability to make a new will in accordance with her wishes if she is in not in fact a victim of undue influence. Unless the client goes to another lawyer or notary, or makes a will herself, her intentions will have been defeated.

On the other hand, if the lawyer goes ahead with the will, then the affected parties may have the question as to whether the will, or a gift in it, has been procured by undue influence before the court. If the court finds that there was undue influence and the new will is invalid, then the beneficiaries of the previous will, or the intestate heirs as the case may be, will receive the estate as they should. On the other hand, if the court upholds the new will, then the client's true intentions (found by the court) will be given effect.

By declining to proceed with the will when the lawyer is unsure, the lawyer is effectively taking away the ability to have the question of undue influence decided by the court.

Poyser suggests that when in doubt the lawyer may use a codicil rather than a completely new will to make the change to the client's estate plan. By using a codicil, the earlier will is preserved. If a new will is made, and the previous will is destroyed, the beneficiaries under the previous will may never become aware of its terms.

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[10] BCLI, ibid. p 43

[11] Poyser, ibid. pp 736-37

ARRANGING ASSISTANCE FOR CLIENTS WHO ARE THE VICTIMS OF ABUSE

Should you contact the police, the Public Guardian and Trustee of Alberta or other authorities if you are concerned that your client is the victim of abuse?

You may of course do so with your client's express consent. If the client doesn't consent, and you have significant concerns, you may-- and should-- provide your client with information as to whom she may contact for help.

If the client does not consent, you are limited by your obligations of confidentiality.

Rule 3.3-1 of the Law Society of Alberta Code of Conduct provides:

> "A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the processional relationship and must not divulge any such information unless:
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law or a court to do so;
>
> (c) required to deliver the information to the Society; or
>
> (d) otherwise permitted by this rule."

But, if your client does not have capacity to protect herself, you may in some circumstances be able to disclose some confidential information to the extent necessary to protect her interests. As set out in section 10 of the commentary:

> "[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks capacity to become a client but nevertheless requires protection."

Rule 3.3-3 provides a public harm/future harm/public safety exception as follows:

> "A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that

an identifiable person or group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm."

The harm may include psychological harm. Paragraph 2 of the commentary says:

> "[2] Serious psychological harm may constitute serious bodily harm if is substantially interferes with the health or well-being of the individual."

Accordingly, you may be able to disclose confidential information in very limited circumstances, and it would be appropriate to seek advice from the Law Society of Alberta before doing so.

DOCUMENTING YOUR FILE

Irrespective of whether the client goes ahead with the transaction, it is very important to document your file. There are two fundamental reasons for going through the process of taking steps to determine whether undue influence is taking place:

1. To avoid unwittingly assisting in the exercise of undue influence; and
2. Providing evidence to assist the court in determining the validity of the will or transaction.

It will be of little assistance to the court 20 years from now if you are called upon to testify when you have little record and perhaps no recollection of what occurred. Notes and memoranda setting out our discussions with our clients, including in some cases the verbatim questions and answers to key questions, notes of what others have told us, and copies of any letters from physicians or other third parties need to be kept on file and available.

If you are concerned that someone may later attack a will or a transaction on the basis of undue influence, consider videotaping your interview with your client (with permission). This can easily be done with a Smartphone.

Although not in a case involving an allegation of undue influence, the British Columbia case of *Machander v. Drader*, 2012 BCSC 1496, demonstrates the value of videotaping an interview. As noted earlier in this paper I use the case of *Modonese* to illustrate what a practitioner ought not to do, in the interests of balance, I am referring to this case as an illustration of a lawyer doing a good job in difficult circumstances.

The lawyer, Mr. David Mulroney, was asked to draw a will for a Mr. Machander on his death bed. He was initially contacted by Ms. Drader, who benefitted under the new will, but he met with Mr. Machander alone. The will was challenged on the basis that there were suspicious circumstances

surrounding the execution of the will and of Mr. Machander's capacity. In considering whether there were suspicious circumstances surrounding the preparation of the will, Mr. Justice Savage relied in part on the videotape evidence. He wrote at paragraph 45:

> "45 Do the circumstances surrounding preparation of the will raise the spectre of suspicious circumstances? In my view they do not, for the following reasons, which I find established on the evidence:
>
> a) Mr. Machander had long held the view that the 2003 Will was outdated and did not reflect his current circumstances. The will was outdated and inappropriate. It gave the residue of his estate to an estranged spouse with whom he had divided assets and was on the eve of obtaining an order absolute of divorce;
>
> b) Mr. Machander advised others of his intention to change his will, including third parties other than the beneficiary of the 2010 Will. He tried to act on that intention but was frustrated by being unable to locate his former solicitor;
>
> c) Mr. Machander revoked the 2003 Will and replaced it with the 2010 Will which made the woman with whom he was in a marriage-like relationship his beneficiary. There is nothing in the details of that relationship that give rise to a suspicion that it was anything but genuine and loving;
>
> d) The change in the will was entirely appropriate from the standpoint of his current relationship and the lack of a close relationship with his parents and siblings, i.e., the absence of there being any other moral claim on his beneficence;
>
> e) Although the beneficiary contacted the solicitor regarding the contents of the 2010 Will, Mr. Machander's condition did not allow him to make direct contact. Ms. Drader was the logical choice to convey his wishes; and
>
> f) The taking of the will was by an experienced solicitor. The solicitor had no significant relationship to any person in the proceeding. The solicitor was entirely forthright in his evidence. A video record of the proceeding was made of the events for the court or any interested person to view."

Mr. Justice Savage held that the will was valid.

CONCLUSION

I thought of different scenarios to use at the beginning of this paper. In one the client's son phones the lawyer. His name is Ernst Blowfeld, and his agenda becomes pretty clear. If only it were that easy to detect undue influence.

The scenario with Mary and Betty is, I think, more realistic. The facts apparent to the lawyer are often ambivalent in the beginning, capable of either innocent or nefarious interpretations. Undue influence happens behind closed doors, and is often difficult to discover.

The vulnerable client may be afraid to tell her lawyer what is really happening.

It is challenging to notice undue influence, and to take steps to deal with undue influence when it is apparent.

There is a process we can follow that will minimize the risk of anyone successfully unduly influencing our clients. It starts with meeting the client alone, then being thorough in our questions and identifying when red flags are present. If they are, discuss concerns openly with our client, ask blunt questions, and if instructed, contact third parties. If the client is doing a will, consider the replacement will strategy if it appears someone may be pressuring the client. If it is an *inter vivos* transfer, don't proceed if you are not confident that the client is acting voluntarily.

Documenting the file is critical. It is equally important to do so if you are satisfied that there is no undue influence. If the will or transaction is challenged, your evidence may be critical in establishing the absence of undue influence.

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PowerPoint

Prepared for: Legal Education Society of Alberta
Capacity and Influence

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Undue Influence:

Identify, Minimize the Risk, and Document the File

By Stanley Rule, Sabey Rule LLP
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Scenario

- Mary calls your office for an appointment for her mother, Betty
- Mary and Betty arrive together
- Mary wants to sit in on the meeting with her mother
  - She says her mother is hard of hearing
  - Relies on her help

A Little More Information

- When arranging the appointment, Mary talks to your assistant
  - She has been living with and looking after her mother
  - She says her mother is leaving her the family home

Undue Influence?

- Not necessarily
  - Natural for Mary to phone to make the appointment and take her mother to the appointment
  - Betty may genuinely wish to benefit Mary out of gratitude
- Or
  - Mary may be isolating Betty from other family
  - Pressuring her to leave the house to her
  - Betty may fear that Mary will withdraw her care if she does not comply

What is Undue Influence?

- "It is influence which overbears the will of the person influenced so that in truth what she does is not his or her own act."
  - Per Southin J.A., B.C. Court of Appeal in *Longmuir v. Holland*
- Coercion
  - But need not be physical violence
  - May be psychological
- Amount of pressure will vary depending on condition of person over whom influence is exercised
  - Little pressure may amount to undue influence if victim is weak and vulnerable

Testamentary Undue Influence

- Burden is always on person alleging undue influence to prove undue influence
  - *Vout v. Hay*
  - (Except in B.C.)

Inter Vivos Undue Influence

- In some circumstances, the burden is shifted to the person alleged to have exercised undue influence
  - Traditional relationships of confidence
    - Example: doctor and patient; lawyer and client
  - the relationship between the person alleged to have exercised undue influence and the transferor is such that there is a potential for domination of the transferor
- Person defending the transaction must then rebut the presumption, and show that the transferor acted on the basis of her own "full, free and informed thought"
  - *Goodman Estate v. Geffen*

Rebutting the Presumption

- "no actual influence was used in the particular transaction or the lack of opportunity to influence the donor
- the donor had independent advice or the opportunity to obtain independent advice
- the donor had the ability to resist any such influence
- the donor knew and appreciated what she was doing
- undue delay in prosecuting the claim, acquiescence or confirmation by the deceased" [citations omitted]
  - *Stewart v. McLean*, Punnett J. BCSC

Consequences of *Inter Vivos* Undue Influence

- Deprives victim of property and security during her lifetime
- May be too vulnerable to seek redress

Lawyer's Evidence

- Independent advice from lawyer is important in rebutting any presumption of undue influence
- Also assists the court in cases where presumption does not apply
- Lawyer's evidence will often be admissible
  - wills exception to solicitor and client privilege
  - waiver of privilege by personal representative

Functions of Independent Legal Advice

- Remove a taint
- Two types
  - Advice as to understanding and voluntariness
  - Advice as to merits of transaction
    - *Cope v. Hill*, Mr. Justice Rooke, ABQB, affirmed CA
- Both are relevant to rebutting a presumption of undue influence

Factors Affecting Weight of Lawyer's Evidence

- "Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed
- Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence
- In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor

Weight of Lawyer's Evidence (cont.)

- Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place
- Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her" [citations omitted]
  - *Coish v. Walsh* (Nfld. CA)

Example of What Not to Do

- Marko Delac gave a notary public instructions that his mother, Regina Delac, wished to transfer her home into a joint tenancy with him
- Marko was a long time client of the notary
- Marko drove Regina to the notary's office
- Notary met with Regina Delac in a car outside the notary's office
- Although the Notary denied Marko was present when the transfer was signed, Marko said he was in the car
- Notary did not have any discussion with her about assets, debts, estate, her health, other funds advanced by her, or about her relationship with Marko

What Not to Do

- Notary did not know that Regina Delac had a daughter (who challenged the transfer), or a will
- Mr. Justice Groves (BCSC) found that the presumption of undue influence applied
- Notary provided no objective advice on the merits of the transfer
- Notary did not inform himself of the circumstances or motives behind the transfer
- The presumption was not rebutted and the transfer was set aside
  - *Modonese v. Delac Estate*

Noticing Undue Influence

- The "cardinal common-sense practice" is to meet with the client alone
  - BCLI report: *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence*
- Some reasons
  - If a person other than the client is giving instructions, how do you know if it is what your client really wants
  - Client may not be candid if another person is in the room
  - Will the client and the other person truly appreciate that the lawyer is only acting for the client
  - How do you ask questions to determine if there is undue influence, if the person who might be pressuring the client is present?

Exceptions

- Independent translator
- Other independent advisers such as accountants and financial planners
  - But still good practice to meet initially with client alone
  - Direct questions to client
- Joint spousal retainers
  - If any indicia of undue influence, refer one or both for independent advice
  - Are both spouses answering the questions, or is one doing all of the talking?

Dealing with Person Who Wishes to be Present

- Short explanation is usually adequate
- Consider sending information to the client ahead of the meeting explaining that you will meet with him alone and why
- Have your assistant advise ahead of the meeting that you meet with estate planning-clients alone
- Be firm
- Have information about the process in the waiting room

"Why Am I Left In the Waiting Room? Understanding the Four C's of Elder Law Ethics."

- Prepared by the American Bar Association Commission on Law and Aging
- Explains the Four C's of Elder Law
  - Client Identification
  - Conflicts of Interest
  - Confidentially
  - Competency

Conduct Thorough Interviews of Clients

- Identify the client's family, and others they may wish to benefit such as close friends and charities
- Assets and liabilities
  - How are they held
- What does current will say?
- Does your client or other family have any disabilities?
- Client's occupation or former occupation
- Previous gift giving

Client Interviews (cont.)

- Client's personal circumstances
  - Others living with client
  - Caregivers
- Financial and personal circumstances of other family
- The above questions are not exhaustive and apply to significant *inter vivos* transfers as well as wills

Ask Why

- If instructions are different from what one usually encounters, such as significant disparity of gifts to children, ask "why?"
- If there is a significant departure from their previous estate plan, ask "why?"

Discuss Consequences and Advise on Alternatives

- Example, for a significant *inter vivos* transfer
  - Will the client have sufficient resources left for her needs?
  - How will the gift affect other beneficiaries of her estate plan?
- Alternatives
  - Will
  - Trust
  - Reservation of life estate

Observe

- Isolation
- Dependency
- Fear
- Vulnerability

Red Flags

- The BCLI Report sets out a comprehensive list of "red flags" that may be risk factors for undue influence
  - The authors were careful to note that a single red flag may be insignificant, but if there is undue influence multiple red flags may be present
  - Although the BCLI Report dealt with wills, the red flags are relevant to *inter vivos* transactions

Red Flags Identified in BCLI Report

- "Someone in whom the will-maker invests significant trust and confidence is – or is connected to – a beneficiary
  - Someone having a confidential or fiduciary relationship with the will-maker, such as that of a lawyer, doctor, member of clergy, financial advisor, or accountant.
  - A formal or informal caregiver, or a health care provider.
  - A member of the same family, other than a spouse, who benefits disproportionately.
  - An overly helpful neighbour or friend.
  - A perception that a person professing emotional attachment to the will-maker is actually pursuing the will-maker for material benefit, and may or may not become a de facto partner or spouse. Such a 'suitor' is usually significantly younger than the will-maker and cognitively intact"

Red Flags

- "Physical, psychological and behavioural characteristics of the will-maker
  - Physical factors that may make the will-maker more dependent on others and possibly increase the opportunity for undue influence, including impairment in vision, hearing, mobility and speech.
  - Physical characteristics that may indicate illness.
  - Signs of neglect or self-neglect such as emaciation, inappropriate clothing, bruising or untreated injuries. This could also be a sign of the onset of some form of cognitive impairment.
  - Physical characteristics indicating an abused or controlled adult such as bruises, black eyes, and untreated injuries.
  - Impaired mental function arising from a psychiatric condition or a non-psychiatric cause such as trauma or a stroke."

Red Flags

- "Illiteracy.
- A state of shock following a very stressful situation or after receiving some bad news, such as the death of a spouse or a loved one. This can trigger a dramatic change in behaviour, lifestyle or decision-making.
- Non-specific psychological factors such as loneliness, sexual bargaining, end of life issues that tend to make someone emotionally vulnerable and open to influence by others.
- Cultural influences and culturally conditioned responses. Examples might be subservience to the wishes of traditional authority figures within an extended family or yielding out of fear of revealing conflicts within the family that could lead to a loss of face within the cultural community."

Red Flags

- "Isolation resulting in dependence on another person to meet physical, emotional, financial, and other needs.
  - Having few, or no, immediate family, or other relatives or friends.
  - Relatives who keep others away from the will-maker and/or have relocated the will-maker to a different community where the will-maker has fewer or no connections.
  - Living in a remote community with restricted access to services.
  - Physical disability.
  - Cultural, religious and language barriers.
  - Recent immigration, especially when the immigrant has been sponsored and is financially and socially dependent on the sponsor."

Red Flags

- "Circumstances relating to the making of the will and the terms of the will
  - Unusual gifts in a will such as a gift to a recent or casual acquaintance.
  - A sudden change in a will or will instructions for no apparent reason, *e.g.* instructions to remove a beneficiary from the will without a rational explanation or under suspicious circumstances.
  - Frequent changes being made to a will.
  - Instructions to make a new will that is markedly different from previous wills.
  - Will instructions from a third party that appear to benefit the third party.
  - A beneficiary, either an individual or an organization, offering to pay for preparation of the will."

Red Flags

- "Beneficiary or another speaks to will drafter on behalf of the will-maker.
- Will-maker is provided with notes and/or information by another.
- Will-maker relies exclusively or to an unusual extent on notes to provide the will instructions.
- Spouses, particularly in second marriages, seek a joint retainer, but one spouse provides instructions and the other is relatively silent.
- Family member has recently died and other family members appear to be influencing will-maker to change terms of existing will."

Red Flags

- "Characteristics of influencer in testator's family or circle of acquaintances
  - Being overly helpful.
  - Insistence that he or she should be present when the practitioner meets the will-maker.
  - Contacting the practitioner persistently regarding the will after instructions are taken.
  - Someone known to the practitioner to have a history of abuse, including violation of court orders."

Red Flags

- "A negative attitude towards the will-maker observed by the practitioner.
- A controlling attitude towards the will-maker observed by the practitioner.
- Someone known to the practitioner to be in difficult financial circumstances.
- Someone who, to the knowledge of the practitioner, engages in substance abuse."

Red Flags

- "One's 'gut-feeling' that undue influence is going on
  - Body language / mannerisms of will-maker indicate fear, anxiety, insecurity, reticence, evasiveness, or embarrassment.
  - A person (potential influencer) who is off-putting or difficult to deal with accompanies the will-maker to the appointment with the practitioner.
  - A person (potential influencer) accompanying the will-maker is rude to staff when in the office or over the telephone. Alternatively, he or she may be overly solicitous."

Red Flags

- I add,
  - Client has seen multiple lawyers in respect of the will or transaction
  - Person exerting undue influence may be shopping for someone who will do the will or transaction

When Significant Red Flags Identified

- Deal with the issue directly
  - Tell your client your concerns
  - Ask permission to take steps to deal with your concerns
    - Poyser, *Capacity and Undue Influence*

Ask Blunt Questions

- A few illustrations from Poyser
  - "Is this your idea?
  - Did your son suggest it?
  - Did your son try to convince you to do this?
  - How?
  - Do you feel under any pressure to do this?
  - Will anything happen to you if you do not?
  - Have you promised to do this?
  - Why are you doing this?"

Information from Third Parties

- With your client's permission, contact third parties, which may include
  - Physician
  - Accountant
  - Financial Adviser
  - Previous lawyer

The Confidential Replacement Will

- Present the client with a will and a codicil
  - Will based on instructions you suspect your client is pressured to give you,
  - Codicil revokes new will and republishes previous will,
  - Client is given the choice to sign the new will, or both the new will and codicil
    - If the client is being pressured, the client can sign the will and take it to show the influencer, while codicil is held by a third party until the client's death
    - Or, the client may say in respect of codicil, "that's nonsense, I want what's in the new will," in which case client may sign something to that effect as evidence that there is no undue influence
    - (See Poyser)

Grey Area *Inter Vivos* Transfers

- High degree of confidence that there is no undue influence required for significant *inter vivos* transfers
  - Depletes client's wealth
  - May cause material hardship
  - If the client is a victim of undue influence, vulnerability may be such that she is likely unable to obtain redress

Grey Area Wills

- Different consequences from *inter vivos* transfers
- If no undue influence, and lawyers decline to proceed, client's true wishes are defeated
- If there is undue influence, then those who would benefit under previous will (or from having a gift in new will set aside), still have the opportunity to challenge the new will
- If the lawyer does not proceed, there is no opportunity for the court to decide the issue of undue influence

Assistance for Victims of Abuse

- Advise client of resources
- May contact authorities if client consents
- If client does not consent, obligation of confidentiality (Law Society of Alberta Code of Conduct Rule 3.3-1)

Limited Exceptions Allowing Disclosure

- May "disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed" (Commentary 10)
- public harm/future harm/public safety exception if a person "is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm" (Rule 3.3-3)
  - May include serious psychological harm (Commentary 2)

Documenting Your File

- May be required to give testimony years or decades in the future
- Take and keep notes, memos to file, communications with third parties
- Take verbatim notes of key questions and answers
- If you think a will or transaction may be challenged, consider videotaping (with client's permission)
  - In a B.C. case, *Machander v. Drader*, court found the video tape helpful in dispelling concerns about suspicious circumstances and incapacity where a lawyer was asked to do a death-bed will