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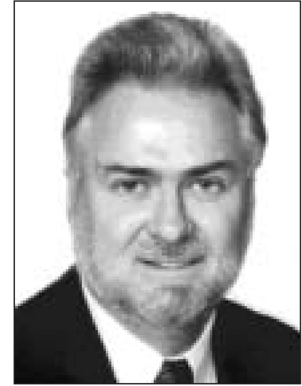

Understanding Undue Influence

In my experience in estate litigation, probably the most difficult issue to win at trial is that of undue influence. A review of case law makes clear that the majority of such allegations are dismissed at trial due to insufficient proof. Frequently the Court simply finds the testator had sufficient mental capacity and therefore allows the Will to be propounded.

The loss of an undue influence case at trial can have devastating effects on both the client and the lawyer. This is especially true for the lawyer handling such a case on a contingency fee basis. An undue influence trial usually requires many days of examinations for discovery. Such a trial often takes a minimum of two weeks. Disbursements can be substantial, including fees for medical expert witnesses and private investigators.

Such influence is most often exerted in private, away from other friends and family members of potential beneficiaries. There are rarely eyewitnesses who observe blatant undue influence being exerted. It sometimes seems, therefore, the only way to prove such a case is with a written confession from the person who exerted the influence.

It is a real challenge for counsel to successfully convince the court to set aside the Will or *inter vivos* gift, on the basis of undue influence.

In this article, I will examine briefly the case law surrounding undue influence and then set out 20 practice tips that will hopefully assist a plaintiff's counsel in winning his or her undue influence trial.

Undue influence is an equitable doctrine. It is a category of constructive fraud.

What is undue influence?

Undue influence is an equitable doctrine. It is a category of constructive fraud. A very fine line separates legitimate influence from undue influence. These cases are understandably very much fact-driven. Success in such cases usually requires a meticulous examination of the facts, particularly those that appear suspicious.

The following oft-cited passage sets out the test for undue influence at law:

> "It is settled law that undue influence sufficient to invalidate a Will extends a considerable distance beyond an exercise of significant influence—or persuasion—on a testator. It is also clear that the possibility of its existence is not excluded by a finding of knowledge and approval.
>
> "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 [strong relationships] 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."
>
> (*Wingrove v. Wingrove* (1885), 11 P.D. 81 (Eng. Prob. Ct.), at page 82.)

This passage is cited with approval in *Williams and Mortimer, Executors, Administrators and Probate*, (17th edition, 1993), at page 184. The authors continue as follows:

> "Thus undue influence is not bad influence but coercion. Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded. Appeals to the affections or ties of kindred, to the

> sentiment of gratitude for past services, or pity for future destitution or the like, may fairly be pressed on the testator. The testator may be led but not driven and his Will must be the offspring of his own volition, not the record of someone else's. There is no undue influence unless the testator if he could speak his wishes would say, 'this is not my wish but I must do it.' "

Two Kinds of Undue Influence: Actual and Presumed

1. Actual

In cases of actual undue influence, the recipient must be shown to have coerced the transferor to make a Will or *inter vivos* gift. The conduct must be such that the Court finds that the transfer or disposition was not the true will or free intention of the victim. Proof may be shown indirectly by circumstantial evidence, and sometimes by direct evidence, such as threats, lies, and promises that the recipient had no intention to keep.

2. Presumed

Here, a relationship of trust and confidence between the transferor and transferee raises a rebuttable presumption that the transfer was made by undue influence. Once the relationship of trust and confidence is shown, the onus of proof shifts to the transferee to prove that the transferor made the transferor after full, free, and informed thought. The policy of preserving public confidence in relationships of trust and confidence allows otherwise valid transfers to be voided. Generally speaking, the courts will be more inclined to interfere to set aside a substantial gift or transfer, as opposed to gifts of a minor nature.

Any presumption of undue influence is rebuttable by showing that the transfer was made after full, free, and informed thought. This is often done by showing that the transferor obtained proper independent advice.

NB: This doctrine of presumed undue influence does *not* apply to testamentary disposition.

Differing Burdens Of Proof: Wills versus *inter vivos* gifts or transfers

A key point is the distinction made between gifts or transfers *inter vivos* as opposed to those made by Will. As noted above, in the case of special "trust" relationships where a transfer is made during life, a presumption of undue influence will arise. Where the gift or transfer is made by Will, however, no such presumption arises, and the plaintiff has the daunting task of proving actual undue influence.

In the recent case of *Araujo v. Neto*, (2001) BCSC 935, Justice Sigurdson does an exhaustive review of the case law.

Justice Sigurdson initially deals with the issue of onus of proof. He states:

> "The onus for proving undue influence for *inter vivos* gifts differs depending on the nature of the relationship between the parties. In the absence of a fiduciary or special relationship, the onus rests on the party alleging undue influence to prove it. However, undue influence is presumed to apply to certain relationships or in certain circumstances and the onus shifts to the recipient of the gift to rebut it."

The Judge continues as follows:

> "Feeney in *The Canadian Law of Wills*, 3rd ed., Vol. 1 (Vancouver: Butterworths, 1987) draws a distinction between the burden of proof when alleging undue influence in the making of a Will and in the case of an *inter vivos* gift made to a person in a special relationship, at page 42:
>
> > 'In the case of gifts *inter vivos* to persons standing in a fiduciary relationship, or some other relationship whereby the donee was in a position to overbear the donor, such persons must show that they did not influence the donor in making the gift. There is, so to speak, a presumption of undue influence. There is no such presumption in the case of Wills. A person in a position to overbear a testator may exercise persuasion to obtain a Will or legacy in his favour and it will stand in the absence of positive proof of undue influence by those who assert it.' "

Undue Influence in Gifts or Transfers

Lord Justice Cotton in *Allcard v. Skinner,* (1887), 36 Ch. D. 145 (Eng. C.A.), at 171, spoke of undue influence in connection with two classes of voluntary gifts:

There is, so to speak, a presumption of undue influence.

> "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for that purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case, the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent Will, and which justifies the Court in holding that the gift was the result of a free exercise of the donor's Will."

At page 181, Lord Justice Lindley said:

> "The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases, the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases, it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.
>
> "This remains an accurate statement of the law, although the Courts have taken a more flexible approach to the second class of case, and it is not always necessary to show that the donor had independent advice in order to rebut the presumption of undue influence."

In *Goodman Estate v. Geffen,* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at 221, Wilson J. asked:

> "What are the factors that go to establishing a presumption of undue influence? This question has been the focus of much debate in recent years. Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence until the contrary is shown."

She noted that these included the relationship between trustee and beneficiary, doctor and patient, solicitor and client, parent and child, guardian and ward, and future husband and fiancée.

Wilson J. in *Geffen* then said at pages 221 and 227:

> "Beginning, however, with *Zamet v. Hyman*, [1961] 3 All E.R. 933, it came to be accepted that the relationships in which undue influence will be presumed are not confined to fixed categories and that each case must be considered on its own facts. Since then it has been generally agreed that the existence of some 'special' relationship must be shown in order to support the presumption, although what constitutes such a 'special' relationship is a matter of some doubt.
>
> "It seems to me rather that when one speaks of 'influence,' one is

really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. ...to dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

> "What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself."

In *Ogilvie v. Ogilvie Estate,* (1998), 49 B.C.L.R. (3d) 277 (B.C. C.A.) at 295, the Court of Appeal, in the context of discussing the various judgments in *Geffen*, stated that:

> "[t]he task to be undertaken by the court is to determine whether there existed in the relationship between donor and donee the potential for influence." In that case, the trial judge had stated the following at para. 41 of her reasons (reported at (1996), 26 B.C.L.R. (3d) 262 (B.C. S.C.):
>
> > 'In my opinion, the case before me is a classic case of the second category of undue influence, not the first. I agree that the Plaintiffs fall short of proving any unfair or improper conduct on the part of the Defendants. The rule of evidence applicable to the doctrine of undue influence doesn't require the Plaintiffs to do so. They only have to show the "special relationship of influence" between the Grahams and Hugh Ogilvie in the sense that they managed his affairs or gave him advice and, therefore, had a duty to ensure he received independent advice before making substantial gifts in their favour. Then the burden shifts to the Grahams to show that Hugh Ogilvie had independent advice, or was free of their influence when making the subject gifts.' "

The Court of Appeal in *Ogilvie*, supra, concluded that the trial judge undertook the correct scrutiny of the relationship between the donor and the donee and the questioned transactions, and upheld her decision that a special relationship existed, and that the presumption of undue influence had not been rebutted by the defendants.

A person opposing probate has the legal burden of proving undue influence.

Undue Influence in Wills

The decision of *Scott v. Cousins,* 37 E.T.R. (2d) 113, summarizes the leading Canadian case on undue influence re. Wills, namely *Vout v. Hay* (1995), 7 E.T.R. (2d) 209 (S.C.C.)

The principles that I believe are established by the decision of the Supreme Court, and that are relevant here, can be stated as follows.

1. The person propounding the Will has the legal burden of proof with respect to due execution, knowledge and approval, and testamentary capacity.

2. A person opposing probate has the legal burden of proving undue influence.

3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.

4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the Will is aided by a rebuttable presumption.

   Upon proof that the Will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents, and had the necessary testamentary capacity (at page 227).

5. This presumption "simply casts an evidential burden on those attacking the Will." (*ibid.*)

6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances—namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder." (*ibid.*)

7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the Will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.

8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the Will:

   > "It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the Will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the Will." (*ibid.*)

Suspicious Circumstances

Suspicious circumstances are simply circumstances that arouse the suspicion of the court. In the leading case, *Barry v. Butlin,* (1838) 2 Moo. P.C. 480, it was held that the court ought not to pronounce in favour of the Will unless the suspicion is removed. That role has been extended to include all cases in which a Will is prepared under circumstances that raise a well-grounded suspicion that it does not express the mind of the testator. (*Clark v. Nash,* (1989) 34 E.T.R. 174 (B.C.C.A.))

Undue influence can be established on the balance of probabilities through circumstantial evidence. In *Scott v. Cousins*, 37 E.T.R. (2d) 113, the Court describes circumstantial evidence that may be considered in undue influence cases:

> "In determining whether undue influence has been established by circumstantial evidence, courts have traditionally looked to such matters as the willingness or disposition of the person alleged to have exercised it, whether an opportunity to do so existed and the vulnerability of the testator or testatrix. ...the testatrix does not have to be threatened or terrorized: effective domination of her will by that of another is sufficient. ...this, I believe, is a consideration of no little importance in the present case as well as in the increasing number of those involving Wills made by persons of advanced age. Other matters that have been regarded as relevant, within limits, are the absence of moral claims of the beneficiaries under the Will or of other reasons why the deceased should have chosen to benefit them. The fact that the Will departs radically from the dispositive pattern of previous Wills has also been regarded as having some probative force."

Examples of suspicious circumstances may include:

1. an elderly testator;
2. a testator who is unwilling to provide the solicitor with full information relating to the assets, liabilities, medical history, or family condition and circumstances;
3. a testator who has suffered significant ill health, particularly if the condition, disease, or medication could affect the mental stability or general mental outlook of the testator;
4. a disposition of the estate that seems unusual in the context of the circumstances as known to the testator;
5. a beneficiary who has been particularly involved in "assisting" the testator in the preparation of the Will;
6. dispositions in the Will drastically different from the terms of the former Will;
7. circumstances where the testator appears dependent upon another, for

example, allowing the other person to speak on his or her behalf;

8. a testator with questionable testamentary capacity;
9. a testator who has had numerous Wills prepared in a short period of time;
10. a testator who has recently contracted a hasty or unwise marriage;
11. a testator with a language, learning, intellectual, or cultural disability;
12. a testator who has recently changed living circumstances, particularly one who moves in with the alleged perpetrator;
13. a Will that makes no gifts to those seemingly appropriate;
14. a Will prepared on instructions provided by the questionable beneficiary;
15. cases where the long-lost beneficiary seems to arrive "out of the nowhere"; or
16. a testator suffering from depression/loneliness.

The existence of any one or more of these factors does not necessarily mean that the Will is vulnerable to attack. However, the presence of any one or more of these factors is probably the best avenue for plaintiff's counsel to attack the Will. Successful counsel will be vigilant as to these and other suspicious circumstances.

20 Practice Tips on How to Win an Undue Influence Case

1. **Before undertaking such a case, particularly on a contingency fee basis, counsel should consider being retained initially only to gather facts. This will assist both client and counsel in determining whether there is a good likelihood of success**.

   This may not be required if probable lack of testamentary capacity is apparent from the outset. The obvious difficulty with most undue influence cases is the absence of witnesses. Most often, there are only two people involved. One is now dead and the other is not talking. Accordingly there are usually immense problems in determining the facts upon which to allege undue influence.

   I simply stress that counsel should be *very* selective in deciding whether or not to accept such cases. Certainly the size of the estate should be considered when making this decision.

2. **File a probate *caveat* right away, but do not commence the court action until you have sufficient proof to justify your allegations of undue influence.**
   The defence may quickly move for a summary trial. The court may award costs or higher costs against your client if you cannot prove the allegations.

The obvious difficulty with most undue influence cases is the absence of witnesses.

3. **Consider retaining an experienced private investigator to assist in determining the facts**.
   Undue influence cases demand a meticulous examination of the facts. The private investigator should take signed statements from any witnesses who have material evidence.

   I consider it necessary to interview almost every person who knew the deceased at the relevant times. Try to obtain a background report on the defendant. It may be surprising how often there may be evidence of prior undue influence allegations. Interview the witnesses to the Will or transfer.

4. **Get as many records as possible concerning the deceased**.
   This would include all medical records from every doctor and medical institution for at least 10 years prior to death, together with all long-term care records, social work records, nursing home records, care facilities, work or school records (if appropriate), and the like. It would also include the lawyer's notes, and perhaps the lawyer's notes of previous Wills. The majority of undue influence cases involve senior citizens; there is often an issue of testamentary capacity. I stress, however, that undue influence can occur in non-senior situations, such as a young person joining a cult.

5. **Marshall the suspicious circumstances; present them in the form of a compelling argument to prove the case (usually through circumstantial evidence).**
   Look to stress situations showing a pattern of the defendant making the deceased more dependant, i.e., isolating and limiting access.

6. **Try to determine the names and addresses of the witnesses that the alleged perpetrator relies upon, and try to interview them**.
   I have found that if the defendant appears to be flaky, (which is often the case), then the old adage "birds of a feather flock together" often applies. Having this information will assist you in your cross examination.

7. **Recognize and benefit from the lack of sophistication of most perpetrators of undue influence. Usually perpetrators are unsophisticated in their methods.**
   While undue influence is a form of civil fraud, the defendants are usually not particularly intelligent, skilled, or savvy.

8. **Try to avoid a summary trial unless you have an overwhelming case.**
   I have succeeded at trial, particularly

through cross examination, on cases that may well have been lost on a summary trial. On a summary trial, the judge never has the opportunity to assess the credibility of the witnesses. As mentioned above, often these characters can be quite "flaky" and may contrast well with presentable and sympathetic plaintiffs.

9. **In setting aside *inter vivos* gifts, take advantage of the presumption of undue influence where there is a special relationship situation**. There often is a "housekeeping" situation present.

10. **Obtain expert opinion(s) from those such as geriatric psychiatrists(s) who never met the deceased.**
    Have them review all of the records, and tender an opinion on both testamentary capacity and the relative vulnerability of the deceased to any undue influence.

11. **Get on the case. Take these steps as soon as possible**.
    The family may come to see you prior to the death. Even where you cannot assist them to diminish any inappropriate influence, start to build your case as pro-actively as possible. This can involve everything from letters to doctors, banks, and the Public Guardian and Trustee, to obtain an injunction or committeeship order.

12. **Use demonstrative evidence, such as home videos, photographs, handwriting samples, and the like, to try to demonstrate a "before and after" situation where there is evidence of medical or psychological decline.**

13. **Cross examine the handling Notary or lawyer.**
    Try to get an order to discover him or her for discovery. Even the most careful and senior lawyers may fall short in their duties. It can be highly effective to use the Law Society

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checklist to cross examine the lawyer. I refer you to *Danchuk v. Calderwood* 15 E.T.R.(2d) 193, where the Judge comments on the solicitor's handling of the Will:

> "In keeping with what I understand to be the law applicable to the duty of a solicitor, in the circumstances here, I accept the submission of counsel for the defendants that she failed with respect to that duty.
>
> "In my view, in the particular circumstances here, at the outset:
>
> a. she should have regarded the circumstances as suspicious, having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;
>
> b. she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;
>
> c. the inquiry should have confirmed whether the deceased had a prior existing Will and if such a Will existed, what were the reasons for any variations or changes that prompted the disposition being put forward;
>
> d. the inquiry should have encompassed why and for what reasons the deceased had given a Power of Attorney to his daughter in late 1992 and, more importantly, why upon revocation of that Power of Attorney a new Power of Attorney was to be given by the deceased to the plaintiff; and
>
> e. collateral to (d), supra, the inquiry should have included some investigation of the health of the deceased.
>
> "In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose [that] because a person says he understands a question put to him and gives a rational answer, he is of sound mind and capable of making a Will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.

Prepare a chronology of relevant medical or factual events germane to your case.

> "If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense, including the medical assessment of the ongoing progression and state of senile dementia, I am satisfied the said Will would not have been prepared by her at that time."

14. **Obtain medical opinions treating physicians as to both testamentary capacity and whether the deceased may well have been more susceptible to undue influence, given his or her medical condition.**

15. **Be bold and confident in the presentation of your case.**
The defence will always be skeptical and the Court may be, as well.

16. **Be prepared to prove the relative inequality of the parties.**
The court should be made to understand any power differential.
Age, infirmity, and loneliness will likely render any person more vulnerable to inappropriate influences; this should be clearly demonstrated for the Court.

17. **Be prepared to prove the substantial unfairness of the Will or bargain.**

18. **Prepare a chronology of relevant medical or factual events germane to your case.**

19. **Think hard and often as to how you will present your case.**

20. **Prepare and use a written opening at trial.**

Conclusion

Undue influence cases have always been difficult to prove for a variety of reasons, and probably will remain that way for some time yet into the future. I hope this article's outline of the law of undue influence, together with the 20 practice tips, will bring success to plaintiff's counsel in the future. ▲

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He is the current Chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a Past President of the Trial Lawyers Association of BC. A frequent lecturer at CLE, Trevor lectures to the Notaries of BC, and teaches estate law to new Notaries.

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