

# **Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide**

**Prepared for the British Columbia Law Institute  
by the Members of the Project Committee on  
Potential Undue Influence: Recommended  
Practices for Wills Practitioners**

# British Columbia Law Institute

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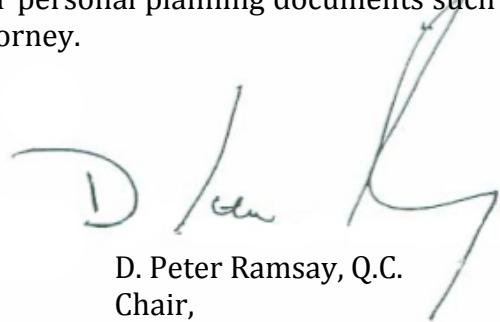
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## INTRODUCTORY NOTE

Legal practitioners who prepare wills now take care to be satisfied that the will instructions represent the independent wishes of their clients. A forthcoming change in the law in section 52 of the *Wills, Estates and Succession Act* requires some heightened awareness of the possibility of undue influence on the part of wills practitioners. Once the section is in force, the onus of proof in cases where undue influence is alleged will shift to the defender of a will in certain circumstances. This change heightens the need for practitioners to be able to recognize signs (“red flags”) pointing to the possibility that a client’s independent wishes are being overborne by coercive pressures and to take reasonable steps to prevent, to the extent possible, later challenges on the ground of undue influence and to record those steps. A practitioner should anticipate being called as a witness to rebutt the new presumption of undue influence.

This Guide is intended for the use of legal practitioners who prepare wills. It was developed by an interdisciplinary committee with the support of the Notary Foundation and the Lawyers Insurance Fund. For background the Guide surveys the present state of the law relating to undue influence and explains the evidentiary change that section 52 will bring about. The main purposes of the Guide, however, are to assist legal practitioners in recognizing and dealing with situations of potential undue influence, and to set out some guidelines (“recommended practices”) that should help to avert undue influence challenges.

While the focus of the Guide is on wills practice, much of its contents are also relevant to the preparation of contracts and other personal planning documents such as representation agreements and powers of attorney.

A handwritten signature in blue ink, appearing to read 'D. Peter Ramsay', is positioned above the printed name and title.

D. Peter Ramsay, Q.C.  
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## Acknowledgments

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We are very grateful to the Notary Foundation for funding this project aimed at developing a practice resource that would be of benefit to notaries and lawyers alike. We are also grateful to the Lawyers Insurance Fund for providing additional funding for technical support in the design of a supplementary reference aid based on the contents of the Guide.

We thank Miller Thomson LLP for providing in-kind support to the project by hosting the meetings of the Project Committee at their offices.

We also acknowledge the contribution of members of the Institute staff who supported the work of the Project Committee by recording its proceedings, carrying out research, and drafting the text of the Guide.



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## **EXECUTIVE SUMMARY**

This Guide is intended for the use of notaries and lawyers alike. Its aim is to

- raise awareness of undue influence as a potential cause of estate litigation and invalidity of a will;
- assist will drafters to recognize red flags of undue influence;
- enable will drafters to interact tactfully but effectively with will-makers to elicit information necessary for them to properly assess the will-makers' individual situations and ability to act independently; and
- insulate wills they prepare against successful challenges based on undue influence.

The Guide has been prompted by the forthcoming change in the law that section 52 of the *Wills, Estates and Succession Act* will bring about when it comes into force. Section 52 will cause the onus of proof to shift to the defender of the will in undue influence challenges once the challenger has shown that the will-maker was in a relationship of dependency with the person alleged to have exerted undue influence, or one in which the potential for domination of the will-maker existed. In effect, section 52 will create a rebuttable presumption similar to the one that applies in undue influence cases relating to non-testamentary gifts.

Undue influence surrounding a will has always been difficult to prove because the will-maker's evidence is unavailable, the true facts are often known only to the alleged influencer, and until now the onus of proof has always been on the challenger. After section 52 is in force, wills may be found invalid for undue influence more frequently. This makes it more important for notaries and lawyers, who must meet the same standard of care in relation to the preparation of wills, to be able to recognize situations in which undue influence could be a problem and avoid preparing wills that are invalid on that ground.

Chapter I of the Guide provides general background. Chapter II summarizes the law relating to testamentary undue influence. Chapter III, entitled "What Is Undue Influence in Fact?" explains how undue influence operates as a form of financial abuse, typically within relationships of dependency, confidence, and trust. It presents some scenarios illustrating testamentary undue influence in different contexts.

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Chapter IV lists “red flags” of undue influence that a wills and estates practitioner should recognize and consider in assessing the possibility that undue influence is in play.

Chapter V sets out recommended practices for dealing with undue influence as a legal and practical issue in wills and estates practice, and for averting successful undue influence challenges.

While the focus of this Guide is on undue influence surrounding wills, much of its contents are equally applicable when taking instructions for the preparation of other personal planning documents, such as powers of attorney and representation agreements.

This Guide has been prepared with the assistance of project funding generously provided by the Notary Foundation.

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### I. BACKGROUND

#### Introduction

Four requirements must be met for a will to be valid:

- the will-maker must have the mental capacity to make a will (*testamentary capacity*);
- the will-maker must be aware of the contents and intend them to serve as his or her will (*knowledge and approval*);
- the will must be signed by the will-maker or at the will-maker's direction in the presence of two attesting witnesses (*testamentary formalities*);
- the will-maker must act independently in making the will (absence of *undue influence*).

This Guide is concerned with the last of these requirements. The Guide is intended to assist notaries and lawyers alike in acquiring skills and knowledge to deal with undue influence as both a practical reality and a legal problem in wills and estates practice.

While this particular Guide focuses on undue influence relating to wills, the same skills and knowledge are fully relevant to the preparation of other personal planning documents such as powers of attorney and representation agreements, and to the documentation of transfers of property and various other common transactions, including gifts, loans and guarantees between family members and acquaintances.

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### Legal Practitioners' Responsibility in Relation to Undue Influence

Notaries and lawyers must meet the same standard of care in relation to the preparation of wills as with other property-related matters.<sup>1</sup>

Will drafters are familiar with the requirement of testamentary capacity and the obligation resting on them to take reasonable steps to be satisfied that the will-maker has testamentary capacity when there is any room for doubt. The practitioner's responsibility is not completely met by making this assessment, however. The practitioner must also be satisfied that the will-maker is able to exercise testamentary capacity *freely*.<sup>2</sup>

The *Principles for Ethical and Professional Conduct Guideline* of the Society of Notaries Public of British Columbia addresses indirectly the responsibility of notaries preparing wills to be alert to undue influence.<sup>3</sup> The *Practice Checklist (Testator Interview)* issued by the Law Society of British Columbia mentions undue influence expressly as a matter requiring vigilance on the part of lawyers.<sup>4</sup>

While undue influence is often intertwined with the question of testamentary capacity in individual cases because diminished mental capacity can make it easier to be influenced, it remains a legal issue separate from that of capacity. Undue influence may be present whether or not the will-maker has diminished capacity.

Recent Supreme Court of Canada authority includes circumstances tending to show that a will-maker's free volition is being overborne by coercion or fraud as being among the categories of "suspicious circumstances" that raise an issue with respect

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1. *Crowe v. Bollong*, 1998 CanLII 5607 (B.C.S.C.); *Flandro v. Mitha* (1992), 93 D.L.R. (4th) 222 (B.C.S.C.); *Anakotta v. Perusini*, 2004 BCSC 168; *Dorndorf v. Hoeter* (1981), 29 B.C.L.R. 71 (S.C.).
  2. *Murphy v. Lamphier* (1914), 31 O.L.R. 287 at 318-319 (H.C.); *aff'd* (1914), 32 O.L.R. 19 (S.C., App. Div.).
  3. Online at <http://www.notaries.bc.ca/home/index.rails>. Article 2-P2 of the *Guideline* states that "Members should take reasonable steps to protect against fraud, misrepresentation, or unethical practices." (Undue influence is of course both an unethical practice and also a form of fraud in which the victims are the will-maker and the will-maker's truly intended beneficiaries.) Article 2-G1 states that "A member should not execute a false or incomplete document, nor be involved with any document or transaction which the member knows to be false, deceptive, fraudulent, or illegal." A will procured by undue influence is obviously false, deceptive, and fraudulent.
  4. Paragraph 4.1 of the checklist suggests that lawyers should question clients alone to determine that the client genuinely wants to make a will and is aware of the "true facts." Paragraph 4.2 indicates the questions and responses should be recorded. The *Practice Checklist (Testator Interview)* is found online at <http://www.lawsociety.bc.ca/docs/practice/checklists/G-2.pdf>.

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to the will-maker's knowledge and approval of the will's contents.<sup>5</sup> While knowledge and approval by the will-maker and undue influence are also entirely separate issues, a practitioner taking will instructions must take particular care when suspicious circumstances are present to be satisfied that the will-maker not only has testamentary capacity, but is acting independently.<sup>6</sup>

Failure on the part of legal practitioners to recognize suspicious circumstances or disregarding them in the preparation of a will has attracted judicial criticism.<sup>7</sup>

### **Section 52 of the Wills, Estates and Succession Act**

A forthcoming change, explained at greater length in Chapter II, will require a heightened awareness on the part of practitioners of the possibility that undue influence may affect the validity of the testamentary documents they prepare. The change will result from section 52 of the *Wills, Estates and Succession Act*,<sup>8</sup> which is expected to come into force in the near future.

Section 52 will alter the law regarding the onus of proof in challenges to wills based on undue influence. While the challenger now has the onus to prove undue influence, the onus to prove that the challenged will or provision did not result from undue influence could shift to the defender under certain circumstances once section 52 comes into force.

As section 52 deals with evidence rather than the validity of the will itself, it will potentially apply whenever a will is contested on the ground of undue influence in a legal proceeding in British Columbia, regardless of where the will was made or what system of law governs its substantive or formal validity.

Section 52 will lessen the evidentiary difficulties that lie in the path of a challenge to a will based on undue influence if dependency or the potential for domination can be shown. It may lead to increased litigation on grounds of undue influence, which would mean that practitioners may find themselves testifying increasingly often as witnesses in these cases. As a result, practitioners drafting wills or advising clients on estate planning matters need now more than ever before to be

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5. *Vout v. Hay*, [1995] 2 S.C.R. 876.

6. *Murphy v. Lamphier*, *supra*, note 2.

7. *Eady v. Waring* (1974), 2 O.R. (2d) 627 at 635 (C.A.); *Re Carvell* (1977), 21 N.B.R. (2d) 643 (Prob. Ct.).

8. S.B.C. 2009, c. 13 (not in force at time of publication).

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- aware of undue influence as a potential source of estate litigation and invalidity of a will;
- able to recognize common indicators (“red flags”) of potential or actual undue influence;
- able to interact tactfully but effectively with the will-maker in order to elicit the information necessary for them to properly assess the will-maker’s situation and ability to act freely;
- aware of the need to keep and retain appropriate records.

This Guide contains information and practical suggestions aimed at assisting legal practitioners to

- deal appropriately with situations where undue influence may be or is being exerted on their clients and avoid becoming an unwitting agent of the influencer; and
- insulate the wills they prepare against successful challenges based on undue influence.

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### II. WHAT IS UNDUE INFLUENCE IN LAW?

#### Undue Influence: The Concept

Undue influence consists of imposing pressure that causes a person to perform some legal act, such as making a will, that does not reflect the true wishes or intentions of that person, but rather those of the influencer.

Undue influence goes beyond mere persuasion to make a will or other disposition of property.<sup>9</sup> It is the imposition of the influencer's wishes on another person, such that the other person is not acting freely in performing the act that the influencer desires. Direct or immediate benefit to the influencer is not essential. It is sufficient if the pressure imposed results in the act desired by the influencer being carried out.<sup>10</sup> *Feeney's Canadian Law of Wills* describes undue influence as having occurred in the context of will-making when "the testator's volition has been overborne by another person such that there was no voluntary approval of the contents of the will."<sup>11</sup>

Undue influence in relation to wills has traditionally been described in terms of "coercion."<sup>12</sup> What may amount to coercion in a particular case may vary with the

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9. In *Ravnyshyn v. Drys*, 2005 BCSC 561, Warren, J. stated at para. 104:

There is nothing improper...for one to attempt to solicit a will in his or her favour and to use all lawful means towards effecting that end. Indeed some amount of persuasion and mere influence is permissible so long as it does not amount to undue influence...

Similarly, in *Hall v. Hall* (1868), L.R. 1 P. & D. 481 at 481-482, Sir J. P. Wilde said:

To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like – these are all legitimate, and may be fairly pressed on a testator.

10. *Re Marsh Estate* (1990), 99 N.S.R. (2d) 21 at 230 (Prob. Ct.).

11. James A. McKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: LexisNexis Canada, 2000) at section 3.5.

12. *Boyse v. Rossborough* (1857), 6 H.L.C. 2, 10 E.R. 1192 (H.L.); *Wingrove v. Wingrove* (1885), 11 P.D. 81 at 82. In *Vout v. Hay*, *supra*, note 5 Sopinka J. said at para. 21:

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circumstances. Actual violence or forcible confinement would clearly constitute coercion, but persistent verbal pressure may do so as well if the will-maker is already in a severely weakened state.<sup>13</sup>

In *Re Kohut Estate*,<sup>14</sup> for example, an elderly woman made seven wills over an eight year period in which she alternately lived with each of her daughters. Each time the testatrix made a new will the principal beneficiary was the daughter with whom she resided. The court concluded that testamentary capacity was not in issue and that neither daughter had actually forced their mother into making a will in her favour. The court still decided that the last four wills came about as a result of undue influence because the mother was highly susceptible to the wishes of her daughters. The court held that the wills were the “result of what those around her had in mind and not the exercise of the deceased’s own volition, albeit influence innocently exerted.” In determining the proof required for undue influence, the court commented that:

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will under some threat or other inducement. One must look at all the surrounding circumstances and determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences.

In *Tribe v. Farrell*, the British Columbia Court of Appeal upheld a trial judgment setting aside a will in favour of the deceased testator’s live-in caregiver on the

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This [allegation of undue influence] requires proof that the testator’s assent to the will was obtained by influence such that instead of representing what the testator wanted, the will is a product of coercion.

13. *Wingrove v. Wingrove, ibid.* Early authorities recognized that various forms of coercive pressure were capable of amounting to undue influence. While *Boyse v. Rossborough, supra*, note 12, is usually cited as the principal authority for the proposition that testamentary undue influence requires coercion, it contains another description of undue influence that emphasizes the effect of the conduct on the testator’s state of mind. Lord Cranworth commented at 6 H.L.C. 34, 10 E.R. 1205 that undue influence:

...must be an influence which can justly be described by a person looking at the matter judicially, to have caused the execution of a paper pretending to express a testator’s state of mind, but which really did not express his mind, but expressed something else, something which he did not really mean.

Burns observes that while this definition covers coercive conduct in its grossest form, it also covers conduct that would deprive the testator of the right of independent agency or expression: Fiona R. Burns, “Reforming Testamentary Undue Influence in Canadian and English Law” (2006) 29 Dalhousie L.J. 455 at 458.

14. *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man Q.B.).
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ground that they were all procured by the caregiver's undue influence, as well as a number of gifts and transfers of property that the deceased will-maker made to her during his lifetime.<sup>15</sup> The trial judge had found that undue influence was present, not because of overt threats or mistreatment, but from psychological pressures playing on the will-maker's fear that the caregiver would leave him if he did not make the gifts and bequests to her.

Another even more recent decision of the Court of Appeal illustrates the variable nature of coercion that can amount to undue influence. In this case, a woman who had previously made a will dividing her estate equally between her three children later signed another will that had the effect of giving her entire estate to her son, to the exclusion of her two daughters. The will had been drafted by her son, on whom she was dependent for much support in daily living. The only direct evidence about how the will had come into being came from the son, whose evidence the trial judge did not treat as reliable. The Court of Appeal held that the trial judge had not erred in drawing the inference he did from the circumstantial evidence available, namely that the son had coerced his mother into signing the will making him in effect the sole beneficiary "not by threats or promises, but working on her over a period of time."<sup>16</sup>

In other words, it is now recognized that undue influence in relation to wills can take the form of subtle or indirect psychological pressures that exploit some source of vulnerability of the will-maker. Direct threats or terrorization of the will-maker are not essential. Undue influence is present if the influencer has effectively dominated the volition of the will-maker, so that the will that is actually made does not represent the independent wishes or intent of the will-maker.<sup>17</sup>

### Effect of Undue Influence

A will or a provision of a will that is the result of undue influence is void.<sup>18</sup> Probate will be refused, either of the entire will or of the part that is tainted by undue influence.

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15. 2006 BCCA 38.

16. *Hix v. Ewachniuk*, 2010 BCCA 317 at para. 13.

17. *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113 at para. 114 (Ont. S.C.J.); see also *De Araujo v. Neto*, 2001 BCSC 945, at para. 133.

18. *Craig v. Lamoureux*, [1920] A.C. 349 at 357 (P.C.).

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In the case of a gift or other property transfer made during life, the transaction is voidable at the option of the donor or transferor.

### Proof of Undue Influence

The rules concerning the proof of undue influence differ as between wills on one hand and gifts or other transfers of property made during life on the other. An understanding of both sets of rules is important to put into context the change in the law of wills that section 52 of the *Wills, Estates and Succession Act*<sup>19</sup> is about to introduce.

### WILLS

The current rule concerning challenges to wills, as mentioned in Chapter I, is that at all times the challenger has the onus to prove undue influence on the balance of probabilities.<sup>20</sup>

Undue influence in relation to a will has usually been considered a very difficult claim to prove, because the will-maker's own evidence is unavailable and the true facts surrounding how the will came into being and why it contains the terms found in it are often within the sole knowledge of the alleged influencer. The court traditionally insists on a high degree of proof, namely that the circumstances must be "inconsistent with a contrary hypothesis" before a finding of undue influence will be made.<sup>21</sup>

The fact that the defenders of a will can demonstrate "knowledge and approval" by the will-maker of the will's contents is not conclusive with respect to the presence or absence of undue influence. Knowledge and approval goes to whether the will-maker appreciates what he or she is doing in signing a will and intends to give it effect, but this does not necessarily mean he or she is acting independently in the sense that the will expresses the will-maker's own wishes. As the Supreme Court of Canada stated in *Vout v. Hay*:

It may be thought that proof of knowledge and approval will go a long way in disproving undue influence. Unquestionably there is an overlap. If it is established that the testator knew and appreciated what he was doing, in many

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19. *Supra*, note 8.

20. *Vout v. Hay*, *supra*, note 5; *Scott v. Cousins*, *supra*, note 17.

21. *Boyse v. Rossborough*, *supra*, note 12, 6 H.L.C. 2 at 51, 10 E.R. at 1212; *Hix v. Ewachniuk*, *supra*, note 16 at para. 15.

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cases there is little room for a finding that the testator was coerced. Nonetheless there is a distinction...A person may well appreciate what he or she is doing but be doing it as a result of coercion or fraud.<sup>22</sup>

The challenger must prove that that undue influence was actually exercised. It is insufficient to prove merely that the alleged influencer had the opportunity to influence the will-maker and the will favours the influencer.<sup>23</sup>

The difficulties traditionally associated with a challenge to a will based on undue influence are illustrated by the facts of *Vout v. Hay*.<sup>24</sup> The 29-year-old executrix and principal beneficiary, a non-relative, had befriended the 81-year-old will-maker and assisted him to some extent on his farm. She provided the will instructions to a legal assistant at the office of her father's lawyer and brought the will-maker there to execute the will. The assistant prepared the will and read it to him in the presence of the principal beneficiary. At one point the will-maker appeared hesitant and looked in the principal beneficiary's direction. She assured him that the will expressed what they had discussed between them and what he had decided. The lawyer never saw the will-maker. Two of his legal assistants attended to the execution of the will. The principal beneficiary paid the account for the preparation of the will.

The will-maker's relatives contested the will, alleging undue influence on the part of the executrix and principal beneficiary. Despite treating the circumstances as suspicious, the trial court gave considerable weight to evidence that the will-maker had been self-reliant and independent both before and after the will was made. It held that undue influence had not been proven. The Supreme Court of Canada upheld the judgment at trial.

Despite the difficulties facing the challenger, it is possible to prove undue influence on the basis of circumstantial evidence.<sup>25</sup> In other words, undue influence may be inferred from proven facts if they point towards undue influence as being a logical explanation that is more probable than not. For example, in the recent case mentioned above where a woman in declining health who was highly dependent on a son had signed a will that was drawn by the son secretly and which favoured him over

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22. *Supra*, note 5 at para. 29.

23. *Maddess v. Racz*, [2008] B.C.J. No. 2202 (S.C.).

24. *Supra*, note 5.

25. *Hix v. Ewachniuk*, *supra*, note 16 at para. 13. See also *Scott v. Cousins*, *supra*, note 17 at para. 115; *De Araujo v. Neto*, 2001 BCSC 935 at para. 132.

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his siblings, the British Columbia Court of Appeal upheld the inference made by the trial judge from the circumstances that the will resulted from undue influence.<sup>26</sup>

Undue influence may be more readily found if the will-maker is susceptible to influence by others as a result of declining mental capacity or if the challenged will differs markedly from the pattern of previous wills.<sup>27</sup>

### GIFTS AND OTHER TRANSFERS OF PROPERTY MADE DURING LIFE

When undue influence is raised in connection with gifts or property transactions made in the lifetime of the donor or transferor (referred to below for brevity as the “donor”), the relationship between the donor and the person benefited must be examined to determine if a rebuttable presumption of undue influence arises.

If there is no relationship between the donor and the benefited person characterized by dependence or domination of the donor, the rule regarding the onus of proof is the same as that in wills cases. In other words, the onus of proving that undue influence was actually exercised is on the party seeking to have the gift or other transaction set aside on that ground.

If the donor was in a relationship with the person benefited in which the donor was dependent upon the benefited person, or the benefited person was in a position to dominate the donor, a presumption of undue influence arises which the defender of the gift must rebut.<sup>28</sup>

Some relationships of power or trust are considered to be ones in which the potential for dominance is inherent. These include trustee and beneficiary, lawyer and client, physician and patient, clergy and parishioners, parent and minor child; guardian and ward.<sup>29</sup>

A gift from the weaker party to the stronger party or from the party investing the trust in the other in such a relationship will always give rise to a rebuttable presumption of undue influence. If it is later sought to have the gift set aside on that ground, the defender of the gift must prove that the donor acted freely. If the donor had independent legal advice before making the gift, this may go a long way towards

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26. *Hix v. Ewachniuk*, *supra*, note 16.

27. *Scott v. Cousins*, *supra*, note 17 at para. 114.

28. *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353.

29. *Ibid.*

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rebutting the presumption, but it is not decisive. The court will examine the circumstances of each case closely to determine whether the donor acted freely.<sup>30</sup>

If undue influence is alleged in relation to a commercial transaction, such as a loan or a transfer of property in exchange for consideration, the challenger may need to show a “manifest disadvantage” before the presumption of undue influence arises.

### **Section 52 of the *Wills, Estates and Succession Act* – A Change in the Law**

Once it is in force, section 52 of the *Wills, Estates and Succession Act* will alter the law with respect to where the onus of proof rests when a will is challenged on the ground of undue influence. Section 52 reads as follows:

52 In an action, if a person claims that a will or any provision of it resulted from another person

- (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.

In other words, once it is shown that the testator was in a relationship of potential dependence on, or domination by, the person alleged to have unduly influenced the testator, section 52 will cause the onus to shift to the defender of the will to prove that undue influence was not exerted. This is essentially the same rule that applies to undue influence surrounding non-testamentary gifts.

Section 52 is only engaged when a relationship of dependency or potential domination is proven. If no such relationship is shown to have existed, the present law that places the onus to prove undue influence relating to a will or a portion of it on the challenger would continue to apply.

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30. *Ibid.*

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It is too early to say whether all the principles applicable to undue influence surrounding lifetime gifts, including the identification of certain relationships where the presumption of undue influence automatically arises, will be employed in applying section 52. They might be expected, however, to have some bearing on its interpretation. As allegations of undue influence are often based on the nature of the relationship between the testator and the person benefiting from a challenged will or bequest, section 52 could assist the challenger significantly and increase the likelihood of success in testamentary undue influence cases.

If the chances of success in undue influence challenges improve because of section 52, it is not unreasonable to think that they will become more frequent. Under an exception to solicitor-client privilege, a drafter of a will may be compelled to testify in litigation concerning the validity of the will regarding communications with the will-maker, and produce the file relating to the genesis of the will.<sup>31</sup> This emphasizes the importance for legal professionals who prepare wills to be attuned to signs forewarning of the potential for a later undue influence challenge, and to keep adequate notes of their own interaction with the will-maker.

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31. *Ibid.*, at 385; *Stewart v. Walker* (1903), 6 O.L.R. 495 at 497-498 (S.C., App. Div.).

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### III. WHAT IS UNDUE INFLUENCE IN FACT?

#### How Undue Influence Works

While undue influence is a legal doctrine, it is also a form of financial abuse. Typically, undue influence operates in one or more of these ways:

- exploiting dependencies;
- abusing relationships of trust and confidence;
- emotional manipulation;
- isolating the victim.

The victim is often elderly, partly because factors that are associated with aging such as cognitive decline, physical illness, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances may make the victim more susceptible to being influenced.<sup>32</sup> Elderly persons may also need more assistance than others with various aspects of living, which can lead to a misplaced or exaggerated sense of gratitude or dependency that plays into the influencer's hands and increases the level of psychological control the influencer is able to exert over the victim.

The elderly are not the only victims of undue influence, however.<sup>33</sup> Impaired mental function in individuals of all ages can result in increased susceptibility to pressure

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32. Mary Joy Quinn, "Undue Influence and Elder Abuse: Recognition and Intervention Strategies," (2002), 21 *Geriatric Nursing* 11 at 13.

33. "An individual's vulnerability to either undue influence or unconscionable exploitation will arise from his or her total life situation and not merely the objective indicia of age or disability....": Margaret Hall, "Equity and the Older Adult: The Doctrines of Undue Influence and Unconscionability" in Soden, Ann, ed. *Advising the Older Adult* (Markham: LexisNexis Canada, 2005) at 341.

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and manipulation.<sup>34</sup> Impaired mental function can result from many causes including injury, mental disorder, developmental disorder or substance abuse.

Common tactics of the influencer in all of the behaviours mentioned above are *control of the information flow* to the victim and *misinformation*. For example, the influencer may poison the mind of the victim by supplying false information regarding the character or intentions of other family members. When this is combined with isolation of the will-maker to cut off other sources of information, the influencer is in an ideal position to manipulate the victim.

Dependence on the influencer may be physical (*e.g.*, on a caregiver in the case of disability or serious illness), economic, or emotional.

Isolation of the victim may be physical, by such means as removing the will-maker from his or her normal surroundings or limiting the will-maker's movements. The influencer may attempt to justify these actions on the pretext that they are done for the victim's welfare or safety.<sup>35</sup> Isolation may also be social, produced by such tactics as restricting interpersonal contacts, intercepting the victim's telephone calls, or withholding mail.<sup>36</sup> It may also be produced by language barriers or difficulties with cross-cultural communication within minority or immigrant communities.

### Undue Influence Models

Researchers have developed various models to describe the dynamics of undue influence as a form of financial and emotional abuse.<sup>37</sup> The models each list key elements of undue influence as identified by the model's authors. Several models that have become well-known are set out below:

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34. C. Peisah, "The wills of older people: risk factors for undue influence" (2009), 21 *International Psychogeriatrics* 7 at 8-9 and 11-12; Michael Silberfeld, "Susceptibility to Undue Influence in the Mentally Impaired" (2002), 21 E.T. & P.J. 331 at 336.

35. Quinn, *supra*, note 32.

36. *Ibid.*

37. ABA Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008) at 115-117.

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### THALER SINGER / NIEVOD MODEL<sup>38</sup>

- Isolation
- Dependency
- Creating Siege Mentality
- Sense of Powerlessness
- Sense of Fear / Vulnerability
- Staying Unaware

### BLUM IDEAL MODEL<sup>39</sup>

- Isolation
- Dependency
- Emotional manipulation and /or Exploitation of a vulnerability
- Acquiescence
- Loss

### BERNATZ SCAM MODEL<sup>40</sup>

- Susceptibility
- Confidential Relationship
- Active Procurement
- Monetary Loss

### BRANDL / HEISLER / STIEGEL MODEL<sup>41</sup>

Goal: Financial exploitation

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38. Margaret Thaler Singer, "Undue Influence and Written Documents: Psychological Aspects" (1993), 10 *Cultic Studies Journal* 19 at 26-29. The reference to "Staying Unaware" in this model refers to keeping the victim unaware of the false reality created by the influencer's manipulative and deceptive tactics and control over information flowing to the victim.
39. Bennett Blum, "The "Undue Influence Worksheet" and "IDEAL" Protocol – An Introduction" (2005). The IDEAL Model is reproduced by permission.
40. Susan I. Bernatz and Temperance Evans, "Financial abuse" in Capezuti, Elizabeth A., Eugenia A. Siegler and Mathy D. Mezey, eds. *The Encyclopedia of Elder Care: The Comprehensive Resource on Geriatric and Social Care*, 2nd ed. (New York: Springer, 2008) 309 at 311.
41. Bonnie Brandl, Candace J. Heisler and Lorie A. Stiegel, "The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault" (2005), 17 *Journal of Elder Abuse & Neglect* 37 at 45. The authors present this model in the form of a wheel with "Financial exploitation" at the hub and the listed tactics of the influencer appearing around the rim.
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Typical perpetrator tactics:

- Isolate from others and information
- Create fear
- Prey on vulnerabilities
- Create dependency
- Create lack of faith in own abilities
- Induce shame and secrecy
- Perform intermittent acts of kindness
- Keep unaware

### **Some Typical Undue Influence Scenarios**

#### **“THE OFFICIOUS SUPPORTER”**

Son A calls a notary to make an appointment for his mother to make changes to her will and power of attorney. Mother is an existing client of the firm. Her present executor and attorney is Son B. Mother’s current will leaves everything to her three sons equally.

Son B phones the notary to warn that Son A has serious financial problems and a history of manipulating his parents. Son B also warns the notary that Son C, an alcoholic who has “borrowed” substantial funds from his parents over the years without repayment, has plans to borrow money to build an in-law suite in his North Vancouver home to take care of his mother who is frail and ill. Son C’s intention is that Mother will pay rent to cover the mortgage. Son C also wants a power of attorney over his mother’s affairs.

Mother and Son A arrive together at the notary’s office. Son A insists on being present in the interview. He claims it is his mother’s wish. The notary explains that to enable her to determine that the instructions are truly the mother’s wishes, the interview must be done in private. The son concedes, but is clearly upset.

During the interview, the mother confides to the notary that Son A wants her to make him the executor and give him power of attorney. He also wants her to eliminate Son B from the Will because Son B is financially independent and has too much control over the mother now. Son A has been nagging her about this for five days since his arrival from California.

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The mother knows the value of her assets and can say what and where they are. She is not physically well, however. She has recently been discharged from hospital and is too tired to argue with Son A. She wants him to stop nagging her about the estate.

After about five minutes, the receptionist reports that Son A is agitated, demanding to see the notary. Son A is told she will finish interviewing the mother first. After 15 minutes, the mother is now telling the notary what she already knows from the information Son B provided on the telephone. She says she does not want to give in to the demands of Son A or Son C but feels she has no choice.

Son A bursts into the room, demanding to know what they are talking about. The notary tells him he cannot participate in the interview and that he must go back to the waiting room. Son A yells at the notary that she has “kidnapped his mother.” He says he will call the police if his mother is not released immediately. The notary replies that she will call the police if he does not calm down and leave the room.

By now, the mother is very distraught. The notary says the interview will have to take place on another day. The notary tells the mother that she may call at any time for a telephone interview when she is alone and able to speak freely.

### Points to Note:

- Supporter arranges the appointment
- Officious, controlling attitude of supporter
- Will-maker’s sense of powerlessness
- Drastic change from current will
- Will instructions disproportionately favour the officious supporter

### Practice Points:

- Client must be interviewed alone
- Instructions should not be taken when client is clearly under duress

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- Notes should be made of incidents, communications and information pointing towards undue influence

### “THE NEFARIOUS CAREGIVER”

Hilda, a care aide originally employed by a private home care agency, began to provide care for Ed on a daily basis when Ed was 85. After several months had gone by, Hilda left the agency and moved in to Ed’s house, supposedly because his needs had increased and he needed a full-time, live-in caregiver.

Hilda began to take care of banking and handling Ed’s money affairs instead of merely driving him to the bank. Ed’s eyesight was very poor by this time, and he was having trouble remembering details of his financial affairs. After a year had gone by, Hilda persuaded Ed to grant her a power of attorney so she could sign cheques for him and manage his bank accounts more easily. Ed’s children did not know about the power of attorney and assumed Ed was still taking care of his own financial affairs. While Ed was entirely dependent on Hilda by this time and could go nowhere on his own, he appeared to be mentally alert and seemed content. The children noticed only that whenever they telephoned Ed’s house, Hilda always seemed to have a reason why he could not speak with them right at that moment and would offer to take a message.

Ed died about three years after Hilda became a live-in caregiver. His children were then shocked to discover that about two years previously, Ed had made a new will making Hilda his executor and sole beneficiary. This will revoked an earlier will that divided his estate between the children equally.

On learning of the will in favour of Hilda, Ed’s children probed further and also learned of the power of attorney that Hilda obtained from Ed. They also discovered that his car had been registered in Hilda’s name for the past two years. Furthermore, he had supposedly made cash “gifts” to her. The cash gifts had amounted to nearly \$200,000 in total and were withdrawn from Ed’s bank account using the power of attorney. Furthermore, Ed’s house had been transferred into joint tenancy with Hilda shortly before his death, so that Hilda now owned the house as the surviving joint tenant. There was practically nothing left in the estate itself.

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### Points to Note:

- Isolation of victim from relatives and other contacts
- Exploitation of relationship of trust
- Dependence on influence
- Exploitation of vulnerabilities (poor eyesight, declining mental capacity)

### Practice Points:

#### Possible indicators (red flags) of undue influence:

- Marked departure from distribution under previous will
- New will benefits non-relative caregiver whom will-maker has known for one year to exclusion of immediate family members
- Depletion of assets (*e.g.*, car) by *inter vivos* transfer to the sole beneficiary

### “THE MERCENARY LATE-LIFE PARTNER”

Jack, a moderately wealthy divorced man with three adult children, was in his late 70’s when he met Edna, who was then 52, also divorced, with two grown children of her own. They began living together in Jack’s townhouse.

At the time Jack and Edna began living together, Jack had a will leaving his estate to his three children in equal shares. After some time went by, Jack made a second will dividing his estate equally amongst Edna and his three children, giving each a 25% share. Edna began to tell him frequently she deserved a larger share as his partner. Jack was unmoved initially and would say that he had treated everyone fairly. After a while, however, she managed to persuade Jack to transfer his townhouse into joint tenancy with Edna.

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In his early 80's Jack began to show signs of mental decline. He had memory lapses. He suffered a mild stroke and because of his restricted mobility, was more reclusive. Edna discouraged other people from seeing or talking to Jack, especially his children, on the pretext that he was not well and visits would tire him. At the same time, she encouraged her own children to visit frequently and to interact with Jack and be attentive to him. She would tell Jack constantly that his family did not care about him and that only she and her children did. She would hint strongly that his own uncaring family did not deserve to inherit his estate.

All this time, Jack was becoming increasingly forgetful and more dependent on Edna to handle his affairs. He was aware of his declining capabilities and increasing dependence. His sense of vulnerability led him to put even more trust in Edna. When Jack turned 85, Edna stepped up her efforts to convince him he could not wait any longer to put his final estate plan and incapacity planning in order. She emphasized he should "do the right thing" by rewarding the people who had taken care of him in recent years and would continue to do so until the end of his life. Jack was easily persuaded now to give Edna a power of attorney over his property and enter into a representation agreement appointing Edna as his representative. He also made a new will appointing Edna as his executrix and residuary beneficiary. The will gave substantial legacies to Edna's son and daughter, and only \$100 to each of his own three children.

### Points to Note:

- Isolation
- Dependency
- Exploitation of vulnerability (physical and mental decline)
- Emotional manipulation
- Sense of powerlessness
- Show of kindness by influencer
- Keeping victim unaware of influencer's distortion of truth
- Increased susceptibility to influence due to lessening mental capacity

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### Practice Points:

Possible indicators (red flags) of undue influence:

- drastic departure from distribution under earlier will
- unusual distribution: preference of stepchildren over immediate family





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### **IV. RED FLAGS OF UNDUE INFLUENCE: THE PRACTITIONER’S INDEX OF SUSPICION**

#### **Introduction**

The following risk factors or “red flags” are intended to assist practitioners in assessing the likelihood of undue influence when taking will instructions from a client. The list is organized into several categories consisting of groups of related indicators associated with potential or actual undue influence.

A single red flag may be entirely insignificant in itself. In many cases of actual undue influence, however, a number of risk factors will operate simultaneously. A greater number of risk factors present indicates an increased likelihood that undue influence has taken or is taking place.

The term “practitioner” appearing in the following list of red flags refers to a lawyer or notary. Where the list refers to circumstances or information that are “known to the practitioner,” this denotes knowledge that the practitioner happens to have acquired from any source, rather than knowledge the practitioner would be expected to have or to actively acquire.

#### **“Red Flags”**

##### **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 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

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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.

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- 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 to pressure 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, 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.

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### 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.

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### 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.



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### V. RECOMMENDED PRACTICES IN SCREENING FOR POTENTIAL UNDUE INFLUENCE

#### The Basic Rule: Interview the Will-Maker Alone

The cardinal common-sense practice for averting undue influence is to take the will instructions in an interview with the will-maker alone.<sup>42</sup> Whenever will instructions are initially relayed through another source, they should always be confirmed directly with the will-maker in a thorough and comprehensive interview conducted in private.

The practice of interviewing the will-maker in private should only be departed from when it would be clearly impractical to follow it, *e.g.* where the assistance of an interpreter is needed. In some cases, the will-maker's accountant may need to be present for part or all of an interview to assist with an explanation of the will-maker's financial and tax situation.

When others must be present during the taking of will instructions, however, they should be entirely disinterested in the legal sense of having no financial interest in the estate. They should also have no kinship or social connection with the will-maker that could give rise to divided loyalties or that would otherwise endanger the confidentiality of the interview. As relatives can be potential beneficiaries or successors in intestacy, they cannot be disinterested. A relative should not serve as an interpreter unless this is completely unavoidable. For example, allowing a relative to interpret might be unavoidable when no one except an immediate family member is able to understand the speech of a stroke victim with aphasia. In such a case, communication with that person may be impossible without the family member present.

Other exceptions will be the occasions when spouses consult the practitioner for simultaneous preparation of their wills. The practitioner should still be alert to the

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42. Carmen S. Thériault, "Taking Effective Estate Planning Instructions," paper prepared for Continuing Legal Education Society of British Columbia seminar, 2009 at 3.1.10. See also Peter W. Bogardus and Mary B. Hamilton, *Wills Precedents* (Vancouver: Continuing Legal Education Society of British Columbia, 1998, looseleaf, updated) at 34-44.

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potential for undue influence in this situation. A joint retainer is inappropriate if several red flags of undue influence are present. A practitioner who accepts a joint retainer should be prepared to refer one or both of the spouses elsewhere for independent legal advice if it emerges that one of them is being subjected to undue influence by the other.<sup>43</sup>

### Explain Why the Client Must Be Interviewed Alone

If a supporter accompanying the will-maker wishes to be present while the practitioner interviews the will-maker, the practitioner should provide an explanation of why the will-maker must be interviewed alone. The explanation should be framed so as to allay a client's possible anxiety about the exclusion of the supporter as well as addressing apparent legitimate concerns of the supporter.

The American Bar Association Commission on Law and Aging has published a brochure entitled "*Why am I left in the waiting room: Understanding the Four C's of Elder Law Ethics?*" that provides an extensive explanation of the reasons why the consultation with the client must be in private. The explanation proceeds in terms of "Four C's":

#### 1. Client Identification

It must be absolutely clear for whom the practitioner is acting.

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43. Rule 11.05(b) of the *Rules of the Society* approved by the Society of Notaries Public of British Columbia provides that when acting for multiple clients under circumstances permitted by the rules, the clients must be informed that information provided by one of them cannot be treated as confidential with respect to the others and, if a conflict arises, the notary cannot continue acting for any of them. Thus a notary would likely have to cease acting for both spouses if an issue of undue influence emerged between them. Rules 4-6.01 in the Law Society's *Professional Conduct Handbook* and the sample retainer letters in Appendix 6 indicate that a lawyer may act for two or more clients simultaneously on the footing that information provided by one client in connection with the joint representation cannot be withheld from the other client, and that if a conflict arises between the clients, the lawyer must cease acting for any of the clients unless they agree at the commencement of the retainer to the lawyer continuing to act for one or more of them with an identity of interest, and withdrawing from acting for the other client. Thus, depending on the joint retainer terms to which spouses seeking simultaneous preparation of wills agree, a lawyer may need either to cease acting for both spouses if a concern about undue influence arises, or refer for independent legal advice the spouse for whom the lawyer cannot continue to act. See also the sample joint retainer letter in Bogardus and Hamilton, *supra*, note 42, at 39-3 to 39-5. Bogardus and Hamilton observe that even under a joint retainer by spouses, seeing each will-maker separately when they sign their wills allows practitioners the opportunity to confirm that the will expresses the wishes of each client and that he or she has not been coerced into making the provisions in the will: *ibid.* at 39-1.



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### *2. Conflict of Interest*

It is necessary to avoid a joint retainer or the appearance of a joint retainer.

### *3. Confidentiality*

Communications with the client must be confidential.

### *4. Competency*

Speaking with the practitioner privately and unassisted allows the client to demonstrate that the client has the capacity to give instructions, and enables the practitioner to form an opinion as to whether there is any question of capacity, which is an essential part of the practitioner's professional responsibility.

The ABA brochure also notes that it can be explained that it is to the supporter's advantage not to be present when the will instructions are taken, so as to avoid the appearance of exerting undue influence over the client. It should be emphasized that this is especially important for the supporter if he or she has been heavily involved in assisting or caring for the will-maker, or is a relative who has been closer or more attentive to the will-maker than other relatives. Anyone in this situation should be especially concerned to protect him- or herself against suspicion of undue influence. The more evidence there is that the will-maker decided on the contents of the will independently and gave the will instructions without an interested person being present, the more likely it is that the will can stand up against later challenge.

The attitude, demeanour and responses of the supporter to an explanation of this kind should be noted, as they may be illuminating. A failure to be satisfied with the above explanation for seeing the client in private may be a red flag that the supporter may be determined to influence the will-maker.

### **If Red Flags Are Present, Ask Non-Leading Questions to Determine What Factors Are Operating on Will-Maker's Mind**

If the practitioner's index of suspicion is engaged by identifying red flags in the course of the will instruction interview, the practitioner should begin to explore the background to particular provisions or instructions that raise a suspicion in the practitioner's mind that the will-maker is not acting independently. This should be

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initiated by asking “open-ended” (non-leading) questions.<sup>44</sup> The questions should be aimed at determining how a particular decision was reached, who else may have been involved in making it, and whether that involvement was benign (supportive) or overbearing.<sup>45</sup> The answers to open-ended questions such as the ones below may point to constraints on the testator’s independence and/or to a relationship of dependency where the potential for undue influence exists.

*How did you decide to divide your estate this way?*

*What was important to you in deciding to divide your property this way?*

*What led you to the decision to make [name] your executor?<sup>46</sup>*

The will-maker’s reaction to probing questions of this type may in itself be indicative, tending either to allay or increase the practitioner’s suspicions that the client is not acting independently. An indignant or resentful reaction may indicate a complete absence of undue influence, or it may mask fear or embarrassment about being controlled. The reaction should be part of the practitioner’s “index of suspicion,” however. The proper interpretation of client resistance to questioning along this line, and the other lines of probing questions described below, is an intangible that a practitioner can arrive at only by considering all the circumstances, including what the practitioner may know of the personality of the will-maker.

### **Explore Whether Will-Maker Is In a Relationship of Dependency, Domination or Special Confidence or Trust**

If the practitioner’s suspicions are not allayed by the answers to general, non-leading questions to determine what factors are operating on the will-maker’s mind, more specific questions may be used to explore whether the will-maker is in a rela-

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44. Thériault, *ibid.*

45. Adapted from the following generalized questions suggested for use by physicians for the purpose of detecting possible victimization of persons suffering from declining mental capacity: How did you reach this decision? What things were important to you in reaching this decision? How did you balance those things when you were making your decision? See UBC Faculty of Medicine Geriatrics Division, *Care for Elders: Incapacity Assessment Pre-reading*, online at <http://www.familmed.ubc.ca/geriatrics/interdisciplineprogram.htm>, p. 46.

46. *Ibid.*

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tionship of dependency, power or subordination with anyone else, or one of special confidence and trust,<sup>47</sup> that could provide an opportunity for undue influence.

For example:

*Do you live alone? With family? With a caregiver? A friend?*

*How long have you lived at this residence?*

*Has anything changed in your living arrangement recently?*

*Do you have to get help with everyday tasks?*

*Are you able to go wherever and whenever you wish?*

*Are you able to speak privately with anyone you wish to see?*

*Does anyone in particular help you more than others?*

*Do you ask anyone for help more than others?*

Answers to the questions below may point to the extent of the involvement of another person in the client's financial and legal affairs, and the nature of that involvement:<sup>48</sup>

*Who arranged / suggested this visit [to the notary or lawyer]?*

*Who customarily handles banking transactions for you?*

*Does anyone help you make decisions?*

*Has anyone told you that you should reward him/her for things that s/he does or has done for you?<sup>49</sup>*

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47. *Supra*, note 37 at 114.

48. This series of questions is based on portions of text in the ABA Commission on Law and Aging publication *Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists, supra*, note 37 at 116-117.

49. This question is intended to reveal if the will-maker is being manipulated through the use of reciprocity as a pressure tactic.

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*Has anyone ever stopped you from doing something you wanted to do (e.g. contact or see a family member or friend, go out occasionally) or take away anything that you like or enjoy?*

If the information elicited indicates a dependency, domination or a special relationship of confidence or trust, its history should also be explored for indications of coercive or manipulative conduct. The duration of the relationship may itself be highly relevant.<sup>50</sup> An acquaintanceship of short duration accompanied by a high level of trust and dependency would obviously be a strong indicator of potential undue influence. The past actions and general character of the acquaintance would be relevant to assessing the likelihood of undue influence being exerted, especially if the acquaintance or someone close to him or her is to benefit under the will.

It is nevertheless very important to bear in mind that dependency and the potential for domination in a relationship do not automatically imply that undue influence is present. An adult child may have cared for an elderly parent to a greater extent than the child's siblings who live further away, and the parent may have become very dependent on that child. If that child benefits to a greater extent than the siblings under the parent's will, this may only reflect a normal desire on the part of the parent to show appreciation for the care and attention that child provided and the extra burdens borne by him or her while the parent was alive.

A relationship of care, dependence and trust between related or unrelated persons may involve a mutual expectation that the caregiver or helper will receive eventual compensation or reward (often by means of a will) for sacrifices made over time by that person to provide the needed care and assistance, and yet be entirely free of undue influence. Commonplace, benign relationships of dependency, care or trust, including ones where this expectation is present, can be difficult to distinguish from ones of undue influence.

### **Explore Whether Will-Maker Is A Victim of Abuse In Other Contexts**

If a client is a victim of physical, psychological or financial abuse in contexts other than ones connected with the client's will, this would be a warning flag that the client's testamentary wishes could also be influenced by fear or the need to placate someone, such as an abusive family member. This information, coupled with a proposed distribution that would benefit the suspected abuser disproportionately, may be a strong indication of undue influence.

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50. *Supra*, note 37 at 116-117.

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If the practitioner has already identified some red flags of undue influence, or suspects that a client is a victim of abuse not directly related to the client's will, probing further into the nature and extent of the abuse may shed light on whether testamentary undue influence is in fact present.

The following set of interview screening questions is recommended by the Vancouver Coastal Health Authority for use by frontline care providers and caseworkers when abuse or neglect of an adult patient or client is suspected. They are direct, and designed to overcome dissembling. Many abused adults are reluctant to admit to being victims out of fear, embarrassment, a misplaced concern for the welfare of the abuser, or strong cultural constraints against revealing the internal affairs of a family to outsiders. This set of questions may be adaptable by legal practitioners in probing to determine if a will-maker is a victim of abuse by others that could interfere with the will-maker's ability to act freely in providing will instructions:

*Has anyone ever hurt you?*

*Has anyone ever touched you without your consent?*

*Has anyone ever made you do things you didn't want to do?*

*Has anyone taken anything that was yours without asking?*

*Has anyone ever scolded or threatened you?*

*Have you ever signed any documents that you didn't understand?*

*Are you afraid of anyone at home?*

*Are you alone a lot?*

*Has anyone ever failed to help you take care of yourself when you needed help?<sup>51</sup>*

Psychological abuse is typically more difficult to detect than physical abuse. Some of the above questions touch on the common techniques of psychological abuse,

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51. Vancouver Coastal Health Authority Re:act Response Resource, *Adult Abuse and Neglect Quick Assessment Guide*, undated brochure. The *Adult Abuse and Neglect Quick Assessment Guide* indicates this set of interview screening questions originated with the American Medical Association.

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such as isolation and threats. The series below focuses on eliciting evidence of isolation or manipulation by explicit or implicit threats:

*What do you like to do for enjoyment?*

*Are there people you like to see? What things do you like to do when you are together with them (e.g., have coffee, play cards, go on outings)?*

*Have you seen these people or done these things recently? How long is it since you have seen / done them?*

*Are you able to see these people / do these things when you wish?*

*Are you worried about someone finding out that you have seen these people or are doing these things you like to do? Why?*

Other possibly relevant probing questions may be:

*Has anyone ever threatened to take you out of your home and put you in a care facility or other institution?*

*Do you wish to stop associating with anyone? Have you tried to do so? What happened?*<sup>52</sup>

Notwithstanding the relevance of abuse to the issue of undue influence, probing in this field may be a highly delicate matter. It may embarrass or offend the client, especially if it is perceived as going well beyond the purpose for which the client is seeing the notary or lawyer. There is also the possibility of a “Stockholm hostage” reaction, in which the victim exhibits a bond with the abuser and tries to protect the abuser from possible repercussions.<sup>53</sup> This is quite likely to be encountered if the abuser is a family member. The will-maker may appear to resent the questioning or take on a hostile attitude. Extreme tact and discretion are required.

If there are concerns about physical, psychological or financial abuse, it may be more appropriate to suggest the will-maker seek help from an appropriate community

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52. These latter two questions are adapted from examples of probing questions contained in BC Institute Against Family Violence, *Aids to Safety Assessment & Planning (ASAP)*, February 2005 test draft at 33 and 44.

53. Thaler Singer, *supra*, note 38 at 28.

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agency than to pursue the matter at length in a direct interview with the will-maker.<sup>54</sup>

If the practitioner believes the will-maker is actually in imminent danger of harm and is too fearful or embarrassed to seek help from an appropriate community agency, the practitioner may legitimately consider whether to report the matter directly. Practitioners should be aware that under section 46(1) of the *Adult Guardianship Act*, anyone may report abuse or neglect of an adult to a designated agency if the adult is unable to seek support and assistance on his or her own due to physical restraint, a physical disability limiting the ability to seek help, or an illness, disease, injury or other condition affecting the ability of the adult to make decisions about the abuse or neglect.<sup>55</sup> If the circumstances involve physical abuse or financial abuse of a criminal nature, the matter can be reported to the police.<sup>56</sup>

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54. Information on reporting abuse, neglect or self-neglect of an adult in British Columbia to the appropriate agency may be found online at <http://www.trustee.bc.ca/pdfs/STA/abuseneglect.htm>.

55. R.S.B.C. 1996, c. 6. Parts 1, 3 and 4 of the Act are in force. "Abuse" and "neglect" of an adult are defined in s. 1 for the purposes of the Act as follows:

"abuse" means the deliberate mistreatment of an adult that causes the adult

- (a) physical, mental or emotional harm, or
- (b) damage or loss in respect of the adult's financial affairs,

and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors;

"neglect" means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs, and includes self neglect;

In the case of an adult eligible to receive community living support under the *Community Living Authority Act*, S.B.C. 2004, c. 60, the designated agency for the purpose of the *Adult Guardianship Act* is Community Living British Columbia: *Designated Agencies Regulation*, B.C. Reg. 19/2002, s. 2(1). In the case of a patient or person in care at a facility operated by Providence Health Care Society, that society is the designated agency: *ibid.*, s. 4. In the case of British Columbia residents not within those two categories, the designated agencies are, generally speaking, the regional health authorities: *ibid.*, s. 3.

56. The Public Guardian and Trustee also has investigative powers with respect to financial abuse that may be exercised in certain circumstances. See s. 17(1) of the *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383. See also *Power of Attorney Act*, R.S.B.C., c. 370, s. 34; *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 30. Information on the role of the Office of the Public Guardian and Trustee and when it can investigate financial abuse may be found at: [http://www.trustee.bc.ca/services/adult/assessments\\_investigations.html](http://www.trustee.bc.ca/services/adult/assessments_investigations.html).

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In a situation where the practitioner believes the will-maker's situation should be directly reported, the obligation of confidentiality owed to the will-maker as a client must still be met.<sup>57</sup> As the practitioner would be disclosing confidential information about a client's affairs derived from the practitioner-client relationship in reporting the abuse or suspected abuse, the will-maker's prior authorization to make the report and consent to the disclosure is required. The protections of anonymity and immunity from civil action for damages given by sections 46(2) and (3) of the *Adult Guardianship Act* to anyone who reports abuse or neglect should not be assumed to displace the ethical obligation applicable to notaries and lawyers alike to preserve the confidentiality of information derived from the practitioner-client relationship. The obligation of confidentiality arises when the practitioner is first consulted by a prospective client about a matter, whether or not the practitioner decides to act further in the matter or declines to act.<sup>58</sup>

The Law Society's *Professional Conduct Handbook* makes an exception to the general obligation not to disclose confidential information derived from the lawyer-client relationship if the disclosure is necessary to "prevent a crime involving death or serious bodily harm to any person."<sup>59</sup> This provision may allow a lawyer to report abuse without the client's prior consent in an extreme case where death or serious bodily harm to the will-maker is feared.<sup>60</sup> The lawyer should consult the Law Soci-

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57. See Society of Notaries Public, *Principles for Ethical and Professional Conduct Guideline*, *supra*, note 3, article G-P1; Law Society, *Professional Conduct Handbook*, Ch. 5, para. 1.

58. Society of Notaries Public, *ibid.*, article 6-P1, commentaries 6.1, 6.2. Law Society, *Professional Conduct Handbook*, annotation to Chapter 5, rule 1. See also the commentary to Rule 2.03(1) of the March 2011 version of the *Code of Professional Conduct for British Columbia* ("BC Code"), expected to replace the *Handbook* at some point during 2012.

59. *Professional Conduct Handbook*, *supra*, note 57, Chapter 5, rule 12. Note also that paragraph 16 of Chapter 5 of the *Handbook*, headed "Incapacity," provides that a lawyer may disclose confidential information for the purpose of securing a guardian or taking "other protective action" on behalf of a client. As "other protective action" is mentioned in connection with guardianship, however, its meaning is likely restricted to protective action needed because of a client's mental incapacity. This interpretation is reinforced by the commentary to the equivalent provision (Rule 2.03(1)) of the proposed BC Code. Chapter 5, paragraph 16 of the current *Handbook* and the proposed Rule 2.03(1) should not be relied upon to justify disclosure of confidential information in other contexts where mental capacity is not a factor.

60. The corresponding provision in the proposed BC Code, *supra*, note 58, is Rule 2.03(3), which does not confine the exception to cases where disclosure is necessary to prevent a "crime." Instead, it limits it to cases where it is necessary to prevent death or serious bodily harm to any person.



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ety before such a step is taken.<sup>61</sup> There is no equivalent exception in the *Principles for Ethical and Professional Conduct Guideline* from a notary's general obligation of confidentiality.

### **Obtain Relevant Information from Third Parties When Possible (With Will-Maker's Consent)**

If red flags of undue influence are present, information from third parties in a position to know relevant facts should be obtained when possible in order to broaden the information base on which the practitioner's conclusion will be drawn. These third parties should be neutrally situated. In other words, they should not be relatives, beneficiaries or proposed beneficiaries. They may include the will-maker's physician, accountant, bank manager, and neighbours and acquaintances. Documentary evidence should be gathered, if it exists.

These inquiries require the will-maker's consent. A written and signed consent should be obtained from the will-maker for any gathering of information from a third party, in order to protect the practitioner as well as providing comfort to the third party about the propriety of answering the inquiries or releasing the information that is requested.

Before the will-maker is asked to sign a consent, the will-maker should receive a sensitive but full explanation from the practitioner of why it is important to gather information that would dispel suggestions of undue influence, particularly in light of the shift in the onus of proof that will occur under section 52 of the *Wills, Estates and Succession Act*.<sup>62</sup> The fact that this process may increase the expense of preparing the will to some extent should be brought to the will-maker's attention. At the same time, it should be emphasized that the additional expense will be far less than the cost of estate litigation if the will is later challenged on the basis of undue influence.

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The commentary to Rule 2.03(3) refers to the Supreme Court of Canada decision in *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 83, where it is stated that serious psychological harm can constitute "serious bodily harm" if it is of the kind referred to in *R. v. McCraw*, [1991] 3 S.C.R. 72 at 81, namely psychological harm interfering substantially with the health or well-being of the individual concerned.

61. This is expressly stated in the commentary to the equivalent provision of the proposed BC Code (Rule 2.03(3)).

62. *Supra*, note 8.

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### Obtain Medical Assessment If Capacity Is In Question

The potential for undue influence extends to both mentally capable and incapable persons.<sup>63</sup> A person may be at a higher risk of becoming subject to undue influence because of declining mental capacity, without having reached the point of losing the ability to make a will. A medical assessment of the will-maker's mental status should be obtained when there is a significant possibility that the will-maker may have diminished mental capacity, or that his or her judgment and independence in will-making may be affected by mental or physical disorders or addiction. This of course requires the will-maker's consent, which is more likely to be obtained if it is explained that the assessment is to guard against a challenge to the will.<sup>64</sup> When there are red flags of undue influence, the medical practitioner should be asked in addition to address the question of whether the will-maker's mental status may affect his or her susceptibility to being influenced by others. Testamentary capacity and susceptibility to undue influence are two separate, though related, matters.

As medical evaluations of mental capacity do not normally address susceptibility to influence, the request to the assessing physician must be very clear in requesting this additional opinion.<sup>65</sup> The request should explain the legal concepts involved: first, the test of testamentary capacity based on *Banks v. Goodfellow*,<sup>66</sup> and second, undue influence as being coercive pressure resulting in the will-maker's independent desires and intents being overborne. This will help the medical assessor to address the opinion to what the legal practitioner needs to know: Can the will-maker perform the mental functions treated in law as essential to making a will? Does the

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63. Silberfeld, *supra*, note 34 at 342.

64. Ann Soden, "Ethical Issues and Dilemmas in an Elder Law Practice" in Soden, Ann, ed., *Advising the Older Client* (Markham: LexisNexis Butterworths, 2005) at 32.

65. *Ibid.*

66. (1870), L.R. 5 Q.B. 548. The elements of testamentary capacity as enunciated in *Banks v. Goodfellow* are:

1. Understanding the nature of a will;
2. Knowledge of the nature and extent of the property the will-maker intends to give by will;
3. Knowledge of who the will-maker intends to make a beneficiary under the will and who may have a just expectation of being a beneficiary;
4. Understanding the way the property is to be distributed between the persons;
5. Absence of a delusion that would affect the will-maker's disposition of property so as to bring about a disposition of property that would not take place if the will-maker did not have the delusion.

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will-maker's mental status impair his or her ability to make independent dispositive decisions despite pressure imposed by others?

Enough of the factual background needs to be set out in the request in order to put the concern about undue influence in context. The available information concerning the medical and personal history of the will-maker, the pattern of previous wills, and the current intentions of the testator should be provided. Circumstances of dependency and other facts about the will-maker's relationships with relatives and acquaintances may need to be explained.<sup>67</sup> The prior consent of the will-maker to these disclosures is required, of course.

Even if no question of mental capacity or status is present, it is often advisable when undue influence is a concern to ask the will-maker to sign a release for medical and financial information in case information has to be sought from the will-maker's physician, banker, accountant, or other third parties.

### **Compile List of Events Indicating Undue Influence**

If the practitioner's suspicions mount, it is advisable to compile a list of the events described by the will-maker and others that are indicative of undue influence in order to substantiate the practitioner's conclusion.<sup>68</sup>

### **Make and Retain Appropriate Records**

The practitioner should retain detailed notes of all interviews with the will-maker. Use of a checklist is recommended. The completed checklist should be kept in the file along with all other notes.

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67. Henry Berry, "A Neuropsychiatric View of Testamentary Capacity" (1988-1989), 10 *Advocates' Quarterly* 11 at 21. See also Kenneth I. Shulman et al., "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (2007), 164 *Am. J. Psychiatry* 722 at 724-725

68. One available aid in compiling this information is the *Blum Undue Influence Worksheet*. This is an investigative tool in which the user lists events by date, time, and location and assigns a number. The events are described in brief in the list and at greater length on individual "event detail" sheets. The names of witnesses and details of any corroborating documentary and physical evidence are recorded. The event is also classified by a letter corresponding to one of the factors of the Blum "IDEAL" model of undue influence, namely I (Isolation), D (Dependence), E (Emotional manipulation and/or Exploiting vulnerability), A (Acquiescence), L (Loss). See Chapter III under the heading "Undue Influence Models," *supra*. Organizing the information in this manner may be helpful in assessing the facts to decide if, taken as a whole, they point to undue influence. The worksheet and the "IDEAL" model are protected by copyright. See Bennett Blum, "The 'Undue Influence Worksheet' and 'IDEAL' Protocol - An Introduction", *supra*, note 39.

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In addition to the will instructions themselves and all related information needed to draw the will, the practitioner's file should contain information supporting the formation of the practitioner's conclusion and ultimate decision whenever red flags of undue influence are present. This should include:

- (a) red flags of undue influence that are identified;
- (b) lines of inquiry the practitioner identified as necessary or worthwhile to pursue;
- (c) what was done to pursue the lines of inquiry;
- (d) the information obtained from the lines of inquiry;
- (e) memoranda to the file recording the reasons for the conclusion the practitioner reaches as to the presence or absence of undue influence and decisions taken as a result of that conclusion.

Regardless of whether the practitioner decides to proceed with preparation of the will or not, the practitioner should keep the file for the full retention period prescribed or recommended by the governing body of the practitioner's profession for will files.<sup>69</sup>

A wills notice should be filed with the will-maker's consent, as this will help to make the existence of the will known to those who need to be aware of it if the client signs a later will that is challenged on the ground of undue influence.

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69. The Society of Notaries Public of British Columbia sets a minimum retention period for will files of 10 years from the date of probate, or 10 years after the will-maker would have been 110 years old if the will is not probated: *Rules of the Society*, Minimum Retention and Disposition Schedule, p. 34. The Law Society of British Columbia recommends permanent retention of original wills and will files, or for a period of 10 years following final distribution of the estate if the will is probated: Felicia S. Folk, "Closed Files: Retention and Disposition" (Vancouver: Law Society of British Columbia, 2002, updated 2007), Appendix B, Suggested Minimum Retention and Disposition Schedule for Specific Documents and Files, p. 24, online at:

<http://www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf>.

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### **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 probable 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.

While care must be taken not to go beyond the scope of the matter in which the practitioner has been consulted, it is not improper to inform the will-maker of resources available in the community for assisting victims of financial, emotional, or other abuse when explaining the reasons for a decision not to proceed with preparation of the will.



## **LIST OF RECOMMENDED PRACTICES**

The Basic Rule: Interview the Will-Maker Alone (p. 29)

Explain Why the Client Must Be Interviewed Alone (p. 30)

If Red Flags Are Present, Ask Non-Leading Questions to Determine What Factors Are Operating on Will-Maker's Mind (p. 31)

Explore Whether Will-Maker Is In a Relationship of Dependency, Domination or Special Confidence or Trust (p. 32)

Explore Whether Will-Maker Is A Victim of Abuse In Other Contexts (p. 34)

Obtain Relevant Information from Third Parties When Possible (With Will-Maker's Consent) (p. 39)

Obtain Medical Assessment If Capacity Is In Question (p. 40)

Compile List of Events Indicating Undue Influence (p. 41)

Make and Retain Appropriate Records (p. 41)

If Index of Suspicion Remains High After Reasonable Investigation, Decline Retainer to Draft Will (p. 43)





# **APPENDIX**

## REFERENCE AID



# Undue Influence

## Recognition/Prevention

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### A Reference Aid

This reference aid is intended to assist legal practitioners in recognizing and dealing with potential undue influence and preventing successful challenges to the wills they prepare. It summarizes the recommended practices set out in greater depth in the BCLI publication *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* (“the BCLI Guide”). The contents of both this reference aid and the Guide reflect the work of an interdisciplinary BCLI project committee supported by the Notary Foundation and the Lawyers Insurance Fund.

While the Guide and this reference aid focus on wills practice, the recommended practices and red flags that they outline are also relevant to the preparation of other personal planning documents, such as powers of attorney and representation agreements.

For more information, see the Guide available on the BCLI website at <http://www.bcli.org>.



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BRITISH COLUMBIA  
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# CHECKLIST OF RECOMMENDED PRACTICES

## Undue Influence - Recognition/Prevention

The practices in the checklist below are recommended for use by wills practitioners if they suspect that a client is susceptible to undue influence or that a client's will instructions do not reflect the client's genuine wishes.

See the BCLI publication *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* ("the BCLI Guide") for further information.

YES  N/A

### 1. Interview will-maker alone (Basic Rule).

Rationale:

- Ensure it is clear that professional is acting for will-maker.
- Professional needs to avoid appearance of a joint retainer.
- Confidentiality of solicitor/client communications.
- Professional needs to satisfy him/herself that will-maker has testamentary capacity.

Exceptions for taking instructions from another person (A):

- A is disinterested and is acting as an interpreter (no kinship, financial interest, or social connection).
- Including A (a relative or interested person) is unavoidable. Remain alert.
- A is Spouse. Remain alert. If any concerns that spouse is not speaking accurately for will-maker, meet with will-maker alone.

YES  N/A

### 2. Ask non-leading, open ended questions to determine factors operating on will-maker's mind.

Examples:

- How/why did you decide to divide your estate this way?
- What was important to you in deciding to divide your estate this way?
- Why did you choose [proposed executor] as executor of your will?

YES  N/A

### 3. Explore whether will-maker is in a relationship of dependency, domination or special confidence or trust.

See examples of open-ended probing questions in BCLI Guide, pp 33 -34.

Sample questions to consider:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?

YES  N/A

- Does anyone help you more than others? Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

### 4. Explore whether will-maker is a victim of abuse or neglect in other contexts.

Sample questions to consider (note need for tact, discretion and awareness for client's physical safety; refer to community resources if and when appropriate):

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone scolded or threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

YES  N/A

### 5. Obtain relevant information from third parties when possible and if the will-maker consents.

YES  N/A

### 6. Obtain medical assessment if mental capacity is also in question, but remember that mental capacity to make a will is ultimately a legal test.

YES  N/A

### 7. Compile list of events or circumstances indicating undue influence.

See list of "Red Flags to Watch For" opposite.

YES  N/A

### 8. Make and retain appropriate records whenever red flags are present.

Detailed notes; checklist recommended; information supporting practitioner's conclusions and ultimate decision should include: red flags identified, inquiry pursued, information obtained, memoranda to record reasoning for conclusion.

YES  N/A

### 9. If Index of Suspicion remains high after reasonable investigation, decline retainer to prepare the will.

# RED FLAGS TO WATCH FOR

## Undue Influence - Recognition/Prevention

The red flags listed below **may** indicate the presence of undue influence on a will-maker. This list is not necessarily complete or definitive. It is an aid to practitioners to identify potential undue influence and provide an “index of suspicion” so that they will be alerted to carry out the necessary inquiries before preparing a will for execution.

See the text of the BCLI Guide for more detailed discussion.

YES NO N/A

**1. Will-maker invests significant trust and confidence** in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new “suitor” or partner).

YES NO N/A

**2 Isolation** of will-maker resulting in dependence on another for physical, emotional, financial or other needs.

YES NO N/A

**3. Physical, psychological and behavioural characteristics** of will-maker.

Examples:

- **Dependence on beneficiary** for sight, hearing, mobility, speech, illness, illiteracy.
- **Signs of neglect/self neglect** (emaciation, inappropriate clothing, bruising, untreated injuries).
- In **state of shock** after stressful situations (e.g. bad news, death of close person).
- Non-specific factors (e.g. loneliness, sexual bargaining, end of life issues).
- **Cultural influences/conditioned responses** (e.g. subservience to traditional authority in extended family; yielding to pressure for fear of revealing family conflicts leading to loss of face in community).
- **Impaired mental function** from a psychiatric condition or a non-psychiatric cause (e.g. trauma or stroke).

Signs include (see BCLI Guide for full list pp 24-25):

- Sudden onset of confusion.
- Short term memory problems, disorientation, difficulty with finances.
- Signs of depression (e.g. irritable, agitated, difficulty making decisions, sad face, bowed head, general lethargy).
- Delusions.
- Extreme sense of well-being, continuous speech, inability to concentrate, poor judgment.
- Apprehensive or appearance of being worried, distressed, overwhelmed.
- Client is intoxicated/signs of substance abuse.
- Down’s syndrome, autism or other developmental disorder.
- Inability to answer open-ended questions.

YES NO N/A

**4. Circumstances related to making of the will and/or the terms.**

Examples:

- **Unusual gifts; sudden change** for no apparent reason; frequent changes.
- **Marked change in** instructions from prior wills.
- **3rd party initiates** instructions which also benefit 3rd party; **beneficiary speaks** for will-maker; **beneficiary offers to pay** for new will; **will-maker relies exclusively/unusually on notes** to give instructions.
- **Spouses:** joint retainer but one spouse provides instructions while **other remains silent**.
- **Recent death of a family member** and other family appear to influence changing existing will.

YES NO N/A

**5. Characteristics of influencer** in will-maker’s family or circle of acquaintance.

- **Overly helpful.**
- **Insists on being present** during interview with lawyer/notary.
- **Contacts practitioner persistently** after instructions are taken.
- Person is **known to practitioner to have history of abuse, including violence.**
- Practitioner **observes negative and/or controlling** attitude to will-maker.
- Practitioner is aware **that influencer is in difficult financial circumstances** and/or **engages in substance abuse.**

YES NO N/A

**6. Practitioner’s “gut feeling”.**

- **Body language** of will-maker indicates fear, anxiety, insecurity, embarrassment etc.
- “Influencer” is **off putting or difficult to deal** with at appointment.
- “Influencer” is **rude to staff** in office or on telephone, or is **overly solicitous.**

# FLOW CHART

OF RECOMMENDED PRACTICES

## Undue Influence - Recognition/Prevention

1 DOES CLIENT HAVE TESTAMENTARY CAPACITY?

**NO**

DO NOT PROCEED OR IF UNSURE, MAKE APPROPRIATE INQUIRIES.

**YES**

2 IS CLIENT AWARE OF CONTENTS OF WILL?

**NO**

DO NOT PROCEED OR IF UNSURE, MAKE APPROPRIATE INQUIRIES.

**YES**

3 IS CLIENT ACTING FREELY AND INDEPENDENTLY?

**YES**

PROCEED TO PREPARE WILL.

**NOT SURE**

IDENTIFY RED FLAGS AND/OR CONCERNS. FOLLOW UP AND/OR INVESTIGATE.

(SEE "RED FLAGS TO WATCH FOR" AND "CHECKLIST OF RECOMMENDED PRACTICES")

4 AFTER INVESTIGATION: IS CLIENT ACTING FREELY AND INDEPENDENTLY?

**YES**

PROCEED TO PREPARE WILL.

**NOT SURE**

PRACTITIONER DECISION DEPENDS ON NATURE AND LEVEL OF CONCERN:

A) SUSPICION ONLY. DOCUMENT FILE. PROCEED.

B) SERIOUS CONCERNS. DO NOT PROCEED.

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