

INSURANCE ISSUES: *Risk Management*

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Undue influence: onus of proof, best practices

If you practise in wills and estates or any area in which undue influence may be alleged, read on.

THE LAW IN relation to undue influence is changing for wills practitioners. The *Wills, Estates and Succession Act* (WESA), expected to come into force in 2013, introduces a shift in the onus of proof in relation to undue influence challenges to wills in some cases. In anticipation of this change, a best practices guide is now available that will help you recognize and deal with situations of potential undue influence when drafting wills.

Although the guide focuses on undue influence around wills, you will find its contents useful if you prepare powers of attorney, representation agreements or other personal planning documents,

transfers of property or various other common transactions, including gifts, loans and guarantees among family members and acquaintances.

In this article, we explain the shift in onus that WESA introduces, highlight the guide and its features and offer a free copy of a handy reference aid.

A shift in the onus of proof (WESA s.52)

Someone may challenge a will or a provision in it, alleging that it does not reflect the true wishes of the will-maker, but is the result of undue influence by a third party. If established, the will or provision is void.

Currently, the onus of proving undue influence affecting a will always falls to the challenger. It can be difficult to establish undue influence when the facts are known only to the will-maker, now deceased, and a third party under no obligation to disclose those facts. Section 52 of WESA (see sidebar) reverses that onus, in certain circumstances.

Under section 52, if a challenger establishes that a third

The Wills, Estates and Succession Act, section 52:

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52 In a proceeding, 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.



party was in a relationship of potential domination or dependence of the will-maker, the onus now shifts to the party seeking to defend the will to prove that no undue influence was exercised by the third party. This shift in onus may result in an increase in undue influence challenges.

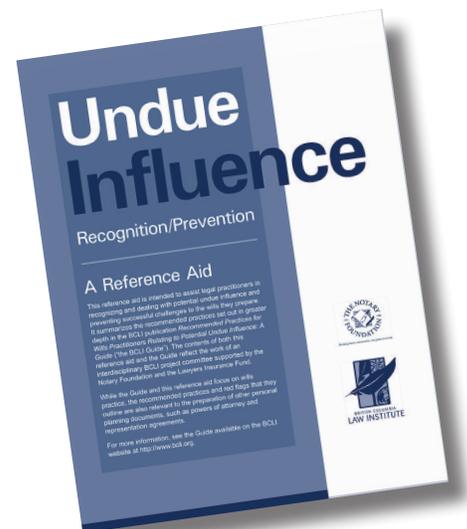
If you drafted the will in question, expect to be called as a witness in the ensuing litigation, compelled to testify about the facts and circumstances surrounding the making of the will and to produce your file, including notes. If you failed to take reasonable steps to ensure the will reflects the will-maker's genuine wishes, or did not keep adequate notes, you may be at risk.

WESA will govern probate of a will if the will-maker dies after it comes into force, regardless of when the will was prepared.

Best practices: A guide and reference aid

Created as part of the BC Law Institute's Project on Testamentary Undue Influence, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* sets out recommended practices to help ensure that the wills you prepare represent the genuine independent wishes of your clients and are insulated against successful challenges based on undue influence.

The guide includes an excellent reference aid summarizing the recommended practices with a checklist, flow chart and list of red flags. Both the guide and reference aid are available on the Law Society's website (go to Lawyers / [Practice Support and Resources](#)). We have a limited supply



of the reference aid in brochure form. If you would like one to be mailed to you, please email us at insurance@lsbc.org and include your mailing address.