THE HERCULEAN TASK OF PROVING UNDUE INFLUENCE

by Justin W. de Vries and Gillian Fournie[1]

Introduction

> *To establish undue influence, it is necessary to prove that power was exercised over the testator, and it was the exercise of that power that resulted in the will being made. Undue influence can usually only be discovered by examining the circumstances leading up to the preparation of the will or by looking at the relationship that existed between the person benefitting from the will and the testator.*[2]

> *The affidavits filed by the respondents offer little evidence to support the allegation of undue influence. I do not find that surprising. It is highly unlikely that overt acts of coercion will occur in front of eye witnesses*[3].

Undue influence is a well-established and popular ground for challenging a will. However, proving undue influence is notoriously difficult. Although best described as murky, many clients often believe the existence of undue influence is obvious in their situation: their evil stepmother pressured their vulnerable father, their conniving cousin insinuated himself into the heart of their gullible aunt. The question is: do the stories amount to sufficient proof? If not, where else to look? As long as undue influence remains emotionally appealing to clients, practitioners will continue to look for ways to confirm its existence.

Definition and Legal Standards of Undue Influence

Whether a will is the product of undue influence is a question of fact decided by the court. Unfortunately, there is no one thing that "proves" undue influence was exercised. Rather, what amounts to undue influence will change with every case.

The courts will accept a great deal of pressure being placed on a testator by a hopeful beneficiary. But the court's tolerance lasts only up to a point; once a certain threshold has been crossed, the pressure will be declared undue and the will (or a provision in it) void. The court in *Wingrove v. Wingrove* (1885), 11 P.D. 81, established the first demarcating line between influence and undue influence. "To be undue influence in the eye of the law there must be – to sum it up in a word – coercion."[4]

Equating undue influence with coercion established a high standard of proof. In addition, the courts often ask that two more factors be satisfied. First, the evidence must show more than just

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[2] *Lamontagne v. Lamontagne* (1996), 15 E.T.R. (2d) 233, (*sub nom. Lamontagne Estate, Re*) 150 Sask. R. 85, [1996] W.D.F.L. 2801, 1996 CarswellSask 658 (SK QB) at ¶28.

[3] *St. Cyr Estate v. St. Cyr*, [1999] S. J. No. 54 (QL) (Q.B.).

[4] *Wingrove v. Wingrove* (1885), 11 P.D. 81, at p. 82.

that the influencer *could* have coerced the testator, the evidence must show that coercion *was* applied.[5] Second, although the court will consider all relevant circumstances, there must be evidence that shows that coercion was applied *at the time the will was drafted*.[6] Viscount Haldane, speaking for the Privy Council in 1919, summarized these requirements succinctly:

> [I]n order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis.
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> …
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> It is … not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.[7]

Although these tests remain relevant, subsequent courts continued to expanded on these definitions or offer their own. The result has been a plethora of descriptions and definitions of undue influence. Justice Macaulay, for the court in *Pollard Estate v. Falconer*, summarized the various definitions of undue influence as follows:

(i) Coercing the testatrix into doing that which she did not desire to do;

(ii) Imposing an influence so great and overpowering that the will reflects the intention of the person imposing the influence rather than the testamentary wishes of the executrix;

(iii) Delegating the will-making power of the executrix to another;

(iv) Showing that the will as drafted is inconsistent with any hypothesis other than its having been obtained by undue influence; and

(v) Showing that it is right and expedient to save the testatrix from being victimized.[8]

The current understanding of undue influence in Canada was set out in *Banton v. Banton*:[9]

> A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a

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[5] *Craig v. Lamoureux*, [1919] 3 W.W.R. 1101, [1920] A.C. 349, 50 D.L.R. 10 (P.C.), 1919 CarswellQue 2 at ¶11. (*Craig v. Lamoureux*)
[6] *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161 (ON Gen. Div.). (*Banton*)
[7] *Craig v. Lamoureux* ¶12-13.
[8] (2008), 2008 B.C.S.C 516, 39 E.T.R. (3d) 188, 2008 CarswellBC 820 (BCSC). ¶79.
[9] *Banton* ¶96.

> case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will-making power to the other person.[10]

Although the test for establishing undue influence has not changed significantly since *Wingrove*, the court's willingness to consider circumstantial evidence has.[11] This evolution of the law has led to an increasing number of cases where undue influence has been found.[12] Since the court is attempting to determine the true intentions of the testator at the time the will was drafted (which is similar to the attempt to determine the testator's state of mind), the evidence will necessarily be circumstantial.[13]

What amounts to coercion will change with the circumstances. Although threats and physical violence would suffice, they are not required to prove undue influence.[14] The court will infer the existence of coercion from all the facts.[15] Mere influence is not sufficient; subjecting a testator to persuasion, pressure, advice, and begging are all acceptable under the law. As the court held in *Scott v. Cousins*, people are entitled to press a testator for what they believe are their moral claims.[16] It is only when the pressure amounts to coercion (as defined by the circumstances and found as a matter of fact by the court) will the will be deemed invalid.

Burden of Proof

The onus of proving undue influence lies with the party attacking the will. The standard of proof is on a balance of probabilities. Unlike *inter vivos* transfers, the burden never shifts: there is no presumption of undue influence in the testamentary context. As a result, it is important to distinguish between cases of undue influence in the context of gifts made during someone's life (i.e. *inter vivos* gifts) and in the preparation of a will.

Undue influence must also be carefully distinguished from suspicious circumstances. Suspicious circumstance rebut the presumption that a testator knew and approved the contents of the will. The presumption arises in every case that a will has been duly executed. Where the presumption is rebutted, the propounders of the will are then required to prove knowledge and approval in order to probate the will. Their obligation is independent of the challenger's obligation to prove undue influence.

The result of raising suspicious circumstances while attempting to prove undue influence is that both parties end up with a burden to discharge; the propounder must show knowledge and approval and the attacking party must prove undue influence. If the propounding party is unable

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[10] *Banton* ¶59.
[11] Parachin, Adam "The Perilous Presumption of Undue Influence," *The Lawyers Weekly*, December 2, 2011, Issue. http://www.lawyersweekly.ca/index.php?section=article&articleid=1550. See also *Lamontagne v. Lamontagne*. ¶30.
[12] Parachin.
[13] *Feeney's Canadian Law of Wills*, 4th ed. looseleaf. (Markham: LexisNexis Canada, 2000). (*Feeney*) §3.4.
[14] *Feeney* §3.11.
[15] *Feeney's* §3.4.
[16] *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113, [2001] O.J. No. 19, 2001 CarswellOnt 50. ¶113. (*Scott v. Cousins*)

to meet his or her case, the will may be declared invalid without the attacking party having proved undue influence. However, it is a risk to rely solely on suspicious circumstances to overturn a will as demonstrating knowledge and approval is a relatively easy test to meet.

Confusion between undue influence and suspicious circumstances arises because it often happens that the same evidence used to prove undue influence also raises a case for suspicious circumstances. In *Vout v. Hay*,[17] the Supreme Court of Canada set out what each party needs to prove in a will challenge. Justice Kruger of the Saskatchewan Queen's Bench later summarized the Supreme Court's findings in *Lamontagne v. Lamontagne*:[18]

> 1. The propounder of the will has the onus, on a balance of probabilities, to prove due execution of the will in accordance with the law, that the testator had knowledge and approved of the will and that the testator had testamentary capacity;
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> 2. The propounder is assisted in this burden by the rebuttable presumption that once the legal formalities of execution have been established, it is presumed that the testator knew and approved of the contents of the will and had the testamentary capacity to make a will;
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> 3. If, however, suspicious circumstances exist in any of the following areas, that presumption is spent:
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> > a) Circumstances surrounding the preparation of the will;
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> > b) Circumstances tending to call into question the capacity of the testator;
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> > c) Circumstances tending to show that the free will of the testator was overborne by undue influence or fraud.
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> 4. Once the rebuttable presumption is spent, the propounder of the will resumes the burden of proving knowledge and approval no matter which category the suspicious circumstances arise from. The propounder must also prove testamentary capacity if suspicious circumstances relate to that category. The propounder never bears the burden of disproving undue influence or fraud.
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> 5. Difficulty will arise, if at all, with the undue influence category of suspicious circumstances. Here, although circumstances raising a suspicion of undue influence cast a duty on the propounder to prove knowledge and approval of the will, such circumstances do not shift the onus to the propounder of the will to disprove undue influence. This is so because of the longstanding tradition of honouring the will of a testator where knowledge and approval and testamentary capacity are proven on a balance of probabilities. Suspicious circumstances of undue influence or fraud would defeat a will if the propounder merely failed to

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[17] *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431. (*Vout v. Hay*)

[18] *Supra* note 2.

> discharge the legal burden. Accordingly, the onus of establishing undue influence remains to be proven, on a balance of probabilities, by the challenger of the will.[19]

A note on standard of proof: Sopinka J. held in *Vout v. Hay* that the court would adjust its scrutiny of the evidence depending on the gravity of the suspicion.[20] This suggested a sliding scale of evidence; depending on the consequences of its decision, the court would required greater or less proof. Justice Newbould of the Ontario Superior Court[21] suggested that Sopinka J.'s comments in *Vout v. Hay* no longer represents good law following the decision of *C. (R.) v. McDougall*.[22] In the later case, the Supreme Court held that there is only one standard of proof in civil trials: balance of probabilities. Justice Newbould suggested that the consequence of applying *C. (R.) v. McDougall* to undue influence cases is that all evidence is scrutinized with the same degree of care.[23]

Evidence

Given the onerous requirements of proving undue influence, what evidence will the court find persuasive? As noted above, the courts are willing to decide a case based on circumstantial evidence alone. When presenting the evidence, the more complete the story the better the chances of success. This means painting a picture of the testator, the influencer, and the circumstances of the drafting.

Justice Lederer set out what he is looking for in cases of undue influence in his article "Understanding the Court's Approach to Allegations of Undue Influence and Suspicious Circumstances."[24] First, he looks for the parties to establish the facts of what happened (setting out the background and context of the story), followed by what each of the facts or the accumulation of facts mean (established by the law, expert testimony, and opinion).[25] Justice Lederer emphasized his interest in gaining an understanding of the players involved: what did each person value, how they acted, and what were their relationships with each other like. Justice Lederer's article emphasises the importance of a complete story, more so than any particular piece of evidence.

In convincing a court that particular actions amount to coercion, it is helpful to establish the testator's degree of vulnerability as an explanation for his or her inability to withstand even moderate pressure from the influencer. Vulnerability may be established by explaining particular social or cultural customs that made the testator less able to stand up to the influencer. More often, however, vulnerability is demonstrated through evidence that the testator had

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[19] (1996), 150 Sask. R. 85,15 E.T.R. (2d) 233 (*sub nom Lamontagne Estate, Re*), 1996 CarswellSask 658 (SKQB). ¶23.
[20] *Vout v. Hay* ¶24.
[21] *Henry v. Henry* (2009), 48 E.T.R. (3d) 128, 96 O.R. (3d) 437, 2009 CarswellOnt 1538 (Ont. Sup. Ct. J.). ¶38-41. (*Henry v. Henry*)
[22] (2008), 2008 S.C.C. 53, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 297 D.L.R. (4th) 193, 2008 CarswellBC 2041 (SCC). ¶45.
[23] *Henry v. Henry* ¶38-41.
[24] Lederer, The Honourable Justice Thomas R. "Understanding the Court's Approach to Allegations of Undue Influence and Suspicious Circumstances" in *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto, LSUC, 2011) page 239.
[25] Lederer J., page 240.

decreased mental or physical capacity. Decreased capacity directly corresponds to increased vulnerability.[26] The deterioration in mental health does not have to be to such an extent that a finding of testamentary incapacity is warranted. Rather, any reduction in capacity is relevant in demonstrating vulnerability.

In conjunction with notes from caregivers, the testimony of medical experts may be particularly valuable in making this point. Be careful not to rely on medical opinion alone. Establishing vulnerability is not sufficient; it is necessary to show that the testator's weakness was exploited. The role of a medical expert is to establish the testator's susceptibility to influence. The role of the lawyer is to establish that the influencer took advantage of the testator's reduced capacity to dictate the terms of the will.

There is no one fact that is ever fatal to or required in a case of undue influence. The goal of the attacking party is to gather evidence from many different sources so that the most complete story possible is presented to the court. There will inevitably be gaps in the narrative; no case is perfect. The goal is to have more evidence that points to undue influence than not. Case law can be used to help give individual pieces of evidence more or less weight.

It is generally accepted that the drafting solicitor must make some inquiry into a testator's capacity and presence of influence. Though not determinative in a will challenge, courts have reprimanded solicitors for failing to do so. In *Danchuk v. Calderwood* the court chided the solicitor for her failure to make any inquiry into the presence of influence, including her failure to interview the testator alone:

> In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.[27]

A solicitor who fails to make proper inquiring into the existence of influence can help a will challenge. However, the presence of a competent solicitor will not devastate a challenge. Because cases regarding undue influence are decided on their facts, every decision looks different. This means that the same fact may be interpreted in different ways by the same court in different circumstances. For example, the fact that a competent, independent solicitor drafted the testator's will weighed heavily in the court's finding that there was no undue influence in *Maw v. Dickey*.[28] Yet the presence of an independent, competent lawyer did nothing to dissuade the court that the testator had been coerced in *Re March Estate.*[29] Once again, this points to the

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[26] See, for example, *Feeney's Canadian Law of Wills*, 4th ed. looseleaf. (Markham: LexisNexis Canada, 2000). §3.11; and *Scott v. Counsins* ¶114.

[27] *Danchuk v. Calderwood* (1996), 15 E.T.R. (2d) 193, [1997] B.C.W.L.D. 087 ¶118.

[28] (1974), 6 O.R. (2d) 146, 52 D.L.R. (3d) 178, 1974 CarswellOnt 351 (ON Surr. Ct.) at ¶43.

[29] 99 N.S.R. (2d) 221, 270 A.P.R. 221, 1990 CarswellNS 231 (NS Prob. Ct.).

fact that the strength of an undue influence case lives in the totality of the evidence, not in the individual pieces.

In organizing the evidence to present, it may be helpful to group it into three broad categories.

- **The Testator:** vulnerable to influence generally (ex. decreased mental or physical capacity) or vulnerable to one person in particular (ex. relationship of dependency, cultural or social norms require submission).

- **The Influencer:** had the ability, opportunity, and motivation to influence the testator.

- **The Drafting of the Will:** anything that shows that influence was applied at the time the will was drafted. For example, the lawyer was hired and paid for by the influencer, or the will was drafted in conjunction with other transfers of property and a new POA designation.

In gathering the evidence, there are many "red flags" to be kept in mind. However, these indicia are generally gathered from the same seven sources of evidence (as identified in Schnurr's *Estate Litigation*):

1. Notes and memoranda of the solicitor who took instructions, prepared and supervised due execution of the will;

2. Oral evidence of the solicitor with respect to his observations regarding the behaviour and mental capacity of the testator;

3. Oral evidence of the solicitor regarding statements made by the testator to the solicitor;

4. Hospital records reflecting the medical history and observations of health care providers, including doctors, nurses, social workers, or physiotherapists;

5. Medical records and medical reports prepared by physicians who provided medical services to the testator;

6. Oral evidence of lay persons, including the witnesses to the will regarding the behaviour of the testator and statements made by the testator; and

7. Medical opinions prepared by physicians who never met the testator, but are providing an opinion at the request of a party to the litigation, based upon material and information provided to them.[30]

Although this list seems to emphasize medical evidence, it is not the most important factor. For example, in *Marquis v. Weston*,[31] the court put little weight on the opinion of medical experts. The court was faced with conflicting evidence; the expert opinions were inconsistent with the observations of those who knew the testator. The court held that the evidence of the testator's

[30] Schnurr, Brian A. *Estate Litigation,* looseleaf (Toronto, Thomson Reuters, 1994). §18.3.
[31] (*sub nom Re Stirling Estate*) (1993), 49 E.T.R. 262 (NB CA).

friends and family was more reliable than the opinions of experts who had reviewed the testator's medical records, but never met her in person.

Medical professionals and the drafting solicitor are likely to comply with requests for disclosure or examination. Unfortunately, friends and family may be less forthcoming. A court order(s) may become necessary in order to facilitate disclosure and examination.

A list of the key witnesses, sources of information, questions to be asked, and topics to be canvassed is attached as **Appendix A**.

Presenting the Evidence

Organizing the evidence into a narrative is the most efficient means of presenting it to the court. There will probably be several narrative strands; one relating to the testator, one relating to the influencer, and one relating to the drafting of the will. Each set of facts or anecdotes should be followed with a general conclusion or opinion as to its meaning and how it fits in with the evidence as a whole.

The court in *Dansereau Estate v. Vallee*[32] took an interesting approach in organizing the evidence. The court released its decision with an appendix listing the evidence in chart form. The columns moved chronologically from left to right, while each row set out the important actions, background, nurses notes and other evidence taken at those times. Persuaded by the evidence, the court held that the testator's son had coerced his mother into changing her will. Attached as **Appendix B** is the chart of evidence released with the court's decision.

Future Direction of the Law

British Columbia has proposed new legislation that would establish a presumption of undue influence. Section 52 of the new *Wills, Estates and Succession Act*, S.B.C. 2009, c.13 would read:

> **52.** ***Undue influence***
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> In a proceeding, if a person claims that a will or any provision of it resulted from another person
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> > (a) being in a position where the potential for dependence or domination of the will-maker was present, and
> >
> > (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for

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[32] 247 A.R. 342, 33 E.T.R. (2d) 71, 1999 CarswellAlta 1337.

> 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.

The effect of this legislation is to create a presumption of undue influence where certain types of relationships exist. The legislative presumption of undue influence imposed on the testamentary context is similar to the one that already exists for *inter vivos* transfers. Under the proposed legislation, a party attacking a will needs only to show that the testator was in a position of dependence or submission to the beneficiary for the presumption to apply. Once triggered, the burden of proof shifts to the beneficiary who must then prove that the will was *not* the result of undue influence.

Those who support the proposed changes believe that the current state of law imposes an unfair burden of proof for will challenges. Supporters feel that the creation of a presumption of undue influence will ease the evidentiary burden on attacking parties. It is hoped that the presumption will result in greater evidentiary fairness by imposing the burden of proof on the alleged influencer. The belief is that the same close relationship that triggered the presumption of undue influence in the first place also puts the alleged influencer in a better position to know the facts of the will drafting and present evidence to that effect.[33]

The proposed change is not without its critics. Adam Parachin, a law professor at Western University, criticized section 52 on several grounds.[34] First among them was his defence of the law as it exists now. He argued that the court's willingness to consider circumstantial evidence means that examples of successful undue influence cases are no longer in short supply. He argued that this suggests that meritorious cases of undue influence do not need a presumption to succeed. As a result, the only effect of the presumption will be to make it easier to overturn wills, thus increasing the amount of litigation and mediation. His fear is that by making it easier to overturn wills, the law's commitment to testamentary freedom is eroded. The impact of the presumption will be especially strong on wills that depart from the "norm" (i.e. wills that do not divide the testator's estate equally between family members). Thus the presumption will have the effect of denying testamentary freedom to eccentric individuals.

The *Wills, Estates and Succession Act* has been postponed from its original enactment date of 2011 to 2013 as the legislature continues to debate these and other issues.

Another recent development is the establishment of a new tort in California. That state has now recognized intentional interference with an expected inheritance as a legitimate cause of action. The court in *Beckwith v. Dahl*[35] identified five elements of the new tort: (i) an expectation of

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[33] See British Columbia Law Institute Report No. 61, "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence," Januray 5, 2012: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf; and BC Ministry of Attorney General Civil and Family Law Policy Office, "Undue Influence in Relation to Preparation of a Will Discussion Paper," October 2007: http://www.ag.gov.bc.ca/legislation/pdf/UndueInfluenceWills.pdf.

[34] Parachin.

[35] *Beckwith v. Dahl*, 205 Cal. App. 4th 1039 – Cal: Court of Appeal, 4th Appellate Dist., 3rd Div. 2012.

receiving an inheritance; (ii) knowledge by a third party of the expectation and deliberate action to interfere with its realization; (iii) the interference must be independently wrongful or tortuous (for example, fraud, duress, or false promises); (iv) reasonable certainty that the plaintiff would have received the inheritance but for the interference; and (v) damages.

The tort is an interesting addition to estates law, but its usefulness may be limited. The California Court of Appeal refused to enforce the tort where the plaintiff had an adequate claim in probate court, wisely reducing redundancy of remedies. Like undue influence, the tort of intentional interference with an expected inheritance imposes a high evidentiary burden, which will help weed out unwarranted claims. Unfortunately, the tort may not be sufficiently distinct from undue influence to offer a remedy to more than a narrow group of individuals. Where there is sufficient evidence to meet the requirements of the new tort, it is likely that a court would also be convinced of the presence of undue influence. The tort is most beneficial in situations where it had been the longstanding intention of a testator to leave a significant gift to a non-family member. Such a person would not benefit from invalidating a will using undue influence and having the estate distributed as an intestacy. However, such specific circumstances occur rarely. As a result, the usefulness of the tort is somewhat doubtful.

Finally, attached at **Appendix C** are some practice tips when litigating an undue influence claim.

APPENDIX A

UNDUE EVIDENCE/LITIGATION CHECKLIST

Each of the following people (or class of people) should be canvassed. The questions (representing "red flags") and/or topics to be canvassed are listed under the person most likely to provide an answer. The questions and topics are by no means definitive or exhaustive.

Keep in mind that it is worth repeating the same question to various people both to strengthen the evidence and expose inconsistencies. Also, in any particular case, the person most likely to know the answer may not be the same as suggested below.

Drafting Solicitor

- Is the solicitor new to the client?
- Is the solicitor known to the alleged influencer?
- Who initiate the drafting of the new will?
- Who assisted the testator with his or her will planning?
- Did someone attend with and speak for the testator?
- Did solicitor observe an overreliance by testator on influencer?
- Did testator rely on notes to instruct solicitor?
- Is there a notable departure from the pattern of giving found in past wills?
    - Ability of testator to explain changes?
    - Particularly large benefit to one person only?
    - Unusual gifts?
- Time lapse between impugned will and previous will?
- Time lapse between execution of impugned will and death?
- Was the mental and physical health of testator explored?
- Signs of depression, confusion, agitation, lethargy, difficulty handling finances. Testator is worried, distressed or overwhelmed
- Language skills of testator and any cultural barriers or obvious influences?
- Notes taken during the drafting:

- Who was present
- Who provided/communicated the instructions
- Who paid for the will
- Who received draft copies for review
- Whether the solicitor made any inquiry into the capacity of the testator or presence of influence
- Whether the solicitor made any informal observations regarding capacity and demeanour of the testator, family dynamics, or other suspicions felt by the solicitor
- Did the solicitor ask open-ended, non-leading questions?
- Did solicitor test or probe answers by the testator?
- Are solicitor's notes comprehensive? What, if anything, is missing (refer to typical will drafting checklists)?

- Was the solicitor asked to complete other tasks at the same time, such as creating a new POA or *inter vivos* transfer of property?
- Was capacity formally tested? If not, why not?
- Vulnerability of testator due to frail health?

Influencer

- Create portrait of influencer from direct examination, stories of witnesses' interactions with the influencer or observations of the interactions between the influencer and the testator
- Was influencer known to family and friends? If yes, for how long and in what role?
- What was the influencer's personal circumstances and financial wherewithal?
- Explore and describe nature of relationship. How has the relationship evolved over time? What was the level of dependency, dominion, and/or trust? Level of trust or confidence placed by testator in influencer. Was the influencer overly helpful or solicitous?
- Was the influencer in a position to bargain with the testator? For example, withhold financial or care services, sex, companionship, or medication?
- Did the influencer isolate or restrict access to the testator? Was the influencer overly negative or controlling?

- Did the influencer ever threaten or emotionally or physically abuse the testator? Did the influencer ever threaten to put the testator in a nursing home against the testator's wishes?
- How involved was the influencer with the testator's estate planning?
- Seek all communication between influencer and deceased (email, mail, hearsay)
- Describe when, where and how often the influencer spent time with the testator – goes to opportunity to influence testator
- Evidence of other transfers made by testator to the influencer around time will was drafted? Review of bank and credit card statements. Conveyances of real estate, transfer of property to joint tenancy, insurance policy designations

Doctor/Nurse/Care Worker Attending Testator

- Notes and oral evidence (particularly those taken around time will was drafted) regarding:
    - The testator's medications and their effects (especially any effect on awareness and ability to think, or changes to behaviour such as paranoia, depression or apathy)
    - General observations regarding mental capacity (ex. muddled, alert and responsive, or disoriented to time and place)
    - Presence of friends or family, especially any observations regarding the relationship between testator and visitors, for example the effect the presence of the alleged influence had on the deceased
- Specific medical conditions suffered by the testator:
    - Mental capacity
    - Physical impairments
    - Emotional or psychological factors
    - Substance abuse
    - Signs of self-neglect
    - Recent emotional turmoil or stress (ex. loss of a loved one)
- Additional Sources of Information
    - Accountant

    - Dentist
    - Priest/Rabbi/Mullah
    - Emergency room doctors
    - Pharmacist
    - Police
- Level of independence/dependency of testator:
    - Is the testator able to live alone?
    - How much support is needed?
    - What kind of support (cooking, household cleaning, financial)?
    - Who provided the support?
    - Signs of neglect

Experts

- Medical opinion (retroactive) as to vulnerability of testator to influence
- Medical opinion (retroactive) as to capacity of testator, mental and physical well being
- Handwriting expert
- Forensic accountant

Family Members/Friends

- Seek disclosure of correspondence between family member or friend and testator or influencer
- Speak to neighbours or casual observers (ex. building superintendant, nursing home personnel, cleaning lady/man, gardener, meals on wheels)
- Obtain description of testator, both in the past and around time of will
    - Example: strong-willed, submissive, opinionated, accommodating, non-confrontational or garrulous
- Was the testator secretive about finances? Was largesse towards influencer out of character?

- Examine relationship of family members to testator, both in the past and around time of will
    - Did the testator become suspicious of previously trusted family members/friends?
    - Did the testator develop a close relationship where none existed before? Was the new relationship to the exclusion of previously close family members?
    - Presence of family conflict?
- Effect of influencer on the testator – dependent, grateful, fearful?
- Was the testator isolated? How and when?
    - An isolated testator is more likely to receive information only from one person (the influencer), meaning that information is more easily distorted and ensuring that the testator is less able to evaluate the information or put it into context
    - A lonely or grieving testator may also be particularly grateful to anyone willing to spend time with him or her
- Description of testator's cultural or social background which may influence his or her pattern of giving or inability to withstand pressure from influencer
- Have family or friends raised concerns about the influencer before this time?

APPENDIX B

CHART OF EVIDENCE IN *DANSEREAU ESTATE V. VALLEE*

	Apr-86	Aug 7 86	Sep-87	Sep-87	Oct-87	Nov-87	Nov 19 87
ACTION	Hector in serious trouble with bank; father angry Hector got himself into this mess. At bank's direction Hector must ask father to fund all expenses for joint farming.	Mr. & Ms. Dansereau make mutual wills, residue divided equally amongst 3 children. Fair division of property to children.	Hector visits father in hospital; tries to get him to change his will; father refuses.	Mr. Dansereau dies.	Ms. Dansereau lives with Helene Lapointe for 1 month after discharge.	Ms. Dansereau moved to Salem Manor.	Ms. Dansereau puts 3 of 4 quarters into her and Hector's name jointly and gives Hector farm machinery: Handrek Agreement.
BACKGRO UND	Father in his 80's; very frugal person; very hard worker; has a past pattern of treating all 3 of his children fairly.	Hector resents that father gave one of his quarters to his grandson, Hector's nephew, Bernard Lapointe.					Ms. Dansereau advises Mr. Handerek that she does not want to change her will.
NURSING RECORDS						Worries about everything, nervous, takes nerve pills. Some problems due to language — speaks French.	
OTHER EVIDENCE	Hector and his then wife sign a promissory note for $580,000 to the Alberta Treasury Branch	There was a family meeting, prior to the execution of these wills. The lawyer who arranged this meeting and subsequent wills was employed by the Government of Alberta to help farmers arrange their affairs.		At time of Mr. Dansereau's death in hospital Ms. Dansereau shared same hospital room, having suffered broken hip. Children have opportunity of witnessing efforts by	Although Ms. Dansereau subsequently complained about what people told her concerning Helene's intentions to obtain a better distribution, Ms Dansereau acknowledge s, even at the end of her life, that		Ms. Dansereau does not have title when agreement is entered into. Consideratio n is $1 and forbearance of action.

				Hecto to get father to change his will by removing bequest to Bernard Lapoint.	she is good friends with Helene.		

	Nov 22/23 87	Sept 15 88	Aug 4 89	Aug-89	Aug 18/19 89	Aug 14 89
ACTION	Nursing attendants at Salem Manor calling Dr. Stewart for increase in Ms. Dansereau's Ativan prescription because she is upset, distressed, and anxious.		Ms. Dansereau opens 2 joint bank accounts.	Hector has discussions with Mark Gunderson and Joanne Amonson re sewer line through property.	Ms. Dansereau suffers stroke. She has memory lapses, could not write, and was nearly blind.	Hector and nephew as co-executors effect a capital gains distribution.
BACKGROUND						No disclosure is made by Hector to co-executor or co-beneficiaries about arrangement with mother.
NURSING RECORDS		Has a daughter and son who visit often.	August 2: no concerns about dizziness. August 5: had dizzy spell at 4:30 pm.		Speech slurred; aching in her arm; headache; has severe dizzy spell. Did tell me earlier, she was nervous today; is admitted to hospital.	
OTHER EVIDENCE			Hector Dansereau's personal bank accounts seized or suspended.			Note: Leopold Dansereau's estate not yet probated. Note: Result of meeting is that Hector gets lions share of capital cost allowance. CCA on "mother's" land is not divided equally among

						all 3 children.

	Sept 8 89	Aug 14 89	Sept 19 89	Sept 21 89	Sept 25 89	Sept 28 89
ACTION	Hector gives information to Ms. Amonson re value of property; has turned down offer of $20,000 an acre in spring of this year; lots across highway selling for $50,000 each — "My property is worth as much."	Ms. Dansereau returns to Salem Manor.	Ms. Dansereau executes power of attorney (Ex. 21)	Ms. Amonson tells Mr. Renaud that she does not know if Ms. Dansereau wants to make a new will.	Ms. Dansereau meets with Mr. Renaud.	Ms. Dansereau meets with Mr. Renaud.
BACKGROUND			Power of attorney prepared by Amonson. Ms. Dansereau tells Ms. Amonson that she does not wish to make a new will.			
NURSING RECORDS						
OTHER EVIDENCE					Transcripts of meeting found in Ex. 102.	Transcript of meeting found in Ex. 102.

	Oct 2 89	Oct 3 89	Oct 4 89	Oct 7 89	Nov 23 89	Dec 8 89
ACTION	Hector tells Ms. Amonson that transfer should now be made to him outright. Hector fires Mr. Renaud. The rehabilitation professional treating Ms. Dansereau enters the following notation on her record: "had another small stroke?"	Hector re-hires Mr. Renaud.	Ms. Dansereau meets with Mr. Renaud. Executes 2nd power of attorney and transfers.			
BACKGROUND						
NURSING RECORDS			Very tired: lawyers and sun visiting for long periods. Oct 5: brandy given on request for insomnia.	Complains of nausea and dizziness.	Pharmacy: Questions use of Sinequan and Ativan. Nurses feel we cannot take these medications from her due to high anxiety level when orrying about anything.	Very tired and weepy after her noon meal.
OTHER EVIDENCE			Transcript of meeting found in Ex.			

			102.			

	Dec 21 89	Jan 11 90	Jan 31 91	Aug 30 91	Dec 2 92
ACTION	Ms. Dansereau executes new will, transfer of land, and farming agreement with Mr. Renaud.	2 additional transfers of land are finalized; 2 powers of attorney.		Hector places value of $9,320,000 on un-annexed contested lands.	Ms. Dansereau dies.
BACKGROUND					
NURSING RECORDS			Becomes very anxious and distressed following any family concerns. This lady is a real worrier and anxiety levels affect her blood pressure.		
OTHER EVIDENCE	Transcript of meeting found in Ex. 102.	Transcript of meeting found in Ex. 102.			

APPENDIX C

SOME PRACTICE TIPS IN AN UNDUE INFLUENCE CLAIM

- Undue influence is notoriously difficult to prove. Prepare your client for the difficult road ahead
- Do not allege undue influence unless you have some credible evidence or at least suspicious circumstances
- Preparation is critical; leave no stone unturned. Do not become blinded to the pitfalls of proving undue influence
- Influence *per se* is not undue influence. Bad influence does not necessarily equal coercion
- Witnesses – who saw what, when? Follow up early while memories and observations are fresh. Pursue all sources of information however unlikely
- Ask family members to approach caregivers who may be unwilling to take to counsel
- Disclosure of documents is key – medical, financial and solicitor records, as well as nursing home, social worker, and pharmacist records
- Consider language, emotional, intellectual or cultural barriers facing testator
- Interview the witnesses to the Will
- Retain a medical expert to review medical records and opine on testator's mental and physical health, as well as vulnerability to undue influence (often a key factor)
- Avoid summary judgment motions. Undue influence cases are best explored at trial
- Fully utilize examinations for discovery and non-party examinations
- Conduct a background check on the undue influencer, including a Google, bankruptcy criminal record, asset, and court searches. Hire a private investigator if needed.
- Focus on hallmarks of undue influence, including, but not limited to:
    - Dependency/dominion/trust relationship
    - Isolation or limiting access (increasing overtime)
    - Lies, threats, false promises, overly solicitous
    - Influencer was overly solicitous or overly involved in estate planning
    - Mental and physical health issues and vulnerability to undue influence
    - No legal or moral claims to testator's estate

  - New will departs from pattern of old wills
  - Unusual or large bequests
  - New relationship

- Circumstantial evidence can prove undue influence. Do not become discouraged if direct evidence is not available (the testator is dead and the influencer won't talk)