



BRITISH COLUMBIA LAW INSTITUTE

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PROJECT ON POTENTIAL UNDUE INFLUENCE: RECOMMENDED PRACTICES FOR WILLS PRACTITIONERS

BACKGROUND

INTRODUCTION

The British Columbia Law Institute has begun a project to develop a set of recommended practices for legal practitioners (lawyers and notaries) for:

- (a) better ensuring that the wills they prepare represent a client's genuine independent last wishes, untainted by undue influence exerted by a third person; and
- (b) how to elicit and recognize signs that undue influence is being exerted on a client, or that the potential for undue influence exists because of the client's susceptibility arising from personality characteristics, family and social circumstances, or other reasons.

The end product of this project will be a concise but authoritative instructional publication on the recommended practices for use by notaries and lawyers. While the background information will include a survey of the relevant law, the legal content is not the focus of this project. The focus is instead on sensitizing legal practitioners to "red flags" such as physical, psychological, or economic dependency and the interpersonal dynamics associated with these factors that create room for undue influence to occur.

The project is made possible by a grant from the Notary Foundation.

THE PROJECT COMMITTEE

BCLI has assembled an interdisciplinary Project Committee to carry out this project. The members are:

D. Peter Ramsay, Q.C. – Chair
Barrister and Solicitor,
Partner, Ramsay Lampman Rhodes

Sandra Enticknap
Barrister and Solicitor
Partner, Miller Thomson LLP

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Dr. Martha Donnelly
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Laurie Salvador
Notary Public
Laurie Salvador Notary Corporation

BACKGROUND TO THE PROJECT

The *Wills, Estates and Succession Act* (WESA) was passed by the B.C. Legislative Assembly in 2009 and is expected to come into force in 2011. Section 52 of the WESA makes a change in the law regarding who has the onus of proof when a will or a part of a will is challenged on the ground that it is invalid because of undue influence exerted on the will-maker by another person.

Under the present law, it is always the challenger who must prove that the will or a specific part of the will resulted from undue influence. After section 52 of the WESA comes into force, the onus to prove that a will or the challenged part of a will is not the product of undue influence will be on the defender once it has been shown that the will-maker was dependent on the person who allegedly coerced the will-maker, or if that person was in a position where the potential for dependence or domination of the will-maker was present. This is similar to the rule concerning the onus of proof that applies in cases involving undue influence in relation to gifts made during the donor's lifetime.

Many people who consult lawyers and notaries about making or changing their wills are physically, emotionally, or economically dependent on others. While it has always been the case that legal practitioners taking will instructions should exercise care to ensure that those instructions represent the fully independent wishes of their clients, section 52 of the WESA will require heightened vigilance by them to make sure that the wills they prepare are not tainted by undue influence. This heightened vigilance is only achievable if practitioners are sensitized to the possibility that a client's wishes are being overborne by coercive pressures, and know to take appropriate steps to guard against receiving will instructions that result from undue influence.