

## Undue Influence Recognition / Prevention Guide Update Project

### Backgrounder

BCLI is revising and updating its publication *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* (the “BCLI Guide”).<sup>1</sup> Since it was published in 2011, the BCLI Guide has become one of our most well-received and most frequently cited publications.

The BCLI Guide sets out and explains practices that enable lawyers and notaries to better ensure that the wills they prepare represent their clients’ genuine independent last wishes and can withstand later challenge on the basis of undue influence exerted by a third person. The BCLI Guide tells its readers how to recognize signs (“red flags”) that undue influence is being exerted on a client, or that the potential for undue influence is present due to the client’s personality characteristics, family and social circumstances, or other causes. The contents of the BCLI Guide are intended to assist legal practitioners to interact tactfully but effectively with will-makers to assess whether they are acting independently in giving will instructions or are subject to coercive pressures by a third party in doing so.

### Why the BCLI Guide Is Being Updated

One reason for updating and re-issuing the BCLI Guide is the *Wills, Estates and Succession Amendment Act, 2020*, which makes radical changes in the law of wills in British Columbia.<sup>2</sup> One of the changes concerns the witnessing of will signature. Remote witnessing of will signature by means of audiovisual technology was introduced under emergency orders in March 2020 as a temporary, pandemic-related measure. The *Wills, Estates and Succession Amendment Act, 2020* supplants the emergency orders and makes remote witnessing a permanent option for will-makers and their witnesses.

The other major change introduced by the *Wills, Estates and Succession Amendment Act, 2020* was to make it possible for a valid will to exist in purely electronic form. In other words, it enacted the framework to allow a valid will to be created, signed, and for witness signatures to be affixed using digital technology, without ever being printed on paper. The provisions on electronic wills are based on ones developed by the Uniform Law Conference of Canada, although they were

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<sup>1</sup> British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, Report No. 61 (Vancouver: The Institute, 2011).

<sup>2</sup> S.B.C. 2020, c. 12.

enacted in British Columbia before the Uniform Law Conference formally adopted them. So far, British Columbia is alone among Canadian provinces and territories in having enacted the electronic will provisions into law.

The remote witnessing provisions of the *Wills, Estates and Succession Amendment Act, 2020* were brought into force retroactively to 18 March 2020.<sup>3</sup> The provisions validating electronic wills are in force as of 1 December 2021.<sup>4</sup> It is now possible for wills to be created in British Columbia with a computer, signed by the will-maker and witnesses using digital signatures, and stored as a computer file.

These changes in law obviously alter the conventional paradigm in which the signature and witnessing of a professionally drafted will is typically supervised directly and at close hand by the legal practitioner who drew the will. While the extent to which the new options of remote witnessing and electronic wills will be taken up cannot be predicted reliably in the short term, it is a fair bet that as time passes, the instances in which legal practitioners are able to supervise signature and witnessing of wills they have prepared in the immediate presence of all the players will be fewer.

In keeping with a world in which digital technology is increasingly used in interpersonal dealings, videoconferencing will be more commonly employed not only for overseeing the fulfilment of testamentary formalities, but also for taking will instructions and reviewing drafts with the will-maker. This means that lawyers and notaries must be increasingly attuned to verbal and nonverbal behavioural cues on the part of their clients and those surrounding them that are red flags of potential undue influence, and be skilled in detecting these red flags in virtual as well as in face-to-face settings.

A second reason for updating the BCLI Guide is to reflect developments in case law concerning testamentary undue influence since the original publication was issued in 2011. The BCLI Guide was originally created in anticipation of section 52 of the *Wills, Estates and Succession Act* (WESA) coming into force. Section 52 made a significant change in the law relating to the onus of proof of undue influence affecting a will. That provision was expected to result in wills being challenged on grounds of undue influence more frequently, and also in more challenges succeeding. WESA, including section 52, has been in force since 2014, and it is timely to incorporate coverage of recent case law in the BCLI Guide.

## The Project Committee

The original version of the BCLI Guide was created with the aid of an interdisciplinary committee chaired by D. Peter Ramsay, Q.C., a wills and estates practitioner who was also then Chair of the

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<sup>3</sup>. *Ibid.*, s.13, item 1.

<sup>4</sup>. See Order in Council 541-2021, dated 1 October 2021. This order in council also approves amendments to Part 25 of the *Supreme Court Civil Rules* to facilitate the admission of electronic wills to probate.

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BCLI Board of Directors. This update will also be carried out with the assistance of an interdisciplinary Project Committee. Its members are:

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## Project Timeline

The project is expected to conclude in the fourth quarter of 2022 with the publication of a revised and updated version of the BCLI Guide.

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## About BCLI / CCEL

BCLI was incorporated in 1997 as an independent, not-for-profit society dedicated to modernization and improvement of the law. The Canadian Centre for Elder Law (CCEL) was formed in 2003 as a division of BCLI. The mandate of CCEL includes research, law reform, and outreach relating to legal issues of concern to older adults.


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