

UNDUE INFLUENCE

Recognition & Prevention



A Guide for Legal Practitioners

Undue Influence
Recognition and Prevention
A Guide for Legal Practitioners

Disclaimer

The information and commentary in this publication is not offered as legal advice. It refers only to the law at the time of publication, and the law may have since changed. BCLI does not undertake to continually update or revise each of its publications to reflect post-publication changes in the law.

The British Columbia Law Institute and its division, the Canadian Centre for Elder Law, disclaim any and all responsibility for damage or loss of any nature whatsoever that any person or entity may incur as a result of relying upon information or commentary in this publication.

You should not rely on information in this publication in dealing with an actual legal problem that affects you or anyone else. Instead, you should obtain advice from a qualified legal professional concerning the particular circumstances of your situation.

© 2022 British Columbia Law Institute

The British Columbia Law Institute claims copyright in this publication. You may copy, download, distribute, display, and otherwise deal freely with this publication, but only if you comply with the following conditions:

1. You must acknowledge the source of this publication;
2. You may not modify this publication or any portion of it;
3. You must not use this publication for any commercial purpose without the prior written permission of the British Columbia Law Institute.

Cover design by Alec Regino. Photo by [Romain Dancre](#) on [Unsplash](#)

These materials contain information that has been derived from information originally made available by the Province of British Columbia at: <https://www.bclaws.gov.bc.ca> and this information is being used in accordance with the King's Printer Licence – British Columbia available at: <https://www.bclaws.gov.bc.ca/standards/Licence.html>. They have not, however, been produced in affiliation with, or with the endorsement of, the Province of British Columbia and **THESE MATERIALS ARE NOT AN OFFICIAL VERSION.**

Published in Vancouver on unceded Coast Salish homelands, including the territories of the xwməθkwəyəm (Musqueam), Skwxwú7mesh (Squamish), and SəlilGwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org

WWW: <https://www.bcli.org>

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its purposes are to:

- promote the clarification and simplification of the law and its adaptation to modern social needs,
 - promote improvement of the administration of justice and respect for the rule of law, and
 - promote and carry out scholarly legal research.
-

The members of the Institute are:

Tejas B. V. Madhur (Chair)
Prof. Mark R. Gillen (Treasurer)
Marian K. Brown
Brian B. Dybwad
Dr. Ryan S. Gauthier
Mathew P. Good
Miriam Kresivo, KC
Timothy Outerbridge

Emily L. Clough (Vice-chair)
James S. Deitch (Secretary)
Filip de Sagher
Stacey M. Edzerza Fox
Dr. Toby Susan Goldbach
Julia E. Lawn
Mona Muker
Edward L. Wilson

The members emeritus of the Institute are:

Prof. Joost Blom, KC
Margaret H. Mason, KC

Prof. Robert G. Howell

This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Attorney General for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

INTRODUCTORY NOTE

The original version of this Guide was issued in anticipation of the *Wills, Estates and Succession Act* entering into force and effecting a significant change in the law relating to undue influence. This new and expanded version of the Guide was also prompted by legislative change. The *Wills, Estates and Succession Amendment Act, 2020* has made fully electronic wills and remote witnessing of will execution by means of audiovisual technology a permanent feature of the legal landscape of British Columbia. More recently, enabling legislation was enacted to allow for remote witnessing of enduring powers of attorney and representation agreements to be retained on a permanent basis as well. Apart from these legislative developments, use of computer-based videoconferencing by legal professionals to communicate with clients has become common.

The virtual environment brings new opportunities for exerting undue influence behind the scenes, and a heightened need for vigilance on the part of lawyers and notaries. This new version of the Guide covers elements of good practice and safeguards when communicating with clients by means of videoconferencing technology.

While the original version of the Guide concentrated principally on undue influence affecting wills, this version covers non-testamentary undue influence in greater depth. It also expands the coverage of medical and psychological aspects of susceptibility to undue influence, and suggests ways of conducting respectful and effective intercultural client communication and avoiding cross-cultural miscues.

In the years since the first version appeared, the Guide became one of the most well-used and frequently cited BCLI publications. It met a need for a practical resource that explains undue influence from a factual as well as a legal standpoint and assisted notaries and lawyers to avoid creating estate and personal planning documents vulnerable to challenge on that ground. This revised and expanded version of the Guide will continue to serve those purposes in an era in which greater expectations are placed on legal practitioners to have good intercultural communication skills and many aspects of practice are conducted increasingly in a virtual environment.

A handwritten signature in black ink, appearing to read 'Tejas Madhur', with a long horizontal stroke extending to the right.

Tejas Madhur
Chair,
British Columbia Law Institute
December 2022

Project Committee to Update the Undue Influence Recognition and Prevention Guide

Emily Clough (Chair)
Barrister and Solicitor
Clark Wilson LLP
Vice-Chair, BCLI Board of Directors

Deidre Herbert
Barrister and Solicitor
McLellan Herbert

Morrie Baillie
Notary Public
Salvador Davis

Emma McArthur
Barrister and Solicitor
Johns Southward LLP

Kathleen Cunningham
Barrister and Solicitor

Maryanne Prohl
Director, Risk Management
Lawyers Indemnity Fund

Dr. Peter Chan
Department of Psychiatry
Faculty of Medicine
University of British Columbia

Geoff White, K.C.
Barrister and Solicitor
Clark Wilson LLP

Kevin Coughlin, RSW
Manager, Personal Decision Services
Public Guardian and Trustee

Dr. Michael Wilkins-Ho
Department of Psychiatry
Faculty of Medicine
University of British Columbia

Hilde Deprez
Notary Public
Deprez & Associates

Dr. Zachary Witkower
Postdoctoral Fellow
Department of Psychology
University of Toronto

Patricia Fedewich
Notary Public
Fedewich & Witt

**For more information, visit us on the World Wide Web at:
<https://www.bcli.org>**

Acknowledgements

BCLI extends its thanks to the members of the Project Committee to Update the Undue Influence Recognition and Prevention Guide for providing the benefit of their individual and collective knowledge and experience throughout the preparation of this revised and expanded version of the Guide. A special debt is owed to the Chair of the Project Committee, Emily Clough. We also acknowledge with grateful appreciation the efforts of the first committee that produced the original version of this Guide.

BCLI expresses its gratitude to the Notary Foundation for its generosity in providing the grant that made possible the revision and re-issuance of the Guide. The Notary Foundation also funded the project that generated the original version. BCLI remains appreciative of the support provided by the Notary Foundation for its present and past activities.

As did the original version of the Guide, this new version reflects the contributions of many individuals and organization. BCLI thanks Brian Dybwad (Manager, Indigenous Services, Legal Aid BC and BCLI Board member), Michelle Isaak (DLA Piper), Prof. Leanne ten Brinke (University of British Columbia), and Dr. Zak Witkower (University of Toronto), for sharing their knowledge and insight with the Project Committee and BCLI staff in the course of the project. We also thank Prof. Jessica Tracy (University of British Columbia) for her advice in the early stages of this project and for referring us to colleagues working in areas especially relevant to the subject of this Guide.

BCLI expresses its thanks to all who provided invaluable comments on the consultation draft of this Guide either on their own behalf or on behalf of the organizations indicated here: Lakhshmi Bhagavatula and staff of the Vancouver and Lower Mainland Multicultural Family Services Society, Dr. Carole Cohen, Dwight Dee and Alex Swabuk (STEP Canada), Salina Dewar (Disability Alliance BC), Jennifer Eshleman (CBABC Okanagan Wills and Trusts Section), Dr. Margaret Hall, Ian Hull and Nick Esterbauer (Hull and Hull LLP), Fiona Hunter (Horne Coupar), David Lee and Sandhya Ghai (MOSAIC BC), Clare Marchant (Law Society of British Columbia), Kavina Nagrani, Jennifer Perry and Avery Milne (Alzheimer Society), John Poyser (Tradition Law LLP), Lauri Salvador, Dr. Ken Shulman, Megan Swail and Maryanne Prohl (Lawyers Indemnity Fund), Jodi Lee White and Bénédicte Schoepflin (Canadian Network for the Prevention of Elder Abuse). Their comments were of great assistance to the Project Committee.

BCLI extends its thanks to Dr. Bennett Blum for granting permission to reproduce the IDEAL model of undue influence in this and the previous version of the Guide, and to American Psychiatric Association Publishing for permission to use the diagram that appears on page 22.

BCLI also acknowledges the contribution of the following members of its staff in the project to revise the Guide: Karen Campbell (Executive Director), Gregory G. Blue, K.C., Alison Wilkinson, Sara Pon, Shauna Nicholson, Alec Regino, Simon Owen.

**Undue Influence Recognition and Prevention
A Guide for Legal Practitioners**

TABLE OF CONTENTS

Executive Summary	xi
Chapter 1. Background.....	1
INTRODUCTION	1
LEGAL PRACTITIONERS' RESPONSIBILITY IN RELATION TO UNDUE INFLUENCE	1
Chapter 2. What Is Undue Influence in Law?	5
UNDUE INFLUENCE: THE CONCEPT.....	5
EFFECT OF UNDUE INFLUENCE	6
WHAT AMOUNTS TO UNDUE INFLUENCE?.....	6
<i>Gifts and Other Transactions During Life.....</i>	<i>6</i>
<i>Wills.....</i>	<i>9</i>
PROOF OF UNDUE INFLUENCE	11
<i>Gifts and Other Transactions During Life.....</i>	<i>11</i>
<i>Wills.....</i>	<i>13</i>
<i>Section 52 of the British Columbia Wills, Estates and Succession Act.....</i>	<i>15</i>
Chapter 3. What Is Undue Influence in Fact?	19
HOW UNDUE INFLUENCE WORKS	19
UNDUE INFLUENCE MODELS	20
<i>Thaler Singer / Nievod Model.....</i>	<i>21</i>
<i>Blum IDEAL Model.....</i>	<i>21</i>
<i>Bernatz SCAM Model</i>	<i>21</i>
<i>Brandl / Heisler / Stiegel Model.....</i>	<i>21</i>
COGNITIVE STATUS AND SUSCEPTIBILITY TO UNDUE INFLUENCE	22
SOME UNDUE INFLUENCE SCENARIOS.....	26
<i>"The Officious Supporter"</i>	<i>26</i>
<i>"The Nefarious Caregiver"</i>	<i>29</i>
<i>"The Mercenary Late-Life Partner"</i>	<i>30</i>
Chapter 4. Red Flags of Undue Influence: A Practitioner's Index of Suspicion	33
INTRODUCTION	33
"RED FLAGS"	33
Chapter 5. Recommended Practices in Screening for Potential Undue Influence.....	39
THE BASIC RULE: INTERVIEW THE CLIENT ALONE.....	39
EXPLAIN WHY THE CLIENT MUST BE INTERVIEWED ALONE.....	41
IF RED FLAGS ARE PRESENT, ASK NON-LEADING QUESTIONS TO DETERMINE WHAT FACTORS ARE OPERATING ON CLIENT'S MIND.....	44
EXPLORE WHETHER CLIENT IS IN A RELATIONSHIP OF DEPENDENCY, DOMINATION OR SPECIAL CONFIDENCE OR TRUST.....	49

**Undue Influence Recognition and Prevention
A Guide for Legal Practitioners**

EXPLORE WHETHER CLIENT IS A VICTIM OF ABUSE OR NEGLECT IN OTHER CONTEXTS	51
OBTAIN RELEVANT INFORMATION FROM THIRD PARTIES WHEN POSSIBLE WITH CONSENT	56
OBTAIN CAPACITY ASSESSMENT IF MENTAL CAPACITY IS IN QUESTION	56
COMPILE LIST OF EVENTS INDICATING UNDUE INFLUENCE	59
MAKE AND RETAIN APPROPRIATE RECORDS	60
OBSERVE SPECIAL PRECAUTIONS FOR VIDEOCONFERENCES WITH CLIENTS.....	61
IF CONCERNS ARISE IN A VIDEOCONFERENCE WITH A CLIENT, INSIST ON A FOLLOW-UP MEETING IN PERSON	62
IF CONVINCED DRAFTING INSTRUCTIONS ARE THE PRODUCT OF UNDUE INFLUENCE AFTER REASONABLE INVESTIGATION, DECLINE RETAINER TO DRAFT DOCUMENT	62
List of Recommended Practices	65
APPENDIX: Reference Aid.....	67

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

EXECUTIVE SUMMARY

This revised Guide is intended, like the original version, for the use of notaries and lawyers alike. Its aim is to

- raise awareness of undue influence as a potential cause of litigation and invalidity of a personal planning document;
- assist legal practitioners to recognize red flags of undue influence;
- enable practitioners to interact tactfully but effectively with clients to elicit information necessary for them to properly assess their clients' individual situations and ability to act independently; and
- minimize the risk of the estate and other personal planning documents they prepare being successfully challenged on the basis of undue influence.

Like the original Guide, this new version has been prepared with the assistance of project funding generously provided by the Notary Foundation.

The impetus for the first version of the Guide in 2011 was the prospect of section 52 of the *Wills, Estates and Succession Act* coming into force. Legislative developments have also inspired the publication of this revised version of the Guide. The *Wills, Estates and Succession Amendment Act, 2020* validates remote signature and attestation of wills by means of audiovisual technology and recognizes wills that are entirely in electronic form as legally valid. Amendments to other legislation passed late in 2022 provide authority to make remote witnessing of powers of attorney and representation agreements permanently available as a valid option. While these changes are in keeping with an increasingly digitalized world, they also bring new opportunities for exerting undue influence.

Apart from these legislative changes, use of videoconferencing technology to communicate with clients will outlive the world-wide pandemic and is here to stay. Lawyers and notaries will need to be aware of the limitations that remote communication places on their ability to perceive verbal and nonverbal cues pointing to potential undue influence. They will need to be increasingly attuned to these cues, and acquire skill in detecting red flags of undue influence in virtual as well as in-person settings. This version of the Guide addresses many issues specific to videoconferencing.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

While the original Guide focused primarily on undue influence affecting wills, the treatment of non-testamentary undue influence has been expanded in this revised version. Practitioners encounter undue influence in the preparation of non-testamentary personal planning documents like powers of attorney, representation agreements, and trust documents as well as when taking will instructions. In addition, wills and non-testamentary planning documents are very often prepared and executed concurrently.

Information on medical and psychological aspects of undue influence has been expanded as well in this version with the assistance of collaborators expert in those fields, and in some cases is drawn from their original research.

In November 2019, the Province of BC passed the *Declaration on the Rights of Indigenous Peoples Act* (the “*Declaration Act*”), which commits the provincial government to take all measures necessary to ensure the laws of British Columbia are consistent with the UN Declaration on the Rights of Indigenous Peoples (the “UN Declaration”). This legislative alignment will progress over time. Section 1(4) of the *Declaration Act* requires that the UN Declaration be applied to BC’s laws without delay. BC’s *Interpretation Act* has been amended to confirm that “every Act and regulation must be construed as being consistent with the [UN] Declaration”.

This Guide is focused on supporting legal practitioners within the statutory and common law frameworks that apply as of the date of publication. Legislation and legal practice will continue to develop in light of BC’s commitment to reconciliation through the *Declaration Act*.

The Guide is intended to be useful for all lawyers and notaries in BC, including those assisting Indigenous clients and those who practice within Indigenous communities. It has been developed in consultation with lawyers and organizations who have such experience. However, the Guide does not discuss how Indigenous human rights, laws, or governance may affect how potential undue influence is assessed and addressed in specific contexts. Practitioners should pay attention to these evolving legal issues alongside the intercultural considerations discussed in the Guide.

Chapter 1 of the Guide provides general background. Chapter 2 briefly summarizes the law relating to undue influence, principally as it applies in British Columbia. Chapter 3 explains how undue influence operates as a form of financial abuse, typically within relationships of dependency, confidence, and trust. It presents some scenarios illustrating undue influence in different contexts.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

Chapter 4 lists “red flags” of undue influence that a practitioner should recognize and consider in assessing the possibility that undue influence is in play.

Chapter 5 sets out recommended practices for dealing with undue influence as a legal and practical issue that lawyers and notaries perennially face, and for averting successful undue influence challenges.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

CHAPTER 1. BACKGROUND

Introduction

This Guide is intended for use by notaries and lawyers to assist them in acquiring skills and knowledge to deal with undue influence as both a practical reality and a legal problem in providing professional services relating to personal financial and incapacity planning, wills and estates, and common transactions including gifts, loans and guarantees between family members and acquaintances.

Notaries and lawyers alike are familiar with the requirement of mental capacity to make a gift, will, or contract, and the obligation resting on them to take reasonable steps to be satisfied that a client has the requisite mental capacity when there is any room for doubt. The practitioner's responsibility, however, is not met completely by making that assessment. The practitioner must also be satisfied that the client is able to exercise that capacity *freely*.¹

Legal Practitioners' Responsibility in Relation to Undue Influence

Notaries and lawyers must meet the same standard of care in relation to property-related matters.²

The *Principles for Ethical & Professional Conduct Guideline* of the Society of Notaries Public of British Columbia address indirectly the responsibility of notaries to be alert to undue influence.³ The *Practice Checklist (Will-Maker Interview)* issued by the Law

-
1. *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.).
 2. *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.).
 3. Online at: snpsc.ca/wp-content/uploads/2020/07/Code-of-Ethical-Professional-Conduct.pdf. 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 or donor, and the truly intended beneficiaries or donees.) 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
-

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

Society of British Columbia mentions undue influence expressly as a matter requiring vigilance on the part of lawyers.⁴

While undue influence is often intertwined with the question of 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 client 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 to the will-maker's knowledge and approval of the will's contents.⁵ 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.⁶

Failure on the part of legal practitioners to recognize suspicious circumstances or disregarding them in the preparation of a will has attracted judicial criticism.⁷ Likewise, courts have been critical of failure to ensure that a client is acting independently when obvious cause for concern surrounding undue influence is present.⁸

The impetus for the first version of the Guide in 2011 was the prospect of section 52 of the *Wills, Estates and Succession Act*⁹ coming into force with its implications for

knows or suspects to be false, deceptive, fraudulent, or illegal." A will, deed of gift, power of attorney, or other legal instrument procured by undue influence is false, deceptive, and fraudulent.

4. Paragraph 5.1 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." It also suggests that recommended practices for undue influence screening be followed, and refers to the 2011 version of this Guide. Paragraph 5.2 indicates the questions and responses should be recorded. The *Practice checklist (Will-Maker Interview)* is found online at www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/G-2.pdf.
 5. *Vout v. Hay*, [1995] 2 S.C.R. 876; see also *Jung v. Jung Estate*, 2022 BCSC 1298.
 6. *Murphy v. Lamphier*, *supra*, note 1; *Jung v. Jung Estate*, *supra*, note 5.
 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. *Halliday v. Halliday Estate*, 2019 BCSC 554, at para. 136. See also *Modonese v. Delac*, 2011 BCSC 82 at para. 153; *aff'd* 2011 BCCA 501; *McMaster Estate v. McMaster*, 2021 BCSC 1100.
 9. S.B.C. 2009, c. 13.
-

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

testamentary undue influence. Legislative developments have also inspired the publication of this revised version of the Guide. The *Wills, Estates and Succession Amendment Act, 2020* validates remote signature and attestation of wills by means of audiovisual technology and also allows wills to be entirely in electronic form.¹⁰ Legislation was also passed in late 2022 to allow a procedure for remote signature and witnessing of powers of attorney and representation agreements to be created by regulations that would stay in effect after expiration of the temporary orders that authorized it as a pandemic-related measure.¹¹ While these changes are in keeping with an increasingly digitalized world, they also bring new opportunities for exerting undue influence and require heightened vigilance on the part of legal practitioners.

Apart from these legislative changes, use of computer-based audiovisual technology for all varieties of communication with clients and third parties will outlive the conditions of the world-wide pandemic and is here to stay. Lawyers and notaries will need to be aware of the limitations that remote communication places on their ability to perceive verbal and nonverbal cues pointing to potential undue influence. They will need to be increasingly attuned to these cues, and astute to detect red flags of undue influence in virtual as well as in-person settings. This version of the Guide addresses many points specific to communication with clients and oversight of signing and witnessing formalities by means of videoconferencing.

While the focus of the original version of the Guide was primarily on undue influence affecting wills, this revised Guide deals with undue influence from a more global standpoint and the treatment of *inter vivos* undue influence has been expanded. Practitioners encounter undue influence in connection with non-testamentary matters like powers of attorney, gifts, loans and guarantees as well as in relation to wills and estate planning. In addition, it is common nowadays for a will, enduring power of attorney, and representation agreement to be prepared at the same time for a client. Undue influence may affect the validity of any or all of these standard components of a comprehensive incapacity and estate planning package.

In November 2019, the Province of BC passed the *Declaration on the Rights of Indigenous Peoples Act* (the “*Declaration Act*”),¹² which commits the provincial government to take all measures necessary to ensure the laws of British Columbia are consistent

10. S.B.C. 2021, c. 12.

11. See *Attorney General Statutes Amendment Act (No. 2)*, 2022, S.B.C. 2022, c. 31, ss. 6-8 amending the *Power of Attorney Act*, R.S.B.C. 1996, c. 370 and ss. 16-18 amending the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, in force as of 1 January 2023: B.C. Regs. 278/2002 and 279/2002.

12. S.B.C. 2019, c. 44.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

with the UN Declaration on the Rights of Indigenous Peoples (the “UN Declaration”).¹³ This legislative alignment will progress over time. Section 1(4) of the *Declaration Act* requires that the UN Declaration be applied to BC’s laws without delay. BC’s *Interpretation Act* has been amended to confirm that “every Act and regulation must be construed as being consistent with the [UN] Declaration.”¹⁴

This Guide is focused on supporting legal practitioners within the statutory and common law frameworks that apply as of the date of publication. Legislation and legal practice will continue to develop in light of BC’s commitment to reconciliation through the *Declaration Act*.

The Guide is intended to be useful for all lawyers and notaries in BC, including those assisting Indigenous clients and those who practice within Indigenous communities. It has been developed in consultation with lawyers and organizations who have such experience. However, the Guide does not discuss how Indigenous human rights, laws or governance may affect how potential undue influence is assessed and addressed in specific contexts. Practitioners should pay attention to these evolving legal issues alongside the intercultural considerations discussed in the Guide.

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
- minimize the risk of the personal and estate planning documents they prepare being successfully challenged on the basis of undue influence.

13. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [“UN Declaration”].

14. *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.1(3).

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

CHAPTER 2. WHAT IS UNDUE INFLUENCE IN LAW?

Undue Influence: The Concept

Undue influence consists of imposing pressure or some form of subterfuge that causes a person to perform a legally significant act, such as making a gift, a will, or granting a power of attorney, that does not reflect the genuine wishes or intentions of that person, but rather those of the influencer.

Undue influence goes beyond mere persuasion.¹⁵ It is the imposition of the influencer's wishes on another person or the procurement of an act by the other person desired by the influencer, such that the other person is not acting freely in performing the act that the influencer desires.¹⁶ Direct or immediate benefit to the influencer is not essential. It is sufficient if the influence improperly exerted results in the act desired by the influencer being carried out.¹⁷

15. *Daniel v. Drew*, [2005] EWCA Civ 507, at para. 36. In *Ravnyshyn v. Drys*, 2005 BCSC 561, Warren, J. stated the following at para. 104 in relation to testamentary undue influence:

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.

16. In *Longmuir v. Holland*, 2000 BCCA 538 at para. 71, Southin, J.A. described undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not...her own act."

17. *Re Marsh Estate* (1990), 99 N.S.R. (2d) 221 at 230 (Prob. Ct.). In the context of will-making, undue influence is described in the leading Canadian text as having occurred when "the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will." James A. McKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: LexisNexis Canada, 2000) at section 3.5.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

For historical reasons, there are some differences between the principles applicable to undue influence in relation to wills (testamentary undue influence) and those applicable to undue influence affecting gifts and other transactions occurring during life (*inter vivos* undue influence).

Inter vivos undue influence is more easily proven than testamentary undue influence, but also creates an immediate risk to the victim's financial security and well-being in a way that undue influence surrounding a will does not.¹⁸ Practitioners should be especially vigilant to protect their clients against undue influence surrounding an *inter vivos* transaction or document.

Effect of Undue Influence

In the case of a transaction occurring during life that is tainted with undue influence, including a gift or other property transfer, or the grant of a power of attorney, the transaction is voidable at the option of the donor or transferor (referred to below for brevity as the “donor”).¹⁹

A will or a provision of a will that is the result of undue influence is void.²⁰ Probate will be refused, either of the entire will or of the part that is tainted by undue influence.

What Amounts to Undue Influence?

GIFTS AND OTHER TRANSACTIONS DURING LIFE

In order for a gift or other transaction during life to be legally valid, it must be the product of “full, free and informed thought” on the part of the donor.²¹ A transaction may be set aside on the basis of *inter vivos* (equitable) undue influence if it is procured

18. John Poyser, *Capacity and Undue Influence*, 2nd ed. (Toronto: Carswell, 2019) at 828.

19. *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 186-187; *Longmuir v. Holland*, 2000 BCCA 538 at para. 75, 81 B.C.L.R. (3d) 99 at 125 (C.A.).

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

21. *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Thompson v. Lougheed*, 2004 BCSC 191 at paras. 173-174, 186-187; *Young v. Veselic*, 2022 BCSC 697. See also Poyser, *supra*, note 18 at 542. The test of “full, free and informed thought” applies to a grant of a power of attorney: *Rudin-Brown v. Brown*, 2021 ONSC 3366, at para. 157.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

by means that prevent or interfere with the free will and independent judgment of the donor or transferor.²²

Inter vivos undue influence has two aspects. The first consists of conduct on the part of an influencer that improperly interferes with or prevents the exercise of independent decision-making on the part of the victim. In the leading case *Allcard v. Skinner*, it was said that to set aside a gift there must be “some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating.”²³ Much more recently the House of Lords described the nature of the conduct that will justify setting aside a transaction on the ground of undue influence in *Royal Bank of Scotland Plc v. Etridge (No. 2)*:

If the intention [to enter into the transaction] was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.²⁴

Undue influence can range anywhere from outright coercion to deceit, manipulation through fear,²⁵ or wearing down a vulnerable victim by importuning or deliberate supply of misinformation over a period of time.²⁶ The range of conduct that amounts to undue influence in relation to transactions during life has been said to be “broader and more amorphous” than that needed to set aside a will.²⁷

The second aspect of *inter vivos* undue influence concerns relationships between a donor from which a rebuttable presumption of undue influence arises. If the donor was in a relationship with the person benefited in which the donor was dependent

22. *Bradley v. Crittenden*, [1932] S.C.R. 552 at 557. See also *Royal Bank of Scotland Plc v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 (H.L.) at para. 7; Poyser, *supra*, note 18 at 524.

23. *Supra*, note 19, per Lindley, L.J. at 181.

24. [2001] UKHL 44, [2002] 2 A.C. 773 at para. 7.

25. *Daniel v. Drew*, [2005] EWCA Civ 507.

26. *Sandberg v. Sandberg Estate* (1986), 50 Sask. R. 27 (Q.B.); *aff'd* (1988), 66 Sask. R. 95 (C.A.).

27. Poyser, *supra*, note 18 at 543.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

upon that 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.²⁸

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.²⁹

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 or other transaction set aside on that ground, the defender of the gift must rebut the presumption by proving that the donor acted freely.

The grant of a power of attorney creates a fiduciary relationship between the donor and the attorney, but it appears that this alone does not create a relationship from which the presumption of undue influence will invariably arise.³⁰ The presumption does arise, however, if the power of attorney is used to benefit the attorney.

Undue influence applies to contracts as it does to other *inter vivos* transactions.³¹ If undue influence is alleged in relation to a commercial transaction, such as a loan or guarantee, the challenger may need to show a “manifest disadvantage” before the presumption arises. This is not settled, however.³²

28. *Geffen v. Goodman Estate*, *supra*, note 21.

29. *Ibid.*

30. *Shkuratoff v. Shkuratoff*, 2007 BCSC 1061, at para. 56; *Elder Estate v. Bradshaw*, 2015 BCSC 1266, at para. 108. See also *Re Coomber*, [1911] 1 Ch. 723 (C.A.) at 728-729.

31. *McKay v. Clow*, [1941] S.C.R. 643 at 664; G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 312. Undue influence will often be pleaded together with duress, a related but separate common law doctrine, as an alternate ground for setting aside a contract

32. *Geffen v. Goodman Estate*, *supra*, note 21, per Wilson, J. at 378. The Supreme Court of Canada was divided on this point in *Geffen v. Goodman Estate*, with the majority of judges holding it unnecessary to consider the point in that case. But see *Gauthier v. Gauthier*, 2017 MBQB 116, at paras. 225-227, where Wilson, J.'s comments on the necessity of manifest disadvantage to overturn a commercial transaction were accepted.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

WILLS

Undue influence in relation to wills has traditionally been described in terms of “coercion.”³³ The following statement in *Leung v. Chang*³⁴ of what is required to set aside a will or a provision of a will because of undue influence has been treated as authoritative in recent British Columbia decisions:

In order to invalidate a will on the grounds of undue influence, the asserting party must prove that the influence exerted against the will-maker amounted to coercion, such that the will did not reflect the true intentions of a free will-maker and was not the product of the will-maker’s own act. The undue influence must constitute coercion which could not be resisted by the will-maker and which destroyed his or her free agency. It is well-established on the authorities that if the will-maker remains able to act freely, the exercise of significant advice or persuasion on the will-maker or an attempt to appeal to the will-maker or the mere desire of the will-maker to gratify the wishes of another, will not amount to undue influence....[Citations omitted]³⁵

What may amount to coercion in a particular case may vary, depending on the vulnerability of the will-maker to pressure.³⁶ 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.³⁷

33. *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:

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.

34. 2013 BCSC 976.

35. *Ibid.*, per Dardi, J. at para. 35. See also *Halliday v. Halliday Estate*, 2019 BCSC 554, at para. 201; *Allart Estate v. Allart*, 2014 BCSC 2211, at para. 36; *Royal Trust Corporation of Canada v. Huff*, 2021 BCSC 1400, at para. 11 [quoting from *Halliday*].

36. Poyser, *supra*, note 18 at 346.

37. *Wingrove v. Wingrove*, *supra*, note 33. Early authorities recognized that various forms of coercive pressure were capable of amounting to undue influence. While *Boyse v. Rossborough*, *supra*, note 33, 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

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Manipulation through fear may also suffice for undue influence in a susceptible victim. 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 ground that it was 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.³⁸ 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 decision of the Court of Appeal illustrates the variable nature of coercion that can amount to undue influence. In *Hix v. Ewachniuk*, 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."³⁹

In other words, direct threats or terrorization of the will-maker are not essential if the will-maker is susceptible to psychological pressure that exploits some source of vulnerability of the will-maker. 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.⁴⁰

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.

38. 2006 BCCA 38.

39. 2010 BCCA 317 at para. 13.

40. *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 935, at para. 133.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

Fraud is an additional form of testamentary undue influence. A common form of testamentary fraud amounting to undue influence is what has sometimes been referred to as “fraudulent calumny.” This consists of feeding falsehoods to the will-maker about a relative or other potential beneficiary in order to poison the will-maker’s mind against that individual and cause the exclusion of the individual who is the subject of the calumny from sharing in the will-maker’s estate.⁴¹ Causing a will-maker to believe in a false set of facts that leads to a will containing terms that it would not have contained if the will-maker had not been misled allows a court to declare the will or the affected terms void.⁴²

Proof of Undue Influence

GIFTS AND OTHER TRANSACTIONS 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 party seeking to have the gift or other transaction set aside has the onus to prove that it was made or entered into as a result of undue influence.

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, including any of the specific relationships in which the potential for undue influence is deemed to be inherent, a presumption of undue influence arises which the defender of the gift must rebut.⁴³

The following list in *Stewart v. McLean*⁴⁴ of the ways in which the presumption of undue influence may be rebutted has been frequently cited:

41. Examples are *Anderson v. Walkey*, [1961] O.R. 289 (C.A.); *Re Timlick Estate* (1965), 53 W.W.R. 87 (B.C.S.C.).

42. *Boyse v. Rossborough*, *supra*, note 33 at 1212 (cited to E.R.).

43. *Geffen v. Goodman Estate*, *supra*, note 21.

44. 2010 BCSC 64. See also *Cowper-Smith v. Morgan*, 2016 BCCA 200, rev’d on other grounds 2017 SCC 61; *Pinsonneault v. Courtney*, 2022 BCSC 120.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

- no actual influence was used in the particular transaction or there was a lack of opportunity to influence the donor;
- the donor is shown to have had independent advice or the opportunity to obtain independent advice;
- the donor had the ability to resist any such influence;
- the donor knew and appreciated what she was doing; or
- undue delay in prosecuting the claim, acquiescence or confirmation by the deceased is shown.⁴⁵

The British Columbia Court of Appeal referred to this list with approval in *Cowper-Smith v. Morgan*.⁴⁶

If the donor had independent legal advice before making the gift, this may go a long way towards rebutting the presumption. It is not decisive, however.⁴⁷ The court will examine the circumstances of each case closely to determine whether the donor acted freely.⁴⁸ This may include an assessment of the adequacy of the legal advice and whether it was truly independent.⁴⁹ In order to rebut a presumption of undue influence, legal advice generally must be “informed advice” going to the merits of the transaction, not merely its nature.⁵⁰

45. *Ibid.*, at para. 97.

46. 2016 BCCA 200, at paras. 50-51; rev'd in part on other grounds 2017 SCC 61.

47. *Black Estate v. Todd*, 1990 CanLII 2177 (B.C.S.C.)

48. *Geffen v. Goodman Estate*, *supra*, note 21.

49. In *Cowper-Smith v. Morgan*, *supra*, note 44 at paras. 51-53 and 65-66 (B.C.C.A.), the Court of Appeal held that legal advice given to the donor was inadequate to rebut the presumption of undue influence in that case because the lawyers took initial instructions from the influencer, and did not give “informed advice” on the merits of the transaction (a transfer of property into joint tenancy with the influencer). See also *Halliday v. Halliday Estate*, 2019 BCSC 554, a case of undue influence involving a will in which the involvement of a lawyer in the preparation and execution of a will was irrelevant because the lawyer took no steps to determine that the will-maker had testamentary capacity or was acting free of coercion despite abundant red flags pointing to the contrary.

50. *Cowper-Smith v. Morgan*, *supra*, note 44, at para. 53; *Cope v. Hill*, 2005 ABQB 625 at paras. 210-215; aff'd 2007 ABCA 32.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

WILLS

The basic rule concerning the onus of proof in undue influence is that it rests on the challenger to prove undue influence on the balance of probabilities.⁵¹

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 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 the significance of signing a will and intends it to have effect, but this does not necessarily mean the will-maker 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 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.⁵²

The challenger must prove that undue influence was actually exercised. Apart from the circumstances to which section 52 of the *Wills, Estates and Succession Act*⁵³ now applies in British Columbia, it is insufficient to prove merely that the alleged influencer had the opportunity to influence the will-maker and the will favours the influencer.⁵⁴

The difficulty traditionally associated with a challenge to a will based on undue influence is illustrated by the facts of the leading case in Canada on testamentary undue

51. *Vout v. Hay*, *supra*, note 5; *Scott v. Cousins*, *supra*, note 40.

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

53. S.B.C. 2009, c. 13. See below in this chapter under the heading "Section 52 of the British Columbia *Wills, Estates and Succession Act*."

54. *Maddess v. Racz*, 2008 BCSC 1550, at para. 324, *aff'd* (*sub nom. Maddess v. Estate of Johanne Gidney*) 2009 BCCA 539; *Peterson v. Welwood*, 2018 BCSC 1379; *Allart Estate v. Allart*, 2014 BCSC 2211.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

influence, *Vout v. Hay*.⁵⁵ 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 uphill battle facing the challenger, it is possible to prove undue influence affected a will or a provision in a will on the basis of circumstantial evidence.⁵⁶ 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 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 his siblings, the British Columbia Court of Appeal upheld the inference made by the trial judge from these circumstances that the will resulted from undue influence.⁵⁷

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.⁵⁸

55. *Supra*, note 5.

56. *Hix v. Ewachniuk*, *supra*, note 39 at para. 13; *Elder Estate v. Bradshaw*, 2015 BCSC 1266 at paras 89-90. See also *Scott v. Cousins*, *supra*, note 40 at para. 115; *De Araujo v. Neto*, 2001 BCSC 935 at para. 132. See also Poyser, *supra*, note 18 at 342.

57. *Hix v. Ewachniuk*, *supra*, note 39.

58. *Scott v. Cousins*, *supra*, note 40 at para. 114; *Halliday v. Halliday Estate*, *supra*, note 49.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

SECTION 52 OF THE BRITISH COLUMBIA *WILLS, ESTATES AND SUCCESSION ACT*

In British Columbia, section 52 of the *Wills, Estates and Succession Act*⁵⁹ now eases the difficulty of proving testamentary undue influence in cases where the challenger is able to prove that a relationship of dependence or potential domination subsisted between the alleged influencer and the will-maker. Section 52 states:

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 akin to the operation of the presumption of undue influence that assists the challenger of a non-testamentary gift or other transaction when a relationship is shown to have existed between the alleged influencer and the donor in which the potential for domination of the donor was present.

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 common law rule that places the onus throughout on the challenger of a will or a will provision to strictly prove undue influence would apply instead. Section 52 is also inapplicable if the will-maker died before the section came into force on 31 March 2014.⁶⁰

59. *Supra*, note 53.

60. *Ibid.*, s. 186(1); B.C. Reg. 148/13.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

While there are few decisions applying section 52 as yet, the early cases contain indications that British Columbia courts view the section as a statutory analogue to the equitable presumption of undue influence in non-testamentary cases.

In *Kerfoot v. Richter*,⁶¹ the Court of Appeal agreed with the appellant's submission that section 52 creates a presumption of undue influence, and held that a triable issue concerning the presumption was raised by a combination of pleaded allegations and circumstantial evidence. The allegations concerned dependence of the will-maker on the alleged influencers. The circumstantial evidence related to the will-maker's advanced age and declining health, the fact that the alleged influencers had knowledge of the will prior to the will-maker's death, and a pronounced difference between the challenged will and earlier wills.

In *Halliday v. Halliday*,⁶² the court described the effect of section 52 as creating a presumption of undue influence that aids the attacker of a will once it is established that the will-maker was in a position where the potential for dependence or domination was present. The court appeared to rely on section 52 in holding two successive wills void for undue influence, without stating so expressly. Having referred to the relationship between the will-maker and his second wife as one in which there was a potential for dependence or domination, the court found itself unable to conclude that the wills were executed "in the absence of undue influence."

In *Young v. Veselic*,⁶³ a case in which both the equitable presumption and section 52 were in issue and found applicable, the court applied the same principles to find that the defendant had successfully met the onus cast on him by section 52 as it did in finding he had rebutted the equitable presumption of undue influence in relation to a land transfer made by the will-maker in her lifetime.

The defendant was also found to have rebutted the presumption of undue influence under section 52 in *Jung v. Jung Estate*,⁶⁴ although the will was held invalid for lack of testamentary capacity. The court found that the will-maker was dependent on her sons and had a passive personality. The defendant, one of two sons of the will-maker, induced a rift between the will-maker and her other son. He arranged for a lawyer to draft a new will for his mother, provided information to the lawyer about what his

61. 2018 BCCA 238.

62. 2019 BCSC 554.

63. 2022 BCSC 697.

64. 2022 BCSC 1298.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

mother's will instructions would be and the values of her assets, and insisted that the retainer of the lawyer and the new estate planning had to be concealed from his brother. The lawyer later met in private with the will-maker to receive instructions, and a medical assessment of her mental capacity was obtained. The defendant had wanted to observe both events, but did not object when told he could not be present. The will gave the will-maker's house to the defendant and the residue of the estate to his brother, which in effect disinherited the brother. It replaced an earlier will dividing the estate between the will-maker's two sons equally.

The court had no hesitation in holding that the presumption of undue influence under section 52 arose on these facts, but concluded it was rebutted on the totality of the evidence, which included the defendant's willingness to accept that the lawyer's meetings with the will-maker and a medical assessment of her mental capacity had to take place in his absence, and his denial that he had asked for any change in the earlier will.

If section 52 creates an easier path to success in challenges to wills based on undue influence in British Columbia, it is not unreasonable to think that they will be made more frequently. 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 the drafter's communications with the will-maker, and to produce the file relating to the genesis of the will.⁶⁵ For these reasons, it is important 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.

65. *Stewart v. Walker* (1903), 6 O.L.R. 495 at 497-498 (S.C., App. Div.); *Re Ott*, [1972] 2 O.R. 5 (Surr. Ct.); *Armstrong v. Kotanko*, 2019 BCSC 1519, at para. 27. See also Sidney Lederman, Alan W. Bryant and Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014) at 965-966. In *Re Samji & Associates Holdings, Inc.*, 2012 BCSC 284 the court expressly assumed that solicitor-client privilege extends to notaries without deciding the point. In light of this, the exception to the privilege arising in litigation surrounding the validity of a will should be assumed to apply to notaries as well unless and until there is a judicial decision otherwise.

CHAPTER 3. WHAT IS UNDUE INFLUENCE IN FACT?

How Undue Influence Works

Undue influence is a form of financial abuse as well as a legal doctrine. Typically, undue influence operates in one or more of these ways:

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

Persons of any age may become victims of undue influence.⁶⁶ Susceptibility can be increased by illness, disability, impaired mental function, financial insecurity, and combinations of these.

Frequently, however, the victim will be an older person. Older people who may experience cognitive decline, difficulties with mobility, impaired vision or hearing, or major changes in life circumstances such as the loss of a spouse may be at an increased risk of undue influence.⁶⁷ They may also require assistance with various aspects of living, which can lead to dependency. This, coupled with misplaced or excessive gratitude, can play into an influencer's hands and heighten the level of psychological control the influencer is able to exert over the victim.

66. "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 Ann Soden, ed., *Advising the Older Adult* (Markham: LexisNexis Canada, 2005) at 341.

67. Mary Joy Quinn, "Undue Influence and Elder Abuse: Recognition and Intervention Strategies," (2002), 23 *Geriatric Nursing* 11 at 13.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Impaired mental function in particular can increase the susceptibility of individuals to pressure and manipulation.⁶⁸ Impaired mental function can result from many causes including injury, dementia, 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 victim 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 victim from normal surroundings or limiting the victim's movements. The influencer may attempt to justify these actions on the pretext that they are done for the victim's welfare or safety.⁶⁹ Isolation may also be social, produced by such tactics as restricting interpersonal contacts, intercepting the victim's telephone calls, or withholding mail.⁷⁰ 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.⁷¹ 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:

68. 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 336-337.

69. Quinn, *supra*, note 67.

70. *Ibid.*

71. ABA Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacities: Handbook for Lawyers*, 2nd ed. (2021) at 26-27.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

THALER SINGER / NIEVOD MODEL⁷²

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

BLUM IDEAL MODEL⁷³

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

BERNATZ SCAM MODEL⁷⁴

- Susceptibility
- Confidential Relationship
- Active Procurement
- Monetary Loss

BRANDL / HEISLER / STIEGEL MODEL⁷⁵

Goal: Financial exploitation

72. 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.

73. Bennett Blum, online: [Undue Influence Models - IDEAL \(bennettblummd.com\)](http://bennettblummd.com) The IDEAL Model is reproduced by permission.

74. Susan I. Bernatz & Temperance Evans, "Financial abuse" in Elizabeth A. Capezuti, Eugenia A. Siegler & 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.

75. Bonnie Brandl, Candace J. Heisler & 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.

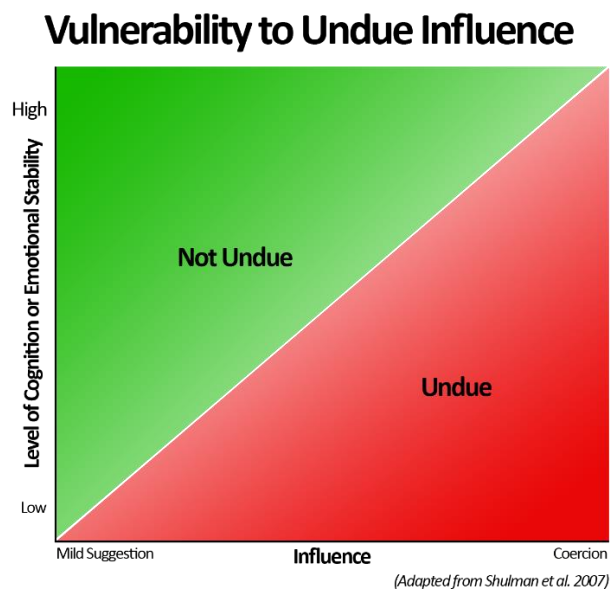
Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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

Cognitive Status and Susceptibility to Undue Influence

The presence of cognitive impairment greatly increases the potential for undue influence to occur. Those living with cognitive impairment are considered one of the most vulnerable groups to be unduly influenced and exploited, particularly in seniors with additional physical vulnerabilities. The diagram below illustrates the relationship between impaired cognitive capacity and susceptibility to undue influence.⁷⁶



Reprinted with permission from American Journal of Psychiatry, (Copyright © 2007) American Psychiatric Association. All Rights Reserved.

76. Adapted from Kenneth I. Shulman *et al.*, “Assessment of Testamentary Capacity and Vulnerability to Undue Influence” (2007) 164:5 Am. J. Psychiatry 722 at 725, Figure 2.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

For those suffering from dementia (defined also as Major Neurocognitive Disorder)⁷⁷ or mild cognitive impairment (defined also as Mild Neurocognitive Disorder),⁷⁸ the mental functions affected will depend on the brain region afflicted with the disease. By definition, those diagnosed with mild cognitive impairment (MCI) do not experience a significant functional decline in their day-to-day living, such as those who suffer from dementia, but they can still exhibit impaired decision-making capacity surrounding financial affairs.⁷⁹

Specific forms of dementia can affect testamentary capacity differentially. For instance, the most common form, dementia due to Alzheimer's Disease, most commonly affects memory function early on but can also affect language, comprehension, and critical thinking. Conversely, there are some forms of dementia (e.g.: Lewy Body Dementia, Fronto-temporal Dementia) that relatively spare memory functions but instead can affect "executive" functions of the brain, such as motivation, critical thinking surrounding contextual factors in decision-making, judgement, impulse control and insight into one's own limitations, or can affect the appraisal of others in a social context (social cognition).⁸⁰ Thus, it may well be that clients with dementia can seemingly demonstrate good recall of their state of affairs and have a good fund of knowledge about their history, but may in fact lack testamentary capacity or be highly vulnerable to undue influence.

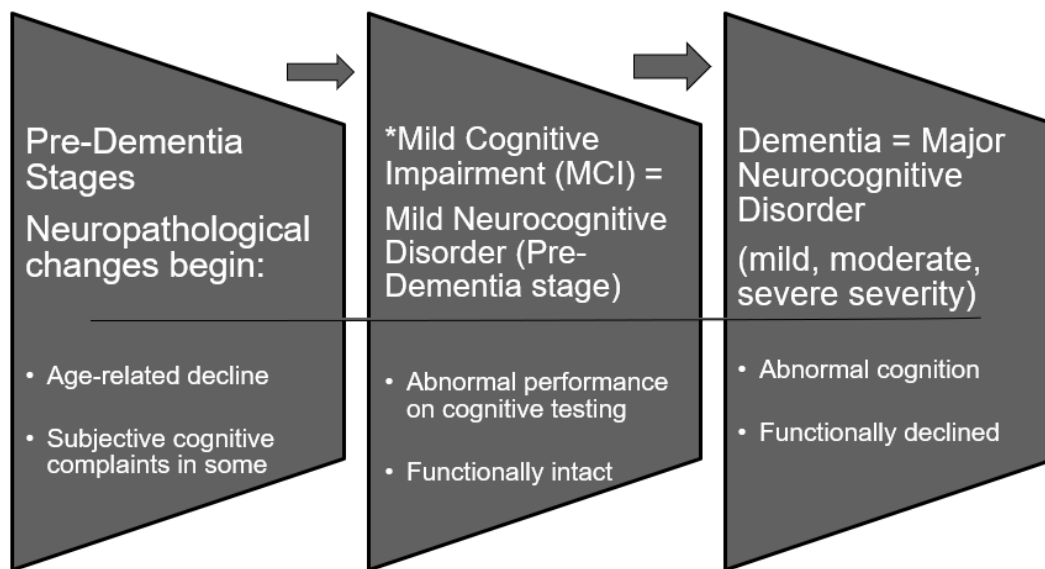
77. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington, D.C.: American Psychiatric Association Publishing, 2022) (DSM-5-TR).

78. *Ibid.*

79. Roy C. Martin et al., "Declining Financial Capacity in Mild Cognitive Impairment: A Six-Year Longitudinal Study" (2019) 34 *Archives of Clinical Neuropsychology* 152 at 158; Anca Bejenaru & James M. Ellison, "Medicolegal implications of Mild Neurocognitive Disorder" (2021) 34:6 *Journal of Geriatric Psychiatry and Neurology* 513 at 520.

80. Kelly Purser & Jane Lonie, "Mapping dementia and cognitive decline in testamentary capacity" (2019) 66 *Int. J. Law and Psychiatry* 101450 at 6-7.

Alzheimer's-type Dementia: Disease Progression Over Several Decades



*MCI has a 10-15% annual rate of progression to Dementia

© Peter Chan MD 2022. Reproduced with permission.

The following table illustrates some of the cognitive domains that can be affected by dementia (one or multiple domains can be affected), their potential impact on testamentary capacity as traditionally defined by *Banks v. Goodfellow*⁸¹ criteria, or susceptibility to undue influence:

81. (1870), L.R. 5 Q.B. 549 at 565. This is the classic statement by Cockburn, C.J. in *Banks v. Goodfellow* on the requirements of the mental capacity required to make a will:

“It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

Undue Influence Recognition and Prevention
A Guide for Legal Practitioners

Cognitive Domains	Memory	Executive Function	Language	Social Cognition	Reality Testing
Mental Function Impairment	Short-term memory loss (early) with long-term memory loss (later)	Poor Insight or Judgement, Impulsivity, Loss of critical appraisal, Amotivation	Loss of ability to understand communication and/or expressing oneself clearly	Underrecognizing the emotions and motivations of others or social cues	Fixed, false, firmly-held beliefs
Testamentary Capacity (<i>Banks v Goodfellow</i> criteria)	Cannot recall what a will is, their assets, or rightful beneficiaries	Poor understanding of wills or reasoning around division of assets	Inability to articulate wishes or reasoning around division of assets	Misconceiving intentions and attitudes of natural heirs	Delusion of the mind
Susceptibility to Undue Influence	Cannot recall past decisions around existing wills or conversations with beneficiaries	Poor judgment leading to favouring the influencer over others; Apathy	Reliance on the influencer to communicate on their behalf	Lack ability to appraise the motivation of the influencer.	Paranoia with vulnerability to misinformation provided by the influencer

© Peter Chan MD 2022. Reproduced with permission.

The legal concept of a “lucid interval” describes a period in which testamentary capacity is temporarily restored in those who are otherwise rendered incapable from a clouding of their mental function. This is most commonly described in those with delirium.⁸² From a medical standpoint, those suffering with dementia can seem to have “good” days and “bad” days. These fluctuations are more prevalent in certain forms of dementia (*e.g.*: Lewy Body Dementia, Vascular Dementia) compared to others (*e.g.*: Alzheimer’s Disease).⁸³ However, the fluctuation occurs mainly in attention, rather than in more complex cognitive domains such as memory and executive function, so that a “lucid interval” is extremely unlikely to occur to the point of restoring

82. Benjamin Liptzin, Carmelle Peisah, & Sanford Finkel, “Testamentary capacity and delirium” (2010) 22:6 International Psychogeriatrics 950 at 951.

83. Kenneth I. Shulman *et al.*, “Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity” (2015) 43 J. Am. Acad. Psychiatry Law 287.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

testamentary capacity.⁸⁴ Similarly, it is highly unlikely that a “lucid interval” would render those suffering from dementia less susceptible to undue influence.

Some Undue Influence Scenarios

“THE OFFICIOUS SUPPORTER”

Son A calls a notary’s office to make an appointment for his mother M to make changes to her will and power of attorney. M is an existing client of the firm. Son A tells the notary’s office that the appointment will have to be by videoconference, because M has just been discharged from the hospital and it would be too strenuous for her to make the trip to the notary’s office.

The notary knows that Son B is M’s executor under a will that divides M’s estate equally between her three sons, as the notary previously drafted the will. Son B is also M’s attorney under a power of attorney that the notary prepared. The notary asks Son A why he instead of Son B is contacting her on M’s behalf. Son A replies that it is because Son B lives further away and he, Son A, has been looking after M most of the time since she was discharged from the hospital.

With some misgivings, the notary agrees to the video meeting because she is aware that M lives in a semi-rural area, her physical condition is frail, and she has limited mobility. The notary tells Son A on the telephone that she needs to meet with M alone to receive instructions, so she and M must be the only participants in the meeting. No one else can be present. After the notary says this to Son A, there are several seconds of silence before he says “OK.”

On the day of the appointment, 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 that Son C, an alcoholic who “borrowed” substantial funds from his parents over the years without repayment, has been pressuring M to move into a suite he plans to build in his North Vancouver home, ostensibly to care for her. Son B is certain that Son C’s intention, however, is that M will pay rent to cover his mortgage. Son B also warns that Son C, like son A, is also vying to get an enduring power of attorney over M’s financial affairs.

When the video meeting starts, M appears on the notary’s screen. The notary asks M to turn the camera around the room so she can verify that no one else is there. Son A is revealed to be in the room. The notary asks Son A to leave and reminds him that

84. *Ibid.*, at 291.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

the meeting will not go ahead unless she can interview M alone. Son A replies that M needs him to be present to assist her with handling the computer and the video software. He also says the internet connection isn't always stable where they are and he needs to be there to deal with any technical problems. If there is a disconnection, M doesn't have enough skill with computers and video software to get back into contact. Son A maintains that his mother wants him there for this reason, and to help her deal with "important stuff like this." M remains silent during this exchange.

The notary insists that Son A leave so that she can interview M in private. She adds that if something goes wrong technically during the interview and M cannot manage to deal with the technical issue herself, the interview will have to resume on another day. After some argument back and forth, Son A concedes and leaves the room, but is clearly frustrated and angry.

In the interview, M confides to the notary that Son A wants her to revoke her current will and power of attorney, make him her executor and give him power of attorney. He also wants her to eliminate Son B from the will because he says Son B is financially independent and has too much control over M's affairs now. Son A has been nagging her about this since she was discharged from the hospital. M also tells the notary what she already knows about Son A and Son C from the information Son B provided on the telephone.

M says she is too exhausted to argue with son A. She wants son A to stop nagging her. She says she does not want to give in to the demands of either Son A or Son C, but feels she has no choice, since they will not leave her in peace to recover otherwise.

As this is being said, the video program starts to freeze repeatedly. The notary tells M that it appears the internet connection is unreliable, and it is unwise to try to continue this meeting or to meet again virtually. Instead, a meeting in person at the notary's office will have to be arranged. The notary encourages M to contact the office to make the appointment for the in-person meeting herself when she feels stronger, rather than having one of the sons do so. The notary asks M not to speak with her sons about this day's meeting in the meantime.

Points to Note:

- Supporter arranges the appointment
- Officious, controlling attitude of supporter

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

- Vulnerability of client due to poor health and dependence on 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
- Practitioner should ask to speak with client directly at the outset to arrange appointment
- Instructions should not be taken when client is clearly under duress
- Consider suggesting postponement of estate and personal planning decisions if client is especially susceptible to manipulation due to factors such as recent illness, bereavement, or other emotional shock
- Notes should be made of incidents, communications and information pointing towards undue influence
- Video meeting with client should be in one continuous session, as interruptions provide opportunity for interference by influencer
- Anyone assisting a client with computer and videoconference technology in setting up a video meeting should be completely disinterested and should be out of earshot while the practitioner and client are conferring
- In-person communications with client in complete privacy are essential when undue influence present or suspected
- In-person meeting with client essential if internet connection is unreliable or other technical problems arise in conducting remote communications

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

“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 an enduring 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 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 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.

Points to Note:

- Isolation of victim from relatives and other contacts
- Exploitation of relationship of trust
- Dependence on influencer

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

- Exploitation of vulnerabilities (poor eyesight, declining mental capacity)
- Possible breach of section 20(1) of the *Power of Attorney Act* in exceeding limit on size of transfers by an attorney to make gifts from donor's assets

Practice Points:

- Presumption of undue influence arising from use of power of attorney to benefit the attorney

Other 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 by *inter vivos* transfers to attorney and 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.

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, to interact with Jack, and be attentive to him. She would tell Jack constantly that his family did not care about him and that

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

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

Practice Points:

Possible indicators (red flags) of undue influence:

Undue Influence Recognition and Prevention
A Guide for Legal Practitioners

- Drastic departure from distribution under earlier will
- Unusual distribution: preference of stepchildren over immediate family
- Need for evaluation of cognitive status and testamentary capacity

CHAPTER 4. RED FLAGS OF UNDUE INFLUENCE: A PRACTITIONER'S INDEX OF SUSPICION

Introduction

The listing of risk factors or “red flags” in this chapter is intended to assist practitioners in assessing the likelihood of undue influence when taking instructions for a will or other personal planning document from a client.

Information in this and the following chapter has been prepared with the assistance of consultants in the fields of medicine and psychology, and portions of it are based partly on research conducted by them.

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 client invests significant trust and confidence is - or is connected to - a beneficiary

- Someone having a confidential or fiduciary relationship with client, such as that of a lawyer, doctor, member of clergy, financial advisor, or accountant.
- A formal or informal caregiver, or a health care provider.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

- 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 client is actually pursuing the client for material benefit, and may or may not become a de facto partner or spouse. Such a “suitor” is usually significantly younger than the client and cognitively intact.

Physical, psychological and cultural characteristics of the client

- Physical factors that may make the client 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, dehydration, poor hygiene or grooming, 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 person may be suffering from a condition that typically results in impaired mental function, which in turn can cause someone to be more vulnerable to undue influence:

- The sudden onset of confusion (disorientation relating 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, inability to do simple calculations and difficulty with managing finances may suggest signs of early dementia or mild cognitive impairment. Moreover, those with dementia or mild cognitive impairment may have word-finding problems or repetitive speech due to forgetfulness about what was recently spoken about in conversation.
- 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.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

- Delusions that result in firm, fixed, and false beliefs can be associated with psychosis (loss of touch with reality) as a primary condition, or associated with other conditions such as dementia, delirium, and depression.
 - An extreme sense of well-being, continuous speech, inability to concentrate, poor judgment, extravagance and delusions of grandeur are typical of manic-like behaviour.
 - Apprehensiveness, or an appearance of being worried, distressed, overwhelmed, or an inability to concentrate may indicate a person is suffering from anxiety that is affecting mental functions.
 - A person 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 client is asked to tell the practitioner about the client's assets and is unable to do so.
 - An inability to concentrate or tendency to become easily distracted can occur in a number of mental conditions as listed here.
- Illiteracy or low level of literacy.
 - 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.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

- Relatives who keep others away from the client and/or have relocated the client to a different community where the client 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.

Circumstances relating to the making of a will or planning document and its terms

- Unusual gifts in a will such as a gift to a recent or casual acquaintance.
- A sudden change in a will or drafting 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 or personal planning document that is markedly different from previous ones.
- Drafting 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 the drafter on behalf of the client.
- Client is provided with notes and/or information by another.
- Client relies exclusively or to an unusual extent on notes to provide the drafting 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 client to change terms of existing will.

Characteristics of influencer in client's family or circle of acquaintances

- Being overly helpful.
- Insistence that the influencer be present when the practitioner meets the client.
- Insistence on participating in a videoconference meeting on dubious pretexts, *e.g.* to give technical assistance to the client.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

- Urging client to make changes abruptly for no clear reason without sufficient time for client to consider the effects.
- Dismissing or minimizing the need for client to obtain professional advice (including legal and tax advice) or for assessment of client's mental capacity.
- Contacting the practitioner persistently 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 client observed by the practitioner.
- A controlling attitude towards the client observed by the practitioner.
- Having sponsored the client's immigration to Canada.
- Someone known to the practitioner to be in difficult financial circumstances.
- Someone who, to the knowledge of the practitioner, engages in substance abuse.

One's "gut feeling" that undue influence is going on

- A person (potential influencer) who is off-putting or difficult to deal with accompanies the client to the appointment with the practitioner.
- A person (potential influencer) accompanying the client is rude to staff when in the office or over the telephone. Alternatively, that person may be overly solicitous.
- Client exhibits a cluster of nonverbal behaviours pointing to emotional agitation – see below.
- Client deviates from baseline behaviour.
- Practitioner becoming aware that client has seen other legal professionals regarding estate and personal planning, with possible implication that an influencer is looking for one who will implement a certain plan.

Nonverbal behaviour of client indicates emotional agitation

Caution: Take note of nonverbal behaviour you observe, but do not fall into the trap of attributing behaviour to a single cause, like coercion or deceptive concealment. No single behaviour is unique to any emotional state. Attach greater importance to clusters of nonverbal cues associated with emotional states than single behaviours. Attach greater significance to what a client says and how it is said than to nonverbal behaviour. Conclusions should not be drawn from nonverbal behaviour alone unless the individual is wholly reliant on nonverbal communication.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Caution regarding video communication: *You have a reduced field of view in video communication, and your ability to observe closely is less than in face-to-face communications. The potential to misread reactions is correspondingly greater.*

- Nonverbal behaviour (body language / mannerisms) of client indicates fear, anxiety, insecurity, reticence, evasiveness, or embarrassment.
 - Get a sense of a client's baseline verbal and nonverbal behaviour before probing to shed light on whether the client is being subjected to undue influence. This enables comparison with the client's behaviour when asked about matters that may cause greater anxiety.
 - Fear is typified by leaning backward, shrinking the upper body, holding the hands and arms in front of the body, abrupt and frequent movements, higher-pitched and faster speech with more pitch inflection (rising and falling tone) and speaking with greater energy.
 - Embarrassment or shame is typified by tilting the head down, shrinking or collapsing the upper body, slumping the shoulders, and lower-pitched, monotonic speech.
 - Untruthfulness is typified by vagueness or equivocation in language, inconsistent answers, tension, gestures disconnected from what the speaker is saying, and fewer gestures accompanying speech. Contrary to widespread belief, avoidance of eye contact does *not* indicate deceptive behaviour. Individuals who are consciously attempting to deceive the questioner may tend to maintain eye contact to try to dispel suspicion.

Caution regarding impressions of untruthfulness: *Detection of deception is extremely difficult. The average accuracy of observers in assessing a speaker's truthfulness is typically little better than chance. Do not draw conclusions of untruthfulness solely from observation of behaviour in an interview.*

CHAPTER 5. RECOMMENDED PRACTICES IN SCREENING FOR POTENTIAL UNDUE INFLUENCE

The Basic Rule: Interview the Client Alone

The cardinal common-sense practice for averting undue influence is to take instructions in an interview with the client alone.⁸⁵ Whenever instructions for preparation of a will or other personal planning document are initially relayed through another source, they should always be confirmed directly with the client in a thorough and comprehensive interview conducted in private.⁸⁶

The practice of interviewing the client 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 client's accountant may need to be present for part or all of an interview to assist with an explanation of the client's financial and tax situation.

When others must be present while instructions are taken, however, they should be entirely disinterested in the legal sense of having no financial interest in the estate or matter. They should also have no kinship or social connection with the client that could give rise to divided loyalties or that would otherwise endanger the confidentiality of the interview. Relatives cannot be disinterested, because they can be potential beneficiaries or successors in intestacy. A relative should not serve as an interpreter unless this is completely unavoidable.

85. Carmen S. Thériault, "Taking Effective Estate Planning Instructions," (Paper delivered at Continuing Legal Education Society of British Columbia seminar, 2009) at 3.1.10. See also Peter W. Bogardus & Mary B. Hamilton, *Wills Precedents: An Annotated Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 1998, looseleaf, updated) at 41-2. See also *Bachman v. Scheidt*, 2016 SKQB 102, at para. 22.

86. In the future, there may be a need to revisit this advice if guidance by professional bodies on practitioners' obligations of confidentiality and undivided loyalty to their clients evolves to accommodate the ethic of supported decision-making. Unless and until that guidance changes, however, it is difficult to see how legal practitioners could fulfil those professional obligations without receiving instructions directly from their clients in a setting where the risk of communications with the client being intercepted by a potential influencer is minimized.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

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.

There may be considerable resistance in other cases from the family members or clients themselves to the suggestion that a disinterested third party rather than a relative must translate for the client. It may be necessary to point out there is a difference between an interpreter and someone who is merely bilingual and capable of translating. An interpreter has an ethical and professional responsibility to translate only what is said with complete objectivity, avoiding any filtering or commentary. Objectivity is not possible if the person translating has a financial or emotional stake in the matter at hand. Having information on available interpretation and translation resources readily at hand to deal with language barriers can go a considerable distance in dispelling resistance to having a neutral third party as an interpreter.⁸⁷ Referral to a practitioner who speaks the language in question may be considered in some cases.

Other exceptions to meeting with the client alone include the occasions when spouses consult the practitioner for simultaneous preparation of wills, reciprocal powers of attorney or representation agreements. The practitioner should still be alert to the 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.⁸⁸

87. Some Indigenous communities and band offices maintain rosters of Elders and others who can act as interpreters in the language and dialect spoken in their communities. The Society of Translators and Interpreters of British Columbia (STIBC) and MOSAIC BC can refer practitioners and clients to interpreters for many other languages. Sign language interpreters may be found through the West-coast Association of Visual Language Interpreters (WAVLI).

88. 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. Rule 3.4-5 in the Law Society's *Code of Professional Conduct* and the sample retainer letter 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 that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

If red flags or suspicious circumstances are present, it may be useful for an additional member of the practitioner's firm to attend the client interview. This can provide a cross-check against one's own impressions of the client's reactions and situation, particularly in cases where mental capacity may be a concern.

Explain Why the Client Must Be Interviewed Alone

If a supporter accompanying the client wishes to be present while the practitioner interviews the client, the practitioner should provide an explanation of why the will-maker must be interviewed in private. 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 "Four C's" referred to in the title of the brochure are:

1. *Client Identification*

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

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.

completely. The Commentary to the rule indicates that while not required by the rule, a lawyer should recommend clients obtain independent legal advice before accepting a joint retainer. The Commentary further states that instruction from spouses or partners to prepare one or more wills based on their shared understanding of what the contents of the wills are to state should be treated as a joint retainer. See also the sample joint retainer letter in Bogardus and Hamilton, *supra*, note 85, at 41-4 to 41-7. Bogardus and Hamilton observe at 41-2 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 neither has been coerced into making the provisions in the will.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

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 practitioners can explain that it is to the supporter's advantage not to be present when instructions for a will or other personal planning document 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 a supporter who has been heavily involved in assisting or caring for the client, 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 about self-protection against suspicion of undue influence. The more evidence there is that the client decided on the contents of the document independently and gave the instructions for its preparation without an interested person being present, the more likely it is that the document 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 on the part of the supporter 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 exert influence. Cultural differences discussed below may place an entirely different complexion on the reaction of a client or a supporter, however.

There may be considerable sensitivity about insistence on meeting with the client alone if the client has roots in a culture that places very high importance on family and kinship relationships, collective rights, and consensus within the family group. The need for interviewing the client in private (except for an interpreter when needed) to determine the client's genuine, independent wishes is all the more important, however, if norms of collective decision-making, subservience to traditional authority figures, or gender-based power structures prevail within the client's own cultural community.

When intercultural differences are in play, the link between meeting in private and the practitioner's professional responsibilities towards the individual client, especially the duties of confidentiality and undivided loyalty, may need to be explained. Persons who have immigrated or who have lived largely within a migrant community

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

may lack familiarity with the Canadian legal system and have misconceptions concerning it and the nature of the practitioner-client relationship.⁸⁹

Lawyers should be aware that the Law Society of British Columbia has declared Indigenous intercultural competency to be a necessary part of lawyers' competence, and requires all practising lawyers to complete the online course it provides on this subject.⁹⁰ Legal practitioners with extensive experience in acting for Indigenous clients emphasize it is necessary to bear in mind that the client's lived experience is likely to have been much different from one's own. The distrust that many Indigenous persons have for the Canadian legal system and anyone connected with it may be difficult to dispel. It is crucial to take extra time in the initial and subsequent meetings to build trust.

Remote communications with clients

If the interview with the client will be conducted remotely by videoconference either by necessity or the client's choice, it is all the more important to explain to the client and other persons in the client's immediate environment why the client needs to be interviewed in private and out of earshot of anyone else.

If the client will have difficulty handling videoconference technology, a disinterested person should be enlisted to assist the client in setting up the video session, and then leave the room and remain out of earshot unless recalled by the client to address a technical issue or close the session. It is only when the client cannot handle the technology at all due to disability, illness, etc. that the assisting person should remain present. That person must be completely disinterested, and be warned to keep the contents of the meeting confidential.

Alternatively, if the client may be able to use the video technology after some familiarization, a short "dry run" with the client conversing with the practitioner's office staff might be carried out for this purpose before the actual meeting with the practitioner.

89. Regarding intercultural practitioner-client interaction generally, see Jatrine Bentsi-Enchill, "Client Communication: Measuring Your Cross-Cultural Competence" (29 September 2014), online: <https://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2014/Client-Communication-Measuring-Your-Cross-Cultural>; American Bar Association, "Multicultural intelligence for lawyers" (Nov. 2018), online: <https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/being-able-to-read-cultural-cues-is-essential-for-legal-success/>.

90. See <https://www.lawsociety.bc.ca/priorities/truth-and-reconciliation/>.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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

If the practitioner's index of suspicion is engaged by identifying red flags in the course of an 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 client is not acting independently. This should be initiated by asking "open-ended" (non-leading) questions.⁹¹ 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.⁹² The answers to open-ended questions such as the ones below may point to constraints on the client's independence 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 X your executor?*⁹³

The client'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." The proper interpretation of client resistance to questioning along these lines is an intangible that a practitioner can reach only by considering all the circumstances, including what the practitioner may know of the client's personality and cultural background.

When interviewing older Indigenous clients, it is very important to let them tell their story as they wish and finish speaking before asking another open-ended question.

91. Thériault, *supra*, note 85 at 3.1.10.

92. Adapted from the following generalized questions suggested by the UBC Faculty of Medicine Geriatrics Division for use by physicians to aid in 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?

93. *Ibid.*

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Interrupting an older person is considered highly offensive within Indigenous societies.⁹⁴ Do not suggest words to keep the conversation moving. The person should be given time to find the words. Taking the time to listen will usually bring more benefit than trying to obtain a lot of information at once. Telling an Indigenous client that you wish to hear about what the client wants to do or to hear the client's story is likely to be more fruitful than direct questioning, which can be seen as discourteous and create discomfort.⁹⁵

If the client belongs to a traditional cultural community, divisions of property that seem unusual may be entirely in keeping with norms within that community. They should not be seen as a red flag of undue influence in themselves. For example, a remote relative might be made a beneficiary because the will-maker raised that person together with the will-maker's own children.

Asking questions in different ways can be a useful technique when interviewing someone who is giving guarded or less than truthful answers. Unanticipated questions may elicit revealing responses. Asking a client what they would like a beneficiary to do with a legacy, for example, may reveal that the legacy was not actually the client's idea. A client who is being pressured to give the legacy by an influencer probably would not have a ready answer.

If a client is being guarded or is suspected of being deceptive, silence after a short, evasive, or incomplete answer can sometimes be employed to the interviewer's advantage. Silence tends to be unsettling. The person being questioned will often try to fill the silence and volunteer more than they wanted to say.

Carefully observe both verbal and nonverbal responses

It is important to take note of both the client's verbal and nonverbal reactions, especially in response to questions probing for undue influence. Nonverbal behaviour, commonly referred to as "body language" or mannerisms, can point to emotional states that may be connected with an undue influence situation. Be wary, however, of wrongly attributing nonverbal mannerisms to emotional agitation, particularly if the person has a disability.

94. Xavier Cattarinich, Nancy Gibson and Andrew J. Cave, "Assessing mental capacity in Canadian Aboriginal seniors" (2001) 53 *Social Science and Medicine* 1469 at 1475.

95. *Ibid.*, at 1474 and 1475.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

One should try to get a sense of a client's baseline verbal and nonverbal behaviour when relaxed, but in context.⁹⁶ In other words, the client's baseline would best be observed when the client is in a meeting with the practitioner rather than conversing with friends, but when the client's mind is directed to a subject that is not a source of emotional agitation. This enables better comparison with behaviour when communicating about matters that may arouse emotions.

While no single behaviour is linked conclusively with the presence of a particular emotion, certain clusters of behaviours are typically associated with specific emotional states.

Fear, for example, is typically displayed by leaning backward, shrinking or collapsing the upper body, and positioning the arms in front of the body.⁹⁷ It is also associated with quicker speech with greater pitch inflection (rising and falling tones), and energetic speech.⁹⁸

Shame or embarrassment is often expressed by tilting the head down, collapsing the upper body, and slumping the shoulders.⁹⁹ Lower, monotonic speech is also typical.¹⁰⁰

A client who is being coerced might experience both fear of the influencer's reaction if the client deviates from what the influencer wants, and shame at the damage that being coerced does to the client's pride and independence. The client might also be

96. Useful suggestions for conducting client interviews in a congenial, supportive manner and setting can be found in Canadian Centre for Elder Law, *Supporting Client Capacity for Investment Decision-Making: Promising Practices*, online: <https://www.bcli.org/publication/supporting-client-capacity-for-investment-decision-making-promising-practices/?hilite=Supporting+Client+Capacity+Investment+Decision-Making%3A+Promising+Practices>.

97. Zachary Witkower & Jessica L. Tracy, "Bodily Communication of Emotion: Evidence for Extrafacial Behavioral Expressions and Available Coding Systems" (2019) 11:2 *Emotion Review* 184 at 188.

98. Christina Sobin and Murray Alpert, "Emotion in Speech: The Acoustic Attributes of Fear, Anger, Sadness, and Joy" (1999) 28 *Journal of Psycholinguistic Research* 347 at 358 and 361; Alex S. Cohen, S. Lee Hong, and Alvaro Guevara, "Understanding emotional expression using prosodic analysis of natural speech: Refining the methodology", 41:2 *Journal of Behavior Therapy and Experimental Psychiatry* 150 at 151.

99. Witkower and Tracy, *supra*, note 97 at 187-188.

100. Judith Lewis Herman, "Posttraumatic Stress Disorder as a Shame Disorder" in Ronda L. Dearing and June Price Tangney, eds., *Shame in the therapy hour* (Washington, D.C.: American Psychological Association, 2011) 261 at 268; Michael Timothy Ryan, "Shame and Expressed Emotion: A Case Study" (1993) 36:2 *Sociological Perspectives* 167 at 169 and 171.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

induced by fear of, misguided loyalty towards, or dependence on the influencer to be less than truthful about pressure and conflict the client may actually be experiencing.

There are great dangers in attempting to detect untruthfulness from observed behaviour. There is much empirical evidence that accuracy in detecting deception from observing and listening to speakers is generally little better than chance, irrespective of the observer's occupational background or experience.¹⁰¹ Average accuracy in distinguishing truthful from deceptive speakers is only about 54 per cent.¹⁰²

Contrary to folklore, *avoidance of eye contact is not an indication of untruthfulness*.¹⁰³ People who are consciously trying to deceive do not typically avert their eyes.¹⁰⁴ There is no relationship between length of eye contact and untruthfulness.¹⁰⁵

Behaviours that have been found to be associated with efforts at deception are vagueness or equivocation in language (e.g., "I don't think so" instead of a simple "no"),¹⁰⁶ numerous pauses,¹⁰⁷ expressions that are inconsistent with context,¹⁰⁸ inconsistent answers to questions about related subject-matter, and fewer than normal gestures

-
101. Valerie Hauch, et al., "Does training improve the detection of deception? A meta-analysis" (2016) 43:3 Communication Research 283 at 284.
102. Charles F. Bond and Bella M. DePaulo, "Accuracy of Deception Judgments" (2006) 10 Personality and Social Psychology Review 214 at 230; Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (Chichester: Wiley, 2000) at 75 and 76; see also Stephen Porter and Leanne ten Brinke, "Reading between the Lies: Identifying Concealed and Falsified Emotions in Universal Facial Expressions" (2008) 19:5 Psychological Science 508; Daniel B. Horn, "Is Seeing Believing? Detecting Deception in Technologically Mediated Communication", online: http://www-personal.umich.edu/~danhorn/reprints/horn_2001_lie_detection_chi_2001.pdf at 3.
103. Aldert Vrij and Samantha Mann, "Who killed my relative? Police Officers' Ability to Detect Real-Life High-Stake Lies" (2001) 7 Psychology, Crime & Law 119 at 125 and 129; Stephan Porter & Leanne ten Brinke, "Dangerous decisions: A theoretical framework for understanding how judges assess credibility in the courtroom" (2009) 14 Legal and Criminological Psychology 119 at 124.
104. Leanne ten Brinke and Stephen Porter, "Cry me a river: Identifying the behavioral consequences of extremely high-stakes interpersonal deception" (2012) 36 Law and Human Behavior 469 at 475; Samantha Mann, Aldert Vrij, and Ray Bull, "Suspects, lies, and Videotape: An Analysis of Authentic High-Stake Liars" (2002) 26:3 Law and Human Behavior 365.
105. Mann, *supra*, note 104 at 365.
106. Ten Brinke, *supra*, note 104 at 473-474 and 475.
107. Stephen Porter & Leanne ten Brinke, "The truth about lies: What works in detecting high-stakes deception" (2010) 15 Legal and Criminological Psychology 57 at 64.
108. Ten Brinke, *supra*, note 104 at 473-474.
-

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

accompanying speech.¹⁰⁹ No single behaviour pattern is uniquely associated with deception, however, and individuals differ considerably in the behaviours they exhibit when attempting to deceive.¹¹⁰

If a client is suspected of concealing the fact of being pressured by an influencer, asking questions the client is unlikely to have anticipated may be illuminating.¹¹¹ For example, if X is a questionable beneficiary, the client might be asked “What do you hope X will do with this very generous legacy?” Unanticipated questions are likely to produce more revealing reactions because they impose greater cognitive demands than ones for which the person being questioned has a prepared answer, forcing those who are lying or prevaricating to exhaust their inventiveness more quickly.¹¹²

Remote communication

If communicating with a client remotely using computer-based videoconferencing, bear in mind that the ability to perceive nonverbal behaviour is likely to be reduced in comparison to face-to-face communications. This can give rise to miscues and incorrect inferences. Eye contact and aversion of the eyes are especially open to misinterpretation in video communication, because glancing away from the screen momentarily may appear to other participants in the video meeting as deliberate avoidance of eye contact. Conversely, as we tend to look directly at the screen in videoconferences longer than we would stare at another person in a face-to-face meeting, this can be misperceived as artificially lengthened eye contact.

Caveats in probing for undue influence

Above all:

- Attach greater importance to clusters of behavioural cues rather than a single cue.
- Do not attribute observed nonverbal behaviour to a single cause like coercion or deception. There could be many legitimate reasons why a client displays the behaviour.

109. *Supra*, note 107 at 59; see also Mann, *supra*, note 104 at 371.

110. Mann, *supra*, note 104 at 372; Porter and ten Brinke, *supra*, note 107 at 59.

111. Aldert Vrij et al., “Outsmarting the Liars: The Benefit of Asking Unanticipated Questions (2009) 33 Law and Human Behavior 159.

112. Porter and ten Brinke, *supra*, note 107 at 63 point to the multiple cognitive demands of attempting to maintain a deception as creating opportunity for its unintentional revelation to an interviewer.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

- Attach greater importance to what a client says and how it is said than to the client's nonverbal behaviour. Do not draw conclusions from nonverbal behaviour alone unless the client is completely reliant on nonverbal communication.
- In remote communication, beware of misinterpreting nonverbal behaviour due to reduced perceptibility and a reduced field of view.
- Do not draw inferences of untruthfulness from observed behaviour alone.

Explore Whether Client 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 client's mind, more specific questions may be used to explore whether the client is in a relationship of dependency, power, or subordination with anyone else, or one of special confidence and trust, 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?

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

Answers to questions like the ones 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.¹¹³

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 them for things that they do or have done for you?*¹¹⁴

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.¹¹⁵ 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 the acquaintance is to benefit under the will or transaction in question.

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 a 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

113. This series of questions is based on portions of text in ABA Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008) at 116-117.

114. This question is intended to reveal if the client is being manipulated through the use of reciprocity as a pressure tactic.

115. *Supra*, note 113 at 116-117.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

appreciation for the care and attention that child provided and the extra burdens borne 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.

Intercultural factors can increase the difficulty of probing for abuse or neglect. For some Indigenous clients in particular, asking who lives with them is a sensitive matter and may be perceived as a safety risk, because information-gathering along those lines may have preceded interventions by child welfare authorities in their communities, which are historic and ongoing sources of extreme grievance. Reluctance to disclose information about internal family affairs is also characteristic of certain other cultural communities.

Explore Whether Client Is A Victim of Abuse or Neglect 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, power of attorney, etc., this would be a red 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.

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 document or matter at hand, 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 has been 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

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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?*¹¹⁶

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

116. 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.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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?*¹¹⁷

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.¹¹⁸ This is quite likely to be encountered if the abuser is a family member. The client 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, neglect or self-neglect, it may be more appropriate to suggest the client seek help from an appropriate community agency than to pursue the matter at length in a direct interview with the client.¹¹⁹

If the practitioner believes the client 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.

117. 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.

118. Thaler Singer, *supra*, note 72 at 28.

119. Information on reporting abuse, neglect or self-neglect of an adult in British Columbia to the appropriate agency may be found online at Public Guardian and Trustee of British Columbia, “Helping an Adult Get Support and Reporting Abuse or Neglect,” online: www.trustee.bc.ca/services/services-to-adults/Pages/abuse-neglect.aspx and “How to Assist an Adult Who is Abused, Neglected or Self Neglecting,” online: <https://www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf>.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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 their 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.¹²⁰ If the circumstances involve physical abuse or financial abuse of a criminal nature, the matter can be reported to the police.¹²¹ A seven day per week telephone hotline, the Seniors Abuse and Information Line (SAIL), has been established for disclosing matters of this kind.¹²²

In a situation where the practitioner believes the client's situation should be directly reported, the obligation of confidentiality owed to the client must still be met.¹²³ As

120. R.S.B.C. 1996, c. 6. Parts 1, 2.1, 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.

121. 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. 1996, 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 is found at: <https://www.trustee.bc.ca/services/services-to-adults/Pages/assessment-and-investigation-services.aspx>.

122. SAIL is accessible online at <https://seniorsfirstbc.ca/programs/sail/>.

123. See Society of Notaries Public, *Principles for Ethical & Professional Conduct Guideline*, *supra*, note 3, article 6-P1; Law Society of British Columbia, *Code of Professional Conduct*, article 3.3-1.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

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 client'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.¹²⁴

The Law Society's *Code of Professional Conduct* 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 death or serious bodily harm.¹²⁵ 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 client is feared.¹²⁶ A lawyer who believes that disclosure may be warranted should contact the Law Society for ethical advice.¹²⁷ There is no equivalent exception in the *Principles for Ethical & Professional Conduct Guideline* from a notary's general obligation of confidentiality.

124. Society of Notaries Public, *ibid.*, article 6-P1, commentaries 6.1, 6.2; Law Society, *Code of Professional Conduct*, commentary to article 3.3-1, paras. [3], [4].

125. Law Society of British Columbia, *Code of Professional Conduct*, article 3.3-3. Note also that paragraph [5] of the commentary to article 3.2-9, headed "Clients with diminished capacity," provides that authority may be implied in some circumstances for a lawyer to disclose confidential information for the purpose of taking "protective action" on behalf of a client lacking capacity until a legal representative can be appointed. Paragraph [10] of the commentary to article 3.3-1 lists relevant considerations in determining if this authority is implied. It states "the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection."

126. The commentary to article 3.3-3 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 "substantially interferes with the health or well-being of the individual."

127. Law Society of British Columbia, *Code of Professional Conduct*, commentary to article 3.3-3, para. [4].

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Obtain Relevant Information from Third Parties With Client Consent When Possible

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. This step could be particularly important if the client whom the practitioner suspects is a victim of undue influence has acquired a siege mentality or has evidently come to accept falsehoods implanted by the influencer.

Third parties from whom information is sought should be neutrally situated wherever possible. In other words, they should not be relatives, beneficiaries or proposed beneficiaries. They may include the client's physician, bank manager, neighbours and acquaintances. Documentary evidence should be gathered if it exists.

If the client has other advisers, such as an accountant, investment advisor, or insurance advisor, it may be helpful to communicate with them if significant changes are being proposed to an estate plan or other personal planning arrangements. The client may have discussed any plans with them before contacting a notary or lawyer. These other advisers may also have more frequent contact with the client and have greater knowledge about the client's situation.

These inquiries require the client's consent. A written and signed consent should be obtained from the client 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 client is asked to sign a consent, the client 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 can occur in an action based on that ground. The fact that this process may increase the expense of preparing the document to some extent should be brought to the client's attention. At the same time, it should be emphasized that the additional expense will be far less than the cost of litigation if the client's will or other personal planning documents are later challenged on the basis of undue influence.

Obtain Capacity Assessment If Mental Capacity Is In Question

The potential for undue influence extends to both mentally capable and incapable persons.¹²⁸ A person may be at a higher risk of becoming subject to undue influence

128. Silberfeld, *supra*, note 68 at 342.

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

because of declining mental capacity, without having reached the point of losing the capacity to make a will, transfer property, or grant a power of attorney. An assessment of the client's mental capacity should be obtained when there is a significant possibility that the client may have diminished capacity, or that the client's judgment and independence in providing drafting instructions may be affected by mental, physical, or substance use disorders. This requires the client's consent, which is more likely to be obtained if the practitioner explains that the assessment is to guard against a challenge to the document in question.¹²⁹

When there are red flags of undue influence, the assessor should also be asked to address the question whether the client's mental capacity may increase susceptibility to being influenced by others. Mental capacity to perform a legal act and susceptibility to undue influence are two separate, though related, matters.

As assessments of mental capacity do not normally address susceptibility to influence, the request for the assessment must be very clear in seeking this additional opinion.¹³⁰ The request should explain the legal concepts involved:

- First, the relevant legal test of mental capacity;
- Second, the concept of undue influence as the subjugation of a person's independent wishes to the influencer's desires through coercion, manipulation or subterfuge.

This will help the assessor to address the opinion to what the legal practitioner needs to know:

- Can the client perform the mental functions treated in law as essential to the legal act in question?
- Are there medical reasons why the client is more vulnerable to undue influence in making decisions?

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

130. Silberfeld, *supra*, note 68 at 342.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Requests for capacity assessments are most commonly sent to medical practitioners, although other professionals may become involved in the process.¹³¹ Contemporary publications in peer-reviewed journals can be a source of guidance for medical practitioners when evaluating testamentary capacity and susceptibility to undue influence.¹³² Exceptionally, neuropsychological testing may be considered in addition to the medical evaluation in more complex cases.¹³³ These will generally be ones where this form of testing may assist in clarifying a diagnosis or illuminating problems with executive function that may not be revealed by standard screening tools. The potential benefits of neuropsychological testing in a particular case need to be weighed against its greater intrusiveness, as well its cost and restricted availability outside a hospital setting.

Enough of the factual background needs to be set out in the request in order to put the concern about undue influence in context. Available information concerning the medical and personal history of the client should be provided. Circumstances of dependency and other facts about the client's relationships with relatives and acquaintances may need to be explained.¹³⁴ If the matter concerns will-making, the pattern of

-
131. Nurse practitioners, for example, are commonly trained to perform cognitive assessments: British Columbia College of Nurses & Midwives, *Scope of Practice for Nurse Practitioners*, online: <https://www.bccnm.ca/NP/ScopePractice/Pages/Default.aspx> Part 2, D: Advanced Assessments. Registered nurses, registered psychiatric nurses, social workers, occupational therapists, and psychologists are prescribed as qualified health providers to carry out the functional component of financial incapability assessments under Part 2.1 (Statutory Guardianship) of the *Adult Guardianship Act*, *supra*, note 120, provided they are eligible to perform this service under standards, limits or conditions established by their respective professional colleges: *Statutory Property Guardianship Regulation*, B.C. Reg. 115/2014, s. 3(2). On occasion, a British Columbia court has accepted the opinion of a non-medical professional experienced in capacity assessment in preference to that of a physician without special expertise in assessing capacity: see *Bentley v. Maplewood Seniors Care Society*, 2014 BCSC 165, at para. 59.
132. See, for example, Nathan Herrmann, Kimberley A. Whaley, Deidre J. Herbert & Kenneth I. Shulman, "Susceptibility to Undue Influence: The Role of the Medical Expert in Estate Litigation" (2022) 67:1 Can. J. Psychiatry 1; Daniel A. Plotkin, "Assessing Undue Influence" (2016) 44 J. Am. Acad Psychiatry Law 344; K.M. Kennedy, "Testamentary capacity: A practical guide to assessment of ability to make a valid will" (2012) 19 Journal of Forensic and Legal Medicine 191.
133. Eric G. Mart, "Testamentary Capacity and Undue Influence: Assessments and Problematic Techniques" (2019) 13 Psychological Injury and Law 1.
134. 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
-

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

previous wills and the current intentions of the client aid in illuminating the overall context.¹³⁵ The prior consent of the client to these disclosures is required.

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

Intercultural factors can raise challenges to obtaining a mental capacity assessment, as incapacity is a taboo subject in some cultures. The legal significance an assessment can have in the Canadian legal context will need to be explained to the client and possibly also the client's supporters. Consent may be more forthcoming if this explanation is given in terms of positive consequences flowing from having an assessment completed. For example, a medical opinion affirming mental capacity will benefit the client's family as the client wishes by supporting the validity of a will. It is important to take the time for a sensitive discussion of the matter.

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 client and others that are indicative of undue influence in order to substantiate the practitioner's conclusion.¹³⁶

135. C. Peisah et al., "The wills of older people: risk factors for undue influence" (2009) 21:1 International Psychogeriatrics 7 at 13-14; Herrmann, *supra*, note 132 at 9-11. A contrary view, namely that will-making patterns are not helpful to the medical assessor in forming an opinion on susceptibility, can be found as well in medicolegal literature: see Daniel A. Plotkin, James E. Spar & Howard L. Horwitz, "Assessing Undue Influence" (2016) 44 J. Am. Acad. Psychiatry Law 344 at 350.

136. 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 3 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 73.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

Make and Retain Appropriate Records

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

In addition to the drafting instructions themselves and all related information needed to draw the will or personal planning document, 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:

- red flags of undue influence that are identified;
- lines of inquiry the practitioner identified as necessary or worthwhile to pursue;
- what was done to pursue the lines of inquiry;
- the information obtained from the lines of inquiry;
- notes of calls or other communications with family members and other persons with connections to the client;
- memoranda to the file recording the reasons for the conclusion the practitioner reaches as to the presence, possible presence, or absence of undue influence and decisions taken as a result of that conclusion;
- if any virtual meetings were held with the client using videoconference technology, screenshots of the client holding identification up to the screen and of the client on screen at the end of each session.

Regardless of whether the practitioner decides to proceed with preparation of the will or other document, the practitioner should keep the file for the full retention period prescribed or recommended by the governing body of the practitioner's profession.¹³⁷

137. 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*, Retention of Documents, p. 38. The retention period for powers of attorney, representation agreements, and health care directives is 10 years from the date of revocation. The Law Society of British Columbia recommends retention of original wills and will files for 100 years, or for a period of 10 years following final distribution of the estate if the will is probated: *Closed Files – Retention and Disposition* (August 2017), Appendix B,

Undue Influence Recognition and Prevention A Guide for Legal Practitioners

If a will is prepared, a wills notice should be filed with the client's consent.¹³⁸ This helps 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.

Consideration can be given to recording videoconference meetings with the client's express consent in order to preserve evidence of the practitioner's efforts to investigate the client's situation and the basis for conclusions the practitioner may draw.

Observe Special Precautions for Videoconferences with Clients

Taking drafting instructions and reviewing documents with a client remotely using videoconferencing holds special dangers, because of the potential for off-screen influencing.¹³⁹

If communicating with clients remotely using video technology, follow the practices and exercise the precautions specifically designed for virtual meetings:

- At the beginning of the meeting, confirm the client's identity by having the client hold identification up to the screen, and take a screenshot to hold on file.¹⁴⁰
- Ask the client to confirm that no one else is present or within earshot. Where possible, have the client provide a 360 degree scan of the client's immediate surroundings to confirm that no one else is there.¹⁴¹ If anyone other than the client is unavoidably present, record their name(s) and the reason for their presence.¹⁴²
- Insist that the client leave the microphone and video feed on throughout the meeting to guard against off-camera influencing. Conduct the meeting as one

Minimum retention and disposition schedule for specific records and files – Rules and Guidelines, page 30, online at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf>.

138. Law Society of British Columbia, Will Procedure Checklist, para. 5.6, online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/G-1.pdf>.

139. Lawyers Indemnity Fund "Risks and tips when using video-conferencing technology," online: <https://www.lif.ca/risk-management/practice-management-wellness-risks-and-tips/using-video-conferencing-technology/> "3. Watch for undue influence."

140. Morrie Baillie, "Zoom 101" blog post, online: <https://www.bcnotaryassociation.ca/resources/blog/?id=23>.

141. *Ibid.*

142. Lawyers Indemnity Fund, *supra*, note 139.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

continuous session wherever possible to prevent an influencer from engaging with the client during breaks.

- Documents sent to a client for review in a virtual meeting should be password-protected.¹⁴³

Be aware of, and follow, the general guidance and resources for conducting client communications by videoconference made available by the Law Society and the Lawyers Indemnity Fund on their respective websites.¹⁴⁴

If Concerns Arise in a Videoconference with a Client, Insist on a Follow-up Meeting In Person

If red flags are present or other concerns about off-screen influence emerge in the course of remote communication with a client, the practitioner should insist on meeting the client in person, ideally in the practitioner's office. If an office meeting is not possible, then the follow-up meeting must be held under conditions that will ensure privacy and confidentiality.

If Convinced Drafting Instructions Are the Product of Undue Influence After Reasonable Investigation, Decline Retainer to Draft Document

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 client resists the practitioner's inquiries, the practitioner needs to weigh the seriousness of the level of suspicion. If the practitioner is convinced that the instructions result from undue influence, the practitioner *should not proceed to prepare the document*.¹⁴⁵ Consciously drafting a document tainted by undue influence

143. *Supra*, note 140.

144. See Law Society of British Columbia, "Video conferencing technology information," online: www.lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/video-conference-technology/; LIF, *supra*, note 139. See also WEL Partners Checklist, <https://welpartners.com/resources/WEL-Checklist-Undue-Influence-and-Video-Conferencing-2020.pdf>.

145. An analogy may be drawn to the level of confidence that would warrant a decision not to proceed with drafting a will on the ground that a client lacks testamentary capacity. Various authorities describe this as being "*reasonably confident* that the testator did not have testamentary capacity" (Feeney, *Canadian Law of Wills*, *supra*, note 17 at 2-8, citing Ian Hull, "Lest We Forget Banks v. Goodfellow" (2007) 31 E.T.R. (3d) 15 at 21, "*convinced* the client lacks adequate capacity" (Law Society of British Columbia Will Procedure checklist at para. 2.4), or "[coming] to the conclusion that a client *clearly lacks* the capacity required to make a will" (Theriault, *supra*, note 85 at 3.1.7). These authorities suggest a high level of confidence, i.e. one of certainty or conviction.

Undue Influence Recognition and Prevention

A Guide for Legal Practitioners

would be to assist the influencer to achieve the influencer's objectives and bring into being a fundamentally false and deceptive document.

If still in doubt as to whether undue influence is present following reasonable investigation, the practitioner may exercise professional judgment to prepare the document in question. One of the factors that may be weighed is whether the client has other practical alternatives if the practitioner declines the retainer.

In either case, however, the basis for the decision should be carefully recorded and retained with the other records referred to earlier in this chapter under the subheading "Make and Retain Appropriate Records."

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 client of resources available in the community for assisting victims of financial, emotional, or other abuse or neglect when explaining the reasons for a decision not to proceed with preparation of the document.

**Undue Influence Recognition and Prevention
A Guide for Legal Practitioners**

LIST OF RECOMMENDED PRACTICES

	Page
1. The basic rule: Interview the client alone.	39
2. Explain why the client must be interviewed alone.	41
3. If red flags are present, ask non-leading questions to determine what factors are operating on the client's mind.	44
4. Explore whether the client is in a relationship of dependency, domination, special confidence or trust.	49
5. Explore whether the client is a victim of abuse or neglect in other contexts.	51
6. Obtain relevant information from third parties when possible (with the client's consent).	56
7. Obtain a capacity assessment if mental capacity is in question.	56
8. Compile a list of events indicating undue influence.	59
9. Make and retain appropriate records.	60
10. Observe special precautions for videoconferences with clients.	61
11. If concerns arise in a videoconference with a client, insist on a follow-up meeting in person.	62

Undue Influence Recognition and Prevention
A Guide for Legal Practitioners

- | | | |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 12. | If convinced after reasonable investigation that the drafting instructions are the result of undue influence, decline the retainer to draft the will or personal planning document and retain good records of the basis for this decision. | 62 |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|

APPENDIX

REFERENCE AID

UNDUE INFLUENCE

Recognition & Prevention

A Reference Aid

This Reference Aid is intended to assist legal professionals to recognize potential undue influence and prevent successful challenges based on undue influence to the estate and personal planning documents they prepare. It summarizes the recommended practices explained in greater depth in the BCLI publication *Undue Influence Recognition and Prevention: A Guide for Legal Practitioners* ("BCLI Guide"). The contents of both this Reference Aid and the BCLI Guide reflect the work of an interdisciplinary project committee.

The revision and re-issuance of the BCLI Guide and this Reference Aid were made possible by the support of the Notary Foundation.

For more information, see the BCLI Guide available on the BCLI website at bcli.org.

CHECKLIST OF RECOMMENDED PRACTICES

Undue Influence - Recognition & Prevention

The practices in the checklist below are recommended for use by legal practitioners if they suspect that a client is susceptible to undue influence or that a client's instructions do not reflect the client's genuine wishes. Note also the list of "Red Flags to Watch For" that follows the Recommended Practices.

See the BCLI publication *Undue Influence Recognition and Prevention: A Guide for Legal Practitioners* ("BCLI Guide") for further information.

YES N/A

☐ ☐

1. Interview client alone (Basic Rule).

Rationale:

- Ensure it is clear that practitioner is acting for client exclusively.
- Practitioner needs to avoid appearance of a joint retainer.
- Confidentiality of solicitor/client communications.
- Practitioner needs to be satisfied that client has mental capacity to give instructions and execute document in question with legal effect.

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 client's spouse. Remain alert. If any concerns that spouse is not speaking accurately for client, meet with client alone.

YES N/A

☐ ☐

2. Ask non-leading, open ended questions to determine factors operating on client'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 client is in a relationship of dependency, domination or special confidence or trust.

See examples of open-ended probing questions in BCLI Guide, pp 49-50. 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?
- 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?

YES N/A

☐ ☐

4. Explore whether client 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 client consents.

YES N/A

☐ ☐

6. Obtain medical assessment if client's mental capacity is in question, but remember that mental capacity to validly execute a personal or estate planning document is ultimately a legal test.

YES N/A

☐ ☐

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

See list of "Red Flags of Undue Influence to Watch For" on the following page.

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 convinced after reasonable investigation that drafting instructions are product of undue influence, decline retainer to prepare document. If suspicions remain, exercise professional judgment whether to proceed. In either case, document file thoroughly regarding basis for decision.

RED FLAGS TO WATCH FOR

Undue Influence - Recognition & Prevention

The red flags listed below MAY indicate the presence of undue influence on a client. 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 personal or estate planning document for execution.

See the BCLI Guide for more detailed discussion.

YES N/A

☐ ☐

1. Client 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 N/A

☐ ☐

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

YES N/A

☐ ☐

3. **Physical, psychological and behavioural** characteristics of client.

Examples:

- **Dependence on beneficiary** due to sight, hearing, mobility, speech disability, illness, language barriers, illiteracy, immigration sponsorship.
- **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, pp 34 – 35):

- Sudden onset of confusion.
- Short term memory problems, disorientations, 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/other signs of substance abuse.
- Down’s syndrome, autism or other developmental disorder.
- Inability to answer open-ended questions.

YES N/A

☐ ☐

4. Circumstances related to **creation of the personal or estate planning document and/or the terms.**

Examples:

- **Unusual gifts; sudden change** for no apparent reason; frequent changes.
- **Marked change** in instructions from prior will, power of attorney, etc.
- **3rd party initiates** instructions which also benefit 3rd party; **3rd party speaks** for client; **3rd party offers** to pay for new planning document; **client 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 document.

YES N/A

☐ ☐

5. **Characteristics of influencer** in client’s family or circle of acquaintance.

Examples:

- **Overly helpful.**
- **Insists on being present** during interview with practitioner.
- **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 client.
- Practitioner is aware **that influencer is in difficult financial circumstances and/or engages in substance abuse.**

YES N/A

☐ ☐

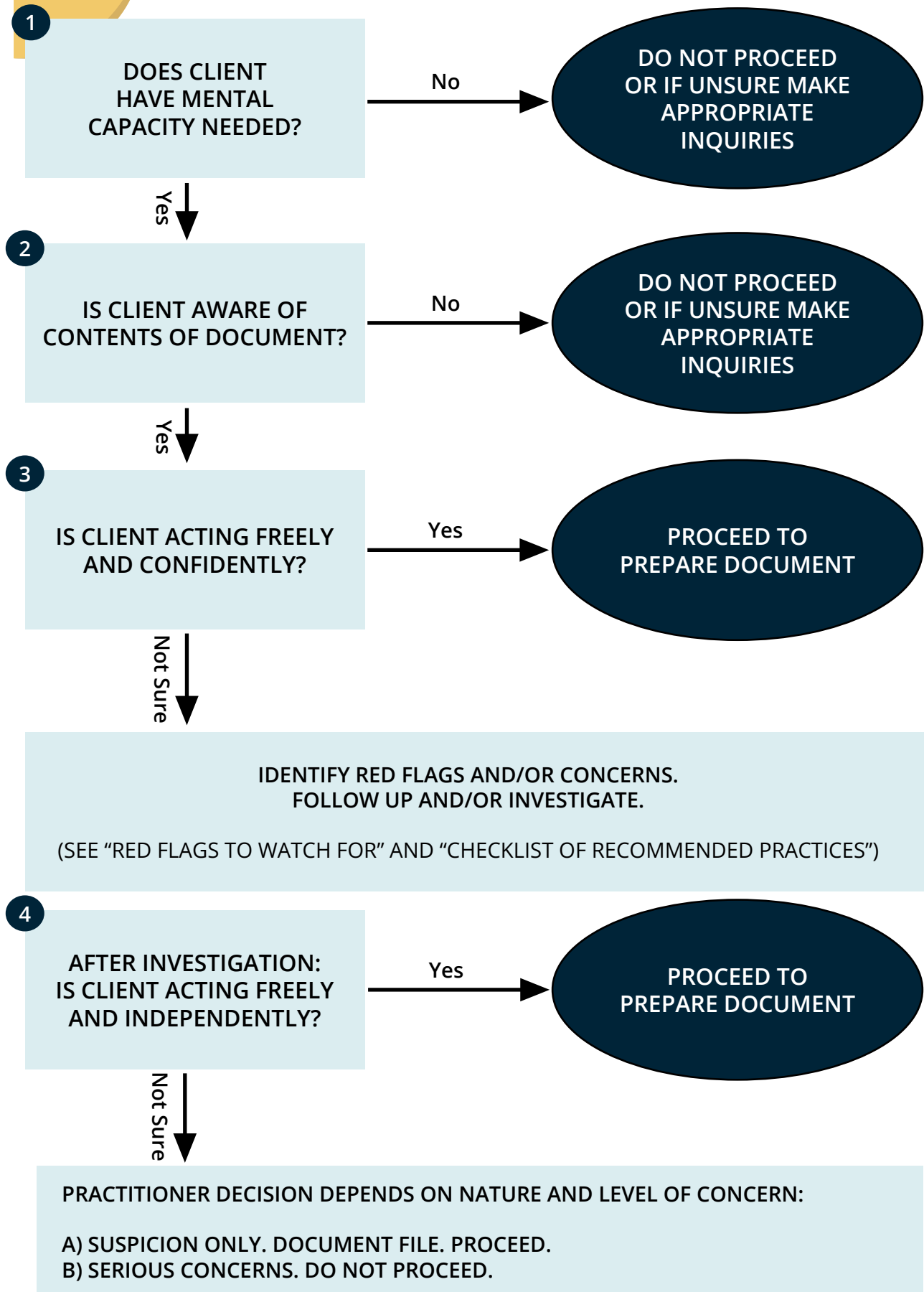
6. Practitioner’s **“gut feeling”.**

Examples:

- **Body language** of client 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



**Undue Influence Recognition and Prevention
A Guide for Legal Practitioners**

PRINCIPAL FUNDERS IN 2022

The British Columbia Law Institute expresses its thanks to its funders in 2022:

- Law Foundation of British Columbia
- Ministry of Attorney General
- Alzheimer Society of Canada
- BC Association of Community Response Networks
- The Council to Reduce Elder Abuse (CREA)
- Department of Justice Canada
- Notary Foundation
- Real Estate Foundation of British Columbia
- Simon Fraser University
- Vancouver Foundation

The Institute also reiterates its thanks to all those individuals and firms who have provided financial support for its present and past activities.

Supported by:

