

Undue Influence

Recognition/Prevention

A Reference Aid

This reference aid is intended to assist legal practitioners in recognizing and dealing with potential undue influence and preventing successful challenges to the wills they prepare. It summarizes the recommended practices set out in greater depth in the BCLI publication *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* ("the BCLI Guide"). The contents of both this reference aid and the Guide reflect the work of an interdisciplinary BCLI project committee supported by the Notary Foundation and the Lawyers Insurance Fund.

While the Guide and this reference aid focus on wills practice, the recommended practices and red flags that they outline are also relevant to the preparation of other personal planning documents, such as powers of attorney and representation agreements.

For more information, see the Guide available on the BCLI website at <http://www.bcli.org>.



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CHECKLIST OF RECOMMENDED PRACTICES

Undue Influence - Recognition/Prevention

The practices in the checklist below are recommended for use by wills practitioners if they suspect that a client is susceptible to undue influence or that a client's will instructions do not reflect the client's genuine wishes.

See the BCLI publication *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* ("the BCLI Guide") for further information.

YES N/A

1. Interview will-maker alone (Basic Rule).

Rationale:

- Ensure it is clear that professional is acting for will-maker.
- Professional needs to avoid appearance of a joint retainer.
- Confidentiality of solicitor/client communications.
- Professional needs to satisfy him/herself that will-maker has testamentary capacity.

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 Spouse. Remain alert. If any concerns that spouse is not speaking accurately for will-maker, meet with will-maker alone.

YES N/A

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

See examples of open-ended probing questions in BCLI Guide, pp 33 -34.

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?

YES N/A

- 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?

4. Explore whether will-maker 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 will-maker consents.

YES N/A

6. Obtain medical assessment if mental capacity is also in question, but remember that mental capacity to make a will is ultimately a legal test.

YES N/A

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

See list of "Red Flags to Watch For" opposite.

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 Index of Suspicion remains high after reasonable investigation, decline retainer to prepare the will.

RED FLAGS TO WATCH FOR

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The red flags listed below may indicate the presence of undue influence on a will-maker. 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 will for execution.

See the text of the BCL Guide for more detailed discussion.

YES NO N/A

1. Will-maker 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 NO N/A

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

YES NO N/A

3. **Physical, psychological and behavioural** characteristics of will-maker.

Examples:

- **Dependence on beneficiary** for sight, hearing, mobility, speech, illness, illiteracy.
- **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 BCL Guide for full list pp 24-25):

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

YES NO N/A

4. Circumstances related to **making of the will and/or the terms**.

Examples:

- **Unusual gifts; sudden change** for no apparent reason; frequent changes.
- **Marked change in** instructions from prior wills.
- **3rd party initiates** instructions which also benefit 3rd party; **beneficiary speaks** for will-maker; **beneficiary offers to pay** for new will; **will-maker 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 will.

YES NO N/A

5. **Characteristics of influencer** in will-maker's family or circle of acquaintance.

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

YES NO N/A

6. Practitioner's **"gut feeling"**.

- **Body language** of will-maker 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**.

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FLOW CHART OF RECOMMENDED PRACTICES

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1 DOES CLIENT HAVE TESTAMENTARY CAPACITY?

NO

DO NOT PROCEED OR IF UNSURE, MAKE APPROPRIATE INQUIRIES.

YES

2 IS CLIENT AWARE OF CONTENTS OF WILL?

NO

DO NOT PROCEED OR IF UNSURE, MAKE APPROPRIATE INQUIRIES.

YES

3 IS CLIENT ACTING FREELY AND INDEPENDENTLY?

YES

PROCEED TO PREPARE WILL.

NOT SURE

IDENTIFY RED FLAGS AND/OR CONCERNS. FOLLOW UP AND/OR INVESTIGATE.

(SEE "RED FLAGS TO WATCH FOR" AND "CHECKLIST OF RECOMMENDED PRACTICES")

4 AFTER INVESTIGATION: IS CLIENT ACTING FREELY AND INDEPENDENTLY?

YES

PROCEED TO PREPARE WILL.

NOT SURE

PRACTITIONER DECISION DEPENDS ON NATURE AND LEVEL OF CONCERN:

- A) SUSPICION ONLY. DOCUMENT FILE. PROCEED.
- B) SERIOUS CONCERNS. DO NOT PROCEED.