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VOLUME 17, NUMBER 1, MARCH 2012

The Challenge of Detecting Undue Influence

by David Morgan Smith

Undue influence, as a basis for challenging the validity of a Will, is notoriously difficult to prove. The challenger must establish that the testator did not act voluntarily but was coerced into making a Will at the behest of the person exerting influence. Not only is the burden of proof usually on the challenger to prove the existence of undue influence on a balance of probabilities; where undue influence is imposed on a testator, the "influencer" will often act (and indeed go out of his or her way to act) in the absence of witnesses. Accordingly, the Court may have to draw inferences from circumstantial evidence to make a finding that a Will was procured by undue influence.

While the estate litigator advancing such an allegation faces a daunting challenge, the lawyer who draws a Will is in a similarly unenviable position when trying to **detect** the existence of undue influence. Short of a relatively obvious scenario where, for example, the influencer cumulatively performs such overt acts as: (i) contacting the drafting lawyer, (ii) attending with the testator, (iii) providing instructions in his or her handwriting, and (iv) insisting on being present during the giving of instructions, undue influence may be imposed on a testator in a far more insidious fashion. Such concern was highlighted by the Supreme Court of Canada in the seminal case of *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 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 was doing but it may be as a result of coercion or fraud (emphasis added).***

How then do we detect undue influence in those situations where the testator knows and approves of the terms of her Will but is nonetheless a victim of undue influence?

This question has recently come into sharp focus in light of a pending change to the legislation governing the law of succession in British Columbia. Section 52 of the new *Wills, Estates and Succession Act* will, in certain circumstances, shift the burden of proof when an allegation is made that a will has been procured by undue influence. In particular, the burden of proof will be shifted to those propounding the will, once the challenger has established that the person alleged to have unduly influenced the testator was "in a position where the potential for dependence or domination of the will-maker was present."

In anticipation of this change, the British Columbia Law Institute recently published ***Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide ("Guide")***. The Guide tackles the pending challenge to will drafters to more critically assess the potential for undue influence.

In addition to providing an overview of "red flags" respecting the potential for undue influence, the Guide highlights particular scenarios that should alert the estates practitioner to the potential for undue influence:

Detecting Undetectable Undue Influence continued from front

- ***"The Officious Supporter"*** - An adult child who arranges the elderly relative's appointment with, attends, and expresses unsolicited opinions to the Will drafter;
- ***"The Nefarious Caregiver"*** - Usually a paid caregiver for an elderly testator who gradually ingratiates him or herself into a position of control and isolation of the testator; and
- ***"The Mercenary Late-Life Partner"*** – sometimes known as a "predatory spouse"; the motivation for the relationship is a calculated gambit to gain control of the testator's finances.

In each of these scenarios, the Guide considers what factors may be seen as "red flags" of the potential for undue influence. In each instance, the marked departure from the distribution provided for in a prior Will is presented as cause for the Will drafter to consider whether undue influence is behind such a change.

While these scenarios provide some assistance, they are not exhaustive and the challenge may be greatest when a lawyer suspects undue influence in circumstances that do not fall neatly within such categories. However, suspicion of the potential for undue influence is a big step away from concluding that a testator is in fact being coerced to make a Will he or she does not want to make. As the Guide points out, "dependency and the potential for domination in a relationship do not automatically imply that undue influence is present." In the presence of red flags that suggest the potential for undue influence, the authors of the Guide recommend probing, open-ended questions geared towards uncovering the existence of "coercive or manipulative conduct." Because the enquiry is focused on uncovering what is, essentially, psychological abuse, such questioning is not without risk:

"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….The will-maker may appear to resent the questioning or take on a hostile attitude. Extreme tact and discretion are required."

Fortunately, it is a relatively rare situation where a lawyer will have to engage in this kind of enquiry. The point made so effectively by the authors of the Guide is that a positive obligation lies with the drafting solicitor to be alert to the potential for undue influence.

1 [1995] 2 S.C.R. 876.

2 http://www.bcli.org/bclrg/publications/61-recommended-practices-wills-practitioners-relating-potential-undue-influence-g

Breakfast Series

Our next Breakfast Series meeting, Thursday, June 14, 2012, will feature a presentation by Ian Hull and Suzana Popovic-Montag on Testing for Capacity and Undue Influence: A Practical Guide.

We invite you to attend in person, or by webcast.

The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd Floor, 20 Street, Salons 2 & 3, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the Presentation to follow at 8:30 a.m. A fee of $30.00 ($26.55 + $3.45 HST) is payable to Hull & Hull LLP upon registration by cheque, VISA or MasterCard.

To register, please contact Sarah Koslicki at (416) 369-1140 (press 0) or by e-mail to skoslicki@hullandhull.com

A Compact Disc recording of the Breakfast Series will be available at a fee of $20.00 ($17.70 + $2.30 HST).

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