A SHIFT IN WHO BEARS THE BURDEN IN A CLAIM OF UNDUE INFLUENCE

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One of the most significant changes to the law under British Columbia’s new Wills, Estates and Succession Act (“WESA”)¹ is the fundamental shift of the onus regarding allegations of undue influence in relation to the creation of a Will and who establishes whether or not undue influence existed.² This paper provides a brief overview of this issue.

What is Undue Influence

Undue influence occurs in the context of a Will when a person exerts pressure on a Will-maker to change or create a Will that does not reflect the Will-maker’s true intentions, but rather the wishes of the person exerting that pressure.³

One of the main requirements of a valid Will is that it be created by a Will-maker who was acting independently and of their own free will.⁴ A Will-maker must act absent any undue influence. If undue influence is found to have been a factor in a Will, the effect is that the Will is deemed invalid.⁵

A claim of undue influence in the making of a Will is made after the Will-maker has passed away. The person with the primary and most direct evidence is not available to address the issue. This means that most of the evidence that will be led in these matters is circumstantial and often difficult to obtain.⁶ Being aware of these issues during the life-time of the Will-maker can greatly assist in diminishing these concerns by proper preparation of the Will and properly conducting the affairs of the Will-maker so that the presumption, if raised, can be rebutted.

Knowledge and Acceptance vs. Undue Influence

A Will-maker may understand and approve of what is included in their Will (i.e. they had capacity to make the Will) but the Will may still have been created as a result of undue influence.⁷ The important question in determining whether undue influence was at play is not whether the Will-maker accepted and intended to include certain gifts in their Will,

¹ Wills, Estates and Succession Act, SBC 2009, c 13 (“WESA”) came into force on March 31, 2014
² WESA, s 52
⁵ Craig v Lamoureux, [1920] AC 349 at 357 (PC)
⁷ Elsie Jones (Re), 2009 BCSC 1723 at para 116; Hix v. Ewachniuk, 2008 BCSC 811 at para 87
but rather whether this approval was derived from another person exerting pressure and influence over the Will-maker which amounted to coercion.\(^8\)

**Coercion**

The law recognizes that many people influence our lives. A minor amount of persuasion and influence from an interested party will not be enough to establish the existence of undue influence.\(^9\) The influence must be ‘undue’. To be undue the influence must be such that the person exerted a level of influence over the Will-maker which reached a level of coercion that overwhelmed the Will-maker’s free will and caused them to create a Will which does not represent their true wishes.\(^10\)

A clear example of coercion is the use of threats or force by the person exerting the influence over the Will-maker which results in a change to the Will. This type of coercion can take the form of a caregiver threatening to cut off contact with the Will-maker or to quit providing care unless the Will is altered.\(^11\) However, other more subtle forms of manipulation and psychological pressure can also amount to undue influence over a vulnerable Will-maker and are difficult to address when alleged.\(^12\)

**The Onus of Proof**

**Prior to WESA**

Prior to WESA, when an individual claimed that another person exerted undue influence over the Will-maker, the individual challenging the validity of the Will had to prove that undue influence actually existed.\(^13\)

**Under WESA**

Under WESA there is now a “presumption of undue influence” when the individual challenging the Will can establish that the Will-maker and the beneficiary were in a

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\(^12\) A discussion of the different forms of manipulation and undue influence is found at BCLI – Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide (2011) starting at page 14; *Hix v Ewachniuk*, 2008 BCSC 811 aff’d 2010 BCCA 317; *Timlock v Crawford* 965 CarswellBC 86 (WL) at paras 48-49

position “where the potential for dependence or domination of the Will-maker was present”. 14

The evidentiary difficulties that had previously been faced by those alleging undue influence have been significantly reduced. Under WESA, the challenging party only has to establish that there was a potential for domination or dependence in the relationship of the Will-maker and the person alleged to have exerted undue influence. 15

This presumption of undue influence is a fundamental change in the law. It essentially shifts the onus of proof from the party challenging the Will, to the party who claims the Will is valid.16 This shift raises many concerns as these allegations are typically made against a child or caregiver who has spent a significant amount of time caring for an elderly parent or other individual in their final stages of life.17 The person who is seeking to uphold the validity of the Will is now required to rebut this presumption by proving a negative. They must show that the Will was free from the presumed influence.18 Proving a negative is a difficult thing to do. This change may have a significant impact on how undue influence claims are dealt with by the court.19

**WESA’s Changes to Undue Influence**

Under WESA, once the requisite relationship is shown, the onus shifts to those against whom the allegation of undue influence is made to show that there was no such influence. The shift in the law was introduced to try to better protect vulnerable and dependent individuals from being taken advantage of and to ensure their true wishes were upheld.20 It was reasoned that requiring the party who is seeking to uphold the Will, who is typically in the best position to produce evidence surrounding the Will’s creation and most likely able to satisfy the court that they had not exerted undue influence over the Will-maker, was the best solution to this difficult issue.21

This change, however, can have the opposite effect as it now allows for a family member or other individual who did not provide care or support to the Will-maker during their lifetime to more easily put forward a claim of undue influence. It places a burden on the caregiver or other individual seeking to uphold the Will to rebut the

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14 CLE Materials 2010 Probate Actions; WESA, s 52 [emphasis added]
17 CLE Materials 2010 Probate Actions
20 Ministry of Justice paper introducing WESA
For example, the courts have recognized that a relationship between an “aged” parent and an adult-child who is the primary caregiver, as being one which is presumed to involve undue influence. The presumption under WESA may result in increased litigation between family members. Unless the caregiver and Will-maker understand these issues and can ensure that there is evidence that the Will sets out the true intentions of a Will-maker, the Will may fail.

Protecting a Will from a Claim of Undue Influence

Forewarned is forearmed. A Will-maker or a caregiver, knowing of the presumption of undue influence under WESA, can take a number of proactive steps that can help to demonstrate that the final wishes outlined in a Will reflect the true intentions of the Will-maker and reduce the likelihood of a successful claim of undue influence.

One of the most important steps a Will-maker can take is to ensure they have competent, independent advice regarding their estate. This can be in the form of an accountant, a doctor (to address competency) and an experienced lawyer to assist in the drafting and execution of a Will.

A court considers obtaining independent legal advice to be one of the key considerations in determining if a Will was the product of undue influence. A lawyer can provide testimony and outline the steps they took in screening for the potential of undue influence, and provide additional recommendations as to how to protect an estate from such a claim.

Evidence provided by third-parties who are able to testify to the intentions, demeanour, typical behaviour and overall mental state of the Will-maker are also key. Sharing the Will-maker’s intentions with people who may be called as witnesses, such as accountants, bank managers or close friends who are trusted, can serve to protect those who will benefit under a Will and ensure that the Will-maker’s wishes are not overturned.

A lawyer can, with the Will-maker’s consent, also arrange for documentary evidence to be gathered from accountants, physicians and other professionals they have consulted prior to the execution of the Will. An accountant’s evaluation of whether a Will-maker

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23 Geffen v Goodman Estate, [1991] SCI No 53, at paras 39-43, 45; Muttart v Jones, 137 NSR (2d) 116 (NSSC) (WL) at para 22; BCLI – Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide (2011) notes that these relationships which result in the presumption of undue influence were established in case law dealing with inter vivos transfers, and it will be up to the court to determine whether these principles will be applies in the context of testamentary transfers
understood the implications of the gifts made under a Will or a medical assessment conducted by a physician relating to mental capacity and susceptibility to influence are strong evidence which can be used to show an absence of undue influence.

It may also be advisable to talk to the beneficiaries. The Will-maker does not have to tell beneficiaries what assets they have or what they are leaving to whom but to generally inform them that a Will has been made, professional advice was sought and the Will-maker is satisfied that it reflects their wishes, can assist in diminishing the likelihood of an undue influence claim.

The benefits of talking to beneficiaries can be, in appropriate circumstances, important when there is an unequal division of assets. Telling those who are to receive a lesser amount under a Will why there is an unequal division and confirming the intention to do so, can help to protect those beneficiaries who are to receive more under the Will. For example, if the Will-maker wants to benefit their primary caregiver to a greater extent than others under a Will there is a presumption of undue influence as a result of the relationship but this can be refuted. An adult-child may have cared for an elderly parent to a greater extent than other siblings who live further away. If the parent wants to benefit that child to a greater extent than the other siblings under their Will, this may reflect a normal desire to show appreciation for the care and attention that child provided. If this is the case and the parent has spoken to the other children about this wish and obtained independent legal advice, this can assist in protecting that child from a claim of undue influence or in defending such a claim.

Caregivers can also be proactive. Caregivers and beneficiaries should remove themselves as much as possible from the estate planning process and execution of the Will. Where possible they can help to ensure that the Will-maker is establishing an independent group of people who can attest to the wishes of the Will-maker. Avoiding recommending to the Will-maker the use of their personal lawyer, providing instructions to the lawyer for the Will-maker or attending the meetings between the lawyer and the Will-maker will all diminish the basis for a finding of undue influence.

Conclusion

The shift in onus under WESA relating to undue influence is significant and can have the unforeseen effect of invalidating a Will if proper steps are not taken. Taking a proactive role in ensuring that there is independent evidence refuting undue influence by both the Will-maker and those close to them, can go a long way to reducing the

28 Muttart v Jones (1995), 137 NSR (2d) 116 (SC) at paras 31-32
29 De Araujo v Neto (2001), 40 ETR (2d) 169, 2001 BCSC 935 at paras 136-138; Hix v Ewachniuk Estate, 2008 BCSC 811 at paras. 102-104
possibility of these claims and can help to ensure the Will-maker’s wishes are followed.\(^\text{30}\)