How to Successfully Defend an Undue Influence Action

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HOW TO SUCCESSFULLY DEFEND AN UNDUE INFLUENCE ACTION

Since section 52 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*") came into force on March 31, 2014, it has become easier than ever before for plaintiffs to successfully challenge the validity of a will on the basis of undue influence. Whereas plaintiffs at one time had the burden of proving actual undue influence in every instance – a burden that was often notoriously difficult to meet – they are now aided by a presumption of undue influence if they can establish the existence of a special relationship between the will-maker and the recipient of a testamentary gift. Given this significant development in the law, and the potential increase in testamentary undue influence claims as a result, it is more important than ever for counsel representing the alleged influencers to understand the most effective ways to defend allegations of undue influence, both procedurally and substantively.

General Principles

Undue influence is influence which overbears the will of the person influenced so that what he or she does is not his or her act: *Longmuir v. Holland*, 2000 BCCA 538. 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: *Peterson v. Welwood*, 2018 BCSC 1379.

Unlike many provinces in Canada, British Columbia wills legislation imposes a presumption of undue influence if there is a potential for dependency or domination between the will-maker and the recipient of a testamentary gift. Section 52 of *WESA* provides as follows:

> **52** In a proceeding, if a person claims that a will or any provision of it resulted from another person
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> > (a) being in a position where the potential for dependence or domination of the will-maker was present, and
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> > (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
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> 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 a relationship with the potential for domination has been established, the onus moves to the defendant to rebut the presumption on a balance of probabilities: Trudeau v. *Turpin Estate*, 2019 BCSC 150.

Particulars

Before considering available substantive defences to a claim of undue influence, there is one particularly effective procedural tool available to defendants to compel a plaintiff to reveal as much as they can about their allegations. It is the demand for further and better particulars.

Rule 3-7(18) requires full particulars of an undue influence claim:

> (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default, or *undue influence*, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

If a plaintiff makes a bare or insufficiently particularized allegation of undue influence, the defendant can (and should) demand further and better particulars pursuant to Rule 3-7(23), and, if necessary, apply for an order requiring further and better particulars pursuant to Rule 3-7(22).

When faced with such a demand or application, it is common for a plaintiff to take the position that the details or particulars of the undue influence claim will be fleshed out from the defendants through the discovery process. That was the position of the plaintiff in *Harrison v. Apperloo*, 2016 BCSC 1129, a decision arising from a chambers application seeking further and better particulars of an allegation of undue influence. Fortunately, Master Bouck held that such a position was not acceptable, stating as follows:

> [13] […] Aside from the fact that the plaintiff ought not to make pleas that have no known factual basis, authorities were offered which allow the plaintiff's obligations under Rule 3-7(18) to await completion of the discovery process. The plaintiff can later add to or elaborate on the initial particulars, following the examinations: Rule 3-7 (20). Nevertheless, in order to identify the actual issues between the parties as well as permit the defendant to comply with the discovery obligations and prepare herself for an examination, it is expected that purported facts of undue influence have more than a generic quality to them. Without intending to do the plaintiff's job for her, some particulars that might be offered are: How was the testator under the direction and control of the plaintiff? What position of trust and confidence did the defendant hold over the testator? When or how did the defendant coerce the testator? [Emphasis added]

Counsel may also wish to consider relying on Madam Justice Southin's comments in *Proconic Electronics Ltd. v. Wong*, [1985] B.C.J. No. 2863 (S.C.). Although the case concerned a breach of fiduciary duty, it is possible the court would apply it to a case of undue influence given the serious nature of such an allegation:

> [23] I think a plaintiff who makes serious allegations of misconduct against someone who stands in a fiduciary relationship to him and who says he cannot give any particulars of those allegations must adduce some evidence even if very

> little in order to require a defendant to answer. Defendants are not to be called upon to answer a bald allegation of breach of fiduciary duty of which there is no evidence and of which no particulars are given.

Subsequent cases, including the recent case of *Sidhu (Litigation guardian of) v. Hiebert*, 2018 BCSC 401 (para. 47), have relied on *Proconic* for the principle that where a plaintiff seeks to assert that he is unable to provide particulars because they are not within his knowledge, and seeks to delay the provision of particulars until after discovery, the plaintiff must provide an affidavit stating: (i) he is unable to provide the specific particulars requested; and (ii) his belief that there is a basis for the allegation and the grounds for that belief. If faced with a bald allegation of undue influence, counsel should consider insisting that the plaintiff, at a minimum, swear such an affidavit.

Avoiding and Rebutting the Presumption

Once the undue influence claims have been sufficiently particularized, the first substantive defence for counsel to consider is the defence that the presumption of undue influence does not apply to the relationship at issue in the case. Remember, the presumption only applies where the relationship between the parties gives rise to the potential of domination. As set out in *Bostrom v. Bigford*, 2019 BCSC 79 (para. 99), the presumption does not usually apply to transfers or gifts from parents to adult children if the parent is in good health and in possession of their faculties, *unless* the parent is dependent, vulnerable to manipulation, or has been historically dominated by the adult child. Therefore, if the will-maker was physically and mentally healthy the best defence is likely trying to avoid the presumption altogether. If the presumption does not apply, the plaintiff must prove actual undue influence.

If the presumption of undue influence does apply, the onus moves to the recipient of the gift to show that the will-maker gave the gift as a result of their own “full, free and informed thought”: *Stewart v. McLean*, 2010 BCSC 64 at para. 97.

A defendant can establish this by showing one or more of the following: *Cowper-Smith v. Morgan*, 2016 BCCA 200 at paras. 49-53, rev’d on other grounds in 2017 SCC 61; *Stewart* at para. 97:

(a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;

(b) the donor had independent advice or the opportunity to obtain independent advice;

(c) the donor had the ability to resist any such influence;

(d) the donor knew and appreciated what she was doing;

(e) undue delay in prosecuting the claim, acquiescence, or confirmation by the deceased; or

(f) the magnitude of the benefit or disadvantage:

The courts have applied the above-noted factors in multiple decisions in recent years. A review of these authorities suggests that counsel should consider obtaining some or all of the following types of evidence for one or more of the factors when trying to either avoid or rebut the presumption of undue influence:

- What was the will-maker's character? Was she a "stern, strong-willed, no-nonsense, and domineering woman… able to stand up for herself, defend her beliefs, and assert her views"? (*Trudeau* at para. 116) Or, was she a person who deferred to those on whom she relied, avoided conflict, and was prone to succumbing to pressure from others to maintain peace in the family? (*Cowper-Smith v. Morgan*, 2015 BCSC 1170 at para. 101, rev'd on other grounds in 2016 BCCA 200);

- What was the defendant's character? If available, lead evidence of the absence of a history of the defendant ever exerting aggressive or suggestive behaviour towards the will-maker. (*Trudeau* at paras. 119-20);

- Was the gift of "sudden origin" or was it made after discussion and contemplation? Counsel should search for evidence that the will-maker engaged in a deliberative process prior to making the will. (*Ali v. Waters*, 2018 BCSC 1032 at para. 36);

- Was the gift concealed from close family members? Or, did the will-maker tell family and friends of the gift and his reasons for making it? (*Ali* at paras. 37-38);

- Is there any evidence of mental impairment or "emotional depletion" at the relevant time? (*Ali* at para. 42);

- Was the will-maker isolated? Or, did she keep in touch with friends and family members? (*Ali* at para. 45);

- Was the will-maker independent and did he exercise his own judgment? Or, was he completely dependent on the defendant for his physical care and financial management? (*Burkett v. Burkett Estate*, 2018 BCSC 320 at para. 191; *Cowper-Smith* at para. 87);

- Did the will-maker ever express fear of the defendant, or were there ever any episodes of violence between the will-maker and the defendant? (*Burkett Estate* at paras. 194-200);

- Did the defendant try to turn the will-maker against other family members or poison her mind in some way? (*Burkett Estate* at para. 204).

- Are there any independent witnesses that can attest to the lack of any undue influence or the will-maker's ability to resist any undue influence, or whose evidence would suggest the will-maker knew and appreciated what she was doing? Consider calling any professionals (e.g. accountants, realtors, notaries, lawyers, etc.) that had interactions with the will-maker at the relevant times, including on unrelated transactions, as well as the will-maker's physician if the doctor-patient relationship was a lengthy one.

With respect to independent legal advice, it is important to note that simply attending at a lawyer's office for legal advice on a transaction is not sufficient on its own to prove that the will-maker entered into the transaction of their own "full, free and informed thought". The legal advice needs to meet a certain standard before the presumption of undue influence will be rebutted. As confirmed by the Court of Appeal in *Cowper-Smith,* the following factors are relevant:

> [51] The following considerations have also been identified as relevant to the assessment of the legal advice provided to the donor (*Fowler Estate v. Barnes* (1996), 1996 CanLII 11726 (NL SC), 142 Nfld. & P.E.I.R. 223, Green J., adopted in *Coish v. Walsh*, 2001 NFCA 41 at para. 23):
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> 1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed;
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> 2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
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> 3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor;
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> 4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place; and
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> 5. Whether the solicitor discussed other options whereby she could achieve her objective with less risk to her.
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> [The "Coish" factors; citations omitted.]

In *Cowper-Smith*, the trial judge held that the legal advice the donor received at the time of the subject transaction was insufficient to rebut the presumption. Not only did the recipient of the gift attend with the donor during much of her interaction with the solicitor, and provide the solicitor with information and instructions on the donor's behalf, but the solicitor did not discuss with the donor the extent of her assets, the existence other family members who might benefit in the absence of the transaction, the wisdom of the

transactions, or other options whereby the donor could achieve her objective with less risk.

The court made similar findings in *Bostrom*. In that case, the donor advanced all of the funds for the purchase of a property with her daughter and son-in-law, but was not registered on title. The solicitor purportedly acting for the donor on the transfer, who was found to actually be taking instructions from the daughter, failed to investigate or discuss the financial implications of the transaction with the donor, and failed to inform her of less risky options to achieve the home purchase with her name on title. He also had the donor sign a gift letter without any explanation of the consequences. The court held that the legal advice was insufficient to rebut the presumption of undue influence.

Evidentiary Issues

The plaintiff will often attempt to adduce out-of-court statements made by the Deceased in the course of trying to establish its claim of undue influence. For example, in *Burkett Estate*, the court relied on the following statement from the Deceased to her daughter-in-law in its analysis of whether there was undue influence:

> You saw Barry's anger-that is what I deal with. I'm afraid of him. I do whatever he tells me to do. It scares me. I don't like seeing it.

In some instances, such statements are admissible as an established exception to the hearsay rule which permits evidence to be given of statements made by deceased persons as to their state of mind or emotional state. However, in order to benefit from this traditional exception to the rule against hearsay, the evidence must have some measure of trustworthiness or reliability: *Peterson* at paras. 71-72.

Statements made by the will-maker may also be admissible under the principled approach to hearsay – i.e. if the party tendering the evidence establishes the necessity and reliability of such evidence on a balance of probabilities: *Peterson* at paras. 73-74

Given that the will-maker is dead, the plaintiff will almost always be able to establish necessity. Therefore, if faced with problematic statements allegedly made by the will-maker, counsel should consider attacking the reliability or trustworthiness of the statement, or the reliability or credibility of the witness who says the statement was made. In *Peterson*, Madam Justice Dardi summarized the relevant considerations in evaluating the reliability of a statement from a deceased person:

> [76] A court is required to assess the reliability of a statement sought to be adduced by way of hearsay evidence by examining the circumstances under which that statement was made. The principal concern arising from the hearsay nature of the evidence is the inability to test the allegations by way of cross-examination. In *Khelawon*, at para. 105, the Court expounded that:

> … The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

[77] In the absence of circumstances where a deceased declarant left a sworn statement or there were earlier opportunities to examine him under oath, the Court must turn to assess the inherent trustworthiness of a hearsay statement. A circumstantial guarantee of trustworthiness is established if the statement was made in circumstances which “substantially negate” the possibility that the declarant was untruthful or mistaken: Smith, at 933.

[78] In *Gutierrez v. Gutierrez*, 2015 BCSC 185 at para. 34, Mr. Justice Voith helpfully summarized the factors that can be considered when assessing the threshold reliability of a hearsay statement:

> 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);
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> 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (*Blackman* at para. 55; *Khelawon* at para. 67; *R. v. Couture,* 2007 SCC 28 at para. 83);
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> 3) timing of the statement relevant to the event, contemporaneity (*Khelawon* at para. 67);
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> 4) the declarant's mental capacity at the time of making the statement (*Khelawon* at para. 107);
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> 5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (Couture at para. 89; Khelawon at para. 86).

[79] It is important to recognize that, as a preliminary threshold issue, the court must first find on a balance of probabilities that the statement was in fact made by a deceased declarant before it goes on to determine the treatment and weight of such evidence […]. This assessment turns on the credibility of the witnesses who relate to the court the hearsay statements attributed to the deceased declarant […].

Costs

If the plaintiff successfully proves undue influence, the defendant will likely face an application for special costs. There is authority to support an award of special costs in these situations: *Hix v. Ewachniuk Estate*, 2008 BCSC 1258; *Wiseman v. Perrey*, 2013 BCSC 904. However, there is also authority that the mere finding of undue influence, without more, does not establish a basis for an award of special costs. In *Johnson v. Pelkey* (1998), 23 E.T.R. (2d) 137 (S.C.), the court stated:

> [55] Similarly, the fact that the court found that the 1992 will was tainted by the undue influence of Albert Pelkey Jr. over the testator, without more, does not establish a basis for an award of special costs against him. Otherwise, special costs would be awarded in every case in which a will or other transaction is set aside for undue influence.
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> [56] Accordingly, I am unable to find that either the plaintiff, or Albert Pelkey Jr., are shown to have engaged in "outrageous" or "scandalous" conduct justifying an award of special costs.

On the basis of this authority, counsel for the plaintiff will need to rely on more than just the finding of undue influence to succeed in a special costs application. He or she will need to convince the court that the specific nature of the undue influence in that particular case was sufficiently outrageous or scandalous.

If the plaintiff is unsuccessful in advancing a claim of undue influence, the defendant should seek its own order of special costs. There is ample authority to support such an order if the defendant can show that the claim was bound to fail. In *Stewart v. McLean,* 2010 BCSC 64, Mr. Justice Punnett discussed and applied these authorities:

> [114] I find the plaintiff's allegations reprehensible. They were completely unfounded and attacked her brother's character. In her statement of claim, the plaintiff alleged that the transfer of the house was made "while the Deceased was in failing health and subject to undue influence exerted on her by the said Defendant"; that the gifts of funds were at "the instigation of the Defendant Donald Emil McLean who deliberately misinformed the Deceased"; and that the defendants "have been unjustly enriched through the Defendant Donald Emil McLean's manipulations of the Deceased" (emphasis added). The statement of claim also referred to "the abuse of fiduciary duty by the said Defendant" (emphasis added). These are serious allegations, which, as Goldie J.A. noted, "sto[p] just short of fraud": *Hamilton v. Sutherland*, 1992 CanLII 1127 (BC CA), [1992] 5 W.W.R. 151 at 163, 68 B.C.L.R. (2d) 115 (C.A.).
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> [115] In *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 (CanLII), 36 E.T.R. (3d) 126, MacKenzie J. reviewed the law of special costs in British Columbia estate cases in which the unsuccessful party alleged undue influence or proceeded with a claim that was bound to fail because of the absence of any basis for it. Justice MacKenzie noted that in a number of cases, special costs have been awarded when undue influence was unsuccessfully alleged. These include *Benekritis v. Benekritis Estate*, [1998] B.C.J. No. 171 (S.C.); *Bates v. Finley*, 2002 BCSC 159 (CanLII), 43 E.T.R. (2d) 1; and *Kouwenhoven Estate v. Kouwenhoven*, 2001 BCSC 1402 (CanLII), 14 C.P.C. (5th) 154.
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> [116] In determining whether special costs should be awarded on this basis, MacKenzie J. considered whether the plaintiff had substantial time to consider his or her allegations and whether the allegations were based on speculation and innuendo. She also took into account the fact that the defendants had warned the plaintiff and his counsel that they intended to seek special costs and had given them cases in which special costs had been awarded because the allegations of undue influence were made without supporting evidence. Thus, the plaintiff could

> not say that he was unaware of the seriousness of his allegations or the law on the topic.

Considering the foregoing authority, it is good practice for counsel for the defendant to put the plaintiff on notice of the defendant's intention to seek special costs in the event the undue influence claim is unsuccessful.

As with the successful undue influence cases, the mere failure to prove undue influence, without more, may not be enough to justify an award of special costs. As Madam Justice Dardi stated in *Leung v. Chang*, 2014 BCSC 1243, "whether a failed allegation of undue influence is sufficiently reprehensible that it warrants the court's condemnation through a special costs award depends on the particular circumstances". Madam Justice Harris relied on this statement in *Allart Estate v. Allart,* 2016 BCSC 768 in finding that the self-represented defendant's failed allegations of undue influence and suspicious circumstances were not sufficiently reprehensible by themselves to give rise to special costs. However, that same defendant's persistence in advancing unsubstantiated allegations of misconduct by counsel for the plaintiff was enough to earn an order of special costs for part of the trial.

Conclusion

Although now easier to advance given the presumption set out in section 52 of *WESA*, undue influence claims remain difficult to prove, and defendants still have significant tools at their disposal to defend them. It is important for counsel to consider all of the options available to them during the course of the defence, whether procedural, evidentiary, or substantive.