

# Recent Trends and Obligations When Assessing Undue Influence

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## I. OVERVIEW

A lawyer assisting a client with their estate and wealth planning has a professional and ethical obligation to ensure that they are taking instructions from someone with an independent mind, free of “undue influence” – i.e., the coercive influence of another.

Upon a finding of undue influence, the court will step in and set aside those affected transfers, gifts, and testamentary instruments.

This paper will summarize recent judicial trends concerning undue influence, and then consider how the updated, December 2022 issue of the British Columbia Law Institute: Undue Influence – Recognition & Prevention (the “**Guide**”) can assist drafting solicitors in assessing red flags that may arise.

The Guide itself hopes to offer the following support to drafting lawyers:

- raise awareness of undue influence as a potential cause of estate litigation and invalidity of a will;
- assist will drafters to recognize red flags of undue influence;
- enable will drafters to interact tactfully but effectively with will-makers to elicit information necessary for them to properly assess the will-makers’ individual situations and ability to act independently; and,
- insulate wills they prepare against successful challenges based on undue influence.

Conversely, and as will be discussed below, the Guide is also instructive to litigators in pursuit of claims against drafting solicitors, in part by showcasing how a solicitor can fail or neglect to follow best practices when assessing undue influence, especially in the digital age where remote meetings, signings, and witnessing – rife with the potential for abuse – have become more commonplace.

## II. UNDUE INFLUENCE – REFRESHER & CROSS-COUNTRY UPDATE

### ***a) What is Undue Influence?***

In a legal context, undue influence is a finding that an individual’s intentions are compromised through coercion and/or manipulation, often at the hands of someone in a position of trust or power.

Undue influence is more than persuasion. There must be an element of coercion – meaning that if the testator could state the circumstances, he or she would say “this is not my wish, but I must do it.” It is not necessary to show physical violence, confinement, or threat.

Undue influence can emerge in any wealth planning context, be it *inter vivos* transfers, or the drafting of testamentary documents.

Care must be taken to distinguish undue influence from both i) incapacity and ii) the client lacking the requisite knowledge / approval as to their planning documents.

Each of these three (3) concepts – capacity, knowledge, and freedom from undue influence – exists within their own factual, legal, and evidentiary universe. While this paper will not examine either capacity or knowledge in depth, it is critical to appreciate that a testator can possess both capacity and knowledge as to their instruments while still falling prey to undue influence.

For illustrative purposes, consider the following scenario: a mother, who lives alone, is suffering from early signs of dementia. She is functionally independent but beginning to show modest signs of cognitive impairment, forgetfulness in particular. Her youngest daughter, E, is unemployed and lives closer, while her eldest daughter, F, works as an ER doctor and lives approximately 50 minutes away with her partner's aging parents.

Mom loves both girls equally, but E attends the house more regularly and is mom's *de facto* caregiver, often tasked with paying bills, purchasing groceries, etc.

Mom subsequently creates a new will using a lawyer who is close friends with E, where she leaves her house (valued at \$1.5 million) together with the residue of her estate (valued at \$2 million) to E, leaving F with just a legacy gift of \$50,000.00.

Mom goes so far as to prepare a handwritten note explaining these changes, and in particular her gratitude for E's support.

However, the drafting lawyer did not know of mom's dementia diagnosis, having never inquired about her health.

Following the execution of both the house transfer and impugned will, mom's cognitive impairments worsen, and she dies just six (6) months later.

Litigation is commenced by F, who obtains the drafting lawyer's file. Upon review, it becomes clear that E was present during the initial meeting, with E's coordinates listed for the client contact information. F also learns that E received all drafts of the testamentary instruments, and was communicating with the drafting lawyer regularly, albeit in respect of minor changes.

We will return to this scenario later when discussing professional negligence, but it serves as an appropriate lead-in to a more thorough discussion concerning various red flags that may arise when assessing undue influence.

## ***b) The Hallmark Red Flags of Undue Influence***

A finding of undue influence is a factual one, with the Guide summarizing the following more commonplace "red flags":

1. Physical, psychological, and cultural characteristics of the client (e.g., impairments, illness, or signs of neglect or distress);
2. Isolation resulting in dependence on another person to meet physical, emotional, financial or other needs;
3. Someone in whom the client invests significant trust and confidence is – or is connected to – a beneficiary;
4. Characteristics of influencer in client's family or circle of acquaintances (e.g., controlling, dismissive of solicitor's advice, known to have difficult personal or financial circumstances, etc.); and,
5. Circumstances relating to the making of a will or planning document and its terms (e.g., presence of beneficiary in lawyer meetings, sudden and marked changes.

This list is, of course, non-exhaustive, and entirely case specific. Furthermore, what may be a red flag in one scenario may be inapplicable in another set of circumstances.

For our scenario, we might apply these categories of red flags as follows, with the mother:

- Exhibiting rapidly worsening cognitive impairments;
- Remaining isolated in her home, presumably following her partner's passing, away from other family members and friends;
- Being supervised by her youngest daughter, who is something of a ne'er-do-well while occupying a position of power and trust; and,
- Suddenly and markedly changing her planning documents, with the direct involvement of the younger daughter.

### ***c) Heightened Difficulty of Assessing Red Flags in the Digital Age***

From the drafting solicitor's perspective, the Guide recognizes how the move towards video conferencing has reduced a solicitor's field of view, and their ability to assess these red flags. In addition to urging vigilance against these more commonplace red flags, the drafting solicitor must take extra care to ensure that they have a fulsome understanding of their client's intentions and environment when taking drafting instructions, and especially when either *inter vivos* or testamentary documents are executed and/or witnessed in that fashion.

### ***d) The Onus of Proof re: Undue Influence***

It remains somewhat controversial whether the existence of "red flags" impacts not just *whether* a court finds undue influence, but *how* the court will conduct that analysis. At root, this is a question as to whether the onus of proof shifts upon the existence of suspicious circumstances relative to undue influence.

The standard line of thinking is that the existence of red flags *does not* result in a presumption of undue influence that must be rebutted. This is unlike cases involving incapacity challenges, where the presence of suspicious circumstances will cause the onus to shift to the propounder of the will.

This approach dates back to the Supreme Court of Canada decision of *Vout v. Hay* ("**Vout**"),<sup>[1]</sup> where the Honourable Justice Sopinka clarified that the suspicious circumstances can arise as circumstances surrounding the preparation of the will, circumstances calling into question the capacity of a testator, or circumstances showing that the free will of the testator was overridden by acts of coercion or fraud.

A distinction may be drawn between undue influence in the context of *inter vivos* transfers vs. testamentary instruments, with some courts shifting the onus only in the former. As will be detailed below, however some provinces (e.g., British Columbia) also apply a reverse onus in the testamentary context, per the applicable provincial statute.

In the Supreme Court of Canada decision of *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), the court found that the onus will shift to the one looking to uphold a transfer marred by undue influence where: a) the potential for domination inheres in the nature of the relationship, especially those of a fiduciary nature; and b) the transfer is more akin to a gift than a commercial transaction. It then falls upon the party defending the transfer to prove that the transfer was the result of an independent and informed donor.

Where independent legal advice is sought, the court will still consider the following factors:

(1) who counsel really took instructions from;

- (2) whether the party benefitting from the transaction was present at the time of the transfer;
- (3) whether counsel discussed the financial implications of the transfer with the donor;
- (4) whether counsel discussed the matter with those who stood to benefit from the transfer; and,
- (5) whether counsel had any prior relationship with the person purporting to exercise influence over the donor.[\[2\]](#)

The recent decision of *McDonald Estate v. McDonald*, 2023 MBKB 31 aligns with the Supreme Court's analysis in *Geffen*, being that red flags may in fact give rise to a rebuttal presumption of undue influence in the context of assessing *inter vivos* transfers.[\[3\]](#)

In that case, a son was gifted a partial interest in his mother's home, a substantial gift that was set aside as the transfer took place while he acted as his mother's power of attorney, during a time when her health was in decline.

#### **e) Cross-Country Case Law Update**

This section of our paper will detail how courts across Canada have assessed undue influence from a factual and evidentiary perspective in the recent past.

##### *i) British Columbia*

In British Columbia, the ***Wills, Estates and Succession Act*** ("**WESA**") allows for the challenge of a will based on undue influence, with s.52 reading as follows:

In a proceeding, 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 ***McMaster Estate v. McMaster***, the Court summarized the applicable legal principles with respect to undue influence, in a manner consistent with the summary set out above.[\[4\]](#)

The courts have agreed that undue influence must amount to coercion such that the will of the testator does not reflect their true intentions 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.[\[5\]](#)

The British Columbia Court of Appeal has summarized these principles as follows, in ***Cowper-Smith v. Morgan***:

Factors to be considered in determining whether the donor acted of her own "full, free and informed thought" in entering the transaction include: (i) the lack of actual influence or opportunity to influence the donor; (ii) the receipt of or opportunity to obtain independent legal advice; (iii) the donor's ability to resist any such influence; and (iv) the donor's knowledge and appreciation about

what she was doing...[\[6\]](#)

Unique to British Columbia and its statutory scheme, specifically s.52 of WESA, is the applicability of a reverse onus even in the testamentary context, as confirmed in ***Miles Estate***:

In order to rely on the presumption in s. 52, the attacker of the will must show, not only that a person had the ability to unduly influence the will-maker, but that undue influence was in fact exercised and that the will was the product of that influence.[\[7\]](#)

## *ii) Ontario*

Ontario courts have continued to adopt the test of undue influence as explained in the Supreme Court of Canada decision of ***Vout***, referenced above.

In ***Di Nunzio v. Di Nunzio*** ("***Di Nunzio***") the court offered the following summary:

Undue influence arises where the testator's agreement to the will was obtained by influence such that instead of representing what the testator wanted, the will is the product of coercion: *Vout* at p. 877. The onus is on the person alleging undue influence, in this case Lucia, to establish it. Mere suspicion cannot defeat the testator's intention.[\[8\]](#)

In ***Di Nunzio***, dominance and control over the testator's financial and medical needs did not establish undue influence, in the absence of any other evidence, given the testator's illness and the respondent's role as primary caregiver and attorney for property.[\[9\]](#)

The Ontario Superior Court of Justice recently summarized the current analysis of undue influence in ***Cozza v. Venneri*** ("***Cozza***"):[\[10\]](#)

Undue influence may occur when the party exerting coercion and the Testator are alone, such that only circumstantial evidence may prove it. The Court may consider the following factors for whether undue influence is established by circumstantial evidence: 1) the willingness or disposition of the persons to have exercised the undue influence; 2) whether an opportunity existed; 3) the vulnerability of the Testator; 4) the degree of pressure that would be required; 5) absence of moral claims of the beneficiaries; 6) whether the Will departs radically from the dispositive pattern of earlier Wills.

While the existence of undue influence is fact specific, the Court has provided certain indicators of undue influence. These include: 1) when the beneficiary suddenly directs the Testator to a new lawyer that is unknown to the Testator to draft a new Will; 2) a beneficiary has conveyed instructions to the drafting lawyer on behalf of the Testator; 3) the Testator made a new Will that is inconsistent with previous iterations of the Will; 4) the Testator made changes that were similar to changes made in other documents, such as a power of attorney.

These pronouncements are consistent with the red flags detailed in the sections above.

In ***Cozza***, the Court held that there was no undue influence since the testator knew the consequences and effect of changing her will, which she did at her own volition and without the pressure of influence from others.[\[11\]](#)

The Court also highlighted the drafting lawyer's role in safeguarding against undue influence, a subject to be expanded upon below:

The role of the solicitor in drafting and executing the Will is also an important consideration for undue influence. When considering whether a solicitor gave independent advice to the Testator, the following are pertinent factors: 1) whether the donee was present when the advice was given to the donor; 2) whether the advisor although technically engaged by the donor, in fact took instructions from the donee; 3) whether the gift was substantially all of the donor's property and did the advisor know this; 4) whether the advisor

asked whether other family members who might be disadvantaged by the gift had been advised; and 5) whether the advisor discussed alternatives with the donor.

### *iii) Alberta*

In Alberta, the **Wills and Succession Act** addresses issues related to undue influence. Alberta courts have similarly equated undue influence with coercion.[\[12\]](#)

In **McAndrew Estate (Re)**, the court affirmed that undue influence requires an element of coercion that goes beyond mere persuasion,[\[13\]](#) and affirmed that the applicable test remains as set out in **Vout**, cited above:

Undue influence, in order to render a will void, 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 mind, but which really does not express his mind, but something else which he did not really mean.[\[14\]](#)

Other recent Alberta decisions have applied the standard test for undue influence, as follows:

The test for undue influence is not a matter of merely influence, nor is it met by evidence that the testator may have been operating under an inaccurate understanding of some relevant circumstances. The "suspicion" necessary to force a trial on undue influence, putting an entire will into question, requires more than the mere belief by disappointed potential beneficiaries that the reputations with a competent testator must have been unfairly hurt such that their hoped-for specific legacy was not included.[\[15\]](#)

### *iv) Manitoba*

Manitoba's **The Wills Act** is the legislation used for contesting a will based on undue influence.

Manitoba courts have applied **Vout** and held that influence alone is not enough.[\[16\]](#)

In the 2017 decision of **Re Estate of Rose May Hazlitt**, the court set out the applicable test, as follows:

The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will under some threat or other inducement. One must look at all of the surrounding circumstances and determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as has been said, the will must be 'the offspring of his own volition and not the record of someone else's'.[\[17\]](#)

### *v) New Brunswick*

New Brunswick's **Wills Act** enables challenges to wills on the grounds of undue influence.

In **Meade and the Estate of Donald Patrick Meade**, the New Brunswick Court of Appeal applied **Vout** and the two-step test articulated by the Supreme Court of Canada in **Geffen v. Goodman Estate**,[\[18\]](#) in a recent decision pertaining to undue influence in an *inter vivos* context.[\[19\]](#)

### *vi) Newfoundland & Labrador*

In **Brien v. Walsh**, the Newfoundland and Labrador Supreme Court confirmed that undue influence sufficient to invalidate a will or a bequest must meet a high burden, requiring evidence of coercion or fraud.[\[20\]](#)

In that case, however, the court found no evidence of undue influence as the testator was able to give instructions to a solicitor and execute the draft will prepared from those instructions, with the testator's children only providing loving support and assistance to an elderly parent.[\[21\]](#)

Courts in Newfoundland and Labrador have also affirmed that "undue haste" is a factor that must be considered when assessing whether a testator has been subjected to undue influence or fraud.[\[22\]](#)

#### *vii) Nova Scotia*

In **Billard v. Billard Estate**, the Nova Scotia Supreme Court confirmed that the onus is on the challenger of the will to prove, on a balance of probabilities, that the testator's mind was overborne by the influence of someone else, such that the testator did not voluntarily approve of the contents of the new will. The test is whether in all of the circumstances, the testator did not have an independent mind that could withstand the competing influences.[\[23\]](#)

In this case, the court found that the testator was unduly influenced by his eldest son, who had manipulated his father into leaving him his entire estate while disinheriting his sister, with whom the father was in a closer relationship. The new will reflected the intent of the son, not the testator. The testator did not have an independent mind able to withstand the son's influence.[\[24\]](#)

#### *viii) Prince Edward Island*

In Prince Edward Island, the **Probate Act** contains provisions for challenging wills based on undue influence.

In **Lewis v. Central Credit Union Limited**, the court found that certain relationships could attract the presumption of undue influence, such as a "mother-son relationship" where a parent is supporting their adult children in commercial ventures where the party seeking to avoid the transaction "generally reposed trust and confidence in the wrongdoer".[\[25\]](#)

This aligns with British Columbia's approach and its implementation of a reverse onus in a testamentary context.

Although this case was not about undue influence in the estates context and was instead about a son's influence on his elderly mother's newly signed second mortgage so the son could invest in a farming business, the analysis of undue influence remains relevant. The court found that the mother was elderly, not personally involved in her son's business with little knowledge of his financial affairs, relied heavily on him for his advice and ability, and importantly, received no financial benefit or remuneration for the mortgage.[\[26\]](#) It was "plain to see that the relationship between the son and his mother was such that potential existed for the son to exercise persuasive influence over his mother".[\[27\]](#)

#### *ix) Saskatchewan*

In Saskatchewan, the **Wills Act** allows for the contestation of a will on the grounds of undue influence.

In **Riben v. Riben**, the Saskatchewan Court of King's Bench outlined five guidelines that are useful in directing a court's inquiry in determining the potential for undue influence upon a testator, which appear to align with the red flags detailed in the Guide:[\[28\]](#)

a. Any issue related to the testator's vulnerability as a result of mental capacity to pain, drugs or illness must have a close temporal connection to the execution of the will.

- b. The circumstances leading up to the preparation of the will should be examined and need not have as close a temporal connection as the inquiry into the testator's vulnerability as a result of mental incapacity.
- c. An examination of the relationship between the testator and the individual who stands to benefit from the will including any evidence that the individual kept the testator apart from others or had the opportunity to control their movements.
- d. Is a new will or other testamentary document a significant change from previous testamentary documents?
- e. If so, does the new document make testamentary sense and/or is there a known valid reason for any change?

In this case, the court also emphasized that the time frame for evidence of undue influence is larger than testamentary capacity as undue influence can be developed and manifest itself over time.[\[29\]](#)

x) *Quebec*

Quebec's **Civil Code** provides for challenging a will if undue influence can be established.

In **Gidney c. Lemieux**, although the trial decision is unreported, the Quebec Court of Appeal held that:

A will can be annulled where a person alleging undue influence shows fraud that induced the testator to dispose of property in a manner that he or she would not have otherwise done.[\[30\]](#)

The Court rejected the appellants argument that even if the testator was capable of making a will, she was so vulnerable because of her psychiatric condition that she was ripe for manipulation. The appellant brought no "no serious argument that the deceased was subject to fraudulent maneuvers, and none whatsoever that blameworthy conduct of this sort caused her to dispose of her property as she did."[\[31\]](#)

### III. PROFESSIONAL NEGLIGENCE WHEN ASSESSING UNDUE INFLUENCE

Of concern to drafting solicitors is the risk that a client has made an *inter vivos* or testamentary gift that is poisoned by such external factors, and is thereafter declared invalid as a result. A public decision finding that solicitor guilty of negligence following such a declaration could have significant consequences to the solicitor's reputation.

The Guide's summary of the potential red flags tracks with the criteria relied upon by courts to assess undue influence. By extension, there is insight to be gained in how solicitors are expected to assess those red flags and how courts might criticize a failure to do so. Put another way, the Guide may well become the standard of care, at least in British Columbia, on these issues.

In this section, we will consider how the Guide may be used to great effect in advancing claims against drafting solicitors, especially those who fail to heed the Guide's approach to assessing whether a client is the subject of undue influence.

When a claim in professional negligence is advanced, a solicitor has no place to hide his or her mistakes. The lifespan of a solicitor's file is often told through the solicitor's dockets, which are one of the first items produced to and reviewed by litigation counsel. Those dockets will reveal whether the solicitor followed best practices, as detailed in the Guide.

The Guide recommends that the following questions be answered before a solicitor proceeds to have any planning documents



executed:

1. Does the client have capacity?
2. Is the client aware of their documents?
3. Does the client exhibit free will, such that instructions are being provided freely and confidently? (e.g., an assessment of the red flags detailed above)

Regarding question (3), we might reiterate those red flags as follows:

1. Physical, psychological, and cultural characteristics of the client;
2. Isolation resulting in dependence on another person to meet physical, emotional, financial or other needs;
3. Someone in whom the client invests significant trust and confidence is – or is connected to – a beneficiary;
4. Characteristics of influencer in client's family or circle of acquaintances; and,
5. Circumstances relating to the making of a will or planning document and its terms.

Regardless of whether red flags are present, the Guide urges the solicitor to ***interview the client alone***, and to ask non-leading questions when assessing a testator's intentions, or the presence of these concerns. Only in so doing can a proper analysis as to the client's health, functioning, relationships, etc. be undertaken. The corollary is that a solicitor must have notes of these discussions that are comprehensive and include factual observations about the client (how were they dressed, did they have their hearing aids in and glasses on, did they appear nervous or relaxed).

In this spirit, the Guide also urges caution at the use and advancement of zoom or virtual conferencing, noting that a solicitor's ability to ensure the client is in fact alone is compromised, and their literal and figurative field of view is significantly narrowed.

While documenting every possible solicitor oversight would be a futile undertaking, certain failures are more commonplace when assessing a client's susceptibility to undue influence:

1. Generally exhibiting a lack of reasonable knowledge, skill and experience of a prudent estate solicitor;
2. Not interviewing the client alone;
3. Making no effort to explain why the client must be interviewed alone, and conversely no effort to interview relevant third parties;
4. Not considering or documenting any relevant illnesses, impairments, or disorders;
5. Not obtaining a capacity assessment when such concerns should reasonably exist;
6. Ignoring a history of neglect and/or abuse in other contexts;
7. Not safeguarding against the domineering presence (both generally and in the estate planning context specifically) of an unreliable or suspicious family member or friend, especially where that person is in a position of trust or power;
8. Not critically analyzing whether significant or marked changes to the client's estate planning documents make sense and align with their true intentions; and,
9. Not keeping appropriate notes and records or documenting or considering events indicating a suspicion of undue influence.

Turning back to our scenario, we see how the drafting solicitor failed to consider many if not all of these red flags – the testator's

impaired capacity, the younger sister's motivations and position of trust and authority, etc. Under those circumstances, a litigation lawyer challenging the validity of that instrument will not only commence an application for directions, but an action against that solicitor in negligence.

The Guide references a few professional negligence cases involving lawyers who were found negligent in similar contexts.

In *Halliday v. Halliday Estate*, 2019 BCSC 554<sup>[32]</sup>, the testator made a will in 2001 in which he appointed his second wife as his trustee and his son as substitute trustee. In 2011 the Testator had difficulties with word-finding. In 2012, he was diagnosed with dementia. In 2015, he was committed to a hospital psychiatric ward when his cognitive functions declined.

In the spring of 2014, he made new wills in which he named his second wife as trustee and her two children as substitute trustees. The testator's son brought proceedings for a declaration that the 2014 wills were invalid.

The court agreed, in part because of the presence of undue influence.<sup>[33]</sup>

Counsel for the parties agreed that the will drafting solicitor did not perform as one would expect of a competent wills and estate practitioner, and the Court agreed.

The drafting solicitor never met with the testator alone, instead always conducting meeting with the second wife in attendance. The court noted as follows:

"The Testator had experienced moderately severe cognitive decline and his day-to-day functioning was poor by the time the 2014 Wills were executed. The plaintiff points out that the instructions for the 2014 Wills came from the Testator's second wife, who initiated all of the contact with W.E.W.'s office. These are matters of concern with respect to the issue of undue influence."<sup>[34]</sup>

The drafting solicitor had no memory of any of the specific interactions he had with either the testator or the testator's second wife.

His assistant in fact made a note saying "[the testator's] memory is starting to go"; however, the solicitor took no steps to consider the testator's capacity or his ultimate diagnosis of dementia. He also failed to discuss the purpose or effect of a will with the testator.

In *McMaster Estate v. McMaster*, 2021 BCSC 1100, the deceased, at the age of 81, purchased home as a joint tenant with one of her five adult children. The court found that the deceased did not receive informed legal advice on the merits, had been unduly influenced by her son, and upheld the presumption of a resulting trust in the circumstances. Of relevance, the court concluded as follows regarding the solicitor:

"There is a need to provide informed legal advice on the merits of the transaction if there are allegations of undue influence. Consequently, it is deeply problematic when, as here, the deceased received no legal advice, independent or otherwise. The realtor, Mr. Milligan, could not and did not provide legal advice to Doreen. He had no discussion with Doreen and Brad about how title to the Madeira property would be held."<sup>[35]</sup>

These cases illustrate how, in practical terms, a solicitor can be found negligent when failing to properly and fully consider the red flags articulated in the Guide.

#### IV. CONCLUSION

This paper has sought to analyze the legal, factual, and evidentiary complications that arise when a drafting solicitor is tasked with assessing a client's susceptibility to undue influence, and how a failure to follow the best practices articulated in the Guide may

expose that solicitor to a professional negligence action.

As difficult as it is for even an experienced lawyer to gather the full context or “field of view”, the invent of remote sessions has only exacerbated those challenges.

The Guide provides instructive guidance, which accounts for the advancement of the digital age, to both solicitors and litigators alike.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[1] *Vout v Hay*, [1995 CanLII 105 \(SCC\)](#), [1995] 2 SCR 876.

[2] *Geffen v. Goodman Estate*, [1991 CanLII 69 \(SCC\)](#) at paras. 49-55.

[3] *McDonald Estate v. McDonald*, [2023 MBKB 31](#) at paras. 49-57.

[4] *McMaster Estate v. McMaster*, [2021 CarswellBC 1842](#) at paras. 47-52.

[5] *Re Charbonneau Estate*, [2021 BCSC 2571](#), at para 36; *Leung v. Chang*, [2013 BCSC 976](#) at para 35.

[6] *Cowper-Smith v Morgan*, [2016 BCCA 200](#), at para 50; also reiterated in *Lamont v Sault*, [2022 BCSC 1087](#), at para 22.

[7] *Miles Estate*, [2023 BCSC 873](#), at para 32.

[8] *Di Nunzio v Di Nunzio*, [2021 ONSC 6689](#), at para 65.

[9] *Ibid*, at para 103.

[10] *Cozza v Venneri*, 2022 ONSC 7053, at paras 161-163.

[11] *Cozza v Venneri*, [2022 ONSC 7053](#), at para 182.

[12] *Kozak Estate (Re)*, [2018 ABQB 185](#).

[13] See also *Campbell v Ensminger*, [2022 ABQB 330](#), at para 69.

[14] *McAndrew Estate (Re)*, [2020 ABQB 614](#) at para. 103.

[15] *Keller v Luzzi Estate*, [2010 ABCA 127](#); see also *Gordon Estate (Re)*, [2023 ABKB 132](#), at para 59; *Fech v. Lewington*, [2022 ABCA 154](#), para 19.

[16] *Tector v Reimer Estate*, [2021 MBQB 133](#), at para 56.

[17] *Re Estate of Rose May Hazlitt*, [2017 MBQB 184](#), at para 17.

[18] *Geffen v. Goodman Estate*, [\[1991\] 2 S.C.R. 353](#).

[19] *Meade and the Estate of Donald Patrick Meade v Cornish*, [2023 NBCA 10](#), at paras 37-38.

[20] *Brien v Walsh*, [2020 NLSC 59](#), at para 121.

[21] *Ibid.* at para 157.

[22] *Melendy v Drodge*, [2017 NLCA 46](#), at para 34.

[23] *Billard v Billard Estate*, [2022 NSSC 167](#), at para 15.

[24] *Ibid.* at paras 86-87.

[25] *Lewis v Central Credit Union Limited*, [2012 PECA 9](#).

[26] *Ibid.* at para 67.

[27] *Ibid.*

[28] *Riben v Riben*, 2023 SKKB 72, at para 47.

[29] *Ibid.* at para 11.

[30] *Gidney c Lemieux*, [2016 QCCA 1381](#), at para 43.

[31] *Ibid.* at paras 41-43.

[32] *Halliday v. Halliday Estate*, [2019 BCSC 554](#) at para. 136.

[33] *Ibid.* at para. 233.

[34] *Ibid.* at para. 222.

[35] *McMaster Estate v. McMaster*, [2021 BCSC 1100](#) at para. 98.

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