

**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

**Undue Influence in Relation to preparation of a Will
Discussion Paper**

**Prepared by the Civil and Family Law Policy
Office**

October 2007

This paper has been developed for consultations relating to the proposed *Wills, Estates and Succession Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the law of undue influence should seek legal advice from a lawyer.

Table of Contents

INTRODUCTION	1
BACKGROUND	1
OPTIONS FOR ADDRESSING UNDUE INFLUENCE	2
1) MAINTAIN THE STATUS QUO	2
<i>Advantages:</i>	2
<i>Disadvantages:</i>	2
2) CHANGE THE LAW	3
<i>Advantages:</i>	3
<i>Disadvantages:</i>	3
3) CHANGE THE LAW ONLY FOR BENEFICIARIES OTHER THAN THE TESTATOR'S HEIRS (CHILDREN)	4
<i>Advantages:</i>	4
<i>Disadvantages:</i>	4
CONCLUSION	4
QUESTIONS	5

Introduction

The British Columbia Law Institute (“BCLI”), in Report No. 45 *Wills Estates and Succession: A Modern Legal Framework* (the “BCLI Report”), decided not to recommend a change in the law in relation to allegations of undue influence in the drafting of a will. As the Project Committee was equally divided on the issue, the Ministry has decided to solicit further input on this issue.

Background

This paper explores the law in relation to gratuitous transfers, i.e. transfers where the person transferring the property (the transferor) receives nothing in return or receives less than the fair market value of the transferred property. If property is transferred as a result of undue influence, the transfer will be set aside whether it takes effect on death as a gift under a will (a testamentary transfer), or during the life of the transferor (an *inter vivos* transfer). When a testamentary transfer is challenged on the basis of undue influence, the challenger always has the onus to prove that undue influence was actually exercised. However, with an *inter vivos* transfer, if it can be shown that the person receiving benefit was in a position of influence or dominance over the transferor, then the onus shifts to the person receiving the property to rebut a presumption of undue influence.

In relation to *inter vivos* transfers, some relationships will always give rise to a presumption of undue influence, including those of parent and minor child, solicitor and client, and guardian and ward. Other kinds of relationships may also give rise to such a presumption, particularly ones involving confidence or reliance. The degree of domination or coercion that suffices to have an *inter vivos* transfer set aside is said to be less than that required to set aside a testamentary gift.

The BCLI Report notes that the legal presumptions in relation to undue influence for *inter vivos* and testamentary transfers arose because responsibility for *inter vivos* and testamentary transfers rested with different courts. One court was responsible for alleged wrongs occurring during a person’s life and a completely separate court was responsible for disputes relating to a person’s will. However, the different focuses of the protective doctrines established by each court may continue to have relevance. First, in the case of an *inter vivos* transfer, the transferor is clearly prejudiced by the transfer as they have lost use of the item transferred (be it a physical object or money, etc.) for the rest of their lives. This same prejudice is not found with testamentary transfers, as the testator clearly has no more use for the item. Second, with a testamentary transfer there are already a number of checks and balances that are introduced to provide some assurance that the wishes expressed in the document represent the true wishes of the testator. In many cases there are no similar formalities associated with the *inter vivos* transfer of property.

It is important to determine the appropriate presumption in relation to undue influence because the population is aging and the elderly are living longer. These two trends have led to an increase in the number of elderly people who have become dependant on others for their daily needs and there is the potential for these people to exert undue influence (either with overt physical abuse or emotional or mental abuse through the threat of discontinuing services) over the elderly under their care. There is currently legislation that prohibits certain caretakers from

receiving gifts from their clients; however, this legislation only applies in very limited circumstances, excluding people caring for their relatives, and even the majority of non-relative caretaker relationships.

Ultimately, changing the presumptions is about balancing the interest of protecting the elderly, and ensuring that the wishes expressed in their wills represent their true uninfluenced wishes with the objective of minimizing the potential for litigation launched by heirs or potential heirs who receive less than they believe they should under a will.

Options for Addressing Undue Influence

There are three options for addressing allegations of undue influence in testamentary transfers:

- 1) Maintain the status quo, where the challenger always has the onus to prove that undue influence actually occurred;
- 2) Change the law so that the principles and presumption respecting *inter vivos* transfers of property are also applied where undue influence is alleged in relation to wills; or
- 3) Change the law as is proposed in option 2 only with respect to beneficiaries other than the testator's children.

1) Maintain the Status Quo

Under the status quo, if a testamentary transfer is challenged on the basis of undue influence, the challenger will always have the onus to prove that undue influence was actually exercised - even if it can be shown that the person receiving benefit was in a position of influence or dominance over the transferor.

Advantages:

The advantage to maintaining the status quo is that the law remains settled. As stated above, the status quo may be sufficient given the other procedural safeguards already in place to ensure that a will represents the true testamentary intentions of the deceased. An associated benefit is that the present presumption reduces the likelihood of a frivolous or vexatious lawsuits launched by disappointed heirs. An example of a situation giving rise to a vexatious lawsuit is where the "neglectful son" who receives less under his parent's will alleges undue influence against the "good daughter" who took care of the parent for little or no compensation.

Disadvantages:

The disadvantage of maintaining the status quo is demonstrated by another scenario, where shortly before death a parent changes his or her will and an unrelated paid caregiver receives a disproportionate share of the estate. Because the present presumption requires the persons making the allegation to actually show there was undue influence it can be difficult for the heirs to challenge the will. In many cases, aside from any suspicious circumstances and the beneficiary's position of influence or dominance, it may be very complicated for a party to obtain sufficient information about the circumstances surrounding the drafting of the will to establish undue influence.

2) Change the law

Under this option, once a person has established that the beneficiary of a testamentary gift was in a position of influence over the deceased, then there is a presumption of undue influence (which the beneficiary can rebut). There are a number of ways that a beneficiary may be able to rebut the presumption, such as showing that the will was prepared before the relationship of influence began (as where a child becomes their parent's caregiver after the will was drafted) or by establishing that the deceased prepared their will with the assistance of a lawyer and without the beneficiary being present.

Advantages:

Arguments in favour of applying the *inter vivos* principles to testamentary transfers are that it would both provide greater protection for genuine testamentary wishes and protect the growing number of older adults living in a state of dependence from exploitation by their caregivers. The change would also place the onus to show that a will expresses the testator's genuine testamentary intent on the party who is more likely to have knowledge of the actual facts surrounding the will (who is thus the person in the best position to discharge the onus). This shift in the law should not place too great a burden on the beneficiary, as it would still be necessary for the person alleging undue influence to raise a prima facie case that the relationship created the potential for undue influence (such as that the deceased was dependant on the beneficiary for the necessities of life and had limited contact with people other than the beneficiary): the mere fact of caring for a parent would not necessarily create such a relationship.

Disadvantages:

The counter-argument raised against applying the *inter vivos* principles is that the category of persons who would potentially have the onus to prove that undue influence was not exerted would be those who would normally be expected to receive a greater benefit under a will, such as a child or other close relative who has cared for the testator in advanced age. Thus, there is concern that the new law could potentially encourage discord and unjustified litigation in testators' families. As well, in comparison to an *inter vivos* beneficiary, it can be more difficult for a testamentary beneficiary to rebut a presumption of undue influence because the testator is deceased and cannot testify. Essentially, the concern is that adding a presumption of undue influence may not be a proportional response to protect the elderly from potential exploitation by their caregivers.

The counter-arguments from those in favour of harmonizing the approach to undue influence for gifts during life and after death is that the beneficiary in a position of influence is still in the best position to provide information that will shed light on whether there was in fact undue influence. Moreover, in many cases where undue influence is alleged in respect of an *inter vivos* transfer the transferor usually has diminished capacity and therefore their testimony has limited value, if any.

3) Change the law only for beneficiaries other than the testator's heirs (children)

A third option is a compromise that would apply the *inter vivos* rules with the exception that no presumption of undue influence could be raised against a specified group (this group would likely be restricted to a child or grandchild of the testator although it could potentially be extended to other family members).

Advantages:

Presuming undue influence only where the relationship with a non-family member gives rise to an imbalance of power protects the elderly against non-familial care-givers while minimizing family discord (by requiring proof of undue influence if the allegation is raised against a child of the deceased).

Disadvantages:

The disadvantage with this proposal is that any decision to exclude a class of persons from the obligation to rebut a presumption of undue influence is arbitrary. It is difficult to define the class that should be excluded, because, depending on the particular cultural background and family situation of a person, many relatives could be expected to adopt a care giving role and be natural recipients of that person's estate upon that person's death.

Conclusion

There are advantages and disadvantages to each of the different options. As stated the status quo may be justified, given the other procedural safeguards present to ensure that a will expresses the true wishes of the testator. However, there may be good reason in amending the law in an effort to provide greater certainty that a person's will expresses their uninfluenced intentions. Your response to this discussion paper will provide meaningful information on which to base this decision.

Question:

To assist us in determining the appropriate course of action, we ask you to indicate which option you support:

I support the following model:

- Maintain the Status Quo – Do not presume undue influence.
- Change the law so that the principles with respect to lifetime transfers apply to testamentary transfers (gifts under a will) – Presume undue influence where it is established that the beneficiary had power over the testator.
- Compromise – presume undue influence for all beneficiaries but the testator’s children and grandchildren.
- Other: _____

Responses may be sent to:

E-mail: CFLPO@gov.bc.ca

Fax: 250-387-1189

Mail:
PO BOX 9222 STN PROV GOVT
Victoria, BC V8W 9J1