

**Undue Influence**

**Canadian Association of Gift Planners – Nova Scotia Round Table**

**September 25, 2008**

**Richard S. Niedermayer**

**STEWART MCKELVEY**

**When results count.**

# What is Undue Influence?

“Persuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”

(Black’s Law Dictionary, Sixth Edition, page 1528)

# Conditions For Making A Will

- Need sufficient “testamentary capacity” to start.
- Requires testator to understand the extent of her property and the nature of the claims of those who might be expected to share in the Estate.
- Burden to prove capacity rests upon the propounder of the Will.
- Testator must also know and approve contents of the Will – presumed in most cases.

# Conditions For Making A Will (cont'd.)

- If prepared and executed in “suspicious circumstances”, burden can shift.
- If “undue influence” is alleged, burden to prove is on party alleging unless there are suspicious circumstances where burden shifts.
- Sufficient capacity also required for other gifts during lifetime, such as annual donations, gifts of insurance, gift annuities and charitable remainder trusts.

# When Do These Issues Arise?

- Family members may question charitable gifts, both during lifetime and on death.
- Issues can include capacity and/or undue influence.
- Charity's role is usually passive – unlikely to take an active position.
- Ethical balance between wishes of the donor and duty to charity's stakeholders.

# *Pace Estate v. Pace*

- Over time, Mrs. Pace had signed at least 7 Wills.
- Several left money or property to both her children.
- Final Will left nothing to either child nor her grandchildren.
- Residual beneficiaries of last Will were Canadian Cancer Society, BC Heart Foundation and Society of Crippled Children.

## *Pace Estate v. Pace (cont'd.)*

- Children challenged Will on grounds obtained under undue influence of their mother's companion and alleged suspicious circumstances.
- Court analyzed facts and found that while suspicious circumstances existed, there was no undue influence.
- Court said:

“At the time of giving instructions and at the time of execution, I find that the Testatrix knew and approved the contents of the document and that it expressed her mind... She knew that she was benefiting charitable organizations and that she was disinheriting the children. From the evidence it would appear she had nothing to do with charitable organizations during her life and that she had no connection or association with the charities mentioned in the Will. However, in the circumstances of this case, I see nothing unusual in the manner in which she disposed of her Estate.”

# *Tyler v. Linkert Estate*

- Testator died at age 86, a bachelor with no children.
- Had been relying on sister as his Power of Attorney, but then struck an association with a gentleman named Barry Shade.
- Testator executed Will appointing Shade as executor and dividing residue between 7 charities.
- Trial ordered on the facts – no decision yet.

## *Tyler v. Linkert Estate (cont'd.)*

- Points to note
  - Shade made the appointment with lawyer to arrange new Will
  - Shade attended with Testator at lawyer's office
  - Testator never told his sister he was making the change until it had occurred
  - Told her later that he changed it because “they” wanted him to
  - Lawyer was concerned so she wrote to Testator's doctor with respect to capacity
  - Testator was brought to office for signing by Shade
  - Lawyer was concerned with capacity and influence so didn't destroy prior Will

# Re Vleeming Estate

- Testator's Will left 20% of his estate to each of two charities and the remaining 60% to a third.
- Deceased's children attacked Will on basis he lacked testamentary capacity and that it was obtained by undue influence.
- Will was prepared by a lawyer.
- Deceased spoke almost no English.

## Re Vleeming Estate (cont'd.)

- Alleged influencer (Van Gyssel) accompanied Testator to lawyer's office and acted as translator (Dutch to English).
- Deceased was in early stages of dementia at time Will was made and had a delusion that his children had abandoned him when in fact they visited regularly and assisted him with the management of his affairs.
- Judge found Van Gyssel thought he was helping Testator and that the Testator had been abandoned, but admitted Testator would not have known of two of the three charities he benefited in the Will and Van Gyssel admitted that he “wrote those” institutions into the Will.

## Re Vleeming Estate (cont'd.)

- Van Gyssel acting on deceased's simply expressed wish to give something to "the church".
- Judge found Testator lacked capacity as follows:

"I am not sufficiently satisfied that the deceased understood how he was disposing of his property in order to be able to hold, in good conscience, that in this case there was a proper testamentary disposition"
- Judge also found that Van Gyssel unduly influenced Testator's Will as follows:

"In all of the circumstances I am not satisfied that it has been proven that the deceased acted of his own mind. I am not satisfied that the disposition of the property was by the "initiative and volition" of the deceased. There are in this case suspicious circumstances which have not been dispelled".

# Charity Risk Management

- Ensure donors obtain independent legal advice about gifts.
- Keep notes of any discussions with the donor about gifts.
- Do not direct legal work to one lawyer who may be or may appear to be dependant upon that referral work.
- Do not pay for any portion of the donor's legal expenses.
- Do not act as an executor of a Will or an attorney under Power of Attorney for a donor.

# Charity Risk Management (cont'd.)

- Do not prepare a Will or Power or Attorney for a donor or the spouse of a donor.
- Do not advise a donor on how to structure the donor's estate without advising the donor to obtain independent legal advice.
- Never provide recommendations on how much of an estate a donor should give to charity.
- Do not meet with the donor and the donor's lawyer when the donor is giving instructions for a Will or Power of Attorney.

# Charity Risk Management (cont'd.)

- Do not witness a donor's Will or be present when it is signed.
- Do not offer to store a Will or Power of Attorney on behalf of donor.

**Questions?**

STEWART MCKELVEY

*smss.com*

*Charlottetown*

*Fredericton*

*Halifax*

*Moncton*

*Saint John*

*St. John's*

# Contact Information

**Richard S. Niedermayer**

Partner

Stewart McKelvey

900-1959 Upper Water Street

PO Box 997

Halifax NS B3J 2X2

Direct 902 420-3339

Fax 902 420-1417

Email [rniedermayer@smss.com](mailto:rniedermayer@smss.com)

Website [www.smss.com](http://www.smss.com)

STEWART MCKELVEY

*smss.com*

*Charlottetown*

*Fredericton*

*Halifax*

*Moncton*

*Saint John*

*St. John's*