2. Undue Influence:

(a) General Principles

[96] In *Longmuir v. Holland*, 2000 BCCA 538 at para. 71, 192 D.L.R. (4th) 62, Southin J.A. defined undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not...her own act".

[97] In the leading case of *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171, 56 L.J. Ch. 1052 [*Allcard*] (C.A.), Cotton L.J. discussed the two classes of transactions which may be set aside on grounds of undue influence: "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor."

[98] The plaintiff claims that this case falls within the second class of transactions. Counsel for the plaintiff argues that "*Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, determined that a gratuitous transfer from a parent to an adult child creates the presumption of undue influence by the adult child." Counsel submits that as the presumption applies in this case, the onus shifts to the defendant to establish that Regina entered into the transaction as a result of her own "full, free and informed thought".

[99] The second class of undue influence does not depend on proof of reprehensible conduct. It affects those who may have acted in the sincere belief of their honesty. Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused: *Ogilvie v. Ogilvie Estate* (1998), 1998 CanLII 6278 (BC CA), 49 B.C.L.R. (3d) 277 at para. 14, 106 B.C.A.C. 55 (C.A.), citing *Allcard*.

[100] In *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53 at paras. 42-45, Wilson J. discussed the presumption of undue influence in the following passages:

> 42 What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.
>
> 43 Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. ...

> 44 … in situations where consideration is not an issue, e.g., gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.
>
> 45 Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v. Hyman*, *supra*, at p. 938, the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.

[101] Accordingly, once a relationship with the potential for domination has been established, the next phase of the inquiry is to examine the nature of the transaction. Where a gratuitous transfer is concerned, the onus moves to the defendant to rebut the presumption on the balance of probabilities: *Stone v. Campbell*, 2008 BCSC 1518 at para. 44, 44 E.T.R. (3d) 146.

(b) Does the Presumption Apply to Parent/Adult Child Relationships?

[102] In *Re: Elsie Jones*, 2009 BCSC 1723 at paras. 19-20, (*sub nom Canada Trust Co. v. Ringrose*) [2009] B.C.J. No. 2530, on the basis of counsel's agreement, the Court held that the presumption of undue influence is triggered where a parent transfers property to an adult child. This decision appears to support the plaintiff's argument. However, in my view the plaintiff's submission that a gratuitous transfer from a parent to an adult child automatically creates a presumption of undue influence is incorrect.

[103] The authorities that have considered the issue hold that the presumption does not arise automatically in the case of a child's alleged undue influence over a parent. In *Calmusky v. Karaloff*, 1946 CanLII 24 (SCC), [1947] S.C.R. 110, [1947] 1 D.L.R. 734, the Court held that a presumption of undue influence does not automatically arise upon a transfer of valuable property from an elderly parent to a child in circumstances where the parent is in good health and has possession of all of his or her faculties. Similarly, in *White v. Reid*, [1945] O.J. No. 75 (H. Ct. J.), Hogg J. stated:

> 14 … It is true that as between certain classes of persons where a donation is made by one to another, a presumption arises that influence may exist on the part of the grantee over the grantor. A child is not deemed capable of making a binding gift to a parent

> without the benefit of independent advice, but there is no presumption of undue influence with respect to a voluntary conveyance from a father to his child, and this principle would seem to extend as well to a gift from a mother to her child. This is not the rule where the parent's faculties have failed through age or otherwise...

[104] More recently, in *Lewaskewicz v. Chender*, 2007 NSCA 108 at paras. 62-65, 259 N.S.R. (2d) 330 [*Lewaskewicz*], Roscoe J.A. held that the presumption of undue influence does not always arise between mother and son, where the parent is the potentially vulnerable person.

[105] However, while the presumption does not automatically apply as a result of the familial relationship, it may apply if the relationship between elderly parent and child is characterized by dependency. This is consistent with Justice Wilson's statement in *Geffen* that in addition to the recognized categories, other relationships of dependency which defy easy categorization may be included.

[106] In the case of an old and sick parent, a child may assume a relationship of dominance over that parent. Some case law has identified such relationships as being ones of dependency: *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 382, 466 A.R. 59 [*Petrowski*].

[107] In *Lewaskewicz*, Roscoe J.A. analyzed the facts of that case as follows:

> 66 Although Klara seemed to often rely on Henry's advice and direction in matters concerning her land, she was also quite independent. She lived on her own and took care of herself. She refused to move to Ontario with him and she disagreed with the decision to sell the gravel pit. She could not be persuaded to agree with either of those proposals, despite Henry's prompting. She was able to read and speak English and understand the nature of Henry's financial problems and the transactions by which she mortgaged her home and later sold the waterfront property in order to assist him. Although Klara did not have the benefit of any legal advice at the time she signed the quit claim deed, in my view, the relationship between Klara and Henry was not one to which the presumption of undue influence applies. It was therefore necessary for Klara to lead evidence to prove that there was actual undue influence. The burden was not on the Chenders to rebut the presumption.

[108] In *Dempsey v. Dempsey*, 2010 NSSC 96 at para. 44, 289 N.S.R. (2d) 159, Edwards J. held that the presumption of undue influence applied between an elderly father and his son, where the son was in a dominant position *vis a vis* his aged father, who suffered from physical and psychological issues. Lack J. made a similar finding in *MacNeill v. MacNeill*, [2002] O.J. No. 3206 at para. 8 (Sup. Ct. J.), concluding that the presumption applied where a son played a "dominant role in his parents' lives, particularly as they grew older and their health concerns increased."

[109] In *Petrowski*, Moen J. held that the presumption did not arise on the facts as there was no relationship of dependency. In the Court's view, "[i]t cannot be the law that simply because a child has lived with and cared for a parent that the child should be denied benefits… for simply that reason alone.": *Petrowski* at para. 390.

[110] In *Stewart v. McLean*, 2010 BCSC 64, 54 E.T.R. (3d) 59 [*Stewart*], Punnett J. held that there was no evidence establishing vulnerability or a chance for the son to influence his mother in regards to a transfer of property she made to him before her death. In the circumstances, the presumption of undue influence did not apply.

(c) Application to the Facts

[111] Accordingly, before the "second class" of undue influence referred to in *Allcard* and the presumption set out in *Geffen* arise for consideration in this case, the plaintiff must establish the existence of a potentially domineering relationship between Marko and their mother, Regina.

[112] If this type of relationship is not established (and the court does not find for the plaintiff on the "first class" of undue influence - that is, that the gift was the result of influence expressly used by the donee for that purpose), the plaintiff's claim on this point must be dismissed.

[113] The following facts are relevant to the question of whether the potential for domination inhered in the nature of the relationship between Regina and her son, Marko:

1. Regina's statements that she feared Marko and did not want to upset him;
2. Marko's physical abuse of his mother;
3. Regina's statement to Helen that she signed documents at Marko's direction and that she did not appreciate the nature and consequences of these documents;
4. Marko was granted an enduring power of attorney, which he used over the plaintiff's assets, granting him control over her affairs and subjecting him to fiduciary obligations (On the fiduciary relationship between an attorney and donor, see *Egli v. Egli*, 2004 BCSC 529 at paras. 76-79, 28 B.C.L.R. (4th) 375, aff'd 2005 BCCA 627, 48 B.C.L.R. (4th) 90.);
5. Marko's attempts to prevent his mother from having contact with the plaintiff, isolating her from other family members;

6. Regina's reliance upon Marko for companionship, help around her home, and in dealing with her general affairs.

[114] On this final point, the following questions and answers from the defendant's examination for discovery are relevant (questions 96-102):

Q So you are basically living off your mother?

A I -- we shared. Whatever was -- if you want to put and say I lived off my mother, she lived off of me and I lived off of her if you like to put it that way. We are a family, sir.

Q … Tell me what services you performed for her? Now you said in the home. For example, what would you do in the home?

A Okay. What would I do? The list is so large. These are things you just do automatically without, you know, thinking about it… I would do anything to do with the yard, the maintenance of -- just I maintained the house completely, put it that way. Maintained it completely.

Q Did you take her shopping?

A Yes.

Q And for doctors' visits?

A Yes.

Q Because she didn't drive?

A Yes.

Q All right.

A That's right. Yeah. You know, any maintenance of the house, needed anything I did it.

Q So she relied on you to help her do these things that needed doing then; is that what you're saying?

A Of course. Of course. Of course.

[115] The next question on his discovery encapsulates the defendant's general response to the allegation that there was a potential for domination in the relationship between himself and his mother:

Q All right. And did she ask you for advice on how to do things like where she should bank?

A She was a very dominant, powerful person, Mr. Meyer, and she asked for advice, but didn't need any, you know. She would ask and sift things through, but she wasn't the person that -- she was quite wise and didn't really require any, you know, advice. I mean I'm her son and she's been in the world a heck of a lot longer than I have and -- but yes, she would ask me for advice, but she didn't really need any. She was a very powerful person. Very dominant. Very outspoken.

[116] The defendant submits that it was his dominant and powerful mother who was "relentless in her instructions to him" concerning the transfer of the property. It was his evidence, and that of his wife, that Regina was a tough and dominant woman who was not subject to influence from her son.

[117] The defendant also points to the fact that his mother was clear minded and did not exhibit signs of dementia or mental health problems at the time of the transfer.

[118] The cumulative effect of the facts referred to above suggests the existence of a relationship between the defendant and his mother that gives rise to the potential for domination. In *Riley v. Riley*, 2010 BCSC 161, 55 E.T.R. (3d) 226 [*Riley*], Greyell J. concluded on similar facts that the presumption of undue influence arose:

> 65 I have proceeded on the basis there was a special relationship between Mr. Riley and the defendant arising not only from their parent-adult child relationship, but also from the very close relationship of reliance Mr. Riley placed upon the defendant. I include in this latter category her position as holder of his Power of Attorney and joint bank accounts and his reliance on her and Mr. Mason to provide day-to-day assistance and advice to him. Accordingly, the defendant has an onus to establish she has not acted improperly in such a manner as to place undue influence on Mr. Riley to convey the property to her.

[119] The factors relevant to the defendant's obligation to rebut the presumption were conveniently summarized by Punnett J. in *Stewart* as follows:

> 97 To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": *Geffen* at 379. A defendant could establish this by showing:
>
> a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
>
> b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
>
> c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
>
> d. the donor knew and appreciated what she was doing (*Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
>
> e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).
>
> Another relevant factor may be the magnitude of the benefit or disadvantage (*Geffen* at 379; *Longmuir* at para. 121).

[120] In *Riley* at para. 67, Greyell J. held that the presumption of undue influence was rebutted on the basis of evidence that the transferor was "a very independent man

with strong views. He was a stubborn and single minded person that, once having made up his mind on a matter, there was little that could change his point of view." The defendant in this case characterizes his mother in the same light.

[121] In *Stewart*, Punnett J. followed *Coish v. Walsh*, 2001 NFCA 41, 203 Nfld. & P.E.I.R. 226 [*Coish*], where Wells C.J.N. addressed the issue of whether independent advice rebuts the presumption of undue influence as follows:

> [23] The trial judge also correctly set forth the law respecting the manner in which such a presumption may be rebutted. In particular, he identified, from the comments of Green J., in [*Fowler Estate*], factors to be taken into account in considering whether or not evidence of legal advice given to the granting party is sufficient to rebut the presumption. At paragraph 24 of [*Fowler Estate*], Green J. identified factors which may affect the character of legal advice to be as follows:
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.
>
> [Citations omitted.]

[122] The function of independent legal advice is to remove a taint that, if not removed, might invalidate a transaction. The nature and circumstances will dictate what constitutes adequate independent legal advice for purposes of a given situation: *Cope v. Hill*, 2005 ABQB 625 at para. 209, [2005] A.J. No. 1413 [*Cope*], aff'd 2007 ABCA 32, [2007] A.J. No. 83, leave to appeal ref'd [2007] S.C.C.A. No. 138.

[123] In *Cope*, Rooke J. provided the following summary of the law concerning independent legal advice where an allegation of undue influence is raised:

> 210 The case law identifies two types of independent legal advice:
>
> (a) advice as to understanding and voluntariness; and
>
> (b) advice as to the merits of a transaction.

The two types may overlap such that advice as to understanding the nature and consequences of a transaction may well constitute, at least in part, advice as to the merits of the transaction.

211 Focusing on the first type of independent legal advice, in *Gold*, a majority of the Court, *per* Sopinka J., observed that independent legal advice addresses two primary concerns, namely, that a person understands a transaction and that a person enters into a transaction freely and voluntarily. Sopinka J. stated at para. 85:

> Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.

212 Focusing on the second type of independent legal advice, in *Corbeil*, Kerans J.A. reasoned at paras. 12-14:

> I distinguish attendance on execution from advice about the wisdom of entering into the agreement. The term "independent legal advice" has a very specific meaning in law. The duty of advising counsel has been summarized in *Halsbury's Laws of England* (4th Ed.), vol. 18, para. 343, at p. 157:
>
> > "The duty of the independent adviser is not merely to satisfy himself that the donor understands the effect of and wishes to make the gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all the circumstances of the case, and if he cannot so satisfy himself he should advise his client not to proceed."
>
> ...

213 However, the adequacy of independent legal advice, or primacy of one type of independent legal advice over the other, is a situation-specific inquiry. In refusing to give effect to a contractual waiver of maintenance in *Brosseau*, the Court, in distinguishing between the two types of independent legal advice, stated at paras. 22-23:

> The term "independent advice" is not one of precision. It may cover the situation in which a lawyer explains, independently, the nature and consequences of an agreement ... It may extend, as it does in cases of undue influence, to the need to give informed advice...
>
> We doubt that any hard and fast rule can be laid down and the peculiar circumstances of this case are not appropriate for the formulation of such a rule, in any event.

...

> Mr. Frohlich stressed the comment in *In re Coomber; Coomber v. Coomber*, [1911] 1 Ch. [723], to the effect that independent advice does not mean independent approval. Again, we agree. While we stress this is not a case of presumed undue influence ..., we agree with what is said in *Wright v. Carter* (1902), 87 L.T. 624, at 634 that [it] is not enough for

> an independent solicitor to be called in merely "to carry out the proposal which had been previously settled".
>
> 214 In finding the first type of independent legal advice adequate in upholding a gift in *Coomber*, the Court found that the donor gave the gift of her own motion and that there was no evidence of undue influence, misrepresentation or any other improper conduct leading to the making of the gift. Fletcher Moulton L.J. rejected the need, in the circumstances of that case, for independent legal advice on the merits of the gift, finding independent legal advice as to the nature and consequences of the gift sufficient. …
>
> 215 In contrast, in *Wright*, Stirling L.J. held that independent legal advice directed at rebutting a presumption of undue influence must be advice on the merits of a transaction. He reasoned at 57-58:
>
> > I think ... that the ... solicitor called in to advise in such a case takes upon himself no light nor easy task. The duties of the adviser have been considered by Farwell J. in the recent case of *Powell v. Powell*, and in the course of his judgment he says this: "The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."
> >
> > With that view of a solicitor's duty I agree. I think a solicitor would fail in his duty if he neglected to inform himself of the circumstances in which the transaction was taking place.
>
> [Emphasis Added.]

[124] In *Cope*, Rooke J. held that assuming the presumption of undue influence applied, it was rebutted, finding that the solicitor satisfied himself that the transferor was acting voluntarily and understood and agreed with the terms of the transaction. The Court also found that the solicitor provided some "objective advice" on the merits or prudence of the transaction. In so ruling, the Court relied on *Geffen*, noting that even imperfect independent legal advice may be sufficient to rebut the presumption in conjunction with other evidence that the transaction was in accord with the transferor's wishes.

[125] In this case, each of the 5 factors from *Coish* suggests that the advice Mr. Tin provided to Regina was completely inadequate and insufficient to rebut the presumption of undue influence. Marko was either nearby or in the car at the time the advice was given. He orchestrated and oversaw the entire process. Mr. Tin asked very few questions, did not know Regina had a daughter or a will, and provided no "objective advice" on the merits of the transaction. He did not inform himself of the circumstances in which the transaction was taking place nor of the motivations behind it.

[126] It is clear that Regina feared upsetting the defendant, whom she relied upon for companionship and for the daily activities of her life.

[127] The home comprised nearly the entirety of Regina's estate. I accept that her expressed desire was to divide her estate equally between her two children. The only evidence suggesting that Regina wished to leave nearly the entirety of her assets to Marko while providing a relative pittance to Helena comes from Marko himself.

[128] Marko kept the transfer a secret until his mother passed away. After the transaction, Regina questioned the effect of what Marko "told her to sign" in a conversation with Helen.

[129] I find on these facts that undue influence has been established.

In the decision of *Stewart* v. *McLean* 2010 BCSC 64 Mr. Justice Punnet also quite succinctly addressed what a Plaintiff needs to do to establish that there is undue influence. http://canlii.ca/t/27k3x

[92] The presumption of undue influence arises when a plaintiff establishes that the potential for influence exists or existed in the relationship: *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211. In *Geffen*, Justice Wilson at 377 defined influence:

> It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. … To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

Justice Southin in *Longmuir v. Holland*, 2000 BCCA 538, 192 D.L.R. (4th) 62 at para. 71, defined undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not his or her own act".