

BCCEAS Undue Influence Assessment Worksheet



The practices in the checklist below are recommended if you suspect that an older adult is susceptible to undue influence or that a potential client's instructions do not reflect the client's genuine wishes.

See the BCLI publication Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide ("the BCLI Guide") for further information. Those practices have been adapted for more general elder law practice.

1. Interview older adult alone (basic rule) Yes N/A

Rationale:

- Ensure it is clear that you are acting for older adult.
- Need to avoid appearance of a joint retainer.
- Confidentiality of solicitor/client communications.
- Need to be satisfied that client has legal capacity.

Exceptions for including 3rd party (A) in instructions:

- A is disinterested and is acting as an interpreter (no kinship, financial interest, or social connection).
- Including A (a relative or interested person) is unavoidable. Remain alert.
- A is Spouse. Remain alert. If any concerns that spouse is not speaking accurately for client, meet with client alone (consider using ABA's *Why Am I Left In The Waiting Room* pamphlet to explain elder law ethics).

2. Ask non-leading, open ended questions to determine factors operating on older adult's mind.

Yes N/A

Examples:

- How/why did you decide to favour 3rd party this way?
- What was important to you in deciding to favour 3rd party this way?
- Why did you choose [3rd party] rather than others?

3. Explore whether older adult is in a relationship of dependency, domination or special confidence or trust.

Yes N/A

See examples of open-ended probing questions in BCLI Guide, pp 33 -34. **Sample questions** to consider:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?
- Does anyone help you more than others? Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

4. Explore whether older adult is a victim of abuse or neglect in other contexts. Yes N/A

Sample questions to consider (note need for tact, discretion and awareness for client's physical safety; refer to community resources if and when appropriate):

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone scolded or threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

5. Obtain relevant information from third parties when possible and if the client consents. Yes N/A

6. Use BCCEAS capacity assessment worksheet if mental capacity is also in question. Yes N/A

7. Compile list of events or circumstances indicating undue influence Yes N/A

See list of "Red Flags to Watch For" opposite page.

8. Make and retain appropriate records whenever red flags are present. Yes N/A

Detailed notes; checklist recommended

Information supporting conclusions and ultimate decision should include: red flags identified; inquiry pursued; information obtained; and, memoranda to record reasoning for conclusion.

9. If Index of Suspicion remains high after reasonable investigation, consider ways to stop/ameliorate undue influence. Declining retainer? Yes N/A

RED FLAGS TO WATCH FOR

Undue Influence - Recognition/Prevention

The red flags listed below may indicate the presence of undue influence on an older adult.

This list is not necessarily complete or definitive. It is an aid to practitioners to identify potential undue influence and provide an “index of suspicion” so that they will be alerted to carry out the necessary inquiries before accepting a retainer or including a 3rd party. See the text of the BCLI Guide for more detailed discussion.

1. Older adult invests significant trust and confidence in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new “suitor” , new best friend or partner). Yes No N/A

2. Isolation of older adult resulting in dependence on another for physical, emotional, financial or other needs. Yes No N/A

3. Physical, psychological and behavioural characteristics of older adult. Yes No N/A

Examples:

- Dependence on 3rd party for sight, hearing, mobility, speech, illness, illiteracy.
- Signs of neglect/self neglect (emaciation, inappropriate clothing, bruising, untreated injuries).
- In state of shock after stressful situations (e.g. bad news, death of close person).
- Non-specific factors (e.g. loneliness, sexual bargaining, end of life issues).
- Cultural influences/conditioned responses (e.g. subservience to traditional authority in extended family; yielding to pressure for fear of revealing family conflicts leading to loss of face in community).
- Impaired mental function from a psychiatric condition or a non-psychiatric cause (e.g. trauma or stroke).

Signs include (see BCLI Guide for full list pp 24-25):

- Sudden onset of confusion.
- Short term memory problems, disorientation, difficulty with finances.
- Signs of depression (e.g. irritable, agitated, difficulty making decisions, sad face, bowed head, general lethargy).
- Delusions.
- Extreme sense of well-being, continuous speech, inability to concentrate, poor judgment.
- Apprehensive or appearance of being worried, distressed, overwhelmed.
- Client is intoxicated/signs of substance abuse.
- Down’s syndrome, autism or other developmental disorder.
- Inability to answer open-ended questions.

4. Circumstances related to making of a will, EPOA, RA and/or gifts, putting on joint account, joint tenancy, etc. Yes No N/A

Examples:

- Unusual gifts; sudden change for no apparent reason; frequent changes.
- Marked change in instructions from prior wills.
- 3rd party initiates instructions which also benefit 3rd party; speaks for older adult; offers to pay for new will/EPOA/RA; older adult relies exclusively/unusually on notes to give instructions.
- Spouses: joint retainer but one spouse provides instructions while other remains silent.
- Recent death of a family member and other family appear to influence changing existing will/EPOA/RA.

5. Characteristics of influencer in older adult’s family or circle of acquaintance. Yes No N/A

- Overly helpful.
- Insists on being present during interview with lawyer/caseworker.
- Contacts practitioner persistently after instructions are taken.
- Person is known to practitioner to have history of abuse, including violence.
- Practitioner observes negative and/or controlling attitude to older adult.
- Practitioner is aware that influencer is in difficult financial circumstances and/or engages in substance abuse.

6. Practitioner’s “gut feeling”. Yes No N/A

- Body language of older adult indicates fear, anxiety, insecurity, embarrassment etc.
- “Influencer” is off-putting or difficult to deal with at appointment.
- “Influencer” is rude to staff in office or on telephone, or is overly solicitous.

FLOW CHART OF RECOMMENDED PRACTICES

Undue Influence - Recognition/Prevention

1 DOES CLIENT HAVE LEGAL CAPACITY?

NO

DO NOT PROCEED OR IF UNSURE, USE CAPACITY ASSESSMENT WORKSHEET

2 IS CLIENT AWARE OF PROPOSED TRANSACTION?

NO

DO NOT PROCEED OR IF UNSURE, MAKE APPROPRIATE INQUIRIES.

3 IS CLIENT ACTING FREELY AND INDEPENDENTLY?

YES

PROCEED TO PREPARE RETAINER.

NOT SURE

IDENTIFY RED FLAGS AND/OR CONCERNS. FOLLOW UP AND/OR INVESTIGATE.

(SEE "RED FLAGS TO WATCH FOR" AND "CHECKLIST OF RECOMMENDED PRACTICES")

4 AFTER INVESTIGATION: IS CLIENT ACTING FREELY AND INDEPENDENTLY?

YES

PROCEED TO PREPARE RETAINER.

NOT SURE

PRACTITIONER DECISION DEPENDS ON NATURE AND LEVEL OF CONCERN:

A) SUSPICION ONLY. DOCUMENT FILE. PROCEED.

B) SERIOUS CONCERNS. DO NOT PROCEED

