Reforming Testamentary Undue Influence in Canadian and English Law

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The traditional doctrine of testamentary undue influence developed in nineteenth century England. Its utility, however, is limited since the doctrine requires the person alleging undue influence to provide direct proof of coercion according to a high standard. In England the doctrine has remained static and there have been calls for reform. In Canada, some courts have ceased to apply the traditional doctrine so that today there is no one consistent and coherent doctrine of testamentary undue influence. This article explores two possible reforms of the doctrine both of which are evident in recent Canadian case law: a presumption of testamentary undue influence and a modified doctrine of testamentary undue influence. It is argued that testators in both England and Canada would be best protected by a three-tiered approach comprising a modified doctrine of undue influence. It entails a presumption of validity where certain measures are taken in the execution of a will; the modification of key elements of the traditional doctrine relating to the testator's state of mind, reliance on circumstantial evidence and the standard of proof; and the adoption of the modified doctrine in those cases where a party challenges the inter vivos and testamentary gifts of a deceased donor on the basis of undue influence.

La doctrine traditionnelle d'influence indue sur le testateur est née et a été élaborée dans l'Angleterre du dix-neuvième siècle. Elle est toutefois d'une utilité limitée puisqu'elle exige que la personne qui allègue qu'il y a eu influence indue apporte une preuve directe et conforme à une norme stricte qu'il y a eu coercition. En Angleterre, la doctrine est restée statique, et il y a eu des appels à la réforme. Au Canada, certains tribunaux ont cessé d'appliquer la doctrine traditionnelle avec le résultat qu'il n'y a aujourd'hui aucune doctrine uniforme et cohérente d'influence indue sur le testateur. Cet article examine deux réformes possibles de la doctrine, les deux ressortant clairement dans la jurisprudence canadienne récente : une présomption d'influence indue sur le testateur et une doctrine modifiée d'influence indue sur le testateur. L'auteur avance que les testateurs, tant en Angleterre qu'au Canada, seraient mieux protégés par une stratégie à trois volets comportant une doctrine modifiée d'influence indue sur le testateur. Cela suppose une présomption de validité lorsque certaines mesures sont prises pour la signature du testament; la modification d'éléments clés de la doctrine traditionnelle en ce qui a trait à l'état d'esprit du testateur, à la fiabilité des éléments de preuve circonstancielle et à la norme de preuve; et l'adoption de la doctrine modifiée dans les cas où une partie conteste les dons entre vifs et les dons testamentaires d'un donateur décédé en invoquant l'exercice d'une influence indue.
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Introduction

The common law doctrine of testamentary undue influence has recently stimulated some important academic comment from writers analyzing its operation in England. They have attacked the doctrine’s lack of utility in two ways. First, they argue that the criteria that must be met for its application are so difficult to fulfill that throughout the Commonwealth

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2. Ridge, supra note 1 at 638.
the doctrine is virtually redundant. Second, they contend that the practical result of the onerous criteria has been that testators susceptible to influence have been left unprotected from conduct that does not fall within the coverage of the doctrine. These conclusions, however, have been based only on an analysis of a few countries like England, and have not taken into account developments in Canada. Accordingly, the purpose of this article is to compare and contrast the doctrine in England and Canada and to investigate possible pathways for reform.

I. An overview of the traditional doctrine

Historically, English Ecclesiastical Courts refused probate of wills that had been made under constraint, duress or coercion. In the nineteenth century, probate courts labelled such conduct as undue influence, although it was not necessarily the kind of behaviour that constituted undue influence in the Court of Chancery. By the middle of the nineteenth century, the decision of the House of Lords in Boyse v. Rossborough (‘Boyse’) provided an enduring precedent for testamentary undue influence in the modern era. In that case, Lord Cranworth indicated that evidence of coercive conduct constitutes undue influence in a testamentary context.

Therefore, in subsequent seminal authorities coercion by the beneficiary or by someone on behalf of the beneficiary was the sole or predominant indicator of undue influence. Significantly, evidence of coercive conduct rather than the state of the testator’s mind characteristically justified a court finding that a beneficiary exercised undue influence.

Lord Cranworth also held that mere persuasion or the opportunity to influence is insufficient. Rather, undue influence has to be proved by direct evidence of a high standard. It is not sufficient that the circumstances

4. For the purpose of clarity and brevity of expression, a reference to a testator includes a reference to a testatrix unless the context indicates otherwise.
5. Kerridge, “Suspicious Circumstances,” supra note 1 at 325-328; Ridge, supra note 1 at 621-626.
6. Ridge principally considers English and Australian cases: see supra note 1 at 621-626.
9. (1857), 6 H.L.C. 3, 10 E.R. 1192 (H.L.) [Boyse]. Note also Winder, supra note 8 at 105.
10. Ibid. at 48-49, 1211.
are “consistent with the hypothesis of its having been obtained by undue influence.” It has to be shown that the circumstances are “inconsistent with the contrary hypothesis.” Therefore, the person challenging the will has to demonstrate that undue influence was exercised, that as a result the will was made and that undue influence is the only possible explanation for the existence of the will. In subsequent cases, courts held that a party challenging the will not only bears the onus of proof, but also bears the costs of the action if that party fails to prove undue influence.

Significantly, the doctrine of testamentary undue influence is in marked contrast to equitable undue influence. Under the equitable doctrine, a rebuttable presumption of undue influence arises in certain inter vivos transactions. It was held in the nineteenth century that the presumption does not operate in testamentary cases.

It is strongly arguable that Lord Cranworth did not intend that the doctrine either be defined so narrowly or so rigidly applied. First, while Lord Cranworth described undue influence in terms of coercion, he also provided another description that emphasizes the testator’s state of mind as well as the conduct of the beneficiary. He observed that undue influence...

... 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 state of mind, but which really did not express his mind, but expressed something else, something which he did not really mean.

This definition covers coercive conduct at its most extreme, but also encompasses conduct that deprives the testator of the right of independent agency and expression. Second, Lord Cranworth indicated that it is not necessary to show that actual violence has been used or threatened. Undue influence is a relative phenomenon and courts should take into account disparities of strength and weakness, and knowledge and ignorance, between the parties when determining if there has been undue influence.

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14. Ibid.
15. Boyse, supra note 9 at 49, 1211; Parfitt, supra note 11 at 474-475, Lord Penzance.
16. Wingrove v. Wingrove (1885), L.R. 11 P.D. 81 at 83, Sir James Hannen; Baudains, supra note 11 at 185 [Wingrove]; Craig, supra note 11 at 357, 15.
20. Ibid. at 48-49, 1211. See also Hall v. Hall (1868), L.R. 1 P. & D. 481 [Hall]; Wingrove, supra note 16; Hull & Hull, supra note 13 at 45-46.
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Third, while Lord Cranworth held that undue influence normally arises from the circumstances surrounding the making of the will,\textsuperscript{21} he observed that “this principle must not be taken too far.”\textsuperscript{22} He described a situation in which an inference of undue influence could be made due to the existence of what could be described as a relationship of control.\textsuperscript{23} When the testator is not a free agent and is completely under the control of the beneficiary, a court can find undue influence, even in the absence of direct evidence concerning the making of the will. A relationship of control based on overwhelming circumstantial evidence has been pleaded in a few cases,\textsuperscript{24} but it appears to have been generally overlooked by modern courts and litigants alike.\textsuperscript{25}

II. \textit{The traditional doctrine}

1. \textit{In modern English case law}

Since the decision in \textit{Boyse}, the case law in England has generally reflected a static and strict articulation and application of the doctrine of testamentary undue influence. The major characteristic of testamentary undue influence has remained coercive conduct that must be proved,\textsuperscript{26} cannot be presumed from the facts of the case,\textsuperscript{27} and must be specifically raised in the pleadings.\textsuperscript{28} The party challenging the will must prove testamentary undue influence at a high standard which is demonstrated by direct evidence that the testator was coerced into making the will or facts consistent only with a hypothesis of undue influence.\textsuperscript{29} Accordingly, there are only a few cases where undue influence has been pleaded alone.\textsuperscript{30} Instead, undue influence

\textsuperscript{21} Ibid. at 51, 1212.

\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid. Note Lovett v. Lovett (1857), 1 F. & F. 578 at 583; 175 E.R. 861 at 862, Erle J. (Norfolk Circuit, Ayelsbury Spring Assizes); Hull & Hull, supra note 13 at 46. C.V. Margrave-Jones in \textit{Mellows: The Law of Succession}, 5\textsuperscript{th} ed. (London: Butterworths, 1993) suggests at para. 5.47 that such circumstances “will give rise to a presumption” of undue influence.

\textsuperscript{24} See, e.g., Parfit, supra note 11 at 470, Lord Penzance; Baudains, supra note 11 at 83.

\textsuperscript{25} However, note Re Harden’s Estate; Clayton and Hunt v. Brown [1959] C.L.Y.B. 3448, (1959) \textit{The Times}, 20 June (Stevenson J.) and Re Killick (Deceased); Killick v Poutney (30 April 1999) \textit{The Times} (Ch.D). In respect to Re Harden, see Margrave-Jones, supra note 23, at para. 5.48; C. Sawyer, \textit{Principles of Succession, Wills & Probate}, 2\textsuperscript{nd} ed. (London: Cavendish Publishing Ltd, 1998) at para. 4.8.5. One possible explanation is that the headnote of the case completely omitted reference to this situation: see \textit{Boyse}, supra note 9 at 3, 1193.

\textsuperscript{26} J.B. Clark & J.G. Ross Martyn, \textit{Theobald on Wills}, 15\textsuperscript{th} ed. (London: Sweet & Maxwell, 1993) at 41-42; Margrave-Jones, supra note 23, at paras. 5.45-5.50; Kerridge, \textit{Parry & Clark}, supra note 11 at para. 5-13.

\textsuperscript{27} Clark & Ross Martyn, supra note 26 at 42; Margrave-Jones, supra note 23 at para. 5.49.


\textsuperscript{29} Clark & Ross Martyn, supra note 26 at 42; Margrave-Jones, supra, note 23 at para. 5.50.

\textsuperscript{30} E.g. Hall, supra note 20; Parfit, supra note 11; Wingrove, supra note 16; Biggins v. Biggins (28 January 2000), (Ch.Div.).
has been pleaded in conjunction with other doctrines which have often determined the case. Indeed, it is arguable that undue influence has become a principle subordinate to other doctrines because it is so difficult to prove. It is likely that a pleading of undue influence will be coupled with allegations that the testator lacked testamentary capacity; that there were suspicious circumstances requiring proof that the testator knew and approved of the terms of the will; that there was no compliance with the formalities; or that there was fraud. Allegations of testamentary undue influence are, for example, often coupled with allegations of lack of testamentary capacity or the suspicious circumstances rule because a party who challenges on either of these bases bears an evidential, rather than a legal burden of proof. Moreover, it may be less difficult to challenge the capacity of the testator than to prove that the testator was coerced into making the will or to infer lack of knowledge and approval than to prove the perpetration of undue influence.

2. In modern Canadian case law

Canadian courts have not been as consistent and coherent in their approach to testamentary undue influence as their English counterparts. This is reflected in the discussion of testamentary undue influence in Feeney's *Canadian Law of Wills* where the author's description of the doctrine combines elements of the traditional doctrine already outlined with modern glosses on and significant departures from it. It is arguable that there is more than one formulation of testamentary undue influence currently operating in Canada.

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34. Clark & Ross Martyn, * supra note 26 at c. 4; Margrave-Jones, * supra note 23, c. 6; Kerridge, Parry & Clark, * supra note 11 at c. 4; In the Estate of Barlow (Deceased); Haydon v. Pring*, * supra note 33; Mills v. Colman, supra note 33.
40. *Ibid.* c. 3 B.
Initially the Canadian law followed the traditional approach to testamentary undue influence and there are still some recent cases where the traditional approach and authorities have been followed. In particular, Canadian courts have cited the decision of the House of Lords in Boyse and the decision of the Privy Council in Craig v. Lamoureux ("Craig"). The latter case was an appeal from a decision of the Supreme Court of Canada in which the Privy Council confirmed that a presumption of undue influence is not part of the principle of testamentary undue influence in Canada and that it is not incumbent on a beneficiary who assists in the making of a will to demonstrate that a testator had not been subject to undue influence. Canadian courts have since held that testamentary undue influence addresses some form of coercive conduct, cannot be presumed simply from the facts and is more than mere persuasion. The


45. Craig, supra note 11.

46. Ibid. at 356-357, 14-15.


party challenging the will\(^5\) has to show that undue influence was exercised and that it is the only possible explanation of the testator's actions.\(^5\) The costs of the action are to be borne by the unsuccessful party who challenged the will.\(^5\)

The adoption of the traditional model of testamentary undue influence in a significant number of Canadian cases ensured that the utility of the doctrine was limited. As in England, concerns about the sufficiency of evidence to prove traditional testamentary undue influence\(^5\) led parties to raise other doctrines in conjunction with undue influence such as lack of testamentary capacity,\(^5\) lack of compliance with formalities\(^5\) and the suspicious circumstances rule.\(^5\) This sometimes led courts to deal summarily with allegations of undue influence or not to deal with these allegations at all.\(^5\) Nevertheless, compared to English authorities, some early Canadian cases indicated that judges were beginning to recognize testamentary undue influence in situations where the improper influence fell short of coercion or could not be proved directly. However, these developments did not undermine or modify the traditional model.

\(^5\) E.g. Riach, supra note 41; Re Kaufman, supra note 43 at 192, Schroeder J.A.; Re Martin; MacGregor v. Ryan, supra note 41; Vout, supra note 44 at 441; Doherty, supra note 41 at paras. 25-27, Ayles J.A.
\(^5\) There were only a few cases where undue influence was solely pleaded or the predominant focus of the case, e.g., Adams, supra note 41; Wannamaker v. Livingston, supra note 48; Craig, supra note 11; Pocock v. Pocock (1951), supra note 48; Christie v. Christie (1983), 20 A.C.W.S. (2d) 242 (B.C.S.C.).
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a. **Wrongdoing coupled with a relationship of control**

Courts identified a situation where a testator steadily fell under the influence of the potential beneficiary who significantly controlled the testator's affairs, falsely informed the testator about his circumstances and influenced the terms of the will. In *Re Kaufman* Schröder J.A. described the situation as:

...not fraud in the strict sense, but a subtle species of fraud involving the making of false and insidious suggestions whereby mastery was obtained by the defendant...over the mind of the testator; that the particular fraud was something which was used...as the means of acquiring an undue influence over the testator and as an efficient aid in its exercise.

It is arguable that this is simply an example of the relationship of control identified by Lord Cranworth in *Boyse* where the testator is not a free agent and a court holds that undue influence has in fact been exercised, even in the absence of direct evidence of coercion. Certainly, some Canadian commentators have recognized this aspect of *Boyse*. However, the threshold set in such cases as *Re Kaufman* was arguably higher than the threshold set down by Lord Cranworth because Canadian courts assumed wrongdoing in the making of the will in addition to undue influence within a broader relationship of control. Therefore, the recognition of situations in Canadian cases where influence was used improperly in what constituted relationships of control ought not be overstated. Some courts insisted that there had to be evidence not only of coercion, but also of illegal or illegitimate coercion, although this distinction was not made in *Boyse* and *Craig*.

b. **The suspicious circumstances rule and undue influence**

In England, the use of the suspicious circumstances rule to cover situations of possible coercion and undue influence is still emerging and has been criticized. In contrast, Canadian courts have encouraged the application of the suspicious circumstances rule in situations where the possibility or likelihood of testamentary undue influence reinforces the conclusion that the testator did not know and approve the will. The mere possibility of undue influence inferred from the facts of the case may trigger the

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59. Supra note 43.
61. *Boyse*, supra note 9 at 51, 1212.
62. Hull & Hull, supra note 13 at 46.
63. Supra note 43.
suspicious circumstances rule without the need to prove actual coercion. If the propounder of the will cannot prove the testator’s knowledge and approval of the contents of the will, then the court will refuse probate of the will. The Canadian courts have not, however, endorsed an approach in which mere trivial suspicions of undue influence will be a sufficient basis to prevent probate. Otherwise, the application of the suspicious circumstances rule would arguably undermine the rigour of the traditional doctrine of testamentary undue influence.

In order to understand the scope of the rule, Canadian courts and litigants have consistently returned to the early descriptions of the suspicious circumstances rule. In one of the seminal English cases establishing the rule, *Barry v. Butlin* (‘Barry’), Parke B. stated that the propounder “must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.” The crucial word in the statement is “free.” The question is whether the propounder of the will not only bears the obligation of demonstrating testamentary capacity and knowledge and approval, but also whether the testatrix is “free” so that she has not been subjected to undue influence in the making of the will. If the propounder of the will is required to prove that the testator was “free,” the propounder, rather than the person challenging the will, bears the legal burden of establishing that the testator was not subject to coercion. In *Barry*, Parke B. also indicated that the rule would apply where a beneficiary “writes or prepares a Will, under which he takes a benefit.” The question is whether the suspicious circumstances rule is only activated when the beneficiary has participated in the making of the will or whether other well-grounded suspicions trigger the rule.

The Canadian Supreme Court considered these issues in several important cases in the twentieth century. In the most recent authority, *Vout v. Hay* (‘Vout’) the Supreme Court not only endorsed the earlier decisions, but also further elaborated the nature of the evidence that will support the suspicious circumstances rule. In *Vout* an elderly testator appointed his friend, Vout, as executor and left significant assets to her. She had been involved in the making of the will, although the extent

67. *Barry*, *ibid.* at 482-483, 1090.
69. *Supra* note 66 at 482-483, 1090.
of her participation was unclear.\textsuperscript{72} The trial judge held that at the time of the execution of the will, the testator had testamentary capacity and that he had made the will he intended to make.\textsuperscript{73} On the other hand, the Ontario Court of Appeal held that there had been suspicious circumstances surrounding the execution of the will that had not been adequately taken into account by the trial judge and that these suspicious circumstances cast the burden of disproving undue influence on Vout.\textsuperscript{74} The Supreme Court of Canada held that the Court of Appeal had erred and allowed the appeal.\textsuperscript{75} Sopinka J. who delivered the judgment of the Supreme Court confirmed that the suspicious circumstances rule can be triggered by circumstances surrounding the preparation of the will which tend to call into question the capacity of the testator or tend to show that the free will of the testator was overborne by acts of coercion or fraud.\textsuperscript{76} Nevertheless, while a suspicion of undue influence can trigger the suspicious circumstances rule, the Court determined that the traditional doctrine of testamentary undue influence still separately applies. Sopinka J. observed:

> It might have been simpler to apply the same principles to the issue of fraud and undue influence as to cast the legal burden onto the propounder in the presence of suspicious circumstances...Indeed, the references in \textit{Barry v. Butlin} to the will of a "free and capable" testator would have supported that view. Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden.\textsuperscript{77}

Sopinka J. acknowledged that there could be an overlap between the suspicious circumstances rule (triggered by concerns about possible coercion) and undue influence in the form of coercion. Accordingly, he pointed out that in many cases when the testator has knowledge of and approves of the contents of the will, it will be difficult to find that the

\textsuperscript{72} \textit{Vout}, \textit{ibid.} at 433-434.
\textsuperscript{73} \textit{Ibid.} at 436. See Oosterhoff, \textit{supra} note 41 at 389-381.
\textsuperscript{74} \textit{Ibid.} at 436-437. See Oosterhoff, \textit{supra} note 41 at 389-381.
\textsuperscript{75} \textit{Ibid.} at 436-442.
\textsuperscript{76} \textit{Ibid.} at 439.
\textsuperscript{77} \textit{Ibid.} at 440-441.
testator had been subject to coercion. Nevertheless, he maintained that there was a significant difference between the suspicious circumstances rule and traditional testamentary undue influence. The latter is based on coercive conduct that may not be counterbalanced by proof of knowledge and approval. As Sopinka J. remarked, a testator “may well appreciate what he or she is doing but be doing it as a result of coercion or fraud.”

In such a situation, it is futile to rely on the suspicious circumstances rule, because the propounder will be able to discharge the legal burden of proving knowledge and approval. The person challenging the will still bears the legal and evidential burden of proving undue influence directly in the form of coercion.

3. The “unintended gap” as a result of the traditional doctrine

Significant problems exist regarding the application and utility of the traditional model of testamentary undue influence in England and Canada. The doctrine has been strictly constructed and applied in English cases and in a large number of Canadian cases. It has been extremely difficult to satisfy courts that not only was there coercion, but that coercion is the only possible explanation for the existence of the will.

The narrow interpretation of testamentary undue influence has also led to a significant and possibly “unintended gap” in the courts’ power to refuse probate. The comments by Sopinka J. in Vout highlight the problem. Testamentary capacity and the suspicious circumstances rule, in particular, may be used helpfully in factual situations where undue influence may be suspected, but cannot be proved. For example, there may be evidence suggesting that the testator lacked testamentary capacity. The propounder of the will may be unable to assuage a court’s concerns about the testator’s capacity and the court refuses to admit the will to probate. The fact that testamentary undue influence is raised but not proved does not matter because the will has been successfully challenged, albeit on another basis.

It must be emphasized, however, that a finding that the testator lacked testamentary capacity or knowledge and approval of the will does not test the contention that there was some form of wrongdoing perpetrated in the form of undue influence. It merely results in the court refusing to grant probate. Therefore, it would be erroneous to assume that the application

78. Ibid. at 441.
80. Ibid. at 442.
of other doctrines can always offset the inherent limitations of traditional testamentary undue influence. The facts of a particular case, even if the situation may be considered highly unusual or irregular, may neither attract an allegation or finding of testamentary incapacity, nor raise facts rebutting the presumption of knowledge and approval. For example, in Vout both the trial judge and the Supreme Court of Canada held that the testator possessed testamentary capacity and knew and approved the will. There was no evidence that the testator had been subject to coercion. 81 Accordingly, the central issue is whether it is possible to reform the law and deal with the “unintended gap.”

III. Pathways of reform

The proposals for reform fall into two broad classes. The first imposes a rebuttable presumption of undue influence that is triggered in certain circumstances. In England, academic commentators and law reform committees have recommended a rebuttable presumption of undue influence. In Canada, the endorsement and adoption of a rebuttable presumption appears to have occurred principally in case law, although recently there has been some academic support. The second kind of reform has arisen from a series of cases in which Canadian judges have not imposed a presumption of undue influence, but have applied modern, practical and more achievable evidential standards than those traditionally prescribed.

1. The imposition of a rebuttable presumption of undue influence in testamentary cases

The notion that insufficient direct evidence ought not to necessarily bar a finding that undue influence was, in fact, perpetrated is not new. In the eighteenth century the Court of Chancery decided that in some inter vivos transactions there was a “kind of fraud...which may be presumed from the circumstances and condition of the parties contracting.” 82 This observation laid the basis for what has become known as “equitable undue influence” 83 or a rebuttable presumption of undue influence with respect to inter vivos gifts and contracts. There are also jurisdictions that have adopted such a rebuttable presumption in probate cases. 84 Modern proposals for a rebuttable presumption of undue influence in England and Canada are underpinned by the view that parties challenging the validity of a will on

81. Vout, supra note 44 at 443, Sopinka J. See Carapeto, supra note 32.
83. Ridge, supra note 1.
84. In this respect, Scotland: see D.R. McDonald, Succession, 3rd ed. (Edinburgh: W. Green/Sweet & Maxwell, 2001) at paras. 8.31-8.33.
the basis of undue influence bear an unrealistically high evidential onus to prove coercion and that there are no good policy reasons why inter vivos and testamentary gifts ought to be treated differently.

Any rebuttable presumption of undue influence, whether in an inter vivos or testamentary context, has three components.

a. *A rebuttable presumption shifting the onus of proof*

The existence of a rebuttable presumption has a significant effect upon the evidence required, the burden of proof and the party who bears the burden of proof. Under the traditional doctrine of testamentary undue influence, the party challenging the will alone bears the burden of proving actual undue influence. Unless there is firm evidence of coercion, courts will grant probate, even if there are concerns about undue influence. In contrast, if there is a rebuttable presumption of undue influence, the party challenging the will is only required to provide sufficient evidence to raise the presumption. It will not be necessary to prove actual undue influence, but only evidence from which a rebuttable presumption of undue influence can be rationally inferred. The propounder of the will or the beneficiary then bears the burden of positively demonstrating that the testator made the will free from undue influence, even where it has been demonstrated that the testator possessed testamentary capacity and knew and approved of the terms of the will.

In both England and Canada, however, courts have endorsed the principle that the party challenging the will bears the burden of proving undue influence; courts in both jurisdictions have not supported a literal interpretation of the view of Parke B. that the propounder of the will is required to prove that the deceased was a free testator. Indeed, it is arguable that the effect of a rebuttable presumption would be to re-instate indirectly a proposition which the courts have not embraced directly. The extent to which the suspicious circumstances rule would remain useful in such cases is also unclear. It is arguable that it would be more attractive to

88. Consider Vout, supra note 44 at 440, Sopinka J.
89. Supra note 9 at 482-483, 1090.
90. Baker suggests that the suspicious circumstances rule is the link between the traditional doctrine of testamentary undue influence and the presumption of undue influence: Baker, supra note 18 at 448.
rely on a rebuttable presumption than evidence that triggers the suspicious circumstances rule.

It has been argued that a presumption of undue influence may be more justified in a testamentary context than in an inter vivos situation because "exploiters might be more inclined to refrain from depredations in the inter vivos context by the very fact that their victims might still be alive and be able to expose them." However, the problem with applying a rebuttable presumption of undue influence in a testamentary context is that it could be used strategically to prevent the grant of probate of a will which in all other aspects appears valid. It is strongly arguable that in Boyse, Lord Cranworth set the standard of proving undue influence too high. The use of a rebuttable presumption could have the opposite effect because it would arise on the mere inference of undue influence, shift the onus of proof and adversely affect the validity of the will. The result would be that an earlier will or intestacy legislation would govern the distribution of assets in a way that could be entirely at odds with the testator's intention. The concept of a rebuttable presumption is used in other contexts in testamentary cases, but it is applied to presume validity rather than invalidity. For example, in both jurisdictions there are initial rebuttable presumptions of capacity and knowledge and approval if the will complies with the formalities and is rational on its face.

Raising a rebuttable presumption of undue influence when the key witness, the testator, is unavailable to give evidence is also fraught with difficulties. A will is ambulatory and does not take effect until the death of the testator. Unlike an inter vivos transaction, the provisions in the will cannot improvidently affect the testator during his lifetime (except to the extent that the testator may know that the will does not reflect his true desires). In most inter vivos cases the donor is alive and has a practical interest in the outcome of any case. She often brings the action and may give evidence about her relationship with the donee and the events that led to the making of the gift or transaction. Conversely, in testamentary cases, the party who challenges the will generally does so because the will does not provide the expected inheritance. She may be aggrieved if the testator was subjected to undue influence, but in most cases it is unlikely

91. Klinck, supra note 86 at 137.
92. Boyse, supra note 9 at 51, 1212.
93. In respect to England see, e.g., Barry, supra note 66; Wintle v. Nye, supra note 38. In regard to Canada see Vout, supra note 44 at 440, Sopinka J.
94. Lifetime gifts are optional, while property must devolve after death: Kerridge, Parry & Clark, supra note 11 at para. 5-34, n. 25.
95. Klinck, supra note 86 at 137.
she would initiate expensive litigation without the prospect of acquiring property under an earlier will or on an intestacy.

b. Triggers of a rebuttable presumption

A rebuttable presumption of undue influence must specify what kind of relationship between the donor and the donee or what kinds of conditions surrounding the making of the gift trigger the presumption. These "triggers" do not focus on the testator's testamentary capacity or knowledge and approval of the will. Rather, they suggest that the exercise of testamentary intention was impaired by the exercise of undue influence.96 Three potential triggers are discussed below.

A gift made in a tightly defined relationship

A narrow form of a rebuttable presumption of undue influence in a testamentary context was suggested by the Committee on Civil Justice in the United Kingdom.97 The Committee recommended that a rebuttable presumption of undue influence should apply when a will was made in favour of a beneficiary providing residential care under contract such as the owner and operator of a nursing home.98 Although wills made in favour of such parties have been challenged on the basis of undue influence,99 it is a difficult policy decision to impose a rebuttable presumption of undue influence for some relationships and not others.100 A selection of specific relationships may convey the impression that testamentary gifts made in the context of other relationships are benign. It is true that in England101 and Canada102 a presumption of undue influence operates for inter vivos transfers in settled categories of influence such as solicitor-client, doctor-patient and religious advisor and advisee relationships. In addition,

96. See Huguenin v. Baseley, supra note 79 at 300, 536, Lord Eldon (Ch).
98. Ibid. at 4 & 7-8. See the facts in Timlick v. Crawford, supra note 60.
101. Barclays Bank plc v. O'Brien 1993, [1994] 1 A.C. 180 (H.L.) at 189-190, Lord Browne-Wilkinson. In Royal Bank of Scotland plc v. Etridge (No. 2), supra note 87 the House of Lords pointed out that this constituted an irrebuttable presumption that the ascendant party was in a position to influence the weaker party. The court would set aside the transaction unless the ascendant party proved that there was no influence: 797, Lord Nicholls. See generally: L.A. Sheridan, Fraud in Equity (London: Sir Isaac Pitman & Sons Ltd, 1957) at 87-96; M. Cope, Duress, Undue Influence and Unconscientious Bargains (Sydney: The Law Book Company Ltd, 1985) at paras. 168-187.
102. Geffen, supra note 87 at 221, Wilson J.
however, courts have recognized that a rebuttable presumption of undue influence can also arise in the particular circumstances of the case.\textsuperscript{103}

\textit{A gift is made in a situation where a rebuttable presumption of undue influence arises in inter vivos cases}

Some judges and commentators have suggested that the rebuttable presumption of undue influence that operates in inter vivos transactions ought to be incorporated into probate law. Academic commentators have made such a recommendation in England, while in Canada some judges, after the decision of the Supreme Court of Canada in \textit{Geffen v. Goodman} ("\textit{Geffen}")\textsuperscript{104} have recognized a rebuttable presumption. Because the nature of the relationship that triggers the rebuttable presumption of undue influence in inter vivos cases differs in England and Canada, it is appropriate to deal with these jurisdictions separately.

\textit{England: a relationship of trust and confidence}

Writing in the English context, Ridge is representative of those who support the incorporation of the inter vivos rebuttable presumption (or "equitable undue influence") into probate law. She has argued that this is the best way to protect testators.\textsuperscript{105} The proposition is not new. Ridge's recommendation is the latest in a series of similar proposals made by judges,\textsuperscript{106} commentators\textsuperscript{107} and law reformers,\textsuperscript{108} and appears comparable with the convergence of inter vivos and testamentary undue influence in one Commonwealth jurisdiction.\textsuperscript{109}

For Ridge, a presumption of undue influence can be achieved by either directly incorporating the inter vivos presumption into probate law or effectively doing so by the imposition of a trust established after probate is granted\textsuperscript{110} on the basis of equitable undue influence. The test currently employed in England to determine whether a rebuttable presumption of

\textsuperscript{103} In England the House of Lords pointed out in \textit{Royal Bank of Scotland plc v. Etridge (No. 2)}, supra note 87 that this is merely an evidentiary presumption in favour of the plaintiff that the defendant used undue influence to procure the transaction: at 797, Lord Nicholls. In respect to Canada see \textit{Geffen}, supra note 87 at 221-222, Wilson J.

\textsuperscript{104} \textit{Geffen}, supra note 87.

\textsuperscript{105} See generally Ridge, supra note 1.

\textsuperscript{106} E.g. the colonial Australian judgments of Hargrave J. in \textit{Buckley v. Millar} [1869] S.R.C. (N.S.W.) Eq. 74 (N.S.W.S.C.) at 91-93; \textit{Callaghan v. Myers} (1880), 1 N.S.W.R. 351 (N.S.W.S.C) at 357.

\textsuperscript{107} Baker, supra note 18.

\textsuperscript{108} New South Wales Law Reform Commission, \textit{Wills, Execution and Revocation} No. 47 (Sydney, N.S.W. Government, 1986) at para. 8.34; Ridge, supra note 1 at 626.

\textsuperscript{109} In respect to Scotland see McDonald, supra note 84 at paras. 8.25-8.33.

\textsuperscript{110} Ridge, supra note 1 at 634-638.
undue influence operates in an inter vivos context would be adopted.\textsuperscript{111} Consistent with this test, Ridge has proposed that where a testamentary gift is made in favour of a person in a strong relationship of trust and confidence with the testator and the gift is not readily explicable by the ordinary motives by which people act, a factual inference of actual undue influence should be raised.\textsuperscript{112} If a presumption arises, then the beneficiary will bear the burden of demonstrating that the testator was able to “exercise an independent will” and that the gift “was the result of a free exercise of his will.”\textsuperscript{113} The advantage of applying the inter vivos presumption is that it is a more flexible tool in cases where there are suspicions of undue influence but insufficient evidence of coercion. Although she has recognized that there may be difficulties adapting a presumption of undue influence based on a relationship of trust and confidence in testamentary situations,\textsuperscript{114} she has downplayed the impediments.

Ridge has argued that the different approaches to testamentary and inter vivos gifts are principally the outcome of the pre-judicature system of separate courts that came to an end in the nineteenth century.\textsuperscript{115} Seen in this light, it is incongruous that whether the gift is contained in a deed or a will determines whether coercion or broader presumptive notions of undue influence apply.\textsuperscript{116} The apparent inconsistency of imposing two different standards is illustrated where a person makes an inter vivos gift and dies soon after. The executor or administrator of the deceased’s estate may challenge the inter vivos transaction relying on a presumption of undue influence because the transaction was entered into and took effect while the deceased was still alive.\textsuperscript{117} One of the common arguments for retaining the traditional approach to testamentary undue influence is that the testator is no longer alive and is unable to bring an action or give evidence.\textsuperscript{118} However, the explanation is also tenable when the donor of an inter vivos gift is dead yet a different rule applies. As both the inter vivos and testamentary transactions are gifts and the donor is dead, there appears

\textsuperscript{111} Relying on the decision of the House of Lords in \textit{Royal Bank of Scotland v. Etridge (No. 2)}, \textit{supra} note 87 at 796-797, Lord Nicholls.

\textsuperscript{112} Ridge, \textit{supra} note 1 at 619.

\textsuperscript{113} \textit{Ibid.} Ridge quotes from \textit{Goldsworthy v. Brickell}, [1987] Ch. 378 at 402, Nourse L.J.

\textsuperscript{114} Ridge, \textit{supra} note 1 at 627-634.

\textsuperscript{115} See F.W. Maitland, \textit{Equity: A Course of Lectures}, 2\textsuperscript{nd} ed. (Cambridge: Cambridge University Press, 1947) at 15-17.


\textsuperscript{117} Ridge discusses the Australian High Court’s decision in \textit{Bridgewater v. Leahy} (1998), 194 C.L.R. 457 (H.C.A).

to be no reason for applying different principles. Instead, for Ridge the adoption of the inter vivos presumption in testamentary cases would be the most advantageous way of dealing with a serious anomaly that originated in an artificial jurisdictional divide.

Judges and authors have disagreed with the kind of proposal Ridge has made. In Parfitt v. Lawless\(^{119}\) Lord Penzance refused to apply a rebuttable presumption of undue influence in a relationship of trust and confidence where there was a testamentary gift. He explained that a person accused of undue influence in relation to a contract or inter vivos gift will have participated in the making of that transaction. A beneficiary under a will may not have taken part in the will-making process and may not be aware of the gift. It is not justifiable to cast such a burden on a beneficiary.\(^{120}\) However, this is unconvincing in situations when the beneficiary is aware of the terms of the will.\(^{121}\)

Commentators have also observed that a testator is most likely to make gifts to persons who fall within a relationship of trust and confidence with the testator.\(^{122}\) The result is that there could be a large number of wills which would have to be proved in a formal manner, where such proof would not otherwise be necessary. However, an equally compelling argument is that the persons who would fall within a relationship of trust and confidence are likely to be those who would exercise undue influence over testators.\(^{123}\) In any event, relationships between spouses, and older parents and their adult children, have not traditionally constituted relationships of trust and confidence in English inter vivos undue influence cases. The existence of the relationship itself satisfactorily explains the making of the gift.\(^{124}\) Therefore, if the inter vivos rebuttable presumption were transposed into a probate context, it is unlikely that gifts to spouses or children would be scrutinized seriously. Yet there have been a number of probate cases


\(^{120}\) Ibid. at 469.

\(^{121}\) Klinck, supra note 86 at 135-136.


\(^{123}\) See Klinck, supra note 86 at 136.

\(^{124}\) In respect to wives see: Royal Bank of Scotland plc v. Etridge (No. 2), supra note 87 at 800, Lord Nicholls; and Sheridan, supra note 101 at 96. In respect to children see: Sheridan, supra note 101 at 93-94; Cope, supra note 101 at paras. 169-174; Fiona R. Burns, “Undue Influence Inter Vivos and the Elderly” (2002) 26 Melbourne U.L. Rev. 499 at 509-510.
in England and Canada where a spouse\textsuperscript{125} or an adult child\textsuperscript{126} has been accused of exercising undue influence.

The major problem with the application of this presumption in a testamentary context is that it might be used to defeat the true intention of the testator on the basis of whether the testator did or did not act in accordance with "social norms." Although such "social norms" may be difficult to articulate, they are discernible in intestacy legislation\textsuperscript{127} or in the underlying principles restricting testamentary freedom in the form of family provision legislation.\textsuperscript{128} Both legislative schemes are based on the view that spouses, issue and collateral relatives ought to benefit to some extent from the deceased's estate. For example, there are some English cases where gifts to spouses,\textsuperscript{129} relatives\textsuperscript{130} and friends\textsuperscript{131} as beneficiaries have been challenged on the basis of testamentary undue influence. If, instead, the artificial framework of the rebuttable presumption based on a relationship of trust and confidence were imposed, it is likely many wills would be considered valid because they appear explicable "by the ordinary motives by which people act," rather than by any analysis of the particular circumstances of the case. On the other hand, substantial gifts to formal care-givers,\textsuperscript{132} housekeepers\textsuperscript{133} and informal care-givers\textsuperscript{134} have been challenged by relatives of the testator. It might be argued that the gift in favour of care-givers or housekeepers to the disadvantage of the relatives is inexplicable "by the ordinary motives by which people act." Yet, there may be good reasons why the testator decided to leave substantial assets to such persons, although the testator may not have articulated these reasons in the will or supplementary documentation. The testator may have

\begin{itemize}
  \item \textsuperscript{125} E.g. Boyse, supra note 9; Hall, supra note 20; Craig, supra note 11; Scott v. Cousins, supra note 44.
  \item \textsuperscript{127} E.g. the Administration of Estates Act 1925 (U.K.); Margrave-Jones, supra note 23, cs. 12 & 13; Kerridge, Parry & Clark, supra note 11 at c. 2.
  \item \textsuperscript{128} E.g. Inheritance (Provision for Family and Dependents) Act 1975 (U.K.); Margrave-Jones, supra note 23, c. 14.
  \item \textsuperscript{129} E.g. Boyse, supra note 9; Hall, supra note 20.
  \item \textsuperscript{130} E.g. Re Cutcliffe (deceased): Le Duc v. Veness, supra note 17; Biggins v. Biggins, supra note 30; Vaughan, supra note 31; Tchilingirian v. Ouzounian, [2003] All E.R. (D) 76 (Ch.Div.).
  \item \textsuperscript{131} E.g. Jones v. Grady (7 February 2000), Smith Bernal (C.A.Civ. Div.).
  \item \textsuperscript{132} E.g. Re Stott (deceased): Klouda v. Lloyds Bank Ltd, supra note 28; White v. McCamley (25 January 1999), CH1997-W-No4169 (Ch.Div.).
  \item \textsuperscript{133} E.g. Baudains, supra note 11; Carapeto, supra note 32.
  \item \textsuperscript{134} E.g. Mills v. Colman, supra note 33; Re Killick (Deceased): Killick v. Poutney, supra note 25.
\end{itemize}
considered that the relatives were not interested in his welfare\textsuperscript{135} or less needy than others or that circumstances had so changed that a new will was warranted.\textsuperscript{136} In short, as relationships change, testamentary intentions may change.

\textit{Canada: domination of the will of another}

Many Canadian judges have adhered to the traditional model of testamentary undue influence. Indeed, when invited to apply a rebuttable presumption of undue influence, some courts have refused to do so.\textsuperscript{137} Courts have also conscientiously differentiated between the rules applicable to inter vivos and testamentary gifts, even when the inter vivos and testamentary gifts were challenged in the same case.\textsuperscript{138} The decision of the Supreme Court of Canada in \textit{Vout} in 1995 is an important precedent for courts which have refused to impose a rebuttable presumption of undue influence. In \textit{Vout} the Court confirmed that a person challenging a will on the basis of undue influence (as distinct from suspicious circumstances) bears the legal and evidential burden of proving undue influence.\textsuperscript{139}

Nevertheless, in Canada in contrast to England, a few courts have either appeared to adopt a rebuttable presumption of undue influence in testamentary cases or have expressly done so.\textsuperscript{140} The decision of the Supreme Court of Canada in \textit{Geffen}\textsuperscript{141} in 1991 has been crucial in this respect. While the judges in that case differed as to whether a rebuttable presumption of undue influence arose on the facts of the inter vivos transaction under review,\textsuperscript{142} in a seminal statement Wilson J. broadly described the kind of relationship that would trigger a rebuttable presumption of undue influence in inter vivos transactions. She observed:

\begin{quote}
when one really speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through
\end{quote}

\begin{footnotes}


139. \textit{Vout}, supra, note 44 at 440-441, Sopinka J. See \textit{Banton}, supra note 41 at 209, Cullity J.

140. \textit{Klinck}, supra note 86 at 127-130.


142. \textit{Ibid}. Wilson and Cory J.J. at 228-230 held that the relationship between the parties triggered the presumption of undue influence. La Forest and McLachlin JJ. at 249-251, and Sopinka J. at 243, held that the presumption had not been raised.
\end{footnotes}
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 first question to be addressed in all cases is whether the potential for domination inheres to the nature of the relationship itself. The 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.\textsuperscript{143}

Wilson J. referred to the presumption covering "gifts and bequests" several times in the judgment.\textsuperscript{144} However, her comments were made about an inter vivos transaction regarding the legal principles governing inter vivos transactions (as her historical reference to equity indicated). While it is strongly arguable that Lord Cranworth alluded to something other than coercion in \textit{Boyse},\textsuperscript{145} the description of undue influence in \textit{Geffen} extends well beyond the traditional testamentary doctrine in two significant ways. First, the exercise of a "persuasive influence" or "mere persuasion" does not satisfy the traditional doctrine.\textsuperscript{146} Second, the traditional testamentary doctrine has required proof of coercion so that, generally, the mere ability or opportunity to coerce has not been considered adequate evidence.\textsuperscript{147}

In the years preceding the decision in \textit{Geffen} there were only a few probate cases where trial judges appeared to adopt a rebuttable presumption of undue influence based either on a relationship of control over the deceased\textsuperscript{148} or a relationship of trust and confidence.\textsuperscript{149} Appellate courts generally required, however, that the trial judges maintain the distinction between inter vivos and testamentary undue influence and that there be evidence of testamentary undue influence\textsuperscript{150}, or glossed over the reference to a relationship of trust and confidence and held that undue influence had not been proved.\textsuperscript{151}

In the years after the decision in \textit{Geffen}, but before \textit{Vout}, aspects of the judgment of Wilson J. began to filter into some testamentary undue

\textsuperscript{143} \textit{Ibid.} at 227, Wilson J. She also considered that a relationship of trust and confidence could constitute a relationship of dominance.

\textsuperscript{144} \textit{Ibid.} at 227-228; 230.

\textsuperscript{145} \textit{Supra note 9}.

\textsuperscript{146} \textit{Ibid.} at 47-48, 1211; \textit{Craig, supra note 11} at 357, 15.

\textsuperscript{147} \textit{Ibid.} at 51, 1212; \textit{Craig, ibid.} at 356-357, 14-15.

\textsuperscript{148} E.g. \textit{Wannamaker v. Livingston, supra note 48} at paras. 21 & 38, Kelly J; \textit{Salvation Army Canada West v. Allen Estate, supra note 58} at paras. 46 & 53, Oppal J.


\textsuperscript{150} \textit{Wannamaker v. Livingston, supra note 48} at para. 68, Ferguson J.A.

\textsuperscript{151} \textit{Gaudet v. Frigstad, supra note 149} at para. 7, Anderson J.A.
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influence cases. For example, in *Patamis Estate v. Bajoraitis*¹⁵² Philp J. did not apply a presumption of undue influence, but considered the description of undue influence in *Geffen* for guidance.¹⁵³ In *Bakken v. Bakken*,¹⁵⁴ however, Armstrong J. relied on *Geffen* and held that undue influence could either be proved or presumed to have taken place in the light of the relationship of the parties.¹⁵⁵ He observed that it was implicit in the approach of Wilson J. that there must be some suspicion and some facts upon which a presumption could arise.¹⁵⁶ However, in *Bakken* undue influence was neither proven nor was there sufficient evidence upon which a presumption could arise.¹⁵⁷

After *Vout*, a number of judges treated *Geffen* as a major authority regarding the onus of proof for testamentary undue influence.¹⁵⁸ In other cases the courts considered the description of undue influence in *Geffen* for guidance, but did not always suggest that a rebuttable presumption will arise if a relationship of domination exists between the beneficiary and the testator.¹⁵⁹ In *Re Morash Estate*,¹⁶⁰ for example, Hall J. decided, consistently with *Vout*, that it was open to a party to prove undue influence, but also observed that a rebuttable presumption of undue influence could also arise. In this case, a testatrix made a will under which a daughter from her first marriage was named as a co-executrix, trustee and principal beneficiary. The testatrix remarried and made a second will under which the daughter was removed as a co-executrix and was no longer a beneficiary (except that certain outstanding debts were forgiven). The daughter contended that the second husband exercised undue influence over her mother. Hall J. held, inter alia, that a rebuttable presumption arose because the testatrix had been highly dependent on her husband who had dominated conversations with lawyers engaged to prepare the second will. This presumption was not rebutted.¹⁶¹ He did not explain how a rebuttable presumption of undue influence could exist in the light of considerable Canadian authority to the contrary. Instead, he appears to have assumed that such a presumption did not conflict with the decision in *Vout*, but rather complemented it. Indeed, in

¹⁵³. Ibid. at para. 96, Philp J.
¹⁵⁵. Ibid. at para 29, Armstrong J.
¹⁵⁶. Ibid. at para. 31, Armstrong J.
¹⁵⁷. Ibid. at para. 32, Armstrong J.
¹⁶¹. Ibid. at paras. 47 & 49; cf. *Butler*, ibid.
In some cases courts have imposed a rebuttable presumption, but maintained that the person challenging the will still completely bears the burden of proof, although this appears to contradict both the orthodox notion of a rebuttable presumption and \textit{Vout}. Finally, in other cases it has been simply assumed without explanation that the same rebuttable presumption applies to both inter vivos and testamentary gifts.

Whether the application of a rebuttable presumption in a testamentary context based on the criteria in \textit{Geffen} would be workable remains debatable. The concept of undue influence described by Wilson J. is very broad so that the imposition of such a presumption could have the unintended effect of undermining the true and legitimate intention of the testator. A testator may decide to make gifts to persons who are capable of and have the opportunity of exercising undue influence in the form of coercion or domination. These persons, although innocent, may be unable to provide adequate evidence to rebut the presumption.

\textit{A gift made when the beneficiary is involved in the making of the will}

In a seminal article on undue influence and the suspicious circumstances rule, Kerridge argued that two important presumptions ought to regulate the making of wills. First, potential beneficiaries ought to be placed on notice that if they or a person on their behalf are involved in the will-making process, then the beneficiary will be required to rebut an automatic presumption of undue influence and fraud. In order to rebut the presumption, the beneficiary will have to produce evidence that proves the testator acted independently and was neither coerced nor misled. Therefore, participation in the will-making process becomes equivalent to active coercion. A rebuttable presumption of undue influence effectively transforms circumstances that originally triggered the suspicious


\footnote{143. \textit{Cullen Estate v. Filla} (26 February 2002), 37027T/01, 2002 WL 38642 (Ont. S.C.J); \textit{Brown v. Zaitsoff Estate}, supra note 162; \textit{West v. Jopp-Shelton} (2004), 8 E.T.R. (3d) 200, 248 Sask.R. 293 (Sask. Q.B); \textit{Kaczmarczyk v. Kaczmarczyk}, supra note 126. In \textit{Dansereau Estate v. Vallee} (15 July 1999), Edmonton 9503-02643 (Alta. Q.B.) it was conceded by the beneficiary that a presumption of undue influence arose in respect to the will in so far as the undue influence was alleged within the context and doctrine in the decision in \textit{Vout}. In \textit{Fair v. Campbell Estate} (2002), 3 E.T.R. 48 (Ont. S.C.J.) it was assumed that the same test applied in respect to testamentary and inter vivos gifts, at para. 29, Langdon J. However, it was unclear whether the plaintiff’s onus of proof required raising the presumption or proving coercion.}

\footnote{144. Kerridge, “Suspicious Circumstances,” \textit{supra} note 1.}

\footnote{145. \textit{Ibid.} at 331.}
circumstances rule in *Barry*\(^{166}\) into the basis for a rebuttable presumption of undue influence.\(^{167}\)

Second, Kerridge suggested that wills ought to be executed in the presence of notaries or solicitors who are totally independent of and in no way connected with the beneficiaries. In this way, an independent party will be able to be satisfied that undue influence and fraud have not been perpetrated. Where there are concerns about the testator’s capacity it will be incumbent on the independent practitioner to seek medical assistance.\(^{168}\) While Kerridge did not suggest that the execution of wills in the presence of independent notaries and legal practitioners be obligatory, he recommended that where the procedure was adopted, there should be a presumption that the testator had capacity and that there had been no undue influence or fraud.\(^{169}\) In the absence of the procedure, the propounder must prove capacity and disprove undue influence and fraud.

The advantage of Kerridge’s dual presumptions is that they are formulated to take into account problems that occur specifically in the testamentary context. The downside of the first presumption is that it is unclear what would constitute involvement in the will-making process. If indirect assistance triggers the presumption, then innocent beneficiaries could be caught by the presumption without the essential evidence for a rebuttal. Conversely, there may be conduct other than actual participation in the will-making process that inhibits the testator’s independent action. Therefore, the second presumption has merit because it would encourage testators and their lawyers to seek independent confirmation and execution of the will. However, even the second presumption may not completely protect testators who may be reluctant to disclose to independent practitioners attempts to influence them.

c. *Rebutting the presumption*

A rebuttable presumption of undue influence needs to specify how the presumption will be rebutted. In testamentary cases, there would be two subsidiary issues: who would be required to rebut the presumption and what kind of evidence would rebut it.

It remains unclear whether the propounder of the will or the beneficiary of the gift (assuming that they are different persons) would bear the burden of rebuttal. Kerridge\(^{170}\) and Ridge\(^{171}\) have argued that the beneficiary

\(^{166}\) Supra note 66.

\(^{167}\) The impetus for such a presumption stemmed from such cases as *Wintle v. Nye*, supra note 38; Kerridge, “Suspicious Circumstances,” supra note 1 at 322.

\(^{168}\) Kerridge, “Suspicious Circumstances,” supra note 1 at 333.

\(^{169}\) Ibid. at 332.

\(^{170}\) Ibid. at 331.

\(^{171}\) Ridge, supra note 1 at 619.
ought to bear the burden of proving affirmatively that the testator acted freely and independently. If the beneficiary bears the burden of rebutting the presumption regarding a gift under the will that did not comprise the whole of the testator's estate, the rest of the will could still be valid.\textsuperscript{172} This also accords with the view that the initial and only essential duty of the propounder of the will is to demonstrate testamentary capacity and knowledge and approval. However, in \textit{Re Morash Estate}\textsuperscript{173} a beneficiary against whom allegations of undue influence arose and whose conduct triggered the presumption was dead. The propounders of the will were required to deal with the allegations of undue influence rather than the beneficiary's representatives or other beneficiaries who gained from the exercise of influence.

Another issue is: in what circumstances would the presumption be rebutted? In inter vivos cases it is not sufficient to demonstrate that the donor understood what he was doing or its practical significance. Instead, in England\textsuperscript{174} and Canada\textsuperscript{175} the donee must demonstrate that the donor exercised a free intention and acted independently. For example, the donor may have sought and taken independent legal advice. In a testamentary context, a testator's independent and free action could be established by demonstrating that an independent solicitor advised the testator and the beneficiary did not participate in the will-making process. Whether independent advice would be necessary to rebut the presumption in a testamentary context is unclear.\textsuperscript{176} Perhaps strong evidence of the independent character of the testator would suffice.\textsuperscript{177}

2. \textit{Modification of significant elements in the testamentary doctrine}

So far only two approaches to the doctrine of undue influence have been discussed. They are to prove coercion or to rely on a rebuttable presumption of undue influence. Canadian courts, however, have demonstrated that there is a third possible approach to proving testamentary undue influence. It is by modifying those elements of testamentary undue influence that have limited the utility of the doctrine, namely, the definition of undue

\textsuperscript{172} Traditionally, if only part of a will was found invalid due to undue influence, that part was rejected and the remainder of the will could be admitted to probate: Clark & Ross Martyn, \textit{supra} note 26 at 42.

\textsuperscript{173} \textit{Supra} note 160.


\textsuperscript{175} Geffen, \textit{supra} note 87 at 228, Wilson J.

\textsuperscript{176} See \textit{Inche Noriah v. Shaik Allie Bin Omar} (1928), [1929] A.C. 127 (P.C.), which established that independent advice was not necessary in inter vivos transactions.

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Reforming Testamentary Undue Influence, the evidence that can be relied on to prove undue influence and the standard of proof. While the party who challenges the validity of the will still bears the legal burden of proving undue influence, the three modified doctrinal and evidential standards are more achievable than those prescribed under the traditional doctrine and are in accord with modern trends. A fully modified testamentary doctrine requires adjustment of all three elements.

a. The testator's independence and freedom

In the nineteenth century testamentary undue influence was almost entirely defined as coercion and most courts overlooked the significant subtleties in Boyse. First, Lord Cranworth proffered another definition of undue influence in Boyse. The question was whether the influence had caused the testator to sign a will that "did not really express his mind, but expressed something else, something which he did not really mean." While coercive conduct can force a testator to sign a document that does not express his intention, it appears from this definition that it was not necessary to prove actual coercion, but only undue influence. Therefore, coercion forms only part of a wider framework of undue influence that focuses on free agency and independent action. Indeed, this framework is also consistent with the statements in Barry in the sense that Parke B. held that the validity of a will depended upon a free and capable testator.

Second, in Boyse, Hall v. Hall and Wingrove v. Wingrove the Courts recognized that, in any event, coercion or pressure is a relative phenomenon. Depending on the physical well-being, psychological strength and fears or hopes of the testator, a potential beneficiary can exert minimal pressure which still constitutes undue influence. Ultimately, the issue is not coercion, but whether the testator has freely and independently expressed his intention in the will.

The focus on whether the testator has acted freely and independently is supported by modern authority. The inter vivos presumption of undue influence in both England and Canada may be rebutted by evidence that the donor's inter vivos gift was the "result of his own 'full, free and informed thought.'" The suggestions for reform of testamentary undue influence based on a rebuttable presumption of undue influence in probate

178. Supra note 9 at 34, 1205. See Earl of Sefton v. Hopwood, supra note 12 at 861.
179. Supra note 66 at 482-483, 1090.
180. Supra note 9 at 51, 1212.
181. Supra note 20 at 482, Sir J.P. Wilde.
182. Supra note 16 at 83, Sir James Hannen.
cases also require evidence of testamentary independence and freedom in order to rebut the presumption.

In Canada the early approaches to testamentary undue influence were resurrected by the Privy Council decision in Craig. In that case, the Privy Council used language from both Lord Cranworth's statements in Boyse. It did not discriminate between statements emphasizing the coercive conduct and those that suggested that the essential issue was whether the testator had signed a will that recorded what he really intended and meant.\(^1\)\(^8\)\(^4\)\(^5\) It was assumed that both definitions were consistent with one another and that both supported coercion as the hallmark of testamentary undue influence. Therefore, for most Canadian courts in the twentieth century testamentary undue influence was limited to coercive conduct. However, in the latter decades of the twentieth century some courts began to state either or both tests\(^8\)\(^5\) or to simply omit reference to coercion in favour of whether the testator had signed a will that expressed what he wished to happen to his estate.\(^1\)\(^8\)\(^6\) The transition seemed inconsequential at first and did not appear to conflict with or modify the traditional doctrine because Boyse and Craig were important traditional authorities. In Re Martin; MacGregor v. Ryan\(^1\)\(^8\)\(^7\) and Vout\(^1\)\(^8\)\(^8\) the Supreme Court of Canada specifically referred to the broader definition in Craig with approval (although there was also reference to coercion in Re Martin\(^1\)\(^8\)\(^9\) and Vout\(^1\)\(^9\)\(^0\)). It was no longer necessary to demonstrate coercion or wrongdoing, although proof of coercion remained one way of satisfying the test. A helpful example of the shift from actual coercion to a broader concept of undue influence can be found Re Kohut Estate.\(^1\)\(^9\)\(^1\) An elderly testatrix made seven wills over an eight-year period in which she alternatively lived with each of her daughters. The daughter with whom the testatrix resided at

\(^{184}\) Craig, supra note 11 at 357, 15.


\(^{187}\) Supra note 41 at 138, Ritchie J.

\(^{188}\) Supra note 44 at 441-442, Sopinka J.

\(^{189}\) Supra note 41 at 139, Ritchie J. His Honour quoted Riach, supra note 41 at 128, Crocket J.


\(^{191}\) Supra note 126.
the time she made a new will was the principal beneficiary under that will. The Court was satisfied that the mother possessed testamentary capacity and that neither daughter had actually coerced her mother into making a will in which she was the principal beneficiary. Kennedy J. held that:

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 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.”

The Court concluded that the last four wills were the product of undue influence because the mother was highly susceptible to the wishes of her daughters. Kennedy J. held that the wills were “the result of what those around her had in mind and not the exercise of the deceased’s own volition, albeit influence innocently exerted.”

b. Circumstantial evidence

In Boyse Lord Cranworth held that testamentary undue influence must be proved by direct evidence of a very high standard. Nevertheless, it is inaccurate to suggest that Lord Cranworth considered that indirect or circumstantial evidence had no part to play in the proof of coercion. Circumstantial evidence is an evidentiary fact (or facts) from which the judge or jury are able to infer reasonably the existence of the fact in issue. Lord Cranworth had circumstantial evidence in mind when he suggested that strong evidence of a beneficiary’s complete control over the testator could constitute evidence of coercion, although there was no evidence of the actual circumstances in which the will was made.

Despite the narrow range of evidence that has traditionally been considered in testamentary undue influence cases, some courts have increasingly accepted that a party challenging the validity of a will may be able to rely exclusively on circumstantial evidence. It is likely that a beneficiary will exert undue influence in secret, rather than openly. Therefore, undue influence will usually be proved by circumstantial evidence.

192. Ibid. at para. 38 quoting Hall, supra note 20 at 482, Sir J.P. Wilde.
193. Ibid. at para. 42.
194. Supra note 9.
195. Ibid. at 50-51, 1212.
197. Boyse, supra note 9 at 51, 1212.
rather than direct evidence; and it will be necessary, from a practical perspective, to make an inference of undue influence by reviewing all the facts. Indeed, some courts have accepted that it is permissible to rely on indirect or circumstantial evidence while in other respects apparently following the traditional doctrine of testamentary undue influence.

A reliance on circumstantial evidence is also reflected in the doctrine of suspicious circumstances and proposals for reform based on a presumption of undue influence. In the former, the production of evidence which indirectly suggests undue influence or from which undue influence may be inferred, requires the propounder to demonstrate that the testator knew and approved the will. In the latter, a rebuttable presumption is built on circumstantial evidence that may suggest undue influence and, in turn, requires proof that the testator acted freely and independently.

An emphasis on whether the testator acted freely and independently, rather than on proof of coercion, has also opened the way for reliance on circumstantial evidence. In *Scott v. Cousins*, an elderly testatrix had made earlier wills in favour of her relatives. After her second marriage she made another will leaving her assets to her second husband and his relatives. The beneficiaries under the earlier wills argued successfully that the latest will was invalid because of, inter alia, the husband’s undue influence. Cullity J. observed that it was unnecessary to demonstrate that the elderly testator was threatened or terrorized and that:

In determining whether undue influence has been established by circumstantial evidence, courts have traditionally looked to such matters as the willingness or disposition of the person alleged to have exercised it, whether an opportunity to do so existed and the vulnerability of the testator or testatrix...Other matters that have been regarded as relevant,

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201. E.g. *Riach*, supra note 41.

202. *Supra* note 44.

within limits, are the absence of moral claims of the beneficiaries under the will or of other reasons why the deceased should have chosen to benefit them. The fact that the will departs radically from the dispositive pattern of previous wills has also been regarded as having some probative force.\(^\text{204}\)

Cullity J. held that the husband had planned the acquisition of his wife's property and the wife was susceptible to undue influence because of her weakened mental state. He also relied on the last minute reversal of the pattern of the wife's earlier wills and the absence of any plausible reason why she would substitute her husband's relatives for her own.\(^\text{205}\)

The decision was arguably an important juncture in the modification of testamentary undue influence. First, contrary to earlier authority, Cullity J. accepted that the existence of the opportunity to influence was part of a wider matrix of factors that a court could consider.\(^\text{206}\) It is probable that the mere opportunity to influence on its own would not be sufficient to constitute undue influence but would be weighed with other circumstances.\(^\text{207}\) Second, Cullity J. also considered the susceptibility of the wife to undue influence as well as the conduct of the husband. Therefore, consistent with earlier nineteenth century English authorities, courts will be able to evaluate a wide variety of circumstances\(^\text{208}\) that will shed light on the relative strengths and weaknesses of the two parties, including the testator's mental and physical health\(^\text{209}\) and his practical, emotional or financial dependence on the beneficiary.\(^\text{210}\)

c. **Balance of probabilities**

In *Boyse* Lord Cranworth held that where a will was otherwise valid, the party challenging the validity of the will had to demonstrate that undue influence was the only possible explanation for the existence of the will.\(^\text{211}\) Regrettably, Lord Cranworth did not fully explain why the standard of proof was so high, although it appears that the Court was disinclined to

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207. Note also *Streisfield v. Goodman*, supra note 138 at paras. 141-143, Carnwath J.


209. See generally Silberfeld, *supra* note 79.


211. *Supra* note 9 at 51, 1212. See *Craig, supra* note 11 at 357, 15.
find that a will was invalid simply because undue influence was one of several explanations.

Recently, some Canadian and English courts have neglected or rejected the higher standard of proof in favour of the civil standard of proof, the balance of probabilities, when considering testamentary undue influence. Some courts have assumed that the standard to be applied is the balance of probabilities without noting the standard prescribed in Boyse. Others have explained that the application of a higher standard would mean that undue influence would cease to have a practical significance. The adoption of the civil standard of proof has modernized testamentary undue influence particularly when courts have combined it with an investigation of whether the testator acted freely and independently by reference to actual and circumstantial evidence. Although this standard of proof is not as onerous as the one applied to traditional testamentary influence, it is unlikely that a court will find undue influence and refuse probate of an otherwise valid will on the existence of a mere possibility of influence.

3. The preferable approach

This paper has outlined the traditional doctrine and the two major possible reforms. The question then is: which approach is the most desirable, particularly in the light of the testamentary context?

The modified doctrine of testamentary undue influence is preferable to the traditional doctrine because, in comparison, the modified doctrine imposes practical and achievable thresholds. Moreover, the shift from proof of coercion to an investigation of whether the will recorded the testator’s free and independent wishes means that the court is able to review a broad range of evidence including: the relationship of the testator and the beneficiary; the testator’s health and susceptibility to undue influence; the facts actually leading up to and surrounding the execution of the will; and any past dispositions. The court will also have the benefit of

214. Scott v. Cousins, supra note 44 at para. 48, Cullity J.
evidence from a wide array of persons who had dealings with the testator including relatives, friends, carers, medical and legal practitioners. The modified doctrine fills the “unintended gap” when there are no doubts that the testator possessed testamentary capacity and had known and approved the terms of the will.

The modified doctrine of testamentary undue influence is also preferable to a rebuttable presumption of undue influence. First, the problem is that a presumption of undue influence could be triggered by factors that do not fully shed light on whether the testator acted freely and independently. In contrast, the modified doctrine focuses on the evaluation of all the available evidence, rather than arranging the evidence to suit the particular criteria of a rebuttable presumption. A review of all the relevant evidence could include, for example, the existence of a relationship of trust and confidence or the opportunity to dominate the will of the testator. However, these would not be the only or necessarily the most significant factors. Second, a rebuttable presumption allows the party who challenges the will to trigger the presumption by presenting wholly circumstantial evidence. Yet this evidence may not conclusively demonstrate that the will was not the product of the testator’s free and independent intention. In contrast, the modified doctrine has preserved the traditional burden of proof on the party challenging the will. This is particularly significant if the evidence produced is wholly circumstantial. Third, the modified doctrine maintains the utility of the doctrine of suspicious circumstances where the key issue is whether the testator knew and approved of the will. While the same evidence may be used to plead suspicious circumstances and undue influence, the evidence will be measured against the separate standards of knowledge and approval on the one hand, and free and independent intention on the other.

IV. The reform of testamentary undue influence
Any doctrine of testamentary undue influence ought to be regulated by reference to three matters that, in combination, would significantly diminish the likelihood of grants of probate where undue influence had been perpetrated.

1. Additional presumption of validity
As discussed previously, Kerridge suggested that there ought to be a presumption in favour of validity of a will and against undue influence when the finalization and execution of the will is in the presence of notaries or solicitors who are totally independent of and in no way connected with the beneficiaries. Kerridge stopped short of recommending that the
execution of wills must be in the presence of independent practitioners.\textsuperscript{217} Nevertheless, failure to comply with the recommended procedure would mean that the propounder bears the significant burden of disproving undue influence and fraud. However, Kerridge assumed that there will be no change to the traditional doctrine of testamentary undue influence.

In the light of the modified doctrine it is preferable to adopt only a part of Kerridge’s scheme. When the finalization and execution of the will is in the presence of notaries or solicitors who have not drafted the will and who are not connected with the beneficiaries, there should be a rebuttable presumption that there is no undue influence and the testator executed a will that recorded his free and independent intention. It would remain a rebuttable presumption because there could be circumstances where the testator feared revealing his true wishes even to the independent practitioners. The party challenging the will still bears the burden of proving undue influence on the balance of probabilities even if the will was executed in the presence of an independent practitioner.

2. The modified doctrine of testamentary undue influence applied in all testamentary cases

Whether the will has been executed in accordance with the additional safeguards outlined above, the modified doctrine of undue influence ought to be implemented. A party challenging a will ought to demonstrate that a review of all the relevant evidence reveals on the balance of probabilities that it does not record the testator’s free and independent intention.

In addition, courts could adopt a less strict approach to costs. The traditional approach has been that when a party fails to prove undue influence, the party bears the costs of the action.\textsuperscript{218} It appears that courts wish to discourage costly and vexatious litigation. However, it is submitted that courts ought to take a flexible approach to costs\textsuperscript{219} when applying the modified doctrine. For example, where there is significant initial evidence that suggests that the will did not represent the intention of the testator, but the challenge is unsuccessful on the balance of probabilities, it may be appropriate for either the estate to bear the costs or the parties to bear

\textsuperscript{217} Kerridge, “Suspicious Circumstances,” supra note 1 at 334.


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their own costs. In any event there is evidence that courts in Canada are exercising discretion over costs when the case warrants it.220

3. The application of the modified doctrine of testamentary undue influence when the donor in an inter vivos transaction is deceased

Ridge points out that it is artificial to apply a different test for undue influence based on whether the gifts made by a person took effect before or after his death.221 The anomaly is stark when the making of the inter vivos gift takes place shortly before or simultaneously with the making of the will.222 Her solution is that a rebuttable presumption ought to apply whether the gift becomes effective when the donor is alive or when the donor is dead.223

There are, however, two problems with this approach. First, the factual circumstances may not trigger the relevant rebuttable presumption. Therefore, the wishes of the donor may not be protected from the effects of undue influence; and the transaction will not be scrutinized appropriately. Second, the donor is not available to provide his or her version of the events surrounding the making of the testamentary gift. It is arguable therefore that a presumption of undue influence inter vivos ought to apply only when the donor either brings the action against the donee or is available to give evidence at the time of the trial. It would be preferable to apply the modified doctrine of testamentary undue influence when there are concerns that the deceased donor has not exercised a free and independent intention in respect to the making of an inter vivos gift or the will or both. This approach addresses both the anomaly referred to above and the fact that the donor/testator is unavailable to give evidence.224 The kinds of situations that would benefit from the application of a single modified doctrine of testamentary undue influence include those where shortly before the donor’s death, the donor had made an inter vivos gift which incidentally but significantly depleted the assets for distribution under the testator’s will225; the donor had made an inter vivos gift which,


221. Ridge, supra note 1 at 635. See also Klinck, supra note 86 at 136-140.


224. See Klinck, supra note 86 at 136-137.

225. E.g. Kaczmarczyk v. Kaczmarczyk, supra note 126; Thompson Estate v. Lougheed, supra note 223; Morgan (Guardian ad litem of) v. Lizotte, supra note 223; and Soule Estate v. Vowles, supra note 223.
as part of a wider scheme of asset distribution, significantly depleted the assets for distribution under the testator’s will\textsuperscript{226}, or the donor had made both inter vivos and testamentary gifts to the same donee/beneficiary simultaneously or within a short interval.

\textit{Conclusion}

It has been assumed that undue influence can be proved in only two ways: either by direct proof of coercion or by relying on a presumption of undue influence. For the English ecclesiastical and probate judges in the nineteenth century only the former was appropriate in testamentary cases. In the twentieth and early twenty-first centuries English courts have continued to apply conscientiously the traditional doctrine of testamentary undue influence. Nonetheless, commentators and law reformers have argued that this doctrine is unworkable as it is almost impossible to prove coercion. Consequently, they have sought the imposition of a presumption of testamentary undue influence, despite problems associated with the testamentary context. Initially in Canada there was also a strong adherence to the traditional testamentary doctrine. However, in the late twentieth century some courts abandoned the traditional doctrine in favour of either an inter vivos presumption of testamentary undue influence or modification of elements of the traditional doctrine in order to make it more feasible to challenge a will. It has been argued in this article that neither the traditional doctrine of testamentary undue influence nor a presumption of testamentary undue influence adequately protects testators or their true testamentary intentions. Instead, in both jurisdictions, a modified doctrine of testamentary undue influence ought to be a cornerstone of a three-tiered scheme focusing on the process of will-making and the testator’s free and independent intention.