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Litigating an Undue Influence Case?

Carefully examine the circumstances of the testator's life surrounding the time of will execution to help prosecute and defend such a claim

It seems that every will contest includes a claim of undue influence along with the more standard claims of lack of testamentary capacity and lack of due execution. But, undue influence is certainly no throw-away claim. Indeed, properly pleaded and proven, undue influence can carry the day even if you fail to prove any of the other claims.

Proving undue influence, however, is no easy feat. The case is almost always proven by circumstantial evidence as direct evidence of undue influence rarely exists. The individuals most able to exercise undue influence—close family members, friends and caregivers—are also the individuals most likely to simply exercise natural, normal and legitimate influence. There's nothing inherently wrong with a family member or trusted confidant providing their thoughts and opinions to the testator.

So, when does influence become undue? When "the existence of a testamentary capacity [is] subjected to and controlled by a dominant influence or power."[1] Or put another way, when "excessive persuasion causes another person to act or refrain from acting by overcoming that person's free will and results in inequity."[2] While the precise definition of undue influence may vary somewhat from state to state, the essence of the offense is always the same: the exercise of influence on the testator of a will or the settlor of a trust that overcomes their exercise of free choice and results in a will or trust that expresses the wishes of the undue influencer rather than of the testator or settlor.

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Thus, the prosecution or defense of an undue influence claim requires careful analysis of the circumstances surrounding the testator's health, finances and relationships. Let's examine what courts consider to be the badges of undue influence and then how to rebut those badges. Finally, as all undue influence cases rise and fall on the evidence, we'll discuss how to marshal the circumstantial evidence.

Badges of Undue Influence

As well summarized by one court, the badges of influence include:

1. the nature and type of relationship existing among the testator, the contestants and the party accused of exerting such influence;
2. the opportunities existing for the exertion of the type of deception possessed or employed;
3. the circumstances surrounding the drafting and execution of the testament;
4. the existence of a fraudulent motive;
5. whether there had been a habitual subjection of the testator to the control of another;
6. the state of the testator's mind at the time of the execution of the testament;
7. the testator's mental or physical incapacity to resist, or the susceptibility of the testator's mind to the type and extent of the influence exerted;
8. words and acts of the testator;
9. weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise; and
10. whether the testament executed is unnatural in its terms of disposition of property.[3]

Factors for Successful Claim

Although there's no single set of circumstances that

will support a claim of undue influence, certain factors tend to be strongly associated with a successful claim. They include: the ill health and isolation of the testator; the influencer's control over the making of the will; a significant change of estate plan; and a will that prefers an "unnatural" beneficiary.

Ill health. One of the required elements of an undue influence claim is the opportunity to exert the influence, and it's the testator's ill health that makes them susceptible to undue influence. The mere existence of medical problems is insufficient; they must be of such type and severity that enabled the testator's mind to be overpowered.

In cases with no clear mental illness, be attentive to physical maladies that, in combination with other factors, can make the testator too weak to resist undue influence.

Dementia, usually in combination with other infirmities, continues to be one of the most common factors in successful undue influence cases. And, as the average life expectancy continues to rise, expect the amount of undue influence cases to rise as well. In these cases, the testator had (sometimes barely) the mental capacity to make the will or trust but was sufficiently impaired to be susceptible to undue influence.[4]

Even when there's no diagnosis of dementia or Alzheimer's, the unduly influenced testator often has mental problems.[5] And, in cases with no clear mental illness, be attentive to physical maladies that, in combination with other factors, can make the testator too weak to resist undue influence.[6] Indeed, other mental health issues, such as a below-average IQ[7] or physical issues, such as debilitating pain,[8] may pave the way for the exercise of undue influence.

Practitioners also should be alert to ill health that causes the testator to be dependent on the undue influencer for care, transportation, obtaining and administering medications, decision making and management of personal, financial and legal affairs. Such dependency tends to be present in successful claims of undue influence.

Isolation of testator. Undue influence often is accomplished through the isolation of a weak and vulnerable testator from some or all of their natural heirs. The ill health of the testator is what makes the isolation possible. If the beneficiary of a new will takes any action that limits a natural or pre-existing heir's contact with the testator, it may support a finding of undue influence.

Perhaps the most common method of isolation is simply preventing the competing heir from talking to the testator in person or by phone.[9] Sometimes isolation is accomplished through the creation of physical barriers.[10] Isolation may also be accomplished through the defamation of competing heirs, usually in combination with limiting their access to the testator.[11]

Finally, isolation may occur through the death of the testator's spouse or other close relative on whom the testator was dependent for material and emotional support, and then the undue influencer takes advantage of the situation to insinuate themselves into the testator's life.[12]

Alleged influencer's control over making of will. To procure a will that wouldn't otherwise be made by the testator, the undue influencer must exert some level of control over the process of making the will. That control might consist of pressuring the testator to make the will, engaging a drafting attorney loyal to the influencer, attending the testator's meetings with counsel and handling the execution of the will or dictating the terms of the will to the testator or counsel. Often, several of these circumstances are present simultaneously, but even one may be sufficient to raise suspicion.

In many undue influence cases, the will or trust is drafted by counsel who's loyal to the influencer rather than to the testator.[13] But, even if the drafting attorney is independent, an inference of undue influence will still arise if that attorney didn't meet privately with the testator both prior to and during the execution of the will or trust and didn't adequately investigate the circumstances of the testator's life and health, so as to ensure that the new will is carrying out the testator's

rather than someone else's wishes.[14] Thus, a well-intentioned but ill-informed attorney draftsperson may inadvertently enable the influencer.

Significant change in estate plan. The purpose of undue influence is to cause the creation of a will or trust favorable to the influencer. Therefore, in cases in which undue influence is established, the new will or trust creates an estate plan that's significantly different from the preexisting one.[15]

If a testator has no will and no apparent interest in making one, then making a will in favor of the influencer gives rise to the same inference as making a will that materially differs from a prior one.[16]

Unnatural disposition. In virtually every case in which undue influence is found, you'll see one of two fact patterns: (1) a will or trust that favors one child over their sibling(s) that previously had been treated as equals; or (2) a will or trust that favors an unrelated person over family members. Judges and juries tend to view bequests that seem unnatural with extra high suspicion.[17]

Rebutting a Claim

Even if there are multiple badges of undue influence, it doesn't necessarily mean that such influence occurred. Indeed, if the evidence is both consistent with undue influence and its absence, the objectant will lose.[18] Two means of rebuttal are particularly effective: (1) the use of truly independent drafting counsel; and (2) a reasonable explanation for the changes giving rise to the claim of undue influence.

Testator properly advised by independent counsel. If the testator was *properly* advised by an *independent* drafting attorney—ideally, an attorney who met privately with the testator before and during the execution of the will, inquired about the circumstances of the testator's life and the history of their estate planning, knew of the possibility of undue influence and reasonably determined that the new will isn't the result of such influence—the testimony of that attorney will be powerful evidence of the legitimacy of the will and can overcome multiple badges of undue influence.[19]

Reasonable explanation for the estate plan. If the beneficiary is a caregiver or helper of the testator and has a meaningful relationship with the testator, the will probably will be perceived as carrying out the testator's wishes rather than resulting from undue influence.[20] The quality of the testator's relationship with their children and siblings may also logically explain the choice of beneficiary.[21]

Circumstantial Evidence

As shown above, undue influence typically is proven through circumstantial evidence. There are several key sources of that evidence—fact witnesses, medical experts and certain types of documents.

Fact witnesses. A practitioner must interview or take the deposition of the fact witnesses most likely to have information relevant to undue influence. They include relatives, friends and neighbors of the testator who can be aware of the testator's physical and mental condition for several years before and after execution of the will.

> The testimony of medical experts can be critical in an undue influence case.

The practitioner also will want to interview or depose the individuals involved in the making of the testator's will or trust, including the drafting attorney, attesting witnesses and any employees of the drafting attorney who were able to observe and speak with the testator. These individuals are in a strong position to testify concerning the influencer's involvement (if any) in engaging counsel and making the will, the physical and mental condition of the testator at and near the time of execution and the testator's reasons for changes to the estate plan.

It's also necessary to obtain the evidence of individuals whose contact with the testator was somehow prevented or limited after the suspected undue influencer entered the decedent's life. Typically, such witnesses will be disinherited children of the testator. But, even someone not related to the testator, and who was never a potential beneficiary, can be an important witness of the influencer's efforts to isolate the testator.[22]

Medical experts. The testimony of medical experts can be critical in an undue influence case. The term "experts" includes both: (1) physicians, psychologists

and nurses who actually treated the decedent and therefore are fact witnesses; and (2) experts engaged to testify at trial.[23]

Documents. Through document requests and subpoenas, a practitioner will want to obtain certain categories of documents that consistently prove to be important in undue influence cases. These categories are estate-planning documents, medical records, financial and property records and communications.

You'll need copies of all POAs, health proxies and agency appointments.

Estate-planning documents. The party claiming undue influence will need to prove a material departure from a prior estate plan, which means either: (1) the new will or trust treats a beneficiary less favorably, or (2) the testator had no prior will or trust and created one that favors the undue influencer. Therefore, the practitioner must review all wills, trusts, codicils and drafts of the foregoing documents, including the most recent and prior versions. And, because the testator usually is dependent on the alleged undue influencer, the latter individual often holds a power of attorney (POA) signed by the testator. Sometimes the POA is created with the new estate-planning documents that resulted from the suspected undue influence. More often, the POA is already held by a relative or caregiver who's accused of using it to assert greater control over the testator's life. Therefore, you'll need copies of all POAs, health proxies and agency appointments.

Medical records. Evidence of the testator's physical and mental health, for an extended period up to execution, is highly relevant to determining their susceptibility to undue influence. Obtain all medical office and hospital records for a period of several years before the making of the will. If, as often happens, the testator suffered an illness or injury that precipitated the suspected undue influence, obtain the records for both before and after that key event.

Financial and property records. These include the statements for bank and investment accounts, tax returns and deeds to real estate. If the testator recently operated a business, obtain the books and records of the business. The practitioner needs to identify all property that the testator owned at the time of the making of the will or trust at issue, a reasonable period in advance and at the time of death. Be attentive to any changes in ownership of the testator's property.

*Communications***.** You'll also want to review all the communications between the testator and: (1) their family members, including competing heirs; (2) the drafting attorney; and (3) the alleged undue influencer. Courts pay close attention to the undue influencer's contacts with the drafting attorney. Even a single email can be critical.[24] Conversely, letters, emails and greeting cards between the testator and the alleged undue influencer can be evidence of a long-term, voluntary and loving relationship that will tend to rebut the claim. Finally, phone logs, which will likely need to be subpoenaed from the phone company, can show the date and time of all phone calls between the drafting attorney's office and the testator and alleged undue influencer. The drafting attorney's office should also have records of paper and electronic communications in its files, which you should also subpoena.

Endnotes

1. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).
2. Cal. Welfare and Institutions Code Section 15610.70(a), incorporated into Cal. Probate Code Section 86.
3. *Estate of Scott*, 601 S.W.3d 77, 90 (Tex. App. 2020) (quoting *Matter of Kam*, 484 S.W.3d 642, 651-53 (Tex. App. 2016)).
4. *See, e.g., Cobb v. Day*, No. COA19-805, 2020 WL 1686334, at *7 (N.C. App. April 7, 2020) (testator was 95 years old, suffered from dementia, intermittently experienced episodes of confusion and occasionally fainted and, when he executed his trust, was too weak to get out of his recliner chair and went to the hospital soon after); *King v. Smith*, No. G057238, 2020 WL 1041073, at *6-7 (Cal. App. March 4, 2020) (testator was diagnosed with dementia four years before execution of a will, had "moderate impairment" and "probable Alzheimer's disease" at the time of execution and was dependent on her daughter/caregiver for management of her affairs).
5. *See, e.g., Scott, supra* note 3, at pp. 82-98 (decedent had a below-average IQ, learning disabilities, cognitive impairments, paranoia and impaired judgment and suffered from terminal cancer when he changed his will); *Estate of Cavanaugh*, No. 1872 WDA 2017, 2018 WL4844701, at *7-10 (Pa. Super. Oct. 5, 2018) (90-year-old testator suffered short-term memory loss and confusion, often repeated herself and "was starting to lose it").

6. *See, e.g., Estate of Russey*, No. 12-18-00079-CV, 2019 WL 968421, at *5-6 (Tex. App. Feb. 28, 2019) (63-year-old testator suffered from congestive heart failure, pneumonia, back pain and generally deteriorating heath, and her sister recently died); *Hickox v. Mendonca*, No. F076754, 2019 WL 1253676, at *2-7 (Cal. App. March 19, 2019) (testator had been very independent and strong-willed but became weak and exhausted after a diagnosis of inoperable cancer and after surgery and blood transfusions), *rehearing denied* (April 9, 2019).
7. *Supra* note 3.
8. *Russey, supra* note 6.
9. *See, e.g., Blinn v. Carlman*, 159 So.3d 390, 393 (Fla. App. 2015) (testator's fourth wife hung up the phone whenever his children tried to call him, didn't invite the children to the wedding and took control of his life); *Estate of Reno,* 443 S.W.3d 143, 153 (Texas App. 2009) (beneficiary secretly placed testator in a nursing home and instructed it not to reveal his residence there); *Matter of Panek*, 667 N.Y.S.2d 177, 179 (App. Div. 1997) (beneficiary child forbade disinherited siblings and other family members from entering father's home, wouldn't let him take their calls and threatened to place him in a nursing home).
10. *See, e.g., Struever v. Yoswig*, No. 4-19-0038, 2019 WL 6655279, at *3-4 (Ill. App. Dec. 5, 2019) (beneficiary neighbor installed gates and a "no trespass" sign on 90-year-old testator's 120-acre estate, restricted access of other friends and neighbors to him and ceased renting the estate for hunting), *leave to appeal denied*, 144 N.E.3d 1181 (Ill. 2020); *Estate of Friend*, No. 04-18-00714-CV, 2020 WL 806654, at *3 (Tex. App. Feb. 19, 2020) (beneficiary sister installed a gate with a coded lock on mother's ranch and changed the locks to her home, in addition to taking control of mother's voicemail).
11. *See, e.g., Dowling v. Uriostegui*, No. B294046, 2020 WL 1241605, at *1-7 (Cal. App. Mar. 16, 2020) (friend engaged in years-long campaign of defamation against child and grandchildren of mentally ill testator, calling them "thieves," "liars" and "drug addicts"), *review denied* (July 15, 2020); *Blinn*, *supra* note 9, at p. 393 (fourth wife accidentally left a voicemail screaming at testator that his daughter was a thief and liar).
12. *In re Williams*, 101 N.Y.S.3d 290, 291 (App. Div. 2019) (soon after the accidental death of testator's 55-year-old son, which left her "unconsolable and distressed, and which further compromised her mental and physical health," the beneficiary child moved in with her and started managing her medical and financial affairs); *Russey, supra* note 6, at *1 (undue influencer, who was testator's former employer, "swoop[ed] in" and befriended the testator after the death of her sister, who was her closest friend and advisor).
13. *See, e.g., Matter of Bullock*, 100 N.Y.S.3d 304, 306 (App. Div. 2019) (friend contacted drafting attorney, attended that attorney's meetings with the testator and paid his fee); *Blinn*, s*upra* note 9 at p. 392 ("will was executed under most suspicious circumstances," in which referring lawyer was a friend of testator and defendant, and drafting lawyer was paid by defendant and had no personal interaction with testator before execution and no knowledge of his prior estate plan); *Haynes v. First Nat'l State Bank*, 87 N.J. 163, 184 (1981) ("a strong taint of undue influence was permitted, presumptively, to be injected into the testamentary disposition of [testator]," when her counsel also represented her daughter, who was the principal beneficiary and in whom the testator reposed trust, confidence and dependency).
14. *See, e.g., Cobb*, 2020 WL 1686334, at *7 (drafting attorney testified that he wouldn't have drafted the will if he had known that 95-year-old testator suffered from dementia); *Friend, supra* note 10, at *3 (drafting attorney relied on a typewritten letter from a testator who couldn't type or use a computer); *Matter of Henderson*, 80 N.Y.2d 388, 393-94 (1992) (drafting attorney relied on referring attorney/beneficiary's memorandum and a brief meeting with testator; question of fact existed whether testator received the benefit of independent legal advice, resulting in reversal of summary judgment in favor of proponent).
15. *See, e.g., Holden v. Holden,* No. CA2019-02-040, 2019 WL 6698180, at *1, 3 (Ohio App. Dec. 9, 2019) (a prior will divided the estate equally between siblings, while the new will left the entire estate to daughter)*; Hickox, supra* note 6, at *3-5 (the prior will divided the estate equally among four children, while the new trust left small cash bequests to three oldest children and balance of the estate, including a dairy farm, to youngest child); *Struever, supra* note 10, at *3-4 (testator's prior will and trust left estate to his wife and, if she predeceased him, to his two stepchildren equally, while his new trust gave everything to his neighbor).
16. *See, e.g., Scott, supra* note 3, at p. 91 ("[W]hen [testator] first met [defendants], he did not have a will, and had not expressed any intent to draft a will; to the contrary, in his 2010 meeting with [psychiatrist], [testator] told her that his family did not write wills and that they had all died intestate. [Defendant] himself admitted that when he initially suggested to [testator] that he should draft a will, [testator] was resistant to the idea, and that he spent several months trying to convince [testator] of the need to do so.")
17. *See, e.g., Dowling, supra* note 11, at *1 (the will favored family friend over only living child); *Russey, supra* note 6, at *1 (the will favored former employer, who befriended the decedent after the death of her sister, over her children); *Scott, supra* note 3, at p. 84 (the will favored a private investigator and his assistant over the testator's cousins, who were his only surviving family members); *Estate of Singer*, 99 N.Y.S.3d 284, 285 (App. Div. 2019) (the will favored neighbor over family members).
18. *See, e.g., Rothermel, supra* note 1, at pp. 922-23 ("[T]he circumstances relied on as establishing the elements of undue influence . . . must not be equally consistent with the absence of the exercise of such influence."); *Will of Walther*, 6 N.Y.2d 49, 56 (1959) ("undue influence can only be established by evidence that is not inconsistent with a contrary hypothesis").
19. *See, e.g., Estate of Grogan*, 595 S.W.3d 807, 820 (Tex. App. 2020) (Affirming dismissal of undue influence claim, even though testator's girlfriend pushed him to make a will disinheriting his brothers. "Importantly, it was uncontested that the 2010 will was prepared by [the drafting attorney] after he met with [testator] alone, determined him to be 'strong-willed' and of sound mind, and heard [testator's] wishes directly from [him]. [The drafting attorney] also stated that [testator] returned alone to execute the 2010 will in accordance with the formalities of Texas law in front of neutral witnesses."); *Shea v. Koehler*,

No. 2-17-0818, 2018 WL 6334667, at *3-6 (Ill. App. Dec. 3, 2018) (Affirming verdict of no undue influence of a will amendment that favored testator's daughter and daughter's children while largely disinheriting her two sons. The daughter was her mother's "around-the-clock paid caregiver," held a power of attorney for property and attended her mother's meeting with counsel at his office and had phone conversations with counsel, including one in which she tried to schedule the execution. These facts suggested undue influence. But, counsel refused to schedule the execution at the daughter's request, had no further phone conversations with her and met privately with testator in person and by phone and learned that she disliked her sons. The attorney was "especially attuned to any possible undue influence on [the daughter's part], and he took measures to circumvent it.")

SPOT LIGHT

Out on the Town

On 14th Street by Clyde Singer sold for $50,000 at Christie's American Art sale on Oct. 28, 2020 in New York City. Singer is known for his smaller scale oil and watercolor paintings, which often feature people at carnivals, standing in bars and other similar scenes reminiscent of American life. Raised in a small town in Ohio synonymous with farming, Singer was recognized for his artistic talent and often regarded as the "different" one in the family.

20. *See, e.g., Estate of Wilson*, No. E070066, 2020 WL 1060237, at *6-7 (Cal. App. March 5, 2020) (testator had a long-term friendship with neighbor/helper and grandparent-like relationship with her son and didn't like or spend time with his disinherited brother); *Matter of Delgatto*, 950 N.Y.S.2d 738, 740-42 (App. Div. 2012) (the will favored testator's friend and neighbor, "on whom she relied for care and support," over grandnieces and grandnephews); *Estate of Shumway*, 197 Ariz. 57, 62-64 (Ariz. App. 1999) (blind but strong-willed testator gave larger bequests to his helper/bookkeeper than daughters and siblings), *aff'd in part, rev'd in part on other grounds*, 198 Ariz. 323 (2000) (en banc).
21. *See, e.g., Grogan*, *supra* note 19, at pp. 813-22 (testator, who was mentally strong, left his estate to his "lifetime companion" of 30 years instead of to his brothers, with whom he had a "strained" personal and business relationship after a fight in which the testator had prevented one brother from killing the other while they practiced dentistry together); *Shea*, *supra* note 19, at *4-6 (as expressed in private consultations with drafting attorney, testator disliked her disinherited sons with whom she and her beneficiary daughter had a conflict-ridden and sometimes violent relationship); *Walther*, *supra* note 18, at pp. 55-56 (the will favored sister who was testator's "most intimate companion" and sometimes caregiver, instead of brother and grandchildren who lived overseas and paid little attention to her).
22. *See, e.g., Struever*, *supra* note 10, at *3 (members of a neighboring family testified that defendant alienated testator from them and restricted their access to him, and lessor of testator's land for hunting testified that he received a letter from defendant's lawyer informing him that he could no longer enter the property without defendant's permission).
23. *See, e.g., Estate of Fabian*, 222 A.3d 1143, 1148-50 (Pa. Super. 2019) (although drafting attorney testified that testator seemed mentally sound during execution, the testimony of treating physician at nursing home and incorrectly excluded expert testimony of nurse specializing in Alzheimer's care, raised issues of fact concerning testator's susceptibility to undue influence that required reversal of probate decree); *Hall v. Hall*, 190 So.3d 683, 685 (Fla. 3d Dist. 2016) (affirming verdict of no undue influence based on, among other testimony, the testimony of geriatric psychiatrist who reviewed testator's medical records and videotape of the will execution); *Scott*, *supra* note 3, at p. 92 (key evidence in favor of verdict of undue influence was the testimony of psychiatrist who treated testator three years before execution and diagnosed him as suffering from learning disabilities and paranoia that were likely to get worse); *Holden*, *supra* note 15, at *2 (Ohio App. Dec. 9, 2019) (the testimony of geropsychologist concerning testator's dementia, memory loss, anxiety and depression, exacerbated by husband's death a few months earlier, supported the finding that testator was susceptible to undue influence).
24. *See, e.g., Hickox*, *supra* note 6, at *6, 12 (an email from beneficiary son to drafting attorney, asking how his mother can include certain property in her will or trust, was key evidence supporting undue influence).