Testamentary Capacity and Undue Influence in Estate Planning and Litigation

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TESTAMENTARY CAPACITY AND UNDUE INFLUENCE IN ESTATE PLANNING AND LITIGATION

By Roxanna E. Hammett and Adam K. Derman
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I. Types of Capacity

The issue of whether a decedent had sufficient capacity to make a Last Will and Testament, referred to as "testamentary capacity," arises frequently in trusts and estates practice as well as related litigation. Given the general aging of the population, it can be expected that the number of court cases where it is alleged that the testator lacked testamentary capacity will increase. Since people are living longer, it is becoming more and more likely that age-related incapacity issues will arise.

There is an increasing rate of diagnoses of dementia in both the United States and other countries. As one commentator noted, "A diagnosis of dementia is a reality becoming all too familiar in recent years," R. Zebulon Law, Shauna R. Anderson and Alyse Frederick, "Diminished Capacity," 46 Estate Planning 22 (July 2019). According to Braintest.com, as of 2015, 7,700,000 new cases of dementia are diagnosed world-wide each year, and 47,500,000 people are living with dementia. In the United States, it is estimated that one out of every six women and one out of every 10 men living past the age of 55 will develop dementia. Of the various forms of dementia, 70% are Alzheimer's Disease which is defined by the National Institute on Aging as an "irreversible, progressive disorder that slowly destroys memory and thinking skills." U.S. Department of Health and Human Services, "Basics of Alzheimer's Disease and Dementia" at www.nia.nih.gov/health/alzheimers/basics.

Given the increasing prevalence of dementia and Alzheimer's Disease, if one or more of the testator's family members are unhappy with the terms of the testator's Will after the testator's death, either because they will receive less assets than they expected or they have been disinherited entirely, the disgruntled family member may well decide to

bring a lawsuit alleging that the testator did not have sufficient capacity to make the Will. The goal of such a lawsuit is to have the Will declared invalid with the result that either a previously revoked Will will be revived (if there is one), or the intestacy law will apply, and presumably under either scenario the disgruntled heir would end up with more assets than he or she would have under the invalidated Will.

Sometimes the disgruntled heir and his or her counsel may be aware that their case alleging lack of testamentary capacity is weak. Nevertheless, by bringing a lawsuit, the motive may be to cause the estate to incur expensive legal fees, disrupt the administration of the estate and generally be a thorn in the executor's side in order that the executor will want to settle and pay off the disgruntled heir. So the family member challenging the Will ends up with some assets although perhaps not the full amount that they would have received had a revoked Will been revived or the intestacy law applied.

Simply being unhappy with the terms of a Will is not a legal justification for invalidating it. Rather, the plaintiff in a lawsuit must allege and prove that the testator lacked testamentary capacity which basically means that he or she was of "unsound mind," i.e., the testator did not have sufficient mental and cognitive ability to create and understand the Will at the time when then Will was executed. Other grounds for attacking a Will in addition to lack of testamentary capacity are as follows: (1) the Will was not executed properly (insufficient number of witnesses, witnesses were under age 18, the testator or the witnesses printed their names instead of signing, etc.); (2) the Will had been revoked by the testator prior to death; or (3) the Will was the product of undue influence (discussed below), duress or coercion of the testator.

Testamentary capacity is only one type of capacity under the law. Other types of capacity include the following: (1) to dispose of property upon death other than through a Will, such as by beneficiary designation with regard to life insurance, retirement accounts, annuities and other "non-probate" assets; (2) to create an inter vivos trust; (3) to make a lifetime gift; (4) to grant someone power of attorney to take actions during the principal's life if he or she cannot act for himself or herself; (5) to make a Living Will or health care power of attorney to decide end of life decisions and appoint someone else to make them

if needed; (6) to manage property; (7) to make a contract; (8) to enter into real estate transactions; (9) to marry or divorce; (10) to bring a lawsuit; and (11) to provide instructions to counsel.

Although there is no single definition of testamentary capacity that is universally accepted, it is clear that there is a much lower threshold for the capacity required to make a Will than what is needed to validly execute other legal documents, such as a contract. Indeed, the New Jersey Superior Court in the case of In re Rasnick, 77 N.J. Super. 380 (1962) stated, "As a general principle, the law requires only a very low degree of mental capacity for one executing a Will."

The reason why more legal capacity is needed to enter into a contract than a Will is that generally a contract is a more complex document than a Will, plus a second person is a party to the document rather than just a single person who is the testator. Note that other requirements for making a Will, i.e., that the testator have reached the age of majority which is 18 (minors cannot create Wills), the Will was properly signed by the testator and witnessed, it had not been revoked at the time of the testator's death and there was no fraud in making the Will, are simpler, more fact based and more easily proven than lack of testamentary capacity.

II. What the Testator is Expected to be Able to Understand and Do

Generally, in order to create a valid Will, which is the means to transfer assets owned in the decedent's name at the time of death where the assets have no co-owner or beneficiary designated ("probate" assets), the requirements of the relevant state law of the decedent's domicile must be met. States generally require that: (1) the testator have the capacity required to make a Will, i.e., testamentary capacity; (2) the Will must be properly drafted, executed by the testator and witnessed; and (3) the Will must be of a type recognized as valid in that state, i.e., not a foreign Will or one that is oral (nuncupative) or handwritten (holographic), as meeting the particular state's requirements.

In deciding whether a Will is valid, the Court's highest priority is to carry out the decedent's intent even if all of the formalities of making a Will are not exactly met. An

unusual recent New Jersey case illustrating that point is In the Matter of the Will of E. Warren Bradway (App. Div. 2018) which held that a document purporting to be a Codicil to the decedent's Will that was written in the decedent's own blood (as proven by a DNA test on his close relatives) but which was unsigned by the decedent was admitted to probate after the decedent's death. The Court held that there was clear and convincing evidence that the decedent intended the document to be a Codicil to his Will and a signature on the document was not an absolute requirement for validity under New Jersey law.

To have sufficient testamentary capacity, the testator is expected to be able to understand and do several things. A court will look to the following factors in deciding whether the testator had testamentary capacity:

A. Whether the testator understood that he or she was creating a Will and he or she intended to create a Will.
B. Whether the testator generally knew the nature and extent of his or her property, i.e., what assets the testator owned.
C. Whether the testator intended to pass his or her property upon death under his or her Will, i.e., did the testator understand that the persons named in the Will, and no one else, will receive the testator's property.
D. Whether the testator was able to identify to whom he or she will be transferring property upon death, i.e., who are the recipients or beneficiaries under the Will, and did the testator understand his relationship to such beneficiaries; and
E. Did the testator know the persons who were the "natural objects of his or her bounty" i.e., the members of the testator's immediate family (spouse, children, grandchildren, etc.) who would inherit under the relevant state's intestacy statute if the testator died without a Will.

As the New Jersey Supreme Court stated in the case of Gellert v. Livingston, 5 N.J. 65 (1950), "The gauge of testamentary capacity is whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others; and the distribution that is made by the Will." In re Liebl, 260 N.J. Super. 519 (App. Div. 1992)

stated that, "A testator's misconception of the exact nature or value of his assets will not invalidate a Will where there is no evidence of incapacity . . . It is not ignorance of the kind or amount of property owned by the testatrix which invalidates a Will, but ignorance resulting from a mental incapacity to comprehend the kind and amount of such property." Thus, the knowledge that a testator is required to have of his or her assets is general rather than specific.

If all or at least most of the above factors are present, a court will likely find that the testator had testamentary capacity and his or her Will is valid. Importantly, the testator's mental state is judged at the time when the Will was executed, although the mental state at the time of the making of the Will is also important to consider. It is possible for the testator to have had episodes of confusion or dementia in the weeks or months leading up to the execution of the Will, but if the testator was having a lucid interval and the above factors were met at the time of execution, sufficient testamentary capacity will be found to exist. It is also possible for the testator to be generally capable but be suffering from an insane delusion, i.e., a false belief unsupported by the facts that caused the testator to leave nothing or less assets to a family member who later challenges the Will. One can have an insane delusion without actually being insane and that sole factor will not invalidate the entire Will but only the provision which is the result of the insane delusion.

In the case of In re Riordan (N.J. App. Div. 2011), the trial court found that the testatrix suffered from "a dementia condition of undefined specific proportions." Yet, the court also noted that she was often lucid and clear in her thoughts and behavior despite suffering from symptoms of dementia. The court held in the Riordan case that the testatrix had testamentary capacity to execute a Will despite her dementia symptoms.

In the case of In re Liebl, 260 N.J. Super. 519 (App. Div. 1992), the Court found that the decedent's Will was properly admitted to probate and the decedent had sufficient mental capacity to make the Will. The mere fact that the decedent was mistaken as to the value of his business and his net worth did not invalidate the Will given no medical evidence of the decedent's diminished capacity was presented by the plaintiff. Although the decedent's prior Will provided for an equal split of his assets between his children, the

last Will that was executed prior to death provided for an unequal distribution which was explicitly acknowledged in the Will itself. There was evidence that the child who received less assets was not getting along with his father and they no longer spent time together. Thus, the disgruntled heir's Will contest did not succeed.

While medical records of the testator's condition are very important as discussed below, it is also important in a Will contest that there be credible witnesses who knew the testator and can testify as to his or her mental state and ability to meet the necessary factors described above in order to establish testamentary capacity. In addition, if the witnesses to the Will were unrelated third parties who testify that the testator appeared competent, rather than interested parties, that will be a significant factor in a Will contest case.

III. Ensuring/Documenting Testamentary Capacity at Signing of the Estate Planning Documents: Key Questions to Ask

It is the responsibility of the estate planning attorney to assess the client's testamentary capacity both when meeting with the client to gather the information necessary to prepare the client's Will and again at the time of execution of the Will. The attorney must determine whether the factors listed in the previous section are present, i.e., did the client understand that he or she was creating a Will and the nature and extent of his or her own property, did the client intend to pass such property by the Will to the beneficiaries named therein, and did the client know which persons were the "natural objects" of his or her bounty.

Before the attorney's first meeting with a client, the attorney needs to provide the client with a retainer letter to sign. The retainer letter must identify the client, define the scope of work to be performed, and describe the responsibilities of both parties. If the attorney has reason to believe that testamentary capacity may be an issue, the attorney should consider including in the retainer letter a waiver by the client of the attorney-client privilege so the attorney can discuss the client's mental state with his or her physician, a social worker, accountant and friends or family members who would be potential witnesses

to testify in a Will contest. The attorney must have signed the retainer letter in hand prior to any work being performed.

Once the attorney has a signed retainer letter, if the client is elderly or if there is any potential question or "red flags" about the client's testamentary capacity, the attorney needs to meet with the client in person to discuss his or her wishes regarding his or her Will, Living Will, Power of Attorney and trusts, rather than simply speaking to the client by phone. It is easier to assess someone's mental state when sitting face to face with them rather than over the phone.

The meeting should involve the attorney and the client without including any family members or friends of the client. The attorney may consider having another attorney at the same firm sit in on the meeting as a witness and then after the meeting both attorneys can discuss their impressions of the client's capacity and prepare contemporaneous memos to the file. The attorney will need to decide if the meeting should be held in the attorney's office, or in the client's home. The client would be expected to be more comfortable in a familiar environment if the meeting is at his or her home, but there could be other family members, friends or home health aides present who would need to be in another area of the home and not participate in the meeting.

The attorney may wish to videotape the meeting in order to build a record that the client was competent. However, some considerations about videotaping are: (1) unless the attorney videotapes all of his or her estate planning clients, the mere fact that this particular meeting was videotaped indicates that the attorney had doubts about the client's testamentary capacity and that information could be used by a disgruntled heir in a lawsuit alleging lack of capacity, and (2) the videotape could not be edited in any manner and it may not turn out the way the attorney may think it will, thus causing more confusion on the question of the client's capacity.

During the meeting, the attorney needs to be on the alert for signs of diminished capacity. The signs can be cognitive, emotional or behavioral and the attorney's "antennae" should be up. While these signs may not be conclusive, they can indicate a need for the attorney to take further measures, such as arranging for the client to be

examined by the client's own physician who is familiar with the client and his or her mental health situation, or by an independent physician, and obtain a report on the physician's assessment of the client. Medical records from the client's recent past could also be obtained and reviewed in order to document whether a change in mental state has occurred and capacity has diminished.

Possible signs of incapacity from a cognitive perspective which the attorney should make notes of at the meeting include (1) short term memory loss which can result in the client repeating questions frequently, forgetting what is discussed in a short period and not remembering recent events; (2) difficulty in communicating, i.e., searching for the correct words, using vague language, deferring to others such as a spouse or child when asked direct questions, not staying focused and on topic, or making odd statements or using odd reasoning; (3) problems in comprehending concepts that require more than a simple "yes" or "no" answer; (4) lack of mental flexibility such as difficulty comparing alternatives, making decisions or adjusting to changes; (5) problems with simple mathematical calculations, such as if the attorney asks the client for the total value of his or her assets and the client struggles to answer, or even difficulty with adding or subtracting when that previously would have been easy for the client, and difficulty paying bills and managing the client's own finances; and (7) disorientation such as if the client gets lost on the way to the meeting at the attorney's office even though the client has been to numerous meetings there in the past, or if the client is generally confused.

On an emotional level, the attorney may see such signs in the client as (1) emotional distress which could include anxiety or appearing tearful or panicky; and (2) quickly changing from laughter to tears or having feelings inconsistent with whatever topic is being discussed (such as being fearful about a routine issue). Behavioral signs that are relevant may include (1) delusions such as the feeling that others out "out to get" the client or they are spying on him or her, or feeling unsafe or fearful; (2) hallucinations where the client appears to hear or see things or talk to people who are not there, and (3) poor or inappropriate dress or unclean hygiene.

If some of the above signs of incapacity are observed by the attorney, there could be "mitigating" factors which explain why the client may be acting the way they are. For example, (1) the client may be under stress, depressed or grieving the recent loss of a spouse or other family member, in which case the attorney could refer the client to a mental health professional such as a therapist to assist with resolving these issues; (2) medications may be causing the client to appear disoriented or confused, or the client may not be getting property nutrition or hydration, in which case the attorney could assist the client with making an appointment with his or her physician or refer the matter to a new physician or other medical professional; (3) it is normal for older adults to experience mental fatigue especially later in the day, so mid-morning appointments may be when the client is at his or her best; (4) the client may have vision or hearing loss that affects his or her ability to read or converse, so the attorney could refer the client to an ophthalmologist or optometrist for new glasses or to a hearing specialist for hearing aids; and (5) it is normal for older adults of differing educational, socio-economic status and job experience to have a range of cognitive abilities so that should be taken into account. Testamentary capacity is rarely an issue of black or white; rather, it is a gray concept and the attorney will have to exercise judgment as to whether he or she should prepare a Will for the client or not.

Some examples of key questions for the attorney to ask at a meeting held to discuss information for preparing the Will of a client who may (or may not) lack testamentary capacity are as follows:

A. Do you understand that your Will will dispose of your "probate" assets, i.e., those assets owned in your own name with no co-owner or beneficiary designation, upon your death?
B. Can you provide me with a list of your assets, how are title to the assets held and what are their approximate values?
C. Why have you decided to bequeath your assets under the Will in this manner?
D. If there is a Will already in existence, can you explain why you have decided to make changes to your Will? If the attorney has known the client for many years, and the client is exhibiting inconsistency with his or her known long-term goals,

values or commitments, that is a cause for the attorney to have concerns and whether the change is a result of diminished capacity.

E. If a family member who was included as a beneficiary under a previous Will is now being disinherited, do you understand that your family member may be upset at being excluded from the Will?

F. Can you describe your important relationships with family members?

G. Can you tell me about any personal disputes or problems which have affected the decisions you are making with regard to your Will?

H. Who have you designated as beneficiaries of your "non-probate" assets such as life insurance and retirement accounts that will pass outside of your Will? Are the beneficiaries of your non-probate assets consistent with the beneficiaries of your probate assets or do you intend for assets to pass in different ways?

Attorneys can have differing views on how best to handle the meeting with the client. For example, the attorney may ask the client to drive himself or herself to the meeting at the attorney's office, believing that the ability to drive can be an important factor to establish capacity. Other attorneys may want to ask simple questions such as,"What is the day of the week today?" or more pointed questions such as, "Have you ever been diagnosed with dementia or a similar condition?" Some of these questions can be of a delicate and personal nature and must be handled sensitively and appropriately by the attorney.

At the conclusion of the meeting between attorney and client, the attorney will need to make some conclusions about the client's testamentary capacity before proceeding to prepare a Will for the client. There are generally four conclusions that may be reached: (1) the client has either no evidence of diminished capacity or very minimal evidence of it, in which case the attorney can proceed with the representation and the drafting of the Will; (2) the client has some evidence of diminished capacity in which case the attorney will need to decide whether to proceed with the representation and prepare the Will, or make a referral to physician if the client needs medical attention, make a referral to a mental health professional, or arrange for a formal examination of the client by his or her own physician

or by an expert physician and have a report issued; (3) the client has substantial signs of diminished capacity (i.e., more than mild problems) which means that the attorney should proceed with the representation and the preparation of a Will only with extreme caution but should more likely make referrals to a physician or mental health professional or arrange to have an examination performed; or (4) the client has severe issues and clearly lacks testamentary capacity in which case the attorney should NOT proceed with the representation but rather should make a referral to a physician or mental health professional, withdraw from representing the client on his or her estate planning and perhaps consider protective action under Rule 1.14(b) of the Model Rules of Professional Conduct promulgated by the American Bar Association such as seeking a court appointment of a guardian ad litem or conservator for the client.

A useful guide for estate planning attorneys who find themselves in a situation where they need to make a judgment as to a client's capacity is a publication of the American Bar Association called Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005, updated in 2007). This guide is available on the internet under "Resources for Lawyers" on the website for the American Bar Association under www.americanbar.org/groups/law_aging/resources/capacityassessment. Included in the guide is a "Capacity Worksheet for Lawyers" which is a tool that can be used by the attorney to organize and write down his or her observations of signs of lack of testamentary capacity during a client meeting. The worksheet can later be reviewed and the attorney can make a conclusion on the issue of capacity and how best to proceed.

After the Will has been prepared and the attorney is meeting with the client to sign the Will, the attorney should review with the client his or her previous responses to the same questions that were asked at the initial meeting in order to make sure that the client's responses have not significantly changed. The attorney may also wish to make small talk at the signing meeting, ask the client about current events in the world and what is happening in the client's life to see if the client is able to carry on a relatively normal conversation. Again, it may be a good idea to have another attorney (or even two additional

attorneys) sit in on the signing meeting or serve as a witness to the signing in order to get another viewpoint on the client's testamentary capacity.

Once the client is ready to sign the Will, the attorney should routinely ask the same questions in the presence of those persons who will serve as the witnesses to the Will and the notary public. The questions typically are if the client has read his or her Will, does the client understand the document, and does the client wish for those persons to serve as witnesses. Immediately after the signing meeting, the attorney and the witnesses should write contemporaneous memos setting forth their impressions of the client and describing what transpired at the meeting. Specifically, the memos should discuss the testator's testamentary capacity, what signs were present to evidence that the testator had capacity, summarize what questions were asked by the attorney and memorialize the responses provided by the client, and describe the steps that the attorney took to ensure that the requirement of testamentary capacity was met.

Note that the attorney may choose to include an "in terrorem" clause in the Will which provides that if a beneficiary challenges the Will, he or she forfeits any assets that he or she would have otherwise receive under the Will and the challenger will be responsible for paying the estate's legal fees and costs to defend the Will. However, under New Jersey law (which may differ from the law of other states), a beneficiary who has "probable cause" to bring a Will contest may do so and the in terrorem clause will not be enforceable against them. So the mere fact that an in terrorem clause is in the Will is unlikely (at least in New Jersey and in other states with similar laws) to deter a disgruntled heir from challenging it.

IV. Testamentary Capacity in Will Contests: Burden of Proof and Medical Evidence

In general, adults are presumed to have sufficient testamentary capacity to make a Will. There is a legal presumption that the "testator was of sound mind and competent when he executed the Will." Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 175-176 (1981), quoting Gellert v. Livingston cited above. Courts generally want to uphold

Wills as was shown in Alper vs. Alper, 2 N.J. 105, 114-5 (1949) which stated that, "Testamentary dispositions are required to be enforced unless contrary to public policy or a rule of positive law." Furthermore, "It is well settled in this State [New Jersey] that every citizen of full age and sound mind has the right to make such disposition of property by will or deed as he or she in the exercise of individual judgment may deem fit." Casternovia v. Casternovia, 82 N.J. Super 251, 257 (App. Div. 1964). A testator "is not required to divide his or her estate equally among his or her children ... Indeed, a testator may exclude one or more or all of the members of his own family . . . Our statute permits intentional disinheritance." See In re Liebl, 260 N.J. Super. 519 (App. Div. 1992).

The burden of overcoming the presumption of testamentary capacity and the desire of the Courts to uphold Wills is upon the person who challenges the Will. That burden must be met by the plaintiff is the standard of "clear and convincing evidence." In re Hoover, 21 N.J. Super 323 (1952); In re Will of Davis, 14 N.J. 166 (1953); In re Coffin, 103 N.J. Super. 1 (App. Div. 1968).

Each case alleging lack of testamentary capacity will turn on its own particular facts and whether they constitute "clear and convincing evidence." This is why it is so important for the attorney drafting the Will to take appropriate precautions to establish the factors that show testamentary capacity exists – by meeting with the client in person, asking appropriate questions at the meeting, writing down his or her impressions and conclusions in a worksheet or chart, perhaps videotaping the meeting, reviewing past medical records and speaking with potential witnesses who are close to the client, and if in doubt about diminished capacity obtaining a medical evaluation of the client by his or her own physician or an expert physician.

Assuming these actions have been taken, as noted above the attorney should again ask questions of the client at the meeting for the signing of the Will to determine whether any changes (whether small or substantial) have occurred in the client's mental state, and taking further precautions of having another attorney sit in on the signing meeting, having contemporaneous memos prepared by the attorney and witnesses as to their impressions of the client, and again perhaps videotaping the signing meeting. The attorney should at all

times “play defense,” i.e., assume that there may very well be a Will contest filed after the client’s death and take all reasonable preparatory actions to show that the client had sufficient testamentary capacity and the attorney’s preparation of the Will was appropriate and not malpractice. It would be malpractice for an attorney to prepare a Will for a client and have the client execute it if the attorney believes (or has reason to believe) that the client does not have sufficient testamentary capacity.

Absent unusual circumstances, the witnesses to the Will signing will be called to testify in a Will contest case as to their impressions of the testator and whether he or she appeared competent. The testimony of the witnesses to the Will is given more weight if they were uninterested third parties who have no stake in whether the Will is upheld or declared invalid, so it is good practice to always use uninterested witnesses if the signing is occurring in the attorney’s office. Other witnesses may also be called to testify in a Will contest, including friends and relatives of the testator, home health aides, physicians and other medical professionals with personal knowledge of the testator’s mental state and actions.

A common strategy to undermine the credibility of the witnesses whose testimony would support upholding the Will is for the attorney representing the disgruntled heir who is challenging the Will to introduce evidence consisting of copies of the testator’s medical records which shed light on his or her mental health. The plaintiff will be seeking to prove by introducing such records, as well by testimony from other witnesses who support his or her case, that the testator suffered from such severe mental ailments at the time the Will was signed that the court should invalidate the Will.

If the attorney who drafted the Will already has a report sitting in his or her file that was prepared at the time of the execution of the Will, from the testator’s own physician or an expert physician, and the report concludes that the testator met the criteria for testamentary capacity, that will be very difficult hurdle for the plaintiff to overcome. Another relevant issue is how much time has passed between the signing of the Will and the testator’s death. For example, if the testator executed a Will but then did not die until 10 years later, the disgruntled heir who brings a Will contest would have to provide medical

records and evidence from 10 years ago showing that the testator did not have testamentary capacity at that time (not at the time of death) and produce testimony from the witnesses to the Will who may not even remember witnessing it. In general, it is very difficult for a disgruntled heir to provide the clear and convincing evidence of lack of testamentary capacity that is needed to win a Will contest.

To illustrate, in the case of In re Riordan (App. Div. 2011), although the plaintiff who challenged the Will introduced expert testimony about the testator's dementia, the court nevertheless concluded that the testator had sufficient testamentary capacity to understand her Will. Similarly, in In the Matter of the Estate of Vivian Fassett (App. Div. 2012), the plaintiff's application to invalidate his sister's Will on the grounds of lack of testamentary capacity was denied. The court found that the plaintiff failed to introduce sufficient competent medical testimony to support his claim and he did not meet the burden of proof to overcome the legal presumption of capacity. The fact that the sister died within 30 days after executing her Will was held not to be dispositive without additional evidence. The plaintiff did not meet his obligation to produce evidence that his sister was unable to comprehend the nature and scope of her assets, the identity of the persons who would receive those assets, the fact that she was executing a Will, and that the document would distribute her assets to the persons named in her Will as the beneficiaries. The court stated that the plaintiff submitted unauthenticated documents and general information about his sister's condition at various points in time which was not dispositive or admissible evidence.

If an individual who has been disinherited from a Will has some evidence and information, such as medical records and witnesses, which raises serious questions about the testator's capacity, it is still not a simple decision as to whether a Will contest should be filed. As noted above, prevailing upon a claim that the testator lacked testamentary capacity at the time of the execution of his or her Will is very difficult to accomplish. The courts view Will contests with great skepticism and judges will make every effort to preserve and protect an individual's right to create a Will and to carry out their intent as

shown in the Will unless there is clear and convincing evidence demonstrated by the plaintiff that the presumption that testamentary capacity exists should be overcome.

V. The Will as Evidence of Lost Capacity (Assessing Reasonableness of Provisions)

The testator's Will itself may provide evidence on whether or not he or she lacked the sufficient testamentary capacity to make the Will. For example, the Will might include a provision explaining why the testator has chosen to disinherit a family member. That way, the testator's thinking will be clearly evident from the Will and the rationale for the disinheritance may be reasonable, such as if the family member has mistreated the testator, has done something to anger the testator or has an issue such as a drug or alcohol problem.

The Will could also contain a statement from the testator to the effect that he or she is aware that he or she has physical medical issues, but the testator is of sound mind and the Will accurately reflects his or her wishes. Although such a statement is obviously self-serving, it should nevertheless be considered by the court in a Will contest.

Some provisions of a Will citing why a disgruntled family member has been disinherited or receives fewer assets may be clearly unreasonable or untrue and provide some evidence of a lack of capacity. An example would be if the testator states in the Will that he or she is not including a particular grandchild as a beneficiary under the Will because the grandchild has changed to a different religion, or the grandchild has not completed a four-year college education. If in reality the grandchild has not changed religions or has completed college, a plaintiff in a Will contest could cite such provisions as evidence that the testator was of unsound mind at the time of executing his or her Will.

A comparison can be made to previous Wills of the testator to check for reasonableness. If the testator in all past Wills provided for equal shares to his or her children upon death, and suddenly the Will is changed to disinherit one of the children, yet there have been no family disputes or actions or non-actions by the child to warrant the change, the child may decide to bring a Will contest to challenge the testator's capacity and cite the Will as evidence. Furthermore, certain provisions of the Will could be the

result of undue influence (to be discussed in the next section of the program) which has overcome the testator's capacity, such as if a caretaker or new "friend" suddenly appears in a new Will as a beneficiary.

Thus, it is not only medical records and the testimony of witnesses that can be used as evidence of lack of testamentary capacity in a Will contest, but also the provisions of the Will itself. This may be especially relevant if the testator drafts the Will himself or herself rather than having an attorney prepare it. For example, if the testator provides is a self-drawn Will that one-third (1/3) of his or her estate is bequeathed to each of four beneficiaries, that mathematical error might form a basis for a lack of testamentary capacity claim if there are other indicators of diminished capacity that are present as well.

VI. Undue Influence

A. Definition

As noted above in the discussion of testamentary capacity, in any challenge to the validity of a Will, it is generally presumed that the testator was of sound mind and competent when he or she executed the Will. However, if a Will is tainted by "undue influence," it will be declared invalid. Undue influence is, along with lack of testamentary capacity, the second most common reason for a Will to be overturned.

Undue influence occurs when the testator has testamentary capacity, but that capacity has been manipulated and controlled by another individual for selfish reasons. In New Jersey, undue influence has been defined as "mental, moral or physical" exertion which has destroyed the "free agency of a testator" by preventing the testator "from following the dictates of his own mind and will and accepting instead the domination and influence of another." Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 175-176 (1981). Merely because one person influences another does not mean that the influence was "undue" and the Will contest will always be successful. As the Court in the Gellert v. Livingston, 5 N.J. 65 (1950) stated, "Not all influence is 'undue' influence. Persuasion or suggestions or the possession of influence and the opportunity to exert it, will not suffice. It must be such as to destroy the testator's free agency and to constrain him to what he

would not otherwise have done in the disposition of his worldly assets." The coercion must be sufficiently strong to overcome the testator's own desires.

Although some courts have hesitated in providing a precise definition, many states have identified the following elements as being necessary to establish undue influence: (1) the existence and exertion of an influence; (2) the use of influence to subvert or overpower the mind of the testator at the time of executing the instrument; and (3) the execution of the testament which the maker thereof would not have executed but for such influence. See, e.g., In re Estate of Reno, 443 S.W.3d 143 (2009); Estate of Davis v. Cook, 9 S.W.3d 288 (1999). We will use this definition in the discussion herein.

And, although the basic concepts of undue influence are universal, different jurisdictions have different standards or burdens of proof. For example, some states only require proof of undue influence by a preponderance of the evidence, but many states require clear and convincing evidence.

While the burden is naturally on the person or persons' challenging the Will, many states provide that if the person contesting the Will puts forth evidence of (a) a confidential relationship between the testator and the benefited party; and (b) suspicious circumstances, the burden shifts to the proponent of the Will to demonstrate it was not the product of undue influence. A confidential relationship is generally a relationship of trust and dependence; it will be found "where trust is reposed by reason of the testator's weakness or dependence or where the parties occupied relations in which reliance is naturally inspired or in fact exists." Haynes, 87 N.J. at 176. Although a confidential relationship naturally exists between spouses, a presumption of undue influence will usually not arise if either spouse makes a Will in favor of the other even if children of the testator are omitted. Thus, the most common confidential relationship is that of a parent and a child, although it is not necessarily present in all circumstances.

The second element to shift the burden, suspicious circumstances, can be presented in many different ways, including where the proponent of the Will initiated its creation or was present during execution; where efforts were made to exclude the natural objects of

the testator's bounty; where the benefiting party concealed the making of the Will or took possession of the Will.

It should be noted that undue influence is a question of fact left for the factfinder to determine. In doing so, most jurisdictions employ the totality-of-the-circumstances test in adjudicating whether a person was unduly influenced.

It is worth noting that undue influence and lack of testamentary capacity are two entirely distinct grounds for avoiding a Will. While testamentary incapacity involves the lack of intelligent mental power by the testator to comprehend the disposition of property, undue influence implies that the testator possessed capacity to dispose of his or her property subject to and controlled by a dominant influence or power. Thus, most courts have found that in order to invalidate a Will for the reason of undue influence, the testator must have had testamentary capacity.

The estate planning attorney needs to, therefore, be watchful for signs that his or her client may be unduly influenced by another person in making a Will. As discussed above in the section on testamentary capacity, the attorney should meet with the client alone to find out his or her wishes as to the provisions of the Will that the attorney will be drafting. Neither family members nor friends, especially those who are beneficiaries under the Will, should be permitted to attend the meeting. If the client insists that a certain beneficiary attend the meeting, at minimum, the attorney should ensure that when the client signs the Will, these interested persons leave the room. The attorney should, however, proceed with caution if the client wishes to change the Will's language to strongly favor the attending beneficiary

If the client is not new and the attorney has prepared previous Wills for him or her, the attorney should be wary if the client asks the attorney to significantly alter major dispositions that have been in previous Wills for years, such as equal distributions to all of the children. If suddenly the client tells the attorney that he or she wants to leave his or her entire estate to only one of several children and the client cannot articulate to the attorney understandable reasons why that change should be made (i.e. substantial lifetime gifts to the other children), the attorney may suspect that the sole child to be benefitted is exercising

undue influence over the client. It is not being suggested that a quick conclusion be made in this situation; just that the attorney investigate by speaking with the client further on the matter by engaging in more robust questioning and perhaps even speaking with others such as the client's physician or staff at a facility where the client is living (with the client's permission of course) to try to determine if the client is being unduly influenced. While the attorney's goal is to follow and record the wishes of the client, the attorney does not want to prepare a Will that is ultimately invalidated.

Other signs that an attorney should be conscious of that may demonstrate that a third party is unduly influencing the testator include: where a third party 1) urges the attorney to change the Will in secret or as quickly as possible; 2) recommends counsel who prepares the Will or especially a Codicil prepared by a different attorney; 3) comes to meetings with the testator; 4) attempts to control the information the testator receives; 5) calls counsel on the testator's behalf; 6) gives counsel instructions when preparing the will; 7) procures the witnesses to the will; 8) safeguards the will after execution; 9) is present at the Will execution; 10) knows the Will's contents before execution; and 11) is otherwise heavily involved in the drafting of the Will. In essence, once the third party starts to make decisions and exercise a degree of control and participation in the Will process, warning signs should start flashing for the drafting attorney. In fact, as discussed below, these facts may be used by the party challenging the Will in a claim for undue influence.

Not only should the attorney observe the actions of third parties who may be exerting undue influence over the testator, the attorney should also investigate whether the client is susceptible to financial exploitation. Common risk identifiers that attorneys should be aware of are when the testator 1) is dependent on someone else, especially a beneficiary under the Will; 2) suffers from a cognitive impairment; and 3) is in poor physical health. Dependence is obviously one of the biggest factors for clients at risk of undue influence. This typically occurs in older testators. As a person gets older, it becomes more likely that the person's physical and cognitive functions diminish. The person then is more likely to be reliant and dependent upon assistance from different family members, who may believe their good deeds should not go unnoticed. This also opens the door to the testator making

"new friends" or, in other words, people seeking to come into a dependent person's life, offer them caregiving services, and, in return, demand some bequest upon the dependent person's death. Especially in instances of existing clients, attorneys should question when the testator seeks to amend his or her Will to add an unrelated third party as a beneficiary.

More commonly than not, financial exploitation will occur when a client suffers from a cognitive impairment due to advanced age. One of the common consequences of cognitive impairment is poor decision-making. This leaves an elderly person with degenerative cognitive impairment vulnerable to the potential loss of financial skills and judgment, and the inability to detect when they are being financially exploited by another. The elderly person may not understand his or her current financial status or not be able to remember the nature and extent of his or her assets. They may also be at risk of being easily deceived into including a new relative or friend into the Will or Codicil.

To put all of this into perspective, let's consider the following example. Susan is an 84-year old testator for whom you previously prepared a Will. She calls you on the telephone and asks if she can come in to discuss amending her Will. On the day of the meeting, she is driven to your office by a younger man named John. John accompanies her into the office and requests to be included in the meeting. You, after reviewing this section, do not believe it would be best to have John included in the discussions and ask Susan if it would be okay for John to wait for her in the lobby. Susan agrees. During the meeting, Susan wishes to change her Will to exclude her only child, Peter, from receiving a share of her estate. She explains that Peter used to be over her house every day to perform daily tasks for her that she could not do herself. Peter would drive her to her almost daily doctor's appointments and to the pharmacy for her medication. He would also water her plants and mow her lawn. She further states that Peter used to pay all of her bills. She states that Peter no longer does that for her. Instead, she recently met John, a bank teller, when she went to deposit a check for $50,000 at the bank he worked at. She explains that John has been performing all of the tasks Peter used to do for her. She, therefore, wants John to get Peter's share and specifically bequests her BMW car to him, stating that "he

really wants that car. He's always telling me he wants it and asks what will come of it when I pass away."

Based on this fact pattern, there are obvious signs that the attorney should have observed that show Susan may be the victim of John's undue influence. First, John drove Susan to the meeting and requested to be included in the meeting, which are both signs he may be attempting to influence Susan's decisions. He also repeatedly informed her that he really wants her BMW, and she ended up leaving it to him. She also made a significant change in her disposition to include John and exclude her only child. These factors all point to John is unduly influencing Susan.

More importantly, Susan herself meets all three of the risk factors for someone who may be susceptible to financial exploitation. She is dependent upon someone to perform all of the jobs that Peter used to for her. It does not appear that Susan is capable of driving and needs John in order to get to her doctor's appointments and the pharmacy. This also leads to the next risk factor the attorney should have noticed. Susan goes to the doctor's office "almost daily" and goes to the pharmacy, which could be signs that she is in poor health. She also needs helping managing her affairs, all of which could be signs that she suffers from some form of cognitive impairment. Further, the fact that she met a "new friend" when she was 84 years old at the bank when she was depositing a large sum of money into the bank, and he began a close personal relationship with her is also concerning.

B. Key Evidence to Prove the Existence and Exertion of an Influence

For purposes of this discussion, we will focus on the standard of undue influence followed in Texas and elsewhere, which requires evidence of: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert or overpower the mind of the testator at the time of the execution of the Will; and (3) the execution of a Will which the maker thereof would not have executed but for such influence.

An existing or potential client comes to you and says he or she wants to challenge their mother's Will on the grounds that the client's brother unduly influenced her to give him, and not the client, her entire estate. With the elements, presumption, and standard of review in mind, what evidence do you need to prove "the existence and exertion of an influence?" Obviously this will oftentimes depend on the jurisdiction, but there are some universal key pieces of evidence that can be submitted in any state.

Courts have interpreted the phrase "existence" to require actual influence to be present, not merely the opportunity to exert influence. See Longaker v. Evans, 32 S.W.3d 725, 732 (Tx. 2000). Therefore, in order to prevail on an undue influence claim under the elements provided above, the attorney needs to adduce sufficient facts to show that the influence alleged existed at the time the Will was drafted and that it was actually exerted.

To establish the existence of an influence, courts typically look to the nature and extent of the relationship between the testator, the Will contestants and the alleged influencer. To show the relationship created an influence, the Will contestants would want to adduce facts to show that the relationship between the testator and the alleged influencer was of such that the influencer could influence the decisions of the testator. For instance, if the nature of the relationship was one that the testator depended on the influencer to complete daily life affairs, this may be sufficient. The relationship could also be a "new friend" relationship or a distant relative that decides to get involved with the testator later in life.

As for the exertion of influence, it is difficult to show directly that someone exerted influence over another. Thus, courts generally look at circumstantial evidence that demonstrates whether influence was actually exerted. One factor to consider is whether the alleged influencer had the opportunity to exert influence over the testator. Such evidence can include that the testator completely and entirely relied upon the alleged influencer to handle his or her daily affairs. This can be established through the use of direct or circumstantial evidence demonstrating a sufficient level of dependency by the testator. The Will contestants can also show, as previously discussed, that the circumstances surrounding the drafting and execution of the Will demonstrate the existence

of an influence. The more involvement the alleged influencer has in the Will drafting process, such as driving the testator to the office, demanding to be included in meetings with the drafting attorney, and knowing the full scope of the Will's dispositions, is evidence of the existence of an influence. Typically, the attorney who drafted the Will is the best source of obtaining this evidence and, oftentimes, will be called as a fact witness in the contest.

Another key piece of evidence that the Will contestants would want to show is some sort of selfish motive by the alleged influencer. For instance, if the alleged influencer insists that the testator pass her entire estate to her son and not her daughter because the influencer does not believe the daughter cares about the testator, and the influencer would receive no benefit from the son receiving the entire estate, it would be difficult to show that the influencer had any mal-intent in influencing the testator's decision. Again, courts are not concerned with all "influences", only those that are undue.

For example, let's go back to the example of Susan from the prior section. The nature and extent of the relationship between John and Susan would support finding the existence of an influence. John met Susan at a bank while she was depositing a large sum of money when she was nearly 84 years old. John then began performing life tasks for her and when it came time to amend her Will, John attempted to be a part of the conversation. As such, it seems more plausible than not that a court would find the existence of an influence. As for the exertion of the influence, John had the opportunity to influence Susan, he attempted to be included in the drafting process, and his motive would be to receive a portion of Susan's estate, including her BMW. Thus, it seems that on these facts the first element would be satisfied.

C. Proving "the Use of Influence to Subvert or Overpower the Mind of the Testator at the Time of the Execution of the Testament"

Because the underlying principles behind claims of undue influence are that Wills must be the product of the testator's free agency, this element focuses on the mental status of the testator at the time the Will was created. Merely because someone attempts to influence another does not mean that the person's free will has been subverted or

overpowered. The best evidence to make a showing of subversion or overpower would be evidence that the testator suffered from a weakened mental or physical condition. The inquiry focuses on the testator's mental or physical incapacity to resist, or the susceptibility of the testator to, the type and extent of the influence exerted. This can be shown in several ways.

First, the words and acts of the testator may circumstantially show their current mental state. If the testator is acting differently or saying things out of character around the time the Will is executed, this may be used to show that the testator was operating under a weakened intellect. The most compelling form of evidence would be that a weakness of mind or body was produced by disease or documented medical condition. Medical records showing that a testator suffered from a diagnosable condition would be the best evidence to offer. The reason being is that it injects some amount of precision into the case. An identified condition is tangible and has a set list of side effects from which a factfinder could draw conclusions. Although not the best evidence, the advanced age of the testator at the time the Will was executed may also circumstantially show the testator was in a weakened state.

D. Proving "the Execution of the Testament Which the Maker Thereof Would Not Have Executed but for Such Influence"

The keyword in this element is a common legal principle; the idea of but-for causation. It is not enough that influence was present and exerted and that the testator was in a weakened condition. Rather, the Will contestants must also show that the influence, coupled with the mental or physical deficiencies, caused the testator to dispose of the property in the manner prescribed in the executed Will.

This showing is usually predicated upon determining whether the Will is unnatural in its terms for the disposition of the estate. The term unnatural has also been used in connection with unequal. In the most traditional setting, and assuming the testator's spouse predeceases them, the most natural disposition of the testator's property would be equally among his or her children and their heirs, absent any major lifetime gifts that would

impact one of the children's inheritance. Obviously, some testators seek to make bequests to close friends, other family members, or even charities in the Will. This is also fairly natural. But, these inheritances are normally limited to some extent in the amount that is being provided. The testator may leave one or two items of valuable or a small amount of money to a church or a cousin, but a large chunk or the entirety of the estate could be considered unnatural.

F. Critical Case Law

The following cases highlight the multiple issues and forms of proof in undue influence cases.

First, in Estate of Davis v. Cook, 9 S.W.3d 288 (1999), the testator Estha Davis ("Estha") was ninety-nine (99) years of age when she executed her first Will in 1995. The Will provided for the following distributions: (1) $1 million to her former daughter in law Ruth Cook ("Ruth"); (2) $100,000 to Ruth's son Robert Cook ("Robert"); (3) $25,000 to Hill Country Youth Ranch; (4) $75,000 to the First United Methodist Church (the "Church"); (5) $2,000 to Estha's long-time housekeeper; and (6) the remainder of the estate valued at $2 million to Schreiner College ("Shreiner"). Seven months later, Estha amended her Will through a Codicil which gave 2,400 shares of Brown Stock (a shoe business the Davis family owned) to Ruth and a promissory note to Robert.

By way of background, Ruth had married Estha's only son in the mid-1940s, but that son died three years after the marriage. Ruth then re-married. Despite this, Ruth remained in contact with Estha and visited her several times per year. Robert was Ruth's son from the new marriage. Robert also remained in contact with Estha and visited her once a year in the ten years preceding her death. Estha's deceased son attended Schreiner. Thus, the Will and Codicil did not provide for any distributions to any of Estha's nature heirs or any other family members.

After Estha died, her nieces and nephews ("Contestants") challenged the Will on the grounds of undue influence. In regards to the existence and exertion of undue influence, the Contestants argued that both Robert and Schreiner were actively involved in the planning and preparation of Estha's Will. To this end, the Contestants argued that after

Estha transmitted her tax information to Robert, who was an attorney, she began making large cash gifts to his family up until the time the Will was executed. In addition, although Ruth was not a party, the Contestants alleged that Ruth and Robert were present during the execution of the Will and gifted Estha a bible and wheelchair shortly before the initial Will was executed. As to Schreiner, Contestants alleged that the college development officer began to visit Estha in 1994 and at that time, the Contestants contend that Estha was "lonely, isolated, and plagued with physical infirmities." Contestants believed that Estha's bequest of $2 million to Schreiner was influenced by Schreiner's repeated requests for donations and this was Davis' way of appeasing them.

The Court went through the three part test and found that although the evidence demonstrated that Robert had the opportunity to influence Estha, there was no evidence that Robert actually did influence her. As for Schreiner, the Court did not find it improper for charitable organizations to offer estate planning advice, including plans for charitable donations. The Court found that although Schreiner may have influenced Estha, this influence was not undue.

With respect to Robert, the decision seems without controversy. Robert had a close relationship with Davis and attempted to be in her life and be helpful to her. The facts did not support finding that there was really any improper influence over Estha's decision to leave Robert a monetary bequest.

As for Schreiner, it gets a little murkier. According to the allegations, Estha was lonely in 1994—the year before she executed her original Will—and was plagued with physical infirmities. While it is not facially wrongful to request donations from a person, the nature of the conversations between the college development officer and Estha would be very important here. According to the Contestants, the college officer made pleas to Estha to donate money to them which included flattery, appeals to patriotism and self-worth, glorification of her deceased son, and the offering her a membership in the Schreiner Oaks Society, an honorary organization for Schreiner donors. The college development officer had the opportunity to influence her and would be technically a "new friend." The officer also offered estate planning advice, including plans for charitable donations, which

could be interpreted as being involved in the estate planning process. The whole purpose of his relationship with her was to persuade her to leave her assets to the college. Although not discussed, it seems significant that this was not a charity for which Estha was involved during her life; rather, the college was requesting that they be written into her Will. Presumably, a different court may have found, or further facts may have shown, that there was an existence and exertion of undue influence by Schreiner.

That said, it seems that one of the most important facts was that Estha did not have any children who were being left out of the Will. In fact, the Court found that excluding collateral heirs in favor of charities was not unnatural. The Court found a "direct connection" between Estha and each of the beneficiaries, which was a reasonable explanation for the devises.

By contrast, consider the court's analysis in In re Estate of Reno, 443 S.W.3d 143 (2009) a case decided by the Court of Appeals in Texas. In that case, the Court addressed issues of both testamentary capacity and undue influence. There, the testator Evelyn Reno ("Reno") died in 2008. She was married twice and had three children from her first marriage, Freeman, Tappan, and Brown (collectively, the "Contestants") and one child from her second marriage, LeGrand. This dispute centered on whether Reno's 2007 holographic Will ("2007 Will") was the product of undue influence. After Reno's death, a holographic Will executed in 2001 ("2001 Will") and a Codicil from 2002 ("2002 Codicil") were admitted to probate. Notably, there were other Wills and Codicils executed, but were all revoked. The 2001 Will and the 2002 Codicil divided the estate among the four children and numerous other charities and family members. The 2007 Will, by contrast, gave the entirety of the estate to LeGrand.

LeGrand sought to set aside the order probating the 2001 Will and 2002 Codicil and filed an application to probate the 2007 Will. The Contestants argued that Reno lacked testamentary capacity to execute the 2007 Will and that it was the subject of undue influence. The trial court concluded that Reno did not have mental capacity to execute the Will in 2007 and that the 2007 Will was the product of undue influence. The Appellate

Court reversed the determination that Reno lacked testamentary capacity, but affirmed the finding of undue influence.

First, with respect to testamentary capacity, there was substantial evidence in the record that Reno was not always alert and was at times confused and forgetful on days before and after the 2007 Will was executed. There was even evidence that she was at times incoherent. However, LeGrand was able to come forward with evidence, including testimony from the notary public who signed the Will, as well as nurses and a hospice chaplain, who all testified that she had sufficient testamentary capacity on the day she executed the Will.

Nevertheless, the Court concluded that the Reno was the subject of undue influence when she executed the 2007 Will. In discussing the existence and exertion of an influence prong, the court looked at the relationship between Reno and her four children. Interestingly, Tappan and Freeman had filed a guardianship action seeking to appoint a guardian over Reno in 2006 which infuriated Reno. Furthermore, before Reno was placed in a nursing home, she lived within walking distance of Tappan, but had repeatedly accused Tappan and Tappan's children of stealing from her. It got so ugly that Tappan sent a letter to Reno in 2006 stating that neither she nor any of her children would ever set foot on Reno's property and threatened to file a harassment suit against Reno. Despite visiting Reno frequently before the letter, Tappan never saw Reno again afterwards.

The Court also explained that long-standing conflict between Brown, Tappan, and Freeman and Legrand. In fact, Reno knew the animosity was so bad that she even noted it in the 2001 Will. The Court found that because Reno was upset with Freeman and Tappan and there was a conflict between the children, nature of the relationship factor did not weigh in favor of a showing that any undue influence had been exerted.

The Court then looked at if LeGrand had the opportunity to exert undue influence. From 2006 until her death in 2008, LeGrand was Reno's primary visitor, caregiver, and supporter. LeGrand exercised a considerable degree of control over the healthcare that Reno received and even chose Reno's nursing home. Prior to 2006, Tappan and LeGrand both ensured that Reno's bills were paid by writing checks and having Reno sign them.

After their falling out, Reno only relied on LeGrand to perform this task. In addition, from 2006 to 2008, Reno did not have any contact with Brown, Tappan, or Freeman. Therefore, the Court found that LeGrand had exclusive access to Reno and unlimited opportunity to exert influence on her.

Next, the Court considered the nature of the 2007 Will. Although Reno handwrote her previous wills and codicils, LeGrand handwrote the 2007 Will and arranged for its execution at the nursing home. While there did not appear to be evidence that LeGrand forced Reno to sign the Will or was even present when it was executed, the Court found the fact that LeGrand prepared the Will without the intervention of an attorney or third party was significant. Thus, coupled with LeGrand's unfettered access to Reno, the Court found this to be extremely persuasive evidence that LeGrand influenced LeGrand.

Lastly, the Court considered Reno's dependence on LeGrand. Because Reno's mental and physical health was declining in the last two years of her life, and LeGrand was her primary visitor and caregiver, the Court found that this factor weighed in favor of finding the existence and exertion of an influence. After weighing the factors, the Court concluded that the first element was satisfied.

Thereafter, the Court discussed whether this influenced subverted or overpowered Reno's mind. Reno was in a weakened physical and mental state when she executed the 2007 Will. While she still had testamentary capacity, the Court found that it was shown that Reno was not always fully cognizant of all events and was, therefore, susceptible to undue influence. Thus, the Court found the second element had been satisfied.

The Court, then, considered whether Reno executed a Will she would otherwise not have. Here, the Court focused on the provisions of the previous Wills and Codicils and how the dispositions contained in those documents were altered. In all four of these previous Wills and Codicils, including the 2001 Will and 2002 Codicil, Reno made specific bequests and devises to each of her four children, each of her thirteen grandchildren, hospitals, a church, and a pastor. The 2007 Will, however, left everything to LeGrand. Nevertheless, the Court did not find this to be entirely unnatural. Reno had cut ties with three of her children and it made sense she would not want to leave them anything. The

Court also found that it made sense that a person may have second thoughts about leaving money to charitable organizations. The Court did, however, take notice to the fact that the 2007 Will was dramatically different from the previous Wills and Codicils. While this single fact alone did not show undue influence, coupled with the fact that LeGrand prepared a self-serving Will, the Court found that the trial court was correct in finding that LeGrand unduly influenced Reno.

Both the Reno and Davis cases demonstrate the analysis courts conduct when dealing with claims of undue influence and the types of evidence and factors that are considered. Both involve situations with elderly people with family members from different marriages.

VII. Fact Witnesses

In both claims of lack of testamentary capacity and undue influence, fact witnesses will be crucial in establishing either claim. Especially where a testator has not been medically diagnosed with a physical or mental condition, the testimony of witnesses will be the primary source of showing the testator suffered from some weakness of mind. Fact witnesses can also be used to show the relationship between beneficiaries of a Will and the testator. In many instances, the fact witnesses will be neighbors, friends, relatives, or anyone that would come into contact with the testator and be able to observe changes in their mental or physical status, the behavior of the testator and involvement of people around him or her.

VIII. Expert Witnesses

As for expert witnesses, they also may be important to claims for lack of testamentary capacity and undue influence. Will contests occur after the testator has died. Therefore, the medical experts would be tasked with reviewing the testator's medical records and rendering a determination on whether the testator had capacity to make a will or, in the context of undue influence, whether they were in a weakened state and susceptible to undue influence. Notably, it is not always easy. For instance, Courts have routinely

found that a testator suffering from dementia is not *per se* deemed to lack capacity to execute a Will. The medical doctor would have to demonstrate that at the exact moment in time that the Will was executed, the testator did not understand its contents or the nature of its disposition.

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