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Estate Planning

Minimize Undue Influence Claims Through Proper Drafting and Execution of the Will

Such claims can arise in many different scenarios, including both well-intentioned acts and acts of coercion

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Allegations of fraud, lack of testamentary capacity and undue influence seem commonplace today, particularly when a will omits a child or treats one child differently than other children, when a proffered will provides a different dispositive scheme than a prior will, or when a sizeable bequest is made to a charity, paramour or friend.

David Margolick's book, *Undue Influence; the Epic Battle for the Johnson & Johnson Fortune*, exposed the famed estate litigation battle surrounding J. Seward Johnson's last will and testament and the numerous changes made by codicils shortly before his death. However, Johnson's estate was but one of the highly publicized estates in which fortunes were distributed in accordance with a settlement agreement or court decree rather than the decedent's last will and testament.

Examples of unnatural wills, deathbed wills or wills executed in secrecy fill law libraries and court dockets. What makes undue influence a staple used by probate litigators is that such claims can arise in many different scenarios, including both well-intentioned acts and acts of coercion.

Indeed, undue influence is one of the most common challenges to the validity of a will. One study noted that 74 percent of all will contests included allegations of undue influence. Jeffrey A. Schoenblum, "Will Contests — An Empirical Study," 22 Real Prop., & Trust J. 607 (1987).

What Is Undue Influence?

Although somewhat difficult to define, courts generally characterize undue influence as being the mental, moral or physical exertion that destroys the testator's ability to decide for himself or herself. See *Haynes v. First Nat'l State Bank of New Jersey*, 87 N.J. 163, 176 (1981). As the *Haynes* Court noted, in many instances, the testator is often prevented from following the dictates of his own mind and instead accepts the dominance and influence of another.

Moreover, such influence can be exerted through violent or peaceful means. Of course, any analysis of undue influence depends on the specific facts of each case and the relationships of the parties involved. As the Court noted in *In re Raynolds' Estate*, 132 N.J. Eq. 141 (1942), "[e]ach case must necessarily depend upon so many and varied factors, such as physical condition, sex, age, temperament and the means of coercion or influence employed, as well as other circumstances, that it must be governed by its own peculiar circumstances."

Many Paths, Same Result

A variety of factual scenarios demonstrate how an undue influence claim might be supported. The most extreme example of undue influence is the use of physical coercion. This could be as blatant as physically forcing the signing of a will by holding a gun to the testator's head or withholding basic life necessities, such as food and medical treatment, from a testator until the will is signed.

However, undue influence claims usually surface in a less extreme manner:

- when there are unexplained changes in the manner in which the testator disposes of the property under a new will;

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• circumstances involving "unnatural" or "unjust" gifts;

• when there is a heightened susceptibility of the testator being influenced;

• when the testator's financial and business affairs are controlled by the influencer; and

• when the length of the relationship between the testator and the alleged influencer is questioned, such as when the testator becomes involved with a new paramour. See 5 N.J. Practice (Clapp, Wills and Administration) §60 (3d. ed. 1962).

The burden to disprove undue influence shifts to the proponent of the will if the existence of a confidential relationship and the presence of suspicious circumstances is demonstrated.

Many times, undue influence claims arise when one of the beneficiaries of the will has a close, confidential relationship with the testator and there are "suspicious circumstances" associated with that relationship. According to *Black's Law Dictionary* 294 (7th ed. 1999), a confidential relationship is an association in which one person puts trust and confidence in another to act in good faith for that person, such as between an attorney and his client or a stockbroker and her client

The attorney-client relationship (setting aside the ethical considerations) was specifically addressed by the Court of Errors and Appeals in *In re Heim's Will*, 136 N.J. Eq. 138, 158 (1945), which refused to permit a will to be probated given that it appeared that an attorney exercised undue influence over the testator.

In *Heim*, four months prior to his death, the 90-year old testator decided to have his attorney create a will for him while he was in the hospital. The testator told his attorney to put himself as the beneficiary of the will, stating with respect to the members of his family that "[t]hose wolves have had enough."

Determining that the only proof to rebut the claim of undue influence that the proponent of the will (the attorney) offered was essentially his own testimony which contained "inherent contradictions," the Court found that "the testimony produced to countervail the presumption of undue influence was neither impeccable nor convincing [and] [t]he proponent of the will did not successfully carry his burden."

Several facts demonstrated the existence of undue influence in the execution of the will, including: the attorney/beneficiary had been handling certain financial matters for the testator, that is, controlled his checkbook; the attorney/beneficiary had two younger attorneys from his law firm go to the hospital with him to have the testator execute the will while he lay ill in his hospital bed; and there was evidence that suggested that the testator's ability to fully comprehend what was occurring at the time of the will's execution "had failed him."

Accordingly, the Court determined that there was sufficient evidence of undue influence to set aside the lower court's decision to allow the will to be probated.

Suspicious Circumstances

Confidential relationships can also develop between paramours, friends, and parents and their children. It all depends on the extent to which a person relies upon another.

Such a relationship occurs when one person has influence or a superior position over the other as a result of the confidence being placed in him by the person in the dependent position, which, in this case is the testator. This confidential relationship in and of itself, however, is insufficient to establish undue influence. As the *Haynes* court noted, in addition to a confidential relationship, suspicious circumstances must exist.

Examples of what courts consider to be suspicious circumstances include when: one of the beneficiaries actually drafts the will; the alleged influencer orchestrates having the will drafted, chooses the drafter of and the witnesses to the will and is able to secure an extreme benefit for himself through the will; or where the alleged influencer also obtains a power of attorney to handle all of the testator's finances while the testator is still living.

Situations where a testator might have been influenced by certain threats made by beneficiaries can also be cause for setting aside a will based upon undue influence. See *Lynch v. Clements*, 24 N.J. Eq. 431 (Ch. 1874), and *In re Sickles' Will*, 64 N.J. Eq. 791 (1902).

In *Sickles*, probate of the will was denied based upon undue influence because the 81-year old, bedridden and paralyzed testator was induced to make the will in favor of a son and the son's wife with whom the testator lived as a result of a threat that they would leave the testator if the will was not made.

Similarly, in *Lynch*, the Court found that a son had unduly influenced his father in the making of the father's will. The Court determined that the father had been unduly influenced because the father

> was afraid of [the son's] power, as the holder of the mortgage on his farm. He was enfeebled by age and disease. He knew his son to be a hard and bad man, and made the will as he directed him to make it, in the vain hope, as may well be inferred from the

> evidence, that he might treat the family with leniency, and possibly take care of the younger brother, whom he directed his father to disinherit.

The Court dismissed the action by the son to enforce the will.

Shifting Burden

Although the person claiming the existence of undue influence bears the burden of proof, if he is able to demonstrate both the existence of a confidential relationship and the presence of suspicious circumstances, the burden to disprove undue influence shifts to the proponent of the will. See *Haynes*.

Generally, the proponent's burden is to prove by a preponderance of the evidence that undue influence does not exist. See *In re Weeks' Estate*, 29 N.J. Super. 533 (App. Div. 1954).

Note, however, that mere appearance of impropriety is insufficient to sustain the burden of proving undue influence. Any such appearance must be accompanied by fraudulent acts.

As New Jersey courts recognize, and as the Court noted in *In re Merkel's Will*, 4 N.J. Misc. 656, 661 (1926), "influence of affection and kind offices, unconnected with fraud or contrivance, though it induces gratitude and testamentary recompense, it is not undue. … mere possession of influence and opportunity and motive to exercise it affords no presumption of undue influence. It must appear either directly, or be justified from the facts proven, that the influence was exerted and operated to … coerce."

In *In re Raynolds' Estate*, 132 N.J. Eq. 141 (1942), the Court chose to deny a claim of undue influence because, while it recognized that the wife in the case clearly exercised influence over the testator husband, the Court did not find the influence to be undue.

> [f]or the purpose of argument, it may be conceded that Madeline Taitt Raynolds brought all her powers of persuasion to bear upon her husband to induce him to prefer her own sons over her stepsons in the testamentary disposition of his estate. And it may be that the testamentary disposition here complained of resulted largely from her entreaties and persuasions. But it does not follow that the influence thus exerted by her was undue. It was not undue unless his will was overcome by hers; unless her will was substituted for his; unless it appears that, without such substitution, a different disposition of his estate would have been made by the testator; in short, unless it appears that the questioned document as her will, not his. He may have submitted to persuasion and succumbed to entreaty, but if he was still free to do otherwise, and if what he did was in the exercise of his free will, even though induced by persuasion and entreaty, it cannot be said to be the result of undue influence.

Accordingly, the burden of establishing an undue influence cannot be met simply by demonstrating that someone persuaded the testator to make certain distributions — the persuasion must be coupled with conduct that rises to the level of fraud.

Preventing Claims

Undue influence claims can be minimized through proper preparation in the drafting and execution of the will and through the manner in which the testator makes his distribution of the property.

In terms of the preparation and execution of the will, the *Haynes* Court noted that one of the initial ways to minimize the risk of an undue influence claim is to ensure that the testator obtains advice from an independent attorney.

As described above, many times the perpetrator of the undue influence will have his attorney prepare the testator's will. Such circumstances enhance a claim that something untoward may have occurred. If, however, the testator obtains separate, independent legal counsel, the appearance of impropriety and potential conflicts of interest are minimized.

The preparation of the will may also require the inclusion of a no contest clause that could chill the beneficiary from challenging the will for fear that the interest or bequest provided would lapse upon any such challenge.

It is also important to properly orchestrate the execution of the will. Efforts should be made to choose appropriate disinterested witnesses who, if subpoenaed, will be able to attest to the details of the will signing.

It may be beneficial to videotape the will signing so there is a visual record of the testator executing the will. Note, however, that videotaping the execution of a will can be a double-edged sword. To prevent any misstatement or error, it is important for the testator to rehearse and read from a prepared statement in an effort to avoid a mental slip or ambiguity.

Additionally, in more extreme circumstances, one can consider executing a series of similar wills over time, each of which gives a successively larger amount to the potential contestant. See, Stephen Simpson, "Avoiding A Will Contest: Estate Planning and a Legislative Solution," 37-Aug Hous. Law. 36, 38-39 (1999). Accordingly, if the contestant is successful in contesting the most current will, the prior will takes effect and grants the contestant less than the most recent will.

While used primarily in lack of capacity cases, the testator can undergo a mental examination close to the time of execution of the will to obviate the existence of undue influence as well.

Will contests can also be avoided, or at least minimized, through the manner in which the property is distributed. One way to accomplish this is to avoid having the property pass through the estate. This can be accomplished through gifts, trusts or joint ownership.

This method of distribution prevents having some or all of the property having to pass through probate. And if the property is not required to go through probate, challenges to the distribution may be minimized.

Although there is no way to completely remove the possibility of a will contest on the grounds of undue influence, the precautions set forth above might deter or minimize the likelihood of success of a will contest. ■