



Wills and Trusts: Testamentary Capacity and Undue Influence

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Disclosures

Neither I nor my spouse/partner has a relevant financial relationship with a commercial interest to disclose.

Testamentary Capacity: The Basics

1. Adults are presumed to have the capacity to undertake legal tasks.
2. The party challenging capacity has the burden of proving incapacity
3. And the standards of such capacity are transaction specific
4. For Testamentary Capacity: (see Banks v. Goodfellow 1870)
 - At the time of will execution, the testator has the capacity to:
 - Know the meaning of a will
 - Know that a class of individuals are natural heirs (natural objects of ones bounty”)
 - Know the extent of one’s assets
 - Understand a general plan of distribution to heirs
5. The language varies state to state and cases interpreting standards are also state specific. (see also Model Probate Code)

Testamentary Capacity: The Caveats

Caution:

1. Testamentary capacity is a relatively low bar and differentially applied state to state
2. Capacity need only be present during the execution (“Lucid Interval”)
3. General capacity can be negated by an “insane delusion”
4. Courts usually use a sliding scale – complex estates require more capacity than simple ones

Testamentary Capacity: A Cognitive Standard

Understanding a Will:

- Semantic Memory

- Verbal abstraction

- Verbal comprehension

Knowing the Extent of Property (approx value)

- Semantic Memory

- Long term historical memory

- Short Term memory

The objects of one's bounty:

- Autobiographical Memory

An Asset Distribution Plan

- An integration of above cognitive abilities

- Executive functioning to understand prospective plan

(Marson, Huthwaite & Hebert 2004)

Consider Source of Cognitive Compromise

- Neurodegenerative Disorders
- Traumatic Brain Injury
- Severe Psychiatric Disorders
- Neurodevelopmental Disorders (Autism Spectrum Disorder)

The Living Testator: Evaluating Transactional Capacity

Contemporaneous Evaluation of Testamentary Capacity

1. Interview testator's spouse, friends, family for information about daily functioning
2. Obtain legal confirmation about the extent of assets and the planned distribution
3. Perform a comprehensive mental status examination of the testator
4. Perform a clinical interview geared specifically to the evaluation of task specific abilities
5. Consider Financial Capacity Instruments (Marson, Lichtenberg)

(Marson, D.C., Herbert T, Testamentary Capacity, 2008)

The Deceased Testator: Reconstructing a Mental State

1. Know the relevant legal standard in the jurisdiction
2. Understand the legal context, mechanics and sequence of execution
3. Obtain Medical records, including of diverse specialties
4. Explore mental status close to the time of will execution
 1. Seek lay judgments about mental abilities (family, friends, caregivers, other professionals)
 2. Seek information about professional interactions (deposition)
 3. Obtain any formal neuropsychological or psychological testing
5. In the case of a dementia, meticulously chart and stage the diagnosis, stage, treatment interventions, responses. (CDR etc)

(American Bar Association: Assessment of Older Adults with Diminished Capacity, Moyer et al 2008)

Undue Influence: The Safety Valve

Restatement of Contracts

“Undue Influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare”

- Subversion of will is the central concept
- Typically based in notions of fraud or duress
- Undue influence can be present even with full cognitive capacity
- However impaired capacity increases the vulnerability to undue influence

Models of Undue Influence

| Singer/Nievod Factors: | Blum "IDEAL" | Bernatz: "SCAM" | Brandle/Heiser/Stiegel |
|--|--|--|--|
| <ol style="list-style-type: none"> 1. Isolation 2. Dependency 3. Siege Mentality 4. Sense of Powerlessness 5. Sense of Fear 6. Staying Unaware | <ol style="list-style-type: none"> 1. Isolation 2. Dependency 3. Emotional manipulation 4. Acquiescence 5. Loss | <ol style="list-style-type: none"> 1. Susceptibility 2. Confidential Relationship 3. Active procurement 4. Monetary Loss | <ol style="list-style-type: none"> 1. Isolate from others 2. Create Fear 3. Prey on vulnerabilities 4. Create Dependency 5. Create lack of faith in own abilities 6. Induce shame 7. Perform intermittent acts of kindness 8. Keep unaware |

ABA Handbook 2008 Moye et al

Undue Influence: The Database

1. Usually in cases of wills and trusts, but can be applied to financial exploitation in general
2. A highly particularized evaluation with a large data base:
 - Personal, Occupational, Social History (IADL, caregiver accts etc.)
 - All medical records, neuropsychological testing, psychological testing, specialized instruments
 - Financial Data Base: Property, Transfers, Habits and Practices
 - Legal Data Base: Estate Planning Documents, Legal Context of Execution
 - Law Enforcement and Social Service/Agency Interventions
 - Collateral Interviews with spouse, family, staff, informants etc
 - Deposition testimony for unavailable informants

Red Flags Regarding Undue Influence

1. A confidential relationship allowed the influencer to control the testator
2. The influencer was active in the procurement of an asset change
3. The influencer received a significant benefit under the procured change
4. The changes were “unnatural” and inconsistent with the testators prior wishes and values
5. **The testator had underlying vulnerabilities (neurologic disease, substance use disorder, other psychiatric illness)**

Underlying Vulnerabilities

- Medical Vulnerabilities
- Psychological Vulnerabilities
- Social Context Vulnerabilities
- Isolation and Control by the Influencer
- The Distortion of Information by the Influencer

Medical and Psychological Vulnerabilities

Medical

- Cognitive Impairment
- Sensory Deficits (Vision, Hearing)
- Disability or Injury

Psychological

- Depression/Anxiety
- Concerns about declining memory/function
- Difficulty getting social needs met
- Emotional Distress (loss of spouse, disruption)
- Underlying Personality Vulnerability (Dependent, Avoidant)

Social and Contextual Vulnerabilities

Social Context Permits Isolation, Dependence, Manipulation:

- Trusted others perform multiple roles for the victim
- The victim views the trusted person as irreplaceable and primary
- The trusted person isolates and controls the victim
 - Physical isolation
 - Controlling who visits
 - Controlling information (mail, phone, email)
 - Controlling access by family and friends

Vulnerability to Information Distortion

The trusted person promotes false beliefs about others (family, friends, advisors)

- Encourages suspiciousness or delusions which emerge in the context of memory deficits
- Encourages negative or hostile feelings towards previous beneficiaries or objects of generosity
- Distorts why trusted others are not visiting when they are prohibited from visiting or communicating.

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