

Wills, Testamentary Capacity and Undue Influence

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Psychiatrists, sophisticated in law and psychiatry, are usually acquainted with the issue of testamentary capacity. Wills are legal instruments by which persons dispose of property after death in accordance with their wishes. Wills are created at the time of the making of the will; they become effective at death unless revoked or succeeded by a later will before death.

One of the necessary elements in the making of a will is the mental capacity to do so at the time that it is prepared. If a person did not have the necessary capacity to make a last testament (testamentary capacity), then the will will be declared void. Wills are presumed to be valid if they conform with the technicalities required by law; those who would contest a will have the burden to demonstrate a lack of capacity by the deceased. This lack of capacity is usually shown by the presence of a mental disease at the time of the making of a will of such a degree that the testator does not know that a will is being made or the extent of the bounty or property owned or even the identity and relationship of those who, under ordinary circumstances, would be the recipients of the testator's largesse. Some states also specifically require an ability to communicate one's desire in the creation of a will. Generally, if a person is unable to communicate orally, in written fashion or by behavior his wishes, then that person will not be considered competent to make a will.

The psychiatric correlates of will-making have been extensively noted in psychiatric journals and texts. The issue of undue influence, to the contrary, is one that usually receives little or no attention, yet it is important in that a mental condition that does not reach the level necessary to justify a finding of testamentary incapacity may, in combination with other circumstances, result in the voiding of a will.

Definition of Undue Influence

The essence of undue influence invalidating a will is that the influence of another person must be such that it substitutes the wishes of that other person for that of the testator. In other words, the undue influence must destroy the free agency of the testator and substitute that of another.

The motivation behind the influencing is irrelevant. If one influences another by kindness and good deeds or if one persuades another fairly and reasonably without fraud or deception, then the effect is not one of undue influence. There must be more than friendly advice or flattery. There must

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be an element of coercion, compulsion or restraint so that the will does not represent the wishes of the testator. Persistent requests and urgings to a point that the testator can no longer resist may result in a situation that results in acquiescence just for "peace and quiet." Threats never to see a person again have been held to be a basis for a finding of undue influence. Defamation using partial truths and causing bitter, angry feelings has been implicated in successful claims of undue influence.

Undue influence and fraud are closely associated. Fraud, duress and undue influence are frequently used synonymously and interchangeably, although fraud in the sense of deceit is a ground for a will contest separate and distinct from undue influence. One difference between undue influence and fraud is that free agency must be destroyed in the former, while it need not in the latter. Fraud and undue influence may be opposites in that with undue influence, the testator is compelled through fear and intimidation to act in ways which might be repudiated if the person were of a free and unconstrained mind while, on the other hand, the testator, misled by fraud, will often do so with pleasure and satisfaction.

An example of fraud is the situation where one influences a testator that another relative has stirred up trouble or has attempted to take the life of the testator. Fraud involves trick, deception, artifice; the testator is deceived and influenced by false statements. False representations must be intermingled with importunities and attempts to influence to establish a claim of fraud. Fraud may be shown by a single act, while undue influence usually embraces a course of conduct.

Duress itself involves the use of coercion or force; actual duress will make void a will. Duress is not a necessary element in undue influence.

Most important from the psychiatric standpoint is the principle that undue influence which will invalidate a will depends to a considerable degree on the intellectual capacity and other factors related to mental status which may interfere with the person's judgmental and dispositional capacities. Obviously, it requires much less influence to control the will of a person whose functional abilities have been severely impaired by mental illness or by physical conditions which affect mental functioning. A lesser degree of intoxication or other impairment is required to establish undue influence than is necessary to maintain a claim of testamentary capacity. A demonstration of impaired mental powers or a clouding of intelligence of the testator makes it easier to establish a charge of undue influence.

Thus evidence of physical and mental health is admissible where the issue is raised. Mere illiteracy or reduced intellect alone is not sufficient to establish undue influence. Such factors must be weighed in their relation to the ability of the testator to exercise free agency.

All facts and circumstances must be considered, and no precise quality of influence can be said to be necessary and sufficient in all cases. Age and general debility are not determinants, but certainly the capacity to function

mentally, by whatever measure, is. Thus, the psychiatrist's role in an undue influence case is to provide clinical data, usually without an explicit or implied conclusory opinion. Inasmuch as a finding of undue influence requires, in addition to some impairment, suspicious circumstances involving the behavior of others, supplemental evidence from other data sources is necessary. The concept of some type of coercion is important; some authorities have referred to the "moral or physical coercion" as an element of undue influence. Another expression encountered is that of the "captive mind."

Thus, the judge must consider not only the physical and mental condition, but also the role and actions of the persons exerting pressure or influence, the time and the place and the surrounding circumstances.

For example, spouses are not usually found guilty of undue influence, particularly if the behaviors utilized are characterized by virtuous concern, kindness and devotion. On the other hand, such allegations are not uncommon when the interests of the second spouse are contrary to the wishes of the children by the testator's first marriage.

Very important is the consideration of whether a beneficiary charged with undue influence occupied a confidential or fiduciary relationship with the testator. This fact may be considered in association with suspicious circumstances, such as the beneficiary's participating in the procuring, preparation and execution of the will or the fact that the testator's mental functioning was impaired. Other facts, such as the testator's being exhausted or at the point of death, may be considered along with any other factor that may render a person more susceptible to influence.

Behavior by one occupying a dominant position in a trust or confidential relation, such as an attorney, may amount to undue influence where the same behavior by another party might not.

Presumptions of Proof and the Weight of Evidence

As undue influence is usually covert, it seldom can be established by direct testimony and the contest must often resort to presumptions of law or circumstantial testimony.

In the majority of states, the burden of proof is on the one contesting the will. In a minority of states, the burden is on the one establishing the validity of the will. Certain circumstances may raise a presumption or inference of undue influence which will require proponents of the will to assume the burden of proof or at least present evidence as a counterweight to such a claim.

Generally, the contestant must prove his or her claim by a preponderance of the evidence; some states use a clear and convincing standard.

When there is a presumption of undue influence, the proponent of the will runs the risk of non-persuasion.

Opportunity to exercise undue influence or such an opportunity, plus the existence of an unjust will, is insufficient to create a presumption of undue

influence. Such a presumption may arise where the beneficiary is actively concerned in some way with the preparation of the will or where the relationship is coupled with some suspicious circumstance, such as mental infirmity of the testator or unfairness in the will. Where one preparing or procuring the execution of a will obtains a substantial benefit or a benefit to which he or she has no natural claim or a benefit out of proportion to others having an equal claim, then a presumption of undue influence is raised. Most important is the presence of what the law considers an unnatural or unreasonable benefit. The presumption of undue influence, as with any legal presumption can, of course, be rebutted.

If an executor or trustee receives benefits in addition to regular fees by virtue of position, this may raise a presumption of undue influence. While physical or mental disorder alone will not raise a presumption, the fact that the person preparing the will is a beneficiary does. This is most clearly the case when the beneficiary is an attorney, where there is a trust relationship and where the testator is in a dependent position. In New Jersey, an attorney must show by clear and convincing evidence that there was not undue influence, whereas the situation with a non-attorney requires only a preponderance of the evidence.

While mental impairment is not a prerequisite to establish undue influence, some authorities state that there should be no presumption of undue influence unless there is proof of mental infirmity.

When a church or clergyman is the beneficiary of a will in which there is a claim of undue influence, there is no presumption.

There is no time limit in terms of the presentation of facts related to the making of the will. Seclusion of the testator or denial of access by relatives at the time the testator makes the will is of some weight. The content of earlier wills may be admitted to show undue influence in a later will. While laymen and experts both are allowed to offer opinions as to testamentary capacity, they are limited in testifying as to undue influence. They can offer comments as to mental condition. The conclusion by a non-expert that a testator was under the influence and control of another is inadmissible. The statements or declaration of a deceased testator may be admitted to show state of mind.

In New Jersey, the issue is usually raised where (1) there has been a confidential relationship between the testator and the one instrumental in preparing a will, either financially or attending to the needs of the testator; (2) there are suspicious circumstances such as (a) the involvement of the beneficiary in obtaining the will, (b) participation by a beneficiary attorney, (c) seclusion of the testator, or (d) an unnatural or unusual disposition in which a child is excluded as beneficiary and (3) where there is a condition of susceptibility or weakness which would impair a person's ability to exercise control of the situation.

One other point is worth noting. A will voided for testamentary capacity has no legal effect; it is void in its totality. To the contrary, a will invalidated

by undue influence may have only the particular clauses at issue declared void if this is possible.

Clinical Vignettes

As might be expected, cases involving a claim of undue influence will most often involve the relevance of organic brain syndromes rather than psychoses such as schizophrenia or manic-depressive illness (major affective disorder).

Case 1. An 88-year-old widow had been hospitalized at a private psychiatric institution at age 82 because of a paranoid psychotic state and cerebrovascular disease — arteriosclerosis. She was hospitalized for six months and placed under guardianship; she was then transferred to a nursing home run by a religious order, where she remained until her death. Two years after admission to the nursing home, she was described by psychiatrist X as most cooperative, bright, alert, having no memory deficit and being quite familiar with her assets of about \$260,000. At a later point, she had her guardianship terminated and sued her daughter for abuse of her position as guardian. At a hearing on this issue, she was noted to be talkative, verbose, flamboyant, extremely hostile, often inappropriate and confused, irritable and petulant. The psychiatrist Y, who had not examined the patient, but observed her during the hearing, emphasized the fact that he had not evaluated her adequately in conformance with professional standards, but felt that the observations and verbatim transcript on its face demonstrated a clear example of severe chronic brain syndrome, probably due to arteriosclerosis. The diagnosis by a nursing home physician was cerebral arteriosclerosis, a diagnosis that psychiatrist X felt was not manifest to any significant degree.

The widow prepared a will leaving her estate to the nursing home. When it was known that a will was being prepared, the daughter hired psychiatrist Z who had managed the patient during her six-month psychiatric hospitalization five or six years earlier to reexamine her mother. The Mother Superior held the patient incommunicado and would not let the psychiatrist who had gone to the nursing home examine the patient.

There was marked conflict in psychiatric testimony by the psychiatrists who had in fact limited opportunity to examine the patient. The court decided that the patient was not shown to be mentally incompetent (that is, lacking testamentary capacity). The court did rule that the will was the result of undue influence, resulting in the voiding of the will and the disposition of the estate to the daughter by an earlier will.

The determining factors were (1) the dependent and impaired condition of the testator, (2) significant evidence of impaired mental functioning even though not of a degree to justify a finding of testamentary incapacity, (3) control of the environment by the beneficiary to the point where the testator was secluded from the outside world. This abuse of a trust situation and the suspicious circumstances resulted in a finding of undue influence. The

limited testimony of the psychiatrists did demonstrate the weakened or impaired condition of the patient.

Case 2. A 71-year-old widower made a will at age 59 leaving his estate to his wife and adopted daughter. Three years later, his wife died. He later became involved with another elderly woman with whom he closely associated and with whom he often traveled, although they did not live together. When he was 70, he had a cerebral vascular accident while visiting his girlfriend in the hospital where she was a patient. After several weeks in one hospital, he was transferred for a few months to a second hospital. As a result of the stroke, he became aphasic. Six months later, he had one leg amputated because of diabetic gangrene. Three months following this, he made a will, leaving his estate of roughly \$200,000 in one-half to his adopted daughter and one-half to his girlfriend. The will was made after he supposedly indicated by motions and occasional words his desire to make a will. His girlfriend called a woman friend whose son was an attorney. He prepared the will, which was signed appropriately by the testator after the will was read to him and to which he responded by nodding and other motions. The lawyer's mother, a witness, was named as executor.

Two days after the making of the will, he had a second stroke. Three weeks later, he was seen by a psychiatrist who described him as labile, crying, somewhat confused, but not psychotic. Six months later, another psychiatrist examined him after the adopted daughter sought to have him declared incompetent. This psychiatrist described him as able to communicate with sign language, limited writing and some words. He was oriented and had intact memory. He died before any court hearing on this issue. At the nursing home, he could communicate bodily needs. His internist felt that he was not competent to handle his affairs. Seven months after the second stroke and the making of the will, he died.

The daughter sought to have the will set aside on the basis of testamentary incapacity. The court ruled that, despite the aphasia, neurologic deficit and cerebral vascular accident, he was competent to make a will; however, in weighing the total circumstances, which included the impaired overall condition of the patient, multifold deficits and state of marked dependency and the fact that the attorney who had prepared the will had had his mother named as executor, the court ruled that there was undue influence. This decision reflects the close scrutiny that will be directed at attorneys who prepare wills in which they or associates have a financial interest.

Case 3. A 69-year-old widow was hospitalized after a cerebral vascular accident with a left hemiparesis. Six weeks earlier, she had had a similar episode with a right-sided hemiparesis which cleared rapidly. A psychiatric consultation described her as confused to some extent for a year, incontinent for a year, with poor recent and remote memory. She was depressed and partially disoriented as to time. She was felt to be incompetent due to an organic brain syndrome that was severe and chronic. A few weeks later, she was transferred to a hospital in another state close to her daughter.

Within three weeks after the second hospitalization, the daughter arranged for her mother to sign a will which differed from the existing will. In the earlier will, the estate of over \$200,000 was split between the two daughters of the patient. The other daughter, a resident of another state, had had a history of psychiatric difficulties and drug abuse. In the second will, the second daughter would receive support from the interest and principal from her share of the estate as determined by a trustee bank, but, ultimately, the principal was to go to the first daughter and her heirs. The second daughter was unmarried and had no children.

A second psychiatrist saw the patient in the hospital a week before the signing of the will. He described the woman as confused and noted that she was depressed and refused to discuss her assets or financial affairs. She knew that there was money "In the bank and in trust," but did not indicate how much. The psychiatrist indicated that she tried to throw him out, stating that she wanted to be left alone. Nonetheless, the psychiatrist concluded that she was "Of sound mind and in possession of her faculties," aware of her estate and able to make proper disposition of her property. Five days after the evaluation, the patient refused to sign the will because she felt overwhelmed, but did so two days later. The psychiatrist was present on both occasions.

The patient was transferred to a nursing home, but three months later was sent to a hospital for cancer of the endometrium. Two months later, a third psychiatrist described her as constantly crying, rambling, disoriented, unable to recall details concerning her property and confused about recent and past events. Diagnosis was chronic brain syndrome with depressive psychosis. She died a month later.

At the later will contest, the lawyer who prepared the will testified that he thought that she was competent. The details of how to prepare the will were presented by the first daughter to the lawyer who brought the will in completed form to the patient.

Despite what seemed to be a heavy weight of evidence to justify a finding of incompetence, the court ruled that the patient had testamentary capacity. The issue of undue influence had not been determined at the time of the presentation of this paper.

Curiously, during these events, the husband of the patient became ill and died shortly after returning with the patient to the state in which the first daughter lived. He had been chronically and terminally-ill and had prepared in his home state a will similar to the one signed by the patient. The daughter had also arranged for that will, the only difference being that the lawyer went to see the father before preparing the will. In the father's case, the father died much closer in time to the making of the will. A ruling of undue influence was made in favor of the second daughter. The will itself was upheld other than that part dealing with the trust. Otherwise, if the will had been totally voided, the estate under an earlier will by the father would have gone to the mother and then disposed of in accordance with the result of the

second will contest over the mother's estate.

Summary

Psychiatrists are generally familiar with the issues involved in testamentary capacity, but not with the nuances involved in undue influence. The legal factors in determining undue influence where the will of one party is substituted or imposed on the testator have been reviewed. Most important are circumstances where the testator has some degree of mental impairment, where a person in a position of trust imposes his or her will on a testator and is a beneficiary in some way, where there are unusual circumstances in the disposition of property or where there are suspicious circumstances that raise such a question. In particular, a lawyer who prepared a will in which he is a beneficiary will be vulnerable to a charge of undue influence.

Examples of actual occurrences have been presented. They illustrate the fact that psychiatric evaluation may be most important in determining the validity of a will even where there is no finding of testamentary incapacity. In such cases, the psychiatric or other medical information is only one factor to be considered by the judge along with the other elements to be considered by the court.

Undue influence is therefore another area of the law about which forensic psychiatrists should be familiar and knowledgeable. Hopefully, this review will serve that purpose.

References

1. 79 Am. Jur. 2d 575, S. 425-S. 494.
2. 94 C. J. S. 1059, S. 221 et seq.
3. 1 Page on Wills 711, Seq. 14.1 et seq.
4. 5 Clapp, Wills and Administration, New Jersey Practice. Series (3d Ed.), 131. □