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Testamentary Capacity and Undue Influence: Analysis of These Legal Siblings

By Dale E. Panzer, MD

Legal and Medical Analysis

Understanding the relationship between testamentary capacity and undue influence in the law is essential in will contest litigation, especially since Courts often allow challenges to testamentary capacity and arguments of undue influence to proceed simultaneously. Common themes emerge.

- Can a cognitively impaired person have intact testamentary capacity?
- Can a person with intact testamentary capacity still be vulnerable to undue influence or lose free will?
- How can a psychiatric expert retrospectively assess testamentary capacity and susceptibility to undue influence for the Court or Jury?

Testamentary capacity is assessed to determine if the testator has or had the capacity to meet basic cognitive legal requirements at that moment in time. Although state laws differ, many adhere to basic tenets:

Knowing the extent of one's bounty: Testator knows their assets and approximate value—e.g., cash, real estate, stocks, a business.

Defining natural heirs: In Pennsylvania and most states, natural heirs are the testator's children, spouse, parents, siblings, or more distant relatives in different degrees and order based on the laws of intestacy.

Understanding the general estate plan: The testator knows they are distributing by a will, trust, or other vehicle and knows the distribution plan.

Note: Some states may require a basic rationale for the distribution

What You Will Find in This Article:

Regardless of whether a person has testamentary capacity, undue influence might occur.

In probate litigation, undue influence is considered in the context of a relationship with an alleged perpetrator that results in a substantial change in the distribution of assets.

Undue influence is a protection in the law, albeit with a high burden of proof, that allows disinherited heirs to challenge a will.

Undue influence typically reflects an evolving relationship between perpetrator and victim in which power dynamics shift over time until, ultimately, the perpetrator's desire to gain financial benefit replaces the testator's free will.

The relationship between testamentary capacity and susceptibility to undue influence is not a plaintiff or defense issue. It is a psychiatric-medical issue.

We will look at an actual redacted case of the estate of Mr. A which was challenged over questions of Testamentary Capacity, cognition and brain disease, and family and friend relationships which may have risen to the level of undue influence.

Expert Psychiatry Assessment of Testamentary Capacity and Undue Influence

A psychiatrist is uniquely trained to assess the interplay between psychiatric and medical conditions and reconstruct a decedent's cognitive functioning at and around the time of a will change.

A thorough psychiatric assessment of testamentary capacity and undue influence requires the following:

Create a Timeline of Important Events

I start by constructing a timeline of important dates and events from proffered information largely obtained from counsel. Each case has a unique fact pattern. Important events may include:

- Date of testation
- Date of transfer of significant financial instruments or property deeds
- Date a family member moved into a testator's home

- Duration of the relationship between interested parties and frequency of face-to-face contact
- Activities an alleged influencer performed for the testator
- Information about how the scrivener was identified
- Whether an alleged influencer took the testator to meet with the scrivener and if the influencer is present at this meeting
- Narrative history about the relationships, if any, among the contestants or with the testator

Assist Counsel in Identifying Potential Sources of Evidence

An integrative understanding of multiple sources of evidence is necessary to form a psychiatric opinion about testamentary capacity and vulnerability to undue influence. Seemingly less important records like physical therapy or case management notes contain evidence on cognition, capacity, decision-making, and susceptibility to undue influence.

Potential Sources of Evidence

HOSPITAL MEDICAL RECORDS (Table 1)

OUTPATIENT MEDICAL RECORDS (Table 1)

LEGAL DOCUMENTS (Table 1)

TESTATOR'S WRITTEN RECORDS

WITNESS INTERVIEWS

FAMILY/FRIEND INTERVIEWS

DEPOSITIONS

BANK/STOCK RECORDS

TRANSACTION/PURCHASE RECORDS

Determining Whether a Psychiatric–Medical Condition Impacts Cognition

A psychiatrist can best aid the court in understanding the relationship between the decedent's established diagnosis(es) impacting cognition (i.e., dementia or delirium) and retrospective evidence of the testator's actual cognitive capacity.

Diagnoses Affecting Cognition

A psychiatrist expert must determine if the testator's diagnosis impacted their cognition. Although dementia and delirium are frequently considered, other less common conditions should not be overlooked. Below are a few such conditions.

As an expert in Brain Injury Medicine and Psychiatry, I utilize brain imaging results to inform diagnosis and correlate imaging with cognitive testing to inform opinions held within a reasonable degree of medical certainty.

Conditions Associated with Altered Cognition

Category	Sub-Category
DEMENTIA	• Degenerative: Alzheimer's/Lewy Body/Frontal • Vascular: Multi-Infarct Dementia • Alcoholic
DELIRIUM	• Medication effect/electrolyte disturbance/dehydration • Infection: Pneumonia/urinary/meningitis • Cardiac/kidney/liver disease
BRAIN	Tumor/Stroke/TBI
NUTRITIONAL	Folic Acid/B12
PSYCHOSIS	Schizophrenia/secondary to medical illness/delusional disorder
MOOD	Depression/Anxiety/Bipolar
SENSORY	Hearing loss/visual change

Reconstructing the Decedent's Actual Cognitive Capacity

A psychiatrist expert can often reconstruct a decedent's actual cognitive functioning at and around the time of a will change.

Neuropsychological testing results are sometimes available but may be remote and not directly pertinent. In addition to the physical, occupational, and speech therapy records mentioned previously, cognitive screening tools, e.g., mini mental status examination and Montreal Cognitive Assessment (MoCA) are performed by clinicians in many disciplines.

Physician progress notes may contain direct comments about cognition and may be useful for making reasonable inferences. For example, if a physician needs to explain the use of a new medication to a family member for permission to start it, it is clear the decedent could have cognitive impairment.

Contemporaneous scrivener notes also often contain useful cognitive data. Sources of information are case specific. Targeted collateral interviews of friends, family, professional advisors, and others can attest to the testator's retrospective cognitive function.

Using interviews is case specific and should not infringe on the Court's ultimate determination of credibility.

The Lucid Interval and Testamentary Capacity

Expert psychiatrists should offer opinions about diagnoses impacting cognition and the testator's cognitive function and apply this to the law. Lucid Intervals are medically and legally relevant because we assess the testator's momentary capacity for lucidity when they sign their documents.

Black's Law Dictionary defines Lucid Intervals as: "Intervals occurring in the mental life of an insane person during which he is completely restored to the use of his reason, or so far restored that he has sufficient intelligence, judgment, and will to enter into contractual relations, or perform other legal acts, without disqualification by reason of his disease."

A expert is tasked with determining whether the potential for a lucid interval exists, based on the testator's medical-psychiatric conditions and cognitive function. This determination is critical since the vast majority of will contests occur when there is evidence that a testator had both a diagnosis(es) impacting cognition and evidence of significant cognitive impairment.

The expert must consider if such a lucid interval, assuming it was possible, would restore the person's use of reason sufficiently to exercise testamentary intent as required in state law. If affirmative, testamentary capacity is supported. If there is no reasonable likelihood of a lucid interval, testamentary capacity cannot be supported.

The Insane Delusion and Testamentary Capacity

A psychiatrist expert must also consider the possibility that the will is a product of an insane delusion. An insane delusion is defined as "an insane belief or a figment of imagination, a belief in something which does not exist and which no rational person, in the absence of evidence, would believe to exist." (Leedom Estate, 347 Pa. 180, 32 A.2d3 1943); Plaska Estate, 11 Fiduc. Rep. 2d 369 (O.C. Phila. 1991). Such cases require establishing that a focal insane delusion directly impacted a testator's bequest by a clear and convincing standard in Pennsylvania. (Protyniak Estate, 427 Pa. 524, 235 A.2d 372 1967; Estate of Agostini, 311 Pa Super. 233, 457, A.2d 861 1983).

Such focal delusions occur more commonly in the elderly and may manifest as paranoia that, for example, one child wants to harm the testator or that a spouse is cheating on them. A perpetrator can reinforce such thoughts through repetitive fabrications, especially in a testator who is dependent on them.

Undue Influence

Index of Suspicion of Undue Influence

When a lack of testamentary capacity is not proven, the psychiatrist expert should consider if there is an index of suspicion for undue influence.

Suspicious circumstances include a significant change in a lifetime preference, an influencer isolating the testator from natural heirs or finding the scrivener. A number of cases involve scriveners who are not attorneys but people paid by the Influencer. Generally accepted suspicious circumstances include:

- The influencer took the decedent to the attorney appointment and/or was present at the meeting
- The influencer is unrelated but relatively recently insinuated themselves in the day-to-day life of the testator
- The testator depended on the influencer to live at home and/or the influencer was a caregiver

- The influencer had a position of authority relative to the testator, such as an attorney, doctor, or financial advisor. Note: In many states, these and other authority figures, e.g., priests, power of attorney, and caregivers, may be considered statutory confidential relationships and automatically shift the burden of proof to the will proponents.

Behavioral Models & Other Vulnerabilities to Undue Influence

The psychology literature is replete with behavioral models of undue influence applicable in multiple contexts.

Margaret Singer, Ph.D. proposed an early model based on her work with cult victims. She identified six areas leading to "overmastering influence."

Bennett Blum's IDEAL model organizes data characterizing the relationships between perpetrator and victim. Bernatz's SCAM Model is another way of organizing data.

Singer-Nievod Model	IDEAL Model (Blum)	SCAM Model (Bernatz)
Isolation	Isolation	Susceptibility
Dependency	Dependency	Confidential Relationship
Siege Mentality	Emotional Manipulation and/or Exploitation of a Vulnerability	Active Procurement
Powerlessness	Acquiescence	Monetary Loss
Fear/Vulnerability	Loss	
Staying Unaware		

When appropriate, an expert psychiatrist can comment on unique dynamic interactions between perpetrator and victim by discussing how facts fit into a behavioral model of undue influence.

Due Influence vs. Undue Influence and Susceptibility

The Favored Child Scenario

The expert psychiatrist often needs to distinguish Undue Influence from the Due Influence that arises in the ordinary course of a relationship. This requires a contextual determination of whether the "influence" conforms with historical patterns of relating between testator and beneficiary and/or whether a longstanding preference for distribution is altered.

In several will contests where I have been a disclosed expert, a child moves in with a parent to assist them at the end of life and then inherits more than their siblings. Is this child –often the least financially secure– deserving of more since they cared for their parent? Or, did they live with their parent to unduly influence them?

While a psychiatrist expert typically does not comment directly on the presence or absence of undue influence, distinguishing between due and undue influence is a factor in assessing susceptibility to it. An expert psychiatric opinion can help make these determinations.

Variations in State Law

State laws about undue influence vary. In Pennsylvania, in addition to establishing a confidential relationship, a demonstration of weakened intellect ("persistent confusion, disorientation, and forgetfulness") is required to shift the burden of proof to the will proponents. In New Jersey and Florida, there is no such requirement, and, as in many states, there are several situations that are presumed confidential relationships and automatically shift the burden.

In my experience, each is unique and requires a psychiatrist medical-legal expert to be familiar with relevant state law.

WAS IT UNDUE INFLUENCE?

AN ACTUAL CASE (Redacted)

Mr. A died leaving no surviving partner, spouse or children. He had kept in contact with two nephews for over forty years, but then disinherited them, and instead bequeathed nearly his entire estate to long-time friends Mr. X and Mr. Y.

Caregiver Compassion or Caregiver Influence?

After the death of his partner, Mr. A moved in with Mr. X and Mr. Y. who were his caregivers in his final years. He relied on them for meals and eventually to handle his financial affairs. They purchased a car and placed a down payment on a condo with Mr. A's money.

Were Dementia and Parkinson's Disease Factors in Testamentary Capacity?

I reviewed records and opined Mr. A had dementia due to both vascular and Parkinson's disease.

Did Mr. A lack testamentary capacity? At trial, his treating neurologist, who also served as an expert, opined he had only mild cognitive impairment (MCI). I applied the systematic approach discussed above and, at trial, offered specific cognitive evidence from speech and occupational therapy records that contradicted his neurologist's opinions.

While Mr. A's dementia was not so severe to preclude a lucid interval (see above), it did meet Pennsylvania statutory requirements for weakened intellect; one of several generally accepted vulnerabilities to undue influence about which I testified.

Visit *Mr. A: An actual Case About Testamentary Capacity and Undue Influence* to read the entire case and its interesting complexities. I discuss how I arrived at conclusions that ultimately shifted the burden of proof.

Table 1

Pertinent Documentation in Hospital, Medication Records and Legal Records

MEDICATION LIST	Medicines that directly or in combination impact cognition
LABORATORY STUDIES	Electrolytes, kidney and liver function, thyroid, & B12 levels
VITAL SIGNS	Fever (delirium), blood pressure
RADIOLOGY	CT/MRI Brain imaging, X-ray
EEG	Seizure (increased activity), delirium (global slowing)
ATTENDING PHYSICIAN	Medical decision-making
PSYCHIATRY	Diagnoses, mental status examination data. Pre-existing mental health conditions. Medications taken in the past or when executing documents, and dosages.
PHYSICAL THERAPY	Physical function, retention of information, sequencing of tasks
OCCUPATIONAL THERAPY	ADLs & Instrumental ADLs, Attention to task
SPEECH THERAPY	Language understanding, use and expression. Cognitive tests.
RECREATIONAL THERAPY	Current activity interests and participation
SOCIAL WORKER/CASE MANAGEMENT	Family dynamics, patient wishes and social service interventions
LEGAL DOCUMENT	Power of Attorney for Health Care and/or Financial Decisions, living wills, DNR orders, letters from family