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Pitfalls and Potholes: Lack of Capacity & Undue Influence

by Robert N. Sacks

Money giving is a very good criterion...of a person's mental health. Generous people are rarely mentally ill people.

Dr. Karl A. Menninger
Newsweek, November 2, 1959

Throughout the United States, lawsuits challenging the validity of wills and trusts, or specific provisions in them, have become increasingly common. For those involved in gift planning, identifying prospective donors and obtaining a commitment for a substantial gift to be provided upon a donor's death are simply the initial steps for insuring that the gift will be received. Gift planning professionals must also now consider that instead of receiving a gift, they may receive a summons to answer a lawsuit when the donor dies.

Although various grounds exist to contest wills or trusts, the most common claims are that the person who executed the questioned document: 1) lacked the required mental capacity or 2) was subject to undue influence. Gift planning professionals will unlikely replace doctors or estate planning lawyers as the key witnesses who play a dominant role in any future litigation. However, prudence dictates that some knowledge of the relevant concepts in handling and possibly avoiding estate and trust litigation is necessary to gift planners. The following are some thoughts on the relevant legal issues, as well as practical considerations and tips for dealing with situations that might lead to controversy.

Legal Standards

Mental capacity. Although gift planners generally share Dr. Menninger's sentiment quoted above, it is hardly uncommon for people suffering from some mental affliction to be generous in giving away their property. Indeed, elderly persons afflicted with Alzheimer's disease or other types of dementia are easy prey for deceitful people, although "gifts" obtained through fraud may be reversed while the donor is living or after death.

In the area of charitable planned giving, issues of actual fraud are rare. The most common challenge to a charitable gift is the claim that the gift was made at a time when the donor lacked mental capacity.

According to a noted treatise,[1] "Intellectual capacity and mental power vary in individuals in such infinite degree that it is impossible for the law to do more than set forth a general definition or standard for use by the jury or fact finder in determining whether mental capacity to make a will exists in a given case." Generally, the level of mental acuity a donor must possess in order to make a testamentary gift is quite low.[2] In summarizing the "great weight of authority" around the United States,

the treatise states:

> [A] testator must have sufficient strength and clearness of mind and memory to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them. He must have sufficient mind and memory to understand all of these facts, and to comprehend these elements in their relation to each other; and a charge, in negative form, that capacity is lacking if testator is not able to know all of these facts, is erroneous, since he lacks capacity if he is unable to understand any one of them. He must be able to appreciate the relations of these factors to one another, and to recollect the decision which he has formed.[3]

One modern statute reflecting these general principles is California Probate Code § 6100.5(a), which states, "An individual is not mentally competent to make a will if at the time of making the will either of the following is true: (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will. (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done."[4]

Accordingly, the required capacity to execute a will is usually very low. As long as the testator is not suffering from delusions or hallucinations that caused him or her to execute the will, the testator need only understand the basic nature of the testamentary act (i.e., what the will accomplishes), have a general understanding about assets and their values, and know who are his or her relatives and beneficiaries.

When courts examine testamentary capacity after the fact in will contest litigation, it must be emphasized that the focus is on capacity at the time the questioned document was executed. Because testamentary capacity is presumed, the contestant has the burden of proving that the testator lacked the requisite mental capacity when the will was executed. Accordingly, although witnesses and other evidence concerning the testator's mental condition at times both before and after the execution of the will may be helpful, the critical evidence concerns the testator's condition on or around the time of the will's execution. This focus is also followed when courts look at a claim that the testator was unduly influenced to execute the will.

Undue influence. We all have, or at least hope we have, some influence over our relatives, friends, colleagues and many other people involved in our lives. In the area of planned giving, institutions and the people that represent them quite properly hope to influence potential donors to make substantial gifts. Influence is fine; *undue* influence is not.

Different jurisdictions define undue influence in a variety of ways, but these definitions usually refer to some type of coercion or control exercised over the testator that destroyed free will such that the testamentary act was not voluntary.[5] For example, 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.'"[6]

Just a few months ago, the Supreme Court of California defined what influence is "undue" in connection with both wills and trusts. "Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency."[7] Thus, asking a person to make a testamentary gift or having some "influence" about such a gift is acceptable. But when "influence" amounts to force or pressure that causes a testator to do something that they otherwise would not have done, such influence is "undue." Under Oklahoma law, "For influence to be wrongful, it must be used directly to procure the will and rise to a level of coercion which in effect substitutes another's will for that of the testatrix's."[8]

It is apparent that having influence over the donor does not cause a gift to be invalid. For such influence to be "undue," the gift planner essentially must have pressured or coerced the donor to make a gift that he or she would not have made otherwise.

It bears noting that will contests rarely rely on either a lack of capacity or undue influence claim alone. Usually, these claims are filed together, on the theory that even if the testator had the

minimum level of capacity necessary to execute a valid will, his or her capacity was so diminished that the testator was more susceptible to the undue influence alleged.

Practical Tips

In the context of planned giving, there are many practical considerations for professionals to consider in trying to ensure that a testamentary gift is valid and would likely be able to withstand a subsequent challenge by a disgruntled heir. As noted above, gift planners should not attempt to replace lawyers and doctors who are often the critical witnesses in contests. But like these other professionals, non-attorney gift planners can and should look for warning signs of a possible challenge to the gift and try to help ensure that the gift will be upheld, without controlling the estate planning process.

There are a number of issues that are common to virtually any challenge to a testamentary document. One of the first key areas in a contest is the story behind the dispositive provisions in the will. Does the planned gift seem natural for this particular testator? Juries and judges are people, too, and the trier of fact in any will contest is likely to be troubled by a gift that seems odd to them.[9]

Contests are highly fact specific, so what would seem to be a "normal" gift for a particular person will vary based on the circumstances. Is the planned gift all or a substantial part of the person's estate? If so, why has the testator chosen to make such a large gift to that specific charity, especially if the testator has close relatives? In extreme cases, why did the testator choose to disinherit one or more children and favor a particular charitable organization? Obtaining answers to these questions at the estate planning stage is extremely important in defending later against a contest. Although having clear answers for the "why" questions that come up in contests is not dispositive at trial, an attorney defending a will is in an awkward position if evidence cannot be presented regarding why the testator did what was done. Undoubtedly, the contestant will testify as to the close and loving relationship shared with the testator, and the trier of fact will want to know why the testator disinherited the heir and left a substantial gift to charity.

It is also important to assess the universe of potential witnesses who could answer such questions. Because showing why the testator chose to sign the specific will in question may be crucial information, the more neutral, disinterested witnesses who can testify to the many good and valid reasons as to why the testator made certain choices, the more likely it is that the will is upheld. The drafting attorney, and there should always be one of these, because many contests involve handwritten wills or ones that were prepared by a family member or by a non-lawyer, is obviously a key witness. But family members and close friends of the testator, in addition to other professionals like accountants and stockbrokers, among others, may provide important insights into the testator's thoughts and desires in connection with estate planning and potential beneficiaries.

In addition, having a host of potential witnesses close to the testator who can provide favorable testimony helps dispel any notion of undue influence. Most undue influence cases involve a

person who is able to isolate the testator, making him or her feel dependent and that no one else cares. These conditions make it easy for a wrongdoer to then force the testator to change a long-standing estate plan in favor of the "new" best friend/caregiver/savior.

It has become increasingly popular for lawyers, under certain circumstances, to videotape the execution of a testamentary document. Obviously, a well-made videotape of a coherent testator acknowledging the various terms of the will and confirming desires can be a compelling piece of evidence if a contest is threatened or filed. A strong performance by the testator may not only help dispel any thought that the requisite mental capacity was lacking, but should also help prove that the testator was acting of his or her own free will and was not pressured or coerced into doing something that he or she would not have done otherwise.

However, in practice, videotaping should be used with great caution. Taping the execution invariably leads to questions about why the lawyer chose to videotape the act; were there suspicions that the client might not be competent? In addition, people often may not come across well on videotape, so this evidence may actually help the contestant. And if the videotape is missing or destroyed, there will be an obvious inference that it was harmful for the side defending the will.

In undue influence cases, the argument will be made that the videotape simply shows a short snippet of the estate planning process, and does not show what went on behind the scenes. The argument will follow that the alleged undue influencer exerted pressure over the testator for weeks and months prior to the execution, of course, including on the date the will was signed, even though for a few minutes on videotape, the testator simply parroted what he or she had been forced to say.

In sum, videotape may be compelling evidence, but the decision to videotape the will's execution should be made with care. One should remember that the police officers criminally charged in the infamous Rodney King beating case were acquitted despite the famous videotape, as was John DeLorean, in whose trial the prosecutors used a videotape in which DeLorean seemingly said that the cocaine he was accused of buying was "good as gold."

No Contest Clauses

These general considerations for demonstrating that the planned gift was an entirely natural and voluntary act by the testator are most helpful if a contest has been filed and goes to trial. Although such evidence may also be helpful in persuading a potential contestant not to file suit, there is another consideration that can be far more persuasive in forestalling a potential contest. For gift planners in jurisdictions that enforce "no contest" clauses, also known as *in terrorem* clauses, having a well-drafted clause coupled with a gift to the anticipated contestant may work wonders in having the potential contestant reconsider litigation.

No contest clauses basically state that any person who unsuccessfully challenges the validity of a testamentary document containing such a clause will be deemed to have forfeited any interest in the estate. Such clauses range from simple ones focusing on traditional contests, to multi-page versions that provide for forfeitures if any beneficiary challenges any provision in the document, makes any type of claim on any of the testator's assets, and a host of other, onerous provisions.

Many states, including New Mexico, Nebraska and Colorado enforce no contest clauses and will disinherit the contesting party, unless the contest is brought with probable or reasonable cause.[10] Other states uphold no contest clauses and disinherit the contestant even if there was reasonable cause for filing the contest.[11] Conversely, in Florida, no contest clauses are unenforceable.[12]

Thus, in jurisdictions in which no contest clauses are enforceable, an appropriate clause will cause a forfeiture of any gift under the will to a contesting beneficiary. Of course, if a contestant is successful in challenging the will or a particular provision, then the no contest clause is of no effect and, as noted above, even a losing contestant may avoid a forfeiture in jurisdictions that provide that no contest clauses are unenforceable if the contest was brought with probable cause.

Surprisingly, many wills contain no contest clauses, but leave nothing to the most likely contestant. In order to provide a disincentive for a beneficiary to challenge the validity of the will, the no contest clause must be coupled with a gift to the potential contestant that is substantial enough to cause that person to be reluctant to file suit. In connection with gift planning, this means that professionals advising the donor should raise the issue of whether potential beneficiaries who are known to be troublesome should be completely disinherited, when a relatively small gift might be enough to avert a later challenge. Even the most adamant testator bent on disinheriting a child may be persuaded that a gift of $100,000 could avoid years of costly litigation.

Specific Concerns

There are other issues to take into account when a gift planner perceives possible questions being raised in the future as to

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the donor's mental capacity. Aside from the drafting lawyer as a potential witness, the gift planner can also take steps to help protect the validity of the gift. By probing the donor's reasons for making the gift, as well as for making other decisions in the context of overall estate planning, the gift planner can confirm that the will reflects the donor's desires and can shed light on the reasons behind those decisions.

In addition, by being able to confirm that the donor was able to discuss everyday matters around the time the gift was made, the gift planner, like other professionals or friends and relatives involved in the testator's life around the time of the gift, can confirm that the donor acted rationally and appropriately in social and business situations. Asking basic questions often used in psychological examinations, such as who is the current president, what is the current day and date, and other common facts that are generally known may also help show that the testator had the minimum level of capacity necessary to execute the will.

Gift planners may also be in a position to suggest that medical personnel be involved to buttress the case against a potential contest, particularly if there appears to be a likely contestant. The testator's treating physicians are often good witnesses to confirm that their patients appeared able to make decisions for themselves. But even better would be an evaluation by a competent psychiatrist familiar with legal capacity issues. Particularly in larger cities, there are now experts specializing in geriatric psychiatry or related areas who can be extremely helpful in assessing legal capacity at the time a will is signed, in addition to serving as expert witnesses when a will contest is filed.

Proposing such an examination should only be done in situations where the expense is justified, when such an evaluation seems necessary, and when the donor is likely to be agreeable. Even proposing such an examination must be handled with great delicacy, because to some potential donors the mere suggestion that a psychiatrist be contacted might be enough to terminate any dialogue about the potential gift. However, explaining that such an evaluation is akin to purchasing an insurance policy against a challenge by a disgruntled heir may smooth any ruffled feathers.

Some years ago, a well-known entertainer wished to change his estate plan late in life. His estate planners were well acquainted with their client's troubled family situation, and wanred to be as thorough as possible in ensuring that the new estate plan would survive a challenge. But they also knew that their client would not react well to any suggestion that he be examined by a psychiatrist or otherwise questioned on his mental acuity. Their creative solution was to invite a psychiatrist, who was an expert on mental capacity issues, to attend estate planning meetings with the client, including the meeting at which the new estate planning documents were executed. This psychiatrist was not introduced as such, but only a member of the "team" and was able to perform a comprehensive evaluation of the client without the client's knowledge.

There are undoubtedly many other ways in which gift planners can help establish that the donor has the requisite level of mental capacity to make a will. Although no one likes the thought of being a potential witness in a lawsuit, helping to gather potential evidence confirming mental capacity may well help

to prevent any will contest from being filed in the first place. And if litigation ensues, it is obviously best to have detailed, helpful testimony that may help persuade the trier of fact.

As noted above, in gathering evidence showing that the testator possesses testamentary capacity, gift planners should explore the donor's reasons and obtain any other information that could be helpful in a future contest. However, a high level of contact with the donor may be a two-edged sword. The more contact the gift planner has, the greater the likelihood that a possible contestant will argue that undue influence was present.

Accordingly, at some point the gift planner should step aside. Although it might seem normal for the gift planner to speak directly with the estate planning lawyer, it may be more prudent for the gift planner not to have any such communication. There may be clear exceptions, however, such as when an estate planner asks for key will language from a charity's counsel that will preserve tax advantages. Moreover, the gift planner should not be present when the will is executed, if at all possible. Then, the drafting attorney and the witnesses to the will can confirm that the testator expressed his or her wish to make the charitable gift privately, with the inference that it was free from any undue influence.

In undue influence cases, courts look not only to the contacts between the testator and the person or persons who allegedly unduly influenced the testator, but also focus on which of those contacts had anything to do with estate planning. Accordingly, if a potential donor asks the gift planner for assistance in locating an estate planning attorney, simply providing such a referral is common and appropriate. But it is preferable if the testator locates his or her own attorney, and even better if the testator uses an attorney with whom he or she has had a previous estate planning relationship.

Gift planning professionals may, of course, have friendly or even close relationships with donors. But a contestant in an undue influence case will try to paint *any* relationship in an unfavorable light, and such cases are highly fact specific. Accordingly, gift planners should maintain a professional detachment in avoiding any participation in the estate planning process, if at all possible. Even a contestant who shows an extremely close relationship between the donor and the alleged undue influencer will be unsuccessful unless the contestant can also show the latter played an active role in the estate planning process, with the corresponding inference of undue influence.

Finally, gift planners should take notes or draft memoranda documenting their contacts with testators. Contemporaneous evidence such as this is often quite persuasive in showing that the gift planner acted professionally at all times, and dealt with the particular donor in the same appropriate fashion in which he or she deals with all potential donors.

Of course, there is never any way to guarantee that a lawsuit will not be filed. But, keeping in mind the standards for testamentary capacity and undue influence, and assisting to a limited degree in the estate planning process can enable gift planners to try to minimize the risks of litigation and an adverse result.

Endnotes:

1. *Page on the Law of Wills*, Bowe, William J. and Parker, Douglas H., WH Anderson Co., Cincinnati, OH, 3rd Edition, 1981 (Supp. 2002), § 12.21.
2. In addressing mental capacity, this article focuses on legal standards involving the required capacity to execute a will. In some jurisdictions, there may be different standards regarding the capacity necessary to contract or to execute a trust.
3. *Supra* at 1, *Page on the Law of Wills.*
4. In addition, California Probate Code § 811 provides a long list of mental functions that are to be considered in a judicial determination concerning whether a person lacks capacity to do various acts, including to execute wills and trusts. These factors appear to be both relevant and useful in assessing capacity at the time of the execution of a testamentary document, if a judicial determination is then sought, as opposed to reviewing a person's mental capacity when a will is challenged after death.
5. *Supra* at 1, *Page on the Law of Wills* at § 15.2.
6. *Haynes v. First National State Bank of New Jersey*, 87 N. J. 163, 1981.
7. *Rice v. Clark*, 28 Cal. 4th 89, 2002.
8. *In re Estate of Sneed*, 953 P.2d 1111, Oklahoma, 1998.
9. In California, the parties had a right to a jury trial in will contests until 1987 when the California legislature changed the law so that contests now are tried only by judges. This was because studies showed that appellate courts were reversing jury decisions in contests quite often. Apparently, juries generally seemed unable to honor the testamentary wishes of testators when they seemed unfair to the jury even though, by law, a testator has the right to bequeath property as seen fit.
10. See, for example, New Mexico Statutes § 45-2-517; Nebraska Probate Code § 30-24; Colorado Revised Statutes § 15-12-905.
11. As examples, see California Probate Code § 21303; *Rudd v. Searles*, 262 Massachusetts 490, 1928; New York Estates, Powers and Trusts Law § 3-33.5(b).
12. Florida Statute § 737.207.

***Robert N. Sacks** is a partner of Sacks, Glazier, Franklin & Lodise LLP in Los Angeles, California, and specializes in litigation and mediation involving estates, trusts and conservatorships. Sacks currently serves as chair of the estate and trust litigation and controversy committee of the American Bar Association's Real Property, Probate and Trust Law Section. He has also been elected a Fellow of the American College of Trust and Estate Counsel. Sacks lectures on estate and trust litigation topics for organizations such as the Los Angeles County, Beverly Hills and American Bar Associations.*