

Smart, Sweet and Susceptible: Treading a Fine Line Between Mental Capacity and Undue Influence in the Preparation of Estate Plans for Elderly Clients

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In order to execute a Will or other testamentary document, an individual must have sufficient mental capacity to do so. The standard for sufficient mental capacity is relatively basic and seeks to determine whether the Testator understands the “why, what and who” of the testamentary document. *Probate Code* Section 6100 sets forth the formal standard for determining the requisite mental capacity and specifies that an individual must “(A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, [and] (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.”

Even if an individual has the mental capacity to execute an estate plan, the individual’s Will or Trust may still be found invalid if the execution was tainted by “Undue Influence.” Undue influence occurs when a person’s will becomes susceptible to the control of another, as if he or she is a puppet with someone else pulling the strings. The possibility of undue influence opens an estate to extensive and costly litigation if the testamentary document was executed when the Testator was dependent on others, i.e., most often with elderly clients whom, as a result of their age and vulnerability, are likely more susceptible to undue influence by those around him or her, especially those who regularly provide him or her with care.

By way of explanation, consider the following hypothetical situation. “Jane” is a woman in her late eighties and has always had a fulfilling and close relationship with her children and grandchildren. Jane has also had a trust in place for several years, leaving all of her property to her children and grandchildren. A new young couple has moved in next door to Jane. They are a kind couple and always offer to help Jane with going through her mail, picking up her prescriptions, and buying her groceries. Jane becomes increasingly unwell and bedridden. She does not want to bother her children for help especially when they are so busy. Jane’s neighbors continue to help her and Jane is immensely grateful; Jane does not know what she would do without their help. Jane is compelled to thank her neighbors and as a result, she decides to change her trust. She explains her desire and reasoning to her neighbors and in turn, Jane’s neighbors arrange for an attorney to come to her home. Jane explains to her attorneys the property she wishes to distribute and to whom, and also verifies the names of her nuclear family. Jane then executes an amendment to her trust, leaving her home, bank accounts and all of her personal property to her neighbors. Three days later, she dies. Jane’s family suspects that Jane was not capable of revising her estate plan and that her neighbors threatened to refuse to assist

Jane unless she amended her Trust documents for their benefit. Working with the given facts, in fact, Jane does have the mental capacity to execute the Trust document. She understands the nature of the act, that it is a way to distribute her property after death. She understands the nature of her property, i.e. that she owns a home and several bank accounts. And lastly, she understands her relations, as she names her nuclear family. Determining whether the document was tainted by undue influence is not quite as clear an analysis. Even though Jane has the mental capacity to execute a Will or Trust, she is still in a vulnerable position and thus susceptible to undue influence, even if it was unintentional. In general as a society, we are still wary of drastic changes to testamentary documents, such as the ones in this example and thus the legal process of estate planning aims to protect individuals and their families at this vulnerable time.

Some indicators that suggest that a person may be susceptible to undue influence include the following:

1. The individual is isolated from most friends and family;
2. The individual has a mental or physical condition which renders her dependent on others;
3. The relationship between the individual and main beneficiary enabled the beneficiary to control the testamentary act;
4. The main beneficiary did in fact control the act; and
5. The dispositions of the will were vastly different from the previously expressed intentions of the decedent.

As a result of this susceptibility, *Probate Code* Section 21350 sets forth certain donative transfers (i.e. gifts through a Will or Trust) which are *presumptively* invalid (i.e. the Court operates with the belief that the gift is invalid and the burden of proof shifts to the beneficiary to prove otherwise), which include but are not limited to the following:

1. The person who drafted the Will and/or Trust and possibly other members of the firm;
2. Transfers to any person who has a fiduciary relationship with the transferor such as a conservator or trustee;
3. Care custodians, i.e. those who provide care for the individual; and
4. All those who are related by blood or marriage to, the domestic partners of, cohabitants with, and employees of, the specifically excluded individuals as described above.

In order to protect a dependent adult's true intentions in her estate plan, the attorney should require a capacity certification for the client. Such a certification is given by a doctor and verifies that the client has the mental capacity to complete the testamentary act. Secondly, the attorney must complete a Certificate of Independent Review. This certificate requires the attorney to interview the client to make sure that the donative

transfer is not the result of fraud or undue influence. This certification process must be done outside the presence of the beneficiary of the gift in question.

Due to the delicate nature of estate planning for dependant adults, attorneys drafting testamentary instruments for dependent adults must tread a fine line in determining 1) whether the client has the requisite capacity to complete the testamentary act and 2) whether the client has succumbed to undue influence in making a gift or has a genuine relationship with a care custodian and is making such gift freely and voluntarily. Likewise, the current laws and case law attempt to prohibit gifts that are the result of undue influence, yet still try to enable dependent adults to make gift as they truly desire. As a result of the inherent difficulties in drafting estate plans for dependent adults, it is important to consult an attorney experienced in this particular facet of the law. Such legal counsel will be able to advise clients on the necessity of (1) capacity certifications by doctors and/or mental health professionals, (2) certifications of independent review, and (3) various other fact-specific issues pertaining to the client. The Attorneys at Cooper-Gordon LLP have extensive experience with estate planning and drafting, probate and trust administration, and trust and estate litigation and offer initial consultations at a reduced rate.