

I. Introduction

Typically, wills are contested on two grounds: lack of testamentary capacity and undue influence. This presentation explores the nature and use of claims for undue influence, and reviews some of the cases dealing with it.

II. What Is Undue Influence?

In its simplest form, influence becomes “undue” when it causes another to do something that he or she would not have done but for the influence. The legal elements of undue influence in the context of a will contest are:

1. The existence and exertion of an influence.
2. The effective operation of such influence to subvert or overpower the mind of the testator at the time of the will’s execution.
3. The execution of a will that the maker would not have executed but for such influence.

Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).

Basically, “one may request, importune [demand], or entreat [beg] another to create a favorable dispositive instrument, but unless the importunities or entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument.” *Guthrie v. Suiter*, 934 S.W.2d 820, 831 (Tex. App. – Houston [1st Dist.] 1996, no writ), citing *Rothermel* at 922.

The mere influencing of a testator to benefit yourself in a will is not improper. For example, there is nothing illegal about begging someone to include you in their estate, but as the intensity of the begging increases, it may cross an invisible line into undue influence. A major problem is that the location of the invisible line is disputed, and undue influence is generally a fact question, decided on a case by case basis. *Furr v. Furr*, 403 S.W.2d 866 (Tex. App. – Fort Worth 1966, no writ). Some cases imply that undue influence occurs any time a testator makes a disposition in order to obtain peace.

Example: If two people are stranded in a raft in the ocean for two weeks, and one begs the second person every day to be included in his will, and on the thirteenth day the second person voluntarily writes a handwritten will including the beggar in his will, there is no undue influence. But if the second person wrote the will just to get the beggar to shut up, then the case becomes one of undue influence. There can be a fine line between persuasion and badgering.

Many try to limit undue influence to heavy pressure, such as threats, a “gun to the head”, etc. In actuality, undue influence is usually much more subtle.

Undue influence need not be accomplished forcibly and directly, as at the point of a gun. It is more often exercised by subtle and devious, but no less effective, means, such as deceit and fraud.

Holcomb v. Holcomb, 803 S.W.2d 411, 414 (Tex. App. – Dallas 1991, writ denied).

Undue influence may be exercised through threats, or fraud, or the silent power of a strong mind over a weak one.

Furr, at 871, quoting *Curry v. Curry*, 270 S.W.2d 208, 214 (Tex. 1954).

Undue influence has also been defined further as that dominion acquired by one person over the mind of another, which prevents the latter from exercising his discretion, which destroys his free agency, and which compels him to do something against his will from fear, or from a desire of peace, or from some feeling that he is unable to resist.

Lowery v. Saunders, 666 S.W.2d 226, 234 (Tex. App.-San Antonio 1984, writ ref’d n.r.e.), citing *Black v. Black*, 240 S.W. 2d 458 (Tex. Civ. App. - Amarillo 1951, writ ref’d n.r.e.).

The Supreme Court tells us that it is impossible to lay down hard and fast rules on what a record must contain to affirmatively establish undue influence, and that no definition can embrace all forms and phrases of the term “undue influence”. *Long v. Long*, 925 S.W.2d 1034, 1035 (Tex. 1939).

To invalidate a will, the undue influence must occur at the time of the execution of the will. When the influence was first brought to bear is immaterial, if the effect of the influence continues until the time of the execution of the instrument. *Furr*, at 871.

A common method of unduly influencing a testator is by fraudulent inducement. While many authorities consider undue influence and fraudulent inducement to be separate grounds for invalidating a will, Texas treats the two as the same, because undue influence is a “species of legal fraud”. *Holcomb*, at 414, citing *Curry v. Curry*, 270 S.W.2d 208, 214 (Tex. 1954).

Fraudulent inducement occurs when some fact outside the will is misrepresented or some other misrepresentation is made which causes the testator to execute a will he otherwise would not have executed.

Example: Father wanted both children to be share equally. He signed a will providing that his property would go to his daughter to offset property that his wife had conveyed to their son. There was evidence that the son told his father that the property he had received was less valuable than his father believed, and that son promised to equalize both estates if father

would devise his estate equally between the two children, although the son testified that he made no such agreement. The jury found undue influence. The court held that “this intent not to fulfill his promise is part and parcel of the undue influence, fraud in the inducement which led to the execution of a will which Mr. Holcomb would not have exercised, but for this influence.” *Holcomb*, at 415.

“Fraud in the factum” basically occurs when the testator is misled as to the nature or content of the instrument executed. *Guthrie v. Suiter*, 934 S.W.2d 820, 832 (Tex. App. – Houston [1st Dist.] 1996, no writ). But fraud in the factum is different from mistake in the factum. A mistake of fact or law alone is not a sufficient ground to set aside a will. See *Carpenter v. Tiney*, 420 S.W.2d 241 (Tex. Civ. App. – Austin 1967, no writ). In order for a mistake in the factum to justify setting aside the will, fraud and other undue influence have to be in play. In *Holcomb*, the court held: “we note that a mistake of fact or law alone will not defeat the probate of a will even though the testator would have made a different will but for the mistake inducing the making of the will. Coupled with undue influence or fraud perpetrated upon the testator, such a mistake is sufficient to deny probate of such an instrument.” *Holcomb*, at 415. Mistake in the factum may include a mistake as to what the testator’s will actually provides. However, a mistaken belief as to the contents of one’s will raises a question of testamentary intent. *Collins v. Smith*, 53 S.W.3d 832 (Tex.App. – Houston [1st Dist. 2001], no writ). This may happen more than we know - think about how often testators do not read the will, but merely hear a summary (if that) from others.

III. Is Testamentary Capacity a Prerequisite to Undue Influence?

- Certainly, some cases hold that “undue influence assumes the existence of testamentary capacity.” *Rothermel*, at 922; *Green v. Ernest*, 840 S.W.2d 119, 121 (Tex. App. – El Paso 1992, writ denied). But does this really make sense? Why can’t an incapacitated person be influenced into making a will that he would not have otherwise done? In fact, there are many appellate cases that affirm findings of lack of testamentary capacity and undue influence. See, e.g., *Tieken v. Midwestern State Univ.*, 912 S.W.2d 878 (Tex. App. – Ft. Worth 1995, no writ).

Practical Issue: Many will proponents try to convince the trial judge to condition the submission of the undue influence question on a finding of testamentary capacity, meaning that, if the jury finds a lack of testamentary capacity, they will not answer the question on undue influence. We have never had a statutory probate judge accept this argument, and the jury questions have always been submitted without condition. From a practical standpoint, if anyone should want the question made conditional, it should be the contestant. For example, assume that the jury found lack of testamentary capacity and did not reach the undue influence issue; the case goes up on appeal; the court finds that the evidence of incapacity was insufficient as a matter of law; in which case, you would still have a trial on the issue of undue influence with a new jury. It makes far more sense for both questions to be submitted unconditionally and for the judge to resolve any inconsistency, if the judge believes them to be inconsistent, with a *jnov*. This way the entire matter can be resolved on appeal and minimize the chance of a retrial.

IV. The Fatal Myth That Undue Influence Is Not A Viable Attack

Many commentators and lawyers suggest that undue influence is no longer a viable claim, or that undue influence cases are impossible to win. Nothing could be further from the truth. Lawyers who think that undue influence claims are dead are simply wrong. As shown below, many courts have affirmed findings of undue influence in will contests. From our review, it appears that there are more decisions affirming undue influence rather than reversing it, at least since 1990.

Undue influence cases are not that hard to win, either. Although the contestant must marshal sufficient evidence to defeat a summary judgment, a thorough investigation will usually produce enough evidence to defeat summary judgment, if the claim has any merit at all. All too often, lawyers have had their client's undue influence claims defeated by summary judgment because insufficient discovery or effort was put into marshalling evidence that could help preserve the claim. Most of the myth about undue influence arises from the many cases affirming summary judgments. Summary judgments against undue influence are very likely to be affirmed by the appellate court, even if erroneous.

V. Some Cases Affirming Findings of Undue Influence

Since 1990, jury findings of undue influence in the execution of a will have been affirmed in:

- *Cobb v. Justice*, 954 S.W.2d 162 (Tex.App. - Waco 1997, writ denied) (reversing trial court's JNOV of jury finding of undue influence)
- *In The Matter of Reynolds*, 1997 WL 217574 (Tex. App. – Beaumont 1997, no writ)
- *Tieken v. Midwestern State Univ.*, 912 S.W.2d 878 (Tex. App. – Ft. Worth 1995, no writ)
- *Fenwick v. Sims*, No. 04-92-00286-CV, slip op. at 18 (Tex.App.--San Antonio, May 26, 1993, writ denied) (not designated for publication).
- *Matter of the Estate of Williams*, 1995 WL 102780 (Tex. App. – Beaumont 1995, no writ)
- *Harkins v. Crews*, 907 S.W.2d 51 (Tex. App. – San Antonio 1995, writ denied)
- *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App. – Houston [14th Dist.] 1992, writ denied)
- *In re Estate of Riley*, 824 S.W.2d 305 (Tex. App. – Corpus Christi 1992, writ denied)
- *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App. – Dallas 1991, writ denied)

In other appeals of undue influence findings, the appellate courts never reached the issue, because they affirmed other findings such as lack of testamentary capacity. *In re Estate of Robinson*, 140 S.W.3d 782 (Tex.App.-Corpus Christi 2004, writ pending); *In re Estate of Blakes*, 104 S.W.3d 333 (Tex.App.-Dallas 2003, no writ).

VI. Some Cases Reversing Findings of Undue Influence

Horton v. Horton, 965 S.W.2d 78 (Tex. App. – Fort Worth 1998, no writ)

Estate of Montgomery, 881 S.W.2d 750 (Tex. App. – Tyler 1994, writ denied)
Baumgartner v. Baumgartner, Cause No. 02-98-00138-CV (Tex. App. – Fort Worth 1999, writ refused) (not designated for publication).
Estate of Davis, 920 S.W.2d 463 (Tex. App. – Amarillo 1996, writ denied)

VII. Some Cases Reversing Summary Judgments Against Undue Influence

Estate of Swanson, 130 S.W.3d 144 (Tex. App. – El Paso 2003, no writ)
In re Estate of Hall, 2001 WL 753795 (Tex.App.-Dallas 2001, no writ)
In Re Estate of Thompson, 873 S.W.2d 113 (Tyler 1994, no writ)

VIII. Some Cases Affirming Summary Judgments Against Undue Influence

In re: Estate of Graham, 69 S.W.3d 598, 609 (Tex. App. – Corpus Christi 2001, no writ)
Guthrie v. Suiter, 934 S.W.2d 820 (Tex. App. – Houston [1st Dist.] 1996, no writ)
Green v. Ernest, 840 S.W.2d 119 (Tex. App. – El Paso 1992, writ denied)
Hammer v. Powers, 819 S.W.2d 669 (Tex. App. – Fort Worth 1991, no writ)

IX. Circumstantial Evidence and the Equal Inference Rule

Undue evidence cases are almost always built upon circumstantial evidence. The reason is simple – the bad guy does not want others to know what he is up to. Undue influence “hides its features behind masks and operates in dark and secret places and in covert ways, and proof of it must usually be by circumstantial rather than by direct testimony.” *Truelove v. Truelove*, 206 S.W.2d 491, 497 (Tex. Civ. App. – Amarillo 1953, writ ref’d).

Appellate courts have often held that contestants may not use circumstantial evidence which supports the absence of undue influence as evidence to also support undue influence. For example: “Circumstances that are as consistent with a will executed free from improper influence as they are with will resulting from undue influence cannot be considered as evidence of undue influence.” *Bostic v. Bostic*, 2003 WL 22047902 (Tex. App.-Tyler 2003, no writ), citing *Mackie v. McKenzie*, 900 S.W.2d 445, 450 (Tex. App. – Texarkana 1995, writ denied). Contrast that holding, however, with the requirement that “in the absence of direct evidence all of the circumstances shown or established by the evidence should be considered even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together, they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testator.” *In re: Estate of Graham*, 69 S.W.3d 598, 609 (Tex. App. – Corpus Christi 2001, no writ).

The rule set forth in *Bostic* and other cases is really a restatement of the “equal inference rule” that when circumstantial evidence can lead to two equal inferences, it is evidence of neither. This writer believes the rule is mostly applied incorrectly and removes the right of the jury or fact finder to weigh the evidence and determine credibility.

Undue influence is almost always proven exclusively by circumstantial evidence. The more circumstances showing possible undue influence, the stronger the case. If you have other circumstantial evidence that could lead to an inference supporting undue influence, then the jury should be able to weigh any circumstance that supports a finding of undue influence, as well. In other words, while one circumstance, alone, may lead to the equal inference, that circumstance, together with other circumstances, may support a finding of undue influence. For example, the Supreme Court has held that “[b]y its very nature circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern.” *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993). “Thus, each piece of circumstantial evidence must be reviewed not in isolation but in light of all of the known circumstances.” *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001).

In *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984), the Supreme Court summarized the equal inference rule: “When circumstances are consistent with either of the two facts, and nothing shows that one is more probable than the other, neither fact can be inferred.” But the Supreme Court may have either clarified the rule or made it more confusing in *Lozano*, where the Supreme Court appeared to limit the applicability of the equal inference rule and allow the trier of fact to assign the appropriate weight to circumstantial evidence. In *Lozano*, the Supreme Court determined that:

The equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the Court of Appeals to assure that such evidence is factually sufficient.

Circumstantial evidence often requires a fact finder to choose among opposing, reasonable inferences [citation omitted] and this choice may, in turn, be influenced by the fact finder’s views on credibility. Thus a jury is entitled to consider the circumstantial evidence, weigh witnesses’ credibility and make reasonable inferences from the evidence it chooses to believe.”

Id., at 148-49.

In undue influence cases, the fact finder must consider all of the circumstantial evidence as a whole, rather than each circumstance viewed separately. Appellate courts, when reversing undue influence findings, tend to cherry pick the circumstances, then hold that each is consistent with a will executed without undue influence. Too often, the appellate court substitutes its view of the case and its inferences for those of the jury. However:

The jurors are in the best position to sift through the direct and circumstantial evidence presented concerning this subtle concept. The jury is vitally important in the determination of whether undue influence was exerted to the degree required and with the result alleged when probative evidence is introduced which tends to show undue influence.

In re Estate of Butts, 102 S.W.3d 801, 807 (Tex. App. - Beaumont 2003, writ denied), citing *Cobb v. Justice*, 954 S.W.2d 162, 166 (Tex. App.--Waco 1997, pet. denied).

X. The Factors To Be Considered

In re Estate of Graham, 69 S.W.3d 598, 608-609 (Tex. App. – Corpus Christi 2001, no writ) provides a good laundry list of factors to consider in undue influence cases:

- 1) The nature and type of relationship existing between the testator, the contestants, and the party accused of exerting undue influence;
- 2) Opportunities existing for exertion of the type of influence or deception possessed or employed;
- 3) Circumstances surrounding the drafting and execution of testament;
- 4) Existence of fraudulent motive;
- 5) Whether there has been an habitual subjection of the testator to the control of another;
- 6) State of testator's mind at the time of execution of testament;
- 7) Testator's mental or physical incapacity to resist or susceptibility of the testator's mind to the type and extent of influence exerted;
- 8) Words and acts of the testator;
- 9) Weakness of mind and body of testator, whether produced by infirmities of age or by disease or otherwise; and
- 10) Whether the will is unnatural in its terms or disposition of property.

In *Granville v. Haskins*, 1997 W.L. 770173 (Tex. App. – Dallas 1997, no writ), the Dallas court provided yet another list:

Factors to consider in determining the existence of an undue influence include: (1) the physical and mental condition of the testatrix, including her age and any weakness or infirmity; (2) an unnatural disposition of property; (3) the participation of the beneficiary in the preparation or execution of the

will; (4) the relationship between the testatrix, the contest and the proponent of the will; (5) circumstances surrounding the execution of the will; (6) the interest and opportunity existing for the exertion of undue influence; and, (7) the testatrix's acceptability to influence.

Each of these cases suggested a slightly different list of factors to consider. We believe that all of them are relevant and should be pursued. Here are some factors to keep in mind:

A. Participation by a beneficiary in the preparation of documents.

Be suspicious when one of the will beneficiaries is involved in the preparation of the will and receives a disproportionate share. If the testatrix leaves her property equally to her five children and one of the children is involved in the will preparation, no one will think twice about it. But if a child is involved in the preparation of a will which leaves all of the property to that child, and excludes the others, his involvement becomes much more problematic.

Evidence of undue influence can include selecting the lawyer, communicating with the lawyer, driving the testator to and from the lawyer's office, paying the lawyer, or actually preparing the instrument itself. The more involvement by a beneficiary, the better it is for the contestant. Was the beneficiary present when terms were discussed? Did the beneficiary provide any information? Was the beneficiary the one making the contact with the lawyer, setting up appointments, etc.? Is the beneficiary's handwriting on any notes or drafts in the lawyer's file? Did the lawyer even talk to the testator? Be sure to check the lawyer's notes, message slips, time and billing sheets, and e-mail!

Also, check to see if the draftsman was the testator's regular lawyer. Many times the influencer takes the testator to a new lawyer, in order not to be found out. We have had at least one situation where the regular lawyer had even refused to prepare a new will for the testator because of his condition.

B. The circumstances surrounding the execution.

Similar questions apply to the execution. Generally, there is no reason why a beneficiary (other than a spouse) should be at the will signing. Focus on the beneficiary's arranging the document execution, transporting the testator/settlor, assisting in the actual signing, arranging for witnesses, reading the instrument with the testator/settlor, asking questions, making comments, etc. Did the testatrix read the will in its entirety, did she ask questions or make suggestions or requests, were sections explained to her, and was anything said about the content? Did she wear glasses? Her hearing aids?

Example: Who took possession of the instrument after execution? The brother/beneficiary denied any involvement in the drafting or execution of his sister's will. However, the draftsman did not have a file for the sister, and the copies of her will were kept by the draftsman in the brother's file, indicating that the brother was involved.

C. The words and acts of all attending parties.

This is especially important, because it will likely produce conflicting stories, and may also provide direct evidence of the beneficiary's involvement, the dependency of the testator on others, and the relative lack of involvement of the witnesses and/or lawyer.

Example: Who is doing the talking at the execution ceremony? Frequently, the testator sits almost mute, while others do the talking for him or her, or about him or her. The testator may simply answer "yes" or "okay" to whatever is said, instead of asking questions or making independent statements.

Example: What does the testator tell others that he intends by his will? Is it consistent with the actual will, or does it indicate the possibility of fraudulent inducement or fraud in the factum?

D. The motive, character, and conduct of those benefited by the instrument.

Motive is always important, and usually is the easiest aspect of undue influence to prove. Money is the typical motivation, but control, dominance, or acquisition of a certain asset may also play a role. The will does not always have to directly benefit the bad actor, but might benefit someone or some entity close to the bad actor (a child or charity). If money is the typical motivation, the influencer is likely to be involved in the testator's financial affairs. When a new or greater beneficiary is suddenly signing all the checks of living off the testator, there is a good chance that undue influence may be behind it. You should not merely look at the checks and financial documents, but you should try to understand them.

Example: The checks may appear to have all been signed by the testator. In reality, the testator may have signed a bunch of blank checks which the influencer used for his personal purposes without the testator knowing the actual use.

E. The relationships between the testator/settlor and the beneficiaries and heirs.

A contestant will look for evidence showing that the testator/settlor's relationships with beneficiaries who were cut out were good or, if not good, were thwarted by undue influence or an insane delusion. A proponent should develop justification for the testator/settlor's action and all facts showing a bad relationship with the excluded individuals.

Example: Children were cut out by their father. Stepmother and draftsman justified the exclusion because the children had sued their father. Yes, the children had sued their father, but the father had executed other wills in favor of the children *after* the lawsuit, thus indicating that the lawsuit was not the true basis of the exclusion.

F. The physical and mental condition of the testator/settlor (e.g., weakness or infirmity).

The weakness or feeble-mindedness of the testator/settlor is obviously significant. The contestant should develop testimony showing that the testator was weak, feeble-minded, physically, mentally or emotionally impaired, and otherwise unable to resist the importunities of the influencer and/or susceptible to undue influence.

G. Dependency on or submission to another person.

The dependency of the testator on others (like a “favored” child, caregiver, neighbor, or recipient of a power of attorney) is an especially important factor, particularly if the person in control happens to be the beneficiary or a named executor or trustee. We look at virtually every aspect of the testator/settlor’s life, including being driven, dressed, fed, medicated, scheduled, and isolated by family, live-ins, advisers and confidants.

H. The improvidence of the transaction.

An unjust, unreasonable, or unnatural disposition is always evidence in an undue influence case. A disposition that does not seem “right” to the fact-finder makes the undue influence case a lot easier. Also, look for inconsistency with the decedent’s previous dispositive schemes.

Example: One subtle example would be the case where mom leaves all the property in trust to stepfather, but on his death, the remainder passes to mom’s children subject to a power of appointment. Mom knows that the children dislike stepfather, but nevertheless gives stepfather a power of appointment over the trust, which the stepfather would likely use to defeat the children’s remainder interest.

Example: One of our favorite examples of an unreasonable disposition is the will that left the home to the two sons. The problem was that the daughter lived her entire life in the home and, at the time of the will, was in her sixties. The sons stated that mom thought it was time for her daughter to get a job and move out of the house.

This inquiry can be a little more difficult than you might suspect. A good example is *Smallwood v. Jones*, 794 S.W.2d 114 (Tex. App. – San Antonio 1990, no writ). There the testatrix left 80% to her sister and 20% to her natural son. The court disregarded the jury finding of undue influence and concluded that the testatrix’ bequest of 80% to sister and 20% to son was not unnatural. *Id.*, at 119. This is a classic example of an appellate court substituting its judgment for that of the jury.

XI. Evidence Before and After the Execution, and Even After Death, is Relevant

It is proper to consider evidence of relevant matters occurring a reasonable time before and after the execution of the will which tend to indicate the existence of undue influence at the time of execution. *Lowery*, at 234.

Even parties' conduct after death can be considered as evidence of undue influence. In *Hickman v. Hickman*, 244 S.W.2d 681, 686 (Tex. Civ. App. – Eastland 1951, writ ref'd n.r.e.), the court considered the efforts of the alleged influencer to conceal the existence of the will as evidence of undue influence.

XII. The Existence of Fiduciary Duty

Much confusion exists about the effect of a fiduciary duty in undue influence cases, possibly because fiduciaries generally have the duty to prove that transactions that benefit them are fair. Some lawyers have concluded that the fiduciary who benefits under the testator's will must prove that there was no undue influence. In reality, the cases merely provide that, although a fiduciary relationship raises a presumption of undue influence, the only effect of the presumption is to establish the burden of producing **some** evidence by the alleged influencer that there was no undue influence. *Spillman v. Estate of Spillman*, 587 S.W.2d 170, 172 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e).

The court went on to say that “[a] presumption is not evidence of something to be weighed along with the evidence. ... An issue of undue influence was submitted to the jury and answered adversely to appellants. This was all that appellants were entitled to...” *Id.*

This holding was also confirmed in *Daily v. Wheat*, 681 S.W.2d 747 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.) and *Turk v. Robles*, 810 S.W.2d 755, 760 (Tex. App. – Houston [1st Dist.] 1991, writ denied). In all three cases, the courts would not submit an instruction that there was a presumption of undue influence. This does not make much sense. A good analogy would be the presumption that a lost will, last seen in the possession of the testator, is presumed to have been revoked. In the absence of evidence to the contrary, the presumption carries the day. Why is it any different with respect to a fiduciary duty presumption? Basically, the courts have said that contestants are not entitled to any issue or instruction other than the jury question on undue influence.

This presumption may hold more importance in connection with defeating a “no-evidence” motion for summary judgment.

In any event, we believe that a fiduciary relationship between a testator and the undue influencer is highly significant, and should be pursued in depth, regardless of whether the entire burden is shifted.

XIII. Red Flags of Undue Influence

A good estate planner must be on guard for red flags which signal a potential situation involving undue influence:

1. The testator's heavy dependence on one of the intended beneficiaries for care, transportation, and/or communication.
2. The beneficiary sets up the meetings.
3. The beneficiary or his or her spouse attends the meetings with the testator.

4. The testator asks few or no questions.
5. The beneficiary or spouse does most of the talking in the meetings.
6. The beneficiary calls you to discuss the dispositive terms or the changes.
7. The beneficiary and/or spouse attend the execution of the documents.
8. The testator's regular lawyers have been bypassed.

XIV. Practical Tips

1. Pay Attention to the Potential Signs of Undue Influence.

Any time the testator's estate plan contains a disproportionate or unnatural disposition (and thus makes a contest possible), watch for signs of undue influence. All too often, estate planners prepare dispositive documents without giving a thought to whether undue influence might be behind the document or, even more important, whether a jury might view it that way. Just as we cannot be the final judge of our client's testamentary capacity, we rarely can know with absolute certainty that undue influence is not at play. However, if we are alert to the possibility, perhaps we can help protect the testator from the influence and see that his or her true wishes are carried out.

Example: We recently tried a will contest in which the veteran lawyer who prepared the will testified that he did not believe that undue influence had been involved. He was a very honest and honorable attorney, and truly believed that there was not any influence. However, the problem was that he did not look for it. He admitted on the stand that seven red flags of undue influence were present in his situation.

2. Conduct a Surprise "Inspection".

Even if the testator tells you to communicate with his son or spouse, or someone else, call the testator out of the blue and go over the plans. This may be easier said than done, if the potential influencer is the testator's caretaker.

3. Never Discuss the Plan in the Presence of the Beneficiaries.

In the planning stages, there is no need for anyone else to be present.

4. Make a House Call.

If you are worried about your plan being attacked for undue influence, eliminate one of the issues by going to the testator to discuss and execute the will, rather than having the accused influencer bring the testator to you.

5. Be Open In Front of the Witnesses.

Sometimes privacy concerns prevent it, but one of the best things you can do is go over the terms of the will in the presence of the witnesses. All too often, the testimony is that the will was not discussed with the testator at the execution ceremony. For the

execution of estate planning documents that you think might be challenged, use some witnesses who know the testator, and have some discussion about the plan with the testator in front of them.

6. Prepare, Deliver, and Retain a Summary of the Dispositive Terms.

Some wills or trust documents have twenty-plus pages, filled with boilerplate. We all know that few testators ever read the entire document. The question then becomes, did the testator know what was in the document? Having a summary that was given to and discussed with the testator will help prove after the fact that the testator knew the contents of his instrument.

Example: In one of our cases, the ninety-two year old testatrix signed 151 single-spaced pages of wills, trusts, and partnership documents at one sitting. Our theme was that the testatrix could never have understood these documents. At trial, the proponents tried to simplify the documents by describing it as a “49, 49 and 2 plan”, meaning 49% of the estate to one side of the family, 49% to the other, and a 2% tie breaker. The problem for the proponents’ trial lawyer was that this simplification was nowhere to be found in the draftsmen’s files, it wasn’t present in the documents themselves, and one of the draftsmen did not know what “49, 49, and 2” meant.

7. Keep Your Notes.

If you make notes, keep them. Juries have a hard time believing that a lawyer makes no notes of early discussions with the testator. The problem is even worse if notes are made and later destroyed. But, be careful what you write down!

8. Be Careful What You Add to the Document.

While testators usually tell us what they want, they leave it to us to draft the details. Many lawyers think they are doing the testator a favor by putting in over-reaching *in terrorem* clauses or exculpatory clauses. The classic example is the exculpatory clause for a corporate fiduciary. There is no reason why any testator or settlor should ever exculpate a corporate fiduciary for negligent acts when it is being paid for its professional expertise. Another favorite of ours is the *in terrorem* clause that gives the cut-out beneficiary more (\$1.00) if he contests than if he does not contest. Although that may seem immaterial, it suggests that the testator did not know or understand was in the will, and could lead a fact finder to conclude that the testator was misled about what was or was not being left to the target of the *in terrorem* clause.

9. Counsel Your Client About Will Contests, If the Circumstances Warrant It.

If a client truly wants to do something that might be perceived as unnatural, tell the client about the ramifications and ways to minimize or avoid a fight. There may be nothing wrong with a testator wanting to provide for his second spouse (not the mother of the children) for the rest of his or her life, as long as the remainder passes to his children. In that

situation, however, it would not usually be logical for the testator to also give the spouse a power of appointment so that the spouse could give the property, for example, to her subsequent spouse. More importantly, the idea of a power of appointment is almost always the lawyer's, and rarely the testator's. There may be many reasons to have it, but if it makes no sense to the jury, watch out.

10. Keep Your Name Out of the Document.

Unless it is for a family member or is an absolute last resort, you should not draft wills or trusts that name you as a personal representative or trustee, or even as the attorney for those fiduciaries. It opens the door for the fact finder to question your motives.

11. Do Not Let Someone Else Speak For the Testator.

If the testator is competent and acting free of influence, he will know what he wants done and why he wants it done. If someone else conveys the message or the information for him, it is a good indication that it is not the testator's plan. Have some private meetings with the testator, or ask the question again and see if the testator can answer it.

XV. Conclusion

A key doctrine of Texas law is that a testator is presumed to be competent and, as such, has the right to leave an estate to any chosen beneficiary in any amount. However, a major reality of Texas law is that a jury can disregard that doctrine, and reject a competent testator's decisions long afterward on the ground of undue influence. What you think is a private act by a private person with his or her private property, may ultimately become a public event to be analyzed by six or twelve complete strangers who never knew the testator. Every estate planner preparing a disproportionate or unnatural disposition should keep in mind that a future jury which does not feel comfortable with that disposition may reach back in time and destroy the estate planner's work. Preparing for that possibility will make the possibility occurring less likely.