**UNDUE INFLUENCE CAN BE UNDONE**

**BY: WILLIAM G. MORRIS, ESQ.**

Florida has plenty of elderly along with plenty of people who want to take advantage of them. Advantage takers come in contact with the elderly in many ways. Some are caretakers paid by the elderly. Some are con men and shysters who perpetrate scams. Perhaps the worst are family members who want to beat their siblings out of an inheritance.

Undue influence is generally defined as over persuasion, coercion or force that destroys or hampers free agency and willpower. It can be exercised to obtain lifetime transfers, and those transfers can be challenged at any time. However, undue influence is most frequently raised in cases involving Wills, Trusts or other dispositions effective at death. Undue influence is usually not discovered until the influenced person dies and the influencer reaps the spoils of his or her effort.

Undue influence is not merely persuasion. It must reach a level of such control or pressure that the influenced person does not act understandably and voluntarily but acts subject to the will of another. In other words, the influenced person has lost free will.

Florida’s Supreme Court decided the Seminole case on undue influence in the 1971 case of Carpenter v. Carpenter. The Court’s ruling stated that if a substantial beneficiary under a Will has a confidential relationship with the testator and is active in procuring the contested Will, a presumption of undue influence arises. The Court went on to explain that undue influence would rarely be susceptible of direct proof, primarily because of the secretive nature of the dealings between the beneficiary and the testator. Evidence of undue influence is usually circumstantial.

Florida court decisions have set out a number of factors that indicate undue influence was involved in procuring a Will. Perhaps the biggest is the beneficiary’s involvement in the decedent’s life. More involvement usually means more influence and certainly more opportunity. Involvement can include personal interaction, time with the decedent, handling of the decedent’s finances and other matters.

Involvement with preparation of the decedent’s Will is another indication of undue influence. Did the beneficiary choose the attorney? Did the beneficiary take the decedent to the attorney? Did the beneficiary “sit in” on conversations with the attorney and/or signing of the Will. After the Will was signed, was it kept a secret or was it shared with other family members? Same questions can be asked about involvement with adding names to bank accounts or death beneficiary of accounts. Active involvement in Will preparation or change in account ownership is often the key factor leading a judge to claim back assets or invalidate a Will.

Another factor considered by courts is previous versions of the decedent’s Will and previous arrangements for transfer of assets at death. When there is an abrupt change in the distribution plan of the decedent, courts tend to give closer scrutiny.

Physical and mental health of the person influenced is often important. Physical or mental weakness, or both, can make a person easier to influence. The decedent’s medical history is often used to bolster the claim that the decedent was unduly influenced by someone.

When one or more of these factors exist, a presumption is raised that the decedent’s actions were the result of undue influence. That presumption shifts the burden of going forward with the evidence to the person accused of exercising undue influence. Section 733.107 Florida Statutes requires the person accused of undue influence prove the absence of undue influence. Purpose of the statutes is to implement public policy against abuse of a fiduciary or confidential relationships.

These cases often end up in court. They are most often Will contests but even the growing use of revocable trusts, trust litigation is likely becoming the new forum. The attorney fees in such lawsuits can mount quickly. Attorney fees may be awarded as part of relief when the fees are beneficial to a probate estate. That has generally been interpreted to include the award of fees for successfully contesting a Will. It is possible to recover fees for successfully challenging a distribution from trust based on undue influence, but the road is much more difficult.

Legal challenge to a Will or trust based upon undue influence must generally wait until the person creating the trust or Will has died. Until that time, there is no vesting of an interest any challenge is considered premature by the courts.

Undue influence cases are a mess. They often involve family, greed and all the elements of a made for TV movie. The good news is that even though these cases are mess, they are winnable and the wrongdoer often loses.

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