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COMMITTEE REPORT:
ELDER CARE



By **Sharon L. Klein, Sandra D. Glazier, Thomas M. Dixon & Thomas F. Sweeney**

Confronting Undue Influence in Your Practice?

Industry experts weigh in on how to tackle an increasingly pervasive issue

Individuals with estates both large and small can be susceptible to undue influence, which is becoming more prevalent as the basis for attacking estate-planning documents. As our population ages and becomes more vulnerable, the risk of undue influence being exerted increases. In fact, the Alzheimer's Association predicts that by 2030, 20 percent of the U.S. population will be over 65.¹

Accordingly, it's increasingly important for attorneys to understand and identify vulnerabilities and the indicia of undue influence. This task becomes critical:

1. During the initial representation phase, in understanding the issue of competency versus undue influence;
2. In the drafting phase, in recommending options and practices to protect the integrity of an estate plan; and
3. After death, in being conversant with the ins and outs of litigating undue influence cases.

Sharon L. Klein asked Sandra D. Glazier, Thomas M. Dixon and Thomas F. Sweeney to answer some questions to help planning professionals understand undue



Left to right: **Sharon L. Klein** is managing director of Family Office Services & Wealth Strategies at Wilmington Trust, N.A. in New York City. **Sandra D. Glazier** is a partner at Lipson, Neilson, Cole, Seltzer, Garin P.C. in Bloomfield Hills, Mich. **Thomas M. Dixon** is a member of the Detroit office of Clark Hill. **Thomas F. Sweeney** is of counsel at Clark Hill's Birmingham, Mich. office

influence, identify important factors that might give rise to a claim of undue influence, suggest strategies to enhance enforceability of estate-planning documents and recommend tips for litigating undue influence cases. Here's what they had to say.

Why is it Important?

Klein: *Why is it important for estate planners to understand undue influence?*

Sweeney: A planner can most appropriately discharge his legal and ethical duties if he understands how undue influence occurs and how it can manifest itself, especially if a client has vulnerabilities. The ABA Model Rules of Professional Conduct 1.14 (or the version adopted in one's state) can provide guidance regarding the ethical duties owed to a client with diminished capacity. That guidance provides that the lawyer may take protective actions when dealing with a client with diminished capacity, but only to the extent reasonably necessary to protect the client's interests. The planner can enhance the value and effectiveness of representation if he's familiar with best practices in protecting vulnerable clients. For example, if a family member procures planning services, ostensibly on behalf of a client, or is otherwise intimately involved in the planning process, that can potentially be a sign of undue influence.

What is It?

Klein: *What is undue influence?*

Dixon: In a nutshell, it's influence that destroys free agency and supplants the will of one individual for that of another. It's almost always a process and not any single event. At its core, undue influence is persuasion that abuses a relationship. It may be exerted by an improper threat, but more generally takes the form of unfair



persuasion in the context of an existing relationship. A fact-intensive analysis of the totality of circumstances is inevitably required to prove undue influence occurred. Circumstantial evidence is usually relied on, because undue influence is most often perpetrated in secret.

Klein: *Why is the issue of diminished capacity often raised in undue influence cases?*

Sweeney: Undue influence often occurs when there's diminished capacity accompanied by physical decline, dependency and isolation from the world at large or

Although marital relationships are confidential, marriage alone usually won't satisfy the requirement for a fiduciary or confidential relationship for purposes of establishing the presumption.

from family and friends. Often, in these cases, capacity is open to question and interpretation. But, while reduced cognition may be a factor that makes an individual more vulnerable, it's not a necessary element of undue influence.

Klein: *Are all attempts to influence a plan considered undue?*

Glazier: No. Even if influence involves specific and direct requests by a beneficiary, it may not be undue. This result may be true even though the benefit wouldn't have been provided absent the beneficiary's request. It's possible for many suspicious circumstances surrounding the creation of a plan to be present, yet for the plan still to reflect the individual's free will and desires. What's key is whether the individual's power to resist influence was

overcome, such that the instrument no longer reflects the exercise of free will. Certain individuals may be more susceptible to influence because of vulnerabilities, which may be why we often see challengers to an estate plan focusing on an individual's dependency and vulnerabilities.

Presumption of Undue Influence

Klein: *What's the "presumption of undue influence," and why is it important?*

Dixon: Generally, it's a mechanism that shifts the burden of production, as opposed to persuasion, to the proponent of an instrument. This statement means that while the proponent may be required to produce evidence that the instrument represents the true intent of the individual, the challenger retains the burden of persuading the trier of fact that the instrument is the product of undue influence. Once the presumption is met, it's often sufficient to withstand a motion for summary disposition. Essentially, if met, the presumption is intended to level the playing field in favor of a challenger. While the elements needed to establish the presumption vary among states, usually the challenger must establish that a fiduciary or confidential relationship existed. Planners should be familiar with the elements of the presumption in their particular state, so they can identify circumstances that might warrant additional protective measures in the planning process.

Klein: *So, it appears to be necessary to show a confidential relationship to successfully establish the presumption. Because marital relationships are generally considered confidential, will marriage alone satisfy that requirement?*

Sweeney: Although marital relationships are confidential, marriage alone usually won't satisfy the requirement for a fiduciary or confidential relationship for purposes of establishing the presumption. Generally, a challenger must demonstrate facts that point to some inequality or the repose of confidence or dependency that goes beyond that typically found in a marriage. It's not impossible for undue influence to be found to exist between spouses, but the presumption generally requires establishing a relationship beyond mere marriage or the



existence of significant dependency or other vulnerability factors.

Suspicious Circumstances

Klein: *Are there any generally recognized red flags or circumstances that might be considered suspicious or construed as indicia of possible undue influence?*

Glazier: Unfortunately, there's no all-inclusive or exhaustive list of suspicious circumstances for undue influence. Even when circumstances typically associated with undue influence exist, they may not be determinative. Nevertheless, suspicious circumstances generally revolve around some kind of vulnerability, such as age or impaired mental and/or physical condition and dependency. There are helpful resources to consult, including the Psychogeriatric Association's International Task Force report; *Restatement of the Law (Third) of Property*; and handbooks generated for psychologists, attorneys and judges by the ABA/APA Interdisciplinary Task Force. One might also consult a psychogeriatric expert, and there are marketed models that exist such as: IDEAL,² the Cult model, SCAM,³ SODR⁴ and the Undue Influence Wheel.

Dixon: Often, an element of isolation exists. Isolation can be imposed by another individual, or it may be the natural result of technology or other conditions or challenges. Isolation may even exist despite contact with others due to a lack of privacy. This lack of privacy is a form of isolation known as "chaperoning"—when the vulnerable individual is constantly accompanied by another. Additionally, whether the individual received independent advice or counsel can be extremely important. Determining whether this advice was given involves looking at factors, such as who contacted, arranged for and communicated with the lawyer; whether counsel breached a duty of loyalty to the individual; and even whether counsel took sufficient steps to assure the capacity of the individual and the independence of the plan generated.

Klein: *Given that there's no one comprehensive list that will include all suspicious circumstances, are there any circumstances you might highlight for practitioners to be alert to?*

Dixon: Consider the conduct of the beneficiary. This can relate to patterns of behavior and/or actions of the beneficiary, before, during and after the execution of the instrument. One might then analyze the extent to which the beneficiary materially participated in generating or documenting the plan. This analysis might include the extent to which the beneficiary knew about the terms of the plan before it was created; whether he procured the attorney or witnesses; and whether the beneficiary was present during meetings with counsel or at the execution of the instrument. Consider whether there's been a change in the grantor/testator's attitude toward others; family conflict; fear of abandonment; changed living conditions; recent bereavement; or even sexual bargaining. Also, consider whether the new terms are "unnatural" or whether the beneficiary has now been named a fiduciary (for example, conservator, trustee, executor or agent under a durable power of attorney).

Glazier: It's important to look to the totality of the circumstances. This might also include whether there's mental inequality between the individual and the beneficiary, the existence of an abusive relationship or a shift in the power equation between the individual and the beneficiary. Also, consider whether the instrument was created or executed when the individual was in a highly medicalized or acute care setting or suffered from sleep deprivation or whether it was secured in secret, haste or at an abnormal time or place. These cases are extremely fact specific, and the existence of various suspicious circumstances may be undercut by a single mitigating factor. Often, it's the quality, as opposed to quantity, of evidence that matters when analyzing mitigating factors.

Independent Judgment

Klein: *Why is it important that the planner exercise independent judgment?*

Sweeney: This element can be one of the single most important mitigating factors in rebutting a presumption or claim of undue influence. It's important for planners to be particularly attentive in observing and assessing a vulnerable client's circumstances. A strong defense to an attack of an instrument can be established when the planner actually exercises independent judgment and probes into issues. Proponents tend to use a



myopic approach to the evidence and circumstances. Consequently, planners are well advised to pay close attention to detail when observing and assessing a client. Creating and retaining notes that reflect the planner's thought processes, observations and the independent nature of his advice could be key. Disregarding the need to exercise independent judgment may lead to vicarious liability based on a claim of aiding or abetting the wrongful conduct.

Unique Evidentiary Considerations

Klein: *Are there any evidentiary or other considerations that distinguish undue influence cases from other types of cases?*

Having a complete picture can change the perception of the situation entirely.

Dixon: We've already discussed the presumption. Because of the largely circumstantial nature of these cases, the rules of relevancy and admissibility tend to be relaxed. Importantly, things that happened both before and after execution are generally considered. One difficulty challengers commonly encounter is that they may have lacked control or access to the decedent. Often, the actions of the influencer occur in secret. Evidence of undue influence that occurred after the date of an instrument's execution is relevant and admissible as tending to show a continuance of undue influence. Prior, as well as subsequent acts, may show a pattern, motive or propensity to engage in similar conduct.

Glazier: Like other cases, these are about the money, but they're rarely only about the money. They generally involve complicated family relationships and may evolve out of other emotions and motivations beyond purely financial considerations. It's important to analyze and assess such motives and manage these non-economic considerations.

Professional Assessment

Klein: *Do you recommend having vulnerable individuals assessed by professionals as part of the estate-planning process?*

Sweeney: It depends on the circumstances. In many cases, it may not be necessary. This decision goes back to the requirement that planners exercise independent professional judgment, because there's no simple answer. When the risk of a challenge is greater, additional steps may be appropriate. If there are concerns about diminished capacity, a planner may consider referring a client to the client's regular physician for a mini-mental exam. When there's a higher level of dependency, deficits or circumstances that might enhance the potential for undue influence, a planner might consider a more thorough evaluation by a medical professional specifically trained to assess the extent of deficits and potential vulnerability to undue influence. When family dynamics enhance the possibility of a challenge, planners might consider having a medical professional (who's competent to perform deficit and vulnerability assessments) present at the execution to act as a witness and document contemporaneous observations.

Klein: *What about using geriatric or other qualified forensic psychiatrists or psychologists in the context of litigation?*

Dixon: In a pre-death litigation scenario, an "independent" medical exam can focus on the individual's testamentary capacity and, if competent, the individual's vulnerability to undue influence. These assessments usually include a complete psycho-social profile, as well as assessments of both physical and emotional dependencies. These experts may see things that aren't yet obvious to counsel based on patterns and experience. Moreover, they can assess the potential impact of mental health disorders, such as depression, anxiety disorder, delirium or other cognitive impairment and provide a fuller understanding of medical conditions and their possible impact on vulnerability. These experts can provide value when it comes to motion practice and preparing a case. They can help with meeting the presumption, proving the existence of probable cause for a challenge, defining the scope of discovery, addressing dispositive



motions and synthesizing medical records, testimony and other discovery information to improve presentation of proof at trial.

Glazier: Qualified forensic experts can perform valuable post-death assessments (particularly from a challenger's perspective) based on a broad range of medical records, witness testimony and other discovery sources. Post-death assessments can result in a more comprehensive analysis than one performed by a treating health care provider, because they incorporate broader sources of information covering a greater period of time. By contrast, health care providers often focus on keeping the patient alive and stable. They may rely on skewed or incomplete information provided by a care provider who's participating, perhaps unknowingly, in the undue influence process. Having a complete picture can change the perception of the situation entirely. An example that comes to mind is an individual who couldn't pass a swallow test and was prohibited from having any food orally over an extensive period. When he said he'd really like to have some pizza to eat, the treating physician took this as a sign of humor and a demonstration of higher level reasoning. However, a broader review of records uncovered that this individual asked everyone he could to bring him a pizza and would have eaten it if provided to him, even though doing so might have killed him. Viewed in a longitudinal context, these requests take on a very different meaning.

Enforceability of Planning Instruments

Klein: *How can a planner enhance enforceability of a vulnerable adult's planning instruments?*

Glazier: Be attentive to and document your assessments relative to issues of capacity, vulnerabilities and suspicious circumstances that might be present. Take and keep contemporaneous notes of these observations. The chances are high that you'll be called as a witness. Send draft planning documents for review in advance of execution, and question the individual regarding the rationale for significant changes in a dispositive plan. Whenever possible, meet outside the presence of potential beneficiaries, and exclude any beneficiaries from the meeting when the documents are executed. Don't be afraid to think outside of the box. Consider

the circumstances. It's best not to take shortcuts when you're dealing with vulnerable adults because there's no fool-proof approach.

Sweeney: At the time of execution, speak with the individual in the presence of the witnesses regarding his intentions and the contents of the documents. To the extent possible, avoid using leading questions that call for a "yes/no" response. Also, ask questions in the presence of the witnesses, which can establish capacity. One might even consider asking for witness memos and using professional witnesses (for example, attorneys, paralegals or financial advisors). If the planner is concerned about future power shifts further reducing the individual's ability to withstand influences, he may consider taking some prophylactic measures, such as including a corporate or other independent fiduciary as either a lifetime co-trustee or a trust protector to approve any amendment. Providing that a corporate trustee can only be removed and replaced by another corporate trustee might prevent an end-run around an estate plan by ensuring a neutral third party is always acting. Consider selecting a trust situs in a jurisdiction such as Delaware that permits notifying beneficiaries or heirs at law of a proposed plan while the grantor is alive. Such a pre-mortem notification procedure typically requires an immediate challenge to a proposed plan or otherwise bars a future challenge. 

Endnotes

1. See Dr. Keith Fargo and Laura Bleiler, "Report 2014 Alzheimer's disease facts and figures," *Alzheimer's & Dementia: The Journal of the Alzheimer's Association*, Vol. 10 at p. e57.
2. IDEAL is a model developed by Dr. Bennett Blum and is an acronym for: Isolation, Dependency, Emotional manipulation or Exploitation of a weakness, Acquiescence and Loss.
3. SCAM is a model developed by Dr. Susan Bernatz and is an acronym for: Susceptibility of the victim, Confidential and trusting relationship between the victim and perpetrator, Active procurement of the legal and financial transactions by the perpetrator and Monetary loss of the victim.
4. SODR is an acronym for: Susceptibility of the supposed victim, Opportunity for the exertion of undue influence, Disposition for the exertion of undue influence and Result of such undue influence. SODR was recognized as a court-approved methodology, without attribution of authorship, in *Estate of Herbert, Deceased*, 979 P.2d 39 (Haw. 1999).



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