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 claim 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 areas 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 degrees that it is impossible for the law to do more than we 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 donee must possess in order to make a testamentary gift is quite low. In summarizing the "great weight of authority" around the United States,
the trustee states:

[A] testator must have sufficient strength and clearness of mind and memory to know, in general, with-
out prompting, the nature and extent of the property of which he is about to dispose, and the 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 testamentary is not able to
know all of these facts, is erroneous, since he lacks
such 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.1

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 his individual property, or (C) remember
and understand the individual's relations to living descendants,
spouse, and parents, and those whose intestates are affected by the
will. (2) The individual suffers from a mental disorder with symp-
toms 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."

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 understand-
ing 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 contestee has the
burden of proving that the testator lacked the requisite mental
capacity when the will was executed. Accordingly, although wit-
nesses and other evidence concerning the testator's mental condi-
tion at times both before and after the execution of the will may
be helpful, the critical evidence concerns the testator's condition
at 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, institu-
tions 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. For example, in
New Jersey, "Undue influence has been defined as 'mental, moral
or physical' coercion which has destroyed the testator's free will
by preventing the testator from following the dictates of his
own mind and will and accepting instead the domination and
influence of another."1

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."5 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 testator's."3

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 trial of fact in any will contest is likely to be troubled by a gift that seems odd to them.

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, has the testator chosen to make such a large gift that a 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 contestor 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.

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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 is that the will is upheld.

The drafting attorney, and there should always be one of these, because many contests involve handwriting wills or other documents 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/caretaker/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 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 snip of the estate planning process, and does not show what went on behind the scenes. The argument will follow that the alleged undue influence 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 DeLozat, in whose trial the prosecutor used a videotape in which DeLozat 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 remmunity 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 forborne 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. Other states uphold no contest clauses and disinherit the contestant even if there was reasonable cause for filing the contest. Conversely, in Florida, no contest clauses are unenforceable.

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 reasonable 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 adamantly 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 continued on page 21
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 reassess 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 some potential donors might see any 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 afflled feathers.

Some years ago, a well-known entertainer wished to change his estate plan late in life. His estate planners were well acquainted with his client's troubled family situation, and wanted 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 as 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 testi-
mony that may help persuade the trier of fact.

As noted above, the role of the testator is to possess testamentary capacity, gift planners should explore the donor's nuances 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 wit-
tnesses 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 undue influence.

In undue influence cases, courts look not only to the contacts between the testator and the person or persons who allegedly undue-
ly 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 plan-
ing 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 argue any relationship in an unfavorable light, and such cases are highly fact specific. Accordingly, gift plan-
ers 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 par-
ticular donor in the same appropriate fashion in which he or she dealt with all other testators.

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:
2. In addressing mental capacity, this article focuses on legal standards involving the capable capacity to execute a will. In some jurisdictions, there may be differ-
ent standards regarding the capacity necessary to contest or to execute a will.
3. supra at 1, Page on the Law of Will.
4. In addition, California Probate Code § 813 provides for a foro 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 thus sought, as opposed to reviewing a person's normal capaci-
ty when a will is challenged after death.
5. supra at 3, Page on the Law of Will at § 15.2.
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 heard by a judge. This was done because studies showed that appellate courts were reversing jury decisions in contest cases quite often. Apparently, juries gener-
ally 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 his property as he chooses.
10. See, for example, New Mexico Statutes § 45-2-517; Nevada Probate Code § 36-20; Colorado Revised Statutes § 13-13-909.
11. As examples, see California Probate Code § 23803; Roved v. Scavo, 262 Massachustts 490, 1928; New York Estates, Powers and Trusts Law § 3-33.1(b).
12. Florida Statute § 737.207.

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