

Determining Whether There Has Been Undue Influence
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The presumption of undue influence when the evidence demonstrates that a person in a confidential relationship with a grantor or testator of weakened intellect receives a substantial portion of the grantor/testator's property is nothing new. *In re: Paul's Estate*, 180 A.2d 254 (Pa. 1962). But what constitutes a "confidential relationship" and a "weakened intellect" sufficient to find undue influence bears repeating, keeping in mind that such a determination by a court is fact driven.

The "weakened intellect" required to establish undue influence is typically evidenced by persistent confusion, forgetfulness and disorientation. *Owens v. Mazzei*, 847 A. 2d 700 (Pa. Super. 2004) For example, in a 2015 Allegheny County, Pennsylvania, Court of Common Pleas Opinion by Judge Lawrence J. O'Toole, the Court found that confusion, depression and anxiety, a steady decline in health, and issues with withdrawal, disinterestedness and increased memory deficits are all symptoms indicative of a weakened intellect. *In re: Estate of Dorothy A. Carratura*, No. 2113 of 2010, Memorandum Opinion and Order dated October 16, 2015. In contrast, in another case, although the decedent was in the hospital, sedated for pain, Judge O'Toole found to be credible testimony of four witnesses who indicated definitively that the decedent was mentally sound during her last days. *In re: Estate of Mary Agnes Lewis*, No. 0342 of 2015, Memorandum Opinion and Order dated January 5, 2016.

Closely related to "weakened intellect" is the concept of "testamentary capacity" or the lack thereof. Testamentary capacity exists where a testator has intelligent knowledge of the objects of his/her bounty, the general composition of his/her estate, and what he/she wants done with it. *Estate of Reichel*, 400 A.2d 1268 (Pa. Super. 1979). Where, for example, the attorney who prepared a will testified that the decedent was aware of her assets, knew the terms of her earlier draft will and requested a new will, stating her reasons for leaving nothing to her son, despite the attorney's suggestion that she leave him something, the decedent was found to have had testamentary capacity. *In re: Estate of Mary Agnes Lewis*, No. 0342 of 2015, Memorandum Opinion and Order dated January 5, 2016.

A "confidential relationship" arises when the parties do not deal on equal terms, but rather there is an overmastering influence on one side and on the other weakness, dependence or trust, justifiably reposed. *Owens*, 847 A.2d at 700; *In re: Estate of Angle*, 777 A.2d 114 (Pa. Super 2001) In the *Carratura* case, Judge O'Toole found a confidential relationship did exist where a mother lived next door to her daughter and son-in-law and lived with them for some time, trusted them implicitly and depended upon them for transportation and other necessities. The Court there found undue influence by the daughter and son-in-law when the mother purchased a \$480,000 annuity with the daughter as sole beneficiary, which significantly reduced the value of her estate, impacting her two son's inheritance while the daughter profited handsomely.

Another factor that weighed heavily in the *Carratura* decision was that the daughter and son-in-law did not have "clean hands". The daughter did not inform her brothers of their

mother's death, which the Court found "unfathomable," and the son-in-law contacted a financial advisor on the morning of the mother-in-law's death to re-deposit a partial withdrawal from the annuity, which increased the value of the annuity to the benefit of the wife, at the expense of the estate.

The analysis of undue influence is fact intensive, as these cases remind us. And once a presumption of undue influence arises, the burden of proof shifts and undue influence must be disproved by clear and convincing evidence. *Owens*, 847 A.2d at 700. Like the attorney in *Estate of Lewis*, practitioners are well advised to question grantors/testators as to what they believe constitutes their estate and their reasons for distributing it as planned, in order to avoid a later finding of undue influence. A tactical suggestion to eliminate the potential issues arising from circumstances that might otherwise be conducive to an undue influence claim is to utilize the services of a videographer and engage in a pre-execution examination, removing any potential inferences of undue influence and the elements that make up such a claim.