

# AN OVERVIEW OF EVIDENTIARY ISSUES IN ESTATE DISPUTES

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## I. INTRODUCTION

This article explores several general bases for challenging a will and specific evidentiary issues which arise in such a challenge. Because several of the cases discussed below were rendered by the Fayette Circuit Court, were unpublished, or are ongoing, the names of the parties will be omitted.

## II. EVIDENCE RELEVANT TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

Estate disputes often focus upon a testator's testamentary capacity or the undue influence which may have been exerted upon the testator. Although only minimal capacity is required to make a will, a testator must generally know the natural objects of his or her bounty, understand his or her obligations to those objects, know the character and value of his or her estate, and be capable of formulating a plan to dispose of the estate according to his or her own fixed purpose.

### A. Defining Testamentary Capacity and Undue Influence

A will challenge for lack of testamentary capacity faces significant obstacles. Only the "strongest showing of incapacity," or evidence which "conclusively" demonstrates incapacity, suffices to set aside a will. *Bye v. Mattingly*, Ky., 875 S.W.2d 451, 455 (1998); *Fischer v. Heckerman*, Ky. App., 772 S.W.2d 642 (1989). See also *New v. Creamer*, Ky., 275 S.W.2d 918 (1955) (contestant bears burden of establishing incapacity by "substantial evidence").<sup>1</sup>

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<sup>1</sup> Despite a history of Kentucky caselaw requiring clear and convincing evidence to support a will challenge for lack of testamentary capacity or undue influence, an unreported

Even where a testator was ill, unconscious or mentally unsound before and/or after executing the will, he or she is deemed to have had sufficient testamentary capacity if there was a “lucid interval” at the time of execution of the will. The law generally presumes that the testator was mentally fit at that time. *Bye*, 875 S.W.2d at 455. *See also Warnick v. Childers*, Ky., 282 S.W.2d 608, 609 (1955) (evidence of prior incapacity is insufficient in the absence of evidence showing that incapacity continued until the execution of the will).

Undue influence is a related basis for challenging a will. In “discerning whether influence on a given testator is ‘undue,’ courts must examine both (1) the nature and (2) the extent of the influence.” *Bye*, 875 S.W.2d at 455. Undue influence exists where someone, at the time of the will’s execution, exerts such a level of persuasion upon the testator that the testator’s free will is destroyed and replaced by the desires of the one exerting influence. *Id.* To be undue, the influence must be inappropriate and of a wrongful nature. Influence secured through affection and acts of kindness is not wrongful and therefore will not support a will challenge. *Seals v. Seals*, Ky., 281 S.W. 982, 984 (1926). *See also Huff v. Woosley*, Ky., 212 S.W. 597 (1919). Family members’ reasonable suggestions to a testator will not be deemed unduly influential. *Faulkes v. Brummett’s Adm’r*, Ky., 204 S.W.2d 493 (1947). In contrast, influence created by threats or coercion, which themselves improper and/or illegal, will qualify as undue.

Neither the opportunity to exercise undue influence nor the mere possibility that such influence was exercised can support a will challenge. *Nunn v. Williams*, 254 S.W.2d 698, 700 (1953). Instead, a party challenging a will must show that undue influence was actually exercised. Helpful evidence of undue influence includes the following: medical records which reflect the

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Kentucky Court of Appeals case holds that a mere preponderance of the evidence will suffice.

testator's mental and physical health, evidence from various sources regarding the testator's relationships with family and friends, evidence of the testator's intent as expressed through non-testamentary documents or conversations with relatives, friends, and attorneys, the circumstances surrounding the execution of the will and the testator's death, and, where the will makes a large bequest to a charity, the testator's history of charitable giving.

## **B. Medical Records**

Medical records are obviously relevant to a determination of whether a testator lacked testamentary capacity or was subjected to undue influence. However, these records are difficult to obtain after a death. A personal representative or an estate executor or administrator generally has access to medical records. The testator's family members, spouse, or child do not necessarily have such access. While the law *requires* that medical records be provided to a patient's authorized personal representative after a death, KRS 422.317(1), no similar provision *forbids* medical service providers from giving the records to someone other than the personal representative.

Records maintained by a testator's psychotherapist are treated somewhat differently. Psychotherapist/patient records are privileged. An exception to that privilege permits a party in a proceeding to obtain the records if that party is relying upon the patient's mental condition as an element of a claim or a defense. This rule complicates will challenges based upon lack of capacity or undue influence. A plaintiff may believe that a testator lacked mental capacity to execute a will but may be unable to obtain medical records proving such a lack of capacity until after a lawsuit challenging the will is filed. This quandary is created by Ky. R. Civ. P. 11, which requires that all papers filed with a court be either "well grounded" in fact and existing law or supported by some "good faith argument for the extension, modification or reversal of existing law . . . ." *Id.*

### **C. Testimony from the Testator's Attorney**

The testator's attorney is also an important source of evidence about testamentary capacity or undue influence at the time of the will's execution. The attorney/client privilege continues after death, but no privilege exists for attorney-client communications relevant to a dispute between parties making claims against the estate of the same deceased client. Further, no privilege exists as to any communication about an attested document, such as a will, to which an attorney was an attesting witness. Ky. R. Evid. 503. Kentucky law clearly permits attorneys representing an estate to testify about the execution of the will and conversations with the deceased conversations about the testamentary plan and the basis for that plan, the size of the estate, and the testator's relationships with friends and relatives. Indeed, testimony from the testator's attorney is often the most compelling and important evidence in establishing whether the testator had sufficient capacity or was subjected to undue influence.

### **D. Evidence of the Circumstances of Death**

The fact that a testator died by suicide may be relevant to testamentary capacity. This relevancy particularly exists where the suicide occurred near in time to the will's execution. Although police evidence of the suicide scene may show a lack of testamentary capacity, inflammatory evidence will not be admitted. Even relevant evidence is excluded where its relevancy is outweighed by a danger of unduly prejudicing or influencing a jury. Ky. R. Evid. 403. Ultimately, the decision of whether to permit the introduction of such evidence is within the discretion of the trial court judge.

### **E. Evidence of Charitable Intent**

Large charitable bequests are often based upon legitimate and appropriate motives. Even

in such a situation, however, a charity may be accused of unduly influencing the testator. In a recent case, a testator who suffered from Parkinson's disease had been hospitalized for hallucinations three times during the year in which his will was executed. During that year, he dramatically altered his testamentary plan: rather than leaving most of his property to nieces and nephews, he left his \$2 million estate to a charitable institution which benefitted horses. In a will challenge, the jury confronted two questions: whether the testator had sufficient mental capacity and whether the charity had unduly influenced him. The estate's defense focused upon the very nature of the charity chosen by the testator. Horses, the object of the charity, had been integral to the testator's professional and personal life.

The above-discussed case also emphasizes the importance of evidence about where a testator spent holidays, with whom he exchanged gifts and correspondence, the amount of time relatives spent with the testator and the care provided by those relatives. In that will challenge, the defense noted the fact that the testator's relatives who had inherited under previous versions of the will had almost totally discontinued their relationships with the testator at the time of the final will's execution. These issues were critical to the defense's showing that the testator had sufficient capacity and was under no undue influence. Indeed, in this case, the jury found the evidence about the testator's personal relationships more valuable than the evidence of two forensic psychiatrists.

#### **F. Non-Expert Opinion Testimony**

Anyone, whether an expert or a layman, may testify to an opinion on whether a testator had sufficient capacity or was subjected to undue influence. Indeed, in a will contest centered around testamentary capacity, nearly every witness will have an opinion on that subject. However, non-expert opinion evidence about testamentary capacity will not support a will contest unless the

opinion is based upon facts and circumstances related to evidence which reasonably induced the witness's belief. In *Trust Dept. of First Nat'l Bank v. Hefner*, 476 S.W.2d 128 (Ky. App. 1968), a testator with no children had been adjudged to be of unsound mind and committed to a mental hospital. The testator had a history of suicide attempts and, after his death, witnesses testified that he was "sub-normal" and "sub-mental." Witnesses reported erratic behavior, a mental condition akin to that of a ten-year-old boy, "falling-out" spells, and an inability to understand money. However, the witnesses conceded that, except for a few days prior to his death when he was suffering greatly, the testator always recognized them. The attorney who drafted the will offered his unqualified opinion that the testator had possessed the requisite capacity at the time of the will's execution. No medical testimony was offered. The Kentucky Court of Appeals ultimately held that opinion testimony as to testamentary capacity is admissible, regardless of whether that evidence is presented by medical experts or laymen. As explained above, however, non-expert opinion evidence related to testamentary capacity will not support a jury verdict against the will unless the opinions are based upon evidence which reasonably induced those opinions.

#### **G. Evidence of Confidential and Fiduciary Relationships**

Confidential and fiduciary relationships frequently relate to the question of whether a testator was subjected to undue influence. Fiduciary relationships arise as a matter of law in only two situations: (1) where various, disparate duties have been undertaken by consent, such as in a partnership, or (2) where the court appoints one individual to a position of superiority over another, such as in a guardian/ward relationship. *Algia, Day, Trautwein & Smith v. Broadbent*, Ky., 882 S.W.2d 121 (1994). Confidential relationships arise where one party actually relied upon and reposed special confidence in the other. *Caldwell v. Hatcher*, Ky., 248 S.W.2d 892 (1952).

Superior knowledge will not itself create a fiduciary or confidential relationship. *Bickel v. Louisville Trust Co.*, Ky., 197 S.W.2d 44 (1946).

Confidential relationships do not automatically exist between family members. Even where objective circumstances show “a spirit of great trust, confidence” within a family, the existence of such a spirit is mere “a rebuttable presumption.” *Saylor v. Saylor*, Ky., 389 S.W.2d 904 (1965).

Confidential or fiduciary relationships are important in will contests only insofar as the *testator* is claimed to have been unduly influenced. Evidence that some person other than the testator was influenced to act or not to act is not important. In a recent Fayette Circuit Court case, parties contesting a will alleged that the testator was defrauded or tricked by her son in the drafting of her will. The contestants did not allege that the son had unduly influenced the testator’s disposition of her property but that, had she understood the true effect of her will, she would have drafted the document in an entirely different way. Testimony focused, however, on the allegation that the son had tricked his *sister* into accepting the testator’s estate plan without objection. The Kentucky Court of Appeals held that the case was properly dismissed for lack of evidence indicating that the testator was fraudulently induced to accept a testamentary plan which did not comply with her stated desire to distribute her property equally. Evidence that the son exploited a potential confidential relationship with his sister was irrelevant to whether he had unduly influenced his mother.

### **III. EVIDENCE RELEVANT TO RENUNCIATION**

A surviving spouse may renounce or refuse what is given to him or her by the testator’s will and elect to receive the share of property granted by KRS 392.020, as if no will had been made.

KRS 392.080(1). A renunciation must be made in writing and filed with the court within six months after probate of the will. *Id.* When determining the effectiveness of a renunciation, evidence as to whether the surviving spouse had previously elected to receive under the will may become critical. If such evidence exists, a renunciation may be ineffective even if made within the six-month period.

In a recent Kentucky case, a decedent was survived by his second wife and children from a prior marriage. His will left most of his property in trusts from which the widow would receive the majority of the income. The widow would also receive outright all of the testator's personal property. Within the six month period, the widow filed a renunciation of the will. Prior to making this renunciation, however, the widow had executed "receipt and release" when the estate's personal representative delivered to her certain personal property which the will specifically bequeathed to her. The testator's will had expressly required the execution of a receipt and release upon his heirs' acceptance of property. The document simply stated that the widow was entitled to the property and that she acknowledged receipt of the same. The Kentucky Court of Appeals held that the widow's acceptance of the personalty and her execution of the receipt and release constituted an election to take under the will. She could not thereafter renounce the will.

Renunciation may also require inquiry into the validity of the testator's marriage. In another recent case, the testator had a long-term and close relationship with a girlfriend, although the two did not live together. The girlfriend had no reason to believe that any other woman was a part of the testator's life. Hospitalized during the last stages of his cancer, the testator passed in and out of consciousness and received strong medication which impacted his ability to rationalize. During a visit, his girlfriend learned that he had married another woman from his hospital bed. The girlfriend was the testator's sole beneficiary under his will and had, prior to his death, received as gifts his



house and personal property. Her attorneys filed an action challenging the legality of the marriage because the statute of limitations for such an attack would expire before the date by which the “widow” was required to file a renunciation. The competency test used to void or set aside a marriage differs from the test used in a determination of whether the testator was competent at the time of a will’s execution. A challenge to the validity of a marriage is simply a challenge to a contract. The inquiry is limited to whether a person had the capacity to understand the nature of the marriage contract and the duties and responsibilities which that contract creates. A presumption exists in favor of the legality of the marriage. If someone is incapable of entering a contract at the time of a marriage ceremony, then the marriage is void from its inception and the heirs of the incapable decedent can set the marriage aside after the death. In this case, the girlfriend had strong proof that the decedent was incapable of making a rational decision about marriage. His treating oncologist, for example, believed that the decedent had been incoherent and incapable of making any rational decision at the time of the marriage. The Catholic priest who performed the ceremony had no opinion whatsoever as to the decedent’s mental capacity. Unfortunately, the Fayette Circuit Court ruled that, under KRS 403.120, only the decedent’s personal representative has standing to challenge a will. Because the girlfriend was not the estate’s administratrix, the case was dismissed.

#### **IV. EVIDENCE RELEVANT TO THE DECEDENT’S CHILDREN**

Questions of the identity of the decedent’s children may lead to an estate dispute. Unless a district court issues an order naming a particular individual as a child’s father, questions arise as to whether a person who claims to be a decedent’s child really may claim that decedent as a father. Without an adjudication as to parentage prior to a decedent’s death, the claimant child must prove paternity with clear and convincing evidence. KRS 391.105. Paternity questions are generally

submitted to the jury. *Harris v. Stewart*, Ky. App., 981 S.W.2d 122 (1988).

To resolve a parentage dispute, parties may submit evidence of DNA testing, testimony from persons who knew the decedent, the child's natural mother, and the decedent's other children and friends. The nature and duration of the relationship between the decedent and the natural mother is also relevant.

Although providing some evidence of parentage, birth certificates are not conclusive. After a birth, a mother may give any name at all to hospital administrators asking for the father's identity. Her statement may be entirely fabricated. Therefore, while not entirely meaningless, birth certificates have only slight probative value.

Testimony about the relationship between the decedent and a purported child may be helpful. Such testimony may include what others knew about that relationship as well as what the decedent reportedly said about the child.

## **V. EVIDENCE RELEVANT TO COMPETING WILLS**

When a testator executes one will years before death and another just prior to death, certain kinds of evidence become important in determining which will to probate.

In a recent case, the proponent of an older will acknowledged the existence of the new will. The testator, an aged woman who died shortly after executing the new will, had no children but was quite close with her two sisters. She had employed caregivers for only six months prior to her death. The new will gave the caregivers approximately \$75,000, a significant portion of the estate. The proponents of the older will offered evidence that the decedent lacked testamentary capacity and had been subjected to undue influence at the time of the new will's execution. This evidence included testimony from a social worker who had monitored the decedent's status, the decedent's one

surviving sister, and others who had known about the existence of the older will. The attorney who drafted the new will also testified. Although unaware of any undue influence or incapacity at the time of the new will's execution, the attorney admitted to the peculiarity of the decedent's bequest to her caregivers. The caregivers contended that testimony about undue influence and testamentary capacity is improper in district court and that such evidence is admissible only in a will contest filed in circuit court and that. Rejecting this argument, the district court found that the caregivers had exercised undue influence. The older will was therefore probated and the new will was refused.