

Understanding and Recognizing Undue Influence, Obligations, and Liability in Estate Planning

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The United States is experiencing an unprecedented growth of the population aged 65 and older, as baby boomers began reaching the age of retirement in 2011.² With a rise in the aging population, estate planning attorneys must be aware of the concept of undue

influence, and be able to identify “red flags,” to protect elderly clients and comply with ethical obligations.

Undue influence is defined as any improper or wrongful persuasion, where the will of one person is overpowered, and she is induced to make a decision that she would not have made on her own accord.³ To establish undue influence, the challenging party must prove: (1) the testator was susceptible to undue influence; (2) another person had an opportunity to exert influence over the susceptible testator; (3) improper influence was exerted or attempted; and (4) a result showing the effect of such influence.⁴

A fact pattern, frequently observed in an undue influence case, involves an elderly parent who changed his Will, shortly before passing away, to reduce or eliminate one child’s inheritance in favor of another child. Often, the child exerting the undue influence is the caretaker or agent under the parent’s power of attorney. In addition to taking over management of the parent’s finances (i.e. paying bills), medical affairs (i.e. scheduling medical appointments, picking up prescriptions), and activities of daily life (i.e. transportation to appointments, grocery shopping, house cleaning), the undue influencer might isolate their parent (i.e. limit phone calls, not let other family members over), and/or tell lies about the disinherited sibling (i.e. they’re stealing from you, they said something bad about you). In the eyes of an estate planning attorney, the undue

influencer often appears to be a loving and protective child, who just has their parent’s best interest at heart. Behind closed doors, however, the undue influencer has taken over control of the parent’s life and manipulated them into making changes to their estate plan.

Undue influence is a complex concept, inherently difficult to prove. So, these cases are generally determined upon circumstantial evidence and inferences drawn from a full presentation of facts.⁵ The estate planning attorney’s testimony and client file contains critical evidence for cases involving undue influence. Pursuant to R.C. 2317.02(A)(1)(b), the attorney-client privilege does not apply between a deceased client and their attorney, within disputes seeking to invalidate an estate planning document as the product of undue influence. Within the estate planning file, critical, relevant evidence can be derived from the drafting attorney’s notes, calendar entries, phone logs, billing records, intake forms, and communications between the drafting attorney and any person pertaining to the representation. Evidence that the defendant initiated the relationship between decedent and the attorney, attended meetings, paid the invoice, received drafts of the documents, or communicated the decedent’s wishes raise red flags of undue influence.

So, what duty do estate planners have to protect against undue influence, and are they at risk of liability if they prepare an estate plan that is executed as the result of undue influence?

It is well established in Ohio that an attorney may not be held liable by third parties as a result of performing services on behalf of the client, unless the third party is in privity with the client, or the attorney acts with malice.⁶

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In the context of a third-party legal malpractice claim, malice has been described as the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse, and with the intent to inflict injury under circumstances, indicative of an evil intent.⁷

In the 2008 case of *Shoemaker v. Gindlesberger*, the Ohio Supreme Court determined that the strict privity rule applies within the context of estate planning to prohibit beneficiaries, or intended beneficiaries, of a deceased client from bringing malpractice claims against the drafting attorney.⁸ In *Shoemaker*, the plaintiff argued that, in the context of estate planning, knowledge of the attorney's negligence in drafting a will, or mistaken advice about an estate plan, generally does not arise until after the death of the client, and any damages incurred as a result are sustained by the intended beneficiaries.⁹ Notwithstanding this public policy concern, the Court found that, without the strict privity rule, a drafting attorney would face unlimited potential liability and could have conflicting duties and divided loyalties during the estate planning process.¹⁰

By 2050, the number of Americans ages 65 and older is projected to be 82 million.¹¹ Estate planning serves the important role in society of fulfilling a person's final wishes. To ensure their client's true intention and wishes are fulfilled upon death, estate planners must be aware of undue influence and establish safeguards to protect against it. When an elderly testator makes significant changes to their estate plan, eliminating or reducing the inheritance of a next of kin or prior beneficiary, the attorney must be mindful of who the client is, and ensure they are taking direction from the testator, and not a third person acting on their behalf. The attorney must ask the testator why they are making the significant change, outside the presence of any third parties, and memorialize the client's response. After executing the will or trust, the estate planner can recommend the testator file a petition with the probate court, pursuant to R.C. 5817.10, to determine the validity of the document while the testator is still alive and can testify to the tribunal, on their own behalf, as to their intent and wishes. In such case, the testator's spouse, children, heirs at law, beneficiaries under the will, and beneficiaries under the prior will must be named as defendants.¹² The court will declare the will or trust valid if it finds the document was executed free

from undue influence, fraud, or mistake, and with the requisite testamentary capacity.¹³

Estate planners, like all attorneys, have an ethical obligation to take protective action if they reasonably believe a client is at risk of financial harm, pursuant to Rule of Professional Conduct 1.14.¹⁴ While this accountability does not extend to the point liability for failing to uncover a third party's undue influence (unless the attorney acts with malice), estate planners must be aware of undue influence, and be able to identify "red flags," to protect elderly clients, comply with ethical obligations, and ensure client's assets are distributed pursuant to their actual last wish and intent upon death.

ENDNOTES

- 1 Disclaimer: The views and opinions expressed within this article are solely those of the Author and do not necessarily reflect the views or opinions of any entities she represents.
- 2 <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html>
- 3 *Stanek v. Stanek*, 2019-Ohio-2841, ¶ 50 (2d Dist).
- 4 *Young v. Kaufman*, 2017-Ohio-9015, ¶ 52 (8th Dist.).
- 5 *Simon v. Aullino*, 2020-Ohio-6962, ¶ 54 (4th Dist.).
- 6 *Scholler v. Scholler*, 10 Ohio St.3d 98, 103 462 N.E.2d 158 (1984).
- 7 *Fabec v. Frederick & Berler, LLC*, 2022-Ohio-376, ¶ 27 (8th Dist.).
- 8 *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167.
- 9 *Id.* at ¶ 13.
- 10 *Id.* at ¶ 15.
- 11 <https://www.prb.org/resources/fact-sheet-aging-in-the-united-states/>
- 12 R.C. 5817.05.
- 13 R.C. 5817.10.
- 14 Rule of Prof. Conduct 1.14.

Mary Kraft, Esq., is an associate attorney at Reminger Co. LPA's Columbus office, where she focuses her legal practice in estates, trusts, and probate litigation. Mary represents clients in the pursuit, and defense, of cases involving trust and will contests, power of attorney abuse, declaratory judgment to invalidate financial or real estate transactions, fiduciary liability, and breach of trust. Mary counsels clients through all phases of the probate litigation process, including pre-suit investigation, pleadings, discovery, motion practice, mediation, evidentiary hearings, and trial. In addition to litigation, Mary handles estate planning, as well as estate and trust administrations, as fiduciary, counsel for fiduciaries, or counsel for beneficiaries.