

# New York Law Journal

ALM Properties, Inc.

Page printed from: [New York Law Journal](#)

[Back to Article](#)

---

## Duress: a Separate Objection to Probate

C. Raymond Radigan and Peter K. Kelly

New York Law Journal

03-12-2012

It is a classic concept in New York law that one who wrongfully takes the life of another is not allowed to profit from his wrong and inherit from his victim's estate.<sup>1</sup> However, violence and the threat of violence, short of causing death, are generally not recognized as a bar to inheritance rights. Yet in our time there has come to be a greater appreciation of the extent of domestic violence in the form of spousal abuse, elder abuse and dependent adult abuse. Courts have been increasingly concerned with the physical and mental abuse of the elderly and the infirm, neglect of the elderly and persons with disabilities, and related financial exploitation of these victims.<sup>2</sup> The remedy for these forms of abuse in a will contest is the separate and distinct objection of duress.

Unfortunately, an objection to probate on the grounds of duress has been entangled with that of undue influence. In American law generally, the concepts of undue influence and duress are intertwined.<sup>3</sup> The concept of duress is explained only in connection with undue influence. The New York Pattern Jury Instructions fails to include a separate instruction for a challenge to a will on the grounds of duress.<sup>4</sup> One court has combined duress into what it defines as "the gross, obvious and palpable type of undue influence."<sup>5</sup> That court went on to entangle duress with undue influence by stating the common understanding that:

There are two principal categories of undue influence in the law of wills, the forms of which are circumscribed only by the ingenuity and resourcefulness of man. One class is the gross, obvious and palpable type of undue influence which does not destroy the intent or will of the testator but prevents it from being exercised by force and threats of harm to the testator or those close to him. The other class is the insidious, subtle and impalpable kind which subverts the intent or will of the testator, internalized within the mind of the testator the desire to do that which is not his intent but the intent and end of another.<sup>6</sup>

As Surrogate Kristin Booth Glen noted in the case of the *Matter of Rosasco*,<sup>7</sup> the Restatement (Third) of Property is perhaps the most helpful in distinguishing between duress and undue influence. In Section 8.3(b), the Restatement indicates that:

A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.

The Restatement defines duress in §8.3(c) as follows:

A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.

The Restatement defines a "wrongful act" as one that is criminal or one the wrongdoer had no right to do.

As the *Rosasco* court and the Restatement (Third) of Property point out, duress and undue influence are really separate concepts. They are supported by separate forms of evidence. Undue influence is proven by the circumstantial evidence of persuasion, by the possible physical weakness of the testator, and the slow and gradual gaining of control over the testator's free will. Duress is proven by a wrongful act and the evidence of its effect on the testator. Duress does not depend upon the motive of the wrongdoer, but rather upon the subjective fears of the testator. It is often proven by the doing of a wrongful act of violence and/or menacing accompanied by evidence that the threat or act will be repeated.

Finally, conceptually, undue influence and duress are brought about by totally different forms of persuasion. Undue influence is a mental or psychological form of influence sufficient to lead the testator to carry out the wishes of another person. Duress is a much more overt form of persuasion procured by fear in the mind of the testator that coerces a result which a testator would not otherwise choose.

#### The 'Rosasco' Case

In *Rosasco*, Surrogate Glen undertook an extensive examination of the concepts of duress and undue influence as separate grounds to invalidate a will.<sup>8</sup> Surrogate Glen ruled upon proponent's motion for summary judgment in the probate contest and granted summary judgment on all the objections, including undue influence, but denied summary judgment on the claim of duress. The court held that issues of fact were raised as to whether the decedent felt threatened by the proponent such that she feared making a new will that favored the objectants.

Surrogate Glen found that fact issues existed as to whether the testator's great-nephew (the proponent) had exercised duress over his great-aunt with respect to her will when he berated her and her sisters loudly and often, struck and pushed his own sister in his aunts' presence, punched his own sister in the stomach, and tried to intimidate the decedent and her sisters physically. Proponent had been thrown out of his parents' apartment and was living in an apartment with decedent and his other aunts.

The court found that the great-nephew's violent behavior had a keen effect on the testator and took note of testator's state of mind in testimony in which she had stated she was afraid to change the executor of her will from the proponent to one of the objectants because she was afraid that proponent would find out about it and hurt the niece, proponent's sister. The offered will gave her \$2.8 million estate all to proponent, her sisters having predeceased her.

The court considered that there is some historical support for the concept that undue influence arose out of the use of force and duress. Under the Roman Justinian Code, there was no provision to challenge a document based upon undue influence. Such a challenge could only be made where an act was compelled by duress. Only force or fraud could invalidate a will under Roman law.<sup>9</sup> While historically the concept of undue influence has evolved from force or duress, undue influence now takes note of more sophisticated efforts to overcome the will of the testator, by mental and psychological coercion. Recent modern commentators have recognized that they are distinct concepts requiring different proof.<sup>10</sup> The *Rosasco* court essentially found that the test for duress is subjective, and the proof concerns whether there was an actual threat which induced the testator's assent as the victim of the duress.

In *Rosasco*, the court found that the objectants had established a prima facie case of duress. The evidence adduced by the objectants, if believed, could establish (1) that proponent's violent acts toward his sister posed a threat of repeated violence, (2) that the threat induced fear in decedent, (3) that if she were to make a new will that favored proponent's sister, not only would proponent harm decedent if he were to learn of the new will during decedent's lifetime, but also (and the court found this threat significant) that upon the decedent's death, proponent would physically harm his sister and convert to himself any assets intended for his sister; and finally, (4) such fear precluded decedent from exercising her free will in naming the proponent's sister as a legatee or fiduciary.

With respect to undue influence, the *Rosasco* court found that the decedent, at the time she executed her will, suffered no mental infirmity, lived communally with her sisters and survived an additional eight or more years after the execution of the propounded instrument. The court held that there was no showing of a confidential relationship, and at most the proponent was part of decedent's overall support system. In the absence of actual exercise of undue influence on a weakened mind or abuse of a confidential relationship, summary judgment was granted on the objection based upon so-called "classic undue influence."

The *Rosasco* court has provided the bar and the judiciary with a "tutorial"<sup>11</sup> on the concept of duress as a ground to invalidate a will. The *Rosasco* court has provided an additional service to all in unraveling the historical blur in the distinction between undue influence and duress.

#### Inheritance Disqualifications

How the law continues to deal with duress and its manifestations in spousal abuse, child abuse and physical, mental and financial abuse and neglect of the elderly and persons with disabilities is an evolving process. Some states have enacted statutes that disqualify and bar from inheritance persons who have abused decedents. California, Illinois, Maryland and Oregon have statutes that bar inheritance based upon various forms of abuse. Whether any similar disqualification statutes should be enacted in New York is a matter of discretion for the Legislature.<sup>12</sup>

Duress as a separate and distinct objection, as explicated by the *Rosasco* court, remains the best doctrine under existing probate contest law to address situations where the proponent of the will has threatened or engaged in coercive conduct or abuse.

**C. Raymond Radigan** is the former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek. He served as chair of the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act. He can be contacted at [crayradigan@rmfpc.com](mailto:crayradigan@rmfpc.com). **Peter K. Kelly** is of counsel to Ruskin Moscou. He can be contacted at [pkelly@rmfpc.com](mailto:pkelly@rmfpc.com).

#### Endnotes:

1. [Matter of Covert](#), 97 N.Y. 2d 68 (2001); *Riggs v. Palmer*, 115 N.Y. 506 (1889).
2. See for example, [Matter of Ferrara](#), 7 N.Y. 3d 244 (2006).
3. See, *Matter of Rosasco*, 31 Misc.3d 1214(A) (Surrogate's Court 2011), quoting Ronald J. Scalise, "[Undue Influence and the Law of Wills](#)," 19 Duke J. Comp and Int. L. 41 (2008).
4. See, 2 NY Pattern Jury Instructions 2d (PJI 2d) Sections 7:45 to 7:65.
5. [Matter of Kaufman](#), 20 A.D. 2d 464, 482-483 (1st Dept. 1964), aff'd 15 N.Y. 2d 825 (1965).
6. *Matter of Kaufman*, supra; *Rollwagen v. Rollwagen*, 63 N.Y. 504, 519 (1876).
7. *Matter of Rosasco*, supra.
8. See, 2 Harris, N.Y. Estates, Probate, Admin & Litigation, §24:48 (6th edition).
9. *Rosasco* at fn 14.
10. 2 Harris, N.Y. Estates: Probate Administration & Litigation §24:48 (6th ed.).
11. Harris, supra, §24:48.
12. Elder abuse is a bar to inheritance in four states. Cal. Prob. Code §3-111; Oregon Rev. Statutes Ann. §§112.455-466; Illinois Comp. State Ann. 5/2-6.2(b); Md Code Ann., Crim. Law §8-801(a) (10); child abuse is a bar to inheritance in all states that have enacted Uniform Probate Code §2-114(a)(2).