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Expert Analysis

The Facts and Misconceptions Between Undue Influence and Mental Capacity

By **C. Raymond Radigan**

And **John G. Farinacci**

Litigants in Surrogate's Court cases and Supreme Court guardianship matters often bring claims challenging transactions to which elderly and infirm individuals were parties. Will contests are an obvious example of this as they have been around for time immemorial and they almost always include claims that the testator lacked the requisite mental capacity to form a testamentary instrument and that the will was the product of undue influence.

These same claims are applied in other contexts too, such as challenges to transactions that confer some pecuniary benefit or another, such as inter vivos asset transfers, contracts, the formation of trusts, and even marriages, to name just a few.

As such, there exists a long and storied body of law that has developed around these cases, and yet, there remains confusion about the relationship between the distinct claims of incapacity and undue influence.

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One reason for this confusion is that proof of a person's diminished mental status is often common to both claims. This leads to the common misconception that the party claiming undue influence must first show that the subject individual lacked legal capacity to enter into the challenged transaction.

Further adding to the confusion is that the level of legal capacity required to enter into transactions varies depending on the nature of the transaction. For example, unlike most challenges to capacity, where capacity is presumed and the burden of proof is on the one claiming incapacity, the initial burden of proving testamentary capacity rests with the proponent of the will, as in *Matter of Friedman*, 26 A.D.3d 723 (3d Dept), *lv to app den*, 7 NY3d 711 (2006). The proponent must show that the decedent understood the nature and consequences of making a will, knew the nature and extent of the property being disposed of, and knew who would be the natural objects of his or her bounty and his or her relationship to them. Testamentary capacity is considered the lowest level of capacity known in law, see *Matter of Safer's Will*, 29 A.D.2d 725, 726 (2d Dep't 1963) ("less mental faculty

C. RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* JOHN G. FARINACCI, *a partner with the firm, represents clients in all aspects of trust and estate law, including estate planning, probate, estate and trust administration, Surrogate's Court practice and guardianships.*

is required to execute a will than any other legal instrument").

On the other hand, the level of capacity required to, for example, enter into a civil contract is generally considered to be higher than testamentary capacity. To enter into a contract one must be capable of "comprehending and understanding the nature of the transaction at issue," see *Smith v. Comas*, 173 A.D.2d 525, 535 (2d Dep't 1991).

Trusts are in essence contracts between grantor and trustee and, historically, the higher degree of capacity has been required. However, some modern cases hold that whether contract capacity or testamentary capacity should apply to trusts depends on whether the trust is more like a will or a contract in its substance, see *Matter of Donaldson*, 38 Misc. 3d 841 (Sur. Ct. Richmond Cty. 2012).

Marriages are also civil contracts, see *Matter of Dot E.W.,* 172 Misc.2d 684, 691 (Sup. Ct. Suffolk Cty. 1997). A party lacks capacity to a marriage where he is unable to "comprehend the significance of the decision to marry," that is, he cannot understand "the nature, effect and consequences of the marriage, " see *Levine v. Dumbra*, 198 A.D.2d 477, 477-78 (2d Dep't 1993).

It is clear from the foregoing examples that depending upon the nature of the transaction, there are nuanced differences in the level of proof that a challenger of a transaction would have to adduce to show incapacity. The same is not true of an undue influence claim because, while a person's mental status is certainly relevant to an undue influence claim, legal incapacity is not an element of undue influence and it is not necessary to prove legal incapacity to prove undue influence.

To understand this distinction, it is important to understand exactly what undue influence is, why it differs from an incapacity claim and how it can be proven.

"Undue influence has been defined as any improper constraint, urging, or persuasion whereby a decedent's will is overcome and he or she is induced to do an act with reference to the disposition of his or her property which he or she would not do if left to act freely and of his or her own volition," 39 NY Jur. Decedents' Estates § 513; undue influence "is seldom practiced openly but it is, rather, the product of persistent and subtle suggestion imposed on a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another," see *Matter of Panek*, 237 A.D.2d 82, 84 (4th Dep't 1997).

It has been held that: Mental competence and undue influence are distinct issues. Mental incapacity implies the lack of intelligent mental power; while undue influence implies within itself the existence of a mind of sufficient mental capacity to make a will, if not hindered by the dominant or overriding influence of another in such a way as to make the instrument speak the will of the person exercising undue influence, and not that of the testator, see *Weber v. Burman*, 880 N.Y.S.2d 228, 228 (Sup. Ct. Nassau Cty. 2008) (emphasis added).

Indeed, "even though a testator possesses sufficient capacity to make a will, the testator may not be strong enough to ward off undue influence."

Consistent with the foregoing, the Second Department has held that even where there is a "paucity of evidence of incapacity," an undue influence claim may still be proven and must be submitted to the jury, see *Matter of Donovan*, 47 A.D.2d 923, 923 (2d Dep't 1975). In fact, it is reversible error not to consider the merits of an undue influence claim even where lack of capacity has not been proven.

The foregoing notwithstanding, the Second Department has also made it clear that the fact that an individual has capacity "should not preclude [the jury] from considering the testator's mental, emotional or physical condition in deciding whether he had succumbed to undue

influence." This precept is an outgrowth of the well-established notion that "undue influence is not often the subject of direct proof," as in *Rollwagen v. Rollwagen*, 63 N.Y. 504, 519 (1876). Instead, it can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. (Court of Appeals affirming the denial of probate of a will benefitting the decedent's housekeeper on the basis of undue influence, noting that the housekeeper "was alone with [decedent] and had every opportunity, in the helpless condition of his body and the enfeebled condition of his mind and will, to impose upon him and to subdue him entirely to her will").

"In deciding the question of undue influence, the question of the strength of testator's mind is an important factor," see *Matter of Gnirrep*, 2 A.D.2d 404, 407 (3d Dep't 1956). "The extent of the influence necessary to overcome the volition of a particular individual will vary in direct proportion to his or her strength of mind and body; that which a normal healthy person would brush aside with ease might be more than ample to overcome the resistance of one in extremis," see *Matter of Chinsky*, 268 N.Y.S. 719 (Sur. Ct. Kings Cty. 1934). Put another way, "the influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired," see *Matter of Rosasco*, 31 Misc.3d 1214(A) (Surr. Ct. N.Y. Cty. 2011) (quoting *Rollwagen v. Rollwagen*, 63 N.Y. 504, 519 (1876)) (emphasis added).

These cases tell us that while a person's diminished mental status can be a factor (and is often an important factor) in showing susceptibility to undue influence, it is not a required element of proof.

Applying these principles, the Second Department has upheld a jury verdict that was not based on proof of lack of mental capacity, but instead on the following facts: the testimony at the trial indicated that the testator, approximately 90 years old at the time of the execution of the will, suffered from a number of physical infirmities consistent with a man of his advanced age. Additionally, several witnesses' testimony established that around the time of the execution of the will, the testator was variously described as being "upset," "in space" and a "beaten individual."

In sum, these cases tell us that while a person's diminished mental status can be a factor (and is often an important factor) in showing susceptibility to undue influence, it is not a required element of proof. Indeed, in some circumstances it is not even required to demonstrate diminished mental capacity because other weaknesses can cause a person to fall prey to an undue influencer while his or her cognition remains intact. Understanding this is vital to avoid prosecuting these two claims in such a way that there is a general belief that undue influence case will rise or fall on proof of legal incapacity.