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COMMENTARY AND DIALOGUE

Re-Considering Undue Influence in the Digital Era

Jodie Distler*

In a thought-provoking article (the “Article”) sitting in the intersection of legal scholarship and psychological study, Dominic J. Campisi, Evan D. Winet, and Jake Calvert explored the understanding of a person’s susceptibility to undue influence and the methods by which an influencer can intentionally or unintentionally exploit common human behavior to the influencer’s own benefit.¹ Campisi, Winet, and Calvert apply the six basic categories of persuasion tactics from Robert Cialdini’s, *Influence: The Psychology of Persuasion*² to the decision-making processes involved in lifetime and testamentary asset transfers. They caution that “in evaluating the susceptibility of people to undue influence and elder abuse tactics, it is important to focus on the actual cognitive processes by which most people make decisions.”³ The author agrees with this advice and further argues that the emerging laws authorizing electronic estate planning documents, remote notarization, and e-signature processes could increase the opportunity for undue influence by allowing influencers, in the absence of attorney involvement in the estate planning process, to leverage those principles of persuasion.

Humans have developed shortcuts like heuristics, dual system decision making, and other mental tools to deal with complex decisions based on little information.⁴ These mental shortcuts enabled us to survive and flourish, but “[o]lder adults may rely more on strategies that use biases or heuristics to help make decisions than do younger adults.”⁵ Shortcuts assist in quick decision making but are vulnerable to manipulation, making the elderly a target for various forms of elder abuse. By 2030, the entirety of the baby boomer generation will have reached age

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¹ Dominic J. Campisi, Evan D. Winet, & Jake Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L.J. 359, 360 (2018).

² *Id.* at 371-80; ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* at VII (Pearson Educ. 2013, 5th ed. 1984).

³ Campisi et al., *supra* note 1, at 383.

⁴ *Id.* at 361.

⁵ *Id.* at 370; COMM. ON PUB. HEALTH DIMENSIONS OF COGNITIVE AGING, INST. OF MED. OF THE NAT’L ACADS., *COGNITIVE AGING: PROGRESS IN UNDERSTANDING AND OPPORTUNITIES FOR ACTION* 234 (Dan G. Blazer et al. eds., 2015).

65 and 1 in every 5 U.S. residents will be retirement age.⁶ The potential for widespread fraud and abuse has been recognized by lawmakers. The Elder Justice Act signed into law in 2009 provides a definition of elder abuse, neglect, and exploitation which includes “the fraudulent or otherwise . . . improper act or process of an individual . . . that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.”⁷ The American Bar Association identifies abrupt changes in a will or other financial documents as a possible indicator of fraud.⁸

The concepts of capacity and undue influence are often important issues in cases of possible financial elder abuse. Both are legal and medical concepts. Capacity generally refers to the ability to make decisions and the level of capacity necessary varies based on the type of decision at issue. The legal definition of undue influence varies by state, but can be summarized as “influence which deprives a person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own.”⁹ When examining cases of undue influence, courts commonly consider whether a person had diminished capacity. The presence of diminished capacity provides an explanation of why the alleged victim was vulnerable to or unable to resist the influence. The individuals surrounding the victim – lawyers, advisers, friends, and family – are often consulted to determine the victim’s capacity. In addition, when a particular instrument is called into question like a will, the witnesses to the will may be consulted.

The formalities of will execution, including witnessing, have evolved over the course of centuries, being formalized by the English Statute of Wills and the Statute of Frauds but having roots deep in the evolution of property and inheritance laws in general.¹⁰ The functions of these formalities include an evidentiary function (providing proof of execution), ritual function (establishing deliberative testamentary intent),

⁶ Jonathan Vespa et al., *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf, at 1 (Mar. 2018).

⁷ Elder Justice Act of 2009, Pub. L. No. 111-148, § 2011, 124 Stat. 782, 783 (2010).

⁸ Lori A. Stiegel, *Legal Issues Related to Elder Abuse: A Desk Guide for Law Enforcement*, https://www.americanbar.org/content/dam/aba/administrative/law_aging/ABA_ElderAbuseDeskGuide.authcheckdam.pdf, at 14 (2015).

⁹ Daniel C. Marson, Justin S. Huthwaite & Katina Hebert, *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 L. & PSYCHOL. REV. 71, 78 (2004) (quoting HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 1697-98 (4th ed. 1968)).

¹⁰ See JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 226 (8th ed. 2009).

and protective function (ensuring free will).¹¹ The idea that witnesses to a will execution can verify the testator's free will is a foundational element of will formalities. Free will presupposes freedom from undue influence and therefore unadulterated capacity.

However, the Article suggests a much wider net must be cast when investigating potential cases of undue influence. As a person's reliance on mental shortcuts increases with age, the susceptibility to persuasive tactics can also increase. A person may have undiminished intellectual capacity, but due to age, isolation, or just personality quirk, that person can be manipulated. This manipulation can rise to the level of undue influence or financial elder abuse. The victim need not have a medical or other condition creating an unusual susceptibility.

Our increasingly digital lives make identifying undue influence more difficult. Many tasks of our daily lives are routinely performed online. Recognizing this trend, national laws and models have emerged to make it easier to conduct business electronically, although initially these laws excluded the traditional estate planning documents.¹² Eager to appease a growing demand, states have slowly started to address electronically signed wills. Nevada authorized electronic signatures in 2001,¹³ but New Hampshire,¹⁴ Virginia¹⁵ and Florida¹⁶ introduced legislation that was eventually defeated. Arizona's statute allowing the electronic wills takes effect on July 1, 2019.¹⁷ Indiana has passed one of the most sweeping authorizations of electronic wills, trusts, and powers of attorney, permitting not only the electronic execution of these documents, but also the electronic preparation and storage of the documents.¹⁸ With each legislative attempt, a key concern was protecting the testator from undue influence by adhering to the traditional formalities of will execution.

The Electronic Wills Drafting Committee of the Uniform Law Commission also is grappling with the adherence to will formalities in the course of creating model legislation for electronically signed wills,

¹¹ Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 *YALE L.J.* 1, 5-13 (1941).

¹² See Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) and UNIF. ELEC. TRANSACTIONS ACT (UNIF. LAW COMM'N 1999).

¹³ NEV. REV. STAT. § 133.085 (2018).

¹⁴ Dan DeNicuolo, *The Future of Electronic Wills*, 38 *BIFOCAL* 76 (2017).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ARIZ. REV. STAT. ANN. § 14-2518 (2018).

¹⁸ IND. CODE § 29-1-21-1 (2018) (will); § 30-4-1.5-1 (trust); § 30-5-11-1 (power of attorney).

currently referred to as the Electronic Wills Act.¹⁹ Much of the focus of the Electronic Wills Act and the state statutes authorizing electronic wills has been attempting to preserve the “protective function” of those formalities.²⁰ However, as our understanding of cognitive processes grows, it becomes less reasonable to believe the witness requirement can protect the testator against undue influence.

Because “[d]rafting a will or trust involves expert knowledge incomprehensible to most lay people,”²¹ attorneys historically have been intimately involved in the construction of their clients’ estate plans and the subsequent drafting and execution of the estate planning documents. In attorney-involved estate planning, the attorney has had the opportunity to interact with the client and assess his or her capacity over the period of time necessary to prepare the estate plan and draft the estate planning documents. The attorney can observe the client and conclude, based on this set of observations, whether the client has been subject to undue influence. The attorney, acting as the client’s advocate, serves as a prophylactic against undue influence. While, a witness may easily observe physical coercion or obvious mental incapacity, even an astute witness would have difficulty spotting undue influence as subtle as those described in the Article²² and even more difficulty determining if the testator’s will was so overcome that he or she lacked testamentary capacity. When a will is electronically prepared, signed, and stored, only the formalities for execution - two witnesses attesting to the testator’s signature, age, soundness of mind, and free will - memorialize the client’s capacity.

Although the Electronic Wills Act in its current draft form is intended only for use in executing wills,²³ one can reasonably foresee more states following Nevada and Indiana’s lead in permitting the drafting and storage of wills electronically. As we navigate the era of the largest wealth transfer in history, it is foolish not to anticipate the emergence and growth of companies looking to bring new services onto market to tap into the estimated 64% of the adult population currently

¹⁹ *Electronic Wills Act*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5713cffd-8bf2-e628-4469-aa8152b81931&forceDialog=0> (draft dated Oct. 24, 2018) (last visited Dec. 28, 2018).

²⁰ See Memorandum from Suzy Walsh, Turney Berry, and Susan Gary to the Elec. Wills Drafting Comm. (Nov. 16-17, 2018), http://www.uniformlaws.org/shared/docs/electronic%20wills/2018nov_E-Wills_Issues%20Memo.ADA.pdf.

²¹ Campisi et al., *supra* note 1, at 384.

²² See *id.* at 359, 383-84.

²³ See *Electronic Wills Act Draft*, *supra* note 19, at 2.

without wills.²⁴ The issue facing state legislatures, practitioners, and advisers in drafting this legislation is how to adequately protect the testator from financial elder abuse in the absence of independent third party advice and observation. Relying on a witness to identify and prevent undue influence is ineffective outside of cases of obvious incapacity and, as the Article suggests,²⁵ even diminished capacity is not a necessary element for undue influence. As the debate continues and laws emerge and evolve, the best protection for testators will continue to be an experienced estate planning attorney.

²⁴ Jeff Reeves, *Plan ahead: 64% of Americans don't have a will*, USA TODAY, July 11, 2015, <https://www.usatoday.com/story/money/personalfinance/2015/07/11/estate-plan-will/71270548/>.

²⁵ Marson et al., *supra* note 9, at 83; *see also* Stiegel, *supra* note 8, at 23, 30.

