

# UNDUE INFLUENCE:

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## What Property Lawyers Should Know

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# SCENARIO

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You have represented a client for many years who is the pastor of a nearby church that you also attend. One day, Pastor calls you about an elderly woman in the congregation who wants to make a will, but she is in poor health and is homebound. You go to visit the woman at her house and are greeted by Pastor, who is there for moral support. You learn that the woman lost her husband a few years ago and her kids live out of state, so members of the church—led by Pastor—have been helping her as her health declined over the past year. Pastor even comes to her house every day to pray with her.

After visiting with the woman for a little while, you ask how she would like to see her estate distributed upon her death. She says, “Well, I might leave a few things to my kids, but I want everything else to go to Pastor’s church.” Pastor pipes up and says, “I hope you’re not just saying that because I’m here! You can do whatever you want with your money. I’m just here to offer whatever support or advice you might need.”

# SCENARIO

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You tell the woman, “Pastor is absolutely right. This is your decision, and you should make sure it’s what you really want. How about you sleep on it and call me tomorrow with your thoughts?” The woman agrees, and you leave.

The next day, you get a call from Pastor, who says, “I’m here with Ida Mae, who thought things over like you suggested and wanted to give you a call.” Pastor then hands the phone to Ida Mae, who says, “I thought it over, and I still want to leave most everything to the church. I’ve written out notes for some other terms of the will, and Pastor will bring them to you.”

A few hours later, Pastor comes to your office with the notes Ida Mae mentioned, which detail a few gifts to make to her children and a few friends. You and Pastor talk for a while about her notes to make sure you understand them correctly, then he leaves.

# SCENARIO

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When you finish the draft of Ida Mae's will, you mail it to her home address. A few days later, Pastor calls you and says, "Ida Mae has looked over the draft you sent her and is ready to sign it. If you're able to come over to her house tomorrow afternoon at 3:00, I can bring a couple members of the congregation to serve as witnesses." You agree and make plans for the will execution ceremony the next day.

The next afternoon, you go to Ida Mae's house. Pastor greets you at the door and leads you to the kitchen, where Ida Mae is talking with the two witnesses Pastor brought from the church. Since everyone is already together, you conduct the signing ceremony, give the original will to Ida Mae, and leave. Ida Mae dies six months later.

**Question: If Ida Mae's children challenge her will on grounds of undue influence, how do you think the court will rule?**

# WHAT DO YOU THINK?

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**VALID**

**INVALID**

**YOU MIGHT BE ASKING YOURSELF...**

**What the hell is undue influence?**



## UNDUE INFLUENCE

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*“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 . . . [transfer they] would not otherwise have made.”*

# ELEMENTS OF CONTRACT OR WILL

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## ✓ Formalities

*Contract: offer, acceptance, and consideration.*

*Will: either (1) writing, signature, and witnesses, or (2) handwriting, signature, and date.*

## ✓ Capacity

*Contract: ability to understand consequences of the transaction.*

*Will: ability to understand, in a general way, extent of property and objects of bounty.*

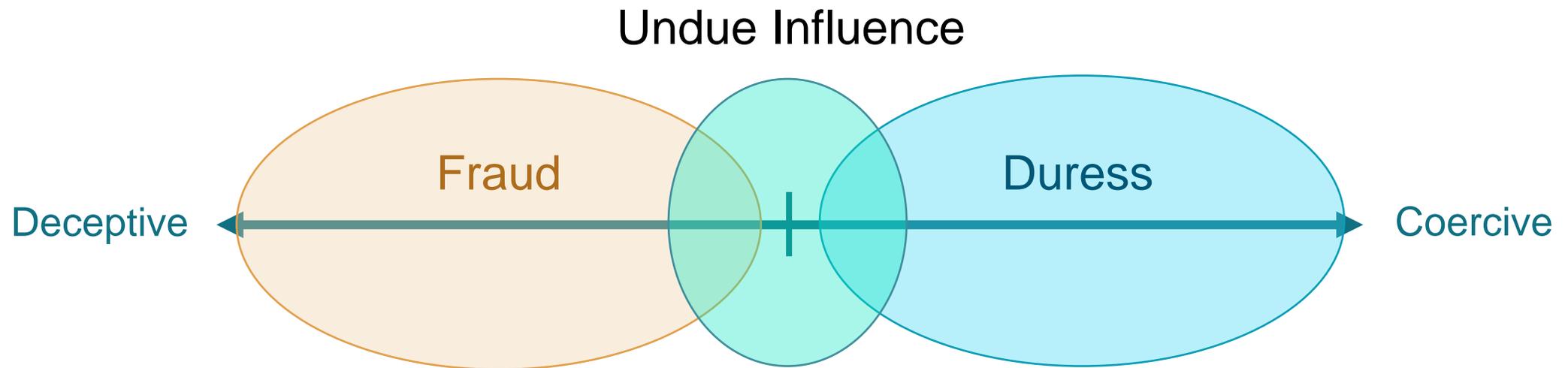
## ✓ Intent

*Contract: contractual intent.*

*Will: testamentary intent.*

# CHALLENGING A CONTRACT OR WILL

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# WHAT INFLUENCE IS UNDUE?

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Undue influence is that degree of influence “which destroys the testatrix’s free agency,” effectively “substitut[ing] another’s will for that of the testatrix’s” and causing her to make a donative transfer she would not otherwise have made.<sup>1</sup>

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1. *In re Estate of Sneed*, 1998 OK 8, ¶ 17, 953 P.2d 1111 (citing *Hubbell v. Houston*, 1967 OK 138, 441 P.2d 1010)

# HOW DO YOU PROVE IT?

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- There is rarely direct evidence of undue influence, only circumstantial.
- For that reason, courts have long used inferences and burden-shifting presumptions to aid them in assessing such claims.
- Important to understand the distinction:
  - **Inference** – something the trier of fact *can*, but is not *required* to, rely on as definitive fact.
  - **Presumption** – something the trier of fact *must* rely on as definitive fact, unless rebutted.

# RAISING AN INFERENCE

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- Circumstantial evidence is generally sufficient to raise an *inference* of undue influence, where the following factors are present:
  - donor was **ssusceptible** to influence of others;
  - influencer had **oppportunity** or ability to exert influence over donor;
  - influencer had a **disposition** to exert influence of a nature that would cause donor to make disposition contrary to her own desires; and
  - **resulting** disposition appears to be product of the undue influence.<sup>2</sup>
- Not determinative of undue influence but objective indicia to guide court.

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2. See 1 R. ROBERT HUFF, OKLAHOMA PROBATE LAW AND PRACTICE § 6.2, at 89 (3d ed. 1995)

# RAISING A PRESUMPTION

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- A rebuttable *presumption* of undue influence will arise where:
  - a “**confidential relationship**” existed between the donor and another, stronger party; and
  - the stronger party “**actively assisted**” in procuring the disposition.<sup>3</sup>
- Confidential relationship can come in many forms, but hallmarks are reliance by donor or influence and/or control by influencer over donor.
- Not necessary for influencer to personally benefit from instrument.<sup>4</sup>

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3. *In re Estate of Holcomb*, 2002 OK 90, ¶ 18, 63 P.3d 9 (citing *In re Estate of Maheras*, 1995 OK 40, ¶ 9, 897 P.2d 268)

4. *In re Estate of Maheras*, 1995 OK 40, ¶ 11, 897 P.2d 268

# REBUTTING THE PRESUMPTION

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- Once raised, burden shifts to proponent to show mitigating circumstances.
- Oklahoma Supreme Court has cited two primary factors sufficient to rebut a presumption of undue influence:
  - receipt by the donor of **independent and competent legal advice**; or
  - termination of confidential relationship prior to execution of instrument.<sup>5</sup>
- Advice is “independent” when donor consults “fully and privately about [the matter] with a person so dissociated from the stronger party that the advice may be treated as having been given impartially and confidentially.”<sup>6</sup>

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5. *In re Estate of Holcomb*, 2002 OK 90, ¶ 31, 63 P.3d 9

6. *In re Estate of Maheras*, 1995 OK 40, ¶ 9, 897 P.2d 268

# WHAT DO YOU THINK?

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**VALID**

**INVALID**

# IS PRESUMPTION RAISED?

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- Was there confidential relationship between Pastor and Ida Mae?
- Did Pastor actively assist in procurement of the will?
- Did Ida Mae receive “independent and competent” legal advice?
- Did the confidential relationship end prior to the will’s execution?

# What should have happened?

# ETHICAL IMPLICATIONS

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- Front-End “**Protective**” Implications:

- Duty of competence
- Duty of confidentiality
- Conflicts of interest



Only covering these today

- Back-End “**Evidentiary**” Implications:

- Lawyer as witness

# DUTY OF COMPETENCE

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A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.<sup>7</sup>

# DUTY OF CONFIDENTIALITY

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(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing: (i) a crime; or (ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another . . . .<sup>8</sup>

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8. Rule 1.6(a),(b), Oklahoma Rules of Professional Conduct

# DUTY OF CONFIDENTIALITY

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When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.<sup>9</sup>

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9. Rule 1.14(b), Oklahoma Rules of Professional Conduct

# DUTY OF CONFIDENTIALITY

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“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>10</sup>

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10. Rule 1.0(e), Oklahoma Rules of Professional Conduct

# CONFLICTS OF INTEREST

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A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.<sup>11</sup>

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11. Rule 1.8(f), Oklahoma Rules of Professional Conduct

# CONFLICTS OF INTEREST

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A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.<sup>12</sup>

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12. Rule 5.4(c), Oklahoma Rules of Professional Conduct

# Why does undue influence matter?

# A GROWING PROBLEM

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**1 in 6**

*Seniors (age 60+) suffer abuse/exploitation each year <sup>13</sup>*

**20-40%**

*Cases involve financial exploitation, including undue influence*

**\$2.9-35B**

*Estimated annual loss to seniors from known instances of exploitation*

**1 in 23.5**

*Instances of elder financial abuse go unreported <sup>14</sup>*

**IMPACT**

13. NATIONAL CENTER FOR ELDER ABUSE, *Research, Statistics, and Data*, <https://bit.ly/3zqrjLv>

14. Paul Bischoff, *The United States of Elder Fraud*, COMPARITECH (Jan. 11, 2022), <http://bit.ly/3GYJf44>

# SOME BEST PRACTICES

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- ✓ **Know Warning Signs**
- ✓ **Be Candid With Client**
- ✓ **Visit With Client Alone**
- ✓ **Minimize Third-Party Involvement**
- ✓ **Get Second Opinion**
- ✓ **Advise Client of Potential Challenges to Will**

# QUESTIONS?

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