Balancing Testamentary Incapacity and Undue Influence: How to Handle Will Contests of Testators With Diminishing Capacity

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I. INTRODUCTION

As the baby boomer population ages—and accordingly, there is an increase in the number of people who suffer and die from the effects of
Alzheimer’s disease—a estate planning and probate attorneys will likely more often be faced with the following scenario.

A young attorney (Attorney)—specializing in wills and probate—has a prospective client (Beneficiary) contact him to contest a will. Beneficiary’s mother (Mother) recently died from complications stemming from Alzheimer’s disease. Divorced, Mother lived alone for the past twenty years. Beneficiary is a successful businessman. After graduating high school, he moved out of state to attend college and began a lucrative career in wealth management. Beneficiary has one sibling, a sister (Sister), who is three years younger than him. She has not been quite as successful as her older brother. Sister attended a local community college but never graduated. She is currently unmarried and earns a modest hourly wage at a “big-box” retail store. Sister has lived at Mother’s home for the past six years.

Neither Beneficiary nor Sister knows exactly when Mother began showing symptoms of diminished capacity associated with Alzheimer’s disease. As new attorneys enter the legal profession, they should consider that this shift toward an increasingly older population is expected to endure. "By 2056, the population 65 years and over is projected to become larger than the population under 18 years . . . ." Id. To put this in perspective, “[b]y 2030, about one in five Americans will be older than 65.” HISTORY.COM, supra note 1.


Alzheimer’s disease is an irreversible, progressive brain disorder that slowly destroys memory and thinking skills and, eventually, the ability to carry out the simplest tasks. In most people with Alzheimer’s, symptoms first appear in their mid-60s. Alzheimer’s disease is the most common cause of dementia among older adults. Id. Note that “[d]ementia is not itself a disease but is the name given to a group of symptoms including memory loss, reduced ability to reason, impaired judgment, and progressive loss of ability to understand either spoken or written language.” JAMES, supra note 3, at 4. Alzheimer’s disease is a form of dementia. Id. at 7.

People with Alzheimer’s disease do not die from the disease itself; rather, they pass away as a result of physical and mental changes in the patient, including malnourishment and pneumonia. See JAMES, supra note 3, at 34.
Sister first noticed that Mother began to forget things about eight years ago. Believing it was just a natural characteristic of old age, Sister thought nothing of it. But about a year later, Sister noticed Mother’s forgetfulness was increasing. Mother started getting lost while driving and often would appear confused and moody when Sister would come to visit. It was at this time that Sister began to suspect Mother might be developing some form of dementia. Mother’s primary care physician, along with a psychiatrist who specializes in dementia, diagnosed Mother with Alzheimer’s disease.

Both Sister and Beneficiary were devastated. Believing that it would be in Mother’s best interest, the two agreed that Sister should move in with Mother to care for her. Sister moved in about a month later and, being the loving and proactive daughter that she is, took Mother to their family

6. In the first stage of Alzheimer’s disease, there may be no noticeable signs or symptoms to the observer. Id. at 26. But as destruction of nerve cells in the brain worsens, the person generally shows more noticeable changes in behavior, including “memory loss, difficulty reasoning, poor judgment, language difficulties, confusion about time and space, a decreasing ability to interpret sensory stimuli, an inability to concentrate, loss of initiative, extreme mood changes, and changes in personality.” Id. at 26–27. For a detailed examination of Stage 1 mild Alzheimer’s symptoms, see id. at 27–33.

7. Problems with memory are “typically one of the first warning signs of cognitive loss, possibly due to the development of Alzheimer’s disease.” Alzheimer’s Disease Educ. & Referral Ctr., Alzheimer’s Disease Fact Sheet, NAT’L INST. ON AGING 2, http://www.nia.nih.gov/sites/default/files/alzheimers_disease_fact_sheet_1.pdf (last updated Sept. 2012). In Stage 1 of the disease, the memory loss is primarily of recent events, which may interfere with daily functioning and completing important life tasks, such as paying bills and keeping appointments. JAMES, supra note 3, at 27. But “while the person is unable to recall recent events, he or she can still remember things that occurred a long time ago, such as during childhood or young adulthood.” Id.

8. As some people age, they develop a condition that affects memory called amnestic mild cognitive impairment (MCI). Alzheimer’s Disease Fact Sheet, supra note 7, at 2. While people with MCI experience some memory problems, their symptoms are not as severe as those seen in people with Alzheimer’s disease. Id.

9. See JAMES, supra note 3, at 30–32 (discussing how a person in Stage 1 Alzheimer’s disease may experience confusion about time and space, extreme mood changes, and changes in personality).

10. While there is no single test to determine whether someone has Alzheimer’s disease, “physicians can almost always determine if a person has dementia.” Diagnosis of Alzheimer’s Disease and Dementia, ALZHEIMER’S ASS’N, http://www.alz.org/alzheimers_disease_diagnosis.asp (last visited Sept. 1, 2015). But “diagnosing Alzheimer’s disease requires careful medical evaluation, including: a thorough medical history [check], mental status testing, a physical and neurological exam, [and] tests . . . to rule out other causes of dementia-like symptoms.” Id. “[A] skilled physician can diagnose Alzheimer’s with more than 90 percent accuracy.” Id.

11. Professor of Law Vaughn James asserts that aging in place (staying at home) may be the best option for people who have developed Alzheimer’s disease because they are familiar with the surroundings, and they would be less likely to become disoriented at home than if they moved elsewhere. JAMES, supra note 3, at 183–84. He further notes “[s]ome studies suggest that this decreased disorientation may slow the disease’s progress.” Id.
attorney to redraft (and finalize) Mother’s will.12 Living far away, Beneficiary did not accompany them to the attorney’s office.

Mother’s former will designated Beneficiary as the executor13 and trustee14 of her estate, while it named Sister as the successor executor and trustee.15 Further, the former will devised the residue16 of Mother’s estate to Beneficiary and Sister in equal shares. But under the revised will, Mother designated Sister as the executor and trustee of the estate, while Beneficiary was relegated to the successor role. Even more disturbing to Attorney’s prospective client, Mother revised her will to devise her home (the house Mother and Sister had been living in at the time of Mother’s death) to Sister, while also bequeathing the remaining assets in equal shares between the two siblings.

Sitting in Attorney’s office, Beneficiary tells him that he believes Sister pressured Mother into revising the will to reflect a more favorable bequest to Sister.17 Knowing that his prospective client’s mother suffered from Alzheimer’s disease, the following questions arise for Attorney: (1) how to show that a decedent with Alzheimer’s disease lacked mental capacity at the time of signing and (2) how to prove undue influence in the execution of testamentary documents?18 Further, if found that the testator did indeed lack testamentary capacity, would he or she be susceptible to

12. While it is preferable to prepare and execute a will before the onset of Alzheimer’s disease, someone in Stage 1 or early Stage 2 would still most likely possess testamentary capacity. See JAMES, supra note 3, at 70–71 for a discussion about mental capacity to execute a last will and testament.

13. “Executor” is defined as “[t]he person nominated in a testator’s will to act as personal representative and ‘execute’ its provisions, carrying out the will’s directions regarding disposition of the testator’s estate.” MARK REUTLINGER, WILLS, TRUSTS, AND ESTATES: ESSENTIAL TERMS AND CONCEPTS 134 (2d ed. 1998). The executor acts in a fiduciary capacity, with varying degrees of supervision by the probate court. Id. at 134–35. Upon being named executor, that individual is usually appointed the “personal representative” of the estate by the probate court to administer the estate of the decedent. Id. at 134. Once the will has been probated, the personal representative must carry out the wishes of the decedent. Id. at 137. “For example, creditors must be identified, notified, and paid; legatees must be allocated their share of the estate, against which may be assessed a share of the expenses; a proper accounting must be made to the court and beneficiaries; and the estate must be closed.” Id.

14. The “trustee” is “[t]he person who ... holds and deals with trust property for the benefit of another (the beneficiary).” Id. at 155. As in the case of most wills, the trustee may also be a beneficiary. Id.

15. The successor executor and trustee succeeds an earlier executor and trustee, usually provided in the will or trust agreement. Id.

16. “[R]esidue” is the fund containing “whatever remains in the estate after the payment of specific, general, and demonstrative gifts.” Id. at 43.

17. See generally infra Part IV (discussing undue influence in the execution of testamentary documents).

18. See discussion infra Parts II, IV.
undue influence notwithstanding having lacked the requisite capacity?\textsuperscript{19}

Lack of mental capacity is "the second most commonly alleged ground for setting aside a will."\textsuperscript{20} This Article will explore these ever-increasingly common, yet intricate and complex scenarios. First, Part II of this Article will give the reader a broad overview of the requisite mental capacity to execute a will.\textsuperscript{21} Additionally, because each state has its own unique—but similar—common law tests, sample case studies are provided for the jurisdictions of Missouri, New York, and Texas.\textsuperscript{22} Next, Part III will discuss the generally recognized presumption of requisite testamentary capacity—presumed across all jurisdictions—unless evidence is presented to show otherwise.\textsuperscript{23} Part IV of this Article will delve into various case law and common law tests used to prove the existence of undue influence in the execution of testamentary documents.\textsuperscript{24} Following, Part V attempts to answer the circular question challenging attorneys and courts of whether a testator can actually be unduly influenced if he or she lacked testamentary capacity.\textsuperscript{25} Upon conclusion, this Article will provide practical recommendations to consider when assisting persons with Alzheimer's disease and other forms of dementia execute testamentary instruments.\textsuperscript{26}

II. REQUISITE MENTAL CAPACITY TO EXECUTE A WILL

A testator may make a will, even if he or she is very old.\textsuperscript{27} But a will is not valid if, at the time of execution,\textsuperscript{28} the testator lacked the requisite
testamentary capacity. Simply stated, to possess requisite testamentary
capacity, at the time a person signs a will, that person must: (1) recognize
who are his or her family members and friends; (2) know the extent and
value of the assets he or she owns; (3) know to whom he or she wants to
make dispositions; and (4) understand that he or she is executing a will and
the implications of doing so.

This test, commonly known in U.S. jurisdictions as the Greenwood-
Baker test, stands as the recognized standard measure of testamentary
capacity. This approach was developed through two cases in early English
common law courts: Greenwood v. Greenwood and Harwood v. Baker. Although each state has its own case law version of the Greenwood-Baker
test, each variation contains generally the following three elements: "[(1)]
ability to know the natural objects of one’s bounty, [(2)] ability to know the
nature and extent of one’s property, and [(3)] ability to make a rational plan
for post-death distribution of that property." This legal standard is particularly important to consider when a will contest challenges the mental capacity of a testator with Alzheimer’s disease. If someone with Alzheimer’s has not executed a will before entering the latter stages of the disease, he or she will likely not have the

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29. The doctrine of testamentary capacity serves three protective functions to the testator: “(1) protection of the public from the irrational harmful acts of the incompetent, (2) protection of the family from unreasonable disinheritance, and (3) protection of the incompetent from his own erratic behavior.” Robert Gene Smith & Laurence M. Hager, The Senile Testator: Medicolegal Aspects of Competency, 13 CLEV.-MARSHALL L. REV. 397, 401 (1964) (citing Edwin M. Epstein, Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform, 35 TEMP. L.Q. 231, 232 (1962)).

30. JAMES, supra note 3, at 46–47. There are many versions of the formal elements of testamentary capacity that vary slightly. One of the earliest formulations of the legal test was set forth by Lord Cockburn in Banks v. Goodfellow:

[A] testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Banks v. Goodfellow, (1870) Q.B. 549 at 565 (Eng.).


33. See ROSS & REED, supra note 20, § 6:2 for generally accepted formulations of the Greenwood-Baker test in a complete state-by-state analysis with case law.

34. Id.

35. The National Institute on Aging breaks down the progression of Alzheimer’s disease into three broad stages: (1) mild, (2) moderate, and (3) severe. Alzheimer’s Disease Fact Sheet, supra note 7, at 3. But the Alzheimer’s Association has outlined common patterns of symptom progression into seven stages: (1) no cognitive impairment; (2) very mild decline, (3) mild cognitive decline, (4) moderate cognitive decline, (5) moderately severe cognitive decline, (6)
mental capacity to execute a will and, thus, will die intestate. However, someone with Stage 1 or early Stage 2 Alzheimer’s may still possess the requisite mental capacity to prepare and execute a will. One accompanying such a testator should “ensure that at the time the document is signed, the person possesses the requisite testamentary capacity” analyzed through the requirements listed in the paragraph above.

The key language here is “at the time the document is signed.” This is known as the “lucid moment” theory, which asserts that a person who lacks capacity may have a moment of perfect clarity and, thus, be able to function normally, even if only for a short period of time. This reasoning traces its origins all the way back to Roman law, where a testator “could not make a will if he or she was insane, unless the will was made during a lucid moment.” Early modern British legal scholars also agreed, postulating that “unless an old man had become so infirm of mind as to forget his own name, he could make a will.”

Whether before or after a will has been admitted to probate, the will contestant (usually a beneficiary) has the burden of proving that the testator lacked the requisite mental capacity at the time he or she executed the
However, mere proof that a person had dementia or Alzheimer’s disease at the time of execution does not per se show a lack of testamentary capacity. Rather, to prove mental incapacity, the will contestant must establish that, in light of all the surrounding facts and circumstances, the cognitive impairment rendered the testator incompetent. The following cases will provide the reader with some examples of generally accepted formulations and applications of the Greenwood-Baker test, showing variations of the rule from state to state.

A. Missouri: Lewis v. McCullough

In Lewis v. McCullough, the five children and only heirs of Eddie Lewis, the decedent, appealed a directed verdict denying their request that the will be set aside on account of the decedent’s alleged incapacity. Lewis died at the age of seventy-six; he executed his Last Will and Testament almost three years prior to his death. The will left only $200 to each of Lewis’s five children, but left the remainder in trust to Leona Conner, who was to be paid $60 per month as long as she lived. Connor, who was neither related to nor married to Lewis, was living with him at the time of his death.

The Supreme Court of Missouri set forth the standard for determining...
testamentary capacity as whether, at the time the testator executed the will, he or she was of sound mind, understood the ordinary affairs of life, knew the nature and extent of his or her property, and knew the persons who were the natural objects of his or her bounty while appreciating his or her natural obligations to those persons.\footnote{Id. at 505 (citing Morrow v. Bd. of Trs., 181 S.W.2d 945, 955 (Mo. 1944); Rex v. Masonic Home of Mo., 108 S.W.2d 72, 85 (Mo. 1937) (per curiam)).}

Further, the court pointed out that under Missouri common law, lay witnesses are not qualified to testify that, “in the opinion of such witness, a person is of unsound mind or insane, without first relating the facts upon which such opinion is based.”\footnote{Id. at 503–04 (citing various Missouri supreme court cases).} Simply stated, a lay witness cannot plainly testify that it is his or her opinion that a testator lacks capacity.\footnote{Id. at 504.} Rather, the witness must state specific facts and occurrences that show that the testator lacked capacity.\footnote{See id.} If the witness fails to establish a sufficient foundation of facts as a basis for his or her opinion of capacity, any such opinion is not admissible in evidence.\footnote{Id.} Furthermore, “evidence of sickness, old age, peculiarities, eccentricities in dress or oddities of habit, forgetfulness, inability to recognize friends, [and] feebleness resulting from illness” does not, in and of itself, constitute a basis to testify that a person lacked testamentary capacity.\footnote{Id. (emphasis added) (quoting various Missouri supreme court cases) (internal quotation marks omitted).}

In Lewis, two witnesses for the contestants testified that the decedent testator repeated his stories, made inconsistent remarks, glued patches on his overalls, wore a charm on his underclothing, and refused his son’s request for three dollars for transportation to the Veteran’s Administration Hospital by saying, “Honey, honey, honey, honey, no.”\footnote{Id. at 503 (internal quotation marks omitted).} The court held that none of these facts established a mental condition inconsistent with a sound mind.\footnote{Id. at 502–04.} The fact that testator repeated himself many times, made inconsistent statements, wore a charm, and glued patches to his clothing did not prove that he did not understand the ordinary affairs of life.\footnote{Id. at 505.} Furthermore, because the witnesses’ testimony did not support a proper foundation upon which their opinions of incapacity could be made, those opinions were properly not admitted into evidence by the court below.\footnote{Id. at 506; see id. at 503–04.}
B. New York: In re Estate of Kumstar

In In re Estate of Kumstar, the will contestant argued that several peculiarities in the decedent’s will, including a bequest to a deceased sibling, constituted sufficient evidence to warrant submission of the issue of testamentary capacity to the jury.\(^61\) New York’s high court set forth “the indisputable rule” to prove testamentary capacity, stating that a testator must (1) understand “the nature and consequences of executing a will;” (2) know “the nature and extent of the property [the testator] was disposing of;” and (3) know “those who would be considered the natural objects of [the testator’s] bounty and [his or] her relations with them.”\(^62\)

The decedent’s will contained a bequest to a brother “in Cuba, Cattaraugus County, New York,” who, in fact, was “long since deceased.”\(^63\) Further, the decedent made a bequest to establish trust funds in relatively small amounts, and he omitted “a specific devise of certain land to a historical site, contrary to a wish mentioned on several occasions.”\(^64\)

Decedent’s attorney, without knowing of decedent’s brother’s death, assumed that the intended beneficiary listed as “brother” was in fact decedent’s nephew—who bore the same name as decedent’s brother.\(^65\) The nephew and his two sisters were the sole heirs of the estate, and they also resided in Cuba, Cattaraugus County.\(^66\) The court held these minor errors and abnormalities were insufficient to warrant submitting the issue of testamentary capacity to the jury.\(^67\) Thus, a single error in a bequest, omission of a specific devise previously mentioned, and peculiarities in establishing trust funds did not, in and of itself, show a lack of requisite testamentary capacity.\(^68\)

C. Texas: Prather v. McClelland

The testator in Prather v. McClelland created a will that bequest a life

\(^{61}\) Harp v. Bruckert (In re Estate of Kumstar), 487 N.E.2d 271, 272 (N.Y. 1985) (“When there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the jury.”).

\(^{62}\) Id. (quoting Marine Midland Bank v Scallen (In re Will of Slade), 483 N.Y.S.2d 513, 514 (App. Div. 1984)) (internal quotation marks omitted).

\(^{63}\) Id. (internal quotation marks omitted).

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id. It is important to note that “[t]he subscribing witnesses and those who were close to decedent when the will was drafted each testified that decedent was alert and capable of understanding the nature of her actions[, and the] [decedent’s treating physician testified that it was his opinion, based on a reasonable degree of medical certainty, that decedent was competent when she signed the will.” Id.

\(^{68}\) Id. at 272–73.
estate of his homestead and all the property therein to his wife. He entrusted the rest of his estate to an executor to be managed for twenty-five years, with a provision for a home and monthly allowance to his son. Upon the testator's death, his widow contested the will (and subsequent codicil, which for the purpose of this analysis, this Article shall not discuss), claiming the executor had unduly influenced the decedent.

The Supreme Court of Texas recognized the lower court's jury charge to determine requisite testamentary capacity, which entailed a sufficient mental ability at the time of the execution of the will to (1) understand the nature and extent of the business he or she was engaged (the act of making a will), (2) understand the effect of making the will, (3) know the general nature and extent of his or her property, (4) to know the persons of which the bequests were made and "the persons dependent upon his bounty, and the mode of distribution among them," and (5) to have sufficient memory to assimilate "the elements of the business to be transacted, and to hold [those elements] long enough to perceive... their obvious relations to each other, and be able to form a reasonable judgment as to them."

A more recent Texas case simplifies proof of requisite testamentary capacity, requiring a showing that at the time the will was executed, the testator had sufficient mental ability (1) to understand the business in which he or she was engaged (the making of the will), (2) to understand the effect of the will, (3) to understand "the general nature and extent of his or her property," and (4) to know the "natural objects of his or her bounty" and the claims upon them. Further, in accordance with the lucid moment theory discussed supra, this court noted that "[t]he proper inquiry in a will contest on the ground of testamentary incapacity is the condition of the testator's mind on the day the will was executed." Thus, absent any direct testimony of "acts, demeanor, or condition indicating that the testator

69. A "life estate" is "an estate lasting for the lifetime of the transferee." REUTLINGER, supra note 13, at 95. When a testator bequests a life estate to a certain beneficiary, it is also necessary to name a second beneficiary who will receive the residue of the estate upon the death of the first (life estate) beneficiary. See GERRY W. BEYER, TEXAS WILLS AND ESTATES: CASES AND MATERIALS 354 (7th ed. 2015).
70. Prather v. McClelland, 13 S.W. 543, 544 (Tex. 1890).
71. Id.
72. Id. at 546.
73. Id.; see also Rothermel v. Duncan, 369 S.W.2d 917, 922–23 (Tex. 1963); Tieken v. Midwestern State Univ., 912 S.W.2d 878, 882 (Tex. App.—Fort Worth 1995, no writ).
75. See supra text accompanying notes 39–42.
76. In re Estate of Trawick, 170 S.W.3d at 877.
lacked testamentary capacity on the date the will was executed," the will is presumed valid.

III. THE PRESUMPTION OF TESTAMENTARY CAPACITY

Courts generally presume a testator has requisite capacity, shifting the burden of proof of lack of capacity to the person challenging the will. Courts usually will go one step further and presume a will "to be free from any taint of lack of capacity or undue influence." Additionally, certain courts in Texas, Missouri, and other states have held that a properly executed self-proving will satisfies the proponent’s burden of proof on capacity. For example, in Texas, the presumption of a valid will absent direct testimony of testamentary incapacity is derived from Spanish law, in which a testator is presumed to know the contents of a duly executed testamentary instrument "if the testator is (1) of sound mind, (2) able to read and write, (3) has the capacity to acquire knowledge of the contents of a document by exercising those faculties, and (4) executes the instrument..."
and has it witnessed as required by statute."\(^{81}\)

Thus, in a will contest, the trier of fact must presume the testator had requisite testamentary capacity at the time of execution of the instrument.\(^{82}\) However, courts are split when the introduction of evidence shows lack of capacity.\(^{83}\) In some jurisdictions, such as Massachusetts, Florida, and Georgia, the fact finder must treat the presumption of capacity as a "bursting bubble," which in essence, disappears upon the will contestant's production of evidence to the contrary.\(^{84}\) Other states, such as California, Kansas, Mississippi, Pennsylvania, and Tennessee, "treat the presumption of testamentary capacity . . . as if it survived adverse evidence."\(^{85}\) Simply stated, the trier of fact in a will contest would need to weigh the presumption of capacity against the weight of the evidence of lack of requisite testamentary capacity.\(^{86}\)

The presumption of testamentary capacity is not an easy burden to overcome.\(^{87}\) Even unrebutted evidence of very old age, physical incapacity, memory loss, personal untidiness, or peculiar or regressive behavior is generally insufficient evidence to overcome the presumption and show a

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82. See supra notes 77–80 and accompanying text.
83. See ROSS & REED, supra note 20, § 6:13.
86. See supra cases cited and text accompanying note 84.
87. State specific common law regarding the burden of proof for lack of testamentary is complex and varies from state to state. This analysis could not be summed up in terms of generalities, and thus, is beyond the scope of this Article. In keeping with the theme above discussing the controlling cases from Missouri, New York, and Texas, the following state-specific case studies are provided as examples, extracted from a case law survey of state jurisdictions:

Missouri: In a will contest, the proponent has the burden of establishing a prima facie case as to due execution and a prima facie case as to testamentary capacity. After the proponent has established a prima facie case, contestant, to make a case for the jury on the issue of due execution or testamentary capacity, is required to adduce . . . substantial evidence that testator's will was not duly executed or that testator lacked capacity.

New York: In a will contest, the proponent has the burden of proving that the testator possesses testamentary capacity.

Texas: The proponents of the admission of a will to probate have the burden to establish that all requisites to execution of the will have been complied with.

ROSS & REED, supra note 20, § 6:14 n.1 (citations omitted).
lack of testamentary capacity. And as previously discussed, the presumption of capacity survives the contestant’s introduction of contrary evidence; thus, evidence of lack of requisite testamentary capacity must be overwhelming.

IV. PROVING UNDUE INFLUENCE IN THE EXECUTION OF TESTAMENTARY DOCUMENTS

The concept of “undue influence” on a testator is a complex and often murky area of law. Courts have provided inconsistent definitions of the term, and judicial tests used to evaluate proof of undue influence have varied between jurisdictions. One generally accepted definition of undue influence is: “An act that has the effect of overcoming the testator’s free will in the execution of a testamentary instrument.” Simply put, undue influence is “influence that substitutes the wishes of another for those of the testator,” or influence that “destroys the free agency and will power of the testator.”

It is important to note that the mere exertion of influence upon a testator is not, in and of itself, undue just because it has the effect of persuading the mind of the testator. “Rather, there must be some element of fraud or coercion, mental or physical, which overrides the testator’s volition and substitutes that of the influencer.” While fraud and coercion are common elements of undue influence, rarely do allegations involve physical duress or psychological coercion. Most often, the alleged undue influencer “has inveigled his or her way into the testamentary plans of the

88. See, e.g., Green v. Holland, 657 S.W.2d 572, 575 (Ark. Ct. App. 1983) (“A testatrix’s old age, physical incapacity and partial eclipse of the mind will not invalidate a will if she had sufficient capacity to remember the extent and condition of the property and who her beneficiaries are.” (citing Griffin v. Union Trust Co., 266 S.W. 289, 292 (Ark. 1924))).
89. See supra text accompanying notes 84–85.
90. ROSS & REED, supra note 20, § 7:1.
91. REUTLINGER, supra note 13, at 55; see also Jan Ellen Rein-Francovich, An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes, 20 GONZ. L. Rev. 1, 33 (1985) (“Most judicial definitions of undue influence speak of domination of the testator’s mind which substitutes the influencer’s volition for that of the testator.”).
93. Sehr v. Lindemann, 54 S.W. 537, 540 (Mo. 1899) (“By ‘undue influence’ is meant such influence as amounts to force, coercion, or overpersuasion, which destroys the free agency and will power of the testator. It is not merely the influence of affection or desire to gratify the wishes of one who is near and dear to the testator.” (citing various Missouri supreme court cases)).
94. Id.
95. Id.
96. ROSS & REED, supra note 20, § 7:2.
testator. Further, it is immaterial when the undue influence took place if, in fact, it was a controlling factor on the mind of the testator at the time of execution of the will. Thus, it is not necessary that the person who exercised the undue influence on the testator be present when the will was made.

Courts agree that the existence of a confidential relationship between the testator and the alleged undue influencer is an essential element to consider in determining whether a testator's post-death distribution of assets was the product of undue influence. Most states define a confidential relationship as generally "a relationship in which the testator places special trust and confidence in the influencing beneficiary, rather than holding him or her at arm's length," or, put simply, "[a]ny relationship of trust and confidence." The relationship need not also be a fiduciary relationship, but the existence of a fiduciary relationship (such as a beneficiary attorney who drafts the decedent's will) creates a stronger argument for undue influence for the contestant. Typical examples of fiduciary relationships deemed confidential include that between a guardian and ward, attorney and client, and trustee and beneficiary. There is no exhaustive list on

97. Id.
98. Coté, supra note 92, at 114; see also 79 AM. JUR. 2D Wills § 393 (2015).
99. Coté, supra note 92, at 114; see also 79 AM. JUR. 2D Wills § 393 (2015).
100. See ROSS & REED, supra note 20, § 7:4; see, e.g., McCauley v. Talk (In re Estate of McCauley), 415 P.2d 431, 434 (Ariz. 1966) (en banc); Sanger v. McDonald, 112 S.W. 365, 368 (Ark. 1908); Rocco v. Sims (In re Estate of McQueen), 918 So. 2d 864, 867 (Miss. Ct. App. 2005) (en banc); Heintz v. Vestal (In re Estate of Vestal), 605 P.2d 606, 608 (Mont. 1980); Jarvis v. Tonkin, 380 S.E.2d 900, 903–04 (Va. 1989); Johnson v. Merta (In re Estate of Dejmal), 289 N.W.2d 813, 820 (Wis. 1980); see also Coté, supra note 92, at 115.
101. Ross & Reed, supra note 20, § 7:4
102. REUTLINGER, supra note 13, at 56.
104. See ROSS & REED, supra note 20, § 7:4.
105. See, e.g., Birch v. Coleman, 691 S.W.2d 875, 877–78 (Ark. Ct. App. 1985); Garvin's Adm'r v. Williams, 44 Mo. 465, 470 (Mo. 1869); In re Null's Estate, 153 A. 137, 139 (Pa. 1930); In re Cowdry's Will, 60 A. 141, 142 (Vt. 1905).
106. See, e.g., In re Estate of Davidson, 839 S.W.2d 214, 215, 218 (Ark. 1992); Dunham, 528 A.2d at 1132–33; Breadheft v. Cleveland, 108 N.E. 5, 6 (Ind. 1915); Pasternak v. Mashak, 428 S.W.2d 565, 568, 570 (Mo. 1967) (per curiam); Plonksy v. Murphy (In re Delorey), 529
what types of relationships courts may recognize as confidential, essentially, "any type of relationship between two human beings may be deemed confidential, if one of the parties places trust or confidence in the other." In general, there are four elements of undue influence: (1) existence of a confidential relationship, (2) procurement of the testamentary instrument, (3) a change in the testator's post-death distribution plan, and (4) a change in the testator's post-death distribution that was "unnatural." Plainly stated, undue influence requires "(1) a person who is subject to influence; (2) a disposition to exert undue influence; (3) an opportunity to exert undue influence; and (4) a result indicating undue influence." But as mentioned,
these elements vary from state to state, and divergent common law makes it impossible to present a concise yet accurate overview of undue influence analyses. Thus, this section will provide a small sample of analyses of the common law elements used to prove undue influence in Missouri, New York, and Texas.

A. Missouri

Courts in Missouri have defined undue influence simply as “influence that destroys the free choice of the person making the will.” In order to prove undue influence, “the evidence must show influence amounting to force, coercion, or overpersuasion sufficient to destroy the free agency and will power of the testator.”

A presumption of undue influence arises when the will contestant shows (1) a fiduciary relationship existed between the beneficiary and the testator, (2) the beneficiary received a substantial bequest in the will, and (3) the beneficiary was active in procuring or assisted in causing the execution of the new will. The contestant creates a presumption of undue influence upon proving these three elements, by direct or circumstantial evidence, and thus, the claim is then submissive to the fact finder.

age, lack of intellectual capacity or firmness of character, and physical debility. 79 AM. JUR. 2D Wills § 396 (2015); see also Rein-Francovich, supra note 91, at 33 (“The typical test [for undue influence] is whether the testator’s mind was so controlled as to overpower his free agency and to cause him to make a will which he would not have made if left to his own devices.”).
Missouri is one of twenty-two states that recognizes a presumption of undue influence when the contestant shows that the testator had a fiduciary (and confidential) relationship with the alleged undue influencer, who in turn received unconscionable post-death benefits from the testator. Thus, Missouri courts require clear and convincing evidence to rebut the presumption of undue influence. It is interesting to note that Missouri courts do not require the existence of a confidential relationship between the testator and the beneficiary to prove undue influence; however, there does not seem to be any case law where the contestant has prevailed absent a confidential relationship.

The fact finder may determine the existence of undue influence by considering whether there was (1) an unnatural disposition, (2) an onset of solitude of the testator by the alleged undue influencer, (3) a change in any such predetermined testamentary intent, (4) any unusual circumstances surrounding the execution of the will, (5) hostile feelings toward the expected recipients, (6) derogatory remarks about the contestants made by the alleged undue influencer to the testator, (7) the source of the testator’s property being such as to make the disposition to the beneficiary unlikely (suspicious intestate succession), and (8) recitals in the instrument itself indicative of undue influence. Utilizing these factors, the contestant must prove undue influence by a preponderance of the evidence.

B. New York

New York, similar to most jurisdictions, generally defines undue influence as coercion, duress, or destruction of the testator’s free agency.
To prove undue influence, a contestant must show that the decedent was constrained to act against his or her own free will and desire.\textsuperscript{126} To do this, the contestant should identify "the motive, opportunity and acts allegedly constituting the influence," and the time and location such acts occurred.\textsuperscript{127} New York classifies undue influence as "a species of fraud."\textsuperscript{128} However, the contestant need not prove that the alleged undue influencer made false statements to the testator to change his or her testamentary disposition.\textsuperscript{129} Courts may also find undue influence through "concealment of facts or misrepresentations, even innocently made, where a confidential relationship exists between the testator and the beneficiary."\textsuperscript{130}

In order to prove undue influence, the [contestant] must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for the undue influence, would not have been executed.\textsuperscript{131}

Like other jurisdictions, New York courts first look to the existence of a confidential relationship, in which the testator placed special trust and confidence in the alleged undue influencer.\textsuperscript{132} A confidential relationship has been defined as "a relation of parties in which one is bound to act for the benefit of the other and can take no advantage to himself from his act relating to the interests of the other."\textsuperscript{133}

If the proponent proves a will has been duly executed, New York common law presumes the testator to have executed the instrument free of undue influence.\textsuperscript{134} Thus, the burden of proof lies with the contestant to show undue influence.\textsuperscript{135} The contestant must prove undue influence by a

\textsuperscript{126} In re Estate of Turner, 866 N.Y.S.2d 429, 432 (App. Div. 2008).
\textsuperscript{127} Id.; see also Barnard v. Walther (In re Will of Walther), 159 N.E.2d 665, 669 (N.Y. 1959); Matteson v. Cole (In re Estate of Malone), 846 N.Y.S.2d 782, 785 (App. Div. 2007).
\textsuperscript{128} In re Schillenger's Will, 179 N.E. at 381 ("Undue influence is a species of fraud."); In re Smith, 95 N.Y. 516, 522 (N.Y. 1884) (opinion of Andrews, J.) ("Undue influence . . . is a species of fraud.").
\textsuperscript{130} Id.
\textsuperscript{131} In re Will of Sanger, 991 N.Y.S.2d 251, 258 (Sur. Ct. 2014); see also In re Will of Walther, 159 N.E.2d at 668.
\textsuperscript{133} Id.
preponderance of the evidence. However, courts do require close scrutiny of the execution of a will for inequity and coercion. Along the same line, when an attorney drafts a will and receives a substantial or disproportionate bequest from that will, a fact finder may justify an inference of undue influence. Such a bequest to the drafter of the will would constitute “suspicious circumstances,” and the contestant need only show slight evidence of coercion or duress in addition to these suspicious circumstances for a finding of undue influence.

C. Texas

Texas common law defines undue influence as “influence or dominion” that “destroys the free agency of the testator, and substitutes in the place thereof the will of the one exerting the influence.” But, courts have noted that not every influence exerted by one person over the mind of another is undue. “The influence is not undue unless the free agency of the testator has been destroyed, and a [testamentary instrument] produced that such testator did not desire to make.” Thus, one may request or importune the testator to execute a favorable bequest in the testamentary instrument, “but unless the importunities and entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument with undue influence.”

Similar to New York, Texas characterizes undue influence as “a

137. See Smith v. Mitchell (In re Putnam’s Will), 177 N.E. 399, 400 (N.Y. 1931) (scrutinizing attorney who drafted a will and was also a beneficiary); Hickey v. Adams (In re Neenan), 827 N.Y.S.2d 164, 166 (App. Div. 2006) (beneficiary participating in the will drafting process gave rise to a presumption of undue influence).

In effect, [New York] reach[es] the same result as those [states] that presume that a will making a bequest to the drafter is the product of undue influence. However, the proponent is not put to any proof of lack of undue influence. Instead, the contestant needs some slight circumstantial evidence of undue influence to win. The contestant’s burden of proof has been reduced to something less than a preponderance of the evidence by this standard.

Ross & Reed, supra note 20, § 7:12.
140. Long v. Long, 125 S.W.2d 1034, 1035 (Tex. 1939).
141. Id. at 1035–36.
142. Id.; accord Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).
143. Rothermel, 369 S.W.2d at 922; Curry v. Curry, 270 S.W.2d 208, 212 (Tex. 1954); Craycroft v. Crawford, 285 S.W. 275, 278 (Tex. Comm’n App. 1926, holding approved).
species of legal fraud.\textsuperscript{144} Texas places the burden of proof on the contestant to show undue influence, although the proponent has the burden of proving due execution and testamentary capacity.\textsuperscript{145} The contestant must prove undue influence by a \textit{preponderance} of the evidence.\textsuperscript{146} Because undue influence generally occurs through subtle actions over an extended course of dealing and circumstances, the contestant may prove the existence of undue influence through direct or circumstantial evidence.\textsuperscript{147}

The contestant must prove: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence.\textsuperscript{148}

Generally, the fact finder must look to the existence of a confidential relationship between the testator and the alleged undue influencer.\textsuperscript{149} However, like Missouri,\textsuperscript{150} Texas courts have indicated that they are open to the possibility that undue influence may be proved absent evidence of a confidential relationship;\textsuperscript{151} but likewise, there is no case law to support such a finding. In accordance with the proof structure of other jurisdictions, the fact finder is also required to look to the procurement of a new

\textsuperscript{144} Rothermel, 369 S.W.2d at 922; Curry, 270 S.W.2d at 214; Novak v. Schellenberg, 718 S.W.2d 822, 824 (Tex. App.—Corpus Christi 1986, no writ).

The basic elements of fraud are: 1. A false representation made to the testator. 2. The representation was known to be false by the person who made it. 3. The representation was reasonably believed by the testator. 4. The representation caused the testator to execute a will that the testator would not have made but for the misrepresentation.

Beyer, \textit{supra} note 69, at 270. However, as a \textit{form} of fraud, the elements of undue influence slightly vary from that of actual fraud—notably, the absence of the requirement of a misrepresentation. See Rothermel, 369 S.W.2d at 922.

\textsuperscript{145} See \textit{In re} Estate of Woods, 542 S.W.2d 845, 846 (Tex. 1976); Gaines v. Frawley, 739 S.W.2d 950, 952 (Tex. App.—Fort Worth 1987, no writ); Wood v. Stute, 627 S.W.2d 539, 541 (Tex. App.—Fort Worth 1982, no writ).

\textsuperscript{146} See \textit{In re} Estate of Woods, 542 S.W.2d at 846; \textit{In re} Estate of Reynolds, No. 09-95-446CV, 1997 WL 217574, *2 (Tex. App.—Beaumont May 1, 1997, no writ).

\textsuperscript{147} Rothermel, 369 S.W.2d at 922; Long v. Long, 125 S.W.2d 1034, 1036 (Tex. 1939); Lowery v. Saunders, 666 S.W.2d 226, 234 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); Barksdale v. Dobbins, 141 S.W.2d 1035, 1038 (Tex. Civ. App.—Texarkana 1940, writ ref'd).


\textsuperscript{149} See \textit{supra} discussion in text accompanying notes 100–09.

\textsuperscript{150} See \textit{supra} note 122 and accompanying text.

\textsuperscript{151} See Gaines v. Frawley, 739 S.W.2d 950, 951–52 (Tex. App.—Fort Worth 1987, no writ).
testamentary instrument by the alleged undue influencer, a change in the testator’s post-death distribution plan that favored the alleged influencer at the expense of those who shared prior plans, and a change in the testator’s post-death distribution that was “unnatural.” In addition to these factors, Texas courts may look to “the testator’s mental or physical incapacity to resist or the susceptibility of the testator’s mind to the type and extent of the influence exerted,” while also considering the testator’s “weakness of mind and body, whether produced by infirmities of age or by disease or otherwise.”

V. CAN A TESTATOR BE UNDULY INFLUENCED IF HE OR SHE LACKS TESTAMENTARY CAPACITY?

While a lack of testamentary capacity and undue influence are “two distinct grounds for avoiding a will,” many courts have had conflicting opinions on whether a finding of undue influence is dependent upon a finding of testamentary capacity or whether the two findings are mutually exclusive. Due to the great amount of conflicting case law from state to state, this section will provide only a Texas analysis through a case study from the Fourth Court of Appeals in San Antonio, Texas.

Texas courts have long held that in order to prove the existence of undue influence, the fact finder must have found the testator to have had testamentary capacity at the time of execution of the will. The Texas Supreme Court articulated in the controlling case Rothermel v. Duncan, “[w]hile testamentary incapacity implies the want of intelligent mental power, undue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power.” Thus, under this reasoning, a fact finder could only find undue influence if the testator was found to have requisite testamentary capacity. Therefore, a

153. See Rothermel, 369 S.W.2d at 923.
154. See Watson, 831 S.W.2d at 837–38.
155. Rothermel, 369 S.W.2d at 923.
156. See Long v. Long, 125 S.W.2d 1034, 1036 (Tex. 1939); see also Rothermel, 369 S.W.2d at 922. But see In re Estate of Lynch, 350 S.W.3d 130, 134–35 (Tex. App.—San Antonio 2011, pet. denied).
157. See Long, 125 S.W.2d at 1036 (“In will cases, after mental capacity has been shown, the burden of proving undue influence is on the party contesting the probate of the will.” (emphasis added) (citing Hart v. Hart, 110 S.W. 91, 91 (Tex. Civ. App.—Texarkana 1908, no writ)).
158. Rothermel, 369 S.W.2d at 922 (emphasis added) (citing Long, 125 S.W.2d at 1036; Besteiro v. Besteiro, 65 S.W.2d 759, 761 (Tex. Comm’n App. 1933, judgm’t adopted)).
159. See id.
will contestant could logically argue only one of the two grounds for avoiding a will: (1) that the testator lacked requisite mental capacity at the time of execution of the will, or (2) that the testator had the requisite mental capacity to execute the will but was subjected to undue influence by the alleged influencer which interfered with his or her testamentary intent.\(^{16}\)

Many Texas courts have relied on the Rothermel proposition that a finding of testamentary incapacity and undue influence are in conflict.\(^{161}\) In *In re Estate of Lynch*, the Texas Court of Appeals in San Antonio directly addressed this issue.\(^{162}\) In Lynch, the decedent had three daughters: Peggy, Patricia, and Tracy.\(^{163}\) After the decedent died two years following the execution of his will, Tracy filed an application for probate.\(^{164}\) After it was admitted to probate, Peggy and Patricia contested the will on the ground that decedent lacked testamentary capacity to execute the will, and thus, he executed it as a result of Tracy’s undue influence.\(^{165}\) A jury returned a verdict in favor of Peggy and Patricia, and Tracy appealed.\(^{166}\)

The Texas Court of Appeals took up the question upon review: “Does a finding that a testator lacks testamentary capacity conflict with a finding that he was unduly influenced?”\(^{167}\) This question arose from the lower court jury’s findings that the testator did not have testamentary capacity when he executed the will, and at the time testator executed the will, he was acting under the undue influence of Tracy.\(^{168}\) Using the Rothermel analysis, Tracy argued that “these findings create[d] an irreconcilable conflict because a [testator] cannot both lack testamentary capacity and be unduly influenced.”\(^{169}\) Tracy interpreted the Rothermel language “the mind of the testator” to impliedly mean “the sound mind of the testator.”\(^{170}\) Under such reasoning, “a sound mind—or testamentary capacity—[would be] implicit in a finding of undue influence.”\(^{171}\)

\(^{160}\) See id.

\(^{161}\) See, e.g., Lowery v. Saunders, 666 S.W.2d 226, 229 n.2 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.) (“[T]hat the testatrix lacked testamentary capacity and that she was unduly influenced are in conflict.”).


\(^{163}\) Id. at 133.

\(^{164}\) Id.

\(^{165}\) Id.

\(^{166}\) Id.

\(^{167}\) Id. at 134.

\(^{168}\) Id.

\(^{169}\) See id. (arguing that “these findings implicate the same material fact: a person’s mental capacity”).

\(^{170}\) Reply Brief of Appellant Tracy June Lynch at 4, *In re Estate of Lynch*, 350 S.W.3d 130 (No. 04-09-00777-CV), 2010 WL 5821135 (internal quotation marks omitted).

\(^{171}\) Id.
However, upon a closer reading of the language, one should note the use of the word “implies” as not a dispositive requirement. The Lynch court reasoned: “We acknowledge that the [Texas] Supreme Court has recognized that a finding of undue influence implies the existence of a sound mind. However, neither the Texas Supreme Court nor this court has held that a finding of undue influence requires the existence of [a] sound mind.”

The Lynch court relied on Long v. Long and Lowery v. Saunders. The Long court recognized that “weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in a condition to be susceptible to undue influence.” In Lowery, the court recognized—in accordance with the traditional interpretation of Rothermel—that “evidence of impaired mentality not amounting to testamentary incapacity may afford an opportunity for the exercise of undue influence.”

Drawing from these two cases, the Fourth Court of Appeals in San Antonio, Texas held that “incapacity may be a factor in the existence of... undue influence.... [and] accordingly, we are unwilling to hold that in all cases a person cannot both lack testamentary capacity and be unduly influenced.”

It is my contention that the Lynch court misapplied the reasoning from both Long and Lowery. Both cases essentially stood for the same proposition: that “weakness of mind” or “impaired mental condition” may contribute to a testator’s susceptibility to undue influence. The

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172. See supra note 158 and accompanying text.
173. In re Estate of Lynch, 350 S.W.3d at 135.
174. Id. (citing Long v. Long, 125 S.W.2d 1034, 1036 (Tex. 1939)).
175. Id. (citing Lowery v. Saunders, 666 S.W.2d 226, 233, 235 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.)).
176. Long, 125 S.W.2d at 1036.
177. Lowery, 666 S.W.2d at 233 (emphasis added).
178. Id. at 235.
179. In re Estate of Lynch, 350 S.W.3d at 135 (parentheses omitted).
180. Long, 125 S.W.2d at 1036.
181. Lowery, 666 S.W.2d at 233.
182. Courts generally recognize that certain mentally debilitating conditions—such as illness, senility, alcoholism, and other physical or mental impairments—justify a heightened examination of the actions of any alleged influencer on the ground that the testator’s condition made him or her susceptible to undue influence. See, e.g., McCauley v. Talk (In re Estate of McCauley), 415 P.2d 431, 440 (Ariz. 1966) (en banc); Sanger v. McDonald, 112 S.W. 365, 368--
Lynch court added to the susceptibility elements to include a testator lacking requisite testamentary capacity.\textsuperscript{183} However, such a holding directly conflicts with Lowery's precedent of "impaired mentality not amounting to testamentary incapacity,"\textsuperscript{184} which was in accordance with Long and Rothermel's longstanding convention of implied existence of testamentary capacity as a prerequisite for a finding of undue influence.\textsuperscript{185} Therefore, under that line of reasoning, the lower court jury's finding of testamentary incapacity should have negated its finding of undue influence.

I used Lynch as an example of how confusing the interrelation of testamentary capacity and undue influence can be. While it is only my humble opinion that the court erred in its analysis, other generally-accepted case law, practice guides, and scholarly literature support this position that "[i]n order for undue influence to occur, the testator must have testamentary capacity."\textsuperscript{186} Contrary to the holding in Lynch, "if a court finds a testator lacked testamentary capacity, the will is void, and the issue of whether or not undue influence existed is never addressed."\textsuperscript{187} Thus, I conclude that the answer to the title of this section (Can a Testator Be Unduly Influenced If He or She Lacked Testamentary Capacity?) is: No. Perhaps the Court of


\textsuperscript{183} See In re Estate of Lynch, 350 S.W.3d at 135.

\textsuperscript{184} Lowery, 666 S.W.2d at 233 (emphasis added).

\textsuperscript{185} See Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963); Long, 125 S.W.2d at 1036.

\textsuperscript{186} Thomas Phillip Boggess V, Cause of Action to Invalidate Testamentary Device on Ground of Undue Influence in Its Execution, in 27 CAUSES OF ACTION 2d 469, 486 (2005) (emphasis added); see In re Estate of Harms, 149 P.3d 557, 561 (Mont. 2006); In re Will of Landsman, 725 A.2d 90, 98 (N.J. Super. Ct. App. Div. 1999) ("Testamentary capacity may exist but the testator may nonetheless, because of age or physical condition, be subject to undue influence. The concepts are separable. Indeed, if [testator] did not have mental capacity there would be no need to inquire into . . . undue influence."); Estate of Lakatosh, 656 A.2d 1378, 1385 (Pa. Super. Ct. 1995); see also 79 AM. JUR. 2d Wills § 396 (2015).

\textsuperscript{187} Boggess, supra note 186, at 486; see also Rein-Francovich, supra note 91, at 33; Julia Cowan Spear, Comment, Undue Influence in Louisiana: What It Was, What It Is, and What It Might Be, 43 LOY. L. REV. 443, 448 (1997) ("A finding of undue influence theoretically presupposes that the testator had testamentary capacity, because the court should never get to the undue influence issue if it finds that the testator lacked the requisite mental ability to make a will.").
Appeals of Tennessee, Western Section explained it best:

    [S]hould a jury in a case where both of these issues were present, find the deceased to be of unsound mind, the issue of undue influence is never reached. Undue influence presupposes a mind of testamentary capacity. Acts of . . . minds lacking testamentary capacity are void regardless of influence, undue or not.\(^{188}\)

VI. CONCLUSION

I have attempted to provide a general understanding of the basic concepts and theories relating to will contests of testators with diminishing capacity. Although Missouri, New York, and Texas were used throughout the Article as examples to show the variation in common law across the jurisdictions, such content is far from comprehensive. A will contest, whether based on lack of testamentary capacity or on the ground of undue influence, is a delicate situation, and attorneys should proceed with caution. An attorney with a prospective client desiring to contest a will, such as the one presented in the opening hypothetical, should consult jurisdictional-specific common law and statutes to understand the exact requirements for burden of proof, presumptions, and other evidentiary matters.

Perhaps even more important, a prudent attorney should advise a prospective client of the high risk of failure involved in bringing a will contest. Most will contests challenging the capacity of the testator or alleging undue influence ultimately fail.\(^{189}\) "Three out of four will contests directed against the wills of aged, physically and mentally infirm persons result in judgments for the proponent of the will."\(^{190}\)

In the case of a decedent with Alzheimer’s disease, the attorney must begin a fact-specific inquiry with the prospective contestant to be certain of the decedent’s condition at the time of execution of the testamentary instrument.\(^{191}\) As discussed, a testator with Stage 1 or early Stage 2 Alzheimer’s disease may still possess the requisite mental capacity to prepare and execute a will, whether signed in the morning while the testator had peak mental clarity ("sundowning syndrome")\(^{192}\) or if executed during a "lucid moment."\(^{193}\) Conversely, a will contest is more likely to prevail when
(1) a will leaves nothing or only nominal gifts to close family members (such as a spouse of many years or children); (2) a will disproportionately awards a large amount to a certain child who has no special need;\textsuperscript{194} (3) a testator makes a sudden or significant change in the disposition plan; (4) a testator displays peculiar or erratic behavior indicative of mental incapacity; or (5) a testator is more susceptible to undue influence due to advanced age, infirmity, or debilitating illness.\textsuperscript{195}

Allegations of testamentary incapacity and undue influence go hand in hand; often a prospective client (such as the hypothetical Beneficiary) implies that both conditions existed at the time of execution of the will.\textsuperscript{196} However, an astute attorney should recognize that bringing both causes of action opens the door for confusion, as seen in Lynch,\textsuperscript{197} and possibly a detrimental outcome for his or her client.\textsuperscript{198} The majority of courts recognize that in order for undue influence to occur, the testator must have testamentary capacity.\textsuperscript{199} While courts generally recognize that certain mentally debilitating conditions—such as Alzheimer’s disease, senility, and other mental impairments—increase the testator’s susceptibility to undue influence, the testator must have still had the requisite testamentary capacity in order for the court to address the undue influence issue.

\textsuperscript{194} Ross & Reed contend:
A contestant who is a family member of the testator and was wholly or partially disinherited in favor of another family member may have a difficult time getting the will set aside on the grounds of undue influence by the favored family member, as courts have generally been reluctant to set aside wills favoring one family member over another unless the proof offered shows egregious overreaching conduct. ROSS & REED, supra note 20, § 7:19. However, courts are more likely to set aside a will that disinherits a family member in favor of a non-family member (such as an attorney or other professional). See id.

\textsuperscript{195} See BEYER, supra note 69, at 279–80.

\textsuperscript{196} See supra Part I.

\textsuperscript{197} In re Estate of Lynch, 350 S.W.3d 130, 134 (Tex. App.—San Antonio 2011, pet. denied).

\textsuperscript{198} See supra notes 186–88 and accompanying text.

\textsuperscript{199} See supra notes 186–88 and accompanying text.