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Jason Domark,left, and Janet Rayo,right, of Cozen O'Connor. Courtesy photos

COMMENTARY

Estate Planning Gone Afoul—What Is Needed to Raise the Presumption of Undue Influence?

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Your aunt, who never married or had any children, is unfortunately diagnosed with a terminal disease. Although your aunt's mind remains intact, she begins to become frail and weak, leaving her in constant need of physical help. As a result, you hire a live-in caregiver who will provide your aunt with the 24-hour care needed to perform all of her daily activities including bathing and feeding, as well as driving her to any medical appointments.

After a hard-fought battle, your aunt passes, leaving you and your family struck with grief. As part of your aunt's desires, you accept the appointment as personal representative of your aunt's estate to ensure her wishes are carried out. Mere days after your aunt's passing, the caregiver, whom you hired just a few months ago, calls and requests her portion of your aunt's trust. You respond, "what portion" and quickly review your aunt's trust. To your complete shock, the caregiver is now a substantial beneficiary of the trust. You are in utter disbelief because based on multiple conversations with your aunt and her testamentary documents, she always intended that her trust assets be distributed equally among her siblings.

You decide to do some digging and find out that a few weeks prior to your aunt's passing, the caregiver drove your aunt to her attorney and the trust was altered to reflect the change. You learn that the caregiver had called to schedule the appointment, was present for the change, and was provided with a copy of the amended trust. You know your aunt would not have willingly made this change but you don't think you can show she lacked mental capacity. It seems like you're at a crossroads. So what next?

The good news is that Florida law provides you with an avenue of relief—challenge the validity of your aunt's trust on the ground of undue influence. As a contestant, you will need to prove the "testamentary disposition resulted from the exercise of undue influence on the mind of the testator." See *Estate of Brock*, 692 So. 2d 907 (Fla. 1st DCA 1996). Of utmost importance, incapacity by the testator is not required to establish undue influence. Instead, the court evaluates whether the testator's mind was so controlled or affected, whether by persuasion or influence, that he/she did not act voluntarily. See *Peacock v. Du Bois,* 105 So. 321, 322 (Fla. 1925). However, proving this might seem like a difficult, if not impossible, feat, considering the most concrete evidence has passed with the testator. That is why Florida law permits contestants to present sufficient facts to raise a presumption of undue influence.

To raise the presumption, the contestant must show the beneficiary had a confidential relationship with the testator, is a substantial beneficiary under the amended testamentary document, and was active in procuring the change. Florida courts determine whether a beneficiary actively procured the change by considering a list of nonexhaustive factors, including whether the beneficiary was present when the change was made, provided instructions to the attorney making the change, and safely kept the document subsequent to its execution.

Notably, a contestant is not required to show all these factors to establish active procurement. And most importantly, once the contestant presents sufficient facts to raise the presumption, the burden shifts to the beneficiary to explain his or her active role in procuring the change. Unfortunately, cases of undue influence have existed across the decades and seem to be more prevalent today. The question is—has Florida

extended the presumption of undue influence beyond testamentary changes? It has. The burden-shifting procedure has been applied to pay-on-death or transfer-on-death designations, as well as other inter-vivos transfers. Provided the requisite facts are raised to show undue influence, the presumption will apply.

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