

WILL CONTESTS 2025

**Undue Influence and Lack of Capacity:
How much evidence is enough?**

P. KEITH STAUBUS

Staubus | Blankenship | Legere | Walker PLLC

PROBATE & TRUST LITIGATION

8150 N. Central Expy., Ste. 850

Dallas, TX 75206

pks@sblwlaw.com

Phone No. (214) 833-0100

Fax No. (214) 833-0200

Purpose of Presentation:

To explore the two claims used to set aside wills and trusts

- Lack of Capacity
- Undue Influence

Other transactions affected by claims of lack of capacity/undue influence:

- Life insurance beneficiary designations
- 401K / I.R.A beneficiary designations
- Gifts
- Loans
- Powers of Attorney
- Real estate transactions

Professional practices impacted by claims of lack of capacity/undue influence:

- Estate Planners
- Wealth Advisors
- Trust Officers
- Accountants
- Foundations and Charities

Scope of Analysis

- All reported will contests decided since *Rothermel v. Duncan*, 369 S.W.917 (Tex. 1963) have been reviewed.
- Excluded from the cases analyzed:
 - (1) Will contests decided on grounds other than lack of capacity or undue influence
 - (2) Cases which did not contain adequate detail of the evidence.
 - (3) Unreported decisions.
 - (4) Cases decided by summary judgment.

64 will contests have been reviewed:

- 43 Jury Trials**
- 21 Bench Trials**

We will review how certain types of evidence which are frequently touted as “game changers” actually affected the outcome of the lack of testamentary capacity and undue influence claims at the trial court level.

ELEMENTS OF TESTAMENTARY CAPACITY

The elements of testamentary capacity are sufficient mental ability:

1. To understand the business in which the testator is engaged, the effect of his or her act in making the will, and the general nature and extent of his or her property;
2. To know his or her next of kin and the natural objects of his or her bounty; and
3. To have sufficient memory to collect in his or her mind the elements of the business to be transacted and to hold them long enough to at least perceive their obvious relation to each other and to form a reasonable judgment about them

- Pivotal issue: Whether the testator had testamentary capacity on the day the will was executed.
- However, evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed, provided that the evidence demonstrates a condition affecting his testamentary capacity persists and was likely present at the time the will was executed.

Burden of proof: Testamentary capacity

If raised *prior* to the admission of the will to probate, the *proponent* has the burden of proof.

If raised *after* the will is admitted to probate, the *contestant* has the burden of proof.

ELEMENTS OF UNDUE INFLUENCE

Elements of undue influence (*Rothermel v. Duncan*):

1. The existence and exertion of an influence.
2. The effective operation of that influence subverts or overpowers the mind of the testator at the time of the execution of the testament.
3. The execution of a will which the maker would not have executed but for such influence.

- May be proved by circumstantial as well as direct evidence.
- Mere opportunity to exercise undue influence is no proof that it was exerted.
- 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 a person was in a condition to be susceptible to undue influence.

Factors to be considered in determining the existence of undue influence are as follows:

- The nature and type of relationship existing between the testator and the parties.
- Habitual subjection of the testator to the control of another.
- The state of the testator's mind at the time of the execution of the will.
- Weakness of mind and body of the testator whether produced by infirmities or age or by disease.
- Unnatural disposition.
- Whether the beneficiary participated in the preparation or execution of the instrument.
- “Equal inference” rule.

Burden of proof: Undue Influence

The contestant always has the burden of proof as to undue influence

**REVIEW OF IMPORTANT
CATEGORIES OF EVIDENCE**
(WAS IT ENOUGH?)

Review of Important Categories of Evidence:

- A. Drafting Attorney Testifying for Proponent
- B. Testimony of the Treating Physician
- C. Advanced Age
- D. Medication
- E. Wills Executed in the Hospital
- F. Wills Executed Shortly Before Death
- G. Unrelated Beneficiary
- H. Physical Illness

IT'S TIME TO PLAY

WILL OR NO WILL

**DRAFTING ATTORNEY
TESTIFYING FOR
PROPONENT**

1. *Tieken v. Midwestern State University*

- Contest grounds – Lack of testamentary capacity
– Undue influence

Proponent's evidence:

- The **drafting attorney** spent five hours with the testatrix in three separate meetings.
- The attorney reviewed each paragraph of the will with the testatrix in the presence of the witnesses.
- The attorney testified that she left her property to her friend because he had been there when she needed him.
- The beneficiary had been a friend to the testatrix and her husband for several years.

- The treating physician signed a note stating that the testatrix was capable of making a new will.
- Treating physician's records show that the testatrix was alert, her speech fluent, and her cognitive functions intact three weeks prior to the will.
- Doctor's notes ten months after execution of the will reflected no real changes in her memory.

- Adult Protective Services investigator found that the testatrix was well aware of the changes she made to her will and provided reasons.
- Testatrix was mad at prior beneficiary for writing a letter questioning her friend's motives in taking charge of the testatrix and moving her to a nursing home.
- A friend testified that the testatrix was fond of the beneficiary and his children.

Contestant's evidence:

- After the friend placed the testatrix in a nursing home, a friend of the friend selected an attorney to prepare a new will and power of attorney. The beneficiary's friend typed up a list of property for the testatrix so she could "organize her mind".
- The beneficiary put the testatrix in a nursing home, and changed her doctor, lawyer and accountant within four months of moving her there.
- Beneficiary was present at the time the will was signed.
- Beneficiary and his friend were always with the testatrix.

- Her prior treating physician testified that the testatrix had suffered two strokes in the three years prior to executing the will.
- In 1986 she arrived at the office without an appointment not knowing why she was there.
- The testatrix suffered hardening of the arteries in her brain and heart.
- Testatrix taking Ativan for the year prior to signing the will, which can cause hallucinations.
- The testatrix had hallucinations both before and after signing the will.

- Two months after signing the will the testatrix was prescribed medication for Alzheimer's Disease.
- The doctor who signed the note stating that the testatrix was capable of signing a new will changed his opinion at trial after learning that she had experienced hallucinations three days after signing the will.

**Will
OR
No Will?**

NO WILL

JURY VERDICT – The testatrix lacked testamentary capacity and was unduly influenced.

COURT OF APPEALS – Affirmed.

2. *Estate of Russell*

Contest grounds – Undue influence

Proponent's evidence:

- The **drafting attorney** testified he procured the execution of the documents outside of the presence of the proponent.
- Proponent argued there was no evidence of the son's opportunity to influence his mother, of her susceptibility to influence, or that her mind was overpowered or subverted at the time of the execution of the will.
- The disposition of the will, all to testatrix's living son, was not unnatural.

Contestants' evidence:

- The testatrix's son hired a new attorney to prepare a series of wills, in 1998, 2000, and 2002.
- The drafting attorney's file contained the drafts of the will and three post-it type notes:
 - One post-it note bore the son's phone number but no phone number for the testatrix.
 - Second post-it note referenced a power of attorney that was to be prepared on behalf of the testatrix and listed the son's address and phone number.
 - Third post-it note had the name of the son and a notation to add to the mother's will the round dining table to go to one of the grandson's.

- Son confirmed that his mother deferred to him on all financial matters.
- All of testatrix's previous wills distributed the testatrix's estate per stirpes to her son and daughter.
- Last will cut out predeceasing daughter's children.

**Will
OR
No Will?**

NO WILL

JURY VERDICT – For contestants finding undue influence.

COURT OF APPEALS - Affirmed.

Drafting Attorney Testifying for Proponent

Contestant's Success Rate:

Lack of Capacity – 50%

Undue influence – 73%

**TREATING PHYSICIANS
TESTIFYING FOR
PROPONENT**

3. *Estate of Trawick*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Proponent's evidence:

- The **treating physician** who examined the testatrix neurologically in 1994, 1997, and the year of the will (1998) testified that she was expressive of her opinion, consenting to certain tests while refusing others.

- Physician** testified that it was not until two years after the will that she became combative, confused, and diagnosed with Sundown Syndrome.

- The drafting attorney testified that the testatrix specified how she wanted her will written and testatrix came back to the attorney's office to execute the will.

- The witnesses to the will and the notary testified testatrix appeared mentally competent, and not confused.
- A friend who played dominoes with the testatrix testified that she was capable of playing and that he never saw her confused.
- The testatrix did her own banking (although proponent drove her to the bank).

Contestants' evidence:

- A local grocery store employee testified that the 92 year old testatrix tried to cash checks which had already been cashed the month of execution of the will.
- A caretaker and wife who lived with the 92 year old testatrix until shortly before execution of the will testified she insisted on going to the bank to make deposits which she had already made.
- The testatrix failed to recognize the caretaker who was living in her home.

- A police officer testified that several years prior to execution of the will, the testatrix reported her car as stolen when she had actually left it in a parking lot.
- A fifty to sixty year friend who was paid to sit with testatrix testified that prior to execution of the will her mental condition declined.
- She was not able to recognize people she knew including some relatives.
- Testatrix imagined there were children in her house that kept her awake at night and spoke of deceased people as living.

- The year prior to execution of the will the testatrix called a relative during the summer to say it was snowing outside.
- Testatrix lost her way back home during year of will.
- During year of will testatrix talked about strange people living in her house and stealing her blankets.

- After the niece began taking care of the testatrix, she drove her to see an attorney to discuss the will.
- Niece drove the testatrix to the attorney's office to execute the will and was present when it was executed. (Niece the beneficiary)
- Niece drove testatrix to the bank where the will was placed in a lock box.

**Will
OR
No Will?**

WILL

JURY VERDICT -The trial court directed a verdict for the proponent on undue influence. The jury returned a verdict for the proponent as to testamentary capacity.

COURT OF APPEALS - Affirmed.

4. *Estate of Robinson*

- Contest grounds - Lack of testamentary capacity
- Undue influence.

Proponents' evidence:

- Testatrix's **treating physician** and internist testified that beginning in 1993 he adjusted her medications and began seeing her regularly.
- The doctor saw no indication of a mental problem. Testatrix alert and oriented.
- No observation that she was suffered from any gross impairment of memory, reasoning, or judgment.

- He treated the testatrix after she had a stroke in 1996, and after rehabilitation was intact mentally.
- Proponent's forensic psychiatrist testified from a review of records that:
 - Testatrix was functioning at a normal level.
 - Her medical records lacked any evidence that her brain was oxygen deprived.
 - The testatrix's high blood pressure caused her dizziness, not a lack of oxygen.

- The testatrix worked with her estate planning attorneys from December 1994 through May 1996 formulating her estate plan and discussing her desires.
- Testatrix's sister testified that the testatrix was a strong and independent woman with a sharp mind who knew her family.
- Testatrix's oil & gas attorney testified that she carried on her oil and gas business through 1995, signed oil & gas leases and discussed them. Testatrix's long time financial planner testified that she understood the business she transacted in 1995, took an interest in interest rates and tax free bonds, and knew what she was doing.

- Testatrix's sister-in-law who was a sitter during the month of execution of the will testified that prior to her 1996 stroke, testatrix managed her business, wrote her own checks and went through her mail.
- The testatrix played dominoes at her church after executing the will, had discussions with the sitter about the Bible, and that she was the boss of her house.

Contestants' evidence:

•A forensic psychiatrist testified, based solely upon his review of the testatrix's medical records, that the testatrix suffered from the following medical conditions:

- High blood pressure,
- Dizziness and weakness,
- Hypertensive cardiovascular disease, and
- Congestive heart failure.

- A 1996 CT brain scan showed moderately severe atrophy, and evidence of a stroke suffered approximately nine months after signing the 1995 will.
- He also testified regarding a 1996 psychological assessment, reflecting a history of arteriosclerotic heart disease.
- He concluded that arteriosclerosis (hardening of the arteries) caused her to lack testamentary capacity.

- A caregiver from 1990 to 1998 testified that the testatrix was forgetful, unable to care for herself, had trouble with her eyesight and hearing, did not understand her doctor visits, did not drive, could not handle her business, and complained that she did not understand her estate-planning documents.
- 1993 sitter's notes reflected "Not being as out of it as she was yesterday. Business matters have really begun to confuse her."
- There were direct communications between testatrix's attorney and her relatives regarding the new estate plan.

**Will
OR
No Will?**

NO WILL

JURY VERDICT - Jury verdict for the contestants, finding a lack of testamentary capacity and undue influence.

COURT OF APPEALS – Affirmed.

TREATING PHYSICIAN TESTIFYING FOR PROponent

Proponent's Success Rate:

- Lack of capacity – 60%
- Undue influence – 66%

TREATING PHYSICIAN TESTIFYING FOR CONTESTANT

5. *In Re Estate of Neville*

Contest grounds - Lack of testamentary capacity

Proponent's evidence:

- The notary testified that the testatrix was in a recliner and was alert when she signed the will.
- The testatrix told the drafting attorney that she wanted her son to have everything.
- She was responsive to the notary's conversation, including the fact that she was making a will and understood its effect.
- A witness to the will testified that testatrix was lucid and clearly stated that she intended to leave her estate to her son.

- Son testified that testatrix was aware of her property and estate, discussed her assets, met with her bankers and executed a deed just before she signed the will.
- A retired bank employee testified that she discussed with the testatrix her accounts the month prior to execution of the will.
- Branch manager of the bank testified that the testatrix was able to transact business at the bank and testatrix discussed changing her will the week before executing it.
- On cross-examination the business partner who testified for the contestant admitted that he had a deed signed by the testatrix the week before partitioning some property that they jointly owned.

Contestant's evidence:

- The **treating physician** testified that one month earlier she was complaining of short term memory loss over the past two months.
- She had been diagnosed with a malignant brain tumor.
- She had difficulty deciding what words to use, forgot where she left items, and would sometimes reverse sentences when speaking.
- Doctor testified her prognosis was progressive dementia.

- Attorney who drafted prior will refused to draft new will because he did not believe she was competent.
- Testatrix's nephew and granddaughters testified based on their observations in June and July 1998 that she did not believe she was competent.
- A business partner of the testatrix testified that he did not believe she was competent to make the will.
- A neighbor who saw her regularly in June and July testified that she was not coherent.

**Will
OR
No Will?**

NO WILL

TRIAL COURT RULING - Denied admission of the will to probate based upon lack of testamentary capacity.

COURT OF APPEALS – Affirmed.

6. *Burk v. Mata*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Proponent's evidence:

- Owner of the nursing home where testatrix resided testified that a few days prior to executing the will the testatrix asked her “this is my death bed wish - in case I don't live through the night, will you see that Rumalda Mata (the proponent) gets everything that is mine?”
- The next day, the testatrix asked the nursing homeowner twice to call a notary to come to the nursing home.
- The notary brought the will to the nursing home.

- Testatrix confirmed the contents were as she requested.
- Two attesting witnesses and notary testified that testatrix had testamentary capacity.
- LVN who had known the testatrix for more than twenty years testified she frequently discussed her property.
- The beneficiary visited the testatrix frequently and would help feed her.

Contestant's evidence:

- **Treating physician** testified that five months prior to executing the will he recommended that she be placed in a nursing home.
- Testatrix was incontinent, could not feed herself, had a sore on her face and a tumor of the lung.
- She had arteriosclerosis and in doctor's opinion she was senile when she was sent to the nursing home.

- He did not believe she had lucid moments to make rational decisions.
- Could not have known the nature and extent of her property, or who her relatives were, or the effect of signing a will.
- The administrator from the nursing home testified that she was senile, would pick at things which were not there, and was not able to carry on a normal conversation.

**Will
OR
No Will?**

WILL

TRIAL COURT RULING - The court admitted the will to probate.

COURT OF APPEALS – Affirmed.

Treating Physician Testifying for Contestant

Contestant's Success Rate:

- Lack of Capacity: 63%
- Undue influence: 75%

ADVANCED AGE (Age 80+)

Advanced Age Not a Factor...

Estate of Trawick - 92 year old (Despite imagining children in house, failing to recognize relatives, cashing cashed checks, getting lost on way home, etc)

Wilkinson v. Moore - 90 year old (Hallucinations, refused clothing thinking they were her wedding gown)

Advanced Age a Factor...

Estate of Robinson - 93 year old (arteriosclerosis)

Rothermel v. Duncan - 93 year old (hard of hearing, feeble, poor eyesight; Supreme Court reversed)

Johnson v. Estate of Sullivan - 88 year old (did not recognize people, know the date or time, could not pay hairdresser)

ADVANCED AGE (80 +)

Contestant's Success Rate:

- Lack of Capacity: 45%
- Undue influence: 55%

MEDICATION

7. *Alldrige v. Spell*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Proponent's evidence:

- The testator contacted his attorney the day before executing the will about changing his will.
- The testator met alone with his attorney, told the drafting attorney what he wanted, the attorney drafted the will and it was signed on that date.
- The attorney testified the testator had capacity to know the objects of his bounty and knew the nature and extent of his property.

- The notary and witnesses who worked in the attorney's office testified the testator had requested the changes to the will and understood he was executing a will.
- The testator's treating physician wrote a memorandum the day after the execution of the will reflecting the testator was oriented to time, person, and place. "He is competent to make decisions without assistance from anyone. His recent and past memory is excellent. In my best judgment he is sane."

Contestant's evidence :

- The testator was diagnosed with cancer the day before the will was executed.
- Testator suffered from diabetes which was not medically regulated.
- The testator's golf buddy, a physician, spent approximately twenty hours a week with the testator over the last four to five years.

- His golf buddy testified that testator was mentally in and out.
- The golf buddy/physician testified testator was on **Valium, pain medications, sleeping medications, an anti depressant and other medications.**
- Golf buddy testified that when diabetes is not regulated it can affect a patient's mind.

**Will
OR
No Will?**

NO WILL

JURY VERDICT - For contestant finding lack of testamentary capacity.

COURT OF APPEALS - Affirmed.

8. *Long v. Long*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Contestants' evidence:

- The testator had cancer and was receiving high dosages of **chemotherapy** and **radiation**
- The month prior to executing the will, the testator's medical records reflected isolated incidences of **medicated confusion**
- Testator suffered from manic depressive disorder

- Contestants referred to testator's second wife as "black widow"
- Wife reportedly exploited testator's illness and manic depressive disorder to foster dependence on her
- Will was executed at the bank where the second wife's daughter worked

Proponent's evidence:

- The testator drafted his will on his computer.
- The will was witnessed at a bank.
- The testator updated friends and family about his health through email during the time period the will was executed.
- A friend/co-worker of the testator testified that the testator was in complete control of all of his faculties.

- There was no evidence that the testator was isolated from others
- The testator's relationship with his sons was strained during his illness and at the time he made the will, due to his divorce and remarriage
- The proponent's witnesses testified that the testator's sons were angry with him over the divorce, and rarely visited him in the hospital
- The testator had kicked his sons out of his rent house, and had to spend \$5,000 to repair it

**Will
OR
No Will?**

WILL

TRIAL COURT RULING - Admitted the will to probate.

COURT OF APPEALS - Affirmed.

MEDICATION

Contestant's Success Rate:

- Lack of Capacity: 62%
- Undue influence: 40%

HOSPITAL WILLS

9. *In Re Estate of Blakes*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Proponent's evidence:

- A friend relayed what he believed to be the testator's wishes to the drafting attorney, including the bequest of the testator's medical practice to his partner, with the remainder of the estate to testator's three biological children.
- The testator's treating physician testified that his pain medications were withheld by request the morning before the will was executed.
- The treating physician visited the testator at the hospital at 9:00 or 10:00 a.m. on the date of execution of the will, and testified that he knew who he was and where he was

- Drafting attorney prepared the will, and the testator's friend brought the will to the hospital for the testator's signature the day before his death
- Will executed in the presence of his friend who was not a beneficiary, two witnesses and a notary
- The friend summarized the contents of the will for the testator and watched him flip through the pages before signing
- There was testimony that the testator recognized and visited with his family on the day he executed the will

Contestant's evidence:

- The testator, a physician, was suffering from stage four cancer
- The testator was admitted to the **hospital** six days prior to his death suffering from dehydration and confusion
- The testator's friend was informed by a nurse who worked for the testator, (with whom testator was romantically involved) that the testator wanted to make a will.
- The testator's friend contacted the attorney and had the attorney prepare the will based solely on the instructions conveyed by the friend, which left nothing to his wife who he had continued to support financially, or his stepson, who he treated as one of his children.

- The witnesses and notary had limited recollection about the execution of the will.
- Contestant's forensic psychiatrist testified testator was "confused" at about 5:00 a.m. on the day the will was signed according to nurses' notes
Testator had cancer, liver failure and anemia
- Forensic psychiatrist testified he did not have testamentary capacity.
- The attorney did not speak directly to the testator and did not supervise the execution of the will.

**Will
OR
No Will?**

NO WILL

JURY VERDICT - The jury found that the testator lacked testamentary capacity and was unduly influenced.

COURT OF APPEALS - Affirmed as to lack of capacity. Did not rule on undue influence.

Hospital Wills

10. *Reynolds v. Park*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Contestants' evidence:

- The testator had surgery in February 1970, and sustained one or more strokes after his surgery before leaving the hospital in May of 1970.
- On October 17, 1970, he had convulsions or a seizure and was rushed to the **hospital** where he remained until his death on November 5, 1970.
- The will was executed while he was hospitalized, dividing his estate between his wife and his two daughters.

- An attorney visited the testator after receiving a call from someone other than the testator, prepared the will, and supervised its execution all in one day.
- The daughter testified that she was unable to see her father alone, and that the wife was constantly present with the testator.
- Daughter testified that the testator's weakened physical and mental condition made him susceptible to influence.

- Testimony further showed that the wife was present while the testator was being interviewed by the attorney, and was present during the execution of the will **in hospital room**.
- Testimony showed that the testator was in a weakened condition from his medications.
- One of the contestants testified that the wife prevented her, her husband and her daughter from visiting the testator outside of the wife's presence, and that the wife exerted strong influence over the testator in relation to the handling of a business transaction a few months before his death.

Proponent's evidence:

- Witnesses who visited the testator in the hospital testified that the testator knew the extent of his land, knew to whom his property was going and that he was of sound mind.
- The testimony showed that the will was prepared by an attorney.
- There was no testimony that the wife made any statement concerning the execution of a will or that she made arrangements for drafting or execution of the will.

- There was no testimony that the wife said anything during the conference with the attorney or that she exercised any influence over testator.
- Testator was very strong willed.
- Testator did not want his wife to leave him alone with anyone else.

**Will
OR
No Will?**

WILL

JURY VERDICT - Jury verdict for the proponent finding that the testator had testamentary capacity and was not unduly influenced.

COURT OF APPEALS – Affirmed.

WILLS EXECUTED IN THE HOSPITAL

Contestant's Success Rate:

- Lack of Capacity: 80%
- Undue influence: 75%

**WILLS EXECUTED
SHORTLY BEFORE DEATH**

WILLS – SHORTLY BEFORE DEATH A FACTOR

- *Blakes* - 1 day before death
- *Croucher* - 5 weeks before death
- *Kenney* - 1 week before death

WILLS – SHORTLY BEFORE DEATH
NOT A FACTOR

- *Horton* - 21 days before death
- *Green* - 3 weeks before death
- *Reynolds* - 1 week before death
- *Click* - 2 months before death

WILLS EXECUTED SHORTLY BEFORE DEATH

Contestant's Success Rate:

- Lack of Capacity: 56%
- Undue influence: 64%

UNRELATED BENEFICIARIES

Unrelated Beneficiaries

11. *Johnson v. Estate of Sullivan*

- Contest grounds - Lack of testamentary capacity
- Undue influence

Proponent's evidence:

Witnesses who were present during execution of the will stated that they satisfied themselves that testatrix understood what she was doing, and that she desired to execute the will and dispose of the property in the manner as stated in the document.

Contestants' evidence:

- The proponent/beneficiary had been the 88 year old **testatrix's nurse** for approximately three weeks at the time of the execution of the will.
- Treating physician testified that he had examined her earlier in March 1978, diagnosing her with severe organic brain syndrome.
- Second treating physician diagnosed the testatrix two years prior with cerebral vascular disease and hardening of the arteries (arteriosclerosis).

- Previous nurse testified that in the prior year the testatrix lacked capacity.
- Witness stayed with testatrix for seven to ten days and described testatrix as childlike, unable to recognize people, unable to know the time and day, unable to communicate.
- On trip to beauty shop the testatrix was unable to talk to hairdresser or pay for the charges.

**Will
OR
No Will?**

NO WILL

TRIAL COURT RULING – Lack of testamentary capacity
– Undue influence.

COURT OF APPEALS – Affirmed.

UNRELATED BENEFICIARIES

Contestant's Success Rate:

- Lack of Capacity: 88%
- Undue influence: 83%

PHYSICAL ILLNESS

- Evidence of a testator's physical incapacity may be probative of lack of testamentary capacity if the illness is consistent with mental incapacity *Croucher v. Croucher*, 660 S.W. 2d 55, 57 (Tex. 1983).
- Four physical illnesses cited most frequently in the reviewed cases:
 - Dementia – Contestant's success rate: 100%
 - Strokes – Contestant's success rate: 75%
 - Arteriosclerosis – Contestant's success rate: 63%
 - Cancer – Contestant's success rate: 50%

Undue influence claims:

- Stroke – Contestant's success rate: 71%
- Arteriosclerosis – Contestant's success rate: 57%
- Cancer – Contestant's success rate: 56%
- Dementia – Contestant's success rate: 50%

Summary of Contestants Results Based on Categories of Evidence

LACK OF TESTAMENTARY CAPACITY

Contestants' Success Rates

Unrelated Beneficiary -	88%
Hospital Wills -	80%
Illness -	65%
Treating Physician/Contestant -	63%
Medication -	62%
Treating Physician/Proponent -	60%
Shortly Before Death -	56%
Drafting Attorney -	50%
Advanced Age -	45%

UNDUE INFLUENCE

Contestants' Success Rates

Unrelated Beneficiary -	83%
Treating Physician/Contestant -	75%
Hospital Wills -	75%
Drafting Attorney -	73%
Treating Physician/Proponent -	66%
Shortly Before Death -	64%
Illness -	58%
Advanced Age -	55%
Medication -	40%

JURY TRIAL v. BENCH TRIAL

Contestants' Success Rates

Jury Trial

Bench Trial

59%

Lack of Capacity

50%

73%

Undue Influence

43%

LESSONS FOR ESTATE PROFESSIONALS

As we learned from the *Tieken* and *Robinson* cases, sometimes even careful estate planning over several meetings, and going over the will paragraph by paragraph prior to its execution is not sufficient to withstand a will contest.

GUARDING AGAINST UNDUE INFLUENCE CLAIMS

1. It is preferable if the initial contact with the client be made directly by the client.
2. The will should not be prepared from emails, notes or instructions from someone other than the testator or testatrix.
3. Meet with the client in person to discuss the will.

4. Do not allow a will beneficiary to be present during the discussion or execution of the will.
5. Supervise the execution of the will personally.
6. If you have any question about the Client's capacity, have them examined by a psychiatrist, neurologist, or their treating physician (in that order of preference).
7. Do not file the will for probate the day after the death or the day after the funeral.

By adhering to these simple edicts, the estate planner may avoid learning the answer to the question:

“How much evidence is enough?”

For a full copy of the underlying scholarly research paper, you can download it from the resources portion of the firm website.

www.dallasprobateandtrust.com

Staubus | Blankenship | Legere | Walker PLLC
PROBATE & TRUST LITIGATION



P. KEITH STAUBUS

8150 N. Central Expy., Ste. 850
Dallas, TX 75206
pks@sblwlaw.com
Phone No. (214) 833-0100
Fax No. (214) 833-0200