# ***UNDUE INFLUENCE***

*by Curtis E. Shirley*

Undue influence is defined as "the exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised." *Hamilton v. Hamilton, 858 N.E.2d 1032, 1037 (Ind.App.2006).* "It is an intangible thing that only in the rarest instances is susceptible of what may be termed direct or positive proof." (quoting *McCartney v. Rex, 145 N.E .2d 400, 402 (Ind.App. 1957),* as follows: "The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy."). As such, undue influence may be proven by circumstantial evidence, and the only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred. *Gast v. Hall, 858 N.E.2d 154, 165 (Ind.App. 2006).*

Undue influence is influence that overpowers the mind of the person making the will, destroying the person's freedom to decide at the time the will is signed. Undue influence must be directly related to making the will and of such force that the will in reality represents the intentions of another person. If someone exerted undue influence over the decedent, the result is that the document she signed may have been hers in outward form, but in reality reflected another's wishes. This could involve mental or physical coercion, fear, desire for peace, or a feeling which the decedent was unable to resist.

Someone having undue influence over the decedent does not need to be actually present at the time and place of preparation and execution of a will in order to make them invalid because of undue influence. It is a question of fact for the jury as to whether influence previously acquired still persisted at the time the documents were signed. *See Indiana Model Civil Jury Instructions 3911; In re Estate of Wade, 768 N.E. 2d 957, 962 (Ind. App. 2002); Gast v Hall, 858 N.E. 2d 154, 166 (Ind. App. 2006); Workman v. Workman, 46 N.E. 2d 718, 726 (Ind. 1943); Arnold v. Parry, 363 N.E.2d 1055 (Ind.App. 1977); Cooper v. Cooper, 51 N.E.2d 100 (Ind. App. 1943); McCartney v. Rex, 145 N.E.2d 400 (Ind.App. 1957).*

In determining whether there was undue influence in creating a will or trust, the following may be considered: "(1) the character of the beneficiary; (2) any interest or motive the beneficiary might have to unduly influence the testator; and (3) the facts and surrounding circumstances that might have given the beneficiary an opportunity to exercise such influence." *In re Rhoades, 993 N.E.2d 291 (Ind.App. 2013).* By statute Indiana has changed the presumption of undue influence where an attorney in fact is not involved in the disputed transfers. *Estate of Compton, 919 N.E.2d 1181 (Ind.App. 2010).*

The Indiana cases have mentioned various facts which either support an inference of undue influence, or show the lack of influence:

| UNDUE INFLUENCE | NO UNDUE INFLUENCE |
|---|---|
| Beneficiary drove testator to law office | Beneficiary did not |
| Beneficiary in the room when signed | Beneficiary was not |
| Beneficiary used his or her own attorney | Decedent used prior attorney |
| Beneficiary lived with testator | Beneficiary did not |
| Beneficiary isolated or secluded testator | Beneficiary did not |
| Beneficiary helped testator with living | Beneficiary did not |
| Beneficiary was guardian, attorney, or POA | Beneficiary was not |
| Beneficiary was paid for services | Beneficiary was not |
| Beneficiary caused family turmoil | Beneficiary did not |
| Beneficiary obtained beneficiary forms | Beneficiary did not |
| Beneficiary at the Bank with testator | Beneficiary was not |
| Beneficiary never in a prior document | Beneficiary was previously included |
| Annual exclusion gifts to others stopped | Regular gifts continued |

In *Lasater v. House, 841 N.E.2d 553 (Ind. 2006),* the Indiana Supreme Court held that in a will contest, statements of a testator when he or she signed the will are not admissible as evidence of undue influence, but can be admitted on the issue of testamentary capacity. In my opinion the Court made this decision based on outdated law, and without the benefit of all arguments.

Suppose the testator tells the drafting lawyer: "I have to sign this new will giving my nurse everything or she'll kick me out of my house and make me go to a nursing home." Hard to imagine why the court would allow such testimony under the auspices of soundness of mind but not on the issue of undue influence.

Prior to a few years ago the Indiana Deadmans' Statute prevented any party from testifying concerning occurrences during the lifetime of the decedent, except on the issue of soundness of mind. The legislature amended the Deadmans' Statute so it no longer applies in will contests or trust contests. *I.C. 34-45-2-4.* Yet in *Lasater* the Court cited to the case law of *Allman, Loeser, Crane, Emry, Ditton, Westfall, Todd,* and *Hayes*, all of which were Deadmans' Statute cases effectively overruled by the legislative change. These cases speak about whether a witness is competent (which goes to whether or not he or she can testify at all because of the Deadmans Statute), not whether certain testimony is admissible, which is an entirely different question.

The attorneys in the case and the courts missed the correct evidentiary rule in the first place, which can be common when objections and responses are made quickly during a trial. In *Lasater* the plaintiff wanted the witness to testify about what the testator said. Because an executor is a party defendant to a will contest, everything the decedent said or did during his or her lifetime is admissible as non-hearsay under Evidence Rule 801(d)(2). The briefing, however, relied solely on Evidence Rule 803(3).

The executor is a necessary defendant to any will contest. *Moll v. Goedeke, 25 N.E.2d 258 (Ind.App. 1940)*; *I.C. 29-1-7-17* ("The executor and all other persons beneficially interested in the will shall be made defendants to the action."). The executor is charged in

his fiduciary capacity to defend the probated will. *Hamilton v. Huntington, 58 N.E.2d 349 (Ind. 1944).* This makes the plaintiff and the estate party opponents.

Pursuant to Evidence Rule 801(d)(2), "A statement is not hearsay if: The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; …" This rule applies not only to statements, but also to opinions. *Beresford v. Starkey, 563 N.E.2d 116, 124 (Ind.App. 1990).* The plaintiffs do not have to show that the decedent had personal knowledge of any facts. *Miller, Courtroom Handbook on Evidence, page 270 (2005 ed.)*, citing *Blackburn v. UPS, 179 F.3d 81, 96 (3d Cir. 1999).* Thus, when the plaintiff's attorney asks a witness (including the plaintiff) what the decedent said, his or her statements are not hearsay. *Hebel v. Conrail, 475 N.E.2d 652, 660-61, (Ind. 1985)* ("They were admissible as the admissions of a decedent against his personal representative."), *and footnote 2* (which applies the rule to "a party, or a party's predecessor in interest").

As another example, in *Uebelhack Equipment v. Garrett, 408 N.E.2d 136 (Ind.App. 1980)*, an owner brought an action against a general contractor for damages. "Part of the evidence introduced to show the nature and terms of the contract were statements made by Edwin Uebelhack to Paul Zimmer. … The only unusual factor is that Edwin Uebelhack is since deceased from the time of the making of the statements. … the declarations of a deceased person, especially when they are corroborated by conditions and circumstances, are sufficient to establish the existence, terms and conditions of an express oral contract." *Id. at 138-39*. *First Bank & Trust v. Tellson, 118 N.E.2d 496, 501 (Ind.App. 1954)*; *Weir v. Lake, 41 N.E.2d 828, 831 (Ind.App. 1942)* ("Such statements may be sufficient to prove the issue in question and to support a decision, and particularly is this true where the declarations or statements are supported by other evidence").

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