AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
NEW ENGLAND FELLOWS INSTITUTE

April 29, 2022

CONTESTING TESTAMENTARY TRANSFERS IN MASSACHUSETTS

Mark E. Swirbalus
Goulston & Storrs PC, Boston
mswirbalus@goulstonstorrs.com

Marshall D. Senterfitt
Goulston & Storrs PC, Boston
msenterfitt@goulstonstorrs.com

I. TESTAMENTARY CAPACITY

A. What is the standard?

1. For the most recent discussion of the standard, see Haddad v. Haddad, 99 Mass. App. Ct. 59 (2021).

2. The Massachusetts Probate Code provides simply that a testator must be of "sound mind to make a will." G.L. c. 190B, § 2-501. More direction is found in the common law.

3. "At the time of executing a will, the testatrix must be free from delusion and understand the purpose of the will, the nature of her property, and the persons who could claim it." O'Rourke v. Hunter, 446 Mass. 814, 826 (2006), quoting Santry v. France, 327 Mass. 174, 175-176 (1951). It is the time of execution that counts. See Haddad, 99 Mass. App. Ct. at 71 ("the relevant focus always remains on the moment of execution, even where the testator executes a will in the midst of periods of confusion, delusion, or incapacity.").

4. "Testamentary capacity requires ability on the part of the testator to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance." Goddard v. Dupree, 322 Mass. 247, 250 (1948).

5. "Testamentary capacity does not require perfect physical health or perfect articulation. Physical ailments and related depression do not per se negate the testator's mental capacity. Howes v. Riordan, 81 Mass. App. Ct. 1117 (2012) (internal quotations omitted).

6. Lack of testamentary capacity requires more than "deterioration of mental capacity or loss of alertness as often comes with advanced age, leaving intelligence and awareness adequate to support the exercise of judgment." Cushman v. Nichols, 20 Mass. App. Ct. 980, 982 (1985) ("That a testator disposes of property in a manner that some may think unwise, is remote from proof of the kind of mental breakdown that ought to invalidate a will.").

7. Note that testamentary capacity is not the same as contractual capacity.

    a. Contractual capacity is governed by an "affective" or "volitional" test and has been described as follows: "Under this modern, affective test, '[w]here a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.' Also relevant to the inquiry in these circumstances is whether the party claiming mental incapacity was represented by independent, competent counsel." Sparrow v. Demonico, 461 Mass. 322, 330 (2012) (internal citations omitted).

    b. "The capacity to contract requires the ability to transact business, and more specifically the ability to understand the nature and quality of the transaction and to grasp its significance. In contrast, the standard for testamentary capacity requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will." Maimonides School v. Cole, 71 Mass. App. Ct. 240, 251 (2008) (internal quotations and citations omitted).

B. Who has the burden of proof?

1. Courts presume that a testator has capacity when executing a will. See O'Rourke, 446 Mass. at 827. An objector can rebut this presumption by providing "some evidence of the lack of testamentary capacity." Paine v. Sullivan, 79 Mass. App. Ct. 811, 817 (2011) (quotation omitted).

2. "The proponent of the testamentary document … has the burden of proving testamentary capacity on the date of execution, but he is aided by a presumption of testamentary capacity on that date." Haddad, 99 Mass. App. Ct. at 69.

3. "Where there is some evidence of lack of testamentary capacity, the presumption of sanity loses effect and the burden [is] on the proponent of the will to satisfy the tribunal of fact by a fair preponderance of the evidence that the deceased was of sound mind and testamentary capacity

when the instrument was executed. The burden is met by a showing that it is more probable than not that, at the time of execution of the will, … the testator [was able] to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance. It requires freedom from delusion which is the effect of disease or weakness and which might influence the disposition of his property. And it requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will. It is also well settled that in addition to possessing the requisite testamentary capacity and complying with the statutory formalities regarding execution, it must also be shown that the testator knew the contents of the instrument which he signed and executed it with the intention that it operate as his will. The burden of proof on these matters is on the proponent. Here again, he is aided by a presumption that a person signing a written instrument knows its contents." Paine, 79 Mass. App. Ct. at 817-818 (internal quotations and citations omitted).

C. What kind of evidence is permissible and persuasive?

1. The question is "whether there was sufficient circumstantial evidence to rebut the presumption" of testamentary capacity. Haddad, 99 Mass. App. Ct. at 69 (citing cases relying on medical evidence).

2. "[T]he reliance on medical and expert evidence is routine when addressing issues of mental illness, capacity, and competence." Sparrow, 461 Mass. at 332.

3. Only "the witnesses to the will, the [treating] physician … and witnesses who by special skill and experience are qualified as experts in the knowledge and treatment of mental diseases … [may] give their opinions" as to a testator's testamentary capacity. May v. Bradlee, 127 Mass. 414, 421 (1879); see also Falzone v. Sayen, 87 Mass. App. Ct. 1135, 1135 n.10 (2015); Maimonides School, 71 Mass. App. Ct. at 251 n.8.

4. A qualified expert witness may base his or her opinions on the following evidence: (a) medical records; (b) mini-mental status examinations, which offer a quick and simply way to quantify cognitive function and screen for cognitive loss, testing the individual's orientation, attention, calculation, recall, language, and motor skills; and (c) competency evaluations.

II. UNDUE INFLUENCE

A. What is the standard?

1. Undue influence is "whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammeled desire." Bruno v. Bruno, 10 Mass. App. Ct. 918 (1980).

2. Undue influence involves swaying the testator into doing something against the testator's free will so that he or she acts favorably to the wishes of the person who is exerting pressure, even if doing so is contrary to his or her own intended wishes. Heinrich v. Silvernail, 23 Mass. App. Ct. 218, 223 (1986).

3. To support a determination of undue influence, the court must find that (1) an unnatural disposition of property has been made, (2) by a person susceptible to undue influence, (3) benefitting someone who had an opportunity to exercise undue influence and (4) who used that opportunity to procure an improper disposition. Id.; see also O'Rourke v. Hunter, 46 Mass. at 827-828.

B. Who has the burden of proof?

1. The burden of proof rests with the party asserting undue influence, unless a person who stood in a fiduciary relationship with the testator benefits from the challenged transaction, in which case the burden shifts to the fiduciary to disprove undue influence.

2. "[T]he fiduciary who benefits in a transaction with the person for whom [she] is a fiduciary bears the burden of establishing that the transaction did not violate [her] obligations." Cleary v. Cleary, 427 Mass. 286, 295 (1998); see also In re Estate of Moretti, 69 Mass. App. Ct. 642, 652 (2007) (the will's proponent, who was the decedent's fiduciary, bore the burden of explaining there was no undue influence despite his involvement in the preparation of the decedent's will); Rempelakis v. Russell, 65 Mass. App. Ct. 557, 567 (2006).

C. What kind of evidence is permissible and persuasive?

1. Undue influence need not be proved by direct evidence; often its existence must be gathered from attendant circumstances, such as the health and mental condition of the testator and the opportunity and power of the alleged influencer to overcome the free will of the testator. O'Brien v. Collins, 315 Mass. 429, 434 (1944).

2. A physician or medical expert may be permitted to testify as to whether an individual was susceptible to undue influence.

3. Courts look at the testator's intent to determine if a disposition is unnatural. See Germain v. Girard, 78 Mass. App. Ct. 1105 (2010) (because the testator's "principal aim" was to ensure his wife's financial security, the court determined that "[a]ny disposition of assets tending to benefit [the wife] would suggest a natural character, while any disposition benefitting others could tend to reduce that natural character"); Rostanzo v. Rostanzo, 73 Mass. App. Ct. 588, 606 (2009) (disposition of testator's estate to his children rather than to second wife was not unnatural, because

testator, "an active and experienced businessman in full command of his affairs who was neither ill, dependent, nor enfeebled," revised his will after thoroughly discussing the value of his assets with his attorney); Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 461-62, 465 n.11 (1997) (disposition of testator's marital residence to his wife of twenty-seven years was not unnatural, especially when the testator had never told his daughter, granddaughter, or sisters that he would leave his house to them).

III. AFFIDAVITS OF OBJECTIONS

A. What is required in an affidavit of objections?

1. A will contestant must state "specific facts and grounds" in his affidavit of objections that would, if true, entitle him to relief. See G.L. c. 190B, § 1-401(e); see also Baxter v. Grasso, 50 Mass. App. Ct. 692, 697-98 (2001) (reversing trial court's ruling that struck affidavit of objections because the contestant had set forth facts that met the "specificity requirement" and would, if true, entitle him to relief).

2. Courts treat an affidavit of objections like a civil complaint. See O'Rourke, 446 Mass. at 818 (the specificity requirement for an affidavit of objections "is no more burdensome that court rules in other areas of the law requiring a plaintiff to assert with specificity in his complaint (or other pleading) allegations which, if proved, would entitle him to prevail"), quoting Wimberly v. Jones, 26 Mass. App. Ct. 944, 946 (1988).

3. The Court must assume that statements in an affidavit of objections are true and draw all inferences in favor of the objecting party. See Baxter, 50 Mass. App. Ct. at 696 (assuming statements in contestant's affidavit of objections were true and drawing inferences in his favor to find that he had stated claims sufficient to survive a motion to strike); see also Leighton v. Hallstrom, 94 Mass. App. Ct. 439, 443 n.9 (2018) (when "reviewing [an] affidavit of objection, factual inferences [are] to be drawn in favor of the objector").

B. What if the objecting party lacks personal knowledge?

1. This question often arises, for example, when the objecting party was not present when the challenged will was executed.

2. An objecting party may rely on sources of information beyond his or her own personal knowledge. See Wimberly, 26 Mass. App. Ct. at 945 n.3 (possible sources of information regarding decedent's condition include doctors, hospital attendants, neighbors, and others); see also Brogan v. Brogan, 59 Mass. App. Ct. 398, 398 (2003).

3. When personal knowledge is lacking, it is good practice to serve discovery requests immediately upon filing a notice of appearance and objection. Cf. Fitzgerald v. Foley, 89 Mass. App. Ct. 1129 (2016) (objector failed to adequately pursue discovery that might have uncovered additional facts sufficient to survive a motion to strike).

IV. GATHERING THE EVIDENCE

A. What are the typical sources of evidence?

1. Medical records

2. Lawyer files

3. Correspondence (including email, text messages, and social media – don't forget text messages and social media!)

    a. Send litigation hold letters at the outset of the case.

B. Method of gathering the evidence?

1. Serve document requests, interrogatories, and requests for admissions on parties.

2. Serve subpoenas on non-parties like medical providers and lawyers.

3. Depositions of parties and non-parties alike

    a. Consider using video depositions for out-of-state witnesses or to preserve testimony.

4. Also consider a motion for summary judgment as a method of gathering additional evidence. Such a motion can force the opposing side to lay its evidence bare.

V. TORTIOUS INTERFERENCE WITH EXPECTANCY

A. The elements of a claim for tortious interference with expectancy are:

1. intentional interference with expectancy in an unlawful way (including fraud, duress, or undue influence);

2. the plaintiff has a legally protected interest; and

3. the interference acted continuously until such time as the expectancy would have been realized.

Labonte v. Giordano, 426 Mass. 319 (1997).

B. The claim is not ripe for adjudication until the donor dies. In Labonte v. Giordano, 426 Mass. at 321, the court rejected a claim for tortious interference with expectancy that was asserted while the donor was still alive. "[A] cause of action cannot arise for tortious interference with the expectancy of receiving a legacy until the donor's death, because any such expectancy would only be realized at that time." Id.

C. In cases where it is reasonably certain that "the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received." Restatement (Second) of Torts, § 774B, Comment (d); Hanna v. Williams, 2017 WL 2292756, *5 (Mass. Super. Ct. Jan. 9, 2017). In these cases, the court can take into consideration "[t]he fact that it was the defendant's tortious act that makes it not possible to prove with certainty." Restatement (Second) of Torts, § 774B, Comment (d).

D. Note that the Probate and Family Court does not have subject matter jurisdiction over a claim for tortious interference with expectancy. As the name of the claim suggests, it is a tort.

VI. THE ATTORNEY-CLIENT PRIVILEGE

A. Legal files are privileged, right?

1. Under Section 502(d)(2) of the Massachusetts Guide to Evidence, the attorney-client privilege does not apply to communications relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction. See Mass. G. Evid. § 502(d)(2) (2021).

2. The official Note to Section 502(d)(2) explains that this exception to the attorney-client privilege reflects Massachusetts practice, citing Phillips v. Chase, 201 Mass. 444, 449 (1909), which states the following:

> It has been repeatedly held that this rule of privilege should be construed strictly. Foster v. Hall, 12 Pick. 89, 98. Hatton v. Robinson, 14 Pick. 416, 422. It is for the protection and benefit of the client, so that his disclosures may not be used against him in controversies with third persons. He may waive it, and if there is a controversy after his death between his estate and those claiming adversely to it, the privilege may be waived by his executor or administrator, (Brooks v. Holden, 175 Mass. 137,) or by his heirs (Fossler v. Schriber, 38 Ill. 172); but where the controversy is not between an estate and persons claiming against it, but is to determine who shall take by succession the property of a deceased

person, and both parties claim under him, the reason for the privilege does not exist, and neither can set up a claim of privilege against the other. Doherty v. O'Callaghian, 157 Mass. 90. Russell v. Jackson, 9 Hare, 387. Blackburn v. Crawfords, 3 Wall. 175, 192, 194. Glover v. Patten, 165 U. S. 394, 406. See also, as tending to establish the same proposition, Layman's Will, 40 Minn. 371; Coates v. Semper, 82 Minn. 460; Kern v. Kern, 154 Ind. 29; O'Brien v. Spalding, 102 Ga. 490; Scott v. Harris, 113 Ill. 447, 454; Thompson v. Ish, 99 Mo. 160, 175.

VII. PRESENTING THE EVIDENCE

A. Motions in limine

B. Motion to bifurcate the trial

C. Video evidence

D. Time lines and chalks

VIII. LEGAL FEES AND COSTS

A. The Probate and Family Court—but *not* the Superior Court—has specific statutory authority pursuant to M.G.L. c. 215, § 45 to award fees and costs in contested cases relating to wills, estates, and trusts.

B. Section 45 gives the Probate and Family Court the discretionary authority to award fees and costs to a prevailing party as a matter of equity, and this discretionary authority is not limited to cases of bad faith or other egregious litigation conduct. See In re Estate of Bartley J. King, 455 Mass. 796, 802-803 (2010).

C. It is "equitable" for purposes of Section 45 to award fees and costs against the party whose conduct triggered the litigation. Id. at 804, citing Hurley v. Noone, 347 Mass. 182, 190 (1964); Strand v. Hubbard, 31 Mass. App. Ct. 914, 914-915 (1991) ("it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the burden of legal costs").