

An Evidentiary Puzzle:
Dismissal of an Undue Influence Objection upon Summary Judgment

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The solution often turns out more beautiful than the puzzle.

- Richard Dawkins

As all litigators know, confronting Summary Judgment on any issue is a daunting undertaking. When one is either a Movant or Respondent, a near categorical knowledge of the Record facts, and a deep understanding of the applicable law – pertaining to both the specific case, *and* the procedural mandates of CPLR § 3212 itself - often present a host of complex, interdependent issues that need to be carefully distilled when presented to the Court. This process is no less involved in a Will Contest Proceeding before the Surrogate’s Court than it is when before the Supreme Court, especially when wrestling with an Objection to Probate sounding in Undue Influence. Nevertheless, securing Dismissal of an Undue Influence Objection upon Summary Judgment is not as difficult as it may first appear. Indeed, when arranging the pieces of the evidentiary puzzle that is the Record one can often find that an Objectant has offered only unsupported, self-serving, conclusory, and/or speculative allegations in support of their claim – allegations that will not only fail to defeat a Movant’s *prima facie* case, but renders their Undue Influence Objection ripe for Dismissal as a Matter of Law.

As a threshold issue, it is important to note that in order to be “undue,” the influence exerted over a Testator “must amount to mental coercion that led the testator to carry out the wishes of another, instead of their own wishes,” commonly “because the testator was unable to refuse or too weak to resist” (N.Y. Pattern Jury Instr.--Civil 7:55; Matter of Walther, 6 N.Y.2d 49 [1959]; Matter of Kumstar, 66 N.Y.2d 691 [1985]).

The diverse types of Undue Influence that might be brought to bear on a Testator are innumerable in form and are only limited by the ingenuity of the wrongdoer. Ultimately though, Undue Influence is pressure which - by whatever machination - overwhelms a

Testator's Testamentary Intent and replaces it with that of another (*see generally*, N.Y. Pattern Jury Instr.--Civil 7:55).

In order for an Objectant to establish that a Will is invalid based on the ground of Undue Influence, they must prove: 1) the Motive to Unduly Influence the Testator; 2) the Opportunity to Unduly Influence the Testator; and 3) the Actual Exercise of Undue Influence over the Testator (*see* 26A Carmody-Wait 2d § 152:243).

Importantly, establishing these elements – and the Party with whom the Burden of Proof rests, is materially affected by whether or not if a Confidential and/or Fiduciary relationship exists between the Parties (*see*, Matter of Albert, 137 A.D.3d 1266 [2nd Dept 2016]; Matter of Burrows, 203 A.D.3d 1699 [4th Dept. 2022]; *citing* (Blase v. Blase, 148 A.D.3d 1777, 1778, [4th Dept 2017]; Bazigos, 140 A.D.3d 811, 813 [2nd Dept 2016]; Matter of Prievo v. Urbaniak, 64 A.D.3d 1240, 1241, 6 [4th Dept 2009]; Matter of Graeve, 113 A.D.3d 983, 984 [3rd Dept 2014]).

As though that were not enough to contend with, seeking Summary Dismissal of an Undue Influence claim is further complicated by the fact that “...direct evidence of undue influence is seldom available, and thus the law permits it to be shown by the surrounding facts and circumstances leading up to and surrounding execution of a will;” i.e.: this element may be established by an “inference,” and not direct proof (*see*, N.Y. Pattern Jury Instr.--Civil 7:55; 26A Carmody-Wait 2d § 152:243, *citing* Lewis v. DiMaggio, 151 A.D.3d 1296 [3d Dept 2017]; Kotick v. Shvacko, 130 A.D.3d 472 [1st Dept 2015]; Matter of Estate of Bacon, 169 Misc. 2d 858, [West. Sur. Ct. 1996]).

This lack of direct evidence in and of itself can create a “question of fact” which will defeat Summary Judgment as the Court often requires a Fact Finder to determine the essential element of Actual Exercise (Motive and Opportunity being comparatively easy to establish [*see generally* Matter of Fellows, 16 A.D.3d 995 (3rd Dept 2005)]).

In practical terms, this means that when determining if Undue Influence was Actually Exercised over a Testator, the Court (or Fact Finder at Trial) will consider multiple factors, including but not limited to the Testator's:

- Physical and mental condition;
- If a Confidential and/or Fiduciary relationships existed between the Parties;
- Contact with, or isolation from family and friends;
- Knowledge and awareness of the Will's provisions and satisfaction with them; personal retention of independent counsel; etc. (see N.Y. Pattern Jury Instr.--Civil 7:55).

While these factors can be used – in part - to establish the “inference” that Undue Influence was Actually Exercised over a Testator, the facts upon which an Objection sounding in Undue Influence are based must still be proved by a fair preponderance of the evidence (N.Y. Pattern Jury Instr.--Civil 7:55; Matter of Klitgaard, 83 A.D.2d 651 [3rd Dept 1981]).

Importantly, “evidence of motive and opportunity without more does not establish a prima facie case, or furnish the basis for inferring” the Actual Exercise of Undue Influence (see, N.Y. Pattern Jury Instr.--Civil 7:55; Matter of Cianci, 165 A.D.3d 655 [2nd Dept 2018]; Matter of Anderson, 3 Misc.2d 869 [Broome Surr. 1956]).

In other words, neither unsupported, self-serving, conclusory and/or speculative allegations will satisfy Objectant’s Burden of Proof when trying to satisfy the “Actual Exercise” element.

Moreover, the “inference” that Undue Influence was Actually Exercised upon a Testator will only be invoked when no other reasonable conclusion can be reached from the Record facts - i.e.: if the Record facts can lead one to reasonably conclude that a Will was not the product of Undue Influence, then an Objectant will not be afforded the “inference” that Undue Influence was exercised upon the Testator (see, N.Y. Pattern Jury Instr.--Civil 7:55; Matter of Malone, 46 A.D.3d 975 [3rd Dept 2007]; Matter of Swain, 125 A.D.2d 574 [2nd Dept 1986]).

To that end, when moving for Summary Judgment to Dismiss an Objection sounding in Undue Influence – as with any Motion for Summary Judgment - Proponent

must first establish their *prima facie* case that the making of the Will was free from Undue Influence (see Matter of Zirinsky, 43 A.D.3d 946 [2nd Dept 2007]).

Movant can do this by identifying Record Proof establishing that the Will was created freely. As there is rarely – if ever - a single, direct, and determinative piece of evidence that establishes such a *prima facie case* – to the extent they are present – Movant must rely on a constellation of Record facts that show the Court the Will offered for Probate reflects the Testator’s true Testamentary Intentions.

Examples of from a Record that can establish Movant’s *prima facie case* can include, but are most certainly not limited to, whether:

- The Testator “was coherent and financially, mentally, and emotionally independent” when the Will was executed;
- The Will offered for Probate does not deviate significantly from the prior Estate Plan;
- The attorney who drafted the propounded Will:
 - Engaged in the proper due diligence during the intake/drafting process – including but not limited to:
 - Understanding the Testator’s Testamentary goals;
 - Providing informed consent regarding the Testator’s Estate Planning options;
 - Understanding the Family Tree;
 - Understanding the Family dynamics and Family History;
 - Understating the Testator’s Medical History;
 - Reviewing any prior Estate Plan(s);
 - Knowing the organization, size, and content of the Testator’s assets – including non-Probate assets;
 - Memorializing the above;
 - Confirmed that the Will reflected Testator, and no other’s, Testamentary Intent;

- Ascertained if the Testator enjoyed a Confidential and/or Fiduciary Relationship with any of the Beneficiaries;
- Observed no indicia of: Undue Influence; Lack of Capacity, or Diminished Capacity;
- Had a prior relationship with the Testator, or was independently selected by the Testator and not a beneficiary of the Will;
- Included an “Attestation Clause” in the Will;
- An attorney supervised the execution of the propounded Will, and:
 - Complied with the mandates of EPTL § 3-2.1;
 - Ensured that the no Party with a pecuniary interest under the Will was present during its execution;
 - Annexed (preferably contemporaneous) Affidavits of Attesting Witnesses detailing the Will execution ceremony, confirming the Testator’s Testamentary Intent was reflected in the instrument, and that they Observed no indicia of: Undue Influence; Lack of Capacity, or Diminished Capacity;
 - Prepared a Memorandum memorizing the above;
- Testimony of disinterested individuals:
 - Confirmed Testator’s Testamentary Intentions;
 - Detailed the reasons for a Testator’s desire to create or change their Testamentary Plan;
 - Detailed the Testator’s personality, and their resistance to the influence of others;
- Medical Records document the Testator’s cognitive and/or physical well-being, or in the alternative, do not evince cognitive and/or physical decline, incapacity, medications related to same, opioid, or other prescriptions that impair cognition and/or physical activity, or history of alcoholism or substance abuse;
- No adjudications of incapacity and/or appointment of a Guardian have been made;
- Financial Records document:
 - Testator’s knowledge of, and control over, their assets;
 - Privacy and confidentiality of financial information was maintained;

- Not evincing inconsistent, erratic, and/or suspicious expenditures, including Gifts;
- Consistent and contemporaneous signature and handwriting samples.

Record Proof such as this – as well as virtually anything else that one can reasonably offer to the Court to demonstrate that the Testator was not in a vulnerable state and/or otherwise compromised – can be used to establish Movant’s *prima facie* case in support of Summary Judgment.

Once Movant’s *prima facie* case is established, the burden upon the Motion will then shift to Respondent to establish a triable question of material fact as to whether Undue Influence was actually exercised upon the Testator in the making of the Will (see, Matter of Gobes, 189 A.D.3d 1402 [2nd Dept 2020]).

Needless to say, the degree to which a Respondent can establish a triable question of material fact is equally as dependent on the Record Proof as was Movant’s initial offering in support of Dismissal itself.

Accordingly, where an Objectant cannot identify any Record Proof - beyond conclusory allegations and mere speculation, or otherwise - that someone actually exerted Undue Influence over the Testator, they should not be able to defeat Summary Judgment (see, Matter of Eastman, 63 A.D.3d 738 [2nd Dept 2009]).

Indeed, a Record that is devoid of sufficient – or in some cases, any - evidence that an individual interfered with the making of a Will through the use of Undue Influence should result in Summary Dismissal of the Objection (see, Matter of Capuano, 93 A.D.3d 666 [2nd Dept 2012]; Matter of Estate of Colverd, 52 AD3d 971, [3rd Dept 2008]; Matter of Coniglio, 242 A.D.2d 901 [4th Dept 1997]).

The above referenced examples of Record Proof that can establish a Movant’s *prima facie* case in support of Dismissal are instructive in this regard.

Assume Movant relies upon any number of the above listed Record facts to establish their *prima facie* case in support of Dismissal, it would then turn to Respondent

to identify and/or create question(s) of material fact regarding each point in order to survive Summary Judgment, i.e.: Respondent must convince the Court that the factual basis of Movant's *prima facie* case requires review and determination by a Fact Finder before a legal conclusion can be drawn.

However, if Respondent cannot cite sufficient – or any – Record Proof creating a question of fact regarding the Movant's *prima facie* case, then Respondent quite simply should not survive Summary Judgment.

Though by no means guaranteed a victory, a Proponent should always consider seeking Summary Judgment Dismissing an Objection sounding in Undue Influence when presented with a Record like that described above. Indeed, where an Objectant has no - or patently insufficient – evidence to support their Objection, there is a strong likelihood that they cannot defeat Movant's *prima facie* case, and Dismissal of the Objection can be secured upon Summary Judgment.

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