

ANSWER TO QUESTION NO. 12

This question tests three of the most common types of will contest: lack of testamentary capacity, undue influence resulting in lack of free will, and the testator's failure to properly execute the will.

Testamentary Capacity: MCL 700.2501 states "An individual 18 years of age or older who is of sound mind may make a will." The case law has interpreted sound mind to consist of the individual must be able to (1) comprehend the nature and extent of his property; (2) recall the natural objects of his bounty; and (3) determine and understand the disposition of property which he wishes to make. *In re Sprenger's Estate*, 337 Mich 514 (1953); *In re Carmas' Estate*, 327 Mich 235 (1950); *In re Walker's Estate*, 270 Mich 33 (1935).

In this case, Jason Walker was 84 years old so he meets the threshold age requirement. The family will say that he suffered from a number of health problems including the effects of a stroke and deep depression all of which could affect his mental capacity. Carlee will counter that when Jason dictated the letter requesting the codicil he stated specifically that he (1) knew he was wealthy; (2) knew who his family was; and (3) felt that his wealth would be wasted with his family and directed a change in who was to be beneficiary of his will. The codicil was drafted to the specifics of the letter and attorney reviewed the letter with Jason when the codicil was executed. At the time of execution, having reviewed the letter that set forth the elements of testamentary capacity Jason executed the codicil without any indication that he was not of "sound mind" as defined by law. As such, the facts do not support a claim of lack of testamentary capacity.

Undue Influence: According to *Kar v Hogan*, 399 Mich 529, 537 (1976), a presumption of undue influence arises upon introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest that he represents benefits from a transaction, and (3) the fiduciary had an obligation to influence the grantor's decision in that transaction. In this case, the family will argue that Carlee was a fiduciary of Jason in that she was his employee and personal caregiver. She benefitted from the transaction because she will not inherit his wealth. Finally, she not only had opportunity to influence the grantor's decision, but she actively participated in it. She drafted the letter causing the codicil to be created, she placed the pen in his hand and helped him sign the codicil, and she witnessed the codicil. Thus, the presumption of undue influence

has been met. *Kar v Hogan*, 399 Mich 529, 538 (1976). Furthermore, Jason was in a weak, paralyzed state and suffering from deep depression and the case law indicates that the lower the degree of the testatory's intellect or strength, the easier it is to infer that influence is undue. *In re Shepard's Estate*, 161 Mich 441 (1910); *Schneider v Vosburgh*, 143 Mich 476 (1906).

Carlee will counter that not all influence is undue influence and the burden of proof does not shift to her as a proponent of the codicil even though the presumption of undue influence has been met. Rather, only the burden of going forward with evidence the transaction was free of undue influence shifts to her. The burden of proof remains on the family throughout the case to show that the will was the product of undue influence and not the product of Jason's own free will. *Kar v Hogan*, 399 Mich 529 (1976). She will argue that Jason's letter to his attorney was a surprise to her and she drafted it exactly as he wanted by taking dictation as she usually did. She will also argue that even though she assisted Jason in signing the codicil, she acted only as was their usual practice in helping him sign something when he could not because of his paralysis. She will also argue that despite Jason's illness, he was of sound mind and capable of making his own decisions. Finally, she will argue that Jason obtained and consulted independent legal counsel regarding the codicil and he did so outside of her presence. Despite the presumption of undue influence having been met, the family has not met its burden in demonstrating that the codicil was the product of undue influence and not the product of Jason's own free will. Therefore, any presumption of undue influence has been rebutted.

Failure to execute a proper will: A codicil to a will must be executed with the same requirements that a valid will must be executed. The family will argue that under the common law Carlee could not be a witness to a will that she was a beneficiary or interested person in. Carlee will counter that when EPIC took effect in 2000, the legislature modified the common law. EPIC 700.2505(1) states: "An individual generally competent to be a witness may act as a witness to a will." EPIC 700.2505(2) states further: "The signing of a will by an interested person, does not invalidate the will or any provision of it." Thus, EPIC has changed the common law and Carlee could properly witness the codicil despite being a beneficiary of the will. Therefore, the codicil was executed with the same requirements of a valid will.