

WADE ASH

WADE ♦ ASH ♦ WOODS ♦ HILL & FARLEY, P.C.

CHERRY CREEK CENTRE
360 SOUTH MONROE STREET, SUITE 400
DENVER, CO 80209
303.322.8943
WWW.WADEASH.COM

DISCLAIMER

Material presented on the Wade Ash Woods Hill & Farley, P.C., website is intended for informational purposes only. It is not intended as professional service advice and should not be construed as such.

The following memorandum is representative of the types of information we provide to clients when we prepare estate planning documents for them. However, this material may not be used by every attorney in the firm in every case. The attorneys at Wade Ash view each case as uniquely different and, therefore, the information we provide to our clients may be substantially different depending on the client's needs and the nature and extent of their assets.

Any unauthorized use of material contained herein is at the user's own risk. Transmission of the information and material herein is not intended to create, and receipt does not constitute, an agreement to create an attorney-client relationship with Wade Ash Woods Hill & Farley, P.C., or any member thereof.

WILL CONTEST MEMORANDUM

1. **Burden of Proof.** In order for a Will to be admitted to probate, it is the proponents of the Will who have the initial burden of proof to establish their “prima facie” case that the testator had testamentary capacity. Generally, that burden is easily met upon presenting a self-proved Will or proving the Will’s due execution by subscribing witness’ testimony and by showing proof of death and venue. Once due execution of the Will is shown, two things occur: (i) a presumption arises that the testator had testamentary capacity on execution; and (ii) the proponent established the “prima facie” case. After the enactment of Colorado Probate Code § 15-12-407, C.R.S., the initial “prima facie” burden and ultimate burden of persuasion to establish the testator’s lack of testamentary capacity and/or that the Will was a product of undue influence rests on the contestant.

2. **Testamentary Capacity.** The following discussion regarding lack of testamentary capacity will be relevant if, upon review of the medical records, we determine that there was diminished testamentary capacity at the time of the Will execution.

Colorado Jury Instruction (“C.J.I.”) 3d § 34:9 provides that the testator, at the time he or she signed the Will, must understand all of the following: (i) that he or she is making a Will; (ii) the nature and extent of the property he or she owns; (iii) how that property will be distributed under the Will; (iv) that the Will distributes the property as he or she wishes; and (v) those persons are the natural ones to receive his or her property. C.J.I. 3d § 34:9. See also, *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 P. 956 (1910); *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953). The testator also must be free of an “insane delusion,” defined as a persistent belief in that which has no existence in fact, which is adhered to against all evidence and which materially affects the dispositions in the Will in question. *Breeden v. Stone*, 992 P.2d 1167 (2000).

In *Lehman v. Lindenmeyer*, the Colorado Supreme Court held that an exact quantity of mind and memory necessary for Will validity cannot be determined by the law. The Court’s interpretation of mental soundness required the testator to:

. . . possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts [sic] with reference to their conduct and treatment toward him, their capacity and necessity, and that he will have sufficient active memory to retain all of these facts in his mind long enough to have his Will prepared and executed; if he has sufficient mind and memory to do this, the law holds he has testamentary capacity.

Id. at 305, 109 P. at 958.

The Colorado Supreme Court in *Cunningham v. Stender* relying on the *Lehman* interpretation of sound mind refined the concept to mean:

. . . that a disposing mind and memory is one in which the testator has a full and intelligent consciousness of the nature and effect of the act he is engaged in, and [general] knowledge of the properties he possesses, and the understanding of the disposition he wishes to make of it by Will, and [his relation to] the persons and objects he desires to participate in his bounty. . . and memory sufficient to call in mind, without prompting, the particulars or elements of the business to be transacted, and to hold them there with sufficient length of time to perceive at least their obvious relations to each other, and to be able to form rational judgment in relation to them.

Id. at 293, 255 P.2d at 981.

In the *Breeden* case, the Colorado Supreme Court reaffirmed *Cunningham* and unified the *Cunningham* standards with the “insane delusion” standard.

Colorado Probate Code § 15-12-407, C.R.S., requires the Will contestant to establish the testator's testamentary capacity by a preponderance of the evidence. Establishing lack of testamentary capacity by direct evidence is rare, and Colorado Courts have generally taken a liberal view on admitting testimony to accumulate circumstantial facts to establish facts from which the testamentary capacity can be inferred. *In Porter's Estate*, 125 Colo. 16, 204 P.2d 516 (1952). Wide latitude is given in introducing evidence on testamentary capacity. *Ashworth v. McName*, 18 Colo. App. 85, 70 P. 156 (1902).

Testamentary capacity is a substantive question of fact. The issue is determined by the trier of fact (*i.e.*, the judge or the jury). The fact finder may consider both direct and circumstantial evidence indicative of the testator's mental status to determine how reasonable and natural the disposition was relative to the testator's situation. *In Re Shapter's Estate*, 35 Colo. 578, 85 P. 688, 689 (1905); *Scott v. Leonard*, 117 Colo. 54, 184 P.2d 138, 139 (1947); *Estate of Murphy*, 483 P.2d 1364, 1365 (Colo. App.1971).

The question is not the degree of impairment, but whether the testator: (i) understood he was making his Will, (ii) understood the proposed testamentary disposition, (iii) knew the extent of his property, (iv) knew the natural objects of his bounty, (v) had his wishes represented in the Will, and (vi) perceived all of these elements relative to one another. Testators who suffer from Senile Dementia can have testamentary capacity. The lawyer's dilemma is knowing when a client has capacity and when the client does not have capacity. See 44 C.J.S. *Insane Persons* § 2 (1956); 94 C.J.S. *Wills* § 27 (1956); 79 Am.Jur.2d *Wills* § 77 (1975).

3. **Undue Influence.** Undue influence is defined in Colorado Jury Instructions 3d, § 34:12 as words or conduct, or both, which, at the time of the making of the Will, (i) deprive the person making the Will of his or her free choice, and (ii) cause the person to make the Will or to make one or more provisions differently than he or she otherwise would have. C.J.I. 3d § 34:12.

Undue influence is proved if the contestants can prove the following facts:

- (1) A person unequivocally was susceptible to undue influence;
- (2) The opportunity of a third person to exercise undue influence and to affect a wrongful purpose;
- (3) A disposition to influence unduly for the purpose of procuring an improper benefit; and
- (4) A result appearing to be the effect of supposed influence.

Circumstantial Evidence. Undue influence is always proved by circumstantial evidence and Colorado Courts have been liberal in admitting evidence of all circumstances, even though slight, which, in conjunction with other evidence, may show undue influence. *In Re Kotches Estate*, 136 P.2d 673 (Colo. 1943). In *Kotches Estate*, the Colorado Supreme Court, citing *In Re Shell's Estate*, 28 Colo. 167, 63 P. 413 (1900), stated:

A charge of undue influence is substantially that of fraud, and it can seldom be shown by direct and positive evidence. While it is true that it must be proved and not presumed, yet it can be and most generally is, proved by evidence and circumstances which, as to themselves, may admit of little dispute, but which are calculated to establish it, and from which it may reasonably and naturally be inferred.

Undue influence cannot be inferred from motive or opportunity alone. There must be some evidence, either direct or circumstantial, to show that undue influence not only existed, but that it influenced the making of the Will. *Piggott v. Schachet*, 232 P. 1112 (Colo. 1925); *Scott v. Leonard*, 184 P.2d 138 (Colo. 1947); *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952); *In re Shell's Estate*, 28 Colo. 167, 63 P. 413 (1900). Colorado Courts have long recognized the nature of undue influence and its difficulty of proof other than by circumstantial evidence. In *Blackman v. Edsall*, 17 Colo. App. 429, 68 P. 790 (1902), the Colorado Appellate Court held:

It follows from the very nature of the thing that evidence to show undue influence must be largely in effect circumstantial. It is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof . . . he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery or other methods to obtain power and control over the will of another and direct it improperly to the accomplishment of the purpose which he desires . . . the evidence required to establish what need not be – indeed cannot be – of that direct, affirmative and positive character which is required to establish a tangible fact. The only positive and affirmative proof required is the facts and circumstances from which undue influence may be reasonably inferred. (emphasis supplied)

4. **Presumption of Undue Influence.** Colorado Courts have held that where beneficiaries are also fiduciaries or in a confidential relationship with the decedent the temptation for overreaching is great. *Bohl v. Haney*, 228 Colo. App. 55, 470 P.2d 603 (1970); *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975); *Meyer v. Schwartz*, 638 P.2d 821 (Colo. App. 1981). The Colorado Supreme Court has held:

It is not the mere relation [confidential or fiduciary] that necessarily induces or exerts an undue influence . . . but because drawing a will presents an opportunity and a temptation, which, together with the personal friendship and confidence and influence of the relationship . . . justify suspicion and the requirement from the legatee of

satisfactory evidence that the opportunity was not embraced and the influence was not exerted.

Gehm v. Brown, 245 P.2d 865, 868 (Colo. 1952).

Drafting Attorney's Active Participation. Colorado, like most other states, recognizes the rule that when a confidential or fiduciary relationship exists between the testator and a beneficiary (or the beneficiary's attorney) under the Will and the beneficiary or his or her attorney, either drafted or was actively involved in the drafting of the Will, a presumption of undue influence on the part of the beneficiary is raised. *See* Colorado Jury Instruction 3d § 34:14; *Columbia Savings and Loan Ass'n v. Carpenter*, 521 P.2d 1299 (Colo. App. 1974), *rev'd on other grounds*, *Judkins v. Carpenter*, 537 P.2d 737 (Colo. 1975); *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952). The Colorado Jury Instruction provides that if a jury finds by a preponderance of the evidence that the donee was a beneficiary under the Will and that at the time of the preparation or execution of the Will the donee was in a confidential or fiduciary relationship with the testator and that the donee was actively involved in some way with the preparation or execution of the Will, the law presumes that the Will was executed under undue influence (emphasis supplied).

Presumptions (in general). Colorado Jury Instruction 3d § 3:5 governs presumptions generally. This section provides that “presumptions are rules based upon experience or public policy and established in the law to assist the jury in ascertaining the truth . . . [and] unless and until the presumption is outweighed by evidence to the contrary, which has been proved by (a preponderance of the evidence), you must consider the presumption with other evidence in arriving at your verdict.” C.J.I. 3d § 3:5.

There is a division of authority as to whether a rebuttable presumption has evidentiary weight or is to be disregarded as soon as substantial opposing evidence is entered. That is, whether a presumption in effect shifts the burden of proof or only shifts the burden of going forward. Under one view, the presumption of undue influence drops out of the case once actual evidence is introduced to rebut it. *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975). Under another view, the presumption stays in the case and the trier of fact may consider the presumption together with the other evidence in the case. (*See* Source and Authority to C.J.I. 3rd). The conflict in Colorado case law has resulted in three recommended versions of this instruction:

(1) For use with a rebuttable presumption when there is no or insufficient rebutting evidence;

(2) For use with a rebuttable presumption when there is sufficient rebutting evidence and the presumption is one that remains in the case as “some evidence” of the presumed fact even when there is sufficient rebutting evidence; and

(3) For use with a rebuttable presumption when there is sufficient rebutting evidence and the presumption is one that “disappears” from the case in such circumstances.

The function of the presumption of undue influence is to make a *prima facie* case and shift to the proponent the burden of producing some evidence to rebut the presumption. But it does not shift the burden of proof which remains on the contestant throughout the trial. *Lesser v. Lesser*, 250 P.2d 130 (Colo. 1952). The risk of non-persuasion is on the contestant and the duty of going forward or producing evidence is on the proponent if the evidence is sufficient to give rise to the presumption. *Snodgrass v. Smith*, 94 P. 312 (Colo. 1908); *Lamberg v. Kirkpatrick*, 50 P.2d 542 (Colo. 1935).

The proponent need only rebut the presumption by proving enough evidence to act as a counterweight to the evidence presented. The strength of the presumption and the amount of proof required to overcome it must depend on the circumstances in each case. *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952).



IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice included in this written or electronic communication was not intended or written to be used, and it cannot be used by the taxpayer, for the purpose of avoiding any penalties that may be imposed on the taxpayer by any governmental taxing authority or agency.