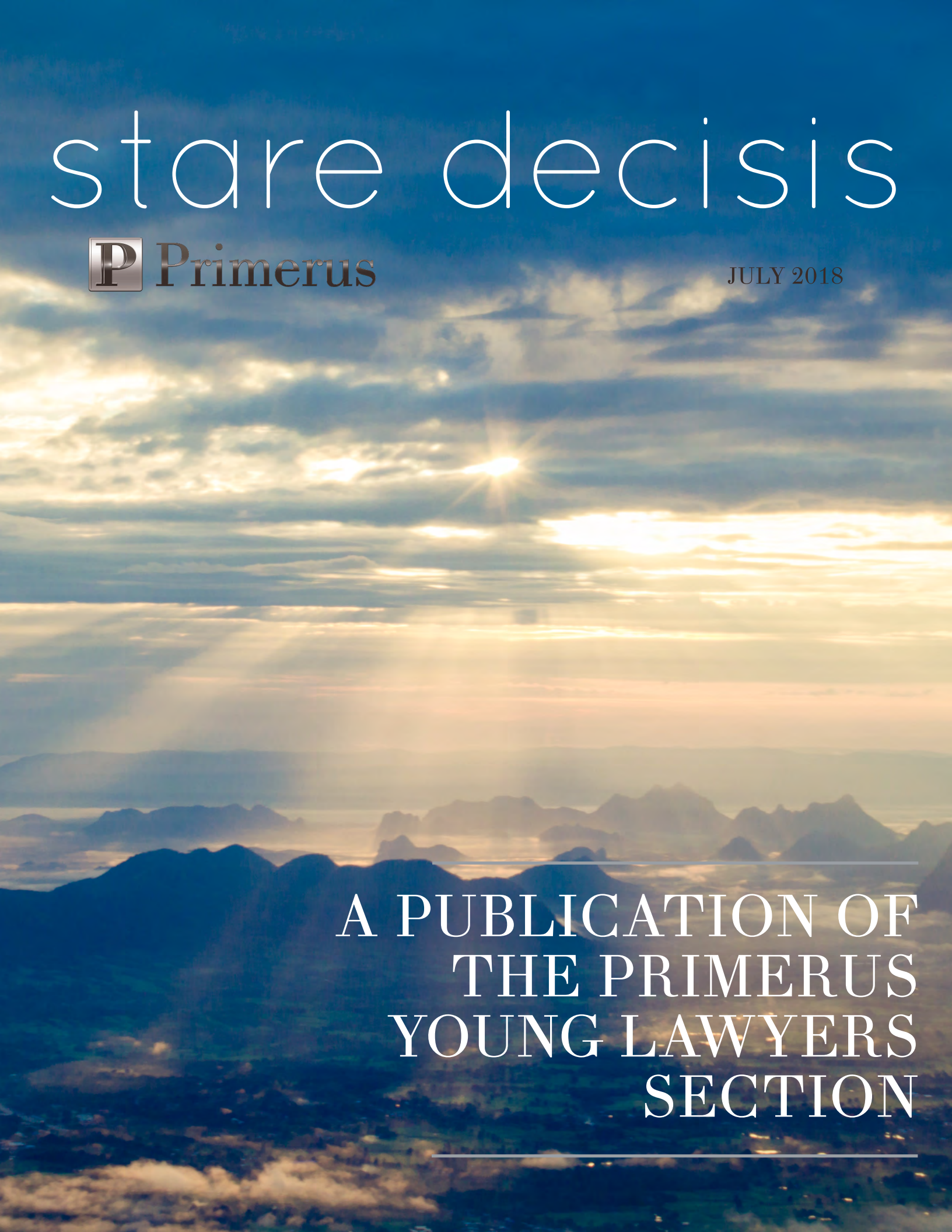

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# issues in trust & estate litigation: "undue influence" claims on the rise

by liam duffy

Liam Duffy is an attorney with Rosen Hagood in Charleston, SC, where he represents both plaintiffs and defendants in complex civil litigation matters, with an emphasis on commercial and business disputes, trust and estate conflicts, and construction matters. In addition to his litigation practice, Liam enjoys working as a strategic partner to startup and growth stage businesses across a broad spectrum of industries, where he advises clients on a variety of corporate matters with an eye toward conflict avoidance.

Liam's practice is anchored by diligence, agility and a commitment to developing creative, practical strategies to help his clients navigate the most challenging legal scenarios.

By now, most estate planning attorneys, wealth advisors, and litigators are familiar, or at least becoming more acquainted with the overall rise in trust and estate conflicts. Some of the legal and societal factors contributing to this litigation trend include an aging population, life-lengthening advances in medicine, second marriages, sibling rivalries, and the adoption of the Uniform Trust Code by approximately two-thirds of states. But perhaps most importantly, the stakes are higher now than they've ever been. According to this 2015 study, over the next 30 to 40 years, **$30 trillion** in financial and non-financial assets is expected to pass from the Baby Boomers to their heirs in North America. And in an increasingly litigious society, where cable news and social media often turn these private, family probate matters into high-profile, viral sagas (e.g., Prince, Sumner Redstone, Donald Sterling, James Brown, Anna Nicole Smith), it's no surprise more Americans are exploring their own options through the court system.

Trust and estate disputes can be highly complex, and at times involve the convergence of issues in estate planning, tax law, fiduciary management, prudent investment and diversification, neurology and medicine, and multi-party litigation to name a few. Despite the many case-specific intricacies, a classic one-two combination seems to emerge in a large number of challenges to a testamentary instrument or other donative transfer: claims of undue influence and lack of mental capacity.

In practice, litigation of these two issues is inextricably intertwined. However, the following analysis focuses on problems unique to undue influence claims, and hopefully offers some guidance on how estate planners and litigators (and their clients) can navigate this contentious legal landscape.

**How Much Influence is Too Much?**

Courts have defined undue influence as "mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the

disposition of assets." *In re Estate of Stocksdale*, 953 A.2d 454 (N.J. 2008). In other words, undue influence sufficient to defeat a will, trust, or gift is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's. *In re Estate of Clinger*, 872 N.W.2d 37 (Neb. 2015); *Byrd v. Byrd*, 308 S.E.2d 788 (S.C. 1983) ("[T]he circumstances must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so the will is that of the latter and not of the former."). Because undue influence usually takes place behind closed doors in a clandestine setting, it is typically proven by circumstantial evidence. *Estate of Mann*, 184 Cal. App. 3d 593 (Ct. App. 1986). Restricted visitation or contact, threats, secrecy and haste in executing a donative instrument, unexplained departure from longstanding habits or intentions, a feeble-minded testator, and a lack of independent advice are just a few of the hallmarks of improper influence.

A plaintiff seeking to invalidate a testamentary disposition (or intervivos gift) on the basis of undue influence bears the burden of proving his or her case by clear and convincing evidence. Surmounting this evidentiary bar is no small feat, and for good reason. As the high court of South Carolina has long held, undue influence is not merely "the influence of affection and attachment," nor is it "the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act." *Smith v. Whetstone*, 39 S.E.2d 127 (S.C. 1946). There is nothing unlawful about a person who, through "honest intercessions and modest persuasions," procures favor from a testator. *Id.* Moreover, motive, opportunity, and even general influence are not enough without evidence that such influence was actually utilized and brought directly to bear on the testamentary or donative act. *Howard v. Nasser*, 613 S.E.2d 64 (Ct. App. 2005).

**Beware the Shifting Burden**

Litigants and lawyers should be mindful of the burden shifting that applies in these cases, and must understand its impact from the outset. While the claimant generally bears the burden of proving undue influence, a presumption of undue influences arises where there is a confidential or fiduciary relationship (between the testator and alleged wrongdoer) coupled with other "suspicious circumstances." *Haynes v. First Nat'l State*

*Bank of N.J.*, 87 N.J. 163 (1981). Suspicious circumstances are slightly questionable events that "require explanation." *Id*. Other courts have couched the "suspicious circumstances" element in terms of evidence of an "unnatural disposition," such as where the alleged influencer becomes the primary (or only) beneficiary, and where that person generally dominated the testator. The Restatement of Property captures the mechanics of this burden shift:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Restatement (Third) of Property: *Wills and Other Donative Transfers* § 8.3 cmt. f (2003).

This issue was at the heart of a recent Nebraska Supreme Court opinion in an appeal over the proper jury instructions regarding the burden shift in undue influence cases. In *In re Estate of Clinger*, the court noted that the presumption of undue influence is not a true presumption, but rather a "permissible or probable inference." 872 N.W.2d 37 (Neb. 2015). Think of it this way: the presumption of undue influence in a will contest (or similar action) is **not an evidentiary presumption**, but, rather, is a "bursting bubble" presumption that disappears when evidence to rebut the presumption is introduced. *In re Estate of Clinger*, 860 N.W.2d 198 (Neb. Ct. App. 2015). Put simply, the ultimate burden at trial always remains with the party alleging undue influence.

Understanding the implications of burden shifting in undue influence cases is critical in several respects. First, it should serve as a guide for trust and estate counsel when advising their clients and their client's loved ones (who may be in a confidential or fiduciary position as trustee, attorney-in-fact, etc.) with regard to preparation and execution of estate planning documents. From a risk-avoidance standpoint, it would be wise—if possible—to avoid donative transfers to fiduciaries, so that in any subsequent litigation, the efficacy of the testator's intentions is not handicapped by an adverse presumption. In any event, trust and estate counsel should take measures to ensure that undue influence (or even the appearance of undue influence) is not present.

Second, the question of which party bears the burden in undue influence cases is an important one for litigators to ask at the beginning of a potential case. For litigants asserting the existence of undue influence, it's an important part of the calculus of the strength of their case (which faces a high evidentiary hurdle). For those seeking to uphold or defend a testator's actions, a presumption of undue influence may factor into a risk analysis and drive the parties toward settlement.

## Conclusion

As trust and estate litigation, including will challenges, guardianship/conservatorship proceedings, and other contested probate actions continue to increase in the years to come, claims of undue influence will undoubtedly serve as a centerpiece of those cases. And while more states adopt and grapple with the complexities of the Uniform Trust Code (and other emerging laws enacted for elder protection), we can expect that courts' discussions of this topic will evolve accordingly. For the benefit of their clients' families (and perhaps their own), lawyers of all types would do well to stay abreast of these developments.