


**New Hampshire
Will & Trust Contests
& Other Litigation Claims**

April 18, 2018

Ralph F. Holmes

McLane 1




COMMON CAUSES OF ACTION

Types of cases:

1. Guardian / Conservatorships
2. Will/Trust Contests
3. POA Accounting Claims
4. Breach Of Fiduciary Duty Claims
5. Unjust Enrichment Constructive Trust Claims


McLane 4



ProbateTrial.com


1. Pleadings bank
2. Court orders
3. Law summaries
4. Commentary

McLane 2



**Incapacity And Exploitation
Of The Elderly**


McLane 5



Most Common Pivotal Issues

- Capacity
- Undue Influence
- Family Dynamics
- Financial Exploitation

McLane



Exploitation of the Elderly

Vulnerabilities to exploitation:

1. Loneliness
2. Dementia or other mental impairments
3. Psychological impairments
4. Poor physical health
5. Dependency on others for housing, transportation, or other assistance

McLane 6



Progression of Decline

The process of decline is often gradual.
 Functional limitations are sometimes difficult to establish at a particular moment in time.
 May even vary from moment to moment.
 At early stages, likely to be disagreement among observers.



Physical Decline

Multiple hospitalizations or ER visits, increasing frequency of hospitalization, etc.
 New diagnosis of chronic illness likely to impact ability to live independently or diagnosis of terminal illness (e.g., cancer, Parkinson's, dementia, stroke, etc.)
 Acute serious illness (e.g., heart attack, stroke, emergency surgery, any ICU stay, etc.)



Financial Indicators

Sudden depletion of assets
 Change in beneficiaries
 Transfer of title in real estate (including joint title)
 Substantial "gifts"
 Request for POA for caregiver to handle financial matters



Personal Relationships

Death of spouse, divorce, relocation, etc. can trigger rapid decline.
 "Mission creep" of family or care providers or staff.



Financial Indicators

Difficulty:
 paying bills
 keeping appointments
 responding to important correspondence
 planning or scheduling




Personal Relationships

Exploiter usually is a family member, most commonly a child
 Care providers is next most common
 There are serial predators



Guardianship and Conservatorship

McLane 13



Capacity

To be capacitated, a testator/settlor must:

1. Understand the act of making a will/trust;
2. Understand the property to be disposed of and its general nature;
3. Understand his or her natural objects of affection, usually the testator's/settlor's nearest relatives;
4. Understand and intend to carry out the will's dispositional scheme; and
5. If capacity is present, the will/trust must not be the offspring of a delusion.

McLane 16



Contesting Estate Plans & Other Transactions


McLane 14



Capacity

For an *inter vivos* irrevocable trust, argument might be made that the relevant capacity standard is contractual, not donative/testamentary capacity.

McLane 17




Grounds for Contesting Transactions

Grounds for Contesting:

1. Incapacity
3. Undue Influence
4. Lack of due execution (Will only)
5. Fraud
5. Revocation
6. Mistake

McLane 15



Undue Influence Defined

Undue influence "exists only when the willpower of the testator is destroyed and his own will is worn down. His freedom of will must be so destroyed as to substitute the will of another for his own."

Bartis v. Bartis, 107 N.H. 34 (1965)

McLane 18



Undue Influence Conceptual Framework

1. An "unnatural" disposition;
2. Principal was "susceptible to" undue influence;
3. Transaction benefitted someone with an opportunity to exercise undue influence; and
4. Donee exploited that opportunity through improper means to procure the disposition

McLane



Undue Influence Conceptual Framework

The exception: *Gaffney v. Coffey*, 81 N.H. 300 (1924):

Brother disapproving of sister's relationship with Arthur Pappachristo ("the damn Greek") intimidated mother to cut the sister from the Will:

1. Threatened to withhold money from his mother;
2. Slapped his sister and blackened her eye in front of the mother; and
3. Threatened to evict mother and sister.

McLane

22



Undue Influence Conceptual Framework

Considerations whether gift is "natural" vs. "unnatural" include principal's:

1. Current and past relationship with donee;
2. Current and past relationship with persons harmed;
3. Prior statements of intent; and
4. Nature and value of gift.

McLane



Undue Influence Conceptual Framework

Transaction benefitted
someone with an opportunity
to exercise undue influence

McLane

23



Undue Influence Conceptual Framework

Susceptibility to undue influence:

Generally Undue Influence Will Occur
Only In The Context Of Absent Or
Diminished Capacity

McLane



Undue Influence Conceptual Framework

Donee procured the benefit
through improper means.

McLane

24



Undue Influence NH Trust Code 406(a)

"A trust is void *to the extent* that... its creation was induced by fraud, duress, or undue influence"

Depending on the facts, can the remedy be reformation, not just rescission?

McLane



Will and Trust Contests: Fraud

For fraud to affect the validity of a Will (or Trust), the deception must be such as to induce the testator to make some disposition of his property that he would not otherwise have made.

Knox v. Perkins, 86 N.H. 66, 68 (1932)(allowance of Will benefiting widow with prior marriages upheld on finding that the testator "either knew of [her] former marriages, or if he did not know, would have made the same disposal of his property after learning the facts")

McLane 28



Will Execution Requirements

Will Execution Requirements:

1. The testator must be married or at least 18 years old, RSA 551:1;
2. The will must be in writing, RSA 551:2, II;
4. The will must be signed by the testator or by some person at his or her express direction in his or her presence, RSA 551: 2, III; and
5. The will must be signed by 2 or more "credible" witnesses at the request of and in the presence of the testator attesting to the testator's signature, RSA 551:2, IV.

McLane 26



Will and Trust Contests: Mistake

"[A]ccording to the prevailing view, if the testator knew and approved the contents of his will, it is immaterial that he mistook the legal effect of the language used or that he acted upon the mistaken advice of counsel, provided that advice 'was given in an honest belief that it was sound.'" *Leonard v. Stanton*, 93 N.H. 113, 115 (1944) (quoting *Elam v. Phariss*, 289 Mo. 209, 217 (1921)).

McLane 29



Will Execution Requirements

"The term 'credible' ... means, simply, that the witness must be competent, or not disqualified at the time of the attestation to be sworn and to testify in a court of justice." *Lord v. Lord*, 58 N.H. 7 (1876)

See *Ross v. Carlino*, 120 N.H. 489, 490 (1980) (Will witnesses (a hospital patient) "lacked the requisite mental capacity to attest that the deceased executed the will [and] that she neither had knowledge of its contents nor possessed the mental capacity to sign")


McLane 27



Will and Trust Contests: Mistake

To set aside a Will on grounds of mistake, the error must be so substantial as to be tantamount to a failure of capacity, such as a mistaken belief that the document is other than a Will.


McLane 30



Will and Trust Contests:
Mistake

To correct a mistake, a Trust can be reformed against plain meaning by clear and convincing evidence of settlor intent, RSA 564-B:4-414

McLane 31




Will and Trust Contests:
Procedure

A Will Contestant Must Surrender
Any Legacy Received

Holt v. Rice, 54 N.H. 398 (1874)


McLane 34



Will and Trust Contests:
Procedure

An Executor Has A Duty To Defend A Contest Of The Will And A Trustee Has A Duty To Defend A Contest Of The Trust

McLane 32




Will and Trust Contests:
Procedure

A capacitated party of majority age within the country has six-months from allowance of a Will to file a Motion to Re-Examine Will to seek that it be proved in solemn form. RSA 552:7.

For "[a] minor, insane person or person out of the United States," the statute of limitations does not run until "one year after the removal of the disability." RSA 552:9


McLane 35



Will and Trust Contests:
Procedure

A Will/Trust Contest If Successful Will Revive A Prior Will/Trust Revoked Expressly Or By Implication By The Contested Document


McLane 33



Will Contests

Guardians must be appointed for all minors and other incompetents and agents must be appointed for interested parties who are out-of-state or are unknown, RSA 552:11


McLane 36



Will and Trust Contests: Procedure

The Statute Of Limitations For Contesting A Trust Can Be Accelerated


McLane 37



Will and Trust Contests: Trial

The Proponent Of A Will Has The Burden Of Proof

McLane 40



Will and Trust Contests: Procedure

Notice which can be sent to potential contestants:

"Pursuant RSA 564-B:6-604(a)(2), you: are on notice of the existence of the Trust; have been provided a copy of the Trust; are on notice that Jane Doe, of [address] and [phone number], is the Trustee of the Trust; and are on notice that you have 180 days from the date of this letter to commence a judicial proceeding to contest the validity of the Trust."


McLane 38



Will and Trust Contests: Trial

Trust Contestant Has The Burden Of Proof Unless Evidence Is Presented That The Trust Proponent (or Beneficiary) Procured The Trust Through Undue Influence In A Confidential Relationship With The Settlor


McLane 41



Will and Trust Contests: Trial

Unless Due Execution Of The Will Is Stipulated, The Executor Must Prove Due Execution By Presenting The Witnesses To The Will Or Evidence Sufficient To Explain Their Unavailability

McLane 39



Confidential Relationship

"A confidential relationship exists if there is evidence of a family or other personal relationship in which one person justifiably believes the other will act in his or her interest"

Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)

McLane 42

Will and Trust Contests: Trial

Key Issues Will Include:

1. Variance Between The Current Plan And Prior Ones
2. Relationship Between The Testator And The Principal Legatee
3. Relationship Between The Testator And The Contestant
4. Testator's Management of her Affairs
5. Medical Testimony
6. Involvement of Counsel

Will and Trust Contests Tips for Estate Planners

Family Pathology Is A Key Predictor
Of Litigation

Will Contests and Trust Contests: Trial

Evidence

- a. Non-subscribing lay witnesses may testify to observations regarding competency of testator. *Hardy v. Merrill*, 56 N.H. 227 (1875).
- b. "Witnesses may testify as to whether the testator was a person easily influenced by others." 7 DeGrandpre, *Wills, Trusts and Gifts*, § 8-10, p. 79 (3rd ed.) (citing *Patten v. Cilley*, 67 N.H. 520 (1893)).
- c. "[W]hen undue influence is an issue, 'the field open to investigation is very broad.'" 7 DeGrandpre, *Wills, Trusts and Gifts* (3rd ed.), § 8-10, p. 78 (quoting *Cobb v. Follansbee*, 79 N.H. 205,206 (1919)).

Will and Trust Contests Tips for Estate Planners


Mental Capacity Is
Usually The Key Issue

Will and Trust Contests


Tips for Estate Planners

Will and Trust Contests Tips for Estate Planners

Capacity Is Not
Always Easy To Evaluate



Date	Medical Record Event
3/3/01	He asked staff over and over again: Where is his wife? Where is his home and all his furniture? Why was he here? Was he bad? Has he lost his mind?
3/4/01	He asked about arrival time of his wife (deceased)
3/8/01	He asked when his wife (deceased) would arrive
3/15/01	He was up most of the night hollering for help and kept trying to answer his phone when no one was on the phone
3/23/01	He stored dirty, moldy coffee cups in his drawers
3/26/01	He did not recognize his own furniture and had no idea of the place or date
3/28/01	He had no insight into his mental problems
5/31/01	The day after a six-day trip with his daughter, he said, "What trip? I've been right here."
6/3/01	He asked for wife (deceased) often
6/10/01	He asked for wife (deceased) frequently



55




Will and Trust Contests: Tips for Estate Planners

Assess For Capacity Again On The Day The Plan Is Signed




58




Will and Trust Contests: Tips for Estate Planners

Not All Dementias Are Equal




56



Will and Trust Contests: Tips for Estate Planners

Consider Asking The Client To Write A "Letter Of Reasons"



59




Will and Trust Contests: Tips for Estate Planners

Meet With The Client Without Other Family Members



57




28 August 2007

I want to say soooooo!

Regarding my 2 sons -
I say them well love them, always
looking to make for good, but
probably a mistake. I want
to not be sure holding
myself up in their employment
My oldest I want in state
of being a medical doctor.
I want to see you
money.

My daughter [redacted] some
more to about me in the
U.S. at the time [redacted]
and - she never comes
anywhere! Always
wishes goods from the
U.S.

True [redacted]



60



Will and Trust Contests: Tips for Estate Planners

Consider Video Recording Or A
Medical Evaluation



PRETERMITTED HEIRS



Will and Trust Contests: Tips for Estate Planners

Consider Broad In Terrorem
Provisions



PRETERMITTED HEIRS

RSA 551:10:

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.



Will and Trust Contests: Tips for Estate Planners

In the event that the Donor's son, **JOHN DOE**, shall contest the probate or validity of the Donor's will or shall contest the validity of this trust instrument or any provisions of it or join in any proceeding to contest the validity of the Donor's will or to prevent any provision of it from being carried out in accordance with its terms, ...then ...all such benefits for the issue of **JOHN DOE**, including but not limited to the benefits provided in Article 3.02 and 3.04, shall cease and this instrument shall be interpreted as if **JOHN DOE** and his issue had predeceased the Donor. For purposes of this clause, the filing of an appearance shall constitute the filing of an objection.



PRETERMITTED HEIRS

Requirements for Application:

1. Child is born after decease of the testator; or
2. Child is not named in Will;
3. Child is not referred to in Will; and
4. Child is not a legatee under the Will

PRETERMITTED HEIRS

Wills

Chart page 65 (and ProbateTrial.com)

Trusts

In re Theresa Craig on interlocutory appeal
before NH SupremeCourt

McLane

Powers Of Attorney Can Be Licenses To Steal

It's common:

For POA to be released to a child for a parent who has limited
or essentially no capacity to monitor the agent's activities

For there to be no accountability to any other family member

Agent starts treating the money as his own

Invitation to steal

By the time anyone finds out, money long gone

McLane

PRETERMITTED HEIRS

Unresolved question if child who is referenced or named in trust
that is beneficiary of pour-over Will may assert statutory share
claim against the Will

McLane

POA Accounting Actions

Agent's duties under RSA 564-E:114 to act:

1. With loyalty to the Principal's best interest;
2. In good faith;
3. To avoid conflicts in interest;
4. With the same care as a similarly situated agent; and
5. To "keep a record of all receipts, disbursements, and transactions made on behalf of the principal."

McLane

POA Accounting Actions RSA 564-E (RSA 506:7 prior law)

McLane

POA Accounting Actions

Exculpatory provision in POA under RSA 564-E:115 will be
honored except to the extent:

1. Relieves the Agent for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the POA or the Principal's best interests; or
2. Was inserted as result of an abuse of confidential relationship with Principal.

McLane



POA Accounting Actions

Accounting action may be brought under RSA 564-E:116 by:

1. Agent
2. Principal
3. Spouse, descendant, or parent of principal
4. Intestate heirs
5. Any person named in principal's will
6. Treating health care provider

McLane



POA Accounting Actions

Agent may held liable for attorneys' fees if the Court finds he/she "failed without any reasonable cause or justification" to account or "clearly violated the agent's fiduciary duties"

RSA 564-E:116(e)

McLane



POA Accounting Actions

Agent has 60 days to comply with a request by one of these persons for an accounting and, upon his/her failure to comply, the accounting action can be filed, RSA 564-E:114(h)

McLane



POA Accounting Actions

Factors for evaluating proposed/contested gift under 564-E:217:

1. Terms of POA;
2. Principal's interests and intent;
3. His/her gift history;
4. His/her estate plan;
5. His/her future needs; and
6. Tax considerations.

McLane



POA Accounting Actions

"Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney." RSA 564-E:116(c)

McLane




POA Accounting Actions

Gift shall be presumed lawful if POA expressly grants the authority to make the gift and is accompanied by statutory disclosure statement; "otherwise agent shall be required to prove by a preponderance of the evidence that the gift was authorized and was not a result of undue influence, fraud, or misrepresentation."

RSA 564-E:116(g)(3)

McLane




POA Accounting Actions

Accounting proceedings shall be closed to the public other than for "good cause" and the final decision of the Court shall be a public record.

RSA 564-E:116(f)

McLane 81




Elements

Clear and convincing evidence proves:

1. Confidential relationship between transferor and transferee; and
2. Transferee would be unjustly enriched by retaining property (did not pay fair value)

McLane 82




POA Accounting Actions

POA "is durable unless it expressly provides that it is terminated by the incapacity of the principal."

RSA 564-E:104

McLane 81




Confidential Relationship

"A confidential relationship exists if there is evidence of a family or other personal relationship in which one person justifiably believes the other will act in his or her interest"


Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)

McLane 83



Constructive Trust

McLane 81




Unjust Enrichment

"A person may be unjustly enriched if he or she obtain title to property by fraud, duress, or undue influence, or violates a duty that arises out of a fiduciary relation to another"

Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)


McLane 84



Burden of Proof

The Contestant Has The Burden Of Proof Unless Evidence Presented that Benefit Received For Less than Fair Value in the Context of a Confidential Relationship

McLane 85



Creditor Claims

"Just debts" of the decedent are entitled to payment under RSA 554:19, but failure of creditor to assert claim may create a statute of limitations defense and arguably require Administrator to deny claim.

Skrizowski v. Chandler, 133 N.H. 502 (1990)

McLane 88




Transitive Application

Transferee of property who pays no value and receives it from a party who holds it in (constructive) trust holds it in constructive trust.

Marcucci v. Hardy, 65 N.H. F.3d 986, 990 (1st Cir. 1995) (applying New Hampshire law)


McLane 86



Creditor Claims


Under *Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340 (1988), known and reasonably ascertainable creditors are entitled to actual notice of the opening of the estate and the deadlines for filing claims.

McLane 89



Creditor Claims Against Estates

McLane 87



Creditor Claims

[case caption]

NOTICE

[Date]


TO: [Creditor]

FROM: [Counsel name & address]

By Order dated [date], the Court granted the Petition for Administration and, by Certificate of Appointment dated [date], the Court appointed [name] Administrator of the above Estate.

RSA 556:3 provides: [quote statute]


McLane 90



Creditor Claims

Creditors must exhibit their demands within the first six months and file suit within the second six months of the appointment of the administrator to preserve their claims. RSA 556.

McLane 91




Creditor Claims

Because foreclosure is not an action in Court, the creditor deadlines of RSA 556 do not apply to the mortgagee relative to its rights to foreclose.

In re Estate of Mills, 167 N.H. 125 (2014)


McLane 94



Creditor Claims


While the exhibition requirement can be informally satisfied, *Frost v. Frost* (1956) ("it has been settled law... that the claim may be oral, written, or a combination of both"), the suit deadline operates as a statute of limitations.

McLane 92



Litigation Inventory and Accounting Issues


McLane 95



Creditor Claims

A creditor who misses the deadline must seek relief under RSA 556:28 by filing a petition "setting forth all the facts" to extend the deadline, which the Court shall grant if it finds that the claimant is not chargeable with culpable neglect and justice and equity so require.

McLane 93



Probate Inventory

Within 90 days of appointment, Administrator has duty to prepare and file inventory of Estate assets, RSA 554:1

Administrator may petition Probate Court to quiet title in property claimed by the Estate and third parties, RSA 554:1,III

Depending on circumstances, NH may not have exclusive jurisdiction to determine title to property claimed by the Estate, *In re Estate of Kathleen Mullin*, 169 N.H. 632 (2017)

McLane 96



Probate Inventory & Account

Even if assets are not inventoried, Administrator is required to marshal and account for them

Interested party has 30 days to object to a Probate Account

Account objection is generally the means to raise issues of maladministration and can lead to resource intensive litigation requiring structuring for depositions, expert disclosures, and trial

Administrator should notify the bonding and its liability carrier of claims



Thank You