

MCLANE MIDDLETON

The Probate Process from Start to Finish for Paralegals

Probate Disputes and Litigation

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October 4, 2019

Key Topics in Probate Litigation

- ☐ Elder Exploitation
- ☐ Will and Trust Contests
- ☐ Pretermitted Heir Claims
- ☐ Power of Attorney and Constructive Trust Claims

ProbateTrial.com

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Elder Exploitation

Indicators of Vulnerability or Susceptibility

- Loneliness
- Dementia or other mental impairments
- Psychological impairments
- Poor physical health
- Dependency on others (e.g., for housing, transportation)

Progression of Decline

The process of decline is often gradual.

Functional limitations are sometimes difficult to establish at a particular moment in time.

Side effects may even vary from moment to moment.

At early stages, there is 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, etc.)

Acute serious illness (*e.g.*, heart attack, stroke, emergency surgery, any ICU stay, etc.)

Emotional Decline

- ☐ Emotional instability
- ☐ Depression
- ☐ Paranoia
- ☐ Mood swings
- ☐ Increased forgetfulness

Personal Relationships

- ❑ death of spouse, divorce, etc. can trigger or accelerate decline
- ❑ relocation
- ❑ “mission creep” of family or care provider/staff
- ❑ “exploiter” is usually a family member
 - most commonly a child or care providers
- ❑ serial predators

Financial Indicators

- ☐ Sudden depletion of assets
- ☐ Change in beneficiary designations
- ☐ Transfer of title in real estate
- ☐ Substantial “gifts”
- ☐ Request for POA appointing caregiver as agent to handle financial matters

Financial Indicators

Difficulty:

- ☐ paying bills
- ☐ keeping appointments
- ☐ responding to important correspondence
- ☐ planning or scheduling

Elder Exploitation: Equity Actions

- ❑ Breach of Fiduciary Duty
- ❑ Unjust Enrichment
- ❑ POA Accountings

Criminal Financial Exploitation

RSA 631:9

In breach of a fiduciary obligation, a person, knowingly or recklessly, for his own profit/advantage:

- Fails to use the real or personal property or other financial resources of the EA to provide food, clothing, shelter, health care, therapeutic conduct, or supervision for the EA; or
- Unless authorized by the instrument establishing fiduciary obligation, deprives, uses, manages, or takes either temporarily or permanently the real or personal property or other financial resources of the EA for the benefit of someone other than the EA; or

In the absence of legal authority a person knowingly or recklessly through the use of undue influence, harassment, duress, force, compulsion, coercion, or under any circumstances where the person knew that the EA lacked capacity to consent, or consciously disregarded a substantial and unjustifiable risk that the EA lacked capacity to consent:

- Acquires possession or control of an interest in real or personal property or other financial resources of an EA;
- Induces an EA against the EA's will to perform services for the profit/advantage of another; or
- Establishes a relationship with a fiduciary obligation to an EA that gives the person control of an interest in real or personal property or other financial resources of an EA.

Elder Exploitation: Example

Institution	Date	Event	Amount
Citizens	11/7/2017	Nfcu (Navy Federal Credit Union)	\$6,500.00
Citizens	11/7/2017	Westlake Financial Services (auto loan)	\$5,324.33
Citizens	11/7/2017	Merrick Bank (online payment)	\$1,013.75
Citizens	11/7/2017	First Premier Bank (Card Internet)	\$387.58
	11/11/2017	DOD	
Citizens	11/13/2017	Nfcu ACH Payment	\$5,425.25
Citizens	11/13/2017	Cash withdrawal (Portland St. Rochester)	\$100.00
Citizens	11/13/2017	Merrick Bank (online payment)	\$455.61
Northeast Credit Union	11/18/2017	Decedent Account Closed	
Citizens	11/16/2017	Purchase JCPenney Newington	\$225.00
NECU	11/18/2017	Doe opens own account	\$452,390.51
NECU	11/18/2017	bank check to Doe	\$7,500.00
NECU	11/18/2017	bank check to Doe	\$7,500.00
TD Bank	11/20/2017	Withdrawal	\$800.00
Citizens	11/20/2017	Merrick Bank (online payment)	\$62.70
Citizens	11/21/2017	Retainer for Attorney re: identity fraud (criminal)	\$4,000.00
Citizens	11/21/2017	Cash Withdrawal (Peabody, MA)	\$400.00
Citizens	11/22/2017	Retainer for Attorney re: identity fraud (criminal)	\$3,500.00
Citizens	11/22/2017	Cash Withdrawal	\$500.00
Citizens	11/24/2017	Cash Withdrawal (Portland St. Rochester)	\$500.00
Citizens	11/24/2017	Cash Withdrawal (Main St. Rochester)	\$400.00
Citizens	11/27/2017	Cash Withdrawal (Main St. Rochester)	\$400.00
Citizens	11/27/2017	Cash Withdrawal (Portland St. Rochester)	\$500.00
Citizens	11/28/2017	Cash Withdrawal (Portland St. Rochester)	\$500.00
Citizens	11/28/2017	Cash Withdrawal (in-person)	\$5,000.00
NECU	11/29/2017	Doe signs Indemnification Agreement (notarized 12/05/2017)	
Citizens	11/30/2017	Cash Withdrawal	\$500.00
TD Bank	12/4/2017	Online Transfer	\$1,253.00
NECU	12/6/2017	Withdrawal at ATM Transfer (to Savings)	\$50,000.00
NECU	12/7/2017	Check to Rochester Truck (Memo: Trailer)	\$4,475.00
NECU	12/8/2017 (11:12 am)	cash withdrawal (Portsmouth)	\$100,000.00
NECU	12/8/2017 (12:34 pm)	cash withdrawal (Rochester)	\$100,000.00
NECU	12/11/2017	Check to Porsmouth Chevrolet (2018 Silverado)	\$41,682.00
TD Bank	12/19/2017	Online Transfer	\$2,000.00
TD Bank	12/29/2017	Online Transfer	\$1,000.00
NECU	1/7/2018	Check to Doe's ex-wife	\$2,500.00
TD Bank	1/16/2018	Online Transfer	\$1,500.00
TD Bank	1/24/2018	Online Transfer	\$500.00
TD Bank	1/30/2018	Online Transfer	\$1,000.00
TD Bank	2/5/2018	Online Transfer	\$400.00
TD Bank	2/15/2018	Online Transfer	\$200.00
TD Bank	2/20/2018	Online Transfer	\$200.00
TD Bank	2/27/2018	ATM Transfer (Rochester)	\$7,000.00
TD Bank	3/6/2018	Online Transfer	\$3,000.00
TOTAL (from Decedent Accounts)			\$491,159.48
TOTAL withdrawn from Citizens			\$16,262.70
TOTAL remaining at Citizens			\$175,626.17

Most Common Pivotal Issues

- ☐ Capacity
- ☐ Undue Influence
- ☐ Family Dynamics
- ☐ Financial Exploitation

Will and Trust Contests: Grounds for Contesting

1. Incapacity
2. Undue Influence
3. Lack of Due Execution (Will)
4. Fraud
5. Revocation
6. Mistake

Will and Trust Contests: Capacity

Mental Capacity Is Usually the Key Issue

BUT

Capacity Is Not Always Easy To Evaluate

Will and Trust Contests: Capacity

Generally, incapacity is a legal, not medical, question and there are multiple definitions.

Testamentary Capacity

To execute a will or trust, a person must:

- ☐ Understand the nature and extent of his wealth;
- ☐ Understand who his relatives are and the roles they play in his life;
- ☐ Understand what a will/trust is;
- ☐ Understand and have a desire to carry out the dispositional scheme in the will/trust; and
- ☐ Be free from delusions about the will/trust.

Undue Influence: Defined

“Undue influence exists only when the will power of the testator is destroyed, and his own will is borne 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 (1966)

Susceptibility to Undue Influence

Generally Undue Influence Will Occur Only in the
Context of Absent or Diminished Capacity

Undue Influence: Trust Contest

RSA 564-B:4-406(a)

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

Will and Trust Contests: Procedure

Will Contest

- ❑ Executor has a Duty to Defend a Contest of the Will
- ❑ Proponent of a Will has the Burden of Proof
 - If the Court finds there's a tie on capacity, the Will gets thrown out

Trust Contest

- ❑ Trustee has a Duty to Defend a Contest of the Trust
- ❑ 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

Thinking ahead by looking back

A Will/Trust contest, if successful, will revive a prior will/trust revoked expressly or implicitly by the contested document.

Will and Trust Contests: Procedure

A Will Contestant Must Surrender

Any Legacy Received

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

Will and Trust Contests: Timing

Will Contest

- ❑ A capacitated party of majority age within the country has six (6) 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

Trust Contest

RSA 564-B:4-406(b):

- ❑ 3 years after the settlor’s death;
- ❑ 3 years after the trustee sends a notice to the beneficiary; or
- ❑ 180 days after the trustee sends a notice and copy of the trust instrument

Notice to Potential Trust Contestants to Accelerate the Statute of Limitations

“Pursuant to RSA 564-B:4-406(b)(3), you are: being **provided a copy of the Trust**; on notice of the **existence of the Trust**; on notice that **Jane Doe**, of **1600 Pennsylvania Ave NW, Washington, DC 20500**, and **(800)123-4567**, is the Trustee of the Trust; and 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.”

Will and Trust Contests: Trial

Key Issues Will Include:

- ☐ Variance Between The Current Plan And Prior Ones
- ☐ Relationship Between The Testator And The Principal Legatee
- ☐ Relationship Between The Testator And The Contestant
- ☐ Relationship Between The Testator And The Drafting Attorney
- ☐ Testator's Management of her Affairs
- ☐ Medical Testimony

Will and Trust Contests: Evidence

- ❑ There is no attorney-client privilege “[a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.” N.H. R. Evid. 502(d)(2).
- ❑ Non-subscribing lay witnesses may testify about:
 - their observations regarding the competency of the testator
 - whether the testator was easily influenced by others
- ❑ “[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)).

May 29, 2001

Mr. [REDACTED] came to the office of [REDACTED] at approximately 10 a.m. and left the office at 11:15 a.m. When Bernice [REDACTED] and Judy [REDACTED] entered the conference room he was reading his Last Will and Testament and Trust. Norman [REDACTED] asked him if he was all set to sign his Will. He said he had a question about his tangible property. He stated that they took his license away-greatest blow- so he did not have a car. Tangible property meant boat, canoe, clothes, jewelry, books, watch. These go to Alison.

Mr. [REDACTED] got to the part about cash bequests. He asked where is the cash coming from. I have mostly securities. They will have to sell the securities.

Then he got to the part about the Trust. He stated that this trust is for the benefit of [REDACTED] and [REDACTED]. After they die it goes to [REDACTED] and [REDACTED] (I call him [REDACTED]).

My son [REDACTED] gets \$10,000 and his wife gets 5,000.00, \$5,000 to Elliott. Can [REDACTED] challenge it? I think he will challenge it.

When [REDACTED] dies goes to [REDACTED] and [REDACTED] and [REDACTED] probably will challenge it.

After Mr. [REDACTED] signed the Trust. Norman [REDACTED] said trust is in effect. No assets in it. I thought it happened when I die.

When signing the date of the trust he recognized that Bernice had typed in the year. He voluntarily signed each page and know it was the month of May on page 6. He voluntarily stated "that the document was his Will. This is to protect me from my son. Yes, I want everything to Alison. Everything to Alison except gifts and real estate."

When asked if his signing was voluntary he stated "yes" loud and clear.

When asked if he was 18 he joked by saying not until tomorrow. Judy [REDACTED] asked him when his birthday was and he answered October 3, 1912.

When asked if he was of sound mind he answered appropriately and then recited "Being of sound mind and body I spent it all".

How did you acquire property in Francetown. My wife's family had a house in Francetown and she like the town. When I was in college around 18 I first went to Francetown. Where did you go to college Harvard. I played intermuriel football. I went to Northwood Prep School (Lake Placid) on a scholarship and was on the crew. However, I was not good enough to make the team at Harvard also did was skiing.

[REDACTED] did a lot of skiing at Green Mountain College. Where is that in Vermont.

Will and Trust Contests: Evidence

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7 DeGrandpre, WILLS, TRUSTS AND GIFTS (3rd ed.) § 8-10 (quoting Cobb v. Follansbee, 79 N.H. 205, 206 (1919))

Pretermitted Heir Claims

What is a pretermitted heir?

Pretermitted Heir Claims

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.

To Be or Not To Be ... Pretermitted

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 Heir Claims

In re: The Teresa E. Craig Living Trust, 171 N.H. 281 (2018)

- ❑ RSA 551:10 is not a rule of construction, but rather a rule of law
- ❑ Pretermitted heir statute does not apply to trusts

While interlocutory appeal pending, legislature amended RSA 564-b:1-112, adding the following sentence: “RSA 551:10 shall not apply to any trust.”

Powers of Attorney (POA) Accounting Actions

RSA 564-E
(RSA 506:7 prior law)

POA Accounting Actions

“A power of attorney created under this chapter is durable unless it expressly provides that it is terminated by the incapacity of the principal.”

RSA 564-E:104

Licenses To Steal

It is 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

POA Accounting Actions

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

1. Agent
2. Principal
3. Spouse, descendent (child), or parent of principal
4. Intestate heirs
5. Any person named in principal's will
6. Treating health care provider
7. DHHS
8. Person who demonstrates to the satisfaction of the court:
 - a. Sufficient knowledge of the principal and
 - b. Lack of capacity of principal to bring the action

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)

Accounting Actions: Relief

RSA 564-E:116

- ❑ “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).
- ❑ Reasonable attorneys’ fees may be awarded if the court determines that the agent “failed without any reasonable cause or justification” or “clearly violated the agent’s fiduciary duties”. RSA 564-E:116(e).

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.

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)

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)

POA Accountings: Potential Causes of Action

- ☐ Challenged transfer or gift of agent
- ☐ Breach of fiduciary duty
- ☐ Conversion
- ☐ Constructive Trust
- ☐ Restitution/Unjust Enrichment

Constructive Trust: 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)

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

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, 420 (2003)

Unjust Enrichment

“A person may be unjustly enriched if he or she obtains 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, 4120 (2003)

Thank you!