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# Avoiding Contests: Donor Relations When Legal Capacity Becomes an Issue

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Marcia Inger Navrátil

The University of Texas System

Megan N. Watkins

Osborne, Helman, Knebel & Scott, LLP



# Some Baby Boomer Stats

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- The number of Americans aged 65 and older is projected to more than double from 46 million to more than 98 million by 2060.
- Between 2020 and 2030 alone, the number of older Americans is projected to increase by almost 18 million as the last Baby Boomers reach age 65.
- Over the past 25 years, the proportion of elderly Americans suffering from some sort of cognitive decline has decreased; however, due to the rapid growth in the American population over age 65, the total number of Americans experiencing some form of dementia or other cognitive impairment is increasing, and that trend is projected to continue.

# Definitions and Legal Standards

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- Legal Capacity to Contract: where a person had sufficient mind and memory to understand the nature and effect of his or her act at the time of execution
- Testamentary Capacity: whether the testator, at the time of execution, had sufficient mental ability to: (1) understand the act of making a will; (2) understand the effect of his making the will; (3) understand the general nature and extent of his property; (4) understand the natural objects of his bounty and their claims upon him and (5) collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive at least their obvious relation to each other, to be able to form a reasonable judgment as to them.



# Possible Signs of Incapacity

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- Memory lapses
- Forgetting past meetings, conversations or correspondence
- Confusion about unrelated things, such as forgetting other meetings or appointments
- Changes in appearance, especially lapses in hygiene
- Lack of attention to cleanliness in person or environment
- Changes in basic personality
- Mood swings or inappropriate behavior

# Signs of Aging NOT Related to Mental Capacity

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- Vision and hearing loss
- Physical infirmities such as trouble writing or diminished fine motor skills
- Taking more time to process thoughts or ideas
- Speaking more slowly
- Delayed reflexes
- Thoughts may wander more or not be as linear, may spend more time reflecting, repeating thoughts or concepts in conversation

# Definitions and Standards

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- Undue Influence: The existence of sufficient mental capacity that has been subjected to, and controlled by, a dominant influence or power of another.
  - To set aside an instrument due to undue influence, a contestant must establish:
    - (1) an influence existed and was exerted
    - (2) the influence undermined or overpowered the mind of the individual at the time he executed the document; and
    - (3) the individual would not have signed the instrument but for the influence



# Undue Influence

- Factors considered in determining whether undue influence was exerted:
  - The nature and type of relationships between the parties
  - The opportunities that existed for the exertion
  - The circumstances surrounding the drafting and execution of the instrument
  - The existence of a fraudulent motive
  - Whether there had been a habitual subjection of the testator to the control of another
  - The state of the testator's mind at the time of the execution of the instrument;
  - The testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted
  - The words and acts of the testator
  - The weakness of mind and body of the testator
  - Whether the instrument executed is unnatural in terms of disposition



# The Donor Relationship

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- The charity/development officer's ongoing relationship with a donor is the single best strategy for assessing a donor's mental state and avoiding undue influence when a donor is considering making a charitable gift

# Strategies for Donor Meetings

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- Multiple visits, at different times of day, provide a baseline of “normal behavior”
- Active listening
  - Let the donor do most of the talking
  - Engage the donor in discussion of specifics of the gift
  - Engage the donor about family knowledge about the gift
- Careful scheduling of appointments to avoid taxing energy of older donors
  - How far does the donor have to travel?
  - Public venues can make hearing difficult



# When You Suspect Issues of Capacity

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- Immediately suspend ALL charitable gift discussions!
- Involve family, professional advisor, or estate planning attorney – where appropriate
- Recognize that some issues of capacity may be temporary
  - Medical conditions such as stroke or illness
  - Interactions from medication
  - Even fatigue can impair and elderly individual's judgment temporarily
- Information Letter

# The Role of Donor Stewardship

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- Maintaining reasonable contact with a donor after a gift is made can provide proof of the relationship and evidence that a donor's gift was reasonable
- This does not necessarily need to be entirely through personal visits:
  - Letters
  - E-mails
  - Communications and events with planned giving recognition society
- Too much contact can be as suspicious as too little



# The Role of Third Parties

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- If a development officer suspects a donor may lack capacity, contacting the donor's family, advisor or estate planning attorney may be the best course of action
  - Estate Planning Attorney may be able to confirm or deny that there is a problem
  - Confidentiality may prevent attorney from providing detailed information about donor's condition
  - Involving a donor's attorney in gift planning discussions before a gift is made can provide protection for a charity later

# Strategies and Techniques to Avoid Allegations of Undue Influence

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- Carefully document all contact with donors
  - Contact reports of visits and phone calls
  - Copies of e-mails and letters
- Signed gift agreement separate from bequest or giving vehicle
- Disclosure statements for charitable gift annuities are required by law
- Affidavits of recognition of disclosures for gifts made during donor's lifetime
  - Retained life estates
  - Remainder interests in homes or farms
- Involvement of professional advisor in gift discussions and documentation of gift



# Case Studies

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