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practices

primarily in the areas of business and commercial litigation, trust and probate litigation, and employment law. Diane and other attorneys at the Firm work closely with clients' trust and estate planning professionals to maximize clients' opportunities for successful resolution of disputes. Diane may be reached at 702.385.2500 or [dwelch@hutchlegal.com](mailto:dwelch@hutchlegal.com).

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## TESTAMENTARY CAPACITY

**A**fter a will or trust is executed, disputes may surface regarding the validity of the document because of the mental state of the deceased. Family members and friends may claim that the content of the will or trust doesn't reflect the intent of the deceased because of diminished mental capacities. Often, this issue is presented to a court for determination.

ferred to as "diseases of the mind," – a condition that prevents making rational decisions. This includes: alcoholism, drug abuse, delirium, dementia, psychotic/neurologic disorders (Alzheimer, Schizophrenia), and insanity.

### Undue Influence and Testamentary Capacity

When evaluating testamentary capacity, courts will consider consistency of behavior as part of this evaluation, which may involve medical evaluations. Most medical tests performed pre- and post-mortem focus on the deceased's ability to manage core cognitive domains of competency: comprehension of information, information processing, and communication of decisions. If there are sudden changes in the deceased's actions, lifestyle, or even beliefs, that could be evidence of lack of testamentary capacity.

Undue influence is different than lack of testamentary capacity as it focuses on outside forces

### Determining Testamentary Capacity

Testamentary capacity, or the lack thereof, may be evaluated under the following criteria:

**1 Basic Understanding.** The deceased has full understanding of what a will or trust is, meaning the effect and consequences that come from such a document, and an understanding that her property does not transfer until after death. Inherent to this understanding, is an appreciation for what her property includes and its approximate value.

**2 Reasonable Claim.** The deceased recognizes who has a reasonable "right" to claim the property in question, that is, family members and/or friends, who would appreciate a bestowal of the property given its monetary and intrinsic value.

**3 Medical Condition.** The deceased is not suffering from what is re-



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interfering with the deceased's ability to make decisions for herself as opposed to addressing her mental abilities. Undue influence may take the form of coercion, manipulation, threats, or even intimidation. Claims of undue influence often arise when a beneficiary has been more actively involved than others in the making of a will or trust and then receives more of the benefits.

## Challenging Testamentary Capacity

Challenging testamentary capacity is difficult. The law presumes capacity. Courts, therefore, favor upholding testamentary intentions unless compelling evidence establishes a lack of capacity. The burden is on the party challenging capacity. However, there are successful challenges. Those cases tend to be those where evidence supports diminished capacity through strong expert testimony and/or witnesses who have experience with the deceased over prolonged periods of time.

Likewise, successfully proving undue influence is difficult, but can be realized through strong, direct evidence of a person—often a beneficiary—exerting control or dominion over the deceased. Experts and percipient witnesses who can establish those circumstances are vital to a successful undue-influence claim.

## Conclusion

Will and trust contests can cause emotional distress among families and often involve serious allegations against family members or friends. Hutchison & Steffen's Trust and Probate Litigation Practice offers deep and broad legal experience, and its attorneys understand the emotional strain experienced by all involved in a difficult process. That is why the attorneys representing clients in will and trust contests strive to resolve the cases as effectively and efficiently as possible. ■



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