

Estate of Kester – Undue Influence Challenge to Inter-Vivos Transfers

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Recently decided *Estate of Barbara Kester/Glenna Kester v. Pamela Rocco and Cynthia Collins*¹ is a good reminder of the dangers of “do it yourself” estate planning using beneficiary designations and joint forms of ownership in addition to, or instead of, more formal estate planning documents such as wills and revocable trusts. The very informality of such planning that makes it attractive to individuals may also raise the suspicions of disappointed would-be inheritors. In extreme cases, this will result in a challenge based on inter-vivos undue influence (undue influence with respect to lifetime gifts or gifts passing by beneficiary designation or joint ownership at death). A challenge is particularly likely when such planning is inconsistent with an estate plan created with the assistance of an attorney (as was the case in *Estate of Kester*).

Given the ubiquity of such informal planning, estate planning attorneys naturally look to published cases for guidance on (i) planning to avoid inter-vivos undue influence challenges and (ii) challenging transfers that appear to have been made due to inter-vivos undue influence. Unfortunately, *Estate of Kester* (like the many other reported Florida cases dealing with inter-vivos undue influence) is very focused on the facts and circumstances before the court. Absent from the case is any sort of descriptive framework for the reader to apply to different facts and circumstances. However, the court’s analysis can be generalized by reference to the inter-vivos undue influence factors proposed by this author below.

Factors Described by the Court

In *Estate of Kester*, the court considered an inter-vivos undue influence challenge to certain transfers passing from the decedent to her daughter, Glenna, as a beneficiary, pay-on-death beneficiary, or joint account holder with right of survivorship. The court explained that:

“[u]ndue influence must amount to ‘over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator.’ *Raimi v. Furlong*, 702 So. 2d 1273, 1287 (Fla. 3d DCA 1997); see also *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) (undue influence present where person ‘is not left to act intelligently, understandingly, and voluntarily’ and the influence operates ‘to dethrone the free agency of the person . . . rendering his act the product of the will of another instead of his own’).”

In its analysis, the court noted that undue influence is presumed when “(i) a person with a confidential relationship with the testator, (ii) was active in procuring or secur-

ing the preparation or execution of the devise and (iii) is a substantial beneficiary thereof.” The court listed the following factors to be considered in determining the active procurement element:

“presence of the beneficiary at the execution or the occasions where the testator expressed desire to devise; recommendation of an attorney; the beneficiary’s knowledge of the contents prior to its execution; giving instructions to the drafting attorney; securing witnesses and safekeeping of documents after execution . . . [and] (in)equality of mental capacity and strength between testator and beneficiary.”

However, these factors give little guidance as to the court’s ultimate reasoning based on the facts of the case. The quoted factors were developed by courts in the context of undue influence in the procurement of a will or revocable trust (both of which generally involve the active participation of an attorney and significant planning) and have limited applicability in the context of undue influence challenges to inter-vivos transfers, which seldom involve an attorney and are frequently handled informally. However, as long as the courts continue to repeat these factors in inter-vivos undue influence cases, practitioners are left to an exhaustive review of cases to determine what indicia of active procurement will actually be useful in an analysis of potential inter-vivos undue influence.

Inter-Vivos Undue Influence Factors

In *Challenging Inter Vivos Transfers Procured by Undue Influence: Factors to Consider*,² this author proposed that in reported Florida cases dealing with inter-vivos undue influence, courts have been swayed not by the traditional indicia of undue influence, which rely heavily on the involvement of an attorney and the execution of formal documents, but by one or more of a somewhat expanded and related set of factors, namely:

1. Donee’s level of involvement in the donor’s affairs;
2. Donee’s level of involvement in the actual gift in question;
3. Relationship of the donee to the donor as compared to the natural objects of the donor’s bounty;
4. Secrecy or openness of the transaction;
5. Effect of the transfer on the donor’s pre-existing estate plan; and
6. Physical health and mental acuity of the donor at the time of the gift.

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Interestingly, in overturning the probate court and determining that no undue influence occurred, the court in *Estate of Kester* ignored most of the factors it quoted, but directly or indirectly hit on every one of the factors listed above. Among other things, the court found that:

- While Glenna had a close relationship with her mother, other heirs (siblings) also had close relationships and assisted her with various tasks (factor 1, factor 3).
- Glenna did not actively participate in the process of changing the relevant account designations (factor 2).
- For one of the accounts in question, a sibling (not Glenna) accompanied the decedent to the bank to make the beneficiary change (factor 4).
- The decedent had made various pre-death outright gifts to her children, and there was no evidence that her intended equal treatment of heirs was to be accomplished by the probate proceedings alone without reference to other gifts effective at death (factor 5). An unsigned, undated, unwitnessed “to do list” referencing contrary intentions was deemed insufficient to take precedence over the actual actions taken by the decedent.
- The decedent acted without confusion or anxiety, retained her mental faculties, and was fully aware of her

actions when the accounts were changed, even shortly before death (factor 6).

While no one set of factors will ever perfectly capture the tangled web of facts present in any real-life situation involving potential inter-vivos undue influence, the guidance offered by the courts in this area is distinctly lacking. The proposed alternate factors above, however imperfect, may serve as a guide for those assisting clients where undue influence is alleged. **■**

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Endnotes:

- 1 117 So.3d 1196 (Fla. 1st DCA, June 24, 2013)
- 2 The Florida Bar Journal Volume 82, No. 3

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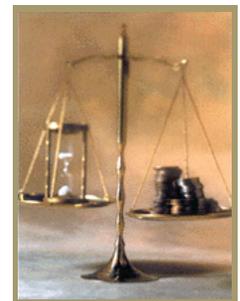
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