

Anatomy of an Undue Influence Case

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In view of Colorado law defining “sound mind” to make a will, will contests typically center on the issue of undue influence. Based on actual events, this article reveals the frequently encountered, realistic features of the undue influence case.

As practitioners may discern from an initial read of *Breedon v. Stone*,¹ the Colorado Supreme Court’s preeminent expression of the unified definition of testamentary capacity, and from further application of such definition in *Estate of Romero*,² Colorado law establishes a relatively low set of standards for “sound mind”³ to execute a valid will. Such standards perhaps reflect public policy’s enduring respect for testamentary freedom,⁴ even while the Colorado Probate Code makes identification and effectuation of the decedent’s true intent for distribution of property at death one of its chief underlying purposes.⁵

Accordingly, absent strong indicia of the testator’s severe cognitive impairment, disputes over the validity of testamentary and donative instruments frequently take the form of the undue influence case instead of the lack of testamentary capacity case, though objections to wills often list both as grounds. Using the detailed facts of an actual case litigated to settlement (with changed names, condensed evidence, composite characters, and altered time frames to protect confidentiality), this article describes the important factors and intricate subtleties of an undue influence case.

Facts of the Case

Kingston Walter Lear (Walter) died in his home at age 90. He was predeceased by his wife of more than sixty years. Walter had no children.

Walter was born and raised in New England. After serving in World War II, he returned to New England and moved in with his only sister; her husband; and their two young children, Cordelia and Kent. Walter always maintained a pleasant familial relationship with his sister and her family, particularly with his niece and nephew. After several years in New England, Walter married and moved to Colorado, where he became very successful in the oil and gas industry. Cordelia and Kent remained in New England, where they continue to reside with their respective families.

As the years passed, lives became busy and Walter and his family were not always in close contact. However, in 2004, when Walter’s wife passed away, Cordelia and Kent reconnected with Walter and the three became close again. Cordelia and Kent began talking to their uncle over the phone on a weekly basis and visiting him in Colorado several times a year.

In 2007, Walter retained a highly regarded local attorney to draft his estate plan. Under this plan, he appointed Cordelia and Kent his co-agents under medical power of attorney and financial power of attorney. Walter also nominated Cordelia and Kent as co-personal representatives under his will. Cordelia, Kent, and a few of Walter’s close friends were the only beneficiaries under the will.

In 2008, Walter began to suffer from numerous incapacitating physical ailments, including arthritis and spinal stenosis. By 2010, Walter’s physical health was rapidly deteriorating. On several occasions, Walter checked himself into hospitals and rehabilitation centers due to weakness and debilitating pain. In addition, as his physical health began to worsen, Walter underwent a similar decline in his mental capabilities. Specifically, he became easily forgetful and confused, and periodically struggled with basic reasoning. Walter’s doctors suspected that he was in the early stages of dementia.

Based on Walter’s compromised physical state and cognitive challenges, his doctors believed that it was no longer safe for Walter to stay at home by himself, and strongly recommended placement in an assisted living facility. However, Walter was adamant that he remain in his home. Supportive of this desire, but concerned about their uncle’s safety, Cordelia and Kent took turns traveling to Colorado to stay with Walter for large blocks of time. When neither Cordelia nor Kent could be in Colorado, they checked in daily with Walter via telephone.

In late 2010, Cordelia came to stay with her uncle. When she arrived, it was immediately apparent that Walter had entirely lost the ability to care for himself. Cordelia cared for her uncle as long

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as she could, but eventually she had to return home. Accordingly, Walter voluntarily entered a temporary rehabilitation program. However, after two weeks in the program, Walter again wanted to move back to his home and resisted any further care-facility placement. Although Walter's doctors were amenable to his desires, they advised that Walter should not be discharged from his program without 24/7 at-home care.

Cordelia and Kent arranged at-home-care for their uncle with Sarah Oswald, a highly recommended certified nursing assistant (CNA) with years of experience. Oswald was unable to stay overnight, so she arranged nighttime care from another CNA, Millicent Goneril. Goneril was young, inexperienced, and very eager for the job.

For the first week of Walter's at-home care, Kent stayed in Colorado to ensure that Walter adjusted to his new caregivers. Reassured that Walter was in good hands with Oswald, Kent returned to New England. Shortly after Kent left Colorado, Walter's care situation changed. Specifically, Goneril started to encroach on Oswald's daytime position, showing up for her shift early and leaving late. Within two weeks of Kent leaving Colorado, Walter fired Oswald and insisted on having Goneril as his full-time care provider. Cordelia and Kent were concerned about this change, but Walter was committed to keeping Goneril full-time. Goneril then moved into Walter's home with her three young children.

Shortly after Goneril took over Walter's care, Cordelia and Kent began to notice that Walter was less accessible to them. Specifically, Walter no longer answered his phone. Whenever Cordelia or

Kent tried to try to call their uncle, Goneril answered. Frequently, she informed them that Walter was busy and unavailable to talk to them.

Around that same time, Walter's medical providers began to notice that he had developed several deep-rooted misconceptions about himself and his family. Specifically, Walter maintained a delusion regarding his decline in physical health. Walter refused to acknowledge that his age or physical ailments could be the cause of his decline in health and adamantly believed that there was a magic pill that would keep him alive. In addition to the delusions about his health, Walter started to develop a paranoid fantasy that Cordelia and Kent were attempting to place him in a nursing home so they could take his money.

As weeks passed, Walter's physical health deteriorated to the point that he was fully dependent on Goneril for all activities of daily living. In addition, Walter's delusions about Cordelia and Kent became more extreme and began to more directly affect his outward behaviors. Eventually, communication between Walter and his niece and nephew broke down entirely. Walter refused to speak to Cordelia or Kent on the phone and refused to see them when they visited. Cordelia and Kent's only communication regarding their uncle came from medical personnel and social workers who periodically visited Walter.

Approximately a month after Goneril moved into Walter's home, Walter contacted Cheapo Law Firm (Cheapo Law) regarding changes to his estate plan. Richard Regan, Walter's neighbor and recent chum of Goneril, retained Cheapo Law on behalf of Walter. When Walter called Cheapo Law to discuss his estate plan, he spoke with Cecilia Cornwall, paralegal to attorney Lester Edmund. After Walter's phone conversation with paralegal Cornwall, Regan delivered a handwritten sheet of paper to Cheapo Law purportedly containing Walter's wishes for his estate plan. The handwritten sheet of paper was in Goneril's handwriting and designated Goneril and Regan as beneficiaries of Walter's estate. At no point did Walter meet with or speak to attorney Edmund before the drafting of his documents.

In early 2011, paralegal Cornwall went to Walter's home so Walter could execute a new medical power of attorney, financial power of attorney, and will. Paralegal Cornwall orchestrated the entirety of the will-signing ceremony without the supervision of attorney Edmund. Goneril and Regan were present throughout the signing ceremony. Under the financial power of attorney, Goneril became Walter's agent. The will made small bequests to Cordelia and Kent, a bequest to Regan, and a substantial bequest to Goneril.

Two weeks after Walter executed his new financial power of attorney, unusual charges started appearing on Walter's bank account. Specifically, Goneril was writing large checks to herself and to Regan, alleging reimbursements for various services. In addition, Goneril was using Walter's debit card to purchase items at expensive women's clothing stores and lingerie boutiques. Based on significant concerns about Walter's financial situation, Walter's bank froze all of his accounts. Walter's bank also contacted Adult Protective Services (APS), requesting that the agency initiate an investigation due to the same concerns.

Shortly after the request from the bank, APS sent a social worker to Walter's home to investigate the situation. The social worker met with Walter once, at which time she was informed that Cheapo Law recently had prepared estate planning documents for

Walter. Accordingly, the social worker called attorney Edmund to discuss Walter's situation. Attorney Edmund affirmatively reassured the social worker that Goneril and Regan were not unduly influencing or exploiting Walter. After speaking to attorney Edmund, the social worker promptly terminated the investigation and Walter's bank accounts were unfrozen. Despite attorney Edmund's representations to APS, he had never actually spoken to or met with Walter.

The APS investigation greatly upset Walter. Despite all information to the contrary, Walter assertively blamed the investigation on Cordelia and Kent. Shortly after his interview with APS, Walter again contacted Cheapo Law to revise his estate plan. Again, Walter did not speak to or meet with attorney Edmund and interacted solely with paralegal Cornwall.

In early January 2011, paralegal Cornwall again went to Walter's home for him to execute a pour-over will and revocable trust. On that particular day, Walter was feeling very unwell. Specifically, Walter had been suffering from an infection for several days, causing him to be especially confused and indecisive. In addition, Walter's arthritis had flared up, causing him substantial pain and stiffness in his hands. Despite Walter's ailing state, paralegal Cornwall proceeded with the execution of the documents.

Walter's new estate plan excluded Cordelia and Kent entirely. Under the new will, Regan remained the nominated personal representative and received a small monetary bequest. Under the trust, Regan was nominated successor trustee and Goneril was the sole death beneficiary. When time came for Walter to execute the new documents, paralegal Cornwall asked him if his will and trust reflected his desires. Walter explicitly responded, "Whatever Ms. Goneril wants." Additionally, because Walter's hands were in severe pain, Goneril had to physically grip his hand for him sign the documents.

Hours after Walter executed his new will and trust, Goneril left Walter's home to visit a local car dealership. Acting as agent under financial power of attorney, Goneril purchased a brand new sport utility vehicle (SUV), titling it in her name. Although Goneril told the dealership that she was purchasing the vehicle for Walter—a "driving Miss Daisy type situation," she explained—she neglected to mention that Walter was at that time totally confined to a wheelchair. Getting into the SUV was physically impossible for Walter.

In February 2011, a month after executing his new will and trust, Walter passed away in his home. The same afternoon, Goneril, acting under her then invalid power of attorney, withdrew a substantial amount of cash from the Walter's bank account.

Goneril did not inform Cordelia or Kent of their uncle's passing. After several days without word from Walter's nurses or social workers, Cordelia and Kent began to worry about their uncle. Accordingly, they contacted the local police department to conduct a wellness check at Walter's home. A police officer responded to the call. After ringing the doorbell several times, the officer became suspicious because it appeared that people were hiding inside. As the officer was about to force entry into the home, Goneril opened the door and demanded that the officer leave, showing him Walter's estate planning documents as her authority over the home and stating that Walter had died days earlier. Still suspicious, the officer called his commander. The commander instructed his officer to leave the premises because it was a civil matter. The police officer left and later informed Cordelia and Kent of their uncle's death.

Under Walter's final estate plan, Goneril and Regan received several million dollars in liquid assets and real estate. Cordelia and Kent initiated a will contest action, alleging undue influence, as well as the "insane delusion" component of lack of sound mind. In the event of trial, however, paralegal Cornwall would testify that Walter's estate plans comported entirely with his clearly expressed wishes and that he appeared completely competent during all of her communications with him. Some of the private nurses and social workers who visited Walter periodically under his insurance coverage would have corroborated paralegal Cornwall's testimony, based on their observations of his apparent cognitive function, and further would have lauded the quality of Goneril's care. Despite the analysis and forensic opinion described below, and due to limited funds for litigation fees and expenses, as well as the desire to avoid the stress and risks of trial, Cordelia and Kent eventually reached a settlement in mediation with Goneril and Regan. To date, Goneril still lives in Walter's home, and she is looking for another in-home care position as a CNA.

Legal Analysis

With respect to the particular law applicable to undue influence issues and the validity of a testamentary or donative instrument, the Colorado Jury Instructions and related annotated case law supply the most vivid definition.⁶ "Undue influence" is defined as words or conduct (or both) that, at the time of the making of a will, deprive the person making the will of his or her free choice, and cause the person making the will to make it or part of it different than he or she otherwise would have.⁷ Although undue influence

cannot be inferred from motive or opportunity alone, direct or circumstantial evidence showing the existence of undue influence with respect to the making of a will can be sufficient in reaching the conclusion of undue influence.⁸

With respect to the presumption of undue influence, the leading case is *Krueger v. Ary*.⁹ In conformity with CJI-Civ. 34:16 (2012), the Colorado Supreme Court's holding provides that where the contestant proves that, at the time of preparation or execution of the instrument at issue, a beneficiary of such instrument was in a confidential or fiduciary relationship with the donee and was actively involved in such preparation or execution, the instrument is presumed to have been a product of undue influence. Such presumption then becomes an item of evidence for the factfinder to consider in determining the validity of the instrument, unless rebuttal evidence, sufficient in the view of the trial court, is presented by the proponent of the instrument's validity. In that event, the presumption disappears from the case as evidence, although the factfinder still may draw an inference of undue influence under those circumstances.¹⁰

With respect to the expert opinion that Walter lacked testamentary capacity due to the insane delusions that afflicted him, the leading case is *Breeden v. Stone*,¹¹ in which the Colorado Supreme Court defined "sound mind" pursuant to CRS § 15-11-501. In the case of *Walter Lear*, the opinion that he suffered from insane delusions materially affecting the dispositions in the will is relevant to the issue of undue influence, because such delusions rendered him extraordinarily susceptible to such influence.

In *Breeden*, the Court provided the following unifying definitional analysis as to "sound mind" to make a will:¹²

This court has also held that a person who was suffering from an insane delusion at the time he executed the will may lack testamentary capacity. We first defined an insane delusion in 1924 as "a persistent belief in that which has no existence in fact, and which is adhered to against all evidence." *In re Cole's Estate*, 75 Colo. 264, 269, 226 P. 143, 145 (1924). We held that a party asserting that a testator was suffering from an insane delusion must meet the burden of showing that the testator suffered from such delusion. *See id.*

We also have addressed the issue of the causal relationship necessary between an individual's insane delusion and his capacity to contract. *See Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 585, 168 P.2d 256, 260 (1946). In *Hanks*, we noted that contractual capacity and testamentary capacity are the same. *Id.* . . .

The *Hanks* case sets out a standard for the requisite causal connection between insane delusions and contractual capacity that is equally applicable to testamentary capacity. A number of other courts have applied a similar standard in the context of testamentary capacity by phrasing the inquiry as whether the delusion materially affects the contested disposition in the will. . . .

Based on Colorado precedent and the persuasive authority from other jurisdictions discussed above, we hold that before a will can be invalidated because of a lack of testamentary capacity due to an insane delusion, the insane delusion must materially affect the disposition in the will.

The insane delusion test ordinarily involves situations in which the testator, although in possession of his general faculties, suffers from delusions that often take the form of monomania or paranoia. . . . [See] *In re Haywood's Estate*, 109 Cal.App.2d 388, 240 P.2d 1028, 1032-33 (1952) (fact that a testator dislikes the natural objects of his bounty is not an insane delusion). [See also] *Power v. Overholt*, 257 Pa. 254, 101 A. 733 (1917) (a testator's belief, not based on any evidence, that his niece stole from him is an insane delusion). . . .

As such, the *Cunningham* and insane delusion tests, although discrete, are not mutually exclusive. To have testamentary capacity, a testator must have a sound mind. In Colorado, a sound mind includes the presence of the *Cunningham* factors and the absence of insane delusions that materially affect the will.

Finally, of particular interest with respect to the facts of *Walter's* case is *Ofstad v. Sarconi*.¹³ In *Ofstad*, the testatrix was in a weakened mental and physical condition that made her susceptible to undue influence. The proponent of the will and the testatrix were in a confidential relationship. The proponent provided instructions to the drafting attorney, who neglected to meet with the testatrix before drafting a will that was highly favorable to the proponent. The will was contrary to the testatrix's former will, which benefited her family.

The Court found that there is no precise formula for determining whether undue influence has been exerted. Further, the Court noted that direct evidence of undue influence is frequently difficult to obtain:

It has long been accepted that, ordinarily the very nature of undue influence is such that it is rarely susceptible of direct or positive proof, and must therefore rest upon circumstantial evidence. Usually, if undue influence is present, a careful effort of concealment would naturally be made and therefore direct proof

would be difficult to obtain.¹⁴

Nevertheless, the Court noted that there are many circumstances from which undue influence may be inferred. Specifically, the Court considered the following:

- 1) whether there was a confidential relationship;
- 2) whether the preparation of the will was under the direction of one enjoying the confidence of the testatrix;
- 3) whether the proponent will enjoy benefits from the will proposed when, at the time of execution of the will, the testatrix was fatally ill, mentally and physically; and
- 4) whether the proponent kept the execution of the will secret from other members of the family.

The Court held that all of the above-mentioned circumstances were strongly suggestive of undue influence.¹⁵

Walter's facts bear a striking similarity to those of *Ofstad*. Walter was in a weakened mental and physical state and was virtually totally dependent on Goneril at the time of the relevant estate planning. Goneril was in a fiduciary relationship with Walter at the time of the relevant estate planning. Goneril provided handwritten instructions to Cheapo Law to draft a will under which she was a substantial beneficiary. Finally, the estate plans executed in the last few months of the Walter's life were starkly contrary to his earlier estate plans, which benefitted his family.

Forensic Review of the Facts

When conducting a forensic review in contemplation of potential undue influence, four factors must be analyzed:

- 1) whether, and the extent to which, the victim was susceptible to undue influence;
- 2) whether an opportunity to exercise undue influence existed and whether there were actual indications of such exercise;
- 3) whether, and to what extent, the alleged influencer participated in the estate planning; and
- 4) whether the alleged victim of undue influence made drastic and unnatural changes to his estate plan.

These four factors are discussed below.

Susceptibility to Undue Influence

The first factor considered is the extent of the victim's susceptibility to undue influence. Here, from summer 2010 until his death, entries in Walter's medical records describe obvious indications of the severity of his medical and physical conditions. In particular, the records show Walter's complete physical decline, significant impairment in his abilities to manage all instrumental activities of daily living, and his total reliance and dependence on Goneril for his survival.

Walter's most significant physical medical diagnoses and conditions were as follows: (1) chronic noninflammatory bone disease; (2) rheumatoid arthritis; (3) spinal stenosis; (4) type 2 diabetes; (5) severe pain; (6) incontinence; and (7) orthostatic hypertension and frequent dizziness. In addition, Walter's medical records specified that he was non-ambulatory and suffered from "severe weakness with no improvement." Several months before his death, Walter was certified as terminally ill.

In terms of his mental condition, Walter's medical records indicate that he was suffering from "cognitive impairment" and "mental decline." As a result of his physical and mental state, Walter's medical providers specified that he required twenty-four-hour super-

vision. Walter expressed frustration to his medical providers because he had to rely so substantially on others.

In sum, because of his physical and mental conditions, Walter lacked the ability to satisfy essential requirements for physical health, safety, and self-care without round-the-clock care. Goneril provided that care, and Walter was totally dependent on her to meet all of his needs. Accordingly, by virtue of his total dependence, Walter was vulnerable and susceptible to overreaching and undue influence from Goneril.

Exercise of Undue Influence

The second factor considered is whether an opportunity to exercise undue influence existed and whether there were actual indications of such exercise. Here, Goneril had an exclusive opportunity to exercise undue influence over Walter when she became his overnight caregiver. This opportunity broadened when Goneril moved into Walter's home with her children shortly after becoming his caregiver. As discussed above, Walter's physical condition was severely impaired. Medical records indicated that Walter was totally dependent and reliant on Goneril for his care, safety, and survival, as well as all of his activities of daily living from the beginning of their relationship until he died. Accordingly, Goneril had the opportunity to exercise undue influence.

A number of indications reveal that Goneril did, in fact, exercise undue influence over Walter. First, she isolated Walter from his friends and family by controlling and restricting their access to him. Second, she provided input to the preparation of his estate planning documents when she scribed a handwritten note with Walter's

alleged desires to be delivered to Cheapo Law. Third, she developed a confidential and fiduciary relationship with him by becoming his agent under a medical durable power of attorney and financial power of attorney. Finally, Walter executed estate planning documents under which he left substantial bequests to Goneril.

In sum, numerous medical reports and collateral documents reveal that Goneril had the opportunity to exercise undue influence. The evidence also indicates that Goneril actually exercised undue influence over Walter.

Participation in Estate Planning by Alleged Influencer

The third factor considered is whether, and to what extent, the alleged influencer participated in the estate planning. Here, Goneril undeniably contributed to Walter's estate planning. The following are all examples of Goneril's participation: (1) Cheapo Law drafted Walter's first set of estate planning documents based on a piece of paper that was in Goneril's handwriting; (2) Goneril was present when Walter executed his initial will, even though she was a beneficiary under that will; (3) Goneril was present and then acting as his agent under power of attorney when Walter executed his pour-over will and trust; (4) Goneril held Walter's hand to help him sign the pour-over will and trust, which primarily benefitted her; and (5) when paralegal Cornwall asked Walter if his documents reflected his desires, he responded, "Whatever Ms. Goneril wants." Based on these numerous instances, it is undeniable that Goneril participated extensively in Walter's estate planning.

Drastic and Unnatural Changes to Estate Plan

The final factor is whether the alleged victim of undue influence made drastic and unnatural changes to his estate plan. Here, Walter had always maintained a close familial relationship with his surviving family, particularly Cordelia and Kent. For nearly ten years before Walter's death, his niece and nephew had been intricately involved in monitoring and supporting his care. In Walter's estate plan that had been in place for many years, Cordelia and Kent were beneficially included. Further, Cordelia and Kent had been acting as agents for Walter for many years under his financial and medical powers of attorney.

In the last months of his life, after being diagnosed and treated for terminal illnesses, Walter executed unnatural and drastic changes to his estate plan. Specifically, a month after Goneril moved into his home, Walter executed estate planning documents making Goneril his agent under power of attorney and a beneficiary under his estate. Two months after Goneril moved into his home and only weeks before he died, Walter executed estate planning documents that almost exclusively benefitted Goneril, to the complete exclusion of his family. Accordingly, Walter made drastic and unnatural changes to his estate plan in the last months of his life.

Examples and Characteristics of Insane Delusions

Beginning in late 2010, entries in Walter's medical records indicate that he was experiencing paranoid delusions. Many of the entries in the medical records are descriptions and characterizations that indicate that Walter's paranoid delusions became insane delusions affecting his decisions about his estate planning.

For example, Walter told care providers on numerous occasions that he had not been involved with Cordelia or Kent for many years. Yet, notes from social workers and other medical providers indicate that his niece and nephew were very involved in his care.

Numerous independent sources provided elaborate examples of Walter's very close relationships with Cordelia, Kent, and members of their respective families.

In addition, on numerous other occasions in late 2010 and early 2011, Walter told care providers and social workers that Cordelia and Kent just wanted to put him in a nursing home and take his money. However, numerous independent sources reveal that Cordelia and Kent were supportive of Walter's desire to live at his own home instead of a care facility. Walter's medical records clearly reflect that his care providers strongly encouraged placement in a care facility on several occasions. However, the same records reflect that Cordelia and Kent were not interested in placing him in a care facility if he did not want the placement.

For example, an entry in the medical records describes an occasion when Walter was voluntarily entering a rehabilitation center. At that time, Cordelia conveyed to the staff that Walter was very concerned that he would not be able to leave the facility. Cordelia asked the facility if there was any paper work that Walter could sign to reinforce that he would not be kept in the rehabilitation center following rehab against his will. In addition, Cordelia and Kent were responsible for arranging twenty-four-hour in-home care for their uncle. The above examples indicate that Walter's medical providers were the actual persons making the placement recommendations for Walter—not his niece and nephew.

In early 2011, Walter called Cheapo Law to make additional changes to his estate plan. He told paralegal Cornwall that his niece and nephew called APS because they wanted to put him in a nursing home and take his money. Indeed, paralegal Cornwall noted in the Cheapo Law file that Walter had telephoned her office very upset because Cordelia and Kent had called APS and made "false allegations." These "false allegations," to which Walter referred and that prompted APS to investigate were actually made by officers from Walter's bank. Paralegal Cornwall later testified that Walter made the decision to disinherit his niece and nephew because of the APS investigation, which he improperly attributed to them.

Numerous sources provided consistent, vivid evidence that Walter's belief that his family wanted him to be placed in a nursing home so they could take his money was not based on reality but rather on a paranoid delusion. This paranoid delusion eventually became an insane delusion that affected his decision making in respect to the estate planning at issue.

Forensic Opinion Pursuant to CRE 702

Based on forensic consideration of the data reviewed in this case, the expert opinion was that Walter lacked testamentary and contractual capacity to execute the changes prepared for him in his estate plans. The two factors by which his lack of testamentary and contractual capacities became apparent were: (1) the abundance of evidence supporting each of the four indicators of undue influence; and (2) the clinical presence of insane delusions that specifically and materially affected the changes Walter made in his estate plans.

The status and actions of Goneril met the criteria indicators of undue influence, which, therefore, supports at least the reasonable inference of undue influence. Further, based on the above discussed references to the medical records, and on the examples from collateral sources, there were numerous examples of the insane delusions Walter exhibited and expressed. The findings with respect to the abundance of examples as to the indicators of undue influence,

as well as the examples of Walter's insane delusions, were important factors underlying the opinion.

Conclusion

With respect to the reality of improper influence to achieve objectives of greed and power, the Colorado appellate courts perhaps have never been more prescient than in the Supreme Court's opinion in *Ofstad v. Sarconi*, where the Court stated:

It has long been accepted that, ordinarily the very nature of undue influence is such that it is rarely susceptible of direct or positive proof, and must therefore rest upon circumstantial evidence.¹⁶

If the experience of the Estate of Kingston Walter Lear reveals anything, it is the subtlety of undue influence and how such subtlety, along with the practical realities of how such cases develop, may afford the wrongdoer some profit or reward from his or her wrongful conduct, despite all efforts to prevent such a result. Indeed, such reward specifically contravenes an underlying principle of the Colorado Probate Code—that a wrongdoer must not profit from his or her own wrong.¹⁷ Such experience accordingly might be of informational value as state lawmakers consider the possible provisions, enactment, and implementation of a statute for mandatory reporting of abuse and exploitation of at-risk adults.¹⁸

Notes

1. *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000).
2. *Estate of Romero*, 126 P.3d 228 (Colo.App. 2005).

3. CRS § 15-11-501.

4. Underlying Colorado's law of wills is the fundamental concept of freedom of testation—namely that a testator “may dispose of his property as he pleases, and that [he] may indulge his prejudice against his relations and in favor of strangers, and that, if he does so, it is no objection to his will.” *Breeden*, *supra* note 1, citing *Lehman v. Lindenmeyer*, 109 P. 956, 959 (Colo. 1909).

5. CRS § 15-10-102(2)(b).

6. *See also* CRS § 15-12-407 (prescribing respective burdens of proof in formal testacy proceedings).

7. *CJI-Civ.* 34:14.

8. *See Scott v. Leonard*, 184 P.2d 138, 139 (Colo. 1947).

9. *Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009). *See also* Walker, “The Protective Doctrine of Undue Influence,” 38 *The Colorado Lawyer* 75 (June 2009); Kirch, “A Donor's Rights to Disposition of Assets Versus Undue Influence Protection,” 39 *The Colorado Lawyer* 10 (Oct. 2010) (providing additional insight on the *Krueger* opinion and undue influence with regard to non-probate assets).

10. *CJI-Civ.* 34:17.

11. *Breeden*, *supra* note 1.

12. *Id.* at 1170-72.

13. *Ofstad v. Sarconi*, 252 P.2d 94, 95-97 (Colo. 1952).

14. *Id.* at 97.

15. *Id.*

16. *Id.*

17. *See* CRS § 15-11-803(6) (Colorado “Slayer Statute”); *Lundsford v. Western States Life Ins. Co.*, 908 P.2d 79 (Colo. 1995) (decided on other grounds under statute in effect before 1994).

18. SB 13-111, introduced during the 2012-13 Session of the Colorado General Assembly. ■