

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2688**

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Subject: Mary Vandenack on *In the Matter of the Estate of Lois B. Erickson*, Interference with Testamentary Intent

*“In the case of *In the Matter of the Estate of Lois B. Erickson*, the Court of Appeals of Iowa, affirmed the district court findings that Wayne Erickson had exercised undue influence over his mother Lois sufficiently such that his actions rose to the level of tortious interference with bequest. The district court also awarded attorney fees to the executor of the estate and such award was affirmed. A key fact in the tortious interference determination was that the lawyer for the decedent acknowledged that Wayne Erickson was the primary driver of changes to his mother’s will.”*

We close the week with **Mary Vandenack’s** commentary on *In the Matter of the Estate of Lois B. Erickson*.

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, international tax, state and local tax, and tax-exempt entities. Mary’s practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Law Practice Group and on the Planning Committee. Mary is a member of the American Bar Association Techshow Board and incoming Editor-in-Chief of Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech and recently appointed to ABA SCOTIS. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law, and, building sustainable law firms.

Here is her commentary:

EXECUTIVE SUMMARY:

In the case of *In the Matter of the Estate of Lois B. Erickson*,ⁱ the Court of Appeals of Iowa, affirmed the district court findings that Wayne Erickson had exercised undue influence over his mother Lois sufficiently such that his actions rose to the level of tortious interference with bequest. The district court also awarded attorney fees to the executor of the estate and such award was affirmed. A key fact in the tortious interference determination was that the lawyer for the decedent acknowledged that Wayne Erickson was the primary driver of changes to his mother's will.

FACTS:

Lois Erickson executed a will in 2010 dividing her estate among her children equally (Wayne Erickson, Alan Erickson, Mary Ann Ward). Lois executed another will in 2011 giving most of her estate to her son Wayne Erickson. Lois died in 2015.

Lois was diagnosed with Alzheimer's. Her health and her living conditions deteriorated over time. Alan and Mary Ann petitioned for appointment of a guardian and conservator. When Wayne learned of the petition, he had a codicil to Lois' 2011 will drafted that provided penalties for any contest of the will. Lois signed the will codicil two days prior to a hearing on the guardianship/conservatorship. Lois signed a document naming Wayne as attorney-in-fact under a power of attorney one day prior to such hearing. The court conducting the guardianship/conservatorship hearing appointed Alan as Lois' guardian and named a bank to act as conservator.

After Lois died, Alan submitted the 2010 will to probate. Wayne filed a petition to set aside the 2010 will and have the 2011 will declared as valid. Alan and Mary Ann filed a counterclaim against Wayne for tortious interference with a bequest. The district court determined that the 2011 will was invalid due to undue influence and lack of testamentary capacity and that Wayne was liable for tortious interference with a bequest. The court ordered Wayne to pay all of the estate's attorney fees from his share of the estate.

Wayne appealed the district court rulings claiming that the finding that he exerted undue influence over Lois was insufficient to support a tortious interference finding. The Court of Appeals noted that undue influence does not necessarily support a tortious interference finding but that in this case, the district court's findings were the "effective equivalent" of finding fraud, duress or other tortious means.

In analyzing the district court findings, the Court of Appeals noted that the lawyer who drafted the 2011 will spoke primarily with Wayne with respect to requested changes to the will. When Wayne and Lois called the lawyer requesting a change to the will, Wayne claimed that Lois wanted a new will because Alan had broken into her safe and stolen items. The lawyer acknowledged that Wayne was driving the conversation and the process. The district court noted that the claimed theft was investigated and that no evidence of theft was found. The district court also found that Wayne exerted control over Lois by preventing Mary Ann from taking Lois to events. Lois had been diagnosed with Alzheimer's. The district court noted that such diagnosis would result in Lois lacking testamentary capacity and being susceptible to undue influence. The Court of Appeals agreed that the district court's findings were supported by substantial evidence.

COMMENT:

Generally, the elements of tortious interference are:

- Plaintiff had an expectancy with which the defendant interfered.
- The interference was tortious.
- Reasonable certainty exists that, but for the defendant's tortious interference, the expectancy would have been fulfilled.
- Damage or injury.ⁱⁱ

A plaintiff alleging tortious interference with a bequest must show the defendant acted with tortious intent.

Undue influence is an act or series of acts that result in overcoming the free will or judgment of another. Testamentary capacity is knowing the objects of one's bounty, the property held, and the desired disposition.ⁱⁱⁱ

Over half the states have adopted or acknowledged some form of tortious interference with inheritance. Some states do not recognize the tort on the basis that remedies in probate court will be adequate.

In this case, the lawyer for the decedent acknowledged and noted that Wayne was “driving the bus” yet drafted the requested change to Lois’ previous testamentary plan and was involved in Lois signing the document. Generally, lawyers have some duty to assess testamentary capacity and undue influence.^{iv} Regardless of duties, lawyers should adopt best practices for supporting the effectuation of the testamentary intentions of clients. Such best practices include:

- Know the standard for testamentary capacity for the jurisdiction.
- Evaluate capacity. If there is doubt, call in a professional whose job is to make such assessments.
- Consider the possibility of undue influence. Is one beneficiary bringing the client to meetings? Note where the client is vulnerable. Assist on meeting the client alone.
- When a client leaves out a beneficiary who would normally be benefitted, verify that the client fully understands the effect of leaving such beneficiary out.
- Involve witnesses.
- Verify and document.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

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CITATIONS:

ⁱ *In the Matter of the Estate of Lois B. Erickson*, deceased, (No. 17-0430), July 18, 2018

ⁱⁱ Restatement (Second) of Torts §774B (1979).

ⁱⁱⁱ *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989)

^{iv} ABA Model Rule 1.14