



**WICKENS
HERZER
PANZA**

ESTATE PLANNING SERIES – UNDUE INFLUENCE. Part 2: Practical Pitfalls to Avoid to Best Protect Against the Prospect of an Undue Influence Claim

By [Wilbert V. Farrell IV, Esq.](#) and [Malorie A. Alverson, Esq.](#)

This article is the second installment of a three-part series that discusses best practices during the estate-planning process to avoid an undue influence claim. The first installment addressed the definition of undue influence, discussed how much influence may be too much, and provided relevant examples of common undue influence claims that we see in our trust, estate, and probate litigation practice. This installment examines practical pitfalls to avoid to best protect your estate against the prospect of an undue influence claim. The third installment will discuss what happens if someone would like to bring, or is confronted with, an undue influence claim, including related litigation considerations.

Relatives who suspect that a deceased person was taken advantage of – and didn't just change his or her mind – can file an undue influence action in court. If they succeed in proving undue influence, the judge can rule that a will, trust, or other estate-planning document is invalid. To avoid a court battle after your death based on an undue influence claim, there are several proactive steps that you can take when creating your estate plan.

First, choose an attorney who focuses their practice in estate planning. An experienced estate-planning attorney will be well versed in crafting an estate plan to meet your needs, and will draft estate-planning documents designed to limit the opportunity for future successful legal challenges. Insist on meeting with your estate-planning attorney without any person present who may benefit from a particular property disposition.

Not surprisingly, claims of undue influence often go hand in hand with challenges to the decedent's competency, at the time of execution, to execute their estate plan. Create your estate plan when you are in good mental and physical health. If you suspect that competency may be an issue, consider having a physician examine you to determine competency near or at the time that you execute your estate-planning documents, and include the evaluation with your estate-planning documents.

If your estate plan distributes assets in a way that your relatives may not suspect, the potential for an undue influence claim heightens. In lieu of disinheriting certain family members outright, consider giving those family members reduced shares, coupled with the inclusion of a no-contest clause providing that should a beneficiary challenge your will or trust unsuccessfully, they will receive nothing. The potential to lose their inheritance may be sufficient deterrence to dissuade a beneficiary from filing an undue influence claim. If that's not possible, and a family member is disinherited, it may be advisable to state the reason(s) for the disinheritance within your estate plan, or by separate dated letter to be included with your estate-planning materials.

Once you are satisfied that the estate-planning documents reflect your intentions, execute the same in the presence of independent witnesses. No beneficiary should be present during the execution and witnessing of the estate-planning documents. Evidence that the estate-planning attorney exercised independent judgment and provided independent advice, as opposed to merely acting as a scrivener, may become critically important to assessing whether the challenged document accurately represented the decedent's intent relative to that of the alleged undue influencer. Accordingly, encourage your estate-planning attorney to create and to preserve notes of all discussions with you. Evidence of independence of counsel, coupled with documentation of the efforts engaged in by the estate-planning attorney, often lead to effective defense against undue influence claims.

This article provides an overview and summary of the matters described therein. It is not intended to be and should not be construed as legal advice on the particular subject.