Will Contests 2025:

UNDUE INFLUENCE AND LACK OF CAPACITY: HOW MUCH EVIDENCE IS ENOUGH?

A 60-Year Survey

Dallas Estate Planning Council
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TABLE OF CONTENTS

UNDUE INFLUENCE AND LACK OF CAPACITY: HOW MUCH EVIDENCE IS ENOUGH?

I. PURPOSE

This paper, written from the perspective of a will contestant, seeks to address the question: "In the trial of a will contest, as to the claims of undue influence and lack of testamentary capacity, how much evidence is enough?"

II. SCOPE OF PAPER

In order to do a broad analysis of the types of evidence which have been sufficient to establish claims of lack of testamentary capacity or undue influence, all Texas Appellate opinions on will contests decided since the Texas Supreme Court set out the elements of undue influence in *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963) have been reviewed thus, this analysis is based on sixty years of Texas Appellate opinions. Not included in the cases analyzed are will contests which were decided on grounds other than lack of capacity or undue influence, and cases which did not contain adequate detail of the evidence introduced at trial. Also excluded from this analysis are cases which were decided by summary judgment. The vast majority of will contests decided by summary judgment involved primarily claims of undue influence. An excellent and comprehensive review of summary judgments in will contests involving claims of undue influence is contained in M. Keith Branyon's recent article on Undue Influence - Dead, Alive or On Life Support, Advanced Estate Planning and Probate Course 2006, Chapter 25.

In total, 64 reported will contest cases have been reviewed, including 43 jury trials and 21 bench trials. These cases are referred to collectively herein as "the reviewed cases." As to each case, the evidence introduced in support of and in opposition to claims of lack of testamentary capacity and undue influence will be reviewed and compared in jury trials, followed by a review and comparison of the evidence as to those causes of action in bench trials. This paper will then compare the results as between jury trials and bench trials, to review the effect of the choice of the trier of fact.

Finally, this paper will review how certain types of evidence which are frequently touted as "game changers" actually effected the outcome of the lack of testamentary capacity and undue influence claims at the trial court level in the reviewed cases.

This paper is an update of a 2010 paper, supplemented with Appellate Opinions filed since 2010.

III. LEGAL TESTS FOR TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

In order to review the sufficiency of the evidence introduced as to lack of testamentary capacity and undue influence in the reported cases, an understanding of the elements of those claims is necessary.

A. ELEMENTS OF TESTAMENTARY CAPACITY

Texas Probate Code §88(b)(1) requires that a person be of "sound mind" in order to execute a valid will. Texas Courts have defined the term "sound mind" to mean "testamentary capacity". The elements of testamentary capacity are sufficient mental ability:

1. To understand the business in which the testator is engaged, the effect of his or her act in making the will, and the general nature and extent of his or her property;

2. To know his or her next of kin and the natural objects of his or her bounty; and

3. To have sufficient memory to collect in his or her mind the elements of the business to be transacted and to hold them long enough to at least perceive their obvious relation to each other and to form a reasonable judgment about them. *In Re Neville*, 67 S.W.3d 522, 524 (Tex.App. - Texarkana 2002, no pet.); *In Re Estate of Jernigan*, 793 S.W.2d 88, 89 (Tex.App. - Texarkana 1990, no writ).

In a will contest, the pivotal issue is whether the testator had testamentary capacity on the day the will was executed. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968). However, evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed, provided that the evidence demonstrates a condition effecting his testamentary capacity persists and was likely present at the time the will was executed. *Croucher v. Croucher*, 630 S.W.2d 55, 57 (Tex. 1983).

If the issue of testamentary capacity is raised prior to the admission of the will to probate, the proponent has the burden of establishing if the testator was of sound mind. The fact that the will is self-proved does not shift the burden of proof. *Croucher*, Id. Once the will is

admitted to probate, the burden of proof as to capacity shifts to the contestant. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

B. ELEMENTS OF UNDUE INFLUENCE

The Texas Supreme Court set out the elements of undue influence in *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963):

1. The existence and exertion of an influence;

2. The effect of operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and

3. The execution of a will which the maker thereof would not have executed but for such influence.

Some of the principals applied in reviewing claims of undue influence include the following:

(a) These elements may be proved by circumstantial, as well as direct, evidence. *Estate of Montgomery*, 881 S.W.2d 750, 754 (Tex.App. - Tyler 1994, writ denied).

(b) Mere opportunity to exercise undue influence is no proof that it was exerted. *Miller v. Flyr*, 447 S.W.2d 195, 202-03, (Tex.Civ.App. - Amarillo 1969, writ ref'd, n.r.e.).

(c) Weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in a condition to be susceptible to undue influence. *Brewer v. Foreman*, 362 S.W.2d 350, 354 (Tex.Civ.App - Houston 1962, no pet.).

(d) Factors to be considered in determining the existence of undue influence are as follows:

1. The nature and type of relationship existing between the testator, the contestants and the parties accused of asserting such influence;

2. The opportunities existing for the exertion of the type of influence or deception possessed or employed;

3. The circumstances surrounding the drafting and execution of the agreement;

4. The existence of a fraudulent motive;

5. Whether there has been a habitual subjection of the testator to the control of another;

6. The state of the testator's mind at the time of the execution of the testament;

7. The testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted;

8. The words and acts of the testator;

9. Weakness of mind and body of the testator whether produced by infirmities or age or by disease or otherwise;

10. Whether the testament executed is unnatural in terms of disposition of property;

11. Whether the beneficiary participated in the preparation or execution of the instrument. *In Re Estate of Graham*, 69 S.W.3d 609 (Tex.App. - Corpus Christi 2001, no pet.); *Guthrie v. Suiter*, 934 S.W. 2d 820, 831 (Tex.App. - Houston [1st Dist.] 1996, no pet.).

(e) Finally, Texas courts apply the "equal inference" rule in undue influence cases, which provides that circumstances which are as consistent with a will executed free from improper influence as they are with a will resulting from undue influence cannot be considered as evidence of undue influence. *Mackie v. McKenzie*, 900 S.W.2d 445, 450 (Tex.App. - Texarkana 1995, writ denied).

The burden of proof as to undue influence is on the contestant. *Rothermel*, Id.

IV. JURY TRIALS

The review begins with a comparison of the evidence introduced by proponents and contestants in the 43 jury trials decided from and after the *Rothermel* decision which are a part of the reviewed cases.

1. *Estate of Russell*, 2009 WL 3855950 (Tex.App. - El Paso) [this opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.]
Testatrix executed will February 20, 2002
Testatrix died November 20, 2003
Proponent - Son
Contestants - Granddaughters
Contest grounds - undue influence

Contestants' evidence in support of undue influence - The proponent, one of the testatrix's two sons, admitted in regards to the prior 1998 will that he had contacted the attorney, instructed him as to the will's contents, and then took his mother to the attorney's office. He admitted that he was "the one that dictated what to do and what we wanted", that the mother said "you take care of it", and that she couldn't function enough to know enough about how to fix the will. The 1998 will divided her estate equally between her two sons and daughter per stirpes. The proponent hired a new attorney to prepare a power of attorney for his mentally incapacitated brother to undo his sister's power of attorney over him, and to do a new will changing the disposition of his brother's estate from dividing it equally between him and his sister, to just the brother, the proponent explaining that he "needed to change the will to me because I could divide with her but she wouldn't divide with me". Although the new attorney testified that the brother had mental capacity to execute the power of attorney, the proponent testified that the brother had no idea what the power of attorney was and signed it because the attorney asked him to sign it. The new attorney then prepared a series of wills for the testatrix, including wills in 1998, 2000 and 2002. At trial, he testified that his file for the testatrix contained three sticky, Post-It type notes, these being the only items in the file except for unsigned copies of the three wills. One of the notes bore the proponent's phone number on it but the file did not contain a phone number for the testatrix. The next note referenced a power of attorney that was to be prepared on behalf of the testatrix and it listed the proponent's address and phone number. The third note had the name of the proponent on it and made a notation to add to the mother's will the round dining room table to go to one of the grandsons. This specific gift was contained in all three wills. The proponent confirmed that his mother deferred to him on all matters including financial matters. In addition to the admissions of the proponent referenced above, the contestants all testified that the testatrix was fair and equal when it came to her family. The drafting attorney testified that with the exception of the third will which he prepared, all previous wills distributed the testatrix's estate in equal proportions per stirpes as opposed to the 2002 will which cut out the grandchildren after testatrix's daughter died in 2001.

Proponent's evidence in opposition to undue influence - The drafting attorney testified that he procured the execution of the documents outside of the presence of the proponent. The proponent argued that the contestant introduced no evidence of the opportunity to influence his mother, of her susceptibility to influence, that her mind was overpowered or subverted at the time of the will execution, and that the disposition was not unnatural in consideration of the circumstances.

Jury verdict - The jury found that the will was executed as the result of undue influence and denied it probate.

Court of Appeals - Affirmed. The testimony of the drafting attorney as well as the admissions and involvement of the proponent assisted the contestant in establishing undue influence.

2. *Estate of Trawick*, 170 S.W.3d 871 (Tex.App. - Texarkana 2005, no pet.)

Testatrix executed will March 11, 1998 at age 92.
Testatrix died May 2000
Proponent - Niece
Contestants - Grandchildren of testatrix
Contest grounds - lack of testamentary capacity and undue influence.

Contestants' evidence in support of lack of testamentary capacity - The testatrix's hairdresser testified that as of 1996, the testatrix's mind was not what it should be. The testatrix accused her best friend of stealing things from her home, imagined that there were children in her house that kept her awake at night, spoke of deceased persons as living, and got confused about her beauty shop appointments. A friend of the testatrix testified that she had known the testatrix for 50 years, and that the deaths of testatrix's son in 1989 and granddaughter in 1997 turned her mind off to a certain degree, with further mental deterioration after the testatrix's daughter died in 1997. By the fall of 1997, the testatrix was not mentally capable of carrying on any business. A fifty to sixty year friend testified that she was sometimes paid to sit with the testatrix, and that during the time period August 1997 through March 1998, her mental condition declined to the point she was not able to recognize people that she knew well including some relatives. The testatrix would also say that certain people never came to see her when they had. A police officer testified that in 1991, the testatrix reported her car as stolen, when she had actually left it in a parking lot. A caretaker and his wife, who lived with the testatrix until shortly before the execution of the will, testified that she insisted on going to the bank to make deposits which she had already made, and failed to recognize the caretaker who was living in her home. A local grocery store employee testified that in March or April of 1998, the testatrix came to her store and tried to cash checks which had already been cashed. Her great

aunt testified that the testatrix called during the summer of 1997 to say that it was snowing outside. There was testimony that in 1997 and 1998, the testatrix left her home and needed help finding the way back, refused to bathe, talked about deceased people as if still living and talked about strange people living in her house and stealing her blankets. He also testified that the testatrix hid canned food in her dresser drawers, beginning in the latter part of 1997.

Proponent's evidence in support of testamentary capacity - The proponent testified that the testatrix asked her to drive the testatrix to see her attorney. The drafting attorney testified that the testatrix specified how she wanted her will to be written, and returned to his office and executed the will. The witnesses to the will and the notary testified that she appeared mentally competent, and not confused. A friend who played dominoes with the testatrix testified that she was capable of playing and that he never saw her confused. A church friend testified that the testatrix was conversing with other people at her 94th birthday party (two years after the will was executed). A bank employee testified that the testatrix did her own banking (although the proponent drove her to the bank). The testatrix's treating physician, who examined the testatrix neurologically in 1994, late 1997, and 1998, testified that she was very expressive of her opinion, consenting to certain tests while refusing others. The doctor further testified it was not until February 2000 that the testatrix became combative and confused, eventually being diagnosed and treated for "sundown syndrome." He stated his opinion that "there is nothing from my recollection or in the notes that I have about Ms. Trawick that would suggest that she could not understand and do - make a will or understand her finances."

Contestants' evidence in support of undue influence - After the proponent began taking care of the testatrix, she drove her to see an attorney to discuss the will, and drove her to the attorney's office to execute the will. She was present when the will was executed, and then drove her to the bank where the will was placed in a lock box. The testatrix was easily confused and susceptible to undue influence.

Jury verdict - The trial court directed a verdict for the proponent on the issue of undue influence, and the jury returned a verdict for the proponent as to testamentary capacity.

Court of Appeals - Affirmed. Although the trial court directed a verdict as to undue influence, the testimony of the lay witnesses as to incidents reflecting the testatrix's incapacity overcame the testimony of the testatrix's treating physician, resulting in a finding of lack of testamentary capacity by the jury.

3. *Estate of Steed*, 152 S.W.3d 797 (Tex.App. - Texarkana 2004, pet. denied)
Attorney's holographic will executed in 1998
Contestants - Sons
Proponent- Wife
Contest grounds - undue influence.

Contestants' evidence in support of undue influence - The Attorney's assistant testified that the attorney told him that he had prepared the holographic will to get his wife off of the warpath, to pacify his wife, and to curb her spending, because every time his wife got mad or upset she would buy something. His assistant also testified that he overheard conversations between the testator and his wife concerning money, to the effect that the testator would like to retire, and could not afford to do so due to her demands. He further testified that the Testator was distraught regarding the wife's accusations of extra-marital affairs, and that he did not want to have a nasty divorce. The testator's son testified that although the testator and his wife lived over 500 miles apart, the wife exerted pressure on the testator by spending thousands of dollars, and demanded that the testator provide the money. He further testified that her allegations of sexual improprieties overpowered the testator's mind, who was prescribed Prozac for depression and anxiety.

Proponent's evidence in opposition to undue influence - Friends and the testator's pastor testified that the testator and his wife had a close, loving relationship. The contestant acknowledged that the testator loved his wife. The evidence showed that although the wife lived 500 miles from the husband, they were in constant contact by telephone and were together on many weekends. The evidence further showed that the testator was the sole drafter of the holographic will, and that there was no evidence that the wife was with the testator when he drafted the will or that she participated in its preparation. There was no evidence that the wife asked, pleaded with, cajoled or persuaded the testator to execute the will. The wife testified that she never asked the testator about a will, and that at the time of preparation of the holographic will, they were in different cities. She further testified that the testator himself mailed the will to his wife. There is no evidence of any

misrepresentation or fraud by the wife exercised upon the testator. The testator was not financially dependent on his wife, being engaged in the active practice of law until his death. The testator was described as an independent, opinionated, and take charge person. Witnesses described the testator as a powerful, confident mover and shaker, active, with a sharp mind. The testator filed a financial statement with the bank stating that he had a will and that the wife was the executor.

Jury verdict - Jury verdict for the contestants finding that the will was executed as the result of undue influence.

Court of Appeals - Reversed and remanded for new trial, finding that the verdict of undue influence was not supported by the evidence and was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Apparently the testimony of Mr. Steed's legal assistant about his effort to get his wife off of the war path was persuasive to the jury, but not adequate to stand up on appeal.

4. *Estate of Robinson*, 140 S.W.3d 782 (Tex.App. - Corpus Christi 2004)

Testatrix executed will 1983 and August 24, 1990 codicil (beneficiary: foundation)
Testatrix executed a new will August 14, 1995 at age 93 (beneficiaries: nieces and nephews)
Testatrix died October 30, 1998
Contestants - Foster daughters and a foundation.
Contest grounds - lack of testamentary capacity and undue influence.

Contestants' evidence in support of lack of testamentary capacity - A forensic psychiatrist testified, based solely upon his review of the testatrix's medical records, that the testatrix suffered from the following medical conditions: High blood pressure in 1991; dizziness and weakness; hypertensive cardiovascular disease; a balance problem in 1992; edema and shortness of breath in 1993; and congestive heart failure. A 1996 CT brain scan showed moderately severe atrophy, and evidence of a stroke suffered approximately nine months after signing the 1995 will. The psychiatrist also reviewed a 1996 psychological assessment, reflecting a history of arteriosclerotic heart disease, high blood pressure, and frequent falling. He concluded that the arteriosclerosis (or hardening of the arteries) caused her to lack testamentary capacity. He further testified that the sitter's notes supported his opinion as to lack of capacity. He opined that based upon this medical history, the testatrix lacked testamentary capacity to execute the 1995 will.

A caregiver from 1990 to 1998 testified that the testatrix was forgetful, feeble, unable to care for herself, had trouble with her eyesight and hearing, and did not understand her doctor visits. She could no longer drive, could not handle her business, and complained that she did not understand her estate-planning documents. A second sitter who sat with the testatrix from 1993 to 1995 testified that the testatrix was forgetful and was unable to read documents because of the size of the print. The 1993 sitter's notes reflected: "Not being as out of it as she was yesterday. Business matters have really begun to confuse her."

Proponents' evidence in support of testamentary capacity- The forensic psychiatrist admitted that the testatrix could have been aware she owned land and cattle, oil and gas leases, hunting leases and rice fields, and that he assumed that she could have recognized long time family members. The sitter admitted that the testatrix followed her investments, worried about her taxes and met with business persons including her attorneys. The second sitter admitted that the testatrix played dominoes at her church after July 1995, had discussions with the sitter about the Bible, and that she was the boss of her house. There was testimony and documentary evidence reflecting that the testatrix worked with her estate planning attorneys from December 1994 through May 1996 in formulating and implementing an estate plan, discussing her desires. The sitter's notes reflected that "Robinson did book work followed by a full day of activities. Met with business associates and managed her finances. Donated money to her favorite causes." Testatrix's oil & gas attorney testified that she carried on her oil and gas business from the 1970's through 1995, signed oil & gas leases and discussed them with him. The manager of testatrix's ranch testified that she discussed business, and asked appropriate questions. The testatrix's long time financial planner from the 1980's through 1995 testified that the Testatrix understood the business they transacted, took an interest in interest rates and tax free bonds, and knew what she was doing. The sister-in-law, who was a sitter during the month of execution of the 1995 will testified that before the 1996 stroke, the testatrix managed her business, writing her own checks, and that she went through her mail with her. The testatrix sent thank you notes, enjoyed social visits, talked about the cattle business, enjoyed driving around the ranch and going into town, was interested in her oil & gas business, had a good

sense of humor and was "queen of her domain." Testatrix's treating physician and internist testified that beginning in 1993 he adjusted her medications and began seeing her regularly. He saw no indication of a mental problem, she appeared alert and oriented, nor did he observe that she was suffering from a gross impairment of memory, reasoning, or judgment. He further testified that one could not determine whether the testatrix had gross impairment from a CT scan. He further testified that he treated the testatrix after she had a stroke in 1996, and that she was confused but went into rehabilitation and appeared to be intact mentally, there being some initial change, but it was not permanent. Proponent's forensic psychiatrist testified that his review of the records supported a conclusion that she was functioning at a normal level, further stating that her medical records lacked any evidence that her brain was oxygen deprived. He further opined that the testatrix's high blood pressure caused her dizziness, not a lack of oxygen to her brain, also causing her confusion, tiredness, and ultimately a stroke. The testatrix's sister testified that the testatrix was a strong and independent woman with a sharp mind who knew her family.

Contestants' evidence in support of undue influence - There were direct communications between testatrix's attorney and her relatives regarding the estate plan.

Proponents' evidence in opposition to undue influence - Testatrix worked with her attorneys from December 1994 through May 1996 formulating and implementing an estate plan. She met with her attorneys, discussed her concerns with them, discussed her desires to get her family more involved as executors and to leave the ranch to her family, but was also concerned that she did not want to pay a lot of taxes.

Jury verdict - Jury verdict for the contestants, finding a lack of testamentary capacity and undue influence.

Court of Appeals - Affirmed. This was a very close case where it appears that the testimony of the forensic psychiatrist on behalf of the contestant, together with caregiver's notes, overcame the proponent's evidence by the testatrix's treating physician, oil and gas attorney, ranch manager, financial planner, and estate planning attorney.

5. *In Re Estate of Blakes*, 104 S.W.3d 333 (Tex.App. - Dallas 2003, no pet.)

Testator signed will May 25, 1999 at the hospital.
Testator died May 26, 1999 at age 62
Proponent - Executor
Contestant - Widow
Contest grounds - lack of testamentary capacity and undue influence.

Proponent's evidence in support of testamentary capacity and opposing claim of undue influence - The evidence showed that the testator and his wife had been separated for twelve years. A friend testified that he was generally aware of how the testator wanted to dispose of his property from conversations during previous years with the testator. When the friend asked the testator whether he wanted to leave anything to his stepson, the testator replied "nothing". The friend relayed what he believed to be the testator's wishes to the drafting attorney, including the bequest of the testator's medical practice to his partner, with the remainder of the estate to testator's three biological children. The testator's treating physician testified that his pain medications were withheld by request the morning before the will was executed. The treating physician visited the testator at 9:00 or 10:00 a.m. on the date of execution of the will, and testified that the testator knew who he was and where he was. The drafting attorney prepared the will, and the testator's friend brought the will to the hospital for the testator's signature the day before his death, which was executed in the presence of his friend who was not a beneficiary, two witnesses and a notary. The friend testified that he summarized contents of the will for the testator and watched him flipped through the pages before signing. There was testimony that the testator recognized and visited with his family on the day he executed the will.

Contestant's evidence in support of lack of testamentary capacity and undue influence - The testator, a physician, was suffering from stage four cancer. The testator was admitted to the hospital six days prior to his death suffering from dehydration and confusion. The testator's friend was informed by a nurse who worked for the testator, with whom testator was romantically involved, that the testator wanted to make a will. The testator's friend contacted the attorney and had the attorney prepare the will based solely on the instructions conveyed by the friend, which left nothing to his wife who he had continued to support financially, or his stepson, who he treated as one of his children. The witnesses and notary had very limited recollection about the testator's execution of the will. There was no evidence that the testator asked any questions about the will after he purportedly reviewed it. The contestant's forensic psychiatrist testified based on his review of the

medical records that the nurses' notes indicated that the testator was "confused" at about 5:00 a.m. on the day the will was signed, and that based upon the testator's depression, pain, mental state, and confusion, together with the effects of the cancer, liver failure and anemia, that the testator did not have testamentary capacity. During the will execution ceremony, the testator was tired and asked to finish the next day. The testator's friend and the nurse urged the testator to complete his signing of the will. The attorney did not speak directly to the testator and did not supervise the execution of the will.

Jury verdict - The jury found that the testator lacked testamentary capacity and was unduly influenced.

Court of Appeals - Affirmed as to lack of capacity, and did not rule on undue influence. The fact that the estate planning attorney did not speak directly to the testator and did not supervise the execution of the will, coupled with the fact that the testator was tired and asked to finish the next day assisted the contestant in establishing lack of testamentary capacity and undue influence. The treating physician's testimony for the proponent was not strong and was not as persuasive as the forensic psychiatrist's testimony and nurses' notes regarding confusion on the date of execution of the will.

6. *Bracewell v. Bracewell*, 20 S.W.3d 14 (Tex.App. - Houston [14th Dist.] 2000, no pet.)
Testatrix executed will August 17, 1989 at age 76
Testatrix died May 9, 1995
Proponent - Son
Contestant - Husband
Contest grounds- lack of testamentary capacity

Proponent's evidence in support of testamentary capacity - The proponent, who had a house on the testatrix's property, visited her daily, and helped care for her, testified that although his mother was diagnosed with Parkinson's Disease in 1984, her mental health did not decline until 1991 when she started hallucinating. Although she was treated for overmedicating herself with Valium and Sinemet, she was able to walk, make coffee and dress herself. Disinterested witnesses testified that at or near the time the testatrix signed her will, she knew her next of kin and had an understanding of the general nature of what was going on around her and did not appear delusional. The testatrix's older sister, who saw the testatrix on the day of the execution of the will, testified that she believed the testatrix was capable of making good judgments on that date. The contestant admitted that he had the testatrix sign a letter to the bank allowing him to put the testatrix's money into a certificate of deposit six months prior to execution of the will, cashable by either one of them, and that he probably typed that letter. The doctor who testified for the contestant admitted that he was surprised to learn that his office had the testatrix execute a power of attorney form while in his office less than a month before execution of the will, her signature witnessed by one of his nurses.

Contestant's evidence in support of lack of testamentary capacity - Three of the testatrix's treating physicians testified that the testatrix suffered from Parkinson's Disease, which was severe in 1987 and that she was abusing her medications, becoming dependent upon tranquilizers. There were hospital notes in 1987 describing problems with incoherence as well as a geriatric psychiatrist records reflecting that by 1992 the testatrix was extremely confused, suffering from delirium and had a dementia process which had probably been going on for some time. A doctor further testified that her medications could cause hallucinations, confusion and delirium.

Jury verdict - Jury found that the testatrix lacked testamentary capacity.

Court of Appeals - Affirmed. The testimony of the testatrix's treating physicians and the evidence regarding her overmedication trumped the testimony of the proponent's disinterested witnesses.

7. *Horton v. Horton*, 965 S.W.2d 78 (Tex.App. - Fort Worth 1998, no pet.)
Testator executed will December 30, 1993 (all to wife)
Testator died January 20, 1994
Proponent - Wife
Contestants- Son and grandsons
Contest grounds - lack of testamentary capacity and undue influence

Contestants' evidence in support of lack of testamentary capacity and undue influence - A CAT Scan performed during the first week of January 1994 revealed that the cancer had spread to the testator's brain, skull and bones. The proponent admitted that in mid December 1993 the testator began taking morphine and MS-Contin for pain relief and Zoloft, an anti-depressant. The proponent further admitted that the testator hallucinated at times, imagining things on the bedspread that were not actually

there. Although she could not recall any specific times when those episodes occurred, she did admit that the testator had been hallucinating before he was admitted to the hospital on January 19, 1994. The proponent further admitted that she was the one who called the estate planning attorney back and asked him to prepare the will deleting the life estate in the real estate to the children. A nurse who saw the testator within a few days before and after execution of the December 30th will testified that on Christmas Eve 1993, he was very sick. She also testified that on January 10, 1994, after he returned from chemotherapy treatment in Houston, he was confused and disoriented. One of the contestant's wives testified that the testator was extremely weak and in a great deal of pain on December 24, 1993. The testator did not read the will until five minutes before he signed it.

Proponent's evidence of testamentary capacity and in opposition to undue influence - The proponent testified that the testator had not taken any medication prior to executing the will, and that he was set in his ways and would not have signed a will if he had not wanted to, being headstrong and not easily influenced by others. A friend and retired school teacher testified that she visited the testator on the date of execution of the will and that the testator was bright and alert, not groggy or sleepy.

The testator's older sister testified that despite the cancer, the testator continued to handle all of his own business dealings until the day that he died. An eighteen-year friend of the testator testified that the testator was strong-willed, and continued to handle his own business affairs. He further testified that he saw the testator in the week after execution of the will, that he did not appear to be medicated, and that they discussed business during the visit, during which the testator calculated the money due on a line of credit he carried for the witness. The testator's treating physician, who had been his physician for several years stated that he examined the testator in his office on December 17, 1993, that he appeared to be in full control of his mental capacity, and that the medications he was on would not have impaired him mentally. The drafting attorney, who had drafted her previous will, testified that he initiated the conversation about changing the prior will due to his concern that the life estate provision in favor of the wife in some real estate would create a problem for her in paying off the note, and would cause her to be unable to sell the property if needed due to the remainder interest. One of the subscribing witnesses to the will testified that she believed the testator knew who his family was, what he owned, and what he was doing in signing the will and the effect of his action, and did not appear to be under the influence of any drugs. A second subscribing witness to the will testified that she had known the testator for fourteen years, and that she observed the testator ask a question about the will, which he and his attorney discussed, further testifying that the testator did not appear to be drugged or drowsy and did not appear reluctant to sign the will.

Jury verdict - The jury found that the testator lacked testamentary capacity and that the will had been procured through undue influence. The trial court granted the motion for judgment NOV as to testamentary capacity, but allowed the jury verdict to stand on the issue of undue influence.

Court of Appeals - Affirmed judgment NOV that the testator had testamentary capacity, and reversed and rendered judgment that the 1993 will was not procured through undue influence. The Court of Appeals gave the following analysis as to the insufficiency of the evidence:

- Evidence of physical infirmities, without more, does not tend to prove that a testator is incapable of knowing his family or his property, or understanding the effect of signing the will. The fact that a testator consumed pain medication on the day he executed the will in question is likewise insufficient to prove a lack of testamentary capacity, without some evidence that the medication rendered the testator incapable of knowing his family, his estate, or understanding the effect of his actions. In this case, appellees offered no evidence that Pete's pain medication and physical problems impaired his testamentary capacity.

- It is not enough to show that a testator lacked testamentary capacity on some days without also showing the condition probably persisted on the day the will was executed. The record is devoid of evidence that would allow the jury to reasonably conclude that Pete was experiencing hallucinations or is otherwise incapacitated *on the day the will was executed.*

- Although the evidence indicates that Melba had the opportunity to exert influence over her husband in the execution of the will, there is simply no evidence that she did so. Likewise, there is no evidence that would tend to prove that Pete's mind was in fact subverted at the time

he executed the will.

8. *Cobb v. Justice*, 954 S.W.2d 162 (Tex.App. - Waco 1997, pet. denied)

Testator executed prior will July 22, 1993
Testator executed new will June 2, 1995
Testator died June 4, 1995
Proponent - Niece
Contestant - Niece (beneficiary of prior will)
Contest grounds - undue influence

Contestant's evidence in support of undue influence - The testator could not read or write. The testator told a neighbor that his niece (the proponent) bothered him about his will, and told the neighbor not to let that niece use the extra key to his house because things would be missing. On June 1, 1995, the testator's doctor determined that he was close to death from prostate and lung cancer, and increased his morphine. The testator was on oxygen at the time. His appetite waned and his weight declined. Testimony showed that the testator felt nervous when surrounded by a large group of people. On June 2, 1995, the proponent niece came with four others to visit. Proponent's sister asked about the contents of his will, and attempted to schedule an appointment with an attorney to write another will for the testator. They called attorneys out of the phone book. When some friends stopped by and told the group that the testator had a friend who was an attorney, the niece called the attorney and arranged for a meeting that afternoon. The proponent niece loaded the testator into a van and drove him to meet the attorney. The attorney prepared a will at that time leaving the estate to the proponent. The group then took the testator to the insurance agent's office to change the beneficiary of the life insurance policy to the to the niece. The next day the testator was comatose, and died June 4th. The day after death, the proponent took the will to the attorney's office to have it filed for probate. The testator had been told by the proponent that the other niece who was the previous beneficiary was not taking care of the testator's financial business.

Jury verdict - Jury verdict for the contestant, finding that the will was executed as the result of undue influence. The trial judge entered a judgment NOV for the proponent.

Court of Appeals - Reversed the judgment NOV, and reinstated the verdict of the jury. The factual evidence of the susceptibility of the testator two days prior to his death, the proponent's actual participation in procuring the execution of the will and her disparagement of the previous beneficiary, were sufficient to establish undue influence.

9. *Estate of Davis*, 920 S.W.2d 463 (Tex.App. - Amarillo 1996, writ denied)

Testatrix executed will October 1991
Testatrix died March 1994
Contestants - Two sons
Proponents - Four other children
Contest grounds - undue influence

Contestants' evidence in support of undue influence - The two daughters of the testatrix, who sided with their mother in a family squabble over their father's care prior to his death, lived with the testatrix after the father's death and had opportunities to exert influence over the testatrix, often discussing the two brothers who had sided with the father during the family squabble. There was testimony that the girls had their mother wrapped around their finger and got anything they wanted. The girls obtained a peace bond to keep the sons away from the house and they often discussed the brother's hurtful behavior. They were in constant need of money. The evidence showed that the daughters may have talked to the testatrix about her wills. The testatrix's will only left the two sons $1,000 each.

Proponents' evidence in opposition to undue influence - The only testimony relating to the circumstances surrounding the execution of the will came from the testatrix's attorney and his secretary, who stated that the testatrix visited the office on three separate occasions, wrote a letter explaining her motivation for changing her will, and that she was alone during all three visits.

Jury verdict - The jury found that the will was executed as the result of undue influence

Court of Appeals - Reversed and remanded for new trial. The jury was persuaded more by the lay testimony concerning the daughters encouraging the testatrix's division with the two sons than the testimony of the drafting attorney. The Court of Appeals, however, reasoned that while the evidence showed that the daughters had the opportunity to exert influence, there must be proof the influence was not only present but that it was in fact exerted with respect to the making of the testament itself. They found that the proof was lacking in that regard.

10. *Tieken v. Midwestern State University*, 912 S.W.2d 878 (Tex.App. - Fort Worth 1995, no writ)

Testatrix executed will dated August 14, 1987
Contestant - Midwestern State University
Proponent - Insurance adjuster friend of testatrix
Prior will dated 1981
Contest grounds - lack of testamentary capacity and undue influence.

Contestant's evidence in support of lack of testamentary capacity - The doctor testified that he had treated the testatrix from 1984 to April 1987, that the testatrix had suffered two strokes prior to coming to him, and two while under his care. He further testified that during a 1986 visit to his office, she arrived without an appointment not knowing why she was there. The doctor further testified that the testatrix had hardening of the arteries in her brain and heart, and had suffered strokes and transient ischemic attacks. She was treated with Ativan, which has side effects including hallucinations. The testatrix had been on this drug for a year prior to signing the will. There was testimony that the testatrix had hallucinations both before and after signing the will. The doctor stated his opinion that the testatrix lacked testamentary capacity. A doctor who had signed a note stating that the testatrix was capable of signing a new will changed his opinion after learning that she had experienced hallucinations three days after signing the will. Two months after signing her will, she was prescribed medication to treat Alzheimer's disease.

Proponent's evidence in support of testamentary capacity - A doctor signed a note stating that the testatrix was capable of making a new will. The doctor's records dated three weeks before the will showed that the testatrix was alert, her speech was fluent, and her cognitive functions appeared intact, with her memory being consistent with her age. Although this doctor changed his opinion regarding her capacity during the contest, his notes reflected that ten months after execution of the will, he had not seen any real changes in her memory. The drafting attorney testified that he spent five hours with the testatrix in three separate meetings and believed that she was fully competent. The attorney and subscribing witnesses say that the attorney reviewed each paragraph of the will with the testatrix. The attorney testified that the testatrix never displayed a lack of knowledge as to her property during the five hours he spent with her on the day of signing, and that she wanted to leave her property to her friend because they had been there when she needed them. A friend testified that the testatrix was fond of the insurance adjuster and his children, who had been friends with her and her husband for several years the previous decade. Other friends testified that the strokes did not affect her mentally.

Proponent's evidence in opposition to undue influence - The testatrix contacted the proponent, who had been her friend, about moving her to a nursing home. An Adult Protective Services investigator found that the testatrix was well aware of the changes she had made to her will and power of attorney, and provided reasons for having done so. A friend of the testatrix testified that the testatrix was mad at all of her prior beneficiaries for writing a letter questioning the insurance adjuster/friend's motives in taking charge of the testatrix and moving her to a nursing home.

Contestant's evidence in support of undue influence - After placing the testatrix in the nursing home, a friend of the proponent selected an attorney to prepare a new will and power of attorney. The evidence further showed that the friend of the proponent typed up a list of property for the testatrix so she could "organize her mind", and claimed to be instrumental in the testatrix executing a new will. The proponent reviewed the list made by his friend, and made notes. The friend of proponent then selected the attorney who would prepare the new will for the testatrix. The evidence further showed that the proponent tried unsuccessfully to borrow $30,000 from the testatrix and her husband during the husband's lifetime. The proponent and his friend changed the testatrix's residence, attorney in fact, doctor, lawyer, and accountant within four months of moving her to the nursing home. The proponent was present at the nursing home when the will was signed. There was further testimony that the proponent and his friend were always with the testatrix.

Jury verdict - Jury verdict for contestant, finding that the testatrix lacked testamentary capacity and that the will was executed as the result of undue influence.

Court of Appeals - Affirmed. The testimony of the treating physician for contestants, together with the participation of the proponent's friend in preparing a list of property and in selecting the attorney overcame the testimony of the drafting attorney for the proponents.

11. *Estate of Montgomery*, 881 S.W.2d 750 (Tex.App. - Tyler 1994, writ denied)

Testator executed will May 14, 1991 (favoring wife)
Prior will March 23, 1989 (all to daughter)
Proponent - Wife

Contestant - Daughter
Contest grounds - undue influence

Contestant's evidence in support of undue influence - The testator's younger wife initiated the relationship with the recently widowed 68 year old man despondent over his first wife's death, a passive person who sought to please and went out of his way to avoid conflict. Shortly before marriage, the proponent became a joint tenant with right of survivorship on the testator's checking account, as well as the beneficiary on certain life insurance policies. After being married in Las Vegas, she had him take dancing lessons which he disliked and forced him to smoke and drink less. After marriage the testator saw less of his family and friends. On the date of the testator's death, the wife signed over to herself a number of vehicle titles executed in blank, did not include the family in the funeral arrangements and changed the locks on the house. At the time of trial, she had not visited the cemetery where the testator was buried. It appears the testator's choice of executor was influenced by proponent's preference, including the substitution of the wife's son-in-law in place of the testator's long-time friend as executor. Seven days after having a new will prepared, the testator rewrote his will for the sole purpose of making additional gifts to the new wife, and bequeathing his Mobil stock to the wife instead of his daughter. The will attempted to revoke the prenuptial agreement signed despite the attorney's assurance that it would have no effect, reflecting that the wife's desire for its inclusion overrode the testator's understanding of the law and the effect of the provision.

Proponent's evidence in opposition to undue influence - The drafting attorney, who did not know the proponent, testified that the testator had been his client for a number of years, that the testator came in by himself, and that he was clear in what he wanted. The attorney testified that the testator was a strong-willed person and was of sound mind. The notary and witnesses to the will testified that the proponent was not present nor was her name mentioned when the will was executed.

Jury verdict - Jury verdict for contestant denying the will to probate based upon undue influence.

Court of Appeals - Reversed. The jury was clearly not enamored with the young wife and her age disparity with the testator, despite the testimony of the drafting attorney. The Court of Appeals, however, reversed the verdict stating that the will did not constitute an unnatural disposition of the testator's property, finding that it is not unusual that a husband leave the lion's share of the estate to his wife.

12. *Estate of Riley*, 824 S.W.2d 305 (Tex.App. - Corpus Christi 1992, writ denied)

Proponent - Surviving spouse
Contestants- Children
Contest grounds - undue influence

Contestants' evidence in support of undue influence - The testator, at 71 years of age, married the proponent, age 41, a several-time divorcee. A few months after the marriage, the testator suffered a heart attack and required major surgery. A day prior to the operation, the new wife obtained a preprinted will form, completed the form herself, and falsely told the testator that the will conformed to his wishes, whereas it actually provided all to her. A witness testified that the testator had expressed his intention to divide the property among his children, but that the predetermined language on the form left the testator no choice but to give all of his property to one person. The testator's son testified that he was alarmed at the rate of spending by the testator and his new wife. The new wife never notified the family of the father's death, which they learned about by reading it in the newspaper. The new wife filed the new will for probate the day after the husband's funeral. The prior will divided the property evenly between testator's children.

Proponent's evidence in opposition to undue influence - The testimony showed that only one child of the testator maintained an amicable relationship with the testator after his marriage to the new wife. The new wife testified that the family alienated the husband by disapproving of the marriage.

Jury verdict - Jury verdict for contestants, finding that the will was executed as the result of undue influence.

Court of Appeals - Affirmed. The age disparity between the testator and the new wife, together with the wife's use of the preprinted will form and the wife's misrepresentation to the testator that the will conformed to his wishes were persuasive to the jury.

13. *Holcomb v. Holcomb*, 803 S.W.2d 411(Tex.App. – Dallas 1991, writ denied)

Testator executed wills December 19, 1983 and February 1, 1984
Prior will December 1, 1983

Testator died February 26, 1984

Proponent - Son
Contestant - Daughter
Contest grounds - undue influence

Contestant's evidence in support of undue influence - Contestant, testator's daughter, contested the two later wills which devised the estate equally between the son and daughter, the proponent and contestant, based upon undue influence. The testator's prior December 1, 1983 will was offered by the proponent which left the bulk of the testator's estate to the daughter. The will expressly stated that the daughter was receiving the bulk of the estate because the son had received a substantial amount of property from his mother from whom the testator was divorced and who was not leaving any property to the daughter. The testator spoke of his desire that his children be provided for equally after his death, taking into account the mother's provision only for the son. The contestant alleged that the brother brought about the execution of the later wills by exerting undue influence on the testator, misrepresenting to the testator the value of the property which he had been or would be given by the mother. The contestant further testified that the proponent made a commitment to the testator that he would equalize the combined estates of both parents to ensure that both children were provided for, causing the testator to change his will, a promise which the proponent had no intention of fulfilling.

Proponent's evidence in opposition to undue influence - The proponent denied promising to equalize the estates and misrepresenting what he was to receive from his mother.

Jury verdict - Jury verdict for contestant, finding that the will was executed as the result of undue influence by the son.

Court of Appeals - Affirmed. The Court noted that the testator's mistake as to the extent of the property to be transferred by the testator's ex-wife to his son, a mistake of fact, would not alone defeat the probate of a will, in that such a mistake is not grounds for invalidating a will, but noted that such a mistake when coupled with undue influence or fraud is sufficient to deny probate of the will.

14. *Broach v. Bradley*, 800 S.W.2d 677 (Tex.App. - Eastland 1990, writ denied)

Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence in support of testamentary capacity and in opposition to undue influence - The evidence showed that the testatrix was a strong-willed person who could not be easily influenced, that she knew what she was doing and was of sound mind when she signed the will, and that she knew and understood her business. The evidence also showed that under the will, the bulk of the testatrix's estate went to charity, and that proponent was to receive only 22% of the estate.

Contestant's evidence in support of lack of testamentary capacity and undue influence - The evidence showed that the testatrix was an elderly woman, that the proponent worked for the testatrix, and that the testatrix suffered from physical problems. The evidence further showed that the proponent drove the testatrix to the attorney's office and was present when the will was signed.

Jury verdict - Jury verdict for proponent that the testatrix possessed testamentary capacity and was not unduly influenced.

Court of Appeals - Affirmed. The opinion does not reflect any medical testimony offered on behalf of the contestant as to capacity, and the proponent's driving of the testatrix to the attorney's office and being present during the execution of the will was not sufficient to establish undue influence.

15. *Smallwood v. Jones*, 794 S.W.2d 114 (Tex.App. – San Antonio, 1990, no writ)

Testatrix executed will January 26, 1988
Testatrix died May 3, 1989
Proponent - Sister (80% of estate)
Contestant - Son (20% of estate)
Contest grounds - undue influence

Contestant's evidence of undue influence -The testatrix, who developed Parkinson's Disease in 1986, needed assistance with her daily living tasks after her husband died in 1987. The testatrix stayed for one month with the proponent, her sister, when her illness worsened, and the will was executed three weeks after the testatrix came to stay with her sister, who took over the testatrix's finances. The evidence showed that the sister called the testatrix's family attorney to make an appointment for the testatrix to make a will, drove her to the lawyer's office, and waited in the lawyer's reception area while the will was being executed. The testatrix told the contestant that the sister was pressuring her as to how she dressed and kept house. The contestant also testified that his mother sometimes called him by the name of a

deceased uncle, and that the testatrix was experiencing financial difficulty at the time of the will's execution.

Proponent's evidence in opposition to undue influence - The will was prepared by the testatrix' family lawyer. The contestant waited in the lawyer's reception room while the will was being executed. The testatrix first requested the lawyer to leave the entire estate to proponent, and then changed her mind, leaving 20 % to her son, the contestant. When the proponent was seven years of age, she went to live with the testatrix, who raised her for eleven years.

Jury verdict - Jury verdict for contestant finding undue influence. The trial judge granted judgment NOV for the proponent, admitting the will to probate.

Court of Appeals - Affirmed. The Court stated that a trial court may enter a judgment NOV if a directed verdict would have been proper, and may disregard any jury finding on a question that has no support in the evidence under T.R.C.P. 301. The Court further stated that if there is any evidence of probative value to support the jury's answer, it is error to disregard the answer. The court stated that the testatrix's illness was no evidence that her mind was subverted or over-powered at the time of the will's execution, nor was her financial condition nor any "pressure" from the proponent regarding the testatrix's clothing and housekeeping any such evidence. The court stated that there was no evidence that the free agency of the testatrix was destroyed or that the will expressed the will of the proponent.

16. *Alldridge v. Spell*, 774 S.W.2d 707 (Tex.App. - Texarkana 1989, no writ)

Testator executed will December 10, 1986
Testator died March 6, 1987 at age 73
Proponent- Daughter
Contestant - Surviving spouse
Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence of testamentary capacity - On December 9, 1986, the testator contacted his lawyer about changing the will. The following day, the testator's daughter drove him to the attorney's office, but did not accompany him inside. The attorney drafted the will, and served as a witness to the will. The attorney testified that the testator had the capacity to know the objects of his bounty and knew the nature and extent of his property. The attorney's wife and legal secretary witnessed the will, and testified that the testator understood what he was doing. The notary, the attorney's legal secretary, testified that the testator had requested changes in the will, and understood that he was executing the will. The proponent also offered a memorandum from the testator's personal physician dated the day after the will was executed, reflecting that the testator was "orientated to time, person and place. He is competent to make decisions without assistance from anyone. His recent and past memory is excellent. In my best judgment he is sane."

Contestant's evidence of lack of testamentary capacity - The testator suffered from diabetes which was not medically regulated during 1986, and was diagnosed with cancer on December 9, 1986, the day prior to executing his will. A physician friend of the testator who golfed with the testator stated that he spent approximately twenty hours a week with the testator over the last four to five years. He testified that on December 12, 1986, the testator was mentally "in and out". He stated that in his opinion as a doctor and a friend, the testator could not have made a will on December 10th, would not have known the nature and extent of his estate, and would not have known the objects of his bounty. He testified that the testator was taking Valium, two pain medications, a sleeping medication, a medication for relaxing his stomach muscle, heart medication, an anti-depressant and other medications. He further testified that when diabetes is not regulated, as was the case on the date the will was executed, it can effect a patient's mind. The testator's son who was not the proponent gave his opinion that his father did not have mental capacity, and that his father's mind was "completely gone" in early December 1986, that he could not concentrate and would forget things that he said. Another friend of the testator testified that during the period around the date of execution of the will, that the testator's mind would wander and he appeared irrational when he discussed with him what he wanted done.

Jury verdict - For contestant, finding lack of testamentary capacity.

Court of Appeals - Affirmed. The testimony of the testator's golf partner who was a physician overcame the testimony of the drafting attorney and the memorandum as to capacity from the testator's personal physician.

17. *Jones v. LaFargue*, 758 S.W.2d 320 (Tex.App. - Houston [14th Dist.] 1988, writ denied)

Testator executed will April 19, 1983

Testator died November 7, 1983
Proponents - An attorney and two other non-relatives
Contestants - Nieces and nephews
Contest grounds - lack of testamentary capacity and undue influence

Contestant's evidence of lack of testamentary capacity - Witnesses testified that there were instances prior to the will being signed when the testator could not understand the extent of his property and when he failed to recognize members of his family. Although he had no children of his own, the testimony showed that he was close to his nieces and nephews, his affection being demonstrated in letters and in generous gifts. He often attended family picnics and gatherings of the family. The testimony further showed that beginning in 1978 he became a recluse, avoiding family reunions, and remaining in his room for gatherings that he formerly would have enjoyed. Family members noticed at a gathering in November 1982 that he was no longer the "Esquire fashionplate" in white suit and spats that his neighbors remembered, that but more resembled a "war prisoner from Auschwitz." There was further testimony as to his irrational conduct prior to execution of the will, including an inability to distinguish the extent of his own property as opposed to that of his sister, and was unaware of property that he owned jointly with his sister. There were multiple occasions in early 1983 when he did not recognize his family members. In August of 1983, testimony showed that the testator injured his leg and refused to seek medical treatment. When his nephew checked on him, he found him in bed wrapped only in a filthy sheet, disheveled with a gangrenous wound on his leg. The leg could not be saved and was amputated. The evidence further showed that five doctors had concluded that the testator had organic brain syndrome, or dementia. Several doctors testified for the contestants, including a physician who testified that the brain scan showed atrophy, supporting a diagnosis of dementia, and that the dementia was chronic beginning several years prior to execution of the will. An attorney brought the estate planning attorney to the testator's home to discuss the preparation of a will. The drafting attorney could not recall whether the testator or the other attorney gave him the notes from which the will was prepared. The primary beneficiaries under the will were the non-drafting attorney, a woman who had worked for the family for thirty years, and a friend of the testator's who regularly accompanied him.

Proponent's evidence in support of testamentary capacity - The drafting attorney who came to the testator's home for an initial meeting to discuss the preparation of the will testified that the testator knew who he wanted to leave his property to and the effect of signing his name to the document. The drafting attorney's employee, who was present during the execution of the will on a second trip to the house, testified there was no question in her mind that the testator knew why they were there and what he was doing. They further testified that he was appropriately dressed. One of the beneficiaries testified that in the Spring of 1983 he regularly accompanied the testator, driving him on errands, to church, and out for entertainment. He said the testator played gin rummy well, prepared his own meals, and read the newspaper daily. Another witness, the manager and bartender of a gay bar, testified that the testator and one of the beneficiaries visited once or twice a week, and that the testator was courteous, well-dressed and had a good memory.

Jury verdict - Jury verdict for contestant that the testator lacked testamentary capacity.

Court of Appeals - Affirmed. The testimony of the five treating physicians regarding the testator's dementia, together with family's testimony, overcame the testimony of the drafting attorney, who was undermined by not being able to recall whether the testator or the other attorney, who was a beneficiary, gave him the notes from which the will was prepared.

18. *Gaines v. Frawley*, 739 S.W.2d 950 (Tex.App. - Fort Worth 1987, no writ)

Testatrix executed will November 14, 1979
Testatrix died November 17, 1980
Proponent - Purported common law husband
Contestants - Sons
Contest grounds - undue influence

Contestants' evidence in support of undue influence - The testatrix's treating physician testified that the testatrix had emphysema and was diagnosed with brain cancer in May of 1979. According to the doctor the illness effected her thought process, and caused her to lose a significant amount of weight. The testatrix was drinking heavily, drinking 1/5 of a gallon of scotch a day beginning in the morning. A few months prior to execution of the will, the alleged common law husband threw a fit and cursed obscenities and yelled at the testatrix in front of guests for 15 - 20 minutes when she locked the Doberman pinscher in the house after it attacked a small child at a birthday party. The husband kept a sawed off shotgun by the side of his bed and guns

in both of his vehicles, all loaded. He had a hot head temper and violent arguments with customers two or three times a week. A few months prior to executing the will, the testatrix had an opportunity to act in a training film, but initially declined because she did not feel well. The husband forced her to change her decision. The testimony showed that the testatrix was afraid of the husband's anger.

Jury verdict - The jury found that although the testatrix had testamentary capacity, the will was executed as the result of undue influence

Court of Appeals - Affirmed

19. *Green v. Green,* 679 S.W.2d 640 (Tex.App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.)

Testator executed will December 4, 1979
Testator died December 25, 1979
Contestants - Children of testator from prior marriages
Proponent - Third wife
Contest grounds - lack of testamentary capacity and undue influence

Contestants' evidence in support of testamentary capacity and undue influence - The testator was diagnosed with terminal lung cancer in May of 1979 and was hospitalized numerous times between August and November of 1979, in constant pain until his death. The testator took Percodan regularly until November at which time he began receiving morphine injections. He was also receiving radiation treatment and chemotherapy. The contestants testified that the leaving of the entire estate to the proponent was an unnatural disposition based on the short length and tumultuous nature of the testator's marriage to the proponent, including several periods of separation, and the fact that the proponent remarried within a month after the testator's death. The proponent had filed for divorce in November 1978 but dismissed the action three days later. A family friend testified that the fights between testator and his wife were over the wife's dislike for the testator's children and that she had once became so angry that she threatened the youngest son and the testator with a shotgun, sending them running into the night clad only in pajamas. The testator made statements to a friend that he would take care of his son in his will and that he intended to leave his business to his son. The daughter further testified that during the testator's final hospitalization, the proponent told her that they had both changed their wills to include all of the children, and that the father, who was in the room, nodded his head in agreement. The attorney who prepared the will did not speak to the testator prior to drawing up the will, receiving his instructions from the proponent. The contestants testified that they believed the testator was unduly influenced by the proponent by her control of his pain medication over the months prior to the hospitalization, and her order that the medication be withheld on the morning that the will was signed, medication that he was extremely dependent on. The testator died within two weeks after the will was executed. The will was witnessed by the wife's friend and her sister's husband.

Proponent's evidence in support of testamentary capacity and in opposition to undue influence - The proponent testified that the marital troubles had to do with the testator's excessive drinking. The proponent also testified that the testator named her as the sole beneficiary of the estate because he knew she would take care of his children in the event they needed help. The drafting attorney testified that he asked the testator to be seen by a doctor on the morning immediately prior to the will's execution, which was done, and that on the morning of the will's execution he explained the terms of the document which were agreed to by the testator.

Jury verdict - The trial judge instructed a verdict that the testator had testamentary capacity, and after the jury returned a verdict finding undue influence, the court granted a judgment NOV for the proponent.

Court of Appeals - Reversed the trial court and rendered judgment according to the jury verdict that the will was procured by undue influence. The fact that the drafting attorney did not meet with the testator prior to drawing up the will, receiving his instructions from the proponent, together with the evidence of the stormy relationship with the proponent, the medication which the testator was taking, and the proximity of the execution of the will to the testator's death was more persuasive to the jury than the testimony of the drafting attorney, despite the fact that he arranged for a doctor to see the testator the morning of the execution of the will.

20. *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983)

Testator executed will July 7, 1980
Testator died August 17, 1980
Contestant - Son from previous marriage
Proponent - Second wife
Contest grounds - lack of testamentary capacity

Contestant's evidence of lack of testamentary capacity - The evidence showed that the testator had a history of physical problems stemming from his diabetes in December 1979, and had two toes amputated. A brain scan was done at that time indicating that he testator had a diminished flow of blood to the brain. In January 1980, the testator returned to the hospital to have his left leg amputated. An arteriogram revealed that the testator's right internal carotid artery was totally occluded. A neurological examination was performed at that time and stated that the testator's "memory was sketchy and he seemed at times confused." The testator executed the will several months later on July 7, 1980. The next month, the evidence indicates the testator suffered a stroke. The admission report stated that the testator was suffering from "severe arteriosclerotic cardiovascular disease and had been undergoing decreasing mental status for one month." The testator died approximately one month later on August 17, 1980. One of the proponent's witnesses, a doctor, admitted that the testator's condition could have caused the testator to be less than lucid at times. Another of the proponent's witnesses admitted that they had seen the testator in late July, that he appeared to have suffered a stroke, and could not talk, and was no longer able to care for himself.

Proponent's evidence in support of testamentary capacity - The attesting witnesses to the will stated that the testator was lucid at the time he was executing the will. Several persons who saw the testator at a fourth of July party, three days before the will was executed, testified that he was alert, able to carry on a conversation and participated in a card game. An acquaintance of the testator who was also a medical doctor testified that he had seen the testator around the same time, believed him to be competent, and testified that the blockage in the carotid arteries would not necessarily cause mental decline.

Jury verdict - Jury verdict for the contestant, finding that the testator lacked testamentary capacity.

Court of Appeals - Reversed.

Texas Supreme Court - Reversed the Court of Appeals, affirming the trial court judgment that the testator lacked testamentary capacity. The proximity of the execution of the will to the testator's stroke and death together with his medical history was more persuasive to the jury than the testimony of the attesting witnesses and friends of the testator.

21. *Wilkinson v. Moore*, 623 S.W.2d 662 (Tex.Civ.App. - Houston [1st Dist.] 1981, no writ)

Testatrix executed will July 28, 1971 at age 90
Testatrix died October 18, 1975
Proponent - Niece
Contestant - Nephew
Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence in support of testamentary capacity and in opposition to undue influence - The drafting attorney testified that the testatrix called his office and asked him to come to her home to draw up a new will. After a long conversation during which the proponent and a nurse were present, the attorney determined that the testatrix was alert and clear-minded, knew who she was, discussed her family members by name, discussed her property, and was aware of the acreage she owned, the nature of her business, her income, and who managed her property. She told the attorney that she wanted to leave her estate in equal portions to her niece and nephew, but wanted the nephew to have only a life estate in his share because she believed this would result in tax savings, and she did not want her nephew's third wife to inherit her estate. The testatrix later went to the attorney's office where the testatrix read her will, the attorney diagramed it for her, and after expressing her approval, and signed it. Her treating physician testified that he had seen her the day before for a sore throat, that she was in a good state of mind, mentally alert, and her memory was sharp, and that her mental condition did not decline until six months before her death.

Contestant's evidence in support of lack of testamentary capacity and undue influence - The contestant offered testimony showing irrational behavior on occasions prior to and subsequent to the execution of the will, and testified that the testatrix had high blood pressure, arteriosclerosis and hallucinations on occasion. She further refused to put on certain clothes, thinking they were her wedding gown, and erroneously referred to a niece as her sister.

Jury verdict - Jury verdict for proponent.

Court of Appeals - Affirmed. The testimony of the drafting attorney and the treating physicians resulted in a verdict for the proponent.

22. *Rich v. Rich*, 615 S.W.2d 795 (Tex.Civ.App. - Houston [1st Dist.] 1980, no writ)

Testatrix executed will February 10, 1971
Proponent - Grandson
Contestant - Son (father of proponent)
Contest ground - lack of testamentary capacity

Contestant's evidence in support of lack of testamentary capacity - The wife of the contestant testified that she saw the testatrix a day or two after her execution of the 1971 will, and that the testatrix seemed upset and had been crying all night, having written nasty letters to her mother, half-sister, husband and her son, upset because her son had attended her ex-husband's funeral. She further testified that the testatrix had lost a tremendous amount of weight, her eyes were black clear down on her cheekbone, that she shook quite a bit, and had a loss of appetite. Two other witnesses testified that testatrix's health was poor from late 1970 to early 1971, and that she seemed to be confused at times, being unable to carry discussions to a conclusion.

Proponent's evidence in support of testamentary capacity - There was testimony that the testatrix recognized everyone and often spoke of her family, that she was actively engaged in her real estate business, selling her home and buying a new one during the 1970 - 1971 time period.

Jury verdict - Jury verdict for contestant as to testamentary capacity.

Court of Appeals - Reversed the judgment, ruling that the jury's finding that the testatrix lacked testamentary capacity was so against the great weight and preponderance of the evidence as to be manifestly wrong.

23. *Wilson v. Estate of Wilson*, 593 S.W.2d 789 (Tex.Civ.App. - Dallas 1979, no writ)

Testatrix executed holographic will in 1970 (all to one of two sons)
Testatrix executed will April 1, 1972 (dividing her estate equally between two sons)
Contestant - One of two sons.
Contest grounds - lack of capacity and undue influence

Proponent's evidence in support of testamentary capacity- The proponent's wife testified that the 78 year old testatrix knew her sons' names, the property she owned, and that she took care of her business affairs. She expressed her opinion that testatrix was of sound mind. The proponent's granddaughter testified that the testatrix knew her heirs, carried on normal conversations, and had good mental capacity. A neighbor of the testatrix testified that he saw no evidence of mental failure, that she knew both of her sons, and the extent of her property.

Contestant's evidence in support of lack of testamentary capacity - The contestant offered evidence showing that the testatrix was 78 years old, had suffered minor strokes, and that she was hospitalized with a broken hip at the time the will was executed. The evidence also showed that the proponent had filed an application for guardianship over the testatrix two months prior to execution of the will, alleging that the testatrix was of unsound mind.

Contestant's evidence in support of undue influence - The testatrix and the proponent son had a bad relationship over several years. The testatrix was physically weak and susceptible to undue influence. The contestant testified that the proponent forced the testatrix to write the new will by filing an application for guardianship, as evidenced by the fact that one month after the 1972 will was executed he dismissed the guardianship application. The evidence showed that one year later, the testatrix deeded real estate to the proponent, then one month later executed an affidavit stating that proponent had fraudulently induced her into signing the deed to her property, then sued him for cancellation of the deed, obtaining a judgment that appellant had used undue influence in procuring the deed.

Proponent's evidence in opposition to undue influence - The proponent introduced into evidence a March 1974 letter written by the testatrix to the probate court asking that the proponent son be appointed as her guardian. After testatrix executed her will and returned home from the hospital with her broken hip, the proponent son and wife visited her every other day and did her grocery shopping.

Jury verdict - Jury verdict for the contestant, finding lack of testamentary capacity and undue influence.

Court of Appeals - The Court of Appeals found that the evidence of lack of testamentary capacity and undue influence was insufficient, and reversed and remanded for a new trial.

24. *Sebesta v. Stavinoha*, 590 S.W.2d 714 (Tex.Civ.App. - Houston [1st Dist.] 1979, writ ref'd n.r.e.)

Testatrix executed will April 24, 1973 at age 83
Contest grounds- lack of testamentary capacity

Contestant's evidence in support of testamentary capacity - The testatrix was 83 years of age at the time the will was executed. She was of foreign ancestry and could not read or write English. The proponent was called as an adverse witness and admitted that two months prior execution of the will, she helped the testatrix fill out a sworn application for food stamps, which required her to list the property owned by her. The application omitted a certificate of deposit owned by the testatrix, evidencing that she did not know the nature and extent of her property. Proponent had two witnesses testify to the physical and mental condition of the testatrix two years after the will, testifying that she lacked capacity. There was also testimony that the physical and mental health of the testatrix deteriorated after an illness in 1966, she had hardening of the arteries (arteriosclerosis), heart trouble and arthritis, and that as she aged, her general physical and mental condition grew worse.

The proponent offered witnesses who disputed the contestant's testimony as to the testatrix's lack of testamentary capacity, which was not detailed in the opinion.

Jury verdict - Jury verdict for contestant.

Court of Appeals - Affirmed.

25. *Estate of Hensarling*, 590 S.W.2d 639 (Tex.Civ.App. - Tyler 1976, writ ref'd n.r.e.)

Testator executed will September 3, 1974
Proponents - Son & daughter
Contestant - Wife
Contest grounds - lack of testamentary capacity and undue influence

Contestant's evidence in support of lack of testamentary capacity - A witness who was raised by the testator and his wife from age 7 testified that from 1973 to 1975, she spent every weekend with them as well as when she had days off from work, and that she drove the testator places. She testified that he did not have sufficient ability to understand the natural objects of his bounty, the nature of his estate or property, and was like a baby. A former co-worker testified that after the testator had a stroke in 1973, he visited him once per week, and that the testator did not know all of his family and would not have known how to handle business transactions. The testator's brother in law who lived across the street talked to him nearly every day after the stroke and testified that he had difficulty talking and remembering things almost every time they spoke. Another friend and neighbor testified that the testator was unable to carry on a conversation for an extended period of time and at times did not recognize her or her husband. An LVN who knew the testator before his stroke and took his blood pressure after the stroke every few days, staying forty-five minutes to an hour each time, testified that the testator could not carry on a conversation, would go off in a daze, and would have difficulty remembering anything.

Proponents' evidence in support of testamentary capacity- The testator's treating physician testified that although the testator had symptoms associated with cerebral vascular insufficiency and had suffered a stroke in April 1973 which caused speech defects and mental confusion for several days, it was his opinion that the testator would have known his family and his children and what property he owned. A former friend of the testator who visited him several times after the stroke testified that he had no trouble carrying on a conversation and that in his opinion he knew his friends and family, and the nature and extent of his property. Another witness testified that he sold auto parts to the testator for several years and saw him once a month after his stroke, testifying that he never had trouble carrying on a conversation, that the testator could carry on his business and drive his car, and that in his opinion the testator would know who his children and heirs were and the nature and extent of his property.

Jury verdict - The jury found that the testator lacked testamentary capacity and that the will was executed as the result of undue influence by the daughter.

Court of Appeals - The Court of Appeals affirmed the verdict as to testamentary capacity, and did not address the undue influence claim. The testimony of the LVN and friends and family who testified on behalf of the contestant son and daughter was more persuasive to the jury than the testimony of the treating physician on behalf of the proponent second wife.

26. *Wright v. Wolters*, 579 S.W.2d 14 (Tex.Civ.App. - Beaumont 1979, writ ref'd n.r.e.)

Testator executed will August 21, 1970
Testator died July 8, 1975
Proponent - Friend of testator
Contestants -Brothers, sisters, nieces and nephews
Contest grounds - lack of testamentary capacity and undue influence

Contestants' evidence in support of lack of testamentary capacity - A restaurant owner testified that the testator came into his restaurant frequently, and that beginning in 1969 the testator began to shuffle his feet while walking, his clothing and appearance was shabby, and that he was irrational. Other witnesses testified that he was forgetful, mumbled, had bad judgment in the cattle business and that he began writing letters to an old acquaintance regarding his visits to other countries in a "Q-lix machine". A neuropathologist testified that after the decedent's death (five years after making a new will) he diagnosed the testator as having Jakob's Disease, a disease effecting the brain which causes people to shuffle their feet, to have shortness of memory, and effecting the judgment and intellect of the person. Though he never met the testator, he testified that based upon the things told to him by others that the testator would have difficulty executing a will.

Proponent's evidence in support of testamentary capacity - The will was drawn up and signed in the office of the drafting attorney who practiced law for nearly fifty years in the county. The drafting attorney testified that the testator brought in a will written entirely in his handwriting to be checked out, typed and executed. The testator came into the attorney's office alone. The drafting attorney had been the testator's friend for many years and had handled other legal business for the testator, including the settlement of his wife's estate. The doctor who treated the testator for cancer in 1973 testified that the testator was of sound mind as of 1973. The testator's accountant stated that the "Q-lix" letters were a joke and that the testator joked with him about it. The testator was the owner of an x-ray business. On cross-examination, the contestant's medical witness admitted that the testator could have known that he owned his bank account and stocks and bonds.

Jury verdict - Jury verdict for contestant, finding lack of testamentary capacity and undue influence.

Court of Appeals - Reversed and remanded. The appellate court found that the testimony as to the severity of the disease on the date of execution of the will was weak and vague, stating "a testator may be old and infirm, weakened in energy and impaired in his senses, but, if he responds to the test which is applied to human beings in the ordinary affairs of life, the disposition of his property will be respected. It is not for juries nor courts to say how property should be passed by will. They can do no more than see that the testator's mentality meets the law's tests." The court found that the finding of the jury as to lack of testamentary capacity was so greatly against the overwhelming weight of the evidence as to be manifestly unjust. The court did not detail the evidence in reversing the jury finding on undue influence.

27. *Williford v. Masten*, 521 S.W.2d 878 (Tex.Civ.App. - Amarillo 1975, writ ref'd n.r.e.)

Testatrix executed will August 9, 1965.
Testatrix died April 9, 1967
Contestant - Surviving husband
Proponents - Executor, private colleges and charities
Contest ground - lack of testamentary capacity

Contestant's evidence of lack of testamentary capacity - The testatrix's long-time treating physician testified that in 1961, the testatrix was admitted to the hospital for coronary artery disease, that the primary cause of death was cerebral vascular bleeding beginning two years prior to her death, and that the secondary cause of death was arteriosclerosis, from which she had suffered for the last 15 years. The doctor further opined that in 1964, she did not know the extent of her property, and that she would not have known the business in which she was engaged. The doctor further testified that he saw her five months after execution of the will, she did not know the extent of her property, and would not know the business in which she was engaged, although she probably knew her husband and her closest relatives. A second treating physician testified that he had treated her 32 times, including a few weeks before, and four days after the signing of the will, at which time she was worse than at other times. The testatrix complained to him about not being able to remember, and felt her head was so heavy that she was about to fall to the floor. He further noted that the month after executing the will, she complained of dizziness, heavy headedness, and not being able to remember. The doctor concluded that he would not have relied on her business judgment, and did not think she knew the full consequences of the action of signing a will. A nephew testified that he had observed the testatrix in 1965, that she talked thick-tongued, and

changed the subject in the middle of a sentence. He testified that she did not recognize him in September of 1965, and that in the summer of 1966, testatrix stated that she did not have a will. A nurse who observed her physical condition in the summer of 1965 testified that the testatrix got lost while driving to the nurse's office, and that she failed to recognize the nurse. The nurse testified that she had to drive the testatrix home. A college chancellor testified that he visited the testatrix several times in September 1965, and that during those visits, she seemed confused, and did not know the nature and extent of her property and the business in which she was engaged. A neighbor who saw the testatrix three times a week testified that she did not know the nature and extent of her property, or the business in which she would have been engaged. He further testified that in 1966, she did not recognize her niece. A longtime neighbor testified that in 1965, the testatrix did not know the nature and extent of her property, and that the testatrix didn't have any interest in knowing what she owned.

Proponents' evidence in support of testamentary capacity- According to the Court of Appeals, the proponents offered many witnesses who had contact with the testatrix on the day before as well as the day of the execution of the instrument, who testified that based upon their observations and contacts with her, she was of sound mind and had testamentary capacity. These witnesses included the nominated independent executor, representatives of various institutions designated as legatees under the will, medical experts, a clinical psychologist, and other lay witnesses.

Jury verdict - Jury verdict for contestant finding lack of testamentary capacity.

Court of Appeals - Affirmed. The testimony of the testatrix's treating physicians, bolstered by the lay testimony of the nurse and the neighbors supported the contestant's capacity claim .

28. *Bettis v. Bettis*, 518 S.W.2d 396 (Tex.Civ.App. - Austin 1975, writ ref'd n.r.e.)

Testator executed will January 2, 1973 at age 56
Testator died March 8, 1973
Contestant - Second wife
Proponents - Two sons
Contest grounds - lack of testamentary capacity (chronic alcoholism)

Contestant's evidence in support of lack of testamentary capacity - The testator was an admitted alcoholic, and by 1971 consumed a half gallon of hard liquor every two days from the time that he arose from bed at nine or ten o'clock in the morning and poured himself an eyeopener, he hastened to be drunk, that becoming the business of the day. Contestant testified that he had difficulty in remembering recent events. The evidence showed that the testator continued drinking heavily until his final hospitalization and death on March 8, 1973. Contestant called a psychiatrist who had treated the testator during her hospitalization, as well as a forensic psychiatrist who had not treated the testator, each of whom testified that it was doubtful that the testator had testamentary capacity on January 2, 1973 based upon his medical records, opining that he probably would not have remembered the beginning of the will by the time he reached the end of the document.

Proponents' evidence in support of testamentary capacity- Proponents showed that two months prior to executing the will, the contestant filed her second suit for divorce against the testator after which they never lived together. Proponents called the drafting attorney as well as the witnesses to the will who all stated that he had testamentary capacity. Proponents also offered the testimony of a doctor who had not treated the testator but who examined the medical records and opined that he had sufficient mental capacity.

Jury verdict - Jury verdict for proponents.

Court of Appeals - Affirmed. The contestant argued on appeal that testamentary capacity could only properly be determined by expert medical testimony, which she argued was a specialized medical matter peculiarly within the factual knowledge of experts outside the scope of a layman's knowledge. The appellate court disagreed stating that expert testimony was not conclusive on the issue and that lay testimony was admissible.

29. *Hamill v. Brashear*, 513 S.W.2d 602 (Tex.Civ.App. - Amarillo 1974, writ ref'd n.r.e.)

Testatrix executed will on February 16, 1968 at age 72
Testatrix executed codicils on February 29, and March 8, 1968
Testatrix died in 1969
Proponent - Daughter
Contestant - Granddaughter
Contest ground - lack of testamentary capacity

Contestant's evidence in support of lack of testamentary capacity - The testatrix was 72 years old and had been

under the treatment of a doctor for various illnesses including diabetes, arteriosclerosis and kidney trouble. There was also testimony the testatrix would sometimes interrupt or monopolize conversations and change the subject of conversations. The evidence further showed that she was very upset over the death of her only son and the remarriage of her daughter-in-law. One witness testified that she thought the testatrix was of unsound mind in 1968 based upon conversations she had with her which were sometimes not normal although she "could not put her finger on anything definite." A son-in-law of the testatrix testified that on occasion the testatrix would take small items from his home and later those items were found in the testatrix's home.

Proponent's evidence in support of testamentary capacity - None of the witnesses called by the contestants could relate the activities or conduct of the testatrix on the dates of execution of either the will or the codicils. The testimony showed that the testatrix lived alone, took care of her business, made oil and gas leases, rented her property and collected the rents up to the time of her death. The drafting attorney who prepared the testatrix's will and codicils testified that he had known and represented the testatrix for several years before the will until her death, and that he saw her several times a year, drawing wills, trusts, oil and gas leases and discussing various business matters with her, including investments, the bond market and interest rates. He testified that she knew exactly the nature and extent of her property, and to whom she wanted to leave her property. The treating physician testified that he had seen and treated the testatrix several time during the month when the will and codicils were executed as well as twenty-five to thirty times thereafter prior to her death, and indicated that he observed no evidence of mental illness, confusion or disorientation indicating mental problems. He testified that she knew the natural objects of her bounty in February and March of 1968 and had the necessary mental capacity to understand the nature of transactions and make a reasonable judgment regarding her property and the objects of her bounty. The testatrix's CPA testified that she had a keen mind, understood tax and business matters, the nature and extent of her property, and the natural objects of her bounty, and that she was capable of forming and carrying out her own judgment.

Jury verdict - Jury verdict for proponent as to testamentary capacity.

Court of Appeals - Affirmed. The court cited the rule that "less mental capacity is required to enable a testator to make a will than for the same person to make a contract." The Court of Appeals further stated that the "observations by the lay witnesses called by the contestant were not sufficient upon which to base their opinions that the testatrix was of unsound mind at the times in question and thus were without probative value."

30. *Reynolds v. Park*, 485 S.W.2d 807 (Tex.Civ.App. - Amarillo 1972, writ ref'd n.r.e.)

Testator executed will October 27, 1970
Testator died November 5, 1970
Contestants - Daughters
Proponent - Surviving spouse
Contest grounds - lack of testamentary capacity and undue influence.

Contestants' evidence in support of lack of testamentary capacity - The testator had surgery in February 1970, and sustained one or more strokes after his surgery before leaving the hospital in May of 1970. On October 17, 1970, he had convulsions or a seizure and was rushed to the hospital where he remained until his death on November 5, 1970. The will was executed while he was hospitalized, dividing his estate between his wife and his two daughters.

Proponent's evidence in support of testamentary capacity- Witnesses who visited the testator in the hospital testified that the testator knew the extent of his land, knew to whom his property was going and that he was of sound mind.

Contestants' evidence in support of undue influence- An attorney visited the testator after receiving a call from someone other than the testator, prepared the will, and supervised its execution all in one day. The daughter testified that she was unable to see her father alone, and that the wife was constantly present with the testator. She further testified that the testator's weakened physical and mental condition made him susceptible to influence. The testimony further showed that the wife was present while the testator was being interviewed by the attorney, and was present during the execution of the will. There was further testimony that the testator was in a weakened condition from his medications. One of the contestants testified that the wife prevented her, her husband and her daughter from visiting the testator outside of the wife's presence, and that the wife exerted strong influence over the testator in relation to the handling of a business transaction a few months before his death.

Proponent's evidence in opposition to undue influence - The testimony showed that the will was prepared by an attorney. There was no testimony that the wife made any statement concerning the execution of a will or that she made arrangements for drafting or execution of the will. There was no testimony that the wife said anything during the conference with the attorney or that she exercised any influence over testator. There was further testimony that the testator had a very strong will. There was testimony that the testator did not want his wife to leave him alone with anyone else.

Jury verdict - Jury verdict for the proponent finding that the testator had testamentary capacity and was not unduly influenced.

Court of Appeals - Affirmed. The drafting attorney's testimony on behalf of the proponent was persuasive to the jury, despite the fact that someone other than the testator contacted him and despite the fact that he allowed the wife to be present during the discussion of the will and during its execution.

31. *Duke v. Falk*, 463 S.W.2d 245 (Tex.Civ.App. - Austin 1971, no writ)

Testator executed will September 1965 at age 93
Testator died September 18, 1966
Proponent - Daughter of life-long friend
Contestants - Sons of niece
Contest grounds - Lack of testamentary capacity

Contestants' evidence in support of lack of testamentary capacity - The testator was 93 years of age at the time of the execution of the will. Seven months prior to executing the will, a guardian of the person and estate was appointed for the testator.

Proponent's evidence in support of testamentary capacity- The will was a written by a lawyer who talked with the testator for about an hour. The beneficiary, who drove him to the lawyer's office, waited for the testator in their car while he met with the attorney. The testator returned to the lawyer's office a week later, who read the will slowly and carefully to the testator, after which the testator replied "it is drawn just as exactly as I wanted to leave my property." The drafting attorney testified to the facts of testamentary capacity.

Jury verdict - Jury verdict for proponents finding that the contestants had not carried the burden of proving lack of testamentary capacity.

Court of Appeals - Affirmed. Apparently the drafting attorney was a very persuasive witness despite the fact that the testator was 93 years of age and had a court appointed guardian at the time of execution of the will.

32. *Miller v. Flyr*, 447 S.W.2d 195 (Tex.Civ.App. - Amarillo 1969, writ ref'd n.r.e.)

Testatrix executed will dated August 29, 1967
Prior will dated July 19, 1966
Proponent - Daughter
Contestant - Daughter
Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence in opposition to claim of undue influence - A friend recommended a drafting attorney to the testatrix. The testatrix visited alone with the drafting attorney, discussed the terms of the will, gave the attorney the names and spellings of all of the multiple beneficiaries and executed the will in his presence in his office. She also explained the reason for favoring one daughter over the other, that she did not trust her son-in-law, husband of the contestant. The drafting attorney testified that she was of sound mind. The drafting attorney's law partner also testified that he had a conversation with testatrix and that in his opinion she was a person of sound mind. The proponent was not in the office with the attorney and testatrix as the will was being discussed and executed.

Contestant's evidence in support of undue influence - The proponent went with the testatrix to have the will drawn up.

Contestant's evidence in support of lack of testamentary capacity - Witnesses testified as to the testatrix's eccentricities and weak mind and gave their opinion that at the time of the making of the will she did not understand what she was doing.

Proponent's evidence in support of testamentary capacity- In addition to the testimony the attorneys, the subscribing witnesses testified to her mental capacity at the time of executing the will and stated that she was of sound mind. The testimony also showed that the testatrix balanced her own checkbook.

Jury verdict - Jury verdict for contestants that the testatrix lacked testamentary capacity and was unduly influenced to execute the will.

Court of Appeals - Reversed and rendered judgment for

the proponent, finding that there was no evidence of probative force to sustain the finding of the jury. The court further stated "where it is shown that the execution of the writing was supervised by a lawyer, much probative force attaches to his opinion that the instrument expressed the wishes of the decedent."

33. *Click v. Sutton,* 438 S.W.2d 610 (Tex.Civ.App. – San Antonio 1969, writ ref'd n.r.e.)

Testator executed will July 12, 1963 at age 83.
Testator died September 9, 1963.
Proponents - Two sons
Contestants - Two daughters
Contest grounds - Lack of testamentary capacity and undue influence.

Proponents' evidence in support of testamentary capacity - The uncontroverted evidence showed that the testator was physically and mentally active, and actively operated his ranch. The testimony showed that the will was executed in the drafting attorney's office, who testified that the testator had testamentary capacity.

Contestants' evidence in support of lack of testamentary capacity - The testator was 83 years of age at the time of execution of the will.

Contestants' evidence in support of undue influence - The testator was dependent upon his son to drive him around. The son was in an adjoining room of the attorney's office while the will was being discussed and executed. There was testimony that there were disagreements between the testator and his son, who lived on the property, over whether the ranch should be sold. One incident occurred in 1961 when a neighbor approached the testator about purchasing a part of his land. This neighbor testified that the testator told him that his son had advised him not to sell the ranch. A realtor testified that one year later, the testator had listed the ranch for sale and had received a contract for its purchase, but that the testator backed out at the last moment saying "I just can't take anymore, I just can't take anymore beating on this." The realtor testified that the son had talked with the testator privately for a few moments. A friend of the testator testified that two or three years before his death, the testator showed her a purported will that gave his property to all of his children. At this time the testator was having trouble with someone at his home, and was sleeping at his pool hall in Medina City. The contestants argued that this was trouble with one of the sons, and that it was evidence of the son's exertion of undue influence. The purported will was never accounted for.

Proponents' evidence in opposition to undue influence - The will offered for probate was prepared by an attorney, and neither son was in the room during discussions of the will with the attorney or the execution of the will. There was no evidence showing that either son selected the attorney to draft the will, and no evidence that either son took any part in the preparation or discussed the disposition under the will with the testator. The testator made a change in the first draft of the will, and did not execute the will until his third visit to attorney's office.

Jury verdict - The court granted a directed verdict for proponents finding that the testator had testamentary capacity and was not unduly influenced.

Court of Appeals - Affirmed

34. *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965)

Testatrix executed will December 28, 1936 at age 62.
Date of death: December 14, 1960 at age 86.
Proponents - Charities offered two holographic wills for probate
Contestants - Heirs at law.
Contest grounds - lack of testamentary capacity.

Contestants' evidence in support of lack of testamentary capacity - The testatrix was moved into "Brown's Rest Home"on December 7, 1936, and was legally adjudicated as a person of unsound mind the next month on January 18, 1937. The nursing home administrators testified that the testatrix was highly excited, that during these manic periods she would jabber continuously, tear the wallpaper off the wall, tear her clothes, and beat on the wall, and that she did not have lucid intervals in December, 1936. The testatrix suffered from mental illness throughout her life, and for some months prior to making the holographic will.

Proponents' evidence in support of testamentary capacity- A psychiatrist from the State Mental Hospital, testifying on the basis of the testatrix's records rather than having personally examined the testatrix, testified that the testatrix was mentally ill with manic depression, that her thinking went along with her mood, and that at times she could be quite rational, the mental illness having no effect on her memory. The proponent also argued that the will, which was holographic, appeared rational on its face, and was therefore evidence of capacity. She wrote in the will that she was making the

will "owing to great sufferings, trials, and tribulations that have recently befallen me". She left her property to the Dean of Students at the University of Texas for the benefit of her two nieces and three nephews, and provided that if any of them died without issue that their part would go to the University of Texas to establish a scholarship in honor of members of her family. The will provided for an independent administration, and was signed and dated.

Verdict - Jury verdict for contestant finding lack of testamentary capacity.

Court of Appeals - Affirmed.

Texas Supreme Court - Reversed and remanded, based upon the exclusion by the trial court of the psychiatrist's opinion as to the elements of testamentary capacity in response to hypothetical questions.

35. *Oliver v. Williams*, 381 S.W.2d 703 (Tex.Civ.App. - Corpus Christi 1964, no writ)

Testator executed will October 21, 1960
Testator died April 26, 1962
Proponent - Niece
Contestants - Brothers and sisters of testator
Contest grounds - lack of testamentary capacity

Contestants' evidence in support of lack of testamentary capacity - The testator was unable to read or write. Contestants' witnesses testified that the testator did not have the ability to understand the nature and extent of his property nor did he have the ability to conduct a business transaction. Another witness testified that he tried to lease some land owned by the testator and the testator said that he had ten acres, when in fact he had three hundred thirty acres. The evidence also showed that the testator stated incorrectly on a number of occasions the amount of money he had sold his land for. The testimony further showed that the testator was uneducated and in declining years.

Proponent's evidence in support of testamentary capacity - The two witnesses to the will testified that the will had been explained to the testator and that he expressed a desire to execute it. The proponents also called several witnesses who had transacted business with the testator and that he was capable of transacting his business.

Jury verdict - Jury verdict for proponent.

Court of Appeals - Affirmed. The court stated that the lack of education or proof of illiteracy has little, if any, bearing on the mental capacity to make a will.

36. *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963)

Testatrix executed will January 30, 1958 at age 93 (all to son)
Proponent - Son
Contestants - grandchildren
Contest grounds - undue influence

Contestants' evidence in support of undue influence - At the time of the execution of the will, the testatrix was 93 years old, had difficulty hearing, had poor eyesight, was feeble, and suffered from arthritis and diabetes. The son handled all of her affairs and she trusted him completely. Her other family rarely visited her. She kept all of her papers in his safe deposit box. The son prepared the new will with no assistance from an attorney, using as a pattern either her prior will or one of his own. He suggested to the testatrix that her will provide that if he predeceased her, that his daughter would be her executrix and her property be divided equally among her grandchildren and great grand children. He gave it to the testatrix who signed it. She asked no questions and there was no other discussion. No one read the will to her and no one explained it to her. After the will was signed, she returned it to the son who placed it in his safe deposit box.

Proponent's evidence in opposition to undue influence - The testatrix asked her son to make a new will and leave everything to himself. The son was in the house, but not in the same room with the testatrix when she executed the will.

Jury verdict - The jury found the will was executed as the result of undue influence.

Court of Appeals - Affirmed

Texas Supreme Court - The Supreme Court reversed and rendered judgment that contestant take nothing. While the jury as to trier of fact was satisfied with the facts as to the son's preparation of the will, his suggestion as to the alternative disposition of the estate and as to the alternate executrix, and his control of the will after its execution by the testatrix is adequate evidence of undue influence, the Supreme Court ruled that the proof of exertion and the effective operation of any influence possessed by the son over his mother so as to subvert or

overpower her will was not supported by any tangible evidence.

UPDATED JURY CASES SINCE 2010:

53. *Mittelsted v. Meriwether,* 661 S.W.3d 867 (Tex. App.—Houston [14th Dist.] 2023, no pet.).

Testator executed will on February 12, 2019
Testator died February 22, 2019
Proponent – Half-brother
Contestants – Testator's two sisters
Contest grounds – Lack of testamentary capacity and undue influence

Contestant's evidence in support of undue influence – The testator changed the pay on death beneficiary designations for six financial accounts. Additionally, the proponent was heavily involved in the creation of the 2019 will, and when the drafting attorney asked the testator if the will he prepared was really what he wanted to do he said, "Yes because I know that [the proponent] will do the right thing."

Proponent's evidence in opposition to undue influence – The branch manager for the bank accounts testified that she believed the testator was alone when he changed his beneficiary designations.

Contestants' evidence in support of lack of testamentary capacity – The testator had a stroke in 2017, and was hospitalized for several days before checking himself out against medical advice. A close friend of the testator, testified that he visited the testator weekly, and he was always drunk before noon. The close friend further testified that the testator struggled to get around because of a clubfoot, and the testator was "getting so drunk he couldn't hardly get out of the chair. . . ." The testator also had a long history of smoking marijuana.

Proponent's evidence in support of testamentary capacity – The branch manager for the bank accounts testified that the testator was "very lively" and "knew what he was doing" when he changed the beneficiaries for his pay on death accounts. The day before the testator died, the testator's ex-wife testified that she spoke to him and had a conversation with him. She also testified that he left the house and drove himself that same day.

Trial court ruling – The trial court denied the will admission to probate based upon lack of testamentary capacity and undue influence.

Court of Appeals – Affirmed. The appellate court ruled that the testimony from numerous witnesses was sufficient to support the jury findings of lack of capacity.

54. *In re Estate of Scott,* 601 S.W.3d 77 (Tex. App.—El Paso 2020, no pet. h.).

Testator executed four wills on March 23, 2013, July 10, 2015, July 21, 2015, and August 13, 2015
Testator died August 2015
Proponent – Private investigator and assistant hired by testator
Contestants – Two of testator's cousins
Contest grounds – Lack of testamentary capacity and undue influence

Contestant's evidence in support of undue influence – Prior to meeting his investigator and assistant, the testator did not have a will and had not expressed any intent to draft a will. In a 2010 meeting with his doctor, the testator stated that his family did not write wills, and they all died intestate. After meeting the testator, the investigator suggested that the testator should draft a will which the investigator admits the testator was resistant to. The investigator also admitted in a series of emails that he had been "working on" getting the testator to "trust" him enough to follow his advice, and that it took "several months" before he "finally got [testator] to write out a holographic will. The investigator even submitted an invoice for four and a half hours of time spent assisting testator on March 23, 2013 in preparing his will. The investigator was also in control of virtually all of testator's legal affairs, retaining attorneys or the testator and accompanying every meeting the testator had with his attorneys. The investigator also responded to an attorney's critique of the testator's holographic will in an email by saying "If I'd known [the holographic will] should include most the [sic] same language of a more formal Texas will as you now indicate, *I'd have him write it differently*." The testator also signed a Limited Power of Attorney in November 2014 giving the investigator control of his legal, business, and medical affairs. A Statutory Durable Power of Attorney was later executed, and the investigator drafted at least three different wills for the testator to sign.

Proponent's evidence in opposition to undue influence – Several witnesses, including three of the testator's long-time family friends and former attorney, described the witness as being "quite stubborn" and "damn hard-headed." Additionally, the testator's mental assessment was done three years prior to the execution of the first holographic will. The proponents contend there is nothing "unnatural" about the testator's decision to disinherit his

cousins because the testator was upset with his cousins for their role in prior guardianship proceedings and he did not have any significant relationship with them.

Contestants' evidence in support of lack of testamentary capacity – The testator had previously been placed under a management trust in 2007 after being examined by a doctor who found the testator was "mentally retarded," and suffered from substance or alcohol abuse or both. The court found that the testator was "completely without capacity as provided by the Texas probate Code to manage his property." A different doctor evaluated the testator in February 2010. While disagreeing with the first doctor's assessment that the testator was "mentally retarded," she believed the testator had below average IQ, suffered from learning disabilities, and evidenced some cognitive impairments. The doctor also noted that the testator exhibited some degree of paranoia, poor insight, and impaired personal judgment, and concluded that, among other things, the testator was unable to take care of himself independently and was "partially incapacitated."

Proponent's evidence in support of testamentary capacity – A notary public and two witnesses who were present at the will signings all testified that they believed the testator appeared (1) to understand what he was doing, (2) determined to sign the wills, (3) not to have been coerced into signing the wills.

Trial court ruling – The trial court denied all three wills admission to probate based upon the finding that the testator lacked testamentary capacity and was unduly influenced to sign the July 21, 2015 will and August 13, 2015 will and that while testator had capacity to sign the March 23, 2013 will, he revoked it prior to his death.

Court of Appeals – Affirmed. Sufficient evidence supported finding that investigator and assistant exerted influence over testator's decision to draft first will and overpowered testator's decision-making process for the first will, and they also effectively asserted influence over testator as to second and third wills

55. *Yost v. Fails*, 534 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Testatrix executed will in November 2011
Testatrix died March 2012
Proponent – Testatrix's nephew
Contestants – Testatrix's neice
Contest grounds – Undue Influence

Contestant's evidence in support of undue influence – After testatrix's fall and subsequent stay at a rehabilitation center, testatrix moved in with her nephew at his suggestion. Testimony from family members disputed the nephew's claim that he and testatrix were close. Other testimony reflected that testatrix did not want her nephew informed about her fall. Testatrix was frail and in ill health when she moved in with her nephew. She had cataracts, a colostomy bag, and hearing poor enough to require hearing aids. Testatrix could not drive, cook, bathe, or dress herself, and she used a wheelchair or walker to get around. Shortly after moving in with her nephew, testatrix enacted a power of attorney in favor of her nephew. After gaining power of attorney, the nephew transferred significant sums of money out of testatrix's accounts; some of which went to his own checking account and accounts belonging to his girlfriend's grandchildren. The nephew also enriched himself to the proceeds of testatrix's annuity and life insurance policies. Testatrix's 1979 will bequeathed everything to her sister, and her nephew only took under the will if her sister predeceased her. The 2011 will made no mention of testatrix's niece, and it was prepared by an attorney who the nephew had a previous attorney-client relationship with. The nephew paid for the will and helped with its preparation by drafting a handwritten list of testatrix's bequests and acting as an intermediary.

Proponent's evidence in opposition to undue influence – Both niece and nephew agree that testatrix was unable to live alone, and the attorney who prepared the will testified that she prepared the will according to the testatrix's instructions and denied that anyone else told her what to do.

Trial court ruling – The jury determined that testatrix signed her will because of undue influence. The trial court granted the proponent of the will a judgment notwithstanding the verdict.

Court of Appeals – Reversed. Evidence supported finding that testatrix signed updated will as result of undue influence by nephew.

56. *Texas Capital Bank v. Asche*, 2017 WL 655923 (Tex. App.—Dallas 2017, pet. dism'd).

Testator executed will in 1994, 1995, January 1998, June 1998, and 2005
Testator died October 6, 2011
Proponent – Testator's wife
Contestants – Testator's children

Contest grounds – Lack of testamentary capacity and undue influence

Contestant's evidence in support of undue influence – The will made an unnatural disposition, especially when compared to the previous wills because it disinherited his children and left his residual estate to the proponent. The proponent of the will met with drafting attorneys to make new estate planning documents for the testator after the January 1998 will, and the proponent was heavily involved in the will making process through its execution in June 1998. The proponent also ran all of the testator's household and financial affairs. She also controlled all phone calls and the mail.

Proponent's evidence in opposition to undue influence – In a memo for the January 1998 will, the attorney who drafted the will memorialized his meeting with the testator by saying his change in his estate plan was motivated by the act the children "had paid relatively little attention to [the testator] after the stroke." The memo also stated the children had substantial property and would receive more upon the testator's death.

Contestants' evidence in support of lack of testamentary capacity – The testator suffered a severe stroke in 1997. His right side was permanently paralyzed, he could not walk, get his own food, bathe or dress himself, or get himself in and out of a chair. The testator also communicated "on the level of a small child," and could only engage in conversations at a basic level.

Proponent's evidence in support of testamentary capacity –A doctor testified to seeing the testator more than fifty times from 2002-2010, and concluded that the testator was alert, oriented, and exhibited no signs of dementia or cognitive impairment. His children never raised questions about his capacity during his lifetime, the testator could converse in foreign languages, was still able to understand and discuss financial matters, and he gave advice to his friends about buying homes and cars.

Trial court ruling – The trial court denied the will admission to probate based upon lack of testamentary capacity and undue influence.

Court of Appeals – Reversed to set aside 2005 management trust, but the rest of the order is affirmed as the evidence supported the jury's finding.

57. *Estate of Rodriguez*, 2017 WL 1228905 (Tex. App.—Corpus Christi-Edinburg Mar. 2, 2017, no pet.).

Testator executed will in 2003
Testator died April 10, 2010
Proponent – Daughter
Contestant – Son
Contest grounds – Undue influence

Contestant's evidence in support of undue influence – The daughter executed checks paying for her normal household expenses such as insurance, the cable bill, and purchases at stores such as Wal-Mart from the testator's bank accounts. Testimony was conflicting between the daughter who contended that she wrote these checks at the testator's direction, and the son who said that the daughter said she personally paid for household expenses during the relevant time period. Because of this, a reasonable jury could discredit the daughter's testimony and infer the daughter was taking advantage of her access to the testator's money to finance her own expenses. The new will, combined with a deed the testator executed prior to his death, left everything to his daughter and nothing for her seven living siblings evidencing an unnatural disposition. In addition, the daughter was also present at the time of the will's signing. This disposition was especially unnatural considering he always considered providing for the interests of one of his sons who was disabled.

Proponent's evidence in opposition to undue influence – The testator had a strong relationship with all of his children, but his relationship with his daughter was much closer. Testimony from numerous family members reflected an agreement that the testator was normally not the type of man to do something against his will. Because his daughter provided for the testator and assisted in taking care of him during the end of his life, it was contended that his bequest to leave everything to her is in line to what he wanted.

Trial court ruling – The trial court denied the will admission to after the jury determined that the testator executed a will and deed while being unduly influenced.

Court of Appeals – Affirmed. The evidence was legally sufficient to support the jury's verdict. For example, the alleged undue influencer lived with the testator, used the testator's funds to pay personal expenses, was present when the testator executed the documents, and the documents favored one child excluding seven others. While none of these factors alone is not necessarily dispositive, taken together they were sufficient to support a finding of undue influence.

58. *Le v. Nguyen*, 2012 WL 5266388 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Testator executed will on December 1, 2009 and December 27, 2009
Testator died January 3, 2010
Proponent – Testator's fiancé
Contestants – Testator's niece
Contest grounds – Lack of testamentary capacity

Contestants' evidence in support of lack of testamentary capacity – The testator was transferred from hospice care to the hospital on December 27, 2009 after his condition rapidly declined following a gastric cancer diagnosis. During his hospital stay, the testator was given intravenous opioids to control his pain. The testator expressed a desire to write a new will and subsequently met with an attorney who visited him in the hospital on December 29 to give him instructions on how he wanted the will. The attorney returned twice on December 30 and December 31 to obtain a signature but was unable to do so because the testator was unable to sign. The will was left with the proponent, and then signed by the testator with two witnesses present. The document was not notarized. The will stated that the testator was in good health which he was not. Testimony reflected that the testator was unable to speak the date the will was signed. The drafting attorney also testified that when he met with the testator, he was sedated and very weak, and that "everyone around hum gave [him] cause to believe that he was not his normal self." Additionally, there were factual mistakes in the will which the testator failed to recognize.

Proponent's evidence in support of testamentary capacity – Testimony reflects that the testator responded by nodding when asked about each portion of his will, and unassisted by anyone the testator also signed every page of the December 31 will. The proponent also testified that on December 31, the testator could speak occasionally, was awake when the will was read to him, did not appear confused, and recognized the mistakes in the will.

Trial court ruling – The trial court denied the will admission to probate based upon a jury finding that the testator lacked the testamentary capacity required to execute the December 31 will.

Court of Appeals – Affirmed. Even though the evidence was disputed, there was more than a scintilla of evidence to support the jury's decision that the testator lacked testamentary capacity.

59. *In re Estate of Lynch,* 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

Testator executed wills in April 2001 and 2003
Testator died July 2005
Proponent – Testator's daughter
Contestants – Testator's two other daughters
Contest grounds – Lack of testamentary capacity and undue influence

Contestant's evidence in support of undue influence – The testator suffered a stroke in 1995, and following his wife's death in March 2000, the proponent and her children moved in with the testator. The testator needed help with everything, including bathing and eating, and he could not read, use the telephone, or television. The testator filed an "affidavit" at the courthouse giving his house to the proponent in November 2000.

Proponent's evidence in opposition to undue influence – The proponent stated the reason the testator executed the 2003 will was because "one of [his] daughter's has challenged it . . . [s]he wants money and I don't have any money . . . I've given her a bundle of it, but she wants more."

Contestants' evidence in support of lack of testamentary capacity – In April 2001, the entire family met with an estate planning attorney where the testator created an inter vivos trust requiring the unanimous consent of his three daughters to dispose of his property, a will leaving his estate in equal shares to his three daughters upon his death, and filed a deed giving the proponent his house. The new will leaving everything to contestant was unnatural given his earlier disposition. At trial, the doctor who evaluated the testator in 2003 conceded that the test he administered indicated the testator's stroke affected his frontal lobe which controls a person's ability to make decisions, process information, sequence information, and understand new concepts. A different doctor, who had not met the testator, testified for the contestants tat the 2003 will was not consistent with the testamentary capacity evaluation he had.

Proponent's evidence in support of testamentary capacity – In 2003, a doctor conducted a testamentary capacity evaluation of the testator who "saw no reason to question [the testator's] competency to execute his Last Will and Testament at this time or for the foreseeable future within the next few months if no untoward medical situations occur." Within four days, the testator executed a new will.

Trial court ruling – The trial court denied the will admission to probate based upon lack of testamentary capacity and undue influence.

Court of Appeals – Affirmed. Testamentary capacity and undue influence are not necessarily mutually exclusive and evidence was legally and factually sufficient to

support jury's finding that testator did not have testamentary capacity when he executed a will.

V. BENCH TRIALS

The following cases compare the evidence introduced by proponents and contestants in the 21 bench trials decided on the merits in Texas since 1963.

37. *Estate of Henry*, 250 S.W.3d 518 (Tex.App. - Dallas 2008, no pet.)

Testatrix executed will November 12, 1996
Testatrix died June 2005
Proponent - Husband
Contestants - Four children from previous marriage
Contest grounds - undue influence

Contestants' evidence in support of undue influence - One of the contestants testified that the testatrix told her she did not want to sign the 2004 will because it left her children totally out and that "she didn't want to leave us like that." The daughter further testified that she witnessed conversations in which the husband told the testatrix that if she didn't sign the 2004 will, he would divorce her and she would get absolutely nothing. The testatrix stated that she wanted her estate to go to her kids and that her husband's estate was going to go to his children. The conversation regarding changing the will caused friction between the testatrix and her husband which made her physically ill. The testatrix's hairdresser testified that she would come into the shop and would talk about how her husband's sons were harassing her and that the testatrix was upset due to discussions about a will. Another witness testified that the testatrix told her she was being harassed to death, receiving as many as twenty phone calls a day and multiple visits a day regarding wanting her to sign a will.

Proponent's evidence in opposition to undue influence - The drafting attorney and his legal secretary testified regarding the drafting and execution of the will. The testatrix did not tell them that she was being coerced into making the will. The attorney arranged for the will to be signed outside of the presence of her husband with other witnesses present. At no time did the testatrix express concern about signing the will and she appeared to be in good health on the day of signing.

Trial court ruling - The trial court denied the will admission to probate based upon undue influence.

Court of Appeals - Affirmed. The testimony of the lay witnesses regarding pressure exerted by the husband to sign the new will overcame the testimony of the drafting attorney.

38. *Long v. Long*, 196 S.W.3d 460 (Tex.App. - Dallas 2006, no pet.)

Testator's will executed May 2002.
Testator died December 2002
Contestants - Sons from first marriage
Proponent - Second wife
Contest grounds - lack of testamentary capacity and undue influence.

Contestants' evidence in support of undue influence - The proponent/sons testified that the second wife was a "black widow", exploiting the testator's illness and his manic depressive disorder to foster utter dependence on her, which she directed to the will, their testimony focusing on the timing of the events leading up to the execution of the will. The evidence showed that the will was executed at the bank where the "black widow's" daughter worked.

Proponent's evidence in opposition to undue influence - A friend/co-worker of the testator testified that the testator was in complete control of all of his faculties in May 2002, and that there was no evidence that the testator was isolated from others. The testator continued to communicate with his friends and family during this time period. The testator's relationship with his sons was strained during his illness and at the time he made the will, due to his divorce and remarriage. The proponent's witnesses testified that the testator's sons were angry with him over the divorce, and rarely visited him in the hospital. The testator had kicked his sons out of his rent house, and had to spend $5,000 to repair it.

Contestants' evidence in support of lack of testamentary capacity - At the time of execution of the will, the testator had cancer and was receiving high dosages of chemotherapy, as well as undergoing radiation, which made him weak. There was also evidence that the testator suffered from manic-depressive disorder. The testator's medical records from April 2002 reflected isolated incidences of medicated confusion.

Proponent's evidence in support of testamentary capacity- The testator drafted his will on his computer. His second wife testified that he knew what he was doing, knew the extent of his property and who his heirs were, and knew how his property was to be distributed. The will was witnessed at a bank. A close friend/co-

worker of the testator spoke with him a couple of times a week, and he never sounded confused, and was strong emotionally and physically. The testator's sister visited the testator after the will was executed in September

2002, and testified that although he was weak physically, he was fine mentally. The testator updated friends and family about his health through email during the time period that the will was executed.

Trial Court Ruling - Admitted the will to probate.

Court of Appeals - Affirmed. The fact that the testator drafted his own will and communicated with his family and friends via email during the period when the will was executed, coupled with his strained relationship with his sons, was sufficient to overcome the contest.

39. *Schlindler v. Schlindler*, 119 S.W.3d 923 (Tex.App. - Dallas 2003, pet. denied)

Testatrix will executed September 26, 1995 (all to husband)
Prior will -1987 (husband for life, remainder to children and grandchildren)
Testatrix date of death: June 18, 1996
Proponent - Husband
Contestants - Children
Contest ground - lack of testamentary capacity

Proponent's evidence as to testamentary capacity - The five witnesses who were present when the testatrix signed her 1995 will on September 26, 1995, testified that the testatrix knew her family and understood that she was signing a will.

Contestants' evidence as to lack of testamentary capacity- The testatrix suffered strokes in 1993 and 1994. Thereafter, her physical and mental condition deteriorated. She could not pay her bills, buy groceries or write checks in 1995. She had difficulty recognizing her family members in September of 1995. She suffered physical and mental abuse from her husband in September of 1995, the month during which she executed her will leaving her estate to him. In 1994, the testatrix told neighbors that she had just spoken to her parents, who had been dead for decades. Medical records reflected a history of senile dementia, coronary heart disease, atrial fibrillation, a cerebrovascular accident, kidney disease, and Alzheimer's disease.

Trial Court ruling - Denied admission of the will to probate, finding that the testatrix lacked testamentary capacity.

Court of Appeals - Affirmed.

40. *In Re Estate of Neville*, 67 S.W.3d 522 (Tex.App. - Texarkana 2002, no pet.)

Testatrix signed will July 9, 1998
Prior will executed in 1992
Contest grounds - lack of testamentary capacity

Contestant's evidence in support of lack of testamentary capacity - The testatrix's treating physician testified that he saw her one month earlier, that she was complaining of short term memory loss over the past two months and that she had been diagnosed with a malignant brain tumor. He testified that she had difficulty deciding what words to use, forgot where she left items, and would sometimes reverse sentences when speaking. He testified that her prognosis was progressively worsening dementia and that at the time of the visit her mental capabilities were diminished. He also testified based on a reasonable medical probability that she did not have mental capacity to execute a will one month later. The attorney who prepared the prior will for the testatrix testified that he refused to draft the new will signed July 9, 1998 because he did not believe she was competent. Testatrix's nephew and granddaughters testified based on their observations in June and July 1998 that she did not have mental capacity. A business partner of the testatrix testified that he did not believe she was competent to make a will in July 1998. A neighbor who saw the testatrix regularly in June and July testified that she was not coherent.

Proponent's evidence in support of testamentary capacity- The proponent offered the testimony of the testatrix's son who was a witness to the will, who testified that the testatrix was aware of her property and estate, had discussed her assets, met with her bankers, and executed a deed just before she signed the will. The notary who notarized the will testified that testatrix was in a recliner and was alert when she signed the will, that the testatrix told the drafting attorney that she wanted her son to have everything, and that she was responsive to the notary's conversation, including the fact that she was making a will and understood its effect. A college student who witnessed the will testified that she believed the testatrix knew what she was doing when she signed the will. A retired bank employee testified that she discussed with the testatrix her accounts in June 1998 and that she had no incapacity at that time. The branch manager of the bank testified that the testatrix was able to transact business at the bank and that the testatrix discussed changing her will on July 1, 1998. Another witness to the will testified that the testatrix was lucid

and clearly stated that she intended to leave her estate to her son the proponent. On cross-examination the

business partner who testified for the contestant admitted that he had a deed signed by the testatrix on July 1, 1998 partitioning some property that they jointly owned.

Trial court ruling - Denied admission of the will to probate based upon lack of testamentary capacity.

Court of Appeals - Affirmed. The Court rejected the contestant's argument that since there was direct testimony about the mental condition of the testatrix on the date of execution, that the court could not look at evidence regarding the testatrix's mental condition on other dates: "Although the proper inquiry is whether the testator had testamentary capacity at the time he executed the will, the court may also look to the testator's state of mind at other times if those times tend to show a state of mind on the day the will was executed. Evidence pertaining to those other times, however, must show that the testator's condition persisted and probably was the same as that which existed at the time the will was signed. Whether the evidence of testamentary capacity is at the very time the will was executed or at some other time goes to the weight of the testimony to be assessed by the fact finder." The testimony of the treating physician was a key to the contestant prevailing.

41. *Longaker v. Evans*, 32 S.W.3d 725 (Tex.App. - San Antonio 2000, pet. filed)

Testatrix executed will July 6, 1995
Proponent - Brother (drafter of the will)
Contestant - Son
Contest grounds - undue influence

Contestant's evidence in support of undue influence - The will was drafted by the testatrix's brother, an attorney, while she was suffering from uterine cancer and was deathly ill from radiation and dehydration. The testimony showed that she was medicated, causing her to be confused and lethargic. The will increased the bequest to the brother from $50,000 to a much more generous amount. The testatrix signed the will in the waiting room of her doctor. She expressed a wish to die while waiting in the waiting room due to the overwhelming pain and discomfort. One of the witnesses to the will was unsure whether the testatrix read the will or knew what it said. Another witness testified that the testatrix often submitted to her brother's demands and sometimes feigned sleep to avoid him. The brother supervised the execution of the will in the doctor's waiting room.

Proponent's evidence in opposition to claim of undue influence - The testatrix's treating physician testified that she appeared to be capable of making independent decisions on the date of execution of the will, executed in the waiting room of his office, and that she was not susceptible to influence. The evidence showed that the brother cared for the testatrix while she was seriously ill.

Trial Court ruling- Admitted the will to probate.

Court of appeals - Affirmed. The testimony of the treating physician on behalf of the proponent who saw the testatrix immediately after execution of the will executed in his waiting room overcame the contestant's evidence that the proponent drafted the new will increasing the bequest to himself.

42. *Estate of Livingston v. Nacim*, 999 S.W.2d 874 (Tex.App. - El Paso 1999, no pet.)

Testator executed will January 14, 1997
Prior will executed October 7, 1991
Testator died July 29, 1997 at age 79.
Proponent - Daughter
Contestant - Son
Contest grounds - undue influence

Proponent's evidence in opposition to claim of undue influence - The evidence showed that the notary went to the testator's home to notarize the document, and that the testator asked the notary whether he was there to notarize the will. The notary further testified that the testator was dressed appropriately, understood the questions asked of him, and had no difficulty communicating. The testator did not appear nervous, confused, fearful or pressured to sign the will. The evidence showed that the testator remained at the beneficiary daughter's house along with the daughter and husband for a half hour after signing the will. The testator drove himself home.

Contestant's evidence in support of undue influence - The will was signed at the beneficiary daughter's house. The beneficiary daughter and her husband witnessed the will. The beneficiary's husband made the arrangements for the notary to come to the house and notarize the will. The notary's employer was the cousin of proponent's husband. The evidence showed that the testator was heard discussing the will a few weeks prior with the beneficiary daughter. The will left nothing to the son, which the contestant testified was an unnatural disposition of the testator's property.

Trial Court ruling - Admitted the will to probate.

Court of appeals - Affirmed.

43. *Watson v. Dingler*, 831 S.W.2d 834 (Tex.App. - Houston [14th Dist.] 1992, writ denied)
Testator executed will October 1989
Proponent - Daughter from common law marriage
Contestant - Daughter from prior marriage
Contest grounds - undue influence

Contestant's evidence in support of undue influence - The testator suffered from cancer of the brain, and was completely dependent upon others for care. He was physically incapable of resisting. There was testimony that his mind was susceptible to influence. The proponent daughter moved into the testator's house, and the next day took him to see a lawyer to change his will leaving her the testator's house, Porsche, Jaguar, and a bank account. On the date of execution of the will, the testator's communication was limited to nodding. The daughter prevented others from visiting the testator at his home. When she learned that he only had a couple days to live, she brought documents to the hospital in order to get check writing authority on his bank accounts. The notary on the will stated that the testator could only communicate by nodding and blinking his eyes. The daughter admitted to the testator's sister that she stayed up all night trying to convince testator to change his will, stating that "it took a lot to do".

Trial Court ruling - Denied admission of will to probate based upon undue influence.

Court of Appeals - Affirmed. It is rare that you get a statement from the person accused of asserting undue influence to the effect that they stayed up all night convincing the testator to change their will, and that it took a lot to do.

44. *Kenney v. Kenney*, 829 S.W.2d 888(Tex.App. - Dallas 1992, no writ)
Testatrix executed a will August 17, 1990
Testatrix died August 24, 1990
Contestant - Husband
Proponents - Children
Contest grounds - lack of testamentary capacity

Proponents' evidence in support of testamentary capacity - The testatrix's bookkeeper who was in the room with the testatrix for about thirty minutes and witnessed the testatrix execute the will, testified that she looked tired and very sick, but that she was alert and conscious and recognized the bookkeeper and his wife. The notary told the testatrix that the document was her will and showed her where to sign. No one discussed the terms of the will with testatrix while the bookkeeper was present. The notary, who had never met testatrix before that day, testified that she was awake and was lying flat on her back and did not talk much other than to respond that she knew she was signing a will. The husband testified that the testatrix asked him to have the will drawn. The testatrix never discussed the terms of the will with the attorney who drafted it, but she read it and made changes to it. The husband was in the room before and after, but not during the execution.

Contestant's evidence in support of lack of testamentary capacity - The testatrix suffered from cancer and was taking several types of pain killers, including liquid morphine several times per day. One of the contestants testified that he visited the testatrix for thirty minutes on the morning of the execution of the will and that she could not talk or maintain consciousness during the visits and that he did not see her read anything the last two weeks of her life. The daughters testified that the last two weeks of her life, that testatrix was semi-comatose, would fall asleep while someone was talking with her, and took liquid morphine because she could no longer swallow, the medication causing her to hallucinate. The will was executed one week prior to her death.

Trial court ruling - The trial court denied the will to probate based upon lack of testamentary capacity.

Court of Appeals - Affirmed. The testimony concerning the heavy medication, coupled with the proximity of the execution of the will to the testatrix's death, coupled with the fact that the drafting attorney never discussed the terms of the will with the testatrix was sufficient to obtain a ruling of lack of testamentary capacity.

45. *Estate of Jernigan*, 793 S.W.2d 88 (Tex.App. - Texarkana 1990, no writ)
Testator - 90 years old on date of execution of will
Contestant - Brother
Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence in support of testamentary capacity- The drafting attorney testified that he prepared the will at the request of the testator's son-in-law. After preparing the will, the attorney met with the testator and discussed the terms of the will with the testator paragraph by paragraph, explaining to him the effect of

the will. The testator did not sign the will at the time the attorney explained the terms of the will to him, but he signed it at a later date. Both subscribing witnesses testified that they talked with the testator before he signed the will, that he appeared to know what he was doing and that no one was guiding him or exerting any type of influence over him. The notary testified that the testator realized he was signing a will and appeared to be of sound mind and that no one was guiding or directing him.

Contestant's evidence in support of undue influence - The testator's son-in-law contacted the attorney and dictated to him how a will was to be drafted for the testator. At the time the will was executed, the testator was 90 years old and was dependent upon the son-in-law for daily assistance. The son-in-law was present when the testator executed the will.

Proponent's evidence in opposition to undue influence - The drafting attorney thoroughly discussed the will with the testator who appeared to understand the attorney's explanations. There was no evidence that while the son-in-law had participated in the preparation of the will that they exerted any influence on the testator to get him to sign the will.

Trial court ruling - Admitted the will to probate.

Court of Appeals - Affirmed. The testimony of the drafting attorney as to the preparation and discussion of the will with the testator overcame the contestant's evidence that it was the proponents who contacted the attorney, dictated to him the terms of the will, and were present during the elderly testator's execution of the will.

46. *Lowery v. Saunders*, 666 S.W.2d 226 (Tex.App. - San Antonio 1984, writ ref'd n.r.e.)

Testatrix executed will April 7, 1976 and codicil April 19, 1977 (in her 90's)
Testatrix died January 9, 1980
Contest grounds - lack of testamentary capacity and undue influence

Proponent's evidence in support of testamentary capacity - The testatrix executed her will in the presence of her attorney who drafted the will for her. The attorney testified that he explained the will to her paragraph by paragraph, and believed that she knew who the members of her family were and the nature and extent of her property, expressing the opinion that her memory was sufficient to enable her to make a valid will. He further testified that the testatrix fully intended to exclude the contestants from her will because she was angry about an earlier transaction with them in which she had lost all of her rights and ownership interest in her homestead except for a life estate. The attorney made arrangements for a psychiatrist to examine her before the will was prepared and executed. The psychiatrist examined her a few weeks prior to the execution of the will for one hour as well as on the date the will was executed. The psychiatrist testified that the testatrix was generally able to name her relatives and had been handling her own business affairs and paying her own bills concluding that she had the necessary capacity.

Contestant's evidence in support of lack of testamentary capacity- On cross-examination, the psychiatrist was shown not to be knowledgeable about the nature and extent of the testatrix's property, being unaware that the house and furniture had already been conveyed to the contestants and that the conveyance had been confirmed by a court order following litigation. The testimony also showed that the psychiatrist and the testatrix were mistaken about the identity of the testatrix's relatives.

Proponent's evidence in opposition to undue influence - The contestants testified that the change in the will was consistent with the testatrix's anger towards the contestants as the result of bitter litigation.

Contestant's evidence in support of undue influence - The proponent instructed the attorney as to how to draft the will, and was present when the will was executed. The attorney never met with the testatrix alone. The proponent paid the attorney for his services.

Trial court ruling - The will was denied probate based on a lack of testamentary capacity and undue influence.

Court of Appeals - Affirmed. The evidence that the drafting attorney received his instructions as to contents of the will from the proponent, never met with the testatrix alone, and allowed the proponent to be present when the will was executed, together with the shoddy work of the psychiatrist who could not testify as to the nature and extent of the testatrix's property, disqualifying him from knowing whether she knew the nature and extent of her property, assisted the contestants in being successful.

47. *Wood v. Stute*, 627 S.W.2d 539 (Tex.App. - Fort Worth 1982, no writ)

Testatrix executed will August 24, 1980(all to son)
Testatrix died October 13, 1981
Proponent - Son Contestant

- Daughter
Contest grounds - undue influence

Contestant's evidence in support of undue influence - The evidence showed that the drafting attorney was the son's personal attorney. The contestant also testified that the testatrix filed a lawsuit to collect a loan from her son, the testatrix's grandson, constituting evidence of undue influence by her brother. The loan was made at the testatrix's suggestion. The testatrix then had her son obtain an attorney to file the suit.

Proponent's evidence in opposition to undue influence - The will was executed by the testatrix in the presence of residents in her hometown of Azle, Texas. The proponent was not present at the time of the execution and did not know any of the attesting witnesses or the notary.

Trial court ruling - Admitted will to probate

Court of Appeals - Affirmed. The court observed that the only influence shown in the testimony was that the proponent had referred his mother to his personal attorney to prepare the will, and that the proponent had the testatrix's confidence, ruling that this evidence standing alone was insufficient to raise an issue that the will was executed as the result of undue influence.

48. *Johnson v. Estate of Sullivan*, 619 S.W.2d 232 (Tex.Civ.App. - Texarkana 1981, no writ)
Testatrix executed in March 30, 1978 at age 88
Proponent - Testatrix's nurse
Contestants - Niece and her husband
Contest grounds - lack of testamentary capacity and undue influence

Contestants' evidence in support of lack of testamentary capacity and undue influence - The proponent had been the testatrix's nurse for approximately three weeks at the time of the execution of the will. During the month of the will, one of the contestant's witnesses stayed with the testator for seven to ten days and described the testatrix as being childlike and unable to recognize people, unable to know the time and date and unable to communicate. She testified that on a trip to the beauty shop the testatrix was unable to talk to the hairdresser or pay for the charges. A previous nurse testified that in the prior year the testatrix lacked capacity. The testatrix's treating physician testified that he had examined her earlier in the month of March 1978, diagnosing her as having severe organic brain syndrome. Another treating physician diagnosed the testatrix two years prior to the will as having cerebral vascular disease and hardening of the arteries (arteriosclerosis).

Proponent's evidence in support of testamentary capacity and in opposition to undue influence - Proponents called as witnesses persons who were present during the execution of the will, each of whom stated that they satisfied themselves that the testatrix understood what she was doing and that she desired to execute the will and dispose of the property in the manner as stated in the document.

Trial court ruling - The court denied the will admission to probate, finding that the testatrix lacked testamentary capacity and was under undue influence.

Court of Appeals - Affirmed. The court noted that although the proper inquiry is the condition of the testator's mind on the day the will is executed, a court may also look to the state of the testator's mind at other times to the extent it shows the testator's state of mind at the time of execution. The testimony of the treating physicians was persuasive evidence for the contestants.

49. *Reding v. Eaton*, 551 S.W.2d 491 (Tex.Civ.App. - Austin 1977, no writ)
Testator executed will May 21, 1975 (majority of estate to Laura)
Testator died November 8, 1975
Proponent - Daughter Laura
Contestant - Daughter Sharon
Contest grounds - lack of testamentary capacity

Contestant's evidence in support of lack of testamentary capacity - Proponent Laura removed the testator from the hospital in the Spring of 1975 in New Orleans and took her to her home in Mississippi. Shortly thereafter, the proponent took the testator to an attorney's office where the will was executed. The contestant testified that while in the hospital, the testator was unable first to recognize her and that his mind wandered back and forth. A neighbor in Mississippi testified that the testator's mind wandered and he would forget things, such as asking the neighbor to take him to the post office once he had already done so earlier in the day, forgetting doctor's appointments and forgetting to take his medicine, and was unable to find his billfold in his clothing. She further testified that she began paying his bills, that he did not understand why he had to pay the premiums for automobile and burial insurance and could not conduct simple banking transactions. She further testified that she was present during the execution of the will and that

to a certain extent he did not understand what he was doing, testifying as to her opinion that the testator did not have the mental capacity to understand the objects of his bounty, although he probably understood the general nature and extent of his property.

Proponent's evidence in support of testamentary capacity- The proponent's son-in-law testified that during the testator's hospital stay, he was able to carry on a conversation, and recognized him and the proponent. On a trip to Mississippi, the testator gave directions. At the attorney's office, the testator told the attorney what he wanted to do.

Trial court ruling - Denied probate of the will (later granting a new trial based on lack of notice).

Court of Appeals - Affirmed

50. *Chambers v. Chambers*, 542 S.W.2d 901(Tex.Civ.App. - Dallas 1976, no writ)
Testator executed holographic will February 20, 1963.
Testator died September 8, 1970.
Proponents offered four subsequent holographic wills (not offered for probate because not offered within statutory time period, but offered to prove revocation)
Contestant - Son (sole devisee under prior 1963 will)
Contest ground - lack of capacity and undue influence

Proponents' evidence in support of testamentary capacity- An attorney and friend of the testator, who himself was an attorney, testified that the testator was capable of caring for himself and moving about the city, of understanding his business affairs until 1968, and that he knew his family members. The four holographic wills included two executed in 1964, one in 1968, and one in 1970.

Contestant's evidence in support of lack of capacity - The attorney and friend of testator who testified admitted that he did not know the mental state of the testator on the actual dates that the subsequent holographic wills were executed. The testator's son testified that by 1966, the testator did not have testamentary capacity, and did not know the extent of his property in 1966. In a "zinger" on cross-examination, however, the son admitted that the testator had sound mind when the son borrowed money from him in both March and April of 1964 just prior to the execution of the two holographic 1964 wills.

Contestant's evidence in support of undue influence - The son testified that the testator told him that in 1962 that one of the proponents withdrew money from the testator's bank account, and had threatened to place the testator in a mental institution, as well as harassing the testator into allowing one of the proponents to remove her legal disabilities prior to attaining age 18.

Trial court ruling - All four subsequent holographic wills were found to be valid for the purpose of revoking the 1963 will.

Court of Appeals - Affirmed.

51. *Soto v. Ledsema*, 529 S.W.2d 847 (Tex.Civ.App. - Corpus Christi 1975, no writ)
Testatrix executed will November 19, 1973
Testatrix died April 20, 1974.
Contestant - Son
Proponent - Unrelated (all to her)
Contest grounds - lack of testamentary capacity

Contestant's evidence in support of lack of testamentary capacity - Two witnesses who had known the testatrix for twenty-nine years testified that the testatrix did not know what she was doing if she signed the will on November 19, 1973. One witness saw the testatrix almost daily during the last year of her life, and testified that the testatrix had cancer, and was taking medication which caused her to lack the requisite mental capacity to execute a will; and that she was not the type of mother likely to disinherit her son. The witness further testified that the testatrix had to be told where to sign routine papers for welfare, food stamps and doctor's exams by saying "sign here" during the time period that the will was signed.

Trial court ruling - Denied admission of the will to probate, finding lack of testamentary capacity.

Court of Appeals - Affirmed.

52. *Burk v. Mata*, 529 S.W.2d 591 (Tex.Civ.App. - San Antonio 1975, writ ref'd n.r.e.)
Testatrix executed will November 8, 1971 at age 96
Testatrix died May 16, 1972
Contest ground - lack of testamentary capacity and undue influence

Proponent's evidence in support of testamentary capacity and lack of undue influence - The two attesting witnesses and notary for the will testified that the will was signed between noon and three o'clock in the afternoon and that the testatrix had testamentary

capacity. The owner of the nursing home testified that in the early part of November 1971, the testatrix was very sick and said "this is my death bed wish - in case I don't live through the night, will you see that Rumalda Mata (the proponent) gets everything that is mine?" The next day, the testatrix asked the owner twice to call Hector Vera, a notary, to come to the nursing home, and that Vera read the will in its entirety to them, asked the testatrix if it was what she wanted and she said that it was. She then signed the will and the owner and another witness signed. The witness testified that she was strong-minded, and that no one could influence her. Proponent also called an LVN who had known the testatrix for more than twenty years and visited her often, who testified that she frequently discussed her property. There was other testimony that the proponent would visit frequently and help feed the testatrix.

Contestant's evidence in support of lack of testamentary capacity and undue influence - A treating physician for the testatrix testified that five months before executing the will, she was brought into his office and he recommended that she be put in a nursing home, that she was incontinent, could not feed herself, had a large sore on her face and a tumor of the lung. He further testified that she had arteriosclerosis and hardening of the arteries and that she was senile at the time she was sent to the nursing home prior to executing the will. He further testified that he did not believe she had lucid moments sufficient to make rational decisions, and that she could not have known the nature and extent of her property, who her relatives were, or the effect of signing a will in November of 1971. The administrator and an LVN from the nursing home testified that she was senile, would sometimes pick at things which were not there, and was not able to carry on a normal conversation.

Trial court ruling - The court admitted the will to probate.

Court of Appeals - Affirmed. The declaration of the testatrix as to her testamentary wishes supported by the testimony of the notary and the owner of the nursing facility overcame the contestant's testimony by the treating physician.

UPDATED BENCH TRIALS SINCE 2010:

60. *Neal v. Neal,* 2021 WL 1031975 (Tex. App.—Houston [1st Dist.] Mar. 18, 2021, no pet.).

Testator executed wills on June 14, 2008, November 9, 2009, April 13, 2011, and January 23, 2012
Testator died on July 28, 2015
Proponent – One of testatrix's sons
Contestants – One of testatrix's sons
Contest grounds – Lack of testamentary capacity and undue influence

Contestant's evidence in support of undue influence – Proponent was testatrix's power of attorney, and he held a fiduciary relationship with her, establishing a presumption of undue influence. The 2012 will left out the contestant, which is contrary to the other three wills where she had included contestant.

Proponent's evidence in opposition to undue influence – The testatrix's attorney testified that she believed the testatrix was not under the influence of anyone at the relevant time periods. The testatrix contacted the drafting attorney herself, told the attorney she did not want her family involved with her plans to distribute her estate, and no family members were involved in the creation of the 2012 will.

Contestants' evidence in support of lack of testamentary capacity – The testatrix had a stroke in July 2011, and was diagnosed with vascular dementia in August of 2011, five months before execution of the fourth will. The testatrix was also diagnosed with cerebrovascular disease. Records from the testatrix's primary care physician reflect that the testatrix had cognitive defects, hallucinations, confusion, and problems with her short-term memory.

Proponent's evidence in support of testamentary capacity – The testatrix's attorney testified that she believed the testatrix was of sound mind. Additional witness testimony supported that the testatrix was of sound mind.

Trial court ruling – The trial court admitted the 2012 will to probate finding that the testatrix was of sound mind at the time the will was executed. The court did not make a specific finding regarding the existence of undue influence.

Court of Appeals – Affirmed. The appeals court concluded that their was no evidence beyond speculation of the exercise of undue influence, and the evidence that the testatrix lacked testamentary capacity was insufficient.

61. *Estate of Flarity*, No. 09-19-00089-CV, 2020 WL 5552140 (Tex. App.—Beaumont Sept. 17, 2020, pet. filed).

Testator executed will in 2004
Testator died November 16, 2016
Proponent – One of testatrix's daughters and one of testatrix's sons
Contestants – One of testatrix's daughters and one of testatrix's sons
Contest grounds – Lack of testamentary capacity, undue influence, and mistake of fact

Contestants' evidence in support of lack of testamentary capacity – Evidence suggests the testatrix may have suffered from depression many times in her life including when the will was made.

Proponent's evidence in support of testamentary capacity – Proponent testified that she knew the testatrix did not plan to split her estate equally between her four children. There were no medical records supporting the claim that the testatrix had depression. Additionally, the evidence suggests the testatrix chose to give her children a percentage of her estate based on how much time they spent with her as she aged as the contestants did not spend much time with the testatrix.

Trial court ruling – The trial court admitted the will to probate, finding little support for the contestants' claims.

Court of Appeals – Affirmed. The claims brought fourth by the contestants were not supported by evidence, and the evidence supported the trial court's ruling that the testatrix had testamentary capacity when she executed the 2004 will.

62. *Estate of Russey*, No. 12-18-00079-CV, 2019 WL 968421 (Tex. App.—Tyler Feb. 28, 2019, no pet. h.)

Testatrix executed will on March 2, 2017
Testatrix died April 13, 2017
Proponent – Testator's friend and Testatrix's divorce attorney
Contestants – Testator's daughter
Contest grounds – Undue influence

Contestant's evidence in support of undue influence – A few of the many factors the court discussed which showed the undue influence and the testatrix's inability to resist included the beneficiary was subject to deferred adjudication for theft and needed to repay almost $40,000 in restitution which she had not done, the beneficiary had accused the testatrix of stealing from the beneficiary's business for which the testatrix had worked, the testatrix relied on the beneficiary for her care and transportation during her last illness, the beneficiary worked to keep the testatrix and her children and grandchildren estranged, and the beneficiary printed the will, give it to the testatrix to sign, and wrote the date of the will.

Proponent's evidence in opposition to undue influence – The proponent contends that her and the testatrix established a close relationship after the testatrix was rejected by her family.

Trial court ruling – The trial court denied the will admission to probate based upon lack of testamentary capacity and undue influence

Court of Appeals – Affirmed. The evidence was legally and factually sufficient to prove that the sole beneficiary, a non-family member, had exerted undue influence over the testatrix.

63. *Matter of Kam*, 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).

Testator executed will in 2012
Testator died 2012
Proponent – Testator's daughter
Contestants – Testator's son
Contest grounds – Undue influence and invalid will execution

Contestant's evidence in support of undue influence – Prior to his passing, the testator suffered a major stroke as well as several minor strokes that weakened him physically. It is undisputed that the testator's original lost will split his estate evenly between his six children, and the new, purported will left out the contestant. In executing the new will, the proponent's friends served as attesting witnesses, but neither woman actually saw the testator sign the document or see each other sign the document. Testimony from one of the attesting witnesses to the will reflected that the testator looked like he was "surrendering" when she witnessed his signature.

Proponent's evidence in opposition to undue influence – The testator met with his daughter's boyfriend to set up a new will disinheriting the contestant. The boyfriend testified he used a form will he found online and filled it in with provisions based off of the testator's wishes. A letter from the testator provided that the testator chose to leave contestant out of his will for changing the beneficiary of his VA life insurance policy to himself

and for how the contestant handled the proceedings relating to the death of the contestant's brother. Testimony from several witnesses supported the notion that the testator intended to disinherit the contestant. Other testimony from another one of the testator's sons reflected that the testator was "pretty sharp" until he began being administered medications for pneumonia that he contacted the summer after he signed the alleged will.

Contestant's evidence in support of invalid will execution – None of the attesting witnesses could describe the will's contents, and none of the attesting witnesses saw the testator sign.

Proponent's evidence in opposition to invalid will execution – An attesting witness does not need to have knowledge of the will's contents when establishing the issue of proper attestation and, by extension, proper execution. Additionally, the Texas statute does not require the attesting witnesses to see the testator sign the will, so long as "they can attest, from direct or circumstantial facts, that the testator in fact executed the documents that they are signing."

Trial court ruling – The trial court agreed with the contestant that the will, which excluded him, was invalid for undue influence and lack of proper execution. The trial court agreed, and denied the probate application.

Brother objected arguing that this will which completely excluded him was invalid for lack of proper execution. The trial court agreed and denied the probate application

Court of Appeals – Reversed. The trial court's conclusions on validity and undue influence were erroneous because while the new will probably would not have come into existence but for the proponent's efforts to get the testator to execute a new will, the contestant did not provide any evidence that the proponent's efforts actually overwhelmed the testator's agency.

64. *In re Estate of Parrimore*, 2016 WL 750293 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.).

Testator executed will on November 29, 2009
Testator died September 3, 2010
Proponent – Testator's wife
Contestants – Testator's two sons
Contest grounds – Lack of testamentary capacity

Contestants' evidence in support of lack of testamentary capacity – The testator was suffering from congestive heart failure and worked together with his wife to create a will using a computer program. After creating the will, but before the will was signed, the testator suffered a stroke which hospitalized him for three days.

Proponent's evidence in support of testamentary capacity – The testator had a will signing party at his home which was attended by friends and family. At the party, the testator was socializing with guests and playing pool before the execution ceremony. Testimony from one of the attendees reflected that the testator asked his wife to sign the will for him and that three witnesses attested to the will in the testator's presence. In the months following the signing, the testator continued his therapy, was able to drive, and even went back to work.

Trial court ruling – The trial court admitted the will to probate.

Court of Appeals – Affirmed. Ample testimony from individuals at the signing party was sufficient to establish the testator appeared to be of sound mind and knew he was executing a will.

VI. JURY TRIAL v. BENCH TRIAL

The conventional school of thought in will contests is that contestants should try their cases to a jury. Do the statistics bear this out?

Table A attached to this paper reflects a review of the results of the thirty-six jury trials summarized above. As reflected in that Table, contestants had a success rate on claims of lack of capacity in jury trials of 56%. Surprisingly, as reflected in Table B, the contestant's success rate on lack of capacity claims in bench trials was actually higher, at 63%. On claims of undue influence, the success rate of contestants in jury trials was 67%, compared with 36% in bench trials. As to whether the trial court judgments stood up on appeal, of the jury verdicts finding lack of testamentary capacity, 67% were affirmed on appeal. By contrast, all of the bench trial judgments finding lack of testamentary capacity were affirmed on appeal.

As to jury verdicts finding undue influence in favor of contestants, only 36% of these verdicts were affirmed on appeal. By contrast, all of the bench trial judgments finding undue influence for the contestants were affirmed.

These statistics suggest that a contestant with an undue influence claim has a substantially better chance

at the trial court level with a jury trial, but some difficulty holding on to that verdict at the appellate court level. According to the statistics from the reviewed cases, contestants have a slight edge on capacity cases in a bench trial.

VII. REVIEW OF IMPORTANT CATEGORIES OF EVIDENCE: WAS IT ENOUGH?

Having analyzed all of the evidence in the reviewed cases, we will now review how certain types of evidence frequently thought to be difference makers in will contests actually effected the outcome of the contests in the reviewed cases. The contestant's success rates referred to below are the success rates at the trial court level. The attached tables reflect the trial court results as well as all appellate reversals.

A. DRAFTING ATTORNEY TESTIFYING FOR PROPONENT

I have heard a number of proponent's attorneys warn a contestant's attorney that the drafting attorney would be testifying for the proponent at trial. To be sure, the testimony of a well-qualified and careful estate planner is certainly helpful to any proponent's case. By contrast, a sloppy drafting attorney can be devastating to a proponent's case. As we saw in the *Miller* case above, the Court of Appeals stated that "where it is shown that the execution of the writing was supervised by a lawyer, much probative force attaches to his opinion that the instrument expressed the wishes of the decedent." Table C reflects the actual results of trials where the drafting attorney testified on behalf of the proponent in opposition to claims of lack of testamentary capacity and undue influence. Based upon the cases analyzed, the contestants were successful on claims of lack of capacity when the drafting attorney testified for the will proponent only 44% of the time, but inexplicably were successful on undue influence claims 67% of the time. In some of these cases, it appears that the testimony of the drafting attorney, while helpful to the proponent, was overcome by other types of evidence in the case.

DRAFTING ATTORNEY TESTIMONY NOT ENOUGH

For example, in the *Tieken* case, the drafting attorney testified that he spent five hours with the testatrix in three separate meetings, reviewing each paragraph of the will with the testatrix at the execution ceremony. Clearly this appears to be careful and thoughtful planning by the drafting attorney. However, facts which were probably more important for the contestant which overcame the drafting attorney's testimony included the change of opinion of an examining physician from his note written prior to trial stating that the testatrix was capable of executing a new will, to an opinion at trial, after learning that she had experienced hallucinations three days after signing the will, that she lacked testamentary capacity, as well as the testimony of her treating physician regarding strokes suffered prior to the execution of the will.

In the *Alldridge* case, the drafting attorney was contacted directly by the testator who met alone with the testator, drafted the will and witnessed it. He also had the testator obtain a memorandum from his personal physician reflecting that he was oriented as to time, person, and place, competent to make decisions without assistance from anyone, his recent and past memory excellent, and in the doctor's best judgment "he is sane". Apparently the drafting attorney's testimony was overcome by evidence of a friend of the testator who was a doctor and who golfed frequently with the testator to the effect that he had unregulated diabetes, that his mind was "completely gone", that he was on a number of medications, and that in his opinion as a doctor the testator would not known the nature and extent of his estate or the objects of his bounty.

Similarly, in the *Jones* case, the drafting attorney's testimony was unhelpful for the proponent, likely undermined by the fact that he could not recall whether the testator or the attorney who became a beneficiary under the will had given the drafting attorney the notes from which the will was to be prepared, as well as the testimony of five doctors concluding that the testator lacked capacity.

As noted in Table C, the drafting attorney's testimony was less effective in assisting proponents in overcoming claims of undue influence, and in some instances, assisted the proof of undue influence. For example, in the *Russell* case, the drafting attorney's testimony reflected that the only notes in his files were three Post-It type notes which reflected the proponent's phone number, but no phone number for the testatrix and another note with the name of the proponent on it and a notation as to something to add to one of the wills. These notes helped prove the proponent's involvement in the planning process, bearing directly on the exertion of undue influence, and resulting in a verdict finding undue influence.

In the *Horton* case, there was testimony that the proponent of the will being contested was the one who called the attorney and asked him to prepare a will cutting out a remainder interest from the previous will, showing evidence of the exertion of undue influence which, coupled with the testator's illness, confusion and disorientation, resulted in a jury finding of undue influence. The drafting attorney had testified that he had initiated the conversation about changing the will due to his concern that the life estate provision in favor of the wife as to some real estate would create a problem for her in paying off the note and being unable to sell the property due to a remainder interest.

DRAFTING ATTORNEY TESTIMONY HELPFUL

The drafting attorney's testimony was clearly key evidence for the proponent in the *Green* case. The drafting attorney explained the terms of the will on the day of its execution, and also had the testator examined by a physician on the morning immediately prior to the will's execution. This careful planning resulted in a verdict for the proponent.

Similarly, in the *Wilkinson* case, the drafting attorney went to the testatrix's house and had a long conversation with the testatrix (although he conducted it in the presence of the proponent), discussing her family members and her property in detail. He further had the testatrix come to his office to execute the will, at which time he had her read the will, and diagrammed it for her. The proponent was successful as to capacity and undue influence.

In the *Click* case, the attorney did not allow the proponent to be in the room during the discussions or the execution of the will, and the will discussion execution took place over three visits to his office. This resulted in a directed verdict for the proponents on testamentary capacity and undue influence.

In *Jernigan*, the drafting attorney's testimony was sufficient to overcome the contestant's evidence that the proponents were the one who contacted him, dictated to him the terms of the will, and were present during the 90 year old testator's execution of the will, testifying that he discussed the terms of the will with the testator paragraph by paragraph, explaining to him the effect of the will.

Finally, in the *Miller* case, although the jury did not find for the proponent in the trial court, the Court of Appeals reversed and rendered judgment for the proponent based primarily on the testimony of the drafting attorney, stating that "Where it is shown that the execution of the writing was supervised by a lawyer, much probative force attaches to his opinion that the instrument expressed the wishes of the decedent."

B. TESTIMONY OF THE TREATING PHYSICIAN

How determinative is the testimony of the treating physician? Of the reviewed cases, seventeen involve the testimony of the testator or testatrix's treating physician, with nine cases involving the treating physician testifying for the proponent of the will, and eight cases involving the treating physician testifying for the contestant. As reflected in Table D, when the treating physician testified for the proponent, the contestant's success rate at the trial court level on lack of testamentary capacity cases was 50%, and on undue influence claims 57%. By comparison, as reflected in Table E, when the treating physician testified for the contestant, the contestant's success rate on lack of testamentary capacity claims was 63%, and in the cases reviewed, was successful on 75% of claims of undue influence.

TREATING PHYSICIAN TESTIMONY FOR PROPONENT ENOUGH

Reviewing some of the cases where the treating physician testified for the successful proponent, in *Trawick* the treating physician had examined the testatrix neurologically several times, including the year that the will was executed as well as afterwards, and was able to testify that it was not until two years later that the testatrix became confused, resulting in a verdict for the proponent.

In *Wilkinson*, the testatrix's treating physician was able to testify that he had seen her the day prior to her execution of the will for a sore throat, and that she was mentally alert and her memory was sharp, stating that her mental condition did not decline until over three years after the will was executed. The proponent prevailed in the jury trial. Interestingly, the court excluded the admission into evidence of some hospital records on which the doctor had noted the testatrix as being "senile" on examinations both prior to and subsequent to the date of execution of the will, ruling that the records dated six months prior to the date of execution of the will should be excluded as they were based primarily upon the doctor's speculation, and the post- will execution records being dated more than a year and a half after the date of the will should be rejected as too remote in time.

In the *Hamill* case, the treating physician testified that he had treated the testatrix several times during the month when the will and codicils were executed as well as twenty-five to thirty times thereafter prior to her death, never observing any evidence of confusion or disorientation. The proponent prevailed.

Similarly, in the *Longaker* case, where the will was executed in the waiting room of the treating physician's office (without his knowledge), the physician was able to testify that he had seen the testatrix immediately after the execution of the will, that he doubted the testatrix

was susceptible to influence on the day she signed her will, and that she was capable of independent decision-making and was fully aware of what happened that day, aiding the proponent in overcoming a claim of undue influence.

TREATING PHYSICIAN TESTIMONY FOR PROPONENT NOT ENOUGH

By contrast, the testimony of the treating physician for the proponent was unpersuasive in the trial court in several cases.

In *Robinson*, the testatrix's treating physician and internist testified that beginning two years prior to the execution of the will, he began seeing the testatrix regularly and adjusting her medications. He testified that even after the testatrix suffered a stroke the year after execution of her will that she was intact mentally. His testimony was likely overcome by the testimony of the contestants' forensic psychiatrist, who testified solely on the basis of the testatrix's medical records. In essence the psychiatrist detailed a lengthy history of medical conditions and opined that the testatrix's atherosclerotic heart disease was consistent with mental incapacity, and that she was incapable of executing the will in question. The forensic psychiatrist's testimony was bolstered by the sitter's records.

In the *Horton* case, the testator's treating physician, who had treated him for several years, testified that he had examined the testator in his office two weeks prior to the execution of the will at which time the testator was in full control of his mental capacity, further stating his opinion that the medications the testator was on would not have affected his mental capacity. This was not persuasive to the jury, who found both lack of capacity and undue influence. The Court of Appeals did, however, reverse and render for the proponent.

In the *Hensarling* case, the proponent was unsuccessful in proving the testator's capacity despite the testimony of the treating physician to the effect that the testator's stroke one and a half years earlier did not affect the testator's ability to know his family and what property he owned. Apparently the testimony of the friends and neighbors, and of the nurse who visited the testator to take his blood pressure every few days, to the effect that the testator could not carry on a conversation for any period of time outweighed the testimony of the treating physician.

TREATING PHYSICIAN TESTIMONY FOR CONTESTANT ENOUGH

Contestants had a much higher success rate in contesting lack of testamentary capacity where the treating physician testified for the contestant. In the *Bracewell* case, three of testatrix's treating physicians testified that the testatrix suffered from Parkinson's Disease, which was severe two years prior to the execution of the will. They further testified that she was abusing her medications and became dependent upon tranquilizers. Hospital notes from two years prior to the will described problems with incoherence. One of the physicians testified that her medications could cause hallucinations, confusion, and delirium. On the strength of this testimony, the jury found that the testatrix lacked testamentary capacity.

In *Tieken*, the treating physician testified on behalf of the contestant that he had treated the testatrix during the relevant time period, that she had suffered two strokes several years prior to executing the will, and two in the three years prior to its execution. He further testified that the year prior to the execution, she visited his office, arriving without an appointment, and not knowing why she was there. In addition to her condition of hardening of the arteries in her brain and heart, she was affected by the prescription Ativan, which had the side effect of hallucinations. The testimony showed that the testatrix had hallucinations both before and after signing the will. This testimony apparently overcame the testimony of the drafting attorney on behalf of the proponent as to having spent five hours with the testatrix in three separate meetings and his opinion that she was fully competent, the contestant prevailing on both lack of capacity and undue influence.

In the *Williford* case, two of the testatrix's treating physicians testified for the contestant that around the period of execution of the will, the testatrix complained about not being able to remember, had cerebral vascular bleeding which began at approximately the time the will

was executed, and that she could not have known the extent of her property or the business in which she was engaged. This testimony, coupled with the testimony of family, a nurse, and neighbors was sufficient to establish lack of testamentary capacity.

In the *Neville* case, the testatrix's treating physician testified on behalf of the contestant that he had seen the testatrix one month earlier, when she was complaining of short term memory loss over the past two months and that she had been diagnosed with a malignant brain tumor. He testified that she had difficulty deciding what words to use, forgot where she left items, and would sometimes reverse sentences when speaking. He further testified that based on a reasonable medical probability, she did not have mental capacity to execute a will one month later. This testimony apparently overcame the testimony of the notary and witnesses to the will that she was responsive to the conversations during the execution of the will, and that she had stated that she wanted her son to have everything, as the will provided, the contestant prevailing on lack of testamentary capacity.

Similarly, in the *Johnson* case, the contestants called the testatrix's treating physician, who testified that he had examined her a couple of weeks prior to execution of the will, diagnosing her as having severe organic brain syndrome. This apparently overcame the testimony of the subscribing witnesses to the will who testified that each satisfied themselves that the testatrix understood what she was doing and that she desired to execute the will and to dispose of the property in the manner as stated in the document, the contestant prevailing on both lack of testamentary capacity and undue influence.. This is an example of a case where testimony regarding the testatrix's mind on a date other than the date of execution of the will was weighed more heavily that the testimony of the subscribing witnesses testifying to the testatrix's mental status on the actual date of execution of the will.

TREATING PHYSICIAN TESTIMONY FOR CONTESTANT NOT ENOUGH

The contestant was not always successful when calling the treating physician as a witness in the reviewed cases. In the *Bettis* case, the contestant called the psychiatrist who had treated the testator during his hospitalization for alcoholism. She testified that it was doubtful that the testator had testamentary capacity on the date of the execution of his will two months prior to his death from chronic alcoholism based upon his treatment in the hospital. This testimony was likely overcome by the fact that the will contestant had filed her second suit for divorce against the testator prior to the execution of the will and was living with the testator, together with the testimony of the drafting attorney and witnesses to the will to the effect that he had testamentary capacity. The proponent prevailed.

In *Burk*, the will contestant was unsuccessful in a bench trial despite offering the testimony of the testatrix's treating physician, who testified that five months prior to executing the will, he recommended that she be put in a nursing home, being incontinent, unable to feed herself, and suffering from arteriosclerosis and hardening of the arteries. He further testified that she was senile at the time she went into the nursing home, prior to execution of the will, and that she would not have had lucid moments sufficient to make rational decisions, could not have known the nature and extent of her property, who her relatives were, or the effect of signing a will. Despite this testimony, the proponent prevailed on the strength of the testimony of the notary and witnesses to the will to the effect that she had testamentary capacity, as well as the owner of the nursing home testifying that the testatrix stated "this is my death bed wish- in case I don't live through the night, will you see that Rumalda Mata (the proponent) gets everything that is mine?"

Although there are cases where the parties argue on appeal that a verdict should be overturned as being against the great weight and preponderance of the evidence based upon an argument that the physician's opinion regarding mental capacity should trump the capacity of lay witnesses on mental capacity, the case law is clear that a physician's opinion regarding mental capacity generally, or the mental capacity necessary to make a will, is, in the eye of the law, no better than that of any other person. *In Re Finklestein*'s *Estate*, 61 S.W.2d at 590, 591 (Tex. Civ. App. - Amarillo 1933, writ dism'd).

C. ADVANCED AGE

How often does the advanced age of a testator or testatrix sway the trier of fact towards finding lack of testamentary capacity or undue influence?

Texas case law in the will contest area makes clear that age in and of itself should not be a factor in will contests: "Though a testator may be aged, infirmed, and sick, he has the right to dispose of his property in any manner that he may desire if his mental ability meets the

laws tests." *Nowlin v. Trottman*, 348 S.W.2d at 167, 172 (Tex. Civ. App. - Amarillo 1961, writ ref'd n.r.e.). On the other hand, case law also makes clear that "weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in a condition to be susceptible to undue influence." *Brewer v. Foreman*, 362 S.W.2d 350 (Tex. Civ. App. - Houston 1962, no writ). In any event, the advanced age of a testator or a testatrix is unquestionably a factor stressed by will contestants when that fact arises. As reflected in Table F, the contestant's success rate in the reviewed cases involving testators and testatrix' of advanced age, defined herein as 80 years of age or older, has a success rate of 40% in claims of lack of testamentary capacity, and 38% in claims of undue influence, suggesting that it was not as strong of a factor as the other factors explored in this paper.

ADVANCED AGE NOT A FACTOR

In the *Trawick* case, the will of the 92 year old testatrix was admitted to probate over claims of lack of testamentary capacity and undue influence despite the testimony that prior to the execution of the will, she imagined there were children in her house that kept her awake at night, spoke of deceased persons as living, failed to recognize people that she knew well, including relatives, reported her car stolen when she had left it in the parking lot, and insisted on going to the bank to make deposits which she had already made. There was further testimony that prior to the execution of the will she attempted to cash checks which had already been cashed, called a relative during the summer prior to execution of the will saying that it was snowing outside, and got lost on the way back to her home. This evidence, which reflected the mind of an aged testatrix, was apparently overcome by the testimony of the drafting attorney and the testatrix's treating physician, the proponent prevailing.

In *Wilkinson*, the testimony regarding the 90 year old testatrix's irrational behavior prior to and then after the execution of the will, including hallucinations, refusal to put on certain clothes thinking they were her wedding gown, and erroneously referring to her niece as her sister, was apparently overcome by the testimony of the drafting attorney, the proponent prevailing.

In the *Duke* case, the 93 year old testator had a guardian of his person and estate appointed prior to his execution of the will. The testimony of the drafting attorney who spoke with the testator for an hour, then returned to the lawyer's office a week later, at which time the drafting attorney read the will slowly and carefully to the testator, the testator replying "it is drawn just exactly as I wanted to leave my property." His testimony was sufficient to overcome the contestant's claim of lack of testamentary capacity. The testator's age was not a controlling factor.

ADVANCED AGE A FACTOR

By contrast, the advanced age of a testator or testatrix has clearly worked to the advantage of some contestants. In the *Robinson* case, the mental and physical condition of the 93 year old testatrix, which included a number of medical conditions including arteriosclerotic heart disease, as well as forgetfulness and periods of confusion not uncommon for a person of that age, clearly created a fact scenario that allowed a forensic psychiatrist to opine that the testatrix lacked testamentary capacity to execute the will, despite the testimony of the testatrix's estate planning attorneys, oil and gas attorneys, financial planner, and treating physician.

In *Sebesta*, the physical and mental condition of the 83 year old testatrix, not uncommon to a person of her age, including hardening of the arteries, heart trouble, and general physical and mental decline, created the facts upon which the jury based its finding of lack of testamentary capacity.

In *Rothermel*, the testimony concerning the 93 year old testatrix who had difficulty hearing, was feeble, and suffered from poor eyesight and diabetes, causing her to rely upon the proponent, assisted the contestant in establishing her susceptibility to undue influence by the son who was handling her affairs. Clearly, these age-related maladies assisted the contestant in establishing undue influence to the satisfaction of a jury. Unfortunately for the contestant, the Texas Supreme Court reversed the jury verdict finding that the evidence of undue influence was insufficient.

In *Johnson*, in a bench trial, the contestant established the frailty of the 88 year old testatrix, including her inability to recognize people, to know the time and date, and to pay her hairdresser for her charges. These frailties, together with the treating physician's diagnosis of cerebral vascular disease and hardening of the arteries, overcame the testimony of the subscribing witnesses to the will who had satisfied themselves that the testatrix understood what she was doing and desired to execute the will disposing of her property in the manner stated in the will.

D. MEDICATION

Contestants frequently cite the effect of medication on the testamentary capacity of a testator or testatrix when available. In those cases where medication was cited as a basis for lack of testamentary capacity or for susceptibility to undue influence in the cases reviewed, as reflected in Table G, the contestant was successful in the trial court on claims of lack of testamentary capacity 57% of the time, and on claims of undue influence 40% of the time.

MEDICATION A FACTOR

In the *Bracewell* case, testimony regarding the testatrix overmedicating herself with Valium and Sinemet, supported by the testimony of three treating physicians that she was abusing her medications and becoming dependent on tranquilizers, assisted the contestant in obtaining a verdict that the testatrix lacked testamentary capacity. One of the doctors testified that her medications could cause hallucinations. This testimony overcame the testimony of disinterested witnesses in support of testamentary capacity, including the testatrix's older sister who saw the testatrix on the day of execution of the will and testified that she was capable of making decisions on that date.

In *Tieken*, the contestant introduced evidence that the testatrix was being treated with Ativan which produced hallucinations, including hallucinations experienced three days after her signing of the will. Coupled with testimony from the treating physician that the testatrix had suffered strokes, the contestant was able to achieve a jury verdict finding lack of testamentary capacity and undue influence, despite the testimony on behalf of the proponent of the drafting attorney who had spent five hours with the testatrix in three separate meetings.

In *Alldridge*, the contestant introduced evidence that the testator was taking Valium, two pain medications, a sleeping medication, medication for relaxing his stomach muscle, heart medication, anti-depressant medication, and other medications. The testator's friend, who was a physician, testified that all of these medications together with his unregulated diabetes caused him to lack mental capacity the month of execution of the will. This evidence was sufficient for the jury to find lack of testamentary capacity.

Similarly, in *Soto*, the testimony that the testatrix had cancer and was taking a medication which caused her to lack capacity was found to be a sufficient cause of incapacity to find that the testatrix lacked testamentary capacity.

In *Horton*, the fact that the testator was taking morphine, MS-Contin and Zoloft causing him to hallucinate at times and imagine things on the bedspread which were not actually there, supported the contestant's claim of susceptibility to undue influence. Although the jury found no lack of testamentary capacity, it did find that the will was executed as the result of undue influence. On appeal however, the Court of Appeals reversed and rendered for the proponent as to the undue influence claim. Among the court's findings were that the fact that the testator consumed pain medication on the day he executed the will in question was insufficient to prove a lack of testamentary capacity without some evidence that the medication rendered the testator incapable of knowing his family, his estate, or understanding the effect of his actions.

MEDICATION NOT A FACTOR

By contrast, in the *Long* case, the contestant's evidence that the testator was receiving high doses of chemotherapy and radiation, together with entries in the testator's medical records the month prior to execution of the will reflecting incidences of medicated confusion, was insufficient to obtain a finding of lack of testamentary capacity or undue influence in a bench trial. The fact that the testator drafted his own will on his computer, and emailed his friends and family regularly about his health during the time period, together with the lay testimony of friends and family as to his capacity overcame the contestant's evidence regarding the medication.

E. WILLS EXECUTED IN THE HOSPITAL

Wills executed in the hospital always present a fertile ground for potential contests, due to the obvious question concerning the physical and mental strength of the testator or testatrix, and the ready availability of medical evidence which may contain notations of mental capacity issues. As reflected in Table H, among the reviewed cases, there were three cases involving wills executed in the hospital, with two of the three wills being denied probate based upon lack of testamentary capacity and undue influence.

HOSPITALIZATION A FACTOR

In the *Blakes* case, the testator was suffering from Stage four cancer having been admitted to the hospital

with dehydration and confusion a few days earlier, executing the purported will one day prior to his death. The nurse's notes reflected "confusion" earlier that morning prior to the execution of the will. The medically documented weakness of the testator was demonstrated by the testator being tired and asking to complete the execution of the will the next day, although he was urged to complete the signing. The jury found for the contestant on lack of testamentary capacity and undue influence.

In the *Wilson* case, the 78 year old testatrix was hospitalized with a broken hip at the time the will was executed. The hospital records reflected that she had suffered minor strokes previously. While this testimony was undoubtedly helpful to the contestant, the contestant also had the luxury of the fact that the proponent of the will had filed an application for guardianship over the testatrix two months prior to execution of the will alleging that the testatrix was of unsound mind, and there was evidence that showed that the proponent son had a bad relationship over the past several years with the testatrix, including a lawsuit over which she had sued him for unduly influencing him into signing a deed conveying some property to the proponent.

HOSPITALIZATION NOT A FACTOR

In the *Reynolds* case, the testimony showed that the testator was hospitalized ten days prior to executing the will, being rushed to the hospital with convulsions or a seizure, the testator dying approximately one week after executing the will while still hospitalized. The testimony of the drafting attorney, (although it was shown that the wife was present while the testator was being interviewed by the attorney and was present during the execution of the will), together with the "fair division of" the estate equally among the testator's wife and two daughters, was sufficient to overcome the circumstances of the will being executed in the hospital.

F. WILLS EXECUTED SHORTLY BEFORE DEATH

Anther red flag for contestants are wills executed shortly before death, sometimes referred to as "death bed wills". In the reviewed cases, wills executed within two months of the date of death were analyzed in this category. As reflected in Table I as to wills executed within two months of the date of death, the contestant was successful in the trial court in both lack of capacity and undue influence claims 43 % of the time.

PROXIMITY TO DEATH A FACTOR

In the *Blakes* case, discussed in the section immediately above, the will was executed in the hospital one day prior to the testator's death, the testator asking to finish executing the will the next day, but being urged to complete it. The jury found lack of testamentary capacity and undue influence.

In the *Croucher* case, the will was executed approximately five weeks before the testator died. A neurological exam from earlier in the year reflected that the testator's memory was sketchy and at times seemed confused. In addition, a hospital admissions report a month after execution of the will reflected that "the testator was suffering from severe arteriosclerotic cardiovascular disease and had been undergoing deceasing mental status for one month." The jury found that the testator lacked testamentary capacity despite the testimony of the attesting witnesses to the will and his acquaintance who was a medical doctor who testified regarding his contact with the testator around the date of execution of the will that he appeared to be competent. While the closeness of the execution date to the date of death cannot be seen as the primary factor, it obviously placed in question the testator's physical and mental health, contributing to the finding of lack of testamentary capacity.

In the *Kenney* case, the testatrix executed a will one week prior to her death, the testatrix being tired, very sick, and lying flat on her back when the notary arrived, being medicated with pain killers including liquid morphine. The evidence concerning the death bed condition of the testatrix and her pain medications supported the trial court's ruling of lack of testamentary capacity.

PROXIMITY TO DEATH NOT A FACTOR

By contrast, wills executed twenty-one days prior to death in *Horton*, three weeks prior to death in *Green*, one week prior to death in *Reynolds*, and two months prior to death in *Click*, did not assist the contestant in seeking to establish lack of testamentary capacity and undue influence, the contestant being unsuccessful in each of those cases.

G. UNRELATED BENEFICIARY

An unnatural disposition may be considered, along with other circumstances, in determining whether a will was the product of undue influence. *Long v. Long*, 125

S.W.2d 1034, 1036 (Tex. 1939). In addition, an unnatural disposition may also be some evidence of lack of testamentary capacity *Dominquez v. Duran*, 540 S.W.2d 567, 571 (Tex.Civ.App. - Houston [1st Dist.] 1976, writ refused, n.r.e.). Among the reviewed cases, there were seven cases involving beneficiaries identified as unrelated to the testator or testatrix. As reflected in Table K, of those contests, the contestant's success rate in the trial court on claims of lack of capacity was 83%, and on claims of undue influence was 75%.

In the *Tieken* case, the unsuccessful proponent was a friend of the testatrix who had met she and her husband as an insurance adjuster working on their claim for hail damage ten years earlier. The testimony reflected that a friend of the proponent selected the attorney to prepare the will, typed up a list of property for the testatrix so she could "organize her mind" and claimed to be instrumental in the testatrix executing a new will. The jury was likely motivated in part by the lack of family relationship between the testatrix and contestant accused of undue influence, finding that the will was the product of undue influence and that the testatrix lacked testamentary capacity.

In the *Johnson* case, the proponent/beneficiary was the testatrix's nurse who had been taking care of her for approximately three weeks at the time of execution of the will. When coupled with the testimony of a friend who stayed with the testatrix for several days during the relevant time period to the effect that the testatrix was childlike and unable to recognize people, together with testimony of the treating physician as to severe organic brain syndrome, the unnatural disposition to the nurse was clearly a factor in the jury finding a lack of testamentary capacity and undue influence.

Finally, in the *Soto* case, the status of the proponent as unrelated to the testatrix, offering a will which disinherited her only son, the contestant, created some natural suspicion as to the testamentary capacity of the mother. The contestant's evidence was that the testatrix had cancer and was taking medication which caused her to lack the requisite mental capacity to execute the will, together with the testimony of a witness that the testatrix had to be told where to sign routine papers for welfare, food stamps and doctor's examinations by saying "sign here". The testatrix's twenty-nine year friend who saw her almost daily during the last year of her life testified that she was not the type of mother who would disinherit her son. It is likely that the unrelated nature of the beneficiary factored into this decision, as the contest evidence described in the appellate opinion did not include any medical testimony.

H. PHYSICAL ILLNESS

As the Texas Supreme Court stated in the *Croucher* decision, evidence of a testator's physical incapacity may be probative of lack of testamentary capacity if the illness is consistent with mental incapacity. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983). Among the reviewed cases, a number of the opinions reference physical illnesses from which the testator or testatrix was suffering at the time of execution of their will. The four illnesses cited most frequently were arteriosclerosis, cancer, stroke, and dementia. As reflected in Table K, the contestants were successful on lack of capacity claims in cases where the testator or testatrix was diagnosed with dementia in 100% of the cases cited, with strokes 75% of the time, with arteriosclerosis, 63% of the time, and with cancer 50% of the time. As to undue influence, the contestants were successful in cases where the testator or testatrix had suffered a stroke 67% of the time, where there was evidence of arteriosclerosis 60% of the time, and where the testator or testatrix was suffering from cancer 50% of the time. While the evidence of physical illness was not the sole evidence in any of the successful contests, it was certainly important evidence for the contestant not only as to capacity, but also as to undue influence, providing some evidence of susceptibility to undue influence, and weakness of mind and body and physical incapacity to resist undue influence.

VIII. CONCLUSIONS

Having analyzed the sixty-four reviewed will contest cases, it is clear that there is no definite answer to the question of how much evidence of undue influence and lack of capacity is enough. It is also clear that any will proponent feeling bullet proof in a contest believing that the testimony of the will drafting attorney, and/or the testimony on behalf of the proponent of the treating physician, is certain to overcome the claims of will contestants, even when the drafting attorney has the treating physician examine the testator in conjunction with the execution of the will (see *Alldridge*), is much more at risk of losing than they appreciate.

While it can certainly be argued that the contestant's success rates in Tables A through L attached to this paper may not be statistically significant in some instances where there were not a sufficiently large sample of cases in some of the evidence categories, they do reflect, as Sergeant Joe Friday of Dragnet would say, "Just, the facts, ma'am." Table L summarizes the

contestant's success rates at the trial court level in each of the important categories of evidence.

Some of the significant factors which can be gleaned from the summary of results in Table L include the following:

1. An unrelated primary beneficiary of a contested will is the most compelling fact for the contestant as to both undue influence and lack of testamentary capacity.

2. The testimony of the treating physician on behalf of the contestant questioning the testator's capacity is extremely strong evidence for the contestant as to both undue influence and lack of testamentary capacity.

3. The testimony of the treating physician for the proponent, while certainly helpful for the proponent, is statistically not as big of a difference-maker as their testimony for the contestant.

4. The execution of the purported will in a hospital significantly increases a contestant's chances.

5. The testimony of the drafting attorney does not seem to make much of a difference in testamentary capacity cases, and statistically seems to be almost completely insignificant in undue influence cases.

6. An illness of the testator or testatrix (such as arteriosclerosis, cancer, strokes, and dementia) is a significant factor in helping a contestant establish lack of testamentary capacity, and slightly less impactful in cases of undue influence.

7. Claims by contestants based upon the effects of medication that a testator or testatrix lacked testamentary capacity did have some significance but it was not as helpful in establishing susceptibility to undue influence.

8. The advanced age of the testator or testatrix, and the proximity of the execution of a will to the date of death were not as significant of a problem for proponents as were other categories of evidence.

IX. LESSONS FOR ESTATE PLANNERS

As we learned from the *Tieken* and *Robinson* cases, sometimes even careful estate planning over several meetings, and going over the will paragraph by paragraph prior to its execution is not sufficient to withstand a will contest. Certainly the estate planner should be careful in meeting with the client, giving them an adequate opportunity to review the draft, and in explaining the content and effect of the planning documents. In addition, the drafting attorney should guard against undue influence claims by guarding against the following facts cited in the undue influence cases:

1. It is preferable if the initial contact with the prospective client be made directly by the prospective client (see *Cobb* and *Blakes*).

2. The will should not be prepared from notes or instructions from someone other than the testator or testatrix (see *Jones*, *Green*, *Tieken,* and *Kenney*).

3. Supervise the execution of the will personally (see *Blakes* and *Miller*).

4. Do not allow a will beneficiary to be present during the discussion or execution of the will (see *Lowery* and *Click*).

5. Do not file the will for probate the day after the death (See *Cobb*) or the day after the funeral (see *Riley*). This fact always makes its way into the appellate opinion.

By adhering to these simple edicts, the estate planner may avoid learning the answer to the question: "How much evidence is enough?"

TABLE A
CONTESTANT'S RESULTS IN JURY TRIALS

	TRIAL COURT		APPELLATE COURT	
Case	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
1. Russell	N/A	Yes	N/A	Affirmed
2. Trawick	No	DV - No	Affirmed	Affirmed
3. Steed	N/A	Yes	N/A	Reversed
4. Robinson	Yes	Yes	Affirmed	Affirmed
5. Blakes	Yes	Yes	Affirmed	Did not rule
6. Bracewell	Yes	N/A	Affirmed	N/A
7. Horton	No (JNOV)	Yes	Affirmed	Reversed
8. Cobb	N/A	No (JNOV)	N/A	Reversed
9. Davis	N/A	Yes	N/A	Reversed
10. Tieken	Yes	Yes	Affirmed	Affirmed
11. Montgomery	N/A	Yes	N/A	Reversed
12. Riley	N/A	Yes	N/A	Affirmed
13. Holcomb	N/A	Yes	N/A	Affirmed
14. Broach	No	No	Affirmed	Affirmed
15. Smallwood	N/A	No (JNOV)	N/A	Affirmed
16. Allridge	Yes	N/A	Affirmed	N/A
17. Jones	Yes	N/A	Affirmed	N/A
18. Gaines	No	Yes	Affirmed	Affirmed
19. Green	DV - No	No (JNOV)	Affirmed	Reversed
20. Croucher	Yes	N/A	Affirmed (Tx.Sup.Ct.)	N/A
21. Wilkinson	No	No	Affirmed	Affirmed
22. Rich	Yes	N/A	Reversed	N/A
23. Wilson	Yes	Yes	Reversed	Reversed
24. Sebesta	Yes	N/A	Affirmed	N/A
25. Hensarling	Yes	Yes	Affirmed	Did not rule
26. Wright	Yes	Yes	Reversed	Reversed

Case	TRIAL COURT Lack of Capacity	TRIAL COURT Undue Influence	APPELLATE COURT Lack of Capacity	APPELLATE COURT Undue Influence
27. Williford	Yes	N/A	Affirmed	N/A
28. Bettis	No	N/A	Affirmed	N/A
29. Hamill	No	N/A	Affirmed	N/A
30. Reynolds	No	No	Affirmed	Affirmed
31. Duke	No	N/A	Affirmed	N/A
32. Miller	Yes	Yes	Reversed	Reversed
33. Click	DV- No	DV- No	Affirmed	Affirmed
34. Carr	Yes	N/A	Reversed (Tx. Sup. Ct)	N/A
35. Oliver	No	N/A	Affirmed	N/A
36. Rothermel	N/A	Yes	N/A	Reversed (Tx.Sup.Ct.)
UPDATED CASES:				
53. Mittelsted	Yes	Yes	Affirmed	Affirmed
54. Scott	Yes	Yes	Affirmed	Affirmed
55. Yost	N/A	Yes	N/A	Affirmed
56. Texas Capital Bank	Yes	Yes	Affirmed	Affirmed
57. Rodriguez	N/A	Yes	N/A	Affirmed
58. Le	Yes	N/A	Affirmed	N/A
59. Lynch	Yes	Yes	Affirmed	Affirmed
Cumulative Totals:	19 - Yes 13 - No	22 - Yes 8 - No	15 - Yes/Affirmed 5 - Yes/Reversed	12 - Yes/Affirmed 8 - Yes/Reversed 2 - Yes/Did not rule

TABLE B

CONTESTANT'S RESULTS IN BENCH TRIALS

	TRIAL COURT		APPELLATE COURT	
Bench Trials	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
37. Henry	N/A	Yes	N/A	Affirmed
38. Long	No	No	Affirmed	Affirmed
39. Schlindler	Yes	N/A	Affirmed	N/A
40 Neville	Yes	N/A	Affirmed	N/A
41. Longaker	N/A	No	N/A	Affirmed
42. Livingston	N/A	No	N/A	Affirmed
43. Watson	N/A	Yes	N/A	Affirmed
44. Kenney	Yes	N/A	Affirmed	N/A
45. Jernigan	No	No	Affirmed	Affirmed
46. Lowery	Yes	Yes	Affirmed	Affirmed
47. Wood	N/A	No	N/A	Affirmed
48. Johnson	Yes	Yes	Affirmed	Affirmed
49. Reding	Yes	N/A	Affirmed	N/A
50. Chambers	No	No	Affirmed	Affirmed
51. Soto	Yes	N/A	Affirmed	N/A
52. Burk	No	No	Affirmed	Affirmed
60. Neal	No	No	Affirmed	Affirmed
61. Flarity	No	N/A	Affirmed	N/A
62. Russey	N/A	Yes	N/A	Affirmed
63. Kam	N/A	Yes	N/A	Reversed
64. Parrimore	No	N/A	Affirmed	N/A
Cumulative Totals:	7 – Yes 7 – No	6 – Yes 8 – No	7 – Yes/Affirmed 0 – Yes/Reversed	5 – Yes/Affirmed 1 – Yes/Reversed

TABLE C

DRAFTING ATTORNEY TESTIFYING CONTESTANT'S RESULTS

	TRIAL COURT		APPELLATE COURT	
Case	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
1. Russell	N/A	Yes	N/A	Affirmed
2. Trawick	No	DV-No	Affirmed	Affirmed
4. Robinson	Yes	Yes	Affirmed	Affirmed
7. Horton	No (JNOV)	Yes	Affirmed	Reversed
9. Davis	N/A	Yes	N/A	Reversed
10.Tieken	Yes	Yes	Affirmed	Affirmed
11.Montgomery	N/A	Yes	N/A	Reversed
16. Alldridge	Yes	N/A	Affirmed	Reversed
17. Jones	Yes	N/A	Affirmed	N/A
19. Green	No	No (JNOV)	Affirmed	Reversed
21. Wilkinson	No	No	Affirmed	Affirmed
26. Wright	Yes	Yes	Reversed	Reversed
28. Bettis	No	N/A	Affirmed	N/A
29. Hamill	No	N/A	Affirmed	N/A
31. Duke	No	N/A	Affirmed	N/A
32. Miller	Yes	Yes	Reversed	Reversed
33. Click	DV - No	DV- No	Affirmed	Affirmed
37. Henry	N/A	Yes	N/A	Affirmed
45. Jernigan	No	No	Affirmed	Affirmed
46. Lowery	Yes	Yes	Affirmed	Affirmed
53. Mittlested	Yes	Yes	Affirmed	Affirmed
55. Yost	No	Yes	N/A	Affirmed
56. Tex. Cap. Bank	Yes	Yes	Affirmed	Affirmed
57. Rodriguez	N/A	Yes	N/A	Affirmed

58. Le	Yes	N/A	Affirmed	Affirmed
59. Lynch	Yes	Yes	Affirmed	Affirmed
60. Neal	No	No	Affirmed	Affirmed
62. Russey	N/A	Yes	N/A	Affirmed
Contestant's Success Rate:	11 – Yes 11 – No **50%**	16 – Yes 6 – No **73%**		

Table C

TABLE 2

DRAFTING ATTORNEY FOR PROPONENT
CONTESTANT'S RESULTS/BENCH TRIALS

	BENCH TRIALS		APPELLATE COURT	
Case	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
37. Henry	N/A	Yes	N/A	Affirmed
38. Long	No	No	Affirmed	Affirmed
39. Schlindler	Yes	N/A	Affirmed	N/A
40. Neville	Yes	N/A	Affirmed	N/A
41. Longaker	N/A	No	N/A	Affirmed
42. Livingston	N/A	No	N/A	Affirmed
43. Watson	N/A	Yes	N/A	Affirmed
44. Kenney	Yes	N/A	Affirmed	N/A
45. Jernigan	No	No	Affirmed	Affirmed
46. Lowery	Yes	Yes	Affirmed	Affirmed
47. Wood	N/A	No	N/A	Affirmed
48. Johnson	Yes	Yes	Affirmed	Affirmed
49. Reding	Yes	N/A	Affirmed	N/A
50. Chambers	No	No	Affirmed	Affirmed
51. Soto	Yes	N/A	Affirmed	N/A
52. Burk	No 7 Yes 4 No	No 4 Yes 7 No	Affirmed 7 Yes/Affirmed 0 Yes/Reversed	Affirmed 4 Yes/Affirmed 0 Yes/Reversed
Success Rate	63%	57%		

TABLE D

TREATING PHYSICIAN TESTIFYING FOR PROPONENT
CONTESTANT'S RESULTS

Case	TRIAL COURT Lack of Capacity	TRIAL COURT Undue Influence	APPELLATE COURT Lack of Capacity	APPELLATE COURT Undue Influence
2. Trawick	No	DV-No	Affirmed	Affirmed
4. Robinson	Yes	Yes	Affirmed	Affirmed
5. Blakes	Yes	Yes	Affirmed	Did not rule
7. Horton	No (JNOV)	Yes	Affirmed	Reversed
21. Wilkinson	No	No	Affirmed	Affirmed
25. Hensarling	Yes	Yes	Affirmed	Did not rule
26. Wright	Yes	N/A	Reversed	Reversed
29. Hamill	No	N/A	Affirmed	N/A
41. Longaker	N/A	No	N/A	Affirmed
56. Tex. Cap. Bank	Yes	Yes	Affirmed	Affirmed
59. Lynch	Yes	Yes	Affirmed	Affirmed
Cumulative Totals:	6 – Yes 4 – No	6 – Yes 3 – No		
Proponent's Success Rate:	60%	66%		

TABLE E

TREATING PHYSICIAN TESTIFYING FOR CONTESTANT
CONTESTANT'S RESULTS

Case	TRIAL COURT Lack of Capacity	TRIAL COURT Undue Influence	APPELLATE COURT Lack of Capacity	APPELLATE COURT Undue Influence
6. Bracewell	Yes	N/A	Affirmed	N/A
10. Tieken	Yes	Yes	Affirmed	Affirmed
18. Gaines	No	Yes	Affirmed	Affirmed
27. Williford	Yes	N/A	Affirmed	N/A
28. Bettis	No	N/A	Affirmed	N/A
46. Neville	Yes	N/A	Affirmed	N/A
48. Johnson	Yes	Yes	Affirmed	Affirmed
52. Burk	No	No	Affirmed	Affirmed
Cumulative Totals:	5 – Yes 3 – No	3 – Yes 1 – No		
Contestant's Success Rate:	63%	75%		

TABLE F

ADVANCED AGE (80 OR OLDER)
CONTESTANT'S RESULTS

		TRIAL COURT		APPELLATE COURT	
Case	Age at Execution	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
2. Trawick	92	No	DV-No	Affirmed	Affirmed
4. Robinson	93	Yes	Yes	Affirmed	Affirmed
21. Wilkinson	90	No	No	Affirmed	Affirmed
24. Sebesta	83	Yes	N/A	Affirmed	N/A
31. Duke	93	No	N/A	Affirmed	N/A
33. Click	83	DV - No	DV - No	Affirmed	Affirmed
34. Carr	86	Yes	N/A	Reversed (TxSupCt)	N/A
36. Rothermel	93	N/A	Yes	N/A	Reversed (TxSupCt)
45. Jernigan	90	No	No	Affirmed	Affirmed
48. Johnson	88	Yes	Yes	Affirmed	Affirmed
52. Burk	96	No	No	Affirmed	Affirmed
55. Yost	90	N/A	Yes	N/A	Affirmed
59. Lynch	90	Yes	Yes	Affirmed	Affirmed
63. Kam	90	N/A	Yes	N/A	Reversed
Cumulative Totals:	5 – Yes 6 – No	6 – Yes 5 – No			
Contestant's Success Rate:	45%	55%			

TABLE G

MEDICATION
CONTESTANT'S RESULTS

	TRIAL COURT		APPELLATE COURT	
Case	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
6. Bracewell	Yes	N/A	Affirmed	N/A
7. Horton	No (JNOV)	Yes	Affirmed	Reversed
8. Cobb	N/A	No (JNOV)	N/A	Reversed
10. Tieken	Yes	Yes	N/A	Reversed
16. Alldridge	Yes	N/A	Affirmed	N/A
19. Green	DV - No	No (JNOV)	Affirmed	Reversed
38. Long	No	No	Affirmed	Affirmed
51. Soto	Yes	N/A	Affirmed	N/A
58. Le	Yes	N/A	Affirmed	N/A
Cumulative Totals:	5 – Yes 3 – No	2 – Yes 3 – No		
Contestant's Success Rate:	62%	40%		

TABLE H

WILLS EXECUTED IN THE HOSPITAL
CONTESTANT'S RESULTS

Case	TRIAL COURT Lack of Capacity	TRIAL COURT Undue Influence	APPELLATE COURT Lack of Capacity	APPELLATE COURT Undue Influence
5. Blakes	Yes	Yes	Affirmed	Did not rule
23. Wilson	Yes	Yes	Reversed	Reversed
30. Reynolds	No	No	Affirmed	Affirmed
54. Scott	Yes	Yes	Affirmed	Affirmed
58. Le	Yes	N/A	Affirmed	N/A
Cumulative Totals:	4 – Yes 1 – No	3 – Yes 1 – No		
Contestant's Success Rate:	80%	75%		

TABLE I

WILLS EXECUTED SHORTLY BEFORE DEATH
CONTESTANT'S RESULTS

Case	TRIAL COURT Lack of Capacity	TRIAL COURT Undue Influence	APPELLATE COURT Lack of Capacity	APPELLATE COURT Undue Influence
5. Blakes	Yes	Yes	Affirmed	Did not rule
7. Horton	No (JNOV)	Yes	Affirmed	Reversed
8. Cobb	N/A	No (JNOV)	N/A	Reversed
13. Holcomb	N/A	Yes	N/A	Affirmed
19. Green	DV - No	No (JNOV)	Affirmed	Reversed
20. Croucher	Yes	N/A	Affirmed (Tx.Sup.Ct)	N/A
30. Reynolds	No	No	Affirmed	Affirmed
33. Click	DV - No	DV - No	Affirmed	Affirmed
44. Kenney	Yes	N/A	Affirmed	N/A
53. Mittelsted	N/A	Yes	N/A	Affirmed
54. Scott	Yes	Yes	Affirmed	Affirmed

55. Yost	N/A	Yes	N/A	Affirmed
58. Le	Yes	N/A	Affirmed	N/A
62. Russey	N/A	Yes	N/A	Affirmed
Cumulative Totals:	5 – Yes 4 – No	7 – Yes 4 – No		
Contestant's Success Rate:	56%	64%		

TABLE J

UNRELATED BENEFICIARIES
CONTESTANT'S RESULTS

	TRIAL COURT		APPELLATE COURT	
Case	Lack of Capacity	Undue Influence	Lack of Capacity	Undue Influence
8. Cobb	N/A	No (JNOV)	N/A	Reversed
10. Tieken	Yes	Yes	N/A	Reversed
17. Jones	Yes	N/A	Affirmed	N/A
26. Wright	Yes	Yes	Reversed	Reversed
31. Duke	No	N/A	Affirmed	N/A
48. Johnson	Yes	Yes	Affirmed	Affirmed
51. Soto	Yes	N/A	Affirmed	N/A
54. Scott	Yes	Yes	Affirmed	Affirmed
58. Le	Yes	N/A	Affirmed	N/A
62. Russey	N/A	Yes	N/A	Affirmed
Cumulative Totals:	7 – Yes 1 – No	5 – Yes 1 – No		
Contestant's Success Rate:	88%	83%		

TABLE K
PHYSICAL ILLNESS
CONTESTANT'S RESULTS

ARTERIOSCLEROSIS

	LACK OF CAPACITY	UNDUE INFLUENCE
4. Robinson	Yes	Yes
10. Tieken	Yes	Yes
21. Wilkinson	No	No
24. Sebesta	Yes	N/A
27. Williford	Yes	N/A
29. Hamill	No	N/A
48. Johnson	Yes	Yes
52. Burk	No	No
53. Mittelsted	Yes	Yes
60. Neal	No	No
Cumulative Totals:	6 – Yes 4 – No	4 – Yes 3 – No
Contestant's Success Rate:	60%	57%

CANCER

	LACK OF CAPACITY	UNDUE INFLUENCE
5. Blakes	Yes	Yes
7. Horton (Brain)	No	Yes
8. Cobb (Lung)	N/A	No
18. Gaines (Brain)	No	Yes
19. Green (Lung)	No	No
38. Long	No	No
40. Neville (Brain)	Yes	N/A
41. Longaker (Uterine)	N/A	No
43. Watson	N/A	Yes
44. Kenney	Yes	N/A

51. Soto	Yes	N/A
54. Scott	Yes	Yes
58. Le	Yes	N/A
Cumulative Totals:	6 – Yes 4 – No	5 – Yes 4 – No
Contestant's Success Rate:	60%	56%

STROKES

	LACK OF CAPACITY	UNDUE INFLUENCE
23. Wilson	Yes	Yes
25. Hensarling	Yes	Yes
30. Reynolds	No	No
39. Schlinder	Yes	N/A
53. Mittelsted	Yes	Yes
56. Tex. Cap. Bank	Yes	Yes
60. Neal	No	No
63. Kam	N/A	Yes
64. Parrimore	No	N/A
Cumulative Totals:	5 – Yes 3 – No	5 – Yes 2 – No
Contestant's Success Rate:	62%	71%

DEMENTIA

	LACK OF CAPACITY	UNDUE INFLUENCE
6. Bracewell	Yes	N/A
17. Jones	Yes	N/A
39. Schlinder	Yes	N/A
56. Tex. Cap. Bank	Yes	Yes
60. Neal	No	No
Cumulative Totals:	4 – Yes 1 – No	1 – Yes 1 – No
Contestant's Success Rate:	80%	50%

COMBINED AVERAGE SUCCESS RATE: **65%** **58%**

TABLE L

SUMMARY OF CONTESTANT'S SUCCESS RATES

LACK OF TESTAMENTARY CAPACITY

Unrelated Beneficiary -	88%
Hospital Wills -	80%
Illness -	65%
Treating Physician/Contestant -	63%
Medication -	62%
Treating Physician/Proponent -	60%
Shortly Before Death -	56%
Drafting Attorney -	50%
Advanced Age -	45%

UNDUE INFLUENCE

Unrelated Beneficiary -	83%
Treating Physician/Contestant -	75%
Hospital Wills -	75%
Drafting Attorney -	73%
Treating Physician/Proponent -	66%
Shortly Before Death -	64%
Illness -	58%
Advanced Age -	55%
Medication -	40%