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MEMBER



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## UNDUE INFLUENCE AND WILLS

The Supreme Court of Georgia recently decided a case in which it found that a will was product of undue influence and fraud, and that the testator lacked testamentary capacity.

In *McDaniel v. McDaniel* (S10A1497, March 7, 2011), the testator, Mr. McDaniel, was married to his wife, Mrs. McDaniel, for over 60 years, until her death in 2006 at age 87. Mr. McDaniel died in 2009 at age 92. The McDaniels had two sons, Charles and Jerry, both of whom are married. In 2002 Mr. and Mrs. McDaniel executed new wills that left everything to the surviving spouse, and upon the death of the surviving spouse, then to the two sons equally. Mrs. McDaniel had Alzheimer's related dementia and other ailments, and in January 2006, Charles moved in with his parents. Jerry and his wife stayed with Mr. and Mrs. McDaniel on some weekends to provide Charles with some relief. During 2006, Mr. and Mrs. McDaniel added Charles's name to all of their bank accounts so he could help manage their finances. Mrs. McDaniel continued to exhibit common signs of dementia, such as confusion, and toward the end of 2006, Mr. McDaniel also exhibited signs of confusion and a decline in his mental status. His confusion worsened after Mrs. McDaniel's death.

After Mrs. McDaniel's death, Jerry and his wife encouraged Charles and his wife to take a vacation in Florida. Jerry and his wife said they would stay with Mr. McDaniel to keep him company. Before Charles left for Florida, he took his father to several banks to remove Mrs. McDaniel's name from the joint accounts, and then drove him to Mr. McDaniel's attorney's office to ask about the process for probating Mrs. McDaniel's will. They scheduled a meeting for Mr. McDaniel, Charles, Jerry and their wives with the attorney prior to Charles's departure to Florida. Charles then went to Regions Bank and closed an account that he had held jointly with Mrs. McDaniel, and he put the funds in an account in his own name. He planned to use the funds for Mr. and Mrs. McDaniel's funerals, pursuant to Mrs. McDaniel's wishes. At

the family meeting with the attorney, the attorney said that Mrs. McDaniel's name should not have been removed from the joint accounts. Jerry suggested that Mr. McDaniel's name be removed from the accounts and his own name added. Charles said that things should be left as they were, and the issue was not resolved at the meeting. Charles and his wife left for Florida, and Jerry and his wife stayed with Mr. McDaniel.

Jerry and his wife told Mr. McDaniel that Charles had stolen approximately \$600,000 from Mr. McDaniel by having Charles's name on his father's accounts. They convinced Mr. McDaniel of this, and that Charles and his wife had moved to Florida with Mr. McDaniel's money and were not coming back. Mr. McDaniel, confused and distraught, repeated these claims to others, as did Jerry. Jerry told his father that he would help him fix everything, he drove Mr. McDaniel to the banks, where Mr. McDaniel removed Charles's name from all of the accounts. Jerry called the attorney's office and scheduled a meeting for Mr. McDaniel to change his will. Jerry also changed the locks on Mr. McDaniel's house.

Jerry asked the attorney to draw up a new will for Mr. McDaniel leaving everything to Jerry and disinheriting Charles. The attorney refused and talked with Mr. McDaniel privately. As a result of that conversation the attorney drafted a new will leaving 20% to Mr. McDaniel's grandchildren and the rest to Jerry. Mr. McDaniel executed the new will along with a durable power of attorney. Charles returned from Florida a few days later, but Jerry refused to talk with him and told him to speak with the attorney. When Charles met with the attorney, the attorney gave him a letter saying that Mr. McDaniel did not want Charles to come on his property again until after the probate of Mrs. McDaniel's estate was complete. Charles returned the \$32,000 that he had moved into the new account in his name, as well as some personal property he had been holding for safekeeping. Charles was not allowed to visit his father for the next six months, and when he did visit, his father was glad to see him. Charles did not discuss the changes to the will with his father. In the meantime, Jerry started using his father's power of attorney to convert the father's property into the names of Jerry and his father jointly, giving himself survivorship rights on mutual funds, real estate, bank accounts, and certificates of deposit. Jerry and his wife moved Mr. McDaniel into the basement of their new home in December 2007, where Mr. McDaniel lived until his death in June of 2009. Charles was not allowed to visit his father without making an appointment, and Jerry told Charles that he was recording the visits.

After Mr. McDaniel's death, Jerry filed a petition to probate the will, and Charles filed a caveat. A jury found that the 2007 will was not valid and should be denied probate on the grounds of undue influence and fraud. The probate court entered judgment on the verdict and Jerry appealed. Charles filed a defensive cross-appeal.

On appeal, the Court reviewed the jury's finding of undue influence. Under Georgia law, "Absent legal error on the part of the probate court, a jury's finding of undue influence will be affirmed 'if there is any evidence to support the trier of fact's determination.'" The Court found that the jury was "clearly authorized to find that the 2007 will was the product of undue influence." The Court discussed Jerry and his wife's encouraging Charles and his wife to vacation in Florida, poisoning Mr. McDaniel's mind

against Charles by falsely telling him that Charles had stolen all of his money, that Mr. McDaniel was broke, and that Charles had abandoned him and would not return. The Court also noted that Jerry and his wife also participated in the preparation of the 2007 will. Jerry and his wife also made sure that Charles was never left alone with his father again. The Court also discussed the fact that the 2007 will radically changed the distribution of Mr. McDaniel's estate to favor Jerry and disinherit Charles. The Court said, "We therefore conclude that the evidence regarding 'the circumstances and surroundings of the testator and his associations' authorized the jury's finding that the 2007 will was the product of undue influence."

The Court also held that there was sufficient evidence to support the jury's finding that the will was procured by fraud. The Court said that in order to set aside a will on the basis of fraud, the fraud must be such that it operates upon the testator, and that it is "a procurement of the execution of the will by misrepresentations made to him. It exists only when it is shown that the testator relied on such a representation and was deceived." The Court cited the evidence previously discussed regarding Charles's trip to Florida and Jerry's poisoning their father's mind against Charles by false statements, which their father relied upon when he had his new will drafted. The Court concluded that the evidence was sufficient to support the jury's finding that the 2007 will was "procured through 'misrepresentation' and 'fraudulent practices upon the testator's fears, affections, or sympathies.'" The Court thus held that the evidence supports the jury's findings of undue influence and fraud in denying probate of the 2007 will.

The attorneys at Oast & Hook can assist clients with their estate, financial, insurance, long-term care, veterans' benefits and special needs planning issues.

### **Ask Allie**

O&H: Allie, we've heard about a special sanctuary for sight-impaired cats. Please tell us about it.

Allie: Sure! Alana Miller opened The Blind Cat Rescue and Sanctuary near Fayetteville, North Carolina. It is the only sanctuary dedicated to sight-impaired felines in the country. There are 45 cats living in the sanctuary, and they come from all over the country. Ms. Miller tries to find permanent homes for the cats, but she prefers that the potential adopters live within easy reach of the sanctuary. Ms. Miller says this is because adoptions can fall through, especially for special needs cats, and she wants the assurance that she is just a phone call away. In addition to helping these special cats live happy lives, Ms. Miller also helps educate the public about how quickly a cat can lose its sight as a result of an eye infection or conditions such as diabetes, high blood pressure, and hyperthyroidism. For more information, please visit the organization's website at [www.blindcatrescue.com](http://www.blindcatrescue.com). Ms. Miller is a special friend to cats, that's for sure! Time to go and play. See you next week!

### **Announcement**

Oast & Hook is proud to announce that Oast & Hook attorney Stephen Taylor recently passed the North Carolina Bar Exam.

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