

Introduction¹

A brilliant and accomplished man suffers injuries in an accident. He is being cared for by a woman who is a former nurse. This woman worships, adores and admires him. She attends to all his needs. While he lacks mobility and is unable to attend to even his most basic needs (such as food preparation, toileting, and transfers) and he requires significant assistance, his mind is crisp and clear. His sense of humor remains intact. His ability to formulate a plan of action and engage in conduct with the expressed goal of implementing it is evident. Anyone observing him would have no doubt that he has his wits about him and is fully competent. He suffers no cognitive limitations or impairments. His female “help mate,” at times, reminds him that he better hope that nothing ever happens to her (and anyone looking at his face knows that he believes her when she says it).

It is obvious that he has full knowledge of just how isolated and dependent he truly is. She coos such things to him as “[s]ush, darling, trust me, it’s for the best, G-d I love you.” She tells him “[y]ou’ve got a lot of recovering to do. There’s nothing to worry about. You’ll be just fine.” She tells him “I’m your number one fan” and how brilliant he is. She assures him that she has contacted the appropriate healthcare providers and obtained the best medical advice possible. She makes special food just for him. She says things like: “you poor dear thing”; “let me help you”; “comfy?”; “it breaks my heart to see you like this”; and, “I have faith in you my darling.” She knows everything about him. Her admiration of him is long standing and apparent. One might even say her concern over him is obsessive. She keeps a picture of him in a prominent location in her home. She intones how she has saved his life and is working to

¹ This introduction is adapted from an article previously published by BNA: Bloomberg BNA, Sandra D. Glazier, Esq., Thomas M. Dixon, Esq., & Thomas F. Sweeney, Esq., *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It . . . And Litigating It*, TAX MANAGEMENT MEMORANDUM (2015).

nurse him back to health. There are, at times, interchanges of dialogue between them, which contain words of respect, caring and concern.

Is he competent? Absolutely. There is no doubt that he knows and understands his situation. One could easily surmise that he knows the objects of his bounty, extent of his estate and is of sound mind. Were he to do so, there would be no question that he has sufficient capacity to execute an estate-planning instrument.

However, despite these apparently loving and respectful interchanges of dialogue, those privy to the backstory are fully cognizant that this relationship is one based upon fear, vulnerability and dependency. But without access to, or the utilization of, an independent individual who might meet with the man in private and instill confidence sufficient for him to trust that what he communicates will not be disclosed back to the woman, an outsider might only see a loving caring woman who attends to the man's every need. To the outside world the impact of the man's vulnerabilities, dependency and fear, as well as the true story behind the situation, might not be apparent.

Does this scenario sound familiar? It comes from the 1990 movie, *Misery*, based upon the novel by Stephen King. As a viewer, one is privy to the nuances of the relationship and able to make independent observations. However, in the typical undue influence case, such nuances are conducted outside the purview of others – in privacy and in secret. If the character, Paul Sheldon, were to die, discovery of the true circumstances of the relationship might be lost. To the viewer, there is no doubt that Paul Sheldon's burning of the sole copy of his newest manuscript and writing of a new one that suits the demands of his caregiver, Annie, are the direct result of undue influence. We see it. We understand it. We know it to be the undeniable truth because through the director's eyes we have a front row seat. But if you did not see it, had not experienced it, if it had been more subtle and nuanced, and if Paul Sheldon had died and never escaped Annie's clutches, how would you be able to identify it?

Turning from fiction to reality, and perhaps further down the capacity spectrum, a different example can be found in the saga of musician Brian Wilson of the Beach Boys fame, recently recounted in the movie *Love & Mercy* (2014). Imagine Brian Wilson, a youthful musical genius in the 1960s, writing hit song after hit song to lead his band the Beach Boys to

fame and fortune. Now, imagine Wilson 20 years later, a broken, vulnerable man, damaged by drugs, alcohol, and recurring mental illnesses, living as a recluse under the control of a therapist/guardian who abuses that fiduciary relationship for personal gain.

What is significant about this real-life story is the number of indicia (“red flags”) that point to undue influence present in this story that are common to many other situations of undue influence, including:

- A vulnerable adult (an elderly, infirmed, or disabled person)
- Undue influence effected as a process over time, rather than as a single event
- Family and friends believing that addressing the victim’s issues may be a lost cause
- Perpetrator’s complete control of the victim’s life under the guise of 24-hour psychiatric therapy
- Use of medication to deny the victim the ability to take independent action
- Isolation of the victim away from family and friends
- Isolation of the victim from historical or perhaps other professional advisors
- Isolation of the victim from the world at large
- Restriction of the victim’s communication via telephone, mail, or other means
- Use of chaperones to routinely accompany the victim when not in isolation
- Perpetrator’s use of the victim’s home as his own
- Perpetrator making himself a business partner of the victim
- Perpetrator making the victim (and others) question the victim’s own abilities and thereby enhancing dependency
- Transfer of substantial funds to the perpetrator, allegedly as reasonable compensation
- Modification of the victim’s will to make the perpetrator the primary beneficiary
- Abuse of the fiduciary relationship of the therapist and patient for personal benefit
- Abuse of the relationship of guardian and ward for personal benefit

While the list of suspicious circumstances in the Brian Wilson case was long (and ultimately exposed during his lifetime, via a chance conversation at an automobile dealership visited by Brian and his chaperones to purchase a new car for Brian, and which led to Brian’s escape from this abusive relationship),

the same is not necessarily apparent or existent in other situations where undue influence is present (and perhaps differently nuanced or more subtle).

In Brian's case, while sitting in the front seat of a new car as the saleswoman explained the car's features outside the hearing of chaperones, Brian was able to write on her business card that he was frightened, lonely, and afraid. This eventually led to his family learning about his abusive guardian; they were able to take legal action to end it. In Brian Wilson's situation, he was able to escape the abusive control that was exerted by his guardian/therapist, and the therapist was removed as guardian and lost his license. Brian returned to his musical work, and several years later, he married the saleswoman. In many instances, the victim does not escape, and it is up to the victim's family to address these issues after the victim's death.

The question posed by this book is not the entertainment value of the aforementioned situations but rather, whether in addressing a Paul Shelton, a Brian Wilson, or a situation somewhere else along a spectrum of behaviors, why is understanding this process so important to estate planners?