

UNDUE INFLUENCE UNDER OREGON LAW

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I. INTRODUCTION

Undue influence is a commonly referenced concept in regard to financial or other abuse of the elderly and incapacitated. It is a difficult concept to fully understand in a legal context. At its most basic definition undue influence is a tool used by a person to wrongfully dictate actions that benefit themselves at the expense of another. The element of wrongfulness of the actor's actions separates undue influence from all other types of influence in human interaction.

All decisions made by a person are influenced by something. Has the loving child who has spent countless hours with an elderly frail parent exercised undue influence to become the sole beneficiary of the parent's estate? When does influence become undue influence? Does the answer depend upon who is the influencer or what is the motive of the influencer?

From a legal prospective the answer is yes, the context in which a decision is made determines whether undue influence has occurred. The legal definition of what constitutes undue influence will be the only approach addressed herein. This by no means is a simple task, but is a far cry easier then trying to define and understand human behavior in a broader overall sense. Similarly, only Oregon Law will be presented. While each state's courts approach these matters with a similar overall analysis, the particulars are somewhat different.

Finally, the language of our legal system uses several different terms to label parties to a transaction based upon the type of transaction. For simplicity, as set forth herein, the term "donor" means any person who transfers property or a property right to another. This would include all transfers whether by a gift, deed, devise in a Will or beneficial interest in a trust. On the other side, the term "donee" means any person receiving property or a property right, regardless of the type of transfer.

II. DEFINING UNDUE INFLUENCE UNDER OREGON LAW

Present day analysis of undue influence in Oregon law begins with the case of *In re Reddaway's Estate*, 214 Or. 410, 418, 329 P.2d 886 (1958). In *Reddaway* the Oregon Supreme Court defined the approach that the Oregon courts would take in reviewing a matter alleging undue influence:

“In *Reddaway*, the Supreme Court noted that there are two distinct approaches to analyzing undue influence. In one approach, the basic question is whether the testator was induced to execute an instrument that, in reality, did not express the testator's wishes but the wishes of another. The other approach, and the one the court ultimately adopted, focuses not on the testator's freedom of will but on the nature of the influencer's conduct in persuading the testator to act as he does. Under that approach, undue influence denotes something wrong, according to the standards of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal. Under this ‘moral standard’ approach, the consequences of upholding the influenced gift are important. It would be expected that there would be less concern with the influencer's motive in a contest between him and the state claiming by escheat than there would be in a contest between him and the donor's deserving spouse.”

Ramsey v. Taylor, 166 Or. App. 241, 261, 999 P.2d 1178 (2000) (internal citations and quotations marks omitted).

At its broadest sense undue influence relates to whether a beneficiary of a transfer of property or property right, by his or her conduct, gained an unfair advantage by means that reasonable persons would regard as improper. *Van Marter v. Van Marter*, 130 Or. App. 500, 503-04, 882 P.2d 134 (1994). Underlying the theory of undue influence is the principal that “the law will not permit improper influences to control the disposition of a person's property.” *In re Reddaway's Estate*, 214 Or. 410, 418, 329 P.2d 886 (1958).

A court is not asked to look at the mindset of the donor, but instead the lack of conscience of the donee in persuading the donor to act as they did. *Sangster v. Dillard*, 144 Or. App. 210, 216, 925 P.2d 929 (1996), *mod* 146 Or. App. 105, 931 P.2d 815 (1997).

Undue influence is not duress or lack of consent on the part of the donor. The court is not concerned about whether the donor wanted to transfer the property, the question is what actions did the donee take, or fail to take, in order to accomplish the transfer of property to the donee's benefit. The focus in undue influence cases should be on "the unfairness of the advantage which is reaped as a result of wrongful conduct. * * * Equity acts because there is a want of conscience on the part of the donee, not want of consent on the part of the donor." *Penn v. Barrett*, 273 Or. 471, 475, 541 P.2d 1282 (1975).

A robbery at gunpoint on the street would never be viewed as an act of free will on the part of the victim. Yet the victim probably reached into their pocket or purse and handed over his or her money. In this instance the improper act on the part of the robber is apparent and no further inquiry is necessary. Take away the gun and add a veiled threat by the robber, and we still do not have a problem saying improper action on behalf of the robber. Substitute a meek panhandler for the robber and any transfer to the panhandler would generally not be seen as improper. Now turn the panhandler

into a fundraiser for a respected charity using sympathy as a hook for gathering funds and very few would see any resulting transfer as improper.

Finally, substitute a trusted family member for the fundraiser. This family member constantly tells a frail elder that the family member is the only one that will care for the elder and that he needs money in order to do so. Is this improper action on the part of the family member? Is this undue influence? The answer will depend on the circumstances surrounding the relationship of the actors and the actions of the donee.

The above examples point out that undue influence is just a method or tool of a person to facilitate the wrongful transfer of property. There is no crime under Oregon law called "Undue Influence". There is no civil lawsuit called an "Undue Influence Action". The bad act is the wrongful transfer of property; the tool or method used to facilitate the transfer is the undue influence. The ultimate question is not whether undue influence occurred, it is whether a wrongful transfer of property occurred. The answer to this question will hinge upon a moral determination of the tactics used by a donee to cause a transfer of property to occur.

The above examples also show the importance of the relationship between the donor and donee involved in a transfer of property. It is the nature of this relationship that will be a major focus of whether the transfer between the parties was improper. This is especially true in regard to the ability to prove the existence of undue influence as a basis for the wrongful transfer of property. Most wrongful transfers are apparent. The robbery, extortion, theft, or the con based upon fraud and deception are apparent when they occur or soon thereafter. Cases involving undue influence are rarely apparent while the wrongful conduct is occurring due to the nature of the relationship of the parties and the circumstances under which the wrongful transfers are discovered.

This also emphasizes one of the biggest problems associated with the investigation and prosecution of a legal case alleging undue influence as a tool for the wrongful transfer of property. The problem consists of the fact that, in every transfer induced by undue influence, the transfer or creation of a right to property has already occurred and the actions necessary to facilitate the transfer were actually performed by the donor. That is to say, the deed was signed, the Will was executed or the donor wrote the checks. Parties including adverse witnesses and certainly the donee and their attorney will steadfastly deny any wrongdoing on the simple fact that the donor "gave" the property away. This is why Oregon law focuses on the actions of the donee rather than the consent of the donor. Again, no one would argue that the victim "gave" the robber his wallet and therefore the robber did nothing wrong.

This emphasis on the wrongfulness of the donee's conduct is also why this area of law is dominated by cases involving persons involved in a confidential or fiduciary relationship. The actions of a person who owes no duty to another party and gains an economic advantage over that other party in a typical transaction is not generally seen as performing a legal wrong in our society. However, when a person who stands in a position of trust to another benefits from that relationship, the law is more apt to

presume an element of wrongfulness and will require the donee to establish the fairness of the transaction.

If the donee can establish the ultimate fairness of the gift then there was no wrongful transfer. Of course the donee will attempt to do this by continually trying to show evidence of the voluntary donative intent of the donor and the consent to the transfer to the donee. See *Bessett v. Hunson*, 179 Or. App. 69, 74, 39 P.3d 220 (2002)(elements of a valid gift).

Therefore, in the typical case alleging undue influence you will be faced with a strongly contested and emotional argument. There will be one party, the person claiming undue influence, taking the position that the mindset of the donor is not a factor in the case because the focus should be on the donee's actions. However, the donee will argue that the mindset of the donor is the only thing that does matter because the donor gave away the property fair and square.

All of this leads to the conclusion that the definition of undue influence is a matter of interpretation of the circumstances in which the parties operated. Undue influence also has the added complication that to define it, the factfinder must make a judgement of the wrongfulness of a party's conduct. In Oregon, that factfinder will usually be a judge. In some cases this might be easy, in the bulk of the cases alleging undue influence it will be much harder. In a legal matter, this comes down to what the parties are required to prove under the rules of law that they are operating under.

The Oregon Court of Appeals has summarized the relevant law in this area as follows:

“Undue influence has been defined as unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare. When undue influence is exerted by one party to a contract on the other party and that influence induces assent, the contract is voidable by the victim of the influence. Moreover, when there is a confidential relationship between the parties, only slight evidence is necessary to establish undue influence. Finally, when there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. That inference may be sufficient to establish undue influence.”

Smith v. Ellison, 171 Or. App. 289, 293, 15 P.3d 67 (2000)(internal citations and quotation marks omitted).

The element of dominance by the undue influencer over the donor is discussed with varying emphasis in different cases. Some cases refer to this dominance as a separate distinct element required to be proven by the person claiming undue influence. *Sangster v. Dillard*, 144 Or. App. 210, 216, 925 P.2d 929 (1996); *In The Matter Of The Estate Of Sommers*, 182 Or. App. 121, 126, 47 P.3d 911 (2002). Other cases cite this element as a factor in determining whether a confidential relationship existed between

the parties. *Kugel v. Pletz*, 22 Or. App. 248, 252-3, 538 P.2d 962 (1975); *Doneen v. Craven*, 204 Or. 512, 522, 284 P.2d 758 (1955). And still others tend to discount the importance of evidence of this factor altogether. e.g. *Ramsey v. Taylor*, 166 Or. App. 241, 262-3, 999 P.2d 1178 (2000).

Overall a person trying to undo a transfer based upon undue influence will have to show some form of a relationship existing between the donor and donee. This relationship can be one of dominance or one of a fiduciary nature. This relationship is one where the donor should have some expectation that the donee will not act against the donor's welfare. If a confidential relationship between the parties exists, only slight evidence is necessary to show undue influence. If there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. This inference alone is enough to establish a wrongful transfer induced by undue influence.

With this framework in mind, the investigation of a case involving allegations of undue influence will involve inquiry into the nature of the relationship of the parties and the circumstances surrounding any transactions. This analysis will include determining the existence of a confidential or fiduciary relationship between the parties and the suspicious nature of any circumstances surrounding the transactions or transfers in question. Only by reviewing these factors can a determination of the wrongful use of undue influence be made.

III. EVIDENCE OF THE USE OF UNDUE INFLUENCE

A. Direct Evidence

Direct evidence of undue influence is rare. *In re Estate of Urich*, 194 Or. 429, 445, 242 P.2d 204 (1952). The nature of the conduct generally involves isolation of the victim and secrecy on the part of the perpetrator. The caregiver that now owns the elderly person's residence is not likely to jump up in the courtroom and confess that he acted wrongfully in convincing the elder person to give it to him.

However, direct evidence does exist and it can be the most powerful evidence produced. Testimony from other family members, caregivers, friends or professionals can show the nature of the relationship between the parties and the involvement of the donee in the transfers or estate plan. Statements of the donor prior to the transfer showing a different donative intent can be used to show a change in the donor's state of mind. Telephone records and care facility logs can show length and frequency of contacts. Records from banks, investment companies, accountants and lawyers will often show the level of involvement of a party in the affairs of the victim. Medical records can show the donor's dependence and susceptibility to influence. This direct evidence is the most difficult for the wrongful beneficiary to explain away.

Due to the nature of cases involving undue influence the search for direct evidence can be difficult. The bulk of the cases alleging undue influence come to light after the victim

is either deceased or incapacitated to the point where they cannot effectively advocate for themselves.¹ The fruits of undue influence are more often than not discovered long after the fact. For example when the testamentary plan of a decedent was changed to leave everything to a neighbor or the conservator discovers previous transfers to one child to the exclusion of the other children of the protected person. The victim is or can be incapable of assisting anyone looking into the transfers and the donee is not going to be stepping forward to admit the wrongfulness of their conduct. In this context there typically is little in the way of direct evidence to show that the transfers were improper.

B. Presumptions and Inferences

This lack of direct evidence of undue influence is also the basis for long held precedents in Oregon law in regard to transfers of assets from donors to donees that occupy confidential or fiduciary relationships. The law imposes a duty upon such donees when certain factual circumstances are met, to rebut an inference of undue influence. This is because of the ability of one who stands in a position of trust to abuse such trust. Allegations of undue influence in cases involving persons in a confidential or fiduciary relationship set forth a common sense rule of law. If a person allegedly acting on behalf of another ends up benefiting himself or herself during the relationship, they must be able to show the absolute fairness of such transactions.

“Ordinarily, the burden of proving undue influence rests upon the party alleging it. However, where a fiduciary relationship exists between donor and donee, there is a presumption of undue influence and the donee is required to produce evidence sufficient to establish that the gift was the free and voluntary act of the donor and that the transaction was fair and equitable. * * * It is not the existence of the confidential relationship alone that constitutes undue influence, but it is the wrongful use thereof which invalidates the conveyance. * * * A gift between persons occupying confidential relations toward each other is, if its validity is attacked, always jealously scrutinized by a court of equity, and unless found to have been made freely, voluntarily, and with a full understanding of the facts, will be invalidated. The existence of confidential or fiduciary relations imposes upon the recipient of a gift the onus of establishing its absolute fairness * * *”

Evans et al. v. Anderson, 186 Or. 443, 471, 207 P.2d 165 (1949) (internal citations and quotation marks omitted).

This is not to say that undue influence can only occur in the context of a confidential or fiduciary relationship. As stated above, however, it is in such cases where the wrongfulness of the alleged conduct stands out. In addition, if a confidential or fiduciary relationship can be shown between the parties, a party alleging a wrongful transfer by means of undue influence receives the benefit of Oregon case law. This benefit

¹ Transfers of lifetime gifts are subject to the same undue influence analysis as other testamentary transfers. See *O'Brien v. Belsma*, 108 Or. App. 500, 816 P.2d 665 (1991). *Ryan v. Columbo*, 77 Or. App. 71, 712 P.2d 139 (1985).

consists of a placing a duty upon the alleged wrongdoer to rebut an inference or presumption of undue influence if certain conditions are shown.

IV. THE EXISTENCE OF A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The first step in analyzing a potential case involving undue influence is to determine whether the parties occupied a confidential or fiduciary relationship. The relationship can be a classic fiduciary relationship such as trustee or attorney in fact, or it can be a confidential relationship that is a form of a fiduciary relationship. A confidential relationship is primarily defined by some level of trust between the parties. “The Oregon cases have used the term ‘fiduciary relationship’ interchangeably with ‘confidential relation’ though technically they are different. No good reason appears why, in the present context, the same rule with respect to burden of proof should not apply to both.” *Geiger v. Palmer*, 249 Or. 123, 130, 437 P.2d 750, (1968).

A confidential relationship is a fiduciary relationship. *Kugel v. Pletz*, 22 Or. App. 248, 252-3, 538 P.2d 962 (1975). “The [Oregon] Supreme Court has said that: ‘A confidential relationship * * * means a fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other. It may be a moral, social, domestic or merely a personal relationship’.” *Doneen v. Craven, Executor et al*, 204 Or. 512, 522, 284 P.2d 758 (1955).” Quoted in *Kugel v. Pletz*, 22 Or. App. 248, 252-3, 538 P.2d 962 (1975).

Many persons accused of undue influence defend their actions by claiming that they were not a superior or dominant influence in the donor’s life. However, “[d]ominance does not necessarily require proof of an authoritative, controlling person bullying or directing the actions of a subservient one. It may exist more subtly such as by suggestion or persuasion or by fostering a sense of need and dependence.” *Sangster v. Dillard*, 144 Or. App. 210, 216, 925 P.2d 929 (1996) (internal citations and quotations omitted).

“We have found dominance where the testatrix is isolated from the outside world and relies almost exclusively on the beneficiary to meet her daily needs. *Carlton v. Wolf*, 21 Or. App. 476, 477, 483, 535 P.2d 119 (1975) (beneficiary routinely bathed and helped into bed elderly testatrix, who lived alone, had broken hip and suffered from variety of health problems); see also *Wismer v. U.S. National Bank*, 112 Or. App. 650, 651 and n 2, 829 P.2d 1052 (1992) (beneficiary lived alone with testator, provided transportation and did chores, yard work and cooking); *In re Estate of Elise Rosenberg*, 196 Or. 219, 232, 246 P.2d 858 (1952) (beneficiary tended to all personal needs, took care of correspondence and was sole companion to ill, bedridden testatrix).”

Id. at 216-17.

"A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interests in mind." *Knight v. Woolley Logging Co.*, 278 Or. 691, 696, 565 P.2d 748 (1977) (citations and internal quotation marks omitted). A fiduciary duty exists when there is a relationship of special confidence, in which one party to the relationship is bound to act in good faith and with due regard to the interests of the other. *Starkweather v. Shaffer*, 262 Or. 198, 205, 497 P.2d 358 (1972). Whether a confidential relationship exists in a given case is a question of fact. *Smith V. Ellison*, 171 Or. App. 289, 295, 15 P.3d 67 (2000). Circumstantial evidence is all that is necessary to show the existence of a confidential relationship. *Ramsey v. Taylor*, 166 Or. App. 241, 263, 999 P.2d 1178 (2000).

The nature of the relationship will determine the existence of a confidential relationship. Family members, including spouses, typically share a confidential relationship, but the existence of the confidential relationship will not be presumed due solely to the family relationship. See *McKee v. Stoddard*, 98 Or. App. 514, 780 P.2d 736 (1989).

Evidence showing trust and confidence will determine the nature of the relationship. Entrusting another with access to bank accounts has been cited by Oregon courts as significant evidence of a confidential relationship. *Smith v. Ellison*, 171 Or. App. 289, 295, 15 P.3d 67 (2000) ("Plaintiff's decision to share a bank account with defendant indicates that she reposed trust and confidence in defendant."); *Albright v. Medoff*, 54 Or. App. 143, 145, 634 P.2d 479 (1981) (evidence that testator added beneficiary as authorized signatory to checking account was evidence of confidential relationship); *Ramsey v. Taylor*, 166 Or. App. 241, 263, 999 P.2d 1178 (2000) (donee handling finances prior to testator's death shows confidential relationship). Evidence of the donee's free access to the donor's residence and privacy evidence similar trust, as well as caregiving services and access to health care information.

When there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. *Knutsen v. Krippendorf*, 124 Or. App. 299, 308, 862 P.2d 509 (1993), *rev den* 318 Or. 381 (1994). That inference alone may be sufficient to establish undue influence. *Rea v. Paulson*, 131 Or. App. 743, 747, 887 P.2d 355 (1994). Once this inference is established the donee bears the burden of producing evidence negating that inference. *McNeely v. Hiatt*, 138 Or. App. 434, 440-41, 909 P.2d 191, *adhered to on recon* 142 Or. App. 522, 920 P.2d 1150 (1996). "If a confidential relationship exists and suspicious circumstances are shown, then the beneficiary must go forward with the proof and present evidence sufficient to overcome the adverse inference." *Ramsey v. Taylor*, 166 Or. App. 24, 262, 999 P.2d 1178 (2000) (internal citations and quotations omitted).

V. SUSPICIOUS CIRCUMSTANCES

When there is a confidential relationship between the donor and the donee, and suspicious circumstances exist, there is a presumption of undue influence, and the donee must prove that the transaction was fair. *Penn v. Barrett*, 273 Or. 471, 541 P.2d

1282 (1975); *In re Reddaway's Estate*, 214 Or. 410, 329 P.2d 886 (1958). The Oregon courts have relied upon this presumption or inference to require a donee in a confidential relationship to rebut such an inference when certain “suspicious circumstances” are shown.

Suspicious circumstances include:² (1) participation by the donee in the procurement of the gift; (2) lack of independent and disinterested advice to the donor; (3) secrecy and haste in the transfer or gift; (4) change in the donor's attitude toward others; (5) change in the donor's plan of disposing of property; (6) an unjust and unnatural gift; and (7) the donor's susceptibility to influence. *In re Reddaway's Estate*, 214 Or. 410, 329 P.2d 886 (1958). *Van Marter v. Van Marter*, 130 Or. App. 500, 504, 882 P.2d 134 (1994). Not all factors need to be present. *Id.*

A. Participation in the Procurement of the Transfer

This factor looks at the involvement of the donee in facilitating the actions necessary to effect the gift. Such circumstances include the donee typing up documents, finding and hiring professionals for the donor, driving the donor to institutions to transfer funds, and contacting institutions to inquire about steps necessary to transfer property. One question that can be raised here is whether the transaction would have occurred had it not been for the donee's actions.

B. Lack of Independent and Disinterested Advice

This is one of the most significant factors on the list. The presence of an informed, independent and disinterested professional acting on behalf of a donor will go a long way to dispel any notion of undue influence. On the flip side, the lack of such advice will weigh heavily against a donee.

Typically the independent advice the courts are looking for will come from an attorney, accountant or other financial advisor. However, if the donee was the one that chose the professional, drove the donor to the appointment, and sat in on the appointment, there can be a finding of no independent advice on the part of the donor. See *Mckee v. Stoddard*, 98 Or. App. 514, 522, 780 P.2d 736 (1989).

C. Secrecy and Haste

² **A Note On Isolation:** Isolation of the donor is typically a factor found in all cases involving undue influence and isolation touches upon all of the suspicious circumstances listed herein. This isolation can be a factor of the donor's personal circumstances or brought upon the donor by actions of the donee. Either way a person with limited contacts with others is a persistent factor in the financial abuse of the elderly. Isolation allows the perpetrator to exclude others and curtail independent advice. Isolation also breeds the emotion of fear in the elderly. These fears can include being left alone and not cared for. Playing to these fears is a hallmark of financial abuse cases. Avoiding the isolation of elderly people and alleviating their fears of not being cared for could be the biggest factors in avoiding financial abuse of the elderly.

Secrecy will almost always be a factor in cases involving undue influence. It is not likely that heirs will just sit by if they are aware that all of mom's assets are being gifted away or the Will has been changed to disinherit someone. In addition, an element of haste is often used to deter reflection on the propriety of the gift or restrict the ability of the donor to seek independent advice. The donor can be told that something bad will happen if the changes or transfers do not occur quickly. The sense of urgency is fostered to help facilitate the transfer or gift.

D. Unexplained Change in Attitude Toward Others

Circumstances showing a drastic change in the attitude towards people who used to be a major part of the donor's life raise suspicions. These people are typically other family members or friends, but can also include professionals such as attorneys or accountants. However, if evidence outside the control of the donee exists to explain the changes in attitude, this factor will be diminished. *Anderson v. Hagedorn*, 171 Or. App. 425, 15 P.3d 582 (2000). If the donee fostered the change in attitude, this factor will weigh against him or her.

E. Unexplained Change in Testamentary Plan

A change in a long held testamentary plan or actions that render the plan ineffectual will weigh against a donee. This holds true even if the estate plan leaving 100% of your estate to your only daughter isn't changed, but the fact that the donee gifted away all of his assets prior to death made such a plan an empty promise.

F. Unnatural or Unjust Gift

Our society has certain expectations of the propriety of who is entitled to receive gifts from another. Gifts outside these notions can raise suspicions. This factor is much more prevalent when a natural heir is excluded to the benefit of someone viewed as not a natural object of the donor's affections or generosity. This factor also allows a judge to determine what is "fair."

G. The Donor's Susceptibility to Influence

A donor's advanced age, declining physical and cognitive status, coupled with a dependence for care, weighs against a donee claiming a donor was acting freely and voluntarily. This is the only factor that looks at the donor's mental state in determining whether undue influence was used by a donee. Another issue that may arise here is the use of emotion to influence the donor. A donee may attempt to use fear, guilt, anger, love, greed or prejudice to control another. A donor's background and circumstances may make such tactics more effective. A court will also consider a donor's capacity under this factor. However, incapacity is not a necessary prerequisite to being susceptible to undue influence. See e.g. *In re Howard*, 304 Or. 193, 743 P.2d 719 (1987).

These seven factors set forth by the courts in Oregon are not an exclusive list. Any suspicious circumstance involving a gift or transfer between such parties should be scrutinized. And no single factor is controlling. The importance of any single set of circumstances has to be reviewed on a case by case basis.

VI. REMEDIES

A lifetime or testamentary gift to a donee secured by undue influence is invalid and will be set aside by a court. Prior to Oregon enacting specific laws regarding elder abuse the remedies were limited to actual economic damages or the setting aside of a Will provision wrongfully induced. There was typically no ability to recover damages for non-economic suffering or for the recovery of conservator or attorney fees generated in prosecuting the action.

This changed with the enactment of a statutory cause of action under Oregon law that can be brought on behalf of an elderly or incapacitated person. ORS 124.100. This is a statutory tort enacted in 1995 to address physical and financial abuse. The statute allows for recovery of economic and non-economic damages in addition to attorney fees and conservator fees incurred as a result of the litigation under this section. ORS 124.110 sets forth the financial abuse that is subject to an action under these provisions. This is a broad provision which states that an action for financial abuse may be brought when a person “wrongfully takes or appropriates” money or property of an elderly or incapacitated person. There is no Oregon case law that defines “wrongfully takes or appropriates.” Clearly, conduct ranging from fiduciary misappropriation to undue influence and fraud would fall under the category of “wrongfully takes or appropriates”.

In addition, an action can be brought under this provision of law against others who permit another to engage in such conduct. ORS 124.100 (4) states that a civil action may be brought against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse. Actual knowledge is not necessary if a reasonable person should have known of the abuse. This provision can be a powerful weapon in recovering damages on behalf of the elderly and incapacitated. Note, however, that certain entities, including banks, are exempt under this law. ORS 124.115.

VII. CONCLUSION

Undue influence in Oregon is a matter of judging the conduct of a person who benefited from a relationship with another. The nature of that relationship and the circumstances surrounding any transaction will determine whether the transaction was wrongful. It is the wrongful actions of the person that benefited from the transaction that the courts are concerned with. If the parties enjoy a confidential or fiduciary relationship, the donee

has a duty not to wrongfully benefit from the relationship. A person dealing with the elderly or incapacitated can take certain simple steps to avoid suspicious circumstances surrounding a transfer or property. Failure to take such steps can lead to a finding of undue influence on the part of the donee in securing such a transfer. A wrongful transfer based upon undue influence can be voided and damages can be awarded on behalf of the donor. Such damages arise from the conduct of the donee in wrongfully acting against the interests of the donor.

The determination of the wrongfulness of the donee's actions will hinge on some form of a moral judgment or a notion of what is fair. Yet one person's calculation of what is appropriate or fair, may not be the same as the next person's. Our legal system is supposed to be the final arbitrator of such disputes. However, due to the nature of such conflicts, these determinations can be extremely difficult and problematic to resolve.

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