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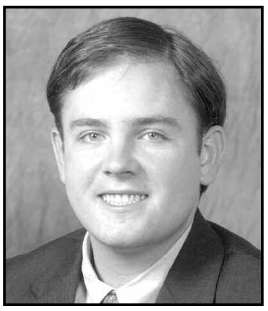
Duress as a Probate Objection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As most trusts and estates practitioners are well aware, lack of due execution, lack of testamentary capacity, undue influence, mistake, and fraud are among the objections that often arise in a contested probate proceeding. However, that list of objections is not exhaustive, as evidenced by New York County Surrogate Kristin Booth Glen's recent decision in *Matter of Rosasco*, which recognized duress as a claim that is separate and distinct from undue influence.[1] This article addresses duress in that context.

One of the primary reasons why duress oftentimes does not arise as a separate objection in a probate contest is that courts, practitioners, and commentators "tend to blur the distinction between duress and undue influence."[2] For evidence of this, one need not look any further than the Pattern Jury Instructions, which "do not even mention duress as a ground, separate from undue influence, for contesting a will."

In the context of a probate contest, undue influence has been described by the Court of Appeals as "moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist."[3] In contrast, duress involves "[a] donative transfer [that] is procured by" a wrongdoer's threat to perform or actual performance of "a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made." The "wrongful act" that is required for duress is one that is "criminal or . . . that the wrongdoer had no right to do."

Rosasco demonstrates that duress and undue influence are separate and distinct concepts, despite the historical tendency to morph them together. In *Rosasco*, the decedent, two of her sisters, and her nephew attended a meeting with an attorney who prepared the decedent's will. The will, which the decedent executed in September 1997 and which was offered for probate after her death a decade later, provided for her estate to be bequeathed to two of the decedent's sisters if they survived her. It further provided that, if the decedent's sisters did not survive her, the nephew would receive the estate.

The nephew's relationship with his sister, the decedent's niece, had deteriorated in 1997 due to the fact that the nephew resented the financial assistance the decedent and her sisters were giving to their niece. The nephew manifested his displeasure with the financial assistance by regularly berating the decedent and his aunts and by striking his sister and pushing her to the floor on one occasion.

Years later, after the decedent died (and her sisters predeceased her), the nephew offered the decedent's will for probate and then moved for summary judgment, *inter alia*, dismissing the duress and undue influence objections filed by four of the decedent's distributees, including the nephew's mother. In opposition to the motion, the objectants proffered the deposition testimony of the nephew's sister, which established that the decedent regretted nominating the nephew to serve as executor under her will, wished she had named her niece as executor, was cognizant of the nephew's past physical violence against his sister, and was afraid the nephew would attack her, if she changed her will.

While Surrogate Glen granted summary judgment dismissing the objectants' undue influence objection, noting that they had failed to come forward with any evidence of undue influence actually being practiced upon the decedent, the Surrogate declined to dismiss the objectants' duress objection. In doing so, Surrogate Glen explained that the decedent's niece's deposition testimony established that the decedent believed that the nephew's past physical violence toward his sister posed a threat of "repeated violence" to the decedent, the "threat induced fear" in the decedent, the nephew would physically harm the decedent and his sister, if the decedent executed a new will favoring her niece and the nephew learned of it, and the decedent's fear prevented her from exercising her free will to benefit her niece. As a result, Surrogate Glen found that a trial was necessary on the issue of duress, even though she dismissed the undue influence objection.

Although oftentimes morphed together, duress and undue influence are separate and distinct concepts. They should be treated as such in the context of a contested probate proceeding, as Surrogate Glen's decision in *Rosasco* demonstrates.

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1 Frank T. Santoro, "Undue Influence or Duress?", *New York Trusts & Estates Litigation Blog*, *available at*: http://www.nyestatelitigationblog.com/2011/04/articles/probate/undue-influence-or-duress/ (last visited on August 31, 2011); *see also Matter of Herman*, 87 Misc.2d 476 (Sur. Ct., New York County 1914).

2 *Matter of Rosasco*, 31 Misc.3d 1214(A) (Sur. Ct., New York County 2011).

3 *Children's Aid Society v Loveridge*, 70 N.Y. 387 (1887).