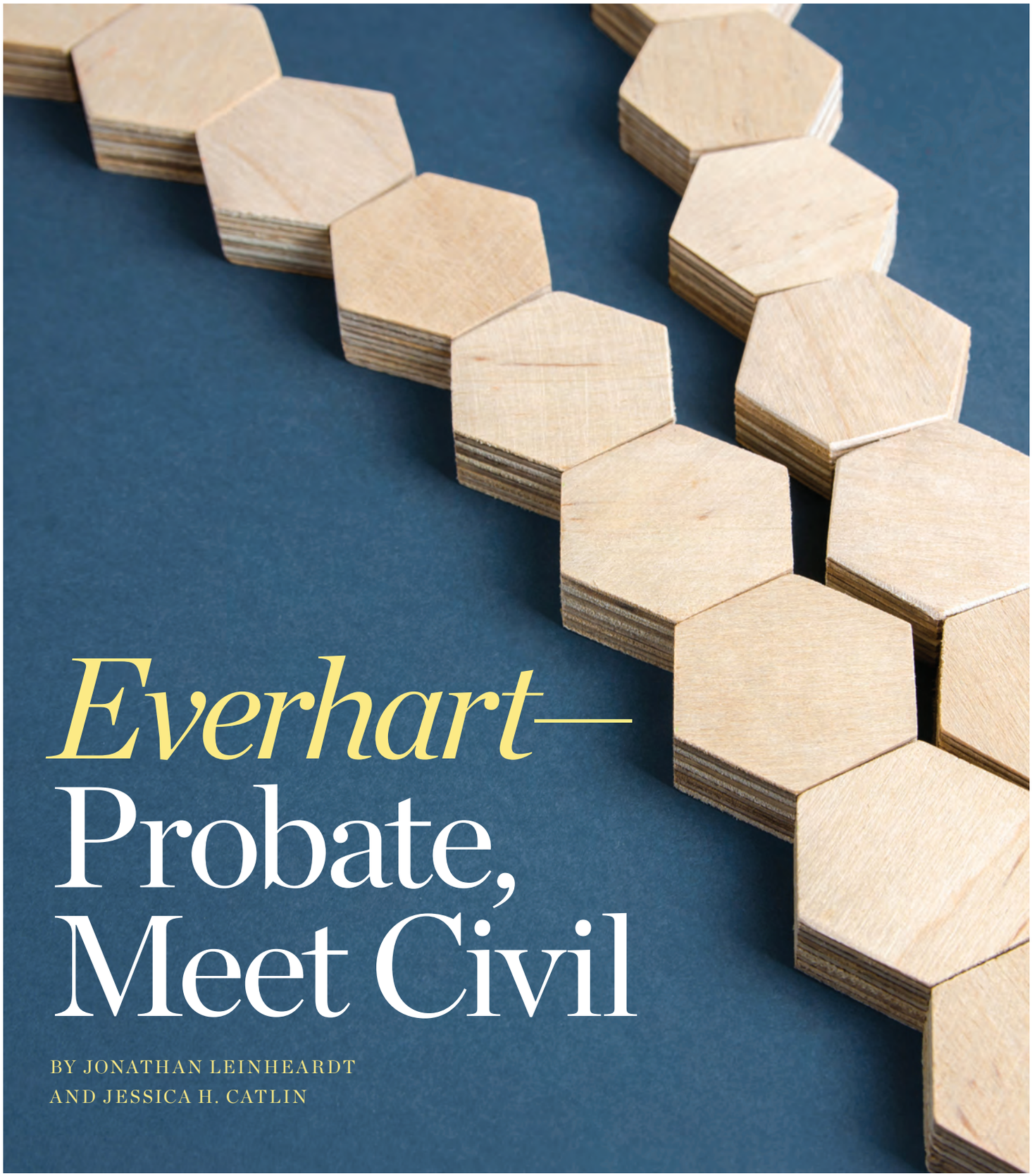

Everhart— Probate, Meet Civil

BY JONATHAN LEINHEARDT
AND JESSICA H. CATLIN

This article discusses how Estate of Everhart *raised the bar for motions to dismiss in probate cases by applying the pleading standard established in* Warne v. Hall.

Since the Colorado Supreme Court adopted the federal "plausibility" pleading standard in *Warne v. Hall*,[1] practitioners have frequently used motions to dismiss for failure to state a claim for early disposal of meritless civil cases under CRCP 12(b)(5). In *Estate of Everhart*,[2] the Colorado Court of appeals applied this plausibility standard—for the first time in a probate case—to affirm dismissal of a probate petition alleging claims of undue influence and lack of testamentary capacity. This ability to quickly dismiss cases may make testamentary challenges much more difficult. This article reviews how Colorado courts have applied the *Warne* standard outside of civil cases, with an in-depth discussion of *Everhart*. It also gives guidance for drafting sufficient pleadings challenging wills or trusts in light of *Everhart*.

Warne v. Hall and Adoption of the Plausibility Standard

In *Warne v. Hall*, the Colorado Supreme Court adopted the federal "plausible on its face" standard established by the US Supreme Court in *Bell Atlantic Corp. v. Twombly*.[3] The "facial plausibility" standard replaced the prior standard under *Conley v. Gibson*,[4] which deemed a complaint sufficient unless it appeared beyond doubt on the face of the complaint that the plaintiff could prove "no set of facts" in support of the claims alleged.[5] After reversing the court of appeals' application of the "no set of facts" standard, the Court determined that the allegations of tortious interference in *Warne* "were insufficient to state a claim because a number of them were conclusory and therefore not at all entitled to an assumption that they were true, and because the remainder insufficiently alleged plausible grounds for relief, largely because they were equally consistent with non-tortious conduct."[6] The Court also decided that other allegations were "equally consistent with non-tortious explanations" for the defendant's conduct.[7] Nonetheless, the Court decided that the plaintiff should be granted leave to amend his complaint based on the new standard.[8]

Colorado's Current Pleading Standard

Following *Warne*, a "pleading"[9] is sufficient in Colorado if it is "plausible on its face."[10] A claim for relief[11] in a pleading is facially plausible when its factual allegations "raise a right to relief above the speculative level,"[12] and allow a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[13]

Nevertheless, as before *Warne*, in evaluating a motion to dismiss under CRCP 12(b)(5), the court accepts a claim's factual allegations as true and views them in the light most favorable to the plaintiff.[14] A plaintiff is not required to present direct evidence or "allege 'specific facts' beyond those necessary to state [a] claim . . . ."[15] However, courts "are not required to accept as true legal conclusions that are couched as factual allegations,"[16] or "bare, conclusory assertions" that are unsupported by factual allegations.[17] Importantly, a plaintiff cannot rely on "'naked assertion[s]' devoid of 'further factual enhancement.'"[18] But allegations "upon information and belief" to support a claim are permissible.[19]

Notwithstanding *Warne*, motions to dismiss for failure to state a claim are still generally viewed with disfavor.[20] Courts will grant a Rule 12(b)(5) motion "only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief."[21]

Appellate courts still review a Rule 12(b)(5) motion to dismiss and apply the same standards as the trial court.[22]

Dispositive Motions in Domestic Relations Post-*Warne*

Two years after *Warne*, in 2018, the court of appeals addressed the plausibility standard outside the civil context in a domestic relations case, *In re Marriage of Runge*.[23] The court held that the *Warne* standard did not apply to ex-wife's CRCP 16.2(e)(10) motion to discover and allocate assets that ex-husband allegedly misrepresented or did not disclose in their divorce proceedings. After reviewing and interpreting the civil rules, the *Runge* panel determined that a "motion is not a pleading."[24]

In 2020, the Colorado Supreme Court confirmed this significant distinction between pleadings and motions in *In re Marriage of Durie*.[25] Noting it was a matter of first impression, the Court held that the plausibility standard in *Warne* does not apply to Rule 16.2(e)(10) motions, reiterating that a motion is not a pleading.[26] Nevertheless, like a pleading, the Court further held that this did not preclude allegations in motions based on information and belief.[27] Thus, if sufficient facts are asserted, the trial court may allow discovery or schedule a hearing (or both); otherwise, like the *Warne* plausibility standard, if the asserted facts are insufficient to justify a hearing or even discovery, the trial court could dismiss the matter outright.[28]

The *Warne* Effect

Many judges expected *Warne* to lead to overly detailed pleadings, but generally that did not happen. Instead, motions to dismiss for failure to state a claim skyrocketed. In the midst of the COVID-19 pandemic, two Colorado judges discussed the "*Warne* effect" on dispositive motions practice in federal and state district courts.[29] The jurists noted that the flurry of motions to dismiss were quickly followed by motions to amend that rarely resulted in a complaint being fully dismissed with prejudice, leading to a backlog and waste of judicial resources and time, "ultimately undermining access to justice for all."[30] This outbreak led to new practice standards aimed at eliminating

impractical motions to dismiss and developing a "more collaborative, focused, and efficient approach to motions practice."[31]

Nevertheless, a recent Westlaw search revealed 2,899 references citing *Warne*, including 621 trial court orders and 1,527 trial court documents. Thus, *Warne*'s eventual application to pleadings in probate proceedings should come as no surprise.

The *Everhart* Court Applies the *Warne* Standard

In *Everhart*, the Colorado Court of Appeals considered the application of *Warne*'s plausibility standard for the first time in a probate matter. Adelaide Everhart (decedent) died in 2018, leaving no surviving spouse or children.[32] Her will devised her estate to her three brothers—Jack, Richard, and Christopher—and two nieces and a nephew.[33] Christopher moved for informal probate of the will and appointment as personal representative. Jack and Richard (objectors) filed a petition objecting to informal probate and seeking to initiate formal probate proceedings, asserting that the decedent lacked testamentary capacity and that Christopher exercised undue influence over her.[34]

A niece and nephew, also devisees, filed a Rule 12(b)(5) motion to dismiss the objectors' petition. They claimed that the petition's conclusory allegations failed to state a plausible claim for undue influence or lack of testamentary capacity as required under *Warne*.[35] The district court granted the motion, concluding that the petition failed to set forth specific factual allegations regarding undue influence or lack of testamentary capacity and instead relied on conclusory allegations.[36] Particularly, the court found the conclusory allegations "insufficient to raise a right to relief above a speculative level and provide plausible grounds to infer the alleged undue influence or lack of testamentary capacity."[37] Objectors filed a motion to reconsider, arguing for the first time that the petition was not subject to dismissal under Rule 12(b)(5) because formal testacy proceedings under CRS § 15-12-403(1) required an evidentiary hearing. The district court denied the motion.[38]

The court of appeals affirmed dismissal of the petition on several grounds, beginning with four procedural points. First, the court determined that petitions contesting a will are subject to dismissal for failure to state a claim, noting that both the probate code and rules of probate procedure state that the rules of civil procedure apply to formal probate proceedings per CRS § 15-10-304 and Colo. R. Prob. P. 5.[39] The court determined that a Rule 12(b)(5) motion's purpose "is to test the sufficiency of the pleading's allegations and to 'permit *early* dismissal' of meritless claims."[40] According to the court, a petition to commence formal probate proceedings is a "pleading" under the probate code.[41] And, just like a general right to a jury trial in a civil matter does not preclude a complaint's dismissal under Rule 12(b)(5), a right to a hearing in a probate proceeding "does not mean that, in every case, a party is entitled to discovery and an evidentiary hearing."[42]

Second, Colorado's probate rules specifically contemplate dispositive motions practice. The court noted that Colo. R. Prob. P. 24,

> which allows matters to be set for a hearing without appearance, explains that "[m]otions for summary judgment and motions to dismiss are not appropriate for placement on a docket for hearing without appearance," and advises that "these motions should be filed using the procedure set forth in CRCP 121 § 1-15."[43]

Third, permitting dismissals of facially insufficient pleadings "advances the purpose of the probate code. Among other goals, the code seeks to 'promote a speedy and efficient system for settling the estate of the decedent and making distribution to [her] successors.'"[44] Citing *Warne*, the court continued: "Applying Rule 12(b)(5) promotes these goals by weeding out petitions that fail to state a plausible claim for relief and protecting parties from frivolous litigation."[45]

Finally, in rejecting the objectors' argument that probate cases differ from civil cases because "family members have less access than other civil litigants to the information necessary to state a claim," the court made clear that in both types of actions, a party "is not entitled to use discovery as a means to formulate a claim." It therefore disagreed that the objectors "had some right to conduct discovery in support of their claims with which a motion to dismiss could not interfere."[46]

Turning to the allegations, the court concluded that the objectors' petition failed to state a plausible claim for relief under the *Warne* standard. Citing Colorado Pattern Civil Jury Instruction (CJI) 34:14, the court defined "undue influence" as "words or conduct, or both, which, at the time of the making of a will, (1) deprived the testator of her free choice and (2) caused the testator to make at least part of the will differently than she otherwise would have."[47] The court considered the objectors' particular allegations, consisting chiefly of assertions that Christopher was in a fiduciary relationship with the decedent, that the decedent was reliant on Christopher before and around the time she executed her will, and that the decedent lived with or near Christopher in the time period before she executed her will.[48]

The court then discussed the district court's determination that there was no presumption of undue influence. Even if Christopher's fiduciary relationship with the decedent preceded the will's execution, the objectors "had nonetheless failed to allege sufficient facts to show undue influence."[49] The court concluded that, absent Christopher's active involvement in preparing or executing the decedent's will, or any indication that he overbore her free will or deprived her of her free choice, the decedent's alleged reliance on Christoper in making certain unidentified decisions did not show undue influence over the decedent.[50]

The court next addressed the claim that the decedent lacked testamentary capacity. Citing the seminal Colorado case of *Cunningham v. Stender*,[51] the court applied what is commonly known as the "*Cunningham* test" to determine if a testator is of sound mind, and stated that a person "lacks testamentary capacity if she does not understand (1) the nature of her act; (2) the extent of her property; (3) the proposed testamentary disposition; (4) the natural objects of her bounty; and (5) that the will represents her wishes."[52] The court then reviewed the objectors' allegations, which included assertions that the decedent had abused drugs and alcohol throughout her life, changed the distribution of her estate in a way that "negated the long-stand-

ing family practice regarding generational distribution of real property," failed to include some nieces and nephews with whom decedent had long-standing relationships, and did not comprehend her assets and the disposition of those assets.[53]

The court found these allegations "insufficient to show that Decedent lacked capacity to make a will. The claim depends on an inference that Decedent's decision not to follow 'long-standing family practice' must be attributable to a lack of testamentary capacity due to an addiction."[54] After noting that without additional allegations the inference amounts to speculation, the court discussed how the objectors potentially could have overcome this speculation, such as by alleging that the decedent was suffering from an addiction when she drafted or executed her will or by asserting specific reasons supporting their belief that the decedent lacked testamentary capacity.[55]

Thus, the court concluded that the objectors' allegations supported only a sheer possibility that the decedent lacked testamentary capacity, did not "raise a right to relief above [a] speculative level," and "did not satisfy the *Warne* plausibility standard."[56]

The court rejected the objectors' argument that the lower court should have permitted them to amend their petition, finding they waived that issue for appeal. The objectors never filed an amended petition, sought leave to amend their original petition, or argued in their motion for reconsideration that they had a right to amend the petition.[57]

Precedence of *Everhart*

A Westlaw search reveals no published appellate cases citing *Everhart* to date. However, three recent unpublished Colorado Court of Appeals have cited *Everhart*.

In *Harmony Painting v. Snowdance, LLC*,[58] the court of appeals quoted *Everhart*: "A claim has facial plausibility when its factual allegations 'raise a right to relief above the speculative level' by allowing a 'court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"[59] The district court ruled that Harmony failed to state a claim against SCMR (a prior defendant who filed a motion to dismiss) upon which relief could be granted because, as a matter of law, SCMR acted as an agent that was not bound by the contract that Harmony alleged was breached. The appellate court agreed with Harmony's argument that, in granting the motion to dismiss, the district court failed to make required factual inferences in Harmony's favor and relied upon allegations from the amended complaint that were irrelevant to the question of whether Snowdance and Our Lady of the Mountain were disclosed principals.[60] The court of appeals reversed the judgment and remanded the case for further proceedings.

In *In re Wolf Family Trust*,[61] the petitioner, Rutgers, appealed the district court's ruling that she lacked probable cause to contest the validity of the amendments to the trust. The court of appeals affirmed, citing *Everhart*, noting that the testimony of an attorney who reviewed the trust amendments did not indicate a "substantial likelihood" that Rutgers could establish either a lack of testamentary capacity or undue influence.[62] The court explained that the information the attorney had relied on was

> vague and speculative, consisting only of a review of the trust documents and a discussion with Rutgers and her attorney, from which [the reviewing attorney] understood that Rutgers hadn't been informed of the amendments, she couldn't find in her joint banking records with the decedent any record of payment by the decedent to the attorney who prepared the amendments (although it seems no one reached out to that attorney to ask about it), the land conveyed to her didn't include the house she'd lived in for decades, the decedent was in recent years "very forgetful" (with the only example being "forgetting" to bring her husband to Rutgers's 2016 wedding) and uncharacteristically irritable, the father of some of the nephews once asked the decedent why his children weren't beneficiaries of the trust, and two of the nieces told the decedent at some point that Rutgers didn't love the decedent or want to be part of her life.[63]

Finally, in *In re Estate of Stieg*,[64] the court of appeals cited *Everhart*: "An interested person may commence a formal testacy proceeding by filing a petition for probate, with or without a request for appointment of a personal representative. Such a petition is an initial pleading under the probate code."[65]

Drafting Sufficient Pleadings in the Wake of *Everhart*

To avoid an early exit and dismissal of claims concerning lack of testamentary capacity and undue influence, objectors to wills and trusts must plead sufficient facts that go beyond the facts pled in *Everhart*.

Lack of Testamentary Capacity Factors

Lack of testamentary capacity claims must include specific allegations beyond mere speculation or possibility that the testator did not have testamentary capacity or was not of sound mind when the will was signed. Under CJI definitions, a person is not of sound mind if, when signing a will, they suffer from an insane delusion that is affecting or influencing their decisions regarding the property included in the will, or they do not understand all of the following: (1) that they are making a will; (2) the nature and extent of the property they own; (3) how that property will be distributed under the will; (4) that the will distributes the property as they wish; and (5) those persons who would normally receive their property.[66]

CJI-Civ 34:12 defines "insane delusion" as "a persistent belief, resulting from illness or disorder, in the existence or non-existence of something that is contrary to all evidence." It is well settled, however, that a will is not invalid even though the testator suffered from insane delusions when the will was executed if these insane delusions did not "materially affect or influence" the disposition of property set forth in the will.[67] Thus, capacity is determined by the *Cunningham* test, the insane delusion test, or both. [68]

In re Estate of Romero, cited in *Everhart*, discussed what it means for a testator to know the "nature and extent" of their property. In *Romero*, the decedent suffered from mental illness, including diagnosed schizophrenia. However, the trial expert was unable to establish a causal relationship between the decedent's auditory hallucinations and his testamentary capacity. Thus, the Denver Probate Court

denied the children's petition for adjudication of intestacy and upheld the will.[69] Relying on *Cunningham* (also cited in *Everhart*), the court of appeals held that it is "sufficient that a testator comprehend the 'kind and character of [their] property' or understand, generally, the nature and extent of the property to be bequeathed."[70] The court continued:

> In other words, "A perfect memory is not an element of testamentary capacity. A testator may forget the existence of part of his estate . . . and yet make a valid will." . . . Therefore, "[t]he fact that [the] testator believes that the residue of his estate is of little value, when it is, in fact, more than two-thirds of his estate," does not show lack of capacity.[71]

An Arizona court offered this insight on how insane delusions regarding family relationships in particular may lead to lack of testamentary capacity:

> [I]f the testator is eccentric or mean-spirited and dislikes family members for no good reason, but otherwise meets the three-prong capacity test, leaving the family members out of the will would not be due to lack of testamentary capacity. However, when mental illness that produces insane delusions renders the testator unable to evaluate or understand his relationships with the natural objects of his bounty and this inability affects the terms of his will, the testator lacks the mental capacity to make a valid will.[72]

Given Colorado's relatively low bar to prove testamentary capacity, courts may require that pleadings reference medical records or other independent evidence indicating beyond speculation or sheer possibility that the testator lacked capacity or a sound mind around the time they signed estate-planning documents. But a common problem facing will contestants is the lack of access to the testator's medical records, especially since a power of attorney terminates when the principal dies.[73] Another issue is the cost and process to access a decedent's electronic communications under Colorado's Revised Uniform Fiduciary Access to Digital Assets Act.[74] Thus, *Everhart* has clearly raised the bar for contestants to plausibly plead beyond mere speculation that a decedent lacked testamentary capacity or a sound mind when signing the will.

A case just decided by the Colorado Supreme Court in June 2024, *In re Estate of Ashworth*,[75] indicates that where a will contestant presumably has plausibly pled claims of undue influence and lack of capacity pursuant to the rigorous standards of *Everhart*, that party is entitled to engage in discovery under CRCP 26(b), including obtaining relevant medical records. After all, "[c]ontestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."[76] And, medical records are vital to conclusively settle claims of incapacity and/or undue influence.

Undue Influence Factors

Despite the stricter standard established by *Everhart*, given the epidemic of elder abuse[77] and Colorado's presumption of undue influence, courts may be less inclined to dismiss claims of undue influence at an early stage if objectors plead sufficient facts showing that a will or trust beneficiary was in a confidential or fiduciary relationship with the decedent and actively participated in the preparation or execution of the governing instrument.[78]

In the seminal case of *Krueger v. Ary*,[79] the Colorado Supreme Court held that if it is shown that the grantee was a fiduciary to the grantor or had a confidential relationship with the grantor, a rebuttable presumption arises that the grantee unduly influenced the grantor, and that the transaction was unfair, unjust, and unreasonable. Once raised, the presumption shifts the burden of going forward to the party seeking to uphold the conveyance.[80] If a transaction results from an abuse of the confidential relationship, that transaction may be set aside.[81]

While *Everhart* relied on the pattern jury instructions to define "undue influence," Colorado case law defines the term as an "unlawful or fraudulent influence" that controls the will of the grantor—that is, influence that overcomes the will of the grantor to the extent that they are prevented from voluntary action and deprived of free agency.[82] In one case, the Colorado Supreme Court listed the following circumstances as plausible indicators of undue influence:

- a confidential relationship between the testator and the influencer;
- terms in the estate plan that clearly benefit the influencer;
- the diminished mental and/or physical condition of the testator (including age, sickness, suffering, by reason of disease or otherwise, or any other cause); and
- a new estate plan that's kept secret from the testator's natural heirs.[83]

Another significant indicator of undue influence is evidence of isolation (e.g., the alleged victim resides in a remote location or the alleged perpetrator prevents others from contacting the alleged victim).[84]

The *Restatement (Third) of Property: Wills and Other Donative Transfers*, § 8.3, identifies eight specific "suspicious circumstances" that suggest the existence of undue influence:

1. the donor was in a weakened physical or mental condition or both, and therefore was susceptible to undue influence;
2. the alleged wrongdoer participated in the preparation or procurement of the will or will substitute;
3. the donor received independent advice from an attorney or other competent and disinterested advisors in preparing the will or will substitute;
4. the will or will substitute was prepared in secrecy or in haste;
5. the donor's attitude toward others had changed by reason of their relationship with the alleged wrongdoer;
6. there was a decided discrepancy between the donor's new and previous wills or will substitutes;
7. there was a continuity of purpose running through former wills or will substitutes indicating the donor's settled intent in the disposition of their property; and
8. the disposition of the property was such that a reasonable person would regard it as unnatural, unjust, or unfair—for example, the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.[85]

At least one trial court in 2014 cited these factors in its decision to rescind a 99-year farming lease on grounds of undue influence. In that case, the court determined that a daughter-in-law took advantage of her widowed

mother-in-law's advanced age and depressed emotional state when she compelled her to sign the lease and other legal documents that she did not understand.[86] While the authors did not find a Colorado appellate case citing § 8.3 of the *Restatement of Property*, other sections have been cited by a number of Colorado appellate courts in various property contexts.[87]

In 2016, California developed the California Undue Influence Screening Tool (CUIST) to aid Adult Protective Services personnel in screening for suspected undue influence.[88] CUIST provides four main factors to consider when determining if a person has been a victim of undue influence: (1) the victim appears vulnerable, (2) the suspected influencer appears to have power or authority over the victim, (3) the suspected influencer has taken steps suggestive of undue influence, and (4) the influencer's actions appear to have resulted in unfair, improper, or suspicious outcomes. Each factor contains its own checklist so that it can be evaluated separately. For example, for the "victim appears vulnerable" section, there is a long list of items that can be checked off, such as "poor or declining health or physical disability," "depends on others for health care," "problems with hearing, vision, or speaking," and so on. This tool is extremely useful in developing sufficient facts to support an allegation that a governing instrument is invalid due to undue influence.

In any event, as noted in *Everhart*, if a claim of undue influence or lack of capacity is dismissed under the stringent plausibility standard, a claimant still may seek leave to amend their deficient pleading under CRCP 15 if they are able to present further or other facts that rise above "sheer possibility" or a "speculative level."

Conclusion

Warne's civil plausibility pleading standard applied in *Everhart* has raised the bar significantly for probate practitioners raising claims of undue influence and lack of testamentary capacity. Practitioners should take note that district courts might rely on *Everhart* to dismiss pleadings in civil and probate cases that fail to plead sufficient facts beyond the speculative level and sheer possibility. CL


Jonathan Leinheardt is an attorney at Strickler Catlin, LLC, with nearly three decades of experience as a counselor and litigator in trust and estate law, conservatorships/guardianships, appeals, and family law. He previously served as chair of the Boulder County Bar Association Elder Law Committee—leinheardt@coloradolawyer.com. **Jessica H. Catlin** is a partner at Strickler Catlin, LLC, and has two decades of experience as a planner and litigator in trust and estate law, elder law, protective proceedings, appeals, and family law. She previously served as chair of the Boulder County Bar Association Elder Law Committee and on the Boulder County Bar Foundation Board—catlin@coloradolawyer.com.

Coordinating Editors: David W. Kirch, dkirch@dwkpc.net; Emily L. Bowman, ebowman@dwkpc.net

NOTES

1. *Warne v. Hall*, 2016 CO 50.
2. *In re Est. of Everhart*, 2021 COA 63, *cert. denied*, No. 21SC442, 2021 WL 5890058 (Colo. Dec. 6, 2021).
3. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Warne*, ¶ 1.
4. *Conley v. Gibson*, 355 U.S. 41 (1957).
5. For an excellent detailed discussion of *Warne* and evolution of the pleading standard in federal and state court, *see* Garnett and Hardy, "The End of Uncertainty: The Colorado Supreme Court Adopts the Plausibility Pleading Standard," 46 *Colo. Law.* 27 (Feb. 2017).
6. *Warne*, ¶ 27.
7. *Id.* at ¶ 28.
8. *Id.* at ¶ 29.
9. CRCP 7(a) expressly describes "pleadings" as: a complaint and answer; a reply to a counterclaim; an answer to a cross-claim; a third-party complaint; a third-party answer; and reply to an affirmative defense.
10. *Warne*, ¶ 1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).
11. Under CRCP 8, a pleading that sets forth a claim for relief must contain: (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, if the court is of limited jurisdiction; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for such relief.
12. *Twombly*, 550 U.S. at 555.
13. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
14. *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7.
15. *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002)).
16. *Fry v. Lee*, 2013 COA 100, ¶ 17.
17. *Warne*, ¶ 27.
18. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).
19. *Warne*, ¶ 20 ("[W]hen a pleader is without direct knowledge, allegations may be made upon information and belief . . . .").
20. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).
21. *Norton*, ¶ 7.
22. *Id.*
23. *In re Marriage of Runge*, 2018 COA 23M.
24. *Id.* at ¶ 18.
25. *In re Marriage of Durie*, 2020 CO 7.
26. *Id.* at ¶ 3.
27. *Id.*
28. *Id.*
29. Jackson et al., "Dispositive Motions Practice in Colorado Best Practices and Challenges Amid the Pandemic," 49 *Colo. Law.* 24 (Nov. 2020), https://cl.cobar.org/departments/dispositive-motions-practice-in-colorado.
30. *Id.*
31. *Id.*
32. *Everhart*, ¶ 4.
33. *Id.*
34. *Id.* at ¶ 5.
35. *Id.* at ¶ 6.
36. *Id.* at ¶ 7.
37. *Id.*
38. *Id.* at ¶ 8.
39. *Id.* at ¶ 14.
40. *Id.* at ¶ 15 (citing *BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 2012 COA 214, ¶ 12) (quoting *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 915 (Colo. 1996)).
41. *Id.* (citing CRS § 15-12-404) ("Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.").
42. *Id.* at ¶ 17 (citing *Coyle v. State*, 2021 COA 54, ¶ 21) (explaining that because the rules of civil procedure apply to the Exoneration Act, a petition filed under the Act is subject to dismissal under Rule 12(b)(5) notwithstanding the petitioner's right to a jury trial on a contested petition).
43. *Id.* at ¶ 18 (citing Colo. R. Prob. P. 24 cmt. 2).
44. *Id.* at ¶ 19 (citing CRS § 15-10-102(2)(c) and *Scott v. Scott*, 136 P.3d 892, 897 (Colo. 2006) (in determining whether a rule of civil procedure applies to a provision of the probate code, we "look first to the underlying purposes and policies of the probate code")).
45. *Id. See Warne*, ¶ 19 ("[W]e have . . . identified a growing need, and effort in our rules, to expedite the litigation process and avoid unnecessary expense, especially with respect to discovery.").

46. *Id.* at ¶ 26.

47. *Id.* at ¶ 33.

48. *Id.* at ¶ 34.

49. *Id.* at ¶ 35.

50. *Id.* at ¶ 36–37 (citing *In re Est. of Romero*, 126 P.3d 228 (Colo.App. 2005) and CJI-Civ. 34:17 (providing that a presumption of undue influence may be drawn if the person claimed to have been in a fiduciary relationship was (1) a beneficiary under the will; (2) in a fiduciary relationship with the testator at the time she executed the will; and (3) actively involved with the preparation or signing of the will)); *Scott v. Leonard*, 184 P.2d 138, 139 (Colo. 1947) ("Undue influence cannot be inferred alone from motive or opportunity.").

51. *Cunningham v. Stender*, 255 P.2d 977 (Colo. 1953).

52. *Everhart*, ¶ 39 (citing *Cunningham*, 255, P.2d at 981–82).

53. *Id.* at ¶ 40.

54. *Id.* at ¶ 41.

55. *Id.* at ¶ 42 (citing *In re Est. of Scott*, 119 P.3d 511, 516 (Colo.App. 2004) (a will is invalid only if the testator lacked testamentary capacity "at the time of the will's execution"), *aff'd sub nom. Scott v. Scott*, 136 P.3d 892 (Colo. 2006); *In re Est. of Breeden*, 992 P.2d 1167, 1170 (Colo. 2000) (testator has a fundamental right to dispose of their property as they please and "may indulge [their] prejudice against [their] relations . . . and . . . if [they do] so, it is no objection to [their] will") (quoting *Lehman v. Lindenmeyer*, 109 P.956, 959 (Colo. 1909); and *Twombly*, 550 U.S. at 566–67 (stating that when allegations are equally consistent with proper and lawful conduct as with improper conduct, the complaint cannot meet the plausibility requirement)).

56. *Id.* at ¶ 43.

57. *Id.* at ¶ 44.

58. *Harmony Painting v. Snowdance, LLC*, No. 23CA0226, 2024 WL 4022058 (Colo.App. Jan. 4, 2024).

59. *Id.* at ¶ 18.

60. *Id.* at ¶¶ 21–22.

61. *In re Wolf Fam. Tr.*, No. 23CA0260, 2024 WL 4032606 (Colo.App. Mar. 14, 2024).

62. *Id.* at ¶ 23 (citing *Everhart*, ¶ 39).

63. *Id.* at ¶ 22. In a footnote, the court noted that the reviewing attorney "referred to the fourth amendment's description of this land as 'wrong' and 'an error' based wholly on his speculation—without having spoken to the attorney who drafted the amendment or having otherwise investigated the facts—that the decedent must have intended to leave Rutgers the home she was living in." Citing *Everhart* at ¶ 42, the court noted: "Yet the decedent had a fundamental right to 'dispose of h[er] property as [s]he please[d].'" *Id.* (quoting Breeden, 992 P.2d at 1170).

64. *In re Estate of Stieg*, No. 23CA0836, 2024 WL 3978476 (Colo.App. Apr. 11, 2024).

65. *Id.* at ¶ 13 (citing CRS § 15-12-401(1)–(2) and *Everhart*, ¶ 15).

66. CJI-Civ. 34:11 (Testamentary Capacity and Sound Mind—Defined).

67. *Breeden*, 992 P.2d at 1174. *See In re Est. of Gallavan*, 89 P.3d 521 (Colo.App. 2004) (insane delusion must materially affect property disposition).

68. *Breeden*, 992 P.2d at 1171; *Romero*, 126 P.3d at 230.

69. *Romero*, 126 P.3d at 229.

70. *Id.* at 231 (citations omitted).

71. *Id.* (citing 1 *Page on Wills* § 12.22).

72. *In re Est. of Killen*, 937 P.2d 1368, 1372 (Ariz.

Ct.App. 1996).

73. CRS § 15-14-710(1)(a).

74. CRS §§ 15-1-1501 et seq.

75. *In re Est. of Ashworth*, 2024 CO 39, ¶ 14 (holding that physician-patient privilege is analogous to the attorney-client privilege and does survive death, but a "testamentary exception" applies to permit disclosure of pertinent medical records "necessary to administer the estate").

76. CRS § 15-12-407.

77. *See* Hellwig, "Elder Abuse: The Hidden Epidemic," *Home Healthcare Now* (Nov./Dec. 2023), https://journals.lww.com/homehealthcarenurseonline/abstract/2023/11000/elder_abuse__the_hidden_epidemic.3.aspx.

78. CJI-Civ. 34:16. A confidential relationship is defined in CJI-Civ. 34:18 as existing "whenever one person gains the trust and confidence of the other person by acting or pretending to act for the benefit of or in the interest of the other (and, as a result, is put in a position to exercise influence and control over the other)." A fiduciary relationship exists when "there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence." *Meyer v. Schwartz*, 638 P.2d 821, 822 (Colo.App. 1981) (quoting *Breeden v. Dailey*, 574 P.2d 508 (Colo. App. 1977)).

79. *Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009).

80. *Id.*

81. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

82. *Anderson v. Lindgren*, 157 P.2d 687, 689 (Colo. 1945).

83. *Ofstad v. Sarconi*, 252 P.2d 94, 95–97 (Colo. 1952) (plausible undue influence claim stated where, among other factors, the will was finally signed at a time when the testatrix was under an oxygen tent and was not using a hearing aid, without which she could not hear at all).

84. *See* 79 *Am. Jur. 2d* Wills § 444 (Preventing or Discouraging Others From Conferring With Testator) (collecting cases).

85. *Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 8.3 cmt. h. (Am. Law. Inst. 2001).

86. *Blake v. Blake*, No. 2012CV25, 2014 WL 7664586 (Wash.Cnty.Dist.Ct. June 5, 2014).

87. *See, e.g., In re Est. of Hope*, 223 P.3d 119, 122 (Colo.App. 2007) (citing *Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 17.5 (Tentative Draft No. 5, 2006)); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234–38 (Colo. 1998), *as modified on denial of reh'g* (Oct. 19, 1998) (citing *Restatement (Third) of Prop.: Servitudes* § 4.5); *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1235–39 (Colo. 2001), *as modified on denial of reh'g* (Dec. 17, 2001) (citing *Restatement (Third) of Prop.: Servitudes* § 4.8(3)); *Land Title Ins. Corp. v. Ameriquest Mortg. Co.*, 207 P.3d 141, 144–47 (Colo. 2009) (citing *Restatement (Third) of Prop.: Mortgages* § 7.6); *Lo Viento Blanco, LLC v. Woodbridge Condo. Ass'n, Inc.*, 2021 CO 56, ¶¶ 20–25 (citing *Restatement (Third) of Prop.: Servitudes* §§ 2.16 and 2.17).

88. The CUIST can be found at https://www.elderjusticecal.org/uploads/1/0/1/7/101741090/final_cuist_5-27-2016_12.4.18.pdf.