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WILLS-UNDUE INFLUENCE

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WILLS—UNDUE INFLUENCE—The right to dispose of one's property at death is one of the more important rights attaching to the owner-

ship of property. Undoubtedly the philosophy behind will statutes is that the presumptive heirs of a man have no claims upon his property and that a testator may do with his property as he pleases within other rules of law. There is more to protecting this right than merely giving effect to a paper presented as the testator's will. The courts must carefully scrutinize this paper to be sure that it actually represents the will of this testator. One of the things from which the testator will be protected is referred to in the cases as "undue influence." However, if the right to dispose of one's property at death is to be diligently safeguarded, it is equally important to have a wise definition of undue influence. This right is equally destroyed if a jury or judge may disregard the will merely because they disapprove of its terms.[1]

Hundreds of cases contain statements which define undue influence as "domination by the guilty party over the testator to such an extent that his *free agency is destroyed.*"[2] Psychologists tell us that in a sense man has no free agency and that every course of action is actually the reflection of various motivations or influences.[3] Inherently, then, a distinction must be made between due influences and undue influences. By undue influence is not meant that the testator has given undue weight to an influence, but rather that the testator's capacity to weigh open mindedly the various influences pressed upon him has been destroyed[4] and that his will is in reality the will of another person.[5] It is not that the testator has been persuaded to execute a will containing certain terms, for the very word "persuade" suggests an agency which makes up its own mind, even if the decision is based upon the unsocial arguments and pressures of another and ignores other more reasonable motivations. Thus the influence must destroy the testator's ability to weigh factors and pronounce a judgment in order to be undue. This suggests a type of mental duress which produces a result as surely as

[1] See Brumbelow v. Hopkins, 197 Ga. 247, 29 S.E. (2d) 42 (1944).

[2] For example, see Cox v. Hale, 217 Ala. 46, 114 S. 465 (1927); Estate of Arnold, 16 Cal. (2d) 573, 107 P. (2d) 25 (1940); Passenheim v. Reinert, 362 Ill. 576, 1 N.E. (2d) 69 (1936); In re Cox's Will, 139 Me. 261, 29 A. (2d) 281 (1942); In re Streb's Will, 247 App. Div. 556, 288 N.Y.S. 334 (1936).

[3] MUNN, PSYCHOLOGY 254 et seq. (1946).

[4] A typical example of language used by the courts may be found in Conner v. Brown, 9 W.W. Harr. (39 Del.) 529 at 545, 3 A. (2d) 64 (1938): ". . . nor will the employment of flattery, appeals to the affection or pity of the testator, or persuasion or importunity falling short of coercion, constitute undue influence."

[5] Alford v. Johnson, 103 Ark. 236, 146 S.W. 516 (1912); In re Estate of Johnson, 222 Iowa 787, 269 N.W. 792 (1937); Combs v. Combs, 271 Ky. 543, 112 S.W. (2d) 989 (1938); O'Brien v. Collins, 315 Mass. 429, 53 N.E. (2d) 222 (1944); In re Hoffman's Estate, 300 Mich. 406, 2 N.W. (2d) 442 (1942); Hale v. Smith, 73 Mont. 481, 237 P. 214 (1925); Shuey v. Shuey, 340 Pa. 27, 16 A. (2d) 4 (1940); Ebert v. Ebert, 120 W. Va. 722, 200 S.E. 831 (1938).

if the testator's signature were forcibly affixed to a will prepared by another. The purpose of this comment is to determine whether from specific decisions upon specific fact situations this metaphysical concept of undue influence can be sustained.

This question arises in the recent California case of *In re Hannam's Estate*.[6] The testator devised his entire estate, valued at from $35,000 to $80,000, to his widow. If she predeceased him their son Harry was to be the beneficiary. There was evidence to the effect that the testator did not trust Harry's ability to handle money and that, while the testator desired to provide for his wife, he feared that if the estate was left absolutely to her it would quickly fall into the hands of the son. Consequently, the testator had executed a prior will in which he left the bulk of his estate to his wife for life, with remainder to a business friend whom he trusted to carry on his business, which made up the principal part of the estate. Shortly thereafter the testator was stricken with cancer and while in great pain signed the will in question, which had been procured by the widow and handed to him. Whether the testator had read the will does not appear. But the evidence showed that he had agreed to leave the property to his wife absolutely. However, it appeared that the testator had not requested the alternate provision for the son to be inserted. The court, reiterating the standard definition of undue influence, affirmed the lower court's finding that the will was the result of undue influence.

While it is most difficult for undue influence to be proved directly, the burden is still on the contestant.[7] The conclusion that in the *Hannam* case there was enough evidence to support a fair inference that the testator's free agency was destroyed requires scrutiny. The chief beneficiary procured the will to be signed by the testator who was physically ill and in pain. To an extent the will was contrary to the prior expressions of the testator. It is probably quite reasonable to infer that the testator was influenced, but is it equally reasonable to draw the inference that he was unduly influenced as that term is usually defined? In most fields of law such evidence could not support the ultimate fact to be proved.[8] When from inferential evidence of some influence an attempt to infer destruction of free agency is made, an

[6] (Cal. App. 1951) 236 P. (2d) 208.

[7] See note 28 infra.

[8] For an excellent discussion of how closely allied circumstantial evidence must be to the ultimate fact desired to be proved, especially when an inference is attempted from an inference, see New York Life Ins. Co. v. McNeely, 52 Ariz. 181, 79 P. (2d) 948 (1938).

entrance into a field of great speculation occurs. Yet the *Hannam* case cannot be said to be out of line with other decisions. It is possible then that our basic definitions of undue influence needs altering. For when fact *A* is concluded from proof of fact *B*, and yet the two facts are not closely allied by fair inference, then fact *B*, in practicality, has become the ultimate. Before reaching a definite conclusion, however, it would be well to consider some of the kinds of evidence that are controlling on the issue of undue influence.

I. Mental Weakness

It is interesting to speculate upon the probable position of the court in the *Hannam* case if the testator had been physically fit and under no pain at the time of the execution of the will. The court must have concluded that the testator's physical condition produced a corresponding mental condition making him more susceptible to actions which would destroy his free agency, or at least which would ordinarily not sway his judgment. While in most cases where the will is denied validity some element of mental weakness is present,[9] there are cases where no such element existed.[10] Other cases, where no undue influence is found, emphasize that the testator appeared to be of clear mind and firm judgment.[11] The importance of a mentally weak testator can be illustrated by a comparison of two Pennsylvania cases. In *In re Patti's Estate*[12] the testator was seriously injured in the mines and taken to a hospital, where he died approximately a month later. Competent testimony showed him to be in a general state of shock and delirium.[13] He executed the will only after entreaty by a chief beneficiary, a stranger to

[9] Estate of Sproston, 4 Cal. (2d) 717, 52 P. (2d) 924 (1935); In re Estate of Gill, 14 Cal. App. (2d) 526, 58 P. (2d) 734 (1936); Sulzberger v. Sulzberger, 372 Ill. 240, 23 N.E. (2d) 46 (1939); In re Estate of Eiker, 233 Iowa 315, 6 N.W. (2d) 318 (1942); In re Estate of Casida, 156 Kan. 73, 131 P. (2d) 644 (1943); Grove v. Spiker, 72 Md. 300, 20 A. 144 (1890); In re Estate of Stephan's, 207 Minn. 597, 293 N.W. 90 (1940); In re Lachat's Estate, 184 Misc. 492, 52 N.Y.S. (2d) 451 (1944), appeal dismissed 60 N.Y.S. (2d) 286; Donovan v. Potter, 70 R.I. 75, 37 A. (2d) 69 (1944); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937).

[10] McQueen v. Wilson, 131 Ala. 606, 31 S. 94 (1901); In re Will of Busick, 191 Iowa 524, 182 N.W. 815 (1921); Matter of Anna, 248 N.Y. 421, 162 N.E. 473 (1928). This latter case is a good example of how far courts may go when meretricious relations are involved. In this connection, see Alford v. Johnson, 103 Ark. 236, 146 S.W. 516 (1912); and 17 L.R.A. (n.s.) 477 (1909).

[11] See Conner v. Brown, 9 W.W. Harr. (39 Del.) 529, 3 A. (2d) 64 (1939); Frese v. Meyer, 392 Ill. 59, 63 N.E. (2d) 768 (1945); In re Will of Diver, 214 Iowa 497, 240 N.W. 622 (1932); In re Livingston's Estate, 295 Mich. 637, 295 N.W. 343 (1940); Llewellyn's Estate, 296 Pa. 74, 145 A. 810 (1929); Buhan v. Keslar, 328 Pa. 312, 194 A. 917 (1937).

[12] 133 Pa. Super. 81, 1 A. (2d) 791 (1938).

[13] The court held that there was enough evidence to go to the jury on the question

the blood, who also aided in the procurement of the will. The court reversed the lower court, which had removed the question from the jury. Great emphasis was placed upon protecting those weakened in mind by illness from influences "improperly" pressed. In *Geist's Estate*[14] the testatrix's attending physician was the chief beneficiary. The doctor prepared the will himself and presented it for signature. Some evidence showed him to be reluctant to allow visitors to see the testatrix. Competent independent testimony showed the testatrix to be of perfectly sound and clear mind and, except for physical defects which did not affect her mental condition, to be in good condition. The court, placing emphasis on the testatrix's sound mental condition, affirmed the lower court's decision that the evidence was insufficient to go to the jury. Wisconsin courts have stated as a definite requirement of undue influence that there be a testator susceptible to such influence.[15] Other courts have not done this, but it is nevertheless difficult to make out a case unless this element is present, for it is difficult to imagine a person of normal mind losing his capacity to weigh influences and make a decision. But the mental weakness need not be of the species bordering on testamentary incompetency, since occasionally the testator may be a person incapable of making decisions in the general affairs of life and may be "putty" in the hands of those who use any type of influence.[16] A leading New York decision, *Tyler v. Gardiner*,[17] illustrates the type of case in which the will is set aside although it cannot be said that the testatrix was readily susceptible to undue influence due to mental weakness. There the chief beneficiary, who, incidentally, was President Tyler's widow, was the testatrix's daughter. Voluminous evidence tended to show Mrs. Tyler to be what might be termed the "dominant" type. She was determined to control every type of activity in which she engaged, and for years had managed the affairs of the testatrix, with whom she resided. According to the majority opinion, Mrs. Tyler had poisoned her mother's mind against a son who was the beneficiary under a prior will. The court makes

of testamentary capacity, but also discussed at length the question of undue influence and decided that it too should go to the jury. In the majority of undue influence cases the will is also attacked on the ground of lack of capacity. However, the courts usually discuss both issues separately and make it clear on which ground the decision rests.

[14] 325 Pa. 401, 191 A. 29 (1937).

[15] See note 34 infra.

[16] In re Brown's Estate, 165 Ore. 575, 108 P. (2d) 775 (1941); Cook v. Covert, 174 Ore. 207, 148 P. (2d) 790 (1944); Ford v. Ford, 89 N.H. 292, 197 A. 824 (1938).

[17] 35 N.Y. 559 (1866).

little pretext of basing its decision on any weakened mental condition of the testatrix and the vigorous dissent brings out that in fact she was of strong and clear mind at the time of execution. It is difficult to explain the case on the theory that the testatrix's free agency was destroyed so that she could not weigh the influences pressed upon her. Rather, the case seems to disparage pressures and influences which the court considers unsocial and pernicious, even though the testatrix has approved and acquiesced in the influences.

II. Procurement

As illustrated by the *Hannam* case, it is important to note that in most cases where a finding of undue influence is permitted, the suspected beneficiary actively participated in the execution of the will;[18] and in many cases where a contrary conclusion is reached, emphasis is placed upon the absence of such activity by the beneficiary.[19] The fact that a beneficiary, already under suspicion of having unduly influenced the testator, engaged in activity such as calling the scrivener to the death bed and dictating the terms of the will, naturally tends to show that he has taken over the mind of the testator, and it is well to demand explanation. On the other hand, as is often the case, the beneficiary is very close to the testator and is apt to be called upon to engage in activity which might otherwise be very suspicious; and, if this is true, the contestant's case is substantially weakened.[20] The highly novel Minnesota case, *In re Estate of Marsden*,[21] brings out

[18] Sulzberger v. Sulzberger, 372 Ill. 240, 23 N.E. (2d) 46 (1939); In re Estate of Casida, 156 Kan. 73, 131 P. (2d) 644 (1943); Grove v. Spiker, 72 Md. 300, 20 A. 144 (1890); In re Brown's Estate, 165 Ore. 575, 108 P. (2d) 775 (1941); In re Lachat's Estate 184 Misc. 492, 52 N.Y.S. (2d) 451 (1944), appeal dismissed 60 N.Y.S. (2d) 286; Boyd v. Boyd, 66 Pa. 283 (1870); Cuthberson's Appeal, 97 Pa. 163 (1881); Donovan v. Potter, 70 R.I. 75, 37 A. (2d) 69 (1944); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937).

[19] Bollinger v. Arkansas Valley Trust Co., 202 Ark. 525, 151 S.W. (2d) 675 (1941); Puryear v. Puryear, 192 Ark. 692, 94 S.W. (2d) 695 (1936); Kilgore v. Atkinson, 227 Ala. 310, 149 S. 808 (1933); Short's Estate, 14 Cal. App. (2d) 258, 47 P. (2d) 555 and 58 P. (2d) 186 (1936); Estate of Baird, 176 Cal. 381, 168 P. 561 (1917); Estate of Agnew, 65 Cal. App. (2d) 553, 151 P. (2d) 126 (1944); Conner v. Brown, 9 W. W. Harr. (39 Del.) 529, 3 A. (2d) 64 (1939); Drury v. King, 182 Md. 64, 32 A. (2d) 371 (1943); In re Livingston's Estate, 295 Mich. 637, 295 N.W. 343 (1941); In re Streb's Will, 247 App. Div. 556, 288 N.Y.S. 334 (1936); Kish v. Backaysa, 330 Pa. 533, 199 A. 321 (1938).

[20] Estate of Higgins, 156 Cal. 257, 104 P. 6 (1909); Wunderlich v. Buerger, 287 Ill. 440, 122 N.E. 827 (1919); In re Henderson's Will, 253 App. Div. 140, 1 N.Y.S. (2d) 871 (1937); Buhan v. Keslar, 328 Pa. 312, 194 A. 917 (1937); Scattergood v. Kirk, 192 Pa. 263, 43 A. 1030 (1899) and 195 Pa. 195, 45 A. 932 (1900); Dean v. Jordan, 194 Wash. 661, 79 P. (2d) 331 (1938).

[21] 217 Minn. 1, 13 N.W. (2d) 765 (1944).

the importance of suspicious circumstances in the procurement and execution of the will. In that case the testatrix, Mrs. Marsden, had executed a will leaving the bulk of her estate to her young granddaughter, who had acted as a companion, and bequeathing virtually nothing to her children. Some ten months later she revoked this will so that she would die intestate. The jury found that both the will and its subsequent revocation were the result of undue influence (consequently a prior will would be in force). The circumstances of the revocation were the following: the children had employed an attorney to remove Mrs. Marsden's guardian, who was unfavorable to them. One of the children visited Mrs. Marsden's hospital room to discuss the disposition of her property. He soon called the attorney to the room where the latter and Mrs. Marsden conversed. The attorney then returned to the children and prepared a petition of general administration of Mrs. Marsden's estate which was signed by the children. This petition was complete in every detail. It named the administrator and recited that Mrs. Marsden had died *intestate* at Mankato, leaving blank the date of death, which had not yet occurred. The attorney then prepared an instrument of revocation which the children took to the hospital room, where it was signed in the presence of no one except the children and two witnesses which they had obtained. The court had no trouble in sustaining the jury's finding that the revocation was the result of undue influence. On the other hand the facts surrounding the execution of the will benefitting the granddaughter were these: Mrs. Marsden went to an attorney and expressed her desires as to a will. The attorney prepared the will and invited some fifteen to twenty persons to Mrs. Marsden's home on the evening of execution. The will, in an elaborate ceremony, was read to Mrs. Marsden in the presence of these guests and great care was taken that she understood the terms of the will completely before she signed. The court reversed the jury's finding of undue influence, emphasizing the circumstances of the execution of the will. Perhaps, then, there is more to an attorney's job in preparing an effective will than using the proper words and obtaining the correct number of witnesses. He owes it to the testator to investigate the possibility of undue influence, and, if none exists, to guard against an unjustifiable contest of the will.

III. Unnatural Wills

Starting with the proposition that close relatives of the testator have no claims if he desires to disregard them in his will, we might conclude

that if a will is unnatural, that is, cuts off the natural objects of the testator's bounty, that factor ought to have no weight in determining undue influence. Usually the very purpose of making a will is to avoid intestacy, and we must assume that statutes of descent and distribution reflect a fair and just distribution. On the other hand, it is less likely that a will is the result of undue influence when the chief beneficiary is a natural object of bounty than where children are ignored in favor of a stranger to the blood. Consequently, courts frequently hold that while the fact of an unnatural will will not support a finding of undue influence, it may be used to corroborate other evidence and buttress the contestant's case.[22] Yet there are cases which indicate that courts would be readily receptive to an argument based primarily upon the fact that the will is unnatural. In *Hiss v. Weik*[23] the testator had an estate of $55,000. He left to his widow and invalid daughter annuities of $2,000 and $600 respectively. He cut off entirely an insane son who had a dependent daughter, and left the residue to a third child, the proponent. There was no evidence of mental weakness.[24] There was some evidence that the proponent had received financial favors in the past as the result of entreaty, but clearly not to an extent that would justify a finding of undue influence in the ordinary case. The record was devoid of proof of any activity by the proponent in the execution of the will. Yet the court upheld a verdict finding undue influence. Great emphasis was placed on the inequality of the will. The court painted a vivid and emotional picture of a father cutting off his insane son and giving his widow and invalid daughter a mere pittance.[25] A necessary conclusion from the

[22] For example, see Estate of Baird, 176 Cal. 381, 168 P. 561 (1917); Zinkula v. Zinkula, 171 Iowa 287, 154 N.W. 158 (1915); Estate of Mazanec, 204 Minn. 406, 283 N.W. 745 (1939); Burgess v. Sylvester, 143 Tex. 25, 182 S.W. (2d) 358 (1944); see 6 L.R.A. (n.s.) 202 (1907). While the courts say that the fact of an unnatural will is not substantive evidence, they often take great pains in explaining that while the will in question may appear to be unnatural, it is easily explained. See for example, In re Meehan's Estate, 220 Minn. 1, 18 N.W. (2d) 781 (1945).

[23] 78 Md. 439, 28 A. 400 (1894).

[24] A slight effort was made to show a degree of mental weakness from a statement made by the testator that he had lost his enthusiasm for his work, but the court did not persist in the point. Indeed, it could not reasonably do so.

[25] 78 Md. 439 at 448, 28 A. 400 (1894): "Whilst the gross inequity of this will—the palpable injustice of its provisions, which absolutely cut off an insane son, upon whom [sic] a motherless and helpless child was dependent, and gave to an invalid daughter a mere annual pittance, out of a large and valuable estate—would not alone be sufficient to annul the will, yet such a disposition by an aged and feeble testator furnishes intrinsic evidence involving the will in suspicion . . . ."

decision is that the terms of the will itself were regarded as substantive, and not merely corroborate, evidence of undue influence.[26]

IV. The Confidential Relationship and Presumptions

No discussion of undue influence would be complete without reference to the effect of proof of a confidential relationship, for the cases are permeated with talk about presumptions resulting from such relationships. By presumption here is meant a fair inference from certain proved facts that undue influence exists. It is a presumption of fact which may be rebutted.[27] The burden of proving undue influence, in the sense of making out a case by the preponderance of evidence, must be sustained by the contestant, and this burden never shifts.[28] However, if the presumption is applied, the burden of proof, in the sense of going forward with the evidence, does shift to the proponent of the will. However, it appears that "presumption" is not used by the courts here in the strict sense, for proof of the basic facts giving rise to the presumption will not justify a directed verdict for the contestant. What is meant by the term here is that upon proof of certain facts, the jury is justified in inferring undue influence; and that a verdict so finding will not be set aside, unless the proponent has produced evidence making such a verdict unreasonable.

Here the term "confidential relationship" indicates a relationship much broader than those such as attorney-client, director-corporation, and trustee-*cestui que trust*. It is submitted that an analysis of the cases shows that the term includes "anyone in a position to influence the testator and whose influence, if presented, would be likely to be considered by the testator and to have an effect upon him."[29] To hold

[26] See In re Woods, 252 App. Div. 78, 300 N.Y.S. 1268 (1937), where other substantial factors tended to show undue influence, but where the inequality of the will was greatly emphasized.

[27] For an excellent discussion, see O'Brien, Appellant, 100 Me. 156, 60 A. 880 (1905). See generally ATKINSON, WILLS §196 (1937).

[28] For examples, see Combs v. Combs, 271 Ky. 543, 112 S.W. (2d) 989 (1938); O'Brien v. Collins, 315 Mass. 429, 53 N.E. (2d) 222 (1944); In re Estate of Mollan, 181 Minn. 217, 232 N.W. 1 (1930). See generally ATKINSON, WILLS §196 (1937).

[29] Coghill v. Kennedy, 119 Ala. 641, 24 S. 459 (1898) (patient-nurse); Estate of Higgins, 156 Cal. 257, 104 P. 8 (1909) (father-son); Estate of Presho, 196 Cal. 639, 238 P. 944 (1925) (brother and business partner who resided in same house as testator); Estate of Lances, 216 Cal. 397, 14 P. (2d) 768 (1932) (neighbor and adviser to testator); Richmond's Appeal from Probate, 59 Conn. 226, 22 A. 82 (1890) (business agent and attorney); Conner v. Brown, 9 W. W. Harr. (39 Del.) 529, 3 A. (2d) 64 (1939) (neighbor who did housework for testatrix); Weston v. Teufel, 213 Ill. 291, 72 N.E. 908 (1904) (business adviser); Gum v. Reep, 275 Ill. 503, 114 N.E. 271 (1916) (son who, being an attorney, acted as business agent); Passenheim v. Reinert, 362 Ill. 576, 1 N.E.

that such a relationship justifies an inference of undue influence would indeed be a harsh doctrine, since a large number of beneficiaries are in such a relationship to the testator. Thus we find courts agreeing that the fact of a confidential relationship alone creates no presumption of undue influence.[30] However, when certain facts exist in addition to the confidential relationship, such a presumption arises. Thus it is often said that a presumption arises when the beneficiary actively engages in the procurement of the will.[31] But this inference of undue influence may be unreasonable if the reason for so procuring the will is inconsistent with undue influence, as where the testator requested the beneficiary to draw the will under circumstances free from suspicion.[32] In addition, the duty has been cast upon the proponent to come forward with evidence rebutting the presumption when confidential relations existed and the testator's mind was weakened.[33]

It is submitted that the courts accomplish no good purpose in handling so many cases in terms of presumptions. The courts in effect say, for example, that if the beneficiary (1) was in a confidential relationship to the testator, and (2) participated in the execution of the will, and (3) received a substantial benefit under the will, then a presumption of undue influence arises, and an inference of undue influence by the jury will be upheld unless the proponent can show such an inference to be unreasonable. Yet, even in cases where the court does not deal with the problem in terms of presumptions, if the contestant

(2d) 69 (1936) (step-son-mother) (dicta); In re Dales Estate, 92 Ore. 57, 179 P. 274 (1919) (granddaughter and her husband who advised testatrix in business affairs); In re Neuman, 133 N.J. Eq. 532, 32 A. (2d) 826 (1943) (intimate sister); Boyd v. Boyd, 66 Pa. 283 (1870) (business adviser); Wolfe's Estate, 284 Pa. 169, 130 A. 501 (1925) (next door neighbor who helped testator in times of need); Koon's Estate, 293 Pa. 465, 143 A. 125 (1928) (sister who resided with testatrix); Dean v. Jordon, 194 Wash. 661, 79 P. (2d) 331 (1938) (niece who ministered to testatrix in declining years).

[30] For example, see Estate of Presho, 196 Cal. 639, 238 P. 944 (1925); Richmond's Appeal from Probate, 59 Conn. 226, 22 A. 82 (1890); Passenheim v. Reinert, 362 Ill. 576, 1 N.E. (2d) 69 (1936); In re Neuman, 133 N.J. Eq. 532, 32 A. (2d) 826 (1943); Wolfe's Estate, 284 Pa. 169, 130 A. 501 (1925); In re Dale's Estate, 92 Ore. 57, 179 P. 244 (1919).

[31] See Coghill v. Kennedy, 119 Ala. 641, 24 S. 459 (1893); Estate of Presho, 196 Cal. 639, 238 P. 944 (1925); Estate of Lances, 216 Cal. 397, 14 P. (2d) 768 (1932); Richmond's Appeal from Probate, 59 Conn. 226, 22 A. 82 (1890); Weston v. Teufel, 213 Ill. 291, 72 N.E. 908 (1904); Passenheim v. Reinert, 362 Ill. 576, 1 N.E. (2d) 69 (1936); In re Neuman, 133 N.J. Eq. 532, 32 A. (2d) 826 (1943); Llewellyn's Estate, 296 Pa. 74, 145 A. 810 (1929).

[32] See note 20 supra.

[33] See Coghill v. Kennedy, 119 Ala. 641, 24 S. 459 (1893); In re Neuman, 133 N.J. Eq. 532, 32 A. (2d) 826 (1948); Wolfe's Estate, 284 Pa. 169, 130 A. 501 (1925); Koon's Estate, 293 Pa. 465, 143 A. 125 (1928); Llewellyn's Estate, 296 Pa. 74, 145 A. 810 (1929).

shows the same facts, a verdict of undue influence will be permitted to stand, unless the proponent introduces countermanding evidence, such as evidence of a strong and clear mind, which shows the verdict to be unreasonable. In the ordinary negligence case, if the plaintiff offers evidence to show that the defendant was driving his car at 80 m.p.h without lights on a night when visibility was poor, no court would say that these elements give rise to a presumption of negligence. The court would simply treat this as very strong evidence of negligence. Of course, if the defendant cannot come forth with evidence which would make an adverse verdict contrary to the weight of evidence, then a verdict of negligence will be permitted to stand. But, in the light of the ambiguous nature of the term "presumption," it would accomplish no purpose, save confusion, to say that there is a presumption. Unfortunately this is what has occurred in the field of undue influence. The end result of the cases may be sound, but there seems little to recommend the "presumption" analysis.

V. Conclusions

The chief interest of the practitioner in the cases does not lie in broad theoretical definitions of what constitutes undue influence, but rather in what factors must be proved in order to have a verdict finding undue influence sustained on appeal. In an effort to answer this latter inquiry, the Wisconsin court has said that in order to prove that the testator's free agency was destroyed the facts must show (1) a person unquestionably subject to undue influence, (2) opportunity to exercise undue influence and effect the wrongful purpose, (3) a disposition to influence unduly for the purpose of procuring an improper favor, and (4) a result clearly appearing to be the result of the supposed influence,[34] and that where any three of the four elements are proved satisfactorily, little evidence of the fourth is required.[35] The test renders little help because it makes too much use of the term attempted to be clarified, i. e., undue influence. An ideal case from the point of view of the contestant might consist of the following factors: (1) a mentally weak testator; (2) activity by the beneficiary in procuring the will; (3) a confidential relationship, that is, the beneficiary had the opportunity to influence the testator and was in such a position that such influence, if presented, would be likely to be considered by the testator and have an effect upon him; (4) a grossly "unjust" will;

[34] Will of Stanley, 226 Wis. 354, 276 N.W. 353 (1937).
[35] Estate of Scherrer, 242 Wis. 211, 7 N.W. (2d) 848 (1943).

(5) many miscellaneous factors such as evidence that the beneficiary had obtained financial favors in the past under suspicious circumstances, had prejudiced the testator's mind against the natural objects of his bounty, and had kept the will in his possession, telling no one of its existence until after the testator's death.[36] As has been indicated, the most important of these factors are the mentally weak testator and the procurement of the will. If these can be proved, it is probable that the case will stand.[37] In addition, if proof of a confidential relationship can be coupled with mental weakness[38] or procurement,[39] then a verdict finding undue influence will be permitted. These statements must be qualified, however, for the proponent may be able to show such findings to be unreasonable. As previously pointed out, the fact of an unnatural will is ordinarily merely corroborative evidence, but certain cases indicate that a court might be receptive to an argument based almost solely upon the fact that the will is unnatural. However, it must be emphasized that there is no satisfactory mechanical test to be applied, for proof of many suspicious factors usually exists in cases where undue influence is found. It is for this reason that dicta, for example that (1) confidential relations, plus (2) activity in procuring the will create a presumption, can seldom be put to the acid test, namely, the case where these two factors stand alone without other suspicious circumstances.

Can it be said that an examination of the cases shows results consistent with the definition that undue influence is the destruction of the free agency of the testator so that he has lost his ability to weigh motivations and reach an independent decision? While the ultimate fact required by the courts may be in keeping with such a definition, it must be recognized that it is most difficult to prove that the free agency has been destroyed. As a result, the courts have been forced to accept a lower standard. It is clear that testators, especially when enfeebled,

[36] Good examples of cases where many of these elements were present are Grove v. Spiker, 72 Md. 300, 20 A. 144 (1890), and In re Lachat's Estate, 184 Misc. 492, 52 N.Y.S. (2d) 451 (1944), appeal dismissed 60 N.Y.S. (2d) 286.

[37] In re Estate of Gill, 14 Cal. App. (2d) 526, 58 P. (2d) 734 (1936); Sulzberger v. Sulzberger, 372 Ill. 240, 23 N.E. (2d) 46 (1939); In re Wood's Will, 253 App. Div. 78, 300 N.Y.S. 1268 (1937); Donovan v. Potter, 70 R.I. 75, 37 A. (2d) 69 (1944); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937). See also In re Estate of Casida, 156 Kan. 73, 131 P. (2d) 644 (1943); Cutherberson's Will, 97 Pa. 163 (1881).

[38] Sproston's Estate, 4 Cal. (2d) 717, 52 P. (2d) 924 (1935); In re Estate of Eiker, 233 Iowa 315, 6 N.W. (2d) 318 (1943) [an attorney about to conclude that it would be futile to contest the will at hand should first read this case]; In re Estate of Stephens, 207 Minn. 597, 293 N.W. 90 (1940), and cases cited in note 33 supra.

[39] See note 31 supra.

ought to be protected from certain "activity" on the part of others. Yet the courts are aware that many a disappointed heir attempts to break a will on any pretext handy even though no real grounds of undue influence exist; and the courts have observed that no jury should be permitted to rewrite a will merely because it disagrees with the propriety of the disposition made by the testator. These latter facts are borne out by the observations that in the great majority of cases appellate courts have either reversed jury findings of undue influence or have affirmed the trial judge in taking the case from the jury. It is submitted that on the whole the courts have succeeded in steering a course so as to accomplish both aims. But just what "activity" the testator is to be protected from can only be "felt" by a reading of many cases. When a testator becomes old and mentally enfeebled, he is apt to be affected by the influences of others much more than in his younger days. While such a testator may not be a mere rubber stamp for the will of others, the courts have refused to permit such influences on the ground that society's interest is better served by allowing him to be free of importunities. This is not removing the testator's right to dispose of his property as he chooses, but is making sure that he is not imposed upon when his better judgment may be absent. By the same token, the courts have felt that a person, who is in such a position that his influence might be held unduly in esteem by the testator, ought to refrain from participation in the procurement of the will; and where there is a flavoring of other suspicious factors, the chances that the testator was unsocially influenced are so great that the will should be set aside, even though free agency in the philosophical sense probably was not destroyed.

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