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# Is There a Presumption of Undue Influence Upon the Testator When the Attorney Drawing the Will Is Made a Beneficiary Therein?

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# NOTES AND COMMENTS

## IS THERE A PRESUMPTION OF UNDUE INFLUENCE UPON THE TESTATOR WHEN THE ATTORNEY DRAWING THE WILL IS MADE A BENEFICIARY THEREIN?

In the recent California case of *In re Erickson's Estate*[1], a will was contested on the ground of undue influence practiced upon the testator by the attorney drawing up the will and who was made one of the residuary legatees thereunder. Although the case was reversed for error, the following instructions of the trial court were approved by the upper tribunal.

> "It is the general rule of law that in order to set aside a will for undue influence, there must be substantial proof by the contestants of a pressure which overpowered the volition of the testator at the very time the will was made. I instruct you, however, that there is an exception to this rule to the effect that where one who unduly profits by the will as a beneficiary thereunder, sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is shifted upon these seeking to support the will to establish by a preponderance of the evidence that there was no undue influence exercised in the execution of the will."

This case raises the quite common and interesting problem often found in a will contest as to whether a presumption of undue influence exists, placing the burden of proving no such influence on the proponents of the will, when the attorney who draws up the instrument is named as one of the beneficiaries therein?

It is the purpose of this comment to discuss this problem, but before so doing it will be necessary in order to better understand the question to briefly analyze the general topic of undue influence and fraud as a ground for setting aside a will.

### Fraud and Undue Influence Distinguished

Although undue influence and fraud are commonly considered together, they are distinct and separate. For when the latter is exercised, the testator acts voluntarily as a free agent, but is deceived into acting by false data, but when the former is exercised the mind of the testator is so dominated that another will is substituted for his own. However, both can be equally destructive of the validity of a will, and it is often a mere question of terms. Fraud may exist without undue influence being present,[2] except in so far as misrepresentation amounts to influence. However, undue influence seems to arise under one of two heads, coercion or fraud, and would seem to include both.

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[1] 35 Pac. (2d) 628 (1934).

[2] *In re Morcel's Estate*, 162 Cal. 188, 121 Pac. 733 (1912).

UNDUE INFLUENCE:

I. DEFINITION

Undue influence such as will invalidate a will is not easy to define with precision. It must be such as to control the mental operation of the testator, overcome his power of resistance, and oblige him to adopt the will of another,[3] thus producing a disposition of property which the testator would not have made if left to act according to his own pleasure. The means of control are not important, and may consist of force or coercion, violence or threatened violence or moral coercion.[4]

The extent or degree of the influence is wholly immaterial, if sufficient to make the act in question the act of another rather than the expression of the mind and heart of the actor. But to destroy the validity of a will the undue influence must be specially directed on the testamentary act, so that its effect may be registered there,[5] and must be sufficient to destroy the free agency of the testator,[6] and control the disposition of his property under the will. Mere passion and prejudice, the ordinary influence of peculiar religious or secular training imbided in the natural course of one's experience and contact with society, cannot be set up as undue influence to defeat a will.[7] Mere advice or suggestions, addressed to the sound judgment of the testator and intelligently weighed and considered by him do not constitute undue influence unless they are so strongly and persistently urged that the testator is unable to resist adopting them,[8] although the will might not have been made but for such advice or persuasion. Influence arising from mere acts of kindness, attention, and congenial intercourse, which operate to secure or retain the affection, esteem or good will of the testator, and induce him to make the persons performing such kindly deeds beneficiaries in his will, do not constitute undue influence,[9] unless such acts are carried out with the purpose and design of subjecting the mind of the testator to the influence and direction of the person exercising the influence, and thus deprive the testator of his free will, free act and free agency

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[3] *In re Ramsdell's Estate*, (Iowa), 244 N. W 744 (1932) "Influence, to be undue, within the meaning of the law, must be such as to substitute the will of the person exercising the influence for that of the testator, thereby making the writing express, not for the purpose and intent of the testator, but that of the person exercising the undue influence."

[4] *Hall's Heir v. Hall's Executors*, 38 Ala. 131 (1876).

[5] *Mallow v. Walker* 115 Ia. 238, 88 N. W 452 (1901) *Engbert v. Engbert*, 198 Pa. St. 326, 47 Atl. 940 (1901).

[6] *In re Kaufman*, 117 Cal. 228, 49 Pac. 192 (1847) *O'Dell v. Goff*, 149 Mich. 152, 112 N. W 736 (1907).

[7] *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27 (1900).

[8] *Flanigan v. Smith*, 337 Ill. 572, 169 N. E. 767 (1929) *In re Wayne's Estate*, 134 Or. 464, 291 Pac. 356 (1930) *Barbee v. Barbee*, 134 Wash. 418, 235 Pac. 945 (1925).

[9] *Ater v. McClure*, 329 Ill. 519, 161 N. E. 129 (1928) *In re Ball's Estate*, 153 Wis. 27, 141 N. W. 8 (1913) where it was held that the natural attentions of the wife to her invalid husband, and her helpful effort in caring for his business and property were not indicative that the will was the product of undue influence exerted by her.

The Washington court in its decisions has recognized substantially the same definitions and tests of undue influence as stated above. An exhaustive study was made by the court in the case of *In re Patterson's Estate*,[10] as to just what comprised the undue influence necessary to set aside a will. It was therein stated by the court that, "undue influence in procuring the execution of a will is not established by showing persuasion or argument which prevailed upon the testator to make some particular disposition of his estate. To vitiate the will an influence must be shown which, at the time of the testamentary act, controlled the volition of the testator, deprived him of his free will agency, and prevented an exercise of his judgment and choice. He may have been subjected to counsel, suggestions, and persuasion, or even importunity, yet if it can be shown, as in this case, that he had testamentary capacity, and at the time of making the will was free and unrestrained in exercising his volition it cannot be held that undue influence has been shown." In the latter case of *In re Adam's Estate*,[11] the Washington court again expressed itself regarding the question of undue influence by stating "Undue influence which will avoid a will must amount to coercion or fraud. It must be an influence tantamount to force or fear which destroys the free agency of the party and constrains him to do what is against his will." And in the quite recent case of *In re Simpson's Estate*,[12] this same doctrine was recognized and the former cases cited with approval. The court through Justice Main said "In the texts and adjudicated cases, what would constitute undue influence has been defined in different phraseology In essence, they all substantially come down to stating, in effect, that such influence, which would vitiate a will, must be shown by the evidence to be such that the testator's volition, at the time of the testamentary act, was controlled by another, and that the will was not the result of a free exercise of judgment and choice."

II. EFFECT

When the probate of a will is contested on the ground of undue influence, one or more of the provisions of the will may be sustained as valid, while others are set aside, if the portion of the will which was the result of undue influence can be separated from the parts not thereby effected.[13] But if the undue influence affects the entire will, though exercised by only one of the beneficiaries, it is invalid, for the will is not the act of the testator unless it is his free and voluntary act.

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[10] 68 Wash. 377, 123 Pac. 515 (1912).

[11] 120 Wash. 189, 206 Pac. 947 (1922).

[12] 169 Wash. 419, 14 Pac (2d) 1 (1932).

[13] *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 88 N. E. 898 (1909) *In re Carson's Estate*, 184 Cal. 417, 194 Pac. 5 (1920) where it was held that fraudulent misrepresentation by the residuary legatee that he was the lawful husband of the testatrix whereby the testatrix was induced to make him the residuary legatee and executor, do not invalidate the will as to the other legatees, in the absence of any showing that the bequests to them were affected in any way by the misrepresentations.

FRAUD

I. DEFINITION

The fraud necessary to invalidate a will has been held not to differ from that required to vitiate an ordinary contract.[14] To invalidate the will, the deception must have been such as to have induced the testator to make a disposition of his property which he would not otherwise have made, and to constitute such, it must have affected the testator in the very act of making his will, and it must be shown that the testator was actually deceived.[15] Fraud sufficient to vitiate a will may consist of the intentional concealment of a material fact,[16] the wrongful altering of the will, or the failing fully and properly to advise the testator. There is no doubt but that slander invalidates the will and hence the court may declare a will invalid for fraud on evidence of false representations made by the beneficiary or proponent to the testator, as where false accusations are made against the natural objects of the testator's bounty[17]

The Washington court has also had to pass on the question of fraud as a ground for setting aside testamentary documents, but it would seem that the court has decided each case upon the particular facts involved therein. Thus, no case has come to the front as containing a concise and accurate statement of the fraud necessary to invalidate the instrument. However, the court has recognized the general principles as herein set out, and is, therefore, in accord with the weight of authority in the handling of this problem.

II. EFFECT

Where the fraud is of such character that the testator is misled or deceived as to the nature or contents of the document which he executes, the instrument, or that portion of it with reference to which the fraud was practiced is rendered invalid, for the reason that there is a want of testamentary intent. And such is the holding where the fraud relates to some extrinsic fact, and as a consequence of the deception the testator is led to make a certain will which, but for the fraud, he would not have made. But to vitiate any part of the will, it is essential to actual fraud that the misrepresentation be made with intent to deceive the testator or to induce him to execute the will. Thus, in the case of *In re Ray's Estate*,[18] where the husband made a false representation to his wife, the testatrix, and the contestant thereafter attempted to set aside the will on the ground of fraud, the court properly said. "The representation, assuming that it was not true, was honestly made, and was therefore not fraudulent."

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[14] *Knox v. Perkins*, (N. H.), 163 Atl. 497 (1932).

[15] *Slade v. Slade*, 155 Ga. 851, 118 S. E. 645 (1923) where the fact that the proponent of a will deceived witnesses as to the character of the paper, did not result in fraud invalidating the will, where the testatrix was not deceived.

[16] *In re Nutt's Estate*, 181 Cal. 522, 181 Pac. 393 (1919).

[17] *Franklin v. Bett*, 130 Ga. 37, 60 S. E. 146 (1908).

[18] 113 Wash. 277, 193 Pac. 682 (1920).

PRESUMPTIONS AND BURDEN OF PROOF

I. IN GENERAL

In accordance with the general principles relating to presumption and burden of proof, it is usually held that when a will appears to have been duly executed and attested according to the statute of wills the law presumes it to be valid, and the burden of proof rests upon whoever alleges it to be the product of undue influence.[19] This rule was closely adhered to by the Washington Supreme court in the case of *Hunt v. Phillips,*[20] where the court speaking through Justice Dunbar said "On the contest of a will which has been admitted to probate *ex parte,* the burden of proof is upon the contestants to establish every material fact alleged." Substantially the same rule has been embodied in the Washington probate code[21] which reads as follows

> "In any such contest proceedings (will contests[22]) the previous order of the court probating or refusing to probate, such will shall be *prima facie* evidence of the legality of such will, if probated, or its illegality, if rejected, and the burden of proving the illegality of such will, if probated, or the legality of such will, if rejected by the court, shall rest upon the person contesting such probation or rejection of the will."

In the contest of a will on the ground of undue influence or fraud the evidence required to establish such need not be of that direct, affirmative and positive character which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence or fraud may be reasonably inferred, for direct proof is rarely attainable. Parol evidence is admissable either to prove or to conteract proof of a fraud or undue influence, for the purpose in such case is not to vary or control what is written, but to impeach the validity of the instrument itself. This requirement as to the sufficiency of evidence to prove undue influence or fraud is likewise followed by the Washington decisions. For *In re Patterson's Estate, supra,* the following rule was laid down "Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." Again, in the case of *In re Tresidder's Estate,*[23] this same doctrine was expressed

[19] *Towson v. Moore,* 173 U. S. 17, 43 L. Ed. 597 (1899) *Cuthbert v. Chauvet,* 136 N. Y. 326, 32 N. E. 1088 (1893) *In re Motz's Estate,* 136 Cal. 558, 69 Pac. 294 (1902).

[20] 34 Wash. 362, 75 Pac. 970 (1904).

[21] Rem. Rev. Stat. 1387.

[22] Parentheses ours.

[23] 70 Wash. 15, 125 Pac. 1034 (1912).

thusly "From the very nature of things, undue influence can rarely be proved by direct evidence. The relations of the parties, surrounding circumstances, the habits and inclinations of the testator, his purposes and wishes expressed, all furnish competent sources for the guidance of the courts when called upon to decide a case of this kind."

II. Burden of Proof Where General Confidential Relation Exists.

While it has been held in a few jurisdictions that the existence of confidential relations between the testator and a beneficiary under his will creates a presumption of undue influence and casts the burden of showing freedom from restraint on the beneficiary,[24] the rule existing in a majority of jurisdictions wherein the question has arisen is that a presumption of undue influence is not raised and the burden of proof is not shifted by the mere fact that a beneficiary occupies, as regards the testator, a confidential or fiduciary relation,[25] such as that of attorney, guardian, employer, landlord or a close business relation. The Washington court has passed upon this presumption after a fashion, but has not laid down a definite rule as to whether such a presumption of undue influence is or is not raised when the beneficiary occupies such a fiduciary relation to the testator. In the case of *White v. White*,[26] an action was instituted to set aside a will, the petition alleging that the will was executed under and because of undue influence exerted upon the testatrix by her attorney and her guardian. (But note that in this case the attorney who drew the will was not a beneficiary thereunder.) The appellate court recognized that only questions of fact were presented by the case and after passing upon the competency of the testatrix to make the will went on to say "It is argued by the appellant that the fiduciary relation existing between the testatrix and her guardian and her attorney are sufficient to show undue influence. While there were confidential relations existing between these parties, we think the evidence conclusively shows that the relation was not used in any way to influence the testatrix in making her will." The court in one sentence seems to pass the question by as being merely one of fact, but it does indicate that no presumption of undue influence exists simply because the beneficiary holds a fiduciary relation with the testator, and thereby is in accord with the majority

III. Burden of Proof Where the Attorney Drawing the Will is a Beneficiary

We are now ready to consider the problem which faced the California court in reaching their decision in the *Erickson* case,

[24] *In re Moxley's Will*, 103 Vt. 100, 152 Atl. 713 (1931) *In re Bailey's Estate*, 186 Mich. 677, 153 N. W. 39 (1915).

[25] *Liddle v. Salter*, 180 Ia. 840, 163 N. W 447 (1917) *In re Holloway's Estate*, 195 Cal, 711, 235 Pac. 1012 (1925) *In re Simmon's Estate*, 156 Minn. 144, 194 N. W 330 (1923) See *Ginter v. Ginter* 79 Kan. 721, 101 Pac. 634 (1909) for a lengthy discussion of this problem and a list of authorities.

[26] 111 Wash. 354, 190 Pac. 1003 (1920).

*supra*. Upon a close examination of the textbook authorities and cases it appears that there is a decided conflict of authority as to whether this drawing of the will by a beneficiary creates the presumption of undue influence practiced upon the testator. Gardner on Wills, 2nd Edition, p. 165, holds that the mere fact that the beneficiary wrote the will gives rise as a matter of law to no presumption of undue influence. On the other hand Page in his treatise of this subject at section 731 says "If an attorney draws a will under which he takes a substantial benefit, a presumption of undue influence arises." These two texts are indicative of the uncertainty of the law in the various jurisdictions as to this point. The California court clearly follows the rule that a presumption does exist and places the burden of proof upon the proponents in this situation.[27] Therefore, the result reached in the *Erickson* case was perfectly consistent with former holdings within that jurisdiction. The supreme courts of Michigan, Oklahoma, Iowa, Illinois and New Jersey have likewise at one time or another followed this rule. But in Connecticut, Kentucky, Missouri, New York and Texas we find that such a presumption does not exist shifting the burden of proof to the proponents.

This particular question was squarely raised in Washington in the case of *In re Tresidder's Estate, supra*. There the pertinent facts showed that the will was in the handwriting of the sole beneficiary and the execution thereof was accompanied by other suspicious circumstances. The court in disposing of these facts said "It is earnestly maintained that the burden of proof is on the contestant, and that this burden has not been sustained. This is true as a general rule, but when it is shown that the will as proposed is in the handwriting of the sole beneficiary, coupled with the other suspicious circumstances, we think enough has been shown, when considered in the light of the former wills to put the executor to his proof that there was no undue influence." Upon analyzing that opinion it would seem that the Washington court would not raise the presumption of undue influence on the part of the beneficiary attorney from this fact alone but would require other suspicious circumstances being present at the execution of the will. This was substantially the holding of the court several years later in the case of *In re Beck's Estate*.[28] There the two beneficiaries under the will employed the scrivener to draw up the will (the scrivener took nothing thereunder) The will was then read to the testatrix but she was unable to understand the English language sufficiently to comprehend the terms of the instrument. The will was subsequently contested on the ground of undue influence as shown by these facts. The supreme court in ruling on the case quoted approvingly from Rood on Wills, section 190,

[27] *In re Morey's Estate*, 147 Cal. 491, 82 Pac. 57 (1905) where it was held that evidence showing that the will was drawn by the testator's attorney at law and the attorney is named in the will as one of the residuary legatees, is sufficient to raise the implication that the will was procured by the undue influence of the attorney. This case was quoted with approval by the court in the Erickson case.

[28] 79 Wash. 331, 140 Pac. 340 (1914).

which reads "If the testator was well and strong no presumption of undue influence or fraud arises from the fact that the person who drew it up was favored by it. But if the testator was weak and the scrivener benefited, slight circumstances in addition may suffice to cast the burden upon him to show that there was no fraud practiced and no undue influence exercised." Thus it appears that although the court was not ruling on a case in which the beneficiary attorney drew up the will, yet the court passes upon this question and again recognizes that before the presumption of undue influence will arise when the attorney drawing the will is a beneficiary thereunder other suspicious circumstances must surround the execution of the instrument. This question again came before the court in the case of *In re Adin's Estate, supra.* The grounds of this will contest were the alleged incapacity of the testator and undue influence in procuring the making of the will. The cause was tried before the lower court without a jury and resulted in the sustaining of the will, except as to one bequest, which was to the attorney who drew the will. The appeal was made from that part of the judgment setting aside the bequest to the attorney on the ground of undue influence. As to this bequest to the attorney who drew the will, the trial court had held. "That a legal presumption of undue influence arises and exists as to the bequest made to the attorney under and in said will." The appellate court in reviewing the case tended only to scrutinize the facts, and reached the conclusion that there was no evidence to sustain the charge of undue influence, without clearly passing upon the presumption followed by the lower court, for we find this statement. "Even though the burden were upon the beneficiary of the bequest to show that no undue influence had been exercised, the evidence in the case would fully meet and overcome such burden." But in the concluding paragraph of the opinion we find this pertinent language· "The facts and the presumption both sustain the will as written. While it may have been an error of judgment for a beneficiary under the will to act as the draftsman thereof, this in itself is not sufficient to defeat a bequest where there is no evidence showing undue influence, and where the evidence upon the question given by creditable witnesses, is clear and unequivocal in support of the view that the will as written was as the testator desired it." There, the court after resting the case upon the facts involved therein again comes out with a statement tending to uphold the rather vague rule as set out in their previous cases to the effect that no unfavorable presumption arises from the single fact that the beneficiary attorney drew up the will. In the recent case of *In re Adam's Estate,*[29] the facts show that the testatrix, a widow, made her attorney who drew the instrument the sole beneficiary, thereby raising the identical problem in discussion. Upon her death the will was contested on the ground of mental incompetency and undue influence of the beneficiary thereunder. From a judgment sustaining the will the contestant appealed. The appellate court in reversing the judg-

[29] 164 Wash. 64, 1 Pac. (2d) 840 (1931).

ment based their decision alone upon the incompetency of the testatrix. Justice Millard for the court said "We have disregarded the issue of undue influence which appellant insists, is evidenced by failure of the respondent to have the decedent consult disinterested persons in the matter of giving her property to her attorney" Once again the state supreme court based its opinion upon other grounds and avoided a clear decision on our problem in issue.

It is submitted, however, that the Washington court, although perhaps frowning upon the drawing of a will by the attorney who becomes a beneficiary thereunder, will not from this fact alone raise a presumption of undue influence upon the testator, but will require that other suspicious circumstances surrounding the execution of the instrument tending to indicate this influence or fraud be shown. Then, and only then, will the burden of proof be shifted to the proponent of the will thereby showing that a presumption of undue influence does exist.

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