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Undue Influence and Fraud In Wills

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What Constitutes Undue Influence and Fraud, and How They are Proven

Perhaps the best and most lucid preliminary statement on the subject of Undue Influence to be found in the books is that of Professor Bigelow on the Law of Wills at page 81, wherein he states:

"The will must, of course, be the will of the person who executes the instrument; which means that it must have been his free or voluntary act. Now one's freedom of action may be taken away either by coercion or by what is called undue influence. Of coercion, otherwise called duress, it is not necessary particularly to speak, for it is obvious enough that if I sign an instrument under the orders of another it is not my own free act. It is my act in a sense, and my intended act (if the very muscles of my hand were not compelled by external force applied to them), for it must have been the result of motives within my own mind—the stronger motive has prevailed; but that does not make the act my free act as the law defines freedom of action. Legally speaking, the act is not my act—the will is not my will."

In this discussion it is necessary to keep the particular subject distinct from that of testamentary capacity.

Armor's Estate, 154 Pa. 517.

In outlining the expressions of the Courts on this latter topic it was pointed out that the requirements of testamentary capacity are not of a very high order. However, if it is shown that a testator lacks testamentary capacity obviously it is unnecessary to go into the issue of undue influence. On the other hand if a testator has testamentary capacity, it may be nevertheless of such a low order as to make him an easy subject of undue influence.

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A great deal has been written and many cases, English and American, have been litigated on the issue of undue influence but it is submitted that out of the mass of learning upon this topic the remarks of Sir J. P. Wilde, in Hall v. Hall, L. R. 1 P. & D. 481, from the English Reports, present the most concise, as well as comprehensive statement extant:

"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

Over three quarters of a century ago Woodward, J. in Zimmerman v. Zimmerman, 23 Pa. 375, thus epitomized the matter:

"When a will duly executed is offered for probate, the law presumes competency in the testator, and that the instrument expresses his free and unconstrained wishes in regard to the disposition of his property. This presumption may be rebutted by showing, to the satisfaction of a jury, that the will was obtained by fraud and imposition practised on the testator, or by duress, or by undue influence. What constitutes undue influence, is a question which must depend very much on the circumstances of each case. It is

in its nature one of those inquiries which cannot be referred to any general rule. Yet many principles have been settled by judicial decision which, properly applied, afford in most cases an adequate guide to a right decision of the question. Thus one has a right by fair argument and persuasion to induce a testator to make a will in his favor: Miller v. Miller, 3 Ser. & R. 267. And it is not sufficient to set aside a will to show declarations of the testator that he intended to make a different one, but that his wife had a high temper and interfered: Moritz v. Brough, 16 Ser. & R. 403. If a wife by her virtues has gained such an ascendancy over her husband, that her pleasure is the law of his conduct, such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of her family; though if that influence was specially exerted to procure the will in question, it might be sufficient to impeach it: Small v. Small, 4 Greenleaf 220. Threats and flattery, which induce and coerce a testator to subscribe and execute the will, furnish sufficient ground for setting it aside: Denslow v. Moore, 2 Day 12. A degree of importunity which deprives a testator of his free agency, which he is too weak to resist, and which renders the instrument not his free and unconstrained act, will invalidate a will: Davis v. Calvert, 5 Gill & Johns. 269. But the influence exercised must be such as to destroy free agency. Unless the jury are satisfied that such mental force has been exercised as prevented free agency, the influence exerted is not to be considered improper: Browne v. Mollis-ton, 3 Wh. 138. To the same effect is the rule as laid down in Greenleaf's Ev. vol. 2, Sec. 688, where it is said undue influence is not that which is obtained by modest persuasion, or by arguments addressed to the understanding, or by mere appeals to the affections; it must be an influence obtained either by flattery, excessive importunity or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his free will, what he is unable to refuse."

In the oft cited case, Tawney v. Long, 76 Pa. 106, an excellent statement is found in the words of Gordon, J.:

"Then we have the declarations of the testator himself, as found in the testimony of Henry Long and his wife; 'that John E. Tawney was dingdonging at him to make his will, and leave all he had to him and his family'.

"But these declarations prove nothing but such solicitations as do not affect the validity of a will. Even importunate persuasion from which a delicate mind would shrink, will not invalidate a devise: Miller v. Miller, 3 S. & R. 267. But beyond this these declarations are too remote from the time of execution, and are not so connected with other facts and circumstances indicating circumvention or fraud in the procurement of the will as to make them part of the res gestae, and are therefore not evidence: 2 Greenl. Ev., Part 4, Sec. 690; McTaggart v. Thompson, 2 Harris 149.

We cannot think, therefore, that all this evidence taken together was sufficient to raise such a question of undue influence as should have been submitted to the jury. Undue influence, of that kind which will affect the provisions of a testament, must be such as subjugates the mind of the testator to the will of the person operating upon it, and in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences must be proved to have operated as a present constraint, at the very time of making the will. But constraint is not to be inferred from mental weakness alone, though the weak mind may be more readily constrained and deceived than the strong one; and though it is to be considered as a fact in determining the question of constraint, nevertheless, as is said in McMahon v. Ryan, 8 Harris 329, that undue influence, which suffices to destroy an alleged will, is distinct from weakness and has no necessary connection with it.

So it has been held that general bad treatment furn-

ishes no evidence of such influence, and we may add, neither does general kindness, though this may have a powerful influence upon a weak mind, unless it is shown to be part of a crafty arrangement to procure the testamentary disposition: Thompson v. Kyner, 15 P. F. Smith, 368; Rudy v. Ulrich, 19 P. F. Smith 177; Eckert v. Flowry, 7 Wright 46."

In the recent case of Koons's Estate, 293 Pa. 465, Walling, J. states:

"We have examined with care all the evidence and considered all the circumstances in this case and agree with the Orphans Court that they fail to make a prima facie case of undue influence. The definition of which, as given by the present chief justice, in Phillips' Est., 244 Pa. 35, 43, with numerous authorities cited in support thereof, follows: 'In order to constitute undue influence sufficient to void a will, there must be imprisonment of the body or mind, . . . fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of the will'."

Volition

In the quotation from Hall v. Hall, supra, Sir J. P. Wilde, described undue influence in a fitting phrase "to overpower the volition without convincing the judgment." This is probably the neatest phrase found in the great amount of learning on this subject, it being recognized that a general rule is difficult of application and that what constitutes undue influence is a question which must depend very much on the circumstances of each case. Volition is defined in the Cent. Dic. as "the act of willing; the exercise of the will," and also quotes from Locke, Human Understanding, this statement: "The actual exercise of that power (the will) by directing any particular action or its forbearance is volition."

The rule of law is, therefore, that the testator must be in a state of free agency, so when the judgment is exercised the act of willing is untrampled. Influences affecting the free exercise of human action may be good or bad but all influences morally bad are not undue or unlawful in the eyes of the law. Conversely, some morally good influences may be exercised to such an extent as to be characterized as undue from a legal standpoint.

Marital Influences

The relationship of husband and wife naturally gives rise to influences affecting their conduct one to another as was aptly stated by Woodward, J. in Zimmerman v. Zimmerman, 23 Pa. 375:

"If a wife by her virtues has gained such an ascendancy over her husband, that her pleasure is the law of his conduct, such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of her family; though if that influence was specially exerted to procure the will in question, it might be sufficient to impeach it: Small v. Small, 4 Greenleaf 220."

On the other hand, the same influences may impel a wife to make a will in favor of her husband and to the exclusion of their children. In Spence's Estate, 258 Pa. 542, Walling, J. observed:

"The evidence establishes no circumstances indicating that the will was procured by fraud or undue influence. There is nothing to indicate that Mr. Spence had or exercised any influence over his wife, except that he was her husband; and, being a near relative, the fact that he wrote the will in which he was sole beneficiary does not cast upon him the burden of proof as it would in case of a stranger: Blume v. Hartman, 115 Pa. 32. Mrs. Spence is presumed to know the contents of the paper signed by her: Vernon v. Kirk, 30 Pa. 218; Dickinson v. Dickinson, 61 Pa. 401; Frew v. Clark, 80 Pa. 170."

Needless to remark in cases of marital influence the

presumption is on the side of the proponent and the burden upon the contestants to show some facts that would indicate the exertion upon the part of proponent of some species of influence which the Courts have characterized as undue. See Schouler on Wills, 6th Ed. Sec. 278; also Perret v. Perret, 184 Pa. 131. Schouler suggests in Sec. 279 that undue influence may be more readily predicated of a husband over his wife than of a wife over her husband. But quere.

Filial Influences

The attitude of the law towards those sustaining filial relations and in respect to mutual will making is the same as that already discussed relative to marital relationship. One of the hardest fought and now leading case on this topic is that of Robinson v. Robinson, 203 Pa. 400. The charge was undue influence in an issue devisavit vel non where a will made by a mother in favor of a son was attacked. It was held that the trial Court properly stated the law in charging as follows:

"A son may importune his mother to make a will in his favor. He has a perfect right to do it, and if the only effect was to move her affections or sense of duty or judgment, he has a perfect right to do it; but if these importunities were such as the testator had not the power to resist, and yielded for the sake of peace and quiet, or escaping from serious distress of mind, if they were carried to a degree by which the free play of testator's judgment, or discretion, or wishes were overcome, it is undue influence. He can coax her, but he must not drive her, either by moral coercion or physical force."

In the late case of Aggas v. Munnell, 302 Pa. 78, 152 A. 840, Walling, J. declared:

"The undue influence must be such as to control the testator in the act of making the will. Tetlow's Estate, supra; Keen's Estate, 299 Pa. 430, 149 A. 737; Wolfe's Estate, 284 Pa. 169, 130 A. 501; Gongaware et al v. Done-

hoo et al., 255 Pa. 502, 100 A. 264; Herster v. Herster, 122 Pa. 239, 256, 16 A. 342, 9 Am. St. Rep. 95. Furthermore, the proof fails to show a confidential relation between proponent and her father. Mere relationship does not create a presumption of confidential relation (Leedom et al. v. Palmer et ux., 274 Pa. 22, 117 A. 410; Vogan, Executor, v. Jordan, 92 Pa. Super. Ct. 519), nor does the fact that they resided in the same home, nor that she used his pension money, with his approval, for the support of the family, nor because she nursed him and attended to his wants, and there is practically nothing else. That she, a daughter was preferred in the will, raises no presumption against her as it might in case of a stranger. Caldwell v. Anderson, 104 Pa. 199, 206. She would be within her rights in urging him to make a will in her favor (Leisey's Estate, supra; Koon's Estate, 293 Pa. 465, 143 A. 125; Masterson v. Berndt, 207 Pa. 284, 56 A. 866; Trost v. Dingler, 118 Pa. 259, 12 A. 296, 4 Am. St. Rep. 593), although there is no proof whatever that she in fact did so. Solicitations, however importunate, will not constitute undue influence. Englert v. Englert, 198 Pa. 326, 47 A. 940, 82 Am. St. Rep. 808."

For an early case of a son as beneficiary in the father's will, see Miller v. Miller, 3 S. & R. 267, 8 Am. Dec. 651.

In Pensyl's Estate, 157 Pa. 465, an issue on the ground of undue influence was properly refused, the evidence showing that the testatrix excluded two of her sons from any participation in her estate, on the ground that these sons "had not treated her right" and it appearing that the two sons thus excluded had instituted lunacy proceedings against their mother and that these proceedings had failed.

In Hook's Estate, 207 Pa. 203, it was held, inter alia, as follows:

"To set aside a will on the ground of undue influence where the testator is in full possession of his faculties and his testamentary capacity admitted or established, the evidence must be clear and strong. Mere opinions or suspicions, or belief not founded on facts testified to, will not be sufficient.

The mere fact that the proponents of a will were the favored children of the testatrix, and that they were more attentive to her in her declining years, is not sufficient to establish undue influence in the absence of proof of acts or course of conduct which unduly influenced the testamentary act.

The fact that a son tried unsuccessfully for years to induce his mother to exclude from her household a daughter, is not evidence in favor of, but rather against undue influence; nor is the fact that at the time testatrix executed her will she executed and delivered in escrow a deed to be delivered to a favorite son after her death on payment by him to her estate of an amount alleged to be less than the value of the land, in itself evidence of undue influence.

The fact that a favorite son of testatrix largely benefited by her will, attended to her business and acted as her attorney in her lifetime, does not in the absence of evidence of impairment of testatrix's mental faculties, impose upon him the burden of proving that he exercised no undue influence on the mind of his mother."

Conversely, it has been held on the trial of an issue devisavit vel non in which the alleged will is attacked on the ground of undue influence that the case is for the jury where the evidence on behalf of the contestant, although contradicted tends to show that his mother, after a quarrel with the contestant, declared that she would have the father cut him off without a cent and it being further shown that she possessed great influence over her husband who feared to resist her and that she immediately sent for a lawyer and had the will in question prepared disinheriting the contestant and that she told her husband who was ill and weak at the time, and died of senility, five days thereafter, that if he did not sign the will she would put him out of the house, and that she remained with her husband until the will was executed.

Furthermore, it was shown that the testator and his son had always been on good terms and that he had expressed his intention to divide the property equally between

the son who had been very kind to him and his daughter. At the trial evidence of declarations of the mother made a few hours before the will, which made her the principal beneficiary and disinherited the son, was drawn and executed to the effect that she would have her husband cut off the contestant, his only son, without a cent, were held admissible and Green, J. in passing upon this point said:

"As to the twelfth assignment, in relation to the declarations and acts of Sarah Perret as to what she would do, and what she did actually do, in procuring the will to be made as it is, it would be strange indeed if these should be excluded. She was the very person who was charged with having exercised the undue influence, and her declarations were of her own purpose to do that very thing, to have Henry cut off without a cent, by means of a will which she would procure her husband to make. And this was followed up by actual and undisputed proof that that very thing was done, and at the very time she said she would have it done, to wit: the same night. And now we have before us that very will, actually made on that same night, and actually cutting Henry off from every possibility of getting a single penny of the estate, and yet we are asked to exclude evidence of her acts and declarations in producing that result. Most certainly we will do no such thing. The ingenuity displayed in accomplishing her object is something remarkable. If the will had nothing more in it than a gift of the whole estate to the wife, and then she had died before her husband, intestate, Henry would have received one half the estate as heir of his mother. But even that possibility was excluded by the next provision in the will, giving the whole estate to the daughter in case the wife died before her husband. The evil purpose, the positive malignity of the woman, could not be more strongly indicated than by this provision; and that too against her only son, who had contributed by his daily and unrequited toil for twenty-five years to the support and maintenance of both his parents. It is doubtful if so gross a case of unnatural malevolence of a mother to a son can be found

in the books. The principles and authorities cited in support of the twelfth assignment have nothing to do with this subject, and they are altogether inapplicable. The assignment is dismissed."

Perret v. Perret, 184 Pa. 131.

Social Influences

In discussing testamentary power it was observed from the citations that, generally speaking, a person has a right to dispose of his property as he deems best providing he possesses testamentary capacity and that although a will may appear to be unjust yet this fact of itself is no evidence of lack of testamentary capacity. Morgan's Estate, 219 Pa. 355, 68 A. 953; Cauffman v. Long, 82 Pa. 72.

By the same token the fact that the provisions of a will may appear to some to be unjust is no evidence of undue influence. 7 Ann. Cas. 894, 13 Ann. Cas. 1044.

The influences motivating a testamentary disposition may arise from a variety of social phenomena such as kind treatment, and friendly services or a beneficiary may be named by a testator not for love for the beneficiary but on account of hatred, aversion and prejudice against some one else. These are not commendable motives but on the other hand are not necessarily unlawful.

In the English case, Wingrove v. Wingrove, 11 P. D. 81, Sir James Hannen in addressing the jury, inter alia, said:

"A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favor. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

"To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or

she will make a will in a particular person's favor, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate, in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence."

In Roberts v. Clemens, 202 Pa. 198, binding instructions for the proponent of a will were approved by the Supreme Court where the issue was undue influence. The essential facts and the attitude of the Court are reflected in the following from a Per Curiam opinion:

"The testatrix was a widow and had no children. Her nearest collateral relatives were Jacob R. Clemens, this defendant, and two children of a deceased brother. The wife of plaintiff, Mary E. Roberts, was her first cousin. The testatrix had lived in her cousin's family for some two or three weeks before her death; eight days before that event, while ill in bed, she requested Mrs. Roberts to draw her will, which she proceeded to do, and wrote the one in question. It was afterwards formally witnessed. It disposed of all her property; the will itself shows she possessed a full and detailed knowledge of all her possessions; besides Dr. Roberts and his wife, she names as legatees of specific articles, no less than eight relatives. The will itself, with the oral testimony, completely rebuts the allegation of testamentary incapacity. It is argued, that the fact of her large gift to the husband of her cousin, to the prejudice of her living brother and the children of a deceased one, was unnatural, and of itself suggestive of undue influence; this is a mistake; Dr. Roberts and his wife at the time of her husband's death and down to her own last illness, had, on the undisputed testimony, been particularly kind and attentive to her; the husband daily ministered to her as a physician, the wife as a nurse; her last illness was in Dr. Robert's house and she died there; what more natural, than that she should try to reward them by the gift of the

larger part of her small estate, not worth over $2,000.00?"

In Morgan's Estate, 219 Pa. 355, Mitchell, C. J. said:

"Testator had an only child, a daughter, whom he passed over and gave the bulk of his estate to her two children, and it is argued from this that the will is an unnatural one and evidence of undue influence. But a will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views it is never unnatural, however much it may differ from the ordinary actions of men in similar circumstances. In the present case it was shown that the testator had a prejudice against his son-in-law and that his reason for passing over his daughter was to avoid the probability of the estate coming into the hands or management of her husband. It is conceded that the prejudice was without any just foundation, but just or unjust its existence explains the testator's action and deprives it of all weight as evidence of mental incompetency. As said by Paxton, J., in Cauffman v. Long, 82 Pa. 72, quoted by the learned judge below, "a man's prejudices are a part of his liberty." The favoring of grandchildren in preference to children is not in itself so unusual as to need justification."

In 7 Ann. Cas. 895, there is reference to certain New York cases which hold that where a will is contrary to the dictates of natural affection, of justice and of duty, the burden is on the proponents to give some reasonable explanation of its unnatural character or at least that it was not the result of mental defect, obliquity or perversion. It is not conceived that our cases go to this length although it is true that where a stranger has actively participated in the preparation and execution of a will in which he is the beneficiary the burden of proof is placed upon him to show that it was not the result of undue influence: Blume v. Hartman, 115 Pa. 32; Hook's Estate, 207 Pa. 203; Spence's Estate, 258 Pa. 542; White's Estate, 262 Pa. 356; L. R. A. 1918 D 755 Note and 774 Note.

In Caldwell v. Anderson, 104 Pa. 199, Gordon, J., laid down the rule in these words:

"The law as contained in those cases may be summarized as follows: Where the testator is shown to be of weak mind, without regard to the cause or causes from which that weakness has arisen, though it be not sufficient in itself to wholly destroy testamentary capacity, and the person by whom, or under whose advice, the will has been written, being a stranger to the testator's blood, receives a legacy or bequest, large as compared to the testator's estate, the burden of proof shifts from the contestants to the proponent of the will. In such case not only must testamentary capacity be affirmatively proved, but it must also be shown that the testator acted with a full knowledge of the value of his estate."

In Lawrence's Estate, 286 Pa. 58, Kephart, J. remarked:

"There is no presumption of mental weakness arising from the fact that the will of the testator may seem to be unreasonable or unnatural in its provisions, or that it makes an unequal distribution among the next of kin, or gives the property to a person other than the natural recipient of the testator's bounty (40 Cyc. 1019), except where the disposition is so gross or ridiculous as to give rise to a presumption of insanity. Unreasonable or unnatural disposition, with other evidence, may be used to prove incapacity, but, standing alone, it is insufficient. Such distribution may, however, become of the utmost importance when considering the question of undue influence to which it is more closely related. Whatever may be thought of the wisdom of the maker of the will, or of the just claims of his collateral relatives upon his bounty, the internal circumstances of this will add little force to the bare allegation that he did not have disposing mind at the date of its execution."

The relevant matter and cognate authorities were further summed up in a recent case by Walling, J.:

"It may also be added that it is only where the testator

is of weak mind, arising from physical or mental ailment that a presumption of undue influence arises when a stranger to his blood procures a large legacy: Adams's Est., 220 Pa. 351; Caughey v. Bridenbaugh, 208 Pa. 414; Robinson v. Robinson, 203 Pa. 400; Friend's Est., 198 Pa. 363, 366; Herster v. Hester, 122 Pa. 239; Caldwell v. Anderson, 104 Pa. 199, 204. To place the burden of proof on proponent, there must be evidence of weakened intellect; Phillips' Est., 244 Pa. 35, 44; Gongaware et al. v. Donehoo, et al., 255 Pa. 502, 508. In the instant case, the physical weakness apparently had no effect upon his mental faculties. As late as July 21, 1926, the decedent overruled Swartley as to the manner of payment of a large farm bill. We might well adopt here the language of Chief Justice Fell, speaking for the Court, in Eble v. Fidelity T. & Tr. Co. et al., 238 Pa. 585, 589; "Undue influence to affect a will must be such as subjugates the mind of the testator to the will of the person operating upon it: Tawney v. Long, 76 Pa. 106. Where the charge is that undue influence has been exerted on a strong and free mind, nothing short of direct, clear and convincing proof of fraud or coercion will avail: Logan's Est., 195 Pa. 282. The only reasonable conclusion from all the testimony is that the will in question was the deliberate act, after mature reflection, of a mind wholly unconstrained." Or, as stated by Mr. Justice Dean, speaking for the court in McEnroe v. McEnroe, 201 Pa. 477, 482; "Here, one of the most significant facts tending to show undue influence is wholly absent; there was no impairment of the mental powers, no clouding of intelligence." And see Miller's Est., 265 Pa. 315, 319: Phillips' Est., supra; Yorke's Est., 185 Pa. 61, 70; Cuthbertson's App., 97 Pa. 163, 171."

Llewellyn's Estate, 296 Pa. 74.

Meretricious Influences

In Wingrove v. Wingrove, supra, Sir James Hannen said:

"We are all familiar with the use of the word "influence"; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies."

In short, the rule of law is that the evidence of meretricious relations between testator and beneficiary does not of itself raise a presumption of undue influence.

However, in Dean v. Negley, 41 Pa. 312, Lowrie, C. J. opined:

"If the law always suspects, and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation."

These remarks are thus explained by Mercur, J. in Main v. Ryder, 84 Pa. 217:

"The fact that the testator lived with a woman to whom he was not legally married, and that she and their illegitimate offspring were the devisees of much of his property, are urged as creating a presumption in law that the will was executed under improper influences. The case of Dean et al. v. Negley et al. is cited to support this view. The opinion of the judge in that case expressly declares that the court does not decide such relations create a

presumption of law of undue influence; but leaves the effect thereof as a question of fact for the jury. To the same effect is the case of Rudy v. Ulrich et al. 19 P. F. Smith 177. No clearly defined weight can be given to such testimony. Much must depend on the particular circumstances of each case. It is an element undoubtedly to be considered."

In Wainwright's Appeal, 89 Pa. 220, Sharswood, C. J. comments:

"In an issue devisavit vel non on the allegation of undue influence by the mother of an illegitimate child, the legatee in the will, the unlawful cohabitation of the mother with the testator is not of itself sufficient evidence from which a jury could infer undue influence: Rudy v. Ulrich, 19 P. F. Smith 177. It is true that if there are other facts, unlawful cohabitation may be a circumstance of weight: Dean v. Negley, 5 Wright 317; Main v. Ryder, 3 Norris 217. In the case before us there was not a scintilla of evidence of the exertion of any influence over the mind of the testator in the testimentary act."

Compare Reichenbach v. Ruddach, 127 Pa. 564; Snyder v. Erwin, 229 Pa. 644.

In Wertheimer's Estate, 286 Pa. 155, Kephart, J. stated:

"The second ground of complaint is undue influence predicated on a charge of illicit relation between testatrix and her husband prior to their marriage in 1912. It may be doubted whether the rule in Dean v. Negley, 41 Pa. 312; Reichenbach v. Ruddach, 127 Pa. 564 and Snyder v. Erwin, 229 Pa. 644, "that, where meretricious relation has been shown to have existed between the testator and the principal beneficiary under his will and the will diverts the entire estate from the natural objects of the testator's bounty and gives it over to a woman he has just married and with whom adulterous commerce has been carried on, the presumption arises that the will was procured by undue influence," is still the law: Ewart's Est., 246 Pa. 579, 585, 586; Kustus v. Hager, 269 Pa. 103, 110, 111, where it appears the rule has been considerably modified if not en-

tirely departed from. Such a presumption cannot arise or continue where the marriage relation has existed for a long time, here more than ten years. There may be circumstances where such presumption would be efficacious but these do not exist in the present case. There is not sufficient evidence to find the fact of illicit relationship."

The present attitude is further endorsed by the same Justice in writing the Opinion of the Court in Weber v. Kline, 293 Pa. 85, wherein he reiterates:

"In Wertheimer's Est., supra, (at P. 164), we said that it may be doubted whether "the rule in Dean v. Negley, 41 Pa. 312; Reichenbach v. Ruddach, 127 Pa. 564 and Snyder v. Erwin, 229 Pa. 644, "that, where meretricious relation has been shown to have existed between the testator and the principal beneficiary under his will and the will diverts the entire estate from the natural objects of the testator's bounty and gives it over to a woman he has just married and with whom adulterous commerce has been carried on, the presumption arises that the will was procured by undue influence, is still the law: Ewart's Est., 246 Pa. 579, 585, 586; Kustus v. Hager, 269 Pa. 103, 110, 111, where it appears the rule has been considerably modified if not entirely departed from." The existence of a meretricous relation standing alone will not give rise to presumption of undue influence: Wertheimer's Est., supra."

In accord, Rood on Wills, Second Edition, Section 182.

Confidential Influences

The leading authority on this topic is the well considered and voluminous case of Yardley v. Cuthbertson, 108 Pa. 395-466, wherein Green, J. said, inter alia:

"The weight of the argument for the plaintiffs in error is that the court charged in the qualification that although the facts supposed by the point created no presumption against the validity of the codicil yet "Mr. Yardley must show by clear and satisfactory proof that the testator fully understood the testamentary disposition of his property,

because it is ground for suspicion when Mr. Yardley prepared the codicil for Mr. Neill which gave him a considerable interest and directed its execution." Why a suspicion if under such circumstances there was no presumption against the validity of the codicil? Why must Mr. Yardley prove by clear and satisfactory evidence that this entirely sound-minded man who 'suggested and directed the alterations' which gave Mr. Yardley "the considerable interest" really understood the testamentary disposition he suggested or directed, if there was no presumption against the validity of the codicil made under such circumstances? The very foundation of the qualification thus made is the thought that the presumption is that the codicil is the will of Mr. Yardley and not the will of Mr. Neill and he must, therefore, by clear proof overcome this presumption and show that Mr. Neill understood the whole thing and meant to give Mr. Yardley the considerable interest. Why must Mr. Yardley show all this? (Because the law under the circumstances stated presumes that Mr. Yardley as the confidential agent of Mr. Neill controlled his mind. The law presumes the codicil invalid until Mr. Yardley by due proof rebuts this presumption) . . . . . If we turn to the authorities it will be apparent that the court below did not transcend them in using the language we are now considering. Thus in Redfield on Wills, 515, the writer says: "Where the party to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. Thus where a will was written by an attorney or solicitor who is to be benefited by its provisions it was considered that this circumstance should excite stricter security and required clearer proof of capacity, and the free exercise of voluntary choice." The whole of this language was embodied and adopted in the opinion of this court in the case of Boyd v. Boyd, 16 P. F. S., 283."

In Arlington's Estate, 147 Pa. 624, Green, J., again took up this topic and gave a review of the authorities pointing

out that the rule of confidential relationship and the duties imposed therein covered a wide field.

"We have no hesitancy in agreeing with the auditor and court below in holding that a confidential relation arose between the uncle and nephew after the letter of attorney was executed, and the duty it imposed was undertaken by the attorney. He became then and thereby charged with the special trust and confidence of protecting the property of his principal, and of managing it, so as to promote the best interests of his principal. Whatever was done by him in hostility to that duty was a breach of the trust and confidence reposed in him. The confidential relation is not at all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and generally, all persons who are associated by any relation of trust and confidence. When the relation exists the consequent duties and obligations are perfectly well established by long settled law."

Rood on Wills, Second Edition, Section 191, thus states the rule concerning confidential relations:

"The rule as stated by Baron Parke and often approved, is this: "If a person, whether an attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each case, in some of no weight at all, ... varying according to the circumstances—for instance, the quantum of the legacy, the proportion it bears to the property disposed of, and numerous other circumstances." In a few cases the mere fact that the beneficiary stood in a confidential relation to the testator, as his attorney, physician, priest, guardian, or confidential agent, is held to raise a presumption that this confidence was abused to obtain the legacy, which will therefore be held void unless the proponent shows that no unfair advantage was taken of the

testator. But the general rule is that the existence of confidential relations raises no presumption of undue influence if the beneficiary is shown not to have had anything to do with the execution of the will."

In Miller's Estate, 265 Pa. 315, the testator gave a large portion of his estate to his physician in trust for a young woman who had lived with the testator from early childhood until her marriage and providing, inter alia, that the residue of the trust after the death of the beneficiary might be disposed of by the physician as he saw fit. The will excluded with an insignificant bequest the brother and sister of the testator. It was contended that an issue d. v. n. must be awarded because the confidential relation existing between the decedent and his physician raised a presumption of undue influence and ipso facto entitled the contestant to an issue. Kephart, J. in the course of his opinion stated that the interest which the testator's physician received under the will was sufficient to shift the burden of proof to the proponents of the will to show testamentary capacity and that no improper influence was exerted. There was not a particle of proof to show at the time testator met the physician and directed how the will was to be written that he was not possessed of his full mental faculties. The learned Justice in affirming the decree of the Orphans Court refusing to award an issue, observed:

"The mere denial of the physician is not enough. But the entire atmosphere of this case is devoid of any attempt on the part of the physician to exercise control, other than in a professional way, over the decedent. There was not the slightest attempt to show the doctor did anything outside of the ordinary work of a physician promptly attended to; nor was there evidence that those in attendance attempted to influence the testator's mind. It does appear that he was determined to give his property to those who had shown some attention and affection for him during the later period of his life."

In XXXI Dickinson Law Review 128, Professor Joseph P. McKeehan, writing on the subject "Undue Influence and Wills in Pennsylvania" makes this observation concerning Miller's Estate, supra:

"The burden of proof was cast upon this physician, not so much because of the weakness of the testator but because of the rule that, "where a will is drawn in favor of one occupying a confidential relation, who either writes it, or procures it to be written, or whose advice is sought and taken, the burden rests on such beneficiary to disprove undue influence. Especially is this so, where the testator, though possessing testamentary capacity, is of weak mind: Boyd v. Boyd, 66 Pa. 283; Cuthbertson's App., 97 Pa. 163; Armor's Estate, 154 Pa. 517; Wilson v. Mitchell, 101 Pa. 495; Douglass's Estate, 162 Pa. 567; Walton's Estate, 194 Pa. 528, 533."

The rule of law, therefore, deduced from our cases is that where one occupying a confidential relation either writes, or procures to be written a will of his principal in which the confidant is a beneficiary, the burden rests on the confidant to disprove the exertion of undue influence, irrespective of the mental or physical condition of the testator at the time of the will making. This burden, however, may be under certain facts very light and the explanatory proof submitted by proponent considered by the Court as sufficient and not warranting the granting of an issue. On this latter point Moschzisker, J. in Phillips' Estate, 244 Pa. 35 pertinently remarked:

"In so far as the testimony of the proponent of a will is not inherently unreasonable or improbable, the judge may consider it in measuring the preponderance of the evidence (Caughey v. Bridenbaugh, supra, 420, 424, 433; Yardley v. Cuthbertson, 108 Pa. 395, 460; Wilson v. Mitchell, 101 Pa. 495, 505; Yorke's Est., 185 Pa. 61, 71), and in the absence of "direct proof of undue influence actually exercised by the proponent" or "a presumption thereof arising against him from something in the evidence indicating weakness or infirmity in the testatrix," his testimony, when

taken with the other proofs in the case, may so far discharge the burden of explaining away any circumstances introduced by the contestants' witnesses, which apparently require explanation, as to justify binding instructions in favor of the will or the refusal of an issue. (Caughey v. Bridenbaugh, supra, 433)."

See Caughey v. Bridenbaugh, 208 Pa. 414.

If the will was not written or procured to be written by the confidential advisor who benefits, nevertheless, the presumption of undue influence arises if the physical or mental condition of the testator is shown at the time of the will making to have been perceptibly weakened. In Lawrence's Estate, 286 Pa. 58, Kephart, J. thus states the rule:

"There is no presumption in this case that would shift the burden to proponent on the question of undue influence. The rule is that "where the testator leaves a substantial part of his estate to one occupying a confidential relation, the burden is on the latter to show that no improper influence controlled the making of the will. . . . . This presumption arises only when there has been proof of extreme infirmity or mental weakness." Gongaware v. Donehoo, 255 Pa. 502, 508; Phillips' Estate, supra, 44, 46."

The strict rule against a confidential agent is not applied in cases of blood relationship unless the element of the weakened physicial and mental condition of the testator is injected even though the will be written by the confidant who is by its terms a principal beneficiary. In Blume v. Martman, 115 Pa. 32, Green, J. said:

"Beyond question, if the will had been written by a stranger who was by its terms the principal beneficiary, the burden of proving that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the estate to be taken by the beneficiary, would rest upon him. But the Court below made a most ample exception to this rule in favor of the plaintiff, because he was a son of the testratrix and therefore had a right of importunity in his own favor without incurring the penalty of affirmative proof."

On the other hand in Miller's Estate, 179 Pa. 645, it was held that where a testator, although possessed of testamentary capacity is aged, infirm bodily, with mental faculties impaired, makes a will giving to his son, who is also his confidential advisor, three fourths of his estate there arises a presumption of fact that undue influence was brought to bear on the mind of the testator and consequently the burden is on the son as beneficiary to rebut the presumption.

Likewise, in Miller v. Miller, 187 Pa. 573, it was held that in a contest over a will in which a son is largely preferred, if it appears that the son, athough not the father's attorney, was his trusted and confidential agent, the burden of proof is on the son to rebut the presumption of undue influence. Although nothing is said in the latter case about the testator's mental or physical condition, apparently the rule of law as enunciated was based upon such facts.

That this is a fair assumption appears in the opinion of the trial court in Friend's Estate, 198 Pa. 363, which opinion was approved per curiam, and wherein it appeared that in a contest over a will in which a son was largely preferred, although it appeared that the son was his mother's trusted confidential agent the burden of proof in the absence of testimony tending to show that the mental faculties of the testatrix were impaired, was placed upon the contestant to show that undue influence was used.

As indicated in the quotation, supra, from Darlington's Estate, 147 Pa. 624, the confidential relation is not at all confined to any specific association of the parties to it and the term is of rather wide application. Even one acting as a caretaker of an old and infirm testatrix was deemed to come within the term.

Scattergood v. Kirk, 192 Pa. 263.

Hook's Estate, 207 Pa. 203.

In Leedom v. Palmer, 274 Pa. 22, Kephart, J. explained:

"No precise language can define the limits of the relation or fetter the power of the Court to control these conditions. While not confined to any specific association of

parties, it generally exists between trustee and cestui que trust, guardian and ward, attorney and client, and principal and agent. In some cases the confidential relation is a conclusion of law, in others it is a question of fact to be established by the evidence: Hetrick's App., 58 Pa. 477, 479; Scattergood v. Kirk, 192 Pa. 263, 267. The mere existence of kinship does not, of itself, give rise to confidential relation such as would impose the burden of proof on the one receiving a gift to assert its validity. A child may take a gift from a parent without being required to furnish explanatory testimony: Clark v. Clark, 174 Pa. 309, 336, wherein the court quoted the English rule announced in Baker v. Bradley, 7 De. G., M. & G. 597; Bigelow on Fraud, 368; Worrall's App., 110 Pa. 349, 364; Carney v. Carney, 196 Pa. 34, 38; Compton v. Hoffman, 265 Pa. 257, 263; Neureuter v. Scheller, 270 Pa. 80; Langdon v. Allen, 1 W. N. C. 395, 397; Heister v. Hiester, 228 Pa. 102, 107. Nor is there confidential relation simply because the parties to the transaction are brothers and sisters: Funston v. Twining, 202 Pa. 88, 90. Where a conveyance of property is to a relative in consideration of support for life, in the absence of fraud or undue influence it is favored as a family settlement. Under similar conditions, where the grantee was the servant of the donor, and grantee's wife nursed the donor in his last illness, the conveyance was not set aside because of supposed confidential relations: Barnard v. Kell, 271 Pa. 80, 86."

Se also Aggas v. Munnell, 302 Pa. 78; 152 A. 840.

Presumptions

It has been noted, heretofore, that various presumptions are invoked in matters of testamentary capacity and undue influence. Sometimes these presumptions are designated as of law or at other times of fact and still again of mixed law and fact.

A presumption is an inference as to the existence of one fact from the existence of some other fact founded

upon a previous experience of their connection or dictated by the policy of the law. See Cent. Dic.

All of the presumptions discussed in the two issues outlined are presumptions of fact and of course rebuttable.

For the convenience of the reader these presumptions are collated as follows:

(1) The law presumes the competency of a testator and that the instrument propounded expresses his free and unconstrained wishes in regard to the disposition of his property. Consequently, the will having been proved in either form already discussed, the burden of coming forward with evidence and dislodging the prima facie case is upon the contestants and they must show the contrary by a preponderance of evidence.

Zimmerman v. Zimmerman, 23 Pa. 375, Page 48 infra.

(2) The will having been proved in the forms already discussed there is a presumption that the testator knew the contents of the will as executed by him and the burden is upon contestants to show the contrary.

Vernon v. Kirk, 30 Pa. 218, Page 52, infra.

(3) In cases of marital relationship, the will having been proved in the forms already discussed the presumption arises in favor of testamentary capacity and the absence of undue influence.

Zimmerman v. Zimmerman, 23 Pa. 375, Page 52, infra.

(4) In cases of filial relationship the will having been proved in the forms already discussed the presumption arises in favor of testamentary capacity and the absence of undue influence.

Hook's Estate, 207 Pa. 203, Page 54, infro.

(5) Where a stranger has actively participated in preparation and execution of a will in which he is a substantial beneficiary the presumption arises of lack of testamentary capacity and undue influence and the burden of dislodging the same is imposed upon the proponent.

Blume v. Hartman, 115 Pa. 32, Page 59, infra.

(6) A meretricious relationship as shown of itself raises no presumption of undue influence and consequently the will having been proved in the forms already discussed the presumption arises in favor of testamentary capacity and the absence of undue influence.

Main v. Ryder, 84 Pa. 217, Page 62, infra.

(7) Where a confidential relationship is maintained and the confidant has actively participated in the preparation and execution of a will in which he is a substantial beneficiary the presumption arises of lack of testamentary capacity and undue influence and the burden of dislodging the same is imposed upon the proponent.

Yardley v. Cuthbertson, 108 Pa. 395, Page 64, infra.

(8) If the will was not written or procured to be written by the confidential advisor who benefits, nevertheless, the presumption of lack of testamentary capacity and undue influence arises if the physical or mental condition of the testator is shown at the time of the will making to have been perceptibly weakened.

Lawrence's Estate, 286 Pa. 58, Page 68, infra.

(9) It may be stated as a general proposition that in any case where proof is submitted by contestants of a will showing extreme infirmity or mental weakness upon the part of the testator, a presumption arises of lack of testamentary capacity and undue influence which must be met by the proponents.

Gongaware v. Donehoo, 255 Pa. 502.

Phillips' Estate, 244 Pa. 35.

Llewellyn's Estate, 296 Pa. 74.

For an interesting and valuable opinion on the subject of burden of proof, presumptions and the granting of issues in the matter of testamentary capacity and undue influence, see the remarks of Hanna, P.J., examining and explaining the Pennsylvania decisions, Yorke's Estate, 185 Pa. 61; also a comprehensive note, 15 Ann. Cas. 551.

For a late case in general accord with observations already made see Masho's Estate, 303 Pa. 56, 153 A. 899.

Fraud

In the cases discussing the issue of undue influence matters involving the fraudulent conduct of a beneficiary may likewise appear and in many of the cases fraud is discussed as being synonymous with undue influence. However, in Boyd v. Boyd, 66 Pa. 283, Sharswood, J., very pertinently observes:

"Undue influence is very nearly allied to fraud, yet it may be true that they are not identical, so that while undue influence comprehends fraud—fraud by no means embraces every species of undue influence: Redfield on Wills, 510, n. A person, for a very disinterested purpose, and because he sincerely believes that it is the duty of a testaton to make a will of a particular character, may carry his persuasion and influence beyond that point which is legitimate. Yet it would hardly deserve so harsh a name as fraud. But where the end and purpose of the influence is the benefit of the party employing it, it is not easy to distinguish and save it from the imputation."

Eckert v. Flowry, 43 Pa. 46.

Thompson v. Kyner, 65 Pa. 368.

Herster v. Herster, 122 Pa. 239, 28 A. L. R. 787, Note; 18 Ann. Cas. 412, Note.

Robinson v. Robinson, 203 Pa. 400.

There are very few cases in our reports where the issues of fraud and undue influence are not necessarily intertwined and as in Phillips' Estate, 244 Pa. 35, the definition of undue influence also embraces generally matters of fraud going to the question of the testamentary act. The citations already given under the discussion of undue influence cover most of the fraud cases.

In Dietrick v. Dietrick, 5 S. & R. 207, there was an issue to try the validity of a will impeached on the ground of imbecility in the testator and fraud and imposition practiced upon him by the principal devisee. It was also alleged that the testator was under the domination and control of this devisee who aroused the displeasure of the

testator against a son whom he almost entirely disinherited by making false representations to the testator concerning the supposed extravagance of the son's wife. It was also alleged that this devisee represented to the testator that the son's wife was dissipated and of a loose character. Gibson, J. held for the Court that evidence of the general good character and conduct of the son's wife was admissible in evidence and in view of the Lower Court's action in rejecting this evidence the judgment was reversed and a new trial awarded.

In Nussear v. Arnold, 13 S. & R. 323, there was an issue to try the validity of a writing purporting to be the last will and testament of John Arnold. On the trial the defendant's witnesses proved that certain women had combined to impose on the testator, after he had lost the use of his rational faculties; that they had kept him in a state of intoxication and had represented each other as persons of virtue and good character and urged him to make a will in their favor, to the exclusion of his own blood relations, the subscribing witnesses to the will made the same declarations. It was held that the defendant could properly offer evidence that the persons in question were women of bad character. Said Tilghman, C. J., "If the women were really of good character they had a right to represent themselves as such; but if being of bad character, they made the testator believe they were good it was a circumstance of fraud very proper to be laid before the jury."

A unique case of constructive fraud perpetrated upon the will maker is found in Stirk's Estate, 232 Pa. 98, involving exceptions to the adjudication of the account of the personal representative of the decedent wherein the facts and the holding of the Court, taken from the headnote of the case, are as follows:

Where a woman executes her will by which she gives her residuary estate, amounting to $340,000. to a charity, and immediately thereafter executes a codicil in which she states that as there may be a question of the legality of the bequest to the charity if she dies within thirty days

from the date of her will she revokes the gift to the charity and gives her residuary estate to a trust company, such gift to the trust company cannot be sustained, where it appears that the trust company in question was a stranger to testatrix, that she was not a stockholder therein nor a depositor, that the will and codicil were prepared by an assistant trust officer of the company, that the codicil was prepared with the name of the residuary legatee left blank, that when the scrivener asked the testatrix to whom she wished her residuary estate to go in case of her death within thirty days, she said "Give that to the company," naming the trust company, and that both the testatrix and the scrivener must have intended, without openly stating it, that the gift to the trust company was simply to meet the requirements of the law and carry the bequest to the charities designated in the will.

In such a case the action of the scrivener constituted a constructive fraud which would prevent the trust company from reaping a benefit from it, although the company did not in any way participate in the fraud.

No person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party claiming under it.

The rule of law of the preceding paragraph that no person can claim an interest under a fraud committed by another has been approved in subsequent cases, notably, Bickley's Estate, 270 Pa. at page 103; O'Connor v. O'Connor, 291 Pa. at page 186; Cameron v. Trust Company, 292 Pa. at page 121. See also 28 A. L. R. 1; 28 R. C. L. 139; 18 Ann. Cas. 412.

Assuming that the fraud was practiced by but one beneficiary under the will and that his interest could be segregated the question arises whether the interests under the will could be separated so that the instrument would be valid as to the innocent parties but invalid as to the guilty

parties. This question does not appear to have been litigated in Pennsylvania but in Carson's Estate, 184 Cal. 437; 194 P. 5; 17 A. L. R. 239, it was said by Olney, J.:

"The present case is, then, one of fraud only. Being such, there is another point of which we would speak before taking up the sufficiency of the evidence. It seems to have been assumed that in case the contestants showed that the will was induced by the alleged fraud of Carson, the entire will would fail. We do not so understand. There is nothing either in the allegations of the contestants' petition or in their evidence, which would tend to show that any of the other beneficiaries were parties to Carson's alleged fraud, or that his fraud had any effect upon the testatrix's testamentary intentions other than to induce her to make him her residuary legatee and to appoint him as her executor. So far as the other beneficiaries are concerned, their situation is that the testatrix died leaving behind her a duly executed instrument, expressing her testamentary wishes in their favor unaffected by undue influence, fraud, or other vitiating circumstance. This means nothing more or less than that the will is perfectly valid as to them. The result is that it is only the portions of the will in favor of Carson whose probate should be revoked in case the contestants should succeed, the remaining portions continuing as valid expression of the testatrix's testamentary intention. 1 Schouler on Wills, Executors, and Administrators, Sec. 248; 14 Cyc. 1149; section 1272, Civ. Code. If it were not possible to separate the portions affected by the fraud from those unaffected, it may be that the whole will would have to fail, but that question is not presented here, for the provisions in favor of Carson are easily and completely separable from the remainder. This being the situation, it is apparent that the beneficiaries, other than Carson, are not affected by the contest, however it may go, and are not interested parties to it."

See also Mechem and Atkinson Cases on Wills, page 47 and following.

In 28 R. C. L. 139, it is stated that where only part of a will has been the result of fraud such part will be vitiated and held inoperative, citing Reggs v. Palmer, 115 N. Y. 506; 22 N. E. 188; 12 A. S. R. 819, 5 L. R. A. 340. There is also a full note on the general subject of fraud in contests concerning wills in 28 A. L. R. 787 and these authorities may be compared with 28 A. L. R. 1 and 18 Ann. Cas. 412 and the general ruling already referred to in Pennsylvania and exemplified by Stirk's Estate, supra.

Another phase of fraud either actual or constructive in connection with wills is where a bequest or devise is given upon an oral trust. In Hoffner's Estate, 161 Pa. 331, testatrix made a gift with an oral trust attached that the donee would leave a certain sum to a religious use and it was held that although the gift by the donee by will would fail it having been made within two days of death and contrary to the Act of April 26, 1855, P. L. 332, nevertheless in an adjudication of the executor's account the charity could recover the money according to the oral trust doctrine and that to deny such recovery would be a species of fraud against the wishes of the donor.

To the same effect is Estate of Lidstone, 9 Pa. Super. Ct. 553 and in Hollis v. Hollis, 254 Pa. at page 94, the principle is thus set forth:

"A trust orally annexed by a testator to a bequest or devise absolute in form, and accepted by the legatee or devisee at the time when the provision was made (or by his assent given prior to and continuing at that time) either expressly or by words or acts of encouragement, or by silent acquiescence, may be enforced in equity, because a refusal to perform the trust under such circumstances is a fraud. The doctrine and its limitations, firmly settled in the jurisprudence of this State, are illustrated by a uniform line of decisions, as the principal ones among which may be cited Hoge v. Hoge, 1 Watts 163; Jones v. McKee, 3 Pa. 496; Irwin v. Irwin, 34 Pa. 525; Church & Wife v. Ruland & Wife, 64 Pa. 432; Schultz's App., 80 Pa. 396; Brooke's App., 109 Pa. 188; Hodnett's Est., 154 Pa. 485;

Hoffner's Est., 161 Pa. 331; McAuley's Est., 184 Pa. 124; McCloskey v. McCloskey, 205 Pa. 491; Washington's Est., 220 Pa. 204; Flood v. Ryan, 220 Pa. 450; Blick v. Cockins, 234 Pa. 261."

Another phase of fraud is found in the curious case. In re Culbertson's Estate, 301 Pa. 438, wherein fraud was practiced upon a Register of Wills in the matter of a probate of an alleged will executed by mark. The essential facts together with the pertinent law appear in the following quotation from the opinion of Sadler, J.:

"It is urged that the letters testamentary, granted more than twelve years prior to the institution of this proceeding, cannot be revoked, though it appears that the will presented was a forgery and received because of fraud practiced upon the register. The Acts of March 15, 1932, Sec. 31, P. L. 135, April 22, 1856, Sec. 7, P. L. 532, and June 25, 1895, P. L. 305, are practically repealed, in so far as a limitation is placed upon the time for taking an appeal by the Register of Wills Act of 1917 ,supra, P. L. 422, Sec. 16 (a), 20 PS Sec. 1886, which makes the probate conclusive as to all property, unless an appeal is taken within two years, thus supplanting the first statute, which designated five, and the second, three, as the time for asking a review. In the present case, the record has been certified to the Orphans' Court to correct an error resulting from the fraud practiced upon the register in presenting to him a will, executed with a mark, and attested by two parties purporting to be witnesses, one of whom was shown to have signed the paper in question. The register had jurisdiction to probate only if two persons had witnessed the unsigned instrument, and the Court has found that no such subscription took place. As a result, there was no will, and no act of the officer could make the paper presented such, if none at any time existed. The invalidity of an entirely void writing was declared in Wall v. Wall, 123 Pa. 545, 16 A. 598, 10 Am. St. Rep. 549, where the letters granted were based on an unexecuted but witnessed instrument, the register finding an intention of the deceased that the paper should be

treated as a last testament. Though judgments usually render matters res judicata, yet fraud in the securing of one unwarranted, as appears here, may render it worthless. Rubinsky v. Kosh, 296 Pa. 285, 145 A. 836; Mitchell v. Kintzer, 5 Pa. 216, 47 Am. Dec. 408. To the same effect will be found Jackson v. Summerville, 13 Pa. 359; Phelps v. Benson, 161 Pa. 418, 29 A. 86. The present proceeding was a direct attack on the grant of letters testamentary, and not merely a collateral one, a distinction recognized in Cochran v. Young, 104 Pa. 333, 338. The jurisdiction of the register is limited to the determination as to whether the paper presented has been legally executed as the will of the deceased, and if his action has been induced by fraud, the order following is void and may be set aside. See McCambridge v. Walraven, 88 Md. 273 41 A. 928; Holton v. Davis (C.C.A.) 108 F. 138; Wall v. Wall, supra. See also, Smith v. Markland, 223 Pa. 605, 72 A. 1047, 132 Am. St. Rep. 747.

Judgments in the ordinary course may be avoided by proving extrinsic fraud, by which is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. And, where this appears, an original decree entered may be vacated. McFadden v. McFadden, 91 Pa. Super. Ct. 301; Willetts v. Willetts, 96 Pa. Super. Ct. 198. Though the exact question here presented, attacking the probate of a will after the time fixed by the statute for an appeal has passed, for fraud and imposition on the officer, has not been expressly determined by this Court, yet final orders have been set aside, in other classes of proceedings, where a time limit for review was fixed by statute. Zeigler's Petition, 207 Pa. 131, 56 A. 419; York County v. Thompson, 212 Pa. 561, 61 A. 1024; Lackawanna County's Appeals, 296 Pa. 271, 145 A. 843. The cases cited dealt with proceedings in which accounts of officers were assailed for fraud, after the period designated by act of assembly for taking an appeal."

Proofs

In the citations and discussions already given relative to the issues of testamentary capacity, undue influence, fraud and other matters pertinent to the establishment of a will, those of proof have been incidentally touched upon. However, in the well considered case of Robinson v. Robinson, 203 Pa. at page 36, Dean, J. discusses a matter of importance in connection with the proofs and established in Nussear v. Arnold, 13 S. & R. 323, and already discussed under the heading of Fraud:

"Next it is alleged for error that the declarations of John B. Robinson were permitted to go to the jury and consequently affected other legatees who had nothing to do with the preparation or execution of the will. Under this head appellants' counsel group 226 assignments of error, setting them out in the old form of a multiplication table. The authorities cited sustain this point, but the point is not framed to fairly cover the ruling of the Court on the admission of the offer. In Nussear v. Arnold, 13 S. & R. 323, Clark v. Morrison, 25 Pa. 453, and other cases, it is held that the interest of devisees under a will are several and not joint, therefore, that the declarations of one against his codevisees are not admissible to affect their interests. But it will be noticed in these cases, that the declarations consisted in an opinion of the legatee as to the testamentary incapacity of the testator and for that purpose they were offered. In the first case cited, there was evidence that three women had combined to get the testator drunk and procure from him a will in their favor; that they had declared to him they were persons of virtue and good character. These declarations made in carrying out the conspiracy were admitted, but the declaration of one of them outside the scope of the conspiracy that "the testator was incapable of transacting business," was held inadmissible. Chief Justice Tilghman, in deciding the case, says: "We are now to establish a general principle to govern all cases of this kind." That general principle was, that

the conduct and declarations of those procuring a will by unlawful means, tending to show their purpose, are evidence; the independent declarations of one as to testamentary incapacity are not. Here, the offer was not to prove declarations of incapacity, it was to prove a confidential relation between the chief beneficiary and testatrix, collusion between him and her agents to procure her to make a will; and by the course of business between them extending over years, the subserviency of a weak mind to stronger ones. The only independent declarations proven were those of John B. Robinson on the witness stand, that his mother was not weak but was entirely capable, and had knowledge of her affairs; these statements formed no part of contestant's offer and were not the subject of the court's ruling. The Court, after most careful consideration, admitted the evidence of the business and confidential relations of the parties from long before, down to the date of the will, strictly confining it to the purpose offered. In this there was no error. Says Justice Gibson in Patterson v. Patterson, 6 S. & R. 55, "In fact, the evidence of practice on the intellect of a weak man, is usually compounded of ingredients so various in their nature and remote in their consequence and connection, that the question of relevancy is often of very difficult solution. In such a case the Court should lean in favor of admitting the evidence, to enable the jury to judge from a consideration of all the circumstances." The case before us does not to us seem even difficult of solution; if the evidence admitted were to be held incompetent, we can scarcely conceive of any case, short of actual physical duress, where undue influence could be proven. All the assignments of error under this caption are overruled."

The general attitude of our Appellate Courts and the analysis to which proofs are subjected are very well illustrated in the remarks of Moschzisker, J. in Phillips' Estate, 244 Pa. at page 45, wherein the learned justice thus reviews the essential proofs:

"After reviewing the testimony and calling attention to the fact that there was no direct proof of solicitation, a course of flattery or other elements necessary to constitute undue influence, the court below states that the circumstances relied upon by the contestants do not in themselves prove that fraud (undue influence), "that most of them, if not all of them, are just as consistent with the hypothesis that no fraud existed," and that, since no direct attack had been made upon the truthfulness of the proponent or of Miss Patterson, the only living witness to the will, and since there was nothing "inherently unreasonable or improbable in her story or that of Charles Miller," considering all the proofs in the case, "if a jury would render a verdict against the validity of Elizabeth Phillips' will on the ground that when she executed it her act was not voluntary and of her own free will . . . it would be the duty of the Court to set such verdict aside." We have held that the testimony of a disinterested person who was "actually present at the drafting of a will, its engrossing and submission to the testator, heard his assent to its provisions, saw him affix his signature thereto, and listened to his remarks and conversation," is entitled to "belief and reliance (Tasker's Est., 205 Pa. 455, 459; Masterson v. Berndt, 207 Pa. 284, 288), and we cannot say that the learned judge below erred in this instance when he considered the evidence given by Miss Patterson; nor do we think error was committed in taking cognizance of the testimony of the proponent. The adjudication plainly shows that the Court did not rest its final conclusion on the testimony of these two witnesses, but rather upon what it deemed to be the weight of the evidence, judged according to the applicable rulings of this Court, and thereunder the failure of the contestants to prove their allegation of undue influence. Of course, such influence may be shown by circumstantial evidence demonstrating a prior course of improper conduct calculated to produce an undue impression likely to remain and operate in the subsequent making of a will (Steadman v. Steadman, 10 Sadler 539);

but it is not enough simply to prove a course of conduct, consistent with propriety, which afforded opportunities for undue influence (Tyson's Est., 223 Pa. 596). The testimony shows that Charles Miller was courteous to the testatrix personally and diligent in his attention to her affairs for several years prior to the making of the will, and that she undoubtedly had a high regard for and absolute confidence in him; further, it indicates generous appreciation of his kindness and constant attentions and is sufficient to prove a confidential business relation between them; hence, had there been any proof of extreme infirmity or mental weakness, this case would have been one proper to send to the jury. But, with the conceded fact of Elizabeth Phillips' strong mentality at the time she made her will, and in view of the lack of direct evidence of undue influence, we cannot say that the court below erred when it refused the issue."

For an outline of facts which when shown by the principal beneficiary under a will meets the burden of proving absence of undue influence, see Girard Trust Company v. Page, 282 Pa. 174.

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