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UNDUE INFLUENCE AND FRAUD IN PENNSYLVANIA WILLS*

By

A. J. White Hutton**

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 law. 86

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

In the older cases the expressions in the opinions are not very helpful in distinguishing presumptions of law from those of fact, but in recent years our courts have been endeavoring to clarify the matter by some very pertinent observations. In Watkins v. Prudential Insurance Company, 86 Maxey, J. observed:

"Considerable confusion appears in judicial opinions as to the nature of presumptions and their function in the administration of justice. They are not evidence and should not be substituted for evidence. Presumptions are generally grouped into two major classes: (1) Of law; and (2) Of fact. The former usually have the force of legal maxims and become rules of law, with definite procedural consequences. As Mr. Justice Agnew said in Tanner v. Hughes and Kincaid, 53 Pa. 289: 'A legal presumption is the conclusion of law itself of the existence of one fact from others in proof, and is binding on the jury, prima facie till disproved, or conclusively, just as the law adopts the one or the other as the effect of proof.' Justice Agnew also refers to the other kind of presumption as merely 'a natural probability', i.e., 'an inference of fact of the probability.'"

In Geho's Estate, 87 applying the learning to a will case, Maxey, J., further observed:

"Proof of the fact of the probate of a will does not upon an appeal from the probate have any evidential value, except as stated in Szmahl's Es-

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86 See Century Dictionary.
87 340 Pa. 412 (1941) 17 A. 2d. 342.
tate, but it does have procedural value, for it raises a presumption of the will's validity and this presumption becomes a challenge for proof addressed to the challenger of the will. We said in Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 A. 644, 95 A.L.R. 869: 'Presumptions are not evidence (315 Pa. page 500, 173 A. page 646, 95 A.L.R. 869).

"They are not fact suppliers; they are guideposts indicating whence proof must come (315 Pa. page 504, 173 A. page 648, 95 A.L.R. 869)."

The following presumptions important for procedural value are collated from the cases heretofore discussed under the topics, Testamentary Capacity and Undue Influence:

(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.

(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.

(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.

(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.

(5) Where a stranger 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.

(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 proposed.

88 335 Pa. 89 (1939) 6 A. 2d. 267.
89 See ante, Testamentary Capacity—Burden of Proof.
91 Vernon v. Kirk, 30 Pa. 218 (1865); Dickinson v. Dickinson, 61 Pa. 401 (1869); Frew v. Clark, 80 Pa. 170 (1875).
94 Blume v. Hartman, 115 Pa. 32 (1886) 8 A. 219; Caldwell v. Anderson, 104 Pa. 199 (1883); Caughey v. Bridenbaugh, 208 Pa. 444 (1904) 57 A. 821, per Endlich, J., "No case has gone so far as to overthrow a will duly executed, when it was shown that the party executing it was of sound mind and clearly understood its contents, though it was drawn by the person taking the estate. Ash's Est., 351 Pa. 317 (1945) 41 A. 2d. 620.
discussed the presumption arises in favor of testamentary capacity and the absence of undue influence.\textsuperscript{96}

(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.\textsuperscript{96}

(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.\textsuperscript{97}

(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.\textsuperscript{98}

\textbf{Undue Influence}

What is undue influence? An answer to this question is given by Sir J. P. Wilde in \textit{Hall v. Hall}\textsuperscript{99} wherein he states:

"Pressure of whatever character whether acting on the fears or the hopes, if so exerted as \textit{to overpower the volition without convincing the judgment}, is a species of restraint under which no valid will can be made.

Impertinence 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 \textit{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."

The emphasis in the above quotation has been supplied by the present writer but it is deemed to be in accordance with our cases.

The word "undue" as pointed out by Judge Endlich in \textit{Caughey v. Bridenbaugh}\textsuperscript{100} is not used in a popular sense but as he explains:


\textsuperscript{98} Lawrence's Estate, 286 Pa. 58 (1926) 132 A. 786.


\textsuperscript{100} L.R. 1 P. & D. 481.
"As a legal phrase, it is used in a stricter sense as denoting something wrong according to a standard of morals which the law enforces in the relations of men, and therefore something legally wrong, something violative of a legal duty—in a word something illegal."

Continuing, the learned judge further explains:

"And again the word 'influence' does not refer to any and every line of conduct capable of disposing in one's favor a free and self-directing mind, but to a control acquired over another which virtually destroys his free agency."

In *Phillips' Estate*¹⁰¹ Moschzisker, C.J. in a statement since repeatedly approved¹⁰² thus sums up the matter:

"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."

In *Zimmerman v. Zimmerman*¹⁰³ Woodward, J. in a well considered case thus cautioned:

"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."

In *Perret v. Perret*¹⁰⁴ is an illustration of such pressure exerted by the wife at the time of execution as to overpower the volition of the testator husband without convincing his judgment and in which his discretion or wishes were overborne by the threat of the wife to put him out of the house if he did not comply with her demands. He was ill and weak at the time and died of senility five days thereafter.

On the other hand in *Moritz v. Brough*¹⁰⁶ although the conduct of the wife towards the husband testator was domineering, overbearing and unseemly yet it did not appear to be connected with the act of execution as in *Perret v. Perret*,¹⁰⁶ and furthermore the will remained undisturbed by the testator for seven years, during which time he had ample opportunity to make another will. Likewise in *Tawney v. Long*¹⁰⁷ although there were importunities testified to as "dingdanging" and from which a delicate mind might shrink, they were declared insufficient to constitute undue influence. However, it is conceivable that such a course of conduct deliberately

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¹⁰¹ 244 Pa. 35 (1914) 90 A. 457.
¹⁰² Lawrence's Estate, 286 Pa. 58 (1926) 132 A. 786; Wertheimer's Est., 286 Pa. 155 (1926)
¹⁰³ 133 A. 144.
¹⁰⁴ 184 Pa. 131 (1897) 39 A. 33.
¹⁰⁵ 16 S. & R. 403 (1827)
¹⁰⁶ See note 104 supra.
¹⁰⁷ 76 Pa. 106 (1874)
and persistently practiced upon a person weak in body and mind, causing distress of mind or social discomfort until the free play of testator's judgment was overborne, would constitute facts sufficient to justify a jury finding undue influence.

In *Armor's Estate*\(^{108}\) is presented a typical set of facts where the confidential advisor asserted such admitted moral command over an aged testatrix in the testamentary act that the same was the record of another's volition rather than the off-spring of the mind and will of the testatrix.

Again in *Robinson v. Robinson*\(^{109}\) is illustrated what the jury apparently determined was the yielding of the mother to the importunities of the son for the sake of peace and quiet of an aged, weak woman escaping from distress of mind or social discomfort by complying with the wishes of the son. In short the conduct of the son passed from the category of coaxing to that of driving. Or did the jury believe the son asserted moral command over his aged, doting and weak mother while occupying a position as confidential advisor as in *Armor's Estate*?\(^{110}\)

In *Scattergood v. Kirk*\(^{111}\) there is an instance of a caretaker of a woman weak in body and in mind and the court considered the situation as one of confidential relationship. The facts of undue influence exerted at the time of the execution of the will indicate a moral command asserted and yielded to by the testatrix, in other words the complete domination by the confidante of the mind of the confidee as illustrated also in *Armor's Estate*.\(^{112}\) *Central Trust Company v. Boyer*\(^{113}\) is also a case to be classified as one of moral command exerted over the testator and indicated, *inter alia* by the unnatural and inofficious will made.

The above cases illustrate in a fairly comprehensive way just what is considered by the courts as undue influence. It has been held repeatedly and is illustrated by such cases as *Trost v. Dingler*,\(^{114}\) *Englert v. Englert*,\(^{115}\) and *Tawney v. Long*\(^{116}\) that solicitations however importunate cannot of themselves constitute undue influence, for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate. Likewise in *Roberts v. Clementi*\(^{117}\) friendly offices and kind and considerate treatment will not be considered as undue influence. There has been stated repeatedly and in fact is embraced in all of the definitions of undue influence that inordinate flattery will be so considered. Rood in his work on *Wills*\(^{118}\) traces this specification to the old work of Swinburne on *Wills*, but states that he has not been able to find a decision refusing a will probate on the

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\(^{109}\) 203 Pa. 400 (1902) 53 A. 253.

\(^{110}\) See note 108 supra.

\(^{111}\) 192 Pa. 263 (1899) 43 A. 1030.

\(^{112}\) 154 Pa. 517 (1893) 26 A. 619.

\(^{113}\) 308 Pa. 402 (1932) 162 A. 806.

\(^{114}\) 118 Pa. 269 (1888) 12 A. 296.

\(^{115}\) 188 Pa. 326 (1901) 47 A. 940.

\(^{116}\) 76 Pa. 106 (1874).

\(^{117}\) 202 Pa. 198 (1902) 51 A. 758.

\(^{118}\) Rood on *Wills*, 2nd Ed. Sec. 181.
ground that the testator was induced to make it by inordinate flattery practiced with the design of procuring the will, and no Pennsylvania case is recalled along this line.118

Something should be said about the peculiar position of the undue influence cases involving confidential relationship. In some of these cases120 there has been actual proof of the exertion of some kind of undue influence falling within the definition of Sir J. P. Wilde, but in others the issue has been granted or the will set aside on the grounds that either the facts were such, essentially involving weakness of body and mind, in the cases of granting issues, or in the trials the proponent was not able to meet the burden of proof as imposed upon him on account of such weakness of body or mind. In Hoope's Estate121 the proponent could not overcome the fact that the testator had been found generally insane. In Griffin's Estate122 there was likewise an adjudication of the testatrix as a weakminded person and the proponent had the burden of overcoming the presumption of testamentary incapacity, and under the facts the court felt impelled to grant an issue.

Likewise in Patti's Estate123 the same general situation prevailed and the court felt impelled to grant the issue in order that the facts might be found by the jury. In Yardley v. Cuthbertson124 it is interesting to note that the jury actually found as a fact no undue influence, but did find that the testator at the time of the execution of the codicil lacked testamentary capacity. In Schwartz's Estate126 the lower court was affirmed in an opinion by Maxey, J., wherein the facts as developed showed that the testatrix was exceedingly weak in body and mind and although there was no specific evidence of undue influence as exercised by the proponent, yet in her capacity as a professional nurse having the care of the testatrix, she occupied a confidential relationship to her and the burden was therefore imposed upon the proponent owing to the weak physical and mental condition of the testatrix to show affirmatively that no improper influence controlled the making of the will and that the testatrix had a clear knowledge of her property and the effect of the testamentary disposition. In contrast with this case, that of Wetzel v. Edwards,128 found in the same volume of the report and the opinion by the same justice, may be studied. In this latter case it was determined that no confidential relationship existed, consequently the tables were turned, so to speak, and the burden of establishing undue influence was a part of the contestant's case which he was unable to meet.

119 Zimmerman v. Zimmerman, supra, note 90, per Woodward, J.: "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."
121 174 Pa. 373 (1896) 34 A. 603.
122 See supra note 46.
123 See supra note 47.
124 See supra note 75.
Although it has been stated that where a confidential relationship is maintained and the confidant has actively participated in the preparation and execution of the 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, our late cases emphasize the physical and mental condition of the testator at the time of the execution of the will. In Caughey v. Bridenbaugh\textsuperscript{127} the testatrix was shown to have been in good health and possessed of a very vigorous mind and therefore the explanation as made by the confidential advisor of his relationship with the testatrix was deemed sufficient along with other evidence and the issue was refused. In Buhan v. Keslar,\textsuperscript{128} Schaffer, J., emphasized that the burden of proof of undue influence rests upon the contestant and shifts to a proponent who occupied a confidential relationship to the testatrix only where there is evidence of weakened intellect.

**Burden of Proof.**

This topic, together with procedural matters incident, has been discussed in the previous chapter.\textsuperscript{129} What was said there will not be repeated here, except in so far as the present discussion requires. The concept of Orphans' Court powers has been of slow growth and it was not until the passage of the Orphans' Court Act of 1832 and the decisions of the courts thereon that this court was recognized as one of co-ordinate jurisdiction with decrees given full recognition by the courts of law.\textsuperscript{130} The history of this development has been traced in interesting fashion by Scott\textsuperscript{131} and Rhone.\textsuperscript{132} In like manner matters of procedure and practice were slow in their development with the courts of first instance using frequently different methods lacking precision and uniformity, which probably has affected some appellate opinions if not decisions. In Wilson v. Gaison\textsuperscript{133} the Supreme Court construed the Act of April 22, 1856\textsuperscript{134} as giving the probate of a will by the Register such a finality that his judicial decree thereon could not be impeached collaterally in an action of ejectment brought in the right of their heir at law to recover real estate devised by the will. The effect of the act as construed was to make the probate of a will devising real estate conclusive unless within the time specified an appeal was taken and thus the law is today.\textsuperscript{135}

However, some years before in Thompson v. Kyner\textsuperscript{136} an ejectment was maintained under similar facts without any comment by court or counsel. Likewise in

\textsuperscript{127} 208 Pa. 414 (1904) 57 A. 821.
\textsuperscript{128} 328 Pa. 312 (1934) 194 A. 917.
\textsuperscript{129} Chapter V, Topic: Burden of Proof and Record of Probate.
\textsuperscript{130} McPherson v. Cunliff, 11 S. & R. 422 (1824).
\textsuperscript{131} Scott on Intestate Law of Pennsylvania.
\textsuperscript{132} Rhone, Orphans’ Court Practice in Pennsylvania.
\textsuperscript{133} 92 Pa. 207 (1879).
\textsuperscript{134} Sec. 7, Act of Apr. 22, 1856, P.L. 533; see also present law, Sec. 16—Register of Wills Act of 1917, P.L. 413, 20 PS 1886.
\textsuperscript{135} 20 PS 1886; Fleming's Est., 265 Pa. 399 (1919) 109 A. 265.
\textsuperscript{136} 65 Pa. 368 (1870).
Yardley v. Cuthbertson\textsuperscript{187} the proper placing of the parties in an issue \textit{devisavit vel non} was questioned by Green, J., and in Caughey v. Bridenbaugh\textsuperscript{188} is an application of the theory of the learned justice in placing contestant as plaintiff and the proponent as defendant. In expounding this theory Green, J.,\textsuperscript{189} thus maintained:

"The law presumes sanity and freedom from undue influence as to all wills, and that presumption prevails until the contrary is alleged and proven. He who makes such allegations must prove them, and therefore the real burden of proof is on him. Strictly, therefore, he should be plaintiff in the issue. As the executors, as such, have no interest in the estate to be distributed, they have no business in the issue and ought not to be parties to it. The parties actually interested in sustaining the will ought to be defendants in the issue. With the contestant as plaintiff and the legatees as defendants and an issue to try specific disputed facts only, a properly constituted litigation will be established by consistent in, and with, itself, conforming to the rules of pleading and evidence, in proper subservience to the statute under sanction, and by force of which it is conducted, and in all things satisfactory to the requirements of the legal and judicial mind. These views, however, are obiter dicta only, the question is not distinctly before us, and they are expressed because the occasion has suggested them, and in order that the attention of the profession may be attracted to the subject. In some facts of the state the issues in will cases have been framed and tried in the manner here suggested for many years and with entire satisfaction to the bench and bar as we understand.\textsuperscript{190}

It has been held that the framing of the issue is wholly within the discretion of the Orphans' Court and is not reviewable\textsuperscript{140} but the long established practice in Philadelphia County and now generally throughout the state is to make the proponents the plaintiffs.\textsuperscript{141} Likewise in the preliminary hearing to determine whether an issue should be granted, the proponent first goes forward. This practice is believed to be the better and in conformance with elementary principles in argumentation and debate that the affirmative goes forward first and essentially has the laboring oar, so the proponent has the affirmative, viz., the eventual establishment of the will. The so-called presumptions, as explained by our courts,\textsuperscript{142} are guideposts indicating whence proof must come, viz., a matter of procedure in presentation of proofs. But this may be quite vital as in any argumentation or debate as to what is essential in proofs and how and when. The hearing judge as chancellor has great control but the higher court has established a rule that proponent may offer the record of probate and is entitled to rest.\textsuperscript{143}

\begin{footnotesize}
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\item \textsuperscript{187} 108 Pa. 395 (1885) 1 A. 765.
\item \textsuperscript{188} 208 Pa. 414 (1904) 67 A. 821.
\item \textsuperscript{189} See note 137, supra.
\item \textsuperscript{190} Palmer's Est., 132 Pa. 297 (1890) 19 A. 137; cf. Newhard v. Mundt, 132 Pa. 324 (1890) 19 A. 298.
\item \textsuperscript{141} Ruddach v. Reichbach, 17 WNC 549 (1886) and article following report of this case by Judge Allison. See also 20 PS 1961 supplement.
\item \textsuperscript{142} Geho's Est., 340 Pa. 412 (1941) 17 A. 2d. 342.
\item \textsuperscript{143} Szmah1's Est., 335 Pa. 89 (1939) 6 A. 2d. 267; Hile's Est., 310 Pa. 541 (1933) 166 A. 575.
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In Szmalh's Estate the Supreme Court through Stern, J. explained at length and reaffirmed the established procedural principles that the proponents of a will may offer the record of probate and rest. They may stand their ground despite any ruling of the hearing judge and if the contestants likewise rest without offering evidence, proponents' case is established by the presumption. This applies to every case. To dislodge the prima facie position of proponents, contestants must offer some evidence. The judge as chancellor should then rule as to the effect of the evidence. The latter may be deemed insufficient or on the contrary it may be ruled that the burden of going forward has shifted to the proponents. The burden of going forward may thus shift back and forth during the hearing or the trial, but always the burden of establishing the will is upon the proponents by a preponderance of evidence. Likewise, contestants must present proofs by a preponderance in order to overthrow the will. When at a hearing the evidence of both sides appears impressive enough to the chancellor to raise "a substantial dispute" a jury trial will be ordered. If contestants show a confidential relationship, the prima facie case is shaken and proponents have the burden to explain the situation. In Caughey v. Bridenbaugh, it was shown testatrix was an active, strong-minded woman, fully conversant with her affairs and obviously acting in the will making of her own volition. The hearing judge refused an issue on appeal from probate and his action was sustained. On the other hand, in Schwartz's Estate contestants showed a confidential relationship and weakness of body and mind and again the burden of going forward shifted to proponent. With physical and mental condition involved, the rule of law becomes more rigid and proponent had the burden of showing affirmatively that no improper influence controlled testatrix and she had a clear knowledge of her property and the effect of the testamentary disposition, which gave a considerable portion of the estate to the confidant. The testimony, both lay and medical, was conflicting and Judge Trimble dismissed an appeal from probate, refusing likewise to grant an issue. This decree was affirmed. In Phillips Estate the procedure and result were similar to that of Caughey v. Bridenbaugh, Moschzisker, J. stressing that weakness of body and mind were essential elements in an attack on a will giving a substantial sum to a confidential advisor. In Gongaware v. Donehoo the facts were quite similar to those of Caughey v. Bridenbaugh but the hearing judge granted an issue resulting in a judgment for the contestants which was reversed by the Supreme Court, stressing again the lack of any evidence showing weakness of body and mind. In Llewellyn's Estate another case of confidential relationship, the decree of the lower court refusing an issue on appeal from probate, was affirmed.

144 See note 143, supra.
145 335 Pa. 81 (1939) 5 A. 2d. 901; Plege's Est., 340 Pa. 529 (1941) 17 A. 2d. 334; Geho's Est., 340 Pa. 412 (1943) 17 A. 2d. 344; See also chapter V ante, Record of Probate.
146 208 Pa. 414 (1904) 57 A. 821.
147 340 Pa. 170 (1940) 16 A. 2d. 374. See notes 125 and 126, supra.
148 244 Pa. 35 (1914) 90 A. 457.
149 See note 146, supra.
150 255 Pa. 502 (1917) 100 A. 264.
151 See note 146, supra.
152 296 Pa. 74 (1929) 146 A. 810.
the facts being persuasive that the testator was fully master of his actions despite a weakness of body, ravaged by a malignant disease, the mind appearing to be clear and well poised. Furthermore, the will was prepared at the instance of the testator and by a lawyer unknown to the confidant.

As a weak body and mind of testator shown inclines the court to increase the weight of the burden for proponent to explain, conversely a strong body and mind decreases the burden of proponents and increases the burden of the contestant. In Plege's Estate affirming the decree of the lower court which dismissed the appeal of contestant from probate and refused an issue, Maxey, J., referring to Llewellyn's Estate said:

"We then quoted with approval the following from Eble vs. Fidelity T. & Tr. Co. et. al, 238, Pa. 585, 589, 86 A. 485, 486; 'When 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 Estate, 195 Pa. 282, 45 A. 729.'"

It is further to be noted, bearing in mind the presumption and the shifting of the burden of going forward in explanation, imposed on the confidant taking a substantial share under the will of a testator weak in body and mind, particularly when he procures the will to be written, that the gift may be defeated although no specific facts of undue influence be shown as exerted at the time of execution. This result magnifies the burden in confidant cases. But where confidential relationship is not present, to shift the burden to proponent, the contestant must show, not only weakness of body and mind but in addition, as Kephart, J., pointed out in Cookson's Estate, there must be evidence, direct or circumstantial of improper conduct sufficient to dominate or control testator's mind, the weakness merely showing the susceptibility of the testator's mind to outside influences.

Effect on Will.

In most cases of undue influence, the effect of a finding is to invalidate the entire will, particularly where there is the element of testamentary incapacity for weakness of mind. In Wagner's Estate the facts found by the Orphans' Court showed both lack of testamentary capacity and undue influence. In disposing of the contention of appellant that the will was effective except as to a provision giving a bequest to the confidential advisor, Sadler, J. observed:

"It may be that some parts of a will can at times be sustained, though others are void because of improper conduct shown to have been exercised in securing their insertion. As was said by the court in Cuthbertson's App., 97 Pa. 163, 173. 'There may be a case where the alleged undue influence is applicable only to a single independent provision in a will, and that pro-

153 340 Pa. 529 (1941) 17 A. 2d. 334.
156 325 Pa. 81 (1937) 188 A. 904.
157 289 Pa. 561 (1927) 137 A. 616.
vision may fail, leaving the rest of the will to stand. It is certainly not this case, where the clause objected to is a residue, and that residue made up or largely increased by alterations made, as a jury may conclude, under the same influence for that purpose. 'According to the authorities, undue influence may be exercised either through threats or fraud; but however used, it must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of making the testament.' Trost v. Dingler, 118 Pa. 259, 269. The learned court below has found that Mrs. Wagner did not comprehend what she was doing when the will was signed, and was without testamentary capacity.'

In Carothers' Estate, Kephart, J. further explains as follows:

"Where a provision in a will which gives a legacy is void because of undue influence, the will itself is not necessarily void nor are other legacies, unless such influence directly or impliedly affects them. Undue influence invalidates such part of a will as is affected by it. If the whole will is procured through undue influence, it is entirely void. Where, however, part of a will is caused by undue influence, and the remainder is not affected by it, and the latter can be so separated as to leave it intelligible and complete in itself, such part of the will is valid and enforceable. Wagner's Est., 289 Pa. 361, 368, 137 A. 616. When a will contains distinct and independent provisions, so that different portions of the property or different estates or interests in the same portions of the property are created, some of which are valid and others invalid, the valid will be preserved; unless the provisions are so interdependent that they cannot be separated without defeating the general intent of the testator. Johnston's Estate, 185 Pa. 179, 190, 39 A. 879, 64 Am. St. Rep. 621; 28 R. C. L. 358 and cases there cited. Bequests in a will, otherwise valid, must be rejected when it is apparent that the disallowance of invalid bequests causes the valid bequests to defeat the testator's wishes as evidenced by the general scheme of his will, or if manifest injustice would result to the beneficiaries. Johnston's Estate, supra. But such is not the case here. The will is drawn in an orderly manner, each bequest is in a separate and distinct paragraph, and no one part bears on another, so that the will without the contested paragraphs, is in itself perfectly intelligible and complete."

Fraud

In the definitions of undue influence fraud is included. In the definition given in Phillips' Estate, it will be noted that this element is likewise embraced. A will induced by force or fear may be said to be induced by fraud and it would thus come within the definition of Justice Storey that fraud consists of any cunning deception or artifice used to circumvent, cheat or deceive another.

In short, as pointed out by Rood it is a trick, secret device, false statement, or pretense by which the subject of it is cheated. Again fraud is said to consist of the unlawful obtaining of another's property by design, but without criminal intent, and with the assent of the owner obtained by artifice or misrepresentation.

188 300 Pa. 185 (1930) 130 A. 585.
189 244 Pa. 35 (1914) 90 A. 457.
180 18 Ann. Cas. 412, Note.
In the cases discussing the issue of undue influence matters involving the fraudulent conduct of a beneficiary may appear and in many of the cases fraud is discussed as being synonymous with undue influence. However, in *Boyd v. Boyd*, Sharswood, J. very pertinently observed:

"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 testator 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."

Whereas undue influence has been defined to be a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices or other species of circumvention, yet cases generally hold that undue influence is not the same thing as fraud, for one may exist without the other. It has also been observed that fraud is a distinct head of objection from that of importunity and undue influence. Importunity and undue influence may be fraudulently exerted but they are not inseparably connected with fraud.

There are comparatively few cases in our reports where the issues of fraud and undue influence are not so intertwined, likewise the issues of testamentary capacity and undue influence, that it is difficult to eliminate the one from the other. However, there are a few cases where this segregation seems to be apparent.

Like undue influence, fraud may assume a great variety of forms. Rood cites a number of instances from the English as well as our American reports. A testator executes one will, which he is led to believe is another as a blind man having one will read to him but another substituted for signing. A specific provision may be inserted fraudulently or testator is induced by fraudulent misrepresentations to either make a certain will or modify the terms of one already made.

In *Dietrick v. Dietrick* there was a feigned issue to try the validity of a will, the contestants alleging fraud and imposition practiced upon the testator by the principal devisee. It was charged that the displeasure of the testator was aroused against his son whom he almost entirely disinherited by being told about the supposed extravagance of the son's wife and that she was dissipated and of loose character. At the trial evidence was offered of the general good character and conduct of the wife, for the purpose of showing the falsity of the representations. The offer was rejected and the jury found for the will. The judgment was reversed and a new trial ordered, Gibson, J. holding that the evidence should have been admitted.

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*162* 66 Pa. 283 (1870).
*164* Rood on Wills, sub nomine.
*165* 5 S. & R. 207 (1819).
In Nussear v. Arnold\textsuperscript{166} there was an issue to determine the validity of a will and contestants were permitted to show that certain women had combined to impose on the testator, after he had lost the use of his rational faculties, by keeping him in a state of intoxication and that they represented themselves as persons of virtue and good character and urged him to make a will in their favor to the exclusion of his blood relations. It was held that the contestant could properly show that the persons were women of bad character. Said Tilgham, 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."\textsuperscript{167}

\textit{Stirk's Estate}\textsuperscript{168}

This is a unique case of constructive fraud perpetuated upon the will-maker under the following circumstances. The testatrix executed a will by which her residuary estate amounting to $340,000, was given to charity. Immediately following the execution of this will a codicil was added setting forth that as a question of the legality of the bequest to the charity might arise if the testatrix died within thirty days from the date of her will, she consequently revoked the gift to the charity and gave the residuary estate to a trust company whose agent had drawn the will and the codicil. The testatrix did die within the period and the trust company claimed the $340,000, and the question arose on exceptions to the adjudication of the account. It appeared that the trust company was a stranger to the testatrix and that she was not a stockholder nor a depositor and that the will and codicil were prepared by an assistant trust officer of the company. When the codicil was prepared with the name of the residuary legatee left blank, the scrivener asked the testatrix to whom she wished her residuary estate to go in case of her death within thirty days and she said "Give that to the company," naming the trust company. It was held that the situation as presented was so extraordinary 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 to carry the bequest to the charities as designated in the will. Furthermore, 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. Said Stewart, J.:

"Upon a review of all the testimony, and having in mind the situation and surroundings of the testatrix, the character of the gift to the trust company, which if absolute, in the language of the learned auditing judge, is incomprehensible and almost incredible,' we are constrained to the conclusion that it was the understanding of both the testatrix and Mr. Simp-

\textsuperscript{166} 15 A. & R. 323 (1825).
\textsuperscript{167} See McShan v. Indemnity Ins. Co. of N.A., 388 Pa. 113 (1940) 12 A. 2d. 59, for application of rule of evidence that declarations of one devisee cannot be admitted as against the interest of another devisee, concerning testamentary capacity of testator.
\textsuperscript{168} 232 Pa. 98 (1911) 81 A. 187.
ler, notwithstanding that neither communicated in words such understanding to the other, that the bequest to the Land Title & Trust Company, though by its terms absolute, was with the purpose to secure to the charities designated in the will the bequests therein given them, in any and every event; and that nothing more was intended than that the trust company should be a medium of transmission. It follows that it is as though the bequests were given directly to the charities, and the testatrix having died within thirty days from the execution of the will, the bequest falls and so much of the estate is to be distributed under the interstate laws of the state.

"We are quite aware that the case upon its facts is without exact parallel; nevertheless, its main and essential features bring it within the operation of established and familiar principles, and these we have applied. With the statute out of the way we would hold without question that the absolute bequest to the trust company was impressed with a trust for the charities. For the reasons given the decree in this case awarding the fund to the Land Title & Trust Company is reversed, and the record is remitted for distribution of that fund in accordance with the views here expressed."

Hoffner's Estate.169

This case presents another application of the constructive fraud doctrine with rather peculiar facts wherein a parol promise was made in 1883 to a testatrix by a beneficiary that the latter at her death would leave a certain sum of money to a charity. In the will of the beneficiary the gift was made pursuant to the promise but as the will was executed two days before the death of the testatrix, the application of the charities provision in the Act of April 26, 1855, P.L. 332, came into question. However, it was held that a gift to a religious use made in a will executed within thirty days of the testatrix's death will be sustained, where it appears that the gift was made in pursuance of a promise given to one who bequeathed her whole estate to testatrix on the express understanding that such a gift should be made. It was observed by Dean, J. that the money goes to the church not by will but because there was no valid will when there ought to have been one, and that the right of the church for whose benefit the promise was made to insist on the fulfilment of the obligation in a court of equity in whose hands is the fund and before whom are all parties in interest: Mitchell, J. in a dissenting opinion made the following caustic observation:

"I do not understand that equity, even under the benign administration of the longest footed chancellor, undertakes to enforce moral obligations in the length and breadth of the Golden Rule, and it is important that we should keep its boundaries carefully marked. The bequest of Prudence Hoffner to the church was either a voluntary gift, or the performance of a legal obligation. It was put in the form of gift, and in that form it was peremptorily made void by statute. If it was to be enforced as an obligation, the church should be required to fill its bill, prove the consideration, the contract or trust, and the failure to perform, as in other cases. Then we should have the case freed from the confusion of moral and legal obligations, and without the danger of sanctioning a violation of the statute under the guise of enforcing a duty."
In Hollis v. Hollis, Endlich, J. sets forth the equity rule as applied in Hoffner's Estate, supra, as follows:

"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 162; Jones v. McKee, 3 Pa. 496; Irwin v. Irwin, 34 Pa. 525; Church & Wife v. Ruland & Wife, 64 Pa. 432; Schulitz'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."

As pointed out by Stewart, J., in Stirk's Estate the trust doctrine will not be applied directly in the fact of the charities restriction in the Act of 1855 although the application was made indirectly in Hoffner's Estate. Another refinement permitting evasion of the Act occurs in Flood v. Ryan and Bickley's Estate, where the gifts were made absolutely to ecclesiastics without any promise exacted by testator who apparently relied upon the donees to consider themselves as bound in the "realm of conscience". This phase of the trust doctrine will be discussed in the next chapter under the charities provision of Section 6 of the Wills Act of 1917.

Assuming that fraud was committed by one beneficiary under a will does it follow that the rule is applied that no person can claim an interest under a fraud committed by another on the theory that however innocent the party may be, if the original transaction is tainted with fraud that taint runs through the derivative.

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170 243 Pa. 90 (1916) 98 A. 789. Cf. Rock's vs. Sheppard, 302 Pa. 46 (1930) 152 A. 754; Tuttle's Estate, 132 Pa. Super. Ct. 356 (1938) 200 A. 921; for rule that to establish a trust the evidence must be clear, explicit and unequivocal. Owner of personal property may impose upon it a valid trust, either by an explicit assertion or by a transfer of the legal title to a third party upon certain specific trusts and no fixed form of declaration is required to create a trust, but sufficient facts must be averred to show the intention was plainly manifest. O'Connor v. Flick, 274 Pa. 521 (1922) 118 A. 431.

171 See note 168, supra.

172 April 26, 1855, P.L. 328; Sec. 6; Wills Act, June 7, 1917, P. L. 403, as amended, see 20 PS 193 Supplement. See Also Sec. 7 (1) Wills Act of 1947. Report of Joint State Government Commission, page 41.

173 161 Pa. 531 (1894) 29 A. 33.

174 220 Pa. 450 (1908) 69 A. 908.

175 270 Pa. 101 (1921) 113 A. 68 per Simpson, J., giving cogent reasons why the decisions are unsound but yielding to stare decisis.

176 See note 172, supra.

177 184 Cal. 427 (1920) 194 Pac. 5, 17 A.L.R. 239; Cases on Wills and Administration, Mechem and Atkinson (1928) page 47.
interest and prevents any party claiming under it? Or may the interest of the fraudulent beneficiary be segregated so that the instrument would be valid as to the innocent parties but invalid as to the guilty parties? Although this question does not appear to have been litigated in Pennsylvania, it has been answered in other jurisdictions and notably in California where the topical case arose, affording another interesting slant to the fraud phase in testamentary dispositions. Testatrix gave bequests to various relatives aggregating some $35,000, and the residue over $100,000 in value to "my husband, J. Gamble Carson." After probate a contest by relatives was started, the charges being: (1) want of due execution, (2) undue influence, (3) fraud upon testatrix practiced by Carson. The first ground was abandoned and the substance of the other two was that, while Carson had gone through a marriage ceremony with testatrix a year before her death, and she believed then and always thereafter that he was her husband, and made her will in that belief, yet he was not legally her husband because he was already married and never been divorced from the wife who was still living. It was alleged also that Carson knew he was not free to marry and yet represented that he was, and that testatrix's belief was induced by these false representations and that solely because of this belief she made the will leaving the bulk of her estate to him. The lower court nonsuited contestants but on appeal this judgment was reversed and the case sent back for a jury trial on the question, "Was the bequest in fact the fruit of the fraud?" This, so said the court, was question for a jury to determine and unless it can be said that the jury could have reasonably reached but one conclusion concerning it, and that was that the bequest to Carson was not the direct fruit of his fraud, the evidence was sufficient to prevent a nonsuit. Olney, J., thus reasoned:

"Now a case can be imagined where, nothing more appearing, as in this case, than that the testatrix had been deceived into a void marriage and had never been undeceived, it might fairly be said that a conclusion that such deceit had affected a bequest to the supposed husband would not be warranted. If, for example, the parties had lived happily together for twenty years, it would be difficult to say that the wife's bequest to her supposed husband was founded on her supposed relation with him, and not primarily on their long and intimate association. It might well be that if undeceived at the end of that time her feeling would be, not one of resentment at the fraud upon her, but of thankfulness that she had been deceived into so many years of happiness. But, on the other hand, a case can easily be imagined where the reverse would be true. If in this case the will had been made immediately after marriage, and the testatrix had died within a few days, the conclusion would be well-nigh irresistible, in the absence of some peculiar circumstances, that the will was founded on the supposed legal relation into which the testatrix had been deceived into believing she was entering. Between these two extreme cases come those wherein it cannot be said that either one conclusion or the other is wholly unreasonable, and in those cases the determination of the fact is for the jury. Of that sort is the present."

178 Stirk's Est., supra, note 168; Bickley's Est., supra, note 175; O'Connor v. O'Connor, 291 Pa. 185 (1927) 139 A. 734; Cameron v. Trust Co., 292 Pa. 121 (1928); 140 A. 768; A.L.R. 1;
The court further held on the question of the entire will being affected or failing, that this would not be so, Carson alone being charged with fraud. On this feature the learned justice declared:

"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 a valid expression of the testatrix's testamentary intention. 1 Schouler on Wills, Executors and Administrators, sec. 248; 14 Cyc. 1149; sec. 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."¹⁷⁹

Culbertson's Estate¹⁸⁰

In the cases discussed so far the fraud has been perpetrated on the testator. In the present case, however, the fraud was upon the register of wills presenting to him for probate a forged will and imposing upon him by false testimony. This case will be examined more in detail, post, in the Chapter on Probate, but suffice it to remark here that the will as probated was set aside after twelve years upon the prompt action of the parties when the fraud was discovered, the rights of grantees and mortgagees dealing bona fide with the devisee being protected.¹⁸¹

¹⁸⁰ 180 301 Pa. 438 (1930) 152 A. 540; see also Wall v. Wall, 123 Pa. 545, 16 A. 598, 10 Am. St. Rep. 549.