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UNDE\U000000a INFLUENCE AND FRAUD IN PENNSYLVANIA WILLS*

By

A. J. WHITE HUTTON**

Undue Influence and Fraud.

There is nothing in the Wills Act of 1947 or prior acts concerning undue influence or fraud in the matter of testamentary dispositions. These legal concepts are the product of the judicial mind. It is obvious, however, that in the exercise of testamentary power the testator must be a free agent. As expressed by Professor Bigelow:

"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."

An English View.

One of the best, concise expositions on undue influence is found in Hall v. Hall by Sir J. P. Wilde:

"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."

The problem of undue influence is frequently intertwined with and shades into the problem of testamentary capacity. In many cases it is difficult or inexpedient to separate them. However, if it is shown that a testator lacks testamentary capacity,

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**A.B., Gettysburg College 1897; A.M., Gettysburg College, 1899; L.L.B., Harvard University, 1902; Professor of Law, Dickinson School of Law 1902-; Member Pennsylvania House of Representatives, 1931-35; Author of HUTTON ON WILLS IN PENNSYLVANIA.

1 Law of Wills, 81.
2 L. R. 1 P. & D. 481.
obviously it is unnecessary to go into the issue of undue influence. On the other hand, if a testator has testamentary capacity, it may nevertheless be of such a low order as to make him an easy subject of undue influence. It is important also to keep these issues distinct in charging a jury and to instruct that separate findings be made on each issue. In *Tawney v. Long*, Green J., was constrained to reverse a judgment entered for the defendants-contestants on a general verdict on issues of testamentary capacity and undue influence because there was no sufficient evidence of the latter, but there was of the former. The court could not tell whether the jury had found for contestants on both issues or upon merely one and which one, hence an order for a new trial.

In the remarks of Sir J. P. Wilde, supra, after observing that the testator must be a free agent, the learned judge divides his statement into two parts, (a) lawful influence, and (b) unlawful influence. Accordingly, in the present discourse the same order will be followed. The very phrase undue influence raises by implication the converse of due influence. Let us consider these influences.

Marital Influences.

One of the influences exerted on testamentary disposition, not considered unusual or illegal, and to the contrary to be expected normally, arises in the relationship of husband and wife and their conduct one to the other. In the early case of *Moritz v. Brough* is found a typical set of facts, long a classic in our annals of wills. The facts were developed on a feigned issue directed by the Register's Court to try the validity of a writing purporting to be the will of Peter Moritz, dated December 25th, 1817, about seven years before testator's death. After the will was formally proved defendant-contestant offered to prove that about a couple of months before the will was made and just after the marriage of defendant and Polly, daughter of testator, her mother, testator's wife, was dissatisfied with the marriage and in the presence of the witness told testator he should now make a will and that Polly should be left nothing and that testator had replied there was time enough; that the wife insisted that the daughter and husband should be left nothing but the testator was opposed to the arrangement; that the wife exercised a great control over testator, at all times and was a woman of high temper, managed the whole establishment, indoor and outdoor, and that testator was a man of easy disposition. This was to be followed by evidence of declarations of testator made before and after the date of the will that he would have made a different will but for the temper of his wife and that the will was made through her importunity and his fear of her violence. The offer was objected to but the court overruled the objection and admitted the evidence with exception to plaintiff. The jury found for the defendant. On plaintiff assigning the above ruling for error, the Supreme Court reversed the judgment

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4 *76 Pa. 106 (1874).*
5 *16 S. & R. 403 (1827)* argued Oct. 31, 1827 at Chambersburg - Southern District - October Term before Gibson, C. J. (appointed May 18, 1827) and Duncan, Rogers, Huston and Tod, Associate Justices. N. B. In this volume is "An Eulogium upon Hon. Wm. Tilghman, late Chief Justice of Pennsylvania, by Horace Binney."
entered on the verdict and awarded a new trial holding that to set aside a will duly executed by a man of competent understanding, evidence is not admissible of declarations made by him, that he intended differently, and was importuned by his wife, or of his wife’s high temper and interference with testator in relation to his will.6

In Zimmerman v. Zimmerman7 Woodward, J., thus commented upon this earlier case:

"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."

Although the learned Justice presents the more pleasing picture of the virtuous wife influencing her husband, it is possible to get the same legal results in case of a vicious wife influencing the admiring husband. In short, lawful influence may be exerted by one’s evil associates as effectually as by good companions, which is aptly pointed out by Sir James Hannen in Wingrove v. Wingrove.8

On the other hand in Perret v. Perret9 our reports present an instance of an evil and malicious wife influencing a dying husband to disinherit their only son and thus described by Green, J.:

"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 un-

6 Declarations of a testator tending to show undue influence must be supported by other testimony of the fact, Keen’s Est., 299 Pa. 430 (1930) 149 A. 737; Cookson’s Est. 325 Pa. 81 (1937) 188 A. 904; Buhan v. Kesler, 328 Pa. 312 (1937) 194 A. 917.  
7 23 Pa. 375 (1854).  
8 11 P. D. 81.  
9 148 Pa. 131 (1898), 39 A. 33.
requited 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."

The marital influences may likewise impel a wife to make a will in favor of her husband and to the exclusion of her children and the reports furnish such an illustration in *Spence's Estate*\(^\text{10}\) where there was an appeal from probate by a son and daughter of the testatrix and a petition to the orphans' court for the awarding of issues on testamentary capacity and undue influence which were refused. In affirming the decree of the lower court, Walling, J., declared:

"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. Clarke, 80 Pa. 170. That presumption is supported by proponent's testimony and is nowhere contradicted. In this respect this case differs from that first cited for there the evidence tended to show that the will was not read to or by the testatrix, or explained to her, before or after its execution, and there the question of her knowledge of the contents of the will was submitted to the jury."

The learned justice likewise observed that the signature of testatrix being normal tended to disprove contestants' contention as to her physical and mental condition.\(^\text{11}\)

In *Zimmerman v. Zimmerman*\(^\text{12}\) Woodward, J., explained:

"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 practiced 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,

\(^{10}\) 258 Pa. 542 (1917) 102 A. 212.

\(^{11}\) See also Keen's Est., supra, note 10, wherein Walling J., makes reference to the signature of testatrix being in a firm natural hand, identical with her normal handwriting, thus disproving the contention of mental and physical weakness. On the general subject of mental and physical weakness raising a presumption of undue influence, see valuable note collating Penna. cases, 66 A.L.R. 256.

\(^{12}\) See note 7, supra.
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 S. & R. 403."

Consequently, 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 or some evidence of extreme infirmity or mental weakness upon the part of the willmaker.1

A distinguished legal writer14 has suggested that undue influence may be more readily predicated of a husband over his wife than that of a wife over her husband, but it would appear difficult to dogmatize on such intricate matters.

Filial Influences.

Filial is defined as pertaining to a son or daughter and therefore bearing upon the relation of a child to a parent. The attitude of the law towards those sustaining filial relationships and in respect to mutual willmaking is the same as that already discussed respecting the marital relationship.

About the turn of the century the case of Robinson v. Robinson15 was litigated and attracted much attention by reason of the social prominence of the litigants and may still be considered as a leading case on this topic.

The testatrix was an aged woman who executed a will in favor of her son who was charged with having exerted undue influence over the mother in the execution of the will. Issues were framed covering five specifications, the first three involving questions of fact as to the execution of the will and the testamentary capacity of the maker. The remaining two specifications were directed to the question of undue influence. The jury was directed to find for the proponents on the first three issues and the latter two went to the jury who found for the contestants. On appeal the judgment was affirmed, Dean, J., delivering the opinion. On the matter of undue influence the following extract from the charge by the trial court was approved:

"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."

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13 Cookson's Est., 325 Pa. 81 (1937) 188 A. 904, per Kephart, C. J., explaining that evidence of weakness of mind or an enfeebled condition shows the degree of susceptibility of the testator's mind to outside influences. But a prima facie case of undue influence cannot be made out from such testimony without more: there must be evidence, direct or circumstantial, of improper conduct sufficient to dominate or control testator's mind.
14 Schouler on Wills, 6th Ed. Section 278-279.
15 203 Pa. 400 (1902), 53 A. 253.
However, Mitchell, J., filed a dissenting opinion contending as follows:

"I would reverse the judgment on the broad ground that there was no evidence on which the jury should have been permitted to set aside the will.

"The contest before the jury, briefly stated, embraced three points, the execution of the will, the testamentary capacity of the testatrix, and undue influence by appellant. As to the first two points the evidence was such that the judge directed a verdict for the will. This left for the jury only the question of undue influence. Upon this there was no evidence amounting to a scintilla that any undue influence, if any ever existed at all, operated at the time of the execution of the will. The instrument in its final form was prepared by counsel in Pittsburgh, mailed directly to the testatrix, and next appears in the evidence when produced by the testatrix from her own custody. The brunt of the argument against the will amounts to no more than that is unnatural and suspicious. Whether a will is unnatural in a moral or ethical sense which cuts off some descendants and favors others is a question of casuistry with which the law is not concerned. A will is unnatural in a legal sense only when it is contrary to what the testator under the admitted circumstances and with his known sentiments would have made, and it is only on that ground that the question is admissible at all, to wit: that it tends to show that what testatrix did was not from her own natural impulse but from coercion.

"In this case there is no room for any such contention, for the testatrix in her will only continued what she had been doing for years, while in the possession of full mental and physical vigor, putting the appellant on the footing of her preferred child and favorite beneficiary.

"That at times she was dissatisfied with the reduction of her income and its lavish expenditure, and expressed her intention to restrict her son's management, was not unnatural, but does not prove undue influence. She was a woman, as testified, of strong will, with counsel of her own, not to mention the intermeddling advice of other relatives and nominal friends, but she never displayed any desire to go beyond a little querulous fault-finding, a not uncommon entertainment of the indulgent parent.

"Taking the definition of undue influence as expressed in the opinion of the court I find nothing in the evidence which comes anywhere near the required standard."

In Aggas v. Munnell16 one of the issues was undue influence alleged to have been exercised by a daughter who kept house for the testator, a Civil War veteran, 86 years of age at the time of the execution of the will. A caveat was filed against the probate and the register certified the matter to the orphans' court and by it to the court of common pleas for jury trial on the questions of testamentary capacity and undue influence. There was a general verdict by the jury for the contestants, upon which judgment was entered and the proponent daughter appealed. Walling, J., in reversing, ordered a judgment entered for the plaintiff-proponent n.o.v., holding that the proofs taken as a whole did not support the finding of the jury on either or both questions. In declaring there was nothing in the record to sustain the contention

16 302 Pa. 78 (1930) 152 A. 840.
of undue influence, it is pointed out that the daughter did nothing improper to influence her father in the disposition of his property, even though she did call in an attorney who drew the will. Furthermore, when the scrivener came, although the testator asked how she desired the will drawn, her answer was that she wished him to make the will just as suited him, which indicated she was not attempting to dictate the contents of the will. And the Justice emphasized that the undue influence must be such as to control the testator in the act of making the will, citing numerous authorities to sustain this proposition.

In Pensyl's Estate\textsuperscript{17} 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 further appeared that the two sons thus excluded had actually instituted lunacy proceedings against their mother, which proceedings had failed. These facts would go far in explaining the mother's reasons for the exclusion. In Hook's Estate\textsuperscript{18} there was an appeal from the decree of the register admitting the will to probate. No issue was prayed for, but the court in an opinion sustaining the decree of the register, held that there was neither lack of testamentary capacity nor undue influence shown and dismissed the appeal. In affirming the lower court, Mitchell, C. J., said inter alia:

"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 influences 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."

Cookson's Estate\textsuperscript{19} affords an excellent illustration of the attitude of our Supreme Court toward wills generally and those of parents particularly as they discriminate in testamentary disposition among their children and at a time when old

\textsuperscript{17} 157 Pa. 465 (1893) 27 A. 669.
\textsuperscript{18} 207 Pa. 203 (1903) 56 A. 428.
age and sickness have unquestionably affected the mental powers. This case was discussed in a previous paragraph as a type of old age testamentary capacity. It likewise is useful in pointing out some applied principles of filial influence meeting judicial approval. The mother, aged eighty-two years, executed a codicil to her will, while extremely ill in a hospital and died four days later. By the terms of the codicil the share of the daughter was increased to a half of the residuary estate and that of each of two sons reduced to one quarter. The mother and daughter frequently quarreled and there was bad feeling between the daughter and the one son. At probate the subscribing witnesses, hospital attaches, testified to the testamentary capacity of testatrix. On appeal the court granted issues on both testamentary capacity and undue influence. The jury found against the proponent daughter on both issues who appealed assigning as error, inter alia, that the court erred in not directing the jury that there was not sufficient evidence to sustain the charge of undue influence. Kephart, C. J., reviewing the evidence, concluded that the record was void of any evidence upon which a finding of undue influence could be predicated. The judgment was reversed and a new trial awarded by reason of the prejudicial error of the court in charging the jury, at least by implication, that the testimony of the attending doctor concerning the testatrix’s mental capacity at the time of the execution of the will was of greater weight than that of the confidential agent of testatrix, particularly in view of the fact the doctor was not present and the agent was present at the execution and had drawn the codicil. The daughter, at the request of the mother, according to her testimony, had sent for the agent and was present when the will was signed, although out of the bedroom when the agent and the testatrix consulted concerning the codicil. At the trial the subscribing witnesses in their testimony described the testatrix as in a dazed and comatose condition. The agent and the daughter testified the decedent was rational, wide awake and fully understood what she was doing. The burden rested upon the contestant and there was no shifting to the daughter as her relationship to testatrix was not confidential, citing Aggas v. Munnell.\textsuperscript{20} There was no evidence of persuasion or solicitation and even if there had been such does not constitute undue influence.\textsuperscript{21} Evidence of weakness of mind or enfeebled condition will show susceptibility to undue influence but must be followed by evidence, direct or circumstantial, of improper conduct sufficient to dominate or control testator’s mind.\textsuperscript{22}

In \textit{Kish v. Bakaysa}\textsuperscript{23} the appeal was the result of refusal of the court below to submit issues of testamentary capacity and undue influence and the giving of peremptory instructions to the jury to answer affirmatively that the testator was of sound mind and memory and that the will was not procured by exercise of undue influence. Motions for new trial and judgment n.o.v. were denied. In affirming the judgment, Drew, J. pointed out that the testator died at the age of 81, having made the will

\textsuperscript{20} 302 Pa. 78 (1930) 152 A. 840.
\textsuperscript{21} Brennan’s Est., 312 Pa. 335 (1933) 168 A. 25; Koon’s Est., 293 Pa. 465 (1928) 143 A. 125.
\textsuperscript{22} Phillip’s Est., 244 Pa. 35 (1914) 90 A. 457; Heister v. Heisetr, 122 Pa. 239 (1888) 16 A. 342.
\textsuperscript{23} 330 Pa. 533 (1938) 199 A. 321.
about a year before. He was survived by seven children, all of full age, his wife hav-
ing predeceased him. The will provided for the payment of debts and the establish-
ment of a trust fund for the saying of masses, and provided that five children were
each to receive $1.00 and the balance of the estate, approximately $2,000 was to be
divided into four parts, two of which were bequeathed to the church and the two
remaining parts respectively to his two sons. The court pointed out that the evidence
offered to show undue influence was wholly inadequate even if fully credited to
support the charge according to the standard of proof required by our cases. The
testimony relied upon by contestants on this point was that one of the sons in the
presence of his sister had said to the father:

"Your will, the way you have it, is not right, it should be changed and
give everything to the priest and the church."

At another time it was alleged that the priest in the presence of three of the
children had said to the testator:

"This will must be changed because it is not right."

It did not appear that these expressions influenced the testator in the slightest
and there was no improper conduct shown with respect to the execution of the will
itself.

Likewise in Royer's Estate24 the testatrix aged 82 years made a will giving the
residue of her estate to her son. A daughter of the testatrix appealed from the pro-
bate and the court refused to grant an issue on the question of undue influence. In
affirming the decree in a per curiam, it was stated that there was no evidence what-
soever to sustain the charge of undue influence, the testatrix having been shown
to be in full possession of her faculties at the time of the execution of the will by two
totally disinterested witnesses whose testimony convinced the trial court beyond any
question of doubt as to their absolute credibility. There was no evidence of weakness
of body or mind on the part of testatrix and none whatsoever indicating a confi-
dential relationship between the testatrix and her son, although it was stated to be
true that he assisted her with her affairs and in fact was constantly taking care of her,
taking her where she desired to go and rendering her every service possible.

In contrast with these cases Perret v. Perret25 is recalled where on the trial of
an issue devisavit vel non, in which the alleged will was attacked on the ground of
undue influence, it was held 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 his 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

24 339 Pa. 423 (1940) 12 A. 2d. 923.
25 See note 9, supra.
husband until the will was executed. Furthermore, it was shown in this case 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 the declarations of the mother were held admissible as 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.

The strict rule against a confidential agent is not applied in cases of blood relationship unless the element of the weakened physical 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. Hartman* 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 testatrix 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* 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* it was held that in a contest over a will in which a son is largely preferred, if it appears that the son, although 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* 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.

It is therefore the law that certainly between parent and child mere kinship

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26 115 Pa. 32 (1886) 8 A. 219.
27 179 Pa. 645 (1896) 36 A. 129.
28 187 Pa. 572 (1898) 41 A. 277.
29 198 Pa. 363 (1900) 47 A. 1106.
does not give rise to any inference of a confidential relationship and this same view has been extended to brothers and sisters. In *Leedom v. Palmer*\(^{30}\) Kephart, J., explained:

"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, 172 Pa. 309, 336, wherein the court quoted the English rule announced in Baker v. Bradley, 7 D. G., M. & G. 597; Bigelow on Fraud, 368; Worral's App., 110 Pa. 349, 364; Carney v. Carney, 196 Pa. 34, 38; Compton v. Hoffman, 265 Pa. 257, 263; Neurcuter v. Scheller, 270 Pa. 80; Langdon v. Allen, 1 W. N. C. 359, 397; Heister v. Heister, 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."

**Social Influences.**

In discussing testamentary power in a previous chapter, it was declared to be the law that a person proved to be of sound disposing mind and memory has a right to dispose of his property as he pleases subject to the restrictions as enumerated. The fact that the will may appear to some to be unjust is no evidence of lack of testamentary capacity or that the will executed through undue influence.

Despite the passage of the years wherein our courts have given expression to sentiments on this subject, nevertheless the homily of Paxson, J., in *Cauffman v. Long*\(^{31}\) still remains the classic expression wherein he observed:

"The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust, the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality and to provide for the wants of the testator's family; to protect those who are helpless; to reward those who have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them; he may be unjust to his children or relatives; he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will,

\(^{30}\) 274 Pa. 22 (1922) 117 A. 410.

\(^{31}\) 82 Pa. 72 (1876) Cf. Paxson's Estate, 221 Pa. 98 (1908) 70 A. 280.
and such instrument is not the result of undue influence, but is the uncon-
trolled act of his mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality."

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 someone else. These latter are not commendable motives but on the other hand are not necessarily unlawful. In addition to the classic of Paxson, J., supra, another helpful statement is found in Wingrove v. Wingrove where Sir James Hannen, addressing the jury, 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 a 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 binding instructions for the proponent of a will were approved by the Supreme Court where the issue was undue influence and the facts were that the testatrix, a widow with no children and only collateral relatives, had given a large bequest to the husband of her cousin which was to the prejudice of her living brother and the children of a deceased one. It was shown that the legatee and his wife had been particularly kind and attentive to the testatrix and it was no more than natural that she would try to award them by the gift of the larger part of her small estate, approximately worth $2,000.00. Again in Morgan's Estate a testator passed over an only child, his daughter, and gave the bulk of his estate to her two children and this disposition was attacked as being an unnatural one and therefore evidence of undue influence. However, it was pointed out 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 his estate coming into the hands or management of her husband. However, it was emphasized that although the prejudice may have been without just foundation, nevertheless it was the right of the testator, not being convicted of testamentary incapacity, to do with his own as he pleased.

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22 11 P. D. 81.
38 202 Pa. 198 (1902) 51 A. 758.
34 219 Pa. 355 (1907) 68 A. 953.
It has been declared, however, that 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, be a stranger to the testator's blood, receives a legacy or bequest, large as compared to the testator's estate, then the burden of proof shifts from the proponent of the will. In such case, not only must testamentary capacity be affirmatively approved, but it must also be shown that the testator acted with a full knowledge of the value of his estate.

In Lawrence's Estate it was declared that although the will of the testator might seem to be unreasonable or unnatural in its provisions, or there might be provided an unequal distribution among the next of kin, or a gift of property to a person other than the natural recipient of the testator's bounty, nevertheless, there is no presumption of mental weakness arising from such a will, except where the distribution is so gross or ridiculous as to give rise to a presumption of insanity. Unreasonable or unnatural distribution, with other evidence, may be used to prove incapacity, but standing alone it is insufficient, but such distribution may become of the utmost importance when considering the question of undue influence to which it is more closely related.

In certain New York decisions where the will was contrary to the dictates of natural affection, of justice, and of duty, the burden was placed upon 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 however 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.

On the other hand, in a very noted case, Llewellyn's Estate, involving over one million dollars, the testator left his entire estate to a friend and employee who was a stranger to his blood. Distant relatives contested the will but were refused the granting of issues on both questions of testamentary capacity and undue influence, and this action was affirmed by the Supreme Court. Walling, J., after pointing out that the beneficiary did not draw the will or suggest that it be drawn or that he be made legatee but on the contrary it was drawn by a lawyer he had never seen before and who was called at the decedent's request further observed that assuming the will was executed under such circumstances as placed upon the legatee the burden of showing it was the free and voluntary act of the testator, that burden, as the hearing judge and orphans' court had found, was fully met, it being clearly shown that the decedent although weak in body was in full and perfect possession of his

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237 Caldwell v. Anderson, 104 Pa. 199 (1883), per Gordon, J.
286 Pa. 58 (1926) 132 A. 786.
37 7 Ann. Cas. 895.
296 Pa. 74 (1929) 145 A. 810.
mind and that the will was his suggestion and drawn by his attorney to carry out his wishes and that proponent had no important part in its preparation. The learned justice then gave these additional reasons and authorities:

"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. In re Adams Estate, 220 Pa. 531, 69 A. 989, 123 Am. St. Rep. 721; Caughey v. Bridenbaugh, 208 Pa. 414, 57 A. 821; Robinson v. Robinson, 203 Pa. 400, 53 A. 253; In re Friend's Estate, 198 Pa. 363, 366, 47 A. 1106; Herster v. Herster, 122 Pa. 239, 16 A. 342, 9 Am. St. Rep. 95; Caldwell v. Anderson, 104 Pa. 199, 204. To place the burden of proof on proponent, there must be evidence of weakened intellect. In re Phillips' Estate, 244 Pa. 35, 44, 90 A. 457; Gongaware et al v. Donehoo, et al, 255 Pa. 502, 508, 100 A. 264. In the instant case, the physical weakness apparently had no effect upon his mental faculties."

Other cases involving similar facts where those not related participated by will in the estate of the decedent, and where the facts so completely explained the situation that the lower court did not feel justified in granting issues to determine questions of testamentary capacity and undue influence, and such action has been supported by our Supreme Court, are Keen's Estate, 40 Brennan's Estate, 41 Geist's Estate, 42 and Mobler's Estate. 43 In Buhon v. Kestlar the case was tried twice and on the first trial the jury found in favor of the will. On the second, which was the subject of the present review, they found against the will and the judgment entered in this case on appeal was reversed with directions to the court below to enter judgment in the plaintiff-proponent's favor. The will in question was written by Buhon, the beneficiary, at the testator's dictation, but the Supreme Court determined from the overwhelming weight of evidence that the testator was competent, clear minded and entirely understood what he was doing, what his estate consisted of, who were his relatives and what he wished to do, and further that there was no sufficient evidence of undue influence as defined in our cases, citing inter alia Geist's Estate supra. On the contrary in Griffin's Estate with the facts appearing as to the weakness of mind of the testatrix, and the gift to strangers, the Superior Court felt impelled to reverse the decree of the lower court and order the awarding of an issue as prayed for.

Likewise in Patti's Estate the Superior Court reversed an order of the orphans court refusing to award an issue devisavit vel non wherein the writing was attacked upon three grounds, namely (1) that at the time of the execution of the will Patti did not possess testamentary capacity, (2) that the writing was procured by undue

40 299 Pa. 430 (1930) 149 A. 737.
41 312 Pa. 335 (1933) 168 A. 25.
42 325 Pa. 401 (1937) 191 A. 29.
43 343 Pa. 299 (1941) 22 A. 2d. 680.
44 328 Pa. 312 (1937) 194 A. 917.
45 See note 42, supra.
47 133 Pa. Super. 81 (1938) 1 As. 2d. 791.
influence exerted by the beneficiaries, and (3) that the writing was not executed in the manner required by statute. The facts in the case are rather unique, involving a miner seriously injured and being in a hospital in a dying condition and certain strangers to his blood obtaining an alleged will in their favor. The attitude of the court and sufficiency of the facts are outlined in the following from the opinion of Parker, J.:

"As we have indicated, we may not here assume at the present time the evidence that the beneficiaries in this will were either of them confidential advisers of the testator, but they are in a similar position. It is not important for present purposes whether we speak of the burden of proof that was upon Mr. and Mrs. Corozzi, or of a duty on them to go ahead with the evidence, or of a presumption against them, or whether we assume from their silence that their evidence would have been favorable to the appellant. We are now concerned in an examination of the weight of the evidence produced rather than with the order of proofs. The facts remain that in any view of the case the mental capacity of Patti was seriously impaired and a stranger to his blood had an active part in the preparation and execution of the paper which gave his entire estate to strangers, Mr. and Mrs. Corozzi. They have not testified themselves nor furnished one iota of evidence tending to show that the paper was his true and free act, uninfluenced and unrestrained. These facts weigh so heavily against the proponents that we are convinced this is a proper case for the submission of the issue to a jury. With a full appreciation of the heavy burden that is here upon the appellant, we are of the opinion that there is a substantial dispute as to the testamentary capacity of Patti and as to the undue influence alleged to have been exercised by Mrs. Corozzi, and that if a jury should find in favor of the appellant a court could conscientiously sustain such finding. The appellant made out much more than a prima facie case. We feel that it was an abuse of judicial discretion to refuse the issue.

"It has been said many times that one may by will dispose of his property as he sees fit and that he is entitled to act on his own prejudices, but the law is rigid in insisting that one of weak mind, whether from inherent causes or by reason of illness, shall not be imposed upon by the art and craft of designing persons. The law has imposed a burden on strangers to the blood of a testator who receive extraordinary benefits and who are shown to be in a position where they might exercise a nefarious influence on one so weakened in mind by disease or illness to make the fullest disclosure of all the circumstances connected with the making and execution of a will."

One of the most recent cases reflecting the attitude of the Supreme Court in the matter of wills with gifts to strangers to the blood is that of Noble's Estate48 wherein there was an appeal from the refusal of an issue to determine whether testator lacked testamentary capacity and whether the will was obtained by undue influence exerted by the stranger beneficiary. In affirming the order of the lower

court Linn, J., made the following observations with citation of many authorities already discussed herein under this topic:

"The two grounds on which the issue was asked, lack of testamentary capacity and undue influence, shade into each other. There is really no evidence worthy the name to be submitted to the jury on the point of undue influence. A number of the testator's friends testified to expressions of affection for Probst made from time to time by the testator. At the time he made his will the testator was old, was not very well, had lapses of memory, but notwithstanding these infirmities, was competent to make a will. He kept it until he died more than a year and a half later. Considering all the circumstances disclosed in the evidence and discussed at length by the learned court below, we all agree that there is no support whatever for the suggestion that there was abuse of discretion in refusing the issue. In addition to the cases quoted above, see generally, Llewellyn's Estate, 296 Pa. 74, 145 A. 810; Minnig's Estate, 300 Pa. 435, 150 A. 626; Brennan's Estate, 312 Pa. 355, 168 A. 25; Kline's Estate, 322 Pa. 374, 186 A. 364; Geist's Estate, 325 Pa. 11, 186 A. 364; Bulman v. Kesler, 328 Pa. 312, 194 A. 917; Kish v. Bakaysa, 330 Pa. 533, 199 A. 321; Olsheski's Estate, 337 Pa. 420, 11 A. 2d. 487."

**Meretricious Influences.**

This topic has had an interesting career of mutation through our cases but the doctrine is now fairly settled. By meretricious is meant immoral and the influences referred to are those arising between two persons by reason of an immoral relationship. The question is what effect, if any, does such a relationship have upon the will of the one leaving property to the other as an element of undue influence. In *Dean v. Negley* Lowrie, C. J., takes judicial notice of the strong influences that arise frequently out of an illicit relationship between two persons. In *Wingrove v. Wingrove* Sir James Hannen states in a very clear way the situation:

"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 influences over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in a 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."

However, in *Dean v. Negley* Lowrie, C. J., did attempt to guard against such contingencies by holding that where a devise was made by the testator to the children of the woman with whom he had lived for years in adultery, a presumption of fact arose that the gift was the result of undue influence brought to bear upon

49 41 Pa. 312 (1862).
60 11 P. D. 81.
61 Supra, note 46.
the testator. Indeed, the learned chief justice was convinced that it would be proper to hold the presumption as one of law but he did not press this conclusion. The line of reasoning was that where the testamentary disposition involved relationship which was legal, the law in turn safeguarded the same with the presumption of regularity and validity. On the other hand where the testamentary disposition involved a relationship which was illegal, a presumption of irregularity of the disposition should then be raised. To this was added the following:

"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 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."

This form of argumentation not only confuses law and morals which are not convertible terms but it also sets up a presumption which may be contrary to fact, thus defeating the will in an effort to inculcate morals or to punish immorality. In Main v. Ryder, Mercur, J. endeavors to explain Dean v. Negley by stating that the judge there repudiated the presumption of law theory and left the matter to the jury as a question of fact, citing to the same effect Rudy v. Ulrich and concluding thus:

"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."

However, in Wainwright's Appeal Sharswood, C. J. flatly declared:

"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."

In Kustus v. Hager the will was sustained of a testator who left his estate to a woman, alleged to be his paramour and who kept house and cared for him. The testator's habits were such that his relatives had disowned him. However, after his death they manifested sufficient interest to contest his will on the grounds of undue influence exercised by the legatee. The evidence showed testator to have had testamentary capacity, the will having been prepared by his lawyer and witnessed by him and another in his office. The legatee took no part in the preparation or execution of the will and in fact at the time disavowed any interest in the estate except to be

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54 84 Pa. 217 (1877).
55 Supra, note 49.
56 69 Pa. 220 (1879).
57 89 Pa. 177 (1871).
58 Supra, note 49.
60 269 Pa. 103 (1920) 112 A. 43.
repaid certain loans and to be compensated for domestic services performed. The court declared there was not the slightest evidence of undue influence practiced. In *Wertheimer's Estate*, Kephart, J. opined:

"It may be doubted whether the rule in Dean v. Negley, 41 Pa. 312, Reichbenbach 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 Estate, 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."

In *Weber v. Kline*, several years later, the same justice referring to the above remarks as made in *Wertheimer's Estate* declared:

"The existence of a meretricious relation standing alone will not give rise to a presumption of undue influence. *Wertheimer's Estate*, supra."

Thus, the courts vacillated about three quarters of a century and by coincidence in the same period developed the doctrine of the judicial functions in the granting or refusing of issues devisavit vel non. *Central Trust Co. v. Boyer* follows in sequence; wherein is confirmed the doctrine that a meretricious relationship shown to exist between the testator and the chief beneficiary of the will does not of itself establish a charge of undue influence but supplies to this conclusion the compelling corollary that where the testator has made an unnatural and inofficious will at a time when according to the evidence his general course of conduct was dominated by the paramour, the hearing judge is justified in submitting to a jury the question of undue influence exercised by the beneficiary-paramour. Furthermore, the jury having found for the contestant and the chancellor having concurred in this finding, the judgment on the verdict should be affirmed, the court on appeal having presented to it the question whether in view of the relevant rules of law applicable to the case, is it conceivable a judicial mind desiring only to arrive at the truth and do exact justice on due consideration of the evidence as a whole, could reasonably have reached the conclusion of the court below. Drew, J., in a strong, well-reasoned opinion for the majority court answers the question in the affirmative and the judgment is affirmed. Schaffer, J. dissented from this view, stating that according to his impression of the record, there was no evidence of undue influence.

It would seem that the decision of the majority was sound and in furtherance of the ends of justice and supportable on two grounds (1) the entire situation presented by the evidence was essentially for the court and jury, and (2) although

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60 286 Pa. 155 (1927) 133 A. 144.
61 293 Pa. 85 (1928) 141 A. 721.
62 Supra, note 60.
63 308 Pa. 402 (1932) 162 A. 806.
there appeared to be no direct evidence of specific conduct of the beneficiary at the time, together with the glaring fact that the will was inofficious and unnatural, bring the case within the principle of Watmough's Estate.\textsuperscript{64}

In Fidelity Trust Co. v. Travelers Insurance Co.\textsuperscript{65} Maxey, J. restates the established rule that the mere existence of the immoral relation does not give rise to a presumption of undue influence and standing alone would not support the setting aside of the will, citing many authorities already discussed.\textsuperscript{66}

Confidential Influences.

Confidential relations beget confidential influences and such influences may be more potent than those arising out of marital, filial, social or even meretricious relations. Furthermore, a confidential relationship is essentially different from that arising out of the other types mentioned, although some of these other types are included in definitions of the former.

In Darlington's Estate,\textsuperscript{67} Green, J. explained:

"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 co-partners, 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."

In Null's Estate,\textsuperscript{68} it was said that a confidential relationship appears when the circumstances make it certain the parties do not deal on equal terms but on the one side there is overmastering influences, or on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage being possible. In Leedom v. Palmer,\textsuperscript{69} Kephart, J. thus explained the matter:

"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."

\textsuperscript{64} 258 Pa. 22 (1917) 101 A. 857.
\textsuperscript{65} 320 Pa. 161 (1935) 181 A. 594.
\textsuperscript{67} 147 Pa. 624 (1892) 23 A. 1046; Scattergood v. Kirk, 192 Pa. 263 (1899) 43 A. 1030, where caretaker of old and infirm testatrix was deemed a confidential advisor.
\textsuperscript{68} 302 Pa. 64 (1930) 153 A. 137; per Maxey, J. Wetzel v. Edwards, 340 Pa. 121 (1940) 16 A. 2d. 441.
\textsuperscript{69} 274 Pa. 22 (1922) 117 A. 410.
In *Null's Estate* the same justice explained that in the cases of trustee and cestui que trust, guardian and ward, attorney and client, and principal and agent, the confidential relation is a conclusion of law, whereas in other cases as parent and child it is a question of fact to be established by the evidence. However, when a confidential relation is established, the presumption is that the transaction, if of sufficient importance, is void and there is cast on the donee the burden of proving affirmatively a compliance with equitable requisites and overcoming the presumption by showing that no deception was used and the act was the intelligent and understood act of the grantor, fair, conscientious and beyond the reach of suspicion.

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.

In *Phillip's Estate*, Moschzisker, J. pertinently remarked:

"Insofar 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 and in the absence of 'direct proof of undue influence actually exercised by the proponents' 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."

On the other hand, 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 *Mohler's Estate* the proposition was advanced by appellant-contestant that the alleged will was void as a matter of public policy for the reason that the chief beneficiary was the confidential advisor of testatrix although the uncontradicted

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70 See note 68, supra.
72 244 Pa. 35 (1914) 90 A. 457; Caughey v. Bridenbaugh, 208 Pa. 414 (1904) 57 A. 821, note excellent opinion of Judge Endlich containing full review of the authorities and affirmed per curiam; Yardley v. Cuthbertson, 108 Pa. 393 (1883) 1 A. 765, containing charge of Allison, P. J. to the jury and extensive opinion by Green, J., affirming judgment; Mercer, C. J., and Clark, J. dissenting; see same case Cuthbertson's Appeal, 97 Pa. 163 (1881); Wilson v. Mitchell, 101 Pa. 495 (1882).
74 343 Pa. 299 (1941) 22 A. 2d. 680.
testimony was that the will was not written or procured to be written by the confidant but was wholly the creation of the testatrix. Maxey, J. declared:

"There is no public policy condemning the receipt of a bequest by one who stood in a fiduciary relationship to the giver. Such a policy would impose an unwarranted restriction on the testamentary alienation of property and would prevent a testator from bestowing gifts on his closest friends and confidants, who often have stronger than kinsmen's claims on his bounty. The law wisely cast upon a legatee standing in a confidential relation to a testator the burden of proving that he used no undue influence to secure the legacy and this rule satisfies all the applicable requirements of 'public policy.'"

At this point Yardley v. Cuthbertson\(^7\) is in order as the leading case in our reports on bequests to confidential advisors, much cited along with the companion case hereafter mentioned and both valuable contributions to this topic. In Cuthbertson's Appeal\(^6\) the lower court refused the granting of an issue but this action was reversed on appeal and the case sent back for trial on the issue prayed for. Thus arose Yardley v. Cuthbertson\(^7\) as tried before Allison, P. J. of the Philadelphia Court. The report embraces seventy-one pages and includes in full the charge to the jury, the various exceptions taken and points submitted, and likewise an extensive opinion by Green, J., in which each assignment of error is taken up and discussed with ample citation of authorities. The opinion is interesting likewise for the prefatory remarks in the form of an admitted obiter dictum on the subject of the proper arranging of the parties as plaintiffs and defendants in the issue together with some remarks concerning the anachronism of the issue devisavit vel non, the learned justice maintaining the thesis that the contestants properly should be placed as plaintiffs. The matter was apropos in view of the action of the lower court in ruling that the plaintiff-executor by reason of the pleadings and the record was not entitled to rest with the mere proving formally of the will, but that he had the additional and immediate burden of going forward on the proofs as to testamentary capacity and undue influence.\(^7\) This unquestionably gave to contestants a tactical advantage of grave importance as will be noticed in the study of our various cases on the matter of issues in will cases. The ultimate result was that the jury found that the codicil was not the act of the testator and that at the time he lacked testamentary capacity. On the question of undue influence the jury found for the plaintiff-executor. As to the framing of the first issue it was contrary to law as laid down in our later cases as involving a mixed question of law and fact.\(^9\) On appeal the judgment of the lower court was affirmed and consequently the codicil to the will which was the subject of controversy was thrown out and the original will of the testator made some years before stood as his last testamentary disposition. It is a

\(^7\) 108 Pa. 395 (1885) 1 A. 765.
\(^6\) 97 Pa. 163 (1881).
\(^7\) Supra, note 75.
mutter of possible doubt in view of our later decisions\textsuperscript{86} whether in \textit{Cuthbertson's Appeal}\textsuperscript{81} the case should have been sent back for trial, and in \textit{Yardley v. Cuthbertson}\textsuperscript{82} whether the charge of the court was not prejudicial to the proponent,\textsuperscript{83} and whether the proponent as a confidential advisor had not, in the light of contestant's evidence, met the burden of explanation and the fact of testator's knowledge of his property and the effect of the codicil. Again, in the light of our later decisions, it may be questioned whether the court gave proper weight to the evidence of the attending doctor who was also a witness to the codicil, and who gave his opinion very strongly as to the testamentary capacity of the testator in contrast with the testimony of the expert witnesses called by contestants and whose opinions were based upon an assumption or hypothesis of fact as presented by the evidence.\textsuperscript{84}

(\textit{The remainder of Prof. Hutton's article on this subject will be published in the October issue of the "Dickinson Law Review."})


\textsuperscript{81} See note 76, supra.

\textsuperscript{82} See note 73, supra.

\textsuperscript{83} See Cookson's Est., 325 Pa. 81 (1937) 188 A. 994.