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Humer v. Betenbough: Total or Partial Invalidity of a Will-A Possible Middle Ground

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HUMER v. BETENBOUGH: TOTAL OR PARTIAL INVALIDITY OF A WILL—A POSSIBLE MIDDLE GROUND

The Supreme Court of New Mexico in *Hummer v. Betenbough*,[1] has adopted a rule whereby a will may be either partially probated or held entirely void even if only a portion of the will is alleged to have been procured by undue influence. This holding creates a presumption that the entire will was procured by undue influence once it has been established that any portion was so procured. Depending upon whether other beneficiaries rebut this presumption, the will could be partially probated or held entirely void. This Note will review the two prevailing rules applied when a beneficiary's undue influence procures only a portion of a will and then explore the possible operation and advantages of a third rule patterned after the New Mexico decision.

The testatrix left a will bequesthing one dollar each to her son and to her former husband, a one-half interest in certain land to appellants, grand-daughters of the testatrix, and a house and lot to her sister, the intervenor-appellee. The residue was given to her two brothers. There was considerable doubt as to the competency of the testatrix to manage her affairs at the time she executed the will on August 10, 1946. On that same day, the testatrix's son filed a petition alleging that she was incompetent. The petition, declaring the testatrix incompetent as of August 10, 1946, was granted. On August 12, 1947, a hearing was held to determine the validity of a deed the testatrix had executed on July 12, 1946. At the conclusion of the hearing, the testatrix was adjudged incompetent at the time she had executed the deed on July 12, 1946, and at all times subsequent thereto.[2] In the instant case, the probate court admitted the testatrix's August 10, 1946 will to probate. The district court affirmed, but disregarded a previously executed disclaimer by the brothers which precluded them from taking under the will.[3] The testatrix's grand-daughters appealed.

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1. 75 N.M. 274, 404 P.2d 110 (1965).

2. A person who has been adjudicated insane, or an incompetent, by a court is presumed to lack testamentary capacity, but such a person may nevertheless make a valid will during a lucid interval. A will made by a person adjudicated to be insane may also be upheld if it is shown that the delusion upon which the adjudication of insanity was based did not affect the will. Dean v. Jorden, 194 Wash. 661, 79 P.2d 331 (1938); *accord*, Mohler's Estate, 343 Pa. 299, 22 A.2d 680 (1941).

3. Hughes v. Betenbough, 70 N.M. 283, 373 P.2d 318 (1962). This case concerned a conveyance which the testatrix had made and a disclaimer her brothers had signed.

The testatrix had conveyed real estate to a brother, C.G. Betenbough. The testatrix then brought suit to cancel the deed, stating she didn't know why she had made the conveyance. Both brothers attempted to have the

The sole appellee was the testatrix's sister, and there was no allegation that she had exercised any undue influence in procuring her bequest. The portions of the will directed to the sister and the appellants were independent, specific legacies.

The *Hummer* decision contained several holdings. It first held that the rights of the testatrix's brothers had been previously adjudicated by the court,[4] and the brothers were entirely precluded from taking any of the testatrix's property, either by will or intestate shares. To determine appellee's rights under the will, however, the court considered what would have been the brother's rights in the absence of the disclaimer. The record of the lower court established the existence of a confidential relationship between the testatrix and her brothers at the time the will was executed. This relationship, coupled with other circumstances surrounding the execution of the will,[5] was held to establish a rebuttable presumption that the brothers had exerted undue influence upon the testatrix.[6] This was the first presumption created. Since evidence had not been presented which rebutted this presumption it was held that the district court had erred in not finding that undue influence had been exerted by the brothers. This undue influence invalidated the residuary clause. The appellee contended that only the residuary clause should be invalidated, and the remainder of the will should be admitted to probate. The appellants argued that the entire will should be denied probate.[7]

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suit dismissed, but their initial effort was futile. The brothers then took the testatrix to an attorney for the purpose of having her draw a will naming them residuary legatees. By this means they would take the same property by will.

In settling the suit to cancel the deed, the brothers disclaimed all right, title and interest to any and all property of the testatrix and renounced all right of inheritence by will or by descent and distribution. After the testatrix's death, the brothers repudiated the settlement and asserted their rights as residuary legatees under the will of August 10, 1946.

The testatrix's grand-daughters, Hummer and Hughes, brought action to enjoin the brothers from making claims contrary to the terms of the settlement. The brothers asserted that there was no consideration for their disclaimer.

It was held that the settlement was supported by an adequate consideration and valid; therefore, the brothers were entirely precluded from taking under the will or by intestate distribution.

4. *Ibid.*

5. The other circumstances were: (1) the age, poor eyesight and lack of education of the decedent; (2) the opportunity of the brothers to exercise undue influence; and (3) the brothers' participation in the procurement of the will. 75 N.M. at —, 404 P.2d at 117.

6. The mere existence of a confidential relationship between the testator and a beneficiary is not, of itself, enough to raise a presumption of undue influence. There must be additional evidence which shows that the testator's intellect was weakened before the confidential advisor will have to show a lack of undue influence on his part. Gold Will, 408 Pa. 41, 182 A.2d 707 (1962).

7. The appellants sought to invalidate the entire will so that they

The court held that in the absence of any evidence tending to show the reasons or basis for the gift to the sister, the entire will is invalid as a result of the undue influence of the brothers.[8]

Undue influence is a species of fraud. It is any act, or combination of acts, which has the result of interfering with the free will of the testator and prevents the free exercise of his judgment and choice.[9] Undue influence is not that which is procured by modest persuasion, arguments addressed to the understanding of the testator, or by mere appeals to the affections.[10] It must be an influence which is obtained either by flattery, excessive importunity, threats, or some other mode by which dominion is acquired over the mind of the testator, destroying his free agency, and constraining him to do that which he is unable to refuse to do.[11]

Two different rules have been applied to cases in which undue influence of a beneficiary has procured only a portion of the will. Under the total invalidity rule, if one bequest was procured by undue influence, the remainder of the will is automatically denied probate. The will must be free from undue influence in its entirety or it is not the testator's will at all.[12] Under the partial invalidity rule, however, if part of the will was procured by undue influence, but there has been no allegation or evidence that the remainder was procured in such manner, the unaffected portion is admitted to probate if it can be separated from the invalid portions.[13]

In *Hummer*, the Supreme Court of New Mexico said:

> Since there is *no evidence concerning the reasons or basis for the gift of the house to intervenor-appellee, . . . and without any wish to deprive appellee of her small inheritance,* we hold the entire will is invalid as a result of the undue influence of the brothers of testatrix.[14]

This decision totally invalidated the will. The court, however, did not adopt the total invalidity rule. Under the total invalidity rule an *irrebuttable* presumption that the entire will was procured by undue influence is created if a part of the will was so procured. The *Hummer* language indicates that the court is not talking about an irrebuttable presumption. Quite the contrary, the language used clearly implies that the court would not have invalidated the entire will if the sister had presented evidence establishing sufficient reasons for the bequest and explaining the role which she

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could share the entire estate. Under the New Mexico intestate laws, issue of the deceased, and issue of issue, share in the distribution before brothers and sisters. N.M. STAT. ANN. ch. 29, §§ 1-10, 1-12, 1-14 (1953).

8. 75 N.M. at —, 404 P.2d at 120.
9. Dean v. Jorden, 194 Wash. 661, 79 P.2d 331 (1938).
10. Zimmerman v. Zimmerman, 23 Pa. 375 (1854).
11. *Ibid.*
12. Snyder v. Steele, 304 Ill. 387, 136 N.E. 649 (1922).
13. 3 PAGE, WILLS § 26.111 (Bowe-Parker 1961).
14. 75 N.M. at —, 404 P.2d at 120 (emphasis added).

played in the execution of the will. No amount of explanation will ever uphold other bequests under the total invalidity rule.

Thus, *Hummer* holds that a *rebuttable* presumption is created once it is shown that a portion of a will has been secured by undue influence. Whether such influence on the part of one beneficiary is established by his failure to rebut a presumption or by a decision of the trier of fact is immaterial. Once it is established that a part of a will is procured by undue influence, a rebuttable presumption arises that the rest of the will is also tainted.

The question of partial probate was one of first impression in New Mexico. In adopting a rebuttable presumption that the other parts of the will were tainted by undue influence, the court backed away from the strictness of total invalidity and an irrebuttable presumption.

TOTAL INVALIDITY RULE

At common law, the rule *devisavit vel non*[16] was applied where there was a contest to try the validity of a will. This rule requires the issue in a will contest to be whether the paper presented is the testator's will. This rule has been codified by statute in many states.[16]

In *Snyder v. Steele*[17] the Supreme Court of Illinois invalidated the testatrix's entire will. The court held that, since an Illinois statute[18] required the issue in a will contest to be whether the writing produced is the will of the testator, the writing produced must be shown to be the testator's will in its *entirety* or it is not the testator's will at all. There were two trials contesting the validity of the will, and both decisions were appealed. On the first appeal[19] the case was reversed and remanded upon the finding that beneficiary Steele had occupied a confidential relationship. This finding, coupled with other facts, created a presumption that Steele exerted undue influence upon the testatrix. Before re-trial, Steele filed a relinquishment of any claim to his legacy. He stated that he relinquished his rights in the hope that the will might be sustained. In both contests, undue influence on the part of Steele, Bartlett and Bishop was alleged. On the first trial, the jury had sustained the entire will. Although this decision was reversed because of the confidential relationship, the court found that the record disclosed no evidence of undue influence on the part of defendants Bishop and Bartlett. On retrial, Bishop and Bartlett were the only defendants, and the jury again upheld the will. In

15. BLACK, LAW DICTIONARY (4th ed. 1957). *Devisavit vel non,* translated literally, means: Did he devise or not?

16. ILL. ANN. STAT. ch. 3, § 92 (1961); *accord,* ANN. MO. STAT. tit. 31, § 473.083 (1956).

17. 304 Ill. 387, 136 N.E. 649 (1922).

18. ILL. ANN. STAT. ch. 3, § 92 (1961).

19. Snyder v. Steele, 287 Ill. 159, 122 N.E. 520 (1919).

the first appeal it had been held that the presumption raised against Steele did not affect Bishop and Bartlett. The second case was appealed. It was held that, since Steele had not overcome the presumption on retrial, the entire will failed. The court said:

> [T]he issue before the jury is whether or not the purported will is the will of the testator, and the question is as to the validity of the will as a whole. Testimony which defeats one defendant, one devisee, or one legatee defeats all, and a judgment against one is necessarily a judgment against all.[20]

Little can be said in support of this decision. Twice defendants Bishop and Bartlett were forced to defend their legacies, and twice a jury found that it was the testatrix's wish that these persons should share in her estate. Yet the court held that Steele's undue influence created an irrebuttable presumption that the rest of the will was procured by the same means. Obviously, the wishes of the testator were of no concern to the court.

The *Snyder* court felt compelled to adopt this rule because the statute required the issue to be whether the will presented was the testator's will. This reasoning is fallacious. Other states have similar statutes, but they have not reached the same result.[21] In Pennsylvania, although not codified by statute, the common law writ *devisavit vel non* is awarded to test the validity of a testamentary instrument.[22] The Pennsylvania courts have not felt, however, that this formation of the issue compels the adoption of the total invalidity rule.[23] There seems to be no sound reason why the will presented may not be the will of the testator in part.[24]

In one of the most recent cases in which the issue of total or partial invalidity was presented, a bequest was invalidated which the court admitted was free from suspicion and which apparently expressed the testatrix's wishes. Unlike *Snyder*, there was no statute involved. In *Barton v. Beck's Estate*,[25] the proponent received the testatrix's entire estate except for a one thousand dollar bequest to an old friend. It was not alleged that the friend exercised any undue influence upon the testatrix nor that any undue influence was exercised on her behalf. The friend was not a party to the action. Upon the jury's finding that the proponent had

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20. 304 Ill. at 394, 136 N.E. at 651.

21. Mississippi has a similar statute. MISS. CODE ANN. tit. 5, §§ 504-05 (1956). However, no Mississippi cases have been discovered which adopt the total invalidity rule.

22. Cuthbertson's Appeal, 97 Pa. 163 (1881); Friend's Estate, 198 Pa. 363, 47 Atl. 1106 (1900).

23. Steadman v. Steadman, 10 Sadler 539, 14 Atl. 406 (Pa. 1888).

24. See, McCarthy v. Fidelity Nat'l Bank & Trust Co., 325 Mo. 727, 30 S.W.2d 19 (1930), where a result identical to *Snyder* was reached. A similar statute was involved. ANN. MO. STAT. tit. 31, § 473.083 (1956).

25. 159 Me. 446, 195 A.2d 63 (1963).

exerted undue influence upon the testatrix, the trial court disallowed the entire will. Affirming the trial court, the supreme court stated: "There is obviously nothing in itself unusual, improper, or suspicious in a legacy of $1,000 to Mrs. Philbrook an old friend. We are unable however, . . . to separate the possible good from the bad, and so the entire will must fail."[26]

The injustice of the result reached in this and other cases applying the total invalidity rule is obvious. This injustice is mitigated in some cases when the deprived beneficiaries are also heirs at law, for they will ultimately share in the intestate distribution. In Mrs. Philbrook's case, however, being merely a friend, she will be deprived entirely of what is rightfully hers. By order of the court, the wishes of the testator are ignored.

The total invalidity rule overlooks the primary object to be achieved whenever litigation involves a will. The object of the law of wills is to enable the owners of property to reasonably control its disposition after their death. The chief purpose of legislation and litigation is to cause the real intentions and wishes of such owners to be ascertained and carried into effect.[27] If the operation of a rule of law defeats a non-proscribed intention of the testator, it is a bad rule. The total invalidity rule not only defeats the intent of the testator, it makes a mockery of it. In accordance with the dictates of reason and the principles of natural justice, fraud or undue influence on the part of one legatee should not affect other legacies which were the result of the free will of the testator.

Partial Invalidity Rule

Under the partial invalidity rule, portions of a will not procured by undue influence may be admitted to probate if they can be separated from those parts which are thus tainted.[28] It is presumed that the remainder of the will is valid.

A portion of a will not affected by undue influence is valid and enforceable if separation from invalid portions will leave it intelligible and complete in itself.[29] If different portions of the testator's property, or different interests in the same property are created in distinct and independent legacies, the valid provisions are preserved, unless the provisions are so interdependent that separation would defeat the general intent of the testator.[30] If it is apparent that the disallowance of invalid bequests would result in manifest injustice to the heirs at law, then the otherwise valid

26. *Id.* at 453, 195 A.2d at 67. *Cf.* State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963) (dictum).

27. Carroll v. Carroll, 57 U.S. (16 How.) 275 (1853).

28. 3 Page, *op. cit. supra* note 13, at 246.

29. Carothers' Estate, 300 Pa. 185, 150 Atl. 585 (1930) (dictum); *accord*, Walker v. Irby, 238 S.W. 884 (Tex. Com. App. 1922).

30. *Ibid.*

bequests will not be separated.[31]

The most common instance of inability to separate the valid portions from the invalid occurs when a beneficiary's undue influence not only secured a sizeable bequest for himself but was also exerted to exclude other natural heirs from the will. Such a will may contain provisions which were intelligently and freely adopted by the testator, but, under the circumstances, a partial invalidity would not be an adequate remedy for those excluded. It is held in these situations that to secure manifest justice for the excluded heirs, the entire will must be denied probate.[32]

The question of total or partial invalidity was resolved in California by *In re Webster's Estate*.[33] The court held void only those parts of the will affected by undue influence.[34] The proponent was both executor and residuary legatee. Finding that the proponent had exerted undue influence upon the testatrix, the trial court excluded the residuary clause from probate. Clauses revoking all other wills and naming the proponent executor were also excluded. A previous will was admitted to probate in its entirety. The appellate court held that denying probate of the residuary clause was proper. Denial to probate the clause appointing the proponent executor and the clause revoking all prior wills was error. This decision illustrates the desirability of the partial invalidity rule since every possible attempt was made to ascertain and carry out the intent of the testatrix.

Those portions of the will not found by the jury to have been procured by undue influence were admitted to probate. Beneficiary Crane's undue influence precluded him from taking under the will. Although there was little evidence on the issue the court below had also invalidated the provision naming Crane executor. Noting that the executor named in the previous will had once misappropriated some of the testatrix's funds the case was remanded for the jury to determine whether or not the clause naming Crane executor had been procured by undue influence.[35] It is submitted that this is a more just disposition of the case than could have been made by any court following the total invalidity rule.[36]

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31. *Ibid.*

32. Walker v. Irby, 238 S.W. 884 (Tex. Com. App. 1922).

33. 43 Cal. App.2d 6, 110 P.2d 81 (1941).

34. In a 1926 case, California's District Court of Appeals for the Third Circuit indicated a willingness to adopt the total invalidity rule. Fletcher v. Superior Court, 79 Cal. App. 468, 250 Pac. 195 (1926) (dictum). However, six years earlier the Supreme Court of California had upheld a partial invalidity of a will in which one portion had been procured by fraud. *In re* Carson's Estate, 184 Cal. 437, 194 Pac. 5 (1920). Since this case involved fraud instead of undue influence, it was questionable whether the dictum in *Fletcher* would be followed in a subsequent case involving undue influence. *Webster* answered this question in the negative.

35. The trial court was also instructed to determine whether or not the clause revoking all previous wills was procured by undue influence.

36. The partial invalidity rule has been adopted in most jurisdictions.

In states following the partial invalidity rule, the portion of the will not contested, if separable, is admitted to probate without question. Often there has been no evidence offered either supporting or contesting these other provisions. In *In re Stauffer's Estate*[37] the testator had devised business property to R. N. Philpot and his secretary. Philpot was also given one-third of the residue. On appeal the issue was whether the residuary clause could be separated and two-thirds of it admitted to probate. The residue was divided equally among Philpot, Jessie Snyder, and Gladys Wollenberg. The trial court found that Philpot had procured his bequests by undue influence, and the devise of the business property and the entire residuary clause were invalidated. Gladys Wollenberg, who had not been a party to the action, appealed. The appellate court reversed, admitting two-thirds of the residuary clause to probate and excluding Philpots' share.

This case illustrates the dilemma which often faces courts following the partial invalidity rule. It is difficult for appellate courts to apply the partial invalidity rule when all beneficiaries have not testified. Without this additional evidence it is difficult to determine the extent to which undue influence of one beneficiary has affected the remainder of the will. The trial court in *Stauffer* felt it could not uphold a partial invalidity, even though the rule had been recognized in California.[38] The appellate majority found that there was absolutely no evidence showing any activity by Snyder or Wollenberg in procuring their bequests. No finding whatsoever was made concerning Mrs. Wollenberg, and her name was not even mentioned in the exhaustive trial court opinion. The dissenting opinion said:

> I believe that the instant case comes within the exception to the general rule of partial invalidity, . . . that 'the doctrine is not applicable where it is impossible to determine to what extent specific legacies have been tainted by the undue influence.'[39]

A Third Rule—A Middle Ground

Under the partial invalidity rule, if there is no evidence that

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Pepin v. Ryan, 133 Conn. 12, 47 A.2d 846 (1946); West v. Fidelity-Baltimore Nat'l Bank, 219 Md. 258, 147 A.2d 859 (1959) (dictum); Goertz v. McNally, 185 Md. 170, 44 A.2d 446 (1945); Old Colony Trust Co. v. Bailey, 202 Mass. 283, 88 N.E. 898 (1909); *In re* Koller's Estate, 116 Neb. 764, 219 N.W. 4 (1926); *In re* Lattouf's Will, 87 N.J. Super. 137, 208 A.2d 411 (1965); Petition of Maguire, 105 Misc. 433, 173 N.Y. Supp. 392 (1918); Johnson v. Ramsey, 18 Ohio App. 321 (1923).

Georgia has provided by statute that a will may be valid in part and invalid in another part. Ga. Code Ann. tit. 113, § 108 (1959). New York has a statute that provides for a partial invalidity of a will, though not dealing with undue influence. N.Y. Deced. Est. Law § 125.

37. 142 Cal. App.2d 35, 297 P.2d 1029 (1956).

38. *In re* Webster's Estate, 43 Cal. App.2d 6, 110 P.2d 81 (1941).

39. 142 Cal. App.2d at 47, 297 P.2d at 1036 (dissent).

undue influence procured other parts of the will, those parts are presumed to be valid.[40] This may leave appellate courts in an awkward position. They may have to decide questions of fact which should have been considered by a jury. This occurred in *Stauffer*. Under the rule announced in *Hummer*, other beneficiaries would be compelled to take the stand or lose their legacies once it has been established that part of the will was procured by undue influence. This compels an investigation of the entire will. The jury will now consider the will in its entirety, including the extent to which other legacies have been tainted, and thus be free to affirm such portions as they find to be unaffected by undue influence. By having the jury consider the testimony of all the beneficiaries, appellate courts will be relieved of the difficult task of determining facts and separating valid and invalid provisions on appeal. By confining testimony only to those charged with undue influence, others who have succeeded in substituting their wishes for the testator's may be allowed to succeed in their surreptitious plans merely because they have cleverly managed to avoid the suspicion which now confronts the proponents.

The New Mexico rule will plug this possible loop-hole in the partial invalidity rule. Undue influence, being a species of fraud, is rarely capable of direct proof. Those who exercise undue influence upon a testator seldom make their plans known. For this reason a wide range of evidence of undue influence should be admissible.[41] The New Mexico rule will enlarge the amount and scope of the evidence produced at the trial, as all beneficiaries will necessarily take the stand to defend their legacies. By creating a presumption that the rest of the will is tainted and thus forcing other beneficiaries to testify, the chances of success for those who seek to interpose their will for the testator's is made more difficult. The validity of the remainder of the will is now considered by the jury as a matter of fact,[42] rather than by appellate courts. If it is impossible for the jury to determine to what extent specific legacies have been tainted, then the whole will must be refused probate.[43]

40. Carothers' Estate, 300 Pa. 185, 150 Atl. 585 (1930) (dictum); *accord, In re* Stauffer's Estate, 142 Cal. App.2d 35, 297 P.2d 1029 (1956).

41. *In re* Porter's Estate, 192 Ore. 483, 235 P.2d 894 (1951).

42. In Pennsylvania, the contestants do not have an absolute right to a jury trial in a will contest. Whether or not a jury will be empaneled is within the discretion of the court. If a jury is empaneled, its verdict will be conclusive only if the court is satisfied with its justness upon the basis of the evidence. The verdict is advisory only. If the court is not satisfied, it may set aside the verdict and enter such other judgment as it feels is just. PA. STAT. ANN. tit. 20, § 2080.745 (1964).

43. 1 PAGE, WILLS § 15.12 (Bowe-Parker 1960); *In re* Cooper, 75 N.J. Eq. 177, 71 Atl. 676 (1909) (dictum). This loop-hole could also be plugged if the contestants would allege that the entire will was procured by undue influence, but in most cases contestants do not do this. The problem could also be solved by statute. Subsequent to *Stauffer*, California compels all beneficiaries to be parties to the action. CAL. PROBATE CODE §§ 370, 381.

There is authority for presuming an entire will to be tainted by undue influence once a part is shown to have been procured by such means. While the burden of proof ordinarily rests upon the party asserting undue influence,[44] there may be circumstances which cast upon the proponent the burden of disproving the exercise of any undue influence. There is no rule which will be decisive in all situations to indicate when the burden of going forward with the evidence shifts to the proponent. Each case will necessarily turn on its own facts.[45] What better fact could create a presumption of undue influence than a jury's determination that undue influence was exerted upon a testator to procure at least one portion of his will? If the testator's intellect has once been so weakened that he has allowed his property to be disposed of in a manner contrary to his wishes, it is not unreasonable to presume that other individuals have accomplished a like result.[46] In *Petition of Maguire*[47] the court discussed the difference between a bequest procured by fraud and one procured by undue influence and said:

> In case of undue influence, addressed primarily to only a part of a will, *there is room for the suggestion that the entire act of testation is affected,* while such suggestion is impossible in respect to the fraudulent introduction of a single paragraph into a will. . . .[48]

It does not appear, therefore, that it would be a radical departure from established rules to create such a presumption upon the finding that part of a will has been procured by undue influence. While the New Mexico rule is desirable from the standpoint of decreasing chances of success for those who procured bequests by undue influence, caution must be taken that this rule does not approach the harshness of the total invalidity rule.

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44. Williams v. McCarroll, 374 Pa. 281, 97 A.2d 14 (1953).

45. *In re* Urich's Estate, 194 Ore. 429, 242 P.2d 204 (1952).

46. Circumstances which have been held to create a presumption of undue influence are: (1) The age and physical condition of the testator; (2) the testator's prior mental history; (3) participation in the procurement or execution of the will; (4) an opportunity to exercise undue influence; (5) receipt of an unusually large proportion of the estate by the beneficiary; and (6) the existence of a fiduciary or confidential relationship between the testator and a beneficiary. Other circumstances are: (1) Whether the will is grossly inconsistent, unnatural, and unjust in its disposition; and (2) whether the testator devises all, or a substantial part, of his property to a non-heir.

While none of these facts and circumstances standing alone will have the effect of raising a presumption of undue influence, their probative force in various combinations may create such a presumption. *In re* Nelson's Estate, 134 Cal. App. 561, 25 P.2d 871 (1933); Franks' Ex'r. v. Bates, 278 Ky. 337, 128 S.W.2d 739 (1939); Thomas v. Thomas, 258 Ky. 236, 79 S.W.2d 982 (1935); Cadlwell v. Anderson, 104 Pa. 199 (1884); Dean v. Jorden, 194 Wash. 661, 79 P.2d 331 (1938).

47. 105 Misc. 443, 173 N.Y.Supp. 392 (1918).

48. *Id.* at 435, 173 N.Y. Supp. at 392 (emphasis added) (dictum).

When evidence raises a presumption that a will was not executed by the free and unhampered will of the testator, the burden of persuasion shifts to the proponents. This presumption is a presumption of fact and does not relieve the contestants from continuing to carry the burden of proof on the issue of undue influence.[49] When a presumption of undue influence is raised, the presumption imposes upon the proponent the duty of going forward with the evidence. The proponent must come forward and balance the scales with evidence at least sufficient to restore the equilibrium of evidence which touches upon the validity of the will. It is not necessary that the proponent rebut the presumption by a preponderance of the evidence.[50]

It is not intended that an insurmountable burden be placed upon the beneficiaries. A presumption of undue influence merely involves calling upon a litigant to make known facts more easily accessible to him than to his adversary. The proponent must come forward with evidence that satisfactorily explains his conduct and states what he knows about the execution of the will.[51] A presumption of undue influence may be rebutted by facts which show that: (1) The testator, though old and senile, nevertheless understood what he was doing and was capable of managing his affairs; (2) the testator was fond of the beneficiary; (3) the will was perfectly natural; (4) the beneficiary was closely related to the testator by ties of blood; (5) there was a close companionship between the testator and the beneficiary; (6) the beneficiary was nearest in point of location to the testator; and (7) the beneficiary faithfully and affectionately ministered to the testator in his declining years.[52] Depending upon what facts gave rise to the presumption in the first instance, other facts may also rebut the presumption.

Once the person against whom the presumption operates takes the stand and negates the presumption by his testimony, the presumption disappears.[53] Where the evidence submitted by way of rebuttal of the presumption is uncontradicted, the court must direct a judgment on the issue contrary to the presumption. However, if the presumption is unrebutted, the court must direct a verdict in accordance with the presumption.[54]

The New Mexico rule has another possible advantage, economy of litigation. The rule will bring all parties interested in the testator's estate before the court, reveal all the facts surrounding

49. Gay v. Gay, 308 Ky. 539, 215 S.W.2d 92 (1948). *Contra, In re* Week's Estate, 29 N.J. Super. 533, 103 A.2d 43 (1954).

50. Dean v. Jorden, 194 Wash. 661, 79 P.2d 331 (1938); *accord, In re* Hampton's Estate, 55 Cal. App.2d 543, 131 P.2d 565 (1942).

51. *In re* Week's Estate, 29 N.J. Super. 533, 103 A.2d 43 (1954).

52. Dean v. Jorden, 194 Wash. 661, 79 P.2d 331 (1938).

53. *In re* Thompson's Estate, 1 Ariz. App. 18, 398 P.2d 926 (1965); See, *In re* Hampton's Estate, 55 Cal. App.2d 543, 131 P.2d 565 (1942).

54. *In re* Week's Estate, 29 N.J. Super. 533, 103 A.2d 43 (1954).

the will, and dispose of all the issues in a single contest. While it is proper practice to join all parties,[55] in states such as Pennsylvania there are no statutes expressly requiring that all beneficiaries and heirs at law be made parties to the contest of the decedent's will.[56] Other beneficiaries frequently are not parties to the action.[57] It is conceivable that a beneficiary not joined in the original suit may later be required to defend his legacy in a subsequent action commenced by another heir. When heirs are not voluntary parties, or have not been brought in by citation, the orphans' court has no jurisdiction to determine the validity of the will against them. Such persons would not be estopped from subsequently instituting proceedings on their own behalf to set aside a provision of the will.[58] While the operation of the New Mexico rule would not compel all of the decedent's heirs to be parties, it does compel all the beneficiaries to be a party to the action if they wish to obtain their legacies. If a beneficiary testifies, and his bequest is upheld, other heirs not parties to the action will be discouraged from instituting subsequent proceedings to question a portion of a will already upheld.

In one situation, however, the economy of litigation may be lost. If the will in question contained numerous beneficiaries, the resulting trial would be lengthy. If the probate court heard many such contests, the advantage secured by having fewer contests may be outweighed by the increased length. However, if the beneficiaries are numerous, the possibility of multiple contests by heirs not joined in the first proceeding is also increased. Substituting one lengthy proceeding for three or four shorter ones may still be an advantage.

The operation of the New Mexico rule may also benefit other beneficiaries mentioned, but not challenged, in the will under attack. It is generally held, even in states following the partial invalidity rule, that where undue influence procures the *execution of a will*, rather than a single bequest, the whole will is void. This is true even though such influence is perpetrated by only one of the beneficiaries.[59] It is submitted that the New Mexico rule could be applied in such situations and a more just result would be reached. If a beneficiary can satisfy a jury that, absent the undue influence of another, the bequest to him would nevertheless be the same, this portion of the will should be allowed to stand. If it can be shown that other portions express the testator's wishes, they should be given effect. Courts invalidating the entire will

55. New York has required that all persons interested in the decedent's estate must be made parties to the action contesting the will. N.Y. SURROGATES COURT ACT §§ 140, 148.

56. 1 PARTRIDGE-REMICK, PENNA. ORPHANS' CT. PRACTICE § 4.08 (1961).

57. *In re* Stauffer's Estate, 142 Cal. App.2d 35, 297 P.2d 1029 (1956).

58. Thomas Will, 349 Pa. 212, 36 A.2d 819 (1944); *accord,* Miller's Estate, 159 Pa. 562, 28 Atl. 441 (1894).

59. *In re* Rosenberg's Estate, 196 Ore. 219, 246 P.2d 858 (1952).

when undue influence procures its execution give other beneficiaries no opportunity to be heard. An application of the New Mexico rule would afford them this opportunity.

Conclusion

Three rules are now in operation when part of a will is found to have been procured by undue influence. The total invalidity rule creates an *irrebuttable* presumption that the entire will was procured by undue influence. The New Mexico rule creates a *rebuttable* presumption that the remainder was procured in a like manner. The partial invalidity rule presumes that the remainder is free from undue influence.

The total invalidity rule is too rigid and too harsh. Often its operation ignores the wishes of the testator and works a severe injustice by denying to innocent beneficiaries legacies which are rightfully theirs. By comparison, the partial invalidity rule is more just, but it is submitted that the rule is too liberal. It may not bring before the courts all those who have exercised undue influence upon a testator. Without the testimony of all the beneficiaries it is impossible to determine just how far undue influence has permeated the will.

The New Mexico rule represents a middle ground between the total and partial invalidity rules. It is a more flexible rule which can be readily adapted to the facts of each particular case. The rule does not declare a will wholly invalid once it is proven that a part has been secured by undue influence; it leaves the door open for the innocent beneficiary to receive his just and rightful inheritance. The rule mitigates the harshness of the total invalidity rule. At the same time, its operation will make it more difficult for those who have exercised undue influence upon a testator to go unnoticed.

If the adoption of the New Mexico rule is not preferred, then, as an alternative, the partial invalidity rule is favored. Beneficiaries should not be deprived of their legacies, at least not without an opportunity to be heard.

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