

Will Contests - Burden of Proof as to Undue Influence: Effect of Confidential Relationship

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Will Contests—Burden of Proof as to Undue Influence: Effect of Confidential Relationship—Alice Berkowitz, an unmarried daughter and one of seven children of decedent, Jennie Berkowitz, was a registered nurse who, at decedent's request, gave up her profession to assist deceased in her remaining years. Alice remained in this capacity, living with decedent, another brother and her uncle for eleven years, during which time decedent conveyed the bulk of her estate to Alice. Administrators of the estate of Jennie Berkowitz brought this action to set aside these inter vivos conveyances, alleging they were obtained while deceased was under the influence and domination of Alice and were the direct result of undue influence exercised through a breach of the confidential relation between them; therefore, the burden of disproving a breach of this relationship of trust and confidence should be placed on the beneficiary, Alice. The Supreme Court of Errors of Connecticut found for the defendant, Alice, holding that the burden of proof of undue influence is on the party alleging it, except when a stranger standing in a confidential relationship with deceased is the principal beneficiary to the exclusion of the natural objects of the decedent. Then there arises a presumption against the validity of the deed and the burden to prove otherwise is placed on the beneficiary. However, when a child of deceased is found to stand in a relationship of trust and confidence, the fact of the confidential relationship alone never raises a presumption that the disposition was the result of undue influence. *Estate of Jennie Berkowitz*, 147 Conn. 474, 162A. 2d 709 (1960).

The burden of proof¹ when the issue of undue influence is raised in will contests² is on the party alleging it.³ He must prove the existence of undue influence by establishing four elements by a preponderance of the evidence: first, that the testator was susceptible to the exercise of undue influence; secondly, that the beneficiary had the opportunity to influence; thirdly, that the beneficiary had a disposition to influence;

¹ Wigmore and Thayer theorize that the burden of proof is broken down into two senses, the primary and the secondary. The primary sense is the risk of non-persuasion which stays with the party throughout the case, never shifting from him. The secondary sense is the duty to come forward with the evidence which shifts back and forth from one party to the other as they prove their respective allegations. 9 WIGMORE, EVIDENCE §2485 at 271, §2487 at 278, §2489 at 285 (3d ed. 1940); THAYER, A TREATISE ON EVIDENCE AT THE COMMON LAW 378 (1898).

² In the principal case, the controversy involved inter vivos conveyances, but the court pointed out that the same rules applicable to undue influence in will contests apply to actions in equity to set aside conveyances. See also, *Estate of Fillar*, 10 Wis. 2d 141, 102 N.W. 2d 210 (1960).

³ There is a split as to which party, the proponent or contestant, has the risk of non-persuasion in will contests when undue influence is alleged. Some jurisdictions hold the proponent suffers the risk of non-persuasion of proving the voluntariness of the testator's act. Thayer, *supra* note 1, at 378. Most jurisdictions hold that the issue of undue influence is an affirmative defense and place the risk of non-persuasion on the contestant to be proved as a part of his case. 9 WIGMORE, *supra* note 1, at 363; Annot., 154 A.L.R. 583, at 595 (1945); ATKINSON, WILLS 548 (2d ed. 1953).

fourthly, the result clearly indicated undue influence was exercised.⁴ When established, the contestant has made a *prima facie* case, raising a presumption against the validity of the will, placing on the beneficiary the duty to come forward in rebuttal.

There appears to be general confusion among the jurisdictions as to just what effect the finding of a confidential relationship between testator and the beneficiary has on the burden of proof. The majority of jurisdictions hold that the mere existence of a relationship of trust and confidence, without more, is not sufficient to raise a presumption that the disposition was invalid. There must be shown by the contestant in addition that the beneficiary has been actively concerned in the preparation and execution of the will.⁵

With this, the contestant has made his *prima facie* case raising a presumption that undue influence was exercised by the beneficiary. What degree of proof is required of the beneficiary in rebuttal depends on the weight given presumptions in the different jurisdictions.⁶

The *Berkowitz Case* reflects the Connecticut view which is contrary to the majority proposition in certain instances. A disposition to a stranger standing in a confidential relationship with the testator, to the exclusion of the testator's natural objects raises a presumption against its validity. This rule is based on public policy and therefore limited to unique relationships of trust and confidence such as religious advisors, guardians, attorneys, physicians or other persons standing in a similar degree of trust.⁷ Such strangers are assumed to have "special opportuni-

⁴This is the majority view. 2 PAGE, WILLS §815, at 608 (3d ed. 1941); ATKINSON, *supra* note 3, at 549. However, contrast Wisconsin's holding that the contestant must prove undue influence by evidence that is clear, satisfactory and convincing. Will of Freitag, 9 Wis. 2d 315, 101 N.W. 2d 108 (1960); Kuehn v. Kuehn, 11 Wis. 2d 15, 104 N.W. 2d 138 (1960).

⁵Annot., 66 A.L.R. 228 (1930); Annot., 154 A.L.R. 583, at 584 (1945). Some jurisdictions require the contestant to go further in their proof. See Kuehn v. Kuehn, *supra* note 4, where the court found a confidential relationship, but decided the case on the *prima facie* establishment of the four elements of undue influence by clear, satisfactory and convincing proof. Other jurisdictions only require a finding of a relationship of special confidence. See Kirby's Appeal, 91 Conn. 40, 98A. 349 (1916), where a disposition of a stranger excluding testator's natural objects raises a presumption of undue influence where the stranger stood in a confidential relationship, whether the stranger participated in its execution or not.

⁶Wigmore writes that the presumption has no evidentiary value, it merely throws on the opposite party the duty of coming forward with the evidence. Once the presumption is rebutted, it leaves the case entirely. 9 WIGMORE, *supra* note 1, at 281. The Wisconsin courts follow this view. Ball v. Boston, 153 Wis. 27, 141, N.W. 8 (1913). Other courts, Connecticut and Iowa for example, state that the presumption can only be rebutted by a clear preponderance of the evidence. Lockwood v. Lockwood, 80 Conn. 513, 69 A. 8 (1908); Woolwine v. Bryant, 244 Iowa 66, 54 N.W. 2d 759 (1952). Requiring this degree of proof is to give the presumption evidentiary weight, shifting the risk of non-persuasion to the beneficiary. Atkinson feels that the presumption should not shift the primary burden, but should be strong enough to give a directed verdict to the contestant if not rebutted. ATKINSON, *supra* note 3, at 551.

⁷Gager v. Mathewson, 93 Conn. 539, 107 A. 1 (1919).

ties for influencing,"⁸ and if this type of relationship is found, it alone is sufficient to shift the burden of proof to the beneficiary who must disprove the existence of undue influence by a clear preponderance of the evidence.⁹ This is an extreme view and seems unduly to infringe the right that a party has to dispose of his property as he sees fit. Possibly, in order to mitigate this effect is the reason Connecticut allows a greater degree of freedom in dispositions to relatives, as this view has no application when the beneficiary is a natural object of the testator.¹⁰

The Wisconsin court in *Will of Faulks*¹¹ went to some lengths to summarize the law on the subject of undue influence in will contests. It was made clear that the party alleging undue influence has the risk of non-persuasion, which risk never shifts, and the contestants must establish the requisite four elements by clear, satisfactory and convincing proof, either directly or circumstantially, to make his *prima facie* case and raise a presumption against the validity of the will.¹² But, the beneficiary need only rebut one of the four elements so that it no longer exists by clear, satisfactory and convincing evidence in order to shift the duty of coming forward with the evidence back to the contestant. The presumption of undue influence previously created by the contestant then drops completely out of the case.¹³

Wisconsin gives very little or no weight to a confidential relationship between the testator and the beneficiary. In the *Faulks Case*, Mary Faulks left her doctor the bulk of her estate to the exclusion of her foster children, principal beneficiaries under a will of two years previous. In attempting to establish undue influence, the contestant introduced evidence that the doctor under the guise that he could not collect his bills, induced testatrix to pay off a mortgage on his home, buy a hangar for his airplane, help him finance the purchase of a second airplane and make other gifts to him. After the testatrix was confined to his hospital for treatment of a heart ailment, the doctor on one occasion drove deceased at her expense to Yellowstone National Park and on three different occasions took testatrix for airplane rides, two of which came after the execution of the will in question. This was all beyond the call of ordinary medical care. The relationship between Mary Faulks and

⁸ *Id.* at 2.

⁹ Lockwood v. Lockwood, *supra* note 6, at 11.

¹⁰ What a natural object is seems to depend on the circumstances of each case. See Gager v. Mathewson, *supra* note 7, where, although the beneficiary was not a member of testator's family, she was like a sister and the burden of proof did not shift when contestant alleged the confidential relationship.

¹¹ 246 Wis. 319, 17 N.W. 2d 423 (1945).

¹² *Id.* at 358, 17 N.W. 2d at 439. Note that this is a higher degree of proof than preponderance of the evidence as required by the majority of jurisdictions. See note 4 *supra*. But see Estate of Fillar, 10 Wis. 2d 141, 102 N.W. 2d 210 (1960), which reiterated the requirements necessary for a *prima facie* case, but held that where three of the four elements are present, very little evidence of the fourth is required.

¹³ Ball v. Boston, 153 Wis. 27, 141 N.W. 8 (1913). See note 21, *infra*.

her foster children became so strained that she changed her will, substituting the doctor as principal beneficiary in their stead, a result that was not natural and indicated that undue influence might have been exercised. The majority of the court reviewed the effect of the confidential relationship on the contestant's burden of proof and found that this alone would do no more than cause the court to scrutinize the disposition more thoroughly, but combined with other circumstances—beneficiary assisted in drafting the will, or the deceased is found to be weak minded, or the provisions of the will are unnatural—it would raise a presumption of undue influence.¹⁴ However, the court made no further mention of a possible confidential relationship and proceeded to reverse the lower court by finding that the four necessary elements to establish a *prima facie* case of undue influence were not present. Taking the facts to be true, the dissenting opinion, stating that the contestants had made a *prima facie* case, seems to be a far more plausible analysis. Even if the contestants were not able to establish and maintain the four elements by clear, satisfactory and convincing proof, the majority could well have reduced the contestants' burden by finding a confidential relationship, as the actions of Mary Faulks in her last years indicate that she had become deeply entrusted to the doctor's will and was most susceptible to his influence.

Wisconsin, by requiring that undue influence be proven by proof that is clear, satisfactory and convincing, which is apparently true notwithstanding a confidential relationship, has taken the view at the opposite extreme to Connecticut and is not in line with the majority of jurisdictions. The strictness of Wisconsin seems to stem from two main factors: first, that each person has a *constitutional* right to will his property;¹⁵ secondly, that undue influence is analogous to fraud which requires a higher degree of proof than other actions because of the presumption against wrong-doing tied to this particular affirmative defense.¹⁶ Since the decision in the *Faulks Case*, there has been no uniformity in Wisconsin as to the effect of the confidential relationship. In *Estate of Fillar*,¹⁷ the administrator brought an action to recover certain assets transferred to the testator's son prior to testator's death. The court sustained the finding that undue influence was established by clear, satisfactory and convincing proof. The possibility of a confidential relationship and its effect was never considered.¹⁸ In *Kuehn v. Kuehn*,¹⁹

¹⁴ Will of Faulks, *supra* note 11, at 360, 17 N.W. 2d at 439.

¹⁵ Ball v. Boston, *supra* note 13, at 31, 141 N.W. at 10.

¹⁶ Will of Faulks, *supra* note 11, at 358, 17 N.W. 2d at 439.

¹⁷ 10 Wis. 2d 141, 102 N.W. 2d 210 (1960).

¹⁸ There is no indication from the case that a confidential relationship was alleged by the administrator in the lower court. However, in the case of *Kuehn v. Kuehn*, 11 Wis. 2d 15, 104 N.W. 2d 138 (1960), there is no indication the confidential relationship was alleged, but the court brought it in just the same.

¹⁹ 11 Wis. 2d 15, 104 N.W. 2d 138 (1960).

a conservator brought suit to recover certain personal property allegedly obtained by the exercise of undue influence. The court found that undue influence had been exercised, and appeared only to use the fact of a confidential relationship between grantor and grantee as an afterthought in order to justify their decision when the grantee rebutted the third element, disposition to influence.²⁰ Under the language of a prior decision, *Will of Ball*, the rebuttal of one of the four elements would have been sufficient to win the case for the beneficiary, notwithstanding the confidential relationship.²¹ In *Will of Ganchoff*,²² a recent Wisconsin case with facts similar to the *Berkowitz Case*, the testator's two sons contested a will in which their sister was principal beneficiary. It had been drawn on the day following the execution of a will in which they were named principal beneficiaries. Both the sons . . . and the daughter took an active part in the execution of the respective devises. Again the court made no mention of what effect a confidential relationship would have on the burden of proof, but disposed of the case by finding that the contestants had not established the four essential elements by clear, satisfactory and convincing proof.²³

The possible effects of a confidential relationship are important in undue influence controversies because in most cases there is likely to be found some such relationship. It would seem proper for the Wisconsin court to re-evaluate the principle behind the majority rule. When there is evidence of someone taking undue advantage of a relationship

²⁰ *Id.* at 24, 104 N.W. 2d at 144. "While there is some evidence in support of the defendant's position, it is not sufficient. Moreover, Neva, in handling Elmer's affairs stood in a relationship of confidence and trust which raises a presumption that the conveyances were induced by undue influence." [Emphasis added.]

²¹ *Supra* note 23, at 31, 141 N.W. at 12. The testator married his previous housekeeper, who managed to alienate him from his children of a prior marriage and procure a subsequent will in which she was the principal beneficiary. The court reversed the lower court finding that the contestant having established the confidential relationship plus three of the four elements: opportunity, disposition and unnatural result, had made a *prima facie* case placing the burden on the beneficiary to show the will was the testator's own act. The court said: "In a case of this kind, upon a *prima facie* case being circumstantially made calling for the person charged with fraud to explain his acts—there still stands a presumption against wrong doing, eclipsed for the time being by the adversary presumption, but, subject to being sufficiently aroused by affirmative evidence, . . . weaken the case as to any one of the vital incidents so that it can no longer be said to exist by clear and satisfactory evidence; then the *prima facie* case once rebutted is so far rebutted that the contestant cannot successfully stand thereon, but must go further."

²² — Wis. 2d —, 107 N.W. 2d 474 (1961).

²³ *Ibid.* The result of the case possibly would have been the same even if the majority rule applicable to a finding of a confidential relationship had been applied, as from the circumstances the disposition to the daughter was quite natural. When her mother died she gave up her position as a practical nurse and devoted her entire time to the service of the testator. Also, a will executed in 1957 showed that the testator and his wife had made substantially the same distribution as made in the contested will. However, the author is of the opinion that the confidential relationship should have been considered notwithstanding there was adequate evidence to rebut the presumption that would have been raised.

of trust and confidence, whether the beneficiary be a stranger or natural object, the rule placing on the beneficiary the duty of coming forward and showing his good faith and honesty is not to punish him but to protect the interest of the testator. It should be the policy of the state to protect those persons whose mental faculties are less keen and more susceptible to the exercise of undue influence. These persons are easy prey for those who manage to gain a position of trust with the testator, substituting their will for that of the testator's. It is the writer's opinion that the finding of a relationship of trust and confidence should carry more weight than that given by the Wisconsin court. The contestant should have only to establish by a preponderance of the evidence, either direct or circumstantial, that the beneficiary was actively concerned in some way with the execution of the will to raise a presumption against its validity, strong enough to effect a directed verdict if not rebutted. Then the burden would be on the beneficiary to show that the testator had the benefit of independent counsel or that the disposition was in all respects natural under the circumstances.

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