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Article 8

Wills - Under Influence

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ferred to in the second paragraph of this article has not been remedied and still exists. Perhaps the confusion has been increased by the very act that was meant to remove it.

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WILLS—UNDUE INFLUENCE. Undue influence in the law of Wills is a subject of vital importance, in that the validity or non-validity of the instrument purporting to be a will is dependent on the existence or non-existence of the various elements essential to constitute such undue influence.

The supreme court of Wisconsin In re Jackman's Will, 26 Wis. 104, held that undue influence sufficient to invalidate a will, must be of such a nature as to in some degree destroy the free agency of the testator and constrain him to do something against his will, so as to virtually render the testamentary act the will of another rather than that of the testator. That is, to constitute undue influence in the eyes of the law sufficient to set aside a will there must not only be an opportunity to influence, a disposition to influence and the coveted result, but the obtaining of the result must be by coercion of the testator.[1] In stressing the fact that coercion was a necessary element to establish undue influence many cases have held that such influence must be so exercised as to amount to moral coercion; resulting in destroying the testator's free will and independent action.[2]

In re Slinger's Will, 72 Wis. 22, 37 N.W. 236, the evidence showed that the testator, a man about 70 years of age, who had been a habitual drunkard for 50 years and had become a victim of an uncontrolable appetite for drinking, suddenly inherited considerable property from a daughter whom he had not seen since she was a child; that he was placed under guardianship as a spendthrift; that he went, against the will of his guardian, to live with his younger brother, who was a saloon keeper and had offered him a home as long as he lived, with full and free opportunity to drink when and what he pleased while there; and that after drinking to some extent, he made a will giving all property to such brother. The court held that there was sufficient evidence to sustain a finding that such will was the result of undue influence and refused probate of the instrument as the will of the testator, laying down the well-settled rule, that where the party to be benefited by the

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[1] In re Bocker's Will, 167 Wis. 100, 166. N.W. 660.

[2] Anderson v. Laugen, 122 Wis. 57, 99 N.W. 437. In re Evenson's Will, 152 Wis. 113, 139 N.W. 766.

will has control, influence, or agency, or is particularly active in procuring execution of the will, this is regarded as a very suspicious circumstance requiring the fullest explanation, especially where such active agent occupies a confidential relation to such testator.

It is a well-settled principle of law in this jurisdiction that the evidence showing the exercise of undue influence to set aside the will must be clear and satisfactory. It cannot rest on mere preponderance of the evidence in favor of the invalidity of the will. That is, the proof must be affirmative and, at the same time, clear, convincing and satisfactory.[3]

In the case of Elliott v. Fisk, 162 Wis. 249, 155 N.W. 110, the testator, a bachelor 64 years of age, at the time of his death, left a one-seventh undivided interest in a farm valued at $15,000. At various times the testator, prior to his death, expressed dissatisfaction with his father and brothers because he could not get his one-seventh undivided interest of his mother's estate. His life was spent in various kinds of work and at different places. About seven years before his death, testator made his home with Jess McCullough, the residuary legatee. Fisk, the other legatee, was an old friend of his but the friendship with him was no greater than that of other friends. Prior to his death testator lived as a hermit. The Tuesday previous to the Friday on which testator died, he was taken from his house by McCullough on a cot and brought to the boarding house of Fisk. The week before that he was so sick and weak that he was unable to take any nourishment. In fact at the time of the execution of the will he had to be assisted in holding the pen and guided in making his mark.

The trial court further found that the beneficiaries exerted undue influence on the testator and accordingly refused probate of the will, because there was a portrayal of actual exertion of physical influence enough to prima facie establish the existence of undue influence. The supreme court affirmed the holding of the trial court on the ground that the deceased never expressed any intention of making a will, because he considered that he had very little if anything to leave. Testator was susceptible to undue influence especially at the time the will was made owing to the extremely weakened and enfeebled condition from which he was suffering. An opportunity to exercise undue influence existed for Testator was in the house of the proponent of the purported will before he died. In addition there was the fact that the property was left to absolute strangers, both by blood and marriage, and the exclusion of the testator's aged father and other near relatives with

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[3] Will of Emerson, 183 Wis. 437, 198 N.W. 441; Ball v. Boston, 153 Wis. 27, 141 N.W. 8; Will of Boardman, 178 Wis. 517, 190 N.W. 355.

whom he was on especially good terms. In support of their position the supreme court cited; Ball v. Boston, 153 Wis. 27, 141 N.W. 8; Duncan v. Metcalf, 154 Wis. 39, 141 N.W. 1002; Skrinsrud v. Schwenn, 158 Wis. 142, 147 N.W. 370; Gunderson v. Rogers, 160 Wis. 468, 152 N.W. 157.

This case states the rule to be that evidence that disposition is the result of undue influence may be drawn from the fact that the beneficiaries as seeking to retain that which was gratuitously given them and from the fact that the result appears to have been the effect of such influence, and is therefore in the last analysis an unnatural will.

Courts have been so firm in this holding that in 185 Wis. 407, 201 N.W. 826, Estate of Wegner, the supreme court reversed the county court who refused to allow probate of the will on ground that it was made while under undue influence, and in holding that before undue influence can be established it must be of such a character as to destroy the free agency of the testator and substitute for his intention that of another. The supreme court said that the fact that the testator's reason is convinced by persuasion and argument is not sufficient to constitute undue influence if the document is executed according to his own will and intention. This same rule was again emphasized in Will of Lotwin, 186 Wis. 42.

These cases have been to a certain degree over-ruled by the Will of Link, reported in 202 Wis. 1, where the supreme court pointedly differentiates the distinction between the various forms of force and coercion necessary for undue influence and in the final analysis holds that the force or coercion be inferred from the other existing essential elements, breaking away from the principle heretofore established and adhered to.

The facts of the case were substantially as follows: The testator, 81 years of age and a resident of Milwaukee County, owned some property in the City of Milwaukee from which the rents yielded him a monthly income. In addition to that he received a monthly pension from the government. The evidence further showed that he denied himself not only the comforts but the necessities of life. In January, 1928, the testator had a serious illness and subsequently suffered poor health. A divorced daughter kept house for him and had her children with her, one of whom was a boy whose noisy and boisterous conduct greatly irritated the deceased. In July, 1928 the testator's daughter took the boy to Chicago for the purpose of turning him over to her divorced husband, leaving her daughter to keep house. During the absence of the testator's daughter, Chris Monday, 62 years of age and Mayme Monday, 45 years of age, a nephew and niece of the testator came from Oshkosh to Milwaukee and urged the testator to go with them to Osh-

kosh, representing, among other things, that they had a cottage on the lake where he could enjoy the sunshine and fresh air to benefit his health. The testator accompanied them and the Mondays devoted themselves to his care and comfort. Prior to this time the intimacy between the nephew and niece and that of the testator was that of comparative strangers.

On September 10, Mayme, the preferred niece, called an attorney to her cottage and the testator executed a will leaving his entire estate to Chris and Mayme Monday. On September 20, 1928, at 3:30 in the morning the testator died. In the forenoon of the same day, the petition for probate of the will executed on September 10, was filed in the county court of Winnebago, before any arrangements were made for the funeral or the relatives notified.

Contestants of the will are his children and until July 1, 1928, cordial relations existed between the testator and his children, evidenced by testator's executing one will on February 9, 1928, and another on June 9, 1928, in both of which he left to them all of his disposable estate in equal shares.

At the time of the execution of the will, offered for probate the testator was of sound mind and of sufficient mental capacity to make a will, although he labored under delusions with reference to his children.

The Supreme Court reversed the order of the county court admitting to probate on the ground that it was produced by undue influence. The important feature of this case is the establishing of the rule that where three of the four elements necessary to establish undue influence are present namely: one, a fit, easy subject; second, an opportunity for exercising undue influence; and third, a result indicating its exercise, a prima facie case of undue influence is established and the fourth element of force may be inferred from the three existing elements. So in this case where the evidence conclusively established by clear and satisfactory evidence the three elements, the court inferred the fourth.

GERTRUDE SPRACKER.

CONSTITUTIONAL LAW — CITIZENS — NATURALIZATION — *United States* v. *Macintosh,* 51 S. Ct. Rep. 570. By the barest majority the United States Supreme Court denied citizenship to the applicant Macintosh, a Canadian born Baptist minister, chaplain and professor of theology at Yale University.

He was denied citizenship because he was unwilling to take the oath of allegiance unqualifiedly. He asserted that he was willing to take up arms in defense of this country except in a war which he