Wills: Undue influence; bequest in favor of one occupying a confidential relationship with testator

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In *Fischer v. Stevens*, cited in *Phillips v. Holland*, supra, we again find the situation of an entirely executed contract and a consequent holding that the involved contract is outside the operation of the statute of frauds. Here an equitable defense was interposed which involved an oral extension of time. The plaintiff in this case agreed to extend the indebtedness if the debtor would give him a note for an acquired claim and a judgment which the plaintiff had against the debtor. The court says at page 771:

But the rule in this state and the decided weight of authority seem to be that an agreement made after the note becomes due, for its extension after a definite time, when supported by a valuable consideration, as in this case, and is otherwise valid though verbal may be interposed as a bar to an action on the note or mortgage, brought within that time.

It then seems that none of the cited cases are precisely in point. In the present case, the last payment of interest had not been paid. It therefore was not an executed contract, and the Court,

Not being bound by any former rulings of this court to the contrary, we, therefore, feel free to follow that which seems to be the better reason and logic, namely, that the statute of frauds in question, making void contracts not to be performed within a year and not in writing, apply to just such contracts as are here involved; namely, those extending the time of the payment of a promissory note.

The Court in coming to this conclusion, apparently clarifies the law as regards contracts for the payment of money which by their terms is not to be performed within a year. It would seem that such contracts are within the operation of the statute unless rescued therefrom by performance; and such performance must be a complete execution of the consideration on one side. Thus, prepayment of interest, payment of interest when not yet due, or any other act totally executed which provides consideration for an oral extension of time for more than one year removes the entire contract from the operation of the statute of frauds.

CHARLES L. GOLDBERG

**Wills: Undue influence; bequest in favor of one occupying a confidential relationship with testator.**

The recent case of *In re Weaver's Estate*, is the latest addition to the long line of Wisconsin cases which protect the aged and infirm desirous of making wills from the unlawful solicitations of their relatives. The right to dispose of property by will is one of the oldest rights known to law and is one of the rights which the law most zealously guards. In this most recent case the testator made a will in which he gave 120 acres of land to one son, Robert, forty acres to the contestant, his son, Louis, and forty acres to his daughter. The personal property was divided equally among the three children. By a codicil executed about two months before his death he gave the same 120 acres to Robert and the other eighty to his daughter. The

|1| 143 Mo. 181; 44 S.W. 769.
|2| — Wis. —; 211 N.W. 130.
personal property was this time divided equally between these two children and Louis was cut off with a bequest of $100. In the personal property thus taken away from Louis were some royalties from a mine which had yielded large profits during the last few years. Testator had lived for a number of years with Louis and his relations with this son were entirely pleasant. Robert was the confidential adviser of his father in all business matters. On the day that the codicil was made Robert had invited the old man to go to town with him, and although he disclaims any knowledge of what went on while they were there, he was in the lawyer's outer office when the codicil was being executed. The court saw in these circumstances a clear case of undue influence and reversed the judgment of the lower court admitting the will to probate.

The court in this case follows the rule laid down in the case of 

*Davis v. Dean,* 2 that where an aged and infirm person makes disposition of his property under circumstances which arouse suspicion and in such a way as to inflict an injustice on the heirs of such aged person, the law casts upon the one who profits by such disposition of property the burden of showing that such disposition was untainted with undue influence or other fraud, and that the will was the intelligent and deliberate act of the testator.

In 40 Cyc. 1144 we find this statement:

The court as to what constitutes undue influence has been variously stated, but the substance of the statements is, that, to be sufficient to avoid a will, the influence exerted must be of such a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency, and make him express the will of another, rather than his own.

The evidence adduced to show undue influence must usually establish that there is an unjust or unnatural result in the will; that the testator was a fit subject for the exercise of the influence; that there was a person who had a motive for the exercise; and that there was an opportunity for its exercise. 3 There must be a showing that the influence was exerted actually on the mind of the testator in regard to this particular will at or near the time of its execution. 4

Practically the question in each case is whether the influence shown by the testimony was "undue" within the meaning of the rules above. No specific amount of influence can be said to be undue. The quantity must vary with the circumstances in each case—with the strength of mind possessed by the testator, and with the relationship of the parties.

In the case of *In re Weaver's Estate,* supra, the undue influence was exerted by one in a confidential relationship with the testator. Now it is not the law that all influences are unlawful. There are many appeals which may legitimately be addressed to the judgment of the testator. This general rule applies as well where the influence is exerted by one in a confidential relation to the deceased as where it is exerted by a stranger. The influence wielded by the wife, child, parent, guardian, attorney, physician, spiritual adviser, or other confidential

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2 66 Wis. 100.
3 10 MARQUETTE LAW REVIEW, 226. See generally Rood on Wills, 175-191.
4 40 Cyc. 1145.
NOTES AND COMMENT

relator of the testator is not per se undue. Like the influence of all other persons it must overwhelm the will of the testator without convincing his judgment. As a rule undue influence will not be presumed from the mere existence of the fiduciary relationship, although such relationship may cause the courts to view the transaction with more scrutiny than otherwise.

In this connection the case of *Armstrong v. Armstrong* is interesting. The testimony there showed that the husband of the testatrix asked an attorney to come to the house as his wife wanted to make a will. The attorney, from statements of the husband as to what his wife wished the will to be, prepared it in advance. It gave all her property to her husband. Later the will was brought to the house and read to the testatrix on her deathbed. She signified that it was "just what she wanted" and thereupon it was duly executed. The facts were held not to show any undue influence on the part of the husband.

In *Deck v. Deck* the husband made his will about three days before the death of his wife. He consulted her about it and she in fact dictated its provisions to him. The will practically disinherited three of the children. It was objected that the will was invalid for undue influence because the wife had a controlling interest in its making. In passing on this objection the court said:

But with whom should he consult and by whom should he be influenced under such circumstances, if not by his wife, the mother of all his children? Presumptively she was controlled by motives of natural affection and propriety, as well as himself." This court held many years ago that "motives of natural affection and gratitude on the part of the testator, and solicitations and arguments which appeal to such motives, do not constitute undue influence."*

In the case of *Ball v. Boston* the rule is very well laid down by Justice Marshall.

Undue influence is the very antithesis of right influence. It exists only where there is a practical destruction of voluntary volition—at least, is moral coercion for an ulterior purpose. (Citing *Anderson v. Laugen*). This species of wrongful influence should never be compared with influence through affection or disposition to favor a member of one's family produced by feelings of esteem or gratitude.

In *Ball v. Boston*, supra, the testator was aged, infirm, and addicted to alcoholism. His first wife, with whom he had lived happily for thirty years, was dead, and his children were now independent of him financially, favorably disposed toward him, but so circumstanced as not to be able to take care of him in his old age. In this situation he married his former housekeeper, a mature lady, apparently of quite strong character. They secluded themselves from the rest of the world, and she took care of him until his death, about a year later. There was testimony that she took an active interest in his business; sued one

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*63 Wis. 162.*
*166 Wis. 470.*
*In re Jackman's Will, 26 Wis. 104.*
*153 Wis. 27.*
*122 Wis. 57.*
of his sons for an old laundry bill; when he made his will kept it secret from the children; and tried to have him make over to her an insurance policy payable to his estate. The court concluded from these facts that the opportunity to exercise undue influence is not satisfied by the ordinary seclusion and association in the domestic relations of husband and wife. Neither the natural attention of the wife to her invalid husband, nor her efforts in carrying on his business, nor her efforts, at his request, in expressing efficiently his dying wishes as regards his property, are badges of fraud.

It will be noted in the case of In re Weaver's Estate, supra, that the court saw in the testimony all the essentials of undue influence. Justice Stevens points out that here was a susceptible person, an opportunity to exert an unlawful influence, a motive for its exercise, and an unnatural and unjust result in the will.

We may conclude generally, therefore, that the influence of a wife, or a child, over the testator is not presumed to be unlawful because of the mere existence of the relationship. Nor are wills made to persons who have obtained a place in the affections of the testator by reason of their kindness to him subject to be attacked on the ground of undue influence. Even where the confidential relationship involved is an adulterous one and the will is made in favor of a mistress, it will not be avoided on the ground of undue influence if it expresses the true wish of the testator. In all these cases no presumption of undue influence will arise until the contestant has made out a prima facie case.

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28 In re Butler, 110 Wis. 70; Thompson v. Ish, 99 Mo. 160, 17 Am.S.R. 552.
40 Cyc. 1,149; 31 Am.S.R. 680.
23 In re Weaver's Estate, supra; Davis v. Dean, 66 Wis. 100; Ball v. Boston, supra.