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SELECTED EVIDENCE PROBLEMS IN ILLINOIS WILL CONTESTS

Joachim J. Brown*

INTRODUCTION

The work of lawyers is often geared towards either creating and preserving a factual record in anticipation of possible litigation, or recovering and gathering relevant facts after an occurrence. These facts can be used as evidence to reconstruct a criminal act, a contract breach, or an injury to a person or property. The evidence removes the mystery from the occurrence and contributes to the systematic resolution of controversy.

Estate litigation presents some unique and intriguing evidentiary problems. Whether the litigation arises from a will contest, partition, construction, imposition of a trust, or other form of action, the necessary inquiry is always directed to an occurrence in which the most important character, and potential witness, the testator, has died. Because of his death, the best evidence to the transaction, the decedent's testimony, is never available.

The evidentiary problems encountered in the reconstruction of the events surrounding the making of a will have prompted numerous recommendations for reform of the law of evidence in this area. One author has suggested, only somewhat facetiously, that attesting witnesses to a will be psychiatric experts who simultaneously certify their belief as to testamentary capacity. Another commentator has suggested that the entire execution of the will be immortalized on videotape for possible future submission to the trier of fact. Reforms have not been adopted, however, either by

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* B.A. Loyola University; J.D. De Paul University, 1974; Member, Illinois Bar. The author wishes to acknowledge the research assistance of Mary Sinclair Pearce, J.D. De Paul University, 1979.

1. ILL. INST. FOR CONTINUING LEGAL EDUC., CONTESTED ESTATES, § 8.15, p. 8-42 (2d ed. 1977) [hereinafter cited as CONTESTED ESTATES].


3. Kahn, New Doctrine of Undue Influence, 45 ILL. BAR J. 436 (1957). See also Schuyler, supra note 2; JAMES, ILLINOIS PROBATE LAW & PRACTICE, § 92.4 (1951) [hereinafter cited as James]. Statements made by the testator were held admissible in: Frese v. Meyer, 392 Ill.
This article will survey evidence problems that arise at various stages of estate litigation in Illinois. It will focus upon evidentiary restrictions and limitations that are likely to be encountered by the estate advocate in the progression from the probate hearing to the will contest. The possibility of a contract action as an alternative to a will contest in certain situations also will be explored. Finally, some suggestions as to evidentiary reforms will be offered.

THE DEAD MAN'S ACT

An examination of the Dead Man's Act is imperative to under-

59, 63 N.E.2d 768 (1945); Mason v. Willis, 326 Ill. App. 481, 62 N.E.2d 135 (1945); Lich v. Werling, 151 Ill. App. 340 (1909); Skinner v. Hemenway, 135 Ill. App. 582 (1907). In contrast, such statements were not admitted in: DeMarco v. McGill, 402 Ill. 46, 83 N.E.2d 313 (1948); Quigley v. Quigley, 370 Ill. 151, 18 N.E.2d 186 (1938); Anderson v. Anderson, 191 Ill. 100, 60 N.E. 810 (1901); Richards v. Miller, 62 Ill. 417 (1872).

Suggestions for reform have been varied. Over forty years ago, Schuyler, supra note 2, urged the application of a discretionary rule in determining admissibility of lay opinion. Such a rule would permit the abolition of distinctions between facts and conclusions as to the testator's capacity.

A more detailed suggestion for reform was advocated by James. He suggested eight distinct rules for governing the admissibility of lay opinion. JAMES, supra, at § 92.4 (1).

4. ILL. REV. STAT. ch. 51, ¶ 2 (1979). The statute provides:

In the trial of any civil action in which any party sues or defends as the representative of a deceased or incompetent person, no adverse party or person directly interested in the action shall be allowed to testify on his own behalf to any conversation with the deceased or incompetent person, except in the following instances:

(1) If any person testifies on behalf of the representative to any conversation with the deceased or incompetent person or to any event which took place in the presence of the deceased or incompetent person, any adverse party or interested person if otherwise competent, may testify concerning the same conversation or event.

(2) If the deposition of the deceased or incompetent person is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

(3) Any testimony competent under Section 3 of this Act, is not barred by this Section.

(4) No person shall be barred from testifying as to any fact relating to the heirship of a decedent.

As used in this section:

(a) "Incompetent person" means any person who is adjudged by the court in the pending civil action to be unable to testify by reason of mental illness, mental retardation or deterioration of mentality.

(b) "Representative" means an executor, administrator, heir, legatee or devisee of a deceased person and any guardian, or trustee of any such heir, legatee or devisee or a guardian or conservator of, or guardian ad litem for, an incompetent person.

(c) "Person directly interested in the action" or "interested person" does not include a person who is interested solely as executor, trustee or any other fiduciary
standing evidentiary problems in estate litigation, since the Act pervades every stage of the litigation. Despite constitutional challenge\(^5\) and attempts at repeal,\(^6\) the Dead Man’s Act remains a significant obstacle in re-establishing the circumstances at issue in estate litigation. The statute precludes any person directly “interested”\(^7\) in the outcome of the litigation from testifying as to any transaction involving the decedent.\(^8\) This ban applies even to the parties to the litigation.\(^9\)

As applied in will contests, the heirs at law and the beneficiaries

capacity, whether or not he receives or expects to receive compensation for acting in that capacity.

(d) This amendatory Act of 1973 applies to proceedings filed on or after its effective date.

Another statute concerning the admission of evidence is the Proof of Handwriting Act, ILL. REV. STAT. ch. 51, ¶ 50 et seq (1979).

5. The constitutionality of the act was upheld in the face of an equal protection challenge arguing that only the adverse party was precluded from testifying, and that this preclusion denied that party equal access to justice and denied due process by excluding this testimony. Murphy v. Hook, 21 Ill. App. 3d 1006, 316 N.E.2d 146 (1974). See also Lueth v. GoodKnecht, 345 Ill. 197, 177 N.E. 690 (1931); Segur’s Estate v. Jacoby, 5 Ill. App. 3d 459, 283 N.E.2d 76 (1972). This holding is compatible with the reasoning that the purpose of the statute is to put the parties on an equal footing. Since the decedent is not able to testify, neither should the adversary of his estate. Morse v. Hardinger, 34 Ill. App. 3d 1020, 341 N.E.2d 172 (1976); Schuppenhauer v. Peoples Gas Light & Coke Co., 30 Ill. App. 3d 607, 332 N.E.2d 583, cert. denied, 425 U.S. 937 (1975); In re Estate of Colewell, 9 Ill. App. 3d 247, 292 N.E.2d 96 (1972); 37 ILL. LAW & PRACTICE, WITNESSES § 42 (1958). This stated justification is less prominent than the fraud-preventative theory. See note 8 infra.

6. A repealer bill was defeated in the 1977 session of the Illinois legislature. CONTESTED ESTATES, supra note 1, at ¶ 6.16.


8. The rule evolved from the common law exclusion of the testimony, whether voluntary or by admission, of all persons with a proprietary or pecuniary interest in the outcome of the contest. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 65, at 142 (2d Ed. 1972). The harshness of this rule gave way to reform in England, but the modern Dead Man’s Statutes emerged as an exception in the United States.

In this country, however, a compromise was forced upon the reformers. The objection was raised that in controversies over contracts or other transactions where one party to the transaction had died and the other survived, hardship and fraud would result if the surviving parties or interested persons were permitted to testify to the transactions. The survivor could testify though the adverse party’s lips would be sealed in death. This is a seductive argument. It was accepted in nearly all the early statutes, at a time when the real dispute was whether the general disqualification should be abolished or retained, and the concession for survivors’ cases undoubtedly seemed a minor one. But the concession has now become so ingrained a part of judicial and professional habits of thinking that it is hard to dislodge by argument.

Id.

under the will are all precluded by the Act from testifying because of their "interest" in the controversy.\textsuperscript{10} The only way the statute permits such persons to testify is if the adversary first "opens the door" by presenting the deposition of the decedent, or if the representative of the estate presents testimony by disinterested witnesses.\textsuperscript{11} Even then interested persons can testify on rebuttal only as to the limited question of the specific occurrence or transaction which has been "opened" in the case in chief.\textsuperscript{12}

The prevailing modern justification for the Dead Man's Act is to prevent fabrication of self-serving and fraudulent evidence.\textsuperscript{13} The dubious value of such a rationale for depriving interested parties to the litigation of the opportunity to testify on their own behalf is apparent.\textsuperscript{14} Nonetheless, the Act retains vitality in Illinois and serves as a serious limitation in all stages of estate litigation.

THE HEARING TO ADMIT THE WILL TO PROBATE

Will contests generally proceed in two stages: (1) the hearing to admit the will to probate and (2) the will contest proper.\textsuperscript{15} At the

\begin{itemize}
\item 11. Note that waiver of the incompetency provisions of the statute can only be made by an adversary, ILL. REV. STAT. ch. 51, ¶ 2(1) (1979), and that co-parties may not call one another to testify in each other's behalf, as this would defeat the purpose of the rule. Mitchell v. Van Scoyk, 1 Ill. 2d 160, 115 N.E.2d 226 (1953); Linn v. Linn, 221 Ill. 606 (1914).
\item 12. See note 4 supra.
\item 14. One author has observed:
\begin{quote}
Most commentators agree that the expedient of refusing to listen to the survivor is, in the words of Bentham, a "blind and brainless" technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the "tangled web" of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not balk at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story. 
\end{quote}
\item 15. A contestant is entitled to a bench trial at the hearing, \textit{In re Estate of Haines}, 51 Ill. App. 3d 163, 366 N.E.2d 548 (1977), and a jury trial at the will contest. There is no \textit{res judicata} effect to the first trial.
\end{itemize}
hearing to admit the will to probate, the sole question presented is whether the will submitted to probate conforms to the statutory requirements. The burden of establishing the statutory prerequisites is on the proponent of the will. Once that burden is satisfied, the document will be admitted to probate regardless of the lack of dispositive provisions or other deficiencies of the document itself. Essentially, the proponent of the will must provide two witnesses who will testify that they (1) saw the decedent sign or acknowledge the will in their presence; (2) witnessed the document in the presence of the testator; and (3) believed the testator to be of sound mind and memory. An attestation clause reciting com-

16. The formal statutory requirements for the admission of a will are met:
   (a) When each of 2 attesting witnesses to a will states that (1) he was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness or the testator acknowledged it to the witness as his act, (2) the will was attested by the witness in the presence of the testator and, (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the execution of the will is sufficiently proved to admit it to probate, . . . 

ILL. REV. STAT. ch. 110 1/2, § 6-4 (1979). The predecessor statute ILL. REV. STAT. ch. 110 1/2 § 6-7 (1976) required that the witnesses "testify" to rather than "state" the facts. Evidence not relevant to the actual execution of the document in question will be excluded. It has long been recognized that the proof necessary to entitle a will to probate is confined to the essential elements fixed by the statute . . . and is for the purpose of establishing whether a prima facie case of validity has been made. . . . The hearing is to determine whether the will has been executed with the formalities required by statute . . . no other evidence is required and no contradictory evidence is admissible. . . . Ruffing v. Glissendorf, 41 Ill. 2d 412, 420, 243 N.E.2d 236, 240 (1968). See also In re Estate of Ketter, 63 Ill. App. 3d 796, 380 N.E.2d 385 (1978).

17. In re Estate of Zingraf, 51 Ill. App. 3d 145, 366 N.E.2d 464 (1977). If the will is executed in due form, then the proponent is aided by a presumption of validity. In re Estate of Willavize, 21 Ill. 2d 40, 171 N.E.2d 21 (1960); In re Estate of Thomas, 6 Ill. App. 3d 70, 284 N.E.2d 513 (1972).


19. The statute requires the testimony of a minimum of two attesting witnesses. One witness is not sufficient to sustain the burden of proof. Ill. Rev. Stat. ch. 110 1/2 § 6-4 (1979); Hill v. Chicago Title & Trust Co., 322 Ill. 42, 152 N.E. 545 (1926). See also In re Estate of Randall, 82 Ill. App. 3d 593, 403 N.E.2d 48 (1980).


21. The attestation clause is the language prefacing the witnesses' act of attesting to the signature of the testator. It usually includes language reciting that the witnesses signed the will in the presence of and at the direction of the testator, and that they believed the testator to be of sound mind and memory. Its use, although historically prevalent, was not independently sanctioned by statute until 1979, when the Probate Act was amended to include attestation as a means to admitting the will to probate. The statute provides in part:
   (b) The statements of a witness to prove the will under subsection 6-4(a) may be
pliance with the statute can be used if the attesting witnesses are forgetful or if either of them repudiates his or her statements, but it cannot be used as a substitute for the testimony of both attesting witnesses.

In addition to the statutory prerequisites, the proponent of the will is permitted to introduce any "other evidence competent to establish a will." This may include all of the facts and circumstances surrounding the execution of the document, as encompassing the res gestae. Testimony from the draftsman, nonattesting occurrence witnesses, and, where forgery is in issue, acknowledgements by the testator would all be admissible on the behalf of the proponent.

One of the most perplexing evidentiary problems for the contestant is the limited inquiry into testamentary capacity at the hearing stage. The root of this problem is that the statute only requires that the attesting witnesses have the "belief" that the testator was of sound mind and memory. No foundation need be laid for such testimony and the refusal to permit a witness' testimony without made by (1) testimony before the court, (2) an attestation clause signed by the witness and forming a part of or attached to the will or, (3) an affidavit which is signed by the witness at or after the time of attestation and which forms part of the will or is attached to the will or to an accurate facsimile of the will.

I.LL. REV. STAT. ch. 110 1/2, ¶ 6-4(b) (1979).


23. In re Estate of Krausman, 131 Ill. App. 2d 514, 268 N.E.2d 505 (1971); CONTESTED ESTATES, supra note 1, at § 2.6.


25. ILL. REV. STAT. ch. 1101/2, ¶¶ 6-4, 8-2(c) (1979).

26. Res gestae statements or declarations are those which are made spontaneously or contemporaneously with and as a part of the transaction, event or condition to which they relate. GARD, ILLINOIS EVIDENCE MANUAL 191 (1963). The imperative in this rule is that the statement or act submitted as part of the "res gestae" must truly be a part of the conditions or circumstances under which the will came into existence. Therefore the physical and verbal condition of the testator, the identity of those persons assisting in the preparation and execution of the will, the statements of the testator and witnesses at the time of execution, etc. are all examples of the res gestae.

See 1 James, supra note 3, at § 43.52(m)(12), n.75. Caveat: excessive use of the res gestae exception to the hearsay rule can be hazardous to one's credibility. See, e.g., Res Gestae, or Why is That Event Speaking and What is it Doing in This Courtroom?, 63 A.B.A.J. 968 (1977). See also In re Will of Rutledge, 5 Ill. App. 2d 355, 125 N.E.2d 683 (1955).


In Haines, the decedent's will was witnessed by the employees of a bank trust depart-
foundation is reversible error. The contestant cannot introduce any evidence as to testamentary capacity. He or she may only cross-examine the attesting witnesses as to their belief. Impeachment of the attesting witnesses may include unfamiliarity with the testator as well as prior inconsistent statements as to their belief. There also may be impeachment by inquiry into the circumstances surrounding the execution of the document itself, not only by cross-examination but also by the testimony of other witnesses. Further evidence of testamentary capacity or undue influence beyond the scope of the attesting witness’ belief, however, can be presented only in a statutory will contest.

In addition to restrictions on cross examination of the attesting witnesses, the contestant is severely limited by statute as to the issues that can be presented to the court to oppose admission of the purported will to probate. The contestant may only introduce evidence on the issues of fraud, forgery, compulsion or “other improper conduct.” In order to establish fraud, there must be:

The attesting witnesses are witnesses that the statute requires. They are in a sense placed there by the statute for the purpose of observing the method of the execution of the will and of determining whether the testator at the time is possessed of testamentary capacity. An attesting witness may form a belief or opinion of the testator’s mental capacity from his appearance at the time he executed the instrument in controversy.

357 Ill. at 122-23, 191 N.E. at 271.
31. Craig v. Trotter, 252 Ill. 228, 96 N.E. 1003 (1911). Courts look with suspicion to such contradictory statements of attesting witnesses and hold the statements and the witnesses in disrepute. In re Estate of Willavize, 21 Ill. 2d 40, 45, 171 N.E.2d 21 (1960); Szarat v. Schuev, 365 Ill. 323, 6 N.E.2d 625 (1937); CONTESTED ESTATES, supra note 1, at § 2.6. Illinois takes the minority view that an unavailable attesting witness cannot be impeached by inconsistent statements in contravention of the terms of the will and the Probate Act. Craig v. Wismar, 310 Ill. 262, 141 N.E. 766 (1923). See also ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION FEDERAL RULES OF EVIDENCE § 641 (1975).
32. Such witnesses would be those people who attended the execution of the will but did not attest to the will.
33. As to testamentary capacity, see Stuke v. Glaser, 223 Ill. 316, 79 N.E. 105 (1906) and cases at note 35 infra. As to undue influence, see Sheperd v. Yocum, 323 Ill. 328, 154 N.E. 156 (1926); In re Estate of Jackson, 56 Ill. App. 3d 915, 372 N.E.2d 711 (1978).
34. ILL. REV. STAT. ch. 110½, ¶ 6-4 (1979).
such conduct as a trick or device by which a person may be induced to sign the paper under the impression it is something else, or to the alteration of the will after it is signed, or the substitution of another paper for part of the will after it has been signed, and matters of like character.  

The standard is similar to the distinction between fraud as a real defense as opposed to a personal defense in the enforcement of negotiable instruments. It has also been characterized as fraud in the execution as distinguished from fraud in the inducement. 

Proof of forgery in will contests is not unlike the proof required in other civil cases. In will contests, however, the testator is unable to verify his signature. Because of this unique situation, it is the attesting witnesses who are best suited to authenticate the testator's signature. Although lay and expert opinion evidence as to the signature of the testator is admissible, care should be taken by all

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35. Given the often-stated policy of the courts to provide for swift appointment of an estate representative to marshall the assets, In re Estate of Marcucci, 54 Ill. 2d 266, 296 N.E.2d 849 (1973); Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892 (1946); In re Estate of Carr, 126 Ill. App. 2d 461, 282 N.E.2d 54 (1970), the judicial interpretation of the triable issues is quite narrow. For example, although undue influence has been deemed a "specie of fraud," Flanigon v. Smith, 337 Ill. 572, 169 N.E. 767 (1930); see also Smith v. Henline, 174 Ill. 184, 51 N.E.2d 227 (1934); Sterling v. Kramer, 15 Ill. App. 2d 230, 145 N.E.2d 757 (1957), evidence of undue influence has been held to be clearly inadmissible in the hearing to admit the will to probate. Ruffing v. Glissendorf, 41 Ill. 2d 412, 243 N.E.2d 236 (1968); Sheperd v. Yocom, 323 Ill. 328, 154 N.E. 156 (1926); Stuke v. Glaser, 223 Ill. 316, 320, 79 N.E. 105, 107 (1906); In re Estate of Jackson, 56 Ill. App. 3d 915, 372 N.E.2d 711 (1978); In re Estate of Davison, 119 Ill. App. 2d 477, 256 N.E.2d 16 (1970); In re Estate of Guinane, 65 Ill. App. 2d 193, 213 N.E. 2d 30 (1965). These cases hold that, although in certain circumstances wills procurred through a breach of fiduciary duty will be presumed to be fraudulent, or that a constructive fraud will be found in the event that the will is executed in breach of a contract to devise, the hearing on proof of will is limited to the issues of due execution and competency of the testator.

36. Compare Ill. Rev. Stat. ch. 26, ¶ 3-305(2)(c) (1979) with Ill. Rev. Stat. ch. 26, ¶ 3-306(B) (1979) and comments thereto. The "real" type of fraud designated in the Uniform Commercial Code is identified as "such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms" Ill. Rev. Stat. ch. 26, ¶ 3-305(2)(c) (1979). The official comment to the UCC describes the "common illustration" of a maker tricked into signing a note on the belief that it is merely a receipt. This concept is easily transferred to the execution of a will, if the testator has no reason or opportunity to know the character of the document which he is signing. The "personal" defense of fraud, however (analogous to the types of fraud which are outside the scope of the proof-of-will hearing but within the ambit of the will contest) is not separately defined in the UCC other than by its absence from the definition in ¶ 3-305(2)(c). It would include false representations, Drumm Constr. Co. v. Forbes, 305 Ill. 303, 137 N.E. 225 (1922) and breach of fiduciary duty, Perry v. Engel, 296 Ill. 549, 130 N.E. 340 (1921).

37. Contested Estates, supra note 1, at § 2.7.

38. Contested Estates, supra note 1, at § 2.7(4). The expert opinion is entitled to little
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Parties to comply with the Proof of Handwriting Act, which requires notice to adversaries and a "reasonable opportunity" to examine the comparative exemplars of handwriting by the adversary.

While there are no reported Illinois decisions involving "compulsion or other improper conduct" in will contests, the standard of evidence in such cases would appear to parallel that required to establish the type of duress which under the Uniform Commercial Code (UCC) will render the obligation of the party a nullity. The official comment to the UCC contemplates a "gun-to-the-head" type of duress, although even threats of immediate bodily harm and imminent death may not always be sufficient to establish duress. The official comment also recognizes that duress is a matter of degree, and that the conduct must be so harsh as to nullify a contractual obligation. There is a paucity of cases construing what constitutes duress, so that even in the commercial context there are no firm guidelines. For purposes of a probate hearing, duress would have to be shown by very clear and highly persuasive facts. More subtle types of duress are susceptible of proof in the will context.

In addition to these statutory grounds which the contestant can raise in the probate hearing, Illinois courts permit the issue of revocation of the proferred will to be litigated at the hearing. This is
limited to whether the statutory requirements of revocation have occurred, and does not include consideration of whether the subject will revokes a prior joint and mutual will.

Finally, one overriding problem in presenting evidence on the issues which can be raised at the hearing to admit the will to probate is the difficulty in gathering relevant evidence because of the lack of discovery at this stage. Notwithstanding the provisions of the Probate Act or the urgings of scholars, recent appellate
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court decisions hold that no discovery can be taken prior to the probate hearing. Additionally, refusal of discovery requests is not an abuse of judicial discretion. These decisions emphasize the nature of the probate hearing as a proceeding to determine a preliminary issue. The result, nevertheless, is to hamper and limit the evidence presented at the hearing.

53. In re Estate of Haines, 51 Ill. App. 3d 163, 366 N.E.2d 548 (1977); In re Estate of Kvasauskas, 5 Ill. App. 3d 202, 282 N.E.2d 465 (1972). Such holdings are a logical extension of the policy of the expeditious administration of a decedent’s estate while preserving the right to contest the will in a separate proceeding. Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892 (1946); In re Estate of Ketter, 63 Ill. App. 3d 796, 380 N.E.2d 385 (1978); In re Estate of Carr, 126 Ill. App. 2d 461, 282 N.E.2d 54 (1970). It is unknown whether the current posture of speeding along the probate hearing will continue with the new procedure contemplated by § 6-4 et. seq. of the Probate Act, wherein the will is first admitted without notice and Letters issued, with the right of beneficiaries to demand formal proof. Ill. Rev. Stat. ch. 1101/2, §§ 6-4, 6-10, 6-21 (1979).

54. The First Appellate District has taken this one step further by ruling that an order admitting a will to probate is not a final and appealable order. In re Estate of Martino, 72 Ill. App. 3d 867, 391 N.E.2d 412 (1979). The 1979 Amendments to the Probate Act, for the first time, permit the proponent of the will to contest its denial of admission to probate. Ill. Rev. Stat. ch. 110 1/2, § 8-2 (1979). Prior to the 1979 Amendment, orders denying admission were clearly appealable under Supreme Court Rule 304(b). In re Estate of Millsap, 75 Ill. 2d 247, 388 N.E.2d 374 (1979); Heuberger v. Schwartz, 41 Ill. App. 2d 28, 190 N.E.2d 163 (1963). The dissent in Millsap points out the inequities of the prior rules to the proponent, who had only one opportunity to secure the admission of the will. Although the prior law granting two trials to the contestant and one to the proponent had withstood constitutional challenge, O’Brien v. Bonfield, 213 Ill. 428, 72 N.E. 1090 (1904); In re Estate of Haines, 51 Ill. App. 3d 163, 366 N.E.2d 548 (1977); Kahn, Double Trials in Will Contests, 60 Ill. Bar J. 309 (1971), the statutory modification should alleviate the possibility of a proponent being unfairly surprised and prejudiced by the abbreviated proceeding.

The amendment may indicate that the proponent will have to institute a will contest if he wants to seek review of an order denying admission, despite the statutory provision exculpating the proponent from any duty to do so. Ill. Rev. Stat. ch. 110 1/2, § 8-2(f) (1979). Arguably, an order denying admission of the will to probate (or revoking the letters of administration and vacating the order admitting the will under the new procedure provided at Ill. Rev. Stat. ch. 110 1/2, § 6-21 (1979)) remains final and appealable, since it meets the requirements of Rule 304(b) and since the contest of the denial of admission is optional. Supreme Court Rule 304(b)(1) provides:

(b) Judgments and Orders Appealable Without Special Finding. The following judgments and orders are appealable without the finding required for appeals under paragraphs (a) of this rule: (1) A judgment or order entered in the administration of an estate, guardianship, conservatorship, or similar proceeding which finally determines a right or status of a party.

THE WILL CONTEST

(A) Submission of the Probate Hearing Transcript to the Jury in the Will Contest

One of the evidentiary problems encountered in the will contest is created at the hearing to admit the will to probate. The entire transcript of the testimony of witnesses at the hearing is admissible as substantive evidence at the will contest. Historically, only the oath and certificate of an attesting witness were admissible in the will contest, and errors committed at the probate hearing were excluded from the transcript offered at the will contest. In the landmark case of Belfield v. Coop, however, the Illinois Supreme Court held that the entire transcript was admissible regardless of the otherwise incompetent testimony of a party who was called by an adversary to testify as to allegations of fraud. The Belfield court did not address the issue of erroneous examination or erroneous evidentiary rulings other than the waiver of the incompetency standard of the Dead Man’s Act. It would, however, appear from

55. ILL. REV. STAT. ch. 110½, ¶ 8-1(c), 8-2(c) (1979). The transcript is admitted even though none of the issues raised and determined therein are res judicata as to the second trial. Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892 (1946); In re Estate of Carr, 126 Ill. App. 2d 461, 262 N.E.2d 54 (1970).

56. For example, the question, “Was there any fraud, duress or undue influence used to get her to sign the instrument?” was submitted to each attesting witness at the hearing to admit the will to probate in Buerger v. Buerger, 317 Ill. 401, 148 N.E. 274 (1925) and Adams v. First M.E. Church, 251 Ill. 268, 96 N.E. 253 (1911). The court in both cases held that the question should have been excluded from the reading of the transcript of the hearing to the jury in the will contest.

57. 8 Ill. 2d 293, 134 N.E.2d 249 (1956). In Belfield, an “interested” person, Sara Grate, made a recording, on a wire recording device, of the conversations of the decedent immediately prior to the execution of the will. The court held that the recording should have been admitted by the trial court. The basis for the holding was that since the recording was a “mechanical witness,” the evidence was coming from the recording rather than from the incompetent witness.

Sare Grate was then called by the contestant to testify as an adverse witness at the hearing. When the proponent sought to admit the transcript of the probate hearing to the jury in the will contest, the court held that contestant had waived her incompetency under the Dead Man’s Act. 8 Ill. 2d at 307-08, 134 N.E.2d at 257. Thus, the entire transcript was admitted into evidence. 8 Ill. 2d at 306, 134 N.E.2d at 256.

Although the court relied on the predecessor statute to § 8-1(c) of the Probate Act, ILL. REV. STAT. ch. 110½, ¶ 8-1(c) (1975), the new § 8-2(c) is identical in that they both provide for the trial of a will contest by a contestant. The 1979 Amendments, however, introduced a “reverse will contest” where the proponent is permitted to file an action as well as a jury demand to vacate an order denying the preferred will to probate. ILL. REV. STAT. ch. 110½, ¶ 8-2(c) (1979).

58. 8 Ill. 2d at 306-08, 134 N.E.2d at 256-57.

59. Id.
a reading of that case and the plain language of the statute that the entire transcript of the evidence presented at the hearing on the petition to admit the will to probate is admissible in the will contest, errors and all.\textsuperscript{60}

One example of the problems which complete admission raises is that it appears that an "interested" attesting witness, even if "purged"\textsuperscript{61} of his or her benefit, could nonetheless still be an "interested" party for purposes of the Dead Man's Act.\textsuperscript{62} Even though

\textsuperscript{60} Imagine a scenario wherein the proponent's counsel asks the attesting witnesses conclusionary questions such as: "Was the testator incompetent? Was there any undue influence? Did he see you sign as a witness? Was he of sound mind?" The trial judge, sitting without a jury, could very well overrule objections to these improper questions based on the harmless error rule or on the presumption that a judge only considers relevant evidence.

At the will contest, under Belfield, the entire colloquy would be admitted as part of the transcript. Thus, the improper testimony becomes substantive evidence. Although no such case as the illustration has yet arisen, the extreme prejudicial potential of such an occurrence is apparent. The attorney must, therefore, exercise extreme caution at the non-jury hearing, and it is suggested that the transcript be certified on motion only to include admissible matters.

\textsuperscript{61} A necessary witness to a will or codicil is limited to the benefit he would have received if the document he has witnessed were not admitted. This common-law rule of incompetency has been codified into the "purging statute." At common law, the self-interest of the witness would have rendered him incompetent to testify thereby defeating admission of the will to probate. The current statute, ILL. REV. STAT. ch. 110 1/2, 4-6(a) (1979) provides:

\begin{quote}
Beneficiary or creditor as witness. (a) If any beneficial legacy or interest is given in a will to a person attesting its execution or to his spouse, the legacy or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided by this Article exclusive of that person and he may be compelled to testify as if the legacy or interest had not been given, but the beneficiary is entitled to receive so much of the legacy or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established.
\end{quote}

Note that the benefit received by a witness is "purged" or disallowed only if his testimony thereto is necessary to the establishment of the will. Thus, as long as two other witnesses are available to testify, the otherwise purged beneficiary's share is saved.

Similarly, execution of a codicil will secure the legacy, under the will, to the interested party. Since the witness to the codicil provides the necessary testimony, the will take only that which he would have received under the will if the codicil were not established. Thus, by application of the statute, an heir who is a necessary witness is limited to his intestate share while a non-relative necessary witness is denied his bequest entirely. A witness to a codicil would be limited to the bequest in the will which the codicil amends.

\textsuperscript{62} \textit{E.g.}, the attesting witness to a codicil is limited to the bequest in the will itself as republished in the codicil. ILL. REV. STAT. ch. 110 1/2, 4-6 (1979). He is therefore still an "interested" person for purposes of the Dead Man's Act. The purging effect of \textsection 4-6 is applicable also to spouses of beneficiaries who are attesting witnesses, and such spouses are "interested" persons to render them incompetent under the Dead Man's Act. Britt v. Darnell, 315 ILL. 385, 146 N.E. 510 (1925); Treleaven v. Dixon, 119 ILL. 548, 9 N.E. 189 (1886).

Note that spouses may also be incompetent to testify for each other under \textsection 5 of the
this issue has not arisen in any reported Illinois decision, the perplexing situation presented by a necessary witness rendered "doubly incompetent" could present an intriguing problem. The necessity of the testimony of the attesting witness, required by statute, mandates that such testimony be admitted, both at the probate hearing and by submission of the transcript at the will contest. The testimony should be limited, however, to the circumstances surrounding the execution. Additionally, such testimony should be subject to proper impeachment for self-interest.

(B) Testamentary Capacity

1. Attesting Witnesses

The testimony of the attesting witnesses at the probate hearing on the testator's competency lays the groundwork for further opinion testimony from witnesses for both sides to the will contest. It is both obvious and unavoidable that the hearing evidence thus embraces not only the witness' opinion, but also represents the conclusion of the witness on the ultimate issue of competency. There is considerable confusion among the cases regarding conclusions and opinion and little clarification has emerged. For example, it has been held error to permit an attesting witness to conclude whether any fraud, undue influence or duress was used to induce the testator to execute a will, but not error to permit the attesting witness to testify as to whether, as far as he could discern, the testator was subject to undue influence. Furthermore, the seemingly innocuous and routine question to an attesting witness of whether the witness signed the will in the presence of the testator has been held to constitute reversible error as representing the conclusion of the witness. Considering that no foundation need

Evidence Act, Ill. Rev. Stat. ch. 51 § 5 (1979). See also 3 James, supra note 3, at § 92.5(g)(10). Note, also that several interested attesting witnesses may not "bootstrap" one another into a benefit under the will, but that their testimony will be allowed on the issue of due execution. In re Estate of Watts, 67 Ill. App. 3d 463, 384 N.E.2d 589 (1979).

63. The witness would be incompetent once by virtue of the Dead Man's Act and once under the purging statute.

64. See James, supra note 3, at § 92.4(1), wherein the author suggests several rules for opinion testimony on capacity. See also Schuyler, supra note 2, at 932.

65. Buerger v. Buerger, 317 Ill. 401, 148 N.E. 274 (1925); Adams v. First M.E. Church, 251 Ill. 268, 96 N.E. 253 (1911).


How careful can the litigator be in properly asking whether the testator had the ability to know what property he had, e.g., Voodry v. University of Illinois, 251 Ill. 48, 95 N.E. 1034
be laid for the attesting witness to testify as to his belief, the distinctions drawn by the courts are even more puzzling.

2. Lay Witnesses

Unlike the opinion testimony from the attesting witnesses as to the testator's capacity, other lay witnesses must state a foundation for their opinions. The facts elicited in laying the foundation must reasonably tend to support the opinion of the witness as to the testator's mental condition at the time of the execution of the document. These facts must relate to the period of time sur-

(1911), and in avoiding the improper query as to whether the testator was able to carry in his mind and memory the nature and extent of his property? In Baker v. Baker, 202 Ill. 595, 67 N.E. 410 (1903), the trial court sustained objections to the following questions and was sustained on appeal. The attesting witnesses had been asked:

"Whether or not the testator, at the time of making the alleged will, had sufficient mind and memory to understand the will in question"; "whether or not he was able to carry in his mind and memory the nature and extent of his property"; and, "whether or not he was able to understandingly execute the will" . . .

202 Ill. at 616-17, 67 N.E. at 418.

Voodry v. University of Illinois, 251 Ill. 48, 95 N.E. 1034 (1911), attempted to distinguish Baker. It appears that the objectionable questions deal with the subjective capabilities of the testator rather than with objective manifestations. For a clearer and more recent discussion of lay opinions and proper examination, see Trojcak v. Hafliger, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972).

68. See note 34 supra and accompanying text.

69. The court in Tyler v. Tyler, 401 Ill. 435, 440-41, 82 N.E.2d 346, 349 (1948), stated:

Opinions of lay witnesses as to the competency of the testator in a will contest are admissible when they show opportunities for observation and state sufficient facts upon which to base an opinion. The rule is that a person who is not an expert may give his opinion concerning the mental capacity of a testator if it appears that such witness has an acquaintance with the person whose competency is in question and relates facts and circumstances which afford reasonable ground for determining the soundness or unsoundness of mind of such person, and the value of the opinion so expressed is such as the capacity, intelligence and observation of the witness who forms it may warrant.

The rule requiring a foundation is the same as that for other civil actions. The foundation required is that the witness describe the behavior on which his opinion is based. See Bowman v. Illinois Central Railroad Co., 11 Ill. 2d 186, 142 N.E.2d 104 cert. denied, 355 U.S. 837 (1957).

70. In Peters v. Catt, 15 Ill. 2d 255, 154 N.E.2d 280 (1958), the court excluded testimony of three witnesses who expressed opinions that the testator was of unsound mind. The first witness had no contact with the decedent prior to the occurrence on which she based her opinion. Moreover, her opinion was based on the fact that on that occasion, the testator had refused to talk to her. Although the other witnesses indicated that the decedent repeated himself in conversations and would not have recognized them, the court stated: "His lack of loquacity with distant acquaintances can well be explained by his taciturn nature, his admitted old age and physical disability." Id. at 261, 154 N.E.2d at 284. In Shevlin v. Jackson, 5 Ill. 2d 43, 142 N.E.2d 895 (1955), evidence of intoxication and diminished capacity while intoxicated were not considered, absent proof of intoxication at the time that the will was
rounding the execution of the document, and the courts are flexible in determining the relevant period.\textsuperscript{71}

Once a foundation exists,\textsuperscript{72} the lay witnesses may state their opinion as to the soundness of the testator’s mind and memory.\textsuperscript{73} The opinion thus elicited, however, must stop short of invading the province of the jury in determining whether the mental condition of the testator was such as to render him incompetent to make a will.\textsuperscript{74} Some decisions have limited opinion testimony to whether

\textsuperscript{71} A period of two years prior to the execution was found to be sufficiently proximate to the execution itself, Voodry v. University of Illinois, 251 Ill. 48, 95 N.E. 1034 (1911) and in excess of two years to be too remote and of no probative force, Knudson v. Knudson, 382 Ill. 492, 46 N.E.2d 1011 (1943). As part of the reasonable exercise of its discretion, the court can take recognition that the testator’s illness was progressive or continuing. Milne v. McFadden, 385 Ill. 11, 52 N.E.2d 146 (1944); Ergang v. Anderson, 378 Ill. 312, 38 N.E.2d 26 (1941).

\textsuperscript{72} The sufficiency of the foundation is addressed to the discretion of the trial court. In the absence of a foundation, however, any resultant error is considered to be harmless for the reason that the opinion is of little probative value. Ergang v. Anderson, 378 Ill. 312, 38 N.E.2d 26 (1941). Moreover, the weight to be afforded the testimony is dependent upon the facts established while laying the foundation, and it is for the jury to determine if the opinion is adequately supported. Hunt v. Vermilion County Children’s Home, 381 Ill. 29, 44 N.E.2d 609 (1942). The jury should be instructed to the weight of the testimony being affected by the foundation thereof. Mitchell v. Van Scoyk, 1 Ill. 2d 160, 115 N.E.2d 226 (1953).

\textsuperscript{73} Examples of admissible opinion are:

Opinions of witnesses as to sound mind and memory, ability to transact ordinary business, ability to know relatives, ability to know the nature and extent of property, and the like, are all conclusions of fact which are admissible to enable the jury, under proper instructions as to sound mind and memory, to determine whether the testator had mental capacity to execute his will.

\ldots It is well settled that, after laying the proper foundation, a witness may give an opinion as to soundness or unsoundness of mind of the testator.


\textsuperscript{74} The case of Trojcak v. Hafiger, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972) is a rare and refreshing example of clear distinctions between the scope of admissible and inadmissible inquiry. That decision posits that the conclusion of the ability of the testator to make a will is inadmissible and reversible error, regardless of whether the testimony is from a lay or expert witness. It also precludes a treating physician from testifying as to his opinion of the testator’s mental condition at the time of execution. This limitation does not apply to a physician who is qualified as an expert and who answers in response to a proper hypothetical question.

The decision also reinforces the theory that the opinion of a treating physician is of no greater weight than that of a lay witness, Tyler v. Tyler, 401 Ill. 435, 440, 82 N.E.2d 346 (1948); Austin v. Austin, 260 Ill. 299, 103 N.E. 268 (1913), and that the jury must be instructed in that regard. Both v. Nelson, 31 Ill. 2d 511, 202 N.E.2d 494 (1964) held it to be reversible error to refrain from instructing the jury as to the weight to be accorded expert opinion. The opinion testimony of lay witnesses and non-expert treating physicians must avoid reference to the ability of the testator to make or understand the execution of the will.
the decedent was sane or insane, and have excluded opinions as to the decedent's ability to transact business. Most recent decisions, however, have permitted opinion evidence as to the capacity of the testator to transact business. It is important to note the distinction between the ability to transact any business and the ability to transact ordinary business and determining testamentary capacity. The standard of proof of the ability to transact ordinary business is higher than the standard of proof required to prove testamentary capacity. Conversely, the inability to transact any business is measured by a lower standard of proof than that necessary to prove testamentary capacity. Proof going to either the higher or lower standard, therefore, by implication establishes whether the decedent had testamentary capacity.

3. Expert Witnesses

Expert testimony is subject to the general distinction between opinions and conclusions, and therefore, experts must avoid testifying as to their conclusion on the testator's ability to make a will. An opinion can be given as an answer to a hypothetical question presented to the expert on the mental capacity of the testator, subject to the ordinary rules governing such questions in other civil cases. Special care should be taken by all parties to ensure that the expert's opinion is based solely upon facts in evidence, and is not based on conversations between the expert and witnesses disqualified under the Dead Man's Act. Expert opinion, however, is "not highly regarded" in a will contest because of the

75. Trubey v. Richardson, 224 Ill. 136, 79 N.E. 592 (1906).
77. Hess v. Killerbrew, 209 Ill. 193, 70 N.E. 675 (1904); Trojcak v. Hafliger, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972). See also discussion at James, supra note 3, at § 92.4.
83. See notes 4-6 supra and accompanying text.
statutory emphasis on the opinions of attesting witnesses.84

(C) Undue Influence

Evidence that is insufficient to prove lack of testamentary capacity may nevertheless be sufficient to show the testator to have been susceptible to the influence of others interested in the disposition of his property. The courts have recognized that a person with diminished mental capacity is a fortiori more likely to submit to undue influence.85 The greater the testator's mental deficiency, the weaker the proof that is required to establish the existence of such undue influence.86 The contestant, therefore, can use the evidence for dual purposes: if the evidence is held insufficient on the issue of testamentary capacity, the foundation has already been laid for proof of undue influence.87

1. Circumstantial Proof

Undue influence is universally recognized as a specie of fraud.88 This fact further assists the contestant in his proofs. Undue influence by its nature is perpetrated in secret and can be rarely established by direct proof, and therefore may be proved by circumstantial evidence.89 The totality of the evidence, however, must still establish all the necessary elements of undue influence. The contestant must show that the influence: (1) was directly connected to the execution of the will; (2) operated at the time the will was made; (3) was directed toward procuring a will in favor of a particular party; and (4) was of such a character as to have destroyed the testator's free will.90

84. 3 James, supra note 3, at § 92.4(1) n.67; Yowell v. Hunter, 403 Ill. 202, 85 N.E.2d 674 (1949). Such emphasis throughout the proceeding is logically consistent with the effort to minimize the experts' opinion. Since the attesting witnesses are required to state their opinions, are excused from the general foundation requirement, and their testimony at the probate hearing is automatically admitted in the will contest, courts are disinclined to substitute the judgment of an expert for these statutorily important witnesses.

85. See Mitchell v. Van Scoyk, 1 Ill. 2d 160, 115 N.E.2d 226 (1953), and cases cited therein.

86. Id.


88. 79 Am. Jur. 2d Wills § 441 (1975), and cases cited therein.

89. Id.

2. Presumption as to Fiduciary-Beneficiaries

Another evidentiary factor which aids the contestant in proving undue influence is the recognized presumption of undue influence where the chief beneficiary of a will stood in a fiduciary relationship to the testator and was instrumental in the testator's preparation of the will. In Belfield v. Coop, the Illinois Supreme Court, repudiating prior law, declared that for a presumption of undue influence to exist, the contestant must show: "(1) there [is] a fiduciary or confidential relationship, (2) that the devisee is the dominant and the testator is the dependent party, and (3) that the will was procured by and in favor of the fiduciary through the use of his dominant fiduciary or confidential relationship." Once these three elements are established, the burden shifts to the proponent of the will to show that the will was the product of the testator's free deliberation.

The evidence necessary to prove the presumption, however, can sometimes be more difficult to assemble than proof of the undue influence itself. "Fiduciary relationship" is a vague and general concept that can describe any relationship wherein one places special confidence in another who owes him equitable duties. The relationship exists as a matter of law, for example, between attor-
ney and client, broker and principal. Where the relationship does not exist as a matter of law, however, it must be proved by clear, convincing and unequivocal evidence.\textsuperscript{96} Evidence of a close relationship of mutual confidence and trust is not sufficient to establish the existence of a fiduciary relationship. Furthermore, there must be a showing that the beneficiary held the dominant position in his relationship with the testator.\textsuperscript{97} Where there has been no evidence of special confidence by the testator and no domination by the beneficiary, courts have refused to find undue influence.\textsuperscript{98}

Even if the evidence establishes a fiduciary relationship in which the beneficiary was the dominant party,\textsuperscript{99} a presumption of undue influence will not arise unless the evidence also shows that the beneficiary was instrumental in procuring the will.\textsuperscript{100} This "procur- ing cause" factor\textsuperscript{101} must have existed at the time of the execution of the will and been directly connected to the execution.\textsuperscript{102} It is impossible to determine from existing case law what acts by a fiduciary-beneficiary will constitute sufficient participation in the execution of the will to give rise to the presumption.\textsuperscript{103} The mere presence of the beneficiary when the will is discussed, drawn, and executed appears to be insufficient.\textsuperscript{104} Evidence that the beneficiary also arranged for the attesting witnesses has likewise been considered insufficient to constitute procurement or participation.\textsuperscript{105} Evidence that the beneficiary telephoned the attorney, re-

\begin{itemize}
\item \textsuperscript{96} Id.; Brown v. Brown, 62 Ill. App. 3d 328, 379 N.E.2d 634 (1978).
\item \textsuperscript{97} Redmond v. Steele, 5 Ill. 2d 602, 126 N.E.2d 610 (1955).
\item \textsuperscript{98} See Sterling v. Dubin, 6 Ill. 2d 64, 126 N.E.2d 718 (1955) (testator and beneficiary maintained an illicit sexual relationship); Sheslin v. Jackson, 5 Ill. 2d 43, 124 N.E.2d 855 (1955) (beneficiary cared for the testator during illness). In both cases, the relationship between the beneficiary and testator was held insufficient to presume undue influence.
\item \textsuperscript{99} For examples of cases in which a fiduciary relationship has been found, see Mitchell v. Van Scoyk, 1 Ill. 2d 150, 115 N.E.2d 226 (1953); Wilk v. Hagen, 410 Ill. 158, 101 N.E.2d 885 (1951); Swenson v. Wintercorn, 92 Ill. App. 2d 88, 234 N.E.2d 91 (1968).
\item \textsuperscript{101} See cases cited at note 100 supra.
\item \textsuperscript{102} In re Estate of Ariola, 69 Ill. App. 3d 158, 386 N.E.2d 862 (1979). The fiduciary need not be present, however, when the will is signed. Mitchell v. Van Scoyk, 1 Ill. 2d 160 (1953); Sterling v. Kramer, 15 Ill. App. 2d 230, 145 N.E.2d 757 (1957).
\item \textsuperscript{103} See 44 Ill. B.J. 222 (1955).
\item \textsuperscript{104} Lake v. Seiffert, 410 Ill. 444, 102 N.E.2d 294 (1951).
\item \textsuperscript{105} Powell v. Weld, 410 Ill. 198, 101 N.E.2d 581 (1951). See also Powell v. Bechtel, 340 Ill. 330, 172 N.E. 765 (1930) (no presumption where beneficiary contacted attesting witnesses and was present when will was signed); Flanagan v. Smith, 337 Ill. 572, 169 N.E. 767 (1930) (no presumption where beneficiary called attorney who drafted will and contacted
\end{itemize}
mained in the testator’s presence while the testator instructed the
attorney to prepare the will, drove the testator to the attorney’s
office to obtain the will, and later produced the will for execution
while the testator was being examined by his doctor, however, was
held sufficient to raise the presumption.\textsuperscript{106} On the other hand,
where the contestant produced evidence that the testator’s per-
sonal secretary and a chief beneficiary under the will transcribed
and corrected a draft of the will, but failed to establish that the
beneficiary discussed or suggested the provisions, no presumption
of undue influence was established.\textsuperscript{107}

\textbf{(D) Miscellaneous Evidentary Concerns in Wills Contests}

Generally, and in conformity with the statute on wills,\textsuperscript{108} the
declarations of a testator will not be admitted for the purpose of
impeaching or contradicting the will.\textsuperscript{109} The testator’s declarations,
however, will be admissible on the issues of testamentary capacity,
diminished capacity and susceptibility to undue influence if offered
to prove the mental condition or state of mind of the decedent.\textsuperscript{110}

\begin{itemize}
\item attesting witnesses).
\item \textsuperscript{106} Wilk v. Hagan, 410 Ill. 158, 101 N.E.2d 585 (1951).
\item \textsuperscript{107} Sterling v. Dubin, 6 Ill. 2d 64, 126 N.E.2d 718 (1955).
\item \textsuperscript{108} Although the Probate Act is silent on the issue of the admissibility of the testator’s
declarations, the section setting forth the requirements of a valid will suggests that oral
declarations are inadmissible in view of the writing requirement contained therein. Ill. Rev.
Stat. ch. 110 1/2, § 4-3 (1979) provides: “Every will shall be in writing, signed by the testator
or some person in his presence and by his direction and attested in the presence of the
testator by two or more credible witnesses.” (Emphasis added).
\item \textsuperscript{109} Prinz v. Schmidt, 334 Ill. 576, 166 N.E. 209 (1929); Waters v. Waters, 222 Ill. 26, 78
N.E. 1 (1906). But see Werling v. Grosse, 76 Ill. App. 3d 834, 395 N.E.2d 629 (1979) (admit-
ted into evidence declarations against interest). This general exclusionary rule applies even
as to the issue of forgery, resulting in the exclusion of a decedent’s statement that he did
not have a will. Stepanian v. Asadourian, 283 Ill. App. 495, 1 N.E.2d 753 (1936).
\item \textsuperscript{110} Because these declarations are out-of-court statements of the decedent, the hearsay
rule will be triggered if the decedent’s statement is offered for the truth of the matter as-
serted. But where the statement is offered for another purpose, the hearsay objection cannot
be made. Thus, where the statement is offered to prove the decedent’s state of mind, on the
issues of capacity and undue influence, the hearsay objection should be overruled. See GARD,
IILLINOIS EVIDENCE MANUAL 334 (1963).
\end{itemize}

It is imperative to recall that the testator’s declarations must be related by a witness not
rendered incompetent by the Dead Man’s Act, regardless of the purpose for which those
declarations are submitted. The parties are, therefore, precluded from repeating the testa-
tor’s declarations, but their own admissions may be asserted against them. See note 4 supra.

In Teter v. Spomer, 305 Ill. 198, 137 N.E. 129 (1922), the testator’s declaration that his
son had offered the testator’s attorney $50,000 to change the testator’s will was not of the
offered bribe, but was admissible to prove that the testator may have intended to reduce the
share of the estate to be bequeathed to the son. See also GARD, IILLINOIS EVIDENCE MANUAL
335 (1963); Healea v. Keenan, 244 Ill. 484, 91 N.E. 646 (1910); Peet v. Peet, 229 Ill. 341, 82
Admissibility is conditional upon a finding that the statement is not too remote in time from the date upon which the will was executed.\textsuperscript{111} Additionally, only those statements consistent with the terms of the will are admissible to prove a competent state of mind.\textsuperscript{112} Testator declarations which are inconsistent with will terms are deemed inadmissible unless there exists other evidence tending to prove incapacity.\textsuperscript{118} The rationale for this distinction is that whereas the consistent statement is indicative of the testator's ability to understand the nature and extent of the disposition of his property,\textsuperscript{114} an inconsistent statement, standing alone, should not be indicative of a lack of capacity when such a statement may merely represent a change of intent.\textsuperscript{118}

The existing law concerning the admissibility of prior wills\textsuperscript{116} ap-

N.E. 370 (1907).

As to the issue of susceptibility to undue influence, see Reynolds v. Adams, 90 Ill. 134 (1878); Annot. 79 A.L.R. 1447 (1932). Note that not only oral declarations are admissible, but also deeds, checks, notes and other documents, including business documents, which tend to show the capacity to transact ordinary business. 3 James, supra note 3, at § 92.4(1). 111. Ravenscroft v. Stull, 280 Ill. 406, 117 N.E. 602 (1917) (error to admit declarations made 4 or 5 years prior to execution of will); Baker v. Baker, 202 Ill. 595, 67 N.E. 410 (1903) (no fixed rule can be given); see also note 70 supra.


116. See Schuyler, supra note 2, at 925.

It should be noted that the admission of a prior will into evidence can be disadvantageous to a proponent if in fact the will represents to the jury a disposition that they consider more fair than the will at issue. Courts have recognized the propensity for jurors to rewrite wills providing for an unequal distribution of property. Thus, where the prior will informs the jury as to the exact interests of the contestants, it can be very prejudicial. For example, in Heideman v. Kelsey, the Illinois Supreme Court reversed a lower court decision as tainted by a jury instruction identifying the contestant as the sole heir-at-law, thereby prejudicing the proponent. The court stated:

In this kind of case, it is highly important that trial errors be reduced to a minimum. This court made the following observation in a parallel situation in Turnbull v. Butterfield, 304 Ill. 454, 137 N.E. 476: "In a will contest, where the will seems to have made an unequal division of property there is a disposition in the mind of the average juror to hold such will invalid and to look for an excuse to do so, notwithstanding the law is that the testator may make such disposition of his property as he sees fit and may bestow his bounty where he wishes. This tendency on the part of jurors runs counter to the rule of law that they have nothing to do with the equity or inequity of a will and that the children of a testator have no property rights in the parent's property. These facts make it necessary that the jury be carefully instructed on the issue of mental soundness of the testator where
pears to contravene the rules regarding the admissibility of the testator’s oral declarations. Unlike prior consistent oral declarations, a prior consistent will is not admissible, unless the contestants admit to the testator’s sanity at the time of the execution of the prior will.\textsuperscript{117} Although an inconsistent prior will is inadmissible to show lack of capacity,\textsuperscript{118} it is admissible to show the interest of a disinherited beneficiary under the prior will where undue influence is alleged,\textsuperscript{119} though the prior will is inadmissible to show that undue influence was used to change the terms. If, however, the prior will is consistent, it is admissible for purposes of rebutting a charge of undue influence.\textsuperscript{120}

Statements made by a devisee at or near the time of the execution of the will are admissible by the contestant to show lack of testamentary capacity.\textsuperscript{121} Also, the acts, conduct and statements of the contestants are admissible on the issue of capacity.\textsuperscript{122} Admissibility into evidence of statements or acts of undue influence of individual proponents is not allowed against multiple defendants unless their interests are joint.\textsuperscript{123}

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\textsuperscript{117} Ill. 2d 601, 606-07, 131 N.E.2d 531, 534 (1956).
\textsuperscript{118} Burn v. Schmidt, 22 Ill. 2d 47, 174 N.E.2d 188 (1961); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1927).
\textsuperscript{119} Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1927); Floto v. Floto, 233 Ill. 605, 84 N.E. 712 (1908). \textit{But see} Aftalion v. Stauffer, 284 Ill. 54, 119 N.E. 981 (1918).
\textsuperscript{121} Passenheim v. Reinert, 362 Ill. 576, 1 N.E.2d 69 (1936) (ante-execution declaration of testator also admissible to rebut undue influence charge); Waters v. Waters, 222 Ill. 26, 78 N.E. 1 (1906). Such a rule relies on the rationale that it is more likely for the subsequent will to have been executed free of undue influence if it is in conformity to prior declarations than if it were contrary to such declarations. See Harp v. Parr, 168 Ill. 459, 48 N.E. 113 (1897). The rule has also been applied to consistent post-execution declarations. Herbolzheimer v. Herbolzheimer, 46 Ill. App. 3d 563, 361 N.E.2d 134 (1977).
\textsuperscript{122} Brainard v. Brainard, 259 Ill. 613, 103 N.E. 45 (1913); Egbers v. Egbers, 177 Ill. 82, 52 N.E. 285 (1898).
\textsuperscript{123} Rowcliffe v. Belson, 261 Ill. 566, 104 N.E. 268 (1914) (admitted checks drawn by the testator as admissions by the contestants as to the decedent’s capacity to transact business). \textit{See also} Chambers v. Appel, 392 Ill. 294, 64 N.E.2d 511 (1946) (judicial admission and admissions against interest by contestants discussed and distinguished).
\textsuperscript{124} Belfield v. Coop, 8 Ill. 2d 293, 300, 134 N.E.2d 249, 253 (1956). \textit{But see} Latham v. Rischel, 384 Ill. 478, 51 N.E.2d 531 (1943), distinguished in \textit{Belfield}, wherein the declarant himself can be called and interrogated as to his own misconduct. The result of the distinction is that if there is more than one beneficiary of the will in question, the contestant will have to waive the bar of the \textit{Dead Man's Act} with respect to the guilty proponent in order to secure testimony of that proponent's statement or conduct, when the other legatees are
Breach of Contract

Actions brought to establish a contract to make a will or a contract not to revoke an existing will do not challenge the will itself, but instead seek to vary the terms of the will. Contract actions of this type most frequently arise to enforce a joint dispositive scheme or an agreement to devise property in exchange for services. Although general contract principles apply in these cases, the contract and all of its terms must be proven by clear and convincing evidence, as opposed to the lesser standard of preponderance of the evidence. This standard is exceptionally onerous for the contestant.

The most difficult evidentiary problem is proving the existence of the will contract. Statements against interest of the decedent innocent parties. It should also be noted that statements of one proponent are not admissible against the others unless a conspiracy is alleged. Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956). See also Ginsberg v. Ginsberg, 361 Ill. 499, 198 N.E. 432 (1935); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1927); Joyal v. Pilotte, 293 Ill. 377, 127 N.E. 741 (1920).

124. Statements or admissions by the testator relative to revocation are governed by the statute on revocation. See note 47 supra. Declarations falling short of the statutory requirements are not sufficient to revoke the will. See, e.g., In re Estate of Mitchell, 305 Ill. App. 289, 27 N.E.2d 606 (1940). Once a valid revocation has been established, however, such declarations are admissible to show the state of mind of the testator at the time of revocation. In re Estate of Willavize, 21 Ill. 2d 40, 171 N.E.2d 21 (1914); In re Barrie’s Will, 393 Ill. 111, 65 N.E.2d 433 (1946); Burton v. Wylde, 261 Ill. 397, 103 N.E. 976 (1914); Craig v. Wismar, 310 Ill. 262, 141 N.E. 766 (1923); Craig v. Trotter, 252 Ill. 228, 96 N.E. 1003 (1911). See also Szarat v. Schuerr, 365 Ill. 323, 6 N.E.2d 625 (1937).

125. The joint dispositive scheme may consist of a joint, mutual, reciprocal, or joint and mutual wills. A joint will is one where two or more persons execute one document to serve as the will of all and disposes of property owned jointly or severally. A mutual or reciprocal will, on the other hand, are the separate wills of two or more persons which on their face, when considered together, are part of an integrated plan of disposition. Finally, a joint and mutual will is a single document containing reciprocal provisions. James, supra note 3, at § 42.5. See also Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909).


A court should enforce an alleged contract and order a distribution of the decedent’s estate different from that set forth in a validly executed will only after the contract’s existence and terms have been proved by clear, explicit and convincing evidence which leaves no reasonable doubt that (1) the contract was made; and,

(2) that there was a meeting of the minds as to all its terms.

See also Chambers v. Appel, 392 Ill. 294, 64 N.E.2d 511 (1946).

127. If the existence of a contract is established, the claimant then must prove performance of his or her obligations.

Wessel v. Eileenberger, 2 Ill. 2d 522, 119 N.E.2d 207 (1954). This proof may consist of showing performance of the services promised, or, in the case of contracts not to revoke, the
are admissible\textsuperscript{188} in such actions subject to certain important limitations. The most obvious limitation is that the witness testifying as to the statements cannot be one who is rendered incompetent under the Dead Man's Act.\textsuperscript{129} Additionally, the decedent's statements must have been made out of the presence of the party claiming under the contract and be accompanied by conduct indicative of the agreement.\textsuperscript{130} Even after the decedent's statements against interest are submitted into evidence, they are carefully scrutinized and may be rejected, although uncontradicted, if not clear and convincing.\textsuperscript{131}

Compounding the effect of the restrictions imposed upon the decedent's statements, all facts and circumstances going to the inconsistency or improbability of a contract are considered relevant.\textsuperscript{132}

\begin{footnotesize}
\begin{enumerate}
\item death of the first testator without drafting another will, in reliance on the mutual dispositive scheme. Only then can the appropriate relief be granted. Enforcement of the contract underlying the will may arise under many different theories or causes of actions. Most common is a suit in equity to enforce the contract of a joint and mutual will. Curry v. Cotton, 356 Ill. 538, 191 N.E. 307 (1934). Other forms of suits consist of: partition proceedings, Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909); equitable accountings, Jacoby v. Jacoby, 342 Ill. App. 277, 96 N.E.2d 362 (1950); quiet title proceedings, Boczkowski v. Kucharski, 13 Ill. 2d 443, 150 N.E.2d 144 (1958); construction of the will, Jusko v. Grigas, 26 Ill. 2d 92, 186 N.E.2d 34 (1962); suits to set aside deeds, First United Presbyterian Church v. Christenson, 64 Ill. 2d 491, 356 N.E.2d 532 (1976); and citation proceedings, In re Estate of Bell, 6 Ill. App. 3d 802, 286 N.E.2d 589 (1972). See also Contested Estates, supra note 1, at § 8.15.

While a separate action to enforce the contract or for damages can be instituted at any time within two years of the death of the testator, Ill. Rev. Stat. ch. 83, ¶ 24(e) (1979), a claim for specific performance may also be made. Contested Estates, supra note 1, at § 8.3.

The contract, to make a will or devise, sought to be enforced by specific performance may be oral. Werling v. Grosse, 76 Ill. App. 3d 834, 395 N.E.2d 629 (1979). A conveyance by the personal representative of an estate, however, will be granted only under very limited circumstances. Wessel v. Eilenberger, 2 Ill. 2d 522, 527, 119 N.E.2d 207, 210 (1954) (the granting of specific performance should be only in those cases "in which a gross fraud would be suffered by the promisee if specific performance were denied."). Moreover, specific performance will be denied where an award of damages would be adequate. Id. See also In re Estate of Johnson, 39 Ill. App. 3d 246, 350 N.E.2d 310 (1976).


129. Thus, the contestant is automatically precluded from testifying as to the decedent’s statements. See note 4 supra.

130. Fletcher v. Osborn, 282 Ill. 143, 118 N.E. 446 (1918); Wrestler v. Tippy, 280 Ill. 124, 117 N.E. 404 (1917).


132. Only self-serving statements of the decedent are not considered relevant. Dalby v. Maxfield, 244 Ill. 214, 91 N.E. 420 (1910); Oswald v. Nehls, 233 Ill. 438, 84 N.E. 619 (1908).
\end{enumerate}
\end{footnotesize}
The will of the testator is admissible as indicative of the absence of a contract. Actions of the decedent, as well as conduct of the claimant prior and subsequent to the decedent's death also are admissible.

Where the contract is alleged to be embodied in a will, different rules may apply. A presumption of a contract will arise when the document is the joint and mutual will of two parties. In such situations, the form of the will is considered to be the strongest evidence of the contract, although the party asserting that the instrument is both contractual and testamentary still has a signifi-


135. For example, in Freese v. Freese, 49 Ill. App. 3d 1041, 364 N.E.2d 983 (1977) the court held that a contract existed where the separate wills of the husband and wife contained the following provision:

It is understood by me that a Will is being made on this same day and date by my beloved wife [husband], disposing of her [his] property and that it is understood by both of us that this Will and her [his] Will are to be considered as reciprocal and mutual as the plan we have mutually made for the disposition of all of the property owned by us and each of us and the division of same between our children.

Id. at 1042, 364 N.E.2d at 984.

See also In re Estate of Willis, 33 Ill. App. 3d 279, 337 N.E.2d 35 (1975) (wherein the issue was whether a notice provision in a joint will was complied with).

136. Frazier v. Patterson, 243 Ill. 80, 90 N.E.2d 216 (1909); In re Estate of Willis, 33 Ill. App. 3d 279, 337 N.E.2d 35 (1975). When the reciprocal or mutual dispositive scheme is not embodied in the same instrument, the presumption does not arise. Thus, clear and convincing proof of a contract and the consideration to support it must be made aliunde. Frese v. Meyer, 392 Ill. 59, 69 N.E.2d 788 (1945); Freese v. Freese, 49 Ill. App. 3d 1041, 364 N.E.2d 983 (1977); Campbell v. Cowden, 18 Ill. App. 3d 500, 309 N.E.2d 601 (1974); Nat'l Bank v. Emerson, 335 Ill. App. 494, 82 N.E.2d 382 (1948). See also Jordan v. McGrew, 400 Ill. 275, 79 N.E.2d 622 (1948). A recital in mutual and reciprocal wills that they are contractual will stand alone, and no further proof of the contract is necessary. In re Estate of Kritsch, 65 Ill. App. 3d 404, 382 N.E.2d 50 (1978).

Coincidental dispositive provisions, expressions of gratitude, or declarations of intent are insufficient to raise the presumption of the existence of a contract. Because a promise to make a bequest is not enforceable absent all of the elements of a contract, declarations of an intent to make a bequest fall short of the definite and certain terms required. Willison v. Stoutin, 4 Ill. App. 3d 490, 280 N.E.2d 564 (1972). Even if the intent is accompanied by statements indicating an obligation, i.e., "I owe them for staying over there," the requisite specificity is missing. Likewise, expressions of gratitude for services rendered, absent any agreement for payment, are insufficient to support a contract even where the testator had declared an intention to make a bequest. In re Estate of McLaughlin, 1 Ill. App. 3d 940, 274 N.E.2d 618 (1971); Cain v. Hougham, 116 Ill. App. 2d 439, 253 N.E.2d 137 (1969). The contestant should be wary of a decedent's declaration of intent to bequeath since such statements are inconsistent with notions of contractual obligation. In re Estate of McLaughlin, 1 Ill. App. 3d 940, 274 N.E.2d 618 (1971).
Evidence in Will Contests

Evidence in Will Contests

cant burden of proof to establish a contract.\textsuperscript{137}

\textbf{Evidentiary Reform: Some Suggestions}

Evidentiary rules should reflect a concern for accurate reconstruction rather than encourage conflict by excluding probative information. Several areas of estate litigation would benefit from evidentiary reform. First, despite intense criticism, the Dead Man’s Act remains resilient, if not impenetrable. While its purpose was to prevent fraud by disqualifying interested persons from testifying, the statute may actually promote fraud by denying access to justice for litigants whose only evidence is their own testimony. In refusing to repeal the statute, the legislature exhibits a lack of confidence in attorneys and juries to distinguish truthful testimony from falsehood. Should the Act be repealed, the potentially false testimony would merely be subject to the same impeachment and scrutiny as fabricated evidence is in other cases. While the Dead Man’s Act remains a challenge to the trial attorney, whose investigation must uncover non-interested witnesses, attorney time would be far better spent in cross-examining and impeaching interested persons.

Lay opinion on the mental capacity of the testator should be prohibited, with the sole exception of the attesting witnesses. Under current law, non-attesting witnesses must testify as to facts supporting their opinions. The jury should be able to reach their own conclusion as to the ultimate issue in the case relying solely on the facts of the testator’s conduct as recounted by the lay witnesses. To establish rules for opinion testimony merely compounds, rather than cures, the problem.

Conversely, all of the decedent’s declarations should be admissible in evidence. This should include prior wills, statements inconsistent with the proffered will and declarations made to persons deemed incompetent under the Dead Man’s Act. Admittedly, the decedent is not available to refute or rebut such statements, but if both sides to the controversy are permitted to introduce the decedent’s statements, subject to cross-examination, prejudice should be minimal. Since the representative of the estate appears on behalf of the decedent, the decedent’s declarations could be conceived of as admissions and therefore be excepted from the hearsay rule.

\begin{itemize}
  \item \textsuperscript{137} Bonczkowski v. Kucharski, 13 Ill. 2d 443, 453, 150 N.E.2d 144 (1958).
\end{itemize}
The current exceptions to the rule regarding the inadmissibility of the testator's declarations weigh heavily in favor of the propo-
nent of the will. Moreover, the profound injustice codified in the Dead Man's Act is most often visited on the contestant since he is not entitled to any presumption as to the invalidity of the will. The combination of these factors promotes the successful use of undue influence on the aged and enfeebled and denies the rightful objects of their bounty equal access to justice. The burden of over-
coming the presumption of validity is adequately onerous indepen-
dent of additional obstacles. The will contest should proceed as an ordinary civil matter and not as an ordeal of confusion.