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When Does Influence Become Undue?

JOHN J. HOGAN*

Undue influence, a much abused term of art, can describe behavior ranging from the most mischievous Machiavellian maneuver to a seemingly innocent intrusion into a confidential relationship. This article will explore the role of undue influence as an inducement to the making of a will.

A warning flag of "reader beware" should be flown at this point. The use of the word "will" in two senses, *i.e.*, (1) an instrument in writing and (2) the intention or volition of the testator, can be confusing. Whether the will was the will of the testator or the will of another who, it is charged, used his will to obtain the will of the testator more to his will than the will of the testator is often the subject of confusion in judicial decisions and in topical writings.

In a non-legal context undue influence means:

> such influence over another [often presumed from the existence of very close relationships] as destroys his free agency in the eye of the law; such influence as prevents a person from exercising his own will and substitutes in its place the will of another (as by constraint, machination, or urgency of persuasion).[1]

As a legal term of art, undue influence was discussed as early as 1590 by Swinburne who termed it "immoderate opportunity." Three centuries later Jarman *On Wills* adopted the phrase undue influence.[2] The Illinois Supreme Court first used the term in 1866 in *Dickie v. Carter*[3] to observe that no "undue influence" appeared in the record. The remedy of setting aside the will of a testator unduly influenced originated in the late seventeenth or early eight-

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The title reflects a question posed at a morning coffee session, the phenomena which results in so much learning being shared by Bench and Bar in informal, yet professional, association. The material presented will, it is hoped, be helpful in answering that question.

The Probate Act references herein are to the Act prior to the 1975 Amendment, which rearranged and renumbered the provisions of the Act. By the time of publication, the amendments, if available, can be cross-referenced from the prior Act. The literature refers to the former numbering system. It is hoped that this method of reference will assist, and not hinder, additional research by the reader.

1. Webster's Second New International Dictionary 2772 (Unabridged ed. 1950).

2. For the history of the origin of the term, "undue influence," the author is indebted to King, *Undue Influence In Wills In Illinois*, 2 U. CHI. L. REV. 457 (1934-35) [hereinafter cited as King].

3. 42 Ill. 376 (1866).

eenth centuries in the Courts of Chancery.[4]

The equitable nature of an action to determine the invalidity of a will in whole or part was recognized in Illinois Chancery practice.[5] Prior to the 1964 court consolidation, the Illinois County and Probate Courts' jurisdiction was limited to proceedings to determine whether a will should be admitted to probate. Those courts decided whether the will conformed to the statutory requirements of execution and whether "fraud, forgery, compulsion, or other improper conduct . . . sufficient to invalidate or destroy the will" were present.[6] The will contest, predicated on undue influence, was without the jurisdiction of the County and Probate Courts; it would lie only in Chancery Court.[7]

The enactment of the Illinois Civil Practice Act and the consolidation of the courts have eliminated the Bill in Chancery to set aside the will. The remedy is now sought by filing "a petition in the proceeding for the administration of the testator's estate to contest the validity of the will."[8] No matter how eloquent or simple the terminology plaintiff must ask the court to grant relief which is essentially "equitable," to set aside a will previously admitted to probate.[9]

As the term "undue influence" consists of two words, so are there two distinct concepts, "influence" and "undue." Where undue influence is suspected, attention must be directed to two questions; (a) what factors "influenced" the testator to make the will? and (b) were these influences "undue?"

The dual nature of the undue influence inquiry was recognized in *Snell v. Weldon*[10] where the court considered whether an illicit rela-

4. King, *supra* note 2, at 458.

5. The history of the legislative authority for the Bill in Chancery is set forth in Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910). Mr. Justice Carter traced the development through the Northwest Territory Ordinance and the Territorial Laws of Illinois to the enactment of statutes after statehood was achieved.

Carter quotes the statute as it existed subsequent to Illinois' attainment of statehood as providing, *inter alia*, ". . . any person or persons interested may contest any will. . ." *Id.* at 260, 93 N.E. at 155. The legislators retained the basic equitable concept of the remedy by providing that the interested person shall ". . . by his or her bill in Chancery . . . contest the validity of the will . . ." *Id.* at 254, 93 N.E. at 157. This provision remained in the statutes and the succeeding acts until the 1939 amendments eliminated the "Chancery" Court under the Civil Practice Act. For detailed legislative history *see* Historical Note 3 ILL. S.H.A. § 90 and discussion in 3 JAMES ILLINOIS PROBATE LAW § 90 (1951). For a standard text under chancery practice *see* MCCULLOUCH, ILLINOIS LAW OF WILL CONTESTS (1929).

6. ILL. REV. STAT. ch. 3, § 69 (1975).

7. *See* Sheperd v. Yokum, 323 Ill. 328, 154 N.E. 156 (1926).

8. ILL. REV. STAT. ch. 3, § 90 (1975).

9. *Id.*

10. 239 Ill. 279, 87 N.E. 1022 (1909).

tionship between the beneficiary and testator could alone establish undue influence. In *Snell* it was charged that Mabelle, the beneficiary, exerted undue influence on the testator through correspondence. The court was impressed by Mabelle's writings:

> The language used in these letters was filthy beyond comparison and they contained the coarsest and most obscene words known to the vocabulary. They indicated the existence of meretricious relations between the writer and the testator, and the jury would naturally infer from their contents the existence of such relations. It scarcely need be said that the letters were no evidence of such relations or of the existence of any fact, and if they had been, they would still have been incompetent. The existence of improper relations with a legatee would be no reason whatever for setting aside the will, and would not, of themselves, establish undue influence.[11]

The court did not cease inquiry at that point but concluded:

> When there is proof that influence has been exercised by some person upon a testator, the existence of unlawful relations with that person may be considered for the purpose of determining whether the influence was effective or undue, but not otherwise . . . . the fact that his conduct and sentiments are not in accordance with good morals is no ground for setting aside his will.[12]

That a finding that the testator was "influenced" in the making of his will, as revealed by his relationship to the beneficiary, is not sufficient to establish that such influence is "undue," is developed in another line of cases. For example, in *Blackhurst v. James*[13] the court considered the testator's relationship to one of his daughters with whom testator resided. In the *Blackhurst* case this daughter suggested: "Oh Pappy! I would never let them have a dollar" "them" being another daughter and grandchildren.[14] This suggestion was apparently adopted by the testator for his will included the following clause:

> *Fifth*—My daughter . . . and grandchildren . . . have for a period of time last past tormented and annoyed me with reference to the management of my property, and . . . have recently filed a petition . . . asking that a conservator be appointed for me . . . they have treated me unjustly, unfairly, and improperly. . . .[15]

11. *Id.* at 291-92, 87 N.E. at 1026.
12. *Id.* at 292, 87 N.E. at 1026-27.
13. 293 Ill. 11, 127 N.E. 226 (1920).
14. *Id.* at 28, 127 N.E. at 233.
15. *Id.* at 17, 127 N.E. at 229.

The *Blackhurst* court did not specifically hold that this exclusionary article evidenced freedom from influence. The court did conclude, however, that notwithstanding the influence and persuasion on the part of the daughter with whom the testator resided, it was not shown that the testator was deprived of his free agency.

It must be conceded that every person who ever made a will was "influenced." For example, the testator was influenced in his decision to make a will. The decision to make a will may have been motivated by the advice of counsel, by a chance reading of literature published by a Bar Association, by a bank news letter, by a desire to avoid taxes or perhaps by the real or fancied experience of a relative or friend. Further, the selection of a beneficiary or beneficiaries is a result of a variety of influences. A primary influence, almost always reflected in the dispositive provisions of a will, is the love or lack of love of a spouse or descendants.

This type of motivation, which prompts the testator to make a will or to select the beneficiary, is not the type that vitiates the instrument as the will of the testator. The law does not require the testator to dispose of his property in a humane or just manner. The testator has the right to make unequal distribution among his heirs or to distribute to strangers to the exclusion of his heirs.[16]

It is not the motivation which prompted the testator to make a will or to select a beneficiary or to determine the benefits to be received that vitiates the will as the will of the testator. It is the interplay of the facts and circumstances under which the testator was influenced which must be considered. If it can be shown that the combination resulted in the testator being influenced "unduly," then the instrument previously admitted to probate as the will of the testator must be set aside. James details the elements which are necessary to vitiate a testator's disposition as actions which:

(1) are directly connected with the execution of the will;
(2) operate at the time of the execution of the will;
(3) are specifically directed toward procuring the will in favor of a particular party or parties;
(4) must result in the execution of the will;
(5) and must produce a perversion of the testator's mind as a species of fraud.[17]

16. Applehaus v. Jurgenson, 336 Ill. 427, 168 N.E. 327 (1929). *See also*, Farmer v. Davis, 289 Ill. 392, 124 N.E. 640 (1919); Kellan v. Kellan, 258 Ill. 256, 101 N.E. 614 (1913). The influence of affection for, kindness toward, or care of the testator are not, per se, "undue." Alter v. Clure, 329 Ill. 519, 161 N.E. 129 (1928).

17. 3 JAMES ILLINOIS PROBATE LAW § 92.3, p. 147-49 (1951) [hereinafter cited as JAMES].

Consideration of Illinois case law illustrates the operation of the elements delineated by James.

In *Shevlin v. Jackson*[18] it was not shown that the beneficiary, charged with exercising undue influence, performed actions directly connected with the execution of the will. It was not established that he either procured or was present at the will execution. The court held that there could not have been influence sufficient to invalidate the will, since such influence, even if it existed, was not connected with the execution of the will. *Butler v. O'Brien*[19] involved a fact situation similar to *Shevlin* with the additional fact that the evidence showed that the beneficiary had arranged for a witness to sign the will. This was held to be the element sufficient to a finding of undue influence.

The requirement that the influence must operate at the time of the execution of the will was illustrated in *Peters v. Cott*.[20] There it was shown that the beneficiary was present at the execution, where he assisted the testator in affixing his mark to the will. The court found undue influence in that the influence was present at the time the will was executed.

Redmond v. Steele[21] affirms the principle that the actions complained of must be specifically directed to procuring the will in favor of a particular party. The refutation of the contestants' arguments by the court illustrates the rule:

> The contestants vigorously argue that there was a confidential relationship between the testator and Catherine Steele. The two had gone together and discussed marriage for over a period of 23 years, and there unquestionably existed a feeling of mutual trust and confidence. They were engaged to be married, they were saving money in their joint account to purchase a home and were looking for a home to buy in Aurora. There is not the slightest suggestion in the record that Catherine was in any way the dominant party. The testator was in good health, capable of driving back and forth between Morris and Aurora continually up to the time of his death. If the bank accounts, the execution of the will, and the change in the insurance policy had been the product of Catherine Steele's super-imposed influence, and if they displeased Redmond in any way, he had every opportunity to make a change. Even accepting the premise of the appellants, that there existed

18. 5 Ill. 2d 43, 124 N.E.2d 895 (1955).
19. 8 Ill. 2d 203, 133 N.E.2d 274 (1956).
20. 15 Ill. 2d 255, 154 N.E.2d 280 (1958).
21. 5 Ill. 2d 602, 126 N.E.2d 619 (1955).

> between the parties here a confidential relationship, the evidence utterly fails to show any participation by the chief beneficiary.[22]

James' fourth element, that the influence to be undue, must result in execution of the will, is axiomatic. If the person alleged to have been influenced did not execute a will, then the influence, whatever it may have been or whoever might have exercised it, could not possibly have been "undue." Nonetheless, the courts always seem to recite this element.[23]

James' last element of "undue influence," actions which "produce a perversion of the testator's mind as a species of fraud,"[24] is represented as having its origin in *Smith v. Henline*.[25] However, the *Henline* court used the term "species of constructive fraud," while commenting that it would not undertake to define it by any "fixed words."[26]

The "perversion of testator's mind" is the essence of the actions (*i.e.*, all of those actions concerning inducement, procurement and execution of the will) which makes them so tainted as to be characterized as undue. It is suggested that the statement in James predicated on *Henline* is inaccurate. Fraud, or a species of fraud, is a separate ground for contesting the will; to consider "undue influence" as a species of fraud is looseness of terminology which does not define the elements of undue influence with clarity. Undue influence is a genus, as is fraud, rather than either being a species of the other. The characteristic of undue influence which makes it abhorrent is that it is:

> . . . exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances . . . .[27]

Fraud is characterized by its trickery, which deceives the testator into executing a will while believing it to be some other document.

The five elements discussed above are generally stated *in haec verba* or paraphrased to be those consituting the basis for an undue influence finding. There is rarely enumeration of an additional element which gives rise to the cause of action and which is essential

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22. *Id.* at 610-11, 126 N.E.2d at 624.
23. JAMES, *supra* note 17, at § 92.3, p. 149n.41 and the cases cited therein.
24. *Id.* at 149.
25. 174 Ill. 184, 51 N.E. 227 (1898).
26. *Id.* at 201, 51 N.E. at 232. The court did emphasize the "free agency" aspect of this term.
27. Hyatt v. Wroten, 184 Ark. 847, 43 S.W.2d 726, 728 (1931).

to maintaining the cause. There must be detriment suffered by the contestant as a result of the benefit procured by the defendant charged with having exercised the undue influence. Under the Probate Act, the contestant must show that he is an "interested person,"[28] who has a "direct existing pecuniary interest which will be detrimentally affected by the probate of the will."[29]

A will contest may be predicated on any ground which is sufficient to invalidate the will. The Illinois statute provides ". . . [a]n issue at law shall be made whether or not the instrument produced is the will of the testator."[30] The common grounds of contest include fraud, compulsion, lack of testamentary capacity, mistake, and undue influence. The last being the subject under consideration, must be distinguished from the others.

Fraud, without regard to any element of undue influence, may be asserted as a ground for either refusing admission of the will to probate, under section 69 of the Probate Act,[31] or for contesting the will under section 90[32] of the Probate Act. *Stuke v. Glaser*[33] defined "fraud" as:

> . . . 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. While it would be a fraud to procure a signature to a will by a person who was known to be in an unconscious condition from disease and incapable of voluntary and intelligent action, it is not the character of fraud intended by the statute.[34]

In the view of one commentator, the fraud must be analagous to that which will invalidate a deed: (1) misrepresentation of material fact; (2) made for the purpose of inducing the testator's disposition of the property; (3) the misrepresentation must be untrue; (4) known by the "misrepresentor" to be false; (5) the testator must rely on the statement; and (6) the misrepresentation must relate to a material fact.[35]

It is essential to an understanding of undue influence, that one

28. ILL. REV. STAT. ch. 3, § 90 (1975).
29. *See* JAMES, *supra* note 17, at § 90.7, p. 121-25 and cases cited therein.
30. ILL. REV. STAT. ch. 3, § 92 (1975).
31. ILL. REV. STAT. ch. 3, § 69 (1975).
32. ILL. REV. STAT. ch 3, § 90 (1975).
33. 223 Ill. 316, 79 N.E. 105 (1906).
34. *Id.* at 320-21, 79 N.E. at 107.
35. Dyer, *Will Contests*, 1951 ILL. L.F. 416.

must also exclude the element of compulsion. Compulsion may be shown to contest the admission of a will to probate.[36] *Shepherd v. Yokum*, in considering the scope of a hearing to admit a will to probate, held that "compulsion" was ". . . actual constraint or pressure, physical or otherwise, amounting to duress, or threats to compel the execution of the instrument."[37] *Shepherd* also held that undue influence is not included within the terms "fraud . . . compulsion, or other improper conduct" as grounds to deny admission of the will to probate.[38] However, it is the opinion of the author that if either fraud or compulsion, as defined above, is sufficient to deny the admission of a will to probate, either must be sufficient to set aside a will in a contest proceeding under section 90 of the Probate Act.

Undue influence is further distinguished from either fraud or compulsion in that the latter requires malicious intention on the part of the person procuring the will or its execution. There need not be any malice present in undue influence. Undue influence may be present even though the person exercising it believes that he is acting for a worthy purpose.[39]

A simple overview, analyzing the persons involved in each of the bases of will contest, will clarify the different factors involved in each:

(1) Lack of testamentary capacity: a condition *of* the testator without action of any other person. Thus, the influences exerted, of whatever type, are immaterial.
(2) Mistake: error *by* the testator with or without action by any other person.
(3) Fraud: deceit perpetrated *upon* the testator by some other person.
(4) Compulsion: an action involving an element of force, physical or psychological, perpetrated *upon* the testator by another person.
(5) Undue influence: the testator possesses testamentary capacity; there is no mistake, for the testator intends to execute the will; there is no fraud, for the testator knows that he is signing a will, not a credit application; there is no compulsion, *i.e.*, force.

If there were lack of testamentary capacity, if the testator made a mistake, if there were fraud in execution, if there were compulsion,

36. ILL. REV. STAT. ch. 3, § 69 reads: "the will . . . admit to probate . . . unless there is proof of compulsion. . . ."
37. 323 Ill. 328, 335, 154 N.E. 156, 159 (1926).
38. *Id.*
39. Rutherford v. Morris, 77 Ill. 397 (1875).

an issue at law can be made as to each of these. Undue influence may be present in conjunction with each or all of the others, but it is not dependent upon a showing of any. The "issue at law" of undue influence, if made and proven, itself will invalidate the will. So it is with the other grounds; each can stand alone to contest the will. Generally, the contestant will plead each in the alternative or in some combination under the liberal pleading practice now permitted.

In attempting to prove that the influence was undue, rarely are there situations which permit of direct evidence. That the elements of undue influence[40] existed under the circumstances relating to the testator generally must be shown by proof of those facts from which the inference can be drawn.[41] The probability of a witness admitting that the influence which he exercised was of an "undue" nature is at best minimal. The law, recognizing the practicalities and impracticalities of life, raises a rebuttable presumption, under certain circumstances, that the influence exerted on the testator was undue.

Belfield v. Coop[42] held that the presumption that the testator was the subject of undue influence arises when:

> (1) a fiduciary relationship exists between the testator and the devisee, who received a substantial benefit under the will.
> (2) the testator is a dependent and the beneficiary a dominant party.
> (3) the beneficiary is directly connected with the making of the will, whether by its preparation or by participating in its preparation and execution.[43]

The court emphasized that the existence of a fiduciary relationship is essential and expressly repudiated any prior language to the contrary.

The fiduciary relationship recognized as essential to the presumption, may be a relationship existing either as a matter of law or as a matter of fact.[44] The former involves such relationships as

40. JAMES, *supra* note 17, at § 92.3, p. 147-49.

41. CONTESTED ESTATES (I.C.L.E.) §§ 2.40 *et seq.* (1973).

42. 8 Ill. 2d 293, 134 N.E.2d 249 (1956).

43. *Id.* at 309, 134 N.E.2d at 258; Herbolsheimer v. Herbolsheimer, 60 Ill. 2d 574, 328 N.E.2d 529 (1975); Kahn, *New Doctrine of Undue Influence*, 45 ILL. BAR J. 436 (1956-57) [hereinafter cited as Kahn] advocates a contrary rule, *i.e.*, elimination of elements 1 and 2. He also holds that the presumption arising from merely the participation in the preparation by the principle beneficiary is a "fairer and sounder rule." *See also Comment,* ILLINOIS PATTERN INSTRUCTIONS (2d ed. 1971) § 200.03 [hereinafter cited as I.P.I.].

44. Wiik v. Hagen, 410 Ill. 158, 101 N.E.2d 585 (1951). *Comment*, I.P.I., *supra* note 43, at § 200.03. 45. Kolze v. Fortstron, 412 Ill. 467, 107 N.E.2d 686 (1952), where the relationship arises as a matter of fact; *see* Sherman v. Sherman, 359 Ill. 574, 71 N.E.2d 16 (1947), where

attorney-client, guardian-ward, trustee-beneficiary; the latter arises from factual situations wherein special confidence is reposed in a person who by the fact of such confidence must act in good conscience and in good faith.[45]

As to the second element mentioned by *Coop*, dominance, it should require nothing more than the converse of the proposition to demonstrate that the dominance must be "over" the testator. If the testator is dominant, whatever the dispositive plan of the testator, the document necessarily evidences his volitional intention.

Having considered fraud, coercion and improper conduct, those acts which do not constitute undue influence; having noted the remedy available to the victims of undue influence—the will contest; and having alluded to the difficulty of proof and having set forth factual situations where a presumption will arise, it is timely to attempt an accurate and practical definition of "undue influence."

In 1898, *Smith v. Henline*[46] adopted an encyclopedic definition of undue influence:

> . . . any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do if left to act freely.[47]

A critic of this definition characterized the term "undue influence" as a "cliche" and charged that the Illinois Supreme Court in limiting the *Henline* definition: (1) added further vague phraseology to it; (2) built up a highly technical law of evidence in reversing cases decided under it; (3) made acute distinctions on the language of the instructions given in such trials; (4) raised high standards of proof, which the contestant must scale to permit his case to be submitted to a jury; (5) raised the standard of particularity of pleading by the contestant; and (6) shifted the burden of going forward with the evidence to militate against the contestant.[48]

In addition to burdens which fall on the shoulders of the practioners, from a confusion of definition, there has been dissatisfaction with the presumption rule. One commentator regrets the fiduciary relationship element expressed in the *Belfield v. Coop* presumption

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the court held that the proof of the facts giving rise to the fiduciary relationship must be so strong, unequivocal and irrestible as to lead to but one conclusion. Although this case dealt with a constructive trust, its reasoning would be equally applicable to wills.

46. 174 Ill. 184. 51 N.E. 227 (1898).

47. *Id.* at 203, 51 N.E. at 233.

48. King, *supra* note 2, at 461.

rule, contending that it makes "even more difficult the burden of contestants to set aside wills in Illinois."[49]

Notwithstanding the position of commentators, tempered in the crucible of litigation experience, that decisions make it difficult to maintain a contest on the grounds of undue influence, it is submitted that wills should not be invalidated on less than limited, precise grounds. While the bases for contests may be limited, there must be exactness of definition.

Based upon the authorities reviewed, this author believes that "undue influence" is neither a mere cliche nor the *Henline* species of fraud, nor is it so mercurial of nature as to defy definition.

The decisions, when considering whether undue influence has been shown, devote much space to recitation of the facts—the entire picture is portrayed. It is submitted that the following is an accurate summary of the proposition: *Where under the totality of the factual situation surrounding the entire testamentary transaction, a person influences the testator to the degree that the instrument becomes an expression of the intention and volition of that person rather than the testator, the influence has been "undue."*

As previously noted, fraud, mistake and coercion are not elements of undue influence. They may be alternate bases for contesting a will but they should not be included within the concept or its definition.

The problems of pleading and evidence are not within the scope of this article. However, it should be remembered that the ultimate question may be answered through the *Belfield v. Coop* presumption. However, that presumption is not definitive of undue influence; rather it serves only an evidentiary function. The ultimate question always involves the query as to whether some person substituted his intentions and volition for that of the testator.

Undue influence for purpose of jury instruction in Illinois is:

> . . . influence exerted at any time upon the decedent which causes him [her] to make a disposition of his [her] property that is not his [her] free and voluntary act.[50]

As was initially indicated, there is a two-fold inquiry: was influence exerted? If so, was the influence undue? Nothing less than the totality of the transaction, including the relationship of the parties, the inducement, preparation, contents and execution of the will, should be considered in determining the question of fact—did some-

49. Kahn, *supra* note 43, at 436.
50. I.P.I., *supra* note 43, at § 200.09.

one influence the testator to such an extent that the instrument does not reduce to writing the true and volitionary intention of the testator?[51] If all of the evidence necessitates an affirmative answer, the influence is truly "undue."

51. The volitional act of the testator is, at times, termed "free agency." Smith v. Henline, 174 Ill. 184, 51 N.E. 227 (1898); Sulzberger v. Sulzberger, 372 Ill. 240, 23 N.E.2d 46 (1939); Swenson v. Wintercorn, 92 Ill. App. 2d 88, 234 N.E.2d 91 (1968); Blackhurst v. James, 293 Ill. 11, 127 N.E. 226 (1920); and as "free act," I.P.I., *supra* note 43, at § 200.09.