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5/12/88

Memorandum 88-22

Subject: Study L-621 - Confidential Relationship in Will Contests

In will contests, there is a presumption that a beneficiary exercised undue influence on the testator if the following three tests are satisfied:

(1) The beneficiary has a confidential relationship with the testator.

(2) The beneficiary actively participated in procuring the will.

(3) The beneficiary gets substantial benefits under the will and is not a normal object of the testator's bounty. 7 B. Witkin, Summary of California Law *Wills and Probate* § 111, at 5625 (8th ed. 1974).

In 1985, attorney Luther Avery of San Francisco wrote to suggest that the Commission review this presumption. A copy of his letter is attached as Exhibit 1. He sent an article, Whitman & Hoopes, *The Confidential Relationship in Will Contests,* 1985 Trusts & Estates 53, a copy of which is attached as Exhibit 2. The staff has reviewed the presumption, and concludes that legislation is not needed.

Staff Analysis

The authors of the article (Exhibit 2) want a nationally uniform rule on the presumption of undue influence arising from a confidential relationship. However, they do not recommend any particular rule. They do not cite any state statute or recommended uniform law on the subject, and the staff has not found any. The authors do not say that California law is unsatisfactory, but merely that the law is not uniform from state to state. The staff finds the argument for uniform legislation unconvincing.

In California, some presumptions are codified in the Evidence Code and in other codes, but the codified presumptions are not exhaustive; many presumptions are in common law or await classification by the courts. Evid. Code § 630 comment, § 660 comment. See generally *id.* §§ 630-669.5.

The confidential relationship presumption in California is court made. In Estate of Gelonese, 36 Cal. App. 3d 854, 863, 111 Cal. Rptr.

833 (1974), the court held a presumption of confidentiality arises from the parent-child relationship. However, other cases hold that a presumption of confidentiality does not arise from other blood relationships. E.g., Estate of Llewellyn, 83 Cal. App. 2d 534, 562, 189 P.2d 822, 191 P.2d 410 (1948) (brother: no presumption).

Two presumptions could be codified: One is the overall presumption of undue influence arising from the combination of confidentiality, active participation, and unnatural disposition. The other is the subsidiary presumption of confidentiality arising from the parent-child relationship. The staff would not codify either presumption.

The overall presumption of undue influence does not need to be codified because it is now satisfactory, and codification might unnecessarily rigidify the rule.

The subsidiary presumption of confidentiality arising from the parent-child relationship should not be codified, because it is so limited. The existence of a confidential relationship is usually a question of fact. 7 B. Witkin, *supra* § 111, at 5626. The parent-child case is the only one that is not a question of fact. This is of such narrow application that it does not appear to be worth codifying.

A peculiarity of the presumption of undue influence is that the closer the blood relationship, the more likely there is to be a confidential relationship satisfying the first test, but the less likely the beneficiary is to be an unnatural object of the testator's bounty under the third test. So one element of the doctrine works against the other.

If the Commission wants, we could send the proposal to codify the confidential relationship doctrine to the National Conference of Commissioners on Uniform State Laws for their review and possible inclusion in the Uniform Probate Code.

Respectfully submitted,

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John H. DeMoully, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Dear John:

While the Law Revision Commission is revising the Probate Laws, one needed area of review, the "confidential relationship" doctrine as to procedures, is will contests.

I enclose Whitman and Hoopes, "The Confidential Relationship in Will Contests", Trusts & Estates, February 1985, which is a good exposition of some of the issues.

Yours sincerely,

Luther J. Avery

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Enclosure
1. Article

The Confidential Relationship In Will Contests

An organized move towards creating a nationally uniform set of rules seems called for

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The existence of a confidential relationship between a testator and beneficiary of a will can be an important factor in a will contest. Indeed, these rules often decide will contests. While it has been suggested that we ultimately develop better legal rules by considering each state as a separate experimental laboratory,[1] the confusion created by widely varying state rules also has been noted.[2] The authors believe it is time to unify and standardize the rules of confidential relationship applied in will contests.

In many jurisdictions, courts now hold that if a substantial beneficiary is found to stand in a confidential relationship with a testator, and that beneficiary actively participated in the preparation or execution of the will, a rebuttable presumption of undue influence arises.[3] But some jurisdictions additionally require that the benefits received be "undue"[4] or "unnatural,"[5] or permit other "suspicious circumstances" to substitute for active participation.[6] While the presumption of undue influence applies, in one form or another, in nearly every jurisdiction,[7] the definition of what constitutes a confidential relationship clearly lacks uniformity.[8]

Confusion also exists as to the effect of the finding of the existence of the presumption.[9] Generally, if the proponent offers no evidence in rebuttal, the contestant is entitled to a directed verdict.[10] If rebuttal evidence is presented, the presumption disappears from the case, leaving the burden of persuasion on the contestant.[11] In a few jurisdictions, however, the presumption creates a prima facie case, permanently shifting the burden of persuasion to the proponents.[12]

The Confidential Relationship

The question of whether a confidential relationship exists is treated differently from state to state. While it is clear that a confidential relationship exists as a matter of law between a testator and his doctor, lawyer, clergyman or close business associate,[13] when other categories of relationships are involved, each state's law must be consulted; for state law varies widely.

For example, consider the question of whether there is a confidential relationship between husband and wife. In some states,[14] "[i]t is generally held that there is no such thing as a confidential relation between husband and wife in the law governing will contests." Yet other jurisdictions follow the rule that the issue of whether a confidential relationship exists between husband and wife is a question of fact.[15]

The law's treatment of consanguinity is similarly erratic. In one jurisdiction,[16] consanguinity is "an important and material fact in considering the question of whether in fact a confidential relationship exists. . ." Yet elsewhere,[17] consanguinity is considered irrelevant.

When a rule of law does not govern the question of whether a particular relationship is confidential for purposes of will contests, then an issue of fact exists. A typical judicial statement of the standard to be used is that a confidential relationship exists "whenever trust and confidence is reposed by one person in the integrity and fidelity of another."[18] In this area there is uniformity. The difficulty arises in determining whether one of the various rules of law applies to render a particular relationship either confidential, or not, as a matter of law.

Active Participation

There is also a lack of uniformity in the requirement of a showing of active participation in the preparation or execution of the will on the part of the person alleged to have unduly influenced the testator by means of a confidential relationship.

In some states, a showing of active participation is necessary in addition to the existence of a confidential relationship between a beneficiary and a testator.[19] In other states, *additional* suspicious circumstances, such as a substantial gift[20] or a weakness of mind of the testator,[21] *must* be shown. And in still

other jurisdictions, weakness of mind[22] or other suspicious circumstances[23] may serve as *substitutes* for active participation, in that *either* active participation *or* other suspicious circumstances may be shown.

Compounding the confusion, there are differing views as to what constitutes active participation. There appear to be two schools of thought. According to one, there is no active participation unless there is personal participation in the actual drafting or execution of the will.[24] According to the other, active participation may be found to exist where there is only conduct by a beneficiary prior to the drafting or execution of the will.[25]

It has been held, moreover, that a presumption of undue influence does not arise where a beneficiary participated in the preparation of the will at the request of the testator.[26]

Unnatural Disposition

Another trap for unwary practitioners in the area of confidential relationship is the rule that, to raise a presumption of undue influence, it must be shown that the person alleged to have unduly influenced the testator received unnatural or undue benefits under the will. This is the law in some states,[27] in others it is not,[28] and, no doubt, in still others no one can be sure what the law is.[29]

Need for Uniformity

The foregoing suggests a need for uniformity in the law governing confidential relationship in will contests.

Under the current state of affairs, it is difficult to give counsel in this area; it is difficult to settle cases. There is no good reason why an attorney should have to search through ancient state decisions to try to find out whether cousins stand in a confidential relationship with each other as a matter of law, whether they *do not* stand in a confidential relationship as a matter of law, or whether the question is one of fact. And there is even less reason for the unpredictability and uncertainty that exists when, as is often the case, there is no clear answer to be found.

This is not a case of jurisdictions deliberating carefully over the pros and cons of various rules, and then deciding on different rules. Rather, the rules in this area arose in almost accidental fashion and were never rationalized by the promulgation of uniform acts or a Restatement. The presumption of undue influence appears to have developed out of the English rule of equity

In some states, to raise a presumption of undue influence, it must be shown that the person alleged to have unduly influenced the testator received unnatural or undue benefits under the will

by which a presumption of undue influence automatically arose when a donee having a confidential relationship with a donor received an *inter vivos* gift.[30]

The *inter vivos* gift rule does not apply very well in a testamentary context. Its rationale is that an *inter vivos* gift passes property that otherwise would be retained by the donor, who is unlikely to part with property without something in return.[31] A testamentary conveyance, on the other hand, passes property in which the testator's interest must cease anyway.[32]

Recognizing that the arguments for the presumption are weaker in the case of testamentary transfers, the English courts early on added the requirement of active participation.[33] For the same reason, American courts have adopted a confusing array of additional requirements making for unnecessary uncertainty in the application of the doctrine.

Determining the Uniform Rules

The diversity of rules in the area of confidential relationship in will contests suggests a need for uniformity more than a need for any particular set of uniform rules.

The root issue is whether the presumption of undue influence is favored or disfavored. On the side of the presumption is a need to protect testators and the expectant objects of their bounty[34] from the machinations of those who would thwart the free will of testators. Also on the side of the presumption is the fact that undue influence is difficult to prove affirmatively. The only evidence is usually circumstantial, and it is easy for wrongdoers to cover their tracks.[35]

Other considerations, however, militate against too much enthusiasm for the presumption of undue influence. In particular, there is the policy, deeply rooted both in the common law[36] and in Anglo-American notions of individual liberty, of freedom of testation.[37] There is every reason to believe that when the issue of confidential relationship is one of fact, jurors will often allow their own feelings as to how the testator should have disposed of his property to influence their conclusion on the confidential relationship issue. Justice Tobringer of California has stated that "[i]t does appear, from the cases appealed, that the jury finds for the contestant in over 75 percent of the cases submitted to it. But the fact that juries exhibit consistent unconcern for the wishes of testators should come as no surprise. Indeed, the tendency of juries in this respect is so pronounced that it has been said to be a proper subject of judicial notice."[38]

Another view sometimes appearing in the judicial decisions, which is used to justify restriction of the presumption of undue influence, is that influence arising from a husband and wife relationship is always proper, and should therefore never result in a presumption of undue influence.[39] One court has stated that "a wife ought to have great influence over her husband, and it is one of the necessary results of proper marriage relations, and that it would be monstrous to deny to a woman who is generally an important agent in building up domestic prosperity, the right to express her wishes concerning its disposal."[40]

This view, however, is far from universal. It could be argued that, in an age in which second marriages are common, there is an increased danger that children of first marriages will be unfairly disinherited by a susceptible parent.

II. Conclusion

A uniform set of rules on confidential relationship could reflect a balancing of the competing goals. Whatever the rules that might ultimately be adopted, an organized move towards creating a nationally uniform set of rules seems clearly called for. □

FOOTNOTES

1. See, Justice Holmes' remarks in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (exalting the benefits of "social experiments . . . in the insulated chambers afforded by the several States").

2. Richard Wellman, for example, Reporter for the Uniform Probate Code, has argued for the need for the Uniform Code by pointing to the disarray that plagues the institution of probate in America. See, Wellman, The Uniform Probate Code: Blueprint for Reform in the 70's, 2 Conn. L. Rev. 453, 455 (1970).

3. *See, e.g., In Re Estate of Schwartz*, 307 So.2d

338, 362 (Fla.App. 1981); ATKINSON ON WILLS § 101 at 550 (2nd.ed.1953). *But see, Blackmer v. Blackmer*, 165 Mont. 69, 74, 525 P.2d 559, 563 (1974) (taking the apparently unique position that "[u]ndue influence is never presumed . . .").

4. *See, e.g., Estate of Weickum*, 317 N.W.2d 142, 145 (S.D. 1982); *In re Estate of Anders*, 88 S.D. 631, 226 N.W.2d 170 (1975); *In re Metz' Estate*, 78 S.D. 212, 100 N.W. 2d 393 (1960); *Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971).

5. *See, e.g., Estate of Niquette*, 264 Cal. App. 2d 976, 71 Cal. Rptr. 83, 87, 88 (1968); ATKINSON ON WILLS § 101 at 550 (2nd ed.1953).

6. *See, Estate of Komarr*, 46 Wis.2d 230, 175 N.W.2d 473 (1970) cert. den. 401 U.S. 909 (to raise the presumption, active participation need not be shown where it is shown that testator was weak of mind).

7. *See, Blackmer, supra*, n.1.

8. For a general discussion, see Comment, *Blackmer v. Blackmer*, Presumption of Undue Influence in Montana, 37 Mont. L. Rev. 250 (1976); Note, Confidential Relationships and Undue Influence in Wills in Mississippi, 42 Miss. L. J. 146 (1971); Note, Will Contests, Burden of Proof as to Undue Influence, Confidential Relationships, 44 Marq. L. Rev. 570 (1961).

9. *Compare, Franciscan Sisters Health Care Corp. v. Dean*, 102 Ill. App.3d 950, 57 Ill. Dec. 797, 429, N.E.2d 914 (Ill. App. 1981) (holding that trial court misconstrued the effect of the presumption of undue influence in shifting the burden of persuasion, rather than merely the burden of production, onto the proponents) with, *Estate of Komarr, supra* (holding that once the presumption is raised, burden of persuasion shifts permanently to the proponents.)

10. *See, e.g., Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); ATKINSON ON WILLS § 101 at 551-552 (2nd ed.1953).

11. *See, e.g., Franciscan Sisters, supra*, n.9; ATKINSON ON WILLS § 101 at 551-552 (2nd ed.1953).

12. *See, e.g., Estate of Komarr, supra*, n.9; ATKINSON ON WILLS § 101 at 551-552 (2nd.ed.1953).

13. ATKINSON WILLS, § 101 at 550 (2nd ed. 1953).

14. *Knight's Estate*, 108 So. 2d 629, 631 (Fla. App. 1959).

15. *Robbins' Estate*, 172 Cal. App. 2d 549, 342 P.2d 933 (1959).

16. *Estate of Gelonese*, 36 Cal. App. 3d 854, 864, 111 Cal. Rptr. 833, 839 (1974).

17. *Estate of Sensenbrenner*, 89 Wis.2d 677, 688-694, 278 N.W.2d 887, 892-895 (1979) (upholding the trial court's finding that no confidential relationship existed between the testator and her son, where the record did not indicate that the son acted as a confidential advisor to his mother on estate planning matters).

18. *Estate of Baker*, 131 Cal. App.3d 471, 480, 182 Cal. Rptr. 550, 556 (1982). See, also, *Heer's Estate*, 316 N.W.2d 806, 808 (S.D. 1982); *Bleidt v. Kantor*, 412 So.2d 769, 771 (Ala. 1982).

19. *In Re Anderson*, 52 Ill.2d 202, 287 N.E.2d 682 (1972).

20. *Estate of Carpenter*, 253 So.2d 697 (Fla. 1971).

21. *Snedeker's Estate*, 368 Pa. 607, 84 A.2d 568 (1951).

22. *Estate of Komarr, supra*, n.8.

23. *Estate of Jennie Berkowitz*, 147 Conn. 474, 476, 477, 162 A.2d 709, 710, 711 (1960) (when beneficiary standing in confidential relationship with testator is a "stranger" to the testator—that is, not a relative—and takes to the exclusion of the natural objects of the testator's bounty, then no evidence of active participation is needed to raise the presumption of undue influence).

24. *Will of Moses*, 227 So.2d 829 (Miss. 1969).

25. *Estate of Carpenter, supra*, n.4.

26. *White v. Irwin*, 220 Ga. 836, 142 S.E.2d 255 (1965).

27. *See n.5, supra.*

28. *See, e.g., Estate of Carpenter, supra* (stating that the presumption of undue influence arises "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will . . ."); n.4, *supra.*

29. Where this requirement exists, "unnatural" disposition is defined largely by reference to the laws of intestate succession. A disposition will be considered unnatural when there is no explanation why those persons the intestacy laws define as the natural objects of testator's bounty did not receive under the will approximately what the law of intestate succession would have provided for. *See, Garibaldi's Estate*, 57 Cal.2d 108, 17 Cal. Rptr. 623, 367, P.2d 39 (1961) (disposition unnatural where, despite testator's "repeatedly expressed desire that her children should share her property equally, each proponent would receive substantially more under the will than each contestant.") *See, also, Pruitt v. Pruitt*, 343 So.2d 495, 499 (Ala. 1977).

30. *See, Barfitt v. Lawless*, LR 2 P & D 462 (1872).

31. 2 PAGE, THE LAW OF WILLS, § 818 at 616 (1941); *Graham v. Cartright*, 180 Iowa 394, 161 N.W.774 (1917).

32. *Id.*

33. *Parfitt v. Lawless, supra*, n.30.

34. Interestingly, this policy is often stated by commentators solely in terms of protecting testators. The interests of the would-be beneficiaries are often ignored. See articles cited at n.8, *supra*.

35. In *Metz' Estate, supra*, n.4, the court stated: "There is no direct proof of undue influence in this case. There seldom is. Undue influence is not usually exercised in the open."

36. ATKINSON, WILLS, § 5 at 34-36 (2nd ed. 1953).

37. *See, Fritschi's Estate*, 60 Cal.2d 367, 373, 33 Cal. Rptr. 264, 267, 384 P.2d 656, 659 (1963).

38. *Id.*

39. *Estate of Robinson*, 231 Kan. 300, 644 P.2d 420 (1982).

40. *Id.*

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