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ATTORNEY BEWARE—THE PRESUMPTION OF UNDUE INFLUENCE AND THE ATTORNEY-BENEFICIARY

I. Introduction

Since ancient times suspicion has been directed toward attorneys and toward anyone who drafted a will under which he received a gift. Plato remarked that lawyers had an "evil reputation,"[1] and under Roman law, a legacy to one who drew a will was invalid.[2] Despite the high standards set for attorneys, and a tendency for modern Anglo-American law to treat such legacies less severely,[3] the suspicions persist. In light of these attitudes, one would expect that an attorney would be extremely hesitant to draft a will naming himself as a beneficiary. Yet cases continue to arise where an attorney has drafted such a will and the courts have raised a presumption or inference that the will was procured through the exertion of undue influence. To rebut this presumption the attorney is faced with the burden of showing that the testator knew the contents of the will and acted according to his own desires.[4]

Most jurisdictions agree that undue influence is a moral or physical coercion which prevents the testator from exercising his free will, thereby destroying his free agency and substituting the judgment of another.[5] There is, however, little agreement as to what circumstances will give rise to a presumption or inference of undue influence. It is perhaps this disagreement among jurisdictions, and even within the same jurisdiction, that has continually led attorneys to draft wills under which they receive a benefit. While no general rule can be set down which would cover all states, it is hoped that this analysis of the positions taken by most jurisdictions will alert attorneys to the danger of drafting such a will.

II. Mere Confidential Relationship

Although most courts require more than the mere existence of a confidential relationship between testator and beneficiary to raise a presumption of undue influence,[6] some courts have indicated that certain such relationships are sufficient in themselves. *In Re Anderson's Estate,*[7] involved a devise of property by the

1 PLATO, LAWS, bk. XI (B. Jowett 1920).
2 JUSTINIAN DIGEST, bk. XLVIII, tit. 10, 15.
3 3 PAGE ON WILLS § 29.95 (Bowe-Parker ed. 1961).
4 "Proof of the execution of the will and that the deceased was of testable capacity, is not sufficient; but there must be affirmative, plenary evidence that he had knowledge of its contents and fully and freely sanctioned them." (Footnote omitted.) R. PRITCHARD, LAW OF WILLS AND ADMINISTRATION OF ESTATES § 140 (H. Phillips ed. 1955).
5 1 PAGE ON WILLS § 15.2 (Bowe-Parker ed. 1960). For a comparison of the legal and psychological approaches to undue influence see Shaffer, *Undue Influence, Confidential Relationships, and the Psychology of Transference,* 45 NOTRE DAME LAWYER 197 (1970).
6 Some decisions flatly deny that a confidential relationship alone will raise the presumption. *See, e.g.,* Burke v. Thomas, 282 Ala. 412, 211 So. 2d 903 (1968); In Re Estate of Niquette, 264 Cal. App. 2d 976, 71 Cal. Rptr. 83 (1968); Gehm v. Brown, 125 Colo. 555, 245 P.2d 865 (1952); Swaringen v. Swanstrom, 67 Idaho 245, 175 P.2d 692 (1946); In Re Polly's Estate, 174 Neb. 222, 117 N.W.2d 375 (1962); In Re Davis' Will, 14 N.J. 166, 101 A.2d 521 (1953); In Re Roblin's Estate, 210 Ore. 371, 311 P.2d 459 (1957); In Re Draper's Estate, 374 P.2d 425 (Wyo. 1962).
7 142 Okla. 197, 286 P. 17 (1929).

testator to his attorney—a friend and adviser for many years. The Supreme Court of Oklahoma ruled that the burden of showing that the will was not obtained through undue influence was on the attorney-beneficiary acting as proponent, even though he had not drafted the will. It was, however, unnecessary for the court to base its ruling solely on the confidential relationship because the testator's drug addiction provided an additional suspicious circumstance upon which to base the presumption.

Fifteen years later, the same court, in *In Re Harjoche's Estate,*[8] quoting the *Anderson* decision with approval, declared:

> Where a person devises his property to one who is acting during that time as his attorney, either in relation to the subject matter of making the will, or generally, such devise of itself raises a presumption of undue influence.[9]

Again, however, the statement appears as dicta because the attorney had actually drafted the will and was the principal beneficiary. In recent years the Oklahoma courts have retreated from this broad application of the presumption. In *In Re Estate of Newkirk,*[10] though admittedly not faced with an attorney-beneficiary situation, the court limited the application of the *Harjoche* case by indicating that the presence of a confidential or fiduciary relationship would not, standing alone, necessarily raise the presumption.

Connecticut decisions show a trend similar to that taken by the Oklahoma courts, but arrive at a much stricter rule than that followed in most jurisdictions.[11] Finding error in the lower court instruction that in order to raise the presumption the jury must find that the beneficiary was active in procuring the will, the court in *Appeal of Kirby*[12] said that a prima facie presumption of undue influence arose out of a confidential relationship between testator and beneficiary regardless of whether or not the beneficiary actually took part in the execution of the will.

In a subsequent decision,[13] Connecticut modified this approach by declaring that, in addition to the confidential relationship, the beneficiary sustaining such relationship should be a principal beneficiary and the bequest should exclude the natural objects of the testator's bounty to raise the presumption. While this rule still requires no activity on the part of the beneficiary, it does adopt the additional requirement that the disposition be unnatural under the circumstances.

The New York court in *In Re Smith's Will*[14] discerned that state's rule as raising an inference of undue influence from the mere fact of benefit to one standing in an attorney-client relationship. Again, however, the broad rule was unnecessary as the attorney not only drafted the will but was the principal beneficiary. Other New York cases did not follow this strict rule and it seems clear that in that jurisdiction an attorney who sends his client to another attorney to

8 193 Okla. 631, 146 P.2d 130 (1944).
9 *Id.* at 132.
10 456 P.2d 104 (Okla. 1969).
11 Comment, 44 MARQ. L. REV. 570 (1961).
12 91 Conn. 40, 98 A. 349 (1916).
13 Berkowitz v. Berkowitz, 147 Conn. 474, 162 A.2d 709 (1960).
14 170 Misc. 572, 10 N.Y.S.2d 775 (1939).

draft a will favorable to the former need not worry about the presumption of undue influence arising solely from the professional relationship.[15]

The adoption of the broad rule noted in these earlier decisions appears to have been motivated by an attempt to follow the rule applicable to gifts inter vivos under similar circumstances. The Maryland Court in *Cook v. Hollyday*[16] refused to apply the inter vivos rule noting that there is an obvious difference between the gift which strips the donor of its use while he is living and the bequest taking effect upon the testator's death. Some of the problems generated by this approach are illustrated by an examination of two Indiana decisions. In *Willett v. Hall*[17] the court, refusing to apply the rule applicable to gifts inter vivos, said that one's status as a friend and faithful servant of the testator should not render him incapable of taking a devise. To the contrary, the court thought such circumstances should increase the presumption in favor of the will and not against it. Yet four years later, the same court saw no reason why the inter vivos rule should not be applied.[18] Nevertheless, the rule arrived at in this latter case did not raise the presumption on the basis of the confidential relationship alone but required, in addition, some activity in preparing and executing the will.

III. Confidential Relationship Plus Activity

The vast majority of courts that have been confronted with this question have required something more than a confidential relationship between testator and beneficiary to raise a presumption that the document was procured through the exercise of undue influence. Though these additional requirements vary from state to state, most necessitate an unnatural disposition of the testator's estate and some active participation by the beneficiary in the execution or preparation of the will.[19] Some variations require that the person benefited be a "favored"[20] or principal beneficiary, but the result is substantially the same. The Florida rule provides a good model of this three-pronged approach. In order to raise the presumption under Florida law, the contestant must show: (1) a confidential relationship between testator and beneficiary; (2) an active part taken by the beneficiary in procuring the document; and (3) a substantial benefit conferred on the beneficiary by the document.[21]

The second of these elements has given rise to a good deal of the litigation on the subject. While no clear-cut line can be drawn indicating what degree of activity will constitute active procurement, it is clear that where an attorney

15 In Re Putnam's Will, 257 N.Y. 140, 177 N.E. 399 (1931).
16 185 Md. 656, 45 A.2d 761 (1946).
17 220 Ind. 310, 41 N.E.2d 619 (1942).
18 Sweeney v. Vierbuchen, 224 Ind. 341, 66 N.E.2d 764 (1946).
19 E.g., Paskvan v. Mesich, 455 P.2d 229 (Alaska 1969); McNeill v. McNeill, 223 N.C. 178, 25 S.E.2d 615 (1943); In Re Estate of Hobelsberger, 181 N.W.2d 455 (S.D. 1970); Oglesby v. Harris, 130 S.W.2d 449 (Tex. Civ. App. 1939); In Re Estate of Smith, 68 Wash. 2d 145, 411 P.2d 879 (1966).
20 "One who, in the circumstances of the particular case, has been favored over others having equal claim to the testator's bounty. An unnatural discrimination, leading to a natural inference that advantage has been taken by one in position so to do; and shown to have been busy in getting such will executed." Cook v. Morton, 241 Ala. 181, 1 So. 2d 890, 892 (1941).
21 1 D. REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA, § 5.08 (1969); In Re Aldrich's Estate, 148 Fla. 121, 3 So. 2d 856 (1941) (Brown, C. J. concurring).

prepares a will for a client devising a substantial legacy to himself and the bulk of the estate to his mother, a presumption is raised.[22]

Even where an attorney does not draft the will but asks a close associate to act as scrivener, it has been held that the presumption is raised.[23] There is, however, authority to the contrary and it would appear that where the beneficiary's activity is solely pursuant to the testator's instructions, no presumption is raised.[24] Still, the situation may be regarded with suspicion and additional activity, such as the procurement of witnesses, may tip the scale in favor of the presumption.[25]

California, while following the three-pronged approach, apparently does not recognize the exception espoused by other jurisdictions that there is no presumption raised where the draftee-beneficiary merely writes what he is told to write. In *In Re Estate of Peters,*[26] testatrix requested a confidant to draft a will which provided him with a legacy. Despite the beneficiary's admonition to wait, testatrix insisted he draft the will after finding that her attorney was unavailable. Noting that the beneficiary would have received nothing had there been no will, the court held that he had unduly profited. The confidential relationship, undue profit, and the beneficiary's activity in preparing the will gave rise to a presumption of undue influence.

New York has often taken the position that no presumption is raised when an attorney drafts a will which makes him a beneficiary. The attorney is, of course, given the duty of explaining the situation.[27] Later decisions indicate that if his explanation is unsatisfactory a rebuttable inference of undue influence is raised.[28] In *In Re Moskowitz' Will,*[29] the attorney-beneficiary was the testator's son. He drafted a will for his father which excluded the testator's daughter and divided the estate equally between himself and another son. The court, apparently recognizing that the devise was not unnatural, refused to raise an inference of undue influence. Wisconsin also adheres to this position. Where a lawyer drafts a will for his wife, children or parents, no presumption or inference is raised. The rationale is that such relations are natural objects of testator's bounty and, if the proposed legacy is no more than would be received under the law, there is no tendency for such an occurrence to be looked upon with suspicion.[30]

Several other courts have taken a position similar to that expressed by New York in hesitating to raise a presumption of undue influence. The Supreme Court of Iowa in *Olsen v. Corporation of New Melleray*[31] observed:

22 In Re Malone's Will, 22 Fla. Supp. 101, *aff'd,* 167 So. 2d 759 (Fla. App. 1964), *cert. denied,* 174 So. 2d 32 (Fla. 1965).

23 In Re Reid's Estate, 138 So. 2d 342 (Fla. App. 1962).

24 1 D. REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA, § 5.08 (1969); *see* In Re Smith, 212 So. 2d 74 (Fla. App. 1968); Mindler v. Crocker, 245 Ala. 578, 18 So. 2d 278 (1944); In Re Peterson's Estate, 77 Nev. 87, 360 P.2d 259 (1961); Toombs v. Matthesen, 206 Okla. 1139, 241 P.2d 937 (1952); Hubbell v. Houston, 441 P.2d 1010 (Okla. 1968).

25 In Re Estate of MacPhee, 187 So. 2d 679 (Fla. App. 1966).

26 9 Cal. App. 3d 916, 88 Cal. Rptr. 576 (1970).

27 In Re Cotter's Estate, 180 Misc. 399, 40 N.Y.S.2d 93 (1943); In Re Putnam's Will, 257 N.Y. 140, 177 N.E. 399 (1931).

28 In Re Estate of Hayes, 49 Misc. 2d 152, 267 N.Y.S.2d 452 (1966).

29 107 N.Y.S.2d 853, 279 App. Div. 660, *aff'd,* 303 N.Y. 992, 106 N.E.2d 68, *motion denied,* 304 N.Y. 593, 107 N.E.2d 84 (1951).

30 State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

31 245 Iowa 407, 60 N.W.2d 832 (1953).

> All that can be said is that the existence of a confidential relation, such as . . . attorney and client . . . affords peculiar opportunities for unduly exercising influence over the mind, and where the dominant party, in such relation, initiates the preparation of the will or gives directions as to its contents to the scrivener or writes it himself, in other words, is active either in its preparation or execution, and is made a beneficiary thereunder, a suspicion arises that the benefaction may have resulted from the exertion of undue influence over the testator rather than from his free volition.[32]

But the court noted that if the legacy was large, compared to the total value of the estate, an inference might be raised. Likewise, the Massachusetts courts will regard such circumstances with scrutiny and the jury will be warranted in investigating the circumstances.[33]

Although most courts refuse to raise the presumption solely on the basis of the attorney-client relationship, participation in drafting is not the only activity that will give rise to such a presumption. Such activity is only one of many factors that some courts refer to as suspicious circumstances. This approach provides more flexibility and allows the court to raise a presumption or inference of undue influence whenever suspicious circumstances surround a legacy to a confidant of the testator. In *In Re Estate of Komarr,*[34] the attorney-beneficiary's retention of another attorney to draft the will, testatrix' weakened condition, and the failure to contact testatrix' only son and sole heir were sufficient to raise the presumption of undue influence even though the beneficiary had not drafted the will and was not present at its execution.

Other courts, while following the basic three-pronged approach, have required additional circumstances to give rise to a presumption or inference of undue influence. In this regard, Pennsylvania has taken the approach that even where the attorney-beneficiary drafts the will, no presumption is raised unless it is also shown that the testator had a weakened intellect.[35] It is interesting to note that Virginia, while once adhering to the Massachusetts view that no presumption arises,[36] subsequently held that the burden on the issue of undue influence is on the proponent of the will if, in addition, it is shown that the testator was sick or had a weak mind and was inclined to yield readily to persuasion.[37]

The Supreme Court of Wyoming has taken a different approach to the testator's weakened intellect. In *In Re Draper's Estate,*[38] that court held that a confidential relationship would not raise a presumption,

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32 *Id.* at 836.

33 Mooney v. McKenzie, 324 Mass. 685, 88 N.E.2d 546 (1949); Reilly v. McAuliffe, 331 Mass. 144, 117 N.E.2d 811 (1954). *See also* Tomkins v. Tomkins, 1 Bailey 92, 19 Am. Dec. 656 (S.C. 1828); Stormon v. Weiss, 65 N.W.2d 475 (N.D. 1954).

34 46 Wis.2d 230, 175 N.W.2d 473 (1970); *accord,* In Re Burt's Estate, 122 Vt. 260, 169 A.2d 32 (1961).

35 In Re Gold's Estate, 408 Pa. 41, 182 A.2d 707 (1962). The attorney here did not draft the will, but the court viewed his activity in taking down testator's instructions and relaying them to another attorney for drafting as if the beneficiary had drafted the will.

36 Riddell & Als. v. Johnson's Ex'or & Als., 26 Gratt. 152, 67 Va. 60 (1875).

37 Redford v. Booker, 166 Va. 561, 185 S.E. 879 (1936); Croft v. Snidow, 183 Va. 649, 33 S.E.2d 208 (1945); *accord,* Kiefer's Ex'r and Ex'x v. Deibel, 292 Ky. 318, 166 S.W.2d 430 (1942); Hollon's Executor v. Graham, 280 S.W.2d 544 (Ky. App. 1955); Frye v. Norton, 148 W.Va. 500, 135 S.E.2d 603 (1964).

38 374 P.2d 425 (Wyo. 1962).

> . . . unless in addition to such relationship there existed suspicious circumstances such as the beneficiary taking part in the preparation or procuring of the will or actually drafting or assisting in its execution *or* that the testator was weakminded, in frail health, and particularly susceptible to influence or that the provisions of the will were unnatural and unjust. (Emphasis added.)[39]

Under this analysis, the presumption could be raised not only by the additional circumstance of a weakened intellect, but also where the only factors were a confidential relationship and a weakened intellect.

Arizona, while following the majority approach,[40] has so construed the presumption that it would appear to be of little or no value. In *In Re Pitt's Estate,*[41] the court said that any presumption dissolves whenever the person charged with exerting the influence denies such action. It can hardly be expected that one who is guilty of such conduct will readily admit to it, and the effect of the *Pitt* decision is to require the contestant to carry the burden regardless of his ability to show facts which admittedly raise the presumption.

Some courts, though requiring more than a confidential relationship, have declined to require that a person benefited be a principal beneficiary.[42] Conversely, it has been held that where the attorney drafting the will received a gift of slight value[43] or is named only as trustee or executor,[44] no presumption is raised. Notwithstanding the above, where attorneys named as trustees and executors are given a great deal of control over the proceeds of the estate and will receive a large compensation for services, the benefit may be deemed substantial enough to give rise to the presumption.[45]

IV. Statutory Provisions

While most states have statutes establishing probate procedures and allocating the burden of proof for the initial proving of the will, only a few deal specifically with a presumption of undue influence. The Kansas statute squarely meets the problem by creating a statutory presumption of undue influence in providing:

> If it shall appear that any will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew the contents of such will, and had independent advice with reference thereto.[46]

39 *Id.* at 430.
40 In Re Thompson's Estate, 1 Ariz. App. 18, 398 P.2d 926 (1965).
41 88 Ariz. 312, 356 P.2d 408 (1960).
42 Orr v. Love, 225 Ark. 505, 283 S.W.2d 667 (1955); In Re Will of Moses, 227 So. 2d 829 (Miss. 1969); Cline v. Larson, 234 Ore. 384, 383 P.2d 74 (1963); Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965) (citing Cline v. Larson).
43 Trubey v. Richardson, 224 Ill. 136, 79 N.E. 592 (1906).
44 Brown v. Commercial National Bank of Peoria, 42 Ill. 2d 365, 247 N.E.2d 894, *cert. denied,* 396 U.S. 961, *reh. denied,* 396 U.S. 1047 (1969); Estate of Vollbrecht v. Pace, 26 Mich. App. 430, 182 N.W.2d 609 (1970).
45 In Re Estate of Nelson, 232 So. 2d 222 (Fla. App. 1970).
46 KAN. STAT. ANN. § 59-605 (1964).

Georgia, though requiring less proof, takes the same approach through its statute:

> In all cases, a knowledge of the contents of the paper by the testator shall be necessary to its validity; but usually, where a testator can read and write, his signature, or the acknowledgement of his signature, shall be sufficient. If, however, the scrivener or his immediate relations are large beneficiaries under the will, greater proof shall be necessary to show a knowledge of the contents by the testator.[47]

The effect of this statute is to leave the initial burden of proof with the proponent of the will if the stated circumstances exist rather than providing for an initial proving which switches the burden to the contestant to show circumstances raising the presumption. Despite the provisions of the statute, the Supreme Court of Georgia in *White v. Irwin*[48] declared that no presumption of undue influence can arise because one occupying a confidential relationship with the testator is active in drafting a will in which he is made a beneficiary. In holding that the extra burden had been met, the court noted that the beneficiary had written only what testatrix desired, using memoranda she had prepared.

On its face, the Louisiana statute[49] does not apply to attorneys, but it has been construed to apply to the keeper of a boardinghouse where the deceased was staying prior to death. The court held that although such a person was not within the letter of the statute, he was within its spirit.[50] By the same reasoning, an attorney who attended a person under the same circumstances could be held to be within the spirit of the statute. The thrust of this statute is quite different in that it raises a total bar to persons within the statute's purview, rather than requiring any special proof of testator's freedom of choice.

V. No Presumption

Some jurisdictions have refused to raise a presumption of undue influence, reasoning that all the circumstances surrounding the preparation and execution of a will should be considered by the trier of fact. If the circumstances warrant, the trier of fact would be justified in finding that undue influence was exerted.[51] Following this view, the court in *Cook v. Hollyday*[52] noted that while there is a presumption of undue influence in gifts inter vivos between attorney and client, no

47 GA. CODE ANN. § 113-305 (1959).
48 220 Ga. 836, 142 S.E.2d 255 (1965).
49 LA. CIV. CODE ANN. art. 1489 (West 1952) provides:
> Doctors of physic or surgeons, who have professionally attended a person during the sickness of which he dies, can not receive any benefit from donations *inter vivos* or *mortis causa* made in their favor by the sick person during that sickness. To this, however, there are the following exceptions:
> 1. Remunerative dispositions made on a particular account, regard being had to the means of the disposer and to the services rendered.
> 2. Universal dispositions in case of consanguinity. The same rules are observed with regard to ministers of religious worship.

50 Cormeier v. Myers, 223 La. 259, 65 So. 2d 345 (1953).
51 *See* Cave v. McLean, 66 Ohio App. 196, 32 N.E.2d 581 (1939); Carpenter v. Hatch, 64 N.H. 573, 15 A. 219 (1888); Barton v. Beck's Estate, 159 Me. 446, 195 A.2d 63 (1963).
52 185 Md. 656, 45 A.2d 761 (1946).

such presumption exists in the case of a gift under a will. Continuing, the court said:

> [T]here is an obvious difference between a gift whereby the donor strips himself of the enjoyment of his property while living and a gift by will, which takes effect only from the death of the testator.[53]

Similarly, the Montana court, in *In Re Cocanougher's Estate*,[54] specifically rejected the California rule that raises the presumption on a showing of a confidential relationship, active participation, and undue profit.

VI. Disciplinary Action

Notwithstanding the disservice an attorney does his client by creating a situation where the presumption of undue influence may defeat the will, he leaves himself open for possible disciplinary action for unethical practice.

In *State v. Horan*,[55] the Supreme Court of Wisconsin was called upon to consider possible disciplinary action against an attorney who had drafted six wills for a client. Each succeeding will provided for a larger bequest to the attorney. The last will was refused probate but the attorney still received over $38,000 under the fifth will. The court limited its action to a reprimand and costs due to the lack of definition and possible misunderstanding on the part of the legal profession but noted that the attorney had failed to recognize the conflict of interest between his position as an attorney and his position as a beneficiary. He placed himself in a position where he might be rendered unable to give disinterested advice and took no steps to insure that the will would withstand objections. The court maintained that:

> He should have insisted that a disinterested attorney of the client's own choosing be engaged to draft the will if he wanted to become a beneficiary of such a substantial amount under the will. . . .[56]

Even after this warning the same court was forced to consider the question again when an attorney drew a will for his uncle which disinherited the testator's daughter and estranged wife leaving everything to the attorney's mother. While the court noted that the inference of undue influence had been overcome on the contest of probate, it said that it was the lawyer's duty to his client and to the legal profession to avoid action which would raise that inference in the first place. The defendant was reprimanded and ordered to pay $1,750 costs and fees.

The California State Bar recommended a two-year suspension for an attorney who drafted a will for an elderly client which provided a $21,000 legacy to the attorney. On petition, the Supreme Court of California[57] found that an attorney who had acted as witness had, on his own initiative, questioned testatrix

53 *Id.* at 765.
54 141 Mont. 16, 375 P.2d 1009 (1962).
55 21 Wis. 2d 66, 123 N.W.2d 488 (1963).
56 *Id.* at 491.
57 Bodisco v. State Bar of California, 58 Cal. 2d 495, 374 P.2d 803 (1962).

and was satisfied that the bequest was in accord with her desires. This, and the fact that testatrix had no relatives, led the court to dismiss the disciplinary proceeding. Although the evidence provided was insufficient to rebut the presumption of undue influence in the probate court, it was sufficient to raise a reasonable doubt as to the charge that petitioner had exercised undue influence.

VII. Conclusion

In retrospect, the foregoing approaches do not appear to be systematically developed rules which can be applied to all attorney-beneficiary situations. They are rather products of the particular fact situations with which the various courts have been faced. While some approaches seem more structured than others, most jurisdictions require that all circumstances surrounding the preparation and execution of a will be examined to insure that it was an expression of the testator's true intent. All that can be said of those states that form a more structured rule is that certain circumstances are looked upon with greater care and scrutiny than others, but all unusual or suspicious circumstances will be examined. Some courts feel that where these circumstances lead to a natural suspicion that the will was produced through undue influence, an inference or presumption with varying degrees of probative value will be raised. Others refuse to raise a presumption or switch the burden of proof to the proponent, but leave the question to the discretion of the trier of fact.

Because of the many different circumstances that surround the drafting and execution of wills, it is difficult to choose one approach that is adequate to cover all situations. For this reason, the courts should strive to maintain flexibility. If rules are set down that require specific elements and exclude others, many suspicious circumstances will escape the courts' scrutiny. In addition, any strict rule necessarily overlooks situations where an attorney finds it necessary to draft a will for his client regardless of the will's bequest to the scrivener. Notwithstanding the difficult position facing an attorney, such strict approaches may also restrict the testator's free choice.

On the other hand, a rule which is too loosely defined perpetuates the already too prevalent uncertainty and confusion concerning when or if an attorney-beneficiary may act as draftsman. Jurisdictions which fail to raise any presumption or inference arrive at an equally unfavorable result by apparently overlooking the extremely difficult burden a contestant faces when he is required to construct a prima facie case of undue influence.

The approach suggested by the Supreme Court of Wisconsin in *State v. Horan*[58] appears to strike a position which meets most of the objections to the other approaches. The Wisconsin approach allows an attorney to draft wills for the members of his immediate family when a devise to the attorney will not be, or appear to be, unnatural. In other situations, if *any* circumstances are present which appear suspicious or unnatural, an inference will be raised. The court does not overlook the possibility that situations may arise where an attorney is forced to draft a will under suspicious circumstances. In such cases, the inference will

58 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

be raised, but the court provides that if the attorney has adequately explained to his client the dangers inherent in drafting such a will and is careful to ensure that there is adequate independent evidence to explain his actions, the presumption will be rebutted.

While this treatment of a will which provides a gift to the attorney-draftsman puts the burden on the attorney who caused a suspicion to arise, it still does not recognize the extremely difficult situation faced by one who is confronted with either proving or disproving undue influence. The drafting and execution of a will is, quite naturally, a confidential procedure, and this confidence makes illumination of the circumstances peculiarly difficult. If instead of raising the presumption where any peculiar circumstances appear, the attorney is required to show that the testator obtained independent advice, the presumption and its difficult burden could be avoided. This approach provides a rigid procedure for the attorney in those unusual circumstances where he finds it necessary to draft a will favorable to himself without raising a presumption or inference of undue influence. If the attorney is unable to show that he followed this procedure then a presumption of undue influence should be raised.

Regardless of the approach, it is evident that an attorney does his client, the legal profession, and himself a great disservice when, under any but the most unusual and extraordinary circumstances, he drafts a will which makes him a beneficiary. Some states do not recognize the rule of partial invalidity of wills[59] and the inability to overcome a presumption of undue influence renders the entire will invalid, thereby defeating the testator's desires. Whenever an attorney drafts a will under circumstances which may give rise to a presumption of undue influence, he is not acting in the best interests of his client. He is starting off with a deficit which is, at very least, imprudent.

Canon Nine of the *Code of Professional Responsibility* provides, in part:

> Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but the *appearance of impropriety.*[60] (Emphasis added.)

More particularly Canon Five provides:

> Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to make him beneficiary be prepared by another lawyer selected by the client.[61]

The legal profession, to maintain its effectiveness, must and does demand of its members a standard of conduct far more stringent than most professions. An attorney who acts in such a manner as to raise a presumption of undue influence not only fails to live up to this standard, but violates the *Canons of Professional Ethics*[62] and lends weight to Plato's observation of the reputation of attorneys.

59 *Id.*
60 ABA CANONS OF PROFESSIONAL ETHICS No. 9 (1970).
61 ABA CANONS OF PROFESSIONAL ETHICS No. 5 (1970).
62 *Id.*

Unless practices which raise a presumption of undue influence are discontinued, it is not unreasonable to expect that more states will enact statutes restricting the capacity of certain classes of persons to receive a bequest with the corresponding restriction of testamentary free choice.

In addition to severe damage to his professional reputation and the reputation of the legal profession in general, the attorney who acts so as to raise the presumption risks disciplinary action which may lead to a suspension from his practice. The inconvenience of asking one's client to seek another attorney is rendered minute when compared to the enormous repercussions which can follow the failure to so act.

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