Journal of Questioned Document Examination
March 1992 Volume 1, Number 1, pp. 14-26

Undue Influence in Contract and Probate Law

by Abraham Nievod, Ph.D., J.D.

ABSTRACT: The following article provides the history of undue influence and the law, the definitions of undue influence, considerations of the court in deciding undue influence and cases where document examiners testified to undue influence based on handwriting.

Introduction

Undue influence is considered in two areas of the law having to do with written documents, that is, first, contracts, and second, wills and/or trusts. In each of these areas, the courts, in deciding actual cases, and the legislature, in enacting specific statutes, have been concerned with the state of mind of the individual assenting to a contract or executing a will. "Freedom of will", at the time the contract or will is executed, is essential to the validity of both — so that each can truly be the instrument of the maker's will.

If a contract is obtained by undue influence, the document is invalid, literally as contract law theory sees it, no contract has been formed. Within the conceptual framework of contract law, no contract can be formed unless there has be a "meeting of the minds" of independent, bargaining individuals. If a contract is obtained through the use of undue influence then there has never been an actual meeting of the minds of two bargaining parties.

If a will is obtained by undue influence, the courts require a showing that the will of the testator, the maker of the will, is subjugated to the will of another. Such subjugation is shown through acts or conduct that overcome the free agency of the testator. It must be proven that the testator disposed of his or her property in a manner contrary to and different from the disposition that would have occurred had there been no such undue influence.

is simultaneously being cut off from major social supports upon which the stability of identity and emotional well-being depend. At the same time, expulsion also may mean the loss of income, employment, capital and social life.

II.
Undue Influence and Probate Law

A. Undue Influence Defined in Probate Law.

The concept of undue influence also plays an important role in probate law. Although the use of the concept is similar to that found in contract law, the proof of undue influence in contesting the viability of a will is more exacting and detailed. Courts are on the whole reluctant to disturb the disposition of a will after the testator has died. At least three reasons have been advanced supporting the sanctity of wills. First, the courts recognized that an individual may dispose of his or her property as he or she sees fit, either unjustly and unfairly or with justice or with fairness. Second, the central factual witness and oftentimes only witness as to the testator's intent is not available for trial. Third, juries, if given the opportunity, would remake many wills according to their own sense of a just distribution, which may not reflect the testator's actual wishes.

Specifically, the courts are concerned primarily with the mental state of the testator at the precise moment the will was being signed. Undue influence must have been exerted at that moment. The effect of the undue influence must have been to overpower the mind and the will of the testator at the time the will was made. The undue influence must have been such that it in fact produced the disposition of the will, thereby expressing the intent of the one exerting the influence. It must also be established that the testator would not have been made such a distribution of assets but for the but for the undue influence.

B. Circumstantial Evidence of Undue Influence: A Combination of Factors is Necessary to Sustain a Finding of Undue Influence.

The act of undue influence is rarely witnessed; therefore, the common situation is one where undue influence is proven by circumstantial evidence. Courts require substantial evidence to upset a testator's written will. Various lists of factors have been drawn in numerous cases. A consensus of cases would list the following factors: (1) unnatural disposition, (2) opportunity to exert the undue influence, (3) susceptibility, and (4) activity of beneficiaries in procuring the will.[26]

---

[26]. See, Estate of Graves (1927) 202 Cal. 258, 262, 259 P. 935; Estate of Yale (1931) 214 Cal. 115, 122, 4 P.2d 153; Burgess v. Bohle (1944) 63 Cal.App.2d 165.

First, unnatural disposition is taken to mean that "strangers", i.e., unrelated parties, receive the benefits of the will to the exclusion of blood relations, or that one child receives the bulk of the bequest while others of equally close relation receive little or nothing.

Second, opportunity means that relations existed between the chief beneficiaries and the decedent that afforded the beneficiaries an opportunity to control the testamentary act.

Third, susceptibility means that the decedent's mental and/or physical condition was such that it left him susceptible to the undue influence and domination of others.

Fourth, activity means that the chief beneficiaries were active in procuring the will, isolating the testator from his or her family, or preventing the testator from obtaining independent legal advice.

The combination of these four factors present at the same time has been found sufficient.[27] None of these factors alone is sufficient to support a finding of undue influence. For example, mere opportunity to influence even when there is a motive is not sufficient for an inference that such influence was in fact exerted. Moreover, in cases where undue influence has been found, the testator invariably has suffered from a weakened physical condition or psychological vulnerability. This weakness or vulnerability appears to be the foundation of further proof that there was improper persuasion or activity that subverted the will of the testator.

A common pattern in cases when undue influence is found is (a) a physically weak or psychologically vulnerable testator together with (b) active participation in the procuring of a will by the beneficiary and (c) undue profits, i.e., unnatural, profits by the beneficiary.

C. Relationships of Trust and Confidence That Involve Undue Influence.

The courts will rigorously scrutinize a bequest to a beneficiary who also has a simultaneous fiduciary relationship with the testator based on a trust and confidence. This situation is somewhat analogous to that in the discussion of contract law above. The fiduciary relationships contemplated by probate law entail the same statutorily defined fiduciaries, attorneys, trustees, and so forth, and non-statutory relationships based on trust and confidence, family members and friends. Among those professions found to be confidential are a business adviser[28], a secretary/companion[29], and religious counselors[30]. Where the beneficiary is in a confidential relationship with the testator, and both actively is involved in procuring the will and unduly profits from the will, i.e., there is an unnatural disposition of assets, a presumption of undue influence arises. This presumption then forces the beneficiary to prove that the will was the product of the testator's desires and intentions.

---

[27]. Id.

[28]. Estate of Graves (1927) 202 Cal. 258, 259 P. 935.

[29]. Estate of Rugani (1952) 102 Cal.App.2d 624, 239 P.2d 500.

[30]. Estate of Bourquin (1858) 161 Cal.App.2d 289, 326 P.2d 604.

III.
Document Examiners and Undue Influence

The document examiner, who is interested in whether a document under consideration is a product of undue influence, may be consulted as to whether there exists any indicia of undue influence in the signature or writings contained in the document. Based on the cases reviewed for this paper, judicial rulings have not permitted document experts to testify directly that the contract or will was a product of undue influence. In general, the courts have taken the view that factual questions as to the physical condition or mental state of an individual are within the domain of medical, psychiatric, or psychological experts and not document examiners.

Where testimony by a document examiner is permitted to go beyond the narrow domain of the authenticity of a document, such testimony has been on the issue of whether the maker was competent to make a contract or will.

In general, even in the few cases[31] discovered where such testimony has been permitted, the testimony is given limited evidentiary value. No case was found where the testimony of a document expert standing alone (that in his or her opinion the maker of the document suffered from a condition that rendered the maker incompetent) was sufficient proof of incompetence. At most, such testimony is a single fact among others on which a trier of fact may base a judgment as to competency. Hypothetically, if the testimony of a document expert is permitted on the incompetency of a signing individual, as for example that the individual suffered from a degenerative neurological condition as evidenced by degenerative changes in his or her signature over time, that testimony might be used to indicate that such an individual would be particularly susceptible to undue influence. No cases permitting such testimony has been found.

Competency to make a will, or testamentary capacity, is focused on the testator's condition at the time of making the will. The question is whether the individual had sufficient mental capacity to be able (1) to understand the nature of the act he or she is doing; (2) to understand and recollect the nature and extent of his or her property; and (3) to remember and understand his or her relations to living descendants, spouse and parents whose interests will be affected by the will.

In contract law a person is generally assumed to be competent to enter into a contract and bind himself to the terms of the contract. Today, only two defects are generally accepted as impairing the power to contract: (1) immaturity, by chronological age; and (2) psychological status. As to psychological status, no universal standard of mental capacity to contract has been set. Older

[31]. Estate of Little (1920) 46 Cal.App. 226; Estate of Garvey (1940) 38 Cal.App.2d 456; Estate of Darilek (1957) 151 Cal.App.2d 322; McLeod v. Bullard (1881) 84 N.C. 515; Entwistle v. Meikle (1899) 180 Ill. 9. 54 N.E. 217; Raymond v. Flint (1917) 225 Mass. 521, 114 N.E. 811; Adams v. Adams (1923) 253 S.W. 605; Gibbons v. Redmond (1935) 142 Kan. 417, 49 P.2d 1035.

cases were concerned with "lunacy" and "insanity." Mental infirmity, as it was often called, was recognized as being the end result of various processes, including retardation, mental illness, brain damage, dementia, and the use of alcohol and drugs.

The traditional tests for capacity to enter into a contract were cognitive: the capacity to understand the nature and consequences of the transaction, i.e., the ability to know what he or she was doing and appreciate the effects of such an act.[32] In addition to a cognitive test of capacity, some authorities and some states have adopted a volitional test: where the individual understands the nature and consequences of his or her actions, but lacks effective volitional control over such actions, as with an individual suffering from manic-depressive illness[33].

In Estate of Garvey[34] and Estate of Darilek[35], the courts were presented with situations where the contestants to the respective wills introduced testimony by physicians, who were also qualified as handwriting experts, that the testator was incompetent based on reviews of portions of the medical records written by the patient and a comparison of signatures. In Garvey, the physician performed an autopsy and compared documents; in Darilek, a psychiatrist, reviewed hospital records and compared exemplars with records made by the decedent in the hospital. In each case the trial court and the court of appeals rejected that testimony as insufficient to establish incompetency.

---

[32]. Farnsworth, supra, 4.6.

[33]. See, Ortelere v. Teachers Retirement Board (1969) N.Y.2d 196, 250 N.E.2d 460.

[34]. Estate of Garvey (1940) 38 Cal.App.2d 456, at 458.

[35]. Estate of Darilek (1957) 151 Cal.App.2d 322, at 326.

Thomas J. Gibbons, et al.
v.
Owen J. Redmond et al, Appts.
Kansas Supreme Court — October 5, 1935

Editors note: the following ruling by Judge Burch in Gibbons v. Redmond (142 Kan. 417, 49 P. (2nd) 1035.) has been reprinted with permission. The annotation titled "Competency of testimony as to one's mental condition, based on handwriting" follows the Court's opinion on pages 900 and 901 in American Law Reports, Annotated, Volume 103.

Burch, Ch. J., delivered the opinion of the court:

The action was one to contest a will on the ground of mental incapacity of the testator. The district court set aside the will, and those interested in sustaining it appealed.

The will was that of Thomas McDonald, a bachelor, approximately sixty-six years old. He was the son of Patrick McDonald and wife, and had a half-sister, born of the same mother but not the same father. The plaintiffs are children of the half-sister, nephews and nieces of the testator, and his sole heirs at law. They were given $5 each by the will. The defendants are the beneficiaries under the will, and the executor. The beneficiaries are strangers to the blood of the testator. They are children of Christopher and Mary E. Redmond, who were close friends of the testator and his father and mother. The will provided that all the testator's property, real and personal, should be converted into money and the money should be divided equally among these children.

On March 4, 1933, the testator suffered a cerebral hemorrhage, resulting in partial paralysis of one side of his body. The next day he was taken to a hospital, where he remained until April 15, when he died. The will was executed at the hospital on March 23. It is conceded by defendants that while the testator was at the hospital he was at times irrational. It is conceded by plaintiffs that he was at times rational. Therefore the question was whether the testator possessed sufficient mental capacity to make the will at the time it was executed. That does not mean that no evidence could be considered except such as immediately related to the time the testator had the pencil, with which the will was signed, in his hand. No such attitude was assumed at the trial, and the testimony took a wide range.

Defendants' principal contentions are these:

"First: All the substantial evidence in this case conclusively shows that the testator, Thomas McDonald, had testamentary capacity at the time he executed his will.

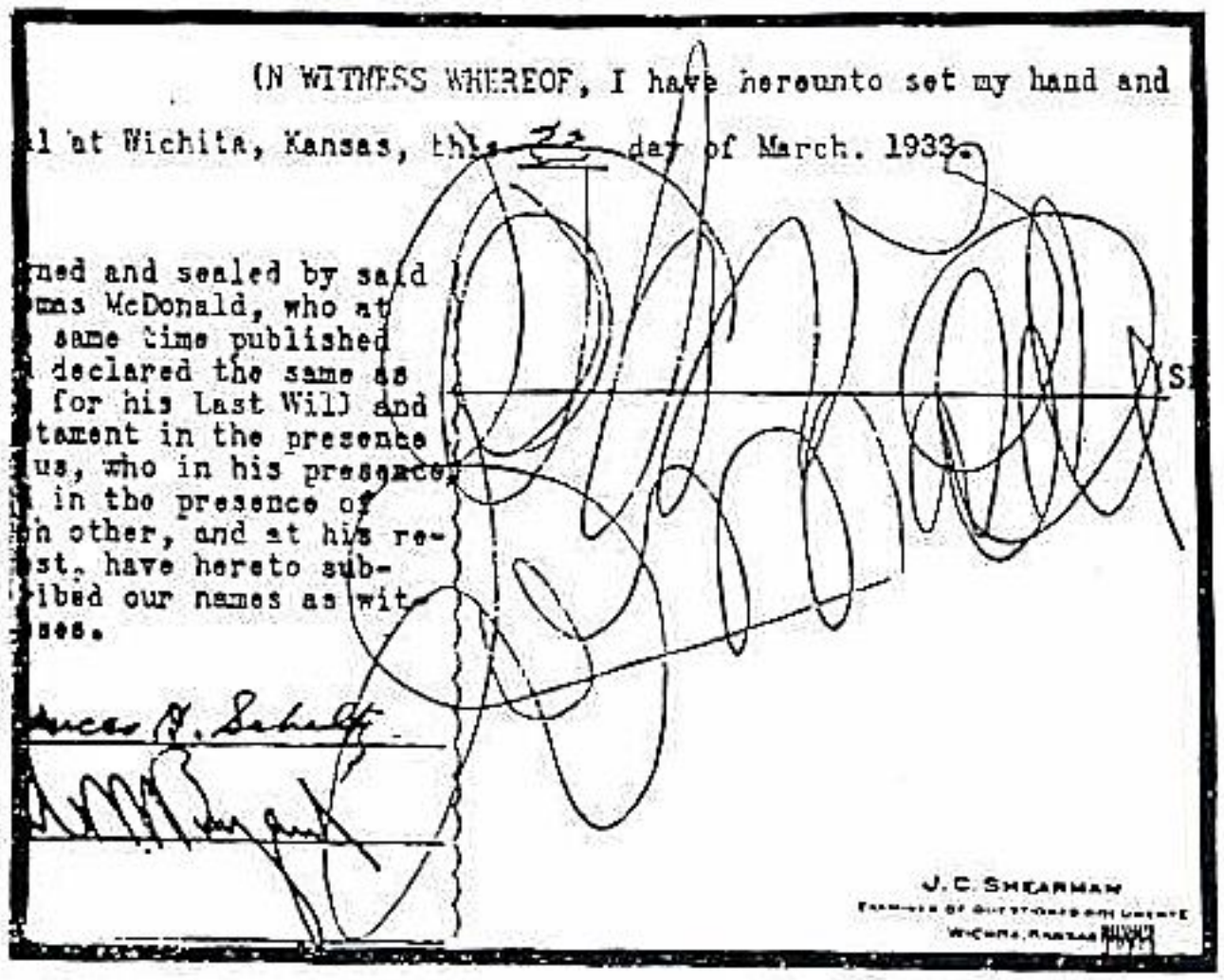
"Conversely, there is no substantial or convincing evidence to sustain the finding of the trial court that the testator did not have testamentary capacity at the time he executed his will."

These propositions serve as a basis for an argument which should have been, and doubtless was, addressed to the trial court. The rules relating to consideration on appeal of credibility of witnesses, of weight of evidence, of conflicts of evidence, and of differing inferences from evidence, are well known, and the court does not propose to review the evidence. Some observations will be made which will serve primarily to develop a question of law relating to admissibility of testimony, and the observations will be extended to include some other evidence relating to the testator's mental condition.

Beginning with the very time the will was executed, the name of the testator was not written at the end of the will. Instead of that, the testator produced a grandiosity, of which the following is a reproduction:

Ex. GG.

GIBBONS v. REDMOND. 895



Usual signatures of the testator were in evidence. None had an extreme height of more than five-eighths of an inch, and what appears at the end of the will does not disclose a single characteristic of the testator's usual signature, unless it be speed. There was no finger movement in making the signature, but anybody can see the pencil was firmly held and the flourishes were produced by free arm movement, without tremor, and without awkwardness.

All the testator's ordinary signatures were written "Thos McDonald." No witness for defendants came forward to say he could find "Thos." or "Thomas," or "McDonald" in the lines, or tell where given name left off and surname commenced. A qualified handwriting expert testified for plaintiffs that the abbreviation "Mc" is entirely absent from the lines, and that there was no indication of any effort to produce the "Mc" portion of the writer's name. There was no testimony that "Mc" could be found in the lines. There was expert testimony, admitted over objection, disparaging to the testator's competency, based in part on the signature itself.

Before discussing admissibility of the expert testimony just referred to, something may be added bearing on the subject of the testator's mental condition when the will was executed.

The will was signed at about 5:30 in the afternoon of March 23, and was prepared for signature pursuant to conversation between the testator and the scrivener on that day. The will contains no description of the testator's property, which consisted of numerous items of both real and personal property, and there was no testimony the testator discussed with the scrivener the composition and extent of his estate. The will contains no name of any nephew or niece, and there was no testimony the testator named any disinherited heir. After the will was signed, the scrivener made independent inquiry concerning who

the nephews and nieces were. The will does contain the names of the Redmond children. The scrivener did not learn these names from the testator, but resorted to independent inquiry to ascertain them.

On Sunday, March 19, the testator, conversing with a friend, W. E. Phifer, who was visiting him at the hospital, indicated he thought he was down in Mexico, down on the Gulf of Mexico. Similar statements were made when Phifer subsequently visited the testator.

A few months before his stroke, the testator had discussed his business affairs with Phifer in considerable detail; discussed the subject of making wills; mentioned some estates disposed of by will to other than relatives, over which trouble had arisen; said it was foolish for a man to leave his property to persons not blood relatives; and said he was going to leave his property to his nephews and nieces. Phifer had no interest in the controversy and testified the testator was out of his mind on March 19.

On March 20 or March 21, the testator was visited at the hospital by J. M. Kessler, who testified:

"He said he had just got back from Mexico, selling real estate. He said he had been selling some down on the Gulf of Mexico. He says, 'You can see—' He says, 'See the water out there?' He says, 'We are selling lots right out there in that water,' and he says, 'They are buying them.' I was there about half an hour. He jumped from one subject to another."

Kessler expressed the opinion the testator was "crazy."

When the testator had his stroke, he was at C. O. Swenson's room. Swenson helped him home, put him to bed, stayed all night with him, and finally persuaded him to call a doctor. Swenson saw the testator several times at the hospital. Swenson testified that several days before the will was made the testator's mental condition was very poor.

On March 22, Phifer visited the testator at the hospital. Phifer testified:

"He had it in his head they were sort of persecuting him at the hospital. He said if somebody didn't get him out of there they were going to kill him. He asked me if I would get him out of the hospital. I told him I couldn't. He said, 'You can get me out if you try,' and I said, 'Well, if I could, I would sure get you out, but I believe the only person that can get you out of the hospital will be the doctor.' . . . He said they wasn't going to let him out, the doctor wouldn't talk to him about getting out; that he was going to get out of there whether or no. My opinion was that he was in pretty poor mental condition. He apparently did not know or understand what he was doing on that occasion."

About 7 o'clock, or later in the evening of March 23, after the will was signed, Swenson visited the testator. A nurse told Swenson the testator had made his will that day. Swenson testified:

"The nurse asked me to stay with Mr. McDonald. She wanted to go out a little. When she went out, I took the chair and moved up to his bed and talked with him. I says, 'Well, you made a will today. I understand you made a will today, Mr. McDonald,' and he said, 'Yes.' 'They told me if I would make a will,' he said, 'that I would get better.' I don't remember what we talked about then after that, that night. I stayed an hour or so every time I went to see him. . . . On the particular evening of the day the will was executed, I think that he was very sick and he didn't know what he was talking about. . . . I think his condition seemed worse the night of the day the will was executed than when I saw him on my previous visit."

On the evening of March 24, the testator was visited by Phifer. Phifer testified:

"He didn't say much of anything on that evening I was up there. He was restless. I don't recall any con-

versation with him at all. He would talk once in a while, while tossing about in bed. He wouldn't talk to me because he didn't know who I was. He never did recognize me after the first week I went up there, not until I would tell him who I was. The nurse or myself, one or the other, would tell him who I was after I went to the room. That is the only way he would recognize who I was. I recall he muttered statements about he was going to take a swim in the Gulf of Mexico. . . . In my opinion he had no mental condition at all; in other words, he was all gone, as we would say."

L. Myers, an old neighbor and friend, visited the testator at the hospital on the evening of March 24. Myers' brother, whom the testator knew, was with Myers. The testator did not recognize them. Myers testified:

"I asked him how he felt and he said he had a severe pain in the back of his head; I asked who his doctor was and he said Dr. Holmes was his doctor. I says, 'Tom, I don't know any doctor in Wichita by the name of Holmes,' and he said, 'Dr. Winn Holmes,' and I says 'Tom,' I says, 'he is an attorney,' and he got mad at me and got up and turned over and turned his back to me and laid there a little while and he turned over again and says, 'I have got to get up and get out of here.' He says, 'I have got an appointment at the Allis Hotel, at four o'clock.' He says, 'I am going to Texas on a big land deal.' From my observation of him in the hospital and my acquaintance with him through the years I am of opinion he was crazy, nothing else, on March 24, 1933."

Between noon and 1:00 p. m., the day after the will was made, the testator was visited by Kessler, who testified:

"At that time he says, 'I am living at the Allis Hotel.' He says, 'You know where the Allis Hotel is up there on the corner of First and Market.' [Wrong location.] He says, 'It runs a block down this way and a block over that away.' He said he was going to build one of them when he got out of there—he thought it was a paying proposition. He wanted to know if I knew Dr. Callahan. I told him, 'Yes.' Well, he says, 'You can't trust Dr. Callahan.' 'Oh,' I says, 'I guess so, Tom. He is a good fellow.' He says, 'No. You can't trust him.' He says, 'He had a woman up there about forty-five years old and wanted me to sign a will.' He says, 'I guess she is after my property.' I asked him, 'Did you sign the will, Tom?' He said, 'No, but they told me if I would sign it I would get better.'"

The attending physician testified that about the 19th of March the testator began to improve and his condition was pretty good. Purporting to give the testator's condition from the hospital clinical record, the attending physician testified as follows:

"On March 18 he was restless, had a poor day and a poor night. On March 19 he had a better day. On the 20th he had a fairly good day. On the 21st he had a fair day and better night, respiration was normal. On March 22 at times he was talking and mumbling and on March 23 he had a fairly good day. On March 24th he was quiet at times and mumbling at times and had a good day."

Another physician, with the same chart before him, testified for plaintiffs that on March 22 the patient was talking at random, was very restless, and had three emptyings of the bladder, soiling the bed. On March 23 the patient had an involuntary passing of urine, and two involuntary stools. Later in the night the patient was very restless and kept jerking at the bedclothes. On March 24 the record showed continued restlessness, talking constantly, and involuntary urination. The chart showed that on March 19 he was given sodium amytal, which is a very strong sedative, probably next to morphine, given hypodermically. On March 23 he was given allonal, also a sedative.

From the foregoing, the court

might have concluded that if the days on which the testator's friends visited him were good days and fair days, the terms "good" and "fair" needed redefinition. The court was also authorized to conclude that if on the afternoon of March 23 the testator possessed all the elements of competency to make a will, he must have made sudden recovery, and then suffered sudden relapse.

It is perfectly manifest something was wrong with the testator when he attempted to sign the will. The formless marks do not make names. Considering the marks as a signature, it is egregiously abnormal. It would be idle to contend, in the face of the dexterity disclosed, that any muscular inhibition caused omission of part of the testator's name. If he could have signed a will disposing of his entire estate with something resembling his signature, doubtless he would have done so, and without expert testimony, the court was warranted in inferring the testator lacked mental capacity to write his name, and when he was through, he did not know what he had done. There was fair basis for nonexpert inference his mental faculties were in a swirl, much like his pencil.

J. C. Shearman, of Wichita, is an examiner of questioned documents who possesses the highest qualifications for work in his field, has had wide experience, and his services are in much demand when genuineness of signature and related subjects are involved. He is not a physician or an alienist, but he has extended his studies to ascertain relation between abnormality of signature and abnormality of mental state when the signature was made. He testified he had investigated a sufficient number of writings made by persons not mentally sound, that he could tell whether the signature was normal or abnormal, and could tell some of the causes of abnormality. Of course there are border-line cases, and he did not profess to know an exact mental state from handwriting alone, but he said the physical evidence on paper is utilizable as a basis for opinion.

1. Evidence—testimony as to mental condition based upon handwriting.

On the basis of his study and experience and an examination of the testator's signatures, Mr. Shearman testified the testator was not in the same mental condition when he signed the will that he was in when the normal signatures were made; the omission of "Mc" from the testator's name indicated mental lapse at that point; and that the freedom and grandeur with which the signature was written indicated exhilaration—a grand and glorious feeling. Objections were made to this testimony, which were overruled, and a motion to strike out the testimony was denied. The first question is: Was the testimony admissible at all?

An objection to the testimony was that Mr. Shearman did not qualify as a mental expert. Without discussing the subject of what it takes to be a mental expert, the witness qualified sufficiently respecting the limited subject upon which he expressed his opinion.

A physician who was an expert in nervous and mental diseases testified for plaintiffs the medical profession had not gotten to the point where human ailments could be diagnosed from handwriting. Mr. Shearman made no such pretension. However, the present state of medical science is due to amazing discoveries, the result of pioneer work in new fields, involving the accumulation of data, study and comparison of data, formulation of tentative hypotheses, and verification of the soundness of such hypotheses. Mr. Shearman discovered there were indications, in writings, of normality and abnormality which were frequently available as the basis of opinion. The fact that he made the discovery before the doctors did, does not detract from the result.

Verification of Mr. Shearman's conclusions in this case is found in part in testimony relating to the testator's mental condition. The record does not show Mr. Shearman

had any information concerning what this testimony would be.

Just before and just after the will was signed, the testator was in a state of mental exaltation. He was engaged in conducting big land deals far from home, and on one occasion, looking toward nurses in the room, he told a visiting friend he came back from Caliente, Mexico, and brought two Mexican girls with him. He was no longer living in a room rented from a landlady. He was living in a big hotel extending a city block in each direction. He intended to build a hotel himself. There was money in it. He had highly important business to do, and he had to be up and about it. He had an engagement at 4 o'clock at the Allis Hotel; he was going to Texas on a big land deal. So, when called on to sign his name, this personage of large affairs made the heroic flourishes found at the end of the will. The tension, however, relaxed for a moment, and this Irishman left the "Mc" out of his name.

Defendants say the question involved has not been decided, and admission of the testimony was necessarily prejudicial error. The court has not investigated the authorities, except such as are cited in the briefs, because the fact that the question has not heretofore been specifically decided is not sufficient to warrant refusal to admit the testimony. If it were, growth of the common law would be arrested, and it would be frozen where it is.

At the 1935 commencement, the president of Cornell University, addressing the graduates of the medical school, said there was a tendency on the part of the medical profession and on the part of the legal profession to act on the premise, "Whatever was, is right." A decision by this court that the testimony should have been excluded, because there is no established rule of evidence authorizing its admission, would demonstrate soundness of the criticism.

The court concludes the testimony of Mr. Shearman was properly admitted. There is debate in the briefs respecting consideration and weight given the testimony by the trial court. For that reason, admissibility of the testimony has been discussed. What weight should ultimately be given the testimony was a matter for the trial court to determine. Before finally disposing of the case, the court put into the record a statement showing the testimony was not regarded as of particular importance to the decision.

The foregoing includes only a portion of the evidence favorable to plaintiffs and is not a review of the evidence generally. There was much evidence favorable to defendants. The signature to the will was written with the testator's right hand. There was abundant evidence the testator's left side was paralyzed and not the right side, as defendants contended. The evidence sustaining this view as utterly incompatible with the opposing evidence, and cast serious doubt on much more evidence for defendants. It was the function of the district court to resolve the conflict. This court may determine whether evidence is sufficiently substantial to create a conflict with substantial evidence, but the weighing of evidence involves exercise of original and not of appellate jurisdiction.

2. —sufficiency to sustain finding—competency of testator.

There was much medical expert testimony relating to mental capacity. The court declined to choose between the irreconcilable views, and found for plaintiffs from other evidence. This court declines to disturb the district court's finding.

The judgment of the District Court is affirmed.

I.
Undue Influence and Contract Law

The concept of undue influence developed in the English courts as a means of policing unfair agreements induced by improper means of persuasion.[1] By contrast, the common law doctrines of duress were conceived as corollaries of the law of crime and tort.[2] The English equity courts sought to protect individuals, affected with a "weakness" that fell short of total incapacity, against improper persuasion by others in positions of authority, control, trust, familial relation, or the like, who had the means and opportunity to exercise improper persuasion.[3] The equity courts did not have to resort to legal doctrines that were based on violations of the law of tort or crime; rather, the unfair gain of economic advantage over someone mentally or physically disadvantaged was condemned by the prevailing standards of ethics as defined and applied by the equity courts.[4]

> Dawson, in tracing the history of the legal concept of undue influence, notes a significant advance in the doctrine as occurring in the nineteenth century.[5] Undue influence cases were seen within a larger context, where the wrong perpetrated was the interference with another's will, which ideally should be free. The test for undue influence became the presence or absence of free agency, i.e., whether the individual will had been overpowered. The net result was that the inequality that the courts should guard against was pressure that compelled the person to act against his or her own desires.

The courts came then to regulate the pressures that can be exerted on the physically, mentally, or emotionally disadvantaged. As Dawson indicates in summation of the development of this doctrine, with the use of donative gifts as a specific example.

A closer reading of the undue influence cases reveals the operation of some objective tests, side by side with the analysis of individual motives that is chiefly accented in judicial opinions. Transactions must be judged not only in terms of motive but in terms of their effects.... The aim is by no means to eliminate but to safeguard the powers of donation of the aged, the timid, the physically or mentally weak. Therefore, the question, difficult as it is to answer, must be whether existing opportunities for the exercise of pressure have been used to divert the gift from its normal and natural course, in view of the donor's total situation — economic, psychological, and emotional.[6](Emphasis added)

---

[1]. Farnsworth, CONTRACTS, 4.20, p. 444.

[2]. Dawson, John P., "Economic Duress — An Essay in Perspective" 45 MICHIGAN LAW REVIEW 253, at 263ff [hereinafter "Dawson"].

[3]. Joy v. Bannister (Chan. 1617), in Bacon's Reports 33, 34, (Ritchie ed. 1932); Clarkson v. Hanway, 2 P. Wms. 203 (1723) (a conveyance by a "weak" seventy-two year old was set aside because the individual was "easily to be imposed", with inadequacy of consideration being an additional ground); Blake v. Johnson, Prec. in Chan. 142 (1700); and Lucas v. Adams, 2 Mod. Cas. in Law and Equity 118 (1725).

[4]. Dawson, 45 MICHIGAN LAW REVIEW 253, at 262.

[5]. Id., at 263.

[6]. Id., at 264.

A striking example of a case that involves both a contract and a will comes from the early English cases. In a case decided in 1617, by Chancellor Francis Bacon, a woman of the quaint name of Mrs. Death was found to have used undue influence to obtain a deed to land and a will leaving her personal property of considerable value, from a Mr. Lydiatt. As Chancellor Bacon writes, Lydiatt was:

> an old man about the age of eighty years and being weak of body and understanding and having a great estate of goods and lands... was drawn by the practices and indirect means of ...[Mrs. Death] to give his house here in London and to come to sojourn with her at her house in the country... [although she was married to Mr. Death], and that she having him there did so work upon his simplicity and weakness and by her dalliance and pretence of love unto him and of intention after the death of her then husband to marry him, and by sundry adulterous courses with him and by sorcery and by drawing of his affections from... his kindred, telling him sometimes that they would poison him and sometimes that they would rob him.[7]
>
> After she had obtained control of his estate and property, Mrs. Death neglected such attendance of him as she had used before and used him in a most cruel manner reviling him and causing him to be whipped and suffered him to lie loathsomely and uncleanly in bed until three o'clock in the afternoon without anybody to help him so as all the skin of his loins went off, he being not able to help himself by reason he was troubled with a dead palsy and other diseases, and when at any time she did come to help him up she would pinch him and revile him and by such cruel and terrible courses kept him so in awe as that he durst no revoke what before he had done, neither would she suffer his nieces to come unto him lest he should make his moan unto them, for she said if they came there she would scald them out of her house.[8]

Here, we see many of the elements of undue influence: weakness, opportunity, means of persuasion, and unnatural disposition of property and estate. Mrs. Death worked "upon [the] simplicity and weakness" of the 80 year old Lydiatt, "by her dalliance and pretence of love... and by sundry adulterous courses with him and by sorcery." that he executed a will and a deed in Mrs. Death's favor.

A. Legal Reasoning

To adequately understand what the concept of undue influence has come to mean in a contemporary legal setting, one must first look to the statutory definition of the term. Second, one looks to actual cases where undue influence is central to the decision to determine in what context the issue has arisen and how judges interpreted the term in light of the facts of a specific case. Third, one reasons by analogy from the facts and judicial interpretation of a precedent setting case to the facts of any case-at-hand. The history of legal decisions on the issue of undue influence becomes a series of legal precedents that are applied by analogy to any new or novel set of facts.

---

[7]. Joy v. Bannister (Chan. 1617), in Bacon's Reports 33, 34, (Ritchie ed. 1932).

[8]. Id., at 34-35.

B. Statutory Definition of Undue Influence

California defines undue influence by statute, in California Civil Code Section 1575:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.[9]

C. Undue Influence in Relationships Based on Trust and Confidence

Corresponding to the first subsection of Civil Code 1575, the courts traditionally require two elements to be proven in a case of undue influence involving a contract: (1) a special relationship between the parties based on confidence and trust; and (2) improper influence or persuasion of the weaker party by the stronger.

1. The Concept of Special Relationship in 1575 (1) of the Civil Code.

The term "special relationship" is a complex concept in the law. The basic idea is a relationship between parties based on trust and confidence where the weaker party is justified in assuming that the stronger will not act in a manner inconsistent with his welfare.[10] Where this relationship of trust and confidence has been formally recognized, either by statute or case law, the stronger party is often referred to as a fiduciary. Examples of such statutorily recognized fiduciaries are trustees, guardians, executors, administrators, and attorneys.

Because professionals, such as trustees or attorneys, are recognized as having fiduciary responsibilities, the courts will scrutinize their actions intensely. In general the fiduciary has the obligation or burden of proving that he or she has adequately discharged the duties attendant on their position.

Other common, non-statutory examples include: parent and child, husband and wife, member of the clergy and confessing communicant, and physician and patient.

---

[9]. Civil Code 1575 (Deering,)

[10]. Restatement Second of Contracts 177 ("a party... who by virtue of the relation between them is justified in assuming that (the other) person will not act in a manner inconsistent with his welfare.")

2. Undue Influence in a Relationship Based on Trust and Confidence

Once the special relationship based on trust and confidence is established, the second step in proving undue influence is to prove that the assent of the weaker party was obtained by means of unfair persuasion or undue influence. Cases differ as to the nature or degree of the unfair persuasion necessary to be present to be called undue influence. Fundamentally, the courts will seek to determine whether the result was an exercise of the individuals free will or produced by means that substituted the will of a stronger party for the will and judgement of a weaker.

One factor the courts will consider is an obvious imbalance of power or inequitable unfairness in the results of the bargain to the weaker party. Other factors considered in various cases are: (1) lack of independent advice; (2) special susceptibility of the weaker party to the importuning of the stronger; and (3) lack of time to reflect and consider the consequences of all actions.

A common example of a fiduciary relationship is that between attorney and client. If an individual enters into a contract with his attorney (except for the original contract to retain the attorney's services in the first place), where the attorney profits from or gains an advantage over his client, that contract is taken by the courts to be presumptively invalid. In order for the attorney to gain the benefit of the contract, the attorney must prove that the client was fully informed of all necessary facts and that the individual had been advised and given the opportunity to consult with another independent attorney. Moreover, the attorney must prove that the contract was fair in all regards and that client received an adequate return in exchange for what the client gave over to the attorney.

The example of a contract between a client and an attorney may be seen as a model of the issues of undue influence where a fiduciary is involved. If a contract is made between an individual and his or her fiduciary, such as an executor or trustee, the contract may be rescinded unless the contract is (a) fair in all aspects; (b) the beneficiary was of full capacity at the time the contract was entered into; (c) prior to entering into a contract, the beneficiary had full knowledge of all the facts of the contract and of his or her rights under the contract; (d) had time to reflect on the contract; and (e) had the opportunity to or was advised to consult an outside fiduciary or expert.

D. Undue Influence In Cases Involving Family Members or Friends

Often cases arise which involve family and friends who become parties to a contract. In general, family relationships, such as between husband and wife or parent and child, are confidential relationship. These relationships, like fiduciary relationships, have at their crux a history of "informal" trust and confidential dealings. In cases that arise where a family member gains a profit or distinct advantage through dealing with a weaker party, the courts have looked to see if the weaker party is very old, mentally incapacitated, suffering from debilitating sickness, or otherwise so physically or psychologically impaired. Such physical or psychological impairment combined with a lack of independent advice and a contract giving an obvious advantage to a family member would force the stronger party to prove a contract's fairness.

E. Undue Influence in Relationships Not Based on Trust and Confidence

The second and third sections of Civil Code 1575, contemplate situations where undue influence occurs outside the ambit of a fiduciary or confidential relationship. The cases arise much less frequently in the law than in cases involving fiduciaries or family members.

One reason for the lack of frequency is that the courts have been worried that individuals who simply made a "bad" bargain might later claim that were induced into the bad contract through the artful deception and undue influence of the other party. Courts have long recognized that good salesmanship and "puffery"— extolling the virtues of an otherwise mediocre object — are the basis of many a contract. If these virtues prove to be actual misrepresentations that induced the unwary party to enter into the contract, he or she can seek to rescind the contract under the doctrine of fraud or misrepresentation.

On the other hand, good salesmanship is limited by the legal concepts of duress and undue influence. Duress is coercive behavior, either physical compulsion/confinement or a threat of the same, which induces the victim's agreement to enter into a contract. Under the theory of contract law, where there has been duress, there has been no actual assent to the contract, since the victim has been forced to become a "mere mechanical instrument" of the stronger party.[11]

Where the relationship is less formalized, that is, without a confidential or fiduciary relationship, the courts will look to a combination of factors to determine whether an individual has taken advantage of the weakness of another through the use of their own disproportionate strength. The courts have found that "disproportionate strength" may be based upon knowledge, experience, training, or relationship. Therefore, undue influence also includes situations in which the a weaker individual comes under the domination of the stronger, when such "strength" is based on knowledge, training, or relationship and "weakness" is a product of weakness of mind or necessities of life and/or distress.

In the most important of such cases, Odorizzi v. Bloomfield School District[12], the plaintiff was a elementary school teach who had been arrested on criminal charges of homosexuality. In his complaint, he alleged that on day, after his arrest, booking, interrogation by the police, and release on bail, and after he had gone 40 hours without sleep, the superintendent of the school district and the principal of his school came to his apartment to ask for his resignation. The school officials said that they were acting in Odorizzi's best interests in seeking his resignation, after which they would not publicize the arrest and thereby interfere with his chances to secure future employment. They also said that if he did not resign immediately, they would dismiss him and publicize the incident. The plaintiff signed a written resignation at that time. Later criminal charges were dismissed. He was later denied reinstatement and reemployment. Odorizzi brought his case against the school district to rescind his resignation.

---

[11]. Farnsworth, supra, 4.16.

[12]. Odirizzi v. Bloomfield School District (1966) 246 Cal.App.2d 123, 54 Cal.Rptr. 533.

The appellate court reversed a trial court decision and said that the situation rightfully fell under the doctrine of undue influence: taking unfair advantage of another's weakness of mind or distress. The court held that improper persuasion may occur when the person being influenced suffers from great weakness or when the person exercising the influence has excessive strength.

Further, the court listed a series of criteria that indicate whether this type of undue influence has taken place:

> (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequence of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys.[13]

Subsequent cases hold the undue influence occurs when a number of these elements, not necessarily all, are simultaneously present. The simultaneous operation of such factors ultimately indicated that the contract was achieved by means that impaired the free will and independent judgment of the schoolteacher.

> [T]he representatives of the school board undertook to achieve their objective by overpersuasion and imposition to secure plaintiff's signature but not his consent to his resignation through a high pressure carrot and stick technique — under which they assured plaintiff they were trying to assist him, he should rely on their advice, there wasn't time to consult an attorney, if he didn't resign at once the school district would suspend and dismiss him from his position and publicize the proceedings, but if he did resign the incident wouldn't jeopardize his chances of securing a teaching post elsewhere.[14]

F. Undue Influence as Programmatic Strategy of Totalistic Groups Intended to Induce the Formation of a Contract.

Recent litigation has seen the rise of causes of action based on the premise that totalistic groups, both of a religious and non-religious character, have developed and employed programmatically applied techniques to control and manipulate behavior in a weaker or subservient party in order to induce the weaker party to enter into a contract or execute a will in favor of the group or the charismatic leader of the group. Briefly, such groups used "coordinated programs of coercive and behavior control" — e.g., the organization and application of intense guilt, shame, and/or anxiety manipulation combined with the production of strong emotional arousal in settings designed to produce behavior that furthered the ends of the group or the leader.[15] Conformity with group

---

[13]. Id., 246 Cal.App.2d at 133, 54 Cal.Rptr. at 541.

[14]. Id., 246 Cal.App.2d at 135, 54 Cal.Rptr. at 543.

[15]. M. T. Singer & R. Ofshe, Thought Reform Programs and the Production of Psychiatric Casualties, 20 PSYCHIATRIC ANNALS No. 4, at 188-193 (April 1990) [hereinafter cited as Singer & Ofshe Thought Reform Programs].

expectations was the goal of the social and psychological pressures applied by the groups. Such pressures could only be reduced by weaker party's acceptance of the group's belief system and participation in behavior orchestrated by the group.

Research indicates that such groups operate by deliberately exploiting psychological vulnerabilities of the weaker party.[16] The strategy developed by these groups employs use of a designed program of psychological and social techniques that attack and destabilize the weaker party's "central elements of the experience of self." Central elements of the self has been defined as including: "self-evaluation of the adequacy or correctness of a person's intimate life and confidence in perception of reality (e.g., relations with family, personal aspirations, sexual experience, traumatic life events, religious beliefs, estimates of the motivations of others, etc.)."[17] Ofshe and Singer propose that reality awareness emotional control, and basic consciousness are at the core of the sense of self.[18]

Destabilization of the sense of self is coerced through techniques that force a reinterpretation of the individual's life history, a radical alteration of their world view, an acceptance of a new version of reality and causality, and/or dependency on the organization. Singer and Ofshe suggest that "attacking the stability and quality of evaluations of self-concepts is the principle effective technique used in the conduct of a coercive thought reform and behavior control program."[19] Among the techniques used to accomplish such ends are: group pressure, modeling, accusations, confessions on a social level, emotional flooding, sleep deprivation, stripping away of various psychological defense mechanisms, induction of cognitive confusion, and hypnosis to intensify recalled or imagined experience. The programmatic nature of these techniques in such groups has been termed a "behavior change technology" that can render a person a highly deployable agent of the organization.[20]

In Molko v. Holy Spirit Association[21], the California Supreme Court held that a former member of a religious group could seek restitution of a monetary gift to that group based on a theory of undue influence. Briefly stated, Molko alleged that defendant Holy Spirit Association [hereinafter "Church"] deceived him into unknowingly submitting to coercive persuasion, thereby obtaining undue influence over him which the Church later used to extract the monetary gift. The Court held that Molko could bring a claim against the Church as to whether the Church established and

---

16. R. Ofshe & M. T. Singer, Attacks on Peripheral Versus Central Elements of Self and the Impact of Thought Reforming Techniques, 3 THE CULTIC STUDIES JOURNAL No. 1, at 3-24 (1986) [hereinafter cited as Ofshe & Singer Attacks].

17. Id., at p. 4.

18. Id.

19. Singer & Ofshe Thought Reform Programs, at 189.

20. Ofshe & Singer Attacks, at 5. See, R. Ofshe The social development of the Synanon cult: the managerial strategy of organizational transformation, 41 SOCIOLOGICAL ANALYSIS 109.

21. Molko v. Holy Spirit Association For The Unification of World Christianity, et al., 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46. en banc, cert. denied, 109 S.Ct. 2110 (1989).

used its dominant psychological position and its confidential relationship with Molko "for the purpose of obtaining unfair advantage him with regard to the gift."[22]

It is of importance that the Court cited three sources for its view of undue influence as applicable to these groups. The first is California Civil Code 1575 (discussed above). The implication would be that such groups could be held to the standard of undue influence as stated in that code section. The second is an appellate court decision[23] that undue influence is "`that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment.'" (emphasis added by California Supreme Court) The third source cited was a legal reference text[24] that stated that undue influence "occurs when `one party uses [its] dominant psychological position in an unfair manner to induce the subservient party to consent to an agreement to which he would not otherwise have consented.'"

The research into such groups would tend to indicate that contracts induced by such could meet the seven criteria established for finding undue influence in non-fiduciary relationships by the court in Odirizzi.[25]

The Odirizzi criteria must be analyzed within the entire context of relations between the individual and the organization. The discussions regarding the contribution of assets occur after an organization has promoted dependence of the individual through incremental structural and material life changes. After an initial "recruitment phase" designed to establish affective bonds between the recruiting agents and the subservient individual. Influence tactics are employed to promote dependence on the organization. Direct social pressure is used to induce an incremental, step-by-step sequence of decisions leading to the formation of dependent power relations. Acceptance of the authority and the rules of the organization leads to structural and material changes in the individual's life which increasingly promote dependence. In part, structural and material changes over an individual are introduced into a person's life by the individual`s intimates who are also subject to the authority of the organization. Such intimates are in fact agents of the organization who ease the person along the road to dependence. Increasingly, the organization controls the person's income, employment, capital and social life. For example, persons may be induced to moving into a communally organized residence, accepting employment in an organization's business, leaving school, or contributing whatever assets they control to the organization.

It is within the context of authority, that is, structural and material control, that pressure and insistence on contributing assets to the organization occurs. The alternative to making contributions is often the threat of expulsion. In such circumstances, a person threatened with expulsion

---

[22]. Id., at 1125, 46 Cal.Rptr. at 141.

[23]. Bolander v. Thompson (1943) 57 Cal.App.2d 444, 448, 134 P.2d 924.

[24]. Calamari & Petrillo, THE LAW OF CONTRACTS (2d ed. 1977) at 274-275.

[25]. See text at footnote 13.