

1955

Theo Swan Hendee v. Walker Bank & Trust Co. et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace, Roberts & Black; Wayne L. Black; Counsel for Defendant and Appellant;
N. J. Coteo-Manes, Counsel for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Hendee v. Walker Bank & Trust Co.*, No. 8246 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2276

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of
WILDA GAIL SWAN, deceased

THEO SWAN HENDEE,

Plaintiff and Respondent,

— vs. —

WALKER BANK & TRUST COMPANY,
Executor of the Last Will and Testament
of WILDA GAIL SWAN, deceased;
GRANT MACFARLANE; DANIEL
KOSTOPULOS; and ADA BRIDGE,

Defendants and Appellants.

BRIEF OF APPELLANTS

RAWLINGS, WALLACE, ROBERTS & BLACK
WAYNE L. BLACK

*Counsel for Defendant and
Appellant, Grant Macfarlane*

530 Judge Building
Salt Lake City, Utah

N. J. COTRO-MANES

*Counsel for Defendant and
Appellant, Daniel Kostopulos*

430 Judge Building
Salt Lake City, Utah

RECEIVED

MAY 6 1955

LAW LIBRARY
U. of U.

TABLE OF CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	1
APPENDIX NO. 1	
Last Will and Testament of Wilda Gail Swan.....	2, I
APPENDIX NO. 2	
Codicil to Last Will and Testament of Wilda Gail Swan	2, III
APPENDIX NO. 3	
Second Codicil to Last Will and Testament of Wilda Gail Swan	2, V
APPENDIX NO. 4	
An exact duplicate of defendants' Exhibit 18, which is a graphic portrayal of the properties and devises in- volved in this will contest	2, VIII
STATEMENT OF FACTS	2
A Brief History	4
Gail and Theo	6
Gail and Daniel Kostopulos.....	10
Gail and Grant Macfarlane.....	11
Gail and the Bridges.....	15
Gail and Oscar Burnside Beam.....	17
Grant Macfarlane, Dan Kostopulos and the Bridges.....	18
Gail's Appearance, Her Hobbies, and Her Social Activities	19
Gail's Properties and Her Business Activities.....	22
Medical Testimony as to Gail's Mental and Physical Condition	28
Lay Testimony as to Gail's Mental and Physical Condition	34
Power of Attorney, Bank Books and Gifts.....	38
Gail's Last Will and Testament and the Codicils Thereto	43

TABLE OF CONTENTS—(Continued)

	<i>Page</i>
STATEMENT OF POINTS	50
ARGUMENT	50
POINT I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN LACKED TESTAMENTARY CAPACITY AT THE TIMES SHE EXECUTED THE WILL AND CODICILS	50
Burden of Proof	51
Test of Testamentary Capacity	51
Gail had Sufficient Mind and Memory to Determine who were the Natural Objects of Her Bounty.....	52
Gail had Sufficient Mind and Memory to Recall Her Property	55
Gail had Sufficient Mind and Memory to Dispose of Her Property Understandingly According to Some Plan Formed in Her Mind.....	56
The Trial Court's Findings of Fact, Conclusions of Law, and Judgment.....	58
Authorities	67
POINT II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN WAS UN- DER THE FORCE OF UNDUE INFLUENCE AT THE TIMES SHE EXECUTED THE WILL AND CODICILS..	77
Burden of Proof and Presumptions.....	77
Test of Undue Influence.....	90
The Trial Court's Findings of Fact, Conclusions of Law and Judgment.....	91
Authorities	111
CONCLUSION	124

TABLE OF CONTENTS—(Continued)

AUTHORITIES CITED

Page

Anderson v. Anderson, 43 Utah 26, 134 Pac. 553.....	49, 51, 90, 116
Anderson's Estate, In re, 142 Okla. 197, 286 Pac. 17 (Oct. 15, 1929).....	123
Bryan's Estate, In re, 82 Utah 390, 25 P. 2d 602, 609.....	81, 91, 122
Buckley v. Francis, 78 Utah 606, 6 P. 2d 188.....	86
Buttars' Estate, In re, Utah, 261 P. 2d 171.....	52, 71
Cave v. McLean, 66 Ohio App. 196, 32 N.E. 2d 581.....	124
Christiansen v. Hilber, 282 Mich. 403, 276 N.W. 495.....	86
Eakle's Estate, In re, 33 Cal. App. 2d 379, 91 P. 2d 954, 958.....	88
Erickson's Estate, In re, 140 Cal. App. 520, 35 P. 2d 628, 631.....	86, 123
Ford's Estate, 70 Utah 456, 261 Pac. 15 (decided Nov. 1, 1927)	70, 106, 121
Frame v. Hudspeth, 10 Cir. 109 F. 2d 356.....	86
George's Estate, In re, 100 Utah 230, 112 P. 2d 498.....	74, 105, 119
Goldsberry's Estate, In re, 95 Utah 379, 81 P. 2d 1106.....	106
Guidi's Will, In re, 259 App. Div. 652, 20 N.Y.S. 2d 240 (May 31, 1940)	124
Gum v. Reep, 275 Ill. 503, 114 N.E. 271.....	89
Hampton's Estate, In re, 127 P. 2d 38 and 131 P. 2d 565.....	89
Hansen's Will, In re (decided Aug. 9, 1917), 50 Utah 207, 167 Pac. 256, 260	49, 51, 60, 67, 77, 122
Hanson's Estate, In re, 87 Utah 580, 52 P. 2d 1103, 1116.....	51, 52
Harjoche's Estate, In re, 193 Okla. 631, 146 P. 2d 130 (Feb. 21, 1944)	123
Kindberg's Will (Ct. of App. of N.Y.) 207 N.Y. 220, 100 NE 789....	89
King v. Denver & Rio Grande Western R. Co., 116 Utah 488, 211 P. 2d 833	86
Klopstock's Estate, In re (Calif. Mar. 20, 1939), 88 P. 2d 722 31 Cal. App. 2d 568.....	77
Lavelle's Estate, In re, 248 P. 2d 372.....	91, 93, 102, 106, 107, 111
Lincoln's Estate, In re, (Oct.), 185 Okla. 464, 94 P. 2d 227.....	77, 91
Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 A. 884, 63 A.L.R. 334	86

TABLE OF CONTENTS—(Continued)

	<i>Page</i>
Morey's Estate, In re, 147 Cal. 495, 82 Pac. 57, 62.....	122
Morrison v. Perry, 104 Utah 151, 140 P. 2d 772.....	86
Newell's Estate, In re, 78 Utah 463, 5 P. 2d 230, 240.....	78
Nixon's Will, In re, 136 N.J. Eq. 242, 41 A. 2d 119 (Feb. 2, 1945)....	123
Oglesby v. Harris (Tex.), 130 S.W. 2d 449.....	124
Peterkin's Estate, In re, 23 Cal. App. 2d 597, 73 P. 2d 897.....	62
Phillipi's Estate, In re, 76 Cal. App. 2d 100, 172 P. 2d 377 (Sept. 16, 1946)	123
Putnam's Will, In re, 135 Misc. Rep. 311, 238 N.Y.S. 112, affirmed by Court of Appeals 257 N.Y. 140, 177 N.E. 399.....	124
Saltas v. Affleck, 99 Utah 65, 102 P. 2d 493.....	86
State v. Green, 78 Utah 580, 6 P. 2d 177; on rehearing 86 Utah 192, 40 P. 2d 961.....	86
State v. Prettyman, 113 Utah 36, 191 P. 2d 142, 147.....	86
Swan's Estate, In re, 51 Utah 410, 170 Pac. 452.....	75
Tuttle v. Pacific Intermountain Express Co., 242 P. 2d 764, 769.....	84
Van Alstine, In re Estate of, 26 Utah 193, 72 Pac. 942.....	51
Whitworth's Estate, In re, 110 Cal. App. 526, 294 Pac. 84.....	60, 61, 62
Wunderlich v. Buerger, 287 Ill. 440, 122 N.E. 827.....	124

TEXTS CITED

Annotation 95 A.L.R. 878 at page 880.....	86
123 A.L.R. 1505.....	93
57 Am. Jur. 570, Wills, Sec. 856.....	51
66 Harv. L. Rev. 1116.....	97

IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of
WILDA GAIL SWAN, deceased

THEO SWAN HENDEE,
Plaintiff and Respondent,

— vs. —

WALKER BANK & TRUST COMPANY,
Executor of the Last Will and Testament
of WILDA GAIL SWAN, deceased;
GRANT MACFARLANE; DANIEL
KOSTOPULOS; and ADA BRIDGE,
Defendants and Appellants.

Case No. 8216

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

The plaintiff and respondent will be referred to as contestant or in her own name, and defendants and appellants will be referred to collectively as proponents or individually in their own names.

All italics are ours.

The following appendices appear at the back of this Brief for the convenience of the court:

APPENDIX NO. 1

Last Will and Testament of Wilda Gail Swan.

APPENDIX NO. 2

Codicil to Last Will and Testament of Wilda Gail Swan.

APPENDIX NO. 3

Second codicil to Last Will and Testament of Wilda Gail Swan.

APPENDIX NO. 4

An exact duplicate of defendants' Exhibit 18, which is a graphic portrayal of the properties and devises involved in this will contest.

STATEMENT OF FACTS

Wilda Gail Swan passed away on the 28th day of May, 1952 leaving a will signed on May 2, 1947, a codicil signed on February 20, 1950, and a codicil signed on April 23, 1951.

On the 5th day of June, 1952 the Walker Bank & Trust Company filed in the Third Judicial District Court

in and for Salt Lake County, Utah, a Petition for Probate of Will and Codicils, and for issuance of Letters Testamentary.

On June 25, 1952 Patricia P. Stewart testified as subscribing witness to the will and first codicil, and Adolph M. Neilsen, M.D., testified as subscribing witness to the second codicil. On the same date Judge Martin M. Larson signed an Order Admitting Will to Probate, and Letters Testamentary were issued to the Walker Bank & Trust Company as Executors of the Estate of Wilda Gail Swan, deceased.

Thereafter, on the 8th day of November, 1952, Theo Swan Hendee filed this action alleging generally that at the times of signing the will and codicils Wilda Gail Swan lacked testamentary capacity and was acting under the undue influence of Grant Macfarlane, her lawyer and a beneficiary in her will and codicils, and of Daniel Kostopulos, a friend and a beneficiary in the codicils, and praying that the will and codicils be declared null and void and that the entire estate be distributed to Theo Swan Hendee, as the only heir of the deceased. Thereafter, the defendants answered, in effect denying the allegations of the complaint and contest, and praying that the estate be distributed according to the terms of the will and codicils. The case was tried by the Honorable Parley E. Norseth, sitting without a jury. Thereafter, on the 14th day of May, 1954, the court made its Findings of Fact, Conclusions of Law and entered judgment in favor

of the plaintiff denying probate of the will and codicils. On the 24th day of May, 1954 defendants, Grant Macfarlane and Daniel Kostopulos filed objections to the court's Findings of Fact and Conclusions of Law and also a Motion for a new trial. On the 15th day of July, 1954 the trial court entered its Order denying said Motion for a new trial. On the 3rd day of August, 1954 said defendants filed their Notice of Appeal.

Inasmuch as the ultimate decision on appeal will depend to a large extent on whether the findings of the trial court are justified by the evidence, we deem it necessary to make a rather comprehensive statement of facts.

A Brief History

Wilda Gail Swan was born at Salt Lake City, Utah in 1890 (R. 94). Her sister and only heir-at-law, Theo Swan Hendee, was born in 1888 (R. 94). Gail's father was Ed Swan (R. 93). Her mother was Blanche Swan (R. 93).

Gail started life as a normal, healthy child. She began school in the year 1896 and continued until 1902 when she suffered a violent epileptic seizure (R. 95). From 1902 until 1917 Gail suffered from epileptic seizures of varying degrees of intensity. In 1917 a Dr. McGee, at Laramie, Wyoming, administered treatments which very much improved her condition (R. 100). During these years Gail did not attend school, although she did receive private tutoring from a Mrs. Sneddon (R. 140). Gail was never married, and due largely to her physical frailties, lived a secluded life (R. 101, 108, 131).

She and her parents moved to the family residence at 1335 Perry Avenue in 1922 (R. 104). From 1922 to 1931 Gail's mother was an invalid and required constant nursing care. Her mother died in 1931 (R. 107). During the years that followed Gail's general condition "improved a great deal" (R. 112).

Gail's father died after an extended illness at the Miners Hospital in Salt Lake City, Utah, on the 30th day of June, 1950 (R. 119). She continued to live at the family residence until her own death on the 28th day of May, 1952. Between her father's death and Gail's death, three different housekeepers stayed with her, the first being Mrs. Sheeran, the second Grace Folden, and the last Alice Wagstaff (R. 119).

During the last six years of her life, Gail was hospitalized five times, the last being approximately six weeks at the L.D.S. Hospital. She was treated on this occasion by Dr. Frank.

Gail's only living relatives at the time of her death were her sister, Theo; her aunt, Bell Martsolf; a cousin, Dee Stone, who practiced law in New York City, and a cousin, Mrs. Bowell, who lived at Harrisburg, Pennsylvania (R. 129).

Gail and Theo

Theo lived at the Swan home until she graduated from high school. In 1907, 1908 and 1909 she attended the University of California. In 1909, 1910 and 1911 she attended Vassar, an exclusive ~~high~~ school for women. She graduated from Vassar with an A.B. degree in 1911 (R. 98). Thereafter she attended the University of Utah where she received a B.S. degree (R. 141).

In 1911, 1912 and 1913 she taught school at Mountain Home, Idaho. In 1913 and 1914 she was in Europe on an extended vacation tour with a Mrs. Bogue and her daughter (R. 98, 99).

Theo married Harold (Deak) Hendee in 1914 and lived with him in the Eastern States until 1922, when she and her husband moved to San Francisco, California where Mr. Hendee worked for the Oakland Tribune, the Coast Banner and thereafter became editor of the Wall Street Journal (R. 104). During the years that followed, Theo visited at the Swan household an average of two or three times a year (R. 110-112). She also corresponded regularly with Gail and frequently called Gail by telephone (R. 112).

Theo and her husband led a socially active life at San Francisco (R. 142, 143). Mr. Hendee belonged to the Bohemian Club, Chamber of Commerce and Rotary Club. Theo belonged to such exclusive clubs as the San Fran-

cisco Musical Club, Pacific Musical Club, the Harp Club, the Forest Hill Garden Club, the Pi Phi Sorority and the Vassar Club (R. 142, 143).

Theo herself testified that as a result of the extreme difference in their social positions Gail had an inferiority complex in her relationship with Theo (R. 141).

Following the year 1935 Gail only visited at Theo's home on two occasions. She didn't feel at home at Theo's (R. 145). Aunt Bell Martsof testified to Gail's awareness of the difference in the social life between Gail and Theo (R. 293).

Gail had certain difficulties with Theo from time to time, and on more than one occasion had responded to Theo's questionings with the answer, "None of your business" (R. 131, 132, 167).

Another indication of difficulties between the two is demonstrated by Theo's testimony on cross-examination (R. 169):

"Q. You wrote Macfarlane didn't you, a letter, or Gayle Macfarlane, on the 27th of November, 1951, in which you said to Gayle, 'Caution Grant to remember I did not see any of you while we were in Salt Lake this time. If Gail found out I had called at the office, trouble might brew again. A little care is so important.'? Did you write her that?

"A. I think I did."

Mrs. Wagstaff testified that Gail thought Theo was ashamed of her, and also that Gail resented Theo sending cast off clothing to her (R. 695, 696, 699, 700).

Macfarlane testified to an occasion when Gail told him he would get his "walking papers" if he discussed her affairs with Theo again (R. 726).

Clair Mortensen, Trust Officer and Vice President of Walker Bank & Trust Company, testified that during the 18 years he had known Gail she had talked to him about Theo on at least 15 or 20 occasions up to her last illness and that on these occasions Gail had said Theo was amply provided for and she didn't intend to "leave her very much." (R. 486, 487).

After the Walker Bank took over management of Gail's property Mortensen became acquainted with Theo and Theo came to see him on a number of occasions. Gail found out about this. In this connection Mortensen testified (R. 478):

"Q. Did Gail say anything about it to you, about her coming up to see you about her, Gail's business?

"A. Yes.

"Q. What did she say?

"A. She said: 'Don't tell my sister anything about my business.'

"Q. Do you recall anything further being said by her along that line?

“A. Well, just that she made it very clear to me, and was very definite: ‘I don’t want my sister to see any of the records pertaining to my business. I don’t want her to know anything about my business.’

“Q. And did that type of conversation take place more than once after you took over the property management.?”

“A. On three or four occasions.”

Theo asked Gail about her will two months before her death and Gail told her nothing about its content (R. 128).

Mrs. Blanche Carney, Gail’s hairdresser, recalled conversations in which Gail had told her that Theo hadn’t been too kind to her (R. 818, 819). However, Macfarlane testified that the relationship between Gail and Theo improved not long before Gail’s death (R. 229).

Gail acquired one of the properties involved in this litigation by deed from her grandfather in the year 1911. She acquired the other properties in later life by deed from her father (Ex. D-18).

Theo had acquired property by deed from her grandfather valued at \$55,000. She had also received a valuable piece of property from her mother, as well as a piece of property below the Moxum Hotel from her father (R. 163, 165, 166).

Gail knew about the properties and revenues Theo was receiving (R. 166).

Gail and Daniel Kostopulos

Dan Kostopulos immigrated to the United States from Greece in his early youth. He had been in the theater business at Salt Lake City, Utah since 1924 (R. 317).

He met Grant Swan in 1932 at a theater Christmas party (R. 318).

He met Gail about six months later when Gail's father brought her to the theater. Thereafter, Gail and her father customarily dropped in at the theater to say hello to Kostopulos when they were downtown (R. 318).

The first time Kostopulos visited at the Swan home was in March of 1940 on the occasion of Mr. Swan's birthday. Thereafter Kostopulos became a frequent visitor. Mr. Swan called him "My big boy" (R. 319, 320). When Mr. Swan became ill in 1950 and had to be hospitalized Kostopulos was at the Swan household practically every day (R. 320). Kostopulos arranged for Mr. Swan's hospitalization during his last illness, and even rented a more comfortable bed for him.

Following Mr. Swan's death Gail depended more and more on Kostopulos for her daily needs (R. 341, 407).

Grace Folden testified that Gail frequently would telephone Dan, and either Dan or his wife would come and take her to town and bring her home (R. 341, 342, 412, 442).

Aunt Bell Martsolf testified (R. 269, 307):

“Gale depended on him for transportation into town; he was very attentive to take her * * *

* * *

“She called him a great many times on the phone for things she wanted, and he was very attentive and brought up whatever she wanted, maybe only a loaf of bread but he would come.”

Dr. Frank affirmed the fact that Gail had much affection for Dan (R. 534).

Mrs. Carney, Gail’s hairdresser, testified (R. 817):

“A * * * She spoke of Dan Kostopulos. Said that he had been her very best friend.”

Theo first met Kostopulos in 1946 at his theater. Thereafter she became well acquainted with Dan. She stated, “He came a great deal to the family home. He met me at the airport. He was very kind to me” (R. 127). Theo considered Kostopulos to be her friend (R. 329).

Kostopulos called Theo for advice from time to time when things went wrong at the Swan household (R. 337, 338).

Gail and Grant Macfarlane

Grant Macfarlane had practiced law at Salt Lake City, Utah since 1927 (R. 186).

He first became acquainted with Gail in September of 1944 (R. 187).

Jack Forsberg, an employee and friend of the Swan family, had referred Gail to Macfarlane in connection with a controversy she was having with the O.P.A. Macfarlane handled this matter for her (R. 187). In the Fall of 1944 Macfarlane saw Gail on four or five occasions. In November of that year she brought some abstracts to his office and asked him to be her regular attorney. She explained that Judge George Armstrong had been her attorney until his death; that thereafter Vernon Snyder had been her attorney (R. 188, 189). In 1945 Gail came to Macfarlane's office probably a dozen times, sometimes on business matters and sometimes for a friendly visit (R. 189, 190).

In the latter part of 1946 Macfarlane suffered an injury to his left eye consisting of a detached retina. An operation was successful but a later infection caused loss of the center vision of the eye. He was hospitalized or convalescing from October 2, 1946 to January 1, 1947 (R. 192). Gail executed her will just three months later. In connection with Gail's reaction to Macfarlane's misfortune, he testified (R. 713, 714):

“A. Well, she indicated that—she said that I had five children to educate, that I had lost the sight of one eye, and if I ever sustained another injury that I might be blind, and that it would be difficult for me to practice.”

During 1947, 1948, 1949, and 1950 Gail continued to come to Macfarlane's office for professional advice and

for social visits, and during this time Macfarlane and his wife and children paid visits to the Swan home (R. 195, 196).

Macfarlane received a detached retina injury to his right eye in November of 1950, and in January of 1951 he went to San Francisco for an operation (R. 199, 733). He was confined to the hospital approximately four weeks. Thereafter he stayed in San Francisco two weeks and spent an additional two weeks in Nevada. He returned to Salt Lake City on March 1, 1951 and first saw Gail in the latter part of March, 1951. At that time she told him she was sorry he had had so much difficulty and that she would like to be helpful to him and his family in any way that she could. Less than a month later she executed the second codicil to her will (R. 733).

Grace Folden, witness for the plaintiff, testified regarding Gail's attitude toward Grant Macfarlane as follows (R. 405):

“A. Yes. She thought a great deal of him. She thought whatever he done was perfect.”

She also testified that when Macfarlane had his second eye operation Gail worried until she had a severe epileptic seizure (R. 432).

Dr. Frank's card (Ex. 19) has a notation dated January 3, 1951, that the night before Gail had had an epileptic attack, that she “has been worrying about lawyer friend's eyes.”

Mrs. Carney corroborated other testimony that Gail had much affection for Macfarlane and was very worried about his eye condition (R. 818).

Mortensen had six or eight conversations with Gail pertaining to her will, in which Gail told him that she was concerned about Macfarlane's condition, and wanted to do something for him and his family (R. 489, 490).

Macfarlane met Grant Swan in 1945 at Gail's request. Thereafter his relationship with Mr. Swan was very friendly and congenial. They discussed Mr. Swan's early years and various ranching activities in Wyoming. They likewise discussed the comparisons between the names of the two families, Grant Swan, Grant Macfarlane, Gail Swan and Gayle Macfarlane (R. 711).

When Mr. Swan and Mr. Beam had a misunderstanding, Macfarlane helped make peace (R. 712). Macfarlane advised and assisted Mr. Swan in connection with an assault and battery charge when a gardner struck Mr. Swan with a garden rake (R. 713). He also handled several business matters for Mr. Swan, including preparation of Mr. Swan's will on the 31st of December, 1946 (R. 200).

Macfarlane was very attentive to Mr. Swan during his last illness at the Miners Hospital (R. 711).

Macfarlane met Theo sometime in the year 1948 (R. 193). Thereafter Theo visited his office from time to time on her trips to Salt Lake and on occasions discussed problems at the Swan home with him.

Theo saw Macfarlane once or twice in 1949; two or three times in 1950 and twice in 1952 on occasions when Gail was hospitalized. In addition to these occasions she saw him from time to time at the family home (R. 125).

Theo testified that Gail called her by telephone when Macfarlane was at San Francisco for his eye operation; that Gail was very distressed. Thereafter, Theo saw Mr. and Mrs. Macfarlane and assisted them in every way possible during their stay at San Francisco (R. 124).

She looked upon Macfarlane as a friend and relied upon him to keep her advised as to conditions at the Swan household (R. 196-199).

Gail and the Bridges

In 1944 Joseph Lamar Bridge was in the army, and Ada, his wife, was helping with family finances by selling eggs and butter. She first became acquainted with Gail as a customer. As time passed, she and Gail became very well acquainted (R. 604). After Mr. Bridge returned from the service in December of 1945 he also became acquainted with Gail (R. 605). The Bridges enjoyed their growing friendship with Gail. They spent many evenings

at the Swan home playing Canasta with her and Mr. Beam (R. 605). This practice continued until the time of Gail's death (R. 605).

The Bridges had six children. They allowed Gail to name the two youngest Mary Blanche and Edward Grant after her mother and grandfather (R. 607, 627). She attended the christening and even bought the christening dress for the youngest one (R. 772).

Gail frequently spent a day at the Bridge home. The Bridges treated her like a member of their family (R. 624). They even had one room in their home which they called "Gail's room" (R. 433, 434).

Ada often accompanied Gail on shopping trips. They would usually go to Auerbach's and the Floraine Fashions at Sugarhouse (R. 608). Ada helped Gail select the range, refrigerator and other equipment for her kitchen (R. 612). She also helped select materials for Gail's drapes in the living room (R. 622).

On occasions Gail gave Ada gifts. She gave Ada a ring for her birthday which had been given to Gail by her mother. She gave her hose for Christmas and her birthday (R. 620, 621).

On one occasion Gail learned that the Bridges were abandoning a planned vacation trip because they couldn't afford a needed set of tires. She insisted on giving them \$100.00 to purchase the tires rather than see the family

disappointed (R. 631, 632). On another occasion the Bridges were endeavoring to build a home. They had completed a basement apartment but the roof was leaking and they couldn't afford to place a roof on the home at that time. Gail insisted on loaning them the money for this purpose. The loan was in the amount of \$3,000. Thereafter Mr. Bridge performed certain work for Gail on her various properties and she would give him credit on the loan. On some occasions she gave him credits on the loan which were in the nature of gifts (R. 644, 645).

Aunt Bell Martsolf testified the relationship between Gail and the Bridges was "very intimate" (R. 277), and that Mr. Swan also was very fond of the Bridges (R. 314, 317). Mrs. Folden testified that the relationship between Gail and Mr. and Mrs. Bridges was "very affectionate" (R. 412).

Gail and Oscar Burnside Beam

Oscar Burnside Beam testified that he was 83 years of age; that he was a cook by profession during his active years; that he had moved to Salt Lake City in 1938.

He met Gail in 1942 when he was papering a room for one of Gail's tenants. Thereafter Gail introduced him to her father (R. 588). Eventually Beam became a frequent visitor at the Swan household. He took care of the lawn and performed other chores for the Swans (R. 588, 589).

In about 1947 it became his custom to be at the Swan home every day, and to stay for the evening meal (R. 589, 590), and thereafter to play Chinese checkers or Canasta with Gail and various of her friends. He became very well acquainted with Theo during these years and also became acquainted with Kostopulos, Macfarlane, the Bridges and the Franks (R. 592-594, 598, 599).

He characterized his relationship with Gail as, "We are good friends" and his relationship with Theo as, "We were very good friends" (R. 594, 595).

Macfarlane testified that he had talked with Gail about Mr. Beam on probably two or more occasions, and that on these occasions Gail had told him that Beam had been a faithful person and would always have a home in the Swan household. He also discussed Mr. Beam's age with Gail (R. 733, 734). At the time of trial Beam lived at the Swan home at 1335 Perry Avenue, where Theo was also living (R. 588).

Grant Macfarlane, Dan Kostopulos and the Bridges

Macfarlane became acquainted with Kostopulos when Mr. Swan was taken to the Holy Cross Hospital during his last illness in June of 1950 (R. 757). The next time Macfarlane saw Kostopulos was shortly after Macfarlane's second eye operation when Kostopulos took Gail to Macfarlane's home and the two of them took him for a short walk (R. 757). Thereafter Macfarlane saw Kostopulos only a few times (R. 758).

Macfarlane met the Bridges at the Swan home when they were playing Canasta one evening with Gail. He had only seen them on two or three occasions prior to Gail's death (R. 758).

Kostopulos apparently had no association with the Bridges, although he was acquainted with them. Theo testified that Kostopulos actually was opposed to the close friendship between Gail and the Bridges (R. 183, 184).

Gail's Appearance, Her Hobbies, and Her Social Activities

Mrs. Carney testified that Gail was modest, neat and clean in appearance and that she dressed very well (R. 819, 820).

Mrs. Bridge thought that Gail had very good taste in clothing. She selected her own clothing (R. 629).

Mortensen thought Gail appeared a little quaint and old-fashioned although she was always neat and clean. With respect to her personality he testified that she was pleasant (R. 471).

Gail played the piano "well" (R. 631). Her mother had also taught her to play the guitar and several pieces on the harp (R. 102, 103). She had a "nice sense of music and a good ear" (R. 103).

Gail took considerable interest in a collection of curios (R. 103).

She was interested in civic affairs. She read the newspaper every morning. When she would come across an article of particular interest she would make some appropriate comment (R. 621, 691, 692, 693).

She frequently commented on civic affairs to Mrs. Carney when she was having her hair dressed (R. 817), and also to Mr. Mortensen when she would see him at the bank (R. 472-474).

Records of the County Clerk's office reveal that Gail voted in the municipal elections of 1945 and 1947, and in the general election of 1948 (R. 754).

Gail had a wide variety of friends, including the bus driver who customarily took her to town (R. 303), and the policeman on the corner, whom she frequently invited to the coffee shop for a cup of coffee (R. 28). She also befriended and performed acts of kindness toward a crippled boy who lived at the Oakland Hotel (R. 284).

She was a fan of the Salt Lake City Bees Baseball Team. The year it won the championship she frequently attended the games with Mr. Beam. Towards the end of the season she gave a party for the entire team (R. 369, 376, 377).

Mable F. Bridge, Ada's mother-in-law, testified that Gail visited at her home on many occasions (R. 786). Mrs. Bridge raised canary birds and Gail became interested in them. On one occasion Gail purchased a South

American bird from her for the sum of \$25.00 (R. 787). Gail took care of Mrs. Bridge's birds for one month when Mrs. Bridge was hospitalized. She returned the birds to Mrs. Bridge in good condition (R. 788).

Gail belonged to a Canasta Club consisting of herself, Ada Bridge, Ada's mother Mrs. Leavitt, Ada's sisters Wanda Bollschweiler, Dorothy Sheets and Geraldine Hatch (R. 764). The club met once a week, usually on Tuesday, played Canasta and had lunch. The six members would take turns having the club at their home. When it was Gail's turn to entertain she would take the club members out to lunch and they would return to her home to play Canasta. It was customary for Gail to keep score for the club. The six ladies would play in teams of three (R. 764, 765). Gail mingled with the other ladies and conversed with them freely (R. 629).

Mrs. Frank invited Gail to visit at her home several times. On one occasion she took Gail to the Alpine Lodge at Alta for dinner. Gail ordered her own food. Once the Franks took their pet lion, Major, to the Swan home to show it to Gail. On another occasion Mrs. Frank invited Gail to her birthday party (R. 524, 561).

Mrs. Wagstaff testified that she accompanied Gail to Mrs. Frank's birthday party; that Gail joined the other ladies at lunch and participated freely in their conversations (R. 688).

Dr. and Mrs. Frank accepted gifts from Gail. On one occasion Gail made them a gift of a boxer dog. Gail also made the Franks a gift of a miniature lion in memory of the lion named Major (R. 582). Dr. and Mrs. Frank visited at Gail's home on five or six occasions and played Canasta with her (R. 580).

Clair Mortensen testified that over a period of ten years, until Gail's death, he, his wife and daughter paid a social visit to Gail on Christmas morning and that Gail and his daughter exchanged Christmas gifts (R. 470, 471).

Gail's Properties and Her Business Activities

During the years following her mother's death, Gail's father managed the properties (R. 113, 114). However, he was anxious to lay down these responsibilities.

In the year 1940 he turned over many of his responsibilities to Gail and Judge Armstrong. Judge Armstrong assisted Gail and according to Theo "taught her a great deal" about managing the business (R. 114, 156).

Otto Michaelis, a barber and tenant, testified that for a considerable period of time Gail collected the rents herself, and would prepare and give him a receipt in the correct amount (R. 379, 380). He further testified that he signed his lease with Gail, had some discussions with her about remodeling, and that Gail told him that any remodeling would have to stay with the place at the end of the lease (R. 384, 385).

H. P. Kipp, Assistant Vice President and head of the property management department of Tracy-Collins Trust Company for 18 years, testified that he had known Gail Swan as a customer of the bank for a long period of time (R. 773, 774). In October of 1949 Gail came to the bank and requested that the bank handle her properties in a managerial capacity (R. 121, 122, 774, 775). In connection with the proposed property management agreement, a meeting at which Gail was present, was held at the bank and the terms of the agreement discussed. Gail took the agreement home with her and later returned stating that it was acceptable. At that time she told Kipp that she was surprised she hadn't thought a long time before of having her property managed, in view of the fact that the cost was so nominal. She gave Kipp a written report containing a list of her properties and the revenues derived therefrom. He stated that in his opinion Gail had prepared the report (R. 778, 779).

During the time that Tracy's managed Gail's properties she had a number of discussions with Mr. Kipp concerning policy matters. He testified that she knew and understood the subject matters being discussed; that she made recommendations which were reasonable and which were followed by the bank (R. 780). He gave as his opinion that Gail was mentally competent to enter into leases and other types of agreements, that she was aware of what was happening, knew the details and could understand them (R. 782). On many occasions Gail would

come to Mr. Kipp's office upstairs in order to discuss her business affairs (R. 781). Mr. Kipp sent periodic reports to Gail at the end of every calender month (R. 785).

On one occasion a dispute arose between Gail and Joe Rosenblatt over a driveway between their properties located at the southwest corner of 7th South and State Streets. Mr. Kipp had a meeting with Gail and Rosenblatt and their differences were adjusted at that meeting. Gail seemed to understand the nature of the controversy and expressed her opinion relative to what she thought should be done. Kipp testified that her judgment in regard to this dispute was good (R. 776, 777).

The management agreement with Tracy's continued until March 31, 1950, at which time a misunderstanding over a deposit occurred between Gail and Tracy's (R. 122, 783). On April 1, 1950 management was transferred by Gail to Walker Bank and Trust Company (R. 779).

Clair Mortensen had known Gail Swan for approximately 18 years prior to her death (R. 468, 689). From 1937 to 1949 Gail averaged once a week stopping at the bank to discuss business. He started preparing Gail's income tax returns in the year 1935. Occasionally he would go to Gail's home to discuss various business affairs. He testified that in his discussions with her pertaining to business, her home life and current events, her mind was clear. He also testified that from 1937 to

1951 he prepared Gail's income tax returns; that she kept two books, one a large size cash journal in which she kept a record of her monthly collections, and a smaller book in which she kept under separate headings lists of her expenditures, such as taxes, repairs, maintenance, contributions, telephone bills, etc. From these records and also the information that Gail would give him orally Mortensen was able to prepare her income tax returns. He stated that in connection with her expenditures and matters pertaining to her business "her memory was good" (R. 469-474).

Mortensen last saw Gail's records and record books sometime between January and March of 1951. On this occasion Gail brought the books to the bank and he used them in preparing her tax returns. Thereafter he returned the books to her (R. 475).

Mortensen worked out a budget with Gail which she followed "pretty well." He stated that she was cautious in business matters (R. 475).

Mortensen testified that when Walker Bank and Trust Company assumed management of Gail's properties he accompanied her on a visit to each of her properties; that she gave him from memory the rentals collected from each tenant; that a later check revealed that she was accurate concerning these matters; that there were ten or twelve tenants in her properties and that the rentals varied with the property. He discussed

with Gail the various provisions of the management agreement which she signed. In his opinion she fully understood the terms of the agreement. In connection with the insurance on the properties he stated that Gail expressed an interest in giving the insurance business to a friend, Mr. Ingberg (R. 481-485, Ex. 12).

Between 1937 and 1950 Mortenson discussed from twelve to fifteen leasing transactions with Gail. He stated that in his opinion she fully understood the content and purport of these documents. He testified (R. 476-478):

“Q At any time in your experience with her did she, prior to her execution of them, evidence any misunderstanding or any indefiniteness in mind as to what they meant?

“A No. She was very farmiliar with the properties.

* * * *

“Q I'll ask you to state, from your experience with her, whether or not in your opinion she had what we commonly say a mind of her own?

“A She did.”

In the latter part of 1950 Mortensen had a series of discussions with Gail regarding a new leasing agreement on Olie's place. He testified that Stevenson, the lessee, desired to make some improvements on the building providing Gail would give him a longer lease; that Gail was cautious and expressed misgivings about giving

him a long-time extension on the lease; that he had a number of telephone conversations, one conversation at her home and one at his office with Gail; that eventually Gail informed him that if Stevenson was willing to spend his money improving the property she believed he was entitled to have an extension of the lease. Eventually the lease was approved. Theo signed as a witness to this document (R. 477-481, 739, 740).

Mortensen gave an opinion concerning Gail's competency to handle her business affairs as follows (R. 491, 492):

“Q What is that opinion?

“A That she was competent to handle her own affairs.

* * * *

“A That she was capable of reaching reasonable conclusions with respect to her own properties and business affairs.”

He testified that records were kept of rentals received from the tenants, that regular reports were made to Gail regarding the status of the various accounts, and that in his opinion Gail understood and appreciated the values of her properties (R. 478).

Patricia Stewart Pike, Macfarlane's secretary, testified regarding a conversation with Gail (R. 794):

“A I recall once she complained about the necessity of the office of price, not stabilization,

bank control. At any rate she was complaining about the paper work that had to be done and what rigmarole had to be gone through. * * *

* * * *

“A Well, there was a girl that lived in her property on West Third South that was paying a very nominal rent, and she wanted to raise the rent on it as I recall, and she was upset because of all the paper work that had to be done and the time you had to wait.”

Exhibits 12 and 15 comprise a number of leasing agreements between Gail and a number of her tenants and indicate that Gail was entering into contracts with a variety of people involving a variety of problems over a long period of time (see also Exs. 14, 16, R. 740-747).

Medical Testimony as to Gail's Mental and Physical Condition

Dr. Edward LeCompte, an M.D., who had practiced as an eye, ear, nose and throat specialist from 1915 until his retirement in 1948, called as a witness by contestant, testified that he met Gail Swan as a patient in the mid 20's and attended her from time to time until a few years before his retirement (R. 385-388). He gave an opinion that her mental development was “about eleven or twelve years, I should think.” He stated that the average person is considered to have a mental development of 15 years, so that Gail would, in his opinion, have a mentality which was about “four-fifths of normal” and further, that epilepsy does not neces-

sarily result in mental deficiency or mental deterioration and that many persons with superior mentality are epileptics (R. 390-392). He further testified that on occasions Gail would discuss various subjects, among which was difficulty she was experiencing in collecting rents on her properties and that he understood what she was talking about (R. 394, 395).

Dr. William D. Pace, an M.D., specializing in psychiatry, and a member of the American Board of Neurology and Psychiatry (R. 822), called by the proponents, testified that Gail was his father's patient from October, 1948 until his father's death in July of 1950. During this time he saw her on a number of occasions and on two occasions examined her while his father was away on trips (R. 822). She was being given anti-convulsion drugs, principally mesantoin and phenobarbital for her epilepsy (R. 823).

Following his father's death Gail came to his office on two occasions in August and September of 1950. In the Winter of 1950 he was called to see her at the L.D.S. Hospital while she was under treatment by Dr. Cowan for cancer. Dr. Cowan requested Dr. Pace to take care of the anti-convulsion control (R. 823). He testified that the various anti-convulsion control drugs would have no adverse effect when taken over a period of time; that phenobarbital is a sedative and would make the average person drowsy and sleepy, but when taken over a period of time a person would become used to it and

it would no longer have that effect (R. 823, 824). He testified that Gail was of a low average intelligence, but that she was not feeble-minded; that she was able to carry on a coherent conversation and that there was nothing about her that would indicate she was irrational in any way. He saw no evidence of insanity (R. 824, 825). He placed her mental development in a range of 11 to 13 years (R. 826).

Joseph Emory Frank, a physician and surgeon, called by contestant, testified that he was first called upon to treat Gail on October 9, 1950. On this occasion his diagnosis was that there was a mild obstruction from adhesion and/or a carcinoma (R. 446). After he had treated her for a short period of time she commenced feeling better. He kept her on mesantoin and phenobarbital to control her epilepsy. These tablets were to be taken morning, noon and night (R. 449). The doses were varied from time to time. Her epilepsy was of the petit mal type in which the seizures are less in severity and duration than the grand mal type. The drugs kept the seizures under satisfactory control (R. 466, 527-529). She gave him a previous history of only one attack in six months (R. 445, 448). He made 60 professional calls on Gail in the year 1951, and perhaps 12 or 15 nonprofessional calls at her home in 1951 and 1952 (R. 454, 455). He stated that during the period of his treatment Gail was going progressively downhill. Among other things she had anemia, kidney and

bladder infections (R. 455, 456). Dr. Frank's opinion was that her mental age was 12 to 15 years (R. 465). He testified that her physical infirmities and afflictions would not effect her in any way mentally.

Adolph M. Nielsen, physician and surgeon, and specialist in surgery, called on behalf of proponents, testified that he received a call from Macfarlane concerning Gail in April, 1951 (R. 837). Macfarlane told him he had a client who was making some changes in a will and who had expressed a desire to have an examination and asked if Dr. Nielsen would perform this service. He performed a physical examination of Gail Swan at his office on April 23, 1951. His office girl was the only other person present. The examination revealed that Gail was in a good state of health (R. 838, 839). While Dr. Nielsen was examining Gail his office girl called Dr. Roy A. Darke, who officed in the same building. Dr. Nielsen had made tentative arrangements for Dr. Darke to make a mental examination of Gail several days earlier (R. 804). Dr. Darke arrived and made a mental examination in Dr. Nielsen's presence, using questionnaires and tables for this purpose (R. 839, 842). In connection with this examination Dr. Nielsen stated (R. 839) :

“A. Well, she said that she wanted to leave her property to primarily three individuals—Mr. Macfarlane, Mr. Kostopulos and her sister—and she mentioned other people whom she desired to leave minor, or less.

“Q Do you recall their names? What she said about them?

“A She mentioned, I believe, a Mr. Beam and a Mr. Bridges. Could have been others.”

In connection with her mental condition he stated (R. 840):

“Q And would you tell us what your opinion of her mental condition at that time was, please?

“A. Well, yes, I thought she was mentally sound, and certainly in the adult bracket.”

Dr. Neilsen saw nothing about Gail that was irrational and nothing about her which would indicate insanity (R. 843, 844).

Roy A. Darke, medical doctor and psychiatrist, called on behalf of proponents, testified that he had interned at the U. S. Marine Hospital on Staten Island; had performed minor surgery at the Marine Hospital in New York City for a year; spent six months at the Psychiatric Institute attached to Columbia University in New York City; ten months at the U. S. Marine Hospital on Ellis Island; 26 months at the U. S. Medical Center in Springfield, Missouri, and 8 months at the U. S. Public Health Hospital in Lexington, Kentucky, specializing in psychiatry, and that he belonged to the American Board of Psychiatry and Neurology, and on numerous occasions had testified in court as an expert in his field (R. 802, 803.)

At 5:15 p.m., on April 23, 1951, as a result of previous arrangements, he went to Dr. Neilsen's office. Dr. Neilsen, Gail, Macfarlane and Kostopulos were present. Before the examination Macfarlane read the will aloud and some questions were asked Gail pertaining particularly to the property involved. During the examination Macfarlane and Kostopulos left the office. He testified that his examination consisted of a series of questions to rule out insanity and to evaluate Gail's mental status with respect to her history of epilepsy and to determine whether she had the mental ability to understand her property and plan its distribution. The examination took approximately an hour. He further stated that Gail was very familiar with her properties; had a definite and intelligent plan for their distribution in her will. He testified: *"I felt that she did wish to do what she was saying she wanted to do with her property. That that was her wish. She was very calm, and there wasn't anxiety or tension as we talked to her. We talked to her privately. We discussed the question of whether she was under pressure or force, or whether she felt that anyone was trying to have her do this. She said not. That this was what she wished to do."*

Dr. Darke also made a mental examination to determine Gail's intellectual ability. The tests indicated that she had the intellectual ability of an average 12 year old person. He further testified that the average mental age at the adult level is about 16 (R. 804-807). Concerning Gail's emotional stability he testified:

“A Well, in relation to her emotional maturity, there would be some restriction, you might say, by the mental age. She, however, was very very businesslike. She listed her properties and discussed them, and discussed rentals and discussed these various people that she wished to leave money to, discussed people that she was associated with, in—well, in a fashion that would indicate that she was functioning at the level of her age, I would say.” (R. 812, 813)

He further testified that Gail probably had no difficulty handling her business affairs and that she could enter leases or agreements if the contents were explained to her in “not legal terms”. (R. 814, 815).

Lay Testimony as to Gail’s Mental and Physical Condition

Wanda Bollschweiler, Ada Bridge’s sister, and a member of the Canasta Club, testified (R. 769): “Her mental condition was perfectly normal.”

Dorothy Sheets, another of Ada Bridge’s sisters and member of the Canasta Club, also testified that Gail’s mental condition was “perfectly normal” (R. 771).

Mrs. Carney testified that during Gail’s regular appointments with her at the Paris Beauty Shop she discussed family and friends, religion and politics. Mrs. Carney stated that she never felt there was anything wrong with Gail’s mental condition “because she carried on very intelligent conversations with me” (R. 817-819).

Oscar Beam testified that Gail generally did most of the cooking at home, and that on occasions when he was at the Swan household he would help her. After the evening meal he and Gail would play Chinese checkers or Canasta (R. 589, 590, 599). He stated that he and Gail played Canasta with Dr. and Mrs. Frank several times, and with the Bridges frequently, and that "if Gail had a good hand she could play a good game" (R. 599).

Grace Folden testified that after a period of hospitalization, Gail expressed the belief that her doctors weren't helping her, and made the decision to change doctors. Mrs. Folden recommended Dr. Frank and Gail accepted the recommendation after first calling Theo (R. 424).

Alice Wagstaff testified that when she commenced working for Gail they had a conversation in which Gail stated her salary would be \$125.00 per month. Gail also told her that she could have the front bedroom, and she and Gail agreed as to the date she would commence work (R. 676). After Gail had recovered from her illness she wrote Mrs. Wagstaff's monthly checks and also gave Mrs. Wagstaff a little gift at Christmas (R. 673). Mrs. Wagstaff stated that on one occasion she accompanied Gail to town for the purpose of purchasing clothing; that Gail tried on a number of dresses, made her own selection and paid for the dress (R. 679). On another occasion she accompanied Gail to town for the purpose of having the Swan initials placed on some silverware; that Gail took

a sample so that the engraving could be copied; that before they arrived at the jewelry store Gail met and introduced her to a friend she had known for many years; that thereafter Gail took her to a restaurant for luncheon; that Gail ordered and paid for the meal. She also accompanied Gail to town on several occasions when Gail had appointments with the hairdresser (R. 679-682). She further testified that Gail planned all of the meals, ordered the groceries and did much of the cooking (R. 684-686).

The estate file indicates that Gail also kept an open account with the Woodland Market Meat Department. After her death the market submitted six slips, each bearing Gail's own signature, for payment (Estate File No. 34571).

Mrs. Wagstaff stated, "Well, my opinion is this, that she was a bright person. If you compare it with the education that she had had" (R. 700).

Ruth C. Corbett met Gail in 1933 at the home of her mother, Anna Liljeblad. For many years Gail and her father came to visit the Liljeblad family and have dinner approximately twice a week (R. 510, 511). She testified that on one occasion she introduced Gail to Mrs. Liljeblad's uncle and Gail "immediately went up and started to tickle him" (R. 513). She stated that in her opinion Gail was "very childish;" that she "giggled," "poked people," "tickled," "was just silly." In her opinion Gail's mental development was "I imagine more like the twelve

year old" (R. 514, 515). However, on cross-examination she testified that outside of Gail's practice of tickling or poking men in the ribs she "seemed to be all right" (R. 517).

Mr. Corbett testified that when Gail talked to people she "kind of giggled" (R. 542) and that on one occasion when he went to Gail's for dinner she "kind of tickled" him in the ribs (R. 549). His opinion as to Gail's mental development was that she was about the age of an eight or nine year old child (R. 552). Another incident which Mr. Corbett thought was odd was that one evening Gail called around 10:00 p.m., and stated that her sink needed fixing and asked him if he could help her. He didn't think a normal person would make such a call (R. 553).

Mrs. Frank thought it odd that on occasions Gail would borrow small sums of money from her. She admitted, however, that all of these loans were repaid by Gail with the exception of the last one (R. 559, 560). Her opinion as to Gail's mental condition was, "Well, she was very childish" (R. 572).

Mrs. Folden testified (R. 413):

"A Her development was just like a child. Everyone babied her."

Bell Martsolf testified that following 1923 Gail had the "appearance of a child and the mind of a child" (R. 263, 265). She stated that Gail was more interested in men than in women and thought that this was odd (R. 280).

According to Macfarlane, Gail's general health was normal in 1947 (R. 736). In 1950, other than during the periods of her hospitalization, her condition was good. In 1951 she remained about the same (R. 737). In the Spring of 1951 Macfarlane thought her physical condition was probably as good as any time he had known her (R. 737). During this year she executed four or five leases and Macfarlane had a number of conversations with her relative to their contents (R. 737).

Power of Attorney, Bank Books and Gifts

In the latter part of March, 1950 Gail had a conversation with Macfarlane at his office and stated that she wanted to give him a power of attorney, so that if she needed any money or any instruments signed or anything done in her name he could do these things for her (R. 246, 723).

On April 1, 1950 Gail signed a general power of attorney prepared by and in favor of Macfarlane (Ex. 6).

Macfarlane testified fully as to each and every occasion that he used the power of attorney. No discrediting evidence was offered to controvert his testimony in this regard.

In 1950 Gail requested Macfarlane to prepare three joint accounts (R. 231). He testified (R. 158):

“A She came in and said that she wanted me to get some joint tenancy cards. She wanted

to create three joint tenancies—one in her own name and in the name of her sister and her sister's husband, one in the name of herself and Dan Kostopulos and his wife, and the third in her name and in my name as joint tenants—and she wanted to have those three accounts as nearly equal as it was possible to do.

“Q Did you go about effecting those wishes of hers?

“A Yes sir.”

The amounts placed in the three bank accounts, after interest of 1951 had been added were: The Hendee account \$4,887.67; the Kostopulos account \$4,797.50; the Macfarlane account \$4,797.50 (R. 247, 248).

Sometime after the joint accounts had been established Macfarlane testified that Gail came to his office with Mrs. Bridge and Dan Kostopulos and stated that she didn't like the kitchen equipment she had purchased and was going to buy new equipment. She wanted a bank book. Macfarlane handed the three bank books to her. She chose the Hendee book and returned the others. This was the last time Macfarlane saw the Hendee bank book (R. 247, 724, 725).

On several occasions Gail came to Macfarlane's office, took the Macfarlane and Kostopulos books, and made certain withdrawals.

On one such occasion Gail withdrew \$350.00 each from the Macfarlane and Kostopulos accounts to use for payment of taxes (R. 249).

On one occasion Macfarlane collected \$1,000.00, plus court costs in an action against one of Gail's tenants by the name of Wolfington. At Gail's request he placed this money in the Hendee account (R. 723).

At the time of Gail's death the Macfarlane account showed \$4,597.17; the Kostopulos account showed \$4,597.17; and the Hendee account showed \$493.89 (R. 232, 233).

Macfarlane also exercised his general power of attorney in signing a lease with Tandy Leather Company. This lease was prepared by Walker Bank and the terms orally agreed upon by Gail, but she was unavailable to sign the lease.

On another occasion Macfarlane received through the mail a signature card signed by Gail Swan, Ada Bridge and Joseph Lamar Bridge. He forwarded this card to the Union Trust Company (R. 234, 235).

Macfarlane also exercised his general power of attorney in April of 1951 when he drew from the Walker Bank & Trust Company 80 shares of Westinghouse Electric Company stock, which belonged to Gail, and 100 shares of Utah Power & Light Company stock, which belonged to Gail. He signed for these as Gail's attorney in fact. He did this at Gail's request. Gail later gave Macfarlane the 80 shares of Westinghouse Electric Company stock and Kostopulos the 100 shares of Utah Power & Light Company stock (R. 753, 754). Macfarlane testified (R. 236, 237) :

“A. * * * She asked me to procure the stock from Walker Bank and get it into my office, which I did, and I called and told her I had the stock and asked her what she wanted me to do with it, and she said she would come down. She came down and asked me to get the stock in Utah Power and Light transferred in the name of Dan Kostopulos, and she told me that she wanted me to have the stock in the Westinghouse.”

* * *

“A. She told me that I had been under great expense, and that she was apprehensive that I might lose the sight of my eyes, and she knew that that expense had been very hard on me and that she wanted to help out.

* * *

“A. And she said she would like me to have this stock, and I told her that I had gotten along with this matter, that we could get along all right, and she said, ‘No, I want you to have it, and I want you to have it now in your lifetime,’ and so I accepted it.”

Macfarlane further testified that a short time later Gail also gave him \$1500.00 in par value government bonds, stating that she wanted him to have them for his children (R. 239).

Kostopulos testified regarding the gift of the Utah Power & Light Company stock to him (R. 325, 326):

“* * * She was downtown. She called me to pick her up, and I say: ‘Where?’ Say: ‘In

the South Temple.' I say: 'I'm working right now, my wife she went out to eat, and she be back in a few minutes. Okay, about ten minutes,' and I went in there on South Temple, on the corner with a drugstore there, and I pick her up. On the way up home she give me the envelope and I say: 'What is that?' She say: 'Some of the good work you done for my father, and I give you this,' and I say: 'Gail, I don't think so, you do that,' and she say: 'Yes, I think because you been more brother to us, and son to my father, for anybody in our family.' "

Kostopulos further testified in connection with \$1500.00 in war bonds which Gail gave him, as follows (R. 345):

"Q. All right. Now what did she say before she give you the envelope?

"A. She say: 'Dan, that's another present for you for the good things you done for my father and me.' "

And again (R. 345):

"Q. Now, did you talk to Gail subsequently about those bonds?

"A. I told her afterwards, I say: 'Gail, it's awful nice of you to done that, but you should never done that.' Gail say: 'Dan, we never repay you the things you done for my father and me for the twenty years.' "

Contestants made no effort to controvert the fact that the gifts to Macfarlane and Kostopulos were freely and voluntarily made.

Gail's Last Will and Testament and the Codicils Thereto

On May 2, 1947 Gail came to Grant Macfarlane's office and told him she wanted to make some changes in her will and that she might as well make a new will. She had with her a will which had previously been prepared either by Judge Armstrong or Vernon Snyder (R. 202-205). During the conversation which ensued, Gail told Macfarlane that she knew of the accident he had had, was aware of his financial burdens, that she had acquired property located at 326 South State Street from her grandfather and that she wanted to leave this property to him. She told him she wanted the will to provide that her bills and expenses and the expenses of her last sickness should be paid. She also informed him that her sister Theo had other properties and that Theo's husband was a prominent newspaper man in San Francisco and that she wanted to leave Theo her harp and the sum of \$500.00. She also stated that Jack Forsberg had been very faithful to the Swan family and performed many services for them and that she wanted to leave him the Swan apartments located on South State Street. She also stated that she wanted her father to have all of the other properties. She informed Macfarlane that she had known Clair Mortensen for many years and desired to have the Walker Bank & Trust Company as the executor of her estate (R. 714-717).

With respect to the execution of the will Macfarlane testified (R. 717, 718):

“She returned, either that day or the following day, in the late afternoon. It was nearly 5:00 o’clock, probably 4:30, when she came back in. She came in and I gave her a copy of, or the original of that typed Will, and I took a copy, and I read through. She sat in a chair and I read the Will through and she followed, and I asked her if she desired to sign it, and she said that she did, so I called in my stenographer and asked her to get my office associate, but he was not there, so she went down the hall and got a young lady by the name of Vivian Weggeland, who was working in the Infantile Paralysis Foundation offices, and asked her to come to my office, and I introduced Gail to Miss Weggeland, she of course already knew my office girl, who was then Patricia Pike, and I said to Gail: ‘Is this your Last Will and Testament?’, and she said: ‘It is.’ And I said: ‘Do you desire that these two persons sign as subscribing witnesses?’, and she said: ‘I do.’ She then executed the Will in their presence, and then each of the witnesses signed in her presence and in the presence of each of the other persons subscribing to the Will.”

Vivian Weggeland, Executive Secretary, Salt Lake County National Foundation for Infantile Paralysis, identified her signature on the will, but remembered no details concerning the document (R. 835, 836).

Patricia Pike Stewart verified Macfarlane’s testimony with respect to preparation and execution of the will.

She further testified that at the time of executing the will Gail “seemed capable and competent” (R. 799).

In February of 1950 Gail came to Macfarlane’s office and stated that she desired to revise her will. In the will of May 2, 1947 Jack Forsberg had been left one of the Swan properties. He had passed away, thus necessitating a change in the will.

Gail told Macfarlane that the Swan apartments bore the Swan name and that she wanted Theo to have ~~the~~ that property and also the old Swan home located at 212 South 3rd East Street if her father preceded Theo in death (R. 206, 207, 718, 719).

She told Macfarlane that Dan Kostopulos had been very good to her father and had been very good to her and that she would like to leave the painting “Girl at the Fountain” and a set of Havilland China to him. She also stated that she wanted to leave the Oakland Hotel to Dan Kostopulos in the event her father preceded her in death (R. 721). At that time Macfarlane was not acquainted with Dan Kostopulos (R. 720). Referring to the Swan home at 1335 Perry Avenue, she told Macfarlane that “You have one of your children married. They haven’t a home, and Theo is never coming back to Salt Lake City, she doesn’t want the home, and I would like, if my father dies first, for you to have that home” (R. 720). She told Macfarlane that if her father died before her, she would like Macfarlane to

have the property located at 158 South 3rd East, known as "Olie's," to remove some of the financial burden from his shoulders (R. 720), and also the properties located at 234 South 2nd East and 342 East 2nd South. It was her expressed desire that Macfarlane have the property located at 326 South State Street (R. 721). Gail then left the office and Macfarlane dictated the first codicil to his stenographer. Gail later returned and he read and discussed the codicil with her (R. 721). Macfarlane then called in his stenographer and Irwin Clawson and in their presence asked Gail if the document was a codicil to her Last Will and Testament and whether she desired that the two persons sign the codicil as witnesses. She stated that she did. She then signed the codicil in the presence of the witnesses and they signed it in her presence and in the presence of each other (R. 722).

Irwin Clawson had known Gail for approximately three of four years. He did not discuss the will or codicil with her. He testified that he had no independent recollection about signing the codicil but identified his signature (R. 834).

Patricia Pike Stewart again verified Macfarlane's testimony concerning preparation and execution of the first codicil. She testified that at the time the codicil was signed Gail seemed "capable and competent." And again, "there was nothing extraordinary about her. She seemed to know what she was doing. She talked coherently. She acted normally." (R. 798, 799).

Shortly before April 23, 1951 Gail again came to Macfarlane's office and said she wanted to make some changes in her will. Macfarlane testified (R. 727):

“A She told me that she had always been of the opinion that Theo never wanted to return to Salt Lake City to live, but that on a recent trip of Theo's to Salt Lake City they had talked about Theo and Deek retiring in Salt Lake City, and she said that if that were to come about she wanted Theo to have the family home, and she wanted to change her Will and codicil so that that could be brought about.”

She wanted Theo to have the furniture and her curios (R. 729).

Gail stated that Aunt Bell had visited her on occasions and she wanted to leave \$100.00 to her (R. 728); that the Bridges had been very close to her and had done many things for her and she desired to have the piece of property located at 234 South 2nd East go to the Bridges; that Kostopulos had continued to be very good to her and she wanted to leave him the property located at 212 South 3rd East. She also stated that if there was any other property she wanted Theo to have it, and that if anything happened to Theo she wanted Macfarlane and Dan to share each one-half of her estate (R. 729). In connection with the fire insurance policies she told Macfarlane she thought they should go to the person that was going to inherit the real property. A provision was made in the will to accomplish this purpose (R. 728).

Gail informed Macfarlane that she had not been entirely satisfied with the funeral services of her father and she wanted Dan to handle her funeral arrangements (R. 729).

At that time she informed Macfarlane that she desired to have an independent doctor examine her so that the will could never be contested (R. 730).

Macfarlane suggested Dr. Neilsen, who was the city physician. She asked him to make an appointment with Dr. Neilsen (R. 730). After the second codicil had been prepared Gail came to Macfarlane's office and he went over each item with her (R. 730). On April 23, 1951, pursuant to appointment, Macfarlane met Gail and Kostopulos at Dr. Neilsen's office. Prior to this time Gail had been to Dr. Frank's office. His card record makes note that at that time she was "feeling fine." (Ex. 19). Kostopulos and Macfarlane sat in the reception room and Dr. Neilsen took Gail into his inner office (R. 731). After she had been in Dr. Neilsen's office for approximately thirty minutes Dr. Roy Darke came through the office and went to Dr. Neilsen's office. She remained closeted in Dr. Neilsen's office with Dr. Neilsen and Dr. Darke for approximately another thirty minutes. Dr. Darke then came out and asked Kostopulos and Macfarland to come in and he asked a number of questions of Gail while they were present and they were again excused. Dr. Darke then came out and said, "She is competent to sign this will that you have prepared."

Macfarlane said to Gail, "Is this your codicil?", and she answered "Yes." At that time the two doctors, Dan Kostopulos, Grant Macfarlane and Gail Swan were present. She signed and the two doctors then affixed their signatures in each others presence and in Gail's presence (R. 331, 731, 806-814).

Before considering the various legal matters pertaining to this case we call attention to the fact that Gail had the absolute right and privilege of disposing of her property by will in such manner as she desired.

In *Anderson v. Anderson*, 43 Utah 26, 134 Pac. 553, 558, the court said:

"* * * The judgment of the jury may be sounder and wiser than that of the father, but that is no reason whatever for substituting the judgment of the former for that of the latter. The law of this state gives 'every person over the age of eighteen years, of sound mind,' the right to dispose of his property by will as to him seems just and right. If this right may be invaded simply because a court or jury may not be able to agree with the testator in the manner he has disposed of his property, or because he has not made an adequate allowance for a specific purpose, then the right had better be abrogated entirely. The Legislature might do so, but courts cannot."

In re *Hansen's Will* (decided Aug. 9, 1917), 50 Utah 207, 167 Pac. 256, 260:

"* * * If he was of sound and disposing mind and memory when he made it, and the jury

found that he was, then, under the law, he had the sole right to choose the objects of his bounty, and it is utterly immaterial whether what he did is approved or disapproved by either court or jury. That right it is the duty of the courts to protect and enforce, and not to fritter it away by entering a judgment which perhaps reflects only their own views, or the views of the jury, regarding the disposition a testator should have made of his property."

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN LACKED TESTAMENTARY CAPACITY AT THE TIMES SHE EXECUTED THE WILL AND CODICILS.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN WAS UNDER THE FORCE OF UNDUE INFLUENCE AT THE TIMES SHE EXECUTED THE WILL AND CODICILS.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN LACKED TESTAMENTARY CAPACITY AT THE TIMES SHE EXECUTED THE WILL AND CODICILS.

Burden of Proof

The burden of proving lack of testamentary capacity by a preponderance of the evidence rests upon the contestant.

In re *Hansen's Will*, 50 Utah 207, 167 Pac. 256, 258, the court said:

“Upon whom ultimately rests the burden of proof in case the mental capacity of the testator is made an issue the authorities are not in harmony. In some jurisdictions the same rule is adopted respecting the burden of proof on the issue of insanity in a will contest that prevails in a criminal prosecution where insanity is a defense, which is that the burden ultimately rests upon the proponent to show that the will is the product of a sane mind by a preponderance of the evidence on that issue. Such is the rule that is laid down by Mr. Schouler in his excellent work on Wills, etc., in volume 1 (5th Ed.) Sec. 174. *There are, however, numerous authorities to the contrary in which it is held that the burden of proof rests upon him who makes the allegation and that he must establish the fact of insanity by a preponderance of the evidence. This court, in will contests, is committed to the latter doctrine.*”

See also In re *Estate of Van Alstine*, 26 Utah 193, 72 Pac. 942; *Anderson v. Anderson*, 43 Utah 26, 134 Pac. 553; 57 *Am. Jur.* 570, Wills, Sec. 856.

Test of Testamentary Capacity

Whether a person is of sound mind depends on certain legal tests. These tests are outlined In re *Hanson's Estate*, 87 Utah 580, 52 P. 2d 1103, 1116 as follows:

“* * * The true test is as to whether the testatrix had ‘sufficient mind and memory (at the time of making the will) to remember who were the natural objects of her bounty, recall to mind her property, and dispose of it understandingly according to some plan formed in her mind. * * *”

See also *In re Buttars' Estate*, Utah, 261 P. 2d 171.

**Gail Had Sufficient Mind and Memory to Determine
who were the Natural Objects of Her Bounty**

Gail was well oriented with respect to her friends, relatives and business acquaintances. She had retained Grant Macfarlane as her counsel in the year 1944, after he was recommended by a mutual acquaintance (R. 187). He represented her in a number of matters and later made the acquaintance of her father and also represented him on occasions. Macfarlane prepared Mr. Swan's will. He was a frequent and welcome visitor in the Swan household. Likewise his wife and children became well acquainted with Gail and her father. Gail relied upon him for advice in both business and private affairs (R. 195, 196, 200, 711-713). She developed a sincere affection for him as illustrated by Mrs. Folden's testimony that the evening Gail found Macfarlane was to undergo a serious eye operation at San Francisco, California she was so upset she had one of her most severe epileptic attacks (R. 432). This is confirmed by Dr. Frank's card under date of January 3, 1951 wherein he records, "Epileptic attack during night — Has been worrying about lawyer friend's eyes." (Ex. 19).

Gail and her father had known Dan Kostopulos for almost twenty years (R. 318). This acquaintance gradually developed into a close friendship. Kostopulos arranged for Mr. Swan's hospitalization during his last illness, even rented a more comfortable bed for him, and as Gail's health began to decline in her later years he responded to her demands for assistance and aid willingly. He furnished transportation to town for her various appointments. At her request he procured various commodities and necessities for her household. He and his wife called upon her frequently during her illnesses and visited regularly in her home (R. 269, 307, 319, 320, 341, 342, 534, 817). These services were greatly needed by Gail and no other person was in a position to nor indicated a willingness to perform them. Gail told Mrs. Carney he was her "very best friend." (R. 817).

Gail's relationship with the Bridges was likewise a natural development, proceeding from that of mere acquaintances to that of close personal friends. The Bridges were attentive to Gail's social and emotional needs. They visited her one to two times a week; played Canasta with her; took her to dinner with them at public places and to picnics. They allowed Gail to name their youngest children (R. 607, 627). They brought much happiness into Gail's life. There is no question but that Gail had developed a great affection for the Bridge family.

Gail's relationship with Theo was not the normal relationship between sisters. They had not lived in the

same household since early childhood. Theo's life was entirely different from Gail's; she was happily married; she and her husband Deak occupied a prominent social position in San Francisco, while Gail lived a secluded life with her father until his death, and with various household companions thereafter. Gail had harbored the feeling for many years that Theo was ashamed of her (R. 141-143-145, 293). Furthermore, Gail was well aware of the fact that Theo was financially secure (R. 163, 165, 166).

She had told Mortensen many times that she did not intend to leave Theo a substantial portion of her property (R. 487, 488). Mortensen also testified that Gail had told him she didn't want Theo to know anything about her business (R. 478). This coincides with Macfarlane's testimony that on one occasion when Gail found that he had called Theo concerning a matter, Gail stated that if he ever did this again he would receive his "walking papers." (R. 726). However, Macfarlane also testified that Gail had later mellowed in her attitude toward Theo and this is substantiated by the fact that Theo's inheritance was increased by the second codicil to approximately one-third of Gail's estate (R. 229).

Gail's relationship with Oscar Beam was that of pleasant, sincere friendship. Beam frequently joined Gail and the Bridges at Canasta. He ate breakfast and dinner at the Swan home almost daily, both before and after Mr. Swan's death. He performed various services around

the home, such as gardening and the work of a general handy man. He considered both Gail and Theo to be his good friends (R. 588-590, 594, 595).

Gail was deeply appreciative of the kindnesses and services rendered by her friends, and her life and personality were such that her friends naturally became the objects of her bounty.

Gail had Sufficient Mind and Memory to Recall Her Property

Theo testified that Gail knew about her own properties and also Theo's, that Gail discussed business matters with her father on occasions when Theo was visiting, and that Judge Armstrong had taught Gail much about the handling of her properties (R. 114, 156). Other evidence revealed that Gail collected her rents, gave receipts, and made bank deposits (R. 379, 380).

Of particular significance was Mortensen's testimony that Gail kept books in which were recorded, in her own handwriting, the various properties and rentals, showing the dates and amounts of collections, and also showing the various expenditures and debits, and his testimony that when Walkers assumed management of Gail's properties she took him to each property, informed him accurately of the amount of rentals for each property and introduced him to the tenants (R. 472-475, 481-485). He stated that her business judgment was sound (R. 491, 492). Kipp corroborated Mortensen concerning Gail's capability of managing her own properties (R. 780-785).

Dr. Darke and Dr. Neilsen's testimony was convincing and undisputed that Gail readily called to mind, either by address or popular name, each of her properties without effort (R. 802-807, 837-844).

Of significance are the many leasing agreements signed by Gail with her various tenants which were introduced in evidence (Ex. 12, 14, 15, 16; R. 740-747). The evidence is overwhelming that Gail was fully capable of recalling to mind her property.

**Gail had Sufficient Mind and Memory to Dispose
of Her Property Understandingly According to
Some Plan Formed in Her Mind**

The will of May 2, 1947 left the property located at 708-710-712 South State Street to Jack Forsberg (Appendix 1). Between execution of the will and first codicil Forsberg died (Appendix 4). As a result, when the first codicil was prepared on February 20, 1950, Jack Forsberg was deleted from the will. On June 30, 1950, Gail's father died (R. 119). Up to this time her father had been the largest beneficiary of her will, and except for the South State Street property willed to Grant Macfarlane, Macfarlane, Kostopulos, and Theo were only residuary legatees (Appendix 1, 2).

On April 23, 1951 the second codicil was executed (Appendix 3). Between the preparation of the first codicil and the second codicil Gail had learned that Theo and

Deak intended to make their home in Salt Lake City upon Deak's retirement (R. 727). Furthermore, Gail's attitude toward Theo had mellowed considerably since her avowed intention not to remember Theo substantially in her will as expressed to Mortensen (R. 229). For these reasons Gail withdrew the family home at 1335 Perry Avenue from Macfarlane and willed it to Theo (R. 727). In the meantime the Bridges had become important in Gail's life, had administered many kindnesses to her and for this reason she withdrew 234 South 2nd East Street from Macfarlane and willed it to Ada Bridge (R. 728).

Following execution of the will on May 2, 1947, Gail's health began to decline. She was in need of assistance. She had no living relatives in Salt Lake upon whom she could rely. Through force of necessity she came to rely on her friends, and principally on Kostopulos (R. 341, 407). Kostopulos performed services that were of inestimable value to Gail. He was "her very best friend." She needed Kostopulos just as every person in declining health and approaching old age needs the help and services of someone and so it was that she remembered him in her first and second codicils.

Doctors Darke and Nielsen questioned Gail at length in private prior to execution of the second codicil. They testified that Gail was capable of planning and did have an intelligent plan for distribution of her property. According to Dr. Neilsen she stated that she wanted three

people to share the substantial portion of her estate, to wit: her sister Theo, Macfarlane and Kostopulos (R. 804-807, 838).

Gail's reasoning power was demonstrated by a number of incidents that appear in the testimony. We call attention to her conversation with Mrs. Folden in which she expressed the belief that Dr. Cowan and Dr. Pace weren't helping her, and for that reason made the decision to change doctors (R. 423, 424). Of similar import was her conversation with Mrs. Folden regarding hairdressers and her decision to have Mrs. Carney fix her hair (R. 437). Another indication of her reasoning ability is seen in her statement to Mortensen that if Ted Stevenson wanted to pay for improvements at Olie's place he was entitled to a longer term lease (R. 481). Similarly her statement to Michaelis that any remodeling would have to stay with the place after his lease had expired (R. 384, 385). Her thoughtfulness is demonstrated by her gift to the Franks of a miniature lion in memory of Major Sheridan (R. 582).

The will and codicils themselves clearly demonstrate that Gail was capable of planning and did plan reasonably and intelligently the disposition of her property.

The Trial Court's Findings of Fact, Conclusions of Law, and Judgment

Following the trial court's memorandum decision counsel for contestant prepared proposed Findings of Fact, Conclusions of Law and Judgment. Various objec-

tions to these documents were made by counsel for Macfarlane and Kostopulos. The trial court denied each and every objection. As we shall attempt to point out, the findings, without exception, are made either in the face of uniform evidence to the contrary, or in the face of a total absence of evidence and solely on the basis of counsel's suspicion and vivid imagination. It is evident that the judge reached his conclusion and was willing to adopt any finding suggested by counsel which would tend to support him regardless of whether or not that finding had an evidentiary basis.

The trial court has made general Findings of Fact and Conclusions of Law that Gail lacked testamentary capacity on the occasions that she executed the will and codicils (Findings of Fact No. 25, 26, 27, 30; Conclusions of Law No. 1, 3, 5), yet has made no specific Finding of Fact that Gail ever lacked sufficient mind and memory to determine who were the natural objects of her bounty, or that she lacked sufficient mind and memory to recall her property, or that she lacked sufficient mind and memory to dispose of her property understandingly according to some plan formed in her mind.

We shall undertake to discuss the evidence pertaining to every specific finding that either directly or inferentially has a bearing on Gail's testamentary capacity.

The trial court first found that Gail "never matured either mentally or emotionally," that she "had the men-

talities of a child from 11 to 13 years of age," that she had a "childish and immature mind." (Findings of Fact 8, 17, 26).

An abstract consideration of Gail's mental and emotional development would serve no useful purpose. Neither would any attempt to compare her intellect with a brilliant or an average mind. The evidence revealed without dispute that she knew and understood the natural objects of her bounty, knew and understood her property, and was fully capable of planning the disposition of her property. Counsel for contestant has made no attempt to meet his burden of proof on this matter. All the evidence is contrary to his position.

The trial court was apparently impressed by testimony that Gail "tickled or poked men in the ribs," "giggled," "kind of giggled," was "childish," "was just silly." (R. 513-515, 542, 549, 552, 572).

However, "eccentricities and idiosyncrasies, however gross, do not constitute insanity, and cannot incapacitate one otherwise sound from making a valid will." See *In re Hansen's Will*, 50 Utah 207, 167 Pac. 256.

In *re Whitworth's Estate*, 110 Cal. App. 526, 294 Pac. 84, 85, there was evidence that the testator was:

"* * * 'feeble minded, * * * weak minded; * * * an immature individual; * * * of unsound mind; * * * silly; * * * had the mentality of a boy not over ten years'; he had 'a silly expression on his

face; acted like a half-wit.' That as a boy, although he had attended school for a period of 'seven or eight terms,' he could read very little * * * could not spell and could only write his name. He would answer questions but he could not carry on a connected conversation; * * * that he would give his money away. 'He gave a barber lady enough money to buy a ranch.' "

The court, discussing the evidence, stated:

"From the foregoing summary of the salient points of the evidence introduced on the hearing of the contest, it may be deduced that the testator was not possessed of the average amount of human intelligence; or, as expressed by one of the witnesses, 'he was a feeble minded, or a weak minded, individual' who, perhaps unsuccessfully, attended to his own personal and business affairs."

The court then concluded:

"It would serve no useful purpose to herein consider the conduct, act by act, of the testator, or to attempt a comparison of his intellect with that of either a brilliant or an average mind. The primary questions which are to be given consideration are: Was he possessed of that mentality which enabled him to understand the nature and situation of his property; to remember and to understand his relations to those persons who would be the natural objects of his bounty; and did he realize the nature of the act which he was performing? But of at least equal importance with the determination of such facts is the solution of the further inquiry as to whether the contestants sustained the burden which was cast upon

them to prove the negative of such facts. A search of the record herein discloses evidence from which it is clearly inferable that at no time was the testator failing in his knowledge with reference to the nature, situation, or extent of his property. Nor is there the least indication that he was not entirely cognizant of the existence of those persons who, on the death of the testator, ordinarily would be expected to share in his estate. He knew them; had business relations with them; and at all times engaged in friendly social intercourse with them. Far from carrying the burden of showing to the contrary, the evidence introduced by the contestants affirms the legal testamentary capacity of the testator by establishing facts vitally opposed to the ultimate conclusion necessary to a decision of the testator's incompetency. In such circumstances, no error was committed by the trial court in its order by which the motion for nonsuit was granted."

See also *In re Peterkin's Estate*, 23 Cal. App. 2d 597, 73 P. 2d 897.

Evidence as distinguished from accusation reveals that Gail lived a relatively active life. When she wasn't too ill she ordered the groceries, planned and either prepared or supervised preparation of the household meals (R. 589). She had a large collection of curios in which she was constantly interested (R. 103). She took care of birds, not only for herself, but for a friend (R. 787, 788). She played the piano "well" and was able to play several pieces on the harp as well as the guitar (R. 102, 103, 631). She read the newspaper (R. 621, 691-693), played Chinese

checkers (R. 589, 590); belonged to a Canasta Club and played Canasta very well (R. 764, 765); was an enthusiastic baseball fan; planned and gave a party for the Salt Lake Bees team the year it won the pennant (R. 369, 376, 377). She went to the hairdresser every two weeks and during the hour or two while there talked intelligently about politics, current events, religion and discussed family affairs (R. 817). On one occasion she took silverware to the jewelry store to have it engraved and took a sample spoon with her to show how she wanted it done (R. 679-682). She selected and bought her own clothing and dressed in good taste, was meticulous and clean in her person (R. 471, 629, 819, 820). She voted in the 1945 municipal election; in the 1947 municipal election, and the general election of 1948 (R. 754). She made many friends. Apparently her company was acceptable to people in various stratum of society. Dr. and Mrs. Frank invited her to a birthday party held for Mrs. Frank (R. 524, 561, 688). She numbered among her friends bank officials; the policeman on 3rd South and Main Street; the bus driver, on whose bus she frequently rode to town, and a crippled boy in the Oakland Hotel (R. 28, 303, 470).

This woman, who was capable of engaging in so many activities, who was described by Dr. Darke as "very business-like" and "functioning at the level of her intelligence" at the time she executed the second codicil has apparently been found by the trial court to be so immature emotionally that she couldn't meet the simple

tests of testamentary capacity. This finding is a clear indication of contestant's futile and empty search for evidence to justify an untenable position.

The trial court found that "three of Gail's intended beneficiaries, i.e., Oscar Burnside Beam, Harold Hendee and Joseph Lamar Bridge, were omitted from the second codicil" and concluded therefrom that Gail did not understand who was benefitting by the second codicil (Finding of Fact 24). That the foregoing finding is supportable only by resort to the grossest kind of speculation and conjecture is clear from the testimony concerning execution of the second codicil as set forth in the Statement of Facts. To review briefly, a medical doctor and a psychiatrist had a conversation with Gail and subjected her to a psychiatric examination that lasted over an hour. They testified that she discussed freely with them her various friends and acquaintances, recalled quickly and easily to mind her various properties, and expressed a plan to leave the bulk of her properties to three people, to wit: Theo, Macfarlane, and Kostopulos. The doctors heard the will read to Gail, and questioned her about the various provisions of the will, and expressed their opinion that she was fully capable of understanding and did understand its provisions. The trial court, however, found that the doctors must have been mistaken solely because of one sentence in a letter signed by them and sent to Grant Macfarlane at a later date. The statement is as follows (R. 806):

“She expressed an interest in making changes in her will and was aware of what this involved. She expressed an interest in leaving some of her estate to Mr. Oscar Burnside Beam, Mr. Grant Macfarlane, Mr. Dan Kostopulos, sister and brother-in-law, and Mr. and Mrs. J. LaMar Bridge.”

Gail knew the property left to Theo would benefit both Theo and Deak. She had also remembered Deak by placing his name as well as Theo's on the joint account heretofore mentioned. She knew the property left to Mrs. Bridge would benefit the Bridge family. Any other conclusion is unreasonable. Oscar Beam spent most of his time at the family home at Perry Avenue. He was on the friendliest of terms with Theo. In withdrawing the Perry Avenue home from Grant Macfarlane and leaving it to Theo, Gail knew she would not only benefit Theo, but would furnish Beam a lodgment until his death. The fact is that since Gail's death Beam has had a home at Perry Avenue, just as Gail planned (R. 588). It is inconceivable that Gail would consider leaving Beam, a man of great age and with no dependants, a substantial portion of her estate. She had previously discussed Beam's age with Macfarlane (R. 733, 734).

The trial court has read into one line in a letter a meaning never intended by the authors, a meaning contrary to the evidence introduced by both contestant and respondents, a meaning which is unreasonable on its face.

The trial court found that Gail was incapable mentally of understanding the language of a formal lease (Finding of Fact No. 7). This is perhaps the strongest and most specific of all the court's findings on the subject of Gail's mental competence. We point out that members of the legal profession on occasions find it difficult to understand the language of some formal leases, and even our courts are sometimes in disagreement as to their meaning. Kipp, however, gave an opinion that Gail was competent to enter into leasing and other types of agreements (R. 782). Mortensen discussed 12 to 15 leasing transactions with Gail between 1937 and 1950. His opinion was that she fully understood the content and purport of these documents (R. 476, 478). Theo herself signed as a witness to one such lease, apparently without misgivings (Ex. 5). Exhibits 12, 14, 15, 16 show that over a long period of time Gail entered into contracts with a variety of people involving a variety of problems. Dr. Darke's testimony, which is the sole and only basis of the finding, is as follows (R. 814, 815):

“A. Well, I think that she probably had no difficulty at all in collecting rents and handling the property in relation to, you might say, the month to month handling. She seemed to know the property, and to discuss it with ease. In relation to entering into leases or agreements or things of that kind, I think that if they would be explained to her in not legal terms, then I think she would know what they were about and what was happening with them. I think that if it were left to her to read and analyze that she would have some difficulty with legal terms.”

Here again the trial court, under the guidance of counsel for contestant, has drawn a few words out of context and given them a meaning never anticipated by the witness, a meaning contrary to all the evidence. Because she couldn't understand legal terms she was mentally incompetent!

The trial court also made a number of findings to the effect that Gail's mind was so influenced and coerced that she lacked testamentary capacity. These findings will be discussed in Point II of this Brief.

Authorities

A number of Utah cases have discussed sufficiency of evidence in establishing lack of testamentary capacity.

In re *Hansen's Will*, 50 Utah 207, 167 Pac. 256, 260 (decided Aug. 9, 1917). Peter Hansen died, leaving as survivors two sons and three daughters. A little more than five months before he died he prepared his Last Will and Testament, leaving one MacGregor and one McConnell as his residuary legatees, and also naming them as executors of his will. Following his death the will was presented for probate and three of his children protested the probate on the ground that he lacked testamentary capacity and on the further ground that the will was obtained by fraud and undue influence.

The case was tried before a jury and the jury found that Hansen was of sound and disposing mind at the time of executing the will and also that said will was procured

by fraud and undue influence on the part of MacGregor and McConnell. The court reversed and remanded and held as a matter of law that neither undue influence nor testamentary incapacity had been proved.

The evidence revealed that decedent was of Danish descent; that he was afflicted with some throat trouble; was hard of hearing, and also had difficulty with his eyes. In the last 11 years of his life he always posed as being entirely destitute and everyone who came in touch with him supposed him to be not only poor, but often times in abject want. The residuary legatees had befriended testator giving him odd chores and frequently providing him with meals, giving him newspapers and magazines to read. There was no direct evidence of undue influence being exerted. The court held as a matter of law that no undue influence had been exerted on decedent.

Inasmuch as the case was remanded for a new trial, the court also discussed the issue of testamentary capacity; observed that the testator was 79 years of age when the will was made; that in his own handwriting he gave the scrivener directions, pursuant to which the will was prepared; that in his correspondence with friends in Denmark he appeared to be sufficiently intelligent to make a valid will. A number of lay witnesses were called, all of whom were allowed to give opinions respecting testator's sanity on the date the will was executed. The court, however, noted that these opinions were no stronger than the evidence related upon which they were based and in a

number of instances pointed out that as a matter of law the basis for the opinions was inadequate to support the opinion. For example, one witness gave an instance occurring 10 or 12 years before the death of the testator in which he had asked why the testator was not wearing gloves in freezing weather, and the testator answered that he had no money. This was the basis for the later opinion given and the court noted that such a flimsy basis would not support the conclusion of the witness. The court stated:

“It is upon instances similar to those just illustrated, and upon the facts that the testator was untidy in his personal habits and dress and at home, and that he had a miserly disposition and an entire lack of affection for his offspring, which were the principal grounds that induced the witnesses to consider him of unsound mind. Indeed, the weight of the evidence is to the effect that they considered him so because he was unlike other men. He was not as they observed other men, and expressions of that character. The fact is that the evidence discloses eccentricities on the part of the testator which at times were induced and aggravated by the fact that the testator was afflicted with the physical infirmities of being deaf, of having some ailment of the throat and of the eyes. True, he had some other physical defects, but those were of minor importance. *Eccentricities and idiosyncrasies, however gross, do not constitute insanity, and cannot incapacitate one otherwise sound from making a valid will. The finding of the jury that the testator was not insane at the*

time he made the will is not only supported by, but it is the only conclusion permissible under the evidence."

In *re Ford's Estate*, 70 Utah 456, 261 Pac. 15 (decided Nov. 1, 1927), involved a contest over the will of William Hersey Ford, who died and left an estate consisting of real and personal property. His heirs and next of kin were his surviving wife, a son and an adopted daughter by a former marriage. He left a will, leaving all of his property to his wife, except the sum of \$1.00 each to the children. The children contested the will. A jury found that deceased was not of sound and disposing mind and that the will was procured by undue influence.

The Supreme Court reversed and remanded holding as a matter of law that decedent had testamentary capacity and that there was no undue influence by his wife. Decedent had been previously married and divorced. He practiced various sex orgies with his first wife and at one time had beaten her severely for refusing to indulge in his habit of sexual perversion. He had continued to indulge in various forms of sex orgy and perversions with his second wife. A doctor who had intimate knowledge concerning his condition and his sexual perversions, as they had been detailed to him by deceased, was of the opinion that as far as sex matters were concerned deceased was insane, but that deceased was able to conduct a rather extensive trucking business. The evidence all seemed to be that he had a great deal of affection for his wife and defended her any time her character or repu-

tation was assailed. The court, in holding contestants had not sustained the burden of proving testamentary incapacity, stated:

“* * * Even the testimony of Dr. Beer excludes the idea that deceased was insane in matters of business. The court is of opinion that the making of a will and the disposing of property by will is a matter of business.”

In *re Buttars' Estate* (decided Sept. 26, 1953), 261 P. 2d 171, 174, contestants appealed from a judgment admitting the will to probate notwithstanding a jury's verdict finding the testatrix did not have a sound and disposing mind at the time of executing the will in 1945. Held evidence insufficient to support finding of lack of testamentary capacity at time of making will. The court stated:

“Sometime in 1940, testatrix who was then 75 years of age became very ill and was hospitalized for a number of weeks suffering from kidney troubles, high blood pressure and hardening of the arteries. After she left the hospital her memory appeared poorer. *She did not recognize some of her grandchildren who had been away for some years on missions for their church or had been in the armed services, when they visited her upon their return.* She suffered a great deal from headaches and would often repeat the same subject in her conversation. She accused some of her daughters of taking and borrowing things when they hadn't. She would forget where she hid things. Once she hid the silverware in bed, and other times she hid edible such as fruit, salmon, or vegetables

in the living room bookcase. She became weaker physically and as time went on she depended more and more on Wallace to aid her in her business transactions, although he was not with her when she made her transfers of her stocks and purchased bonds for her daughters. Testatrix was again hospitalized in 1944, this time for pneumonia, and that year her children had a meeting to discuss her condition. *At that meeting an older son suggested that a guardian should be appointed because in his opinion their mother was not physically or mentally capable of handling her affairs.* None of the other children wanted this done, so it was agreed that the children would take turns coming to their mother's home to help take care of her and that Wallace would continue to look after her business interests. One of the daughters testified that although in 1950 it was arranged that they should be paid for their services and the mother signed the checks for that and other necessities *she did not think her mother knew what she was doing or knew what property she had.*

“When the eldest son of testatrix died she showed no emotion at his funeral and about a month later executed the Will which is contested herein, wherein she stated that the reason she was leaving his children only \$1.00 each was because their father had failed to repay a loan of \$1500 which was more than would have been his share of her estate. In this connection it is noted that his share, if it were equal to that of his brothers and sisters, would have amounted to about \$8000 and that there was also evidence that the loan was probably repaid, even though testatrix had retained the note and mortgage evidencing the loan. It should be further noted that there was evidence

that in the notices of her eldest son's death testatrix was not mentioned among his survivors and that this hurt her very much.

"Testatrix had always been a frugal woman who believed that one should earn what he received. Shortly after she executed her Will she made conveyances of a considerable part of her real property to Wallace and two of her younger daughters who lived near her. She also assigned some valuable bank stock and bought U.S. Savings Bonds for these daughters, giving as her reason for doing so that they had received worthless stock from their father's estate, of which she was one of the administrators, as part of their share in his estate. This stock was not worthless at the time of the distribution but became so within a few years thereafter. By 1951, Wallace was made his mother's agent on her checking account and she also made him a joint tenant on her savings accounts.

"The uncontradicted testimony of friends, neighbors and tradesmen was that in their contacts with testatrix even after her illnesses she always appeared neat and understood what she was talking about; that she always knew what she wanted or needed and would take nothing else. The doctor who attended her in her illnesses and who saw her on the average of at least twice a year since her illness in 1940 until her death, testified that in his opinion she was competent during all that time except in March, 1952, a short time before she passed away, at which time she was extremely ill.

"The jury did not find that the Will was executed under any undue influence or fraud. *The evidence related above is proof that testatrix*

was eccentric in her actions and forgetful at times of some things, but is utterly insufficient to sustain the contestants' burden of proving by a preponderance of the evidence that she lacked testamentary capacity at the time she executed the Will. This is especially so in view of the positive testimony of the subscribing witnesses that she appeared to know what she was doing at that time and that she was alone with the lawyer when she made her wishes known, since the Will itself shows she remembered who were 'the natural objects of her bounty' and that she disposed of her property 'understandingly according to some plan formed in her mind.' There being no question of fraud or undue influence in the formulating and relation of that plan to the lawyer, the mere fact that at times she was forgetful and eccentric and was weak physically and that after she made her Will she disposed of a good portion of her property after a lifetime of careful saving is no proof that at the time of making her Will she lacked testamentary capacity. The court therefore did not err in admitting the Will to probate in view of the complete lack of evidence that at the time of making the Will testatrix lacked the mind to understand what she was doing."

In re George's Estate, 100 Utah 230, 112 P. 2d 498. Certain children of decedent protested admission to probate of a will leaving the estate to two other children. The jury found decedent lacked testamentary capacity and also that the will was the product of undue influence. Judgment was reversed with directions to admit the will to probate.

Testator was 84 years old. His weakened physical condition necessitated guiding of his hand in signing the will. He was forgetful, suffered from pain and was inclined to cry when matters were not to his liking. In the opinion of lawyers, doctors, and subscribing witnesses to the will, testator was competent at the time of the will's execution. In commenting upon the evidence the court stated:

“ * * * At most it is simply evidence which along with other evidence might logically lead to an inference deceased did not possess testamentary capacity. *Absent that other evidence, certainly this evidence is not sufficient of itself to offset positive evidence to the effect that deceased was possessed of testamentary capacity at the time he executed the will.*”

In re *Swan's Estate*, 51 Utah 410, 170 Pac. 452. This case involved the estate of Gail Swan's grandfather, Edward D. Swan. A granddaughter of decedent was the contestant and claimed that decedent lacked testamentary capacity and also that Gail Swan's father, Ulysses Grant Swan, had exerted undue influence upon the decedent which resulted in the execution of the will.

The trial court found that at the time the will was executed decedent was of sound and disposing mind and was not laboring under any duress, menace, fraud or undue influence. The contestant appealed claiming that the Findings of Fact were against the great preponderance and weight of the evidence. The facts showed that at the time the will was executed deceased was 83

years of age, was afflicted with hardening of the arteries, diseased kidneys; that his mind was more or less affected; that at times he had spells of unconsciousness, lasting several hours, said spells occurring approximately a month apart; that when said spells were over his mind usually was clear enough to transact his business, collecting rents which amounted to about \$1200.00 per month, and depositing the money in the bank; that he had written the terms of the will in longhand and taken said writing to a scrivener, who had prepared the will and thereafter called two of his friends of long standing to act as witnesses to the will. *There was some evidence that decedent was suffering from senile dementia.* It also appeared that prior to making the will on December 23, 1911, decedent had deeded to Theo L. Swan a parcel of ground valued at \$55,500. On March 31, 1911 decedent had deeded to Gail Swan a parcel of ground valued at \$51,000, and on December 23, 1911 had deeded to proponent a parcel of ground valued at \$72,000, and on ground valued at \$10,000.

The court placed strong reliance upon the fact that deceased continued to transact his business for several months after he made the will, and held that the trial court did not commit error in finding that decedent had testamentary capacity at the time the will was executed. The court stated:

“ * * * The three witnesses present when the will was executed, whose testimony we have

quoted, say he was of sound mind and seemed to know what he was doing. If their testimony is true, then the medical experts were mistaken when they testified he had senile dementia. If he had senile dementia, and that disease deprived him of testamentary capacity, then the three witnesses referred to were mistaken when they said he knew what he was doing when he executed the will. The question thus presented was one for the trial court. The court found that he was of sound and disposing mind. The finding is sustained by substantial evidence."

The burden was on contestants to establish by a preponderance of the evidence that testamentary incapacity existed *at the time the will was executed*.

See *In re Klopstock's Estate*, 31 Cal. App. 2d 568; 88 P. 2d 722; *In re Lincoln's Estate*, 185 Okla. 464, 94 P. 2d 227.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL SWAN WAS UNDER THE FORCE OF UNDUE INFLUENCE AT THE TIMES SHE EXECUTED THE WILL AND CODICILS.

Burden of Proof and Presumptions

The burden of proving undue influence by a preponderance of the evidence rests upon the contestant.

In re Hansen's Will, 50 Utah 207, 167 Pac. 256, 259, the court stated:

“The burden of proving fraud or force in the procurement of a will (unlike the simple issue of testamentary capacity) lies upon those who contest the instrument; and anything which imputed heinous misconduct to a party concerned and interested in its execution ought to be fairly established by a *preponderance of proof*. As to *undue influence*, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it, either by direct evidence or proof of circumstances inconsistent with fair dealing.”

Grant Macfarlane occupied a confidential relationship with Gail Swan at the time the will and codicils were executed. He prepared the will and codicils and in those documents was made a beneficiary. It has been contestant's position that the foregoing undisputed facts give rise to a presumption that Macfarlane exercised undue influence upon Gail Swan which said presumption has evidentiary weight. Inasmuch as the trial court found in contestant's favor on the issue of undue influence in the face of a total absence of evidence, it is obvious that the trial court adopted contestant's position on this proposition. The Utah decisions are clear, however, that any such presumption was completely dispelled by the testimony of the witnesses to the will and codicils that Gail was not acting under undue influence at such times.

In *re Newell's Estate*, 78 Utah 463, 5 P. 2d 230, 240. Plaintiff, the supposed grandson of decedent, filed an

action to set aside the will of decedent on the ground that he was unintentionally omitted from the will. A jury found the issues in favor of plaintiff. Defendants, the executor and legatees of the will, appealed. Plaintiff sought to avail himself of the presumption that omission of a natural heir from a will is unintentional. The court instructed that said presumption *must be rebutted by a preponderance of the evidence*. The case was reversed on the ground that said instruction was an erroneous statement of law and it was held that when evidence concerning such a presumption is introduced, the presumption ceases to exist. The court stated:

“Now, it is the contention of the defendants that when the evidence heretofore referred to was adduced by them, the presumption created by the statute ceased and in no sense could be considered or weighed as evidence, and inasmuch as the respondent offered no evidence to refute or rebut the evidence so adduced by the defendants, in affect relied only on the presumption to support a finding of an unintentional omission to provide for the respondent, and since on the evidence so adduced but one finding is permissible, that of an intentional omission, the defendants were entitled to a directed verdict. We think the contention must prevail. *Certain it is that on the evidence adduced a finding was justified that the omission to provide for the respondent was intentional. In such case it is just as certain that the presumption created by the statute had fully spent its force and could not be considered as evidence or be weighed against that adduced by the defendants.*

* * *

“In charging the jury, the court in substance charged that if the jury found that the respondent was the grandson of the testator, then because of the statute, which the court in substance stated to the jury, the respondent was entitled to share in the estate of the testator as though he had died intestate, unless it was made to appear that the testator intentionally omitted to provide for him; ‘and you are further instructed that the law raises a presumption that the omission is not intentional and such presumption must be rebutted by a preponderance of the evidence showing that such omission was intentional.’ Complaint is made of the charge in such particular. The respondent first urges that the exception thereto was too general and did not sufficiently indicate the particular matters now complained of, and further defends the charge on the ground that it was not open to the criticism made of it. We think the exception was sufficient to entitle the defendants to a review of the charge. *The principal complaint made of it is that the court thereby conveyed the thought to the jury that the presumption was itself evidence, or had evidentiary value, which could be considered and weighed against whatever evidence may have been adduced tending to show that the omission to provide for the respondent was intentional, or at least in such respect was misleading and confusing, which led to the prejudice of the defendants. We think the charge at least to a great extent is open to the complaint. If it did not directly convey the thought to the jury that they could consider the presumption as evidence, it at least tended to give the jury the impression that in considering whether the evidence adduced respecting an intentional omis-*

sion did or did not preponderate against or over the presumption, the jury were permitted to consider and weigh the presumption against such adduced evidence. What we have just said as to the office and function of the presumption, that when evidence is adduced respecting facts and circumstances concerning which the presumption is indulged the presumption ceased and could not be considered of evidentiary value, it necessarily follows that the charge is erroneous and prejudicial."

In *re Bryan's Estate*, 82 Utah 390, 25 P. 2d 602, 609. Decedent prepared a will, leaving his estate to St. Joseph's Church at Ogden and naming Father P. F. Kennedy as executor. The will was admitted to probate and decedent's sister entered a contest. Father Kennedy had visited decedent at the hospital after being asked for by him. Father Kennedy thereafter obtained the services of R. J. Douglas, an attorney, who went to the hospital and then prepared the will. Decedent died a short time later. Contestant relied strongly upon a so-called presumption arising out of the confidential relationship between the testator and Father Kennedy.

The court stated:

"This court is committed to the doctrine that, when facts and circumstances are shown concerning which a presumption arises or is indulged, the presumption ceases, and the case is to be decided on the evidence introduced independently of the presumption; that is, that the presumption is not evidence and has no weight as evidence. In re Newell's Estate, 78

Utah 463, 5 P. (2d) 230, and State v. Green, 78 Utah 463, 6 P. (2d) 177. If there is evidence that the beneficiary of the will was in confidential relationship with the testator, and was active in the preparation of the will, there arises from proof of such acts and relationship a suspicion which amounts to a presumption of fact, but which may nevertheless be overcome by evidence that the will was the free act of the testator. The presumption, however, disappears, and is not to be weighed against evidence when additional facts are adduced which show the circumstances and conditions under which the will was made. The case then must be decided on the facts. If the evidence is undisputed, and if but one conclusion or inference is properly and reasonably deductible therefrom, it is for the court and not for the jury.

* * *

*“ * * * Undue influence must be proved. It will not be presumed from mere interest or opportunity. The opportunity to exercise influence, unless combined with circumstances tending to show its exercise, affords no presumption that it was in fact exercised. 40 Cyc. 1151; 1 Page on Wills (2d Ed.) 1226; In re Clark’s Estate, 5 Misc. 68, 25 N.Y.S. 712; Severance v. Severance, 90 Mich. 417, 52 N.W. 292; Fischer v. Sperl (In re Sperl’s Estate), 94 Minn. 421, 103 N.W. 502; In re Black’s Estate, 132 Cal. 392, 64 P. 695.*

“Bryan, if of sound and disposing mind and memory, had a right to dispose of his property as he saw fit. He could disinherit his sister if he wished. The will cannot be set aside on the mere suspicion that the priest called to

his bedside suggested to him a certain disposition of his property. To vitiate the will, there must be more than mere influence or suggestion; it must be undue influence. However exhibited, it must be such influence as to destroy the free agency of the testator and impel him to do what he would not have done had he been free from the control of such influence. The kind of influence which will avoid a will has been referred to by this court in Anderson v. Anderson, 43 Utah 26, 134 P. 553, 557, as follows: 'Undue influence may be established without showing any physical coercion or constraint. The influence that vitiates may be subtle and be entirely without outward demonstration, but in whatever form it may appear it must, nevertheless, be made to appear from competent evidence that the will of the one accused of practicing undue influence dominated the will of the testator—that the testament is in fact and effect the will of the accused and not that of the testator.'

“The rule is stated in 40 Cyc. 1144, as follows:

'Mere general or reasonable influence over a testator is not sufficient to invalidate a will; to have that effect the influence must be 'undue'. The rule as to what constitutes 'undue influence' has been variously stated, but the substance of the different statements is that, to be sufficient to avoid a will, the influence exerted must be of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency and make him express the will of another, rather than his own. The mere existence of undue influence, or an opportunity to exercise it, is not sufficient; such influence must be actually ex-

erted on the mind of the testator in regard to the execution of the will in question, either at the time of the execution of the will, or so near thereto as to be still operative, with the object of procuring a will in favor of particular parties, and it must result in the making of testamentary dispositions which the testator would not otherwise have made. No precise quantity of influence can be said to be necessary and sufficient in all cases, as the amount necessarily varies with the circumstances of each case, and especially does it vary accordingly as the strength or weakness of mind of each testator varies, the amount of influence necessary to dominate a mind impaired by age, disease, or dissipation being obviously less than that required to control a strong mind.'

“And further with respect to one occupying a confidential relation: ‘The influence over a testator of one who is his wife, child, gardian, attorney, spiritual adviser, or who occupies some other confidential relation to him, is not necessarily undue influence, although it may, when coupled with other circumstances, raise a presumption of undue influence; but the question must be determined, as in all other cases, by ascertaining whether the free agency of the testator has been destroyed.’”

After considering the evidence the court affirmed the trial court’s ruling in granting a motion for nonsuit this supporting the will.

A late Utah case discussing presumptions is *Tuttle v. Pacific Intermountain Express Co.* 242 P. 2d 764, 769, where the role of the presumption that a deceased

person was in the exercise of ordinary care for his own safety is discussed. Mr. Justice Wade, speaking for the court, stated:

“The term ‘presumption’ is properly ‘used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone.’

“The ordinary presumption merely places on the party claiming the non-existence of the presumptive fact the burden of producing evidence from which the fact trier could reasonably find the non-existence of such fact. In other words, it places on the opposing party the burden of going forward with the evidence or of making a prima facie case on that issue. If the opponent fails to meet this burden the presumptive fact should be assumed and the jury should be so instructed if the facts on which the presumption is based is established, but if the required burden is satisfied by the opponent the presumption disappears and the facts must be established from the evidence the same as though no presumption were ever involved and it is not proper in such case to even mention in the instructions the existence of such presumption. This court has many times held that such is the effect of presumptions generally and of this presumption in particular. Of course, we must keep in mind that the facts on which the presumption is based are in evidence even though the presumption has been destroyed by proof tending to show the non-existence of the presumptive fact, and to the extent that they logically tend to prove the presumptive fact they may be considered by the jury for that purpose.”

See also:

State v. Green, 78 Utah 580, 6 P. 2d 177; on rehearing 86 Utah 192, 40 P. 2d 961;

Saltas v. Affleck, 99 Utah 65, 102 P. 2d 493;

Morrison v. Perry, 104 Utah 151, 140 P. 2d 772;

Frame v. Hudspeth, 10 Cir., 109 F. 2d 356;

Buckley v. Francis, 78 Utah 606, 6 P. 2d 188;

State v. Prettyman, 113 Utah 36, 191 P. 2d 142, 147;

King v. Denver and Rio Grande Western R. Co., 116 Utah 488, 211 P. 2d 833;

Christiansen v. Hilber, 282 Mich. 403, 276 N.W. 495;

Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 A. 884, 63 A.L.R. 334; and

Annotation 95 *A.L.R.* 878 at page 880.

Other jurisdictions have adopted rules somewhat similar to Utah with respect to burden of proof.

In *re Erickson's Estate*, 140 Cal. App. 520, 35 P. 2d 628, 631, (Aug. 30, 1934), involved an action by two heirs-at-law to set aside a will on the ground of undue influence. It appeared that the will was prepared by William A. Monten, an attorney, and in the will William A. Monten and his wife, who was also an attorney, were made beneficiaries and residuary legatees. The case was tried before a jury. The jury found that undue influence had been exercised. The District Court of Appeals reversed

for the reason that certain instructions to the jury were error and prejudicial. One of the instructions held to be erroneous is as follows :

“ * * * The attorney must, however, overcome the presumption of undue influence by a preponderance of the evidence that no undue influence was used upon the testator to make the provision in the will for the attorney who prepared it, or for any other person named as beneficiary therein.”

The court discussed the foregoing instructions :

“We are satisfied that the court erred in the giving of these instructions and thereby throwing upon the proponents of the will the burden of proving by a preponderance of the evidence that there was no undue influence exercised in the execution of the will, and that there was no undue influence exercised with respect to the provisions of the will referred to in the instruction No. 26. In *Scott v. Wood*, 81 Cal. 398, 22 P. 871, 872, the Supreme Court pointed out clearly the distinction that exists between the use of the phrase ‘burden of proof’ to signify the burden of proving or meeting a prima facie case, and the use of the same phrase to signify the burden of producing a ‘preponderance of the evidence.’ The court said: ‘And it is by no means safe to infer that because a party has the burden of meeting a prima facie case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counter-balance the evidence adduced against him.’ The court proceeded to fortify and

explain this ruling with various illustrations and quotations from other cases. These quotations need not be repeated here.

“The same distinction above noted was pointed out by the Supreme Court of New York and applied in the contest of a will in the case entitled *Matter of Connor’s Will*, 230 App. Div. 163, 244 N.Y.S. 221, 223. Under circumstances similar to those in the case at bar, the court said: ‘Whether the attorney has explained satisfactorily or not, there still remains the question upon all the facts and circumstances whether the respondents have sustained the burden of proof on the question of undue influence.’

“There can be no doubt that these erroneous instructions to the jury, considered in the light of the evidence, were very prejudicial to appellant. It is far from certain that under proper instructions the jury would have rendered the same verdict against her.

“For the foregoing reasons, the judgment is reversed.”

In *re Eakle’s Estate*, 33 Cal. App. 2d 379 91 P. 2d 954, 958, (June 16, 1939), was a will contest in which a confidential relationship was established. A jury found undue influence to exist, and the appellate court reversed. The court, again discussing the subject of burden of proof, stated:

“It is contended by appellants that the first two instructions are not correct statements of the law, in that: ‘The contestants at all times have the burden of proving their case by a preponderance of the evidence and when they have made out a prima facie case the burden which shifts to the proponent is not to overcome their showing by a preponderance of the evidence but merely to produce sufficient evidence to offset the effect of the contestant’s showing;’ and they cite *Scarborough v. Urgo*, 191 Cal. 341, 216 P. 584; *Valente v. Sierre R. Co.*, 151 Cal. 534, 91 P. 481, and *In re Estate of Erickson*, 140 Cal. App. 520, 35 P. 2d 628. We agree with appellants. The instructions were erroneous.”

See also *In re Hampton’s Estate*, 127 P. 2d 38 and 131 P. 2d 565, (June 25, 1942); *Gum v. Reep*, 275 Ill. 503, 114 N.E. 271; *In re Kindberg’s Will* 207 N.Y. 220, 100 N.E. 789.

Inasmuch as witnesses have testified fully concerning the events before, during, and after execution of the will and codicils, and have testified fully concerning whether or not undue influence was exercised at the time of execution of the will and codicils, any presumption of fact arising from the confidential relationship and the bequest to Macfarlane has spent its force and cannot be considered as evidence. Contestant has the burden of proving undue influence by a preponderance of the evidence.

Test of Undue Influence

In *Anderson v. Anderson*, 43 Utah 26, 134 Pac. 553, 557, the court stated:

“The Supreme Court of California, in a very recent case, in passing upon the question of what constitutes undue influence, and in holding that in that case there was no evidence of undue influence, said: ‘In the face of this showing, which we have set forth in mere outline, there is no basis for the claim that the will was procured to be made by the undue influence of the proponent. *‘Undue influence, however used, must, in order to avoid a will, destroy the free agency of the testator at the time, and in the very act of the making of the testament. It must bear directly upon the testamentary act.’*”

* * *

“* * * The Supreme Court of Kansas in a very recent case (*Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L.R.A. (N.S.) 1024) lays down the rule in these words: ‘To vitiate a will there must be more than influence. It must be undue influence. To be classed as ‘undue’ influence it must place the testator in the attitude of saying, *‘It is not my will, but I must do it.’ He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will or the provision assailed does not truly proceed from him. He becomes the tutored instrument of a dominant mind, which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and by overcoming his power of resistance impels him to do what he would not have done had he been free from its control.’*”

Also to the effect that undue influence in order to vitiate a will must have been exerted *at the very time and in the very act of executing the will*. In re *Bryan's Estate*, supra; In re *Lavelle's Estate*, 248 P. 2d 372; In re *Lincoln's Estate*, supra.

The Trial Court's Findings of Fact, Conclusions of Law and Judgment

The trial court has made Findings of Fact and Conclusions of Law that Gail was dominated by undue influence on the three occasions spanning a period of four years, when she executed her will and the two codicils thereto. It shall be our purpose to consider every finding which bears upon the subject of undue influence in the light of the evidence.

The trial court found that Gail did not have independent advice at the times of executing her will and codicils, and has attached much significance to this so-called fact in its memorandum decision (Findings No. 18, 20, 23; Conclusions No. 2, 4, 6, 7).

The will was executed in the presence of Macfarlane's secretary, Patricia Pike, and a stranger, Vivian Weggeland. The first codicil was executed in the presence of Patricia Pike Stewart and a lawyer, Irwin Clawson. Although Clawson, not an associate of Macfarlane's, had been an acquaintance of Gail for some time, a finding is no doubt justified that on the two occa-

sions aforesaid Gail had no independent advice, although there is no evidence as to whether prior to executing these two documents she had independent advice.

The circumstances surrounding execution of the second codicil were somewhat different.

Dr. Neilsen and Dr. Darke are professional men of high repute. Neither was shown to have any relationship with Macfarlane, or the other beneficiaries which would in any way impeach their credibility. They discussed the will with Gail in private shortly before its execution. They questioned her specifically as to whether she desired to leave her property to the beneficiaries mentioned in the codicil, and whether she was acting under "pressure or force" from anyone (R. 806, 807). Such questioning was tantamount to advice to Gail that if she was under pressure or force she needn't execute the codicil. Her response was that she wanted to execute it.

As heretofore mentioned, four years elapsed between execution of the will and the second codicil. A different set of witnesses affixed their signatures to each instrument. Five years elapsed between the will and Gail's death. Over this period of time she had many opportunities for change of heart, many opportunities for successful rebellion against any influence that may have been exerted upon her. But she remained steadfast in her purpose to remember her friends substantially in her will.

During this five year period, Gail mingled freely with friends and relatives alike. She was never isolated but was a free agent to the last. She had an abundance of opportunity for independent advice from her various housekeepers, doctors, friends, and relatives. Certainly it cannot be contended that ^{her} ~~his~~ failure to seek and follow unwanted advice invalidates her will. When Theo asked Gail about her will 2 months before her death. Gail responded, "I have made a will" (R. 128). This clearly indicates she did not need nor want any advice. It is likewise indicative of the fact that she was not acting under undue influence.

In re *Lavelle's Estate*, supra, the court stated:

'She was at no time isolated from her relatives or friends who had a legitimate interest in visiting her.'

And again:

"There is another aspect of the case which is strongly persuasive that this third testament represented the will of Lucille Lavelle: It is indisputable that after its execution she lived for a year: about six months in Ogden and about six months in the Holladay rest home; during this time she had communication with others but made no effort to revoke the will or to make another."

In 123 A.L.R. 1505, the annotator discusses the subject of independent advice and states at page 1513:

"In the nature of things, the cases which may be relied upon as authority against the rule of independent advice are sounder direct authority

than those commonly relied upon as supporting the rule. For if a court upholds a transaction in the absence of independent advice, and in so doing declines to follow the suggested rule, it is clear that there has been an actual decision against the rule; while if a court overthrows a transaction where independent advice was not had it may usually be well argued that, in the circumstances appearing, the presumption of unfairness and undue influence was not in any manner rebutted, and hence that language of the court in support of the rule amounted to no more than an obiter declaration to the effect that had independent advice been obtained, the transaction might have been upheld. PEYTON v. WILLIAM C. PEYTON CORP. (Del.) (reported herewith) ante, 1482, is, itself, a decision of that character.”

And again at page 1515:

“Under the authorities generally, the real inquiry in such cases as are here under consideration is whether confidence was abused, or the transaction fair and free from the undue influence which, *prima facie*, is to be inferred from the relationship. The existence or nonexistence of independent advice in the transaction is, according to the prevailing view, merely evidence bearing upon those questions.”

We have discovered no will contest case which requires that where a confidential relationship exists the maker of a will must at his or her peril seek independent advice, or that either directly or inferentially holds that lack of independent advice is anything more than a cir-

cumstance to be considered in its relationship with other circumstances. Certainly it cannot be contended that lack of independent advice takes the place of evidence of undue influence.

It is significant that with changing circumstances the friends Gail remembered in her will changed. Forsberg's death brought about a change. Increased reliance on Kostopulos brought about another change. Her growing friendship with the Bridges brought about still another and her mellowing attitude toward Theo still another. Her affection, gratitude, and later sympathy for Macfarlane were reflected directly in her will and codicils.

The trial court has found that Macfarlane and Kostopulos were doubtful of Gail's mental capacity to make a testamentary disposition of her property, and that as a result "instead of having office help attest the second codicil, Macfarlane made an appointment with a doctor, who was a total stranger to Gail Swan, and entirely unacquainted with her illness. He arranged to have an examination made by Dr. Neilsen" (Finding No. 23).

Macfarlane testified that Gail wanted to be examined (R. 730). No contrary testimony appears in the record. There is extrinsic evidence to support his credibility in this regard. After Gail's grandfather, Edward D. Swan, died, a granddaughter contested the will on the ground of lack of testamentary capacity and on the further ground that Gail's father, the principal beneficiary, had

exerted undue influence on her grandfather. This litigation was unquestionably discussed many times in the Swan household (R. 138). Theo was financially secure. For this reason as well as others, Gail did not want Theo to receive all of her estate. Furthermore, Gail knew Theo was mercenary. She was forced to caution Mortenson and Macfarlane to refuse to impart further information about her business to Theo (R. 478, 726). Is it so incredible that Gail would want to be examined when she made her last will?

If Macfarlane and Kostopulos were in doubt as to Gail's mental capacity to make a will, were practicing undue influence upon her, would they hazard an examination by two medical doctors, one of whom was a psychiatrist with whom they were not even acquainted? On the contrary, the fact Macfarlane was willing to have Gail submit to a physical and mental examination demonstrates his utter frankness.

The true significance of the doctors' examinations of Gail lies in their firsthand professional opinions as to her mental condition *as of the very time the codicil was executed*, that Gail was well oriented with respect to her friends, relatives and acquaintances; that she had the mental ability to know and did know, and could readily call to mind her various properties, that she had the ability to and did have an intelligent plan for disposition of her property, that she was at ease, that she was not subject to force or pressure from any source, and that she sincerely desired to do what she was doing with her prop-

erty under the terms of the will. This fits perfectly with Dr. Frank's card for April 23, 1951, the date the second codicil was executed, which records that Gail was examined on that date and was "feeling fine." (Ex. 19). The weight and significance of Dr. Darke's testimony is even more apparent when viewed in the light of the fact that he was called in by another doctor rather than by anyone interested in the will (R. 804).

66 *Harv. L. Rev.* 1116, 1118, contains an article on the subject of psychiatric assistance in the determination of testamentary capacity. Among other things the annotator states:

"The Psychiatrist in Court. — The difficulties encountered by experts in will contest cases often reflect the failure to use psychiatrists at the will-drawing stage. In most cases the psychiatrist must give his opinion of the testator's capacity without the benefit of a psychiatric examination at the time the will was executed. He must base his conclusions on testimony by laymen as to their observations of the testator—observations made at a time when the lay witnesses were not thinking in terms of testamentary capacity. Moreover, these observers are often partisan in their views. Clearly, a personal examination would have given the psychiatrist a much firmer basis for his opinion."

The trial court has stated at page 4 of its memorandum decision, "Dr. Neilsen made a physical examination, and in that brief time he discovered that Miss Swan was a case for a psychiatrist. Dr. Neilsen then called Dr. Darke, a psychiatrist." This statement is merely indica-

tive of the many misconceptions of evidence on the part of the trial court. Dr. Neilsen had made arrangements for Dr. Darke to examine Gail two or three days prior to his examination of her and before he had even made her acquaintance. He requested Dr. Darke to examine her because of the obvious fact that a psychiatrist rather than a physical problem was involved (R. 804, 840).

The trial court has indicated that Kostopulos and Macfarlane were working in collusion where it finds "At the time of Gail's death the amounts still on deposit in the names of Macfarlane and Kostopulos were exactly the same—\$4,597.17 each." And again at the time of executing the first and second codicils she was "under the influence and domination of Macfarlane and Kostopulos" (Findings 21, 32).

The evidence is that Macfarlane and Kostopulos were not even acquainted when the first codicil was prepared; that the first time they met was during Mr. Swan's last illness in June of 1950, and that they had only seen each other on two or three occasions since that time (R. 757, 758).

There is no evidence that Macfarlane and Kostopulos ever discussed Gail's will or codicils, or planned anything with respect to their contents. It is highly unlikely that Macfarlane would practice undue influence on Gail in behalf of Kostopulos. It is also unlikely that Macfarlane would practice undue influence upon Gail in behalf

of the Bridges, and certainly not in behalf of Theo. If he had such a firm grip upon Gail and were as avaricious and grasping as claimed, he could very readily have dealt Kostopulos, the Bridges, and Theo completely out of the picture. *Yet he wrote the second codicil withdrawing himself as beneficiary of 1335 Perry Avenue and 234 South 2nd East Street, property having a total assessed value of \$24,500.00, and making Theo and Ada Bridge the respective beneficiaries.*

Gail expressed the desire to treat Macfarlane and Kostopulos substantially alike at the time she created the joint bank accounts (R. 158). Her consistency of purpose in this regard is demonstrated by the fact that her later gifts of stocks and bonds to Macfarlane and Kostopulos were in substantially the same amounts (R. 753, 754). This purpose is also reflected in the second codicil in which Macfarlane and Kostopulos are left substantially the same amounts. These transactions reflected Gail's expressed desires. Any other conclusion requires utter disregard of evidence and resort to pure guesswork.

The trial court made a Finding of Fact that in April of 1950, "Macfarlane prepared and caused Gail Swan to sign and deliver to him a full and general power of attorney making him her attorney-in-fact." (Finding No. 21).

The foregoing finding contains a suggestion that the power of attorney was Macfarlane's idea, and not Gail's

and that somehow this power of attorney was misused by Macfarlane to Gail's prejudice. The only evidence concerning the matter was Macfarlane's own testimony that Gail asked him to prepare the power of attorney so that if she needed any money or any instruments signed or anything done in her name he could do these things for her (R. 246, 723). According to Dr. Frank, Gail's general health was on the decline (R. 455, 456). She was hospitalized within a month after executing the power of attorney, and on four additional occasions thereafter (R. 735). The power of attorney was a natural development stemming from her physical decline.

Macfarlane's own testimony was also the only evidence as to the use to which the power of attorney was put. He first testified to setting up the three joint accounts at Gail's request (R. 158, 231). Theo apparently found no fault with the joint account with herself and husband. Neither Macfarlane nor Kostopulos made so much as one withdrawal from these accounts. Gail made several withdrawals from the Macfarlane and Kostopulos accounts and eventually took the Hendee book back from Macfarlane and used most of the proceeds from it (R. 248, 724, 725). It is significant, however, that *on one occasion Macfarlane actually placed \$1,000 in the Hendee account at Gail's request*. The formation and handling of the accounts fits perfectly with Gail's general pattern of purpose (R. 158, 231-233, 247-249, 723-725).

The trial court found that Macfarlane accepted 80 shares of Westinghouse Electric Company stock valued at \$3,000 and \$1,500 par value U. S. Government Bonds, and that he allowed Gail to deliver to Kostopulos 100 shares of Utah Power & Light Company stock valued at \$3,000 and \$1,500 par value U. S. Government bonds, and that the acceptance of the foregoing stocks and bonds was “entirely without consideration and was in furtherance of their design and purpose to abuse their confidential relationship with Gail Swan.” Macfarlane used the power of attorney in connection with these transactions (Finding No. 22).

Again, the sole and only testimony was that of Macfarlane and Kostopulos. They testified that the gifts were Gail’s idea, were freely and voluntarily made, were motivated by her avowed affection for them and appreciation for their services (R. 236-239, 325, 326, 345).

The trial court has inferentially conceded the inadequacy of this evidence as evidence of undue influence where it makes no finding that Gail lacked understanding of these transactions, makes no finding that the gifts were not freely and voluntarily made, or that they did not reflect her desire. That she knew the significance of her act in making the gifts is indicated by the fact that she procured and delivered the war bonds in person (R. 239, 345). She also made personal delivery of the stock certificates (R. 236, 237, 325, 326). She at no time indicated a change of purpose with respect to these gifts. (R. 644, 645).

Gail demonstrated many times during her lifetime a general purpose of returning gifts and consideration in her will for the kindness and services of her friends.

She was deeply appreciative of Jack Forsberg's helpfulness and kindness to her and Mr. Swan over the years. He had helped with the upkeep and management of the Swan properties. She attempted to loan him \$3,000.00 at a time when he was in need (R. 273-275). She made him a beneficiary in her will. The cancellation of Mr. Bridge's indebtedness fits the same pattern of purpose (R. 644, 645). The foregoing transactions were entirely independent of each other. Likewise, they had no relationship with her gifts to Macfarlane and Kostopulos.

~~It is clear that Gail had a mind and purpose that was constant to reward her close friends for their kindnesses and services, both by gift and device.~~

In re *Lavelle's Estate*, supra, the court states:

"* * * She gave him sums of money, some rather large, and items of personal property during her lifetime. Respondents urge that this supports their contention of undue influence; but to the contrary, the fact that they were given, and over a considerable period of time, is strong indication of the constancy of her affection and regard for him and corroborates the idea that she wanted to make provision for him in her will."

Furthermore, making the gifts and setting up the savings accounts in no way impoverished Gail. At the time of her death she had a savings account at Tracy-Collins Trust Company in her own name in the amount

of \$5,867.23. She was receiving approximately \$1,500 per month gross income from her properties, with a net income of approximately \$1,000 per month. Her gross estate was in excess of \$300,000.00 (Probate File No. 34571).

The making of the gifts is strongly persuasive evidence that Gail genuinely desired to make Macfarlane, Kostopulos and the Bridges beneficiaries in her will.

Macfarlane used the power of attorney in signing a lease previously agreed upon by Gail with Tandy Leather Company. On another occasion, at Gail's request, he obtained signature cards on a prospective joint account with the Bridges, and sent the cards to the Union Trust Company (R.234, 235).

The foregoing evidence covers the uses to which the power of attorney was put. From this evidence it is clear that Macfarlane on no occasion used the power of attorney except at Gail's request, and on no occasion transcended her specific verbal authority.

The trial court found that Kostopulos "endeavored to plant in the mind of Gail that her sister was hostile to her. He was informed in advance from time to time when Gail's sister was planning a visit from California, and on such occasions he suggested to Dr. Emory Frank, * * * that Gail should be 'doped up' in advance of her sister's visits." (Finding No. 15).

There was no evidence whatsoever that Kostopulos ever endeavored to bring about a breach between Gail and Theo.

Dr. Frank's testimony was (R. 462) :

“Dan told me that Gail always got upset when Theo would come, and wanted me to be sure and give her a larger dose of medicine to dope her up or quiet her down, so that she'd be sure and be very quiet while her sister was here.”

He also testified that Gail was present when two such conversations occurred (R. 464).

The evidence is that Gail did get upset when Theo was in town. When Theo returned from her latest trip to Europe they had a misunderstanding (R. 132). They had unpleasantness on another occasion when Theo asked what Gail had gotten out of her old stove (R. 131, 132, 167). Gail was upset when Theo sent cast off clothing to her (R. 699, 700). Gail likewise became upset when she learned that Theo was prying into her business (R. 478, 726).

Any upsetting factors caused Gail to suffer ill effects. The difficulty with Mrs. Folden became a matter of great concern to Dr. Frank (R. 450, 451, 533). Her concern over Macfarlane's eye operation caused her to suffer a severe epileptic seizure (R. 432).

The advice Kostopulos gave to Dr. Frank concerning Gail was certainly for her best interest. Yet the trial court has taken the words “doped up” out of context and given them an unnatural and unjustified meaning.

The trial court has found that Kostopulos’ “constant and persistent attention to Gail and her father was unnatural * * * was motivated by a desire to gain the confidence and trust of Gail and her father in the hopes of financial reward,” and that Kostopulos “pretended to be her most obedient friend, for the purpose of cementing and securing a confidential relationship to the end that he might profit from his dominating position.” That “the persistent attentions of the Bridges to Gail Swan was motivated by a desire to gain her trust and confidence in the hope of profiting from such show of kindness,” and that “Macfarlane employed the difficulty with his eyes to play upon the sympathy and emotions of his client,” and that Kostopulos and Macfarlane were “serious rivals for Gail’s generosity.” (Findings No. 15, 16, 17). The motivation which impelled Macfarlane, Kostopulos and the Bridges to perform their countless acts of kindness toward Gail is of relatively insignificant importance. The question is whether Gail genuinely desired these friends to participate as beneficiaries in her will.

We call attention to the language In re *George’s Estate*, supra, where the court stated:

“* * * It makes little difference how hard Weldow labored to accomplish the undue influ-

ence attributable to his desires, if as a matter of fact the father was willing that he and Elizabeth have the property.”

See also *In re Lavelle's Estate*, supra, where it is said:

“Where the affection and desire of a testatrix is genuine, it matters not that the illicit relationship may have played a part in inducing it.”

See also *In re Ford's Estate*, supra.

Gail's reasons for making the proponents beneficiaries were her own affair, so long as the will was her own and not that of some overpowering and unduly influencing person. For example, if she felt that she needed the kindnesses and services of Macfarlane, Kostopulos and the Bridges and that her opportunities for a continuance of these kindnesses and services were enhanced by making them beneficiaries in her will, it was her privilege to make them beneficiaries. It was her privilege to have actually contracted for these services and kindnesses with bequests in her will as the consideration if such had been her desire. See *In re Goldsberry's Estate*, 95 Utah 379, 81 P. 2d 1106, where the court said:

“She appeared rather to be a robust-minded person who wanted something and willing to pay the price to get it.”

Gail's needs and demands upon her friends were considerable.

The following language from *In re Lavelle's Estate*, supra, is particularly appropriate here :

“To declare a will invalid upon the showing made in this case would unduly limit the right of a competent but bedfast person, ill and in dire need of help, to leave her property to the individuals who serve her in the extremity of need. The testatrix should not be prevented from devising her property according to her own wishes merely because an opportunity for undue influence exists; nor should the beneficiaries be deprived of their devise because such opportunity arose through their service to and association with her.”

The trial court also made Findings of Fact that at the time the will of May 2, 1947 was signed Gail's “mentality was too weak to withstand the effect of such influence; that she therefore lacked testametary capacity to make the will.” And further, that when the first codicil was signed on February 20, 1950 Gail “did not have the mental capacity to make a testamentary disposition of her property because her childish and immature mind was unable to resist, and could not resist, the domination and influence of Macfarlane;” that when the second codicil was signed on April 23, 1951, Gail “was under the influence and domination of Macfarlane and Kostopulos and did not have the mental capacity to make a testamentary disposition of her property.”

The court further found that “under the circumstances and in the setting surrounding the signing of the will and the two codicils under attack in these proceed-

ings, she was unable to give any free and independent exercise to what mentality she had and was, therefore, mentally incompetent and lacked testamentary capacity to execute and make a valid testamentary disposition of her property at the time she signed the purported will and each of the codicils.”

Let us consider for a moment whether Gail’s will resulted from overpowering or from her genuine affection for Macfarlane and Kostopulos. Mrs. Martsolf testified that Gail was strong-minded and could not be easily talked out of things (R. 302, 303). She further testified that Gail was rebellious against the strong restraint that had been imposed upon her by her father; that she wanted to dispose of her money in her own way (R. 282, 283). Mortensen testified that she had a mind of her own (R. 476-478). Gail discharged one lawyer, Snyder, and withdrew her documents from his office after he had done work for her over a considerable period of time in order to hire Macfarlane (R. 188, 189). She discharged Tracy-Collins even though she had been a friend of Kipp for many years, after a misunderstanding over placing certain moneys in her personal account (R. 159). When she didn’t think Dr. Cowan and Dr. Pace were helping her she changed to Dr. Frank (R. 423, 424). Gail discharged Mrs. Folden when she insinuated that Gail had taken some theater tickets from Mrs. Folden’s purse (R. 438, 450-453, 532, 533). When Gail became dissatisfied with her newly installed kitchen equipment she insisted, at the inconvenience of everyone concerned, that it

be detached and returned (R. 698, 699). Further indication of Gail's strength of mind was her firm instruction to Mortensen not to let Theo know anything about her business, and her statement to Macfarlane that if he discussed her affairs with Theo again he would get his walking papers, and also her refusal to discuss the contents of her will with Theo two months before her death (R. 128, 488, 726). While Gail was receptive to acts of kindness and friendship, she was not receptive to opposition or efforts to unduly influence her life. She resented any effort to interfere with her free will. *She certainly did not have such a weak and vacillating character as to be unduly influenced over a period of five years by any person or persons.* Gail made Macfarlane and Kostopulos beneficiaries from desire, not from fear or force.

As indicative of the length to which the trial court was willing to go, consider the finding that "neither Ada Bridge nor her husband, Joseph Lamar Bridge, participated in the preparation of the will or either of the codicils, but the court finds that the bequest of Ada Bridge was the result of undue influence exercised upon Gail Swan by Ada and Joseph Lamar Bridge, who occupied a confidential relationship with Gail." (Finding No. 28).

Even though the Bridges had no knowledge of Gail's plan of devise, no knowledge that the will and codicils existed, weren't physically present when the documents were prepared or executed, had no relationship with Mac-

farlane, nevertheless the trial court was willing to follow counsel for contestant and make a finding of undue influence.

The term "confidential relationship" has been given much attention by the trial court. Any person for whom another has a genuine feeling of affection and admiration, is a confidant, the degree of confidence depending on the individual circumstances. The usual and natural thing is for a confidant to be the one upon whom another's bounty is bestowed. Here Gail had a genuine and sincere affection for Macfarlane, Kostopulos, and the Bridges. She was deeply appreciative of their many kindnesses. Also, she had a genuine feeling of sympathy for Macfarlane and the Bridges. There is no contrary evidence. Theo, Aunt Bell, Grace Folden, Dr. and Mrs. Frank, the chief witnesses for contestant, all conceded these facts. And affection, gratitude and sympathy are the strongest and most impelling motives for making a devise. The trial court has in effect conceded that such were Gail's motives where it finds that Gail "was unusually susceptible to any show of friendship," "that difficulty brought on unusual sympathy from Gail" "the confidential nature of their relationship had been made stronger as the years went by," "the complete confidence and trust she put in them" (Findings 8, 17, 23, 32). If such were Gail's motives, can it be said that she was unduly influenced? The cause of Gail's affection for these people was their many acts of kindness, their many services, their consideration. The cause of her sympathy for

the Bridges was their unfortunate financial circumstances, and for Macfarlane his series of personal misfortunes. Gail's reaction was the natural reaction of a loyal and grateful friend. Who can deny these truths? The trial court has cynically mistaken kindness and generosity on the proponents' part for greed, affection for malice, and sincerity for deception. It has mistaken gratitude and sympathy on Gail's part for fear and weakness, and has thereby perpetrated an unthinkable injustice. It completely ignores the word "undue" in the phrase undue influence.

Authorities

In re *Lavelle's Estate*, supra. Mrs. Lucille Lavelle, a widow having no children, died leaving three testamentary instruments, each of which revoked any former wills. The first left half of her property to her husband, and the other half to her half-sister, Kathleen Miller. The second, following her husband's death, left the greater part of her estate to a cousin, and made several bequests to relatives and friends and expressly disinherited her half-sister, Kathleen Miller. The third, and last of the wills, noted an intentional *omission of all her relatives* or any other possible heirs and gave the estate to her "very good friend and benefactor Eric W. Immerthal" and her "devoted friend and benefactor Monte G. Hogg."

The lower court admitted the second will to probate, rejecting the third on the ground that it had been induced

by the undue influence of Immerthal and Hogg. The appeal challenged sufficiency of the evidence to sustain the court's finding of undue influence. It appeared that from May of 1947 until her death in July of 1950, Mrs. Lavelle was a bedridden invalid, paralyzed on her left side and suffering from certain kidney and urinary disorders. Her closest relatives lived out of the state; so, except for the first six weeks after the onset of her illness, when her half-sister, Kathleen Miller, was with her, she had to be cared for entirely by hired personnel. Though Mrs. Miller was legal guardian of the invalid from August, 1947 to May, 1948, the responsibility of seeing to the decedent's wants developed largely upon Immerthal, a succession of over twenty housekeepers and nurses, and W. H. Loos, trust officer for the First Security Bank of Utah, who for a time administered a trust for Mrs. Lavelle and later became guardian of her estate.

Immerthal was a male nurse and masseur, who visited Mrs. Lavelle almost daily in the course of his professional responsibilities. With the passage of time he took more and more interest in her welfare. He helped find replacements for the nurses and housekeepers and it was from this association and service to the testatrix that the supposed undue influence resulted.

Hogg was employed by Mrs. Lavelle as her carpenter to transform part of her home into rental rooms. Later he moved into the home, forming with her an attachment seemingly of great warmth, and as the court found, sus-

tained an illicit relationship. Concerning this particular evidence the court stated:

“Conceding the impropriety of their intimacy and also remembering that the motives of a man who formed such a liason with a partially paralyzed woman older than himself (she was almost 60, he in his early 50’s) certainly would be suspect, yet those circumstances alone, which in the main form the basis of the respondents’ case as to Hogg, do not support a finding of undue influence with respect to the making of the will.”

The court then considered the evidence concerning undue influence on the part of Immerthal.

“As to Immerthal, there also is no direct evidence of undue influence. It is true that he interested himself in the management of Mrs. Lavelle’s personal affairs (in January of 1950, after the execution of the third will, he became guardian of her person). In view of the fact that none of her relatives manifested such interest, this seems to have been a fortunate circumstance for her welfare. He helped to arrange for her care when she stayed at home, by artifice managed to get around her resistance to entering the hospital and used similar means to get her into a rest home about six months prior to her death. The desirability and necessity for her to be so hospitalized and later placed in a rest home was corroborated by others. To Immerthal’s credit, it must be said that there is independent evidence that on one occasion Mrs. Lavelle told him that if he would care for her until her death, he could have the property; he refused this offer.

“The strongest single circumstance respondents have to rely on concerning undue influence is evidence that visitors were discouraged from seeing decedent and that ‘No visitors’ signs were placed on her house and on the hospital room during her illness. There is no evidence and no finding that Hogg was connected with this activity and the evidence concerning Immerthal in this regard is very limited. It is not shown that he affixed the signs. There is evidence that at least some of them were displayed with the approval of the attending physician and that the sign at the hospital during the time the third will was executed was put up on the doctor’s authorization. On one occasion when Mrs. Lavelle was alone in her house for a few days just before Christmas of ’49, Immerthal told a neighbor lady that he was trying to get her to go to the hospital and that ‘If you ladies and neighbors won’t come in and interfere, I’ll be able to get her to the hospital much sooner, but if you keep interfering it will take me longer.’ Although there is some dispute in the evidence concerning this matter, it is sufficient so the trial court could properly find, as it did, that Immerthal had discouraged visitors from seeing Mrs. Lavelle. His conduct is explainable as being the means of getting the recalcitrant lady into the hospital and of preventing information of her whereabouts from being learned by Hogg. *She was at no time isolated from her relatives or friends who had a legitimate interest in visiting her.*

* * *

“The directions first given with respect to the third will did not include Immerthal as a beneficiary. As he apparently neither liked nor approved of Hogg, it is unlikely that he had ex-

erted any undue influence upon decedent in Hogg's behalf. To get Mrs. Lavelle to include him as a part beneficiary, it would seem that Immerthal would have had to exercise at least some influence during the one-day period between the lawyer's first and second visits with her. There is no evidence of any such occurrence.

"We are aware that ' * * * undue influence is seldom subject to direct proof, but, as a general rule, must be established by inferences and circumstances * * *'; but it must also be kept in mind that ' * * * it likewise is true that a finding of undue influence cannot rest upon mere suspicion. There must be some substantial facts upon which the inferences and deductions are based, and the circumstances relied on should clearly point out the person who it is alleged exercised the undue influence *and his acts constituting the alleged undue influence.*'

* * *

"* * * The mere fact that testatrix preferred in her will those who were close to her, rendering her assistance, and ministering to her physical and emotional needs, to the exclusion of her relatives, who did not give her that care and attention, does not present an instance of unnatural disposition."

The court, in holding as a matter of law that there was insufficient evidence to support a finding of undue influence, stated as follows:

"To declare a will invalid upon the showing made in this case would unduly limit the right of a competent but bedfast person, ill and in dire need of help, to leave her property to the individu-

als who serve her in the extremity of need. The testatrix should not be prevented from devising her property according to her own wishes merely because an opportunity for undue influence exists; nor should the beneficiaries be deprived of their devise because such opportunity arose through their service to and association with her.

“Viewing the evidence and every fair inference therefrom most favorably to the finding of the trial court, we cannot find it sufficient to support the conclusion reached that the third and last will was induced by undue influence. The cause is remanded to the District Court for the purpose of having that instrument probated as the last will and testament of Lucille Lavelle.”

Anderson v. Anderson, supra, was an action to set aside the probate of a will on the ground of undue influence. Testator was married and had one minor child. He also had two brothers, Heber and John Anderson. The testator and his brothers each owned a one-third interest in a ranch in Idaho. Testator also had a small estate, consisting of money and personalty. While testator was in the hospital with uremic poison and extremely ill, his brother, Heber, came to Salt Lake and visited him at St. Mark's Hospital. Thereafter, Heber arranged for a Mr. Marks, an attorney, to prepare a will. He also procured a memoranda or notes from testator as to how he desired the property to be distributed, and took it to Marks. Marks prepared a rough draft of a will which Heber took back to testator at the hospital and thereafter testator

made some small changes. Marks then prepared the will in final form and testator signed and two witnesses duly attested the will.

An operation was performed on testator two weeks later. He improved in health for a short period of time, returned to the hospital and died. The will left testator's share of the ranch to his two brothers. They were also made residuary legatees. He gave his wife one-third of his remaining property, after payment of all debts, and his infant son a total of \$5000. Testator had been in ill health for a number of years before his death and his brothers had operated the ranch. The court, in holding as a matter of law that there was no undue influence exerted and in reversing a jury's finding of undue influence, stated:

“We have attempted to set forth with as much particularity as is possible within the limits of an opinion all the salient facts that were produced in evidence by the petitioners against the will. Is there anything in what we have set forth that can be dignified by the name of evidence which in any way tends to show undue influence practiced upon the decedent, or from which it may legitimately be inferred that he was influenced to make any kind of a will by any one? Is it not beyond all peradventure of a doubt that whatever inferences are permissible from Heber's acts and conduct are just as likely to have emanated from pure brotherly motives to assist Paul as from motives bent upon influencing him in the disposition of his property in accordance with Heber's will?

One is almost shocked by the assertion that the kindly offices of one brother to another, when the latter is in distress, may, without any tangible facts, be contorted into evidence showing sinister motives. If wills can be set aside by courts upon the ground of undue influence upon proof such as is presented in this case, then any will may be assailed in any case where the decedent was sick for any length of time, and was so situated that his immediate relatives were concerned in his welfare and made any attempts whatever to alleviate his suffering or to comply with his expressed wishes or requests. What is said that Heber did, or what is inferred he did, as shown by this record, cannot be tortured into evidence supporting the charge that he practiced undue influence upon Paul.

* * *

“* * * ‘To vitiate a will there must be more than influence. It must be undue influence. To be classed as ‘undue’ influence it must place the testator in the attitude of saying, *‘It is not my will, but I must do it.’ He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will or the provision assailed does not truly proceed from him.*

* * *

“* * * The judgment of the jury may be sounder and wiser than that of the father, but that is no reason whatever for substituting the judgment of the former for that of the latter. The law of this state gives ‘every person over the age of eighteen years, of sound mind,’ the right to dispose of his property by will as to him seems just and right. If this right may be invaded simply because a court or jury may not be able to agree

with the testator in the manner he has disposed of his property, or because he has not made an adequate allowance for a specific purpose, then the right had better be abrogated entirely. The Legislature might do so, but courts cannot. We can discover no legal reason whatever for sustaining the finding of the jury that the provisions of the will set aside by them were procured through undue influence, or through any influence for that matter."

In re *George's Estate*, supra. Decedent left a number of children as heirs. In his will, however, he left his property to only two of said children, namely: Elizabeth and Weldow George, and expressly disinherited the others. The other children protested admission of the will to probate on the grounds of testamentary incapacity and undue influence. The case was tried to a jury and a verdict returned in favor of protestants, upon which the trial court denied probate. On appeal the court reversed with directions to admit the will to probate and held as a matter of law that the opponents had not discharged their burden of proving testamentary incapacity or undue influence. This case has been heretofore briefly discussed in regard to the question of testamentary capacity. The facts concerning undue influence are briefly that decedent was in failing health, being 84 years of age; was forgetful, suffered from pain, was inclined to cry when matters were not to his liking.

Elizabeth had lived in the testator's home and had taken care of her father for a number of years. Weldow had apparently taken care of a large portion of his father's business interests for a number of years. Weldow was instrumental in getting counsel and witnesses present at the time the will was prepared. There was some evidence that after the will had been prepared decedent had stated to an acquaintance that he had made a mistake in leaving all of his property to Elizabeth and Weldow. On one occasion a witness testified that he had asked decedent whether decedent was going to sell his home and farm in Kanosh. Decedent stated, "Well, I talked of it and I was going to, but Weldow told me not to and so I daren't." Also, statements from Weldow that the "old man" would do anything he wanted him to do. There was evidence that Weldow exerted an impelling influence on his father, and kept the other children from associating with his father. At one time the other children had endeavored to have a guardian appointed for their father and this had made him angry and had also angered Weldow and Elizabeth. The court stated:

"It is reasonable to believe from the above evidence and such of a similar nature that there was a desire on the part of Weldow to unduly influence his father in the distribution of his property. This cannot very well be said of Elizabeth, however, even though she may have benefitted as a result of the desires of her brother. *But, does the evidence actually show that deceased was laboring under undue influence at the time of the execution of the will? Does it show that he did*

something he would not have done but for the influence exerted upon him by Weldow? It makes little difference how hard Weldow labored to accomplish the undue influence attributable to his desires, if as a matter of fact the father was willing that he and Elizabeth have the property.

“The bulk of the property covered by the will had been deeded to Weldow and Elizabeth from three to five years prior to its execution. This may indicate influence by those two, but not necessarily undue influence. There is no evidence that either Weldow or Elizabeth was the source of the idea of recognizing those conveyances in the will. That originated with the attorneys. Assuming that the father was dissatisfied with what he had done by those deeds, plenty of time had elapsed for him to have changed his mind, and to have concluded that the transfers were what he desired after all. On January 4th, 1939, other sons and daughters had served him with the guardianship papers, an act which upset him considerably. It is just as reasonable to believe that he cut them off on account of that incident as it is that the desires of Weldow were governing his acts at the time, assuming that the evidence concerning the acts of Weldow be treated as sufficient to indicate the exercise at that time and by him of undue influence upon deceased. *It cannot be said that the burden of proof has been substantiated if the evidence produces opposing alternatives of equal weight.*”

In re *Ford's Estate*, supra (Facts detailed under Point I of this Brief). Held as a matter of law that undue influence had not been proven, that where the affection is

the inducing cause for the will it is the affection and not what produced the affection which is determinative.

See also *In re Bryan's Estate*, supra, discussed elsewhere. *In re Hansen's Will*, supra.

Many cases from other jurisdictions support wills prepared by attorneys who are also beneficiaries. The following are illustrative:

In re Morey's Estate, 147 Cal. 495, 82 Pac. 57, 62, where the court stated:

“It is claimed that there was a substantial conflict in the evidence regarding the issue of undue influence. There was evidence that Truesdell, one of the residuary legatees who would receive a part of the estate by the provision in his favor, drew the will, and had been for a long time before the attorney for the testator, and that the testator, when he made the will, was old, feeble, and suffering intensely from disease—circumstances which, under the rule given in *Underhill on Wills*, vol. 1, p. 209, Civ. Code, Sec. 2235, *Estate of Wickes*, 139 Cal. 202, 72 Pac. 902, and *Estate of McDevitt*, 95 Cal. 33, 30 Pac. 101, would, if taken alone, raise the technical implication or presumption that the will was procured by the undue influence of Truesdell, or would at least require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence by him could be determined. This presumption, it is claimed, is evidence, and creates a conflict, upon which it was

necessary to allow the jury to decide. But all the other circumstances surrounding and leading up to the execution of the will were fully disclosed by the evidence, without conflict, and they showed that there was no undue influence. In addition to this, there is the positive evidence of the persons present, and of others who could reasonably be supposed to have any knowledge of the case, to the effect that such influence was not exerted; and the expressed affirmance of the will by the testator himself shortly before his death, as already shown, at a time when the persons charged with the exercise of the undue influence did not have an opportunity to exercise it, completely remove the imputation of undue influence, and show that the provisions of the will in favor of the residuary legatees were conceived by the testator himself, without influence or suggestion from others. This is so satisfactorily proven that a verdict for the contestants, if it had been rendered, should have been unhesitatingly set aside by the court."

In re *Phillipi's Estate*, 76 Cal. App. 2d 100, 172 P. 2d 377 (Sept. 16, 1946); In re *Anderson's Estate*, 142 Okla. 197, 286 Pac. 17 (Oct. 15, 1929); In re *Harjoche's Estate*, 193 Okla. 631, 146 P. 2d 130 (Feb. 21, 1944), where it is said:

"* * * certainly there is no rule of law which prevents a party from receiving bequests under, or even being the sole beneficiary, in a will made by, one to whom he stands in a confidential relation.'"

See also: In re *Erickson's Estate*, supra; In re *Nixon's Will*, 136 N.J. Eq. 242, 41 A. 2d 119 (Feb. 2, 1945); *Wun-*

derlich v. Buerger, 287 Ill. 440, 122 N.E. 827; In re *Putnam's Will*, 135 Misc. Rep. 311, 238 N.Y.S. 112, affirmed by Court of Appeals 257 N.Y. 140, 177 N.E. 399; *Cave v. McLean*, 66 Ohio App. 196, 32 N.E. 2d 581; In re *Guidi's Will*, 259 App. Div. 652, 20 N.Y.S. 2d 240 (May 31, 1940); *Oglesby v. Harris* (Texas) 130 S.W. 2d 449.

CONCLUSION

We summarize the following clearly established propositions of law and fact:

(1) Medical and lay testimony clearly reveals that Gail was mentally competent to know who were the natural objects of her bounty, know her property, and dispose of it understandingly according to a plan.

(2) Any presumption of undue influence arising from the attorney-client relationship, has no evidentiary weight and completely disappeared upon admission of evidence concerning execution of the will and codicils.

(3) Counsel for contestant had the burden of proving undue influence by a preponderance of the evidence.

(4) A finding of undue influence cannot be based on a presumption or upon mere inference, innuendo or suspicion.

(5) Goodness or evil in the hearts of the beneficiaries has no materiality.

(6) No collusion or joint effort on the part of the primary beneficiaries was shown to exist.

(7) Gail demonstrated over a period of years a consistent desire to reward her close friends for their many kindnesses, not only by expressions of appreciation but by gifts and by remembrance in her will.

(8) *Gail had an abiding affection for Macfarlane, Kostopulos and the Bridges, was deeply appreciative of their many acts of kindness, and genuinely desired to make them beneficiaries in her will.*

(9) Gail appeared competent and normal to the witnesses to the will and codicils on the three occasions of execution.

(10) The second codicil was actually witnessed by a medical doctor and a psychiatrist, who testified that Gail talked freely and understandingly about her friends and relatives, about her business and property interests, and about the contents of the codicil, that they questioned her in private about whether she was under "force or pressure" from anyone, and that her answer was "No." That she appeared calm and businesslike, and stated that the codicil expressed her desires.

(11) The will and codicils were ~~in~~existence five years during which time Gail was a free agent mingling freely with friends and relatives alike.

(12) When Theo asked Gail in private about her will two months before her death, Gail clearly indicated that she did not wish Theo to know the contents of her will.

(13) Theo was a very substantial beneficiary.

(14) Undue influence to vitiate a will must be exercised at the very time and in the very act of execution.

(15) At the time Macfarlane was last claimed to have been exercising undue influence on Gail he was actually writing a codicil to her will reducing his interest in the amount of \$24,500.

(16) *There isn't a whisper of evidence that Gail was ever encouraged, forced, or otherwise induced to perform so much as a single act against her desires, either at the time the will and codicils were executed, or at any other time.*

From the foregoing we respectfully submit that this Honorable Court should reverse the judgment of the trial court and admit the will and codicils of Wilda Gail Swan to probate.

Respectfully submitted,

RAWLINGS, WALLACE, ROBERTS & BLACK
WAYNE L. BLACK

*Counsel for Defendant and
Appellant, Grant Macfarlane*

530 Judge Building
Salt Lake City, Utah

N. J. COTRO-MANES

*Counsel for Defendant and
Appellant, Daniel Kostopulos*

I

APPENDIX NO. 1

LAST WILL AND TESTAMENT

I, WILDA GAIL SWAN, of Salt Lake City, Utah, being of sound and disposing mind and memory, do make, publish and declare this to be my Last Will and Testament, hereby revoking all former wills by me at any time made.

FIRST: I direct that all my just debts, including my funeral expenses, expense of my last illness and expenses of the administration of my estate, be paid by my executor hereinafter named out of the first moneys coming into his hands and available therefor.

SECOND: I devise and bequeath to my beloved sister, Theo Swan Hendee, the sum of Five Hundred and no/100 Dollars (\$500.00) and my harp.

THIRD: I devise and bequeath to my loyal friends, Jack F. Forsberg and Frances M. Forsberg, his wife, the real property and improvements located thereon at 708-710-712 South State Street, Salt Lake City, Utah.

FOURTH: I devise and bequeath to my friend, Grant Macfarlane, the real property and improvements located thereon at 326-328-330 South State Street, Salt Lake City, Utah.

FIFTH: I devise and bequeath all the rest, residue and remainder of my estate of every kind and descrip-

II

tion, both real and personal, wherever located now or hereafter owned by me, to by beloved father, Ulysses Grant Swan.

SIXTH: I nominate and appoint Walker Bank and Trust Company to be the sole executor of this My Last Will and Testament.

SEVENTH: I nominate and appoint my friend, Grant Macfarlane, to act as attorney for the above named executor in the administration of my estate.

IN WITNESS WHEREOF I have hereunto set my hand this 2nd day of May, 1947.

WILDA GAIL SWAN

Signed by the said testatrix, Wilda Gail Swan, as her Last Will and Testament in the presence of us, who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

PATRICIA L. PIKE

Residing at Salt Lake City, Utah

D. VIVIAN WEGGELAND

Residing at Salt Lake City, Utah

III

APPENDIX NO. 2

C O D I C I L

I, WILDA GAIL SWAN, of Salt Lake City, Utah, do hereby make, publish and declare this to be a codicil to the Last Will and Testament heretofore made, signed, sealed, published, declared and executed by me and bearing date of May 2, 1947; that is to say:

FIRST: Whereas I now desire to make certain changes therein and modifications thereof and additions thereto; and whereas, the third clause in my said Last Will and Testament provided:

“I devise and bequeath to my loyal friends, Jack F. Forsberg and Frances M. Forsberg, his wife, the real property and improvements located thereon at 708-710-712 South State Street, Salt Lake City, Utah.”

I now revoke said third clause of my said Last Will and Testament.

SECOND: I give and bequeath to my friend, Daniel Kostopulos, my set of Havilland china and oil painting known as “Girl at the Fountain.”

THIRD: In the event my father predeceases me, I give, devise and bequeath the real property and improvements located thereon at 708-710-712 South State Street, Salt Lake City, Utah, and the real property and improvements located thereon at 212 South Third East Street, Salt Lake City, Utah, to my beloved sister, Theo Swan Hendee.

IV

FOURTH: In the event my father predeceases me, I further give, devise and bequeath the real property and improvements located thereon at 1335 Perry Avenue, and 158 South Third East Street, and 234 South Second East Street, and 342 East Second South Street, all in Salt Lake City, Utah, to my friend, Grant Macfarlane.

FIFTH: In the event my father predeceases me, I further give, devise and bequeath the real property and improvements located thereon at 56-60-60-1/2 West Third South Street, Salt Lake City, Utah, to my friend, Daniel Kostopulos.

SIXTH: I hereby modify, amend and extend my aforesaid Last Will and Testament in accordance with the provisions of this codicil and as herein modified, amended and extended, I do hereby confirm and republish my Last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand this 20 day of February, 1950.

WILDA GAIL SWAN

Signed by the said testatrix, Wilda Gail Swan, as a codicil to her Last Will and Testament, bearing date of May 2nd, 1947, in the presence of us who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

PATRICIA L. STEWART

Residing at Salt Lake City, Utah

IRWIN CLAWSON

Residing at Salt Lake

APPENDIX NO. 3

C O D I C I L

I, WILDA GAIL SWAN, Salt Lake City, Utah, do hereby make, publish and declare this to be a Codicil to my Last Will and Testament heretofore made, signed, sealed, published, declared and executed by me and bearing date of May 2, 1947, with a Codicil bearing date of February 20, 1950.

WHEREAS I now desire to make certain changes and modifications thereof and additions thereto, that is to say:

FIRST: I devise and bequeath to my beloved sister Theo Swan Hendee the real property and improvements located thereon at 1335 Perry Avenue in Salt Lake City, Utah.

SECOND: I give and bequeath to my beloved Aunt, Bell Matsolf of Redlands, California, the sum of One Hundred Dollars (\$100.00).

THIRD: I give and bequeath and devise to my friend, Ada Bridge, the real property and improvements located thereon at 230 and 234 South Second East Street, Salt Lake City, Utah.

VI

FOURTH: I give and bequeath and devise to my friend, Dan Kostopulos, the real property and improvements thereon at 212 South Third East Street in Salt Lake City, Utah.

FIFTH: I give and bequeath the fire insurance policies covering my real property to the person or persons to whom I have devised said real property.

SIXTH: It is my wish that my dear friend Dan Kostopulos make the funeral arrangements for my last rites.

SEVENTH: All of the rest, residue and remainder of my property, real, person and mixed not otherwise disposed of in my Last Will and Testament and the Codicil thereto, I give, devise and bequeath to my beloved sister Theo Swan Hendee.

EIGHTH: In the event that my sister Theo Swan Hendee predeceases me, then I give, devise and bequeath the property heretofore devised to Theo Swan *Gendee* and all the rest, residue and remainder of my property not heretofore devised, real, personal and mixed, to my friends Dan Kostopulos and Grant Macfarlane, share and share alike.

NINTH: I hereby ratify and confirm my said Last Will and Testament and Codicil in all other respects.

IN WITNESS WHEREOF, I have hereunto set my hand this 23 day of April, 1951.

WILDA GAIL SWAN

VII

Signed by the said testator, Wilda Gail Swan, as a Codicil to her Last Will and Testament in the presence of us, who at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ADOLPH M. NEILSEN, M.D.

Residing at Salt Lake City, Utah

ROY A. DARKE, M.D.

Residing at Salt Lake City, Utah

APPENDIX NO. 4

Property	326 South State St.	158 South 3rd East St.	342 East 2nd South St.	234 South 2nd East St.	1335 Perry Avenue	Oakland Hotel	212 South 3rd East	Swan Apartments	Harp	\$500.00	\$40.00 China Painting \$75.00	\$100.00	Residual Legatee
Date Acquired	1911 \$55,250	1944 \$29,950	1942 \$10,000	1942 \$12,000	1931 \$12,500	1931 \$82,500	1944 \$8,000	1932 \$55,000	\$200				
Will of May 2, 1947	Grant Macfarlane	Father	Father	Father	Father	Father	Father	Jack Forsberg	Theo Hendee	Theo Hendee			Father
Jack Forsberg Died Nov. 29 1948													
Codicil of Feb. 20, 1950 (If Gail Dies First)	Grant Macfarlane	Father	Father	Father	Father	Father	Father	Father	Theo Hendee	Theo Hendee	Dan Kostopulos		Father
If Father Dies First	Grant Macfarlane	Grant Macfarlane	Grant Macfarlane	Grant Macfarlane	Grant Macfarlane	Dan Kostopulos	Theo Hendee	Theo Hendee	Theo Hendee	Theo Hendee	Dan Kostopulos		Theo Hendee
Father Died June 30, 1950													
Codicil of April 23, 1951	Grant Macfarlane	Grant Macfarlane	Grant Macfarlane	Ada Bridge	Theo Hendee	Dan Kostopulos	Dan Kostopulos	Theo Hendee	Theo Hendee	Theo Hendee	Dan Kostopulos	Aunt Bell	Theo Hendee

EXHIBIT "D-18"

RECEIVED copies of the within Brief of
Appellants this day of January, 1955.

Counsel for Plaintiff and Respondent