

1955

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

Utah Supreme Court

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Ray, Quinney & Nebeker; Paul H. Ray; Grant C. Aadnesen; Attorneys for Plaintiff and Respondent;

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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

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Case No.
8246

BRIEF OF RESPONDENT

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Case No. 8246

BRIEF OF RESPONDENT

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and Respondent

STATEMENT OF CASE

This is a law case tried below before the court without a jury. It is controlled by the rule announced by this court in *Hanson's Estate*, 87 Utah 580, wherein it is said:

“This is a law case. Therefore, we cannot disturb the findings if there is any competent evidence to support them.”

The lower court's findings of fact, conclusions of law and judgment and its opinion are presented in the appendix which is bound herewith for the convenience of the court.

The trial court heard all of the evidence and saw all of the exhibits. Not only did the trial court see all that is preserved in the record for review by this court, but saw and observed the witnesses. Each witness who sat before the court and testified was not only a purveyor of evidence, he was likewise an exhibit either for or against himself, and it was the trial court's opportunity, obligation and duty to observe and evaluate each witness as such. The court's evaluation of the key witness is set forth in its opinion, appendix pages iv to ix.

The "statement of facts" in appellants' brief either ignores or so far slights the basic facts revealed by the evidence and found by the court to be the facts of the case that respondent feels constrained to set them forth in advance of her argument.

For a correct understanding of the facts upon which the trial court based its judgment we deem it necessary to set forth an integrated and consecutive statement of the facts, with particular attention to the facts in the record which describe and characterize the testatrix, the beneficiaries named in the purported will, and codicils, and other persons closely related to her in her lifetime. It is the purported will and codicils of Wilda Gail Swan which are the subjects of this litigation. It is therefore appropriate to expose the facts which show her nature, personality, and mentality at the times pertinent to this inquiry. She will hereinafter be referred to as Gail.

Gail was born in 1890, and died an unmarried and childless woman in Salt Lake City on or about May 28, 1952. She left as her sole surviving heir at law her sister, Theo Swan Hendee, who is contestant and respondent in these proceedings. (R 129)

The facts relating to Gail's childhood are undisputed and came largely from the testimony of Mrs. Bell Martsoff and Gail's sister, Mrs. Hendee. Gail's earliest years were normal so far as the record indicates, and she was enrolled in the public schools of Salt Lake City in 1896 when she was about the age of six years. (R 95) When she was about eight years of age she began to show symptoms of nervous disorder (R 95) which culminated when she was about 11 years of age in epilepsy manifested by frequent and violent seizures. (R 96, 254) Her health was so far impaired that it was necessary for her parents to withdraw her from school when she was about 11 years of age, and she was never thereafter well enough to resume her schooling. (R 95, 100)

From and after the time Gail was withdrawn from school she became the particular object of her parent's care and attention. (R 96) Relief for her affliction was sought by the parents both at home and at medical centers in the midwest. (R 97) Her health was such that she was not only withdrawn from school but from all contacts which are normal to a growing child. (R 96, 103, 260) She was denied the companionship of boys and girls of her own age. Between the ages of 11 and 27, the years when a normal girl develops into womanhood and has the greatest desire and need for broadening social contacts, Gail was a physical invalid and a complete social recluse. (R 100, 101, 260)

She was so far sequestered that her only companions were her immediate family, her Aunt Bell Martsolf, who was approximately the same age as her mother, and such persons as were from time to time employed in the household to assist in her care. (R 96, 103, 105, 106, 107, 108, 109)

Gail continued to be a victim of epilepsy to the end of her life, but when she was about 27 years of age medication became available which if persistently given limited the frequency and severity of epileptic seizures. (R 100, 101) It was necessary during all the balance of her life that she receive medication several times each day. (R 130, 265, 448)

It was the family custom to spend the winters in California and the summers in Salt Lake City. (R 96) Under the influence of constant medications Gail's health improved and from the time she was 27 until nearly the end of her life she was able to be up and about, except for temporary sicknesses, and to participate to a limited extent in the life of the family. Until her mother's death in 1931 she was constantly under the sheltering influence of her mother. (R 96, 98, 100, 102) After her mother's death in California her father brought her back to Salt Lake and with the aid of such persons as he could employ he supervised the details of Gail's life, and she continued to be a recluse. She never had a boy friend of her own age and never enjoyed the acquaintance of girls or women of her own age. (R 103, 108, 266)

Gail's father died in 1950 and she spent her last two years deprived of the care and attention of both of her parents. Normal lives develop from normal contacts. The

court found that Gail had never reached maturity either mentally or emotionally. (App. xix R 263)

Five doctors were sworn and testified, three called by the defendants and two by contestant. All of the medical evidence was to the effect that Gail had the mind of a child. (R 389, 465, 811, 812, 826, 827, 828, 829.) Her mental development was given by Dr. Alvin Darke, a psychiatrist called by the defendants, as that of a child 12 years of age. (R 808) On direct examination Dr. Nielson testified that Gail's mental capacity was adult, but upon cross examination, he admitted that he had been present during Dr. Darke's examination and that he concurred in Dr. Darke's conclusion that Gail's mental development had been arrested and that her mentality was that of a child in the age bracket 11 to 13. (R 843)

The evidence of medical experts was supported by that of Mrs. Grace Foulden, who had been a trained nurse for more than 30 years, and who was nurse and companion to Gail for many months. (R 402, 413)

From the long list of lay witnesses there came abundant testimony of Gail's immaturity, both mentally and emotionally.

Typical of lay testimony which the trial court had every right to believe, is the following from Gail's aunt, Bell Martsolf, who was close to Gail nearly all the years of her life:

"* * * I wrote a candid letter to my niece.

"Q. Which niece?

"A. This one here (indicating). Only had those two.

"Q. You refer to the one here as your niece, and one as your child?

“A. Gail has always been a child to me; because of her condition she was never normal, never grew up like the rest of us; she couldn’t be.” (R. 284)

The combination of mental and emotional weakness resulting from long years of sickness rendered Gail especially susceptible to any show of kindness from strangers, especially male strangers.

In the year 1937 Gail was introduced to the witness William L. Corbett. She had known the woman who later became Mr. Corbett’s wife for many years but had never before met Corbett. Within a few minutes after their meeting she became attracted to Mr. Corbett and proposed that he become the manager of her properties. (R 542)

Jack Forsberg had been employed by Gail’s father to keep the family properties in repair and to assist in the collection of rents. Through that employment he became acquainted with Gail. Gail gave him \$3,000.00 (R 212, 273) Somehow information respecting that gift became known to Gail’s father. He was angered by such information and required Forsberg to return the money. (R 271, 272, 273)

Management of the Swan family property was reposed in Walker Bank & Trust Company. (R 215-216) The officers of the bank who had contact with Gail were Joseph Fitzpatrick and Clair Mortenson. In the course of managing the property they became acquainted with Gail and were kind and courteous to her. She proposed to Mr. Fitzpatrick that he be made beneficiary of part of her property in her will. (R 667) He explained that he could not accept any such arrangement, whereupon she

proposed that Fitzpatrick's wife be made a beneficiary. To that alternative Fitzpatrick demurred and explained that it would be embarrassing to him if either he or his wife were made beneficiary in her will. (R 667) She then proposed to Mr. Mortenson that he become a devisee under her will. He, like Fitzpatrick, made it plain that he could not accept any such arrangement, and that it would be embarrassing to him to be named as a beneficiary in her will. (R 506) On at least two occasions Gail stated to Dr. Frank that she would have her will drawn so that he would be a beneficiary. (R 464)

By 1944 Gail was well enough to participate in the collection of rentals upon the family property. During the fall of that year she became acquainted with appellant, Grant Macfarlane, whom she called upon for legal advice. (R 187, 188) From that time until her death the relationship of attorney and client existed between her and Macfarlane. (R 187 to 198) The details of the relationship between Gail and Macfarlane are of dominating importance in these proceedings, but will be set forth in greater length in connection with the facts relating to Macfarlane.

Gail first met Dan Kostopulos, who was the operator of a moving picture theatre in Salt Lake City, about the year 1933. (R 318) Kostopulos was 14 or 15 years younger than Gail, and his acquaintance was of a casual nature until about the year 1949, six or eight months prior to the death of Gail's father. (R 328) At that time Kostopulos began calling frequently at Gail's home, and for the last two years of Gail's life he was a daily visitor. (R 320, 591) Further details with respect to the relationship between Gail and Kostopulos will be supplied in connection with the separate discussion of Kostopulos.

Joseph Lamar Bridge was a plaster contractor. (R 636) He had a wife and six children and a home in Salt Lake County, south of Salt Lake City. (R 637) He was in the military service during the war. While he was away his wife sold and delivered poultry products to customers in Salt Lake City. Among her customers was the Swan family. (R 604) In the course of her business Mrs. Bridge became acquainted with Gail and often stopped to visit. Upon his return from the service Mr. Bridge began accompanying his wife to the Swan home. While the Bridges were young enough to be children of Gail, (R 608) and while they had a family of six, (R 607) a plastering business, and a chicken farm, they managed to see Gail on an average of three times a week during the last two years of Gail's life. (R 638) During that period they showed kindness to Gail. They were in the process of building a house and Gail offered to give Bridge \$3,000.00. (R 642) His testimony was that he declined to accept it as a gift, but he accompanied Gail to the Union Bank and Trust Company, where she drew from savings \$3,000.00 and handed it to Bridge in exchange for a "receipt" which Bridge said he wrote out, but which could not be produced at the trial. (R 643, 644) According to Bridge, the receipt or note provided for no interest and fixed no time for repayment. At least \$1700.00 of the \$3,000.00 was credited upon the note as gifts from Gail. (R 646) The details of this transaction are set forth in connection with the findings of the court that Gail was easily susceptible to those who attached themselves to her. While Ada Bridge is no longer a party to these proceedings, it is necessary to have them in mind because they complete the group which surrounded Gail during the

two years following her father's death: Macfarlane, Kostopulos and the Bridges.

GRANT MACFARLANE

Most of the facts relating to the relationship between Macfarlane and Miss Swan, and to the preparation of the documents under attack in this proceeding, came from Macfarlane himself.

At the time of the trial Macfarlane had been engaged in the active practice of the law for 25 years, (R 186) and had at the same time been engaged in business and commercial enterprises. The court found that Macfarlane was possessed of an attractive and ingratiating personality. App. xix.

From the fall of 1944 until Gail's death he continued to be Gail's attorney at law. (R 187, 189-197) Gail called frequently at his office, sometimes seeking advice in connection with business matters and sometimes seeking only the companionship of Macfarlane. (R 190) She placed full confidence in Macfarlane both as her attorney at law and as her friend and he knew that such confidence was reposed. (R 195) In the year 1945 Macfarlane called at Gail's home where he was made acquainted with Gail's aged father. (R 141) Following that visit a friendship developed between Macfarlane and Gail's father, and Macfarlane was entrusted with Mr. Swan's legal problems. Thus a confidential relationship arose between Macfarlane and Mr. Swan. (R 191)

During the years Macfarlane visited in Gail's home from time to time, and in the course of his relationship with Gail he became acquainted with Gail's sister who

lived in San Francisco, but made frequent visits to Salt Lake City and the family home. (R 193)

Macfarlane suffered an injury to one of his eyes which required surgery and hospitalization. He was treated in San Francisco and while there was shown many courtesies by Mrs. Hendee and her husband. (R 199) A friendship developed between Macfarlane and Mrs. Hendee. Mrs. Hendee reposed full confidence in him. (R 198) He knew that she had confidence in him and that she and her father depended upon him to protect Gail and her interests. (R 198)

For all legal services rendered by Macfarlane to either Gail or her father, Macfarlane sent bills and was paid the reasonable value of his services. (R 241)

After Gail's death there were admitted to probate a purported will dated May 2, 1947, a codicil dated February 20, 1950, and a codicil dated April 23, 1951. Within the time provided by law respondent and contestant filed her complaint and contest which is here under review. The will, as stated above, is dated May 2, 1947. At that time Macfarlane had been Gail's attorney at law for nearly three years. The confidential relationship thus arising had not only persisted for three years, but had been fortified by friendly non-professional contacts from time to time. The court found that on the date the will was written Macfarlane must have been aware of Gail's immaturity, both mentally and emotionally. App. xix. He also found from the evidence given by Macfarlane that Gail had been emotionally upset because of Macfarlane's illness and the expense attendant upon surgical treatment and hospitalization. App. xxiii (R 236)

The will was drawn by Macfarlane in his own office.

(R 202) Gail went there entirely alone. (R 203) She brought with her a prior will. The will was not produced upon the trial, but Macfarlane testified that by its terms Gail's estate was bequeathed and devised to her father. (R 202) Macfarlane then and there dictated the will now under attack and caused it to be attested by two witnesses of his own selection—one of whom was his private secretary, the other a stranger to Gail. (R 204) By the terms of the will Macfarlane was made beneficiary of property having a value of approximately \$100,000.00 representing more than one-third of the entire estate. Ex—(R 664)

At the time the will was prepared by Macfarlane and executed by Gail, she had no independent advice of any kind. Macfarlane offered no suggestion that she should seek advice from anyone else. (R 205, 211) She relied, and he knew she relied, solely upon his advice. (205, 211, 206)

The first codicil admitted to probate and now under attack is dated February 20, 1950. At that time Macfarlane had been Gail's attorney at law for approximately 6 years. Between the signing of the will and the first codicil, a matter of nearly three years, Macfarlane had continued to be the attorney at law and confidential friend of Gail. She continued to be a frequent visitor at his office, and he continued from time to time to visit her home. The court found that there was no interruption in or weakening of the confidential relationship existing between Gail and Macfarlane during the years following the execution of the purported will. (App. xxiv)

When the first codicil was written Gail again called at Macfarlane's office entirely alone. (R 206) Macfar-

lane then and there prepared the first codicil and had it attested by his secretary and a lawyer who occupied space in the same suite. (R 206, 207) The lawyer who witnessed the will is Irwin Clawson. Macfarlane testified that Clawson did not read the will or hear it read. Clawson was sworn as a witness by appellant but did not testify that he had ever given any advice to Gail upon any subject whatever.

As in the case of the purported will, Gail had no independent advice of any kind, and Macfarlane testified that he offered no suggestion that she have independent advice, and that he assumed that she had had none. (R 207) By the codicil Macfarlane was designated as the beneficiary of property worth more than \$100,000.00

By April 1950 Gail's father had been overtaken by his final illness which culminated in his death in the following June. In April 1950, two months after the signing of the first codicil, Macfarlane prepared and caused Gail to sign and deliver to him a full and general power of attorney, making him her attorney in fact. (R 229-230) The acceptance of a general power of attorney from Gail must have been born of a consciousness upon the part of Macfarlane that Gail was in need of care and attention beyond that contemplated by the ordinary attorney and client relationship. It could have resulted from Gail's knowledge of her own lack of capacity. In either case, it is proof of the extraordinary confidence Gail had in Macfarlane. The obligation thus imposed upon Macfarlane was commensurate with the trust bestowed. Macfarlane was examined as an adverse witness, and upon being interrogated about the power of attorney stated that except for the manipulation of certain savings accounts in Union

Trust Company in Salt Lake City, (R 230) and except for his participation in the execution and delivery of a lease, he had not exercised any of the powers granted to him by Gail. (R 234) He was thereafter confronted with certain documents (Exhibits 16, 17, 10) after which he made a disclosure of the extent to which he had exercised his powers as attorney in fact.

He participated in the sale of certain unimproved real estate belonging to Gail. (R 242) Following the sale of the real estate certain securities were acquired by Gail. They consisted of \$3,000.00 par value of United States Government bonds, 100 shares of Utah Power and Light Company stock, and 80 shares of Westinghouse Electric. The securities thus acquired were delivered to Walker Bank and Trust Company for Gail's account. (R 236)

In April 1951, as Gail's attorney in fact, Macfarlane withdrew the securities above referred to. (R 236) He caused the 100 shares of Utah Power and Light stock to be transferred into the name of Daniel Kostopulos, and the 80 shares of Westinghouse Electric stock to be transferred to his own name. (R 236, 237) He permitted Gail to deliver the Utah Power and Light stock to Dan Kostopulos, who sold the same and retained the proceeds for himself (R 325, 327) The \$3,000.00 of U. S. Government bonds were divided equally between Macfarlane and Kostopulos. (R 239, 327) As far as the record shows, Gail never owned or possessed any interest-bearing securities except those just referred to. (R 239, 327)

The year following the death of Gail's father, Macfarlane as attorney in fact caused certain changes to be made with respect to funds belonging to Gail and upon deposit in Union Trust Company, Salt Lake City. (R 231)

The funds totalled approximately \$20,000.00. After the changes were made by Macfarlane as attorney in fact, \$4797.50 stood in the bank in the name of Gail Swan and Grant Macfarlane, and the same amount in the name of Gail Swan and Daniel Kostopulos and his wife. (R 232, 233) Neither Macfarlane nor Kostopulos had any interest in the balance of the funds upon deposit. Between the time when the savings accounts were thus adjusted and Gail's death the accounts not in the name of Macfarlane or Kostopulos were substantially exhausted while the accounts in the name of Macfarlane and Kostopulos remained substantially unimpaired. (R 232, 233) At the time of Gail's death the amounts still on deposit in the names of Macfarlane and Kostopulos were the same—\$4,597.17. (R 232, 233)

Macfarlane also participated in the granting of a long-term lease by Gail to Dan Kostopulos covering a valuable piece of real estate on South State Street in Salt Lake City. (R 250)

The second and last codicil is dated April 2, 1951. By then Macfarlane had been Gail's attorney at law and confidential friend and business adviser for nearly seven years. The confidential nature of their relationship had grown stronger with the passage of years, and Gail's trust and confidence in Macfarlane was complete. At that time he had been Gail's attorney in fact for one year. The court found that her arrested mental and emotional development must have been obvious to Macfarlane. (App. xxvi)

At the time the second codicil was drawn a confidential relationship had existed between Gail and Kosto-

pulos for more than two years, during which Kostopulos had made almost daily visits to Gail seeing her often enough that there could never be any relaxation or deterioration of the relationship between them. (R 591)

Macfarlane drew the second codicil. (R 208) It was drawn under circumstances substantially the same as those surrounding the preparation of the will and the first codicil. Here again Gail came alone. (R 210) She had no independent advice and no suggestion from Macfarlane that she should seek independent advice. (R 210, 211) There was, however, a departure from previous procedure. It is clear that prior to the execution of the second codicil doubt had arisen as to Gail's testamentary capacity. Macfarlane testified that it was Gail who suggested the desirability of a medical examination, but from all the circumstances the court found that it was Macfarlane who saw the advantage of medical witnesses. Gail had been under the care of Dr. William Pace, a psychiatrist, and her family physician was Dr. Emery Frank, who was thoroughly familiar with Gail's condition. Macfarlane called upon neither Pace nor Frank in connection with the execution of the codicil. Macfarlane arranged to have an examination made by Dr. A. M. Nielson. (R 837, 838) He then arranged to have Kostopulos call at Gail's home and bring her to Dr. Nielson's office where Macfarlane was waiting with the will. (R 331) Dr. Nielson made a physical examination. (R 838) He then called in Dr. Roy A. Darke, a psychiatrist, and the two of them examined Gail Swan and then signed the second codicil as attesting witnesses. (R 839) Macfarlane and Kostopulos were both present when the second codicil was signed but were not present during some of the conversations between the doctors and

Gail. When they were not in the actual presence of Gail they were in the adjoining room. (R 331)

Upon direct examination Drs. Darke and Nielson both testified that Gail was competent to sign the codicil for the reason that she clearly understood the nature of her property, and clearly understood the persons who were to benefit by her will. They both testified that upon inquiry as to who were to be beneficiaries under her will she gave them the names of seven persons: Oscar Burnside Beam, her brother-in-law Harold C. Hundee, Joseph Lamar Bridge, Ada Bridge, Theo Hendee, Grant Macfarlane and Dan Kostopulos. The names of her intended beneficiaries were given to the doctors as she was about to sign the codicil which is here under attack. (R 807, 843) An inspection of the codicil will disclose that three of the seven beneficiaries named by the testatrix were omitted from the codicil. Immediately following the examination of Gail and the execution of the second codicil, Dr. Darke mailed his written report to Macfarlane, in which he stated that Gail had named the seven persons above listed as her intended beneficiaries. (R 807) Macfarlane did not deny the receipt of Dr. Drake's report and did not claim that he ever took the matter up with Gail to clear up the omission of the three names.

It is significant to note that at the time Macfarlane prepared the first codicil, by which he would be enriched by more than \$100,000.00, he was a defendant in a case pending in the Third Judicial District Court in which he was accused of preparing the Last Will and Testament of one Becker, whereby he became a principal beneficiary. In that proceeding he was accused of abusing his confi-

dential relationship and procuring Becker's will by fraud and undue influence. (R 221)

DANIEL KOSTOPULOS

Daniel Kostopulos was a witness in his own behalf. He was observed by the court as he testified, and the court in his evaluation of his credibility concluded that he was not worthy of belief. From his testimony it appears that he first became acquainted with Gail about 1933. (R 318) He did not become a frequent visitor in the Swan home until near the end of Mr. Swan's life. (R 320) During the last two and a half years of Gail's life, and the last six months of her father's life, Kostopulos was a constant visitor at the Swan home. (R 320) He frequently drove Gail on errands, (R 325) and often took groceries or other things to Gail's home. He testified that his attention to Gail and the numerous small gifts made to her were done purely out of charity for one who seemed to be in need of help. (R 326) He stated that she was in need of money from time to time and that he made small loans to her. (R 341)

In 1951, after her father's death, Kostopulos accepted from Gail 100 shares of Utah Power and Light stock (R 325) and \$1500.00 par value of U. S. Government bonds. (R 327) During the time that he was making daily visits to the Swan home he was keeping a detailed account of all the small loans made and all purchases made in behalf of Gail. (R 336) Upon her death he filed a claim against her estate for \$2,000.00, and when the executor refused to pay it he brought suit. (R 336) As time went on and his relationship with Gail grew closer

and closer, he undertook to alienate from Gail's affection not only Gail's sister, Mrs. Hendee, but other persons closely identified with Gail's life. His daily visits to the home kept him fully aware of all the details of Gail's life, and he knew in advance from time to time when Gail's sister, Theo, was about to make a visit from San Francisco. (R 461-462) On many occasions just prior to such a visit he took Gail to her attending physician, D. Emory Frank. He told Dr. Frank that Mrs. Hendee was coming to Salt Lake and suggested to Dr. Frank that he "dope up Gail" to the point she "would be very quiet" while her sister was visiting. (R 462)

While Gail was hospitalized for her final illness, her sister was in close attendance upon her at the hospital. Kostopulos induced Dr. Frank to the belief that Gail was made nervous and unhappy by her sister's presence. Mrs. Hendee complied with Dr. Frank's request and remained away from the hospital for two or three days. Dr. Frank then learned that Gail's greatest desire was to have her sister by her bedside, after which he asked Mrs. Hendee to resume her attendance at the hospital. (R 457, 458) During her last days her only requests were that her sister be nearby. (R 457, 458, 459 and 460)

He resented the close companionship developed between Ada Bridge and her husband on the one hand and Gail on the other. On the occasion of one of Mrs. Hendee's visits Kostopulos suggested that she should put a stop to the association between Gail and Bridges "because the Bridges are getting too much money from Gail." (R 183-184.

Kostopulos disliked the supervision of Gail by the trained nurse, Mrs. Foulden. Accordingly, he took Mac-

farlane to the office of Dr. Frank and there persuaded Dr. Frank that it would be in the best interest of Gail's health if Mrs. Foulden should be discharged. (R 454)

Kostopulos denied some of the facts above set forth, but they were testified to under oath by other witnesses whom the court had the right to believe as against the testimony of Kostopulos.

Kostopulos testified that he never knew he was to be a beneficiary under Gail's will until after Gail's death. (R 332) Against such testimony is the evidence that Kostopulos was present when the second codicil was read and signed. (R 332) Against this testimony also was the testimony of Arvid Butler, a wholly disinterested witness. Butler testified that during Gail's life he had inquired of Kostopulos how he was doing in the motion picture business and Kostopulos answered that he wasn't worried about the motion picture business because a rich woman was going to leave him a hotel. (R 355) Thereafter he identified Gail Swan to Mr. Butler as the rich woman who was going to leave him a hotel. (R 357, 358) It is the first codicil which refers to the devise to Kostopulos as a hotel. Wherefore, it was entirely competent for the court to find that Kostopulos knew about the first codicil, and from that time on expected to inherit the hotel on West Broadway. Such expectation would be realized if he saw to it that his confidential relationship and control over Gail was not allowed to deteriorate.

Kostopulos also told Butler after Gail's death that Macfarlane had made a mistake when he eliminated Mr. Beam from the will. (R 359) It was entirely competent for the court to conclude that Kostopulos made such state-

ment because he knew it was Gail's intention to provide for Mr. Beam.

ADA BRIDGE

While Ada Bridge is no longer a party to these proceedings, it is important to see what the record reveals with respect to her and her husband.

When we have pointed out the facts with respect to Macfarlane, Kostopulos, the Bridges and Mrs. Hendee, we will have covered all persons closely identified with Gail, except for nurses and hired companions.

Mrs. Bridge and her husband were almost young enough to be the children of Gail. (R 635, 638, 608) They had domestic and business concerns and friends of their own age ample to absorb all of their time and attention. Notwithstanding this, they made three trips a week from the south end of the county to go to Gail's home on the north side of Salt Lake City, (R 638) and frequently had Gail at their own home. (R 606) We have heretofore set forth the facts with respect to the so-called loan of \$3,000.00 from Gail to Mr. Bridge. The Bridges, like Kostopulos permitted nothing to interfere with the persistence of their visits. Neither participated in the execution of the will or either codicil.

THEO SWAN HENDEE

Theo Swan Hendee is the sole surviving heir at law of Gail Swan, and is respondent and contestant in these proceedings. (R 129, 30) She was two or three years older than Gail, and in all respects normal, mentally and phys-

ically. She began her early schooling at the Wasatch school in Salt Lake City, (R 96) but because the family spent its winters in California she was enrolled in a high school in southern California. (R 96) In due time she was graduated from Vassar College (R 98) and thereafter did postgraduate work at the University of Utah. After finishing college she taught in a high school in Idaho. She was married to Harold Hendee in 1914. (R 98) He was engaged in newspaper business in Michigan until 1922 when he and Theo moved to San Francisco. (R 99) They never had any children. Mr. Hendee continued in the newspaper business until his death which occurred within a few days of the death of Gail Swan. (R 126) At the time of his death, and for many years prior thereto, Mr. Hendee had been associated in an editorial capacity with the West Coast Division of the Wall Street Journal. The evidence in the record is that Mr. Hendee never accumulated any wealth and that Mrs. Hendee never inherited anything substantial from him. (R 848)

During all the years that Mrs. Hendee lived in San Francisco she made frequent visits to Salt Lake City. On the occasion of such visits she lived at the family home and helped out with family affairs, including domestic and business concerns. (R 105, 108, 110-115) In between visits she wrote frequently and often telephoned. (R 107, 112) She consulted with her father upon business affairs of the family, and with the several banking institutions which, from time to time, had the family business in charge. (R 121, 158) Gail was not a frequent visitor at Mrs. Hendee's home in California. Mrs. Hendee testified that Gail was dependent for guidance and companionship upon her father, and that her father so disliked the climate of northern Cali-

fornia that he would not go there. Bell Martsolf was the aunt of Gail and Mrs. Hendee. She lived in Redlands, California. All through the years from time to time Mrs. Hendee paid the expenses of Mrs. Martsolf so that she might go from Redlands to Salt Lake City and be with and give aid and comfort to Gail and her father. (R 111)

The record shows that the women closest to Gail during the last few years of her life were Mrs. Ada Bridge, one of the defendants below, Mrs. Emory Frank, wife of the family doctor, and Mrs. Ruth Corbett, daughter of an old friend and companion of the Swan family. Each testified with respect to the relationship between Gail and her sister, Theo.

In the testimony of Ruth Corbett this appears at 515 on the record:

“Q. Did you observe whether or not Theo and Gail had a pleasant relationship?”

“A. Very affectionate.”

In the testimony of Vinita Frank at 510 and 512 of the record this appears:

“Q. Did Gail ever talk about Theo to you?”

“A. Yes.

“Q. What did she say?”

“A. She liked her.

“Q. She told you that?”

“A. Yes.

“Q. Did she tell you of Theo’s coming to visit?”

“A. Yes.

“Q. What did she say?”

“A. She was very happy she was coming.

"Q. Did you observe the relationship between Theo and Gail?

"A. Yes.

"Q. What kind of relationship was it?

"A. Very affectionate."

Defendant Ada Bridge when asked whether she was close to Gail answered, "She claimed to be a part of our family." (R 609) She later testified that "the relationship between Gail and Theo was very good." (R 620)

Upon the question of the relationship between Gail and her sister some illumination may be had from an examination of the will and the codicils. They were written and their execution supervised by Macfarlane. He admitted that the language of all three documents was his, and (R. 222) that he supplied the adjectives. In the will and in both the codicils Gail's sister is referred to as "my beloved sister, Theo Swan Hendee." Macfarlane stated that the term "beloved" was introduced into each of the documents by him. (R 222) Macfarlane had an intimate knowledge of Gail and knew her sister well. Surely the court was fully justified in finding that Macfarlane knew that in Gail's heart there was an abiding affection for Theo.

At the close of the case after both sides had rested and the trial court had heard arguments of counsel, both oral and written, he made and filed his opinion and thereafter signed and filed his Findings of Fact, Conclusions of Law and Judgment, whereby he adjudged that at the time the contested will and codicils were made Gail lacked testamentary capacity to make them, and that they were made as the result of fraud and undue influence practiced upon her by Macfarlane and Kostopulos.

ARGUMENT

With respect to Gail's testamentary capacity we are willing to here repeat the statement we made in our memorandum to the trial court, that the proof of lack of testamentary capacity in the record is less compelling than that of undue influence. If Gail's mental capacity could have been considered in a vacuum wholly unrelated to the circumstances of her life and the pressure and influences which were exerted upon her, one might conclude that she had mentality enough to understand her property and select those to whom she desired to bequeath it.

This case is in some of its aspects much like *In Re Hanson's Estate*, 87 Utah 580, 52 Pac. (2d) 1103. At the end of its opinion in that case this court said:

"While there may be some doubt as to whether the decedent lacked testamentary capacity, there is no doubt but that it was a mind easily capable of being influenced. The evidence relating to Marie's mentality and general nervous control is therefore material and of aid not only in determining testamentary capacity, but to determine what sort of a subject Dr. McDonald had to play upon."

It has been established in this case beyond any reasonable dispute that Gail was of simple and childish mind and of subnormal emotional development. She was a weak and ready subject for the play of influence by Macfarlane and Kostopulos. As stated by this court in the Hanson case, a strong mind might have withstood the influence of Macfarlane and Kostopulos, but Gail's childish and susceptible mind gave way to the influence of those who occupied a

confidential relationship toward her, and once it had yielded to the strong minds of those about her she no longer had a testamentary capacity.

Evidence of her inability to persist in any mental decision was made clear by the testimony of Dr. Darke. Just before she signed the second codicil she gave to Dr. Darke and Dr. Nielson the names of those whom she expected to be her beneficiaries. She named seven persons, who were to be the objects of her bounty, and yet almost immediately thereafter put her signature to a document by which she eliminated three of those seven persons.

With respect to the finding of the court that the will and the codicils resulted from the fraud and undue influence of the defendants, Macfarlane and Kostopulas, our research has taught us that no court of last resort has ever held that facts such as those related above are insufficient to sustain a judgment setting aside a will. On the contrary, testamentary documents such as those here under attack in similar circumstances have been universally condemned by the courts.

Macfarlane was a mature and seasoned lawyer and business man. He was Gail's attorney at law, her attorney in fact and her confidential friend. Gail, on the other hand, was a childish and simple woman lacking in normal emotional development. She bestowed upon him and he accepted her full confidence. Macfarlane prepared and supervised the execution of her will and both codicils by which he would enrich himself to the extent of approximately \$100,000.00, or substantially more than one-third of her entire estate.

Not only was Gail the weak one and Macfarlane the strong one, but in connection with the execution of the

purported will and codicils she had no independent advice. No such advice was ever suggested, and Gail relied solely upon the advice of her beneficiary.

Kostopulos was Gails confidential friend. She bestowed upon him and he accepted her full confidence. He participated in the execution of the second codicil by which he also would be enriched to the amount of approximately \$100,000.00.

The foregoing are the essential or basic facts of the case and they cannot be evaporated or combed out of the record by resort to any legal or equitable phraseology or nomenclature. They are facts, not inferences or presumptions. Being the facts of the case they lead to certain legal results. As to what those legal results are, our views and those of appellants are in direct conflict.

Appellants admit that the facts of the case give rise to a presumption of undue influence because of the confidential relationship existing between Gail and the defendants, but they assert that as soon as Macfarlane and Kostopulos testified respecting the execution of the testamentary documents the probative force of the facts above referred to, as well as any presumption produced thereby, vanished and nothing remained in the case to sustain a judgment for contestants.

Our contention is that the facts above recited are so full of weight and substance, and are of such probative force, that they compel a conclusion of fraud and undue influence until the absence of such vices is affirmatively and clearly shown by the defense.

Upon filing her contest alleging fraud and undue influence contestant assumed the burden of proof. In discharge of that burden she made proof of the basic facts

above detailed. When such proof was made the burden was then cast upon defendants to prove by clear and convincing evidence the absence of fraud and undue influence. It was up to the trial court as the trier of the facts to determine whether defendant had furnished the necessary proof. Death had stilled the tongue of Gail, and the trial court was not required to accept the mere statement of Macfarlane or Kostopulos with respect to the presence or absence of fraud or undue influence. The trial court was at liberty and he was charged with the duty of evaluating the credibility of Macfarlane and Kostopulos, and weighing the quantum and the quality of their evidence against the facts which so powerfully bespeak the exercise of fraud and undue influence. The rule just stated and for which we here contend has been announced by many courts of last resort, and except for one or two possible exceptions to which we will refer they are unanimous in supporting our position.

It is appropriate to first give consideration to the decisions of this court. No will case has been before this court involving facts comparable to those contained in the record just now under review. The nearest is the case of *In Re Hanson's Will*, supra. This court had no difficulty in that case in sustaining a finding of the lower court that the will was the product of undue influence.

It is contended by appellants in their brief, and the contention is much labored, that the presumption vanishes when evidence comes into the case. By their argument they would induce the court to rule that no matter how close the confidential relationship, no matter how weak the one bestowing confidence, and no matter how strong the other, a court or jury would be unable to find the existence

of undue influence if the beneficiary of the confidential relationship should simply deny the existence of fraud or undue influence. Such a ruling would be contrary to all the authority upon the subject and to the sound social policy of maintaining decent confidential relationships. Appellants' position, if accepted, would result in an adjudication that *any* presumption created by the facts disappears when there is testimony relating to the subject. That such is not the law is perfectly obvious.

Approached from some directions the meaning and effect of a presumption may seem to be altogether illusive, but there is no need for confusion in the application of the law to the facts of this case. This court's prior decisions and the abundant and almost unanimous authority from other jurisdictions leaves the matter clear. The legal results flowing from the relationship between the parties to this proceeding have been clearly recognized. Whether those results were referred to as presumptions is of no importance. The basic facts proven are of such substance and of such probative value that their establishment must result in the conviction that undue influence has been exercised, and such conviction can be dissipated and overcome only by clear and satisfactory proof that there was no undue influence.

Appellants refer to the legal result as a presumption and then argue that because such result is a presumption it vanishes from the case and cannot be weighed by the court in arriving at the court's conclusion. Some presumptions may disappear as soon as evidence of the facts is introduced, but many do not so disappear but persist to the very end. It depends upon their nature and their

quality, and upon the fact, or the absence of facts which give rise to their existence.

Perhaps the most widely known of all presumptions is the presumption of innocence which clings to a defendant charged with crime from the beginning to the end of the case. It takes proof beyond all reasonable doubt to overcome that presumption.

We will a little later refer to the many cases from other jurisdictions which have dealt with the situation presented by the evidence in this case. For the moment we desire to discuss the law of presumptions as announced by this Court. There is an exhaustive discussion of the subject by Mr. Justice Wade in his concurring opinion in the *Pilcher* case (114 Utah 72, 84). In that case it appears that Pilcher married Mabel in Lyon County, Kansas, in 1901. Children were born to the couple but Pilcher and Mabel separated and lived apart for many years. In 1941 Pilcher married Mildred in Logan, Utah. Pilcher thereafter died and Mildred, representing herself to be the surviving widow, applied for and received letters of administration. In the course of the administration of the estate a son of Mabel came from California to Logan and made a settlement with Mildred whereby he received \$3,000.00 from the estate for himself and his brothers and sisters. Thereafter Mildred filed her final account and petition for distribution. At that point Mabel filed her petition claiming that she was the surviving widow of Pilcher and asking that she be substituted as administratrix. She testified that she had never brought any divorce proceedings against Pilcher, and that she had never been served with any papers in any action instituted by Pilcher. She further testified that she had seen Pilcher not long before his death and that

Pilcher had told her that he had never divorced her. Mildred, on the other hand, testified that he had stated to her that he had divorced Mabel. The lower court, believing that Mabel was the surviving widow of Pilcher, entered its order discharging Mildred as administratrix and appointing Mabel. Upon appeal it was contended by Mildred that there was a presumption that her marriage to Pilcher in Logan in 1941 was a valid marriage which could be overcome only by clear and convincing evidence, and that Mabel had failed to produce any such proof.

This Court agreed with Mildred and reversed the lower court. In its final conclusion this court stated that there was a presumption of validity which attached to the marriage ceremony between Pilcher and Mildred, and he closed with this sentence: "Such presumption persists until it is overcome by clear, convincing and *conclusive* evidence."

The decision in the Pilcher case is a conclusive answer to the suggestion of the defendants that the presumption of undue influence has vanished from the instant case. One reason why this court assigned persistent vitality to the presumption of marriage is that such a presumption is socially desirable. It is socially desirable that persons in confidential and dominating relationship with subnormal people should not be allowed to capitalize upon that relationship.

It is especially desirable socially that the standards of members of the bar be maintained at such a level that clients may repose full confidence in their lawyers without fear that that confidence might be abused. It is noteworthy that this court in the Pilcher case ruled that to

overcome a socially desirable presumption the evidence must be "clear, convincing and conclusive."

Recently this Court again discussed presumptions in *Meacham v. Allen*, 262 P. (2d) 285. In that case this court affirmed a judgment against the contention of appellants that it was error for the trial court to instruct the jury that it might consider in arriving at its verdict the presumption that decedent was in the exercise of due care at the time of the fatal collision. In the course of its discussion on the subject of presumptions the court observed that some presumptions disappear when evidence was introduced, but it went on from there to say:

"* * * but there are other so-called presumptions, which require more than a prima facie case to make them ineffective. Some place the burden of proof, or persuasion on the party claiming the nonexistence of the presumed facts, others require clear and convincing evidence to overcome such presumption and still others require proof beyond a reasonable doubt before the trier of the facts may find that the presumed facts do not exist. In such cases the court in the first instance would have to determine that there is sufficient evidence to support the finding, and leave it to the jury to decide whether the evidence has the required persuasive force."

There are three decisions of this court which leave it clear beyond any doubt that the burden lay upon the defendants to clearly prove the absence of undue influence. They are *Peterson v. Budge*, 35 Utah 596, 102 Pac. 211, *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 Pac. 797, and *Jardene v. Archibald*, decided Jan. 24, 1955 and

reported in the February 24th advance sheet of Pacific Reporter at page 454.

In the first of them it appears that Budge was a doctor and accepted a deed to real estate from Peterson who was his patient. Peterson sued to set aside the deed upon the ground that Budge took advantage of a confidential relationship and got the deed through undue influence. Budge denied the confidential relationship and the undue influence. The trial court found for Budge and dismissed the case. This court reversed and ordered findings in behalf of Peterson. The courts opinion fully supports our contentions in the case now under review. We take the liberty of here setting down an extended excerpt from the opinion:

“There is no rule of law more firmly established than that which holds that transactions between persons occupying fiduciary or confidential relations with each other, in which the stronger or superior party obtains an advantage over the other, cannot be upheld. In the case of *Viallet v. Con. Ry. & P. Co.*, 30 Utah 260, 84 Pac. 496, 5 L.R.A. (N.S.) 613, a question involving this same principle was before this court, and in the course of the opinion it said:

“The law is well settled that from the time the relation of physician and patient is created, until it ceases to exist, the physician is not only legally bound to act in the utmost good faith in his treatment of his patient professionally, but he is inhibited from taking advantage of the confidence growing out of this relation, reposed in him by his patient, and, by misrepresentation, or other unfair

means, or by the exercise of undue influence, induce his patient to convey, transfer, or otherwise dispose of, to such physician, or to other parties whom the physician may represent in other capacities valuable property rights for a wholly inadequate consideration.'

"And the rule is well settled that in actions of this kind, *where these confidential relations are shown to exist, the burden of proof is cast upon the superior party to establish the perfect fairness, adequacy of consideration, and equity of the transaction.* In Smith, Law of Fraud, section 190, the author says:

" 'While equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and *casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and thereby overcoming the presumption.*'

"*It having been shown that the confidential relation of physician and patient existed between the Budes and Peterson at the time the sale took place, the burden of proof shifted, and it became necessary for the Budes, in order to uphold the sale, to show that it was for an adequate consideration, and that the entire transaction on their part was in every particular fair, just, and equitable.*"
(Italics supplied)

Omega Investment v. Woolley, supra, is even stronger. In that case it appears that Woolley procured an important stock interest in plaintiff corporation from Bald-

win, who owned control. Woolley was neither a lawyer nor a doctor, but he gained Baldwin's full confidence and the court held that Woolley stood in a confidential relationship to Baldwin. In affirming a judgment setting aside the transfer and restoring the stock the Supreme Court made some statements which vastly illuminate the case under discussion:

"There can be no question but that the trial court was justified in drawing the conclusion that a fiduciary relation existed between Baldwin and Woolley at the time the stock in question in this case was transferred. In fact, no other conclusion can reasonably be drawn. Woolley came into the employ of Baldwin as an agent to settle important litigation that was not finally and completely settled until the day the negotiations for the transfer of the stock began. From the time of Baldwin's acquaintance with him in January of 1924, he constantly manifested an interest in Baldwin's welfare, permitting his office to become the center of discussions with reference to the Baldwin interests. He proffered and endeavored to secure moneys to overcome the financial necessities, advised and conferred with him, and in every action so conducted himself as to induce Baldwin to believe that Woolley was constantly working for Baldwin's welfare.

" 'A confidential relation exists when confidence is reposed by one party and a trust accepted by the other, when a confidence has been imposed and betrayed, or when influence has been acquired and abused. It embraces both technical and fiduciary relations and those informal relations where one man trusts in and relies on another.' Dale v. Jennings, 90 Fla. 234, 107 So. 175.

"The confidential relation being shown to exist, the burden devolved upon Woolley to show that, in the making of the transaction, the fullest and fairest explanation and communication was made to Baldwin of every particular in Woolley's breast; that the transaction itself was fair, and the consideration paid therefor adequate, before a court is justified in permitting the transaction to stand.

"While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. * * *

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on

the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.' 2 Pomeroy, Equity Jurisprudence, Sec. 956. xxx

"The rule as applied between attorney and client is well stated by the Supreme Court of California in *Cooley v. Miller & Lux*, 156 Cal. 510, 105 P. 981, as follows:

" "The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice.'

"Not only was the burden placed upon Woolley to show a full and fair disclosure of all facts within his knowledge, but it was also his duty to show that the transaction was fair and equitable, and that the consideration paid was adequate.

"* * The rule of law in such cases is well stated in *Hogan v. Leeper*, 37 Okl. 655, 133 P. 190, 47 L.R.A. (N.S.) 475 as follows:

" 'Whenever there exists between parties confidence on the one hand and influence on the other, from whatever cause they may spring, equity requires in all dealings between them the highest degree of good faith on the part of him on whom the confidence is reposed. If a conveyance is executed by the other in his favor, the burden rests upon him to prove that it was not procured by means of such confidence and influence. It is his duty, before accepting the conveyance, to see that the grantor has disinterested advice and full information.' "

This court seemed to give full approval to the Oklahoma rule that, "It is his duty, before accepting the conveyance, to see to it that the grantor had disinterested advice and full information." It is noted, however, that in *Jardine v. Archibald*, supra, this court stated that by its decision in *Omega v. Woolley* it did not intend to make independent advice an inflexible necessity. In that connection this court said:

"Of course, among the elements which might be of great importance in most cases in determining alleged undue influence where a confidential relationship exists, is whether independent advice had been received by the donor, and in some instances without such proof the donor might not be able to sustain his burden of showing good faith."

This court closed its opinion in *Omega v. Woolley* by quoting with approval language from the Supreme Court of Washington which could scarcely be more fitting nor more appropriate for application in this case:

"The following language of the Supreme Court of Washington in *Stone v. Moody*, 41 Wash. 680, 84 P. 617, 85 P. 346, 5 L.R.A. (N.S.) 799, is applicable to the facts in this case:

"Where it is to the court perfectly plain that one party has over-reached the other and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people and people of average or

greater intelligence are sometimes duped and misled by the skill, cleverness, and artifices of those who are adept in the matter of deceiving their fellowmen; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoers to enjoy the fruits of his chicanery is of no small import when viewed' in the light 'of public policy.' ”

Jardine v. Archibald, supra, contains this courts latest decision upon the matter here in issue, and, if we correctly read the opinion, it is fatal to the main contention of appellants. In that case some deeds made by grantor just before her death were under attack by heirs of the grantor. The trial court found that there was a confidential relationship between grantor and grantees, but further found that there was clear and convincing evidence of the absence of undue influence. This court ruled that the record contained evidence to justify the trial court's findings and affirmed the judgment. In the course of its opinion this court said:

“It is well settled that where a fiduciary or confidential relationship exists between the donor and donee, equity raises a presumption against the validity of such transactions and the burden is cast

upon the donee to prove their validity and that there was no fraud or undue influence by proving affirmatively and by clear and convincing evidence compliance with equitable requisites. This is so because there is implied in every fiduciary or confidential relationship a superiority held by one of the parties over the other.”

Having accepted the trial court’s findings that there was a confidential relationship but still no fraud or undue influence, this court then said:

“The court having found that there was no fraud or undue influence, the question we have to determine is: was there clear and convincing evidence from which the court could so conclude.”

The foregoing means that in the case now under review the burden was cast upon Macfarlane and Kostopulos to prove the absence of fraud and undue influence by “clear and convincing evidence.” They wholly failed to discharge that burden and now seek to escape by asserting that they were under no such burden.

The cases just referred to are applicable equally to Macfarlane and Kostopulos. While Kostopulos was neither lawyer, doctor, nor priest, he so attached himself to Gail during the last two and a half years of her life that the trial court, pursuant to the cases above cited, was fully justified in finding that the relationship between Kostopulos and Gail was confidential.

The court’s attention is called to the fact that *Peterson v. Budge*, *supra*, is cited with approval by the Supreme Court of Utah in *Glover v. Glover*, 242 P. (2d) 298, 300, decided in 1952.

The case of contestant and respondent could rest securely upon the decisions of this court in *Peterson v. Budge*, supra, *Omega v. Woolley*, supra, and *Jardine v. Archibald*, supra, but we feel justified in showing that the rule for which we contend is supported by the decisions of the courts of last resort throughout the land.

The basic facts showing the relationships between Macfarlane and Kostopulas on the one side and Gail on the other persist from the beginning of the trial until the end, and because they do persist the legal result of such facts requires a finding of undue influence unless there is clear and convincing proof to the contrary. Such is the holding of the many cases which are cited below.

In the case of *Coghill v. Kennedy*, 24 So. 459, the Supreme Court of Alabama ruled that a presumption of undue influence arises where the beneficiary enjoys a confidential relationship with the testator and actively participates in the preparation of the will. In such case the burden is cast upon such beneficiary to make proof that there was no fraud or undue influence.

Pertinent cases from California are indeed numerous. The controlling California law comes not from the District Courts of Appeal but from the Supreme Court of California. The rule as announced by that court is particularly strong in support of the contention here made by respondent.

In Re Witt's Estate, 245 Pac. 197, deserves special attention. From the decision in that case it appears that Lantz was a lawyer and the attorney for Mrs. Witt, the decedent. He was attentive to Mrs. Witt in her lifetime and prepared her will making himself the chief beneficiary.

The will was successfully contested in the lower court and in affirming the Supreme Court of California said:

“The burden of proof to establish all of the elements of fraud or undue influence was not, in the instant case, upon the contestant, as is the usual situation upon the contest of a will. The burden was upon the defendant, by reason of his relationship of attorney to Mrs. Witt, to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client against the strong influence to which the confidential relation naturally gives rise. All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid, on the ground of constructive fraud, and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable, and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly and to deal with the attorney at arm’s length. *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cooley v. Miller & Lux*, 105 P. 981, 156 Cal. 510; *Clark v. Millsap* (Cal. Sup.) 242 P. 918. * *

“Bearing in mind that the *burden was upon the defendant to remove any doubt of the unfairness in his dealings with the decedent whereby she may have been induced to will him her property*, and to establish by clear and satisfactory proof that he had acted in the utmost good faith and taken no unfair advantage, it may be safely said we think

that the jury, having in mind the testimony adduced as to the mental and physical condition of the decedent, was warranted in arriving at the conclusion that the defendant had not sustained the burden of proof upon him, and, therefore, found that the will was procured by the undue influence of the sole beneficiary.”

In Re Witt's Estate, supra, has become a leading case in California, and has been cited with approval and followed in the following cases:

Roberts v. Wachter, 231 F. (2d) 535, 538;
In Re Doty's Estate, 201 P. (2d) 823;
In Re Phillipi's Estate, 172 P. (2d) 377;
McDonald v. Hewlett, 228 P. (2d) 83.

In all of the cases following Witt it is clearly ruled that where the attorney draws the will, or participates in its preparation making himself a beneficiary, a presumption of undue influence arises which can be overcome only by clear and convincing evidence.

In Re Hull's Estate, 146 P. (2d) 242, sets forth at page 245 the elements which must be shown to give rise to the rebuttable presumption of undue influence which in turn imposes the burden upon proponent of removing presumption by clear and convincing evidence.

In Re Graves Estate, 259 Pac. 935. This case is of particular importance in connection with Kostopulos. The proponent was not a lawyer but a real estate agent who insinuated himself into the good graces of the testatrix and showed up as the principal beneficiary under a will, the preparation of which he procured. It will be noted that in that case the proponent had taken the pains of having

a doctor examine the testatrix at about the time the will was drawn.

The Supreme Court of Connecticut, in *In Re Hotchkiss*, 92 Atl. 419, ruled that proof of a confidential relationship creates a presumption which shifts the burden to the beneficiary to prove the absence of undue influence. To the same effect is the Connecticut court's opinion in *In Re Kirby*, 98 Atl. 349.

The Delaware court considered the necessity of the beneficiary in a case like the one now under review being required to see to it that the other party to the confidential relationship had competent and genuinely independent advice.

In *Peyton v. William Peyton*, 123 A.L.R. 1482, the Delaware court said:

“* * * Confidential and fiduciary relations have the same meaning in law; and as every fiduciary relation implies a condition of superiority of one of the parties over the other, equity raises a presumption against the validity of a transaction by which the superior obtains a possible benefit at the expense of the inferior, and casts upon him the burden of showing affirmatively his compliance with all equitable requisites. So, the principle is well established that a person standing in a confidential relation towards another may not retain benefits conferred by his principal in a transaction as to which competent independent advice is considered necessary, except upon a satisfactory showing that the principal had such advice in conferring the benefits. Wherever independent counsel would be of real assistance to the principal in deciding whether to enter into the transaction with his

fiduciary, it is the latter's duty to advise his principal to seek such counsel; and where in the circumstances of the case independent advice is deemed to be indispensable, it is not enough that the fiduciary has urged his principal to obtain such advice; the transaction will be voidable, at the election of the principal, if independent advice was not, in fact, had. The equitable principle has its root in the fact that the parties are not regarded as being on an equal footing; and the court cannot be sure that the principal acted freely and in such way that he ought to be bound irrevocably, unless it be shown satisfactorily that he actually had the benefit of unbiased, competent counsel, and fully understood the matter of the proposed transaction. Application of the principle is not restricted to cases where, by evil design or contrivance to injure another, a benefit has been gained by a fiduciary at the expense of his principal; for even though a fiduciary has no purpose or intention to take an unfair advantage, equity will not lend its aid to the enforcement of the transaction and the fiduciary will not be permitted to retain advantage acquired as a consequence of it, if the transaction results in inequality and injustice. The purpose of the rule is not so much to protect the cestui against the consequences of undue influence as it is to safeguard him against the results of his own voluntary acts induced by the confidential relation between him and his fiduciary the effect of which with respect to his own interests he may not fully comprehend. 13 R. C. L. 411, 1367, 2 Pomeroy, Equity, Sec. 956; Bispham, Equity (7th Ed.) Sec. 237; 3 Bogert, Trusts and Trustees, Sec. 493; Rhodes v. Bate, L. R. 1 Ch. 252; Hall v. Otterson, 52 N. J. Eq. 522, 28 A. 907, affirmed 53 N. J. Eq. 695, 35 A. 1130; Slack v. Rees, 66 N. J. Eq. 447,

449, 59 A. 466, 69 L.R.A. 393; *Pattberg v. Gott*, 102 N. J. Eq. 371, 140 A. 795; *Graham v. Graham*, 143 N. Y. 573, 38 N.E. 722.”

In *Walker v. Hunter*, 17 Ga. 364, the Supreme Court of that state held that a confidential relationship between beneficiary and donor creates a presumption of undue influence which the proponent of the will must rebut.

In *Abbott v. Church*, 123 N.E. 306, the Supreme Court of Illinois held that proof that testator's lawyer drew the will giving himself substantial property was sufficient to take the case to the jury. In the course of its opinion the court said:

“All the testimony offered and excluded by the court from the jury tended to prove that a fiduciary relation existed between testator and the devisee Frank L. Shepard, who received a substantial benefit, and, in fact, the chief benefit, under the will, and it further tended to show that the will was prepared and drawn by Shepard. This proof established *prima facie* that the execution of the will was the result of undue influence exercised by that beneficiary, and, standing alone and undisputed, would entitle appellant to a verdict. *Weston v. Teufel*, 213 Ill. 291, 72 N.E. 908; *Teter v. Spooner*, 279 Ill. 39, 116 N.E. 673. Any relation existing between parties to a transaction, wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other, is a confidential or fiduciary relation. Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another. 12 *Corpus Juris*, 421; *Thomas v. Whitney*, 186 Ill. 225, 57 N.E. 808. While it may be said that the evidence of appellees in this record tends some-

what to rebut the presumption of undue influence, considering all the relevant testimony that should be in the record, still it was error in the court to exclude all the evidence and to direct a verdict. It was appellant's right to have the case submitted to a jury. The vital question in this case was whether or not all the legitimate and proper evidence offered made a *prima facie* case, because, if it did not, the simple error in excluding the evidence in the transcript of the evidence before the probate court would not necessarily be fatal error. It was reversible error to exclude all the evidence and to direct a verdict."

In Re Eldred Estate, 207 N. W. 870 (Mich.), the Supreme Court of Michigan ruled that when the confidential relationship exists between testator and beneficiary a presumption of undue influence arises, and the burden is on the beneficiary to rebut it.

The Supreme Court of Missouri in *Pilitzer v. Chapman*, 85 S.W. (2d) 400, ruled that where a beneficiary, in confidential relationship with the testator was "active in some way which caused or assisted in causing the execution of the will" there is a presumption of undue influence which does not disappear but raises an issue for the trier of the facts.

The matter is put colorfully and quaintly by the Supreme Court of Missouri in *Gott v. Dennis*, 246 S. W. 218, 223:

"Ever since Sarah unduly influenced Abraham (who also 'hated to do it') to send Hagar and Ishmael into the wilderness with but a bottle of water and a loaf of bread, in order that Sarah's son, Isaac, might inherit all of Abraham's property and Ish-

mael should not receive his share, human nature has remained the same, and undue influence has been exercised by many other members of the family, as good as Sarah, upon fathers as strong-minded as Abraham, to cause them to make Ishmaelites of their children and deprive them of their inheritance. But such conduct has never been sanctioned by the law of Moses or Missouri. We hold, therefore, that the circumstantial evidence in this case tends to show that the testator's 'family' exercised such undue influence over him at the very outset of his married life as to separate him from his wife and child against his will, in order to deprive them of their lawful rights in his property. *Undue influence, being once shown to exist, is presumed to continue.*"

In *In Re Bartle's Will*, 13 Atl. (2d) 642, 19 Atl. (2d) 17, the New Jersey court affirmed a judgment sustaining a will, but in the course of its opinion made this statement at page 643 of 13 Atl. (2d) :

"The difficulty in the case arises principally out of the fact that Mr. Herr was named in the paper as executor; he was legatee in the amount of \$5,000.00; and he was further named as a contingent sharer in the residuary estate in case the original bequest of the residue for charitable purposes should fail to become operative under certain somewhat complicated restrictions imposed by the will. The judge of the Orphan's Court said in his opinion, and we think correctly, that 'under the statement of facts, it is clear that a presumption of undue influence has been raised, and that the burden of overcoming the presumption and proving that the will was a spontaneous act of the testator was thrown upon Mr. Herr, Testator's attorney and confidential adviser.' "

An especially strong statement is to be found in the New Jersey court's decision in *Heims Estate*, 40 Atl. (2d) 657, where the New Jersey court said in part:

“* * * And beyond that, where the person to whom the burden has shifted is an attorney at law and the will is drawn by him in his capacity as attorney and legal adviser to the testator and in his own favor, we think that the testimony required to countervail the presumption should be impeccable and convincing.”

In *Hunter v. Battiest*, 192 Pac. 575, the Supreme Court of Oklahoma dealt with an attorney who had drawn his client's will and become one of the principal beneficiaries. We quote from that opinion:

“* * * At any rate the burden would be on the attorney to prove that it was not undue influence, and this burden would not be discharged by a mere denial. Here the only witness to the alleged will is a convict, shown to be under obligation to the proponent and attorneys associated with him, and he cannot therefor be said to be a strictly disinterested witness. Nor is it necessary that the undue influence be exerted at the time of or immediately prior to the execution of the will. If the undue influence has once been exerted it will be presumed to follow and taint every transaction between the parties thereafter and such presumption of undue influence should be rebutted by disinterested witnesses.

“In transactions inter vivos, where one stands in the confidential relation of attorney to another, if the attorney receives benefits during the existence of such relation, a presumption of law arises that the benefits were the result of undue influ-

ence; and in testamentary dispositions of property the rule as to the legal presumption of undue influence is the same as in dispositions inter vivos, except that the attorney standing in confidential relation to the testator and receiving benefits under the will must be shown to have in some way actively participated in the preparation of the will or the disposition of the property.

"When the legal presumption of undue influence has arisen by showing confidential relations, whether in dispositions of property inter vivos or by will, the burden of proof is upon the party seeking to make the benefit of such disposition to rebut the presumption attached thereto by showing either a severance of the confidential relations, or that the party making the disposition had competent and independent advice in regard thereto. *Gidney v. Chappell*, *supra*; *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94. * * *

"The law also presumes that an attorney will so act and will so conduct himself as to leave not even a shadow of suspicion that he has done anything to place his personal interests in conflict with those of his client. If he has done so and has thereby secured an advantage over his client or a gift or devise from his client, the burden is doubly great of showing that such advantage or such gift or devise was not obtained through undue influence.

"It might be said that in determining that undue influence was exercised in this case that the court was guided by reasons of public policy and by considerations which relate to the protection of the client, to the due and orderly administration of justice, to the honor and purity of the profession, and to the dignity of the court itself. A will bequeathing all the property of a client to his attorney in a capital case after the conviction of the client

and his sentence to death, made while the appeal is pending, and received by the attorney with full knowledge of all the conditions, should be regarded with the greatest suspicion. It is absolutely inconsistent with the duty, burdens, and obligations which an attorney assumes when he enters into the relation of attorney and client, and in fact is subversive of them. To presume that such a will was made without undue influence, and is therefore valid and effectual, would be fraught with the most pernicious consequences both to the public and to the profession. It would give rise to most unscrupulous and unprofessional practice, and the rankest fraud could be perpetuated on unsuspecting and unfortunate clients."

One of the most interesting and illuminating cases which has come to our attention is *In Re Lobb's Will*. That case was twice before the Supreme Court of Oregon and is reported at 14 P. (2d) 808 and 160 P. (2d) 295. The trial court twice sustained the will and the Supreme Court of Oregon twice reversed it.

From the Oregon decision it appears that Mrs. Lobb was an elderly woman who had some property in Oregon and some in California. Wilson was her lawyer. Mrs. Lobb asked Wilson to write a will for her making himself residuary legatee. Wilson's testimony was that she insisted upon the preparation of such a will but that he, for a time at least, resisted the suggestion. He went so far as to tell Mrs. Lobb that he would not write a will making himself beneficiary, and suggesting that she have it drawn by an outside lawyer. She then mentioned the name of a lawyer by the name of Clark. Clark was not Wilson's partner, but shared office space with him. There-

after Wilson suggested that Clark call upon Mrs. Lobb and write her will. Clark took the office secretary, who assisted him and Wilson, to Mrs. Lobb's home, and a will was prepared in which Wilson was named as residuary legatee. Thereafter Mrs. Lobb called at the office and stated that she wanted a codicil prepared eliminating one of the special bequests. Neither Clark nor Wilson was present, but Mrs. Lobb insisted upon having the codicil prepared, so it was written up by the secretary and executed by Mrs. Lobb. The effect of the codicil was to increase the residuary estate. Under the circumstances the Supreme Court of Oregon ruled that the advice procured by Mrs. Lobb from Clark was not independent advice, and that case was just as if Wilson himself had drawn the will. The Supreme Court of Oregon rendered its decision annulling and setting aside the will and codicil. In the course of its opinion the court said:

“Mr. Justice Harris, in *Kirchoff v. Bernstein*, 92 Or. 378, 181 P. 746, said: ‘The rules which define the duties of an attorney when dealing with his client are well established. The relation between an attorney and client has always been treated as one of special trust and confidence, and for that reason the law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty, and good faith. Indeed, so strict is the injunction not to take advantage of the client that, when a client challenges the fairness of a contract made with his attorney, the latter has the burden of showing, not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give, if he himself had not been interested, and that the transaction

was as beneficial to the client as it would have been if the latter had dealt with a stranger. * * *

“The following comments upon the foregoing from a dissenting opinion by Mr. Justice Bennett, are peculiarly applicable to the present case:

“ ‘These are brave, strong words, and with every syllable of them I entirely concur. They fix the duty of an attorney toward his client at a high standard, but not too high, when we consider the peculiarly confidential relation which an attorney enjoys, and the fact that those with whom he deals are oftentimes helpless from infancy or old age, and are generally ignorant of the law, and of their legal rights; and practically at the mercy of the lawyer who represents them. Such a declaration of the principles which govern attorneys will be an inspiration to the lawyer who cares deeply for his profession and for its honor.

“ ‘When it becomes generally known that this is the standard which governs the conduct of attorneys, and that the courts unflinchingly carry the principles so declared into execution, there will be an end of that unjust belief, unfortunately now so general among laymen, that lawyers are mercenary and unscrupulous grafters, and that the courts, being composed of lawyers promoted, look with complacent tolerance and winking eye upon the unjust greed and rapacity of their erstwhile associates.’ ”

To the same effect is *In Re Brown's Estate*, 108 P. (2d) 775, by which decision the Supreme Court of Oregon set aside a will which was written by an attorney and which made him an important beneficiary.

In *In Re Everett*, 68 S.E. 924, the Supreme Court of

North Carolina held that when a will is executed by or through the intervention of a person occupying a confidential relation toward the testator whereby such person is made the executor and a large beneficiary under the will, such circumstances create a strong suspicion that undue or fraudulent influence has been exerted, "and then the law casts on him the burden of showing that the will was the free and voluntary act of testator."

The Supreme Court of Virginia in *Hartman v. Strickler*, 82 Va. 225, said:

"Where a will executed by an old man differs from his previously expressed intentions, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a *violent presumption* of fraud and undue influence, which should be overcome by satisfactory testimony."

This court, in *Omega v. Woolley*, *supra*, quoted with approval from the decision of the Supreme Court of Washington in *Stone v. Moody*, 84 Pac. 617.

To the same effect as the foregoing cases are: *Bancroft v. Otis*, 8 So. 286 (Ala.); *McElhaney v. Jones*, 72 So. 531, (Ala.); *In Re Cooper*, 71 Atl. 676; *Roberts v. Wachter*, 213 F. (2d) 535; *In Re Doty's Estate*, 201 P. (2d) 823 (Cal.); *In Re Phillipi's Estate*, 172 P. (2d) 377 (Cal.); *McDonald v. Hewlett*, 228 P. (2d) 83 (Cal.); *In Re Johnson's Estate*, 87 P. (2d) 900 (Cal.); *In Re Gallo's Estate*, 214 P. (2d) 496; *In Re Hotchkiss*, 92 Atl. 419 (Conn.); *Davis v. Frederick*, 118 S.E. 206 (Ga.); *O'Day v. Crabb*, 109 N.E. 724 (Ill.); *Abbott v. Church*, 123 N.E. 306 (Ill.); *Tidholm v. Tidholm*, 62 N.E. (2d) 473 (Ill.); *Bridwell v. Swank*, 84 Mo. 455; *In Re Swartz*,

16 Atl. (2d) 374 (Pa.); *In Re Raasch's Will*, 284 N. W. 571 (Wis.); *Page on Wills*, 2nd Ed., Vol. 1, Sec. 270, p. 1233.

It might be contended that the rule of the New York court in *In Re Smith*, 95 N.Y. 516, is against respondent, but a reading of the case will show otherwise. We quote from that decision:

"The mere fact, therefore, that the proponent was the attorney of the testatrix, did not * * * create a presumption against the validity of the legacy given by her will. But taking all the circumstances together, the fiduciary relation, the change of testamentary intention, the age and mental and physical condition of the decedent, the fact that the proponent was the draftsman and principal beneficiary under the will and took an active part in procuring its execution, and that the testatrix acted without independent advice,—a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled, and intelligent expression of the wishes and intention of the testatrix."

Graham v. Courtright, 161 N.W. 774, is a decision from the Supreme Court of Iowa which seems to hold that a presumption of undue influence is not based on the mere existence of a fiduciary relationship. It is contrary to all other cases we have found upon the subject.

APPELLANTS' POINTS AND AUTHORITIES

Because appellants and respondent are of such divergent views as to what rules of law apply to the facts of the case, we are persuaded that a categorical reply to appellants' brief would not be useful to the court. The arguments made and cases cited by appellants will be given attention in a general way.

BURDEN OF PROOF

Appellants' argument begins upon page 51 of their brief. Their springboard is the statement that the burden of proving both lack of testamentary capacity and undue influence was upon contestant and respondent. They end their argument upon page 126 of their brief, with the statement printed in italics that there isn't a whisper in the record that Gail was ever induced to do anything against her will. That statement entirely ignores the basic fact that Gail was a childish and simple-minded woman; that she was in confidential relationships with both appellants, she reposing her confidence and they accepting it; that MacFarlane was Gail's attorney at law, her attorney in fact and confidential friend, and as such, prepared and supervised the execution of the will and codicils; that appellants would be unduly enriched by the will and the codicils and that Gail had no independent advice in connection with the signing of any of the testamentary documents. Appellants choose to overlook and ignore the rule of law that the basic facts of the case cast upon them the burden of showing by clear and convincing evidence that the will and codicils were free of fraud and undue influence.

The rule so recently stated by this court in *Jardine v. Archibald* has been the settled rule of this court ever since its opinion in *Viallet v. Con. R. & P. Co.*, 30 Utah 260, 84 P. 495, decided in February, 1906. No decision of this court cited and relied upon by appellants involved facts like those presently under review. We must conclude that if the facts of this case had been before the court in the cases cited by appellant this court would have applied the rule of the Budge, Woolley and Jardine cases and the results would have been different.

All of appellants' conclusions reflect appellants' refusal to appreciate or recognize the rule of law that imposed upon them the burden of freeing themselves from the charge of undue influence by clear and convincing evidence. Further discussion of that point would be profitless.

GOODNESS OR EVIL

On page 124 of their brief appellants conclude that, "Goodness or evil in the hearts of the beneficiaries has no materiality." Whether that conclusion is by way of confession and avoidance we express no opinion, but it overlooks the morals and the public policy out of which grew the rules of law governing the relationship of attorney and client and other confidential relationships. If a lawyer has evil designs upon the property of his confiding and simple-minded client, he may be subject to no penalty just for his evil thought, but law and equity alike step in to stay the fruition of such designs.

COLLUSION

Appellants conclude that no collusion or joint effort on the part of MacFarlane and Kostoplos was shown to

exist. The existence or not of such joint effort could in no way impair the validity of the trial court's judgment but proof of collusion is in the record.

Kostopulos believed that the Swan family was wealthy. His close adhesion to the family began just before Gail's aged father fell upon his last illness and had ripened into a confidential relationship before the first codicial was signed.

When MacFarlane took a general power of attorney from Gail he assumed a trust relationship as to her property. It was his duty as such to protect the property for Gail's benefit as against himself and all others. And yet, when he came into possession of Gail's bonds and stocks they were divided equally between him and Kostopulos. Likewise, when the savings accounts were adjusted by him at Union Trust Company the amounts standing in his name and that of Kostopulos were identical, and the small amounts withdrawn from those two accounts during Gail's life were identical. The values of the properties assigned to each in the last codicial is about \$100,000.00. While the foregoing may not compel such a finding, it is certainly ample to support the finding that there was an understanding between MacFarlane and Kostopulos for the division of Gail's property. Kostopulos' statement to the witness Butler that MacFarlane made a mistake when he omitted Oscar Beam from the codicil is likewise persuasive that the preparation of the codicil had been the subject of discussion and agreement between the two.

DESTRUCTION OF THE WILL

It is urged by appellants that Gail never destroyed the will or either of the codicils in her lifetime and that

her failure to do so is proof that the documents expressed her will uninfluenced by either of appellants. Such fact, standing alone, may be evidence to be considered by the court, but it cannot be said to be "clear and convincing proof." This is especially true when considered in connection with the evidence upon the point. The confidential relationship between appellants and Gail was never interrupted and the pressure of the influence arising from it was never relaxed. There is evidence in the record upon this very point which is without dispute and which the trial court could not ignore. MacFarlane drew the will and both codicils in his own office and there is no evidence that he ever entrusted possession of any of them to Gail. If he had ever surrendered possession of any of them to her he surely would have so testified.

The only direct evidence upon the subject came from Mrs. Venita Frank, who was Gail's personal friend and wife of her attending physician. Mrs. Frank testified without contradiction that Gail, toward the end of her life, frequently stated that she could not get "her papers" from MacFarlane. (R. 561-2-3) Mrs. Frank asked Gail why she did not demand them and Gail's answer was that she had demanded them but MacFarlane had replied with this statement: "Gail, you are a sick girl. You can't have your papers around the house."

The trier of the facts could properly conclude that Gail never had possession of the will or either codicil. He could also quite properly conclude that the same reluctance which induced MacFarlane to prepare the will and codicils himself instead of sending Gail to an independent lawyer for that purpose, also induced him to retain exclusive possession of the documents after they were signed.

APPELLANTS' CASES

Appellants have cited two score cases in support of their contentions. None of them is authority against the position of respondent in the instant case.

One group of cases cited by appellants involves presumptions. The basic facts which led the court below to its conclusions are entirely missing from the cases cited. Typical of the cases relied upon by appellants is *Newell's Estate*, 78 Utah 463, 5 P. (2d) 230. In the Newell case there was no confidential relationship. The presumption discussed in the Newell case was one based upon the total absence of facts, while the one now under review flows from the basic facts in the record.

Likewise, the record in *Bryan's Estate*, 82 Utah 390, 25 P. (2d) 609, did not contain the basic facts which must control the decision in the case at bar.

Two cases cited by appellants involved the presumption of sanity in criminal cases. Such a presumption arises in the absence of facts, not as the result thereof. Those cases throw no light upon the present inquiry.

Some of appellants' cases involve the presumption of due care or the lack of it. No case cited by appellants involved the confidential relationship and the rules relative thereto which were so clearly recognized by this court in *Jardine v. Archibald*, *supra*, and prior cases which we have discussed.

Appellants have sought help from the courts of California but they have gone not to the Supreme Court of California but to the intermediate courts of appeal. The California law applicable to a case like this one is stated in *Witt's case*, *supra*, and no case cited by appellants from

California could or pretends to impair the force of that case.

For example, appellants cite *Phillipi's Estate*, 76 Cal. App. (2d) 100, 172 P. (2d) 377. That case contains this language:

“That Mr. Wilson was the attorney of the testator and that a confidential relationship existed between them is not questioned. Where such a situation exists the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealings with his client. *That presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and his client was fair and equitable and that the attorney had taken no advantage of the relationship and that the client was fully informed as to all matters relative to the transaction.* In re Estate of Witt, 198 Cal. 407, 245 P. 197.”

The rule so crisply stated in the foregoing quotation may be found restated or approved by implication in all the cases from California cited by appellants. The same is true with respect to cases cited from other jurisdictions.

Many cases from this and other jurisdictions are cited in connection with the question of testamentary capacity. With the general rules announced and applied in those cases we are constrained to agree. None of those cases holds that the trier of the facts may not view a mental capacity against surrounding circumstances. Here the court, upon the whole record, concluded that he could not correctly evaluate Gail's admittedly sick mind except as it was further weakened and overcome by the pressure of undue influence exerted by those whom she fully trusted.

Much of appellants' brief is devoted to the burden of proof. Among the cases chiefly relied upon by them are *Hanson's Will*, 50 Utah 207, 167 P. 256, and *Bryan's Estate*, *supra*. Neither of those cases is at all like the one now under review. While the facts in the Hanson and Bryan cases are not in point here, the decision in each of those cases nods approvingly toward the rule for which we contend and which has been so clearly stated by this court in the Budge and other decisions.

Appellants quote the following from the Hanson case:

“* * * 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.*”

The italicized portion of the quotation has real significance. In the case at bar proof was made of circumstances which are universally held to be so inconsistent with fair dealing as to require clear and convincing proof of the absence of undue influence.

From Bryan's case appellants quote the following:

“* * * The opportunity to exercise influence, *unless combined with circumstances tending to show its exercise*, affords no presumption that it was in fact exercised. * * *

The italicized portion of the foregoing quotation reminds us that the facts of the instant case show circumstances which not only tend to show the exercise of

undue influence, but which compel a finding of undue influence in the absence of clear and convincing proof to the contrary.

Appellants lean upon *Buttars Estate*, 261 P. (2d) 174, but it gives them no support. The lawyer referred to in that case was not a beneficiary. The case is distinguished from the one at bar by the following excerpt from the opinion:

“ * * * 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.* * * * ”

Such is the quality of the cases relied upon by appellants as to the burden of proof. Upon the facts of the case the rule announced in Witt’s case, *supra*, is the true rule by universal affirmation:

“The burden of proof to establish all of the elements of fraud or undue influence was not, in the instant case, upon contestant, as is the usual situation upon the contest of a will. The burden was upon defendant, by reason of his relationship of attorney to Mrs. Witt, to overcome the presumption of fraud and unfair dealing * * * ”

The Budge, Wolley and Jardine cases control the instant case. No case or text has been cited by appellants which impairs the force of those cases.

CONCLUSION

1. A total invalid from early childhood until she was 27 years of age, Gail continued to be disease ridden and a social recluse. Of arrested mental and emotional development she was utterly guileless and highly susceptible to the blandishments of outsiders. She gave her unreserved trust and confidence to appellants, and against their domination what intellect she may have had was no protection to her. Her trust, her welfare, and her childish mind were given to the safekeeping of appellants. If in any circumstances she could be said to have had a testamentary capacity, that capacity was surrendered to MacFarlane and Kostopulos, and they exercised it for her to their own enrichment. The trial court was justified in finding and adjudging that Gail was lacking in testamentary capacity.

2. The confidential relationship between Gail and MacFarlane is freely admitted by appellants, and no serious challenge is made to the findings of such a relationship as between Gail and Kostopulos. The obligations upon appellants by reason of their fiduciary relationships to the childish and afflicted Gail was enlarged three fold by the confidential hold they had upon her father and her sister. When all of the facts of their relationship came out appellants fell under the burden of proving by clear and convincing evidence the absence of undue influence. They wholly failed to discharge the burden. Upon the record the trial court was fully justified in finding and

adjudging that the pretended will and codicils were the result of undue influence and therefore void and of no force or effect.

Wherefore, respondent prays that the judgment of the trial court be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

By Paul H. Ray

Grant C. Aadnesen

*Attorneys for Plaintiff
and Respondent*

APPENDIX

MEMORANDUM DECISION

At the conclusion of the trial of this case, and oral arguments presented by counsel, the matter was taken under advisement by the Court. Since that time the Court received written briefs submitted by counsel; also the transcript of the testimony in the case. I have carefully read the briefs and transcript, and I have endeavored to analyze all of the testimony given at the trial. After a careful consideration of the record in this case, I conclude that the contest of Mrs. Theo Hendee should be and must be sustained, and that the Will of Wilda Gail Swan and both Codicils thereto should be and they are hereby declared null and void.

The complaint in this case alleges that the Will and Codicils be adjudicated null and void upon two grounds:

1. That Wilda Gail Swan was incompetent to make a Will or Codicil.
2. That the Will and Codicils were the result of fraud and undue influence exercised upon Miss Swan by the defendants.

In reaching the conclusion stated above, I deem it essential to discuss briefly and separately the question of testamentary capacity and undue influence. To me the record in this case clearly indicates that Wilda Gail Swan never matured either mentally or emotionally. The evidence established by lay witnesses is in accord with all of the evidence given by the medical witnesses, to the effect that Miss Swan had the mentality of a child in the age range from eleven to thirteen years. Further, the record dis-

closes beyond dispute that, by reason of health impairment, Wilda Gail Swan, until she reached the approximate age of twenty-seven years, lacked all of the contacts and activities of a normal person, and was prevented a normal emotional development; that she was almost a total recluse; that thereafter, by reason of medical treatment given her, during the last ten or twelve years of her life her seizures were restricted, her health somewhat improved, and to a limited degree she enjoyed self-reliance which enabled her to go to town in Salt Lake City to attend her personal needs and some of her business affairs. However, during all of that time her activities were under the supervision of either her father, various banking institutions, her sister Mrs. Hendee, her aunt Mrs. Martsolf, and by hired companions.

It becomes necessary to discuss the case briefly as it relates respectively to Grant Macfarlane, Dan Kostopulos and Ada Bridge.

As far as the evidence pertains to Grant Macfarlane, to me it discloses a shocking and reprehensible abuse of trust which was imposed in him by and through and as a result of the highly confidential relationship existing between Macfarlane and Miss Swan. Grant Macfarlane is a lawyer of long experience, and as such practiced before the Courts of this State and the Federal Courts. In this regard he is possessed of trained intelligence. Also he is a man of great personal charm and ingratiating personality.

The record shows Macfarlane became Miss Swan's attorney in 1944, and until Miss Swan's death the relationship of attorney and client existed. It becomes inconceivable that Macfarlane could have been long unaware of Miss Swan's mental frailty and emotional susceptibility. It ap-

pears further that matters were not allowed to rest upon the strict relationship of attorney and client between these two individuals. Macfarlane became the close and confidential friend of Miss Swan. He became acquainted with Miss Swan's family, consisting of her father and her sister, who each exercised great concern over Wilda Gail Swan's welfare. Macfarlane also became attorney and confidential advisor to Gail Swan's father, and likewise he became the trusted friend of Mrs. Hendee, Gail Swan's sister.

It therefore becomes apparent that Macfarlane, personally and as a lawyer, had reposed in him full trust, faith and confidence, not only of Miss Swan, but her father and her sister as well. Thus, in such circumstances, it became and was his solemn duty to exercise the most meticulous care in seeing that he never took the slightest advantage of Wilda Gail Swain, and that he never abused the confidence she reposed in him to his own profit.

When the purported Will was drawn on May 2, 1947, Wilda Gail Swan appeared at Macfarlane's law office entirely alone. At that time she brought with her a prior Will, under the terms of which she bequeathed and devised her estate to her father and her sister. Macfarlane prepared the purported Will, by the terms of which he hoped to inherit property located in Salt Lake City, Utah. The record is manifestly clear that he did not at that time suggest or indicate that Gail Swan should have independent legal advice, or independent advice of any kind whatsoever. Moreover, he caused this purported Will to be signed by Wilda Gail Swan in the presence of attesting witnesses of his own selection, one being his private secretary. In the circumstances surrounding the signing of this purported Will, Macfarlane certainly was in a position of such

dominating influence that it was his clear unrevokable duty to see to it that Wilda Gail Swan had independent advice in connection with the preparation and signing of such an important document. The only advice she received was the advice given and furnished to her by Macfarlane.

It is my judgment that Wilda Gail Swan was incompetent to make the Will. However, assuming that if she were technically competent, she at that time was so far under the influence and domination of Macfarlane that the document must be held to be the result of Macfarlane's fraud and influence, and therefore void.

After this purported Will was signed, the relationship of Macfarlane and Wilda Gail Swan, and the highly confidential nature attendant thereto, never deteriorated, diminished or relaxed. On the contrary, it became more cemented by frequent professional and social contacts between Macfarlane and Miss Swan, and became strengthened by the play upon Miss Swan's sympathy because of Macfarlane's eye trouble. He permitted her to worry and brood over his affliction and to believe he was in financial straits because of it.

When the first Codicil was signed, the same circumstances and conditions existed as when the purported Will was signed. Again it appears that no independent advice was ever suggested by Macfarlane to Wilda Gail Swan.

Here we find a woman who had never matured normally, physically or emotionally, pitted against the ingratiating and charming lawyer who had reposed in him Miss Swan's complete trust and confidence. The result obtained under these circumstances and surroundings and lack of independent advice was the signing of a document

which, if given efficacy, would invest property in Grant Macfarlane worth more than \$100,000.00.

I therefore feel constrained and do conclude that the signing of this document was induced by fraud and the undue influence exercised by Macfarlane, and therefore is void.

During the month of April, 1950, Macfarlane prepared and caused Wilda Gail Swan to sign a full and general power of attorney, making him her attorney in fact, under which instrument he had the power and authority to exercise a wide discretion in Miss Swan's matters and business affairs. Macfarlane did strengthen his already strong hold upon the mind and property of Wilda Gail Swan.

On the witness stand Macfarlane denied that he had exercised the power of attorney, except in connection with certain deposits of money in the Union Trust Company and the execution of one lease. However, upon cross examination he admitted that, as attorney in fact for Miss Swan, he procured from the Walker Bank and Trust Company certain corporate shares of stock belonging to and standing in the name of Wilda Gail Swan. He also caused a certificate representing 80 shares of Westinghouse Electric stock to be transferred to his own name, and a certificate for 100 shares of Utah Power and Light Company to be transferred to the name of Dan Kostopulos. Thereafter Macfarlane claims to have received as a gift from Miss Swan the Westinghouse stock and \$1,500 par value of U. S. bonds.

The record in this case shows that Macfarlane, for legal services rendered Wilda Gail Swan, billed her for the same and was paid by her for all professional services ren-

dered. The stock and bonds he took from Miss Swan were received entirely without consideration. At the time he took and received the stock and bonds, he also knew that Kostopulos was getting from Wilda Gail Swan the Utah Power and Light stock and \$1,500.00 in U. S. bonds. It appears that between Macfarlane and Kostopulos they received practically all of the income-producing securities which Wilda Gail Swan possessed.

From the evidence respecting the stock and bonds, it becomes abundantly clear to my mind that Macfarlane intended at all times to turn, and did turn, the confidential relationship reposed in him by Miss Swan to his own profit, and in complete disregard of all the obligations imposed upon him by the confidential relationship existing between himself and Miss Swan.

Further attention is also directed to the fact that, in the exercise of such a power of attorney, Macfarlane caused money, deposited in the name of Wilda Gail Swan in the Union Trust Company at Salt Lake City, to be divided in several accounts. One account remained in the name of Wilda Gail Swan, one in the name of Wilda Gail Swan and Mrs. Hendee or Mr. Hendee, one in the name of Wilda Gail Swan and Dan Kostopulos, and one in the name of Wilda Gail Swan and Grant Macfarlane. The record shows that each of such accounts were in the approximate amount of \$5,000.00. The record further shows that during Wilda Gail Swan's life the account in her name and the one in the name of her sister and brother-in-law were practically depleted. The record further shows that the amounts upon deposit in the name of Grant Macfarlane and Dan Kostopulos were subject to only insignificant withdrawals, and at the time of Wilda Gail Swan's death Kosto-

pulos' and Macfarlane's accounts were in the amount of \$4,597.17 each.

This clearly discloses that during the time Macfarlane acted as Miss Swan's attorney at law, her attorney in fact and her confidential friend and business advisor, he accepted from her, in addition to compensation for all services rendered, stock valued at \$3,000.00, bonds of the value of \$1,500.00, and savings deposited in the amount of nearly \$5,000.00, totalling \$9,500.00. At this same time he stood by and permitted the depletion of Miss Swan's estate by an equivalent amount which Dan Kostopulos obtained. Substantially \$19,000.00 was thus extracted from Wilda Gail Swan's estate by Macfarlane and Kostopulos.

By the time the last Codicil was prepared and signed on April 23, 1951, Kostopulos had assiduously and successfully wormed his way into the full trust and confidence of Miss Swan, and it would appear that Kostopulos was in competition with Macfarlane in the acquisition of Wilda Gail Swan's property, and that Macfarlane had to reckon with Kostopulos in the disposition of Wilda Gail Swan's property. It would appear to this Court, under the circumstances which Macfarlane and Kostopulos acquired the stocks and bonds from Miss Swan, should have persuaded Macfarlane that Miss Swan needed a guardian much more than she needed an attorney in fact. Therefore, I find that by the time the second Codicil was prepared and about to be signed, both Macfarlane and Kostopulos had become doubtful of Wilda Gail Swan's testamentary capacity.

Grant Macfarlane testified in effect that it was Wilda Gail Swan who was doubtful of her own capacity. In any event there existed substantial doubt as to her capacity, and Macfarlane and Kostopulos deemed it expedient and

wise, in furtherance of their own interests, to have the testamentary document attested by medical men.

The apprehension of Macfarlane and Kostopulos, relative to Miss Swan's mental capacity, appears to be in harmony with the feelings of Mortenson and Fitzpatrick, who were called as witnesses by the defendants. Mortenson and Fitzpatrick both testified that Miss Swan had reacted to their friendly intentions by offering them bequests of property. This proposal of Miss Swan's was rejected by both of them and each stated that they would have been embarrassed to accept gifts from her.

Feeling as he did, Macfarlane drew the last Codicil, then made an appointment with Dr. Nielsen. It is significant that Macfarlane did not call either Dr. Pace or Dr. Frank. Both of these doctors were familiar with Wilda Gail Swan's condition. After Dr. Neilsen had been selected, arrangements were then made for Kostopulos to fetch Wilda Gain Swan to Dr. Neilsen's office, where Macfarlane waited for them. 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. Drake, a psychiatrist.

During the examination and questioning of Miss Swan by the doctors, Macfarlane and Kostopulos were either present or in adjoining rooms, and Miss Swan was never free from the effect of their influence and domination. Dr. Neilsen and Dr. Darke both became attesting witnesses to the last Codicil, and each testified that in his judgment Wilda Gail Swan was competent to make a Will, but certain disclosures made by Dr. Darke and concurred in by Dr. Neilsen persuades me to believe that either the doctors

or Wilda Gail Swan or all three of them were deceived and confused and did not know what was going on.

Dr. Darke based his conclusion that Wilda Gail Swan was competent upon his belief that she clearly understood and had clearly in mind the persons who were to become her beneficiaries. To satisfy themselves upon this point, the doctors asked her who were to be her beneficiaries. She then gave the names of seven persons, which were written down at that time by Dr. Darke. Those names included Oscar Burnside Beam, Mr. Hendee and Mr. Bridge. Yet all three of these persons were omitted from the Codicil which had been prepared, and which was at that time executed by Wilda Gail Swan and attested to by Drs. Darke and Neilsen.

It therefore is clear to me that Wilda Gail Swan did not understand the disposition which was being made of her property, and that the Codicil signed in the Doctor's office did not express her free will or her intentions. Therefore, I find that the Codicil was induced by fraud and undue influence and is void.

As to Dan Kostopulos, I find that his constant and persistent attentions to Wilda Gail Swan and her father, which began in about 1949, was motivated by a desire to gain the trust and confidence of Wilda Gail Swan and her father with the intent to turn it to his own profit and advantage. I am compelled to conclude, from the appearance and demeanor of Kostopulos upon the witness stand, that he could not be trusted or believed. Kostopulos was approximately 14 years younger than Miss Swan, a married man, and yet over a period of several years he called upon Wilda Gail Swan almost daily, sometimes several times a day. In Wilda Gail Swan's home the evidence dis-

closes that he pet and fawned upon Wilda Gail Swan in a manner described by the witness Grace Folden as "disgusting." He pretended to be responsive in a wholly charitable manner to every whim and caprice of Miss Swan. He further pretended to be generous in the making of gifts to Miss Swan, and yet the evidence discloses that Kostopulos kept a record in minute detail of every little item which he acquired for and took to Wilda Gail Swan. The record further discloses that immediately after the death of Wilda Gail Swan, Kostopulos filed a claim against her estate to recover more than \$2,000.00 which he claimed due him, and when this claim was rejected by the executor of the estate he brought suit to recover this amount.

Confidential relationship is not necessarily derived from or become dependent upon the professional character of either party. It is not necessary, in order to establish a confidential relationship, that either party be a lawyer, physician or religious advisor. The evidence in this case makes it clear to me that Kostopulos with design and purpose ingratiated himself into Wilda Gail Swan's mind, thereby gaining her full confidence and complete trust. Thus, this relationship between them thereupon became a confidential relationship. It was the childish Wilda Gail Swan who reposed confidence, and Kostopulos who became and continued to be the dominant member of the relationship.

It further appears that during the time when Kostopulos was creating and solidifying the confidential relationship with Wilda Gail Swan, he sought to undermine in Miss Swan's mind the position and influence of others who might share her confidence to his disadvantage. The evidence discloses he sought to impair the relationship

between Wilda Gail Swan and her sister Mrs. Hendee. It appears further that he even had the hardihood to encourage Dr. Frank to dope up Gail Swan whenever her sister was about to arrive from California. The evidence further discloses he disliked the close relationship existing between Wilda Gail Swan and Mrs. Folden, and encouraged disharmony between them, and finally Kostopulos called upon Dr. Frank to dismiss Mrs. Folden from attendance upon Miss Swan. He further endeavored to alienate the friendly relationship existing between Wilda Gail Swan and the Bridges, by telling Mrs. Hendee that she must keep Miss Swan away from the Bridges because they were taking too much money from Miss Swan.

Kostopulos denied that he knew anything about the Will or Codicils until Wilda Gail Swan's death. I do not believe this denial on his part. I am inclined to believe the testimony of Mr. Butler, a wholly disinterested witness, who upon the witness stand stated that before the death of Wilda Gail Swan Kostopulos had said, in substance and effect, that he was not worried about the condition of the moving picture business because he had a rich woman who was going to give him a hotel. At a later time the evidence discloses that Kostopulos identified Wilda Gail Swan to Mr. Butler as the woman who was going to leave him the hotel.

I believe, and therefore find, that Kostopulos was informed and knew, not only of the second Codicil, but also the first Codicil, because the record discloses that it was in the first Codicil that the property identified as a hotel was designated for Kostopulos. I further believe the testimony of Mr. Butler, reflecting in substance that after the death of Wilda Gail Swan, Kostopulos stated that it was

a mistake on the part of Macfarlane to omit Beam from the Will.

It is abundantly clear to me that from the latter part of 1949 until the death of Wilda Gail Swan that Kostopulos maintained and preserved a confidential relationship with Miss Swan under which he could and did dominate Miss Swan's will, and that he fraudulently induced her to dispose of her property so as to make him the beneficiary of real estate having a value of approximately \$100,000.00.

The record in this case makes it clear to me that Kostopulos was guilty of fraud and undue influence, and without such fraud and influence the disposition of Wilda Gail Swan's property would have been otherwise than as designated in her first and second Codicils, and I find that both of said instruments are null and void.

I conclude it is appropriate to summarize the result of the exploitations by Macfarlane and Kostopulos of the confidential relationship which they enjoyed with Wilda Gail Swan. During Miss Swan's lifetime Kostopulos and Macfarlane each received without consideration approximately \$9,500.00 in money and securities. Macfarlane in addition was compensated for legal services rendered. Kostopulos received with Macfarlane's approval a 10-year lease upon a valuable piece of business property. By the purported testamentary documents, Kostopulos and Macfarlane would each receive property appraised at nearly \$100,000.00. In addition each was bequeathed fire insurance policies, a fact which Macfarlane characterized as unusual. The second Codicil discloses that Macfarlane was designated the attorney for the estate and Kostopulos authorized to make the funeral arrangements.

If the Will and Codicils were allowed to stand, Kosto-

pulos and Macfarlane between them would profit by their confidential relationship with Wilda Gail Swan in an amount totaling about one quarter of a million dollars. To permit such a result in the face of the record made in the trial of this cause would, in my opinion, stultify the law and the bench and the bar. Therefore, I conclude that the purported Will and both Codicils must be held null and void, insofar as they would vest any property or thing of value to either Macfarlane or Kostopulos.

This case, as it relates to the beneficiary Ada Bridge, presents problems of particular difficulty. I am reluctant to strike down the bequest of Ada Bridge. If Wilma Gail Swan had been permitted to dispose of her property free from the domination of Kostopulos and Macfarlane, so that her meager mental capacity might have been freely exercised, and if under such circumstances she had made the bequest to Ada Bridge which is here under attack, I would be strongly inclined to sustain that bequest.

I feel constrained to find that the Will and Codicils are entirely void, because of the circumstances and in the setting in which they were signed. I do not believe that Wilda Gail Swan had the testamentary capacity to give effect to her own will and desires as to the disposition of her property.

But even if she had testamentary capacity, considered in the abstract, her childish mind was so easily dominated and she was so completely under the influence of Macfarlane and Kostopulos, who fraudulently employed that influence to bring about the signing of the documents under attack, and the documents were so far contaminated by fraud and undue influence, that they must be declared null and void in their entirety.

As heretofore stated, I conclude that this contest

must be sustained upon both grounds alleged in the complaint:

1. That Wilda Gail Swan was incompetent to make the Will or Codicils.

2. That in any event, the Will and Codicils were the product of and resulted from fraud and undue influence of both Macfarlane and Kostopulos.

Counsel for the contestant are therefore requested to prepare and submit Findings of Fact, Conclusion of Law, and Judgment, giving effect to the views expressed hereinbefore.

Dated at Ogden, Utah, this 14th day of April, 1954.

By the Court,

PARLEY E. NORSETH

Judge

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

This case came on regularly before the court for trial without a jury upon the complaint and contest of plaintiff and contestant and the answers of the defendants. Plaintiff was in court and represented by her attorneys, Paul H. Ray and Grant C. Aadnesen. Defendant, Walker Bank and Trust Company, as executor, was represented by its attorney, Athol Rawlins. Defendant, Grant Macfarlane, was in court and represented by his attorneys, Calvin W. Rawlings, Brigham E. Roberts and Wayne L. Black. Defendant, Daniel Kostopulos, was in court and represented by his attorney, N. J. Cotro Manes. Defendant, Ada Bridge, was in court and represented by he attorney, Le-Grand P. Backman.

Trial was begun on November 17, 1953, and continued on November 18, 19, 20, 23, 24 and 27, 1953. Plaintiff and all of the defendants, except Walker Bank and Trust Company, as executor, offered evidence both oral and documentary. After all parties had rested, all the parties except Walker Bank and Trust Company argued the case orally and thereafter submitted written briefs. The court listened to all of the testimony and examined all of the documentary evidence. The court also heard oral arguments of counsel and examined written briefs. Being fully informed upon all of the matters presented, the court now makes the following

FINDINGS OF FACT

1. Wilda Gail Swan, hereinafter referred to as Gail Swan, an unmarried and childless woman, died in Salt Lake City, Utah, on or about May 28, 1952, leaving as her sole surviving heir at law her sister, Theo Swan Hendee, who is plaintiff and contestant in these proceedings.

2. After her death there were admitted to probate a document purporting to be the last will and testament of Gail Swan, and two documents purporting to be codicils to said last will and testament. The said purported will and the purported codicils named Walker Bank and Trust Company as executor. By the will, or one or the other of the codicils, all of the parties hereto, except Walker Bank and Trust Company, were named as beneficiaries. After the admission to probate of said documents, and within the time provided by law, Theo Swan Hendee, the sister and sole surviving heir of Gail Swan, and one of the devisees mentioned in said will and codicils, filed her complaint and contest by which these proceedings were initiated.

3. When Gail Swan and her sister, Theo, were small children they resided with their parents, Mr. and Mrs. Ulysses Grant Swan, at 118 N Street, in Salt Lake City. Gail's father was generally referred to, and will be hereinafter referred to, as Grant Swan. Gail was, for a time, a normal child. She began her schooling in Salt Lake City in 1896 when she was six years of age. When she was eight years of age, or thereabouts, she began showing signs of nervous disorder manifested by a blinking and rolling of her eyes. When she was eleven years old she became the victim of epilepsy which was manifest by violent and frequent

seizures. It became necessary to withdraw her from school at about that time and she was never thereafter well enough to resume her schooling. Her mother and father devoted themselves to her care and attention, and sought medical advice and relief for her both locally and in eastern medical centers. Gail's health went from bad to worse, and she became a complete invalid unable during long periods of time to care for any of her personal needs. During all of her childhood Gail was withdrawn into the shelter of her parent's home and was deprived, by reason of her condition, of any and all normal contacts and companionships common to growing children. It was impossible for her to engage in normal play. She had no girl friends and no boy friends, and therefore no opportunity for either mental or physical development.

4. In or about the year 1917 when Gail was 27 years of age, drugs were made available to her which, if regularly and frequently given, had the effect of limiting the frequency and the violence of epileptic seizures. But it was necessary that Gail continue for the rest of her life to be under the care of a physician and to receive medication many times each day to minimize the effects of epilepsy. After 1917 Gail's health improved to the extent that she could be up and about and get some measure of enjoyment out of life. She learned to read and write to a limited extent, and learned to play a few tunes upon the harp. Her life continued to be supervised in almost every detail by her mother and father and by housekeepers and companions employed for that purpose.

5. In 1931 Gail's mother died in southern California. Gail was then 41 years of age, and her father brought her back to the family home in Salt Lake City

where he and she resided until their respective deaths in 1950 and 1952. During the years following her mother's death, Gail's father saw to it that there was someone living at the house who could take care of the housekeeping and cooking, and assist Gail with her personal affairs.

6. The property referred to in the will and codicils here involved was acquired by Gail Swan's grandfather and passed from him to Gail's father, who in turn deeded it to Gail. The property consisted mainly of buildings in the commercial section of Salt Lake City. Gail's father, with the aid of persons employed by him for that purpose, supervised the maintenance and renting of the several parcels of property and the collection of rentals until a few months before his death. Management of the property prior to Gail's death was placed with Walker Bank and Trust Company, a banking institution of Salt Lake City.

7. After her mother's death, Gail's health further improved to the point that she was able to and did take some interest in the affairs of the family. She enjoyed being read to and learned to play simple card games. She was taught by Judge George G. Armstrong, her father's lawyer, to collect rentals and to determine whether she was being paid the right amounts. She even discussed leases upon property with persons employed to look after the property by or under the direction of her father and sister. But Dr. Roy A. Darke, a psychiatrist sworn as a witness by defendants, testified, and it is so found to be fact, that she was incapable mentally of understanding the language of a formal lease.

8. From the time of Gail's withdrawal from school in 1901 until her death she was not only afflicted by ep-

ilepsy, but she lived a life sequestered from all normal outside contacts, and until she formed the association with the defendants in this case her companionship was largely limited to that of her parents, her sister, her aunt, and hired housekeepers and companions. As the result of her illness and her sequestered and sheltered life, she never matured either mentally or emotionally. At the time she signed the documents involved in this action she had the mentality of a child from 11 to 13 years of age. She never reached maturity emotionally, as the result of which she was unusually susceptible to any show of friendship by any person outside of her own family.

9. In the early part of 1950 Gail's father, Grant Swan, was stricken with a fatal illness from which he died in June of that year.

10. The defendant, Grant Macfarlane, is a lawyer practicing at the bar of this court, and at the time of the trial had been actively engaged in his profession for a period of 25 years. He is a man of wide experience and trained intellect. He is possessed of a fine physique and stature, a soft and pleasant voice, and with all is possessed of an ingratiating personality particularly well suited to find favor in the eyes of such a woman as Gail Swan.

11. In the fall of 1944 Grant Macfarlane became Gail Swan's attorney at law. The relation of attorney and client between the two came into existence at that time and persisted without interruption until Gail Swan's death in 1952. During the years between that first meeting and Gail's death, Gail called frequently at Grant Macfarlane's office, sometimes for the discussion of business and sometimes on a social basis. For all legal services rendered by

Macfarlane to Gail Swan, Macfarlane rendered bills which were paid in full as rendered.

12. Not long after the relationship of attorney and client came into being as between Gail Swan and Grant Macfarlane, Macfarlane became acquainted with Gail's father, Grant Swan, and from time to time called at the Swan home to visit with Gail Swan and her father. Out of those visits there arose the relationship of attorney and client between Grant Macfarlane and Grant Swan, and from time to time Macfarlane performed legal services for Grant Swan for which he was paid by Grant Swan. Macfarlane also became acquainted with Gail's sister, Theo Swan Hendee, who lived in San Francisco with her husband. The relationship between Macfarlane and Mrs. Hendee became close and friendly, and the trust and confidence which was imposed in Macfarlane by Mrs. Hendee made the relationship between them a confidential one.

13. Theo Swan Hendee, plaintiff and contestant herein, was two years older than her sister, Gail, and was in all respects normal. She was graduated from college in 1912, and in 1914 was married to Harold Hendee. She and her husband moved to San Francisco in 1922 and maintained their residence in that area until his death in 1952.

14. During all the years that Theo Swan Hendee lived in California she made frequent trips to Salt Lake City to visit and be with her father and Gail. Often when she could not come to Salt Lake City she paid the expenses of her aunt, Mrs. Martsolf, to go from Redlands, in the State of California, to Salt Lake City where she resided with and gave assistance to the Swan family. In addition to making many visits each year to the Swan home in Salt Lake City, Mrs. Hendee frequently wrote and fre-

quently called by telephone. She endeavored at all times to be of assistance to her father and sister in connection not only with their domestic but their business affairs. It is found that on some occasions Gail Swan showed some irritation toward her sister, Theo, but it is also found that throughout their lives there was a strong, mutual affection and devotion between them. It is also found that Gail Swan had an abiding affection for her sister's husband, Harold Hendee.

15. Daniel Kostopulos was for many years an operator of a motion picture theatre in Salt Lake City on Broadway between Main and State Streets. He became acquainted with Grant Swan and his daughter, Gail. He visited them at their home infrequently until about the year 1950. Beginning in 1950 the frequency of his visits was stepped up until he was calling there almost daily, and on some occasions several times a day, a practice which he pursued until Gail's death. He was 14 or 15 years younger than Gail Swan, and a married man. His constant and persistent attention to Gail and her father was unnatural, and the court finds that it was motivated by a desire to gain the confidence and trust of Gail and her father in the hopes of financial reward. Kostopulos not only paid persistent and unrelenting attention to Gail, but he insidiously endeavored to alienate other persons from Gail's affection. He 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, who was Gail's attending physician, that Gail should be "doped up" in advance of her sister's visits. Such suggestions were made by Kostopulos to Dr.

Frank in Gail Swan's presence. He suggested to Gail's sister, Mrs. Hendee, that the friendship between Gail and Mrs. Ada Bridge, one of the defendants herein, should be interfered with for fear the Bridges might get too much of Gail's money. The court finds that the relationship between Kostopulos and Gail Swan was such that it became in all respects a confidential relationship with Gail reposing her full confidence and trust in Kostopulos. It is further found by the court that Kostopulos made frequent and constant visits to Gail, and 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.

16. Ada Bridge is the wife of Joseph Lamar Bridge. She is young enough to have been the daughter of Gail Swan. She and her husband maintained a small chicken farm in connection with their home in the south part of Salt Lake County. During the late war Ada Bridge's husband was in the military service. While he was away Mrs. Bridge sold eggs and poultry and among her customers were Grant Swan and his daughter, Gail. She made deliveries from time to time and formed an acquaintance with Gail. After his return from the service Ada Bridge's husband joined his wife in visiting the Swan home. During the last two years of Gail's life Ada Bridge and her husband visited the Swan home several nights a week, and on frequent occasions took Gail Swan to their home. The Bridges had six children and a home to look after. Mr. Bridge had a business to pursue. They had friends of their own age and with the same interests, and yet during the last two years of Gail's life they left their home and their children and drove into the Swan home to play

cards with Gail several nights each week. Ada Bridge's husband was employed on at least two occasions to perform work in connection with the maintenance and repair of some of the Swan properties. Joseph Lamar and Ada Bridge came to believe that Gail and her father were wealthy. Gail endeavored to give Ada Bridge's husband \$3,000.00 to be used in the finishing of a house which he had under construction. Mr. Bridge claims to have refused to accept the money as a gift but went with her to the bank where she drew out of her savings account \$3,000.00 in cash and delivered it to him. In consideration for such cash Mr. Bridge claims to have written a note by which he promised to repay the sum. The note could not be produced at the trial but Mr. Bridge testified that it provided for no interest, and provided no time at which the repayment would become due. \$2100.00 of the amount advanced to Mr. Bridge was never repaid, but credits in that amount were given to Mr. Bridge by Gail. The court finds 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.

17. The will admitted to probate and under attack in these proceedings is dated May 2, 1947. By that time Macfarlane had been Gail Swan's attorney at law for nearly three years. He must have known, and the court finds that he did know, not only that Gail's mind was childish and undeveloped, but that she was emotionally immature and highly susceptible to any show of kindness and friendship. During the period of his confidential relationship with Gail Swan, Macfarlane suffered an injury to one of his eyes which required surgery. That difficulty

brought an unusual sympathy from Gail Swan and Macfarlane employed the difficulty with his eyes to play upon the sympathy and emotions of his client.

18. The will was drawn by defendant Macfarlane in his office. On that occasion Gail called at Macfarlane's office entirely alone. She brought with her a prior will under the terms of which she bequeathed and devised her estate to her father. Macfarlane then and there prepared the will now under attack and caused it to be attested by two witnesses of his own selection, one of whom was his private secretary. By the terms of that will he was made the beneficiary of property having a value of nearly \$100,000.00. At the time the will was prepared by Macfarlane and signed by Gail Swan she had no independent advice of any kind, but relied solely for advice upon Macfarlane.

19. The first codicil admitted to probate and now under attack is dated February 20, 1950. Between the signing of the will of May 2, 1947, and the signing of the first codicil on February 20, 1950, there had been no interruption in or weakening of the confidential relationship between Macfarlane and Gail Swan. On the contrary, the relationship had continued and as time went on Gail Swan's trust and confidence in Grant Macfarlane increased.

20. The first codicil was signed under the same circumstances surrounding the signing of the will of May 2, 1947. Gail Swan went to Macfarlane's law office alone. Macfarlane there drew the first codicil and had it attested by his secretary and a lawyer who occupied space in the same suite. The lawyer who witnessed the will did not know its contents and never gave Gail Swan any advice in connection therewith. Gail Swan had no independent

advice of any kind in connection with the signing of the codicil, and by the codicil Macfarlane was designated as the beneficiary of property worth more than \$100,000.00.

21. In the month of April, 1950, two months after the signing of the first codicil, 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. Following the execution and delivery to Macfarlane of the power of attorney, and following the death of Gail Swan's father, Macfarlane, as attorney-in-fact, caused certain changes to be made with respect to funds on deposit in the name of Gail Swan and her father in the Union Trust Company in Salt Lake City. After the changes were made by Macfarlane as attorney-in-fact there were three joint accounts—one in the name of Gail Swan or Grant Macfarlane in the sum of \$4797.50, one in the name of Gail Swan and Daniel Kostopulos and his wife in the sum of \$4797.50, and one in the name of Gail Swan, or Theo Swan Hendee, or H. C. Hendee in the sum of \$4887.67. During her lifetime the accounts, except those in the name of Macfarlane and Kostopulos were substantially depleted, while only insignificant withdrawals were made in the names of Macfarlane and Kostopulos. At the time of Gail's death the amounts still on deposit in the names of Macfarlane and Kostopulos were exactly the same—\$4597.17 each.

22. As attorney-in-fact and attorney at law and confidential adviser, Macfarlane approved the sale of a piece of unimproved real estate by Gail Swan, the proceeds of which were invested in corporate stocks and U. S. Government bonds. The stocks and bonds consisted of 100 shares of stock of Utah Power and Light Company,

80 shares of Westinghouse Electric Company, and \$3000.00 par value of U. S. Government bonds. As attorney-in-fact for Gail Swan, Macfarlane took delivery from Walker Bank and Trust Company of the corporate stock of Utah Power and Light and Westinghouse Electric Company. Thereafter, and in the month of April, 1951, Macfarlane received from Gail Swan the 80 shares of Westinghouse Electric Company of the value of approximately \$3000.00, and \$1500.00 per value of U. S. Government bonds. He also caused the shares of Utah Power and Light Company to be transferred from the name of Gail Swan to the name of Daniel Kostopulos, and permitted Gail Swan to deliver the Utah Power and Light stock of the approximate value of \$3000.00 and \$1500.00 par value of U. S. bonds to Daniel Kostopulos. The court finds that acceptance of the stock and bonds from Gail Swan by Macfarlane and Kostopulos was entirely without consideration and was in furtherance of their design and purpose to abuse their confidential relationship with Gail Swan and procure her property for their own benefit.

23. The second codicil to Gail Swan's will is dated April 23, 1951. By then Macfarlane had been Gail Swan's attorney at law and confidential friend and business adviser for nearly seven years. The confidential nature of their relationship had been made stronger as the years went by, and Gail Swan's trust and confidence in Macfarlane was complete. He had then been her attorney in fact for one year. He knew that Gail was then immature both mentally and emotionally. He also knew that Daniel Kostopulos had acquired a highly confidential relationship to Gail Swan, and that he was a serious rival for Gail's generosity. He and Kostopulos were by that time doubtful of

Gail's mental capacity to make a testamentary disposition of her property. Macfarlane prepared the second codicil and on this occasion, as on all others, Gail had no independent advice with respect to the disposition of her property. 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. A. M. Nielsen. He then arranged to have Kostopulos bring Gail Swan to Dr. Nielsen's office where she could be examined and where she could sign the will. Kostopulos took Gail to Dr. Nielsen's office where Macfarlane was waiting for them. Dr. Nielsen made a physical examination. He then called in Dr. Roy A. Darke, and the two of them examined Gail Swan and then and there signed the second codicil as attesting witnesses. Macfarlane and Kostopulos were both present when the second codicil was signed, but were not present during some of the conversations between the doctors and Gail Swan. When they were not in the actual presence of Gail Swan they were in the adjoining room, and the effect of their influence upon Gail Swan was never dissipated.

24. Drs. Darke and Nielsen both testified that Gail Swan was competent to sign the codicil for the reason that she understood the nature of her property and had clearly in mind the persons who were to benefit by her will. They both testified that upon inquiry of Gail Swan as to who were to be beneficiaries under her will she gave them the name of Oscar Burnside Beam, her brother-in-law Harold Hendee, and Ada Bridge's husband, Joseph Lamar Bridge. All three persons so named by Gail Swan as she was about to sign the codicil were omitted from the codicil. The

court therefore finds that Gail Swan did not understand who was benefitting by the second codicil she had signed in Dr. Nielsen's office, and that document which she signed did not give effect to the testamentary intentions expressed by her to the doctors at the very time she signed the codicils.

25. The court finds that at the time when Gail Swan signed the will on May 2, 1947, she was under the influence and domination of Grant Macfarlane; that her mentality was too weak to withstand the effect of such influence; that she therefore lacked testamentary capacity to make the will. The court further finds that the will was the result of the undue influence of Grant Macfarlane.

26. The court finds that when the first codicil was made on February 20, 1950, Gail Swan did not have 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. The court further finds that said codicil was produced by the undue influence of Macfarlane.

27. The court finds that when the second codicil was made on the 23rd day of April, 1951, Gail Swan 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 finds that said codicil did not express the free and voluntary will of Gail Swan, but was the result of undue influence then and there practiced upon her by Macfarlane and Kostopulos.

28. The court finds that the relationship between Ada Bridge and her husband on the one side, and Gail Swan on the other, was a confidential relationship. The will and

both codicils were prepared by Macfarlane, and Kostopulos participated in the preparation and execution of the second codicil. 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 to 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.

29. The court finds that the will and both of the codicils were the result of fraud and undue influence and therefore did not express the free and voluntary will of Gail Swan.

30. The court finds that Gail Swan's mind was so undeveloped that under the circumstances and in the setting surrounding the signing of the will and the two codicils under attack in these proceedings, 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.

31. The court finds that at the time Gail Swan signed the will of May 2, 1947, she was so far under the influence and domination of Grant Macfarlane that said will was the product of Macfarlane's influence and expressed his will and desire and not the will and desire of Gail Swan.

32. The court finds that when the codicils of February 20, 1950, and April 23, 1951, were signed by Gail Swan, she was so far under the influence and domination of Macfarlane and Kostopulos that such codicils were the product of Macfarlane's and Kostopulos' influence, and ex-

pressed the wills and desires of Macfarlane and Kostopulos and not the will and desires of Gail Swan. By reason of their confidential relationship to Gail Swan, and the complete confidence and trust she put in them, they were able to and did substitute their wills for hers.

33. The court finds that while Ada Bridge took no active part in the preparation of the will or either codicil, all three documents were prepared by Macfarlane, and Kostopulos was present and participated in the events leading up to and including the signing of the second codicil. The purported will and first codicil were so far a product of undue influence of Macfarlane, and the second codicil was so far the product of undue influence of Macfarlane and Kostopulos, that none of such documents would have been signed except for such undue influence.

From the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW

1. At the time the said Wilda Gail Swan signed the purported will on May 2, 1947, she was mentally incompetent and lacked testamentary capacity to make and execute a valid will, and said will is and should be declared null and void.

2. That when Wilda Gail Swan signed the purported will of May 2, 1947, she was so far dominated by the influence of Grant Macfarlane that he was able to and did substitute his will for hers. The will was, therefore, the product of undue influence exercised upon Wilda Gail Swan by Grant Macfarlane, and is and should be declared null and void.

3. That at the time Wilda Gail Swan signed the purported first codicil on February 20, 1950, she was mentally incompetent and lacked testamentary capacity to execute a valid will or codicil, and the said codicil is and should be declared null and void.

4. When Wilda Gail Swan signed the purported first codicil of February 20, 1950, she was so far dominated by the influence of Grant Macfarlane that he was able to and did substitute his will for hers. The codicil was therefore the product of undue influence exercised by Grant Macfarlane at the time he prepared the codicil and at the time she signed the same. Said codicil is and should be declared null and void.

5. At the time Wilda Gail Swan signed the purported second codicil she was mentally incompetent and lacked testamentary capacity to execute a valid will or codicil, and the said codicil is and should be declared null and void.

6. At the time Wilda Gail Swan signed the purported second codicil she was so far dominated by the influence of Grant Macfarlane and Daniel Kostopulos that they were able to and did substitute their wills for hers. The said second codicil was therefore the product of undue influence exercised by Grant Macfarlane and Daniel Kostopulos, and should be declared null and void.

7. The purported will and first codicil under attack in these proceedings did not and do not express the will of Wilda Gail Swan, but express the will and purpose of Grant Macfarlane; and the purported second codicil did not and does not express the will of Wilda Gail Swan, but expresses the will and purpose of Grant Macfarlane, Daniel Kostopulos and Ada and Joseph Lamar Bridge. At the time Wilda Gail Swan signed the purported will and each of the

codicils she was mentally incompetent and lacking testamentary capacity to execute a valid will or codicil. The purported will and the purported codicils thereto should be declared and adjudged to be null and void and of no force or effect, and the estate of which Wilda Gail Swan died seized, both real and personal, should be distributed to Theo Swan Hendee, the natural sister and sole heir of Wilda Gail Swan, deceased.

8. Theo Swan Hendee, plaintiff and contestant, is entitled to a judgment that the purported will of Wilda Gail Swan, dated May 2, 1947, and the two purported codicils thereto dated February 20, 1950, and April 23, 1951, respectively, are null and void and of no force or effect. She is further entitled to a judgment ordering and directing the distribution of the entire estate of Wilda Gail Swan to her, subject only to the payment of taxes, debts and the costs of probate. She is entitled to have judgment for her costs herein expended.

Dated this 14th day of May, 1954.

Parley E. Norseth

JUDGE

JUDGMENT

The court has heretofore made, signed and filed its separate Findings of Fact and Conclusions of Law in the above entitled case from which it appears that Theo Swan Hendee, plaintiff and contestant, is entitled to a judgment of this court that the purported will of Wilda Gail Swan and both of the codicils thereto are null and void and of no force or effect, and that the entire estate of Wilda Gail Swan should be distributed in accordance with the prayer of plaintiff's complaint.

NOW, THEREFORE, it is hereby ORDERED and ADJUDGED that the purported will of Wilda Gail Swan, dated May 2, 1947, and the two purported codicils thereto dated February 20, 1950, and April 23, 1951, respectively, are null and void and of no force or effect.

It is further ORDERED and ADJUDGED that all of the estate of which Wilda Gail Swan died seized and possessed, both real and personal, be distributed to Theo Swan Hendee, the natural sister and only heir of the said Wilda Gail Swan, deceased, provided that such distribution shall be subject to the payment of taxes and costs of probate.

It is further ORDERED and DECREED that plaintiff have and recover her costs herein incurred.

Dated this 14th day of May, 1954.

Parley E. Norseth

JUDGE