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

Utah Supreme Court

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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 COM-
PANY, Executor of the Last Will
and Testament of WILDA GAIL
SWAN, deceased; GRANT MAC-
FARLANE; DANIEL KOSTOPU-
LOS; and ADA BRIDGE,

Defendants and Appellants.

FILED
MAY - 6 1955

Supreme Court, Utah

REPLY BRIEF

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LOS; and ADA BRIDGE,

Defendants and Appellants.

Case No. 8216

REPLY BRIEF

PRELIMINARY STATEMENT

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

All italics are ours.

STATEMENT OF CASE

It shall not be our purpose in this brief to make a critical analysis of the statement of facts in the Brief of Respondent. We have endeavored to state the facts objectively and fairly in the Brief of Appellants. Where the briefs are at variance the record will unquestionably reveal who is in error. There are several so-called facts related in respondent's brief, however, to which we feel obliged to refer.

At page 11 of respondent's brief in connection with preparation of the will and codicils appears the following: "She relied, and he knew she relied, solely upon his advice. (R. 205, 211, 206)" This statement contains the inference that Macfarlane advised and counseled Gail as to how she should devise her property in her will. The record does not substantiate this as a fact, either directly or by inference. The fact is that Gail had her own ideas as to how she should devise her property and that she informed Macfarlane of those ideas on the occasions prior to execution of her will and codicils. He did not attempt to influence her or direct her thinking in any way, shape or form. He has so testified and there is no evidence to the contrary.

At page 19 of respondent's brief the following statement appears: "Kostopulos disliked the supervision of Gail by the trained nurse, Mrs. Foulden. Accordingly, he took Macfarlane 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)" The fact is conceded by Dr. Frank that discharging Mrs. Foulden was Gail's own idea. The evidence reveals that Mrs. Foulden had insinuated that Gail had stolen some theatre tickets from her purse. This so upset Gail that she initiated the proceedings which resulted in Mrs. Foulden being discharged. To suggest that this was a devious scheme on the part of Kostopulos is entirely unwarranted by the testimony (R. 438, 450-453, 532, 533).

At page 14 of respondent's brief the following appears: "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)" The foregoing is a true statement, but rather than reveal any kind of abuse of confidence on the part of Macfarlane or Kostopulos, it reveals the absence of such abuse. Neither Macfarlane nor Kostopulos withdrew nor procured the withdrawal of one penny from these accounts for their own benefit. Gail had possession of the bank books. Macfarlane and Kostopulos at no time interfered with Gail's free use of the accounts for any purpose she desired. As pointed out in the brief of appellants the bank accounts affirmatively show that Gail considered Macfarlane and Kosto-

pulos to be the natural objects of her bounty and genuinely desired to remember them substantially in her will.

At page 15 appears the following: "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)" There is no evidence that Macfarlane made any arrangements whatsoever with Kostopulos in connection with execution of the will. The record citation of counsel simply doesn't support their claim.

Again at page 14 of respondent's brief the following appears: "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)" If Kostopulos was occupying the property rent free or was leasing it for some un-businesslike sum, that would be one thing. But there is no evidence whatsoever that this lease was not a good and substantial business proposition as far as Gail was concerned. The property was income producing property. The only way to derive income from it was by leasing it. The lease, like so many other of Gail's transactions, is important evidence only because it affirmatively demonstrates Gail's mental competence to conduct her affairs in a businesslike manner.

Also appearing at page 15 of respondent's brief is the following: "Dr. *Nielson* made a physical examination. (R. 383) 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. 838)” Respondent persists with the misimpression that Dr. Nielsen called Dr. Darke for the first time after he had examined Gail. This is not true. He had made arrangements for Dr. Darke before he had ever seen Gail (R. 804).

At page 16 of respondent’s brief is the following:

“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 confidential relationship and procuring Becker’s will by fraud and undue influence. (R. 221)”

The foregoing constitutes only a half statement. Respondent should have gone on in all fairness and informed the Court that the foregoing case was dismissed and that the contest was dropped because of an utter lack of merit (R. 221). Furthermore, the foregoing evidence could have no possible bearing on the issue of Gail Swan’s testamentary capacity or whether she was under the blanket of Macfarlane’s undue influence for a period of five years. It was injected into the case solely for the purpose of creating an emotional bias and prejudice which would blind the trier of the fact to the law and to the evidence of this case.

At page 19 appears the following: "Kostopulos also told Butler after Gail's death that Macfarlane had made a mistake when he eliminated Mr. Beam from the will. (R. 359)" A reading of the record citation which refers us to Butler's testimony reveals that Butler initiated the conversation by asking Kostopulos questions about the will and about Beam. Kostopulos answered that he knew nothing about it, that Macfarlane had prepared the will. This is a far cry from the stretched and twisted claim made by counsel.

ARGUMENT

The first statement in contestant's argument is as follows (p. 24):

"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."

Respondent's brief contains no relation of facts and no argument to support the trial court's finding that Gail lacked mental capacity to know who were the natural objects of her bounty; know her property and dispose of it understandingly according to a plan. We can only assume, therefore, that contestant has conceded that the authorities cited in the Brief of Appellants and the facts therein related satisfactorily establish that the trial court was completely carried away by the rising

well of emotionalism created by counsel for contestant when he held that Gail lacked testamentary capacity over the span of more than five years from execution of the will to her death.

The first case cited by contestant on the issue of undue influence is *In re Hanson's Estate*, 87 Utah 580, 52 P. 2d 1103. A comparison of the facts of the case at bar with those in the *Hanson* case reveals many distinctions. Here we have a woman fully capable of conducting her business affairs, who appeared normal and competent to the witnesses to the will and codicils on the three occasions of execution, who mingled freely with friends and relatives alike during the five years that the will and codicils were in existence. She was actually examined by a medical doctor and a psychiatrist prior to execution of the second codicil, who found her to be competent, and who gave professional opinions that she acted voluntarily and desired to dispose of her property in the manner provided in the codicil. We have a lawyer who prepared a will and codicils in which he was a beneficiary, but who at all times conducted himself in a gentlemanly, kindly manner, who was admired, and respected by Gail, and for whom Gail had an abiding affection and a great deal of sympathy over a period of many years. Here we have a man against whom not one word of testimony was introduced which showed that he ever forced, encouraged or induced Gail to perform a single act against her will, and against whom not one word of testimony was introduced to show he ever deceived

Gail, misrepresented facts to her, or endeavored to alienate her family from her. On the contrary, he was close to and friendly with every member of her family. Kostopulos was a friend of many years standing. He had helped Gail's father, and attended and assisted him in many ways before Mr. Swan's death. He aided and assisted Gail in countless ways over the years. He was known to everyone as her "very best friend." Theo not only approved but appreciated the services rendered by Macfarlane and Kostopulos to Gail. It is difficult to conceive how Gail, alone and friendless, would have fared during her declining years without the assistance of these two men.

In the *Hanson* case the evidence showed that Dr. McDonald secretly took Marie Hanson out and kept her until late hours; that he never associated with her publicly; that he falsely informed her that her brother-in-law was mismanaging her affairs; that he burglarized the brother-in-law's safe and stole books showing decedent's accounts and holdings, and that he prepared the will, spirited her to his apartment, furnished witnesses of his own choice, and had the will secretly executed. Even so, the Court expressed considerable doubt as to the sufficiency of evidence to support the trial court's finding of undue influence. What a vast difference from the case at bar where a medical doctor and a psychiatrist of high repute and who had no personal interest in the transaction, examined the testator and then unhesitatingly witnessed the codicil.

Respondent has attacked that portion of appellants' brief that considers presumptions and burdens of proof and states at page 28: "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." Respondent then proceeds to argue that the presumption of undue influence that arose in the case at bar did not disappear, but persisted to the very end.

Respondent makes this contention in the very teeth of *In re Bryan's Estate*, 82 Utah 390, 25 P. 2d 602, 609. In the *Bryan* case this court recognized and gave full credence to the presumption of undue influence that arose upon the showing of a confidential relationship, procuring a will, and heirship. This Court discussed the role of the presumption, the evidence necessary to dissipate the presumption, the burden of proof on the issue of undue influence, and the sufficiency of evidence to establish existence of undue influence. *In re Bryan's Estate*, *supra*, has never been overruled. The court in that case stated:

"This court is committed to the doctrine that, *when facts and circumstances are shown concerning which a presumption arises or is indulged, the presumption ceases*, and the case is to be decided on the evidence introduced independently of the presumption; that is, that the presumption is not evidence and has no weight as evidence. *In re Newell's Estate*, 78 Utah 463, 5 P. 2d 230 and *State v. Green*, 78 Utah 463, 6 P. 2d 177."

The "facts and circumstances" concerning preparation and execution of Gail's will and codicils were clearly shown by the evidence. On May 2, 1947 Gail came to Macfarlane's office and told him that she wanted to make a new will. She explained to him in detail how she wanted her property devised and to whom. She gave logical and reasonable reasons for her plan of devise (R. 202-205, 714-717). Thereafter, she returned to Macfarlane's office and he asked his secretary to find his office associate to act as the other witness to the will. Unable to find the office associate, his secretary went down the hall and found a young lady by the name of Vivian Weggeland. Vivian Weggeland was in no way associated or connected with Grant Macfarlane. The will was then executed and witnessed in the normal and customary manner.

In February of 1950 Gail again came to Macfarlane's office and stated that she wanted to revise her will, giving as one of the reasons the death of Jack Forsberg. She advised Macfarlane as to the manner in which she wanted the will changed and gave him logical and reasonable reasons for the changes which she desired to make (R. 206, 207, 718-720). She left the office and returned later, at which time the first codicil was executed and witnessed in the normal and customary manner. The said codicil was executed in the presence of Macfarlane's secretary and an office associate, attorney Irwin Clawson. Clawson had known Gail for a number of years (R. 834).

Shortly before April 23, 1951, Gail again came to Macfarlane's office and again stated that she wanted her will changed. Again she advised Macfarlane as to the manner in which she wanted the changes made and gave logical reasons for the changes that she desired to make. We have previously pointed out that on this occasion the changes resulted in Macfarlane's interest in the will being reduced in the amount of \$24,500.00 (R. 727-729). She advised Macfarlane that she desired to have an independent doctor examine her before the will was executed. Macfarlane suggested Dr. Adolph Nielsen, City Physician, and made an appointment for Gail to be examined by Dr. Nielsen. Dr. Nielsen on his own initiative and before he had ever seen or met Gail, made preliminary arrangements with Dr. Roy Darke, who also performed a psychiatric examination of Gail.

On April 23, 1951 Macfarlane met Gail at Dr. Nielsen's office. Gail was examined by Dr. Nielsen and given a careful psychiatric examination by Dr. Roy A. Darke. The two doctors agreed completely and without reservation that she was competent, that she was at ease mentally, that she was executing the will from her own desire and not from force or influence of anyone. On that very day, shortly prior to her visit to Dr. Nielsen's office, she had been to Dr. Frank's office alone and his records indicated that she was "feeling fine". (Exhibit 19).

The will was executed in the normal manner and witnessed by Drs. Nielsen and Darke.

In view of the foregoing facts, it is clear that the “facts and circumstances” were fully shown, and consequently that the presumption of undue influence ceased to exist.

The role of the presumption is particularly important in this case for the reason that if a finding of undue influence can be based upon confidence, preparation of a will and heirship this will must necessarily fail. But if evidence of the facts and surrounding circumstances pertaining to preparation and execution of the will dispel the presumption and make proof of undue influence necessary to a successful contest, then the will here must be sustained.

At this point we call particular attention to the language of *In re Bryan's Estate*, where it is said:

“ * * * Undue influence must be proved. *It will not be presumed from mere interest or opportunity.*”

“ * * * The mere existence of undue influence or an opportunity to exercise it, is not sufficient; such influence must be actually exerted on the mind of the testator in regard to the execution of the will in question . . .”

See also *In re Lavelle's Estate*, 248 P. 2d 372.

Counsel has summarized the so-called evidence of undue influence in the Brief of Respondent at page 55:

“They end their argument upon page 126 of their brief, with the statement printed in italics that there is not 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 simpleminded 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, and 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.”

The foregoing quotation from respondent’s brief reveals the startling truth that contestant’s counsel don’t even contend they have shown more than “mere interest or opportunity”. For what else does their summary contain?

It would not be amiss to consider the practical effect of the rule of law claimed for by counsel. A confidant who is either a close relative, doctor, religious adviser or lawyer is requested by a relative, patient, penitent, or client to help with preparation or procurement of a will and in that will is made a beneficiary. Such a will would fail by operation of law and the beneficiary stamped a fraud and a cheat regardless of the fact he made a full explanation and regardless of the fact that no evidence, other than of “mere interest or opportunity”

were introduced. Such is not and never has been the law of this jurisdiction. The presumption and necessity of explanation arises to protect the natural heirs from losing valuable rights through fraud and undue influence. The presumption disappears when explanatory evidence is introduced to protect an innocent confidant from losing a devise and being stamped a fraud and cheat without evidence. A claim that a person has exerted fraud and undue influence on another has always been a serious matter, and courts have always required evidence to support a finding of fraud and undue influence. In will cases in this state under the circumstances of this case where an explanation is made the presumption has served its protective purpose. From that point on inference and innuendo cannot and will not support a finding of fraud. Or to put it in the language, again, of *In re Bryan's Estate*, supra, a showing of "mere interest or opportunity" is not enough.

As far as their contention concerning lack of independent advice is concerned, we refer the court to our discussion of that subject in the brief of appellant. The fact that Gail mingled freely with friends and relatives alike for five years from execution of the will to her death, together with all of the other circumstances, reduces the claimed lack of independent advice to just another instance of the broodings and suspicions that form such a major portion of contestant's case.

In this connection it is also interesting to note that Gail's determination not to leave her entire estate to Theo dated back to a time long before she had met Macfarlane, and before she was anything more than a casual acquaintance of Kostopulos. It will be recalled that she met Macfarlane in September of 1944 (R. 187). Mortensen testified that on many occasions between 1935 when he first started preparing Gail's income tax and 1944 Gail had informed him that Theo had social position, was amply provided for, and that "she did not intend to leave much of her property" to Theo (R. 470, 487, 488).

Let us consider the authorities cited by counsel for contestant in support of their remarkable contention concerning the presumption of undue influence and the burden of proof.

The first case they cite is *In re Pilcher's Estate, Von Pilcher v. Pilcher*, 114 Utah 72, 197 P. 2d 143. The facts of that case are set out in some detail at page 29 of the Brief of Respondent.

Certain obiter dictum in Mr. Justice Wade's concurring opinion is to the effect that in order to overcome the presumption of validity of a marriage a litigant must present clear and convincing evidence as to its invalidity. The opinion of the court was actually that the first wife, attempting to prevent the second wife from administering the estate on the ground of illegality of the second wife's marriage, was estopped because her objection was

out of time. Neither the opinion of Justice Pratt nor the concurring opinion of Justice Wade in any way attempts to limit, alter or influence the effect of *In re Bryan's Estate*, supra, or the law as applied to the presumption of undue influence arising out of a confidential relationship, preparation of a will and heirship, in a will case. On the contrary, Mr. Justice Wade cites with approval *In re Newell's Estate*, 78 Utah 463, 5 P. 2d 230, in his discussion of the role of presumptions in Utah.

The next case cited by counsel is *Meacham v. Allen*, 262 P. 2d 285. This case involved the presumption that a deceased person was in the exercise of ordinary care for his own safety. This was a head-on collision. The question concerned whether the defendant or the deceased was driving on the wrong side of the road at the time of the collision. Defendants appealed from judgment on a verdict awarding damages to the plaintiffs and claimed that the court erred in instructing the jury as to the presumption that deceased used due care. *The court held that it was error to instruct on the presumption inasmuch as evidence had been introduced concerning the question of which of the parties was on the wrong side of the road.* This opinion sustains our contention that when evidence is introduced concerning a presumption of fact the presumption disappears and the question of fact is to be determined exactly as though said presumption had not existed. We quote from the opinion:

“ * * * but in this kind of a presumption upon the making of such showing, the presumption dis-

appears from and becomes wholly inoperative in the case, and the trial from then on should proceed exactly the same as though no presumption ever existed, or had any effect on the case."

The next case cited by contestant is *Peterson v. Budge*, 35 Utah 596, 102 P. 211. It appeared that Budge, the defendant, was a doctor and accepted a deed to real estate from Peterson, his patient. Peterson sued to set aside the deed upon the ground that Budge took advantage of a confidential relationship and obtained the deed through fraud, misrepresentation, and undue influence. Budge denied the plaintiff's allegations. The trial court found for Budge and dismissed the case. The Supreme Court reversed and ordered findings in behalf of Peterson, the plaintiff. There are obvious distinctions between the cases.

The rule of law for which the *Peterson* case stands is that where a confidential relationship exists *between contracting parties* who are also parties litigant, the burden of proof is cast upon the superior party to establish first, that he furnished the inferior party full information, and second, that the transaction was equitable and the consideration adequate. The court not only found that the confidential relationship existed, but found that a full revelation of the facts was not furnished by the superior party and also that the superior party gained an unconscionable advantage by payment of inadequate consideration. The case at bar and the *Peterson* case are readily distinguishable. Here no contractual

relationship existed between the parties litigant or between the maker and the beneficiaries of the will. No confidential relationship existed between the parties litigant. Furthermore, no adverse interest existed between the maker and the beneficiaries of the will. Evidence of a confidential relationship in a contract case bears upon the question of concealment or misrepresentation with resulting advantage gained by the one contracting party over the other. Whereas, evidence of a confidential relationship in a will case bears only upon the question of whether the will of the testator or testatrix had been overpowered. The very purpose of a will is disposal of all of one's property upon the contingency of death. No consideration running from the beneficiary to the maker of the will is necessary. The fact that a beneficiary also occupies a confidential relationship with the maker does not preclude him as a beneficiary, if such be the maker's will.

The next case cited by contestant is *Omego Inv. Co. v. Woolley et al.*, 72 Utah 474, 271 Pac. 797. In that case Woolley, the defendant, procured an important stock interest in plaintiff corporation from Baldwin, who owned the controlling interest in the corporation. Woolley had gained Baldwin's confidence; was his confidential adviser in whom Baldwin had the utmost faith. Woolley possessed superior knowledge, understanding and information concerning the investment company. He did not reveal this information to his confidant. His confidential relationship had been used to obtain a tremend-

ous advantage over Baldwin. Here again was a business deal in which the superior party to a confidential relationship obtained an unconscionable advantage over an inferior party.

In the case at bar there was no issue of superior information, concealment, fraud or misrepresentation. Gail knew that by her will she was leaving her property to the parties named upon the contingency of her death. Contestant can hardly make a claim to the contrary. No contest of conflicting interests was involved whatsoever, and, as we have pointed out, Gail's determination not to leave all her estate to Theo had been constant and steadfast for years, dating back to a time long before she had ever met Macfarlane (R. 470, 487, 488).

The next case cited by contestant is *Jardine v. Archibald*, decided January 24, 1955, 279 P. 2d 454. That case involved gifts made by decedent in her lifetime to certain of her children. The legality of these gifts was attacked following her death by other of her children. The distinction between the *Jardine* case and the case at bar is readily discernible. In a gift case there is an *immediate transfer*. The donor has lost the right to use and dispose of his own property. This fact alone would render any gift to a confidant immediately most circumspect. In a will case, the maker of the will has no intention of divesting himself of property, except only upon the contingency of death. Therefore, his position during his lifetime is not materially altered or changed.

The usual, customary and normal thing is for the various devises to be made to individuals occupying confidential relationships with the maker of a will. It is also a frequent and common occurrence for such a confidant to participate in preparation or to procure the preparation of a will. The law has always been uniform that such persons are not necessarily precluded from participation in the estate of a deceased person simply because they occupied a confidential relationship with deceased and participated in preparation of the will.

Mr. Justice Wade states the rule in the *Jardine* case as follows:

“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 principle by its own terms is confined to gift cases.

In the *Jardine* case the appellants claimed in their brief, among other things, that a confidential relationship existed between the donor and the donee and that the burden therefore rested with the donee to overcome the presumption of undue influence by clear and convincing proof.

It was respondent's position that the evidence did not establish a confidential relationship between the donor and the donee and that the evidence was sufficient to support a finding that the gift was freely and voluntarily made.

This court based its opinion upon the proposition that even though a confidential relationship existed, nevertheless the evidence, when viewed in the light most favorable to respondent, was adequate to support a finding of lack of undue influence. Therefore, the role of the presumption did not assume a position of importance in the case.

The *Jardine* case makes no effort to alter or modify. In re *Bryan's Estate*, or to in any way change the law of presumptions in a will contest in this state.

Counsel also drag in the old case of *Viallet v. Consolidated Ry. & Power Co.*, 30 Utah 260, 84 P. 496, decided in February, 1906. That case involved a personal injury and a release. Defendant's company doctor treated and cared for plaintiff and fraudulently misrepresented to plaintiff that his injuries were minor and temporary when as a matter of fact they were serious and permanent and thereby induced plaintiff to sign a release of his claim for the sum of \$120.00. Defendant's motion for non-suit was granted and plaintiff appealed. The court in reversing stated:

“In each of the two cases last referred to, the facts were equally within the knowledge of the plaintiff and defendant, and no relation of confidence and trust existed between the parties. In the case before us the jury might well have found from the evidence, as it now appears in the record, that respondent’s physician knew or had reason to believe that plaintiff’s injuries at the time he signed the release, were much more serious than he (the doctor) represented them to be, and that he intentionally concealed from plaintiff his real condition, and that plaintiff, on account of the doctor’s superior knowledge, accepted and acted upon the representations and assurances made by him respecting the condition and probable duration of his (plaintiff’s) injuries.”

The *Viallet* case doesn’t stand for the rule claimed for it by counsel. Furthermore, it doesn’t parallel a will case either in fact or in principle.

As far as we have been able to determine the *Peter-son* case has been cited by the Utah Supreme Court four times.

Froyd v. Barnhurst et al., 28 P. 2d 135, involved an equitable action to set aside a deed.

Olson v. Gaddis Inv. Co., 39 P. 2d 744, involved an action to rescind a contract for purchase of an apartment house.

Ashton v. Skeen et al., 39 P. 2d 1073, involved an action to set aside a contract between attorney and client.

Glover v. Glover, 242 P. 2d 298, involved an action to set aside a quitclaim deed.

In each of the foregoing cases the action was between persons claimed to have occupied a confidential relationship with each other and in which one person was seeking economic redress for advantages taken over him by a superior confidant.

As far as we have been able to determine the *Omega Inv. Company* case has only been cited by the Utah Supreme Court three times. *Ashton v. Skeen et al.*, supra, cites the case along with the *Peterson* case. *Mollerup v. Daynes-Beebe Music Co.*, 24 P. 2d 306, cites the case on another matter. *Jardine v. Archibald*, supra, also cites the case. Neither the *Peterson* case nor the *Omega Inv. Company* case has ever been cited by the Utah Supreme Court in connection with a will contest case where questions arising out of a confidential relationship and a claim of undue influence have been involved, although such cases have since been before the court many times. On the other hand *In re Bryan's Estate* has been cited four times. *In re Goldsberry's Estate*, 81 P. 2d 1106, involving a question of undue influence, cites *In Re Bryan's Estate* with approval. *In re George's Estate*, 112 P. 2d 498, also involving a question of undue influence, cites *In re Bryan's Estate* with approval. *State v. Bruno*, 85 P. 2d 795, 800 and *Malia v. Seeley* 57 P. 2d 357, 360, cite the case on an evidentiary matter of no interest here. *In re Newell's Estate*, supra, is one of the most frequently cited Utah will contest cases.

The following cases cite *In re Newell's Estate* in support of the proposition that when evidence concerning a presumption has been introduced the presumption becomes nonexistent:

Buckley v. Francis, 6 P. 2d 188;

Chamberlain et al. v. Larsen et al., 29 P. 2d 355, 362;

Fox v. Lavender, 56 P. 2d 1049;

Peterson v. Sorensen, 65 P. 2d 12;

Saltas v. Affleck, 102 P. 2d 493;

Buhler v. Maddison, 166 P. 2d 205, 208 and 176 P. 2d 118;

State v. Prettyman, 191 P. 2d 142;

In re Pilcher's Estate, 197 P. 2d 143;

Tuttle v. Pacific Intermountain Express Co., 242 P. 2d 764.

Finally counsel calls attention to the case of *Glover v. Glover*, 242 P. 2d 298, as citing with approval the case of *Peterson v. Budge*. This case likewise involved an entirely different principle of law than that now before the court. This was an action seeking to modify a prior divorce decree on the basis of extrinsic fraud. There was evidence to support a finding that the husband and wife had entered into oral agreement prior to the divorce by which the wife was to deliver a quitclaim deed to certain property to her husband. He was to sell the property and divide the proceeds. In reliance upon this understanding she then obtained a divorce and no men-

tion was made of the agreement concerning the property. The claim was made that she was induced not to present her claim to an interest in this property by the extrinsic fraud of her husband. The judgment of the lower court, sustaining a general demurrer, was reversed and the case remanded for trial on the basis that this was a matter which could properly be considered in the original divorce action and that it was not necessary to file an independent and separate action. The court merely cites *Peterson v. Budge* on an incidental matter. The *Glover* case does not stand for the proposition urged by contestant, either directly or inferentially.

It is clear that the Utah cases cited by contestant and the Utah cases cited by the proponents represent separate and distinct lines of authorities in separate and distinct fields of the law. It is likewise clear that the *Peterson*, the *Omega Inv. Company* and the *Jardine* cases have no materiality here.

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

Justice would then seem to demand an answer to the question: Where are the examples of undue influ-

ence to support the insidious accusations made by counsel? If contestant is not required to answer this question to the satisfaction of this court before a finding of undue influence is sustained, then Macfarlane and Kostopulos must stand forever branded as frauds and cheats solely on the basis of the accusations hurled against them. Counsel for contestant has claimed some items as evidence of undue influence. At page 57 of the Brief of Respondent appears the following statement: "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." As we have previously pointed out, the record does not substantiate contestant's claim. On the contrary, Butler's testimony shows there was no "discussion and agreement between the two." Contestant failed to point out that this testimony was allowed in the case against Kostopulos but excluded in the case against Macfarlane as being hearsay.

At page 58 of their brief, counsel for contestant state: "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 but Macfarlane had replied with this statement: 'Gail, you are a sick girl. You can't have your papers around the house.' "

The significance of the foregoing testimony is questionable. It is inconsistent with contestant's own claim at page 11 that Gail's confidence and trust in Macfarlane never ceased throughout her life. Furthermore, the foregoing testimony is not proper evidence. It is hearsay and the authorities are uniform that such evidence would not support a finding that Macfarlane ever held "papers" away from Gail. See *Wigmore On Evidence*, 3 Ed., Sec. 1738:

“ * * * (1) The testator's ‘assertion that a person’, named or unnamed, has procured him by ‘fraud’ or by ‘pressure’ to execute a will or to insert a provision, is plainly obnoxious to the Hearsay rule, if offered as evidence that the fact asserted did occur:

1868, COLT J., In *Shailer v. Bumstead*, 99 Mass. 122: ‘When used for such purpose, they are mere hearsay, which by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve’; “they are thus inadmissible so far as they form ‘a declaration or narrative to show the fact of fraud or undue influence at a previous period.’

For this reason such declarations of a testator are by most Courts regarded as inadmissible.”

It is interesting to note that counsel for contestant devote only four pages out of a 97 page brief to the

authorities cited by appellants in their brief. Counsel brush aside *In re Newell's Estate*, 78 Utah 463, 5 P (2) 230, with the statement at page 59: "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." They entirely ignore the fact that *In re Newell's Estate* is a will contest case, was cited and relied upon by this court *In re Bryan's Estate*, supra, as well as in many other will cases decided by this Court. They attempt to brush aside *In re Bryan's Estate*, supra, with the statement that it "did not contain the basic facts which must control the decision in the case at bar." As we have pointed out the very issue in *re Bryan's Estate* was the role of the presumption of undue influence in a will contest case where a confidential relationship existed and where the confidant participated in procuring and was a beneficiary in the will.

One of the remarkable aspects of the Brief of Respondent is the fact that no mention is made of *In re Lavelle's Estate*, supra. This is of particular interest inasmuch as *In re Lavelle's Estate* is unquestionably closer to the case at bar in fact situation and principle on the issue of undue influence than any other Utah case.

In that case, Immerthal and Hogg both occupied a confidential relationship with Mrs. Lavelle. They had cared for her and attended to her every need during a

three year period of invalidism prior to her death. Hogg lived at her home and the court found that he maintained an illicit relationship with Mrs. Lavelle. Immerthal was actually guardian of her person for a time before her death. A more perfect opportunity and motive for exerting undue influence could hardly be conceived. Mrs. Lavelle completely disinherited her half-sister and other relatives in behalf of the two confidants, Immerthal and Hogg. However, the court clearly pronounces the long standing rule of law that:

“To declare a will invalid because of undue influence, there must be an exhibition of more than influence or suggestion, there must be substantial proof of an overpowering of the testator’s volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising the influence rather than that of the testator.”

And again:

“ * * * a finding of undue influence cannot rest upon mere suspicion.”

In the Lavelle case circumstances were proven by proponents with respect to execution of the will and the Court held that contestant having failed to “point out the person who it is alleged exercised the undue influence and his acts constituting the alleged undue in-

fluence" must fail in the contest. All that contestant has been able to do with *In re Lavelle's Estate* is ostrich-like to ignore that case and to point to the *Peterson* case involving a confidant procuring a deed by fraud; the *Omega Inv. Co.* case involving a confidant procuring stocks by fraud; and the *Jardine* case involving a gift to a fiduciary.

CONCLUSION

Contestant would have this court completely discountenance the overwhelming evidence that Gail successfully met all qualifications for testamentary capacity; discountenance the testimony of the witnesses to the will and two codicils that no undue influence was exerted on Gail; discountenance the fact that the will and codicils were in existence for a period of five years prior to her death, during which time she mingled freely with her friends and relatives; discountenance the fact, and we reiterate it, that there is *not a whisper of evidence that Gail ever performed so much as a single act against her will*; and uphold a decision that undue influence had been continually exerted over Gail for a period of five years; a decision based on evidence which at most "... amounts to no more than mere opportunity, colored by respondent's hopeful suspicions." See *In re Lavelle's Estate*, *supra*.

We respectfully submit that this Honorable Court should reaffirm the Bryan and Lavelle cases and admit the will and codicils of Wilda Gail Swan to probate.

Respectfully submitted,

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