

1956

Theo Swan Hendee v. Walker Bank & Trust Co. et al : Petition for Rehearing

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Wayne L. Black; N. J. Cotro-Manes; Counsel for Defendants and Appellants;

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Case No. 8216

**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.

**PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF**

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Defendants and Appellants.

Case No.
8216

PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

COME NOW Grant Macfarlane and Daniel Kostopulos, defendants and appellants herein, and respectfully petition this Honorable Court for a rehearing in the above-entitled case and for an order modifying this Court's decision by granting to your petitioners a new trial in accordance with the law as declared in said decision.

We appreciate the fact that many petitions for rehearing are mere formalities which do not raise new and unlitigated issues. We submit, however, that such is not the case here. This Court has rendered a decision which, by its very nature creates problems and issues heretofore never briefed or argued by either party. Each of these issues separately, and all of them collectively, are focal points upon which the ultimate decision in this case could well turn.

This Petition is based on the following grounds:

Point I.

This court, by its opinion herein, has declared that the presumption of fraud and undue influence arising out of confidential relationship, procurement of a will and heirship shifts the burden to the confidential advisor of persuading the fact finder by a "preponderance" of the evidence that no fraud or undue influence was exerted. The trial court erroneously imposed upon the proponents of this will the burden of establishing lack of fraud and undue influence by "clear and convincing" evidence. Inasmuch as a greater burden of proof was imposed upon proponents than this Court has declared to be proper, the proponents should be granted a new trial.

Point II.

This court has held as a matter of law that Gail Swan had testamentary capacity to make a will. The erroneous findings and conclusions of the trial court that Gail lacked testamentary capacity to make a will vitally

affected the weight of evidence on the issue of fraud and undue influence and thereby prejudiced the proponents.

Point III.

The trial court, in its Memorandum Decision, erroneously declared that it was Macfarlane's "clear, unrevocable duty" to see to it that Wilda Gail Swan had independent advice in connection with the preparation and signing of the will and codicils. This court states in its decision herein, "As in the *Jardine* case, we recognize such a showing as an important factor in determining this question and reject the doctrine that without it such presumption is irrebutable." This court should grant a new trial so that the trier of the fact may consider lack of independent advice not as an "unrevokable" obstacle of proof on the part of the confidential advisor, but only as an important factor.

Point IV.

This court has rejected the "*prima facie* evidence rule" advocated by proponents and has approved the "preponderance of the evidence rule." With the burden of proving a lack of fraud and undue influence by a preponderance of the evidence resting with proponents, the erroneous admission into evidence over objection of defendant of the file in the *Becker* matter indicating that once before Macfarlane had been accused of fraud and undue influence was highly prejudicial. The fact the trial court stated that he thought such evidence was proper and was admissible indicates that the trial court con-

sidered improper matters in arriving at its decision.

Accompanying this Petition and filed herewith is a Brief in Support Thereof.

RAWLINGS, WALLACE,
ROBERTS & BLACK

Wayne L. Black
*Counsel for Defendant and
Appellant, Grant Macfarlane*

N. J. Cotro-Manes
*Counsel for Defendant and
Appellant, Daniel Kostopulos*

I hereby certify that I am one of the attorneys for the defendant, Grant Macfarlane, who is a petitioner herein, and that in my opinion, there is good cause to believe the judgment objected to is erroneous and that the case should be re-examined as prayed for in said petition.

DATED this.....day of March, 1956.

Wayne L. Black

BRIEF IN SUPPORT OF PETITION
FOR REHEARING

POINT I.

THIS COURT, BY ITS OPINION HEREIN, HAS DECLARED THAT THE PRESUMPTION OF FRAUD AND UN-

DUE INFLUENCE ARISING OUT OF CONFIDENTIAL RELATIONSHIP, PROCUREMENT OF A WILL AND HEIRSHIP SHIFTS THE BURDEN TO THE CONFIDENTIAL ADVISOR OF PERSUADING THE FACT FINDER BY A "PREPONDERANCE" OF THE EVIDENCE THAT NO FRAUD OR UNDUE INFLUENCE WAS EXERTED. THE TRIAL COURT ERRONEOUSLY IMPOSED UPON THE PROPONENTS OF THIS WILL THE BURDEN OF ESTABLISHING LACK OF FRAUD AND UNDUE INFLUENCE BY "CLEAR AND CONVINCING" EVIDENCE. INASMUCH AS A GREATER BURDEN OF PROOF WAS IMPOSED UPON PROPONENTS THAN THIS COURT HAS DECLARED TO BE PROPER, THE PROPONENTS SHOULD BE GRANTED A NEW TRIAL.

Mr. Justice Wade, in his Majority Opinion, reviews the Utah cases concerning the legal effects of various presumptions. He states:

"Some opinions in this court have held that the only effect of a presumption is to place on the disfavored party the burden of producing prima facie evidence to the contrary and thereupon the presumption is eliminated, and it is firmly established that such is the effect of many presumptions. However, we have also recognized that other presumptions are not so eliminated but have the effect of placing on the disfavored party the burden of persuading the fact finder that the facts are contrary to the presumed facts; some by a preponderance of the evidence, others by clear and convincing evidence, and still others by proof beyond reasonable doubt. * * * "

Thus, it can be seen that four lines of decisions have existed in the State of Utah. For the sake of brevity, we will refer to said lines of decisions as the "*prima facie* evidence rule," the "preponderance of the evidence rule," the "clear and convincing evidence rule," and the "beyond

a reasonable doubt rule.” The “beyond a reasonable doubt rule” has application primarily to criminal cases and is of no concern to us here.

At the trial of this case the position of proponents was that the “*prima facie* evidence rule” was applicable. Proponents cited in support of their position *In re Bryan’s Estate*, 82 Utah 390, 25 P. 2d 602, 609, where a Catholic priest had procured a will in which his church was made a principal beneficiary and where the court stated:

“*This court is committed to the doctrine that, when facts and circumstances are shown concerning which a presumption arises or is indulged, the presumption ceases, and the case is to be decided on the evidence introduced independently of the presumption; that is, that the presumption is not evidence and has no weight as evidence. In re Newell’s Estate*, 78 Utah 463, 5 P. 2d 230, and *State v. Green*, 78 Utah 580, 6 P. 2d 177.”

In the *Bryan* case, the burden of proving fraud and undue influence shifted back to the party claiming such fraud and undue influence upon the introduction of *prima facie* evidence of a lack of fraud and undue influence. We believed that the *Bryan* case correctly stated the law as it existed in Utah at the time of trial. We also cited to the trial court *In re Newell’s Estate*, 78 Utah 463, 5 P. 2d 230; *Anderson v. Anderson*, 43 Utah 26, 134 Pac. 553; *In re Lavelle’s Estate*, 248 P. 2d 372; *Peterson v. Sorenson*, 91 Utah 507, 65 P. 2d 12; *Buhler v. Maddison*, 109 Utah 267, 176 P. 2d 118; *Mecham v. Allen*, 1 Utah

2d 79, 262 P. 2d 285; *Tuttle v. Pacific Intermountain Express Co.*, 242 P. 2d 764, 769; *Gibbs v. Blue Cab*,Utah....., 249 P. 2d 213; *State v. Green*, 78 Utah 580, 6 P. 2d 177; *Clark v. Los Angeles & S.L.R. Co.*, 73 Utah 486, 275 Pac. 582; *Ryan v. Union Pacific R. Co.*, 46 Utah 530, 151 Pac. 71; *King v. Denver & Rio Grande Western Railroad Co.*, 116 Utah 488; 211 P. 2d 833.

Justice Hoyt in his dissenting opinion appears to be of the opinion that we were correct in our position. He states :

“ * * * I am strongly in favor of retention of the rule heretofore repeatedly announced by this court and adopted by the American Law Institute that when rebutting evidence is introduced, the issue should be decided upon the evidence — without having the jury or trier of the facts confused by incomprehensible explanations as to the effect of a presumption or as to the quantum of proof required to overcome a given presumption.

* * * ”

Counsel for the contestant on the other hand contended vigorously that the “clear and convincing evidence rule” was the proper principle of law to be applied in the case. In their written memorandum to the trial court following the oral arguments, counsel repeatedly referred to the “clear and convincing evidence rule” citing cases in support thereof. At page 8 of said Memorandum appears the following statement :

“ * * * The ‘basic facts’ so proven are of such substance and of such probative value that their establishment results in the conviction that

undue influence was exercised, *and such conviction can be dissipated and overcome only by clear and convincing evidence that there was no undue influence.*"

Counsel then cited the case of *In re Pilcher's Estate*, 114 Utah 72, 197 P. 2d 143. On the same page, counsel stated:

"There are two decisions of the Supreme Court of Utah 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, and *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 Pac. 797."

And again at page 17 of said Memorandum, counsel stated:

"The basic facts showing the relationships between Macfarlane and Kostopulos 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.* * * * "

The urgency with which counsel for contestant have always contended for the "clear and convincing evidence rule" can be fully appreciated by an examination of the Brief of Respondent on Appeal." At page 27 of counsel's brief, the following statement appears:

" * * * 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.

* * * ”

At page 30, counsel quotes the following from the *Pilcher* case, *supra*:

“ * * * Such presumption persists until it is overcome by clear, convincing and *conclusive* evidence.”

Commenting on said statement as follows:

“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. * * * ”

Counsel then discussed at length the *Jardine* case, the *Peterson* case and *Omega* case and summarizes as follows:

“The basic facts showing the relationships between Macfarlane and Kostopulos on the one side and Gail on the other persists 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.”

And then at page 56, counsel states:

“All of appellant’s conclusions reflect upon appellant’s 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.*”

At the time of trial the only Utah cases supporting the “preponderance of evidence rule” were *Walton v. Coffman*, 110 Utah 1, 169 P. 2d 97; *Baldwin v. Nielson*, 110 Utah 172, 170 P. 2d 179; *Bradley v. Miller*, 109 Utah 538, 167 P. 2d 978 and *State v. Steadman*, 70 Utah 224, 259 Pac. 326. None of these cases were ever cited or mentioned by contestant either at the time of trial or on appeal. The *Walton* case involved the presumption that the best interests of a child are served by its being in the custody of its natural parents. The court held that such presumption could be overcome by a preponderance of evidence to the contrary. The *Baldwin* case and the *Bradley* case involved the same presumption with the same holding. The *Steadman* case involved the presumption of innocence of a defendant in a bastardy proceeding. The court pointed out that a bastardy proceeding is not criminal in nature and that the presumption of innocence, although it existed, could nevertheless be overcome by a preponderance of evidence to the contrary.

The situation thus confronting the trial court was as follows: The proponents of the will contended vigorously for the “*prima facie* evidence rule.” The contestant of the will contended with equal vigor for the “clear and convincing evidence rule.” No one had the remotest idea that the law of Utah required the proponents to establish a lack of fraud and undue influence by a “preponderance of the evidence.” Certainly the trial court never expressed his belief that such was the law in Utah. He followed counsel for contestant’s view of the law at every stage in the proceedings and adopted the Findings of Fact

and Conclusions of Law prepared by counsel without so much as the change of a comma.

If the trial court had followed the “*prima facie* evidence rule” the decision would have been in favor of proponents. This court in its majority opinion, has conceded such to be the fact where it states :

“Under such rule the trial court’s finding of fraud and undue influence probably is not supported by the evidence, but if the burden of persuasion is shifted the finding is supported by proof of the basic facts of the presumption.”

Justice Hoyt put the matter somewhat stronger in his dissenting opinion where he states :

“As to the evidence in this case, I believe that a careful study of the transcript and the findings of fact and memorandum decision of the trial court will show that there is no evidence or no finding by the court of any act of deceit, deception, concealment, misrepresentation, solicitation or coercion on the part of Macfarlane or any attempt on his part to encourage or create discord between Gail Swan and her sister, Theo, or to persuade Gail to omit Theo from her will.”

If the trial court didn’t follow the “*prima facie* evidence rule” that leaves only the “preponderance of the evidence rule” and the “clear and convincing evidence rule” that the trial court could have followed. In view of the fact that nobody ever mentioned the “preponderance of evidence rule” or cited any cases in support of that rule, and in view of the fact that counsel for contestant contended so earnestly for the “clear and convincing

evidence rule” plus the fact that the trial court agreed with counsel for contestant and adopted without change their proposed findings of fact and conclusions of law, it is clear beyond dispute that the trial court did in fact adopt the “clear and convincing evidence rule.”

This conclusion becomes even more apparent when we consider the uncertainty of our own supreme court on the subject of presumptions. The Bryan case quite clearly adopted the “*prima facie* evidence rule” in a will contest case. Yet eight months after the trial court’s opinion in the case at bar this court in *Jardine v. Archibald*, 3 Utah 2d 88, 279 P. 2d 454, where a gift was made by a decedent to a fiduciary without consideration, stated:

“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 in compliance with equitable requisites.”

Now this court follows the “preponderance of the evidence rule” and states:

“This is contrary to our holding in the Jardine case, which is supported by the California cases and some other decisions that clear and convincing evidence to the contrary is necessary to overcome such presumption. We reach this conclusion because we feel that the rule is more clear and understandable than the rule requiring clear and convincing evidence; that this rule is more apt to produce a just result and is more generally

recognized as the correct rule governing this situation.”

The hardships arising from confusion as to the law of Utah should not fall on the shoulders of either litigant. Both are entitled to a trial according to what this court believes to be most conducive to producing a just result.

The supreme court of this state has developed a considerable body of law outlining the distinction between preponderance of the evidence and clear and convincing evidence, and in a recent case has reversed a trial court for instructing a jury that the burden of proving mutual mistake of fact was by a preponderance of the evidence rather than by clear and convincing evidence.

See *Kirchgester v. Denver & Rio Grande Western Railroad Company* (Dec. 14, 1950), Utah, 225 P. 2d 754, where the court granted appellant’s petition for rehearing in the following language:

“The appellant’s petition for rehearing is granted to allow us to consider on its merits the question of whether the lower court erred in refusing to instruct the jury that in order to avoid the release executed by the plaintiff, he must prove a mutual mistake of fact by clear and unequivocal evidence.”

The court reversed said case at 233 P. 2d 699, 700 and stated:

“The appellant’s petition for rehearing was granted in this case to allow us to consider on its

merits the question whether the trial court erred in denying the appellant's request that the jury be instructed that in order to avoid the release executed by the respondent, he must prove a mutual mistake of fact by 'clear and unequivocal' evidence. Instead, the court charged the jury that a mutual mistake of fact need only be proved by a 'preponderance of the evidence.' For the facts of the case, see our original opinion, Utah, 218 P. 2d 685.

"Upon the authorities cited in our opinion granting the petition for rehearing, Utah, 225 P. 2d 754, we conclude that the lower court erred in the particular above mentioned and that such error necessitates a reversal of the case for a new trial. It would serve no useful purpose to further discuss those authorities here."

The court then discussed the meaning of the words, clear and convincing and stated:

"We had occasion recently to examine the expression 'clear and convincing' evidence. See *Greener v. Greener*, Utah, 212 P. 2d 194, 205. There we remarked that 'for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a light, but a reasonable doubt as to the correctness of its conclusions, would seem to be in a state of confusion.'

"Further, we said: 'That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the

element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind.' See *Southwestern Bell Telephone Co. v. City of San Antonio, Texas, D.C.*, 4F. Supp. 570, 573 where it was stated that proof is not 'clear and convincing' if the court entertains a reasonable doubt."

In *Northcrest Incorporated v. Walker Bank and Trust Company, et al.*, (Sept. 29, 1952), 248 P. 2d 692, this court again defined the terms clear and convincing in the following language:

"For evidence to be clear and convincing it must be such that there is no serious or substantial doubt as to the correctness of the conclusion."

On the other hand, the burden of proof by a preponderance of the evidence requires only that the proof be "more probable," or that it be of "greater weight" than evidence to the contrary. See *Stoker v. Ogden City*, (Feb. 25, 1936), 54 P. (2) 849; *Alvarado v. Tucker*, (April 2, 1954), 2 Utah 2d 16, 268 P. (2) 986; *John Ainsfield Co. v. Rasmussen*, 30 Utah 453, 85 P. 1002; *Hickey v. Rio Grande Western Ry. Co.*, 29 Utah 392, 82 P. 29; and *Wilkinson v. Anderson Taylor Co.*, 28 Utah 346, 79 P. 46.

The total sum of evidence presented by the contestant on the issue of fraud and undue influence was that the proponents occupied a confidential relationship with the testator, had an opportunity to exert fraud and undue influence, that Macfarlane prepared the will in which he was made a substantial beneficiary, and that Macfarlane

did not obtain independent advice for Gail.

On the other side of the ledger was the uncontradicted evidence that Gail had an abiding affection for Macfarlane, Kostopulos and the Bridges, was deeply appreciative of their many acts of kindness and genuinely desired to make them beneficiaries in her will; that Gail appeared normal and competent to the witnesses to the will and codicils on the three occasions of execution; that the second codicil was actually witnessed by a medical doctor and a psychiatrist, who testified that in their opinion she was competent and business-like at the time said codicil was executed; that the will and codicils were in existence five years during which Gail mingled freely with friends and relatives, alike; and that at the time Macfarlane was last claimed to have been exercising fraud and undue influence on Gail he was actually writing a codicil to her will reducing his interest in the amount of \$24,500.00.

It is difficult for us to believe that the foregoing evidence did not preponderate against a finding of fraud and undue influence. Counsel for contestant commenting on the length of time the will and codicils were in existence stated at page 57 of the Brief of Respondent:

“Such fact, standing alone, may be evidence to be considered by the court, but it cannot be said to be clear and convincing proof.”

The many other important facts heretofore mentioned likewise would be entitled to consideration in determining wherein lay the *preponderance of evidence*, but

may not have been considered *clear and convincing* proof. From the record it is reasonable to assume that the trial court believed the preponderance or greater weight of the evidence was against a finding of fraud and undue influence but that such evidence was not clear and convincing. Proponents were not accorded a chance to prevail on this issue if the evidence preponderated in their favor.

This court has held that where a trial court sitting without a jury renders its decision under a misimpression of the law and prejudice results, such decision will not be allowed to stand.

In *Walker v. Peterson*, (Dec. 16, 1954) 3 Utah 2d 54, 278 P. 2d 291, the trial court, sitting without a jury, made the following comment as to the law applicable:

“* * * He who makes the left turn on * * * through highways must take the responsibility regardless of speed or any other circumstances, ***”

The court then found that both parties to the collision were negligent. This court in reversing the trial court made the following statement:

“It is true generally that statements made by the trial judge do not necessarily affect the validity of a judgment if it is otherwise sustainable. But this is not true if the statements make manifest that a material issue was analyzed by the court under an erroneous conception as to the law applicable thereto (as seems to have been done here) and under such circumstances that a correct application of the law might well have produced a different result. For the fact trier to be under such a misapprehension of the law would be com-

parable to having the jury find a verdict under erroneous instructions as to the law.”

In the case of *State v. Whitely*, (Utah S. Ct., Feb. 14, 1951), 110 P. 2d 337, the trial court sat without a jury where the defendant was charged with burglary in the second degree. The defense was that of alibi. In finding the defendant guilty, the trial court stated that it was his belief defendant had the burden of proving an alibi. This court reversed the trial court holding that the burden of proving guilt never shifts from the government in a criminal case. The court stated:

“In the instant case, the statements made by the court were matters of law upon which if given to the jury this court would base its reversal and order a new trial, as such instruction would have been erroneous.

“The case is reversed and the cause remanded for a new trial in accordance with the views expressed in this opinion.”

If this case had been tried before a jury and the jury had been instructed that it was incumbent upon the proponents to establish a lack of fraud and undue influence by clear and convincing rather than by a preponderance of the evidence, such an instruction under the *Kirchgestner* case, *supra*, would have been reversible error. The trial court as trier of the fact rendered its decision under the same erroneous impression as to the law of the State of Utah.

A will contest case is an action at law. See *In re Hansen's Estate*, 87 Utah 580, 52 P. 2d 1103; *In re Swan's*

Estate, 51 Utah 410, 170 Pac. 452, and this court's majority opinion herein. Therefore, this court cannot reweigh the evidence. Proponents should have an opportunity to establish their innocence of fraud and undue influence by a preponderance of the evidence if that is the law of Utah. Such an opportunity has never been accorded them. The trial court required clear and convincing evidence. This court has rejected that requirement and declared proponents right to trial under the preponderance of evidence rule. But a mere declaration of right unless translated into action is as "sounding brass or a tinkling symbol." The only way the trial court's error can be corrected is by granting proponents a new trial.

POINT II.

THIS COURT HAS HELD AS A MATTER OF LAW THAT GAIL SWAN HAD TESTAMENTARY CAPACITY TO MAKE A WILL. THE ERRONEOUS FINDINGS AND CONCLUSIONS OF THE TRIAL COURT THAT GAIL LACKED TESTAMENTARY CAPACITY TO MAKE A WILL VITALLY AFFECTED THE WEIGHT OF EVIDENCE ON THE ISSUE OF FRAUD AND UNDUE INFLUENCE AND THEREBY PREJUDICED THE PROPONENTS.

At page 6 of its memorandum decision, the trial court states:

"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 Kostopoulos."

In its Findings of Fact, Numbers 25, 26, 27 and 30, the trial court finds that when the will and codicils were executed, Gail lacked testamentary capacity. In its Conclusions of Law, Numbers 1, 3, 5 and 7, the court concludes as a matter of law that Gail lacked testamentary capacity to execute a will on the three occasions when the will and codicils were executed.

The quality of mind of the alleged victim is an important factor in determining the issue of fraud and undue influence. Obviously a strong minded individual is less apt to succumb to fraud and undue influence than one with a weak mind. A person having testamentary capacity is a less likely object of fraud and undue influence than a person lacking testamentary capacity.

The trial court held and apparently believed that Gail was so lacking in mentality that she did not have sufficient mind and memory to remember who were the natural objects of her bounty, recall to mind her property, and dispose of it understandingly according to some plan formed in her mind. This erroneous impression of the facts on the part of the trial court unquestionably placed an improper burden on proponents in negating the presumption of fraud and undue influence. This court in holding that the evidence did not sustain a finding of lack of testamentary capacity stated:

“This evidence when considered separately or all together does not indicate a lack of testamentary capacity but at most merely indicates a slightly below normal adult mental age. It does not indicate that she did not remember the natural

objects of her bounty or did not keep in mind her property or lack of ability to dispose of it understandingly in accordance with some purpose or plan. This is especially true in view of the volume of evidence to the contrary. The contestant had the burden of proving or persuading the trier of the fact by the evidence that she lacked testamentary capacity. We conclude that in view of all of the evidence the finding of the trial court that she lacked testamentary capacity was unreasonable and must be reversed.”

In an attempt to cleanse the record of the trial court’s error, this court adopts the following procedure :

“The case is remanded with directions that the findings and decree be corrected in accordance with the views herein expressed, but that the decision of the trial court be affirmed to the effect that the bequests to Macfarlane and Kostopulos are null and void for fraud and undue influence.”

But the serious question is, does the remanding of the case to the trial court with directions to correct its erroneous decision cleanse the record of prejudice to the proponents? This court in its majority opinion concedes that such prejudice in fact occurred when it states:

“The fact that Gail had testamentary capacity makes it more probable that she was not induced to make these bequests by fraud or undue influence.”

The trial court’s misimpression on this issue so colored the finding on the issue of fraud and undue influence that the only way in which the record can be corrected and true justice done the parties is for this court to grant a new trial. One of the trial judges of this juris-

diction has a saying that would seem to be particularly appropriate here. "You can take the fly out of the soup, but you can't take the taste of the fly out of the soup."

POINT III.

THE TRIAL COURT, IN ITS MEMORANDUM DECISION, ERRONEOUSLY DECLARED THAT IT WAS MACFARLANE'S "CLEAR, UNREVOCABLE DUTY" TO SEE TO IT THAT WILDA GAIL SWAN HAD INDEPENDENT ADVICE IN CONNECTION WITH THE PREPARATION AND SIGNING OF THE WILL AND CODICILS. THIS COURT STATES IN ITS DECISION HEREIN, "AS IN THE *JARDINE* CASE, WE RECOGNIZE SUCH A SHOWING AS AN IMPORTANT FACTOR IN DETERMINING THIS QUESTION AND REJECT THE DOCTRINE THAT WITHOUT IT SUCH A PRESUMPTION IS IRREBUTTABLE." THIS COURT SHOULD GRANT A NEW TRIAL SO THAT THE TRIER OF THE FACT MAY CONSIDER LACK OF INDEPENDENT ADVICE NOT AS AN "UNREVOKABLE" OBSTACLE OF PROOF ON THE PART OF THE CONFIDENTIAL ADVISOR, BUT ONLY AS AN "IMPORTANT FACTOR."

During the trial, counsel for contestant contended that failure of Macfarlane to see to it that Gail had independent advice before she executed the will and codicils was decisive of the case. This is indicated by the following statement appearing at page 16 of their trial memorandum with reference to the *Omega Investment* case, *supra*:

"Please note that the Supreme Court of Utah gave its fine approval in the foregoing to the decision of the Oklahoma court that, it is his duty, before accepting the conveyance, *to see to it that the grantor had disinterested advice and full information.*"

Although the language of the *Omega Investment Co.* case, *supra*, does not contain the meaning contended

for it by counsel at the time of trial, there is no doubt that the trial court adopted such meaning, and applied it to the case at bar. At page 2 of his Memorandum Decision, the Court states:

“* * * 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 unrevocable duty* to see to it that Wilda Gail Swan had independent advice in connection with the preparation and signing of such an important document.”

In Webster's New International Dictionary, Second Edition, Unabridged, the word revoke is variously defined as to revise, to repeal, to rescind, to cancel, to withdraw. The prefix “un” when used with verbs is declared to express the contrary or reversal and not the simple negative of the action of the verb to which it is prefixed.

Thus, it can be seen that the trial court believed that Macfarlane had a duty to secure independent advice that could not be revoked, revised, repealed, rescinded, cancelled or withdrawn.

This court, eight months after the memorandum decision of the trial court elaborated upon the law with respect to the need for independent advice where fiduciary relationships were involved in the case of *Jardine v. Archibald*, supra, where it stated:

“Appellants also cite Omega Investment Co. v. Woolley, 72 Utah 474, 271 P. 797 as placing Utah with the jurisdictions holding that independent advice is necessary to sustain a transac-

tion where a fiduciary relationship exists. We do not understand that case to have so held.”

Counsel for contestant in the Brief of Respondent have conceded that their original position with regard to the need for independent advice was erroneous in view of the interpretation of the *Omega Investment Co.* case, supra, by this court in the *Jardine* case, supra, where they state at page 37:

“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.”

To summarize the situation, counsel for contestant contended during the trial that the need for independent advice was an inflexible necessity. The trial court held with contestant and stated in his Memorandum Decision that Macfarlane had a *clear unrevokable duty* to see to it that Gail had independent advice before executing the will. Under these circumstances the fact that the evidence preponderated against the claim of fraud and undue influence became of secondary importance. It was conceded that no independent advice was obtained for Gail, and this settled the issue in the mind of the trial court. If the trial court in effect held, as we contend, that without independent advice the presumption of fraud and undue influence is irrebuttable, the case probably turned on this proposition alone. Here again the trial court has taken an erroneous view of the law; one upon which its decision may well have turned, and one which would seem to demand a new trial with the fact of lack of

independent advice cast in its proper perspective. We quote from the majority opinion:

“As in the Jardine case, we recognize such a showing as an important factor in determining this question *and reject the doctrine that without it such presumption is irrebuttable.*”

POINT IV.

THIS COURT HAS REJECTED THE “*PRIMA FACIE* EVIDENCE RULE” ADVOCATED BY PROPONENTS AND HAS APPROVED THE “PREPONDERANCE OF THE EVIDENCE RULE.” WITH THE BURDEN OF PROVING A LACK OF FRAUD AND UNDUE INFLUENCE BY A PREPONDERANCE OF THE EVIDENCE RESTING WITH PROPONENTS, THE ERRONEOUS ADMISSION INTO EVIDENCE OVER OBJECTION OF DEFENDENTS OF THE FILE IN THE *BECKER* MATTER INDICATING THAT ONCE BEFORE MACFARLANE HAD BEEN ACCUSED OF FRAUD AND UNDUE INFLUENCE WAS HIGHLY PREJUDICIAL. THE FACT THE TRIAL COURT STATED THAT HE THOUGHT SUCH EVIDENCE WAS PROPER AND WAS ADMISSIBLE INDICATES THAT THE TRIAL COURT CONSIDERED IMPROPER MATTERS IN ARRIVING AT ITS DECISION.

At and following the trial of this case, it was the position of the proponents that upon admission of *prima facie* evidence showing a lack of fraud and undue influence the presumption would disappear. It was clear that no actual evidence of fraud and undue influence existed in the case and we firmly believed that the trial court would find as a matter of law that contestant had failed to sustain her burden of proof on that issue. Such was our position on appeal to this court. This court has now declared that the burden of proof remained with proponents to establish a lack of fraud and undue influence

by a preponderance of the evidence. With the “preponderance of the evidence rule” to guide a determination of this issue, factors which might affect the credibility of the witnesses now become of utmost importance. Counsel for contestant offered in evidence at the trial the file in the Estate of George C. Becker, Case No. 31409 which contained the record of a will contest and an allegation that Macfarlane had exerted fraud and undue influence upon the decedent. The following events took place as shown at Record 244:

“MR. ROBERTS: In order for the record, we’d like to make an objection, your Honor, as to the materiality of this matter on anything pertaining to this case.

THE COURT: Well, I think it has, Mr. Roberts, some materiality. Just how much materiality it has this court isn’t in a position to say, but I am going to receive it in evidence and you may have your exception to the court’s ruling.”

And again at Record 245:

“THE COURT: Mr. Ray, will you state to the court the materiality of the proposed exhibit, as you view it?

MR. RAY: Yes. I’ll be glad to, if the court please.

THE COURT: All right.

MR. RAY: This witness is a member of the bar. He is an officer of this court. He is here charged with imposing upon his client. He has testified that he made no effort to see that this woman had any independent advice whatsoever.

Now right while these matters were going on he was charged in another case with being the beneficiary in the will of his client, a will which he himself drew. *That put him on notice, if he didn't have it before, of what the duties and obligations of a lawyer are to his client.*

THE COURT: From that standpoint you deem it material?

MR. RAY: Yes.

MR. ROBERTS: We object to it, your Honor, on the ground that it is immaterial.

THE COURT: The court will overrule the objection, and adhere to the former statement made by the court. It will be received in evidence."

Counsel for contestant claimed in support of the *Becker* evidence that the fact Macfarlane was accused of fraud and undue influence in that case put him on notice "of what the duties and obligations of a lawyer are to his client." That was the sole purpose for which the evidence was offered. No effort was made by counsel to relate just what were the "duties and obligations" to which he had reference. Counsel did make some reference to the fact that Macfarlane did not obtain independent advice for Gail. But the *Becker* matter could neither add to nor distract from this undisputed fact.

The issue was whether Macfarlane practiced fraud and undue influence on Gail, not the quality of his knowledge as to the duties and obligations "of a lawyer to his client." If he had a keener knowledge of his duties this would make it less not more likely that he practiced fraud

and undue influence on a client and if he practiced fraud and undue influence whether he did this act with a keen or a dull sense of duty would not add or detract from the illegality of the will. This is not a punitive action. This is an action to determine legality of a will.

Macfarlane was absolutely innocent of any wrongdoing in the *Becker* matter. The contest was dismissed and the will admitted to probate. But no amount of protestation of innocence or claim of immateriality could remove the harmful effect of this evidence. The stubborn truth is that the sole and only purpose for introducing the *Becker* matter in evidence was to inflame the mind of the trial court and to accomplish by prejudice what could not be accomplished by legitimate evidence. The success of this dubious enterprise can be seen in the results achieved.

Furthermore, it cannot now be successfully contended that the trial court was not influenced by such evidence, where he declared in allowing its admission that he thought it material and proper.

The general rule as to admissibility of this type evidence is set forth in 32 C.J.S. 433 Sec. 579 as follows:

“Evidence of similar acts or transactions is inadmissible when irrelevant to the issues in the case. Thus the law will not consider evidence that a person has, or has not, done a certain act at a particular time as probative of a contention that he has, or has not, done a similar act at another time.”

And in 1 Jones on Evidence, 247 Sec. 140 it is said:

“The question of relevancy frequently arises when the offered proof relates to transactions, acts and declarations of strangers or of one of the parties to the action in his dealings with strangers. Evidence of the latter sort in general, it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or toward certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man toward other persons.”

See also the following cases cited by Jones in support of the foregoing proposition:

Hartman v. Evans, 38 W. Va. 669, 18 S.E. 810, where evidence that the plaintiff habitually made usurious loans to persons other than the defendant is irrelevant to the issue as to usury in a loan to defendant.

Davis v. Meyer, 115 Neb. 251, 212 N.W. 435, 50 A.L.R. 1410, where it was held that circulation by others of rumors similar to the defamatory statements by the defendant is irrelevant in an action of slander.

Here no effort was made to show that the facts in the *Becker* matter were at all like the facts regarding Macfarlane's treatment of Gail. The reason given for offering said evidence on its face demonstrated that the evidence did not relate to any legitimate issue in the case.

And the evidence had the vice of giving rise to dark forebodings and suspicions which were unfounded in fact and extremely prejudicial in nature.

CONCLUSION

(1) This court has declared that the best rule and the rule it is following in this case is that proponents had the burden of proving lack of fraud and undue influence by a preponderance of the evidence. At the time of trial nobody had the remotest idea that the preponderance of evidence rule was the law of Utah. No cases were cited or argument made in behalf of said rule. Counsel for proponents earnestly urged that the “*prima facie* evidence rule” applied. Counsel for contestant just as earnestly urged that the “clear and convincing evidence rule” applied. Contestant prevailed and the trial court signed the findings of fact and conclusions of law prepared by counsel for contestant without a single change. The conclusion is inescapable that the trial court followed the “clear and convincing evidence rule.” We believe that in common justice proponents should be entitled to not just the hardships of the “preponderance of evidence rule” but to the benefits as well. Proponents should have an opportunity to prove lack of fraud and undue influence by a preponderance of the evidence if that is the law of Utah. They have certainly never yet had this opportunity.

In the *Kirchgestner* case, *supra*, this court has de-

clared that the difference in burden of proof between clear and convincing evidence and preponderance of the evidence is so vital that to impose one burden when the other is proper is prejudicial and reversible error. In the *Kirchgestner* case, this court granted a rehearing to air the very point we are now raising and reversed its own previous stand. We sincerely feel that we should be given the same opportunity here.

(2) This court has very justifiably held as a matter of law that Gail had testamentary capacity to make a will. The trial court incorrectly held both as a legal proposition and as a proposition of fact that Gail did not have testamentary capacity.

We ask the simple question, would proponents' chances of prevailing on the issue of fraud and undue influence have been enhanced if the trial court had correctly found as fact and determined as law that Gail had testamentary capacity? This Court, in its majority opinion, has conceded that such would be the case, and has thus conceded the prejudice to proponents from this obvious error by the trial court.

When the trial court's erroneous decision that Gail lacked testamentary capacity is added to the trial court's erroneous application of the "clear and convincing evidence rule" with regard to burden of proof the prejudice to proponents is compounded many fold.

(3) The trial court has imposed upon Macfarlane the “clear, unrevocable duty” to have seen to it that Gail Swan had independent advice in connection with the preparation and signing of the will and codicils.

This court in the *Jardine* case, *supra*, and in its majority opinion here has recognized lack of independent advice as an important factor but has rejected the doctrine that without it the presumption of fraud and undue influence is irrebuttable. The trial court’s erroneous impression of the law on this subject was decidedly prejudicial to proponents.

(4) The trial court wrongfully admitted in evidence and considered the inflammatory *Becker* matter. This evidence was duly accepted to by counsel for proponents.

At the time we wrote the Brief of Appellants we believed that the issue of fraud and undue influence would be resolved as in the *Bryan* case, *supra*, and that considerations of weight of evidence and credibility of witnesses would be immaterial. But in view of the present decision of this court, where the credibility of Macfarlane may very well have been decisive of the case, this highly inflammatory and improper evidence becomes of vital importance.

This evidence may very well have cast into the court’s mind such a feeling of bias and prejudice as to have rendered him incapable of believing Macfarlane even though there was no other evidence which in any manner effected his credibility or good character.

We respectfully submit that a rehearing should be granted in order that this Honorable Court may have an opportunity to fully hear and consider the new issues raised by its majority decision herein.

Respectfully submitted,

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RECEIVED copies of the within Petition
for Rehearing and Brief in Support thereof this
day of April, 1956.

Counsel for Plaintiff and Respondent