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In the Matter of the Estate of Margaret Schramm Holten, Paul Schramm v. Tracy-Collins Bank. & Trust Company As Executor of, the Purported Last Will and Testament of Margaret Schramm Holten, An Genealogical Society of the Church of jesus Christ of Latter-Day Saints, Melvin (Melville) I George Holten : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF MARGARET SCHRAMM HOLTEN,

Deceased,

PAUL SCHRAMM,

Plaintiff and Appellant,

v.

TRACY-COLLINS BANK & TRUST COMPANY, as Executor of the purported Last Will and Testament of Margaret Schramm Holten, and GENEALOGICAL SOCIETY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Defendants and Respondents,

MELVIN (MELVILLE) GEORGE HOLTEN,

Defendant.

Case No.
10281

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial District
Court for Salt Lake County
Honorable A. H. Ellett, Judge

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Defendant.

Case No. 10281

STATEMENT OF THE KIND OF CASE

The respondent adopts the statement of the kind of case involved in this appeal as stated in the appellant's brief. It is a will contest.

DISPOSITION IN THE LOWER COURT and RELIEF SOUGHT ON APPEAL

As stated by appellant, the lower court granted respondent's motion for a directed verdict at the conclusion of appellant's evidence, all parties resting at that time, and appellant now seeks a reversal of the lower court's order and judgment.

STATEMENT OF FACTS

The rules of this court require an appellant to make a complete statement of the material facts involved in the record on appeal, not merely as the appellant contends them to be, but viewing them as they must be on appeal, favorable to the judgment of the lower court.

The statement of facts in appellant's brief is so shockingly lacking in completeness and is so unfair in presentation that respondents are compelled to set forth a complete statement of facts.

The record in this case consists of the testimony and exhibits introduced by appellant. Respondents did not call a single witness or offer a single exhibit. It must be

assumed, therefore, that appellant presented the strongest case which he was able to present. At the conclusion of appellant's case it was so apparent to the trial court that appellant had failed to make a prima facie case, that when respondents also rested and moved for a directed verdict the motion was granted. The record fully and completely supports the trial court's action in granting that motion.

Margaret Holten was an ambitious and hard-working woman. In some manner not entirely made clear in this record, she accumulated or came into the possession of some means which enabled her to go into the real estate and investment business. By shrewd, careful, and frugal management, she gradually accumulated money and property until at the time of her death her wealth had become considerable.

Margaret Holten was the mother of a feebleminded son whom she called "Buddy." After his birth her husband deserted her. Margaret Holten cared for Buddy in her home for twenty-six years until his death in the spring of 1956. (R. 94)

Margaret Holten had very little contact with her brother, Paul Schramm, the contestant herein; his wife or two children, Byran Paul Schramm and Mary Schramm Ashworth. Paul Schramm moved to California in 1909. (R. 75) From that time to the date of her death, Margaret Holten periodically visited Paul Schramm in California. (R. 78)

In 1956, Margaret Holten visited with Paul Schramm at the time of the dedication of the L. D. S. Temple in

Los Angeles. (R. 81) At this time Byran Paul Schramm discussed with her business affairs and various stocks which they both owned. They also discussed an offer to purchase which Margaret Holten had received on a piece of property near the Sears, Roebuck store in Salt Lake City. (R. 120-21)

In July 1957, Margaret Holten again visited with Paul Schramm in Los Angeles. At this time they discussed some of the trust deeds which Margaret Holten owned. (R. 108)

After the July 1957 visit, it was not until July 1960, nine months after the execution of the holographic will, that Paul Schramm or his children had any personal contact with Margaret Holten. (R. 96, 100) During this time, Margaret Holten corresponded with Paul Schramm's wife. Paul Schramm noticed nothing in any of this correspondence which was unusual or different. (R. 75-76)

In July 1960, Paul Schramm's wife died. Margaret Holten traveled to California by bus to attend the funeral. (R. 113-14) At this time Paul Schramm noticed that Margaret Holten could not talk without stuttering. (R. 79) He observed that Margaret Holten refused to lie down or go to bed, but sat up in bed until 3:00 o'clock in the morning with the light on. (R. 80) Although Margaret Holten had difficulty with her speech at this time, she understood perfectly what Paul Schramm and his children said to her. (R. 109, 118)

At this time Paul Schramm did not attempt to con-

tact a physician to check Margaret Holten's physical condition. (R. 98) After the funeral Paul Schramm put her on the bus and sent her home alone. Subsequently, she sent a postcard and told Paul Schramm that she had arrived safely. (R. 98)

Neither Paul Schramm nor his children gave any opinion as to the testamentary capacity of Margaret Holten, nor did they know of any person who exercised undue influence or was even present at the time the holographic will was executed by Margaret Holten. (R. 109, 117, 127-28)

Margaret Holten had a close and intimate relationship with Pauline Hamilton from 1946 or '47 until shortly before her death. (R. 207) Margaret Holten taught Mrs. Hamilton and got her into the business of buying and dealing in real estate contracts. (R. 206) Mrs. Hamilton expressed the opinion that Margaret Holten was a very competent business woman and that there was never a time when she was unable to take care of her business affairs. (R. 207)

During the course of the close association, Margaret Holten told Pauline Hamilton how she wanted to dispose of her property at her death. Testatrix told Mrs. Hamilton on many occasions that she was going to give her property to the L.D.S. Church. After Buddy died in the spring of 1956, these conversations began and continued over the next few years, a substantial time before the execution of the formal will, dated February 18, 1959, and the holographic will, dated October 13, 1959. (R. 197, 200-202, 207)

Margaret Holten also especially indicated during this period that she did not want her brother, Paul Schramm, to have any of her property. Mrs. Holten had stated that her brother had never done anything for her or helped support her mother. (R. 196-97) Margaret Holten had talked to her brother about the care of Buddy if anything ever happened to her and she was unable to care for him. He told her that he would have nothing to do with his care. (R. 200)

Although Margeret Holten was an able and competent business woman, she was eccentric, irritable and somewhat of a crank. On one occasion a child of her neighbor, Mr. Morris, came on her property with a dog. Mrs. Holten came out of her house with a butcher knife swearing and chased the child off her property. (R. 156) She frequently swore at her neighbors. (R. 157) She called the police one time when Mr. Morris went on her property to remove her garbage. (R. 158) In an altercation with another neighbor, Mr. Atkin, she called the police and had him arrested. (R. 190-91) On one occasion Margaret Holten yelled at Mr. Atkin and told him that she hated him and that nobody liked him and that he was "ugly and sour". (R. 193)

Dr. Joyce Henrie, a psychiatrist, from an examination of Margaret Holten's diary, testified that Margaret Holten was a "chronic paranoid personality, bordering at times on a paranoid reaction." (R. 164)

Dr. Henrie stated:

"You would describe a chronic paranoid per-

> sonality as . . . by the lay people more described as a crank or an eccentric, someone who is always irritable and quarrelsome." (R. 165)

Notwithstanding Dr. Henrie's opinion that Margaret Holten was a chronic paranoid personality, she testified that she was mentally competent:

> "Q. . . . Now, doesn't this diary show evidence that Margaret Holton knew who her family was?
>
> "A. I said 'Yes.'
>
> "Q. And doesn't the diary show that she knew what her property consisted of?
>
> "THE COURT: Mr. Bowen, I don't think this doctor has ever said that the lady lacked mental capacity.
>
> "A. I certainly did not.
>
> "Q. You have not said that?
>
> "A. Certainly not. I have not inferred it. We haven't even discussed that." (R. 178)

Dr. Henrie also testified that Margaret Holten might be more susceptible to religious influence than other people. (R. 172-73) In further explanation she stated:

> "THE COURT: Would there be anything to her tendency to belligerency that would cause her to rebel against anyone trying to influence her, whether religious or not?

"A. She would be very prone to develop—to rebel toward people, but if the religion—the power as such were portrayed to her in a way that was convincing, I doubt that she would rebel toward that.

"THE COURT: Thank you.

"Q. Doctor, would she be less inclined to rebel against people who represent the power you just described?

"A. I think Mrs. Holten would rebel toward almost any person from what I have seen of her diary, irregardless of their affiliation."

Dr. Henrie further stated that there was no entry in the diary that would support a conclusion that Margaret Holten was prevailed upon by anybody to write the will in question. (R. 183) The entries in the diary would indicate that in February, 1959, she was capable of knowing that she was drawing a will and that she was capable of knowing her property and heirs. (R. 183) Dr. Henrie also stated that when the holographic will was written by Mrs. Holten the will itself indicated that she was in control of her decision as to whom she wanted as her executor because she made a change. (R. 185)

In 1959 Margaret Holten first met Bishop Buehner. She had gone to the Church offices to see one of the general authorities of the L.D.S. Church. Since Bishop Buehner was available he talked with her. Margaret Holten had come to discuss a problem with a neighbor who was encroaching on her property. (R. 148-49)

The second time they met was uneventful. Margaret Holten had only dropped in to Bishop Buehner's office to pass the time of day. (R. 149)

The third time she contacted Bishop Buehner at his office, she mentioned her impending hysterectomy operation, her invalid son and how she loved him, and that her husband had deserted her twenty-five or some years earlier. She told Bishop Buehner that she had a brother whom she hardly ever heard from, that she had worked hard in the real estate business, and that she had acquired a little property. She told him that she had decided to leave her property to the L.D.S. Church. (R. 149-50)

Upon learning of Margaret Holten's desire to leave her property to the Church and ascertaining that she had an interest in genealogy, he suggested that she might leave her property to the Genealogical Society of the L.D.S. Church. At no time did Buehner ask Margaret Holten to will her property to the Church or try to persuade her to make the Genealogical Society the vehicle for the accomplishment of her purpose. (R. 150)

With this background, Margaret Holten requested Bishop Buehner to arrange to have the Church's legal counsel draft a will for her. (R. 152) Buehner introduced her to Vernon Snyder. The introduction was brief. Buehner merely told Snyder that Mrs. Holten had requested him to ask Snyder to prepare a will and would he do so. After this introduction Buehner had nothing whatever to do with the preparation of the will. (R. 152, 153) He never saw the will nor discussed it further with

Snyder. He was unaware that it provided for him to be the executor. (R 141-43)

Mrs. Holten told Snyder what she wanted in her will and he prepared it as she directed. She specifically instructed him to provide that her property was to go to the Church. She also repeated what she had told Buehner; namely, she gave Snyder her brother's name, told him that she had a deceased son, that her husband had deserted her many years before, and that she did not want her brother to have her property. (R. 141-43)

A few days later, after the will was prepared, Margaret Holten came back to Mr. Snyder's office. The will was read aloud and she expressed satisfaction that the will was as she desired. (R. 134) After the will was executed on February 18, 1959, Snyder kept the document until the testatrix came and asked for it some time later. (R. 136) After this time Snyder never saw the will again and only saw Mrs. Holten a couple of times on the street. (R. 137-38) After February 18, 1959, neither Buehner nor Snyder discussed the subject of a will with Margaret Holten. (R. 137, 141-43)

On October 13, 1959, nearly eight months later, Margaret Holten wrote the will now under attack in her own handwriting. (Ex. C-7) The dispositive provisions of the holographic will were the same as the first will. However, in the holographic will, Margaret Holten had changed the executor from Bishop Buehner to the Tracy-Collins Bank & Trust Company. There is no evidence in the record as to who was present or the circumstances surrounding the execution of the holographic will. The

appellant frankly admits this in his brief. (p. 2) Mr. Snyder did not know that she had written the second will (R. 142); and neither did Bishop Buehner. (R. 152) The holographic will was found by the appellant and his children in a locked steel cabinet on Margaret Holten's porch two or three days after her death. (R. 87, 89)

On September 28, 1960, a year after the holographic will was executed, Margaret Holten consulted Dr. D. C. Bernson, a neurosurgeon, with a complaint of headaches and dizziness. (R. 210, 211) The consultation occurred in Dr. Bernson's office at which place Mrs. Holten presented herself unaided and unassisted. (R. 218, 219) At this time she knew that she was to see the doctor and gave the usual personal and medical information to Dr. Bernson's secretary, including the fact that she had a brother, Paul. (R. 218-219)

Dr. Bernson's tentative diagnosis of her difficulty was "some sort of mass, tumor or hematoma, or blood clot". (R. 213) He recommended that Mrs. Holten be hospitalized for further tests and diagnosis. This recommendation she refused to accept. Two months after his initial examination, Dr. Bernson wrote a letter to Mrs. Holten advising her of the seriousness of her situation and again recommending hospitalization. (R. 213)

In October, 1962, two years after Dr. Bernson's initial examination, a non-malignant tumor the size of a baseball was removed from Margaret Holten's skull. (Ex. C-3) The tumor was exceedingly slow-growing and was probably present for a long period of time, possibly six or seven years. It was located on the left side and involved the

temporal parietal areas which would affect the patient's memory. (R. 216-17) Dr. Bernson further testified that although he felt that this brain tumor had been present for a long time it would be difficult and largely conjecture to estimate how long it had been growing, and further, that it would be impossible to state with any certainty when the size of the tumor became such that it would affect her ability to know and understand what her business was, who her relatives were, or would interfere with her ability to make or formulate a plan of disposing of her estate. (R. 219-20)

On the basis of his examination of Margaret Holten and the hospital records, Dr. Bernson was unable to testify that on October 13, 1959, when she executed the holographic will, that she was mentally incompetent. (R. 220) However, in response to a hypothetical question, Dr. Bernson did state that:

> "If she was able to collect moneys and keep track of sums and additions and handle this sort of thing, I would—in my opinion I would say I think she was probably mentally competent at that time." (R. 223)

ARGUMENT

I *THE TRIAL COURT'S ORDER GRANTING A DIRECTED VERDICT WAS PROPER AND SHOULD BE SUSTAINED.*

Appellant's contention that he was entitled to have this case submitted to a jury is founded upon the argument that the evidence submitted by plaintiff created a presumption of testamentary incapacity and undue in-

fluence in the execution of testatrix's last will and testament. It is certainly clearly and unmistakably admitted by him that the record does not contain any direct, positive, or clear evidence on either of these propositions.

On page 2 of his brief, appellant concedes that there is no evidence as to where, or the circumstances under which, decedent's last will was written. There is no evidence that when this will, made on October 13, 1959 (Ex. C-7), was written, any person had any knowledge concerning it other than testatrix herself. There is no evidence in the record that Margaret Holten lacked testamentary capacity at that time, or that at that time she acted under a delusion, paranoid reaction, or other abnormal mental condition. Neither is there the slightest evidence that on that day, or any day near said date, any person connected with the L.D.S. Church or the Genealogical Society influenced testator in any way or made suggestions to her as to how she should write her will.

Appellant cites a decision of this court which lays down the rules by which testamentary capacity and undue influence are to be determined. The case of *In Re George's Estate,* 100 Utah 230, 112 P2d 498 (1941) cited by appellant in his brief, holds that there must be proof of facts which show that at the time the will was signed there was such pressure being exerted upon the mind of the testator that his volition was overpowered by it.

That case also holds that merely because the testator is old and weak and is emotionally unstable; that his will made two of his children his sole beneficiaries to the ex-

clusion of his other children; that one of the beneficiaries was instrumental in getting counsel to prepare and subscribing witnesses to witness the will; that the two beneficiaries named in the will had been in close association with the testator and had already received much property from him by way of gifts, and that his other children had been almost entirely excluded from association with him, was not enough to support a finding of undue influence of mental incompetency.

II *THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT TESTATRIX'S HOLOGRAPHIC WILL WAS NOT THE PRODUCT OF UNDUE INFLUENCE*

Almost all of appellant's brief is devoted to an attack upon a document which is not the testatrix's last will and testament at all. The circumstances surrounding the execution of that document are not even relevant to the issues of this case.

Appellant directs his main argument against a prior will of Margaret Holten written over seven months before her last will was executed. Appellant claims that because the testatrix executed a will on February 18, 1959, leaving the bulk of her estate to the Genealogical Society after consulting with Bishop Carl Buehner, at that time one of the general authorities of the L.D.S. Church, and after that document had been prepared by the Church's legal counsel at decendent's request, a prima facie case of undue influence was established against her last will, which presumption must remain until rebutted by the

respondents even though there is no evidence that either Buehner or said legal counsel were in any way connected with the preparation or signing of the last will. The only basis for such claim is that the two documents are similar in that they give to appellant only a nominal amount and the bulk of decedent's estate to the Genealogical Society of the L.D.S. Church. Because of this similarity, it is argued that the latter document must have been copied from the earlier one and therefore all of the alleged infirmities of the prior will automatically attach themselves to the last will. Appellant also argues that testatrix was abnormal mentally by reason of afflictions of body and mind and psychotic tendencies and was susceptible to suggestions and influence because of her peculiar religious beliefs.

Respondent submits that the argument of appellant rests not upon evidence but upon speculation, inference, and innuendo and upon the conclusions of a person who never saw the deceased. Furthermore, respondent submits that the testimony of the witnesses, upon whom appellant relies so heavily, does not support appellant's position and that the distorted, unrealistic picture painted by appellant's brief will not stand up under critical examination.

Margaret Holten was not a pathetic, defenseless old woman pictured by appellant as hopelessly unable to manage her affairs and decide upon the disposition of her property by will. The facts are that she was a woman of unusual competence in business affairs who, for over thirty years, alone and unassisted by anyone, built up a sizeable estate that would have been a credit to the most

accomplished, shrewd and able businessman. The record of her activities and accomplishments at the very time when this will was made is a complete answer to the unsupported claims of appellant. The following is quoted from the testimony of Pauline Hamilton, called by the appellant to be a witness and by whose testimony he is bound. Pauline Hamilton knew and associated with the testatrix for over thirty years. (R. 195) Pauline Hamilton's business association with Margaret Holten lasted from 1946 or 1947 until the time of decedent's death. She testified as follows:

> "Q. Did you ever find—did you come to any conclusion about whether Margaret Holten was a competent business woman?
>
> "A. Well, I considered her very competent although very ruthless.
>
> "Q. Now, Mrs. Hamilton, over what period of time did these business associations with Margaret Holton last?
>
> "A. Well, until shortly before she died.
>
> "Q. And when—
>
> "A. From about 1946 or '47.
>
> "Q. Was there any time that you ever observed her when she was unable to take care of her business affairs?
>
> "A. There was never a time she didn't take care of her business. That came first." (R. 207)

Appellant called no other witness who had known and associated with Margaret Schramm Holten intimately or frequently during the last years of her life. Both Viola Parkinson and Adele Bird, who had known Margaret Holten very well over a long period of time, were in court under appellant's subpoena during the trial but neither was ever called to testify. He called Mr. Atkin and Mr. Morris, neighbors of the deceased who were unable to get along with her. Neither of them gave any testimony even remotely tending to prove undue influence in connection with decedent's last will or proving her to be mentally incompetent. Their testimony was confined to the incidents of testatrix's sometimes unreasonable conduct toward them and members of their families.

Nor did appellant or his son or daughter, who also testified, provide any support to his claim of undue influence or testamentary incapacity. They all acknowledged that they had no proof of such influence ever having been exerted upon testatrix in connection with her last will. (R. 109, 117, 127-28)

This leaves Dr. Henrie and Dr. Bernson who were the only other witnesses who testified. On the subject of undue influence, Dr. Henrie stated that she had nothing whatsoever to offer. (R. 181, 183, 185) All that Dr. Henrie said was that in her opinion Margaret Holten, as revealed by the writing in her diary, was a person susceptible of being influenced by religious considerations. She stated that she had absolutely no opinion that this susceptibility had been used and worked upon by anyone at the time testatrix's last will was written and executed.

Dr. Bernson was not even asked to testify on the subject of undue influence.

In view of the foregoing state of the record, it is a gross overstatement for counsel to say that his claim of undue influence rests upon a presumption.

III *UNDUE INFLUENCE, THOUGH PROVEN, EXERCISED IN CONNECTION WITH A PRIOR WILL WILL NOT INVALIDATE A LATER WILL UNLESS THAT UNDUE INFLUENCE IS CONNECTED WITH THE LATER WILL BY COMPETENT EVIDENCE*

The law is clear with respect to the evidentiary effect of undue influence used in connection with a prior will upon a later will. The cases uniformly hold that if a will has been secured by undue influence and thereafter at a later date a new will is executed which confirms the first will or which contains the same provisions of the first will with respect to bequests or devises, the effect of the undue influence in connection with the first will is nullified, unless it can be shown by competent evidence that the same undue influence procured the execution of the later will or codicil.

In re Welch's Estate, 272 P.2d 512 (Cal. 1954), the court said the following at pages 516-17:

> "Almost two years after execution of the will, Myrtle added a handwritten codicil to her handwritten will, on the same paper, merely appointing Arthur as executor. Manifestly the testamen-

tary disposition of her property was then drawn to her attention, and yet Myrtle did not elect to make any change. While Geraldine argues that Arthur's conduct upon moving into Myrtle's home following the death of Myrtle's husband operated to coerce Myrtle into making the will in question *over three weeks later,* there was no semblance of a showing of any pressure or overpowering activity on his part at or near the time of her execution of the codicil. The latter act had the effect of reexecution of the will and removed any possible taint of undue influence which might be argued with respect to its original procurement.

* * * * *

"At most, the record here shows no more than that Arthur was so situated as to have had an opportunity to unduly influence the mind of Myrtle, and that his actions and conduct at times might be regarded as suspicious; but to say that from such evidence it may be found that Arthur 'overpowered the mind and bore down the volition of the [testatrix] at the very time the will was made' would be to permit Myrtle's will to be overturned not upon proof but upon speculation. In re Estate of Gleason, 164 Cal. 756, 765; 130 P. 872. Moreover, the final testamentary act in question was Myrtle's execution of the holographic codicil republishing her will, and as to which there was not the slightest basis for finding that it was the product of undue influence by Arthur."

In *Taft v. Stearns*, 125 N.E. 570 (Mass., 1920), the court said at pages 571-72:

"A will as modified by a codicil is thereafter

to be taken and construed as a will of the date of the codicil. Pratt v. Rice, 7 Cush. 209, 212.

"This principle is applicable to an instrument executed in form as a will, but inoperative as such because executed through fraud or undue influence, which is referred to as a will in a codicil subsequently executed freely, unaffected by fraud or undue influence. There is no reason why such a will, although invalid when framed because the result of the overpowering importunity of another, may not be adopted and declared as a true expression of testamentary desires after the vitiating control of the other dominating mind has been removed or has faded or subsided.

* * * * *

"The result is that, the answer of the jury having established the codicil as the free and untrammeled expression of the testamentary purpose of the deceased, and the will having been affirmed and republished by the codicil, both instruments should be admitted to probate."

In re George's Estate, 100 Utah 230; 112 P. 2d 498 (1941), this court said at page 503:

"Assuming that the father was dissatisfied with what he had done by those deeds, plenty of time had elapsed for him to have changed his mind, and to have concluded that the transfers were what he desired after all."

See also, *In re Baird's Estate*, 168 P. 561, 176 Cal. 381 (1917) and *Warren v. Sanders*, 287 S.W. 2d 146 (Ky., 1946). These cases illustrate the absurdity of claiming that

a presumption of undue influence in connection with an earlier will continues into the execution of a later will until it has been rebutted.

IV *THE EVIDENCE IN THE RECORD WILL NOT SUPPORT A PRESUMPTION OF UNDUE INFLUENCE*

With this background respondents now desire to address themselves to the contention of appellant that there was undue influence in the execution of Margaret Holten's will dated February 18, 1959.

We have already pointed out that there is no direct evidence in the record which even remotely supports appellant's proposition. Appellant's argument is based entirely upon the fact that the testatrix had talked with Bishop Buehner and had asked him to arrange to have the attorney for the Church draw her will.

V *THE EVIDENCE WILL NOT SUPPORT A PRESUMPTION THAT BISHOP BUEHNER USED UNDUE INFLUENCE IN CONNECTION WITH TESTATRIX'S LAST WILL AND TESTAMENT*

The facts were uncontradicted that Mrs. Holten sought out Bishop Buehner in the first instance. It was she who opened the discussion about her will and what she desired to do with her property and who stated that she wanted to give it to the Church. (R. 148-52) Substantially the same thing occurred in her conversations with Vernon Snyder. (R. 129-37, 141-44)

None of this testimony contains any evidence of undue influence having been used by either Bishop Buehner or Vernon Snyder, but it is argued this need not be shown because the relationship of the parties created a presumption of undue influence. It is true that in many instances where a bequest of money is made to a person, in some confidential or fiduciary relationship with the testator, who influences the making of a will in his favor, a presumption of undue influence will arise provided it appears that such gift was made under circumstances which show that the gift would not have been made except for the importuning of the donee and that such importuning overpowered the will of the testator, and either forced or improperly induced the making of the gift. (*In re Swan's Estate,* 4 Utah 2d. 277, 293 P2d 692) However, even in such cases, it is held that mere suggestion or request made to the testator is not undue influence.

In re Bryan's Estate, 82 Utah 390, 25 P2d 602 (1933) the court declared at page 410:

> "* * * The most that can be said is that during the few minutes he was alone with the testator, he, notwithstanding his testimony to the contrary, *may have suggested a disposition of the testator's property to the school over which he presided. Undue influence must be proved. It will not be presumed from mere interest or opportunity.* The opportunity to exercise influence, unless combined with circumstances tending to show its exercise, affords no presumption that it was in fact exercised." (Emphasis added)

Furthermore, the law is that there must be more than a showing of opportunity or desire to exercise undue influence. It must be actually exercised. *In re Hanson's Will*, 50 Utah 207, 221, 167 P. 256 (1917); *In re Bryan's Estate*, supra, at page 410; *Clark v. Johnson*, 105 S.W. 2d 576, 268 Ky. 591 (1937).

Also, before a presumption of undue influence arises, the donee must have secured some direct benefit for himself under the will or for someone close to him in order for undue influence to vitiate a will. *In re Bryan's Estate*, supra, p. 410:

> Prior to the making of the will, there had never been between them any confidence in the nature of confession or administration of sacraments. Father Kennedy was *not* a beneficiary of the will. Adams v. First Methodist Episcopal Church, 251 Ill. 268, 96 N.E. 253."

In the *Adams* case referred to above, cited by the court, the testatrix left all of her estate to the Methodist Episcopal Church. Her brother and sister attacked the will on grounds of mental incapacity and undue influence. The jury upheld the will which was affirmed on appeal. The Illinois court stated, on page 256:

> "It is argued that there was a confidential relation existing between the testatrix and the pastor and trustees of the church. Such a relation exists between a priest or spiritual adviser and his parishioner (Dowie v. Driscoll, 203 Ill. 480, 68 N.E. 56; Gilmore v. Less, 237 Ill. 402, 86 N.E. 568, 127 Am. St. Rep. 330), and, if the priest or

> spiritual adviser receives a gift from the parishioner, the burden is upon him to show the absence of undue influence, but the pastor has no financial interest in the church or the church property, and in this case the will conferred no benefit upon the pastor."

In Gilmore v. Atwell, 283 S.W. 2d 636 (Mo., 1955), the court, on page 641, quotes from Vol. 2 of Page, Wills, Section 840, p. 655, as follows:

> "No presumption of undue influence arises where a testator makes a gift for religious purposes with which the spiritual advisor of such testator is closely connected."

The court further stated, on page 642:

> "Under the proponents' cases, including the majority holding of court *en banc* in Tibbe v. Kamp, supra, in the light of the change effected in the law by Leohr v. Starke, supra, an inference of undue influence did not arise from the clergyman's activities in connection with his communicant's will, the Church, and not the clergyman, being the beneficiary."

See also, *Daugherty v. State Savings, Loan & Trust Co.,* 126 N.E. 545, 292 Ill. 147 (1920), in which the court stated on page 547:

> "* * * The only basis, if it can be said to be a basis at all, to support the claim of undue influence is that S. B. Montgomery, who drew the will, was a stockholder and officer of the banking institution made trustee and executor, and an

> officer of the Blessing Hospital board. So far as the proof shows, the testator went alone, on his own suggestion, to the bank and asked Montgomery to draw his will. Montgomery did so in a back room of the bank, and when it was completed two employees of the bank were called into the room and testator told them the document was his will, and asked them to sign as witnesses, which they did. There is no proof that Montgomery ever advised or suggested the making of the will or any of its provisions, *and the mere fact that institutions in which he was interested received substantial benefits from the will, under all the authorities, does not support the claim of undue influence.*" (Emphasis added)

See also, *In re Fletcher's Estate*, 269 P.2d 349 (Okla., 1954) and *In re Conway's Estate*, 79 A. 2d 208, 366 Pa. 641 (1951).

Measured by these standards, where does the record leave the appellant with respect to Bishop Buehner's connection with Margaret Holten's earlier will? First of all, there was no competent evidence produced by appellant which will support a finding that any confidential relationship existed between Bishop Buehner and the deceased. He was not her confidential business or spiritual advisor. She had never consulted him about how she should dispose of her property by will. She came to him with her mind already made up to give her property to the Church or one of its related institutions. The only question discussed between Bishop Buehner and decedent was which of the Church's institutions would best accomplish the purpose she had in

mind. On one occasion she asked for assistance in the settlement of a disagreement with a neighbor, and once, when she was sick, deceased requested the Bishop to give her a blessing. These two instances did not make Bishop Buehner Margaret Holten's spiritual advisor. Furthermore, there is no evidence at all to suggest any contention that Bishop Buehner was acting as the spiritual advisor of deceased on October 13, 1959; the record is the exact opposite of such situation. The record consistently shows the exact opposite of such contention.

In *Newell v. Halloran*, 68 Utah 407, 250 P. 96 (1926), cited by appellant in his brief, the court stated at page 414:

> "* * * Mere confidence in one person by another is not sufficient alone to constitute a fiduciary relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other."

There simply cannot be a finding that Buehner was guilty of undue influence based upon the evidence in the record. The evidence does not show that Buehner suggested in any way that Margaret Holten leave her estate to the Church or to its Genealogical Society. The record is the exact reverse. It is granted that Bishop Buehner was in a position to urge Margaret Holten to leave her property to the Society, but he did not do so, and, as pointed out, mere opportunity to exercise undue

influence is not enough; it must be actually shown to have been used. Furthermore, this earlier will created no personal benefit for Buehner. He got nothing for himself either directly or indirectly by its terms. The fine-spun, tenuous, and wholly unsupported claim of appellant that Buehner, because he was a general authority of the L.D.S. Church and may have received some intangible benefit from the will of Margaret Holten, is without merit. There are many cases where wills have left property to religious or charitable organizations at the suggestion of a priest or pastor or other religious figure or person in charge of such institution where it has been held that such connection between such institutions and its pastor, priest, or other person in control at the time a will is made is immaterial. *In re Bryan's Estate,* supra, at p. 411; *In re Hanson's Will,* 50 Utah 207, at p. 219, 167 P. 256 (1917); *Clark v. Johnson,* 105 S.W. 2d 576 (Ky, 1937); *Gilmore v. Atwell,* supra; *Daugherty v. State Savings Loan & Trust Co.,* supra; and *In re Conway's Estate,* supra.

VI *THE EVIDENCE WILL NOT SUPPORT A PRESUMPTION THAT VERNON SNYDER USED UNDUE INFLUENCE IN CONNECTION WITH TESTATRIX'S LAST WILL AND TESTAMENT.*

The same rules and tests that apply to Buehner's conduct with respect to Margaret Holten's earlier will also apply to Vernon Snyder, at that time legal counsel for the L.D.S. Church. There is, however, one additional factor in the case of Snyder. He was legal counsel for

the Church and its various organizations. In acting in the preparation of Mrs. Holten's will, he was in a position of trust and confidence. Would the fact that he operated in this dual capacity create a presumption of undue influence with respect to this earlier will? Respondent claims that the record entirely supports its contention that there was no evidence of undue influence. There is no evidence that Snyder violated any confidential relationship with Margaret Holten. He got no benefit from this earlier will. His position as scrivener of this will is not even remotely close to the situation involving McFarlane in the case of *In Re Swan's Estate*, supra.

But assuming that there may be some room for arguing that a presumption of undue influence arose because Snyder was the scrivener with respect to Margaret Holten's earlier will, there is positive evidence in this record which utterly, effectively, and completely destroys it. In the first place, the will of February 18, 1959, which counsel so vigorously argues is tainted by undue influence, is not the will under consideration. The last will of Margaret Holten was not dated February 18, 1959; it was dated October 13, 1959, over seven months after the earlier will was signed. This is a fact from which there is no escape. Furthermore, there is no escape from the fact that there is not one iota of evidence to connect either Bishop Buehner or Snyder with the execution of decedent's last will on October 13, 1959. Because of this fact the trial court properly ruled that before there could be any submission of the issue of undue influence to the jury because of any presumption which

may have attached to the earlier will, it was indispensable for appellant to connect the same undue influence with respect to the later will.

It is at this point that appellant's entire case for undue influence collapses. We have already demonstrated why this is so, by the cases and authorities which have been cited and which will not be repeated at this point.

There is an even more fundamental and basic reason why the appellant's claim of undue influence must fail. This is demonstrated clearly in the testimony of Pauline Hamilton, appellant's own witness, who was not associated with any will of decedent in any way and was wholly disinterested. Her testimony is a complete corroboration of what both Buehner and Snyder say occurred when Margaret Holten came to see them in February 1959, and stated to them her desire to leave her estate to the Church and not to her brother. It must be remembered that appellant's only complaint of error in this case is based upon an alleged continuing presumption of undue influence which, appellant argues, the trial court was bound to submit to the jury. Appellant clearly concedes that his whole case rests upon presumption and not upon evidence.

Now, what did Pauline Hamilton say about what Margaret Holten had told her, long before she ever saw Buehner or Snyder, about what she intended to do with her estate? For years before her operation in March 1959, for a hysterectomy, she had told Pauline Hamilton that she was going to give her property to the Church

and this statement was made to Mrs. Hamilton by the decedent on several occasions. This is Pauline Hamilton's testimony on direct examination by the appellant's own counsel:

> "Q. Now, calling your attention to the year 1959 and to the conversations that you may or may not have had with her during that period, I would like to ask you if she talked to you about her hysterectomy operation.
>
> "A. Yes, she did.
>
> "Q. And did she talk to you during that period of time about what she intended to do with her property in the event she died?
>
> "A. Well, she talked to me before she had her hysterectomy.
>
> "Q. How soon before?
>
> "A. Oh, it was—well, for years she told me how she wanted to dispose of her property.
>
> "Q. Would you relate if you can the conversation that you had with her previous to her hysterectomy operation?
>
> "A. You mean just before her operation, shortly before?
>
> "Q. Shortly before her operation.
>
> "A. Well, shortly before her operation she said that she wanted the Church to be the beneficiary of whatever she had. (R. 196)

On cross-examination, Mrs. Hamilton said:

"Q. And did Margaret Holten know that you were in that business?

"A. Not at that time, not until I moved in Canyon Road, and then I discovered that she was dealing in contracts, discounted real estate contracts.

"Q. Did she discuss these—

"A. Yes.

"Q. —transactions—

"A. Yes.

"Q. —with you?

"A. And she said that's how she made her money and she was able to stay home and take care of her little Buddy.

"Q. And did she make any suggestions to you about getting into that business?

"A. Well, at one time she thought I was bright enough to go into that business, and she could probably teach me something about it. I became interested in anything that I could make money legally, and so I got three contracts from her, a total of three. They were not the best, but at least I got started.

"Q. And did she teach you many things?

"A. She taught me about real estate contracts, yes. That's how I got into the business.

"Q. And how to service the contracts?

"A. Yes.

"Q. And how to collect on them?

"A. Yes. (R. 206)

After Buddy died, Mrs. Holten discussed the disposition of her estate with Mrs. Hamilton. Mrs. Hamilton had suggested to her that she leave her estate to a foundation for mentally defective children. Mrs. Holten repudiated this suggestion and on several occasions said the Church would get her property. (R. 200)

The following testimony was given also on direct examination by appellant's counsel:

> "Q. Now, did you inquire—after this particular conversation did you make any further inquiry as to what she had done with her property?
>
> "A. I couldn't care less what she did with it, but I do know that she mentioned several times that she was going to leave it to the Church. One time she said she would leave it to the Church, and then the Church could take care of her; and I said, 'Margaret, you are in no condition to have them take care of you now. You are able to take care of yourself,' and she said well, that's true, but she had been thinking about it." (R. 200-201)
>
> * * * * *
>
> "Mr. Frank Gustin: Would you repeat the question?

"REPORTER: 'Mrs. Hamilton, wasn't there an occasion of a conversation that you had with Margaret Holten when she mentioned that she had had a conversation with Viola Parkinson and that after that conversation with Viola Parkinson she had decided to leave her money to the Church?

"A. Well, she had said so many times she would leave her money to the Church that I can't remember the relationship between Viola Parkinson and saying this. She may have done. I wouldn't be sure." (R. 202)

Again on cross-examination, Mrs. Hamilton said:

"Q. You mentioned in your testimony that she talked about her brother.

"A. Many times.

"Q. Many times. And what she desired to do with her property, she told you that—

"A. Yes.

"Q. —Said that she wanted to leave it to the Church?

"A. Yes.

"Q. And didn't want her brother to have it?

"A. That's right." (R. 207)

The courts have considered statements by a testator of his intentions made before the execution of his last

will on the issue or claim of undue influence. Appellant cities such a case in his brief—*Longenecker v. Evangelical Lutheran Church,* 50 A. 244 (Pa., 1901). In that case it was, in effect, held that such declarations are to be given great consideration in connection with claims that undue influence procured the execution of a will. The count stated on page 246:

> "* * * There is no testimony in the case that Mr. Reist in any way induced, or attempted to induce, this old lady to do what is now made the subject of this complaint; on the contrary, it was shown by him that she often declared her intention of making some such gift."

Undue influence in cases of this kind where it has been found to exist, has always persisted up until the death of the testator. The will of Margaret Holten was in her possession for three years after she made it and before she died. It was in her house under her control. If this document had been induced by undue influence it could have been changed after that influence was removed. The fact that deceased retained this will in her possession and under her control for three years after it was executed is a circumstance of utmost importance to be considered in this case. It was found after her death locked in a steel cabinet in her home. (R. 87, 89) The fact that she did not destroy or change this will is further evidence that it represented her desires as to the disposition of her estate and further helps to nullify the contention of a continuing undue influence.

The record is uncontradicted that neither Snyder nor Buehner had any contact with Margaret Holten after

the earlier will was executed and had nothing whatever to do with the later one. (R. 137, 141, 142, 153)

Appellant, in arguing for the proposition of a continuing undue influence, suggests, at page 33 of his brief, that the withdrawal of funds by decedent from her joint account in Tracy-Collins Bank is evidence of a paranoid reaction and a continuing undue influence exerted upon her. The statement is patently absurd and deserves little comment or consideration. It is pure speculation and conjecture, not based upon any evidence. There could be a hundred plausible explanations and in the absence of evidence one would merit no more consideration than another.

In the face of testimony such as this, the claim that there is a presumption that the idea of leaving her property to the Church was put into the mind of Margaret Holten and originated in the minds of Carl Buehner and Vernon Snyder vanishes like fog in the sun. The testimony of both Snyder and Buehner, uncontradicted, sustained, and corroborated by appellant's own witness, Pauline Hamilton, shows that when the last will was written by Margaret Holten she was adhering to a decision made by her, long before she met Buehner or Snyder, that her property when she died would go to the Church and not to her brother.

Furthermore, the very fact that in her last will decedent removed Carl Buehner as executor as named in her first will, is eloquent testimony of the fact that if he ever had any influence with her as to the disposition of

her estate, it disappeared sometime between February 18, 1959, and October 13, 1959.

VII *THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT TESTATRIX HAD TESTAMENTARY CAPACITY AT THE TIME OF THE EXECUTION OF THE HOLOGRAPHIC WILL.*

Appellant's final argument is on the issue of alleged testamentary incapacity. On that issue the burden of proof was on the appellant and never could be fixed to the respondents. On that issue, appellant was required to do more than make out a prima facie case. He had the burden of proving testamentary incapacity by the preponderance of the evidence.

It is useless for appellant to assert or even to prove that the cause of decedent's death was a brain tumor from which she died on October 14, 1962, or that she had other infirmities and disabilites, or that she was a peculiar personality or could have been easily influenced through appeals to her religious belief, or that her attitude toward her brother was unnatural in that she imagined without justification that he did not care for her and was only interested in her money, or that she thought that he had tried to kill her on one occasion. Such matters are of no consequence unless it is shown that, by reason of these conditions, the testatrix was unable to recognize the natural objects of her bounty or to know and understand what property she owned and to form a plan for disposing of it by will. These are the only tests

of testamentary capacity which the law applies to a determination of that fact.

In re Hanson's Will, 50 Utah 207, 167 P. 256 (1917), the Court stated at page 222:

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

In re Buttars' Estate, 123 Utah 596, 261 P. 2d 171 (1953), the court stated at page 601:

> "* * * The evidence related above is proof that testatrix was eccentric in her actions and forget-

> ful at times of some things, but is utterly insufficient to sustain the contestants' burden of proving by a preponderance of the evidence that she lacked testamentary capacity at the time she executed the Will."

A very enlightening case upon the effect of an abnormal personality, specifically, a testator alleged to have been a paranoid, is cited in appellant's brief (p. 38). This case is *In re Hansen's Will,* 52 Utah 554, 177 P. 982 (1918), wherein this court stated at page 567-68:

> "Counsel for contestants do not claim that the testator was generally insane, but contended 'that he entertained beliefs respecting his children, and respecting other people, and respecting his money and the disposition he should make thereof, which were without foundation in fact' and in the execution of his will he was the 'victim of' progressive paranoia, an incurable disease, which related to and influenced the provisions made for strangers and the exclusion of his children. In other words, he was laboring under an insane delusion with regard to objects of his bounty. Counsel have cited no cases, nor authority, and we think none can be found, where similar facts and circumstances as detailed by the contestants' witnesses were held to be sufficient to support a finding by either court or jury of mental incompetency to make a will."

The court in conclusion stated at pages 570-71:

> "Upon what reasonable hypothesis may the

> courts penetrate the mind of this man and find that his was an 'unnatural will,' or treat the testimony in this case as even tending to establish that he was controlled by an 'insane delusion' in the making of his will? If, under the record here, we are to sustain the contention of contestants, that we may not disturb the verdict of the jury in finding the will invalid, then, indeed, the civil right of making testamentary disposition of property in this state is but as the will-o-the-wisp, and forever disappears upon the bald assertion of the medical expert that the individual who seeks to exercise the legal right to do so labored under an insane delusion, and that his eccentricities, habits, and conduct of life are conclusive of the fact. *Such is not the law of wills.*" (Emphasis added)

The above mentioned cases support the proposition that peculiarities and idiosyncrasies and attitudes and hostility toward close relatives, even children, are no proof of mental incapacity to make a will. We have nothing in the record of this case more than some evidence of these things which the cases all say will not support a finding of testamentary incapacity.

The two experts who testified would not conclude, despite all of the entries of the diary and the physical infirmities of the deceased, that she did not retain sufficient mental capacity to make a will on October 13, 1959. If anyone could have given an opinion that Margaret Holten was mentally incompetent, it was Dr. Henrie and Dr. Bernson based upon the entries in her diary and upon the medical records introduced in evidence. They were furnished with information upon which their

expert knowledge could form a conclusion, assuming her particular mental peculiarities and abnormalities and the effect of her physical infirmities upon her behavior. Dr. Henrie refused to voice any opinion that Margaret Holten had been unduly influenced in the making of her last or any will or that she was mentally incompetent to make a will. (R. 177, 178, 181, 183, 185) Dr. Bernson stated that if Margaret Holten had capacity to take care of her affairs, collect money, etc., a year before he saw her, she probably was mentally competent at that time. (R. 220, 222, 223)

CONCLUSION

Based upon the record in this case, there was absolutely no evidence that the last will and testament of Margaret Schramm Holten was the product of undue influence exerted upon her on October 13, 1959, or that she, on that date, did not possess sufficient mental capacity to execute her last will and testament. On the contrary, the evidence is clear that she had testamentary capacity and that there was no undue influence. The record further shows that there could be no presumption of undue influence because the record is clear and uncontradicted that Margaret Holten, long before she ever saw either Bishop Buehner or Vernon Snyder, had determined that she would leave her property to her church when she died and not to her brother. This being the state of the record when plaintiff rested, the trial court should have granted respondent's motion for a directed verdict at that time and should not even have required that respondents rest their case before granting such motion. It is sub-

mitted, therefore, that the ruling of the trial court must be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

By
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