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I. INTRODUCTION

Will contests are a subtle form of malpractice action in which disappointed relatives attempt to destroy a lawyer's handiwork because the lawyer drew a will for someone who did not meet the test for competency. Probate practitioners are victimized by gnawing fears that some overaggressive trial specialist will sabotage the well-laid testamentary plans of one of his or her solid and sensible clients by persuading a jury that the will was the result of undue influence or duress.

A sufficient number of will contests are filed each year to make the tactics and strategy of waging war on a will important to every practitioner. Disappointed family members may allege that the decedent's will was executed when the testator lacked testamentary capacity, was under undue influence of another, or was induced to make a will through fraudulent representations or duress.[1] Consequently, probate and estate planning specialists and other lawyers who regularly make wills and trusts might well benefit from a consciousness-raising session on the grounds for breaking wills and trusts under Indiana law. In addition, trial practitioners must learn to appraise the probability of success or failure in a will contest early in the client-contact stage of a case so that hopeless cases may be avoided.

This Article will establish that the vast majority of wills attacked in Indiana as the product of an unsound mind, undue influence, fraud, or duress are eventually sustained by appellate courts despite serious mental aberrations of the testators who executed them. This conforms to the American judicial pattern which sustains wills when at the same time simple contracts would be avoided as the product of an unsound mind. This Article will also encourage the careful

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[1]For a detailed analysis of the American law of testamentary capacity *see* Reed, *The Stolen Birthright—An Examination of the Psychology of Testation and an Analysis of the Law of Testamentary Capacity—A Modest Proposal*, 1 W. NEW ENG. L. REV. 429 (1979) [hereinafter cited as *A Modest Proposal*].

practice of preventive law by will drafters in order to minimize the possibility of an expensive, albeit unsuccessful, will contest when faced with the task of making a disinheriting will for a client. In addition, this Article should be helpful to litigators who must bear the substantial burden of proof and presumption problems for contestants in will contests.

This study is based on a survey of 123 Indiana appellate decisions reported since 1854 involving wills contested on the basis of lack of capacity, undue influence, fraud, or duress. Findings from this survey appear throughout this Article in support of assertions made concerning Indiana will contests.

II. TESTAMENTARY CAPACITY IN INDIANA

Indiana courts have recognized five independent grounds on which a will may be avoided at law: lack of testamentary capacity, undue influence, fraud, duress, and want of due execution.[2] Of these five statutory grounds for avoiding wills, lack of capacity, undue influence, and fraud are the most significant.

The English standard for testamentary capacity originated in two different court systems. The ecclesiastical court system administered those wills, or portions of wills, which attempted to transfer personal property. After 1540, the King's common law courts administered wills, or portions of wills, which devised real estate. The Statute of Wills,[3] passed in 1540, stated that idiots and persons of non-sane memory were precluded from making a will at common law.[4] The Canon Law impediments to a valid testament, the

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[2]IND. CODE § 29-1-7-17 (1976) provides in part:

> Any interested person may contest the validity of any will or resist the probate thereof, at any time within five (5) months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

The statute and its predecessors have been interpreted to include a cause of action for undue influence under the rubric of want of due execution. *See, e.g.*, Barr v. Sumner, 183 Ind. 402, 408, 107 N.E. 675, 677 (1915); Wiley v. Gordon, 181 Ind. 252, 258, 104 N.E. 500, 502 (1914); Clearspring Township v. Blough, 173 Ind. 15, 24-25, 88 N.E. 511, 514 (1909); Willett v. Porter, 42 Ind. 250, 254 (1873); Reed v. Watson, 27 Ind. 443, 445 (1867); Kenworthy v. Williams, 5 Ind. 375, 377 (1854); Kozacik v. Faas, 143 Ind. App. 557, 565, 241 N.E.2d 879, 883 (1968).

[3]The Act of Wills, 1540, 32 Hen. 8, c.1.

[4]The bill concerning the explanation of wills, (1542-43), 34 & 35 Hen. 8, c.5, § 14. This statute provides in part that "wills or testaments made of any manors, lands, tenements, or other hereditaments, by any . . . idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law." *Id.*

most important of which was "defecta mentis sua" (unsound mind), were enforced by the ecclesiastical courts.[5] By the 1780's, English courts had devised a legal test for testamentary capacity. The testator had to be aware at the time of executing the will of those persons who would be intestate successors. The testator also had to be aware of the components of his or her estate and its general value. While keeping these elements in mind, the testator had to be able to make a rational plan for disposing of his or her assets at death by the medium of a will.[6] The first two elements of this formula were forcefully stated in Lord Kenyon's charge to the jury in *Greenwood v. Greenwood*.[7] The "rational plan" element was added by the case of *Harwood v. Baker*.[8] This combined *Greenwood-Baker* Rule was adopted by New York in the early nineteenth century and passed into Indiana case law through the popular treatises on wills brought to the west by the nineteenth century lawyers.[9] The two lines of authority, together with most of the baggage of the common law of property, passed into American law through the colonial courts and went west into the Northwest Territory in the 1780's.

A. The Doctrine of Testamentary Capacity in Indiana

Although some Indiana cases have tried to refine the standard *Greenwood-Baker* formula for determining testamentary capacity, most Indiana decisions restate the New York Court of Appeals' formulation of the doctrine taken from the leading mid-nineteenth century case of *Delafield v. Parrish*.[10]

> [I]t is essential that the testator has sufficient capacity to

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[5]The ecclesiastical impediments to execution of a valid will were: (1) *propter defectum suae potestais* (those who could not make wills, such as a son, a slave, or a monk, because of servile status); (2) *propter defectum mentis* (those who were mentally defective, mentally retarded, madmen, or prodigals); (3) *propter defectum sensualitatis* (those who were blind, deaf, or dumb); (4) *ratione poenalitatis* (criminals in prison); (5) *ratione dubietatis* (those whose legal status was doubtful). For an elaboration of Canon Law impediments to making a will, *see* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (5th ed. 1943).

[6]The first case to construe the provisions of the Statute of Wills relating to idiots and persons of non-sane memory was Pawlet Marquess of Winchester's Case, 77 Eng. Rep. 287 (K.B. 1601). That decision did little to interpret the statute. Later 18th century cases grappled with the appropriate instruction to the jury concerning this provision of the Statute of Wills. *See, e.g.*, Greenwood v. Greenwood, 163 Eng. Rep. 930 (K.B. 1790).

[7]163 Eng. Rep. 930 (K.B. 1790). *Greenwood* is in reality a report of Lord Kenyon's charge to the jury in a will contest, containing the current state of the law of testamentary capacity as evolved in trial courts over several centuries.

[8]13 Eng. Rep. 117 (P.C. 1840).

[9]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-27 (1973) for a description of this process.

[10]25 N.Y. 9, 9 N.Y.S. 811 (1862).

> comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the case, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.[11]

In order to adjudge that a testator had the requisite testamentary capacity when the will was executed, an Indiana court must find

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[11] *Id.* at 29, 9 N.Y.S. at 816. *See also* 2 W. BLACKSTONE, COMMENTARIES* 496-97. Indiana had no appellate decisions which articulated a standard for determining when testamentary capacity had been disproven until Bundy v. McKnight, 48 Ind. 502 (1874). In *Bundy*, jury instructions eight and nine concerning testamentary capacity were challenged on appeal and sustained in pristine form by the Indiana Supreme Court. The instructions read as follows:

> 8. While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and excuted; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained.
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> 9. To enable a person to make a valid will, it is not requisite that he shall be in the full possession of his reasoning powers, and of an unimpaired memory. Few, if any, persons are in the full possession of their reasoning faculties when enfeebled by age or prostrated by disease. A large majority of wills are made when the testator is upon his deathbed, and when the mind and body are more or less affected by disease and suffering; nevertheless, a person prostrated by disease is capable of making a valid will, if at the time of its execution he has mind sufficient to know and understand the business in which he is engaged.

48 Ind. at 511. Indiana cases dealing with testamentary capacity tend to use the *Bundy v. McKnight* formula for stating the elements of testamentary capacity. Ramseyer v. Dennis, 187 Ind. 420, 425-26, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415, 107 N.E. 675, 679 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806 (1962); Powell v. Ellis, 122 Ind. App. 700, 709-10, 105 N.E.2d 348, 352-53 (1952).

that the testator: (1) knew the natural objects of his or her bounty;[12] (2) knew the nature and extent of his or her property (in general, what he or she owned or controlled and its approximate worth at the time the will was drafted);[13] and (3) was able at the time of making and planning the will to keep the two prior factors in mind and make a rational plan for disposing of his or her property after death.[14]

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[12]In Indiana, objects of one's bounty refers to the persons who would take the testator's property according to the laws of descent. This standard for limiting "natural objects of one's bounty" has been articulated in at least two Indiana appellate court cases, Egbert v. Egbert, 90 Ind. App. 1, 5, 168 N.E. 34, 35-36 (1929) and Jewett v. Farlow, 88 Ind. App. 301, 303-04, 157 N.E. 458, 459 (1928). In an earlier case, Bradley v. Onstott, 180 Ind. 687, 694, 103 N.E. 798, 800 (1914), the Indiana Supreme Court held that the jury may consider whether or not the proposed will disinherited the testator's children or their descendants, a natural object of bounty, which the law recognizes as natural objects of the testator's bounty. However, in Barricklow v. Stewart, 163 Ind. 438, 440, 72 N.E. 128, 129 (1904) the supreme court stated that the testator's mistaken impression that an individual would take an intestate share in his estate was not admissible on the issue of the testator's want of capacity. Indiana probably follows the majority of states in tying its notion of "natural objects of bounty" to intestate successors or persons possessing forced share rights in the testator's estate. *See A Modest Proposal, supra* note 1, at 456-57 for a discussion of this phenomenon in greater detail.

[13]Indiana probably has adopted the rule that the ability to recall the nature and extent of one's property is determined more or less by the actual size of the testator's holdings at the time the will is made. Jewett v. Farlow, 88 Ind. App. 301, 306-07, 157 N.E. 458, 459-60 (1928). Indiana has also adopted the position of a majority of states, that one may not actually be required to recall all of his or her property when executing his will. The law demands that the testator simply be *able* to do so. *Id.* at 307, 157 N.E. at 460. In Barricklow v. Stewart, 163 Ind. 438, 72 N.E. 128 (1904) the Indiana Supreme Court held that it was not error to exclude the inventory and appraisal of the testator's estate as evidence of the nature and extent of his property at death. *Id.* at 441, 72 N.E. at 129.

[14]The "rational plan" portion of the *Greenwood-Baker* rule in Indiana jurisprudence has been subdivided by the appellate courts into two types of verbal formulae. Most cases follow instruction eight in *Bundy v. McKnight*, which states that:

> [H]e shall have sufficient active memory to retain all these facts [natural objects of bounty and nature and extent of his property] in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity . . . .

Bundy v. McKnight, 48 Ind. at 511. This model was approved by the court in Ramseyer v. Dennis, 187 Ind. 420, 426, 116 N.E. 417, 418 (1917); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); and Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913). It is essentially the same model as that adopted by the New York Court of Appeals in *Delafield v. Parish*.

The variations on this theme include a significant number of cases which add language from instruction nine approved in *Bundy v. McKnight*: "[A] person . . . is capable of making a valid will, if at the time of its execution he had mind sufficient to know and understand the business in which he is engaged." 48 Ind. at 511. This clause is added to the basic descriptive language cited above in Blough v. Parry, 144 Ind. 463, 467-71, 40 N.E. 70, 71-73 (1895); Dyer v. Dyer, 87 Ind. 13, 18 (1882); and in Lowder v.

In uncontested proceedings for probate, the proponent of a will, by reason of the statutory provisions of Indiana Code sections 29-1-7-20[15] and 29-1-5-1[16] and the implied presumption of capacity arising from due execution,[17] carries the burden of proof on testamentary capacity by showing that the will was duly executed according to the provisions of Indiana Code sections 29-1-5-2[18] and

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Lowder, 58 Ind. 538, 542 (1877). Instruction nine in *Bundy v. McKnight* incorporated a standard applied to the test for appointing a guardian for someone. The instruction, in the context of the case, described the mental capacity of a very sick person. The instruction was incorporated to explain to the jury what effect the terminal illness of the testator had on the execution of his will. Other variations on this verbal formula appear in Ditton v. Hart, 175 Ind. 181, 186, 93 N.E. 961, 964 (1911) and in Whiteman v. Whiteman, 152 Ind. 263, 274-75, 53 N.E. 225, 229-30 (1899).

Modern Indiana Court of Appeals decisions on testamentary capacity restate the language used in *Bundy v. McKnight* as the general formula for testamentary capacity in Indiana. *See* Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806-07 (1962); Noyer v. Ecker, 125 Ind. App. 700, 709-10, 105 N.E.2d 348, 352 (1952). In essence, Indiana's courts believe that a testator must be able to make a rational plan for disposition of his or her property at the time of executing the will.

[15]IND. CODE § 29-1-7-20 (1976) reads in part as follows: "In any suit to resist the probate, or to test the validity of any will after probate, as provided in section 717 [IND. CODE § 29-1-7-17] of this [probate] code, the burden of proof shall be upon the contestor." This 1953 statute erased the learning built upon more than twenty appellate decisions in Indiana on the right to open and close in a will contest and the duty of the proponent to make a prima facie case on capacity and freedom from undue influence. *See, e.g.*, Van Meter v. Ritenour, 193 Ind. 615, 618, 141 N.E. 329, 329-30 (1923) (burden of proof on contestant when will is admitted to probate); Johnson v. Samuels, 186 Ind. 56, 61-62, 114 N.E. 977, 979 (1917) (proponent may open and close when contestant files objections to will prior to probate since proponent has burden of proof); Herring v. Watson, 182 Ind. 374, 377, 105 N.E. 900, 901 (1914) (burden of proof on issue of capacity on proponent in pre-probate will contest).

[16]IND. CODE § 29-1-5-1 (1976) provides in part: "Any person of sound mind who is eighteen (18) years of age or older, or who is younger and a member of the armed forces, or of the merchant marine of the United States, or its allies, may make a will."

[17]In Indiana the proponent enjoys a presumption of capacity and of freedom from undue influence, fraud, and coercion on proof of the due execution of the testator's will. McCord v. Strader, 227 Ind. 389, 392, 86 N.E.2d 441, 442 (1949); Kaiser v. Happel, 219 Ind. 28, 30-31, 36 N.E.2d 784, 786 (1941); Herbert v. Berrier, 81 Ind. 1, 4-6 (1881).

[18]IND. CODE § 29-1-5-2 (1976) provides in part:

> (a) All wills except nuncupative wills shall be executed in writing.
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> (b) Any person competent at the time of attestation to be a witness generally in this state may act as an attesting witness to the execution of a will and his subsequent incompetency shall not prevent the probate thereof.
>
> (c) If any person shall be a subscribing witness to the execution of any will in which any interest is passed to him, and such will cannot be proved without his testimony or proof of his signature thereto as a witness, such will shall be void only as to him and persons claiming under him, and he shall be compelled to testify respecting the execution of such will as if no such interest had been passed to him; but if he would have been entitled to a distributive share of the testator's estate except for such will, then so much

29-1-5-3.[19] When a will contest is filed under Indiana Code section 29-1-7-20, the statute lays the burden of disproving testamentary capacity on the contesting party.[20] It follows that the contestant has the right to open and close in will contests[21] and the proponent of a will is obliged to do nothing more than submit his will for proof under the forms of the Probate Code.[22] Upon proof of execution by one of the means provided for in Indiana Code section 29-1-7-13, the proponent has created a triable issue of fact and has carried whatever burden of going forward with evidence of capacity and freedom from influence, fraud, or duress is imposed by Indiana law. If a contestant successfully disproves any of the three elements of capacity,[23] the court must hold the will invalid.

1. Testators Under Guardianship. — According to Indiana law, a person may be put under guardianship if he or she is "incompetent."[24] "Incompetent" is defined by the Probate Code as "a person who is . . . incapable by reason of insanity, mental illness, mental retardation, senility, habitual drunkenness, excessive use of drugs, old age,

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of said estate as said witness would have been thus entitled to, not exceeding the value of such interest passed to him by such will, shall be saved to him.

(d) No attesting witness is interested unless the will gives to him some personal and beneficial interest. The fact that a person is named in the will as executor, trustee, or guardian, or as counsel for the estate, personal representative, trustee or guardian does not make him an interested person.

[19]IND. CODE § 29-1-5-3(a) (Supp. 1980) provides in part:

The execution of a will, other than a nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to them that the instrument is his will and either:

(i) sign the will;

(ii) acknowledge his signature already made; or

(iii) at his direction and in his presence have someone else sign his name for him; and

(2) The attesting witnesses must sign in the presence of the testator and each other.

[20]IND. CODE § 29-1-7-20 (1976).

[21]The right to open and close, which follows from assignment of a statutory burden of proof on lack of capacity, undue influence, fraud, duress, and want of execution is significant in terms of the tactical position of the contestant. The contestant has the final argument to the jury and the chance to rebut the proponent's case. If this statute is applied rigorously, only the due execution of the will need be established by the proponent.

[22]For the procedure involved, *see* IND. CODE §§ 29-1-7-2 to -5, -13 (1976). With the advent of a self-proving will form in 1975, Indiana lawyers may open an estate and submit an application for letters testamentary by filling out the required form for application for letters and by attaching the original will and the affidavit required by IND. CODE § 29-1-5-3(b) (1976).

[23]For a statistical breakdown of Indiana testamentary capacity cases, *see* appendices available from the publisher.

[24]IND. CODE § 29-1-18-6 (1976).

infirmity, or other incapacity, of either managing his property or caring for himself or both."[25] An adjudication of incompetency could be res judicata on the issue of capacity to execute a will, but Indiana case law consistently refused to recognize the relationship between an adjudication of incompetency and capacity to make a will. *Pepper v. Martin*[26] is a typical case. The testator was quite elderly. He exhibited many signs of senile psychosis and, pursuant to statute, was put under guardianship.[27] Nonetheless, the Indiana Supreme Court reversed the trial court's verdict for the contestant and admitted the testator's will to probate despite the fact that the will was made *after* the guardianship order became final. The grounds for reversal cited by the supreme court were errors in instructions.[28] The court stated that proof that the testator had been under guardianship at the time he made his will was a "prima facie case" of lack of capacity, but not conclusive on that issue.[29] The court stated that the contestant retained the burden of proof on the issue of want of capacity. Therefore, once the proponent offered some evidence to rebut the adjudication of incompetency in the guardianship proceeding, the contestant had to produce *more evidence* of want of testamentary capacity if the contestant was to prevail. The court impliedly treated the presumption of continuing incompetency or insanity as a presumption that disappeared when contrary evidence, however slight or incredible, appeared to oppose it.

When a court finds a person incompetent, it decrees that the person is incapable of making an ordinary contract.[30] The predominant view in the United States is that persons under guardianship may generally make a will although they are protected by the court from making an inter vivos gift of the same property.[31] This dual standard cannot be rationally defended.

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[25]IND. CODE § 29-1-18-1 (1976 & Supp. 1980).

[26]175 Ind. 580, 92 N.E. 777 (1910).

[27]*Id.* at 584, 92 N.E. at 778.

[28]*Id.* at 582-83, 92 N.E. at 778.

[29]*Id.* at 583, 92 N.E. at 778.

[30]This result has long been reached by statute. The present Indiana Code section 29-1-18-41 (1976) summarizes the result of much appellate litigation: "Every contract, sale or conveyance had or executed by any one previously adjudged to be an incompetent and while under such legal incompetency shall be void unless such incompetency is due solely to such person's minority, in which case such contract, sale or conveyance shall be only voidable."

[31]*See, e.g.*, Teegarden v. Lewis, 145 Ind. 98, 100-01, 40 N.E. 1047, 1048 (1895). *Teegarden*, however, held that the capacity to make an inter vivos gift is no greater than that needed to make a will. *Id.* The Indiana Supreme Court reaffirmed this position in Thorne v. Cosand, 160 Ind. 566, 569, 67 N.E. 257, 258 (1903), but the appellate court adopted a different test in Deckard v. Kleindorfer, 108 Ind. App. 485, 491, 29 N.E.2d 997, 999 (1940), holding that to make a valid inter vivos gift a party had to have

2. Alcoholic Testators.—Only one Indiana appellate decision examined the post-death plans of a testator under the influence of narcotics.[32] However, Indiana case law contains at least eight cases of alcoholic testators on appeal. Alcoholic testators generally received gentle treatment at the hands of Indiana appellate courts. In *Derry v. Hall*,[33] the appellate court reversed a trial court verdict and judgment for the contestant.[34] Oria Dolan, the testator, died of nephritis and pneumonia in Indianapolis in 1926 at approximately the age of 53.[35] Mr. Dolan was unmarried and his closest relatives were some cousins, aunts, and uncles with whom he had very little to do during the last twenty years of his life.[36] His will, made at the hospital the day before his death, left the balance of his estate to several Roman Catholic charities.[37] The evidence disclosed that Dolan had been addicted to alcohol and that Dolan exhibited some of the signs of alcoholic brain disease.[38] The jury set aside Dolan's will as the product of an unsound mind but the appellate court reversed the trial court on the ground that the verdict was not supported by the

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"sufficient mind and memory to comprehend the nature and extent of his act and to understand the nature of the business in which he is engaged and to exercise his own will with reference thereto."

[32]Haas v. Haas, 121 Ind. App. 335, 96 N.E.2d 116 (1951).

[33]96 Ind. App. 683, 175 N.E. 141 (1931). *But see* Swygart v. Willard, 166 Ind. 25, 76 N.E. 755 (1906) (case decided for the contestant with strong evidence of mental impairment).

[34]96 Ind. App. at 696, 175 N.E. at 145.

[35]*Id.* at 687, 175 N.E. at 142.

[36]*Id.* at 686, 175 N.E. at 142. The principal lay witness for the contestant was Jessie M. Kinney, a cousin from Muncie, who recited a fantastic tale. The testator had gone with her to the Chicago World's Fair in 1892. He locked her in a hotel room when Dolan (known as Dooley to his friends, and indeed, he signed the will under the name of Dooley) was in an alcoholic frenzy. He threatened her with physical abuse and starved her for several days before letting her go. *Id.* at 689, 175 N.E. at 143. Kinney had not seen Dooley since 1921, however, and her evidence, relevant to Dooley's mental impairment from excessive alcoholism in 1892, really did not provide the contestant with a lay witness who would say Dooley was without sound mind on the day of making his will. *Id.* at 693, 175 N.E. at 144.

[37]*Id.* at 688, 175 N.E. at 143.

[38]*Id.* at 690-91, 175 N.E. at 144. The medical evidence of serious pathology was very strong, probably the strongest evidence in favor of setting aside Dolan's will. The death certificate showed Dolan had died of acute lobar pneumonia, a complication of chronic nephritis. Dr. Albert Sterne, an alienist from Indiana University Medical School, testified that the decedent's condition was clearly the result of chronic, long term, excessive use of alcohol, and that such prolonged use of alcohol in excessive quantities would impair all the mental functions of the deceased, even when he was not drinking. *Id.* The appellate court discounted the medical testimony in this case against the testimony of twenty lay persons who were of the opinion that Dolan was of sound mind when he was last seen by each of them. *Id.* at 693, 175 N.E. at 144. This discounting effect is often encountered when lawyers review medical expert opinions in will contests.

evidence, since there was a lack of any testimony showing that the testator was of unsound mind.[39]

Yet, the evidence established Dolan's excessive drinking habits and showed that his death was caused by a complication of a chronic disease associated with acute alcoholism. Thus, the appellate court stretched judicial reasoning to favor the probate of Dolan's will without revealing its reasons for doing so.[40]

3. Senile Testators.—"Senility" is a lay term which usually describes one of two conditions: arteriosclerotic brain disease—a condition produced by insufficient blood supply to the brain caused by fatty deposits in arteries over a long period of time, and so-called senile psychosis—a non-organic mental condition which is clinically observed in people who are extremely old.[41] Contemporary medical opinion has recently been altered by studies which tend to show that some cases of "senile psychosis" may simply be the by-product of inadequate medical treatment for elderly persons who are confused disoriented, forgetful, or hallucinatory due to improper medical care or neglect.[42] The *Greenwood-Baker* Rule was derived from a judicial policy statement concerning the senile testator. It was intended to be a measure of the lowest threshold mental capacity for responsible activity in the understanding and execution of a will. It may be questioned whether the *Greenwood-Baker* Rule provides an adequate distinction between the wills of competent and of incompetent elderly testators who exhibit signs of senility. The majority of Indiana decisions in which the testator's mental state was described

[39]*Id.* at 693-94, 175 N.E. at 144-45. The testator's physician had earlier testified that lobar pneumonia usually causes swelling of brain tissue resulting in impairment of mental faculties. In response to the hypothetical, including the usual swelling associated with pneumonia, Dr. Sterne opined that the hypothetical testator lacked testamentary capacity. The court held this was of no probative value because the facts used in the hypothetical were not established by the evidence. *Id.* at 144, 175 N.E. at 144.

[40]The court seemed to be saying that the doctor could not conclude the decedent had impaired mental functions when he made his will because the physician assumed the decedent died within 24 hours after becoming infected. This fact had not been proved of record by an independent source, although it could clearly have been proven by the hospital records.

[41]*See A Modest Proposal, supra* note 1, at 473-75 for an explanation of the distinction between arteriosclerotic brain disease, which is not necessarily connected with the process of aging, and senile psychosis, a diagnosis used to classify elderly patients with symptoms similar to that of arteriosclerotic brain disease without the organic etiology of elevated blood pressure and periods of dizziness and blackouts and signs of arteriosclerotic changes in the large blood vessels in the neck characteristic of persons whose brains are not receiving an adequate blood supply due to fatty deposits in the smaller arteries in the cranium.

[42]*See, e.g.*, Douglass & Douglass, *Decrepitude Preventions*, 300 J. NEW ENG. MED. 992 (1979); Schwartz, *The Spectre of Decrepitude*, 229 J. NEW ENG. MED. 1248 (1978).

were those involving senile testators. Indiana's cases include two groups of senile testators: "childish" testators and "recluses." A representative sampling of each type of senile testator illustrates the problems encountered with the *Greenwood-Baker* Rule in practice.

An example of a "childish" testator is found in *Love v. Harris*,[43] in which the appellate court affirmed a trial court verdict and judgment for the contestant. William L. Cranston, an elderly bachelor, lived alone on a farm which had originally been co-owned by Cranston, his brother, and his sister.[44] Cranston was the sole survivor and had clear title to the farm. He was very dirty and unshaven, and maintained his home in an incredibly filthy condition.[45] Lay witnesses described Cranston as childlike, stupid and rambling in conversation, unable to recognize acquaintances or relatives, and unable to remember when his tenant farmers had paid him rent.[46] Cranston, approximately four months after making a disinheriting will, was placed under guardianship.[47] The case went to the jury on the dual grounds of lack of capacity and undue influence exerted by Mr. and Mrs. Love, the neighbors who benefited from the 1950 will at the expense of Cranston's nieces.[48]

In *Love*, the testator showed significant signs of physical and mental debility. He was very old at the time his will was made. He exhibited a tendency to forget and was described as childish by lay witnesses. Indiana courts seem ready to accept jury verdicts in cases similar to *Love* which set aside a will as the product of an unsound mind.

Indiana will contests have also involved an inordinate number of recluses. In *Cahill v. Cliver*,[49] the testator, Jessica Sage, was a typical agoraphobe.[50] She was a delicate person who supported herself by tutoring children in her home. In 1906, Jessica, age 35, married William E. McLean, a 74 year old gentleman. Mr. McLean died within a few days after the wedding, leaving Jessica Sage

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[43]127 Ind. App. 505, 143 N.E.2d 450 (1957). For another strong case for the contestant, *see* Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940).

[44]*Id.* at 508-09, 143 N.E.2d at 452.

[45]*Id.* at 509, 143 N.E.2d at 453.

[46]*Id.*

[47]*Id.* at 510, 143 N.E.2d at 453.

[48]*Id.* at 508, 143 N.E.2d at 452. The neighbors also procured the lawyer who made the will, "talked for" Cranston during the will-making process, and, in general, dominated the testator. For a later case involving a recluse with character traits similar to those of W. Cranston, *see* Zawacki v. Drake, 149 Ind. App. 270, 271 N.E.2d 511 (1971).

[49]122 Ind. App. 75, 98 N.E.2d 388 (1951).

[50]The term "agoraphobia" means fear of being in large open spaces. 1 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER, A-107 (1980).

$250,000. Jessica's father, mother, and brother all died within a few years of one another. Miss Sage suffered a nervous breakdown after the death of her family members and retired within the four walls of the unpainted Sage home in Terre Haute, avoiding all contact with other humans and with the outside world.[51] In addition Miss Sage locked her cleaning woman in the parlour and prevented her from going freely from room to room without Miss Sage's presence.[52]

Jessica Sage's will left the balance of her estate to her lawyer as trustee for the purpose of establishing a home for elderly men in Terre Haute as a memorial for her dead husband, Colonel McLean.[53] The trust instrument, though, varied greatly from the instructions dictated by Sage. It was alleged that she did not know of the changes when she signed the will. The trust instrument gave the trustee unlimited discretion to sell the assets to anyone, including himself, and allowed him to name his own successor trustee.[54] The beneficiaries were described as "worthy poor men," a description which could include anyone whom the trustee chose to designate as worthy and poor, such as friends of the trustee. The appellate court affirmed the trial court's verdict and judgment for the contestant.[55] The court treated the case as one in which an attorney had engaged in overreaching and unethical conduct in order to procure a sinecure from an elderly client.[56]

The recluse syndrome, agoraphobia, is a condition which is not well understood by contemporary medicine. The exaggerated fear of other humans and of open space may have little to do with the legal test for testamentary capacity. It is equally unclear whether agoraphobia is related to any form of senile disorder. Agoraphobic persons may know and recognize the natural objects of their bounty, the nature and extent of their property, and be capable of keeping the two in mind long enough to make a plan for post-death disposition.

4. Organically Impaired Testators.—Indiana will contests include decisions in which the contestant complained that the testator lacked testamentary capacity because the testator made his will on his deathbed while under the influence of debilitating physical illness.[57] Some of the older cases of this genre deal with a testator whose capacity was allegedly impaired by the great pain and agony

[51]122 Ind. App. at 77, 98 N.E.2d at 389.

[52]*Id.* at 78, 98 N.E.2d at 389.

[53]*Id.* at 80, 98 N.E.2d at 389-90.

[54]*Id.* at 80-81, 98 N.E.2d at 390.

[55]*Id.* at 81, 98 N.E.2d at 390.

[56]*Id.* at 76, 98 N.E.2d at 388.

[57]*See, e.g.*, Vance v. Grow, 206 Ind. 614, 190 N.E. 747 (1934); Oilar v. Oilar, 188 Ind. 125, 120 N.E. 705 (1918); Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914); Ludwick v. Banet, 125 Ind. App. 465, 124 N.E.2d 214 (1955); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345 (1940).

of a last illness such as cancer,[58] a spinal lesion,[59] or uremic poisoning.[60] Another group of older cases allege that the testator lacked testamentary capacity because the testator made his or her will while under the influence of high fever or a chronic, fatal infection such as pneumonia or tuberculosis.[61] A third group of more modern cases involves allegations that the testator lacked capacity because of brain damage due to stroke or other brain trauma.[62] None of the Indiana decisions dealing with organically impaired testators involved such organic psychoses as syphilis dementia (paresis), psychosis resulting from seizure-disorders such as psycho-motor epilepsy, or psychosis from traumatic brain damage.[63] The appellate courts were apparently unimpressed by recitations of the deceased's agony and suffering by lay witnesses, and by the impact that extreme pain, high fever, or other impedimentia had on the testator's mental capacity.

Boland v. Claudel[64] illustrates the fate of organically impaired testators in Indiana. Peter Claudel was a bachelor who lived alone on his farm. In June 1910, Claudel became ill and his kidneys failed him. He was taken in by a neighbor, Edward C. James, who looked after him. Claudel sank into a stupor from uremic poisoning. On June 10, 1910, with the scrivener guiding his hand, Claudel executed a will in Mr. James' home. Medical witnesses called by the contestant concluded that a person in such an advanced stage of kidney failure as Claudel could not have been mentally competent.[65] The Indiana Supreme Court affirmed a jury verdict and judgment for the contestant, giving due recognition to a well-constructed case which showed that the testator's mental condition had been severely impaired by organic illness.[66]

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[58]Vance v. Grow, 206 Ind. 614, 617, 190 N.E. 747, 748 (1934) (testator with terminal cancer made death bed gifts); Rarick v. Ulmer, 144 Ind. 25, 28, 42 N.E. 1099, 1100 (1896) (facial cancer).

[59]Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911).

[60]Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914).

[61]*See, e.g.*, Terry v. Davenport, 170 Ind. 74, 83 N.E. 636 (1908) (high fever during last illness); Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883) (will made during last illness); Dyer v. Dyer, 87 Ind. 13 (1882) (testator signed will when extremely weak from pneumonia).

[62]*See, e.g.*, Taylor v. Taylor, 174 Ind. 670, 93 N.E. 9 (1910) (will made after testatrix had suffered a severe stroke); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940) (testator had rheumatism, arteriosclerosis, and Bright's Disease (a form of chronic kidney disease)).

[63]For a more detailed discussion of epileptic testators, *see A Modest Proposal*, *supra* note 1, at 472.

[64]181 Ind. 295, 104 N.E. 577 (1914).

[65]*Id.* at 298, 104 N.E. at 578. For a discussion of the science of toxicology and many of the side effects of commonly used hypertensive medications and pain killers, *see* 4 G. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE chs. 131-32 (3d. ed. E. Berger 1969).

[66]181 Ind. at 298, 104 N.E. at 578.

The *Greenwood-Baker* Rule actually fails to cope with the problem of the organically impaired testator. A person experiencing extreme pain, hallucinating during high fever, or suffering the impact of a seizure may be able to meet the *Greenwood-Baker* Rule yet be unable to orient himself or herself with respect to space, time, and person. At the same time, such organically impaired individuals do not meet the criteria for the "insane delusion" rule. Thus, unless the court is willing to inquire into the effect of pain, fever, or seizure on behavior and to develop a legal explanation for avoiding a will made by someone who was in great pain or delirious, it is highly probable that a will made by a testator who was unable to comprehend the nature of his or her acts will be sustained.

B. Insane Delusion

Indiana case law has recognized that a testator who meets the *Greenwood-Baker* test for testamentary capacity may, nonetheless, lack testamentary capacity if his or her will is the product of an insane delusion or monomania.[67] This rule grew out of the English case of *Dew v. Clark*[68] in which the will of a physician was set aside due to a finding that the will was the product of an "insane delusion" that his blameless daughter was guilty of irregular sexual conduct. This rule, which was generated from eighteenth century psychology, in particular the writings of Jeremy Bentham,[69] was introduced as a means of invalidating a will made as a result of "partial insanity."[70] The type of delusion which can result in the invalidation of a will is a delusion about an object of one's bounty which leads the testator to exclude that person from the will.

The test for the presence of an insane delusion has been variously formulated in Anglo-American case law. In *Barr v. Summer*,[71] it was stated that: " 'An insane delusion exists when a person imagines that a certain state of facts exists which has no existence at all, except in the imagination of the party, and which false impression cannot be removed . . . by any amount of reasoning and argument.' "[72] Insane delusions are frequently confused with strange or absurd

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[67]Thompson v. Hawks, 14 F. 902, 903 (C.C.D. Ind. 1883) (applying Indiana law); Robbins v. Fugit, 189 Ind. 165, 167, 126 N.E. 321, 321-22 (1920); Ramseyer v. Dennis, 187 Ind. 420, 426-27, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415-16, 107 N.E. 675, 680 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914).

[68]162 Eng. Rep. 410 (Prerog. 1826).

[69]*See A Modest Proposal*, *supra* note 1, at 487-89 for an extended discussion of *Dew v. Clark* and its impact on American will contests.

[70]*Id.*

[71]183 Ind. 402, 107 N.E. 675 (1915).

[72]*Id.* at 418, 107 N.E. at 680 (quoting Bundy v. McKnight, 48 Ind. 502, 512 (1874)).

opinions held by people.[73] Unless delusional thought involves some natural object of one's bounty and is related to the relative merit of leaving property to that individual, it is not an "insane delusion." Indiana's insane delusion cases may be classified into three subgroups:

(1) "They're Out to Get Me" cases in which the testator believes that someone in his family is out to do him or her harm;

(2) "Crank" cases, in which the testator holds eccentric, bizarre or strange religious, scientific or political views, which are improperly treated as insane delusions; and

(3) "Unknown" cases in which the trial court gave an insane delusion instruction without revealing enough of the evidence in the case to suggest the basis for the instruction.

Six of the fifteen will contests involving insane delusions were originally trial verdicts for the proponent and nine were originally decided for the contestant. On appeal, the results were exactly reversed with nine cases being finally determined in favor of the proponent and six for the contestant.[74] Only one case, *Barnes v. Bosstick*,[75] involved a testator committed to a mental institution. In that decision, the proponent offered to prove a lost will over objections that Emma A. Dudley, the testatrix, had revoked the lost will by destruction. The lost will which disinherited her relatives in favor of people outside of her family was executed shortly before Mrs. Dudley was committed to a state mental hospital. The evidence showed that Mrs. Dudley had her 1927 will in her possession when she was committed. The Indiana Supreme Court correctly held that if she destroyed the will while she was insane it was not revoked.[76]

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[73]This is evident most clearly in the "spiritualist" cases in which the testator is alleged to have made a will after consulting the spirits of the dead through a medium. In one such case, the medium appears to have instructed the testator to leave his property to the medium. The verdict for the contestant was sustained on a motion for new trial. Thompson v. Hawks, 14 F. 902, 903-04 (C.C.D. Ind. 1883). *See also* Barr v. Sumner, 183 Ind. 402, 417-20, 107 N.E. 675, 680-81 (1915); Wait v. Westfall, 161 Ind. 648, 665-66, 68 N.E. 271, 277 (1903).

[74]*See* Table Fifty in Appendix A to this Article held by the publisher. *See also* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932) (testatrix committed to insane asylum shortly after making will); Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917) (some symptoms of involutional psychosis); Whiteman v. Whiteman, 152 Ind. 263, 53 N.E. 225 (1899) (unspecified mental aberrations); Forbing v. Weber, 99 Ind. 588 (1885) (revocation case: testator tore up will in fit of "temporary insanity"); Kessinger v. Kessinger, 37 Ind. 341 (1871) (psychotic behavior, allegedly caused by "dropsy"); Rush v. Megee, 36 Ind. 69 (1871) (testator alleged to have been insane when will made); Addington v. Wilson, 5 Ind. 137 (1854) (testator believed his wife to be a witch); Cahill v. Cliver, 122 Ind. App. 75, 98 N.E.2d 388 (1951) (recluse).

[75]203 Ind. 299, 179 N.E. 777 (1932).

[76]*Id.* at 302, 179 N.E. at 778.

The trial court found for the contestants on obscure grounds.[77] The cause was remanded by the supreme court for proof and probate of the copy of the 1927 will in the custody of Mrs. Dudley's lawyer.[78] Although an insane delusion instruction was given in the case, the supreme court did not report the nature of Mrs. Dudley's mental problems.

1. They're Out to Get Me Cases.—In *Burkhart v. Gladish*[79] a testator suffered from delusions which arose from his long-standing alcoholism.[80] Peter Burkhart made a will leaving his estate to four of his nine children.[81] Burkhart harbored an irrational conviction that his wife had been guilty of acts of sexual intercourse with some of his sons-in-law. Burkhart's will disinherited the sons-in-law. Two years after making the will, Burkhart shot himself after first killing his wife.[82] The trial evidence showed that Mrs. Burkhart had no sexual relations with her sons-in-law.[83] Lay opinion witnesses swore that Burkhart was crazed by prolonged excessive drinking.[84] The trial court entered judgment on a jury verdict for the contestant and the judgment was affirmed on appeal by the Indiana Supreme Court.[85] This case is typical of the "insane delusion" cases in which contestants generally prevail. Only one other Indiana case presented a similar profile indicating that the testator had what were once called "delusions of persecution" about a natural object of bounty.[86]

2. Crank Cases.—Indiana appellate courts have been unkind to testators who held unusual cultural or religious beliefs. For exam-

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[77]*Id.* at 300, 179 N.E. at 777.

[78]*Id.* at 303, 179 N.E. at 778.

[79]123 Ind. 337, 24 N.E. 118 (1890).

[80]*Id.* at 344, 24 N.E. at 120.

[81]*Id.* at 339, 24 N.E. at 118.

[82]*Id.* at 344, 24 N.E. at 120. The proponent alleged it was error to permit one of the sons-in-law, Elijah Gladish, to testify that he had never had intercourse with Burkhart's wife. The trial court admitted the testimony, and the supreme court held it was not error, since the testimony was relevant to the issue of whether or not Burkhart had a rational foundation for believing his wife to be unfaithful with his son-in-law. *Id.* at 346, 24 N.E. at 120-21.

[83]*Id.* at 344, 24 N.E. at 120. The proponent tried to exclude under the Dead Man Act the testimony of the disinherited Burkhart children concerning acts and conduct of their dead father prior to the making of his will. *Id.* at 345, 24 N.E. at 120. The supreme court reaffirmed its position announced in Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1886) that the Dead Man Act did not make intestate successors incompetent witnesses on the issue of soundness of mind in a will contest even when they claimed adversely to the will. 123 Ind. at 346, 24 N.E. at 120.

[84]123 Ind. at 345, 24 N.E. at 120.

[85]*Id.* at 347, 24 N.E. at 121.

[86]Friedersdorf v. Lacy, 173 Ind. 429, 90 N.E. 766 (1910). The case was originally decided in favor of the contestant. On appeal, the supreme court reversed the decision on the determination that the trial court had given improper instructions.

ple, only one of four will contests involving the will of a Spiritualist was eventually decided for the proponent during the heyday of that sect.[87] The Spiritualist cases usually presented two alternative grounds for avoiding the testator's will: (1) the testator had an insane delusion because he or she believed in consulting the dead before making a will, and (2) the medium whom the Spiritualist consulted exercised undue influence over the testator. The case of the overreaching medium will be discussed in the next section of this Article dealing with undue influence. The Spiritualist who believed that the dead could tell him or her how to make a post-death plan for distribution of assets caused Indiana courts a great deal of difficulty earlier in this century. In *Steinkuehler v. Wempner*,[88] Wilhelmina Albertsmeyer, the testatrix, made a will in April, 1902 and a codicil in December, 1903, which partially disinherited some of her grandchildren.[89] Mrs. Albertsmeyer, an elderly believer in spiritualism, consulted a medium before making her will. The voice of her dead husband allegedly appeared to her through the agency of the medium and stated that the grandchildren were going to cause her trouble; thus, she decided that their legacy should be a dollar each.[90] The disaffected grandchildren brought an action to set aside her will on grounds of lack of capacity, undue influence (by the dead husband), fraud, and want of due execution.[91] The court set aside Mrs. Albertsmeyer's will on a directed verdict. However, on appeal, the Indiana Supreme Court reversed the trial court holding that belief in the spirit world, in mediums, and in resort to mediums for advice from beyond were not insane delusions, and that Mrs. Albertsmeyer's will was not vitiated by her resort to a medium for guidance from beyond the grave.[92]

The frequency of "insane delusion" cases seems to have declined in the past thirty to forty years. The courts in most states have failed to generate a legal test for testamentary capacity out of the rule of *Dew v. Clark*. In Indiana, this failure may be due to the sharp decline in the number of will contests which reach the appellate

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[87]Addington v. Wilson, 5 Ind. 137 (1854) was eventually decided for the proponent on appeal. For cases decided against the proponent *see* Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915); McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909); Steinkuehler v. Wempner, 169 Ind. 154, 81 N.E. 482 (1907). *See also* Thompson v. Hawks, 14 F. 902 (C.C.D. Ind. 1883) (trial decision only).

[88]169 Ind. 154, 81 N.E. 482 (1907).

[89]*Id.* at 164, 81 N.E. at 486.

[90]*Id.*

[91]*Id.* at 155, 81 N.E. at 483.

[92]*Id.* at 164, 81 N.E. at 486. *But see* McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909).

level.[93] The "insane delusion" is an antiquated attempt to frame a rule which invalidates a will if the will is the product of mental disease. If the courts are willing to dust off this concept and apply what is currently known about mental illness, the courts could fashion an appropriate rule for setting aside wills for lack of mental competency of the testator.[94]

III. UNDUE INFLUENCE AND FRAUD IN INDIANA WILL CONTESTS

A. English Development of the Law of Undue Influence

The Statute of Wills contained no provision for avoiding wills on the ground of interference with the testator's free agency. Separate writs were available for an action of deceit in which it was alleged that some individual obtained another's property by fraudulent representations. Ecclesiastical law contained no specific canons dealing with wills obtained by overreaching. Bacon's Abridgment[95] mentioned that a will could be avoided if the testator's free will was overborne by another party. Judicial development of a ground for avoiding wills due to conduct of a beneficiary was slow. The first major case which treated undue influence as a separate ground for setting aside a will was *Mountain v. Bennet*.[96] In *Mountain*, the issue centered upon the validity of the will of the late Wilfred Bennet who left large real estate holdings to his wife. Bennet was described as "a debauched man" and as "fond of women."[97] Bennet made a secret marriage contract with a widow, Mrs. Harford. Shortly thereafter, Bennet made a will leaving his estate to his new wife.[98] Bennet's

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[93]This phenomenon is noticeable in both the Indiana Supreme Court, which has heard no will contest cases since 1949, and in the Indiana appellate courts, which heard only two will contests in 1970-79, five in 1960-69, and only nine in 1950-59. By contrast, during the decade of 1900-09 the supreme court heard twelve will contests, and in the decade 1890-99 the same court disposed of thirteen will contests.

[94]Although this Article deals with the capacity to make a valid will, much the same type of analysis would apply to invalidating trust deeds or agreements for want of capacity. The Indiana Trust Code spells out the standard for capacity to make trust deeds and testamentary trusts, leaving open the issue of a different standard for capacity in the case of trusts created by contract. IND. CODE § 30-4-2-10 (1976).

[95]7 M. BACON, A NEW ABRIDGMENT OF THE LAW 303-04 (5th ed. London 1798).

[96]29 Eng. Rep. 1200 (Ex. 1787).

[97]*Id.* at 1201.

[98]*Id.* at 1200. Lord Eyre in summation to the jury, regarding Mrs. Harford/Bennet/Parry's behavior, stated:

> It does not appear on the state of the evidence, that this woman originally threw herself in the way of Mr. Bennet; he was naturally a debauched man and fond of women; in that state he took a fancy to this woman . . . . There is actual proof of applications from him to her after the death of Mr. Harford for an interview, and he certainly was a volunteer in the business.

Id. at 1201. Parry's complicity in the design was not proved by any direct evidence,

heir objected to the probate of the will.

The case turned on whether the widow had conspired to induce Bennet to leave her his estate through importunity and favoritism. Lord Chief Baron Eyre concluded that:

> [I]f a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs in *general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind . . . . On a general view of this case, it must turn on one or other of these grounds; namely, either on the general capacity of Mr. Bennet to act for himself . . . or on the ground of a dominion or influence acquired over him by this woman, with whom he had most unfortunately connected himself.[99]

A generation later the Ecclesiastical Courts wrestled with an importuning beneficiary in *Kinleside v. Harrison*.[100] Andrews Harrison, the testator, made a will in June, 1808, followed by eight codicils.[101] The first four codicils were conceded to be valid. The last four codicils materially changed his testamentary plans to give a larger share of his estate to his vicar, the Reverend Mr. Kinleside.[102] These later codicils were attacked by caveats alleging that Andrews Harrison lacked testamentary capacity or, alternatively, was under the influence of a conspiracy consisting of Kinleside, Mrs. Jukes, Harrison's housekeeper, and Mr. Wells, Harrison's good friend.[103]

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but was solely inferred from a letter from Mrs. Harford/Bennet/Parry to Parry while she was Bennet's wife in which she told Parry that her husband was weak-minded and that she had an ascendancy over the sot. *Id.* at 1200.

[99] *Id.* at 1201.

[100] 161 Eng. Rep. 1196 (Prerog. 1818).

[101] *Id.* at 1196-97. The first disputed codicil gave some books and pictures from Shawfield Lodge (the home Harrison built for his brother, John) to a Mr. Trevillian subsequent to John's life interest. The second disputed codicil revoked the appointment of Benjamin Harrison as executor and appointed Mr. Kinleside as co-executor in his place. The third disputed codicil was written by Andrews Harrison in his own hand. This codicil revoked the £5,000 legacy and the forgiveness of indebtedness previously made to Paul Malin and made Mr. Kinleside the residuary legatee to Harrison's property. The fourth and final disputed codicil was dated subsequent to the other disputed codicils. This codicil revoked all devises to Benjamin Harrison and Paul Malin, revoked the appointment of Harrison and Malin as co-executors, and turned over more personal property to Mr. Kinleside.

[102] *Id.*

[103] *Id.* at 1197-98. It was developed by the depositions of several witnesses that Paul Malin, the companion of John Harrison, had gone bankrupt, thus making the £13,000 debt uncollectible. Benjamin Harrison, who was no relation to either John or Andrews, but who was a close friend and business associate, apparently knew Malin

Andrews Harrison was subject to fits of temporary imbecility occasioned by an unknown disease.[104] These attacks left him senseless for some period of time[105] and his solicitor, Mr. Boodle, refused to let Harrison execute a codicil to his will when he believed Harrison to be imbecilic as a result of one of his attacks.[106] Andrews Harrison apparently discussed his codicils with Wells and Kinleside several times before they were actually executed.[107] The last two codicils were procured by Kinleside who took down Harrison's instructions and obtained a solicitor to draft the new codicils. These codicils were subsequently recopied by Harrison with assistance from Mrs. Jukes and were executed before the prescribed number of witnesses.[108]

After reviewing the depositions of the witnesses, Sir John Nicholl declared the four disputed codicils to be free from taint.[109] The court stated that Kinleside would likely have been guilty of obtaining the position of executor by undue influence if Kinleside had procured Harrison's signature on the codicil.[110]

The case contained few legal propositions about undue influence. However, the discussion of the evidence relating to the third and fourth disputed codicils took into account the friendship between Andrews Harrison and the Rev. Kinleside and their conversations in

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had gone bankrupt and failed either to warn the Harrisons or to protect their interest against Malin's insolvency. This all occurred early in 1813 and the result was that Andrews Harrison later cut Benjamin Harrison out of his will by his third and fourth contested codicils. *Id.* at 1227.

[104]*Id.* at 1204 (deposition of Curtis, John Harrison's coachman); *id.* at 1207 (deposition of Matthew Harrison, Benjamin Harrison's brother); *id.* at 1208-09 (deposition of Mr. Stanley, a friend of Andrews Harrison); *id.* at 1210 (deposition of Alexander, Mrs. Jukes' maid); *id.* at 1211 (deposition of William Taylor, Mrs. Jukes' footman); *id.* at 1215 (deposition of Mrs. Jukes, the person with whom Andrews Harrison resided from 1808 to his death); *id.* at 1215-16 (deposition of Mr. Roberts, Andrews Harrison's medical attendant); *id.* at 1217-18 (deposition of Mr. Wells).

[105]Mr. Roberts, a physician who visited with Andrews Harrison repeatedly during 1813-1814 when the disputed codicils were made, described these attacks. *Id.* at 1215-16.

[106]*Id.* at 1212-14.

[107]*Id.* at 1229-30. Mrs. Jukes apparently prevailed on Andrews Harrison to cut Malin and Benjamin Harrison out of his will but Taylor could not recall anything Mr. Wells may have said on the subject of altering the will, although Wells was a very frequent visitor to Harrison during 1813 and 1814.

[108]*Id.* at 1230-31. Taylor recounted a conversation between Mr. Harrison, who was quite deaf, and Mr. Kinleside, who was also hard of hearing, in which Kinleside told the gentleman to make a codicil rather than a whole new will. *Id.* at 1230.

[109]*Id.* at 1229-31. Wells' testimony showed that Kinleside procured the codicil which made him the residuary legatee of Andrews Harrison. The order to have the old man recopy the codicil in his own hand was an attempt to conceal procurement of the will.

[110]*Id.* at 1232.

a closed room relating to the alterations of the will in favor of the vicar.[111] Sir John Nicholl also strictly scrutinized the preparation and execution of the codicils which benefitted the vicar.[112]

A few years later, Lord Langdale crystalized the law of undue influence in *Casborne v. Barsham*.[113] *Casborne* involved an equity suit to set aside a deed on the grounds of fraud and undue influence.[114] The advisory jury found that the deed was not procured by fraud but was the result of Barsham's importuning his client for a preference to pay off Chandler's fee bill.[115] The Chancellor set aside the deed on this ground and Barsham appealed to Lord Langdale for a new trial.[116] Lord Langdale granted the motion and stated:

> [I]t is plain that there are transactions in which there is so great an inequality between the transacting parties—so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.[117]

Casborne laid the foundation of 150 years of judicial gloss placed on a "confidential relationship" and the impact a finding of a "confidential relationship" has on a claim of undue influence. The early cases quickly found their way into English treatises on wills and evidence and crossed the Atlantic to become part of American jurisprudence.[118]

B. Early American Undue Influence Cases

New York, Pennsylvania, and South Carolina allowed wills to be set aside early in the nineteenth century because of undue influence by a beneficiary. These early cases followed the doctrinal statements set out in *Williams v. Goude*.[119]

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[111] *Id.* at 1230-31.

[112] *Id.* at 1232.

[113] 48 Eng. Rep. 1108 (Ch. 1839).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1109.

[118] *See, e.g.*, 1 T. JARMAN, A TREATISE ON WILLS § 36, at 48 (3d ed. 1880) (1st ed. 1834).

[119] 162 Eng. Rep. 682 (Prerog. 1828).

> The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted: that it was done merely for the sake of peace so that the motive was tantamount to force and fear.[120]

Indiana's undue influence jurisprudence derived from a notorious series of South Carolina cases involving the estate of William B. Farr.

Will contests directed against Farr's last wills went to the South Carolina Supreme Court three times.[121] William B. Farr was a South Carolina planter who took up with a slave woman called Fan. Farr and Fan had a son, Henry Farr, whom Farr acknowledged as his issue. William Farr attempted to emancipate his son by a special act of the South Carolina legislature but could not obtain passage of his private act. When Henry Farr became 21, his father sent him to Indiana and settled an income upon him.[122] In 1828, Farr made his first will which left his estate to his mistress and to their son.[123] His second will, executed in August 1836, and a codicil of 1837 were set aside after two trials.[124] The second verdict for the contestant was sustained by the South Carolina Supreme Court on evidence showing that in 1836 and 1837 Farr was an habitual drunkard and imbecile.[125] The third trial resulted from caveats against the 1828 will. Again, the jury delivered a verdict for the contestant and the case was appealed.[126] The 1828 will was a devise of Farr's entire estate to J.B. O'Neall, his executor. The will was executed June 16th and on June 19th Farr wrote a letter to O'Neall which said:

> I want Fan and Henry to be free; I want Fan to have one half of my estate, and Henry the other half. When Fan dies,

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[120]*Id.* at 684.

[121]*See* Farr v. Thompson, 25 S.C.L. (Chev.) 37 (1839); Thompson v. Farr, 28 S.C.L. (1 Speers) 93 (1842) for the first two times this case appeared in South Carolina appellate reports. The first two reports contained many striking details of the relationship between Farr, his mistress, and their son which are not reported in O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844). This case was the basis for Indiana's first major will contest, Kenworthy v. Williams, 5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[122]25 S.C.L. (Chev.) at 38.

[123]*Id.* at 40.

[124]*Id.* at 49.

[125]Thompson v. Farr, 28 S.C.L. (1 Speers) 93, 101-03 (1842).

[126]O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844).

> I want Henry to have half of Fan's half, and you the other half for your care and trouble of them; and should Henry die, leaving no wife nor child, I want you to have the whole of my estate forever. I want you to give Henry a good education, and do the best you can with him, and deal out his share to him as you think best, or as you think he will improve it. I want you to take Fan home with you, and build her a comfortable little house somewhere on your plantation, and let Fender and Cesley live with her as long as she lives.[127]

The evidence showed that in 1828 William Farr, although addicted to liquor, was a strong, healthy man in his mid-fifties with an independent mind.[128] Later, Farr indulged in drinking bouts with Fan which left them intoxicated and in mutual blind rage. In 1832, Farr suffered a stroke which left him partially paralyzed. Fan subsequently insulated Farr from the house servants and controlled Farr's business. There was testimony from Mr. Dawkins, an attesting witness to the invalid 1836 will, about the drinking bouts, fist fights, and threats with deadly weapons. Dawkins also testified that Fan importuned Farr to set her free at Farr's death.[129]

The supreme court reversed a jury verdict for the contestant as contrary to the weight of the evidence and ordered another new trial.[130] The court acknowledged that because of their sexual intimacy and their child, Fan had influence over her master inconsistent with the relationship of master and slave.[131] The court also acknowledged that Fan's influence over Farr's business and personal affairs increased from 1832 to 1836 to the point that Fan eventually acquired control over Farr's affairs.[132] However, the court found that the evidence did not sustain a finding that Fan had exercised *undue* influence over Farr in 1828. In reviewing the evidence at trial, the court said:

> As to what shall constitute undue influence, I can add but little to what is said in the case of *Farr vs. Thomson*, [sic] *Ex'or*. Cheves, 37. According to the authorities, it must be so great as, in some degree, to destroy free agency; an influence exercised over the testator to such an extent as to constrain him, from weakness or other cause, to do what is

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[127] *Id.* at 81.
[128] *Id.* at 82-83.
[129] 25 S.C.L. (Chev.) at 40-41.
[130] 30 S.C.L. (1 Rich.) at 90.
[131] *Id.* at 83.
[132] *Id.*

> against his will, but what he is unable to refuse. This influence may be obtained either by flattery, by excessive importunity, or by threats, or in any other way by which one person acquires a dominion over the will of another.[133]

The elements delineated in the quotation from *Farr* formed the basis for the Indiana Supreme Court's decision in *Kenworthy v. Williams*[134] in 1854.

C. *Undue Influence in Indiana*

The law of undue influence in Indiana has not been as effectively articulated as has the law of testamentary capacity. The best way to examine the structure of a claim for relief based upon undue influence is to isolate the elements which the Indiana courts have required before setting aside a will as the product of undue influence. In *Kenworthy*, the Indiana Supreme Court reviewed an appeal from the Henry Circuit Court. The trial judge sustained a demurrer to a five count petition to set aside the will of Stephen Gregg. Two of five counts alleged that Gregg's will had been procured through the "undue influence and improper conduct" of the defendants. The Indiana Supreme Court, citing *O'Neall v. Farr*,[135] stated that the particular facts on which undue influence might rest at trial need not be specifically pleaded by the contestant. The supreme court differentiated between ordinary fraud and undue influence. An action for fraudulent procurement of property required specific averments of the acts and words which constituted fraudulent inducements by the defendant.[136] However, a will contest based upon alleged undue influence by a beneficiary did not require the specific pleading of evidentiary facts amounting to fraud.

1. Susceptibility to Influence.—Nearly all Indiana cases dealing with undue influence concern a testator who was in poor health,[137]

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[133]*Id.* at 84.

[134]5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[135]30 S.C.L. (1 Rich.) 80 (1844).

[136]*See, e.g.*, Baker v. McGinniss, 22 Ind. 257 (1864) in which the supreme court overruled a demurrer to a complaint to set aside a sale of hogs. The plaintiff's averment stated that the defendant sold plaintiff 27 hogs, representing them to be sound and healthy. The hogs in fact had cholera, which the defendant knew, and the plaintiff bought in reliance on defendant's statement to the contrary. The court held that this was a good plea of specific facts to support a claim for relief from fraud in the sale. *See also* Peter v. Wright, 6 Ind. 183 (1855) (bill to cancel deed and title bond, demurrer overruled, facts specific enough to set out cause for equitable relief on grounds of fraud).

[137]The "bad health" cases include occasional discussions by the court of the importunities of relatives and professionals, as in Deery v. Hall, 96 Ind. App. 683, 694-95, 175

under the influence of some sedative or alcohol, afflicted with what is commonly labeled by lay people as "senility,"[138] or suffering from some other mental or physical impairment. In *Folsom v. Buttolph*,[139] the Indiana appellate court quoted extensively from *In re Douglass' Estate*[140] in attempting to cope with the relationship between physical or mental impairment and undue influence, stating: " 'Undue influence exists when, through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendency which prevents the former from exercising an unbiased judgment . . . .' "[141]

Many Indiana cases state that since the testator was a person of strong mind and stubborn character the issue of undue influence was either not present in the case and should have been taken from the jury,[142] or that the contestant failed to establish a prima facie case of undue influence.[143] In either situation, the courts consistently implied that undue influence cannot be proven unless the contestant shows that the testator was susceptible to influence by a potential beneficiary in the first place.[144]

2. Existence of Confidential Relationship Between Testator and Influencer.—Nearly all Indiana undue influence cases allege that the testator and the alleged undue influencer had a special relationship in which the testator placed trust in the influencer.[145] The rela-

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N.E. 141, 145 (1931) in which the appellate court scrutinized the conduct of the testator's priest and medical personnel at St. Vincent's hospital in Indianapolis, noting that the priest and the hospital were substantial beneficiaries under the testator's deathbed will.

[138]The number of cases in Indiana in which an elderly person was alleged to have been influenced by some relative or professional because of his or her senility is quite large. In Love v. Harris, 127 Ind. App. 505, 513, 143 N.E.2d 450, 455 (1957) the court indicated that undue influence is conducted in private and is rarely accompanied by the use of force.

[139]82 Ind. App. 283, 143 N.E. 258 (1924).

[140]162 Pa. 567, 29 A. 715 (1894).

[141]*Id.* at 568, 29 A. at 716.

[142]*See, e.g.*, Stevens v. Leonard, 154 Ind. 67, 70-75, 56 N.E. 27, 28-30 (1900).

[143]The decisions which hold that the contestant had not established a sufficient case to go to the jury on undue influence usually give a precise account of the evidence on the issue and point out that inferences of affection, respect, even importuning by family members, as well as solicitous conduct toward a testator by potential beneficiaries do not provide sufficient circumstantial evidence to go to the jury on undue influence. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 354-55, 146 N.E. 577, 581 (1925).

[144]The best American case on the substantive law of undue influence, In re Faulks' Will, 246 Wis. 319, 17 N.W.2d 423 (1945), adopts this element as one of the primary components of a claim or cause of action to set aside a will on grounds of undue influence. *Id.* at 335, 17 N.W.2d at 440.

[145]In this respect, Indiana also follows the guidelines established in *In re Faulks' Will*. The Wisconsin Supreme Court characterized this element as the "[o]pportunity to exercise such influence and effect the wrongful purpose." *Id.* at 335, 17 N.W.2d at 440.

tionships which courts have found capable of perversion into undue influence include attorney and client,[146] medical professional and patient,[147] agent and principal,[148] and parent and child.[149] The common element in each of these relationships is that the testator, induced by the closeness of the relationship, reposed confidence and trust in the alleged influencer. Indiana courts deem this situation a "confidential relationship" and allow proof of a confidential relationship between the testator and a beneficiary to be admitted as circumstantial proof of undue influence by the beneficiary.[150]

3. Use of a Confidential Relationship to Secure a Change in the Testator's Disposition of Assets at Death.—A will is the product of undue influence only *if* the testator gives some influencer more than the influencer would have taken by prior wills, deeds, or by intestate succession. There are only one or two Indiana cases in which the supreme court ordered the issue of undue influence withdrawn from the jury when the trial transcript showed evidence of a confidential relationship between the testator and the alleged influencer. In each case, the court correctly pointed out that any im-

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[146]*See, e.g.*, Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915); Kozacik v. Faas, 143 Ind. App. 557, 241 N.E.2d 879 (1968); Workman v. Workman, 113 Ind. App. 245, 46 N.E.2d 718 (1943) (a cross-type in which the second spouse connived with a lawyer to obtain benefits from the testator). *See also* Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977) (contestant alleged that lawyer cooperated with Salvation Army to gain testator's favor for the Salvation Army).

[147]There was an allegation in Deery v. Hall, 96 Ind. App. 683, 175 N.E. 141 (1931), that hospital personnel at St. Vincent's Hospital in Indianapolis may have influenced Dolan's testamentary scheme in favor of several Catholic charities. Indiana has no case of the caliber of *In re Faulks' Will* or of Gerrish v. Chambers, 135 Me. 70, 189 A. 187 (1937) in which a nurse used her control over an elderly patient to extract lifetime gifts from the patient in return for overly solicitous behavior.

[148]*See, e.g.*, Bank of America v. Saville, 416 F.2d 265 (7th Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

[149]*See, e.g.*, McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957); Hoopengardner v. Hoopengardner, 102 Ind. App. 172, 198 N.E. 795 (1935).

[150]The best doctrinal summary of the "confidential relationship" theory in Indiana case law appears in Keys v. McDowell, 54 Ind. App. 263, 100 N.E. 385 (1913):

> There are certain legal and domestic relations in which the law raises a presumption of trust and confidence on one side, and a corresponding influence on the other. The relation of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child, belong to this class and there may be others. Where such a relation exists between two persons, and the one occupying the superior position has dealt with the other in such a way as to obtain a benefit or advantage, the presumption of undue influence arises . . . . Upon the issue of undue influence, such a presumption arising in favor of the party having the burden of proof makes a prima facie case; and, if no evidence is introduced tending to rebut such presumption, he is entitled to a verdict or finding in his favor upon that issue . . . . *Id.* at 54 Ind. App. 269, 100 N.E. 387.

portuning by the alleged influencer did not change earlier dispositions made by the testator and did not, therefore, constitute undue influence.[151]

4. The Testator Changed His or Her Disposition.—To have a will set aside as the product of undue influence, Indiana case law requires a testator to make a change of testamentary disposition. Indiana law regards several kinds of events as a change of testamentary disposition. Indiana cases hold that making a new will in favor of the influencer is a change of disposition.[152] The cases also hold that a testator's revocation of a will in order that he may die intestate is a change of disposition.[153] Finally, an inter vivos transfer of property to an influencer in excess of what the influencer could expect at death is also held to be a change of disposition.[154]

5. The Change of Disposition Was Unconscionable.—Unconscionability is difficult to define, but easy to illustrate. In *Crane v. Hensler*,[155] contestants alleged that the testator's second wife importuned the testator to make a will favoring her and her own children by a prior marriage over the testator's children by his first wife.[156] The Indiana Supreme Court set aside a jury verdict for the contestants and ordered a new trial due to an erroneous instruction to the jury about undue influence.[157] In *Brelsford v. Aldridge*,[158] the testator disinherited his only child in favor of his mistress. After executing his will, and just prior to his death, the testator married his

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[151]*See, e.g.*, Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965). This portion of the elements which constitutes undue influence received special attention in Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970).

[152]Nearly all contests claim the testator made a subsequent will which favored the influencer. *See, e.g.*, Jones v. Beasley, 191 Ind. 209, 131 N.E. 225 (1921); Davis v. Babb, 190 Ind. 173, 125 N.E. 403 (1921); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920).

[153]*See generally* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932). Although there are no Indiana will contest cases in which the contestant alleged a prior will was revoked under undue influence, thus permitting the testator to die intestate, Indiana courts would likely adopt the holding of *In re* Marsden's Estate, 217 Minn. 1, 13 N.W.2d 765 (1944), which concluded that the revocation of a testatrix' will procured from her on her death bed by the surviving children, cancelling a devise to her granddaughter and housekeeper, and causing the estate to be divided equally among the five living children of the testatrix, was void as the product of undue influence.

[154]The Indiana cases setting aside deeds of real estate and gifts of personal property in anticipation of death as the result of undue influence include Westphal v. Heckman, 185 Ind. 88, 113 N.E. 299 (1916); Wray v. Wray, 32 Ind. 126 (1896); Gwinn v. Hobbs, 72 Ind. App. 439, 118 N.E. 155 (1917); Beavers v. Bess, 58 Ind. App. 287, 108 N.E. 266 (1915); McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909).

[155]196 Ind. 341, 146 N.E. 577 (1925).

[156]*Id.* at 353-55, 146 N.E. at 580-81.

[157]*Id.* at 352-53, 146 N.E. at 580-81.

[158]42 Ind. App. 106, 84 N.E. 1090 (1908).

mistress. The appellate court reversed a judgment for the defendant on the ground that the trial court erred in refusing to let the testator's daughter testify that she enjoyed good relations with the testator.[159] The distinction between the two cases lies in the social acceptability of the actions of the woman in each case. In *Crane*, the second wife was within her perquisites as a wife in placing pressure on her husband to favor her with a new will. On the other hand, *Brelsford* showed that a mistress may not importune her lover for a legacy since she had no preferential status at law. Therefore, a will leaving an entire estate to a mistress is unconscionable while a will leaving all to a second wife is not.

In summary, Indiana law recognizes undue influence as a claim for relief against a will, deed, contract, or trust instrument which arises when a person who is susceptible to influence by others as a result of mental or physical infirmity establishes a confidential relationship with another person. If that person uses the confidential relationship to manipulate the testator, grantor, or settlor in order to force that individual to change his testamentary plans or lifetime gift plans to favor the influencer, and if the results of that change are socially unacceptable or unconscionable, then the person exercising such importunities will be held to be an undue influencer. A claim for relief may be heard against any benefits secured by the influencer or any confederates as a proximate result of the undue influence.

D. A Rogue's Gallery of Undue Influencers

In many instances, whether the court decides in favor of the contestant or proponent depends in large measure upon the type of person exerting the influence. The status of the individual exerting the influence determines the outcome of a will contest more consistently than propositional legal statements about burdens of proof and presumptions. Since Indiana case law provides a colorful gallery of rascals and rogues engaged in undue influence, a review of the five types of undue influencers will be profitable.

1. David and Bathsheba Cases.[160]—Many undue influencers play the role of Bathsheba, the second wife of King David of Israel, and importune their spouse for preferment against the children of a former marriage. There are thirteen such cases in Indiana jurisprudence which are exemplified by *Workman v. Workman*.[161]

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[159]*Id.* at 109, 84 N.E. at 1091.

[160]Bathsheba's importuning to David for favoritism for her son against Adonijah is recounted in 2 *Samuel* 12:24 and 1 *Kings* 1:11-38. A "David and Bathseba" will contest is a will contest on the ground of undue influence exercised by a second spouse to secure favor over children of the testator by a prior marriage.

[161]113 Ind. App. 245, 46 N.E.2d 718 (1943).

John T. Workman had three children by his first wife who died March 30, 1932. John Workman's life style changed dramatically after his first wife's funeral. He frequented local saloons in the company of a young lawyer named Herbert Lane and consumed enormous quantities of liquor each day. The case report does not disclose whether Lane introduced Workman to a divorcee named Ida Sutton. However, Workman married Ida Sutton within two years after his first wife's death.[162] Lane took Workman on weekend trips and, in 1937, Lane took Workman for an eastern summer vacation.[163] When they returned from the trip east, Workman had Lane draw up a deed conveying all his real estate to Ida Workman.[164]

On March 25, 1938, Herbert Lane and Ida Workman took John Workman to a hospital in Louisville, Kentucky for treatment of rectal cancer. Workman was placed under heavy sedation.[165] John's only living child, Ott Workman, was neither notified that his father was ill, nor where his father had been taken until sometime later when his father lay dying.[166] In late March, Lane drew up a will for Workman giving the remainder of Workman's property to Ida and to her son by a prior marriage, Norval Sutton.[167] Lane never read the will to Workman in the presence of the attesting witnesses and it was unclear whether John Workman knew what he was doing when he signed the will. Some days later, when Ott finally located his father and came to Louisville to see him, John Workman asked Ott to get a lawyer to make a will leaving all his property to Ott.[168]

On this evidence, the Orange Circuit Court entered judgment on a jury verdict for the contestant.[169] The Indiana Appellate Court, finding no reversible error, affirmed the verdict on appeal.[170] The pattern of overreaching and importuning by Herbert Lane and Ida Workman to secure John Workman's estate was conduct which the court was willing to call unconscionable and outrageous. It exceeded what the court felt was the appropriate degree of pressure a second spouse may bring on his or her mate to secure a testamentary advantage.

2. Esau and Jacob Cases.[171] — Will contests often develop be-

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[162]*Id.* at 270-71, 273-74, 46 N.E.2d at 727-29.

[163]*Id.* at 271, 46 N.E.2d at 728.

[164]*Id.*

[165]*Id.* at 274, 46 N.E.2d at 729.

[166]*Id.* at 271, 46 N.E.2d at 728.

[167]*Id.* On the same day that Workman signed his will, he also signed stock certificates over to his lawyer, Lane. Lane had to guide the old man's hand in making the signatures to these instruments. *Id.*

[168]*Id.* at 274, 46 N.E.2d at 729.

[169]*Id.* at 252, 46 N.E.2d at 720.

[170]*Id.* at 280, 46 N.E.2d at 731.

[171]The well-known story of Esau, who sold his birthright to Jacob for a pottage stew, and Jacob's deceitful obtaining of the first-born son's inheritance from his blind,

tween children of a testator. In these inter-sibling fracases, one sibling often accuses the other of exerting undue influence over the deceased parent. There are twenty-six Indiana decisions which fit this pattern of alleged undue influence.

In 1936 the Indiana Appellate Court reviewed *Hoopengardner v. Hoopengardner*,[172] a typical Esau and Jacob case. Lewis Hoopengardner owned a large farm in Wells County. His wife died in 1928, and until his son, Jasper, returned home, he had promised his children that he would divide his estate equally among them. The old man promptly became angry with his other children over trifles and changed his disposition toward them. The elder Hoopengardner went everywhere in the company of Jasper and agreed orally with Jasper that if Jasper would take care of him in his declining years he would deed the home farm to Jasper. Finally, the old man, then near 90, in addition to the inter vivos transfer of the home farm to Jasper for nominal consideration made out a will leaving the bulk of his personal estate to Jasper.[173] The trial court entered judgment on a jury verdict for the contestant which was affirmed on appeal.[174]

In *Hoopengardner*, Jasper Hoopengardner did essentially nothing for his father except befriend him. In return for his companionship, Jasper received an inter vivos transfer of all his father's real estate and a favored position in his father's will. The court in *Hoopengardner* apparently reasoned that the gifts to Jasper were unconscionable in relation to Jasper's potential claim for services. This seems to be the line of demarcation in such cases.[175]

3. The Judge Jaffrey Pyncheon Cases.[176]—Nine Indiana will contests deal with a will in which the undue influencer is alleged to have been a brother, sister, niece, or nephew of the testator.

Gurley v. Park[177] represents the type of Jaffrey Pyncheon case

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dying father, Isaac, is recounted in *Genesis* 25:30-34, 27:6-38, 27:41-45, 32:1-32 and 33:1-20. An "Esau and Jacob" contest is a will contest in which the contestant alleges that his or her sibling or half-sibling importuned their parent for a greater share of the parent's estate.

[172]102 Ind. App. 172, 198 N.E. 795 (1935).

[173]*Id.* at 173, 198 N.E. at 795.

[174]*Id.* at 174, 198 N.E. at 796.

[175]*But cf.* McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957) (decision for the proponent on similar facts when the influencer actually took physical care of the testator for some time).

[176]The "Jaffrey Pyncheon" cases resemble the actions of Judge Jaffrey Pyncheon, the villain of Nathaniel Hawthorn's HOUSE OF THE SEVEN GABLES. In a Judge Pyncheon will contest, the influencer is a collateral relative of the testator, who importunes and intrigues his collateral, as Judge Pyncheon did, to gain testamentary favors. Judge Pyncheon disguised his uncle's death to give the appearance of a murder, and then Jaffrey "framed" Clifford Pyncheon in order to gain the inheritance.

[177]135 Ind. 440, 35 N.E. 279 (1893).

in which the influencer generally loses.[178] Mary B. Park, the testatrix, was very old, infirm, and deranged. On her death bed, she executed a will disinheriting her son after being importuned by her brother to leave her property to the brother's two children in preference to her own son who was in financial need.[179] Mrs. Park was something of a recluse and made statements to other persons in the years immediately before her death that she would leave them her property. The jury verdict and judgment casting out her will was sustained by the Indiana Supreme Court as supported by the evidence at trial.[180] In this case, the importuning brother obtained a will in favor of his own children at the expense of a lineal descendant. The case abounded with evidence of Mrs. Park's susceptibility to influence and of the conscious connivance of her brother to secure an estate for his own children.

4. The Uriah Heep Cases.[181]—In recent years, importuning family members have been replaced in undue influence cases by importuning professional persons. Six of the nine Uriah Heep will contests in Indiana are twentieth century cases. Four of the nine cases have been decided since World War II. The common element in all of these cases is that the person alleged to have exerted undue influence over the testator was the testator's lawyer, physician, or agent rather than a family member.

Kozacik v. Faas[182] illustrates the kind of Uriah Heep will contest in which the contestant may prevail. Katherine Yaeger executed her will August 30, 1963. The principal beneficiary under her will was Andrew M. Kozacik, a lawyer.[183] Mrs. Yaeger's estate amounted to slightly less than $6,000. Her son, Anthony Faas, filed a will contest alleging that his mother's will had been procured by Mr. Kozacik's undue influence. At trial, Mr. Kozacik stated he received no compensation for drawing Mrs. Yaeger's will or for the other services he performed for the testatrix for the seven years prior to her death.

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[178]*But see* Stevens v. Leonard, 154 Ind. 67, 56 N.E. 27 (1900) for a decision for the proponent in which the influencer denied knowledge of the testator's revised will.

[179]135 Ind. at 444, 35 N.E. at 280.

[180]*Id.*

[181]Uriah Heep was the law clerk in Charles Dickens' DAVID COPPERFIELD. Heep importuned his employer's clients for benefits in order to attract away his master's business. Eventually Heep displaced his employer and then took over the management of the affairs of David Copperfield's benefactor. An "Uriah Heep" will contest is a contest in which the influencer, a professional person, importunes the client or patient for benefits.

[182]143 Ind. App. 557, 241 N.E.2d 879 (1968). *Contra*, Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977).

[183]143 Ind. App. at 561, 241 N.E.2d at 881. The gift of the residuary estate was preceded by a provision in the testatrix' will requiring the executor to collect a debt of $16,300 from her son for the benefit of the residuary legatee.

The Starke County Circuit Court was not swayed by Kozacik's evidence in support of the will and entered judgment setting aside the will as the product of Mrs. Yaeger's unsound mind and the undue influence of Mr. Kozacik.[184] The appellate court affirmed the trial court. The court took the opportunity to warn Indiana lawyers that preparing a will for a client which included the lawyer-drafter as beneficiary under the will was an "exceedingly bad practice . . . especially when the terms of the will fail to make any provisions to the natural objects of her bounty. . . ."[185]

5. The Mary Worth Cases.[186]—Six Indiana cases decided in this century alleged that the undue influencer was a non-professional friend of the family who intervened as helper and counselor to the testator. In each case, the kindly friend ended up with a substantial portion of the testator's estate at the expense of blood relatives.

Davis v. Babb[187] is representative of the Mary Worth cases in which the proponent generally loses. Mary L. Taylor, an elderly widow, had been living with her brother, Edmund Babb, in Jennings County for some time when Edmund died in March 1906. Following Edmund's death, William C. Davis became the dominant influence in Mary Taylor's life. He obtained a deed of trust from her for the family farm in Jennings County which made him trustee over the farm.[188] Mr. Davis corresponded extensively by letter with Mrs. Taylor and detailed how to handle her money and how to give it away at her death.[189] Mrs. Taylor told her family that she intended to leave her estate to two nieces, Hattie Sargent and Lucy Boyd.[190] It appeared from the evidence that she also told everyone how much she feared and distrusted Davis. During this period of time, Davis had also taken possession of her 1906 will and removed it to Cincinnati where he placed it in a joint safety deposit box. When Mrs. Taylor wanted to make a codicil, she contacted Mr. Davis and had him bring the original will from Cincinnati to Jennings County. There was evidence that Davis either took notes on the contents of the 1906 will or wrote it himself.[191] When Mrs. Taylor died in 1914, Davis took the will and codicil out of the joint safety deposit box in Cincinnati and presented it for probate in Vernon. Mrs. Taylor's

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[184]*Id.* at 560, 241 N.E.2d at 880.

[185]*Id.* at 566, 241 N.E.2d at 884.

[186]Mary Worth was the principal character in the King Features Syndicate, Inc. comic strip of the same name. She was a neighborhood busybody and do-gooder who had no family of her own, and spent her time importuning the neighbors and meddling altruistically in their private lives.

[187]190 Ind. 173, 125 N.E. 403 (1919). *Contra*, Muson v. Quinn, 110 Ind. App. 277, 37 N.E.2d 693 (1941).

[188]190 Ind. at 186, 125 N.E. at 408.

[189]*Id.* at 179-80, 125 N.E. at 405.

[190]*Id.* at 185-87, 125 N.E. at 406-08.

[191]*Id.* at 186-87, 125 N.E. at 408.

brother and her nieces filed objections to probate which ended in a jury verdict for the contestant on grounds of lack of capacity and undue influence by Davis.[192] The Indiana Supreme Court, after reviewing the slender evidence at trial on Mrs. Taylor's lack of capacity, detailed the instances of overreaching conduct on the part of William Davis. The court concluded that the verdict and judgment should be affirmed.[193]

The Indiana Supreme Court held that undue influence could be proven from circumstantial evidence alone. Davis' long history of intervention in Mrs. Taylor's affairs was strong circumstantial evidence of his undue influence over her.[194] The circumstances surrounding the making of both the 1906 will and the 1913 codicil suggested that Davis consciously managed Mrs. Taylor's affairs so that she could not help but make him the principal beneficiary of her will.[195]

IV. A FOOTNOTE ON FRAUD IN INDIANA WILL CONTESTS

A. The Theory of a Will Contest Based on Fraud

Fraud has been one of the independent grounds for setting aside a will in Indiana since 1852. Of all Indiana will contests surveyed,

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[192] *Id.* at 177-78, 125 N.E. at 405.

[193] *Id.* at 191, 125 N.E. at 409.

[194] *Id.* at 180-81, 125 N.E. at 406.

[195] *Id.* at 186-87, 125 N.E. at 408.

A survey of Indiana will contests reveals that the outcome in will contest cases reflects the status of the beneficiary who is the alleged influencer. Disregarding for the moment the presence or absence of a lack of capacity claim in alleged undue influence cases, some interesting results emerge. For example, of the thirteen "David and Bathsheba" undue influence cases, ten trial decisions were in favor of the contestant and three were in favor of the proponent. After appeal, ten proponents were winners while only three contestants remained winners. Of the twenty-six "Esau and Jacob" undue influence cases, seventeen originally favored the contestants, but fifteen appellate decisions favored the opponents. Of the six "Mary Worth" cases, four trial court decisions favored the contestants but only two survived the appeal. However, in nine "Uriah Heep" cases, of the six trial decisions favoring the contestants, only one was reversed on appeal.

Of all will contests in which undue influence was alleged, 37.7% were trial decisions for the proponent and 62.3% were trial decisions for the contestant. The results after appeal were exactly reversed. The implication of this is that the Indiana appellate courts have applied the brakes to trial court decisions which invalidate wills. This is evidenced by the fact that only 24.3% of all trial decisions for the proponent were reversed on appeal while 55.7% of the trial court decisions for the contestant were reversed on appeal. Conversely, 75.7% of all decisions for the proponent at the trial level were affirmed while only 44.2% of all trial decisions for the contestant were affirmed. Contestants in Indiana will contests stand about a two to one chance of winning a trial and about a three to two chance of having that trial verdict and judgment reversed on appeal. The impact of this long history of judicial protectionism has surely been to discourage attacks on wills on the ground of undue influence.

25.2% included an allegation that the will in question was procured by fraud. Two cases were based on fraud alone. Two more were brought on the grounds of fraud and want of due execution.[196] In *Frye v. Gibbs*,[197] the contestant alleged that the testator's signature had been forged to her will. According to the Indiana Appellate Court, this allegation was not supported by the evidence in the case and the trial decision for the proponent was affirmed.[198] *Barger v. Barger*[199] also turned on the proof of a forged signature to a will. The decision sheds little light on the elements of fraud as an independent cause for setting aside a will in Indiana.[200]

However, *Orth v. Orth*[201] laid a foundation for later Indiana jurisprudence on fraudulent procurement of wills. Godlove S. Orth had been twice married. He had a son William by his first wife, and Harry and Mary by his second wife, Mary Ann Orth, who survived him.[202] Orth executed a will in 1882 which was accompanied by a letter of instruction to his second wife defining how she should handle the administration of his estate to avoid losing the bulk of his real estate to creditors.[203] Orth's will devised his real estate holdings in several Indiana counties to Mary Ann in fee simple and all his personal property to Mary Ann absolutely.[204] Godlove Orth's letter to Mary Ann contained the following statement:

> In a word, act carefully, prudently, and under such good advice as you can procure, *and act justly towards yourself and towards all my children*, and I shall be content. My desire in this matter is that all my debts be paid, that you have a competence during your life, *and then, what is left give to all the children alike*.[205]

Mary Ann Orth's own will left her estate to her two children and excluded William Orth entirely. William Orth died shortly after his stepmother. William's children then brought a lengthy complaint to set aside Mary Ann Orth's will or, in the alternative, to impress her estate with a constructive trust in favor of William Orth's children

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[196]*See* Table 18 in Appendix A to this Article held by publisher.

[197]139 Ind. App. 73, 213 N.E.2d 350 (1966).

[198]*Id.* at 77, 213 N.E.2d at 352.

[199]221 Ind. 530, 48 N.E.2d 813 (1943).

[200]The case was decided on the issue of the exclusion of the testator's statement that he had made a will, uttered after the alleged forgery. *Id.* at 533-35, 48 N.E.2d at 814-15.

[201]145 Ind. 184, 42 N.E. 277 (1896).

[202]*Id.* at 184-86, 42 N.E. at 277-78.

[203]*Id.*

[204]*Id.* at 191, 42 N.E. at 279.

[205]*Id.* at 186, 42 N.E. at 277 (emphasis added).

on the theory that Mary Ann Orth procured Godlove Orth's estate by fraudulently representing to him that she would divide the residue at her death equally between the three children of Godlove Orth.[206] The complaint further alleged that the letter of Godlove Orth created a trust on the bequest in favor of the three Orth children or, alternatively, gave Mary Ann only a life estate with remainder in fee simple in the three Orth children per stirpes.[207] The complaint demanded enforcement of the express trust or imposition of a constructive trust. The trial court sustained the defendant's demurrer to the complaint and the contestants appealed.

The Indiana Supreme Court first stated that Godlove Orth's letter, by itself, could not be the foundation for an express trust.[208] The court further stated that the letter together with Mary Ann Orth's statements to William Orth that she would carry out the terms of Godlove's letter in his favor likewise did not create an express trust.[209] If the letter alone did not create a trust, the "trustee's" statements to a beneficiary could not add any support to the letter in the creation of an express trust.[210]

The court then examined the transaction in terms of fraudulent procurement by Mary Ann Orth:

> If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud . . . . Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including . . . a trust of the character of that here claimed. . . . It is alleged generally that Mrs. Orth "dissuaded the said Godlove from making changes in his said will in favor of the said William M. Orth, or making other provisions for him, which he would otherwise have done," but it is nowhere alleged that the testator expressed a desire to, and was by fraud dissuaded from making a trust . . . .[211]

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[206] *Id.* at 187-90, 42 N.E. at 278-81.
[207] *Id.*
[208] *Id.* at 192-93, 42 N.E. at 279.
[209] *Id.* at 194, 42 N.E. at 281.
[210] *Id.*
[211] *Id.* at 201-02, 42 N.E. at 282.

The court affirmed the lower court's ruling on the demurrer.[212]

Orth shows that Indiana recognizes a cause of action for setting aside a will on the ground of fraudulent procurement or inducement. The cause of action for fraud was not merged into a cause of action for undue influence.[213] This cause of action for fraud follows the ordinary rules relating to any tort claim of fraudulent misrepresentation.

The Indiana Trial Rules continue the common law requirement that fraud be specifically set out in the complaint.[214] Indiana case law requires a litigant to offer proof of intent to defraud or to obtain property under false pretenses, in order to recover.[215] This special intent, called "scienter," requires the actor to make some kind of misrepresentation while aware that the representation is made to a particular individual and that the representation conveys some meaning which will be believed and acted upon by that individual.[216] Decisional law in Indiana established four elements to actionable fraud:

> (1) that the defendant make a material representation of past or existing facts;
> (2) that the representation was made with knowledge of its falsity, or with reckless disregard for the truth of the statement made;
> (3) that the defendant's statement induced the plaintiff to act to his or her detriment; and
> (4) that as a proximate result, the plaintiff was injured.[217]

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[212]*Id.* at 206, 42 N.E. at 284.

[213]*See* text accompanying notes 134-36, *supra*.

[214]*See* IND. R. TR. P. 9(B).

[215]*See, e.g.*, Kirkpatrick v. Reeves, 121 Ind. 280, 281-82, 22 N.E. 139, 140 (1889); Peter v. Wright, 6 Ind. 183, 188-89 (1855). According to Hutchens v. Hutchens, 120 Ind. App. 192, 199, 91 N.E.2d 182, 185 (1950), actual fraud consists "of deception intentionally practiced to induce another to part with property or surrender some legal right," and its essential elements consist of "false representation, *scienter*, deception and injury." *Id.* (emphasis added). *See also* Baker v. Meenach, 119 Ind. App. 154, 160, 84 N.E.2d 719, 722 (1949).

[216]*See, e.g.*, Vernon Fire & Cas. Ins. Co. v. Thatcher, 152 Ind. App. 692, 285 N.E.2d 660 (1972) for the best contemporary restatement of Indiana's law of scienter.

[217]The elements of actionable fraud in Indiana have been stated by the courts in several different ways. For example, in Auto Owners Mut. Ins. Co. v. Stanley, 262 F. Supp. 1, 4 (N.D. Ind. 1967), Judge Grant stated the elements of actionable fraud to be "(1) representations of material facts; (2) reliance thereon; (3) falsity of the representations; (4) knowledge of the falsity; (5) deception of the defrauded party; and (6) injury." In Coffey v. Wininger, 156 Ind. App. 233, 296 N.E.2d 154 (1973), the appellate court stated the elements of fraud as "a material misrepresentation of past or existing facts, made with knowledge (scienter) or reckless ignorance of this falsity," which causes the

If the plaintiff can prove these elements by a preponderance of the evidence, the plaintiff should be able to have a will or other dispositive instrument set aside on the ground of fraudulent procurement.

V. TWO INCIDENTS

The last part of this exposition of Indiana will contests deals with two incidents in a lawyer's file which relate to the doctrinal materials presented earlier. The first case deals with preventive law practice in the law office. It is intended for a general audience. The second case is an evaluation of a client's story by a trial attorney in order to decide whether the client has any probability of success in a will contest should the lawyer agree to take it. Although this case certainly concerns general practitioners, it is slanted toward active trial attorneys who must make a quick review of the potential in a case of this type. Each case involves the application of both the

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plaintiff to change his or her position in detrimental reliance thereon. *Id.* at 239, 296 N.E.2d at 159. This formula was restated in Blaising v. Mills, 374 N.E.2d 1166, 1169 (Ind. Ct. App. 1978). The most recent supreme court case dealing with the elements of the tort of fraudulent misrepresentations, Automobile Underwriters, Inc. v. Rich, 222 Ind. 384, 53 N.E.2d 775 (1944), stated the elements of actionable fraud as (1) false representations made for a fraudulent purpose (2) believed by a party to whom they were made (3) who was thereby induced to act thereon and (4) resulting in effecting a fraud. *Id.* at 390, 53 N.E.2d at 777 (quoting Watson Coal & Mining Co. v. Casteel, 68 Ind. 476 (1879)). The standard for proof of fraud is the preponderance of the evidence test. Grissom v. Moran, 154 Ind. App. 419, 427, 290 N.E.2d 119, 123 (1972); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 466-67, 166 N.E.2d 341, 348 (1960); Holder v. Smith, 122 Ind. App. 371, 377, 105 N.E.2d 177, 180 (1952). *See also* United States v. 229.34 Acres of Land, 246 F. Supp. 718, 722 (N.D. Ind. 1965) (applying Indiana law). The burden of proof in Indiana will contests in which fraudulent procurement of a will is alleged is the same as the burden of proof for undue influence and lack of capacity (proof by a preponderance of the evidence). There is no reason to increase the burden of proof in a will contest to clear and convincing evidence when the standard for fraud in ordinary civil litigation is by a preponderance of the evidence.

Other statements of the defendant which are fraudulent are admissible as an exception to the hearsay rule. *See, e.g.*, Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 289-90, 296 N.E.2d 165, 169 (1973) (scienter proved by statements made by insurer's agent to insured's executor and by executor's responses); Coffey v. Wininger, 156 Ind. App. 233, 243-44, 296 N.E.2d 154, 161 (1973) (constructive fraud proven by evidence of vendor's statement to purchaser of land and purchaser's replies); Bob Anderson Pontiac, Inc. v. Davidson, 155 Ind. App. 395, 397-99, 293 N.E.2d 232, 233-34 (1973) (scienter established by evidence that the defendant tampered with the odometer in order to show a lower mileage than actually existed); Colonial Nat'l Bank v. Bredenkamp, 151 Ind. App. 366, 370-71, 279 N.E.2d 845, 846 (1972) (in bank fraud action, statements by bank officer to plaintiff about securing loan and plaintiff's replies admitted to show scienter); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 465-66, 166 N.E.2d 341, 347-48 (1960) (release obtained from plaintiff by statements by insurance adjuster; entire conversation between plaintiff and adjuster admitted to show scienter).

substantive law pertaining to lack of capacity, undue influence, and fraud, and the procedural principles implicated by each case.

A. Fred Lott: An Exercise in Preventive Law[218]

Fred Lott, 53, is a bachelor. He lives alone in a run-down house in a poor neighborhood. Fred is known around town as a recluse. He seldom leaves his home except to buy groceries at a neighborhood store and to collect rent from his tenants. Fred owns several run-down one and two-family houses from which he appears to receive most of his ready money. His nearest relatives are two sisters, Grace Brown and Viola Wilson, who live with their families out of state. Fred Lott has been buying and selling cheap rental housing for several years. In order to enhance his choices in real estate investment, Lott has been consulting Mrs. Seldon, a medium, who lives near his home. Over the years, the firm of Blackford and Morton has performed real estate title work and other incidental tasks for Mr. Lott. Lott appeared in the reception room one afternoon asking for an appointment to make a will and Oliver P. Morton agreed to see him.

After taking an inventory of Lott's assets, which proved to be considerably larger than Morton had supposed, Morton asked Fred Lott what he wanted to do with his property at death. Lott told Morton that he had been thinking the matter over for some time. He had no desire to give his property to his two sisters or to their children. Fred said that relations with his two sisters had been strained for years. He did not see them often and he did not know the names of their children. Intuition told Morton that Fred's sisters disapproved of Fred's strange behavior.

Fred Lott spent a lifetime amassing a collection of antique glassware. Fred valued the collection at slightly more than $10,000 of the $340,000 he estimated as his net worth. Much of this collection had been purchased through the efforts of Ralph Smith, a local antique dealer, who, according to Fred, was his only real friend. Ralph Smith was also a bachelor. Lott wanted to leave his collection and his real estate to Smith at this death and to will the remainder of his assets to the Indiana Historical Commission. This recitation created some immediate inner conflicts which Morton had to resolve. Morton promised to study the information Fred had given him and to contact Lott in a week to discuss what alternatives Fred might wish to follow in making out his will. After Fred left, Oliver Morton wrestled with his doubts about the situation. Fred was a

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[218]Any similarity between the characters described in Part V of this Article and any real person, living or dead, is purely coincidental.

strange individual. He was unconventional and some people would consider his behavior bizzare. Was he mentally competent to make a will? Was it even Morton's business to question the mental competency of a client? What kind of relationship existed between Fred Lott and Ralph Smith? Why did Lott want to give the bulk of his estate to Smith rather than his family? If Fred Lott went to mediums about buying and selling real estate, had he also consulted a medium about his will? Was there any plan to get Fred Lott's money from him by false pretences? Should Morton have dared to ask his client such questions?

Since Morton is an office lawyer and does not regularly do trial work, his appraisal of Fred Lott's situation has two elements. First, in order to serve his client and avoid liability for professional malpractice, what could Morton do to ensure that Lott's will would be upheld in a later contest? Second, Morton needs to give Lott an accurate forecast of the probability of an attack upon his will after his death and the likelihood of its success. This will help Lott decide whether he really wants to go through with the disinheriting process.

B. A Lawyer's Duty with Respect to a Client's Capacity to Act for Himself

Ordinarily, a lawyer is obliged to handle a client's business with the same standard of care that other lawyers would customarily provide for the client in similar situations.[219] Likewise, a lawyer must possess and exercise the same kind of skill which would be

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[219]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-66 (4th ed. 1971). Indiana courts faced the question of the attorney's duty to his or her client in the mid-nineteenth century. In Reilly v. Cavanaugh, 29 Ind. 435 (1868), the supreme court held that a lawyer was liable for the consequences of his or her "ignorance, carelessness or unskillfulness, just as a physician is for his malpractice." *Id.* at 436. In Hillegass v. Bender, 78 Ind. 225 (1881), the supreme court held that a lawyer is "bound to possess and exercise competent skill, and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his clients." *Id.* at 227. Finally, the appellate court stated what can be taken as a pattern instruction to juries on an attorney's standard of care and skill for purposes of fastening liability for malpractice:

> Appellant also insists that instruction number eight was wrong. The substance of this charge was that an attorney acting under the employment of his client is responsible to him only for the want of ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business he has undertaken to do . . . . There is no implied agreement in the relation of attorney and client . . . that the attorney will guarantee the success of his proceedings in a suit or the soundness of his opinions. He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit.

Kepler v. Jessup, 11 Ind. App. 241, 254-55, 37 N.E. 655, 659 (1894).

reasonable for another lawyer to possess and exercise in similar circumstances.[220] No Indiana decisions have been reported in which an attorney has been successfully sued for negligent preparation of a will or trust instrument. Most cases from other states have been grounded on the drafter's noncompliance with the formalities of the wills act. These derelictions typically take the form of failure to secure the requisite number of attesting witnesses, failure to adhere to the proper form of attestation,[221] or the negligent inclusion of a beneficiary under the will as an attesting witness.[222]

In California, however, malpractice suits against attorneys have been based on errors of judgment rather than simple ignorance. The best known example of this type of suit is *Lucas v. Hamm*.[223] *Lucas* was a suit brought by disappointed beneficiaries under a will which was set aside on the ground that the gift over to them contained in the will violated the Rule against Perpetuities. The California Supreme Court determined that the standard of skill which an ordinary practitioner should possess need not include the intricacies of the Rule against Perpetuities in its most obscure applications.[224] In the case of Fred Lott, the standard at issue is whether Oliver P. Morton should recognize a potentially incompetent testator and be obliged to go beyond the preparation of a will draft and advise against the execution of the proposed disinheriting will. This standard also involves the sub-issue of whether a lawyer of ordinary competence, when faced with a situation similar to that of Mr. Lott, would inquire into such matters as testamentary capacity, undue influence, and fraud.

Since the injured party is the testator and the injury occurs when the testator dies without changing the defective will, the question may arise whether a disappointed heir has standing to pursue the lawyer who drafted the will. This issue has already been answered in California. In *Lucas v. Hamm* the court decided that persons who would have taken under a will but for the attorney's errors in its preparation have standing as donee beneficiaries of the contract to employ counsel to assert the deceased client's malprac-

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[220]*See* Jones v. White, 90 Ind. 255 (1883) (attorney hired to bring replevin action; action dismissed because bond improperly drawn; attorney who does not have the skill to properly prepare form required by a plain statute is liable in damages).

[221]*See* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957) (overruled in part on other grounds); Weintz v. Kramer, 44 La. Ann. 35, 10 So. 416 (1892); *Ex parte* Fitzpatrick, [1924] 1 D.L.R. 981, 54 Ont. L.R. 3 (1923).

[222]Woodfork v. Sanders, 248 So. 2d 419 (La. App. 1971); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

[223]56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

[224]*Id.* at 592-93, 364 P.2d at 690-91, 15 Cal. Rptr. at 826-27.

tice claim.[225] The Connecticut Supreme Court reached a similar conclusion in *Licata v. Spector*,[226] a case in which disappointed beneficiaries under a will brought a malpractice action against the lawyer who negligently failed to have the required number of attesting witnesses sign the decedent's purported will. Louisiana allowed a similar malpractice suit by the beneficiaries in *Woodfork v. Sanders*,[227] a case in which the lawyer permitted a beneficiary to be a subscribing witness and thus caused the beneficiary to forfeit his legacy under the will.[228] Washington has held that the disappointed beneficiaries under a will void for an attorney's mistake had standing to prosecute the malpractice claim of their testator against the offending lawyer.[229]

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[225]*Id.* at 591, 364 P.2d at 688-89, 15 Cal. Rptr. at 824-25. The California Supreme Court overruled Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895), in which an attorney who had made a mistake in drafting a will was held not liable for negligence or for breach of contract to a beneficiary under a will who lost his legacy as a result of the lawyer's mistake. The *Buckley* case turned on the concept of privity of contract between attorney and client. In *Lucas v. Hamm*, the court pointed out that by 1961 the doctrine of privity of contract in other fields of tort law had become less rigorous than it was in 1895. *Biakanja v. Irving* had already permitted recovery by a disappointed beneficiary against a notary public who drew a will without proper attesting witnesses. In *Lucas*, the court said:

> [I]t was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury, and the policy of preventing future harm.

Id. at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823. The court further noted that:

> Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor . . . namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. . . . We are of the view that the extension of this liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. . . .
>
> It follows that lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant.

Id. at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

[226]26 Conn. Supp. 378, 225 A.2d 28 (1966).

[227]248 So. 2d 419 (La. App. 1971).

[228]The actual result in *Woodfork* was that the appellate court held the will itself valid, but invalidated the gift of a "universal legacy" to the plaintiff who signed as an attesting witness. The plaintiff's petition had stated that the will itself was invalid and as a proximate result, the plaintiff lost the universal legacy. The court granted the plaintiff leave to amend his complaint for attorney malpractice on the ground that it was negligent for the defendant to include the universal legatee as an attesting witness which caused the invalidation of the gift. 248 So. 2d at 424-25.

[229]*See* Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

Fred Lott's case presents two sources of future malpractice litigation. First, if Lott's will is set aside for lack of capacity, undue influence, or fraud by Smith and the medium, Lott's intended beneficiary may possibly sue Morton for malpractice. Further, if the will was sustained after an expensive will contest, the beneficiaries who have suffered economic harm as a consequence may also have a claim against Morton for malpractice since any lawyer in Morton's shoes would have spotted the threat of a future contest on these facts and done something about it. Second, the intestate successors to Lott could possibly have an action for malpractice for breach of fiduciary duty to their brother.

In the past decade and a half, some lawyers have attempted to create an anticipatory record during execution ceremonies for wills which were disinheriting made by persons whose capacity was subject to inquiry. Some lawyers have videotaped will executions accompanied by lengthy on-camera interrogation of the testator on his or her property holdings, family members, and his or her reasons for executing a disinheriting will. Other lawyers have maintained a file of letters and memos describing the testator's wishes in the testator's handwriting, or have taken statements from the testator under oath before a notary in order to provide a "file" of admissible hearsay statements for an anticipated will contest. Some law professors have recommended will clauses which partially compensate disinherited relatives who do not file objections to probate.[230]

Leon Jaworski described a pro forma execution ceremony for office lawyers which included interrogation of the testator before the subscribing witnesses prior to execution. The testator had previously read the entire will before the same witnesses.[231] These precautions indicate that attorneys have given serious thought to the implications of disinheriting wills and the probability of some disappointed relative filing objections to probate.

A malpractice suit is a trial within a trial. Lott's will would have to be shown to be valid beyond a preponderance of the evidence but for the want of proper precautions taken by the lawyer during the execution ceremonies. The burden of showing that Lott was competent and was free of undue influence would rest on Smith in such a

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[230]Such clauses are usually referred to as "no contest" clauses, because in less sophisticated versions these clauses threaten to disinherit anyone who contests the will itself. A more modern type of "no contest" clause offers an inducement not to contest. The testator admonishes potential contestants that their specific legacy will be increased if the legacy is not challenged by a will contest. For further discussion of no contest clauses, *see* Jack, *No Contest Or In Terrorem Clauses In Wills—Construction and Enforcement*, 19 SW. L.J. 722 (1965); Leavitt, *Scope and Effectiveness of No Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45 (1963).

[231]Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92-93 (1958).

suit.[232] Although Smith would have to show that the results in any will contest were not res judicata as to the issues of lack of capacity and undue influence, he would have no great problem in showing that the will contest did not raise res judicata or collateral estoppel on the filing of a legal malpractice suit against Lott's lawyer.[233]

If a will contest were filed and successfully defended by Lott's executor on Smith's behalf, the order of distribution under the probate code may be subject to Smith's objections to the size of the attorney's fee allowed on the ground that a proper exercise in file building would have obviated the need for litigation in the first place. In this case, Smith would have the judgment in the will contest showing that Lott had capacity and was free from undue influence. Smith could assert that the increased cost should not be taxed to him as residuary legatee since the objections to probate would not have been filed in the first place had Morton videotaped the execution of the will or otherwise collected evidence at the time of execution. The situation is analogous to the claim made by legatees against an executor who failed to file a federal estate and gift tax return on time but who was able to defeat assessment penalties by legal footwork for which the lawyer charged the estate additional attorney's fees. The situation also bears some resemblance to cases like *Heyer v. Flaig*[234] in which a lawyer made a single woman a perfectly valid will without informing her that on marriage the will would be void as to her spouse. The disappointed beneficiaries sued the lawyer for the amount paid to the spouse which diminished their interest under the will. Their theory of recovery was based on the principle that the lawyer knew or should have known that his client would marry and should have advised her of the effect of subsequent marriage on her will. In *Heyer*, the lawyer had prior information which would have led him to discover that his client was about to marry, had he simply followed up the leads given by his client.[235]

Finally, Lott's sisters may claim that Morton knew or should have known that Lott was incompetent and, as his fiduciary, should

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[232]For greater elaboration of the "trial within a trial" requirement, *see* Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 892 (1973).

[233]Collateral estoppel applies only to issues between parties in prior litigation or in privity with such parties, which could have been and in fact were litigated in a prior contest. For further explanation of this doctrine, *see* Note, *What Might Have Been Adjudicated was Adjudicated*, 9 IND. L.J. 189 (1933). *See* McIntosh v. Monroe, 232 Ind. 60, 63, 111 N.E.2d 658, 660 (1953); Richard v. Franklin Bank & Trust Co., 381 N.E.2d 115, 118 (Ind. Ct. App. 1978); *In re* Estate of Apple, 376 N.E.2d 1172, 1176 (Ind. Ct. App. 1978).

[234]70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

[235]*Id.* at 225, 449 P.2d at 162, 74 Cal. Rptr. at 226.

not have proceeded with the will. This theory implies that drafting a disinheriting will for a mentally incompetent client is a breach of fiduciary duty.

If an attorney suspects that a client is not competent to handle his or her business, the attorney may be required not to act in accordance with the client's "instructions," since the client is unable to give meaningful instruction. In this instance, Fred Lott's strange behavior over a number of years suggests that Lott may be mentally ill and perhaps incompetent. Commonly, the role of a lawyer requires the lawyer to suspend moral judgment about a client's behavior. Attorneys are conditioned to accept a client's wish as a command unless the client wants the lawyer to commit a crime or to do something which personally offends the conscience of the lawyer.[236] If a client is mentally unable to give a valid order to his lawyer, the lawyer cannot be excused from responsibility for carrying out the "wishes" of his or her client when a lay person of reasonable intellect would have questioned the client's mental capacity and sought expert advice before proceeding further. It is possible for Lott's sisters to use this argument to state a claim against Morton for malpractice or breach of fiduciary duty to his client.[237] Similar logic may allow the sisters to seek recovery of legal fees from Morton if they succeed, after filing objections to probate, in breaking Lott's will. The scope of Morton's duty as a fiduciary to his client may extend to carrying out vicarious acts of his client when the

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[236]For an extended discussion of the conceptual framework of a lawyer-client dialogue on the morality of client actions, *see* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

[237]Indiana case law has held lawyers responsible for breach of fiduciary duty to their clients with respect to a lawyer's mishandling of trust funds or documents entrusted to the lawyer for safekeeping. *See, e.g., In re* Kuzman, 335 N.E.2d 210 (Ind. 1975) (disciplinary hearing for attorney who took client's corporate stock worth $200,000 as a "contingent fee"); Olds v. Hitzemann, 200 Ind. 300, 42 N.E.2d 35 (1942) (action to set aside recovery of land conveyed in trust to attorney in fraud of clients); Potter v. Daily, 200 Ind. 43, 40 N.E.2d 339 (1942) (suit on fee agreements; burden of proof on lawyer to show that legal fees were fair and reasonable); McLead v. Applegate, 127 Ind. 349, 26 N.E. 830 (1891) (alleged fraudulent commissioner's deed executed by attorney to client's spouse).

In the process of making a will, a client must entrust to his or her lawyer information about the client's assets, liabilities, and state of mind, all of which are confidential in character. A lawyer who fails to perceive that his or her client is mentally incompetent, under undue influence, or under the spell of fraud or duress, when confidential information communicated to the lawyer would lead a reasonable and prudent professional to that conclusion, may not proceed with the preparation of a disinheriting will. To do so, on the strength of modern agency theory, would be a breach of the fiduciary duty not to misuse confidential information entrusted by the client to the lawyer. RESTATEMENT (SECOND) OF AGENCY § 395 (1957).

client can no longer empower Morton to act.[238] Since an attorney's agency for his or her client is no stronger than the client's mental competency to appoint him as his agent, the risk of a challenge on this ground is not as unrealistic as it may appear on cursory examination.

After reviewing the grim potential for litigation directed against Morton and his law partner, Morton must consider the next steps to take before making Lott's will. Fred's estate will make a substantial fee for the firm. He is a client for whom Morton had done a great deal of work over the years. Despite the legal principle of testamentary freedom, ordinary citizens do not consider disinheriting wills justifiable without proof of fault on the part of the disinherited persons. Common expectations in this area parallel the continental legal doctrine of *legitime* inheritance rather than Benthamite theories concerning testamentary freedom. Fred should be told that his sisters can question his mental capacity. He should be informed that after his death they can allege that at the time his will was made Fred lacked the mental capacity or was under an insane delusion or the undue influence of some third party. Lott should be told that consulting a medium before making a will allows his sisters to accuse the medium and Smith of perpetrating fraud or undue influence to obtain his estate. Although the odds that such an attack would succeed are slim, the chance of a local jury voiding the will and requiring an expensive appeal to save it are quite strong.[239] Thus, the chance of depletion of the estate's assets through a compromise with his sisters is quite probable.

There are realistic alternatives which Fred Lott should consider. He intends to disinherit his sisters. They may eventually defeat his plan by successfully challenging his will. The first obligation Morton owes Lott is to give him correct advice on the probability that his will will be attacked and the probable consequences to the estate. Fred should understand that he has at least four options. First, he can make a disinheriting will and take his chances that the will will not be broken after his death. This alternative requires further preventive legal steps which will be discussed later. Second, Fred could reject his medium's advice and not disinherit his sisters. Ralph Smith would lose any benefits in such a case. Third, Fred could give his glass collection and other assets to Smith as an inter vivos gift. This choice would also require some preventive legal practice to avoid trouble. Finally, Fred can make a will which provides a disincentive to his sisters to challenge it. These disincentives would

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[238]*See* RESTATEMENT (SECOND) OF AGENCY §§ 379, 387, & 404A (1957) for the foundation for a claim of breach of duty on agency principles.

[239]*See* Table in Appendix A to this Article held by the publisher.

include a no-contest clause in the will tied to substantial bequests to his two sisters. Once Morton lays out these choices, Lott has a least started on a means of avoiding future litigation.

If Lott chooses to disinherit his sisters, Morton will then be obliged to tell Lott that he will need to make a record designed to refute in advance any claims that Lott lacked the mental competency to make a will. Morton should inform Lott that similar advance precautions are needed in order to ensure that his sisters are unable to upset his will on the ground that he was the victim of fraud or under Smith's undue influence.[240] Morton should explain that this record-building exercise requires that Lott have a thorough physical examination and an interview with a physician who specializes in mental disorders.

If Lott is mentally ill it is likely he will not perceive that he is ill and will strongly resist the examination.[241] Should Morton discover that Lott is unwilling to cooperate with the preventive law program, the Code of Professional Responsibility would allow him to withdraw from employment.[242] On the other hand, Morton's objective is not to drive a good client and his business out of the firm. Most likely, if Lott is not mentally ill he will see the need to make evidence of his mental competency. Morton should explain to Fred Lott that the medical records and the summary of the physician's interviews will be permanently preserved in order to discourage any later objection to his will by his sisters.

Assuming that Lott agreed to the physical and mental evaluation, Morton may proceed to design an execution ceremony which would preserve a record of Fred's disposition and his mental capacity and freedom from undue influence or fraud. Morton's normal office procedure requires a few modifications in order to meet the needs of this sort of client. The execution of the will should be recorded by conventional magnetic tape recorders or, if available, by a videotape camera and microphone on a videotape recorder.

The scenario for executing a will such as Lott's will requires a publication ceremony consisting of the following steps:

(1) Introduce Lott to the attesting witnesses on microphone.

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[240]*See* Jaworski, *supra* note 231, at 88.

[241]Mentally ill persons seldom have insight into their own condition, and will often refuse to consult a psychologist or psychiatrist. This phenomenon has been noted by psychiatrists doing evaluations of people for mental competency. For an excellent treatment of this examination process, *see* 3 B. GORDY & R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 92A.50-.51 (3d ed. 1980).

[242]*See* ABA COMMITTEE ON ETHICS AND PROFESSIOINAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Disciplinary Rule 2-110(C)(1)(d) (1978).

(2) Have Lott read the will aloud, if he is able to do so, so that the microphone will record Lott's voice.
(3) Interrogate Lott on the nature and extent of his assets, the names and relationships of his next of kin, and his relationship to Smith.
(4) Have attesting witnesses identify themselves and their familiarity with the testator for the record.

The witnesses should be persons who have long and detailed knowledge of the testator and his habits of life. Although Indiana Code section 29-1-5-3 requires only two witnesses for formal validity,[243] three or four long-time friends of Fred Lott would make better testimony in an eventual will contest than Morton's secretary and receptionist who just stepped in for the signing of the will. Morton's objective will be to prepare in advance lay witness testimony that on the day Fred Lott executed his will he was of sound mind and disposing memory.

Following the extended publication and execution ceremonies outlined above, Lott should state to his witnesses that "This is my will and I want you to witness it for me." Lott should then sign the document in the presence of all witnesses. Each attesting witness should sign the document and also identify himself on the tape recording of the proceedings as an attesting witness who was asked by Mr. Lott to witness the signing of his will. Further, each witness should state for the record that in his opinion Lott had the ability to recall the natural objects of his bounty and the nature and extent of his property, and to formulate a rational plan for distribution of his assets at death at the time he signed his will. The recorded statements of the attesting witnesses may later be reduced to an affidavit attached to the will as is commonly done in Illinois and other states in which a self-proving will requires an affidavit that the testator possessed the elements of capacity when the will was signed.[244] If Morton wishes, he may excuse Lott and interrogate each attesting witness separately as an alternative to the above procedure.[245]

If Oliver P. Morton takes the time and trouble to build a record for his client in this situation, it will be exceedingly difficult for any disaffected family members to mount an effective challenge to Lott's will. Morton will, of course, be willing to open this extensive evidentiary file to any lawyer who represents Lott's sisters after Fred's

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[243]IND. CODE § 29-1-5-3 (Supp. 1980).

[244]ILL. REV. STAT. ch. 110 1/2, § 6-7(a) (1979). Attesting witnesses are required under the rules of formal probate to give their opinion on the mental capacity of the testator.

[245]*See* Appendix B to this Article held by the publisher for sample question list.

death. This record can be made by Morton for Lott at minimal expense.

C. Jack Fallstaff's Case: How To Plan a Will Contest

Jack Fallstaff was a local businessman. He had three children by his first wife—Richard, Henry, and Virginia. Jack's first wife died in 1977. A year later, Jack married Kathy Duncan, a thirty-four-year-old cocktail waitress at a local bar. Jack was sixty-five. Jack's pursuit of Kathy Duncan prompted both Richard and Henry Fallstaff to intervene in their father's personal life. Richard told his father that he believed that Kathy had been involved in selling drugs. Henry tried to persuade his father that having a wife half his age would make him the laughing stock of the town. The results of this confrontation were predictable. Jack stormed out vowing to cut off his children without a cent. Before Kathy Duncan had intervened in the family circle, Jack had been extremely close to his three children. He took vacations with them, visited them at college and, in general, was a model father. After meeting Kathy at an office party at his tool and die works, Jack had begun to lose interest in his children. Following the scene between Jack and his sons, the three Fallstaff children were frozen out of their father's life. After Jack's wedding, Jack refused to talk to any of them in person or on the phone. When the children called, Kathy answered and made up some excuse for Jack's refusal to talk to them. After the honeymoon, Jack told his close business associate, Roscoe Turner, that his children were selfish ingrates who were not going to receive a penny from him again. At about the same time Jack opened new joint bank accounts with his bride. He also transferred his house to himself and his spouse as tenants by the entirety.

Jack Fallstaff had had chronic high blood pressure for many years. About ten years before the events described above, Fallstaff had been hospitalized for depression at a private sanitorium. Dr. Barlow, Jack's physician, believed that Jack's mind had been affected by his wife's death in 1977. Dr. Barlow also had prescribed anticoagulants and ordered Jack to give up smoking. Fallstaff refused to reduce his two-pack-a-day cigarette habit. Barlow believed that Fallstaff was the victim of arteriosclerotic disease which had begun to affect his mind after his wife's death. Jack complained of "dizzy spells" at his plant, periods of loss of consciousness, and loss of the sense of balance.

On May 21, 1979, Fallstaff executed a revocable unfunded life insurance trust and a "pour-over will" drafted by a local firm of impeccable integrity. Fallstaff left all assets passing under his will to his trustee who was directed by the trust to pay the residue over to

Kathy Duncan Fallstaff. This was the version of the Fallstaff case given to Jacob Julian, Attorney at Law, during a two hour intake interview with Richard and Henry Fallstaff. Jack Fallstaff died from a stroke two weeks ago and his widow qualified as executor under the will the day before yesterday. The Fallstaff children want to know whether Julian will represent them in an action to break the will and the trust. Julian knows enough probate law to realize that he has five months after the will is offered for probate within which to file an action to contest the will.[246] Since Julian is a plaintiff's trial lawyer, he is not current on will contests and has never tried such a case. The Fallstaff children have convinced Julian that a manifest injustice has been worked on them by Kathy Fallstaff's importunities. Julian has assured the Fallstaff children that he will let them know within a week whether he will take their case.

Julian's notes from the interview contain six questions which he must answer before he decides whether to take the Fallstaff case:

(1) Can Fallstaff's statements to his children, his second wife, his employees, and other lay people be admitted to show both his lack of capacity and Kathy Fallstaff's undue influence over him?
(2) Can lay witnesses express their opinion on Fallstaff's mental competency?
(3) Can Fallstaff's medical history be admitted at trial and can his attending physician be called as a witness for the contestants?
(4) What kind of experts can he employ to help him prepare witnesses and to show that Fallstaff was mentally incompetent and under undue influence?
(5) What is the burden of proof on lack of capacity and undue influence?
(6) What presumptions exist in will contests which either help or harm contestants?

These problems will involve research which concentrates on lack of capacity and undue influence. However, these two areas may not be sufficient to answer the questions.

1. Relevance and Will Contest.—One of Julian's primary concerns is to find out what is relevant and material evidence[247] in a

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[246] IND. CODE § 29-1-7-17 (1976).

[247] Although the literature on will contests in the last fifteen or twenty years is rather limited, general articles in law reviews are available. *See, e.g., A Modest Proposal, supra* note 1; Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970); Note, *Mental Incompetence in Indiana: Standards and Types of Evidence*, 34 IND. L.J. 492 (1952); Note, *Attorney Beware—The Presumption of Undue Influence and the Attorney Beneficiary*, 47 NOTRE DAME LAW. 330 (1971).

will contest. Obviously, the issues will be framed by a complaint to contest the will alleging that the testator executed a will on a certain date and that on that date the testator lacked capacity to make a will. The complaint will further allege that the testator was under the undue influence of some beneficiary. Julian knows that the test for capacity which evolved under the *Greenwood-Baker* rule establishes that evidence on the testator's recall and his intentions are logically related to his capacity. Julian has discovered that undue influence is a form of "transference" in which the influencer substitutes his or her intentions for that of the testator. He is sure that proving undue influence requires proof that the testator was susceptible to influence and under a confidential relationship with the influencer. Although this information is helpful, Julian must still fit it in the matrix for relevance and materiality under Indiana case law. Historically, Indiana courts have used a formula for framing admissibility of evidence at trial which contains two elements. First, the proferred evidence must be logically relevant to a material fact in dispute at trial.[248] Second, in order to be material, the evidence "must tend to prove or disprove a fact which relates to an issue in the lawsuit."[249] This two-fold test has been treated in recent decisional law as a single formula for admissibility of evidence at trial.[250]

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[248]For a thorough discussion of relevant and material evidence, *see* Lake County Council v. Arredondo, 266 Ind. 318, 321, 363 N.E.2d 218, 220 (1977); State v. Lee, 227 Ind. 25, 29-30, 83 N.E.2d 778, 780 (1949).

[249]Shaw v. Shaw, 159 Ind. App. 33, 40-41, 304 N.E.2d 526, 546 (1973); Estate of Azimow v. Azimow, 141 Ind. App. 529, 531, 230 N.E.2d 450, 452 (1967).

[250]141 Ind. App. at 531, 230 N.E.2d at 451-52. The court suggested that materiality deals with "the relationship between the issues of the case and the fact which the evidence tends to prove" whereas relevance deals with "evidence [which] must logically tend to prove a material fact." *Id.* at 531, 230 N.E.2d at 452. Although Indiana courts have distinguished "materiality" and "relevance," they have been combined in the Federal Rules of Evidence. FED. R. EVID. 401 defines relevant evidence as evidence tending to prove or disprove a material fact at issue in the proceeding. FED. R. EVID. 403 allows the trial judge discretion to exclude relevant evidence if the probative value of the evidence is exceeded by prejudice to the judicial process, confusion of the issues, or the cumulative nature of the evidence. Under FED. R. EVID. 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." This schema for admitting relevant data as evidence follows current Indiana practice, although the verbal formula differs from Indiana decisional statements of the law of relevance and materiality. *See*, Walker v. State, 265 Ind. 8, 14, 349 N.E.2d 161, 166, (1976), *cert. denied*, 429 U.S. 943 (1976); Kavanagh v. Butorac, 140 Ind. App. 139, 152, 221 N.E.2d 824, 832 (1966). Much of the decision-making process of the admissibility of relevant evidence turns on the determination of whether the probative value outweighs the prejudice to the inquiry. *See* Smith v. Crouse-Hinds Co., 373 N.E.2d 923, 926 (Ind. Ct. App. 1978).

Thus, tendered evidence must tend to prove or disprove some issue at stake in the lawsuit.[251]

2. Assertive Acts and Declarations of Fallstaff About His State of Mind.—In order to judge what may be admissible in a contest over Fallstaff's will and trust, Julian needs to know what evidence Indiana courts have admitted in prior will contests. The first great class of potential evidence consists of the acts and words of Jack Fallstaff relating to his will. In prior will contests, the Indiana courts have admitted eyewitness testimony by lay witnesses detailing what a testator said and did at a time not too remote from the execution of the will.[252] These witnesses have testified to two kinds of acts of the testator. First, the eyewitnesses have reported non-assertive acts of the testator, which are usually held not to be hearsay. The type of non-assertive conduct generally admitted includes physical manifestations of mental illness such as blackouts, forgetfulness, confusion, and bizarre behavior. Indiana courts treat assertive acts and words of a testator differently than non-assertive acts. Generally, non-assertive conduct of the testator may be admitted on the issues of lack of capacity, undue influence, and fraud without distinction.[253] However, assertive acts and words of the testator evidencing his state of mind may not be admissible.

The admission of assertive acts such as a former will and words of a testator has been sharply limited by the Indiana courts to the issue of the testator's mental competency. This has been done under the rationale that such acts and statements are hearsay and admissible only under the state of mind exception to the hearsay rule.[254] Indiana courts have refused to admit these acts and words of the

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[251]141 Ind. App. at 531, 230 N.E.2d at 451-52.

[252]The justification for eyewitness testimony relating to acts and conduct of the testator prior to death, within a reasonable time before the act of will execution, has always been the logical relationship between specific aberrant acts and testamentary capacity. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 353, 146 N.E. 577, 581 (1925); Jarrett v. Ellis, 193 Ind. 687, 690-91, 141 N.E. 627, 628 (1923); Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (evidence otherwise relevant excluded by Dead Man Act). The admissibility of acts and conduct of the testator depends on the issue for which it was originally offered.

[253]*See* Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917); Patrick v. Ulmer, 144 Ind. 25, 42 N.E. 1099 (1895) (delerium); Bundy v. McKnight, 48 Ind. 502, 513 (1874) (bizarre and strange acts of the testator at the time when the will was made).

[254]*See* Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (declarations of testator not made at time of will admissible to show soundness of mind); Robbins v. Fugit, 189 Ind. 165, 167-68, 126 N.E. 321, 322 (1920) (testator's former will and statements that family members had assaulted him admissible to show unsound mind, but not to show undue influence); Oilar v. Oilar, 188 Ind. 125, 129, 120 N.E. 705, 706 (1918) (testator's statement of intent admissible to show his mental condition); Ditton v. Hart, 175 Ind. 181, 189, 93 N.E. 961, 965 (1911) (letters and other wills of testator admissible to show capacity but not to show undue influence).

testator to show that the testator was under undue influence.[255] In most instances, the acts and words of the testator concerning the making of a will come into the record with a limiting instruction to the jury not to consider the evidence on the issue of undue influence.[256]

Julian considered the impact of Fallstaff's declarations to his employees about his children. From Julian's reading of the theoretical articles on lack of capacity, he sensed that these declarations may be evidence of an "insane delusion" and also circumstantial evidence that Kathy Duncan had exercised undue influence over Jack Fallstaff. Julian would like to be sure that these statements would be admissible in any trial of the Fallstaff case. His reflections on Indiana case law showed that Fallstaff's declarations will be admissible to show that he suffered from an insane delusion at the time he made his will but inadmissible on the issue of undue influence.

Julian also suspected that the Indiana Dead Man Act would bar any of Fallstaff's statements of mental condition made to his children if the statements also contained some future promise of

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[255]The early case of Runkle v. Gates, 11 Ind. 95 (1858) began this process of limiting the admission of declarations of the testator to the issue of capacity. The court excluded the statement of the testator that he was glad his will had been burned when the statement was offered into evidence on the issue of whether the testator had properly revoked his will. The court further interpreted T. JARMAN, WILLS to mean that declarations of the testator that he had revoked a will when in fact the will had not been revoked pursuant to the manner described in the Wills Act of 1837 were excluded by the hearsay rule. 11 Ind. at 99-100 (citing T. JARMAN, WILLS ch. 7, § 2 (2d ed. J.C. Perkins 1849)). Hayes v. West, 37 Ind. 21, 24-25 (1871) added to the confusion by citing 1 I. REDFIELD, THE LAW OF WILLS ch. 10, § 39 (4th ed. 1866), in support of excluding as hearsay declarations of the testator that he had been misled, seduced, or otherwise intimidated into making a will. Redfield indicated, with a great deal of case law support, that declarations of the testator exhibiting his state of mind at the time of execution were admissible and relevant to the issues of capacity, undue influence, and fraud. I. REDFIELD at 548-55. The distinction on the issues were not carried over by later Indiana case law. The decisions which excluded pre-testamentary declarations of a testator on the issue of undue influence should probably be overruled.

[256]The topic is exhaustively reviewed in 6 J. WIGMORE, THE LAW OF EVIDENCE §§ 1734-40 (J. Chadbourne rev. 1976). Wigmore concluded that declarations by a testator which reflected the testator's state of mind should be admissible:

> In surveying these . . . distinctions, together with those already noticed for other kinds of post-testamentary declarations . . . one is impressed with the practical futility of attempting to enforce them strictly. It is doubtful if often they amount to anything more than logical quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to *all the utterances* of a testator, without discrimination as to admissibility, and then to leave them to the jury with careful instruction how to use them. The doctrine of multiple admissibility . . . almost always would justify this.

Id. § 1738, at 188.

benefit to them. However, his investigations so far have turned up only negative, hostile, and threatening statements made by Fallstaff about his testamentary plans for his children. Consequently, Julian feels safe that an incompetency objection would not be sustained against a recital of Fallstaff's conduct and statements occurring before and after he made his will. Such statements will be admissible on the issue of lack of capacity and all but his hearsay declarations of intent to disinherit his children would be admissible on the issue of undue influence.

3. Lay Opinion Witnesses.—There are several sources of lay opinion about Fallstaff's mental state available to both sides in this case. First, the witnesses who witnessed the will have special status, at least in the older cases, as witnesses with an opportunity to observe the testator and to draw an inference concerning his mental capacity from their status as statutory witnesses to the will of Jack Fallstaff.[257] Jack's children and Jack's widow have observed the deceased testator over an extended period of time and so will have an opportunity to relate their opinion of Jack's mental agility when he was last seen by them. A cursory search of Indiana case law revealed to Julian that opinion evidence of this kind falls within a well-recognized exception to the prohibition on lay opinions and is allowable on a foundation of first-hand knowledge on the part of the opinion witness of the testator's acts and conduct.[258] Julian plans to

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[257]Opinions given by lay witnesses on the mental competency of an actor, based on first-hand observation, are admissible in all courts. 7 J. WIGMORE, THE LAW OF EVIDENCE § 1933 (J. Chadbourne rev. 1978). Wigmore also noted that attesting witnesses to wills are uniformly permitted to give their opinions on the mental capacity of the testator. *Id.* § 1936. Wigmore cited Both v. Nelson, 31 Ill. 2d 511, 202 N.E.2d 494 (1964) as authority for the position that a court which fails to permit the attesting witnesses to a will to give their opinions of the testator's mental state at the time of execution has committed reversible error. Although Indiana has no case as strong as *Both*, it is likely that the opinions of attesting witnesses to a will or to trust instruments would be admissible and exclusion would be reversible error as well.

[258]McReynolds v. Smith, 172 Ind. 336, 348-49, 86 N.E. 1009, 1013-14 (1909) (instruction to the jury concerning use of lay opinion testimony approved); Westfall v. Wait, 165 Ind. 353, 357-58, 73 N.E. 1089, 1090 (1905) (cross-examinations of lay opinion witnesses by lawyer for proponent may be based on specific acts or conduct of the testator); Brackney v. Fogle, 156 Ind. 535, 536-37, 60 N.E. 303, 303 (1901) (lay witness may not give opinion of ultimate issue of fact of testamentary capacity); Bower v. Bower, 142 Ind. 194, 199-200, 41 N.E. 523, 524-25 (1895) (lay witness' opinion on mental capacity must be preceded by foundation showing the nature and extent of the witness' first-hand observation of the testator); Staser v. Hogan, 120 Ind. 207, 214-20, 21 N.E. 911, 913-15 (1889) (numerous lay opinions on testator's mental state given on relation of first-hand observation of testator); Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886) (no error to permit proponent to give personal opinion on testator's capacity based on first-hand observations); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965).

interrogate those eyewitnesses to Fallstaff's increasingly erratic behavior using a check list for evaluating lay opinions on capacity.[259] Julian anticipates that these witnesses will also have an opinion on whether or not Jack Fallstaff was susceptible to undue influence by his second wife. No Indiana case has dealt with the issue of the admissibility of lay opinion concerning a testator's susceptibility to undue influence. The very few cases reported in other states, however, have generally excluded such lay testimony.[260]

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[259]The scenario for preparation of lay opinion witnesses would be as follows:

1. How long did you know Jack Fallstaff before his death?
2. Did you notice any change in his behavior within a year or two of his death?
3. Describe the changes you noticed.
4. Can you give specific instances, fixing the date, time and place, as well as you can, of instances of forgetfulness, "black outs", or other behavior which struck you as abnormal, unusual or bizarre relating to Jack Fallstaff?
5. How many times did you meet Fallstaff within a year of his death?
6. On the last date you saw Jack Fallstaff, did you have an impression that he was able to comprehend his surroundings?
7. On that last date, did you have any impression as to whether or not he could manage his business for himself without outside help?
8. Would Jack Fallstaff have been able to recognize his children, and their relationship to him the last time you saw him before his death?
9. Would you say that Fallstaff, on that date, knew in a general way what he owned and its approximate worth?
10. Do you think that Fallstaff had, on that date, the mental ability to make a rational plan for disposing of his property at his death, taking into account his children's affection for him, their needs and the needs of his second wife, Kathy, and the nature and worth of his property?
11. Can you explain the reasons behind your opinions?

Trial lawyers will note that the form of these questions may be objectionable if actual examination in court were conducted this way. However, the object of this preparation program is to prepare the attorney and the witnesses for more structured testimony on capacity at trial.

[260]The admissibility of lay opinion on the testator's susceptibility to influence has been litigated in seven states. Arkansas excluded lay opinion on susceptibility to influence in Smith v. Boswell, 93 Ark. 66, 124 S.W. 264 (1909). Georgia may allow such opinion evidence, although the authority is very old and consists of syllabus statements rather than judicial opinions. *See* Thompson v. Ammons, 160 Ga. 886, 129 S.E. 539 (1925) (syllabus only); Penn v. Thurman, 144 Ga. 67, 86 S.E. 233 (1915) (syllabus only); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914) (syllabus only); Slaughter v. Heath, 127 Ga. 747, 57 S.E. 69 (1907) (syllabus only). Illinois has rejected the admission of lay opinion on susceptibility to influence. Teter v. Spooner, 279 Ill. 39, 116 N.E. 673 (1917). Iowa has excluded such opinion evidence as incompetent and immaterial. *In re* Goldthorp's Estate, 94 Iowa 336, 62 N.W. 845 (1895). Michigan excluded such opinion without explanation as "calling for a conclusion" in O'Connor v. Madison, 98 Mich. 183, 57 N.W. 105 (1893). Pennsylvania excluded opinions on susceptibility to undue influence in the transfer of a deed in the ancient case of Dean v. Fuller, 40 Pa. 474, 478 (1861). This result has not been extended to wills in general, though. Finally, Texas has allowed lay opinion on susceptibility to undue influence in a case dealing with an inter vivos transfer, on a showing that the witness had familiarity with the

Finally, Julian questioned whether an opinion by one of the Fallstaff children constituted a "claim against the estate" of Fallstaff and was thus barred by the Dead Man Act. Fortunately for Julian, Indiana has already decided this issue in his favor and he can be sure that opinion evidence by a party having a claim to set aside a will which goes to the capacity of the testator who made the will can be taken as evidence in a will contest.[261]

Naturally, if Julian may call the Fallstaff children as lay opinion witnesses, Kathy Duncan Fallstaff may also give her opinion. In wondering what weight the jury will give to the lay opinions, Julian must also consider the effect of any expert testimony, especially that of Dr. Barlow.

4. Expert Opinion in Will Contests.—Dr. Barlow, Fallstaff's treating physician, undoubtedly took an extensive history of his patient, including his bouts with depression which may have been psychotic. However, all this information, although admissible as an exception to the hearsay rule, is privileged. Indiana jealously guards its statutory physician-patient privilege in will contests. In *Pence v. Myers*,[262] the Indiana Supreme Court held that admission of an abstract of a physician's death certificate showing the testator's cause of death was reversible error. The court stated that:

> It is well established that in a will contest, a physician, attendant on a testator, at the time of his death, should not be permitted to give testimony tending to strike down the will as to the condition of the testator's mind or as to the disease from which he suffered, the cause or duration of his illness and the cause of his death . . . .[263]

The contestants cited *Kern v. Kern*[264] in which the supreme court held that the attorney-client privilege between the deceased testator and his lawyer did not apply to statements made by the testator which were relevant to the testator's testamentary capacity and freedom from undue influence.[265] By analogy, relevant statements of the testator to his attending physician should be admissible despite the statutory privilege. However, *Kern* was followed by *Brackney v. Fogle*,[266] in which the contestants offered testimony by

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grantor's state of mind. Koppe v. Koppe, 57 Tex. Civ. App. 204, 122 S.W. 68 (1909). In all probability, Indiana's courts would follow the majority rule excluding such opinion evidence on the issue of susceptibility to undue influence.

[261]Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886).

[262]180 Ind. 282, 101 N.E. 716 (1913).

[263]*Id.* at 286, 101 N.E. at 717.

[264]154 Ind. 29, 55 N.E. 1004 (1900).

[265]*Id.* at 35, 55 N.E. at 1006.

[266]156 Ind. 535, 60 N.E. 303 (1901).

the testator's attending physician, yet the testimony was barred on a claim that the communications were privileged. The contestant's lawyer argued to the jury that the proponent's failure to waive the privilege showed that the proponent had something to hide.[267] The *Brackney* court held the argument improper and reversed the trial court's judgment for the contestant.[268]

In recent years the holding in *Pence v. Myers* had been eroded by such cases as *Estate of Beck v. Campbell*,[269] in which the appellate court held that a physician may testify as to dates of treatment for a patient despite the physician-patient privilege,[270] and *Robertson v. State*,[271] in which the appellate court determined that an attending physician, barred by the privilege statute from giving his actual diagnosis and the actual history of his patient in court without the patient's consent, could be called to testify in court to a hypothetical question involving the substance of the prohibited data taken from another non-confidential source.[272] The prohibited data happened to be the level of intoxication of his patient on a particular day and its effect, in his opinion, on his patient's behavior.[273]

In the Fallstaff case, Dr. Barlow's findings on examination of Fallstaff, his treatment notes, and his case history file are all privileged matter. Fallstaff's second wife, as executor, has the physician-patient privilege rights of Fallstaff which she may choose not to waive in this case because of the damaging contents of Dr. Barlow's case history file on Fallstaff. Rather than try for a reversal of *Pence v. Myers*, Julian should amass sufficient detail to put into the record so that Dr. Barlow can be called as a medical expert and respond to hypothetical questions about Jack's mental competency and his susceptibility to undue influence. Julian's data will consist of the lay witness reports concerning what they saw and heard from Fallstaff, nursing notes from the sanitorium in which Fallstaff was a patient, and prescription drug orders, if available, from Fallstaff's druggist. Julian must assume that Kathy Fallstaff will not waive the privilege and allow Dr. Barlow to give his own observations of Fallstaff.

The nursing notes from the sanitorium, interestingly enough, are not privileged matter even though they contain such items as the physician's medication orders, restraint orders from the attending physician, and summaries dictated into the records of the in-

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[267] *Id.* at 537, 60 N.E. at 303.
[268] *Id.* at 538-39, 60 N.E. at 304-05.
[269] 143 Ind. App. 291, 240 N.E.2d 88 (1968).
[270] *Id.* at 296, 240 N.E.2d at 92.
[271] 155 Ind. App. 114, 291 N.E.2d 708 (1973).
[272] *Id.* at 118-19, 291 N.E.2d at 711-12.
[273] *Id.* at 118, 291 N.E.2d at 710.

stitution. Indiana, illogically enough, has a case which holds that matter communicated to a nurse by a patient in a hospital is not privileged under the physician-patient privilege statute.[274] Consequently, any emergency room logs, admission summaries, or other records taken down when Fallstaff was admitted to the emergency room after his 1979 fatal stroke are also admissible under the business records exception to the hearsay rule. All this data will be presented, via the hypothetical question, to Dr. Barlow who will then give his opinion on the testamentary capacity and susceptibility to undue influence of the hypothetical testator.

Julian considered whether he should retain a clinical psychologist to buttress the case for partial insanity or lack of capacity. Clinical psychologists have for years been considered experts in other jurisdictions. Since 1974, these individuals have been held experts on mental disease in Indiana.[275] A psychiatrist is a physician who has been certified as a specialist in psychiatric medicine and is licensed to prescribe medicine. Clinical psychologists, however, do not prescribe medicine but are certified to treat people for mental disorders by non-medicinal psychotherapeutic techniques. For a reasonable fee, Julian may secure a professor of clinical psychology to act as consultant in the Fallstaff case.[276] He or she could tell Julian whether Fallstaff was delusional when he made his will which disinherited his children. The consultant can provide Julian with insight into Fallstaff's personality structure and its interplay with his disapproving children. This will assist Julian in designing better questions for his lay witnesses and better hypothetical questions for his expert witnesses. A clinical psychologist can provide, for relatively low prices, an expert opinion on

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[274]General Accident, Fire & Life Assurance Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

[275]*See* Indianapolis Union Ry. v. Walker, 162 Ind. App. 166, 318 N.E.2d 578 (1974).

[276]The use of psychiatrists in will contests was suggested by Prof. John J. Broderick in Broderick, *The Role of the Psychiatrist and Psychiatric Testimony in Civil and Criminal Trials*, 35 NOTRE DAME LAW. 508, 511 (1960), following the lead of Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 L. & COMTEMP. PROB. 448 (1935). In 1964, George Lassen, a clinical psychologist holding the office of Court Psychologist in Baltimore, Maryland, advocated the use of clinical psychologists in criminal cases as experts on mental problems, including undue influence. *See* Lassen, *The Psychologist as An Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A.J. 239 (1964). In 1968, Dr. Eugene E. Levitt of Indiana University Medical Center, Indianapolis, indicated in an address to the Indiana Judicial Conference just how useful clinical psychologists might be in settling matters in which the competency of a person must be determined by hypothesis or by testing results. *See* Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L.J. 82 (1969). The authority for using psychologists as expert witnesses grows in all other states in the United States. It ought not be a matter for great concern in Indiana trial courts at this time.

Fallstaff's mental competency and assist in planning the case. He or she may also appear as a second expert witness for the contestant.

5. Burden of Proof and Presumptions in a Will Contest.—Since fraudulent inducement to make a will played no part in the Fallstaff case, Julian hypothesizes that under Trial Rule 11 he is restricted ethically to a two paragraph complaint. In the first paragraph, Julian will set up a claim on the issue of lack of capacity. The second paragraph will be drafted to state a claim to set aside the will on the grounds of undue influence. In contesting the will on grounds of lack of capacity, Julian has two alternative grounds to allege. First, he should allege that Fallstaff, on May 21, 1979, was unable to know the natural objects of his bounty, unable to know the nature and extent of his property, and unable to make a rational plan for disposition. Second, Julian should allege that Fallstaff, on May 21, 1979, was suffering from an insane delusion that his children did not love him and as a proximte result he disinherited them. The required burden of proof on each of the elements of the case will be by a preponderance of the evidence.[277]

The second paragraph of the complaint should allege that on May 2, 1979 Jack Fallstaff was susceptible to undue influence. It should assert that Jack Fallstaff had a confidential relationship with Kathy Fallstaff, his second wife, which was used to importune Jack Fallstaff to change his testamentary plans to the benefit of Kathy Fallstaff, but at the expense of the Fallstaff children. The complaint should conclude that this change of beneficiaries was unconscionable.[278] These elements in *In re Faulk's Will* must also be proven by a preponderance of the evidence. Had there been any reasonable basis to assert that Kathy Fallstaff procured the May 1979 will by fraudulent representations, Julian would have been required to allege the specific words or acts constituting the representation, *scienter*, and an unconscionable change of testamentary plans as a result. His prayer for relief would then be confined to a constructive trust rather than an avoidance of the will. This allegation would also require proof by a preponderance of the evidence.[279]

Generally, Indiana courts hold to a Thayerian doctrine of evidentiary presumptions. Such presumptions are considered "rebuttable" or likely to disappear when the party opposing the presumption offers any contrary evidence.[280] Indiana recognizes that there is a presumption that a will, duly executed according to the statute, is

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[277]IND. CODE § 29-1-7-20 (1976) and the cases cited at note 15 *supra*.

[278]*See* cases cited at notes 155-159 *supra*.

[279]IND. CODE § 29-1-7-20 (1976).

[280]Such a view of presumptions was adopted by the Federal Rules of Evidence. *See* FED. R. EVID. 301 and the official comments thereto.

free of undue influence and was executed by a person having testamentary capacity.[281] Indiana also adheres to the presumption that once a person's apparently permanent mental incapacity is established by judicial declaration or expert testimony, the incapacity continues until credible evidence is offered to show that it has ended.[282] This web of presumptive law means that Kathy Fallstaff enjoys a presumption, arising from proof of due execution according to the form prescribed in the Probate Code, that the will in her favor is valid. This means that she has no burden of proof to establish the mental capacity of Fallstaff. Further, the Indiana courts treat this presumption as one which does not disappear when contrary evidence is offered. Therefore, the will contest will go to the jury even if the proponent offers no evidence showing that Fallstaff was of sound mind and free of undue influence when he made his will.

The presumption of continuing mental incapacity may be useful to Julian if he can establish that at some time prior to May 21, 1979, Jack Fallstaff was incompetent. Since Fallstaff's commitment to the sanitorium for depression was probably not judically ordered, Julian must rely on expert testimony alone for aid in this instance.

VI. CONCLUSION

In the mid-nineteenth century Indiana adopted the *Greenwood-Baker* rule for testamentary capacity. The *Greenwood-Baker* rule was derived from eighteenth century English attempts to formulate legal guidelines for avoiding the wills of senile people. The rule states that in order to be able to make a will a testator must: (a) know the natural objects of his bounty; (b) know the nature and extent of his property; and (c) while keeping the two in mind, make a rational plan for disposition of the testator's assets after death. This low-level threshold test for capacity to make a will was qualified by the rule of *Dew v. Clark*, or the "insane delusion" rule, which states that a testator who otherwise meets the threshold test for capacity under the *Greenwood-Baker* rule may lack capacity if the testator's will is the product of a fixed and immediate belief about some natural object of the testator's bounty which is unsupported by rational evidence and which no amount of rational persuasion can overcome.

During the same decade that the *Greenwood-Baker* rule was adopted, Indiana's highest court decided that undue influence over a

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[281]Kaiser v. Happel, 219 Ind. 28, 30, 36 N.E.2d 784, 785 (1941); Young v. Miller, 145 Ind. 652, 44 N.E. 757 (1896).

[282]Branstrator v. Crow, 162 Ind. 362, 69 N.E. 668 (1904); Stumph v. Miller, 142 Ind. 442, 41 N.E. 812 (1895).

testator constituted distinct grounds for relief against a testator's will. It was not a tort claim to set aside a will on account of fraudulent inducement. Rather, undue influence was a claim founded on the replacement of the testator's free will by the will of another. In order to set aside a will as the product of undue influence, the contestant has to prove that the testator was susceptible to undue influence by others and enjoyed a confidential relationship with an influencer who then used that relationship to importune the testator for an unconscionable change of testamentary disposition. The Indiana courts dealing with undue influence have experienced difficulty in dealing with the various classes of rogues involved in undue influence. Generally, the courts favor the importuning of second spouses, children, and collaterals, and disfavor the importuning of lawyers and doctors.

Fraudulent procurement of a will is a third distinct claim against the validity of a will. It is a common law tort action and is independent of the strange Indiana evidentiary rule which bars the admission of conversations of the testator on the issue of undue influence but not on the issue of capacity. A fraud claim is a potent tactical weapon for contestants to counter balance the bias in favor of proponents which is evident in the appellate judicial treatment of will contests in Indiana.

The two fictitious episodes in this essay illustrate the operation of the substantive law in will contests. The case of Fred Lott presented realistic situations which occur in law practice involving decisions of testamentary capacity, undue influence, and fraud. The Lott case dealt with the foreseeable risks which may arise in a later will contest and an attorney's duty to advise his client on the consequences of legitimate and of spurious litigation directed at the estate by disappointed relatives. The main point of the Lott case was to raise the consciousness of office practitioners of the potential for will contests. It also indicated the potential for malpractice claims based on a lawyer's failure to detect the potential for a future contest and to take preventive law measures to ensure that his client's interest is adequately protected by pre-death planning and data-gathering measures.

The Fallstaff case poses a problem for plaintiff's lawyers who are asked to take on a will contest for disappointed relatives of the testator. First, will contests are particularly tortuous pieces of litigation with internal ground rules which differ sufficiently from ordinary litigation to make them more difficult to prosecute. Second, since will contests occur much less frequently than other kinds of litigation, the average trial lawyer's level of experience in such matters will likely be low. Third, the theory of recovery in will contests, like products liability cases, must be built around the opinion

evidence of an expert witness. Finally, orthodox ways of appraising one's eventual success or failure in a will contest are non-existent. Fallstaff's case illustrated how a trial lawyer can evaluate evidence, make a proof chart, and organize data for trial. The primary thrust of this Article is to show how the problems of testamentary capacity, undue influence, and fraud lurk behind everyday practice situations, ready to devour the lawyer who is not sufficiently aware of the dangers of will contests.

In Indiana, as in most states, the wills of persons who are senile or mentally ill are admitted to probate over strong evidence that the testator lacked any conception of what he was doing during the process of formulating a testamentary plan. Jury verdicts for contestants in will contests are regularly overturned by appellate courts on hyper-technical grounds. This nationwide pattern suggests that the judiciary frowns on successful will contests. Indiana, like most other American states, is committed to the concept of testamentary freedom. This commitment is limited only by the doctrines of lack of capacity, undue influence and fraud. Testamentary freedom is an abstract principle of law which seems to be wholly judge-made and largely unexamined by lawyers, law professors, and lay people alike. It may be judicially noticed that, in other jurisdictions, *legitime* heirship and community property temper testamentary freedom, and ensure that the relatives of a deceased person cannot be disinherited save for grave causes. This Article is an attempt to induce the legal profession to undertake a serious study of the social, economic, and cultural impact of disinheriting wills. Without such a study, our judiciary will continue to flounder about enforcing an abstract concept of unfettered discretion in will making. If the social, cultural, and economic harm of disinheriting wills were better known, it is doubtful that the judiciary would be so willing to sustain the abstract principle of testamentary freedom.

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Breaking Wills in Indiana

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I. INTRODUCTION

Will contests are a subtle form of malpractice action in which disappointed relatives attempt to destroy a lawyer's handiwork because the lawyer drew a will for someone who did not meet the test for competency. Probate practitioners are victimized by gnawing fears that some overaggressive trial specialist will sabotage the well-laid testamentary plans of one of his or her solid and sensible clients by persuading a jury that the will was the result of undue influence or duress.

A sufficient number of will contests are filed each year to make the tactics and strategy of waging war on a will important to every practitioner. Disappointed family members may allege that the decedent's will was executed when the testator lacked testamentary capacity, was under undue influence of another, or was induced to make a will through fraudulent representations or duress.[1] Consequently, probate and estate planning specialists and other lawyers who regularly make wills and trusts might well benefit from a consciousness-raising session on the grounds for breaking wills and trusts under Indiana law. In addition, trial practitioners must learn to appraise the probability of success or failure in a will contest early in the client-contact stage of a case so that hopeless cases may be avoided.

This Article will establish that the vast majority of wills attacked in Indiana as the product of an unsound mind, undue influence, fraud, or duress are eventually sustained by appellate courts despite serious mental aberrations of the testators who executed them. This conforms to the American judicial pattern which sustains wills when at the same time simple contracts would be avoided as the product of an unsound mind. This Article will also encourage the careful

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[1]For a detailed analysis of the American law of testamentary capacity *see* Reed, *The Stolen Birthright—An Examination of the Psychology of Testation and an Analysis of the Law of Testamentary Capacity—A Modest Proposal*, 1 W. NEW ENG. L. REV. 429 (1979) [hereinafter cited as *A Modest Proposal*].

practice of preventive law by will drafters in order to minimize the possibility of an expensive, albeit unsuccessful, will contest when faced with the task of making a disinheriting will for a client. In addition, this Article should be helpful to litigators who must bear the substantial burden of proof and presumption problems for contestants in will contests.

This study is based on a survey of 123 Indiana appellate decisions reported since 1854 involving wills contested on the basis of lack of capacity, undue influence, fraud, or duress. Findings from this survey appear throughout this Article in support of assertions made concerning Indiana will contests.

II. TESTAMENTARY CAPACITY IN INDIANA

Indiana courts have recognized five independent grounds on which a will may be avoided at law: lack of testamentary capacity, undue influence, fraud, duress, and want of due execution.[2] Of these five statutory grounds for avoiding wills, lack of capacity, undue influence, and fraud are the most significant.

The English standard for testamentary capacity originated in two different court systems. The ecclesiastical court system administered those wills, or portions of wills, which attempted to transfer personal property. After 1540, the King's common law courts administered wills, or portions of wills, which devised real estate. The Statute of Wills,[3] passed in 1540, stated that idiots and persons of non-sane memory were precluded from making a will at common law.[4] The Canon Law impediments to a valid testament, the

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[2]IND. CODE § 29-1-7-17 (1976) provides in part:

> Any interested person may contest the validity of any will or resist the probate thereof, at any time within five (5) months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

The statute and its predecessors have been interpreted to include a cause of action for undue influence under the rubric of want of due execution. *See, e.g.*, Barr v. Sumner, 183 Ind. 402, 408, 107 N.E. 675, 677 (1915); Wiley v. Gordon, 181 Ind. 252, 258, 104 N.E. 500, 502 (1914); Clearspring Township v. Blough, 173 Ind. 15, 24-25, 88 N.E. 511, 514 (1909); Willett v. Porter, 42 Ind. 250, 254 (1873); Reed v. Watson, 27 Ind. 443, 445 (1867); Kenworthy v. Williams, 5 Ind. 375, 377 (1854); Kozacik v. Faas, 143 Ind. App. 557, 565, 241 N.E.2d 879, 883 (1968).

[3]The Act of Wills, 1540, 32 Hen. 8, c.1.

[4]The bill concerning the explanation of wills, (1542-43), 34 & 35 Hen. 8, c.5, § 14. This statute provides in part that "wills or testaments made of any manors, lands, tenements, or other hereditaments, by any . . . idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law." *Id.*

most important of which was "defecta mentis sua" (unsound mind), were enforced by the ecclesiastical courts.[5] By the 1780's, English courts had devised a legal test for testamentary capacity. The testator had to be aware at the time of executing the will of those persons who would be intestate successors. The testator also had to be aware of the components of his or her estate and its general value. While keeping these elements in mind, the testator had to be able to make a rational plan for disposing of his or her assets at death by the medium of a will.[6] The first two elements of this formula were forcefully stated in Lord Kenyon's charge to the jury in *Greenwood v. Greenwood*.[7] The "rational plan" element was added by the case of *Harwood v. Baker*.[8] This combined *Greenwood-Baker* Rule was adopted by New York in the early nineteenth century and passed into Indiana case law through the popular treatises on wills brought to the west by the nineteenth century lawyers.[9] The two lines of authority, together with most of the baggage of the common law of property, passed into American law through the colonial courts and went west into the Northwest Territory in the 1780's.

A. The Doctrine of Testamentary Capacity in Indiana

Although some Indiana cases have tried to refine the standard *Greenwood-Baker* formula for determining testamentary capacity, most Indiana decisions restate the New York Court of Appeals' formulation of the doctrine taken from the leading mid-nineteenth century case of *Delafield v. Parrish*.[10]

> [I]t is essential that the testator has sufficient capacity to

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[5]The ecclesiastical impediments to execution of a valid will were: (1) *propter defectum suae potestais* (those who could not make wills, such as a son, a slave, or a monk, because of servile status); (2) *propter defectum mentis* (those who were mentally defective, mentally retarded, madmen, or prodigals); (3) *propter defectum sensualitatis* (those who were blind, deaf, or dumb); (4) *ratione poenalitatis* (criminals in prison); (5) *ratione dubietatis* (those whose legal status was doubtful). For an elaboration of Canon Law impediments to making a will, *see* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (5th ed. 1943).

[6]The first case to construe the provisions of the Statute of Wills relating to idiots and persons of non-sane memory was Pawlet Marquess of Winchester's Case, 77 Eng. Rep. 287 (K.B. 1601). That decision did little to interpret the statute. Later 18th century cases grappled with the appropriate instruction to the jury concerning this provision of the Statute of Wills. *See, e.g.*, Greenwood v. Greenwood, 163 Eng. Rep. 930 (K.B. 1790).

[7]163 Eng. Rep. 930 (K.B. 1790). *Greenwood* is in reality a report of Lord Kenyon's charge to the jury in a will contest, containing the current state of the law of testamentary capacity as evolved in trial courts over several centuries.

[8]13 Eng. Rep. 117 (P.C. 1840).

[9]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-27 (1973) for a description of this process.

[10]25 N.Y. 9, 9 N.Y.S. 811 (1862).

> comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the case, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.[11]

In order to adjudge that a testator had the requisite testamentary capacity when the will was executed, an Indiana court must find

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[11] *Id.* at 29, 9 N.Y.S. at 816. *See also* 2 W. BLACKSTONE, COMMENTARIES* 496-97. Indiana had no appellate decisions which articulated a standard for determining when testamentary capacity had been disproven until Bundy v. McKnight, 48 Ind. 502 (1874). In *Bundy*, jury instructions eight and nine concerning testamentary capacity were challenged on appeal and sustained in pristine form by the Indiana Supreme Court. The instructions read as follows:

> 8. While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and excuted; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained.
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> 9. To enable a person to make a valid will, it is not requisite that he shall be in the full possession of his reasoning powers, and of an unimpaired memory. Few, if any, persons are in the full possession of their reasoning faculties when enfeebled by age or prostrated by disease. A large majority of wills are made when the testator is upon his deathbed, and when the mind and body are more or less affected by disease and suffering; nevertheless, a person prostrated by disease is capable of making a valid will, if at the time of its execution he has mind sufficient to know and understand the business in which he is engaged.

48 Ind. at 511. Indiana cases dealing with testamentary capacity tend to use the *Bundy v. McKnight* formula for stating the elements of testamentary capacity. Ramseyer v. Dennis, 187 Ind. 420, 425-26, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415, 107 N.E. 675, 679 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806 (1962); Powell v. Ellis, 122 Ind. App. 700, 709-10, 105 N.E.2d 348, 352-53 (1952).

29-1-5-3.[19] When a will contest is filed under Indiana Code section 29-1-7-20, the statute lays the burden of disproving testamentary capacity on the contesting party.[20] It follows that the contestant has the right to open and close in will contests[21] and the proponent of a will is obliged to do nothing more than submit his will for proof under the forms of the Probate Code.[22] Upon proof of execution by one of the means provided for in Indiana Code section 29-1-7-13, the proponent has created a triable issue of fact and has carried whatever burden of going forward with evidence of capacity and freedom from influence, fraud, or duress is imposed by Indiana law. If a contestant successfully disproves any of the three elements of capacity,[23] the court must hold the will invalid.

1. Testators Under Guardianship. — According to Indiana law, a person may be put under guardianship if he or she is "incompetent."[24] "Incompetent" is defined by the Probate Code as "a person who is . . . incapable by reason of insanity, mental illness, mental retardation, senility, habitual drunkenness, excessive use of drugs, old age,

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of said estate as said witness would have been thus entitled to, not exceeding the value of such interest passed to him by such will, shall be saved to him.

(d) No attesting witness is interested unless the will gives to him some personal and beneficial interest. The fact that a person is named in the will as executor, trustee, or guardian, or as counsel for the estate, personal representative, trustee or guardian does not make him an interested person.

[19]IND. CODE § 29-1-5-3(a) (Supp. 1980) provides in part:

The execution of a will, other than a nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to them that the instrument is his will and either:

(i) sign the will;

(ii) acknowledge his signature already made; or

(iii) at his direction and in his presence have someone else sign his name for him; and

(2) The attesting witnesses must sign in the presence of the testator and each other.

[20]IND. CODE § 29-1-7-20 (1976).

[21]The right to open and close, which follows from assignment of a statutory burden of proof on lack of capacity, undue influence, fraud, duress, and want of execution is significant in terms of the tactical position of the contestant. The contestant has the final argument to the jury and the chance to rebut the proponent's case. If this statute is applied rigorously, only the due execution of the will need be established by the proponent.

[22]For the procedure involved, *see* IND. CODE §§ 29-1-7-2 to -5, -13 (1976). With the advent of a self-proving will form in 1975, Indiana lawyers may open an estate and submit an application for letters testamentary by filling out the required form for application for letters and by attaching the original will and the affidavit required by IND. CODE § 29-1-5-3(b) (1976).

[23]For a statistical breakdown of Indiana testamentary capacity cases, *see* appendices available from the publisher.

[24]IND. CODE § 29-1-18-6 (1976).

infirmity, or other incapacity, of either managing his property or caring for himself or both."[25] An adjudication of incompetency could be res judicata on the issue of capacity to execute a will, but Indiana case law consistently refused to recognize the relationship between an adjudication of incompetency and capacity to make a will. *Pepper v. Martin*[26] is a typical case. The testator was quite elderly. He exhibited many signs of senile psychosis and, pursuant to statute, was put under guardianship.[27] Nonetheless, the Indiana Supreme Court reversed the trial court's verdict for the contestant and admitted the testator's will to probate despite the fact that the will was made *after* the guardianship order became final. The grounds for reversal cited by the supreme court were errors in instructions.[28] The court stated that proof that the testator had been under guardianship at the time he made his will was a "prima facie case" of lack of capacity, but not conclusive on that issue.[29] The court stated that the contestant retained the burden of proof on the issue of want of capacity. Therefore, once the proponent offered some evidence to rebut the adjudication of incompetency in the guardianship proceeding, the contestant had to produce *more evidence* of want of testamentary capacity if the contestant was to prevail. The court impliedly treated the presumption of continuing incompetency or insanity as a presumption that disappeared when contrary evidence, however slight or incredible, appeared to oppose it.

When a court finds a person incompetent, it decrees that the person is incapable of making an ordinary contract.[30] The predominant view in the United States is that persons under guardianship may generally make a will although they are protected by the court from making an inter vivos gift of the same property.[31] This dual standard cannot be rationally defended.

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[25]IND. CODE § 29-1-18-1 (1976 & Supp. 1980).

[26]175 Ind. 580, 92 N.E. 777 (1910).

[27]*Id.* at 584, 92 N.E. at 778.

[28]*Id.* at 582-83, 92 N.E. at 778.

[29]*Id.* at 583, 92 N.E. at 778.

[30]This result has long been reached by statute. The present Indiana Code section 29-1-18-41 (1976) summarizes the result of much appellate litigation: "Every contract, sale or conveyance had or executed by any one previously adjudged to be an incompetent and while under such legal incompetency shall be void unless such incompetency is due solely to such person's minority, in which case such contract, sale or conveyance shall be only voidable."

[31]*See, e.g.*, Teegarden v. Lewis, 145 Ind. 98, 100-01, 40 N.E. 1047, 1048 (1895). *Teegarden*, however, held that the capacity to make an inter vivos gift is no greater than that needed to make a will. *Id.* The Indiana Supreme Court reaffirmed this position in Thorne v. Cosand, 160 Ind. 566, 569, 67 N.E. 257, 258 (1903), but the appellate court adopted a different test in Deckard v. Kleindorfer, 108 Ind. App. 485, 491, 29 N.E.2d 997, 999 (1940), holding that to make a valid inter vivos gift a party had to have

2. Alcoholic Testators.—Only one Indiana appellate decision examined the post-death plans of a testator under the influence of narcotics.[32] However, Indiana case law contains at least eight cases of alcoholic testators on appeal. Alcoholic testators generally received gentle treatment at the hands of Indiana appellate courts. In *Derry v. Hall*,[33] the appellate court reversed a trial court verdict and judgment for the contestant.[34] Oria Dolan, the testator, died of nephritis and pneumonia in Indianapolis in 1926 at approximately the age of 53.[35] Mr. Dolan was unmarried and his closest relatives were some cousins, aunts, and uncles with whom he had very little to do during the last twenty years of his life.[36] His will, made at the hospital the day before his death, left the balance of his estate to several Roman Catholic charities.[37] The evidence disclosed that Dolan had been addicted to alcohol and that Dolan exhibited some of the signs of alcoholic brain disease.[38] The jury set aside Dolan's will as the product of an unsound mind but the appellate court reversed the trial court on the ground that the verdict was not supported by the

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"sufficient mind and memory to comprehend the nature and extent of his act and to understand the nature of the business in which he is engaged and to exercise his own will with reference thereto."

[32]Haas v. Haas, 121 Ind. App. 335, 96 N.E.2d 116 (1951).

[33]96 Ind. App. 683, 175 N.E. 141 (1931). *But see* Swygart v. Willard, 166 Ind. 25, 76 N.E. 755 (1906) (case decided for the contestant with strong evidence of mental impairment).

[34]96 Ind. App. at 696, 175 N.E. at 145.

[35]*Id.* at 687, 175 N.E. at 142.

[36]*Id.* at 686, 175 N.E. at 142. The principal lay witness for the contestant was Jessie M. Kinney, a cousin from Muncie, who recited a fantastic tale. The testator had gone with her to the Chicago World's Fair in 1892. He locked her in a hotel room when Dolan (known as Dooley to his friends, and indeed, he signed the will under the name of Dooley) was in an alcoholic frenzy. He threatened her with physical abuse and starved her for several days before letting her go. *Id.* at 689, 175 N.E. at 143. Kinney had not seen Dooley since 1921, however, and her evidence, relevant to Dooley's mental impairment from excessive alcoholism in 1892, really did not provide the contestant with a lay witness who would say Dooley was without sound mind on the day of making his will. *Id.* at 693, 175 N.E. at 144.

[37]*Id.* at 688, 175 N.E. at 143.

[38]*Id.* at 690-91, 175 N.E. at 144. The medical evidence of serious pathology was very strong, probably the strongest evidence in favor of setting aside Dolan's will. The death certificate showed Dolan had died of acute lobar pneumonia, a complication of chronic nephritis. Dr. Albert Sterne, an alienist from Indiana University Medical School, testified that the decedent's condition was clearly the result of chronic, long term, excessive use of alcohol, and that such prolonged use of alcohol in excessive quantities would impair all the mental functions of the deceased, even when he was not drinking. *Id.* The appellate court discounted the medical testimony in this case against the testimony of twenty lay persons who were of the opinion that Dolan was of sound mind when he was last seen by each of them. *Id.* at 693, 175 N.E. at 144. This discounting effect is often encountered when lawyers review medical expert opinions in will contests.

evidence, since there was a lack of any testimony showing that the testator was of unsound mind.[39]

Yet, the evidence established Dolan's excessive drinking habits and showed that his death was caused by a complication of a chronic disease associated with acute alcoholism. Thus, the appellate court stretched judicial reasoning to favor the probate of Dolan's will without revealing its reasons for doing so.[40]

3. Senile Testators.—"Senility" is a lay term which usually describes one of two conditions: arteriosclerotic brain disease—a condition produced by insufficient blood supply to the brain caused by fatty deposits in arteries over a long period of time, and so-called senile psychosis—a non-organic mental condition which is clinically observed in people who are extremely old.[41] Contemporary medical opinion has recently been altered by studies which tend to show that some cases of "senile psychosis" may simply be the by-product of inadequate medical treatment for elderly persons who are confused disoriented, forgetful, or hallucinatory due to improper medical care or neglect.[42] The *Greenwood-Baker* Rule was derived from a judicial policy statement concerning the senile testator. It was intended to be a measure of the lowest threshold mental capacity for responsible activity in the understanding and execution of a will. It may be questioned whether the *Greenwood-Baker* Rule provides an adequate distinction between the wills of competent and of incompetent elderly testators who exhibit signs of senility. The majority of Indiana decisions in which the testator's mental state was described

[39]*Id.* at 693-94, 175 N.E. at 144-45. The testator's physician had earlier testified that lobar pneumonia usually causes swelling of brain tissue resulting in impairment of mental faculties. In response to the hypothetical, including the usual swelling associated with pneumonia, Dr. Sterne opined that the hypothetical testator lacked testamentary capacity. The court held this was of no probative value because the facts used in the hypothetical were not established by the evidence. *Id.* at 144, 175 N.E. at 144.

[40]The court seemed to be saying that the doctor could not conclude the decedent had impaired mental functions when he made his will because the physician assumed the decedent died within 24 hours after becoming infected. This fact had not been proved of record by an independent source, although it could clearly have been proven by the hospital records.

[41]*See A Modest Proposal, supra* note 1, at 473-75 for an explanation of the distinction between arteriosclerotic brain disease, which is not necessarily connected with the process of aging, and senile psychosis, a diagnosis used to classify elderly patients with symptoms similar to that of arteriosclerotic brain disease without the organic etiology of elevated blood pressure and periods of dizziness and blackouts and signs of arteriosclerotic changes in the large blood vessels in the neck characteristic of persons whose brains are not receiving an adequate blood supply due to fatty deposits in the smaller arteries in the cranium.

[42]*See, e.g.*, Douglass & Douglass, *Decrepitude Preventions*, 300 J. NEW ENG. MED. 992 (1979); Schwartz, *The Spectre of Decrepitude*, 229 J. NEW ENG. MED. 1248 (1978).

that the testator: (1) knew the natural objects of his or her bounty;[12] (2) knew the nature and extent of his or her property (in general, what he or she owned or controlled and its approximate worth at the time the will was drafted);[13] and (3) was able at the time of making and planning the will to keep the two prior factors in mind and make a rational plan for disposing of his or her property after death.[14]

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[12]In Indiana, objects of one's bounty refers to the persons who would take the testator's property according to the laws of descent. This standard for limiting "natural objects of one's bounty" has been articulated in at least two Indiana appellate court cases, Egbert v. Egbert, 90 Ind. App. 1, 5, 168 N.E. 34, 35-36 (1929) and Jewett v. Farlow, 88 Ind. App. 301, 303-04, 157 N.E. 458, 459 (1928). In an earlier case, Bradley v. Onstott, 180 Ind. 687, 694, 103 N.E. 798, 800 (1914), the Indiana Supreme Court held that the jury may consider whether or not the proposed will disinherited the testator's children or their descendants, a natural object of bounty, which the law recognizes as natural objects of the testator's bounty. However, in Barricklow v. Stewart, 163 Ind. 438, 440, 72 N.E. 128, 129 (1904) the supreme court stated that the testator's mistaken impression that an individual would take an intestate share in his estate was not admissible on the issue of the testator's want of capacity. Indiana probably follows the majority of states in tying its notion of "natural objects of bounty" to intestate successors or persons possessing forced share rights in the testator's estate. *See A Modest Proposal, supra* note 1, at 456-57 for a discussion of this phenomenon in greater detail.

[13]Indiana probably has adopted the rule that the ability to recall the nature and extent of one's property is determined more or less by the actual size of the testator's holdings at the time the will is made. Jewett v. Farlow, 88 Ind. App. 301, 306-07, 157 N.E. 458, 459-60 (1928). Indiana has also adopted the position of a majority of states, that one may not actually be required to recall all of his or her property when executing his will. The law demands that the testator simply be *able* to do so. *Id.* at 307, 157 N.E. at 460. In Barricklow v. Stewart, 163 Ind. 438, 72 N.E. 128 (1904) the Indiana Supreme Court held that it was not error to exclude the inventory and appraisal of the testator's estate as evidence of the nature and extent of his property at death. *Id.* at 441, 72 N.E. at 129.

[14]The "rational plan" portion of the *Greenwood-Baker* rule in Indiana jurisprudence has been subdivided by the appellate courts into two types of verbal formulae. Most cases follow instruction eight in *Bundy v. McKnight*, which states that:

> [H]e shall have sufficient active memory to retain all these facts [natural objects of bounty and nature and extent of his property] in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity . . . .

Bundy v. McKnight, 48 Ind. at 511. This model was approved by the court in Ramseyer v. Dennis, 187 Ind. 420, 426, 116 N.E. 417, 418 (1917); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); and Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913). It is essentially the same model as that adopted by the New York Court of Appeals in *Delafield v. Parish*.

The variations on this theme include a significant number of cases which add language from instruction nine approved in *Bundy v. McKnight*: "[A] person . . . is capable of making a valid will, if at the time of its execution he had mind sufficient to know and understand the business in which he is engaged." 48 Ind. at 511. This clause is added to the basic descriptive language cited above in Blough v. Parry, 144 Ind. 463, 467-71, 40 N.E. 70, 71-73 (1895); Dyer v. Dyer, 87 Ind. 13, 18 (1882); and in Lowder v.

In uncontested proceedings for probate, the proponent of a will, by reason of the statutory provisions of Indiana Code sections 29-1-7-20[15] and 29-1-5-1[16] and the implied presumption of capacity arising from due execution,[17] carries the burden of proof on testamentary capacity by showing that the will was duly executed according to the provisions of Indiana Code sections 29-1-5-2[18] and

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Lowder, 58 Ind. 538, 542 (1877). Instruction nine in *Bundy v. McKnight* incorporated a standard applied to the test for appointing a guardian for someone. The instruction, in the context of the case, described the mental capacity of a very sick person. The instruction was incorporated to explain to the jury what effect the terminal illness of the testator had on the execution of his will. Other variations on this verbal formula appear in Ditton v. Hart, 175 Ind. 181, 186, 93 N.E. 961, 964 (1911) and in Whiteman v. Whiteman, 152 Ind. 263, 274-75, 53 N.E. 225, 229-30 (1899).

Modern Indiana Court of Appeals decisions on testamentary capacity restate the language used in *Bundy v. McKnight* as the general formula for testamentary capacity in Indiana. *See* Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806-07 (1962); Noyer v. Ecker, 125 Ind. App. 700, 709-10, 105 N.E.2d 348, 352 (1952). In essence, Indiana's courts believe that a testator must be able to make a rational plan for disposition of his or her property at the time of executing the will.

[15]IND. CODE § 29-1-7-20 (1976) reads in part as follows: "In any suit to resist the probate, or to test the validity of any will after probate, as provided in section 717 [IND. CODE § 29-1-7-17] of this [probate] code, the burden of proof shall be upon the contestor." This 1953 statute erased the learning built upon more than twenty appellate decisions in Indiana on the right to open and close in a will contest and the duty of the proponent to make a prima facie case on capacity and freedom from undue influence. *See, e.g.*, Van Meter v. Ritenour, 193 Ind. 615, 618, 141 N.E. 329, 329-30 (1923) (burden of proof on contestant when will is admitted to probate); Johnson v. Samuels, 186 Ind. 56, 61-62, 114 N.E. 977, 979 (1917) (proponent may open and close when contestant files objections to will prior to probate since proponent has burden of proof); Herring v. Watson, 182 Ind. 374, 377, 105 N.E. 900, 901 (1914) (burden of proof on issue of capacity on proponent in pre-probate will contest).

[16]IND. CODE § 29-1-5-1 (1976) provides in part: "Any person of sound mind who is eighteen (18) years of age or older, or who is younger and a member of the armed forces, or of the merchant marine of the United States, or its allies, may make a will."

[17]In Indiana the proponent enjoys a presumption of capacity and of freedom from undue influence, fraud, and coercion on proof of the due execution of the testator's will. McCord v. Strader, 227 Ind. 389, 392, 86 N.E.2d 441, 442 (1949); Kaiser v. Happel, 219 Ind. 28, 30-31, 36 N.E.2d 784, 786 (1941); Herbert v. Berrier, 81 Ind. 1, 4-6 (1881).

[18]IND. CODE § 29-1-5-2 (1976) provides in part:

> (a) All wills except nuncupative wills shall be executed in writing.
>
> (b) Any person competent at the time of attestation to be a witness generally in this state may act as an attesting witness to the execution of a will and his subsequent incompetency shall not prevent the probate thereof.
>
> (c) If any person shall be a subscribing witness to the execution of any will in which any interest is passed to him, and such will cannot be proved without his testimony or proof of his signature thereto as a witness, such will shall be void only as to him and persons claiming under him, and he shall be compelled to testify respecting the execution of such will as if no such interest had been passed to him; but if he would have been entitled to a distributive share of the testator's estate except for such will, then so much

were those involving senile testators. Indiana's cases include two groups of senile testators: "childish" testators and "recluses." A representative sampling of each type of senile testator illustrates the problems encountered with the *Greenwood-Baker* Rule in practice.

An example of a "childish" testator is found in *Love v. Harris*,[43] in which the appellate court affirmed a trial court verdict and judgment for the contestant. William L. Cranston, an elderly bachelor, lived alone on a farm which had originally been co-owned by Cranston, his brother, and his sister.[44] Cranston was the sole survivor and had clear title to the farm. He was very dirty and unshaven, and maintained his home in an incredibly filthy condition.[45] Lay witnesses described Cranston as childlike, stupid and rambling in conversation, unable to recognize acquaintances or relatives, and unable to remember when his tenant farmers had paid him rent.[46] Cranston, approximately four months after making a disinheriting will, was placed under guardianship.[47] The case went to the jury on the dual grounds of lack of capacity and undue influence exerted by Mr. and Mrs. Love, the neighbors who benefited from the 1950 will at the expense of Cranston's nieces.[48]

In *Love*, the testator showed significant signs of physical and mental debility. He was very old at the time his will was made. He exhibited a tendency to forget and was described as childish by lay witnesses. Indiana courts seem ready to accept jury verdicts in cases similar to *Love* which set aside a will as the product of an unsound mind.

Indiana will contests have also involved an inordinate number of recluses. In *Cahill v. Cliver*,[49] the testator, Jessica Sage, was a typical agoraphobe.[50] She was a delicate person who supported herself by tutoring children in her home. In 1906, Jessica, age 35, married William E. McLean, a 74 year old gentleman. Mr. McLean died within a few days after the wedding, leaving Jessica Sage

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[43]127 Ind. App. 505, 143 N.E.2d 450 (1957). For another strong case for the contestant, *see* Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940).

[44]*Id.* at 508-09, 143 N.E.2d at 452.

[45]*Id.* at 509, 143 N.E.2d at 453.

[46]*Id.*

[47]*Id.* at 510, 143 N.E.2d at 453.

[48]*Id.* at 508, 143 N.E.2d at 452. The neighbors also procured the lawyer who made the will, "talked for" Cranston during the will-making process, and, in general, dominated the testator. For a later case involving a recluse with character traits similar to those of W. Cranston, *see* Zawacki v. Drake, 149 Ind. App. 270, 271 N.E.2d 511 (1971).

[49]122 Ind. App. 75, 98 N.E.2d 388 (1951).

[50]The term "agoraphobia" means fear of being in large open spaces. 1 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER, A-107 (1980).

$250,000. Jessica's father, mother, and brother all died within a few years of one another. Miss Sage suffered a nervous breakdown after the death of her family members and retired within the four walls of the unpainted Sage home in Terre Haute, avoiding all contact with other humans and with the outside world.[51] In addition Miss Sage locked her cleaning woman in the parlour and prevented her from going freely from room to room without Miss Sage's presence.[52]

Jessica Sage's will left the balance of her estate to her lawyer as trustee for the purpose of establishing a home for elderly men in Terre Haute as a memorial for her dead husband, Colonel McLean.[53] The trust instrument, though, varied greatly from the instructions dictated by Sage. It was alleged that she did not know of the changes when she signed the will. The trust instrument gave the trustee unlimited discretion to sell the assets to anyone, including himself, and allowed him to name his own successor trustee.[54] The beneficiaries were described as "worthy poor men," a description which could include anyone whom the trustee chose to designate as worthy and poor, such as friends of the trustee. The appellate court affirmed the trial court's verdict and judgment for the contestant.[55] The court treated the case as one in which an attorney had engaged in overreaching and unethical conduct in order to procure a sinecure from an elderly client.[56]

The recluse syndrome, agoraphobia, is a condition which is not well understood by contemporary medicine. The exaggerated fear of other humans and of open space may have little to do with the legal test for testamentary capacity. It is equally unclear whether agoraphobia is related to any form of senile disorder. Agoraphobic persons may know and recognize the natural objects of their bounty, the nature and extent of their property, and be capable of keeping the two in mind long enough to make a plan for post-death disposition.

4. Organically Impaired Testators.—Indiana will contests include decisions in which the contestant complained that the testator lacked testamentary capacity because the testator made his will on his deathbed while under the influence of debilitating physical illness.[57] Some of the older cases of this genre deal with a testator whose capacity was allegedly impaired by the great pain and agony

[51]122 Ind. App. at 77, 98 N.E.2d at 389.

[52]*Id.* at 78, 98 N.E.2d at 389.

[53]*Id.* at 80, 98 N.E.2d at 389-90.

[54]*Id.* at 80-81, 98 N.E.2d at 390.

[55]*Id.* at 81, 98 N.E.2d at 390.

[56]*Id.* at 76, 98 N.E.2d at 388.

[57]*See, e.g.*, Vance v. Grow, 206 Ind. 614, 190 N.E. 747 (1934); Oilar v. Oilar, 188 Ind. 125, 120 N.E. 705 (1918); Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914); Ludwick v. Banet, 125 Ind. App. 465, 124 N.E.2d 214 (1955); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345 (1940).

of a last illness such as cancer,[58] a spinal lesion,[59] or uremic poisoning.[60] Another group of older cases allege that the testator lacked testamentary capacity because the testator made his or her will while under the influence of high fever or a chronic, fatal infection such as pneumonia or tuberculosis.[61] A third group of more modern cases involves allegations that the testator lacked capacity because of brain damage due to stroke or other brain trauma.[62] None of the Indiana decisions dealing with organically impaired testators involved such organic psychoses as syphilis dementia (paresis), psychosis resulting from seizure disorders such as psycho-motor epilepsy, or psychosis from traumatic brain damage.[63] The appellate courts were apparently unimpressed by recitations of the deceased's agony and suffering by lay witnesses, and by the impact that extreme pain, high fever, or other impedimentia had on the testator's mental capacity.

Boland v. Claudel[64] illustrates the fate of organically impaired testators in Indiana. Peter Claudel was a bachelor who lived alone on his farm. In June 1910, Claudel became ill and his kidneys failed him. He was taken in by a neighbor, Edward C. James, who looked after him. Claudel sank into a stupor from uremic poisoning. On June 10, 1910, with the scrivener guiding his hand, Claudel executed a will in Mr. James' home. Medical witnesses called by the contestant concluded that a person in such an advanced stage of kidney failure as Claudel could not have been mentally competent.[65] The Indiana Supreme Court affirmed a jury verdict and judgment for the contestant, giving due recognition to a well-constructed case which showed that the testator's mental condition had been severely impaired by organic illness.[66]

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[58]Vance v. Grow, 206 Ind. 614, 617, 190 N.E. 747, 748 (1934) (testator with terminal cancer made death bed gifts); Rarick v. Ulmer, 144 Ind. 25, 28, 42 N.E. 1099, 1100 (1896) (facial cancer).

[59]Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911).

[60]Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914).

[61]*See, e.g.*, Terry v. Davenport, 170 Ind. 74, 83 N.E. 636 (1908) (high fever during last illness); Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883) (will made during last illness); Dyer v. Dyer, 87 Ind. 13 (1882) (testator signed will when extremely weak from pneumonia).

[62]*See, e.g.*, Taylor v. Taylor, 174 Ind. 670, 93 N.E. 9 (1910) (will made after testatrix had suffered a severe stroke); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940) (testator had rheumatism, arteriosclerosis, and Bright's Disease (a form of chronic kidney disease)).

[63]For a more detailed discussion of epileptic testators, *see A Modest Proposal*, *supra* note 1, at 472.

[64]181 Ind. 295, 104 N.E. 577 (1914).

[65]*Id.* at 298, 104 N.E. at 578. For a discussion of the science of toxicology and many of the side effects of commonly used hypertensive medications and pain killers, *see* 4 G. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE chs. 131-32 (3d. ed. E. Berger 1969).

[66]181 Ind. at 298, 104 N.E. at 578.

The *Greenwood-Baker* Rule actually fails to cope with the problem of the organically impaired testator. A person experiencing extreme pain, hallucinating during high fever, or suffering the impact of a seizure may be able to meet the *Greenwood-Baker* Rule yet be unable to orient himself or herself with respect to space, time, and person. At the same time, such organically impaired individuals do not meet the criteria for the "insane delusion" rule. Thus, unless the court is willing to inquire into the effect of pain, fever, or seizure on behavior and to develop a legal explanation for avoiding a will made by someone who was in great pain or delirious, it is highly probable that a will made by a testator who was unable to comprehend the nature of his or her acts will be sustained.

B. Insane Delusion

Indiana case law has recognized that a testator who meets the *Greenwood-Baker* test for testamentary capacity may, nonetheless, lack testamentary capacity if his or her will is the product of an insane delusion or monomania.[67] This rule grew out of the English case of *Dew v. Clark*[68] in which the will of a physician was set aside due to a finding that the will was the product of an "insane delusion" that his blameless daughter was guilty of irregular sexual conduct. This rule, which was generated from eighteenth century psychology, in particular the writings of Jeremy Bentham,[69] was introduced as a means of invalidating a will made as a result of "partial insanity."[70] The type of delusion which can result in the invalidation of a will is a delusion about an object of one's bounty which leads the testator to exclude that person from the will.

The test for the presence of an insane delusion has been variously formulated in Anglo-American case law. In *Barr v. Summer*,[71] it was stated that: " 'An insane delusion exists when a person imagines that a certain state of facts exists which has no existence at all, except in the imagination of the party, and which false impression cannot be removed . . . by any amount of reasoning and argument.' "[72] Insane delusions are frequently confused with strange or absurd

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[67]Thompson v. Hawks, 14 F. 902, 903 (C.C.D. Ind. 1883) (applying Indiana law); Robbins v. Fugit, 189 Ind. 165, 167, 126 N.E. 321, 321-22 (1920); Ramseyer v. Dennis, 187 Ind. 420, 426-27, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415-16, 107 N.E. 675, 680 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914).

[68]162 Eng. Rep. 410 (Prerog. 1826).

[69]*See A Modest Proposal, supra* note 1, at 487-89 for an extended discussion of *Dew v. Clark* and its impact on American will contests.

[70]*Id.*

[71]183 Ind. 402, 107 N.E. 675 (1915).

[72]*Id.* at 418, 107 N.E. at 680 (quoting Bundy v. McKnight, 48 Ind. 502, 512 (1874)).

opinions held by people.[73] Unless delusional thought involves some natural object of one's bounty and is related to the relative merit of leaving property to that individual, it is not an "insane delusion." Indiana's insane delusion cases may be classified into three subgroups:

(1) "They're Out to Get Me" cases in which the testator believes that someone in his family is out to do him or her harm;

(2) "Crank" cases, in which the testator holds eccentric, bizarre or strange religious, scientific or political views, which are improperly treated as insane delusions; and

(3) "Unknown" cases in which the trial court gave an insane delusion instruction without revealing enough of the evidence in the case to suggest the basis for the instruction.

Six of the fifteen will contests involving insane delusions were originally trial verdicts for the proponent and nine were originally decided for the contestant. On appeal, the results were exactly reversed with nine cases being finally determined in favor of the proponent and six for the contestant.[74] Only one case, *Barnes v. Bosstick*,[75] involved a testator committed to a mental institution. In that decision, the proponent offered to prove a lost will over objections that Emma A. Dudley, the testatrix, had revoked the lost will by destruction. The lost will which disinherited her relatives in favor of people outside of her family was executed shortly before Mrs. Dudley was committed to a state mental hospital. The evidence showed that Mrs. Dudley had her 1927 will in her possession when she was committed. The Indiana Supreme Court correctly held that if she destroyed the will while she was insane it was not revoked.[76]

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[73]This is evident most clearly in the "spiritualist" cases in which the testator is alleged to have made a will after consulting the spirits of the dead through a medium. In one such case, the medium appears to have instructed the testator to leave his property to the medium. The verdict for the contestant was sustained on a motion for new trial. Thompson v. Hawks, 14 F. 902, 903-04 (C.C.D. Ind. 1883). *See also* Barr v. Sumner, 183 Ind. 402, 417-20, 107 N.E. 675, 680-81 (1915); Wait v. Westfall, 161 Ind. 648, 665-66, 68 N.E. 271, 277 (1903).

[74]*See* Table Fifty in Appendix A to this Article held by the publisher. *See also* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932) (testatrix committed to insane asylum shortly after making will); Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917) (some symptoms of involutional psychosis); Whiteman v. Whiteman, 152 Ind. 263, 53 N.E. 225 (1899) (unspecified mental aberrations); Forbing v. Weber, 99 Ind. 588 (1885) (revocation case: testator tore up will in fit of "temporary insanity"); Kessinger v. Kessinger, 37 Ind. 341 (1871) (psychotic behavior, allegedly caused by "dropsy"); Rush v. Megee, 36 Ind. 69 (1871) (testator alleged to have been insane when will made); Addington v. Wilson, 5 Ind. 137 (1854) (testator believed his wife to be a witch); Cahill v. Cliver, 122 Ind. App. 75, 98 N.E.2d 388 (1951) (recluse).

[75]203 Ind. 299, 179 N.E. 777 (1932).

[76]*Id.* at 302, 179 N.E. at 778.

The trial court found for the contestants on obscure grounds.[77] The cause was remanded by the supreme court for proof and probate of the copy of the 1927 will in the custody of Mrs. Dudley's lawyer.[78] Although an insane delusion instruction was given in the case, the supreme court did not report the nature of Mrs. Dudley's mental problems.

1. They're Out to Get Me Cases.—In *Burkhart v. Gladish*[79] a testator suffered from delusions which arose from his long-standing alcoholism.[80] Peter Burkhart made a will leaving his estate to four of his nine children.[81] Burkhart harbored an irrational conviction that his wife had been guilty of acts of sexual intercourse with some of his sons-in-law. Burkhart's will disinherited the sons-in-law. Two years after making the will, Burkhart shot himself after first killing his wife.[82] The trial evidence showed that Mrs. Burkhart had no sexual relations with her sons-in-law.[83] Lay opinion witnesses swore that Burkhart was crazed by prolonged excessive drinking.[84] The trial court entered judgment on a jury verdict for the contestant and the judgment was affirmed on appeal by the Indiana Supreme Court.[85] This case is typical of the "insane delusion" cases in which contestants generally prevail. Only one other Indiana case presented a similar profile indicating that the testator had what were once called "delusions of persecution" about a natural object of bounty.[86]

2. Crank Cases.—Indiana appellate courts have been unkind to testators who held unusual cultural or religious beliefs. For exam-

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[77]*Id.* at 300, 179 N.E. at 777.

[78]*Id.* at 303, 179 N.E. at 778.

[79]123 Ind. 337, 24 N.E. 118 (1890).

[80]*Id.* at 344, 24 N.E. at 120.

[81]*Id.* at 339, 24 N.E. at 118.

[82]*Id.* at 344, 24 N.E. at 120. The proponent alleged it was error to permit one of the sons-in-law, Elijah Gladish, to testify that he had never had intercourse with Burkhart's wife. The trial court admitted the testimony, and the supreme court held it was not error, since the testimony was relevant to the issue of whether or not Burkhart had a rational foundation for believing his wife to be unfaithful with his son-in-law. *Id.* at 346, 24 N.E. at 120-21.

[83]*Id.* at 344, 24 N.E. at 120. The proponent tried to exclude under the Dead Man Act the testimony of the disinherited Burkhart children concerning acts and conduct of their dead father prior to the making of his will. *Id.* at 345, 24 N.E. at 120. The supreme court reaffirmed its position announced in Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1886) that the Dead Man Act did not make intestate successors incompetent witnesses on the issue of soundness of mind in a will contest even when they claimed adversely to the will. 123 Ind. at 346, 24 N.E. at 120.

[84]123 Ind. at 345, 24 N.E. at 120.

[85]*Id.* at 347, 24 N.E. at 121.

[86]Friedersdorf v. Lacy, 173 Ind. 429, 90 N.E. 766 (1910). The case was originally decided in favor of the contestant. On appeal, the supreme court reversed the decision on the determination that the trial court had given improper instructions.

ple, only one of four will contests involving the will of a Spiritualist was eventually decided for the proponent during the heyday of that sect.[87] The Spiritualist cases usually presented two alternative grounds for avoiding the testator's will: (1) the testator had an insane delusion because he or she believed in consulting the dead before making a will, and (2) the medium whom the Spiritualist consulted exercised undue influence over the testator. The case of the overreaching medium will be discussed in the next section of this Article dealing with undue influence. The Spiritualist who believed that the dead could tell him or her how to make a post-death plan for distribution of assets caused Indiana courts a great deal of difficulty earlier in this century. In *Steinkuehler v. Wempner*,[88] Wilhelmina Albertsmeyer, the testatrix, made a will in April, 1902 and a codicil in December, 1903, which partially disinherited some of her grandchildren.[89] Mrs. Albertsmeyer, an elderly believer in spiritualism, consulted a medium before making her will. The voice of her dead husband allegedly appeared to her through the agency of the medium and stated that the grandchildren were going to cause her trouble; thus, she decided that their legacy should be a dollar each.[90] The disaffected grandchildren brought an action to set aside her will on grounds of lack of capacity, undue influence (by the dead husband), fraud, and want of due execution.[91] The court set aside Mrs. Albertsmeyer's will on a directed verdict. However, on appeal, the Indiana Supreme Court reversed the trial court holding that belief in the spirit world, in mediums, and in resort to mediums for advice from beyond were not insane delusions, and that Mrs. Albertsmeyer's will was not vitiated by her resort to a medium for guidance from beyond the grave.[92]

The frequency of "insane delusion" cases seems to have declined in the past thirty to forty years. The courts in most states have failed to generate a legal test for testamentary capacity out of the rule of *Dew v. Clark*. In Indiana, this failure may be due to the sharp decline in the number of will contests which reach the appellate

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[87]Addington v. Wilson, 5 Ind. 137 (1854) was eventually decided for the proponent on appeal. For cases decided against the proponent *see* Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915); McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909); Steinkuehler v. Wempner, 169 Ind. 154, 81 N.E. 482 (1907). *See also* Thompson v. Hawks, 14 F. 902 (C.C.D. Ind. 1883) (trial decision only).

[88]169 Ind. 154, 81 N.E. 482 (1907).

[89]*Id.* at 164, 81 N.E. at 486.

[90]*Id.*

[91]*Id.* at 155, 81 N.E. at 483.

[92]*Id.* at 164, 81 N.E. at 486. *But see* McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909).

level.[93] The "insane delusion" is an antiquated attempt to frame a rule which invalidates a will if the will is the product of mental disease. If the courts are willing to dust off this concept and apply what is currently known about mental illness, the courts could fashion an appropriate rule for setting aside wills for lack of mental competency of the testator.[94]

III. UNDUE INFLUENCE AND FRAUD IN INDIANA WILL CONTESTS

A. English Development of the Law of Undue Influence

The Statute of Wills contained no provision for avoiding wills on the ground of interference with the testator's free agency. Separate writs were available for an action of deceit in which it was alleged that some individual obtained another's property by fraudulent representations. Ecclesiastical law contained no specific canons dealing with wills obtained by overreaching. Bacon's Abridgment[95] mentioned that a will could be avoided if the testator's free will was overborne by another party. Judicial development of a ground for avoiding wills due to conduct of a beneficiary was slow. The first major case which treated undue influence as a separate ground for setting aside a will was *Mountain v. Bennet*.[96] In *Mountain*, the issue centered upon the validity of the will of the late Wilfred Bennet who left large real estate holdings to his wife. Bennet was described as "a debauched man" and as "fond of women."[97] Bennet made a secret marriage contract with a widow, Mrs. Harford. Shortly thereafter, Bennet made a will leaving his estate to his new wife.[98] Bennet's

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[93]This phenomenon is noticeable in both the Indiana Supreme Court, which has heard no will contest cases since 1949, and in the Indiana appellate courts, which heard only two will contests in 1970-79, five in 1960-69, and only nine in 1950-59. By contrast, during the decade of 1900-09 the supreme court heard twelve will contests, and in the decade 1890-99 the same court disposed of thirteen will contests.

[94]Although this Article deals with the capacity to make a valid will, much the same type of analysis would apply to invalidating trust deeds or agreements for want of capacity. The Indiana Trust Code spells out the standard for capacity to make trust deeds and testamentary trusts, leaving open the issue of a different standard for capacity in the case of trusts created by contract. IND. CODE § 30-4-2-10 (1976).

[95]7 M. BACON, A NEW ABRIDGMENT OF THE LAW 303-04 (5th ed. London 1798).

[96]29 Eng. Rep. 1200 (Ex. 1787).

[97]*Id.* at 1201.

[98]*Id.* at 1200. Lord Eyre in summation to the jury, regarding Mrs. Harford/Bennet/Parry's behavior, stated:

> It does not appear on the state of the evidence, that this woman originally threw herself in the way of Mr. Bennet; he was naturally a debauched man and fond of women; in that state he took a fancy to this woman . . . . There is actual proof of applications from him to her after the death of Mr. Harford for an interview, and he certainly was a volunteer in the business.

Id. at 1201. Parry's complicity in the design was not proved by any direct evidence,

heir objected to the probate of the will.

The case turned on whether the widow had conspired to induce Bennet to leave her his estate through importunity and favoritism. Lord Chief Baron Eyre concluded that:

> [I]f a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs in *general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind . . . . On a general view of this case, it must turn on one or other of these grounds; namely, either on the general capacity of Mr. Bennet to act for himself . . . or on the ground of a dominion or influence acquired over him by this woman, with whom he had most unfortunately connected himself.[99]

A generation later the Ecclesiastical Courts wrestled with an importuning beneficiary in *Kinleside v. Harrison*.[100] Andrews Harrison, the testator, made a will in June, 1808, followed by eight codicils.[101] The first four codicils were conceded to be valid. The last four codicils materially changed his testamentary plans to give a larger share of his estate to his vicar, the Reverend Mr. Kinleside.[102] These later codicils were attacked by caveats alleging that Andrews Harrison lacked testamentary capacity or, alternatively, was under the influence of a conspiracy consisting of Kinleside, Mrs. Jukes, Harrison's housekeeper, and Mr. Wells, Harrison's good friend.[103]

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but was solely inferred from a letter from Mrs. Harford/Bennet/Parry to Parry while she was Bennet's wife in which she told Parry that her husband was weak-minded and that she had an ascendancy over the sot. *Id.* at 1200.

[99]*Id.* at 1201.

[100]161 Eng. Rep. 1196 (Prerog. 1818).

[101]*Id.* at 1196-97. The first disputed codicil gave some books and pictures from Shawfield Lodge (the home Harrison built for his brother, John) to a Mr. Trevillian subsequent to John's life interest. The second disputed codicil revoked the appointment of Benjamin Harrison as executor and appointed Mr. Kinleside as co-executor in his place. The third disputed codicil was written by Andrews Harrison in his own hand. This codicil revoked the £5,000 legacy and the forgiveness of indebtedness previously made to Paul Malin and made Mr. Kinleside the residuary legatee to Harrison's property. The fourth and final disputed codicil was dated subsequent to the other disputed codicils. This codicil revoked all devises to Benjamin Harrison and Paul Malin, revoked the appointment of Harrison and Malin as co-executors, and turned over more personal property to Mr. Kinleside.

[102]*Id.*

[103]*Id.* at 1197-98. It was developed by the depositions of several witnesses that Paul Malin, the companion of John Harrison, had gone bankrupt, thus making the £13,000 debt uncollectible. Benjamin Harrison, who was no relation to either John or Andrews, but who was a close friend and business associate, apparently knew Malin

Andrews Harrison was subject to fits of temporary imbecility occasioned by an unknown disease.[104] These attacks left him senseless for some period of time[105] and his solicitor, Mr. Boodle, refused to let Harrison execute a codicil to his will when he believed Harrison to be imbecilic as a result of one of his attacks.[106] Andrews Harrison apparently discussed his codicils with Wells and Kinleside several times before they were actually executed.[107] The last two codicils were procured by Kinleside who took down Harrison's instructions and obtained a solicitor to draft the new codicils. These codicils were subsequently recopied by Harrison with assistance from Mrs. Jukes and were executed before the prescribed number of witnesses.[108]

After reviewing the depositions of the witnesses, Sir John Nicholl declared the four disputed codicils to be free from taint.[109] The court stated that Kinleside would likely have been guilty of obtaining the position of executor by undue influence if Kinleside had procured Harrison's signature on the codicil.[110]

The case contained few legal propositions about undue influence. However, the discussion of the evidence relating to the third and fourth disputed codicils took into account the friendship between Andrews Harrison and the Rev. Kinleside and their conversations in

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had gone bankrupt and failed either to warn the Harrisons or to protect their interest against Malin's insolvency. This all occurred early in 1813 and the result was that Andrews Harrison later cut Benjamin Harrison out of his will by his third and fourth contested codicils. *Id.* at 1227.

[104]*Id.* at 1204 (deposition of Curtis, John Harrison's coachman); *id.* at 1207 (deposition of Matthew Harrison, Benjamin Harrison's brother); *id.* at 1208-09 (deposition of Mr. Stanley, a friend of Andrews Harrison); *id.* at 1210 (deposition of Alexander, Mrs. Jukes' maid); *id.* at 1211 (deposition of William Taylor, Mrs. Jukes' footman); *id.* at 1215 (deposition of Mrs. Jukes, the person with whom Andrews Harrison resided from 1808 to his death); *id.* at 1215-16 (deposition of Mr. Roberts, Andrews Harrison's medical attendant); *id.* at 1217-18 (deposition of Mr. Wells).

[105]Mr. Roberts, a physician who visited with Andrews Harrison repeatedly during 1813-1814 when the disputed codicils were made, described these attacks. *Id.* at 1215-16.

[106]*Id.* at 1212-14.

[107]*Id.* at 1229-30. Mrs. Jukes apparently prevailed on Andrews Harrison to cut Malin and Benjamin Harrison out of his will but Taylor could not recall anything Mr. Wells may have said on the subject of altering the will, although Wells was a very frequent visitor to Harrison during 1813 and 1814.

[108]*Id.* at 1230-31. Taylor recounted a conversation between Mr. Harrison, who was quite deaf, and Mr. Kinleside, who was also hard of hearing, in which Kinleside told the gentleman to make a codicil rather than a whole new will. *Id.* at 1230.

[109]*Id.* at 1229-31. Wells' testimony showed that Kinleside procured the codicil which made him the residuary legatee of Andrews Harrison. The order to have the old man recopy the codicil in his own hand was an attempt to conceal procurement of the will.

[110]*Id.* at 1232.

a closed room relating to the alterations of the will in favor of the vicar.[111] Sir John Nicholl also strictly scrutinized the preparation and execution of the codicils which benefitted the vicar.[112]

A few years later, Lord Langdale crystalized the law of undue influence in *Casborne v. Barsham*.[113] *Casborne* involved an equity suit to set aside a deed on the grounds of fraud and undue influence.[114] The advisory jury found that the deed was not procured by fraud but was the result of Barsham's importuning his client for a preference to pay off Chandler's fee bill.[115] The Chancellor set aside the deed on this ground and Barsham appealed to Lord Langdale for a new trial.[116] Lord Langdale granted the motion and stated:

> [I]t is plain that there are transactions in which there is so great an inequality between the transacting parties—so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.[117]

Casborne laid the foundation of 150 years of judicial gloss placed on a "confidential relationship" and the impact a finding of a "confidential relationship" has on a claim of undue influence. The early cases quickly found their way into English treatises on wills and evidence and crossed the Atlantic to become part of American jurisprudence.[118]

B. Early American Undue Influence Cases

New York, Pennsylvania, and South Carolina allowed wills to be set aside early in the nineteenth century because of undue influence by a beneficiary. These early cases followed the doctrinal statements set out in *Williams v. Goude*.[119]

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[111] *Id.* at 1230-31.

[112] *Id.* at 1232.

[113] 48 Eng. Rep. 1108 (Ch. 1839).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1109.

[118] *See, e.g.*, 1 T. JARMAN, A TREATISE ON WILLS § 36, at 48 (3d ed. 1880) (1st ed. 1834).

[119] 162 Eng. Rep. 682 (Prerog. 1828).

> The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted: that it was done merely for the sake of peace so that the motive was tantamount to force and fear.[120]

Indiana's undue influence jurisprudence derived from a notorious series of South Carolina cases involving the estate of William B. Farr.

Will contests directed against Farr's last wills went to the South Carolina Supreme Court three times.[121] William B. Farr was a South Carolina planter who took up with a slave woman called Fan. Farr and Fan had a son, Henry Farr, whom Farr acknowledged as his issue. William Farr attempted to emancipate his son by a special act of the South Carolina legislature but could not obtain passage of his private act. When Henry Farr became 21, his father sent him to Indiana and settled an income upon him.[122] In 1828, Farr made his first will which left his estate to his mistress and to their son.[123] His second will, executed in August 1836, and a codicil of 1837 were set aside after two trials.[124] The second verdict for the contestant was sustained by the South Carolina Supreme Court on evidence showing that in 1836 and 1837 Farr was an habitual drunkard and imbecile.[125] The third trial resulted from caveats against the 1828 will. Again, the jury delivered a verdict for the contestant and the case was appealed.[126] The 1828 will was a devise of Farr's entire estate to J.B. O'Neall, his executor. The will was executed June 16th and on June 19th Farr wrote a letter to O'Neall which said:

> I want Fan and Henry to be free; I want Fan to have one half of my estate, and Henry the other half. When Fan dies,

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[120]*Id.* at 684.

[121]*See* Farr v. Thompson, 25 S.C.L. (Chev.) 37 (1839); Thompson v. Farr, 28 S.C.L. (1 Speers) 93 (1842) for the first two times this case appeared in South Carolina appellate reports. The first two reports contained many striking details of the relationship between Farr, his mistress, and their son which are not reported in O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844). This case was the basis for Indiana's first major will contest, Kenworthy v. Williams, 5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[122]25 S.C.L. (Chev.) at 38.

[123]*Id.* at 40.

[124]*Id.* at 49.

[125]Thompson v. Farr, 28 S.C.L. (1 Speers) 93, 101-03 (1842).

[126]O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844).

> I want Henry to have half of Fan's half, and you the other half for your care and trouble of them; and should Henry die, leaving no wife nor child, I want you to have the whole of my estate forever. I want you to give Henry a good education, and do the best you can with him, and deal out his share to him as you think best, or as you think he will improve it. I want you to take Fan home with you, and build her a comfortable little house somewhere on your plantation, and let Fender and Cesley live with her as long as she lives.[127]

The evidence showed that in 1828 William Farr, although addicted to liquor, was a strong, healthy man in his mid-fifties with an independent mind.[128] Later, Farr indulged in drinking bouts with Fan which left them intoxicated and in mutual blind rage. In 1832, Farr suffered a stroke which left him partially paralyzed. Fan subsequently insulated Farr from the house servants and controlled Farr's business. There was testimony from Mr. Dawkins, an attesting witness to the invalid 1836 will, about the drinking bouts, fist fights, and threats with deadly weapons. Dawkins also testified that Fan importuned Farr to set her free at Farr's death.[129]

The supreme court reversed a jury verdict for the contestant as contrary to the weight of the evidence and ordered another new trial.[130] The court acknowledged that because of their sexual intimacy and their child, Fan had influence over her master inconsistent with the relationship of master and slave.[131] The court also acknowledged that Fan's influence over Farr's business and personal affairs increased from 1832 to 1836 to the point that Fan eventually acquired control over Farr's affairs.[132] However, the court found that the evidence did not sustain a finding that Fan had exercised *undue* influence over Farr in 1828. In reviewing the evidence at trial, the court said:

> As to what shall constitute undue influence, I can add but little to what is said in the case of *Farr vs. Thomson*, [sic] *Ex'or*. Cheves, 37. According to the authorities, it must be so great as, in some degree, to destroy free agency; an influence exercised over the testator to such an extent as to constrain him, from weakness or other cause, to do what is

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[127] *Id.* at 81.
[128] *Id.* at 82-83.
[129] 25 S.C.L. (Chev.) at 40-41.
[130] 30 S.C.L. (1 Rich.) at 90.
[131] *Id.* at 83.
[132] *Id.*

> against his will, but what he is unable to refuse. This influence may be obtained either by flattery, by excessive importunity, or by threats, or in any other way by which one person acquires a dominion over the will of another.[133]

The elements delineated in the quotation from *Farr* formed the basis for the Indiana Supreme Court's decision in *Kenworthy v. Williams*[134] in 1854.

C. *Undue Influence in Indiana*

The law of undue influence in Indiana has not been as effectively articulated as has the law of testamentary capacity. The best way to examine the structure of a claim for relief based upon undue influence is to isolate the elements which the Indiana courts have required before setting aside a will as the product of undue influence. In *Kenworthy*, the Indiana Supreme Court reviewed an appeal from the Henry Circuit Court. The trial judge sustained a demurrer to a five count petition to set aside the will of Stephen Gregg. Two of five counts alleged that Gregg's will had been procured through the "undue influence and improper conduct" of the defendants. The Indiana Supreme Court, citing *O'Neall v. Farr*,[135] stated that the particular facts on which undue influence might rest at trial need not be specifically pleaded by the contestant. The supreme court differentiated between ordinary fraud and undue influence. An action for fraudulent procurement of property required specific averments of the acts and words which constituted fraudulent inducements by the defendant.[136] However, a will contest based upon alleged undue influence by a beneficiary did not require the specific pleading of evidentiary facts amounting to fraud.

1. Susceptibility to Influence.—Nearly all Indiana cases dealing with undue influence concern a testator who was in poor health,[137]

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[133]*Id.* at 84.

[134]5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[135]30 S.C.L. (1 Rich.) 80 (1844).

[136]*See, e.g.*, Baker v. McGinniss, 22 Ind. 257 (1864) in which the supreme court overruled a demurrer to a complaint to set aside a sale of hogs. The plaintiff's averment stated that the defendant sold plaintiff 27 hogs, representing them to be sound and healthy. The hogs in fact had cholera, which the defendant knew, and the plaintiff bought in reliance on defendant's statement to the contrary. The court held that this was a good plea of specific facts to support a claim for relief from fraud in the sale. *See also* Peter v. Wright, 6 Ind. 183 (1855) (bill to cancel deed and title bond, demurrer overruled, facts specific enough to set out cause for equitable relief on grounds of fraud).

[137]The "bad health" cases include occasional discussions by the court of the importunities of relatives and professionals, as in Deery v. Hall, 96 Ind. App. 683, 694-95, 175

under the influence of some sedative or alcohol, afflicted with what is commonly labeled by lay people as "senility,"[138] or suffering from some other mental or physical impairment. In *Folsom v. Buttolph*,[139] the Indiana appellate court quoted extensively from *In re Douglass' Estate*[140] in attempting to cope with the relationship between physical or mental impairment and undue influence, stating: " 'Undue influence exists when, through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendency which prevents the former from exercising an unbiased judgment . . . .' "[141]

Many Indiana cases state that since the testator was a person of strong mind and stubborn character the issue of undue influence was either not present in the case and should have been taken from the jury,[142] or that the contestant failed to establish a prima facie case of undue influence.[143] In either situation, the courts consistently implied that undue influence cannot be proven unless the contestant shows that the testator was susceptible to influence by a potential beneficiary in the first place.[144]

2. Existence of Confidential Relationship Between Testator and Influencer.—Nearly all Indiana undue influence cases allege that the testator and the alleged undue influencer had a special relationship in which the testator placed trust in the influencer.[145] The rela-

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N.E. 141, 145 (1931) in which the appellate court scrutinized the conduct of the testator's priest and medical personnel at St. Vincent's hospital in Indianapolis, noting that the priest and the hospital were substantial beneficiaries under the testator's deathbed will.

[138]The number of cases in Indiana in which an elderly person was alleged to have been influenced by some relative or professional because of his or her senility is quite large. In Love v. Harris, 127 Ind. App. 505, 513, 143 N.E.2d 450, 455 (1957) the court indicated that undue influence is conducted in private and is rarely accompanied by the use of force.

[139]82 Ind. App. 283, 143 N.E. 258 (1924).

[140]162 Pa. 567, 29 A. 715 (1894).

[141]*Id.* at 568, 29 A. at 716.

[142]*See, e.g.*, Stevens v. Leonard, 154 Ind. 67, 70-75, 56 N.E. 27, 28-30 (1900).

[143]The decisions which hold that the contestant had not established a sufficient case to go to the jury on undue influence usually give a precise account of the evidence on the issue and point out that inferences of affection, respect, even importuning by family members, as well as solicitous conduct toward a testator by potential beneficiaries do not provide sufficient circumstantial evidence to go to the jury on undue influence. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 354-55, 146 N.E. 577, 581 (1925).

[144]The best American case on the substantive law of undue influence, In re Faulks' Will, 246 Wis. 319, 17 N.W.2d 423 (1945), adopts this element as one of the primary components of a claim or cause of action to set aside a will on grounds of undue influence. *Id.* at 335, 17 N.W.2d at 440.

[145]In this respect, Indiana also follows the guidelines established in *In re Faulks' Will*. The Wisconsin Supreme Court characterized this element as the "[o]pportunity to exercise such influence and effect the wrongful purpose." *Id.* at 335, 17 N.W.2d at 440.

tionships which courts have found capable of perversion into undue influence include attorney and client,[146] medical professional and patient,[147] agent and principal,[148] and parent and child.[149] The common element in each of these relationships is that the testator, induced by the closeness of the relationship, reposed confidence and trust in the alleged influencer. Indiana courts deem this situation a "confidential relationship" and allow proof of a confidential relationship between the testator and a beneficiary to be admitted as circumstantial proof of undue influence by the beneficiary.[150]

3. Use of a Confidential Relationship to Secure a Change in the Testator's Disposition of Assets at Death.—A will is the product of undue influence only *if* the testator gives some influencer more than the influencer would have taken by prior wills, deeds, or by intestate succession. There are only one or two Indiana cases in which the supreme court ordered the issue of undue influence withdrawn from the jury when the trial transcript showed evidence of a confidential relationship between the testator and the alleged influencer. In each case, the court correctly pointed out that any im-

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[146]*See, e.g.*, Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915); Kozacik v. Faas, 143 Ind. App. 557, 241 N.E.2d 879 (1968); Workman v. Workman, 113 Ind. App. 245, 46 N.E.2d 718 (1943) (a cross-type in which the second spouse connived with a lawyer to obtain benefits from the testator). *See also* Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977) (contestant alleged that lawyer cooperated with Salvation Army to gain testator's favor for the Salvation Army).

[147]There was an allegation in Deery v. Hall, 96 Ind. App. 683, 175 N.E. 141 (1931), that hospital personnel at St. Vincent's Hospital in Indianapolis may have influenced Dolan's testamentary scheme in favor of several Catholic charities. Indiana has no case of the caliber of *In re Faulks' Will* or of Gerrish v. Chambers, 135 Me. 70, 189 A. 187 (1937) in which a nurse used her control over an elderly patient to extract lifetime gifts from the patient in return for overly solicitous behavior.

[148]*See, e.g.*, Bank of America v. Saville, 416 F.2d 265 (7th Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

[149]*See, e.g.*, McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957); Hoopengardner v. Hoopengardner, 102 Ind. App. 172, 198 N.E. 795 (1935).

[150]The best doctrinal summary of the "confidential relationship" theory in Indiana case law appears in Keys v. McDowell, 54 Ind. App. 263, 100 N.E. 385 (1913):

> There are certain legal and domestic relations in which the law raises a presumption of trust and confidence on one side, and a corresponding influence on the other. The relation of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child, belong to this class and there may be others. Where such a relation exists between two persons, and the one occupying the superior position has dealt with the other in such a way as to obtain a benefit or advantage, the presumption of undue influence arises . . . . Upon the issue of undue influence, such a presumption arising in favor of the party having the burden of proof makes a prima facie case; and, if no evidence is introduced tending to rebut such presumption, he is entitled to a verdict or finding in his favor upon that issue . . . . *Id.* at 54 Ind. App. 269, 100 N.E. 387.

portuning by the alleged influencer did not change earlier dispositions made by the testator and did not, therefore, constitute undue influence.[151]

4. The Testator Changed His or Her Disposition.—To have a will set aside as the product of undue influence, Indiana case law requires a testator to make a change of testamentary disposition. Indiana law regards several kinds of events as a change of testamentary disposition. Indiana cases hold that making a new will in favor of the influencer is a change of disposition.[152] The cases also hold that a testator's revocation of a will in order that he may die intestate is a change of disposition.[153] Finally, an inter vivos transfer of property to an influencer in excess of what the influencer could expect at death is also held to be a change of disposition.[154]

5. The Change of Disposition Was Unconscionable.—Unconscionability is difficult to define, but easy to illustrate. In *Crane v. Hensler*,[155] contestants alleged that the testator's second wife importuned the testator to make a will favoring her and her own children by a prior marriage over the testator's children by his first wife.[156] The Indiana Supreme Court set aside a jury verdict for the contestants and ordered a new trial due to an erroneous instruction to the jury about undue influence.[157] In *Brelsford v. Aldridge*,[158] the testator disinherited his only child in favor of his mistress. After executing his will, and just prior to his death, the testator married his

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[151]*See, e.g.*, Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965). This portion of the elements which constitutes undue influence received special attention in Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970).

[152]Nearly all contests claim the testator made a subsequent will which favored the influencer. *See, e.g.*, Jones v. Beasley, 191 Ind. 209, 131 N.E. 225 (1921); Davis v. Babb, 190 Ind. 173, 125 N.E. 403 (1921); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920).

[153]*See generally* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932). Although there are no Indiana will contest cases in which the contestant alleged a prior will was revoked under undue influence, thus permitting the testator to die intestate, Indiana courts would likely adopt the holding of *In re* Marsden's Estate, 217 Minn. 1, 13 N.W.2d 765 (1944), which concluded that the revocation of a testatrix' will procured from her on her death bed by the surviving children, cancelling a devise to her granddaughter and housekeeper, and causing the estate to be divided equally among the five living children of the testatrix, was void as the product of undue influence.

[154]The Indiana cases setting aside deeds of real estate and gifts of personal property in anticipation of death as the result of undue influence include Westphal v. Heckman, 185 Ind. 88, 113 N.E. 299 (1916); Wray v. Wray, 32 Ind. 126 (1896); Gwinn v. Hobbs, 72 Ind. App. 439, 118 N.E. 155 (1917); Beavers v. Bess, 58 Ind. App. 287, 108 N.E. 266 (1915); McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909).

[155]196 Ind. 341, 146 N.E. 577 (1925).

[156]*Id.* at 353-55, 146 N.E. at 580-81.

[157]*Id.* at 352-53, 146 N.E. at 580-81.

[158]42 Ind. App. 106, 84 N.E. 1090 (1908).

mistress. The appellate court reversed a judgment for the defendant on the ground that the trial court erred in refusing to let the testator's daughter testify that she enjoyed good relations with the testator.[159] The distinction between the two cases lies in the social acceptability of the actions of the woman in each case. In *Crane*, the second wife was within her perquisites as a wife in placing pressure on her husband to favor her with a new will. On the other hand, *Brelsford* showed that a mistress may not importune her lover for a legacy since she had no preferential status at law. Therefore, a will leaving an entire estate to a mistress is unconscionable while a will leaving all to a second wife is not.

In summary, Indiana law recognizes undue influence as a claim for relief against a will, deed, contract, or trust instrument which arises when a person who is susceptible to influence by others as a result of mental or physical infirmity establishes a confidential relationship with another person. If that person uses the confidential relationship to manipulate the testator, grantor, or settlor in order to force that individual to change his testamentary plans or lifetime gift plans to favor the influencer, and if the results of that change are socially unacceptable or unconscionable, then the person exercising such importunities will be held to be an undue influencer. A claim for relief may be heard against any benefits secured by the influencer or any confederates as a proximate result of the undue influence.

D. A Rogue's Gallery of Undue Influencers

In many instances, whether the court decides in favor of the contestant or proponent depends in large measure upon the type of person exerting the influence. The status of the individual exerting the influence determines the outcome of a will contest more consistently than propositional legal statements about burdens of proof and presumptions. Since Indiana case law provides a colorful gallery of rascals and rogues engaged in undue influence, a review of the five types of undue influencers will be profitable.

1. David and Bathsheba Cases.[160]—Many undue influencers play the role of Bathsheba, the second wife of King David of Israel, and importune their spouse for preferment against the children of a former marriage. There are thirteen such cases in Indiana jurisprudence which are exemplified by *Workman v. Workman*.[161]

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[159]*Id.* at 109, 84 N.E. at 1091.

[160]Bathsheba's importuning to David for favoritism for her son against Adonijah is recounted in 2 *Samuel* 12:24 and 1 *Kings* 1:11-38. A "David and Bathseba" will contest is a will contest on the ground of undue influence exercised by a second spouse to secure favor over children of the testator by a prior marriage.

[161]113 Ind. App. 245, 46 N.E.2d 718 (1943).

John T. Workman had three children by his first wife who died March 30, 1932. John Workman's life style changed dramatically after his first wife's funeral. He frequented local saloons in the company of a young lawyer named Herbert Lane and consumed enormous quantities of liquor each day. The case report does not disclose whether Lane introduced Workman to a divorcee named Ida Sutton. However, Workman married Ida Sutton within two years after his first wife's death.[162] Lane took Workman on weekend trips and, in 1937, Lane took Workman for an eastern summer vacation.[163] When they returned from the trip east, Workman had Lane draw up a deed conveying all his real estate to Ida Workman.[164]

On March 25, 1938, Herbert Lane and Ida Workman took John Workman to a hospital in Louisville, Kentucky for treatment of rectal cancer. Workman was placed under heavy sedation.[165] John's only living child, Ott Workman, was neither notified that his father was ill, nor where his father had been taken until sometime later when his father lay dying.[166] In late March, Lane drew up a will for Workman giving the remainder of Workman's property to Ida and to her son by a prior marriage, Norval Sutton.[167] Lane never read the will to Workman in the presence of the attesting witnesses and it was unclear whether John Workman knew what he was doing when he signed the will. Some days later, when Ott finally located his father and came to Louisville to see him, John Workman asked Ott to get a lawyer to make a will leaving all his property to Ott.[168]

On this evidence, the Orange Circuit Court entered judgment on a jury verdict for the contestant.[169] The Indiana Appellate Court, finding no reversible error, affirmed the verdict on appeal.[170] The pattern of overreaching and importuning by Herbert Lane and Ida Workman to secure John Workman's estate was conduct which the court was willing to call unconscionable and outrageous. It exceeded what the court felt was the appropriate degree of pressure a second spouse may bring on his or her mate to secure a testamentary advantage.

2. Esau and Jacob Cases.[171] — Will contests often develop be-

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[162]*Id.* at 270-71, 273-74, 46 N.E.2d at 727-29.

[163]*Id.* at 271, 46 N.E.2d at 728.

[164]*Id.*

[165]*Id.* at 274, 46 N.E.2d at 729.

[166]*Id.* at 271, 46 N.E.2d at 728.

[167]*Id.* On the same day that Workman signed his will, he also signed stock certificates over to his lawyer, Lane. Lane had to guide the old man's hand in making the signatures to these instruments. *Id.*

[168]*Id.* at 274, 46 N.E.2d at 729.

[169]*Id.* at 252, 46 N.E.2d at 720.

[170]*Id.* at 280, 46 N.E.2d at 731.

[171]The well-known story of Esau, who sold his birthright to Jacob for a pottage stew, and Jacob's deceitful obtaining of the first-born son's inheritance from his blind,

tween children of a testator. In these inter-sibling fracases, one sibling often accuses the other of exerting undue influence over the deceased parent. There are twenty-six Indiana decisions which fit this pattern of alleged undue influence.

In 1936 the Indiana Appellate Court reviewed *Hoopengardner v. Hoopengardner*,[172] a typical Esau and Jacob case. Lewis Hoopengardner owned a large farm in Wells County. His wife died in 1928, and until his son, Jasper, returned home, he had promised his children that he would divide his estate equally among them. The old man promptly became angry with his other children over trifles and changed his disposition toward them. The elder Hoopengardner went everywhere in the company of Jasper and agreed orally with Jasper that if Jasper would take care of him in his declining years he would deed the home farm to Jasper. Finally, the old man, then near 90, in addition to the inter vivos transfer of the home farm to Jasper for nominal consideration made out a will leaving the bulk of his personal estate to Jasper.[173] The trial court entered judgment on a jury verdict for the contestant which was affirmed on appeal.[174]

In *Hoopengardner*, Jasper Hoopengardner did essentially nothing for his father except befriend him. In return for his companionship, Jasper received an inter vivos transfer of all his father's real estate and a favored position in his father's will. The court in *Hoopengardner* apparently reasoned that the gifts to Jasper were unconscionable in relation to Jasper's potential claim for services. This seems to be the line of demarcation in such cases.[175]

3. The Judge Jaffrey Pyncheon Cases.[176]—Nine Indiana will contests deal with a will in which the undue influencer is alleged to have been a brother, sister, niece, or nephew of the testator.

Gurley v. Park[177] represents the type of Jaffrey Pyncheon case

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dying father, Isaac, is recounted in *Genesis* 25:30-34, 27:6-38, 27:41-45, 32:1-32 and 33:1-20. An "Esau and Jacob" contest is a will contest in which the contestant alleges that his or her sibling or half-sibling importuned their parent for a greater share of the parent's estate.

[172]102 Ind. App. 172, 198 N.E. 795 (1935).

[173]*Id.* at 173, 198 N.E. at 795.

[174]*Id.* at 174, 198 N.E. at 796.

[175]*But cf.* McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957) (decision for the proponent on similar facts when the influencer actually took physical care of the testator for some time).

[176]The "Jaffrey Pyncheon" cases resemble the actions of Judge Jaffrey Pyncheon, the villain of Nathaniel Hawthorn's HOUSE OF THE SEVEN GABLES. In a Judge Pyncheon will contest, the influencer is a collateral relative of the testator, who importunes and intrigues his collateral, as Judge Pyncheon did, to gain testamentary favors. Judge Pyncheon disguised his uncle's death to give the appearance of a murder, and then Jaffrey "framed" Clifford Pyncheon in order to gain the inheritance.

[177]135 Ind. 440, 35 N.E. 279 (1893).

in which the influencer generally loses.[178] Mary B. Park, the testatrix, was very old, infirm, and deranged. On her death bed, she executed a will disinheriting her son after being importuned by her brother to leave her property to the brother's two children in preference to her own son who was in financial need.[179] Mrs. Park was something of a recluse and made statements to other persons in the years immediately before her death that she would leave them her property. The jury verdict and judgment casting out her will was sustained by the Indiana Supreme Court as supported by the evidence at trial.[180] In this case, the importuning brother obtained a will in favor of his own children at the expense of a lineal descendant. The case abounded with evidence of Mrs. Park's susceptibility to influence and of the conscious connivance of her brother to secure an estate for his own children.

4. The Uriah Heep Cases.[181]—In recent years, importuning family members have been replaced in undue influence cases by importuning professional persons. Six of the nine Uriah Heep will contests in Indiana are twentieth century cases. Four of the nine cases have been decided since World War II. The common element in all of these cases is that the person alleged to have exerted undue influence over the testator was the testator's lawyer, physician, or agent rather than a family member.

Kozacik v. Faas[182] illustrates the kind of Uriah Heep will contest in which the contestant may prevail. Katherine Yaeger executed her will August 30, 1963. The principal beneficiary under her will was Andrew M. Kozacik, a lawyer.[183] Mrs. Yaeger's estate amounted to slightly less than $6,000. Her son, Anthony Faas, filed a will contest alleging that his mother's will had been procured by Mr. Kozacik's undue influence. At trial, Mr. Kozacik stated he received no compensation for drawing Mrs. Yaeger's will or for the other services he performed for the testatrix for the seven years prior to her death.

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[178]*But see* Stevens v. Leonard, 154 Ind. 67, 56 N.E. 27 (1900) for a decision for the proponent in which the influencer denied knowledge of the testator's revised will.

[179]135 Ind. at 444, 35 N.E. at 280.

[180]*Id.*

[181]Uriah Heep was the law clerk in Charles Dickens' DAVID COPPERFIELD. Heep importuned his employer's clients for benefits in order to attract away his master's business. Eventually Heep displaced his employer and then took over the management of the affairs of David Copperfield's benefactor. An "Uriah Heep" will contest is a contest in which the influencer, a professional person, importunes the client or patient for benefits.

[182]143 Ind. App. 557, 241 N.E.2d 879 (1968). *Contra*, Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977).

[183]143 Ind. App. at 561, 241 N.E.2d at 881. The gift of the residuary estate was preceded by a provision in the testatrix' will requiring the executor to collect a debt of $16,300 from her son for the benefit of the residuary legatee.

The Starke County Circuit Court was not swayed by Kozacik's evidence in support of the will and entered judgment setting aside the will as the product of Mrs. Yaeger's unsound mind and the undue influence of Mr. Kozacik.[184] The appellate court affirmed the trial court. The court took the opportunity to warn Indiana lawyers that preparing a will for a client which included the lawyer-drafter as beneficiary under the will was an "exceedingly bad practice . . . especially when the terms of the will fail to make any provisions to the natural objects of her bounty. . . ."[185]

5. The Mary Worth Cases.[186]—Six Indiana cases decided in this century alleged that the undue influencer was a non-professional friend of the family who intervened as helper and counselor to the testator. In each case, the kindly friend ended up with a substantial portion of the testator's estate at the expense of blood relatives.

Davis v. Babb[187] is representative of the Mary Worth cases in which the proponent generally loses. Mary L. Taylor, an elderly widow, had been living with her brother, Edmund Babb, in Jennings County for some time when Edmund died in March 1906. Following Edmund's death, William C. Davis became the dominant influence in Mary Taylor's life. He obtained a deed of trust from her for the family farm in Jennings County which made him trustee over the farm.[188] Mr. Davis corresponded extensively by letter with Mrs. Taylor and detailed how to handle her money and how to give it away at her death.[189] Mrs. Taylor told her family that she intended to leave her estate to two nieces, Hattie Sargent and Lucy Boyd.[190] It appeared from the evidence that she also told everyone how much she feared and distrusted Davis. During this period of time, Davis had also taken possession of her 1906 will and removed it to Cincinnati where he placed it in a joint safety deposit box. When Mrs. Taylor wanted to make a codicil, she contacted Mr. Davis and had him bring the original will from Cincinnati to Jennings County. There was evidence that Davis either took notes on the contents of the 1906 will or wrote it himself.[191] When Mrs. Taylor died in 1914, Davis took the will and codicil out of the joint safety deposit box in Cincinnati and presented it for probate in Vernon. Mrs. Taylor's

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[184]*Id.* at 560, 241 N.E.2d at 880.

[185]*Id.* at 566, 241 N.E.2d at 884.

[186]Mary Worth was the principal character in the King Features Syndicate, Inc. comic strip of the same name. She was a neighborhood busybody and do-gooder who had no family of her own, and spent her time importuning the neighbors and meddling altruistically in their private lives.

[187]190 Ind. 173, 125 N.E. 403 (1919). *Contra*, Muson v. Quinn, 110 Ind. App. 277, 37 N.E.2d 693 (1941).

[188]190 Ind. at 186, 125 N.E. at 408.

[189]*Id.* at 179-80, 125 N.E. at 405.

[190]*Id.* at 185-87, 125 N.E. at 406-08.

[191]*Id.* at 186-87, 125 N.E. at 408.

brother and her nieces filed objections to probate which ended in a jury verdict for the contestant on grounds of lack of capacity and undue influence by Davis.[192] The Indiana Supreme Court, after reviewing the slender evidence at trial on Mrs. Taylor's lack of capacity, detailed the instances of overreaching conduct on the part of William Davis. The court concluded that the verdict and judgment should be affirmed.[193]

The Indiana Supreme Court held that undue influence could be proven from circumstantial evidence alone. Davis' long history of intervention in Mrs. Taylor's affairs was strong circumstantial evidence of his undue influence over her.[194] The circumstances surrounding the making of both the 1906 will and the 1913 codicil suggested that Davis consciously managed Mrs. Taylor's affairs so that she could not help but make him the principal beneficiary of her will.[195]

IV. A FOOTNOTE ON FRAUD IN INDIANA WILL CONTESTS

A. The Theory of a Will Contest Based on Fraud

Fraud has been one of the independent grounds for setting aside a will in Indiana since 1852. Of all Indiana will contests surveyed,

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[192] *Id.* at 177-78, 125 N.E. at 405.

[193] *Id.* at 191, 125 N.E. at 409.

[194] *Id.* at 180-81, 125 N.E. at 406.

[195] *Id.* at 186-87, 125 N.E. at 408.

A survey of Indiana will contests reveals that the outcome in will contest cases reflects the status of the beneficiary who is the alleged influencer. Disregarding for the moment the presence or absence of a lack of capacity claim in alleged undue influence cases, some interesting results emerge. For example, of the thirteen "David and Bathsheba" undue influence cases, ten trial decisions were in favor of the contestant and three were in favor of the proponent. After appeal, ten proponents were winners while only three contestants remained winners. Of the twenty-six "Esau and Jacob" undue influence cases, seventeen originally favored the contestants, but fifteen appellate decisions favored the opponents. Of the six "Mary Worth" cases, four trial court decisions favored the contestants but only two survived the appeal. However, in nine "Uriah Heep" cases, of the six trial decisions favoring the contestants, only one was reversed on appeal.

Of all will contests in which undue influence was alleged, 37.7% were trial decisions for the proponent and 62.3% were trial decisions for the contestant. The results after appeal were exactly reversed. The implication of this is that the Indiana appellate courts have applied the brakes to trial court decisions which invalidate wills. This is evidenced by the fact that only 24.3% of all trial decisions for the proponent were reversed on appeal while 55.7% of the trial court decisions for the contestant were reversed on appeal. Conversely, 75.7% of all decisions for the proponent at the trial level were affirmed while only 44.2% of all trial decisions for the contestant were affirmed. Contestants in Indiana will contests stand about a two to one chance of winning a trial and about a three to two chance of having that trial verdict and judgment reversed on appeal. The impact of this long history of judicial protectionism has surely been to discourage attacks on wills on the ground of undue influence.

25.2% included an allegation that the will in question was procured by fraud. Two cases were based on fraud alone. Two more were brought on the grounds of fraud and want of due execution.[196] In *Frye v. Gibbs*,[197] the contestant alleged that the testator's signature had been forged to her will. According to the Indiana Appellate Court, this allegation was not supported by the evidence in the case and the trial decision for the proponent was affirmed.[198] *Barger v. Barger*[199] also turned on the proof of a forged signature to a will. The decision sheds little light on the elements of fraud as an independent cause for setting aside a will in Indiana.[200]

However, *Orth v. Orth*[201] laid a foundation for later Indiana jurisprudence on fraudulent procurement of wills. Godlove S. Orth had been twice married. He had a son William by his first wife, and Harry and Mary by his second wife, Mary Ann Orth, who survived him.[202] Orth executed a will in 1882 which was accompanied by a letter of instruction to his second wife defining how she should handle the administration of his estate to avoid losing the bulk of his real estate to creditors.[203] Orth's will devised his real estate holdings in several Indiana counties to Mary Ann in fee simple and all his personal property to Mary Ann absolutely.[204] Godlove Orth's letter to Mary Ann contained the following statement:

> In a word, act carefully, prudently, and under such good advice as you can procure, *and act justly towards yourself and towards all my children*, and I shall be content. My desire in this matter is that all my debts be paid, that you have a competence during your life, *and then, what is left give to all the children alike*.[205]

Mary Ann Orth's own will left her estate to her two children and excluded William Orth entirely. William Orth died shortly after his stepmother. William's children then brought a lengthy complaint to set aside Mary Ann Orth's will or, in the alternative, to impress her estate with a constructive trust in favor of William Orth's children

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[196]*See* Table 18 in Appendix A to this Article held by publisher.

[197]139 Ind. App. 73, 213 N.E.2d 350 (1966).

[198]*Id.* at 77, 213 N.E.2d at 352.

[199]221 Ind. 530, 48 N.E.2d 813 (1943).

[200]The case was decided on the issue of the exclusion of the testator's statement that he had made a will, uttered after the alleged forgery. *Id.* at 533-35, 48 N.E.2d at 814-15.

[201]145 Ind. 184, 42 N.E. 277 (1896).

[202]*Id.* at 184-86, 42 N.E. at 277-78.

[203]*Id.*

[204]*Id.* at 191, 42 N.E. at 279.

[205]*Id.* at 186, 42 N.E. at 277 (emphasis added).

on the theory that Mary Ann Orth procured Godlove Orth's estate by fraudulently representing to him that she would divide the residue at her death equally between the three children of Godlove Orth.[206] The complaint further alleged that the letter of Godlove Orth created a trust on the bequest in favor of the three Orth children or, alternatively, gave Mary Ann only a life estate with remainder in fee simple in the three Orth children per stirpes.[207] The complaint demanded enforcement of the express trust or imposition of a constructive trust. The trial court sustained the defendant's demurrer to the complaint and the contestants appealed.

The Indiana Supreme Court first stated that Godlove Orth's letter, by itself, could not be the foundation for an express trust.[208] The court further stated that the letter together with Mary Ann Orth's statements to William Orth that she would carry out the terms of Godlove's letter in his favor likewise did not create an express trust.[209] If the letter alone did not create a trust, the "trustee's" statements to a beneficiary could not add any support to the letter in the creation of an express trust.[210]

The court then examined the transaction in terms of fraudulent procurement by Mary Ann Orth:

> If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud . . . . Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including . . . a trust of the character of that here claimed. . . . It is alleged generally that Mrs. Orth "dissuaded the said Godlove from making changes in his said will in favor of the said William M. Orth, or making other provisions for him, which he would otherwise have done," but it is nowhere alleged that the testator expressed a desire to, and was by fraud dissuaded from making a trust . . . .[211]

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[206] *Id.* at 187-90, 42 N.E. at 278-81.
[207] *Id.*
[208] *Id.* at 192-93, 42 N.E. at 279.
[209] *Id.* at 194, 42 N.E. at 281.
[210] *Id.*
[211] *Id.* at 201-02, 42 N.E. at 282.

The court affirmed the lower court's ruling on the demurrer.[212]

Orth shows that Indiana recognizes a cause of action for setting aside a will on the ground of fraudulent procurement or inducement. The cause of action for fraud was not merged into a cause of action for undue influence.[213] This cause of action for fraud follows the ordinary rules relating to any tort claim of fraudulent misrepresentation.

The Indiana Trial Rules continue the common law requirement that fraud be specifically set out in the complaint.[214] Indiana case law requires a litigant to offer proof of intent to defraud or to obtain property under false pretenses, in order to recover.[215] This special intent, called "scienter," requires the actor to make some kind of misrepresentation while aware that the representation is made to a particular individual and that the representation conveys some meaning which will be believed and acted upon by that individual.[216] Decisional law in Indiana established four elements to actionable fraud:

> (1) that the defendant make a material representation of past or existing facts;
> (2) that the representation was made with knowledge of its falsity, or with reckless disregard for the truth of the statement made;
> (3) that the defendant's statement induced the plaintiff to act to his or her detriment; and
> (4) that as a proximate result, the plaintiff was injured.[217]

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[212]*Id.* at 206, 42 N.E. at 284.

[213]*See* text accompanying notes 134-36, *supra*.

[214]*See* IND. R. TR. P. 9(B).

[215]*See, e.g.*, Kirkpatrick v. Reeves, 121 Ind. 280, 281-82, 22 N.E. 139, 140 (1889); Peter v. Wright, 6 Ind. 183, 188-89 (1855). According to Hutchens v. Hutchens, 120 Ind. App. 192, 199, 91 N.E.2d 182, 185 (1950), actual fraud consists "of deception intentionally practiced to induce another to part with property or surrender some legal right," and its essential elements consist of "false representation, *scienter*, deception and injury." *Id.* (emphasis added). *See also* Baker v. Meenach, 119 Ind. App. 154, 160, 84 N.E.2d 719, 722 (1949).

[216]*See, e.g.*, Vernon Fire & Cas. Ins. Co. v. Thatcher, 152 Ind. App. 692, 285 N.E.2d 660 (1972) for the best contemporary restatement of Indiana's law of scienter.

[217]The elements of actionable fraud in Indiana have been stated by the courts in several different ways. For example, in Auto Owners Mut. Ins. Co. v. Stanley, 262 F. Supp. 1, 4 (N.D. Ind. 1967), Judge Grant stated the elements of actionable fraud to be "(1) representations of material facts; (2) reliance thereon; (3) falsity of the representations; (4) knowledge of the falsity; (5) deception of the defrauded party; and (6) injury." In Coffey v. Wininger, 156 Ind. App. 233, 296 N.E.2d 154 (1973), the appellate court stated the elements of fraud as "a material misrepresentation of past or existing facts, made with knowledge (scienter) or reckless ignorance of this falsity," which causes the

If the plaintiff can prove these elements by a preponderance of the evidence, the plaintiff should be able to have a will or other dispositive instrument set aside on the ground of fraudulent procurement.

V. TWO INCIDENTS

The last part of this exposition of Indiana will contests deals with two incidents in a lawyer's file which relate to the doctrinal materials presented earlier. The first case deals with preventive law practice in the law office. It is intended for a general audience. The second case is an evaluation of a client's story by a trial attorney in order to decide whether the client has any probability of success in a will contest should the lawyer agree to take it. Although this case certainly concerns general practitioners, it is slanted toward active trial attorneys who must make a quick review of the potential in a case of this type. Each case involves the application of both the

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plaintiff to change his or her position in detrimental reliance thereon. *Id.* at 239, 296 N.E.2d at 159. This formula was restated in Blaising v. Mills, 374 N.E.2d 1166, 1169 (Ind. Ct. App. 1978). The most recent supreme court case dealing with the elements of the tort of fraudulent misrepresentations, Automobile Underwriters, Inc. v. Rich, 222 Ind. 384, 53 N.E.2d 775 (1944), stated the elements of actionable fraud as (1) false representations made for a fraudulent purpose (2) believed by a party to whom they were made (3) who was thereby induced to act thereon and (4) resulting in effecting a fraud. *Id.* at 390, 53 N.E.2d at 777 (quoting Watson Coal & Mining Co. v. Casteel, 68 Ind. 476 (1879)). The standard for proof of fraud is the preponderance of the evidence test. Grissom v. Moran, 154 Ind. App. 419, 427, 290 N.E.2d 119, 123 (1972); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 466-67, 166 N.E.2d 341, 348 (1960); Holder v. Smith, 122 Ind. App. 371, 377, 105 N.E.2d 177, 180 (1952). *See also* United States v. 229.34 Acres of Land, 246 F. Supp. 718, 722 (N.D. Ind. 1965) (applying Indiana law). The burden of proof in Indiana will contests in which fraudulent procurement of a will is alleged is the same as the burden of proof for undue influence and lack of capacity (proof by a preponderance of the evidence). There is no reason to increase the burden of proof in a will contest to clear and convincing evidence when the standard for fraud in ordinary civil litigation is by a preponderance of the evidence.

Other statements of the defendant which are fraudulent are admissible as an exception to the hearsay rule. *See, e.g.*, Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 289-90, 296 N.E.2d 165, 169 (1973) (scienter proved by statements made by insurer's agent to insured's executor and by executor's responses); Coffey v. Wininger, 156 Ind. App. 233, 243-44, 296 N.E.2d 154, 161 (1973) (constructive fraud proven by evidence of vendor's statement to purchaser of land and purchaser's replies); Bob Anderson Pontiac, Inc. v. Davidson, 155 Ind. App. 395, 397-99, 293 N.E.2d 232, 233-34 (1973) (scienter established by evidence that the defendant tampered with the odometer in order to show a lower mileage than actually existed); Colonial Nat'l Bank v. Bredenkamp, 151 Ind. App. 366, 370-71, 279 N.E.2d 845, 846 (1972) (in bank fraud action, statements by bank officer to plaintiff about securing loan and plaintiff's replies admitted to show scienter); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 465-66, 166 N.E.2d 341, 347-48 (1960) (release obtained from plaintiff by statements by insurance adjuster; entire conversation between plaintiff and adjuster admitted to show scienter).

substantive law pertaining to lack of capacity, undue influence, and fraud, and the procedural principles implicated by each case.

A. Fred Lott: An Exercise in Preventive Law[218]

Fred Lott, 53, is a bachelor. He lives alone in a run-down house in a poor neighborhood. Fred is known around town as a recluse. He seldom leaves his home except to buy groceries at a neighborhood store and to collect rent from his tenants. Fred owns several run-down one and two-family houses from which he appears to receive most of his ready money. His nearest relatives are two sisters, Grace Brown and Viola Wilson, who live with their families out of state. Fred Lott has been buying and selling cheap rental housing for several years. In order to enhance his choices in real estate investment, Lott has been consulting Mrs. Seldon, a medium, who lives near his home. Over the years, the firm of Blackford and Morton has performed real estate title work and other incidental tasks for Mr. Lott. Lott appeared in the reception room one afternoon asking for an appointment to make a will and Oliver P. Morton agreed to see him.

After taking an inventory of Lott's assets, which proved to be considerably larger than Morton had supposed, Morton asked Fred Lott what he wanted to do with his property at death. Lott told Morton that he had been thinking the matter over for some time. He had no desire to give his property to his two sisters or to their children. Fred said that relations with his two sisters had been strained for years. He did not see them often and he did not know the names of their children. Intuition told Morton that Fred's sisters disapproved of Fred's strange behavior.

Fred Lott spent a lifetime amassing a collection of antique glassware. Fred valued the collection at slightly more than $10,000 of the $340,000 he estimated as his net worth. Much of this collection had been purchased through the efforts of Ralph Smith, a local antique dealer, who, according to Fred, was his only real friend. Ralph Smith was also a bachelor. Lott wanted to leave his collection and his real estate to Smith at this death and to will the remainder of his assets to the Indiana Historical Commission. This recitation created some immediate inner conflicts which Morton had to resolve. Morton promised to study the information Fred had given him and to contact Lott in a week to discuss what alternatives Fred might wish to follow in making out his will. After Fred left, Oliver Morton wrestled with his doubts about the situation. Fred was a

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[218]Any similarity between the characters described in Part V of this Article and any real person, living or dead, is purely coincidental.

strange individual. He was unconventional and some people would consider his behavior bizzare. Was he mentally competent to make a will? Was it even Morton's business to question the mental competency of a client? What kind of relationship existed between Fred Lott and Ralph Smith? Why did Lott want to give the bulk of his estate to Smith rather than his family? If Fred Lott went to mediums about buying and selling real estate, had he also consulted a medium about his will? Was there any plan to get Fred Lott's money from him by false pretences? Should Morton have dared to ask his client such questions?

Since Morton is an office lawyer and does not regularly do trial work, his appraisal of Fred Lott's situation has two elements. First, in order to serve his client and avoid liability for professional malpractice, what could Morton do to ensure that Lott's will would be upheld in a later contest? Second, Morton needs to give Lott an accurate forecast of the probability of an attack upon his will after his death and the likelihood of its success. This will help Lott decide whether he really wants to go through with the disinheriting process.

B. A Lawyer's Duty with Respect to a Client's Capacity to Act for Himself

Ordinarily, a lawyer is obliged to handle a client's business with the same standard of care that other lawyers would customarily provide for the client in similar situations.[219] Likewise, a lawyer must possess and exercise the same kind of skill which would be

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[219]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-66 (4th ed. 1971). Indiana courts faced the question of the attorney's duty to his or her client in the mid-nineteenth century. In Reilly v. Cavanaugh, 29 Ind. 435 (1868), the supreme court held that a lawyer was liable for the consequences of his or her "ignorance, carelessness or unskillfulness, just as a physician is for his malpractice." *Id.* at 436. In Hillegass v. Bender, 78 Ind. 225 (1881), the supreme court held that a lawyer is "bound to possess and exercise competent skill, and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his clients." *Id.* at 227. Finally, the appellate court stated what can be taken as a pattern instruction to juries on an attorney's standard of care and skill for purposes of fastening liability for malpractice:

> Appellant also insists that instruction number eight was wrong. The substance of this charge was that an attorney acting under the employment of his client is responsible to him only for the want of ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business he has undertaken to do . . . . There is no implied agreement in the relation of attorney and client . . . that the attorney will guarantee the success of his proceedings in a suit or the soundness of his opinions. He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit.

Kepler v. Jessup, 11 Ind. App. 241, 254-55, 37 N.E. 655, 659 (1894).

reasonable for another lawyer to possess and exercise in similar circumstances.[220] No Indiana decisions have been reported in which an attorney has been successfully sued for negligent preparation of a will or trust instrument. Most cases from other states have been grounded on the drafter's noncompliance with the formalities of the wills act. These derelictions typically take the form of failure to secure the requisite number of attesting witnesses, failure to adhere to the proper form of attestation,[221] or the negligent inclusion of a beneficiary under the will as an attesting witness.[222]

In California, however, malpractice suits against attorneys have been based on errors of judgment rather than simple ignorance. The best known example of this type of suit is *Lucas v. Hamm*.[223] *Lucas* was a suit brought by disappointed beneficiaries under a will which was set aside on the ground that the gift over to them contained in the will violated the Rule against Perpetuities. The California Supreme Court determined that the standard of skill which an ordinary practitioner should possess need not include the intricacies of the Rule against Perpetuities in its most obscure applications.[224] In the case of Fred Lott, the standard at issue is whether Oliver P. Morton should recognize a potentially incompetent testator and be obliged to go beyond the preparation of a will draft and advise against the execution of the proposed disinheriting will. This standard also involves the sub-issue of whether a lawyer of ordinary competence, when faced with a situation similar to that of Mr. Lott, would inquire into such matters as testamentary capacity, undue influence, and fraud.

Since the injured party is the testator and the injury occurs when the testator dies without changing the defective will, the question may arise whether a disappointed heir has standing to pursue the lawyer who drafted the will. This issue has already been answered in California. In *Lucas v. Hamm* the court decided that persons who would have taken under a will but for the attorney's errors in its preparation have standing as donee beneficiaries of the contract to employ counsel to assert the deceased client's malprac-

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[220]*See* Jones v. White, 90 Ind. 255 (1883) (attorney hired to bring replevin action; action dismissed because bond improperly drawn; attorney who does not have the skill to properly prepare form required by a plain statute is liable in damages).

[221]*See* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957) (overruled in part on other grounds); Weintz v. Kramer, 44 La. Ann. 35, 10 So. 416 (1892); *Ex parte* Fitzpatrick, [1924] 1 D.L.R. 981, 54 Ont. L.R. 3 (1923).

[222]Woodfork v. Sanders, 248 So. 2d 419 (La. App. 1971); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

[223]56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

[224]*Id.* at 592-93, 364 P.2d at 690-91, 15 Cal. Rptr. at 826-27.

tice claim.[225] The Connecticut Supreme Court reached a similar conclusion in *Licata v. Spector*,[226] a case in which disappointed beneficiaries under a will brought a malpractice action against the lawyer who negligently failed to have the required number of attesting witnesses sign the decedent's purported will. Louisiana allowed a similar malpractice suit by the beneficiaries in *Woodfork v. Sanders*,[227] a case in which the lawyer permitted a beneficiary to be a subscribing witness and thus caused the beneficiary to forfeit his legacy under the will.[228] Washington has held that the disappointed beneficiaries under a will void for an attorney's mistake had standing to prosecute the malpractice claim of their testator against the offending lawyer.[229]

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[225]*Id.* at 591, 364 P.2d at 688-89, 15 Cal. Rptr. at 824-25. The California Supreme Court overruled Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895), in which an attorney who had made a mistake in drafting a will was held not liable for negligence or for breach of contract to a beneficiary under a will who lost his legacy as a result of the lawyer's mistake. The *Buckley* case turned on the concept of privity of contract between attorney and client. In *Lucas v. Hamm*, the court pointed out that by 1961 the doctrine of privity of contract in other fields of tort law had become less rigorous than it was in 1895. *Biakanja v. Irving* had already permitted recovery by a disappointed beneficiary against a notary public who drew a will without proper attesting witnesses. In *Lucas*, the court said:

> [I]t was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury, and the policy of preventing future harm.

Id. at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823. The court further noted that:

> Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor . . . namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. . . . We are of the view that the extension of this liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. . . .
>
> It follows that lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant.

Id. at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

[226]26 Conn. Supp. 378, 225 A.2d 28 (1966).

[227]248 So. 2d 419 (La. App. 1971).

[228]The actual result in *Woodfork* was that the appellate court held the will itself valid, but invalidated the gift of a "universal legacy" to the plaintiff who signed as an attesting witness. The plaintiff's petition had stated that the will itself was invalid and as a proximate result, the plaintiff lost the universal legacy. The court granted the plaintiff leave to amend his complaint for attorney malpractice on the ground that it was negligent for the defendant to include the universal legatee as an attesting witness which caused the invalidation of the gift. 248 So. 2d at 424-25.

[229]*See* Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

Fred Lott's case presents two sources of future malpractice litigation. First, if Lott's will is set aside for lack of capacity, undue influence, or fraud by Smith and the medium, Lott's intended beneficiary may possibly sue Morton for malpractice. Further, if the will was sustained after an expensive will contest, the beneficiaries who have suffered economic harm as a consequence may also have a claim against Morton for malpractice since any lawyer in Morton's shoes would have spotted the threat of a future contest on these facts and done something about it. Second, the intestate successors to Lott could possibly have an action for malpractice for breach of fiduciary duty to their brother.

In the past decade and a half, some lawyers have attempted to create an anticipatory record during execution ceremonies for wills which were disinheriting made by persons whose capacity was subject to inquiry. Some lawyers have videotaped will executions accompanied by lengthy on-camera interrogation of the testator on his or her property holdings, family members, and his or her reasons for executing a disinheriting will. Other lawyers have maintained a file of letters and memos describing the testator's wishes in the testator's handwriting, or have taken statements from the testator under oath before a notary in order to provide a "file" of admissible hearsay statements for an anticipated will contest. Some law professors have recommended will clauses which partially compensate disinherited relatives who do not file objections to probate.[230]

Leon Jaworski described a pro forma execution ceremony for office lawyers which included interrogation of the testator before the subscribing witnesses prior to execution. The testator had previously read the entire will before the same witnesses.[231] These precautions indicate that attorneys have given serious thought to the implications of disinheriting wills and the probability of some disappointed relative filing objections to probate.

A malpractice suit is a trial within a trial. Lott's will would have to be shown to be valid beyond a preponderance of the evidence but for the want of proper precautions taken by the lawyer during the execution ceremonies. The burden of showing that Lott was competent and was free of undue influence would rest on Smith in such a

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[230]Such clauses are usually referred to as "no contest" clauses, because in less sophisticated versions these clauses threaten to disinherit anyone who contests the will itself. A more modern type of "no contest" clause offers an inducement not to contest. The testator admonishes potential contestants that their specific legacy will be increased if the legacy is not challenged by a will contest. For further discussion of no contest clauses, *see* Jack, *No Contest Or In Terrorem Clauses In Wills—Construction and Enforcement*, 19 SW. L.J. 722 (1965); Leavitt, *Scope and Effectiveness of No Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45 (1963).

[231]Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92-93 (1958).

suit.[232] Although Smith would have to show that the results in any will contest were not res judicata as to the issues of lack of capacity and undue influence, he would have no great problem in showing that the will contest did not raise res judicata or collateral estoppel on the filing of a legal malpractice suit against Lott's lawyer.[233]

If a will contest were filed and successfully defended by Lott's executor on Smith's behalf, the order of distribution under the probate code may be subject to Smith's objections to the size of the attorney's fee allowed on the ground that a proper exercise in file building would have obviated the need for litigation in the first place. In this case, Smith would have the judgment in the will contest showing that Lott had capacity and was free from undue influence. Smith could assert that the increased cost should not be taxed to him as residuary legatee since the objections to probate would not have been filed in the first place had Morton videotaped the execution of the will or otherwise collected evidence at the time of execution. The situation is analogous to the claim made by legatees against an executor who failed to file a federal estate and gift tax return on time but who was able to defeat assessment penalties by legal footwork for which the lawyer charged the estate additional attorney's fees. The situation also bears some resemblance to cases like *Heyer v. Flaig*[234] in which a lawyer made a single woman a perfectly valid will without informing her that on marriage the will would be void as to her spouse. The disappointed beneficiaries sued the lawyer for the amount paid to the spouse which diminished their interest under the will. Their theory of recovery was based on the principle that the lawyer knew or should have known that his client would marry and should have advised her of the effect of subsequent marriage on her will. In *Heyer*, the lawyer had prior information which would have led him to discover that his client was about to marry, had he simply followed up the leads given by his client.[235]

Finally, Lott's sisters may claim that Morton knew or should have known that Lott was incompetent and, as his fiduciary, should

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[232]For greater elaboration of the "trial within a trial" requirement, *see* Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 892 (1973).

[233]Collateral estoppel applies only to issues between parties in prior litigation or in privity with such parties, which could have been and in fact were litigated in a prior contest. For further explanation of this doctrine, *see* Note, *What Might Have Been Adjudicated was Adjudicated*, 9 IND. L.J. 189 (1933). *See* McIntosh v. Monroe, 232 Ind. 60, 63, 111 N.E.2d 658, 660 (1953); Richard v. Franklin Bank & Trust Co., 381 N.E.2d 115, 118 (Ind. Ct. App. 1978); *In re* Estate of Apple, 376 N.E.2d 1172, 1176 (Ind. Ct. App. 1978).

[234]70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

[235]*Id.* at 225, 449 P.2d at 162, 74 Cal. Rptr. at 226.

not have proceeded with the will. This theory implies that drafting a disinheriting will for a mentally incompetent client is a breach of fiduciary duty.

If an attorney suspects that a client is not competent to handle his or her business, the attorney may be required not to act in accordance with the client's "instructions," since the client is unable to give meaningful instruction. In this instance, Fred Lott's strange behavior over a number of years suggests that Lott may be mentally ill and perhaps incompetent. Commonly, the role of a lawyer requires the lawyer to suspend moral judgment about a client's behavior. Attorneys are conditioned to accept a client's wish as a command unless the client wants the lawyer to commit a crime or to do something which personally offends the conscience of the lawyer.[236] If a client is mentally unable to give a valid order to his lawyer, the lawyer cannot be excused from responsibility for carrying out the "wishes" of his or her client when a lay person of reasonable intellect would have questioned the client's mental capacity and sought expert advice before proceeding further. It is possible for Lott's sisters to use this argument to state a claim against Morton for malpractice or breach of fiduciary duty to his client.[237] Similar logic may allow the sisters to seek recovery of legal fees from Morton if they succeed, after filing objections to probate, in breaking Lott's will. The scope of Morton's duty as a fiduciary to his client may extend to carrying out vicarious acts of his client when the

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[236]For an extended discussion of the conceptual framework of a lawyer-client dialogue on the morality of client actions, *see* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

[237]Indiana case law has held lawyers responsible for breach of fiduciary duty to their clients with respect to a lawyer's mishandling of trust funds or documents entrusted to the lawyer for safekeeping. *See, e.g., In re* Kuzman, 335 N.E.2d 210 (Ind. 1975) (disciplinary hearing for attorney who took client's corporate stock worth $200,000 as a "contingent fee"); Olds v. Hitzemann, 200 Ind. 300, 42 N.E.2d 35 (1942) (action to set aside recovery of land conveyed in trust to attorney in fraud of clients); Potter v. Daily, 200 Ind. 43, 40 N.E.2d 339 (1942) (suit on fee agreements; burden of proof on lawyer to show that legal fees were fair and reasonable); McLead v. Applegate, 127 Ind. 349, 26 N.E. 830 (1891) (alleged fraudulent commissioner's deed executed by attorney to client's spouse).

In the process of making a will, a client must entrust to his or her lawyer information about the client's assets, liabilities, and state of mind, all of which are confidential in character. A lawyer who fails to perceive that his or her client is mentally incompetent, under undue influence, or under the spell of fraud or duress, when confidential information communicated to the lawyer would lead a reasonable and prudent professional to that conclusion, may not proceed with the preparation of a disinheriting will. To do so, on the strength of modern agency theory, would be a breach of the fiduciary duty not to misuse confidential information entrusted by the client to the lawyer. RESTATEMENT (SECOND) OF AGENCY § 395 (1957).

client can no longer empower Morton to act.[238] Since an attorney's agency for his or her client is no stronger than the client's mental competency to appoint him as his agent, the risk of a challenge on this ground is not as unrealistic as it may appear on cursory examination.

After reviewing the grim potential for litigation directed against Morton and his law partner, Morton must consider the next steps to take before making Lott's will. Fred's estate will make a substantial fee for the firm. He is a client for whom Morton had done a great deal of work over the years. Despite the legal principle of testamentary freedom, ordinary citizens do not consider disinheriting wills justifiable without proof of fault on the part of the disinherited persons. Common expectations in this area parallel the continental legal doctrine of *legitime* inheritance rather than Benthamite theories concerning testamentary freedom. Fred should be told that his sisters can question his mental capacity. He should be informed that after his death they can allege that at the time his will was made Fred lacked the mental capacity or was under an insane delusion or the undue influence of some third party. Lott should be told that consulting a medium before making a will allows his sisters to accuse the medium and Smith of perpetrating fraud or undue influence to obtain his estate. Although the odds that such an attack would succeed are slim, the chance of a local jury voiding the will and requiring an expensive appeal to save it are quite strong.[239] Thus, the chance of depletion of the estate's assets through a compromise with his sisters is quite probable.

There are realistic alternatives which Fred Lott should consider. He intends to disinherit his sisters. They may eventually defeat his plan by successfully challenging his will. The first obligation Morton owes Lott is to give him correct advice on the probability that his will will be attacked and the probable consequences to the estate. Fred should understand that he has at least four options. First, he can make a disinheriting will and take his chances that the will will not be broken after his death. This alternative requires further preventive legal steps which will be discussed later. Second, Fred could reject his medium's advice and not disinherit his sisters. Ralph Smith would lose any benefits in such a case. Third, Fred could give his glass collection and other assets to Smith as an inter vivos gift. This choice would also require some preventive legal practice to avoid trouble. Finally, Fred can make a will which provides a disincentive to his sisters to challenge it. These disincentives would

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[238]*See* RESTATEMENT (SECOND) OF AGENCY §§ 379, 387, & 404A (1957) for the foundation for a claim of breach of duty on agency principles.

[239]*See* Table in Appendix A to this Article held by the publisher.

include a no-contest clause in the will tied to substantial bequests to his two sisters. Once Morton lays out these choices, Lott has a least started on a means of avoiding future litigation.

If Lott chooses to disinherit his sisters, Morton will then be obliged to tell Lott that he will need to make a record designed to refute in advance any claims that Lott lacked the mental competency to make a will. Morton should inform Lott that similar advance precautions are needed in order to ensure that his sisters are unable to upset his will on the ground that he was the victim of fraud or under Smith's undue influence.[240] Morton should explain that this record-building exercise requires that Lott have a thorough physical examination and an interview with a physician who specializes in mental disorders.

If Lott is mentally ill it is likely he will not perceive that he is ill and will strongly resist the examination.[241] Should Morton discover that Lott is unwilling to cooperate with the preventive law program, the Code of Professional Responsibility would allow him to withdraw from employment.[242] On the other hand, Morton's objective is not to drive a good client and his business out of the firm. Most likely, if Lott is not mentally ill he will see the need to make evidence of his mental competency. Morton should explain to Fred Lott that the medical records and the summary of the physician's interviews will be permanently preserved in order to discourage any later objection to his will by his sisters.

Assuming that Lott agreed to the physical and mental evaluation, Morton may proceed to design an execution ceremony which would preserve a record of Fred's disposition and his mental capacity and freedom from undue influence or fraud. Morton's normal office procedure requires a few modifications in order to meet the needs of this sort of client. The execution of the will should be recorded by conventional magnetic tape recorders or, if available, by a videotape camera and microphone on a videotape recorder.

The scenario for executing a will such as Lott's will requires a publication ceremony consisting of the following steps:

(1) Introduce Lott to the attesting witnesses on microphone.

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[240]*See* Jaworski, *supra* note 231, at 88.

[241]Mentally ill persons seldom have insight into their own condition, and will often refuse to consult a psychologist or psychiatrist. This phenomenon has been noted by psychiatrists doing evaluations of people for mental competency. For an excellent treatment of this examination process, *see* 3 B. GORDY & R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 92A.50-.51 (3d ed. 1980).

[242]*See* ABA COMMITTEE ON ETHICS AND PROFESSIOINAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Disciplinary Rule 2-110(C)(1)(d) (1978).

(2) Have Lott read the will aloud, if he is able to do so, so that the microphone will record Lott's voice.
(3) Interrogate Lott on the nature and extent of his assets, the names and relationships of his next of kin, and his relationship to Smith.
(4) Have attesting witnesses identify themselves and their familiarity with the testator for the record.

The witnesses should be persons who have long and detailed knowledge of the testator and his habits of life. Although Indiana Code section 29-1-5-3 requires only two witnesses for formal validity,[243] three or four long-time friends of Fred Lott would make better testimony in an eventual will contest than Morton's secretary and receptionist who just stepped in for the signing of the will. Morton's objective will be to prepare in advance lay witness testimony that on the day Fred Lott executed his will he was of sound mind and disposing memory.

Following the extended publication and execution ceremonies outlined above, Lott should state to his witnesses that "This is my will and I want you to witness it for me." Lott should then sign the document in the presence of all witnesses. Each attesting witness should sign the document and also identify himself on the tape recording of the proceedings as an attesting witness who was asked by Mr. Lott to witness the signing of his will. Further, each witness should state for the record that in his opinion Lott had the ability to recall the natural objects of his bounty and the nature and extent of his property, and to formulate a rational plan for distribution of his assets at death at the time he signed his will. The recorded statements of the attesting witnesses may later be reduced to an affidavit attached to the will as is commonly done in Illinois and other states in which a self-proving will requires an affidavit that the testator possessed the elements of capacity when the will was signed.[244] If Morton wishes, he may excuse Lott and interrogate each attesting witness separately as an alternative to the above procedure.[245]

If Oliver P. Morton takes the time and trouble to build a record for his client in this situation, it will be exceedingly difficult for any disaffected family members to mount an effective challenge to Lott's will. Morton will, of course, be willing to open this extensive evidentiary file to any lawyer who represents Lott's sisters after Fred's

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[243]IND. CODE § 29-1-5-3 (Supp. 1980).

[244]ILL. REV. STAT. ch. 110 1/2, § 6-7(a) (1979). Attesting witnesses are required under the rules of formal probate to give their opinion on the mental capacity of the testator.

[245]*See* Appendix B to this Article held by the publisher for sample question list.

death. This record can be made by Morton for Lott at minimal expense.

C. Jack Fallstaff's Case: How To Plan a Will Contest

Jack Fallstaff was a local businessman. He had three children by his first wife—Richard, Henry, and Virginia. Jack's first wife died in 1977. A year later, Jack married Kathy Duncan, a thirty-four-year-old cocktail waitress at a local bar. Jack was sixty-five. Jack's pursuit of Kathy Duncan prompted both Richard and Henry Fallstaff to intervene in their father's personal life. Richard told his father that he believed that Kathy had been involved in selling drugs. Henry tried to persuade his father that having a wife half his age would make him the laughing stock of the town. The results of this confrontation were predictable. Jack stormed out vowing to cut off his children without a cent. Before Kathy Duncan had intervened in the family circle, Jack had been extremely close to his three children. He took vacations with them, visited them at college and, in general, was a model father. After meeting Kathy at an office party at his tool and die works, Jack had begun to lose interest in his children. Following the scene between Jack and his sons, the three Fallstaff children were frozen out of their father's life. After Jack's wedding, Jack refused to talk to any of them in person or on the phone. When the children called, Kathy answered and made up some excuse for Jack's refusal to talk to them. After the honeymoon, Jack told his close business associate, Roscoe Turner, that his children were selfish ingrates who were not going to receive a penny from him again. At about the same time Jack opened new joint bank accounts with his bride. He also transferred his house to himself and his spouse as tenants by the entirety.

Jack Fallstaff had had chronic high blood pressure for many years. About ten years before the events described above, Fallstaff had been hospitalized for depression at a private sanitorium. Dr. Barlow, Jack's physician, believed that Jack's mind had been affected by his wife's death in 1977. Dr. Barlow also had prescribed anticoagulants and ordered Jack to give up smoking. Fallstaff refused to reduce his two-pack-a-day cigarette habit. Barlow believed that Fallstaff was the victim of arteriosclerotic disease which had begun to affect his mind after his wife's death. Jack complained of "dizzy spells" at his plant, periods of loss of consciousness, and loss of the sense of balance.

On May 21, 1979, Fallstaff executed a revocable unfunded life insurance trust and a "pour-over will" drafted by a local firm of impeccable integrity. Fallstaff left all assets passing under his will to his trustee who was directed by the trust to pay the residue over to

Kathy Duncan Fallstaff. This was the version of the Fallstaff case given to Jacob Julian, Attorney at Law, during a two hour intake interview with Richard and Henry Fallstaff. Jack Fallstaff died from a stroke two weeks ago and his widow qualified as executor under the will the day before yesterday. The Fallstaff children want to know whether Julian will represent them in an action to break the will and the trust. Julian knows enough probate law to realize that he has five months after the will is offered for probate within which to file an action to contest the will.[246] Since Julian is a plaintiff's trial lawyer, he is not current on will contests and has never tried such a case. The Fallstaff children have convinced Julian that a manifest injustice has been worked on them by Kathy Fallstaff's importunities. Julian has assured the Fallstaff children that he will let them know within a week whether he will take their case.

Julian's notes from the interview contain six questions which he must answer before he decides whether to take the Fallstaff case:

(1) Can Fallstaff's statements to his children, his second wife, his employees, and other lay people be admitted to show both his lack of capacity and Kathy Fallstaff's undue influence over him?
(2) Can lay witnesses express their opinion on Fallstaff's mental competency?
(3) Can Fallstaff's medical history be admitted at trial and can his attending physician be called as a witness for the contestants?
(4) What kind of experts can he employ to help him prepare witnesses and to show that Fallstaff was mentally incompetent and under undue influence?
(5) What is the burden of proof on lack of capacity and undue influence?
(6) What presumptions exist in will contests which either help or harm contestants?

These problems will involve research which concentrates on lack of capacity and undue influence. However, these two areas may not be sufficient to answer the questions.

1. Relevance and Will Contest.—One of Julian's primary concerns is to find out what is relevant and material evidence[247] in a

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[246] IND. CODE § 29-1-7-17 (1976).

[247] Although the literature on will contests in the last fifteen or twenty years is rather limited, general articles in law reviews are available. *See, e.g., A Modest Proposal, supra* note 1; Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970); Note, *Mental Incompetence in Indiana: Standards and Types of Evidence*, 34 IND. L.J. 492 (1952); Note, *Attorney Beware—The Presumption of Undue Influence and the Attorney Beneficiary*, 47 NOTRE DAME LAW. 330 (1971).

will contest. Obviously, the issues will be framed by a complaint to contest the will alleging that the testator executed a will on a certain date and that on that date the testator lacked capacity to make a will. The complaint will further allege that the testator was under the undue influence of some beneficiary. Julian knows that the test for capacity which evolved under the *Greenwood-Baker* rule establishes that evidence on the testator's recall and his intentions are logically related to his capacity. Julian has discovered that undue influence is a form of "transference" in which the influencer substitutes his or her intentions for that of the testator. He is sure that proving undue influence requires proof that the testator was susceptible to influence and under a confidential relationship with the influencer. Although this information is helpful, Julian must still fit it in the matrix for relevance and materiality under Indiana case law. Historically, Indiana courts have used a formula for framing admissibility of evidence at trial which contains two elements. First, the proferred evidence must be logically relevant to a material fact in dispute at trial.[248] Second, in order to be material, the evidence "must tend to prove or disprove a fact which relates to an issue in the lawsuit."[249] This two-fold test has been treated in recent decisional law as a single formula for admissibility of evidence at trial.[250]

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[248]For a thorough discussion of relevant and material evidence, *see* Lake County Council v. Arredondo, 266 Ind. 318, 321, 363 N.E.2d 218, 220 (1977); State v. Lee, 227 Ind. 25, 29-30, 83 N.E.2d 778, 780 (1949).

[249]Shaw v. Shaw, 159 Ind. App. 33, 40-41, 304 N.E.2d 526, 546 (1973); Estate of Azimow v. Azimow, 141 Ind. App. 529, 531, 230 N.E.2d 450, 452 (1967).

[250]141 Ind. App. at 531, 230 N.E.2d at 451-52. The court suggested that materiality deals with "the relationship between the issues of the case and the fact which the evidence tends to prove" whereas relevance deals with "evidence [which] must logically tend to prove a material fact." *Id.* at 531, 230 N.E.2d at 452. Although Indiana courts have distinguished "materiality" and "relevance," they have been combined in the Federal Rules of Evidence. FED. R. EVID. 401 defines relevant evidence as evidence tending to prove or disprove a material fact at issue in the proceeding. FED. R. EVID. 403 allows the trial judge discretion to exclude relevant evidence if the probative value of the evidence is exceeded by prejudice to the judicial process, confusion of the issues, or the cumulative nature of the evidence. Under FED. R. EVID. 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." This schema for admitting relevant data as evidence follows current Indiana practice, although the verbal formula differs from Indiana decisional statements of the law of relevance and materiality. *See*, Walker v. State, 265 Ind. 8, 14, 349 N.E.2d 161, 166, (1976), *cert. denied*, 429 U.S. 943 (1976); Kavanagh v. Butorac, 140 Ind. App. 139, 152, 221 N.E.2d 824, 832 (1966). Much of the decision-making process of the admissibility of relevant evidence turns on the determination of whether the probative value outweighs the prejudice to the inquiry. *See* Smith v. Crouse-Hinds Co., 373 N.E.2d 923, 926 (Ind. Ct. App. 1978).

Thus, tendered evidence must tend to prove or disprove some issue at stake in the lawsuit.[251]

2. Assertive Acts and Declarations of Fallstaff About His State of Mind.—In order to judge what may be admissible in a contest over Fallstaff's will and trust, Julian needs to know what evidence Indiana courts have admitted in prior will contests. The first great class of potential evidence consists of the acts and words of Jack Fallstaff relating to his will. In prior will contests, the Indiana courts have admitted eyewitness testimony by lay witnesses detailing what a testator said and did at a time not too remote from the execution of the will.[252] These witnesses have testified to two kinds of acts of the testator. First, the eyewitnesses have reported non-assertive acts of the testator, which are usually held not to be hearsay. The type of non-assertive conduct generally admitted includes physical manifestations of mental illness such as blackouts, forgetfulness, confusion, and bizarre behavior. Indiana courts treat assertive acts and words of a testator differently than non-assertive acts. Generally, non-assertive conduct of the testator may be admitted on the issues of lack of capacity, undue influence, and fraud without distinction.[253] However, assertive acts and words of the testator evidencing his state of mind may not be admissible.

The admission of assertive acts such as a former will and words of a testator has been sharply limited by the Indiana courts to the issue of the testator's mental competency. This has been done under the rationale that such acts and statements are hearsay and admissible only under the state of mind exception to the hearsay rule.[254] Indiana courts have refused to admit these acts and words of the

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[251]141 Ind. App. at 531, 230 N.E.2d at 451-52.

[252]The justification for eyewitness testimony relating to acts and conduct of the testator prior to death, within a reasonable time before the act of will execution, has always been the logical relationship between specific aberrant acts and testamentary capacity. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 353, 146 N.E. 577, 581 (1925); Jarrett v. Ellis, 193 Ind. 687, 690-91, 141 N.E. 627, 628 (1923); Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (evidence otherwise relevant excluded by Dead Man Act). The admissibility of acts and conduct of the testator depends on the issue for which it was originally offered.

[253]*See* Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917); Patrick v. Ulmer, 144 Ind. 25, 42 N.E. 1099 (1895) (delerium); Bundy v. McKnight, 48 Ind. 502, 513 (1874) (bizarre and strange acts of the testator at the time when the will was made).

[254]*See* Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (declarations of testator not made at time of will admissible to show soundness of mind); Robbins v. Fugit, 189 Ind. 165, 167-68, 126 N.E. 321, 322 (1920) (testator's former will and statements that family members had assaulted him admissible to show unsound mind, but not to show undue influence); Oilar v. Oilar, 188 Ind. 125, 129, 120 N.E. 705, 706 (1918) (testator's statement of intent admissible to show his mental condition); Ditton v. Hart, 175 Ind. 181, 189, 93 N.E. 961, 965 (1911) (letters and other wills of testator admissible to show capacity but not to show undue influence).

testator to show that the testator was under undue influence.[255] In most instances, the acts and words of the testator concerning the making of a will come into the record with a limiting instruction to the jury not to consider the evidence on the issue of undue influence.[256]

Julian considered the impact of Fallstaff's declarations to his employees about his children. From Julian's reading of the theoretical articles on lack of capacity, he sensed that these declarations may be evidence of an "insane delusion" and also circumstantial evidence that Kathy Duncan had exercised undue influence over Jack Fallstaff. Julian would like to be sure that these statements would be admissible in any trial of the Fallstaff case. His reflections on Indiana case law showed that Fallstaff's declarations will be admissible to show that he suffered from an insane delusion at the time he made his will but inadmissible on the issue of undue influence.

Julian also suspected that the Indiana Dead Man Act would bar any of Fallstaff's statements of mental condition made to his children if the statements also contained some future promise of

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[255]The early case of Runkle v. Gates, 11 Ind. 95 (1858) began this process of limiting the admission of declarations of the testator to the issue of capacity. The court excluded the statement of the testator that he was glad his will had been burned when the statement was offered into evidence on the issue of whether the testator had properly revoked his will. The court further interpreted T. JARMAN, WILLS to mean that declarations of the testator that he had revoked a will when in fact the will had not been revoked pursuant to the manner described in the Wills Act of 1837 were excluded by the hearsay rule. 11 Ind. at 99-100 (citing T. JARMAN, WILLS ch. 7, § 2 (2d ed. J.C. Perkins 1849)). Hayes v. West, 37 Ind. 21, 24-25 (1871) added to the confusion by citing 1 I. REDFIELD, THE LAW OF WILLS ch. 10, § 39 (4th ed. 1866), in support of excluding as hearsay declarations of the testator that he had been misled, seduced, or otherwise intimidated into making a will. Redfield indicated, with a great deal of case law support, that declarations of the testator exhibiting his state of mind at the time of execution were admissible and relevant to the issues of capacity, undue influence, and fraud. I. REDFIELD at 548-55. The distinction on the issues were not carried over by later Indiana case law. The decisions which excluded pre-testamentary declarations of a testator on the issue of undue influence should probably be overruled.

[256]The topic is exhaustively reviewed in 6 J. WIGMORE, THE LAW OF EVIDENCE §§ 1734-40 (J. Chadbourne rev. 1976). Wigmore concluded that declarations by a testator which reflected the testator's state of mind should be admissible:

> In surveying these . . . distinctions, together with those already noticed for other kinds of post-testamentary declarations . . . one is impressed with the practical futility of attempting to enforce them strictly. It is doubtful if often they amount to anything more than logical quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to *all the utterances* of a testator, without discrimination as to admissibility, and then to leave them to the jury with careful instruction how to use them. The doctrine of multiple admissibility . . . almost always would justify this.

Id. § 1738, at 188.

benefit to them. However, his investigations so far have turned up only negative, hostile, and threatening statements made by Fallstaff about his testamentary plans for his children. Consequently, Julian feels safe that an incompetency objection would not be sustained against a recital of Fallstaff's conduct and statements occurring before and after he made his will. Such statements will be admissible on the issue of lack of capacity and all but his hearsay declarations of intent to disinherit his children would be admissible on the issue of undue influence.

3. Lay Opinion Witnesses.—There are several sources of lay opinion about Fallstaff's mental state available to both sides in this case. First, the witnesses who witnessed the will have special status, at least in the older cases, as witnesses with an opportunity to observe the testator and to draw an inference concerning his mental capacity from their status as statutory witnesses to the will of Jack Fallstaff.[257] Jack's children and Jack's widow have observed the deceased testator over an extended period of time and so will have an opportunity to relate their opinion of Jack's mental agility when he was last seen by them. A cursory search of Indiana case law revealed to Julian that opinion evidence of this kind falls within a well-recognized exception to the prohibition on lay opinions and is allowable on a foundation of first-hand knowledge on the part of the opinion witness of the testator's acts and conduct.[258] Julian plans to

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[257]Opinions given by lay witnesses on the mental competency of an actor, based on first-hand observation, are admissible in all courts. 7 J. WIGMORE, THE LAW OF EVIDENCE § 1933 (J. Chadbourne rev. 1978). Wigmore also noted that attesting witnesses to wills are uniformly permitted to give their opinions on the mental capacity of the testator. *Id.* § 1936. Wigmore cited Both v. Nelson, 31 Ill. 2d 511, 202 N.E.2d 494 (1964) as authority for the position that a court which fails to permit the attesting witnesses to a will to give their opinions of the testator's mental state at the time of execution has committed reversible error. Although Indiana has no case as strong as *Both*, it is likely that the opinions of attesting witnesses to a will or to trust instruments would be admissible and exclusion would be reversible error as well.

[258]McReynolds v. Smith, 172 Ind. 336, 348-49, 86 N.E. 1009, 1013-14 (1909) (instruction to the jury concerning use of lay opinion testimony approved); Westfall v. Wait, 165 Ind. 353, 357-58, 73 N.E. 1089, 1090 (1905) (cross-examinations of lay opinion witnesses by lawyer for proponent may be based on specific acts or conduct of the testator); Brackney v. Fogle, 156 Ind. 535, 536-37, 60 N.E. 303, 303 (1901) (lay witness may not give opinion of ultimate issue of fact of testamentary capacity); Bower v. Bower, 142 Ind. 194, 199-200, 41 N.E. 523, 524-25 (1895) (lay witness' opinion on mental capacity must be preceded by foundation showing the nature and extent of the witness' first-hand observation of the testator); Staser v. Hogan, 120 Ind. 207, 214-20, 21 N.E. 911, 913-15 (1889) (numerous lay opinions on testator's mental state given on relation of first-hand observation of testator); Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886) (no error to permit proponent to give personal opinion on testator's capacity based on first-hand observations); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965).

interrogate those eyewitnesses to Fallstaff's increasingly erratic behavior using a check list for evaluating lay opinions on capacity.[259] Julian anticipates that these witnesses will also have an opinion on whether or not Jack Fallstaff was susceptible to undue influence by his second wife. No Indiana case has dealt with the issue of the admissibility of lay opinion concerning a testator's susceptibility to undue influence. The very few cases reported in other states, however, have generally excluded such lay testimony.[260]

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[259]The scenario for preparation of lay opinion witnesses would be as follows:

1. How long did you know Jack Fallstaff before his death?
2. Did you notice any change in his behavior within a year or two of his death?
3. Describe the changes you noticed.
4. Can you give specific instances, fixing the date, time and place, as well as you can, of instances of forgetfulness, "black outs", or other behavior which struck you as abnormal, unusual or bizarre relating to Jack Fallstaff?
5. How many times did you meet Fallstaff within a year of his death?
6. On the last date you saw Jack Fallstaff, did you have an impression that he was able to comprehend his surroundings?
7. On that last date, did you have any impression as to whether or not he could manage his business for himself without outside help?
8. Would Jack Fallstaff have been able to recognize his children, and their relationship to him the last time you saw him before his death?
9. Would you say that Fallstaff, on that date, knew in a general way what he owned and its approximate worth?
10. Do you think that Fallstaff had, on that date, the mental ability to make a rational plan for disposing of his property at his death, taking into account his children's affection for him, their needs and the needs of his second wife, Kathy, and the nature and worth of his property?
11. Can you explain the reasons behind your opinions?

Trial lawyers will note that the form of these questions may be objectionable if actual examination in court were conducted this way. However, the object of this preparation program is to prepare the attorney and the witnesses for more structured testimony on capacity at trial.

[260]The admissibility of lay opinion on the testator's susceptibility to influence has been litigated in seven states. Arkansas excluded lay opinion on susceptibility to influence in Smith v. Boswell, 93 Ark. 66, 124 S.W. 264 (1909). Georgia may allow such opinion evidence, although the authority is very old and consists of syllabus statements rather than judicial opinions. *See* Thompson v. Ammons, 160 Ga. 886, 129 S.E. 539 (1925) (syllabus only); Penn v. Thurman, 144 Ga. 67, 86 S.E. 233 (1915) (syllabus only); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914) (syllabus only); Slaughter v. Heath, 127 Ga. 747, 57 S.E. 69 (1907) (syllabus only). Illinois has rejected the admission of lay opinion on susceptibility to influence. Teter v. Spooner, 279 Ill. 39, 116 N.E. 673 (1917). Iowa has excluded such opinion evidence as incompetent and immaterial. *In re* Goldthorp's Estate, 94 Iowa 336, 62 N.W. 845 (1895). Michigan excluded such opinion without explanation as "calling for a conclusion" in O'Connor v. Madison, 98 Mich. 183, 57 N.W. 105 (1893). Pennsylvania excluded opinions on susceptibility to undue influence in the transfer of a deed in the ancient case of Dean v. Fuller, 40 Pa. 474, 478 (1861). This result has not been extended to wills in general, though. Finally, Texas has allowed lay opinion on susceptibility to undue influence in a case dealing with an inter vivos transfer, on a showing that the witness had familiarity with the

Finally, Julian questioned whether an opinion by one of the Fallstaff children constituted a "claim against the estate" of Fallstaff and was thus barred by the Dead Man Act. Fortunately for Julian, Indiana has already decided this issue in his favor and he can be sure that opinion evidence by a party having a claim to set aside a will which goes to the capacity of the testator who made the will can be taken as evidence in a will contest.[261]

Naturally, if Julian may call the Fallstaff children as lay opinion witnesses, Kathy Duncan Fallstaff may also give her opinion. In wondering what weight the jury will give to the lay opinions, Julian must also consider the effect of any expert testimony, especially that of Dr. Barlow.

4. Expert Opinion in Will Contests.—Dr. Barlow, Fallstaff's treating physician, undoubtedly took an extensive history of his patient, including his bouts with depression which may have been psychotic. However, all this information, although admissible as an exception to the hearsay rule, is privileged. Indiana jealously guards its statutory physician-patient privilege in will contests. In *Pence v. Myers*,[262] the Indiana Supreme Court held that admission of an abstract of a physician's death certificate showing the testator's cause of death was reversible error. The court stated that:

> It is well established that in a will contest, a physician, attendant on a testator, at the time of his death, should not be permitted to give testimony tending to strike down the will as to the condition of the testator's mind or as to the disease from which he suffered, the cause or duration of his illness and the cause of his death . . . .[263]

The contestants cited *Kern v. Kern*[264] in which the supreme court held that the attorney-client privilege between the deceased testator and his lawyer did not apply to statements made by the testator which were relevant to the testator's testamentary capacity and freedom from undue influence.[265] By analogy, relevant statements of the testator to his attending physician should be admissible despite the statutory privilege. However, *Kern* was followed by *Brackney v. Fogle*,[266] in which the contestants offered testimony by

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grantor's state of mind. Koppe v. Koppe, 57 Tex. Civ. App. 204, 122 S.W. 68 (1909). In all probability, Indiana's courts would follow the majority rule excluding such opinion evidence on the issue of susceptibility to undue influence.

[261]Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886).

[262]180 Ind. 282, 101 N.E. 716 (1913).

[263]*Id.* at 286, 101 N.E. at 717.

[264]154 Ind. 29, 55 N.E. 1004 (1900).

[265]*Id.* at 35, 55 N.E. at 1006.

[266]156 Ind. 535, 60 N.E. 303 (1901).

the testator's attending physician, yet the testimony was barred on a claim that the communications were privileged. The contestant's lawyer argued to the jury that the proponent's failure to waive the privilege showed that the proponent had something to hide.[267] The *Brackney* court held the argument improper and reversed the trial court's judgment for the contestant.[268]

In recent years the holding in *Pence v. Myers* had been eroded by such cases as *Estate of Beck v. Campbell*,[269] in which the appellate court held that a physician may testify as to dates of treatment for a patient despite the physician-patient privilege,[270] and *Robertson v. State*,[271] in which the appellate court determined that an attending physician, barred by the privilege statute from giving his actual diagnosis and the actual history of his patient in court without the patient's consent, could be called to testify in court to a hypothetical question involving the substance of the prohibited data taken from another non-confidential source.[272] The prohibited data happened to be the level of intoxication of his patient on a particular day and its effect, in his opinion, on his patient's behavior.[273]

In the Fallstaff case, Dr. Barlow's findings on examination of Fallstaff, his treatment notes, and his case history file are all privileged matter. Fallstaff's second wife, as executor, has the physician-patient privilege rights of Fallstaff which she may choose not to waive in this case because of the damaging contents of Dr. Barlow's case history file on Fallstaff. Rather than try for a reversal of *Pence v. Myers*, Julian should amass sufficient detail to put into the record so that Dr. Barlow can be called as a medical expert and respond to hypothetical questions about Jack's mental competency and his susceptibility to undue influence. Julian's data will consist of the lay witness reports concerning what they saw and heard from Fallstaff, nursing notes from the sanitorium in which Fallstaff was a patient, and prescription drug orders, if available, from Fallstaff's druggist. Julian must assume that Kathy Fallstaff will not waive the privilege and allow Dr. Barlow to give his own observations of Fallstaff.

The nursing notes from the sanitorium, interestingly enough, are not privileged matter even though they contain such items as the physician's medication orders, restraint orders from the attending physician, and summaries dictated into the records of the in-

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[267] *Id.* at 537, 60 N.E. at 303.
[268] *Id.* at 538-39, 60 N.E. at 304-05.
[269] 143 Ind. App. 291, 240 N.E.2d 88 (1968).
[270] *Id.* at 296, 240 N.E.2d at 92.
[271] 155 Ind. App. 114, 291 N.E.2d 708 (1973).
[272] *Id.* at 118-19, 291 N.E.2d at 711-12.
[273] *Id.* at 118, 291 N.E.2d at 710.

stitution. Indiana, illogically enough, has a case which holds that matter communicated to a nurse by a patient in a hospital is not privileged under the physician-patient privilege statute.[274] Consequently, any emergency room logs, admission summaries, or other records taken down when Fallstaff was admitted to the emergency room after his 1979 fatal stroke are also admissible under the business records exception to the hearsay rule. All this data will be presented, via the hypothetical question, to Dr. Barlow who will then give his opinion on the testamentary capacity and susceptibility to undue influence of the hypothetical testator.

Julian considered whether he should retain a clinical psychologist to buttress the case for partial insanity or lack of capacity. Clinical psychologists have for years been considered experts in other jurisdictions. Since 1974, these individuals have been held experts on mental disease in Indiana.[275] A psychiatrist is a physician who has been certified as a specialist in psychiatric medicine and is licensed to prescribe medicine. Clinical psychologists, however, do not prescribe medicine but are certified to treat people for mental disorders by non-medicinal psychotherapeutic techniques. For a reasonable fee, Julian may secure a professor of clinical psychology to act as consultant in the Fallstaff case.[276] He or she could tell Julian whether Fallstaff was delusional when he made his will which disinherited his children. The consultant can provide Julian with insight into Fallstaff's personality structure and its interplay with his disapproving children. This will assist Julian in designing better questions for his lay witnesses and better hypothetical questions for his expert witnesses. A clinical psychologist can provide, for relatively low prices, an expert opinion on

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[274]General Accident, Fire & Life Assurance Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

[275]*See* Indianapolis Union Ry. v. Walker, 162 Ind. App. 166, 318 N.E.2d 578 (1974).

[276]The use of psychiatrists in will contests was suggested by Prof. John J. Broderick in Broderick, *The Role of the Psychiatrist and Psychiatric Testimony in Civil and Criminal Trials*, 35 NOTRE DAME LAW. 508, 511 (1960), following the lead of Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 L. & COMTEMP. PROB. 448 (1935). In 1964, George Lassen, a clinical psychologist holding the office of Court Psychologist in Baltimore, Maryland, advocated the use of clinical psychologists in criminal cases as experts on mental problems, including undue influence. *See* Lassen, *The Psychologist as An Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A.J. 239 (1964). In 1968, Dr. Eugene E. Levitt of Indiana University Medical Center, Indianapolis, indicated in an address to the Indiana Judicial Conference just how useful clinical psychologists might be in settling matters in which the competency of a person must be determined by hypothesis or by testing results. *See* Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L.J. 82 (1969). The authority for using psychologists as expert witnesses grows in all other states in the United States. It ought not be a matter for great concern in Indiana trial courts at this time.

Fallstaff's mental competency and assist in planning the case. He or she may also appear as a second expert witness for the contestant.

5. Burden of Proof and Presumptions in a Will Contest.—Since fraudulent inducement to make a will played no part in the Fallstaff case, Julian hypothesizes that under Trial Rule 11 he is restricted ethically to a two paragraph complaint. In the first paragraph, Julian will set up a claim on the issue of lack of capacity. The second paragraph will be drafted to state a claim to set aside the will on the grounds of undue influence. In contesting the will on grounds of lack of capacity, Julian has two alternative grounds to allege. First, he should allege that Fallstaff, on May 21, 1979, was unable to know the natural objects of his bounty, unable to know the nature and extent of his property, and unable to make a rational plan for disposition. Second, Julian should allege that Fallstaff, on May 21, 1979, was suffering from an insane delusion that his children did not love him and as a proximte result he disinherited them. The required burden of proof on each of the elements of the case will be by a preponderance of the evidence.[277]

The second paragraph of the complaint should allege that on May 2, 1979 Jack Fallstaff was susceptible to undue influence. It should assert that Jack Fallstaff had a confidential relationship with Kathy Fallstaff, his second wife, which was used to importune Jack Fallstaff to change his testamentary plans to the benefit of Kathy Fallstaff, but at the expense of the Fallstaff children. The complaint should conclude that this change of beneficiaries was unconscionable.[278] These elements in *In re Faulk's Will* must also be proven by a preponderance of the evidence. Had there been any reasonable basis to assert that Kathy Fallstaff procured the May 1979 will by fraudulent representations, Julian would have been required to allege the specific words or acts constituting the representation, *scienter*, and an unconscionable change of testamentary plans as a result. His prayer for relief would then be confined to a constructive trust rather than an avoidance of the will. This allegation would also require proof by a preponderance of the evidence.[279]

Generally, Indiana courts hold to a Thayerian doctrine of evidentiary presumptions. Such presumptions are considered "rebuttable" or likely to disappear when the party opposing the presumption offers any contrary evidence.[280] Indiana recognizes that there is a presumption that a will, duly executed according to the statute, is

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[277]IND. CODE § 29-1-7-20 (1976) and the cases cited at note 15 *supra*.

[278]*See* cases cited at notes 155-159 *supra*.

[279]IND. CODE § 29-1-7-20 (1976).

[280]Such a view of presumptions was adopted by the Federal Rules of Evidence. *See* FED. R. EVID. 301 and the official comments thereto.

free of undue influence and was executed by a person having testamentary capacity.[281] Indiana also adheres to the presumption that once a person's apparently permanent mental incapacity is established by judicial declaration or expert testimony, the incapacity continues until credible evidence is offered to show that it has ended.[282] This web of presumptive law means that Kathy Fallstaff enjoys a presumption, arising from proof of due execution according to the form prescribed in the Probate Code, that the will in her favor is valid. This means that she has no burden of proof to establish the mental capacity of Fallstaff. Further, the Indiana courts treat this presumption as one which does not disappear when contrary evidence is offered. Therefore, the will contest will go to the jury even if the proponent offers no evidence showing that Fallstaff was of sound mind and free of undue influence when he made his will.

The presumption of continuing mental incapacity may be useful to Julian if he can establish that at some time prior to May 21, 1979, Jack Fallstaff was incompetent. Since Fallstaff's commitment to the sanitorium for depression was probably not judically ordered, Julian must rely on expert testimony alone for aid in this instance.

VI. CONCLUSION

In the mid-nineteenth century Indiana adopted the *Greenwood-Baker* rule for testamentary capacity. The *Greenwood-Baker* rule was derived from eighteenth century English attempts to formulate legal guidelines for avoiding the wills of senile people. The rule states that in order to be able to make a will a testator must: (a) know the natural objects of his bounty; (b) know the nature and extent of his property; and (c) while keeping the two in mind, make a rational plan for disposition of the testator's assets after death. This low-level threshold test for capacity to make a will was qualified by the rule of *Dew v. Clark*, or the "insane delusion" rule, which states that a testator who otherwise meets the threshold test for capacity under the *Greenwood-Baker* rule may lack capacity if the testator's will is the product of a fixed and immediate belief about some natural object of the testator's bounty which is unsupported by rational evidence and which no amount of rational persuasion can overcome.

During the same decade that the *Greenwood-Baker* rule was adopted, Indiana's highest court decided that undue influence over a

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[281]Kaiser v. Happel, 219 Ind. 28, 30, 36 N.E.2d 784, 785 (1941); Young v. Miller, 145 Ind. 652, 44 N.E. 757 (1896).

[282]Branstrator v. Crow, 162 Ind. 362, 69 N.E. 668 (1904); Stumph v. Miller, 142 Ind. 442, 41 N.E. 812 (1895).

testator constituted distinct grounds for relief against a testator's will. It was not a tort claim to set aside a will on account of fraudulent inducement. Rather, undue influence was a claim founded on the replacement of the testator's free will by the will of another. In order to set aside a will as the product of undue influence, the contestant has to prove that the testator was susceptible to undue influence by others and enjoyed a confidential relationship with an influencer who then used that relationship to importune the testator for an unconscionable change of testamentary disposition. The Indiana courts dealing with undue influence have experienced difficulty in dealing with the various classes of rogues involved in undue influence. Generally, the courts favor the importuning of second spouses, children, and collaterals, and disfavor the importuning of lawyers and doctors.

Fraudulent procurement of a will is a third distinct claim against the validity of a will. It is a common law tort action and is independent of the strange Indiana evidentiary rule which bars the admission of conversations of the testator on the issue of undue influence but not on the issue of capacity. A fraud claim is a potent tactical weapon for contestants to counter balance the bias in favor of proponents which is evident in the appellate judicial treatment of will contests in Indiana.

The two fictitious episodes in this essay illustrate the operation of the substantive law in will contests. The case of Fred Lott presented realistic situations which occur in law practice involving decisions of testamentary capacity, undue influence, and fraud. The Lott case dealt with the foreseeable risks which may arise in a later will contest and an attorney's duty to advise his client on the consequences of legitimate and of spurious litigation directed at the estate by disappointed relatives. The main point of the Lott case was to raise the consciousness of office practitioners of the potential for will contests. It also indicated the potential for malpractice claims based on a lawyer's failure to detect the potential for a future contest and to take preventive law measures to ensure that his client's interest is adequately protected by pre-death planning and data-gathering measures.

The Fallstaff case poses a problem for plaintiff's lawyers who are asked to take on a will contest for disappointed relatives of the testator. First, will contests are particularly tortuous pieces of litigation with internal ground rules which differ sufficiently from ordinary litigation to make them more difficult to prosecute. Second, since will contests occur much less frequently than other kinds of litigation, the average trial lawyer's level of experience in such matters will likely be low. Third, the theory of recovery in will contests, like products liability cases, must be built around the opinion

evidence of an expert witness. Finally, orthodox ways of appraising one's eventual success or failure in a will contest are non-existent. Fallstaff's case illustrated how a trial lawyer can evaluate evidence, make a proof chart, and organize data for trial. The primary thrust of this Article is to show how the problems of testamentary capacity, undue influence, and fraud lurk behind everyday practice situations, ready to devour the lawyer who is not sufficiently aware of the dangers of will contests.

In Indiana, as in most states, the wills of persons who are senile or mentally ill are admitted to probate over strong evidence that the testator lacked any conception of what he was doing during the process of formulating a testamentary plan. Jury verdicts for contestants in will contests are regularly overturned by appellate courts on hyper-technical grounds. This nationwide pattern suggests that the judiciary frowns on successful will contests. Indiana, like most other American states, is committed to the concept of testamentary freedom. This commitment is limited only by the doctrines of lack of capacity, undue influence and fraud. Testamentary freedom is an abstract principle of law which seems to be wholly judge-made and largely unexamined by lawyers, law professors, and lay people alike. It may be judicially noticed that, in other jurisdictions, *legitime* heirship and community property temper testamentary freedom, and ensure that the relatives of a deceased person cannot be disinherited save for grave causes. This Article is an attempt to induce the legal profession to undertake a serious study of the social, economic, and cultural impact of disinheriting wills. Without such a study, our judiciary will continue to flounder about enforcing an abstract concept of unfettered discretion in will making. If the social, cultural, and economic harm of disinheriting wills were better known, it is doubtful that the judiciary would be so willing to sustain the abstract principle of testamentary freedom.