Undue Influence and the Homosexual Testator

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ARTICLES

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Homosexuality is a subject with which most Americans are still ill at ease, and it is not surprising that this homophobia is reflected in judicial opinions. Sometimes the homophobia is merely suggested, as by the use of such phrases as "homosexual advances" or

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1. In 1973, a poll conducted by the Institute for Sex Research of Indiana University revealed that two-thirds of the American public considered homosexuality "obscene and vulgar," and that one-half believed that homosexuality would bring about the "downfall of civilization." COMMUNITY RELATIONS COMMISSION, CITY OF TULSA, OKLAHOMA, SEXUAL PREFERENCE STUDY 5 (1976). A more recent Gallup poll indicated that 65 percent of the public is opposed to the employment of homosexual persons as teachers. See N.Y. Times, July 17, 1977, § 1, at 34, col. 1. Two months before the 1980 presidential election, a Gallup Poll indicated that only 27 percent of Jimmy Carter's supporters, 19 percent of Ronald Reagan's supporters, and 46 percent of John Anderson's supporters were in favor of allowing homosexual persons to teach school. Chicago Sun-Times, September 12, 1980, at 38, col. 1. See generally Dressler, Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession, 9 Rut.-Cam. L.J. 393, 400-15 (1978).
2. Homophobia means the fear of homosexuality and aversion to homosexual persons. See G. Weinberg, SOCIETY AND THE HEALTHY HOMOSEXUAL, 4-5 (1973). The word seems to have been coined only recently, and the coinage is etymologically unsound since the word in its present form should more properly mean the fear of persons like oneself. (The Greek-derived prefix "homo" means "same," as in "homogeneous" or "homophonic.") Nonetheless, the word has definitely gained acceptance, see, e.g., Barrett, Legal Homophobia and the Christian Church, 30 Hastings L.J. 1019 (1979); Stein, Racial Slurs, Ethnic Jokes, Esquire, Dec. 1979, at 17, and will be employed herein. The term is somewhat tendentious in that it implies that aversion to homosexuality is based on irrational fear rather than considered judgment. However, implicit in this article is the view that such aversion is indeed irrational. See Hyte, A.P.A. Rules Homosexuality Not Necessarily Disorder, Psychiatric News, Jan. 2, 1974, at 1, reporting the decision of the American Psychiatric Association to remove homosexuality from its official list of mental and personality disorders. On December 15, 1974, the American Psychiatric Association's Board of Trustees adopted a resolution that stated in part: "[H]omosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities . . . ." The resolution is reprinted in PORTLAND TOWN COUNCIL, A LEGISLATIVE GUIDE TO GAY RIGHTS 26 (1976).

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“homosexual rape” in circumstances where it was already given that the parties were of the same sex, and where, were persons of the opposite sex involved, courts would hardly have said “heterosexual advances” or “heterosexual rape.” Usually, however, if a case involves homosexuality, such judicial homophobia as may exist will be more apparent. “Few behavioral deviations,” said a New Jersey court, “are more offensive to American mores than is homosexuality.” More recently, the Supreme Court of Washington likewise concluded that homosexuality is immoral and accordingly upheld the dismissal of a high school teacher on the ground that he was homosexual. The court acknowledged that the dismissal would not be proper unless a connection could be made between the teacher’s sexual orientation and his ability to perform his job, but evidence was introduced which, in the court’s opinion, proved that plaintiff’s homosexuality impaired his ability to teach. The evidence consisted of a statement by one student that he objected to plaintiff’s teaching at the school because of plaintiff’s homosexuality, statements by three of plaintiff’s fellow teachers that his remaining on the faculty was objectionable to them both as teachers and as parents, and statements by three school administrators that plaintiff’s presence on the faculty would “create problems.” The dismissal of a teacher on the ground that he grew a beard would hardly have been upheld by the court on the basis of the unsubstantiated speculations of seven persons that bearded teachers would be objectionable, yet the employers in Gaylord prevailed.

5. The needless characterization of such acts as homosexual implies that there is something more horrible about rape or unwelcome sexual advances when the victim is of the same gender as the perpetrator.
8. 559 P.2d at 1346.
9. 88 Wash. 2d at 298, 559 P.2d at 1346-47. These “problems” were not enumerated in the opinion.
10. In Karr v. Schmidt, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972), the constitutionality of a school board regulation limiting male students’ hair length was challenged unsuccessfully. Although the opinion is not a model of judicial analysis, see Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 CORNELL L. REV. 563, 604-06 (1977), more evidence was offered in support of the regulation than unsubstantiated assertions that the regulation was necessary. Expert testimony was introduced as to the health hazards of long hair in the school laboratory courses, and there was evidence that fist fights had broken out between the “short-hairs” and the “long-hairs.” It is not suggested that this evidence is persuasive, merely that it is more substantial than what was offered in
on the basis of just that sort of evidence.

When a will is contested on the ground that it was procured through the undue influence of a legatee, courts frequently regard as evidence of such influence the fact that the will is "unnatural"—that is, that the dispositions prefer strangers in blood to natural objects of the testator's bounty. The use of the word "unnatural" in this context, coupled with the above-documented judicial discomfort with homosexuality, suggests that courts might be more inclined to strike down a will that bequeaths an estate to a testator's homosexual lover than one that leaves the estate to a testator's spouse or heterosexual lover. The purpose of this article, at least in part, is to explore this possibility to determine whether a homosexual testator in fact runs a greater risk of having his will declared invalid on the ground of undue influence than does his heterosexual counterpart. The article will conclude with an examination of some planning devices or techniques that might be employed to reduce that risk.

I. UNDUE INFLUENCE IN GENERAL

In order to contest a will successfully on the ground of undue influence, the contestant must prove that such pressure was exerted

Gaylord.

12. In re Williams' Estate, 52 Mont. 192, 156 P. 1087 (1916); Central Trust Co. v. Boyer, 308 Pa. 402, 162 A. 806 (1932).
14. While the popular conception of the homosexual lifestyle is one of compulsive promiscuity, see, e.g., W. GOLDMAN, THE SEASON 61 (1969), stable, "monogamous" couples in fact pervade the homosexual community. See P. FISHER, THE GAY MYSTIQUE 210-12 (2d ed. 1975); see generally Comment, Homosexuals' Right To Marry: A Constitutional Test and a Legislative Solution, 129 U. PA. L. REV. 193 (1979). The supposition that a homosexual person might wish to leave his estate to his lover is by no means outlandish.
upon the testator as to destroy his free agency and substitute the will of the person exerting the pressure for that of the testator.\textsuperscript{16} There need not actually be physical coercion or duress in order to support a finding of undue influence,\textsuperscript{17} for the term comprehends a more subtle kind of pressure. But mere solicitation or importunity, however extravagant or vigorous, that does not in fact overcome the will of the testator does not amount to undue influence.\textsuperscript{18} The influence must be brought to bear on the testamentary act; it is immaterial when the influence was first exercised so long as it operates at the time the will is executed and produces its execution.\textsuperscript{19}

In theory, at least, courts acknowledge that they ought not to disturb a testamentary disposition merely because it does not conform to their notions of fairness or propriety,\textsuperscript{20} and judges have accordingly attempted to limit the jury’s role in will contests.\textsuperscript{21} Courts likewise acknowledge that a bequest should not be set aside simply because the court disapproves of the conduct of the beneficiary.\textsuperscript{22} For example, in \textit{In re Swartz’s Will},\textsuperscript{23} the testatrix, who

\begin{enumerate}
\item Estes v. Bridgforth, 114 Ala. 221, 21 So. 512 (1897).
\item \textit{In re Wall’s Estate}, 187 Cal. 50, 200 P. 929 (1921); Drury v. King, 182 Md. 64, 32 A.2d 371 (1943).
\item Pooler v. Christman, 145 Ill. 405, 34 N.E. 57 (1893); Lindinger v. Lindinger, 126 Ind. App. 463, 130 N.E.2d 75 (1955); \textit{In re Dobson’s Estate}, 258 Wis. 587, 46 N.W.2d 758 (1951).
\item The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely . . . because it does not conform to their ideas of what was just and proper.
\item \textit{In re McDevitt’s Estate}, 95 Cal. 17, 33, 30 P. 101, 106 (1892).
\item “The tendencies of juries . . . unless well and firmly guided by the [probate judge], are to substitute their notions of justice on the whole case and to correct what they regard as unfair testamentary dispositions.” \textit{In re Huber’s Will}, 103 Misc. 599, 612, 170 N.Y.S. 901, 909 (Sur. Ct. 1918), aff’d, 188 A.D. 882, 175 N.Y.S. 906 (1919).
\item It does appear, from the [California] cases appealed, that the jury finds for the contestant in over 75% of the cases submitted to it. But the fact that juries exhibit consistent unconcern for the wishes of testators should come as no surprise. Indeed, the tendency of juries in this respect is so pronounced that it has been said to be a proper subject of judicial notice.
\end{enumerate}
owned a brothel, left a will devising the brothel to two of the inmates of the house. The testatrix's brother contested the will on the ground of undue influence, arguing that the will unnaturally favored two strangers in blood and pointing out that the devisees were present when the will was executed. The court, upholding the validity of the will, responded to the brother's arguments in the following extraordinary passage:

[T]he testatrix and the proponents of the will had become social outcasts, and had wandered far from the paths of rectitude . . . . They are shunned by people of respectability, they have no one to associate with except those who, like them, have departed from a life of virtue. Is it to be expected then, when they come to their deathbeds and their spirit takes its flight to appear before the Infallible Bar where we hope that mercy will be shown them because of the fact that their sins are largely brought about by a confiding trust in some man, that the pillars of society will be present to administer to their last wants or close their eyes in death? Must we say that because the proponents of this will were at the bedside of the testatrix at the time of her death, drawn together by their common social ban, compelled to administer, each to the other, that this is a circumstance from which alone we must draw a conclusion of undue influence exercised over the testatrix? The testatrix had cast her lot among these kind of people; they were of her world; her days were lived among them; she died among them. Under all the circumstances of the instant case, we are not prepared to say that the proponents would be the unnatural objects of the bounty of the testatrix . . . .

In Dees v. Metts, to take another example, testator, a white man, devised his entire estate to his black mistress at a time when the law of his domicile prohibited interracial sexual relations. Indeed, the court in its opinion declared:

It is reprehensible enough for a white man to live in adultery with a white woman, thus defying the laws of both God and man, but it is more so, and a

24. Evidence that a legatee procured or actively participated in the preparation or execution of a will tends to support the claim that the will was the product of the legatee's undue influence. In re Anthony's Estate, 265 Minn. 382, 121 N.W.2d 772 (1963); Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959); In re Beck's Estate, 79 Wash. 331, 140 P. 340 (1914). To be sure, the mere presence of the legatee at the execution of the will does not amount to proof of such procurement or participation, Jones v. National Bank of Commerce, 220 Ark. 665, 249 S.W.2d 105 (1952); In re Wright's Estate, 219 Cal. App. 2d 164, 33 Cal. Rptr. 5 (1963); Koppel v. Soules, 189 Md. 946, 56 A.2d 48 (1947), and even actual participation is not conclusive on the issue of undue influence. If the will nonetheless represents the unfettered wishes of the testator, it will be upheld. In re Thied's Estate, 301 Mich. 668, 4 N.W.2d 47 (1942).

25. 79 Okla. at 194, 192 P. at 206.
26. 245 Ala. 370, 17 So. 2d 137 (1944).
much lower grade of depravity, for a white man to live in adultery with a Negro woman.\textsuperscript{28}

Nonetheless, the court, noting that the mistress had taken no part in the preparation or execution of the will and that the testator was a man of strong ideas and not easily swayed, upheld the validity of the will against the charge by the testator's mother that it was procured through the undue influence of the mistress.\textsuperscript{29}

Although even a lawful wife may so dominate a testator with respect to the making of his will that it must be denied probate on the ground of undue influence,\textsuperscript{30} courts often assert that a wife is allowed greater freedom than others in urging the testator to make a will in accordance with her wishes—that conduct which would amount to undue influence in the case of someone other than a spouse is permissible in the case of a spouse.\textsuperscript{31} Why this should be so is not immediately apparent. Since a purported will must be denied probate when it represents the wishes of someone other than the testator,\textsuperscript{32} should it matter that the wishes it represents are those of a spouse instead of, say, a third cousin?\textsuperscript{33} Perhaps the rule is predicated on the notion that certain conduct will not de-

\textsuperscript{28} 245 Ala. at 373, 17 So. 2d at 139.

\textsuperscript{29} See also Fox v. Eaglin, 132 Kan. 395, 295 P.2d 662 (1953).

The fact that a beneficiary may be guilty of the criminal offense of bigamy does not disqualify him to take under the will of a woman whom he intentionally or unintentionally wronged by marrying her when he had another wife living, when the wronged woman had become fully apprised of the facts before she executed the will naming him as beneficiary.

\textit{Id.} (syllabus by the court).

\textsuperscript{30} Street v. Street, 246 Ala. 683, 22 So. 2d 35 (1945); Trust Co. of Ga. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934); Martin v. Martin, 287 Mass. 157, 166 N.E. 820 (1929); \textit{In re Tyner's Will}, 97 Minn. 181, 106 N.W. 898 (1905); \textit{In re Tressider's Estate}, 70 Wash. 15, 125 P. 1034 (1912) (husband charged with undue influence).

\textsuperscript{31} Smith v. Henline, 174 Ill. 184, 51 N.E. 227 (1898); \textit{In re Reynolds' Estate}, 132 N.J. Eq. 141, 27 A.2d 226 (Prerog. Ct. 1942), aff'd, 133 N.J. Eq. 346, 32 A.2d 553 (1943); \textit{In re Everett's Will}, 105 Vt. 291, 166 A. 827 (1933); \textit{In re Armstrong's Estate}, 63 Wis. 162, 23 N.W. 407 (1885). \textit{Contra}, Monroe v. Barclay, 17 Ohio St. 302, 317 (1867). Professor Page has said that "on account of the supposed difference of natural influence of the two sexes," the wife is allowed even more freedom than the husband to exert influence over the making of a will, but the cases he cites in support of this proposition do not in fact support it. 3 W. PAGE, \textit{Wills} § 29.88 (Bowe-Parker rev. 1960).

\textsuperscript{32} "[I]n order to constitute undue influence, the conduct of the other must be such as to . . . substitute another's volition for [the testator's]. To be classed as undue, the influence must place the testator in the attitude of saying: 'It is not my will but I must do it.'" T. ATKINSON, \textit{Wills} § 55, at 256 (2d ed. 1953) (footnote omitted).

\textsuperscript{33} One court defends the special rule for spouses by averring, "This must be so from the very nature of human society . . . ." Kessinger v. Kessinger, 37 Ind. 341, 343 (1871).
stroy a testator's free agency if engaged in by his wife but will de-
stroy his free agency if engaged in by anyone else. Again, it is not
at all clear that this is so. What is clear, however, is that this rule
tends to make it easier to challenge the will of a homosexual testa-
tor leaving his entire estate to his lover\textsuperscript{34} than the will of a hus-
band leaving his entire estate to his wife.

There is another rule frequently cited by courts that suggests
a possible double standard in undue influence cases, though it is a
double standard that might favor the homosexual testator. It is
often said that facts which, were the disinherited contestant a
child of the testator, would give rise to a presumption of undue
influence will not do so when the disinherited contestant is a
nephew or other collateral relative.\textsuperscript{35} The rationale here is not that
the same course of conduct on the part of a legatee will have differ-
ent consequences depending on whether the person disinherited is
a nephew or a child of the testator. Rather, the thought is that
because there is rarely eyewitness evidence of undue influence, it is
necessary to rely on circumstantial evidence,\textsuperscript{36} and courts conse-
quently depend on various presumptions in disposing of undue in-
fluence cases. It is generally held that if the contestant can produce

evidence of probative force which establishes (1) the relations between the
one charged with exercising undue influence and the decedent, affording an
opportunity to control the testamentary act; (2) that the decedent’s condition
was such as to permit of a subversion of [his] freedom of will; (3) that

\textsuperscript{34} For a discussion of homosexual marriage as a legal or constitutional right, see
Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 682-86 (1980); Rivera, Our
Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,
30 HASTINGS L.J. 799, 874-78 (1979); Comment, Fundamental Interests and the Question
of Same-Sex Marriage, 15 TULSA L.J. 141 (1979); Comment, Homosexuals’ Right To Marry: A
Constitutional Test and a Legislative Solution, 128 U. PA. L. REV. 193 (1979); Note, The

\textsuperscript{35} Henson v. Denniston, 124 Fla. 843, 169 So. 624 (1936); In re Watmough’s Estate,
258 Pa. 22, 101 A. 887 (1917). In at least three of the four reported cases dealing with the
contest of a homosexual testator’s will, the disinherited contestants were collateral relatives.
In re Larendon’s Estate, 216 Cal. App. 2d 14, 30 Cal. Rptr. 697 (1963) (remote relatives); In
re Spaulding’s Estate, 89 Cal. App. 2d 15, 187 P.2d 889 (1947) (nephew by blood, son by
adoption); In re Kaufman’s Will, 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), aff’d, 15 N.Y.2d
825, 205 N.E.2d 864, 257 N.Y.S.2d 441 (1966) (brother and nephew). The opinion in the
fourth case does not identify the contestant. In re Anonymous, 75 Misc. 2d 133, 347

\textsuperscript{36} In re Ankeny’s Estate, 238 Iowa 754, 28 N.W.2d 414 (1947); Emery v. Emery, 222
Mass. 439, 111 N.E. 287 (1916); In re Bowman’s Estate, 143 Neb. 440, 9 N.W.2d 801 (1943);
In re Freitag’s Estate, 9 Wis. 2d 316, 101 N.W.2d 108 (1960). “[U]ndue influence is not
usually open and visible to the draughtsman of the will, . . . but is commonly exercised
behind the scene.” In re Liney’s Will, 34 N.Y. 700, 13 N.Y.S. 551 (Sur. Ct. 1890).
[the person charged with exercising the undue influence was active in procuring the execution of the will]; and (4) that such person unduly profited as beneficiary of the will.37 he will have raised a presumption of undue influence and placed on the proponent the burden of coming forward with evidence that the will was the product of the testator's free agency.38 (Sometimes the fourth element of the presumption is phrased, "a result showing the effect of such influence."39) Courts evidently believe that when a will favors a stranger over a collateral relative of the testator (a niece, for example), it is less justifiable to infer that the disposition is the result of undue influence than when it is a child of the testator who is disfavored, since "[n]ieces have not the claim upon nor could they expect to be remembered by an uncle the same as they would expect to be remembered by a father."40

II. Cases In Point

There are four cases in which the will of an allegedly homosexual testator has been contested on the ground of undue influence on the part of his lover.41 A detailed examination of these cases is necessary to ascertain whether the courts reached results different from those they would have reached had the testator been heterosexual.

In re Anonymous42 can be disposed of fairly quickly since the reported decision involved only an issue of immunity arising out of a will contest rather than the will contest itself. The testator, in his will, had left property to the respondent, who, it was alleged, had

43. Curiously, the opinion does not mention that it was a will being contested. The inference drawn herein seems a reasonable one, since the opinion refers to the transferor as "the decedent" and the case was heard in Surrogate's Court, which has jurisdiction to hear will contests. N.Y. Consr. art. 6, § 12. The opinion is only a page long and is singularly cryptic, omitting details that one would ordinarily expect to find set forth. Courts in other
been involved with the testator in a homosexual relationship. The will was contested on the ground that it was the product of the respondent’s undue influence. In pre-trial discovery proceedings the petitioner’s attorney asked the respondent about the alleged homosexual relationship, but respondent, on the basis of the fifth amendment privilege against self-incrimination, 44 declined to answer, since New York law prohibited (and continues to prohibit) homosexual acts. 45 Because criminal proceedings for violations of the law against “deviate sexual intercourse” were subject to a two-year statute of limitations, 46 the court ruled that the fifth amendment did not afford the respondent a right to refuse to answer questions relating to his conduct occurring more than two years prior to the discovery proceeding. This ruling would appear to be correct. 47 Regarding respondent’s conduct within two years of the hearing, the court did an extraordinary thing: it purported to grant him transactional immunity from prosecution and thereupon compelled him to give evidence. The grant was extraordinary in that the court was without power to do anything of the kind. A court does not have inherent power to revoke, by an offer of immunity, the privilege against self-incrimination; this power belongs exclusively to the legislature, to confer if at all by express statutory

44. U.S. Const. amend. V.
45. N.Y. Penal Law § 130.38 (McKinney 1975) makes it a misdemeanor to engage in “deviate sexual intercourse,” which is defined as “sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.” Id. at § 130.00.
grant. A statute confers such authority upon a New York surrogate, and indeed, Anonymous is the only reported case in which a New York surrogate undertook to compel self-incriminating testimony by granting immunity.

The case was ultimately settled, so we cannot know how the court would have disposed of the underlying issue of undue influence. Obviously, there is no basis even for conjecture as to whether the court's erroneous assumption of authority was the result of


[A] power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. It may be necessary for fruitful results in a particular instance but it is not so generally indispensable as to attach itself automatically to the mere power to inquire.

Doyle v. Hofstadter, 257 N.Y. 244, 260-61, 177 N.E. 489, 495 (1931) (Cardozo J.).

48.1. The court in Anonymous cited Article 50 of the Criminal Procedure Law as its authority to confer such immunity, but that statute permits the compulsion of testimony by grant of immunity only if the proceeding is one in which, by express provisions of statute, a person conducting or connected therewith is declared a competent authority to confer immunity upon witnesses therein. N.Y. CRIM. PROC. LAW § 50.20, ¶ 2(a) (McKinney 1971).

The decision to grant immunity involves balancing the harm of allowing a criminal to go unpunished against the benefit of using his evidence to convict other criminals. Such balancing can best be accomplished by a prosecutor or by an administrative agency charged with the enforcement of regulatory legislation, not by a judge. Accordingly, the New York statutes that confer the authority to grant immunity confer it only upon district attorneys, see N.Y. CRIM. PROC. LAW § 50.30 (McKinney 1971), or administrative agencies. See, e.g., N.Y. AGRIC. & MTRS. LAW § 33 (McKinney 1972) (power conferred upon the Commissioner of Agriculture or his delegate). New York statutory law grants to state courts of general jurisdiction the power to confer immunity upon a witness "in an enforcement procedure relating to disposition of property in which the judgment debtor has an interest," but no such immunity can be conferred unless twenty-four hours' written notice is given to the appropriate district attorney. N.Y. CIV. PROC. LAW § 5211 (McKinney 1978). Although the Surrogate's Court is governed by the same procedural rules and given the same general powers as the Supreme Court (New York's court of general jurisdiction), N.Y. SURR. CT. PROC. ACT § 102 (McKinney 1967), the aforementioned power would be unavailable in a will contest, because a will contest does not constitute a procedure for the enforcement of a judgment.

The court in Anonymous defended its decision in part by observing:

[S]ince the decedent is dead and the respondent has already indicated his intention to invoke privileges afforded him under the Fifth Amendment to the United States Constitution, it is very unlikely there would be any proof to support a conviction for any acts that he may have committed with the decedent.

In re Anonymous, 75 Misc. 2d 133, 134, 347 N.Y.S.2d 263, 264 (Sur. Ct. 1973). But this is irrelevant, not only because it does not avoid the statutory requirement that express authority to grant immunity be conferred upon the party offering it, but also because the fifth amendment prohibits compulsory self-incrimination even where a subsequent conviction would be less than certain. Hoffman v. United States, 341 U.S. 479, 486-88 (1951).

49. Telephone conversation with the clerk of Surrogate's Court, Nassau County, New York. (Nov. 5, 1979).
homophobia. Courts have, after all, made mistakes even when all the parties are heterosexual. But the court was certainly correct in holding that evidence of a sexual relationship between the legatee and the testator was relevant to the charge of undue influence. As part of his case a contestant must generally show that there was opportunity for the legatee to exert the influence, and certainly an ongoing sexual relationship would afford such opportunity.

In *In re Larendon’s Estate*, the legatee (one Dalton) accused of having exerted undue influence over the testator was also the testator’s murderer. At the time the case arose, however, California law did not bar a murderer from inheriting under the will of his victim, so if Dalton was to be precluded from inheriting, it had to be by means of a will contest. The opinion does not expressly state that Dalton and the testator were lovers. It does state, however, that Dalton was homosexual, and the degree of dominance that he enjoyed over the testator suggests that there was at least a sexual component to their relationship.

The facts in the case are these. The testator had been a bachelor all his life. In 1948, while he was a patient in a New York

50. See note 37 supra.
51. *In re Kelly's Estate*, 150 Or. 598, 46 P.2d 84 (1935).
The mere existence of a meretricious relationship does not render invalid a bequest made to the paramour; nor does such a relationship create a presumption that the beneficiary exerted undue influence in obtaining the testamentary recognition. But since the relationship which arises out of illegal amours may provide favorable opportunities for the exertion of undue influence, proof of the relationship is admissible when undue influence is charged.

Id. at 618, 46 P.2d at 92. But see text accompanying note 71 infra.
54. California law at the time of testator’s murder provided: “No person convicted of the murder or voluntary manslaughter of the decedent shall be entitled to succeed to any portion of the estate...” Cal. Prob. Code § 258 (West 1956). In 1963, this statute was amended, and among the changes was the addition after the word “estate” of the following phrase: “or to take under any will of decedent.” 1963 Cal. Stats. ch. 857, § 1, at 2081. Although there is no case law in point, the legislative history suggests that the prior statute applied only to intestate succession and not to inheritance by will. 38 STATE B.J. CAL. 769 (1963); see Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 647, 241 P.2d 544, 547 (1952).
The wording of the original statute certainly does not compel this reading, but statutes disabling a murderer from inheriting are, in general, strictly construed. *E.g.*, Strickland v. Wysockatcky, 128 Colo. 221, 256 P.2d 199 (1952); cf. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (held as a matter of common law that a murderer could not inherit under the will of his victim). *Contra*, Wilson v. Randolph, 50 Nev. 440, 264 P. 697 (1928) (held that common law would not bar a murderer from inheriting under the will of his victim).

55. The statement of facts is derived in part from the opinion in the will contest and in part from the opinion in the murder trial.
hospital, he met Dalton and thereupon hired him as his "companion and nurse." Dalton, who had no assets of his own, went to live with the testator and continued to live with him until the testator's death in 1960 at the age of eighty-six. Throughout their twelve years together, Dalton treated the testator with contempt and abuse, frequently subjecting him to physical violence. He caused the testator, against his lawyer's advice, to transfer some trust assets from his New York bank (testator was a New Yorker) to a San Diego bank. Indeed, Dalton seems to have brought about the testator's move to California. He completely controlled the testator's every action, even to the point of requiring the testator to ask his permission before getting up from a chair. The testator never objected to this treatment, but bore it meekly and would not allow anyone to criticize Dalton. Although the testator was certainly wealthy enough to hire any number of companions, Dalton succeeded in making him believe that if Dalton left him the testator would be alone and helpless. "I can kill you, you old bastard," Dalton once said, "and nobody will find out about it or care about it."

The testator had executed wills in 1938 and 1949, each of which left his property only to blood relatives. As the years with Dalton passed, however, he wrote new wills from time to time, increasing Dalton's share with each succeeding will. In 1955, for example, the testator executed a will leaving $10,000 to one Kendall and the bulk of the residue to Dalton. Kendall had been hired by the testator as an additional companion and nurse, but he "fell from Dalton's favor" in 1959, and Dalton drove him from the testator's house at knifepoint. The testator's last will, which was the subject of the contest, was executed in May, 1960. It was drafted by an attorney procured by Dalton, who was present with the testator and the attorney when the provisions of the will were being discussed. The will left all the testator's property to Dalton, but in the event Dalton predeceased the testator, the property was to go to one Bullock, a "homosexual associate" of Dalton whom the testator disliked. In addition to the bequest, Dalton had been the recipient of frequent gifts from the testator, and there were occasions when Dalton had forced the testator to sign checks so that Dalton could draw on the testator's account. On December 7, 1960, Dalton beat the testator to death in a particularly sadistic manner.

56. This ambiguous but suggestive phrase is the court's. In re Larendon's Estate, 216 Cal. App. 2d 14, 18, 30 Cal. Rptr. 697, 699 (1963).
57. Id. at 16, 30 Cal. Rptr. at 698.
The will was denied probate on the ground of undue influence, and the result was clearly correct. The contestant was able to raise a presumption of undue influence using the four-part test previously set forth herein. Surely, Dalton had opportunity to exert the influence, and the testator was surely in a weakened state rendering him susceptible to such influence; Dalton participated in the preparation of the will and was the sole beneficiary thereunder. To be sure, the evidence does not reveal Dalton’s participation in the execution of the will to be extensive, but there are many cases which hold that the third part of the four-part test, rather than being a requirement that the legatee have participated in the execution of the will, is a requirement that the legatee only be disposed to exert undue influence. Dalton was certainly so disposed. Even if the contestant chose not to rely on the four-part test as a means of raising a presumption of undue influence, the record taken as a whole certainly reveals that Dalton had embarked upon a course of conduct “by which the mind of the testator [was] subjected to the will of the person operating upon it” and that Dalton profited under the will as a consequence of that conduct.

In re Spaulding’s Estate is the only case of the four in which a homosexual testator’s will was upheld against a charge of undue influence. Spaulding had adopted his nephew when the latter was about 21 years old, and shortly thereafter he executed a will naming the nephew as his sole beneficiary. For the next eight years the two of them lived and worked together, building houses and gas stations and operating motels. Spaulding was sentenced to prison in 1926 for “sex perversion,” paroled in 1931, and sentenced to another two-year term in 1936 for another sexual offense. Between the two periods of incarceration, he executed a will leaving nearly his entire estate to “a young man with whom he was then acquainted,” but he revoked the will the following year. After his second release from prison he ceased living and working with his nephew, although they remained on good terms for the rest of his life. On February 27, 1940, Spaulding executed the contested will,

58. See text accompanying note 37 supra.
59. Sheets v. Estate of Sheets, 345 A.2d 493 (Me. 1975); In re Burris’s Estate, 72 N.W.2d 884 (N.D. 1955).
62. Id. at 17, 187 P.2d at 891.
63. Id.
in which he bequeathed nearly his entire estate to a young man with whom he had evidently had sexual relations—at least during the period from December, 1939 through March, 1940. Some weeks before executing the will, Spaulding described the young man as "just a punk we [sic] picked up." The opinion reveals nothing about Spaulding after March, 1940, except that he died in 1944 without ever having revoked or changed his 1940 will.

Although the testator may not have lavished much serious thought upon the testamentary disposition of his property, the mere capriciousness (if such it be) of his will is not enough to invalidate it. A person may validly make a will that is foolish or unreasonable or unjust, as long as the will is the product of his free agency, and Spaulding's will was the product of no one's agency but his own. There was no evidence that the legatee had exerted any pressure on him. The only evidence that might tend to support a finding of undue influence was that the legatee was present when Spaulding and his attorney were discussing the terms of the will. But after the legatee was introduced to the attorney, he left Spaulding and the attorney together and sat on the bench in a corner of the room far from where they were talking. Indeed, because the room was the size of two ordinary rooms, he was unable to hear their conversation, and he was not present when, some time later, Spaulding returned to the attorney's office to execute the will. That hardly constitutes evidence of undue influence. It is widely held that

[the] mere fact that legatees were present when the will was made, without any evidence that they induced or procured the execution of the will, does not raise any presumption of undue influence, and still less does the presence of a legatee in the... outer office of testator's attorney, while testator is consulting with the attorney in the inner office.

While the existence of a sexual relationship between the legatee and the testator was, as we have seen, relevant to a finding of

64. Id.
65. Towles v. Pettus, 244 Ala. 192, 12 So. 2d 357 (1943); In re Fritsch's Estate, 60 Cal. 2d 387, 384 P.2d 656 (1963); Conway v. Vizzard, 122 Ind. 266, 23 N.E. 771 (1889); In re White's Will, 121 N.Y. 465, 24 N.E. 935 (1889).
66. See note 24 supra.
68. 3 W. Page, Wills § 29.102 (Bowe-Parker rev. 1960).
69. See text accompanying note 51 supra.
undue influence, it was not sufficient. Indeed, "evidence of such relations between testator and the beneficiary is inadmissible in the absence of evidence tending to show undue influence, or that testator was weak mentally and especially susceptible to domination."  

The last of the four cases is In re Kaufmann's Will, which found the testator's will to have been the product of the undue influence of his principal beneficiary. Because this case is, of the four, perhaps the only clear example of judicial homophobia, the facts will be set forth in somewhat greater detail.

Until 1947, Kaufmann had lived in Washington, D.C. with his brother Joel and Joel's two sons; they were all on good terms. In 1947, at the age of 34, Kaufmann took up painting and moved to New York City to establish his own studio. He was ultimately to become a very successful artist. In 1948 he met Walter Weiss, five years his senior, who was an attorney not in active practice. Shortly after they met, a contract was drawn up between them whereby Kaufmann retained Weiss as financial advisor and business consultant at an annual fee of $10,000. They established offices together as financial consultants, Kaufmann paying the expenses and Weiss contributing his time. During the ten years of its existence, the consulting venture earned no fees, and the sole investment made was in an enterprise in which Weiss's brother was the principal. On Weiss's advice, Kaufmann invested $120,000 in the enterprise and lost the entire amount.

Later in 1949, Weiss moved into Kaufmann's apartment, taking full charge of its furnishing, its maintenance, and the employment of household help. There was evidence that all mail and incoming telephone calls were routed through Weiss, that Weiss censored Kaufmann's incoming mail, and that correspondence purporting to be from Kaufmann was actually dictated by Weiss. At about this same time, Kaufmann opened two checking accounts, and Weiss was given the authority to draw checks against each of

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70. Norton v. Clark, 253 Ill. 557, 97 N.E. 1079 (1912); In re Dilios's Estate, 155 Me. 508, 167 A.2d 571 (1960); Sunderland v. Hood, 84 Mo. 293 (1884); In re Mondorf's Will, 110 N.Y. 450, 18 N.E. 256 (1888); In re Lavelle's Estate, 122 Utah 253, 248 P.2d 372 (1952); In re Will of Golz, 190 Wis. 524, 209 N.W. 704 (1926).

71. 3 W. Page, WILLS § 29.92 (Bowe-Parker rev. 1960) (footnote omitted); accord, Stant v. American Sec. & Trust Co., 23 D.C. App. 25 (1904); In re Reed's Estate, 237 Mich. 691, 213 N.W. 64 (1927).

them.

In April, 1950, Kaufmann executed his first will. This will made bequests to certain family members and employees, canceled a debt owed Kaufmann by Weiss, bequeathed to Weiss the stock in Weiss's brother's company that the "financial consultants" business had purchased, and devised and bequeathed the residue to Kaufmann's brothers and nephews—"a natural testamentary disposition."\textsuperscript{73} Weiss prevailed upon Kaufmann to replace the attorney who had drafted the 1950 will, and he introduced Kaufmann to the attorney who drafted what was to be Kaufmann's final will.

Weiss made unsuccessful efforts to ingratiate himself with Kaufmann's family. In April, 1951, he wrote a "confidential memo" to Kaufmann complaining that Joel had given no business to their financial consulting venture and saying that Joel's "surface facade was a 'double-dealing', painful, and embarassing to us both."\textsuperscript{74} In June, 1951, Kaufmann executed his second will, which enlarged Weiss's share of the estate to over $500,000, including the residence and half the residue of the estate. Contemporaneously with the execution of this second will, Kaufmann wrote a letter to his family purporting to explain why he left a large portion of his estate to someone not a member of the family. The letter was put in an unsealed envelope and placed with the 1951 will (and all subsequent wills). It stated that at the time he met Weiss, Kaufmann was a "frustrated time-wasting little boy . . . terribly unhappy, highly emotional and filled to the brim with a grandly variegated group of fears, guilt and assorted complexes." The letter said that Weiss encouraged him to enter psychoanalysis, and then it continued:

Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind—and what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult!

I am eternally grateful to my dearest friend—best pal, Walter A. Weiss. What could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life? I cannot believe my family could be

\textsuperscript{73} 20 A.D.2d at 466, 247 N.Y.S.2d at 668.
\textsuperscript{74} Id.
anything else but glad and happy for my own comfortable self-determination and contentment and equally grateful to the friend who made it possible.  

Until 1954, the letter was in the possession of Kaufmann’s attorney; thereafter it came into the possession of Weiss, who caused it to be delivered to the attorneys who prepared Kaufmann’s last two wills.

In the summer of 1952, Weiss was substituted as primary beneficiary under a $75,000 life insurance policy on Kaufmann’s life. Weiss participated in the change of beneficiaries and in the transfer of the policies from Washington to New York. A few months later, Kaufmann executed a document purporting to give Weiss exclusive power over Kaufmann’s corporeal remains and the authority to make all funeral arrangements.

In April, 1953, Kaufmann executed his third will, which nominated Weiss as sole executor. About two months later, Weiss sent him a “confidential memo” stating, “Your will should be gone over, since there is at least one point needs changing.” Later that year, Kaufmann took a trip to Paris with one Mapson. Weiss had warned Mapson not to take advantage of Kaufmann during their stay in Paris. Some time thereafter, Weiss arrived in Paris unexpectedly and in the presence of Kaufmann, who stood by mutely, told Mapson to remove himself. Kaufmann attempted secretly to maintain his contact with Mapson in New York after their return, but he was discovered by Weiss, who physically intervened. Again, Kaufmann submitted silently.

At about this time, a family business controversy began. Kay Jewelry Stores, the Kaufmanns’ family business, wanted to merge with the Fairfax Company. Weiss was opposed to the merger and advised Kaufmann against it. There were enough stock votes to approve the merger even without Kaufmann’s consent, but as a dissenting shareholder he was entitled to statutory appraisal. The court in the will contest observed that the record clearly showed Weiss’s resentment of Joel and his frequent expression to Kaufmann of uncomplimentary opinions about Joel’s integrity. Nonetheless, it is worth noting that by following Weiss’s advice and filing a lawsuit against Joel, Kaufmann received for his Kay Jew-
elry stock some $70,000 more than he had been offered. 77

In May, 1954, Weiss forwarded Kaufmann's third will to an attorney named Garrison, together with the letter to Kaufmann's family and the document relating to corporeal remains. In a cover letter to Garrison, Weiss stated that Kaufmann wanted to execute a new will as soon as possible. The next day Kaufmann conferred with Garrison's partner, one Rochlin; Weiss was not present. Rochlin's draft of the new will was sent to Kaufmann two weeks later. It provided for Weiss and Garrison to be co-executors, but Kaufmann returned the draft with a request for certain changes, among them the nomination of Weiss as sole executor. This, Kaufmann's fourth will, was executed in June, 1954. He was later to execute a fifth and sixth will, which were similar to the fourth but gave Weiss a larger share. The sixth will was executed on June 19, 1958, and was the subject of the will contest.

At the first trial in Surrogate's Court, the will was held invalid on the ground of Weiss's undue influence, but the Appellate Division reversed78 and ordered a new trial on two grounds: (1) the surrogate, in his charge to the jury, had erroneously characterized Weiss as testator's attorney; and (2) the surrogate, over objection, had admitted testimony relating to incidents and facts so remote in time as to have no bearing on the issue of undue influence. At the second trial the will was again held invalid on the ground of undue influence, but this time the trial court was affirmed.79

It is true that the record reveals Weiss to be a less than exemplary citizen, but his character is hardly the issue. "No matter how evil or sinister may be the purposes of the person who attempts to exercise the influence, it does not become undue influence unless it causes the testator to execute a will which did not represent his own wishes."80 In In re Lincoln's Estate,81 for example, the court acknowledged that a rapacious nurse had, with the most mercenary motives, pressured and cozened an old man (her patient) into mar-

77. Id. at 491, 247 N.Y.S.2d at 689 (Witmer, J., dissenting).
ry ing her; but because her influence was brought to bear on his marital plans rather than his testamentary plans, the court upheld the will leaving all his property to her. In *Marlin v. Hill,* the testatrix left all her property to her deceased husband’s nephew (and business partner). Although the court believed that the nephew, while acting as administrator of the husband’s estate, had violated his fiduciary duty by purchasing property from the estate at what he knew to be less than its fair market value, the court nonetheless upheld the testatrix’s will against a charge of undue influence because there was no evidence that the nephew had even tried to impose his wishes upon the testatrix in connection with the preparation of her will.\(^{83}\)

The *Kaufmann* decision seems to have been based on the court’s conclusion that the testator was “weakwilled”\(^ {84} \) and completely dominated by Weiss in all matters. To be sure, Weiss was a dominant figure in the testator’s life since he evidently took complete charge of his household and business affairs, but that is hardly evidence that the will did not represent Kaufmann’s wishes. Dominance is not necessarily tyranny. There have been many cases in which a principal legatee completely controlled the business affairs of the testator and even participated in the execution of the will, yet the will was upheld where the bequest was prompted by affection and not by the legatee’s imposition.\(^ {85} \) In *In re Walther’s Estate,*\(^ {86} \) for example, the testatrix left virtually all her property to her sister, disinheriting three brothers and some nephews and nieces. Earlier, the sister had removed the testatrix from the latter’s squalid apartment, put her in a nursing home, had her adjudicated incompetent, and had herself appointed guardian. Although

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82. 192 Ga. 434, 15 S.E.2d 473 (1941).
83. The *Kaufmann* court noted that Weiss had given “deliberately false pre-trial testimony” to the effect that it was not until after testator’s death that he learned he was a legatee. 20 A.D.2d at 485, 247 N.Y.S.2d at 684. Yet courts have, in other circumstances, found it in their hearts to overlook a legatee’s perjury. For example, in *In re Blake’s Will, 37 N.J. Super.* 70, 117 A.2d 33 (1955), testator’s sole legatee (who was also the scrivener) testified that he had never, prior to preparing testator’s will, acted as testator’s attorney, even though such testimony was patently untrue; he had represented testator in a lawsuit seven years before. His misstatement seems no more innocent than Weiss’s, yet the New Jersey court simply attributed the misstatement to the attorney’s old age and drew no unfavorable conclusions. In any event, being a liar does not disqualify one from inheriting property.
84. 20 A.D.2d 485, 247 N.Y.S.2d 684.
85. Sterling v. Dublin, 6 Ill. 2d 64, 126 N.E.2d 718 (1955); *In re Thiede’s Estate, 301 Mich.* 658, 4 N.W.2d 47 (1942); *In re Knutson’s Will, 149 Or.* 467, 41 P.2d 793 (1935).
86. 6 N.Y.2d 49, 159 N.E.2d 665 (1959).
there was abundant testimony that testatrix objected to this treatment, the court upheld her will, putting the most benign interpretation on the facts:

It seems to us that the proponent and her husband were very close to the decedent. Moved by a sense of kinship and family duty, they, confronted with a stubbornness common to independent elderly people, compelled the decedent to submit to needed medical treatment and nursing care. Unquestionably she resented this intrusion into her private affairs, but this was only a natural reaction under the circumstances. The evidence does not irresistibly exclude the inference that family ties, natural demands of love and affection prompted the decedent to dispose of her property in this manner.\textsuperscript{87}

Weiss’s monitoring of Kaufmann’s correspondence and telephone calls could, of course, be construed as an attempt to isolate him from the natural objects of his bounty, the better to prey upon him.\textsuperscript{88} But courts have, in other circumstances, imputed to a legatee who isolated the testator the most beneficent motives—namely, a desire to protect the testator from physical\textsuperscript{89} or mental\textsuperscript{90} stress—even though those explanations seemed rather trumped up. As for Weiss’s interference with the liaison between Kaufmann and Mapson, if Weiss had been Kaufmann’s husband instead of his lover, the interference would have been regarded as a “natural” reaction rather than an unjustifiable imposition.\textsuperscript{91}

\textsuperscript{87} Id. at 55, 159 N.E.2d at 669. It is interesting to note that the Kaufmann court distinguished Walther rather cavalierly by observing that the Kaufmann case was “concerned with a marked departure from a prior, natural plan of testamentary disposition which excessively and unnaturally favors a nonrelative.” In re Kaufmann’s Will, 20 A.D.2d 464, 486, 247 N.Y.S.2d 664, 685 (1964), aff’d, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965). (emphasis added).

The Walther case reveals, by implication, that the standards used to determine competence for purposes of establishing a guardianship are different from the standards used to determine testamentary capacity. Even though a person may have been adjudicated incompetent during his lifetime and had a guardian appointed for his property, he may still be held to have possessed sufficient mental capacity while under guardianship to execute a valid will. In re McCrone’s Estate, 106 Colo. 69, 101 P.2d 25 (1940); Gilmer v. Brown, 186 Va. 630, 44 S.E.2d 16 (1947).

\textsuperscript{88} Evidence of a pattern of conduct calculated to isolate the testator from others supports a charge of undue influence. See, e.g., In re Tyner’s Will, 97 Minn. 181, 106 N.W. 898 (1906).

\textsuperscript{89} In re Spence’s Estate, 258 Pa. 542, 102 A. 313 (1917). In barring people from visiting the testatrix, the legatee told them that testatrix’s physicians had prohibited such visits, which was untrue.

\textsuperscript{90} In re Lingenfelter’s Estate, 38 Cal. 2d 571, 241 P.2d 990 (1952).

\textsuperscript{91} Weiss denied any sexual involvement with Kaufmann, see 20 A.D. 2d at 471, 247 N.Y.S.2d at 672, but he seems not to have been believed, probably because of Kaufmann’s
For it is the sexual aspect of the case that seems to have brought about the result. Consider, for example, the court’s reaction to Kaufmann’s grant to Weiss of control over his corporeal remains. The document provided that Weiss was to have the authority to act in such matters as “though he were my nearest relative... and... his instructions and consents shall be controlling, regardless of who may object to them.” Of this document, the court observed, “[Kaufmann] was then 38 and, so far as appears, physically well, and the profound concern with death, illness and hospitalization and the complete, almost sacrificial surrender of his corporeal remains to Weiss is most unusual.” It may be that the recent publicity surrounding the use and misuse of respirators and other “heroic measures” to prolong life has caused people to ponder their own ends at an earlier age today than in 1952 (when the document was executed) or 1964 (when the court’s opinion was written); but had Weiss and Kaufmann been husband and wife, it is unlikely that the court would have characterized Kaufmann’s decision as “sacrificial surrender.”

Of Kaufmann’s 1951 letter to his family explaining why he left the bulk of his estate to Weiss, the court said, “[T]he emotional base reflected in the letter... is gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy.” Statements of love frequently are pitched to a state of fervor and ecstasy, and persons are often more grateful to loved ones than reason would dictate. In In re Ford’s Estate, for example, the testator repeatedly made extravagant claims that his second wife (to whom he left most of his estate to the exclusion of an adopted child and a natural-born child by a prior marriage) was vital to his business success, even though she did little more than keep the company’s books. Yet the court found the evidence, taken as a

1951 letter.
92. 20 A.D.2d at 472, 247 N.Y.S.2d at 673.
93. Id.
95. See, e.g., Vaughan v. Vaughan, 294 Mass. 164, 200 N.E. 912 (1936), and the cases cited therein.
96. 20 A.D.2d at 474, 247 N.Y.S.2d at 674.
97. The Chicago Sun-Times recently reported a Florida case in which a woman sued her ex-lover for $6 million, asserting that he had promised to take care of her forever. The court denied her claim (except for about $187,000 based on a traditional restitution and breach-of-contract theory), saying of the defendant's promise of lifetime support, “Hyperbole is the language of lovers.” Chicago Sun-Times, June 18, 1980, at 38, col. 1.
98. 70 Utah 456, 261 P. 15 (1927).
whole, insufficient to support a finding of undue influence. 99

To be sure, Weiss's acts are consistent with his having exercised undue influence, but that is not enough. The contestant must persuade the trier-of-fact that the circumstances are inconsistent with voluntary action on the part of the testator. 100 One is compelled to agree with the dissenting justice in Kaufmann: "The verdict in this case rests upon surmise, suspicion, conjecture and moral indignation and resentment, not upon the legally required proof of undue influence; and it cannot stand." 101

The evidence offered by the foregoing materials, while hardly conclusive, nonetheless suggests 102 that the lover-legatee of a homosexual testator faces a more difficult task at probate than does his heterosexual counterpart. As proponent of the will, the lover-legatee might therefore be tempted to argue on appeal from a successful will contest that the decision below violated his rights under the Equal Protection Clause. 103 Such an argument would probably fail, however, given the present state of the law. 104 First,

99. Ford's Estate is, in other ways as well, an interesting case to compare with Kaufmann. It was alleged that Ford had "an uncontrollable desire and mania for sexual excesses and perversions, including fellatio and cunnilingus, and was susceptible of being dominated and enslaved by a woman who would submit to his proposals and gratify such appetites." Id. at 459, 261 P. at 16. His first wife was not willing to gratify these appetites, but during his first marriage he met a woman who was: the legatee under and proponent of the contested will. (Eventually, this woman was to become his second wife. She denied in court that she had engaged in sexual relations with the testator prior to their marriage, but the court seems to have disbelieved her. Id. at 477, 261 P. at 23.) Ford was alleged to have struck his first wife upon occasion and to have resented, during the first marriage, any slighting references to the proponent. The proponent kept the books for Ford's business and had the authority to draw checks on the business's account. Despite these suggestive circumstances and the court's belief that fellatio and cunnilingus "represent the lowest and most debasing forms of sexual perversion," id. at 462, 261 P. at 17, the court held that the evidence was insufficient to support a finding of undue influence.


101. 20 A.D.2d at 490, 247 N.Y.S.2d at 689 (Witmer, J., dissenting).

102. See not only the discussion of the Anonymous (text accompanying notes 42-49 supra) and Kaufmann (text accompanying notes 72-101 supra) cases, but also the general discussion of judicial homophobia (text accompanying notes 2-10 supra), the description of the tendency of juries in will contests to return verdicts more in keeping with their prejudices than with the facts (note 21 supra), and the discussion of the special preference accorded interspousal wills (text accompanying notes 30-34 supra).

103. U.S. Const. amend. XIV, § 1.

104. The suggestion is not that the argument is without merit, but rather that, as a practical matter, it is unlikely to be successful at the time of this writing. A thorough exploration of the constitutional issues is beyond the scope of this article. The reader's attention is directed to the following works: L. Tribe, AMERICAN CONSTITUTIONAL LAW 941-45 (1973); Chaitin & Lefcourt, Is Gay Suspect?, 8 LINCOLN L. REV. (1973); Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 FORDHAM L. REV. 1281 (1977);
because homosexual persons have not, in general, been held to constitute a “suspect class”\textsuperscript{105} and the right to bequeath or inherit has not been characterized as a “fundamental interest,”\textsuperscript{106} the proponent would not have the benefit of “strict scrutiny” analysis, but would probably have to be content with the minimal scrutiny afforded by the “rational basis” test.\textsuperscript{107} Second, the proponent would have to prove that the court below intentionally discriminated against him because of his sexual orientation.\textsuperscript{108} Such proof may be


In only one case have homosexual persons been held to constitute a suspect class. Acendor v. Board of Educ. of Montgomery County, 359 F. Supp. 543 (D. Md. 1973), aff’d on other grounds, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974). And in spite of that holding, the court upheld the dismissal of a homosexual school teacher.

In one other case, the court characterized as “plausible” the argument that homosexual persons constitute a suspect class, but the plaintiff therein had never in fact advanced the argument. Fricke v. Lynch, 491 F. Supp. 381, 384 n.3 (D.R.I. 1980).


The United States Supreme Court has stated, “Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.” Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). Of course, once a state chooses to grant its citizens a right or benefit, it must do so in a manner consistent with the requirements of the equal protection clause. See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968).


In fact, these rules are not quite so well-defined, and there are indications that the Supreme Court has developed a third, “intermediate” level of scrutiny in equal protection cases, particularly when classifications based upon gender are involved. See Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971); see generally Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

difficult where only one decision, rather than a pattern of decisions, is before the appellate court and where the trial court's rationale, particularly when the trier-of-fact was a jury, goes largely unarticulated. The proponent could avoid the necessity of proving intentional discrimination by premising his appeal on the Due Process Clause,\footnote{109} arguing that the clause protects an individual's right to choose a private sexual lifestyle.\footnote{110} Recent Supreme Court action, however, suggests that such a "substantive due process" approach may be no more successful.\footnote{111} In view of the likelihood of a will contest and the uncertainties of any constitutional challenge to an adverse decision, the homosexual testator might wish to circumvent the will contest procedure altogether by means of certain special planning devices. The remainder of this article will examine some of these devices.

III. "No Contest" Clauses

A "no contest" clause—more properly called a condition against contest—is a device used to discourage will contests. It is a testamentary provision purporting to preclude any legatee or devisee who contests the will from receiving any legacy or devise thereunder,\footnote{112} but this device is of limited utility in the case of the homosexual testator. First, even though the testator might wish to leave

\footnote{109} U.S. CONST. amend. XIV, § 1.
\footnote{111} In Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 985 (1976), the Supreme Court summarily affirmed the decision of a three-judge district court upholding, against a "substantive due process" challenge, a Virginia statute, VA. CODE § 18.1-212 (1950) (now codified at VA. CODE § 18.1-360 (Supp. 1980)), prohibiting anal intercourse and fellatio. (It should be noted that the statute applied regardless of the sexual orientation or marital status of the parties.) See Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), where the court upheld against a "due process" challenge the United States Navy's policy of automatically discharging all personnel found to have engaged in homosexual activity. But see Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (Bazelon, J.), holding that the Due Process Clause of the fifth amendment barred the Civil Service Commission from dismissing a homosexual employee of the federal government unless it could demonstrate some rational basis for its conclusion that a discharge would promote the "efficiency of the service." Id. at 1164.
\footnote{112} The following is a typical "no contest" clause:
Should any legatee herein directly or indirectly contest the validity of this Will and Testament in any manner, then any bequest, legacy and devise... hereinbefore made in favor of such person or persons shall be void and of no effect and such bequest, legacy and devise shall go to the St. Peter's and St. Paul's Catholic Church of Mazeppa, Minnesota... Hartz' Estate v. Cade, 247 Minn. 362, 77 N.W.2d 169 (1956).
his entire estate to his lover, he must (if he chooses to employ this
device) make a substantial bequest to each heir whom he wishes to
discourage from contesting the will. In the absence of such a be-
quest, an heir would have nothing to lose by contesting, other than
the costs of the litigation itself. A second and more fundamental
drawback is that the condition may not in fact discourage an heir
from contesting if he feels he has a good case. If the contest is
successful, the condition will be invalidated along with the rest of
the will, and the heir will take his ordinary intestate share. Even if
the contest is unsuccessful, it is the law in many states that a con-
dition against contest will not be enforced if the contest was
brought in good faith and with probable cause. In such a juris-
diction, if the heir, in good faith, institutes a will contest that is
unsuccessful, the condition will not bar him from receiving legacies
under the will. Armed with this knowledge, the testator’s heirs may
conclude that the condition does not present a serious risk.

Instead of relying on the uncertain effectiveness of conditions
against contest, the testator may wish to enter into a contract with
each of his prospective heirs not to contest his will. As long as the
contract is supported by adequate consideration, it will be en-
dorsed, and the heir will be barred from contesting the will, ei-
ther on a theory of estoppel or on the theory that the contract
was the equivalent of a release. Indeed, the contract will be en-

113. E.g., South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 A. 961 (1917); In re
Cocklin’s Estate, 236 Iowa 98, 17 N.W.2d 129 (1945); Tate v. Camp, 147 Tenn. 137, 245 S.W.
839 (1922); In re Keenan’s Will, 188 Wis. 163, 205 N.W. 1001 (1925). Contra, Schiffer v.
Brenton, 247 Mich. 512, 226 N.W. 253 (1929) (the condition will be enforced against an heir
even when the contest is brought in good faith and with probable cause); Provident Trust
Co. of Phila. v. Osborne, 133 N.J. Eq. 518, 33 A.2d 103 (1943) (same).

114. In drafting a condition against contest, the attorney ought to provide for a gift
over to another legatee in the event a contest is instituted. In a very few jurisdictions, condi-
tions against contest are enforced only if the will contains a gift over. Compare Fife v.
Van Wyck, 94 Va. 557, 27 S.E. 446 (1897) (condition will not be enforced where there is no
gift over) with Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1957) (condition will be
enforced where there is a gift over). See Rudd v. Searles, 262 Mass. 490, 160 N.E. 882
(1928).

115. In re Wickersham’s Estate, 153 Cal. 603, 96 P. 311 (1908); In re Garcelon’s Es-
teate, 104 Cal. 570, 38 P. 414 (1894); In re Cook’s Will, 244 N.Y. 63, 154 N.E. 823 (1926).

116. E.g., In re Garcelon’s Estate, 104 Cal. 570, 38 P. 414 (1894).

117. E.g., In re Cook’s Will, 244 N.Y. 63, 154 N.E. 823 (1926). A release is an agree-
ment between a prospective heir and the source of an intestate inheritance whereby the
prospective heir, in exchange for an inter vivos transfer of property from the source, agrees
to relinquish his right to share in the source’s intestate estate. See generally T. ATKINSON,
Wills § 130 (2d ed. 1953). Suppose X has three children—A, B, and C—and that under the
applicable state law of descent and distribution the three would share X’s estate equally.
forced and the will contest barred even if it appears that the testator lacked the requisite mental capacity or was subjected to undue influence at the time he executed the will.\textsuperscript{118}

Suppose the testator’s prospective heirs are his two sisters, and he transfers $5,000 to each in consideration of her agreement not to contest his will. Suppose further, however, that one of the sisters predeceases the testator, leaving a surviving son. Upon the testator’s death, will the nephew be bound by his mother’s promise not to contest the testator’s will? It is generally held that if a prospective heir releases\textsuperscript{119} his intestate expectancy to the source of that expectancy but then predeceases the source, the releasor’s heirs will be bound by the release and precluded from sharing in the intestate estate.\textsuperscript{120} Sometimes this result is reached merely as a matter of statutory construction,\textsuperscript{121} but it is properly explained as being consistent with the intestate’s probable intentions in that it permits him, without making a will, to adjust inter vivos the shares

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Suppose further that during X’s lifetime, A released his interest in X’s intestate estate in exchange for a payment of $50,000. Upon X’s death intestate, only B and C would share in X’s estate, assuming $50,000 represented adequate consideration for A’s release. Home Mixture Guano Co. v. McKeone, 168 Ga. 317, 147 S.E. 711 (1929); Chidester v. Harlan, 150 Iowa 171, 159 N.W. 659 (1916). Presumably, if X had left a will, A would have been without standing to contest it. See text accompanying notes 123-24 infra.
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119. For the definition of “release,” see note 117 supra.
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120. Quarles v. Quarles, 4 Mass. 680 (1808); Anderson v. Forbes, 169 Tenn. 223, 84 S.W.2d 104 (1935); Neil v. Flynn Lumber Co., 82 W. Va. 24, 95 S.E. 523 (1918); Liese v. Fontaine, 181 Wis. 407, 195 N.W. 393 (1923).
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Some of these cases use the word “advancement” when they mean “release;” \textit{Quarles} uses the phrase “partial advancement” for what we should call an advancement and the phrase “advancement in full” for what we should call a release. An advancement is a transfer of property from an ancestor to a prospective heir by way of anticipation of the share that the heir will inherit from the ancestor’s intestate estate. \textit{See} Brewer’s Adm’r v. Brewer, 181 Ky. 400, 407, 205 S.W. 393, 396 (1918). Suppose X dies intestate survived by three children—A, B, and C—and that under applicable law his three children would ordinarily share his intestate estate equally. Suppose further that during X’s lifetime he had transferred $80,000 to A, and that on X’s death X’s net probate estate is $150,000. If the transfer to A was coupled with a \textit{release} by A, then A would not share in his father’s estate; B and C would each inherit $75,000. If, however, the transfer to A was a mere \textit{advancement}, it will be regarded as only an anticipation of A’s right to inherit one-third of X’s $210,000 (60,000 + 150,000) of accumulated wealth. Since A received by advancement $60,000 out of that $70,000 share, A would inherit $10,000 from X’s probate estate, and B and C would each inherit $70,000. Professor Atkinson is therefore correct in characterizing a release as “an advancement, which is liquidated by agreement of the parties as the child’s entire share.” T. \textit{Atkinson}, \textit{Wills} § 130, at 727 (2d ed. 1953). If the transfer to A had been an ordinary gift, it would have had no effect on his inheritance; A, B, and C would each have inherited $50,000.
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121. \textit{See}, e.g., Anderson v. Forbes, 169 Tenn. 223, 84 S.W.2d 104 (1935).
\end{flushright}
of his estate that his prospective heirs will inherit. As one court put it, when a father gave property to one of his several sons in consideration of that son's release, "[The parties'] purpose was that neither the son nor [the son's] children should have any interest in the father's estate, and that the remainder of the father's estate should go to the other children unprovided for. The intent was that this share of the estate should be extinguished as to all claimants." Therefore, to return to the problem with which this paragraph began, the contracts with the sisters ought to provide for a release of their expectancies as well as a promise not to contest the will. The nephew would thereby be barred from inheriting by intestacy. Only a party who would share in the property if a will was denied probate has standing to institute a will contest. Because, on account of the release, the nephew would not have shared in the estate had the testator died intestate, he would be without standing to contest the will.

But the very rationale for the rule that the heirs of a releasor are bound by their ancestor's release suggests that there are pitfalls in employing this device in the case of the homosexual testator. The release is a contrivance for allocating intestate shares: that is, for excluding some but not all of one's prospective heirs from one's estate. The homosexual testator wants to bar all his heirs, and here the release theory may fail. In Pylant v. Burns, the decedent was survived by a daughter, five siblings and the issue of a deceased sibling. During the decedent's lifetime, his daughter had released her interest in his estate. Accordingly, the collateral relatives claimed the decedent's intestate estate, arguing that the daughter, although she was the decedent's nearest kindred, was barred by her release. The court held otherwise and awarded the entire estate to the daughter. The court reasoned that a release bars the releasor from sharing the estate with those of an equal degree of relationship to the decedent, but that if the only other possible heirs are of a more distant degree of relationship—a degree which, under the applicable statute of descent and distribution, would preclude their sharing in the intestate estate if some-

125. 153 Ga. 529, 112 S.E. 455 (1924).
one in a closer degree survived the decedent—the releasor takes the entire estate in spite of the release.\textsuperscript{126} Of course, this is not really an explanation at all, merely a restatement of the court’s ruling. Evidently, the court thought that the decedent, in securing his daughter’s release, could not have intended or desired that all his property pass to collateral relatives; his intention, rather, was to insure that if he had any more children, only those later-born children would share in his intestate estate.\textsuperscript{127} How the \textit{Pylant} court would decide our problem case is uncertain, since it is clear that the homosexual testator \textit{does} intend to bar all his heirs-at-law from inheriting.

The \textit{Pylant} case casts no doubt, however, on the general rule that if the testator obtains for consideration a promise from each of his prospective heirs not to contest his will, those heirs will be barred from contesting. The preceding discussion of releases has

\textsuperscript{126} Where one of a class of prospective heirs accepts from his ancestor an advancement in full of his share to which he would be entitled on the death of such intestate, he will be estopped from claiming an interest in the estate against other heirs who would otherwise share equally with him as such heir. . . . But to hold that a prospective heir, who accepts an advancement and relinquishes his claim to any further interest in the estate of a person, who subsequently dies intestate, leaving no person or persons who stand in the same degree of relationship to the intestate as such advanced prospective heir, shall not take any further interest in the estate of his ancestor, but that others should take the estate who do not stand in the same degree of relationship to the intestate as the one so advanced, and who would not inherit the estate under the statute of distributions, is quite a different thing. This is going further than we are willing to go.

. . .

Our statute clearly defines who shall inherit and take the estate of an intestate. Brothers and sisters can only inherit, “if there is no widow, or child, or representative of child.” When there is a child, he takes the estate of his ancestor by this statute. This statute cannot be changed by any agreement entered into by the intestate and his heir at law.

\textit{Id.} at 532, 112 S.E. at 457. But obviously the statute \textit{can} be changed by agreement; that is what a release does. It divides the probate estate in a manner different from what the statute of descent and distribution provides. What prompted the court’s decision, though the opinion does not say so expressly, was the notion that the enforcement of a release must be accomplished in such a way as to carry out the testator’s presumed intent, which was to secure equality of inheritance among his children, although some children might receive their shares during his lifetime and others at his death.

\textsuperscript{127} In saying that the \textit{Pylant} court concluded that the decedent intended to provide for equality among his living child and any later-born children, the author is engaging in a bit of speculation, since the release was given no more than two years before the decedent’s death and at a time when he was old enough to have a married child. (The opinion does not reveal the decedent’s age.) Although the opinion is not remarkably lucid, the decision is likely to have rested at least in part on this conclusion. \textit{See} Note, 21 Mich. L. Rev. 100 (1922).
been aimed solely at the question of what happens if one of the contracting prospective heirs predeceases the testator. The Pylant case suggests that the heir's successors would not be precluded from contesting the testator's will; the rule of the Restatement of Property is to the contrary.\textsuperscript{128} As some protection against the application of the Pylant rule, the testator could secure a promise not only from each prospective heir but also from the prospective heirs of each prospective heir. That might be expensive, though, since the testator would have to furnish consideration for each prospective heir's promise.\textsuperscript{129}

Therein lies the disadvantage of these contracts as compared with a condition against contest: they require the testator to part with wealth while still alive, because the contracts will be enforced only if supported by adequate consideration.\textsuperscript{130} While it is clear that such consideration may be far less than the heir's expectancy,\textsuperscript{131} the consideration must still be more than merely nominal. Consequently, the testator cannot (as he can when relying on a condition against contest) wait until his death to begin parting with his wealth. We must therefore turn to other techniques that the homosexual testator might use to protect his lover's inheritance.

\section*{IV. Adoption}

In every American jurisdiction, if an unmarried intestate decedent is survived by an adopted child but no natural-born descendants, the adopted child will inherit the entire estate to the exclusion of any blood relatives (such as parents or siblings) of the decedent.\textsuperscript{132} Adoption therefore suggests itself as a technique for insuring that the lover of the homosexual testator inherits the testator's prop-

\begin{itemize}
\item \textsuperscript{128} \textit{Restatement of Property} § 316, Illustration 6 (1940).
\item \textsuperscript{129} Furthermore, guardians would have to be appointed for any promissors who were minors.
\item \textsuperscript{130} T. Atkinson, \textit{Wills} § 99, at 527 (2d ed. 1953).
\item \textsuperscript{131} [A] prospective heir would be willing to take a very much less sum 30 years before the death of his ancestor than might be his due if he waited for such event. Not only would he have the use of that property during all of that time, but he would avoid the chance that his father before his death might dispose of all of his estate and die, leaving nothing for distribution among his children.
\item Neil v. Flynn Lumber Co., 82 W. Va. 24, 29-30, 95 S.E. 523, 525-26 (1918); see Eissler v. Hoppel, 168 Ind. 82, 86, 62 N.E. 692, 694 (1902).
\end{itemize}
erty. But if the testator adopts his lover, it should not be for the purpose of relying on the intestacy laws instead of a will for the devolution of property. Rather, it should be for the purpose of nullifying the status as heirs of testator's blood relatives so that they will be without standing to contest his will.

When the adoption of adults is involved, few states have any substantial restrictions as to who may adopt or be adopted. Indeed, courts acknowledge that the only purpose of adopting an adult is to make him the adoptor's heir and that such a purpose does not undermine the validity of the adoption. Still, a few state restrictions are worth noting. Florida, for example, has recently enacted a statute that prohibits homosexual persons from adopting—a restriction that seems to apply whether the adoptee is an adult or a minor. In the absence of such a statute, however,

133. Adoption of a stranger-in-blood may bring about inheritance tax advantages as well. In many states, inheritance tax rates and exemptions vary with the degree of consanguinity between the recipient and the decedent; bequests to lineal descendants are typically taxed at lower rates and subject to larger exemptions than bequests to strangers. Thus, when a stranger is adopted, his acquired status as descendant reduces the inheritance tax assessed. See, e.g., McLaughlin v. People, 403 Ill. 493, 87 N.E.2d 637 (1949); Mo. Ann. Stat. § 145.060 (Vernon 1976). A few states, however, deny this favorable inheritance tax treatment to adoptees adopted as adults. See, e.g., CAL. REV. & TAX. CODE § 13310 (West Supp. 1980) (favorable treatment denied unless adoptee was adopted at least five years prior to decedent's death); MICH. COMP. LAWS ANN. § 205.202 (Supp. 1979).

The McLaughlin case is noteworthy in that, at the time of the decedent's death, Illinois law did not provide for the adoption of adults; yet the legatee was an adult when adopted. The adoption took place in Connecticut, however, and was valid under Connecticut law. Accordingly, the Illinois court held the adoption valid for purposes of making the adoptee a descendant under the Illinois inheritance tax statute. For other cases similarly recognizing a foreign adoption decree that could not validly have been obtained in the forum state, see Delaney v. First Nat'l Bank, 73 N.M. 192, 886 P.2d 711 (1963); Barret v. Delmore, 143 Ohio St. 203, 54 N.E.2d 789 (1944).

134. In Weekes v. Gay, 243 Ga. 784, 256 S.E.2d 901 (1979), a homosexual man died intestate owning some real property in his own name. The land was claimed by decedent's heirs, but the decedent's surviving lover asserted that he was entitled to the land on the theory of implied trust, since he had furnished substantially all the consideration for the original purchase. The lover prevailed. "There is no merit," said the court, "in appellants' contention that the nature of the relationship between the decedent and the appellee should bar any relief prayed for by the appellee since the evidence was inconclusive as to the exact nature of the relationship." Id. at 787, 256 S.E.2d at 904. (The trial judge had found that the two were indeed lovers.

135. See text accompanying notes 123-24 supra.


137. FLA. STAT. ANN. § 63.042(3) (West Supp. 1979) (enacted as 1977 Fla. Laws ch. 77-140, § 1).
the adoptor's sexual orientation would likely be irrelevant.\textsuperscript{138} While courts routinely inquire into a prospective adoptor's moral character in cases where the adoptee is a minor child,\textsuperscript{139} they recognize that such scrutiny is unnecessary in adult adoption cases:

[An adoption solely for the purpose of inheriting does not have for its purpose, nor is it followed by, any change in social or domestic relationship of either party to the transaction, but has for its purpose and effect only the bestowal on the adoptee of the right of a natural heir to inherit undisposed of property from the adopted ancestor. No rights or privileges are surrendered by the person adopted . . . .]\textsuperscript{140}

Four states have restrictions on the adoption of adults which, though phrased in general terms unrelated to homosexuality, would have the practical effect of precluding a homosexual testator from adopting his lover except in very rare circumstances.\textsuperscript{141} Four other states require that the adoptee be younger than the adoptor,\textsuperscript{142} which would not so much hinder the testator as determine whether he was to do the adopting or be adopted. Arizona\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{138} In \textit{In re} Adoption of Russell, 170 Pa. Super. Ct. 358, 85 A.2d 878 (1952), an adoption was challenged, at least in part, on the curious ground that the adoptee was homosexual. "We are at a loss," said the court, "to understand this reasoning. While homosexuality is abhorrent, we know of no rule of law that a homosexual has no civil rights." \textit{Id.} at 363, 85 A.2d at 880.
  \item \textsuperscript{140} Greene v. Fitzpatrick, 220 Ky. 590, 597, 295 S.W. 896, 899 (1927), \textit{But see} \textit{N.J. Stat. Ann.} § 2A:22-1 (1952), which requires, even in the case of an adult adoptee, that the adopting parent be "of good moral character." This statutory provision has been construed as reposing in the court the discretion to refuse to grant an adoption where the adoptee is not a person of good moral character. \textit{In re} Adoption of A., 118 N.J. Super. 180, 182, 286 A.2d 751, 752 (Esses County Ct. 1972).
  \item \textsuperscript{141} \textit{Haw. Rev. Stat.} § 578-1.5 (1976) (adoption of adults is limited to adoptor's nieces, nephews, and stepchildren); \textit{Idaho Code} § 16-1501 (1979) (adults may be adopted only if they would have been adopted as minors but for the inadvertence of the adoptor); \textit{Ohio Rev. Code Ann.} § 3107.02 (Page 1980) (an adult may be adopted only if he is disabled, is mentally retarded, or established a child-foster parent or child-stepparent relationship while still a minor); \textit{Va. Code} § 63.1-222 (Supp. 1979) (the adult adoptee must have resided with adoptor for at least one year while adoptee was a minor). \textit{See also} \textit{Ill. Rev. Stat.} ch. 40, § 1504 (1979) (an adult who is not a blood relative may not be adopted unless he has previously resided with the adoptor for more than two years); \textit{N.J. Stat. Ann.} § 2A:22-2 (Supp. 1980-1981) (adopter must be at least ten years younger than adoptor); \textit{P.R. Laws Ann. tit. 31, § 531 (1968) (adopter must be at least sixteen years younger than adoptor).}
and Nebraska\textsuperscript{144} appear to be the only American jurisdictions that do not permit the adoption of adults under any circumstances.

Apart from statutory restrictions as to relative ages, is there any basis for deciding which lover should be the adoptor and which the adoptee? Since the adoption of an adult does not give the adoptor any legal authority over the adoptee,\textsuperscript{145} the sole consideration should be how inheritance would be affected. If the adoptor is the first to die, the adoptee will inherit by intestacy to the exclusion of the adoptor’s blood relatives.\textsuperscript{146} But suppose the adoptee is the first to die.\textsuperscript{147} In the vast majority of jurisdictions, adoption cuts off the right of the adoptee’s natural parents (and their relatives) to inherit from the adopted child in the event of his intestacy,\textsuperscript{148} which means they would be without standing to contest any will that the adoptee might execute.\textsuperscript{149} But in Illinois, for example, if an adoptee dies intestate,

the natural parent and the lineal or collateral kindred of the natural parent shall take from the adoptee and the adoptee’s kindred the property that the adoptee has taken from or through the natural parent or the lineal or collateral kindred of the natural parent by gift, by will or under intestate laws.\textsuperscript{150}

Under this statute, upon the adoptee’s death prior to the adoptor’s, the adoptee’s blood relatives would have standing to contest the adoptee’s will if he possessed at his death any property that he originally acquired from blood relatives. Perhaps, in Illinois at least, the person with the shorter life expectancy (or the more

\textsuperscript{144} Appeal of Ritchie, 155 Neb. 824, 53 N.W.2d 753 (1952).
\textsuperscript{145} See text accompanying note 140 supra.
\textsuperscript{146} See the statutes listed at note 132 supra.
\textsuperscript{147} The inheritance rights of adoptors and adoptees are usually determined by the statutes in force at the time of the decedent’s death rather than by those in force at the time of the adoption. In re Williams, 154 Me. 88, 144 A.2d 116 (1958); In re Holibaugh’s Will, 33 N.J. Super. 232, 109 A.2d 706 (Monmouth County Ct. 1954), aff’d, 18 N.J. 229, 113 A.2d 654 (1955); Black v. Washam, 57 Tenn. App. 601, 421 S.W.2d 647 (1967). But see Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836 (1950). Thus, adoption is necessarily a somewhat speculative estate planning technique, since the applicable law can be changed after adoption. As a matter of statutory construction, a few courts have held that the determinative date is the date of adoption rather than the date of death. See, e.g., Hall v. Scarlett, 181 F.2d 277 (D.C. Cir. 1950), rehearing denied, 188 F.2d 990, cert. denied, 341 U.S. 925 (1951).
\textsuperscript{149} See text accompanying notes 128-24 supra.
\textsuperscript{150} Ill. Rev. Stat. ch. 110½, § 2-4(b) (1979).
litigious relations) should do the adopting. Another consideration is that in most states a person who is adopted loses his right to inherit from or through his natural parents, which suggests, all other things being equal, that the person with the wealthier relations do the adopting.

Because the adoption of an adult does not in any way alter the legal obligations or independence of either party, it is hardly surprising that the procedures for adult adoption are considerably simpler than those for the adoption of children. There is not the same detailed investigation of the adoptor’s background as there would be in the case of child adoption, and the consent of the adoptee’s parents is not required in any jurisdiction, although in a few states if the adoptee is married, his spouse’s consent is required.

Some states, however, require a finding that the adoption is in the best interests of the parties before an adult may be adopted. Search has revealed only one case where such a “best interests”

151. Illinois law requires that the adoptee have resided “in the home of” the prospective adoptor for more than two years continuously prior to the commencement of the adoption proceeding. Ill. Rev. Stat. ch. 40, § 1504 (1979). As of this writing, there has been no case law interpreting the quoted phrase. This requirement could affect the decision as to which party should be the adoptor and which the adoptee.


154. Because the adoption of an adult deprives his natural parents of their status as his heirs, see note 145 supra, one might suppose that the parents ought to have the right to prevent the adoption by withholding their consent. The fallacy in such reasoning is that natural parents have no legal or constitutional right to inherit from their child. See generally T. Atkinson, Wills § 5 (2d ed. 1955). If the child wrote a will completely disinheriting them, they would be effectively barred from sharing in his estate. One commentator has suggested, in an otherwise excellent note, that “due process” requires that natural parents be given at least notice of the adoption proceeding. “Without notice, the natural parent may never become aware that his child has been adopted as an adult, and the child may benefit under the will of the natural parent when he would have been excluded otherwise.” Note, Adult Adoption, 1972 Wash. U.L.Q. 253, 259. Here again there is a fallacy, in that the author of the note seems to suppose that parents have a legal right to be notified whenever a child of theirs does anything that might grieve them or cause them to disinherit him.


requirement was construed in the context of an adult adoption: *In re Adoption of A.*, 157 where a married couple sought, for the most charitable reasons, to adopt an adult man confined to prison. The couple’s petition was denied on the ground that they had failed to show that such adoption would be “to the advantage and benefit of the person to be adopted,” as required by the applicable statute. 158 The court’s explanation was somewhat unconvincing; it expressed the view that when the adoptee was eventually released from prison, he might “suffer great embarrassment” 159 as a consequence of the adoption because he was a married man with two children. Perhaps an unstated rationale for the finding that the adoption would not be for the adoptee’s advantage was that the petitioners were, in the court’s words, “of apparently modest means,” 160 so the adoptee would be unlikely to reap a substantial inheritance. 161 Because of the dearth of case law in point, it is difficult to determine the extent to which these “best interests” statutes might be used to bar the adoption of a homosexual lover, though it is certainly true that adoptions of mistresses have been countenanced thereunder. 162

In a sizable minority of states 163 there are no laws prohibiting private consensual sexual acts between unrelated adults of the same gender. If, however, a homosexual person in such a jurisdiction adopted his lover as his child, would any subsequent sexual activity between them be a violation of the statutes prohibiting incest? In the absence of a specific reference to adopted children in an incest statute, it is held that because the essential element of incest is consanguinity, 164 sexual interaction between a person and

159. 118 N.J. Super. at 183, 286 A.2d at 753.
160. Id. at 181, 286 A.2d at 751.
161. The court also expressed the view that the New Jersey statute empowered it to refuse to allow an adoption in cases where the adoptee was not of good moral character.
163. For a list of the states that have decriminalized private consensual homosexual acts, see Rivera, supra note 34, at 950-51.
his adopted child does not constitute incest.\textsuperscript{165} The statutes of
some states expressly limit the crime to persons of blood relation
rather than affinity.\textsuperscript{166} Illinois law, on the other hand, provides that
sexual activity with an adopted child is a felony if the child is
under age eighteen\textsuperscript{167} but is not criminal if the child is older; Col-
orado has a similar provision, although the critical age there is
twenty-one.\textsuperscript{168} Because incest is regarded as a purely statutory
crime rather than a codification of a common law rule, incest stat-
utes are strictly construed.\textsuperscript{169} Consequently, the prohibition against
incest will probably not be a bar to the adoption of a homosexual
lover.

Unfortunately, although the blood relatives of the adoptor
would have no standing to contest the will,\textsuperscript{170} they would have
standing to contest the adoption itself after the adoptor’s death.\textsuperscript{171}
It has been held that because adoption may effect a devolution of
property and so accomplish the same result as a will,

the courts should, in determining the validity of the adoption, apply the

daughter constitutes incest).

\textsuperscript{165} State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1973); State v. Youst, Ohio App. 381,
59 N.E.2d 167 (1943); see State v. Lee, 196 Miss. 311, 17 So. 2d 277 (1944).

\textsuperscript{166} \textbf{ALASKA STAT.} \S 11.41.450 (1979); \textbf{S.D. CODIFIED LAWS ANN.} \S 22-22-19 (1979).

\textsuperscript{167} \textbf{ILL. REV. STAT.} ch. 38, \S 11-10 (1979).

\textsuperscript{168} \textbf{COLO. REV. STAT.} \S 18-6-302 (1979), provides that “sexual intercourse” with an
adopted child under age 21 constitutes aggravated incest. Section 18-6-301 provides that
“sexual intercourse” with a “descendant” constitutes incest, a less serious felony, but the
word “descendant” presumably refers only to descendants by blood. See text accompanying
notes 164-65 \textit{supra}. Elsewhere in the Colorado Criminal Code, a provision makes clear that
the term “sexual intercourse” does not comprehend fellatio, cunnilingus, or anal intercourse.
\textbf{COLO. REV. STAT.} \S 18-3-401(6) (1979). Indeed, as a matter of general usage, the term “sexual
intercourse” does not refer to those other techniques. See Liptroth \textit{v.} State, 335 So. 2d 683, 685 (Ala. Civ. App. 1976); State \textit{v.} Fears, 116 Ariz. 494, 496, 570 P.2d 181, 183 (1977);
Buculis, 373 N.E.2d 221, 226 (Mass. App. Ct. 1978). Since incest statutes are strictly con-
strued, it could be argued that even if the adopted child were under age 21, so long as the
sexual interaction between adoptor and adoptee did not involve the penetration of vagina
by penis, there was no incest.

\textsuperscript{169} People \textit{v.} Baker, 69 Cal. 2d 44, 442 P.2d 675 (1968); State \textit{v.} Rogers, 260 N.C. 406,
133 S.E.2d 1 (1963).

\textsuperscript{170} See text accompanying note 135 \textit{supra}.

\textsuperscript{171} \textit{In re Adoption of Sewall,} 242 Cal. App. 2d 208, 51 Cal. Rptr. 367 (1966); Greene
1049 (1909), appeal dismissed, 216 U.S. 616 (1910); Tucker \textit{v.} Fisk, 154 Mass. 574, 28 N.E.
1051 (1891); Wilson \textit{v.} Caulfield, 228 Mo. App. 1206, 67 S.W.2d 761 (1934); Stevens \textit{v.}
Halsead, 181 A.D. 198, 168 N.Y.S. 142 (1917); \textit{In re Adoption of Brundage,} 194 N.Y.S.2d 703
(Sup. Ct. 1954), aff’d, 285 A.D. 1185, 143 N.Y.S.2d 611 (1955); \textit{In re Adoption of Russell,}
same tests as in case of a testamentary act. The want of testamentary capacity in the foster parent and the exercise of undue influence by the adopted person should, at the suit of the next of kin or heir at law, be sufficient to nullify the act.\textsuperscript{172}

Furthermore, the applicable legal principles in undue influence cases are the same whether it is an adoption or a will that is being challenged.\textsuperscript{173} This might suggest that the homosexual testator, by adopting his lover, will not appreciably reduce the risk that his testamentary design will be overturned by disappointed relatives.\textsuperscript{174}

It might still be advantageous for the homosexual testator to adopt his lover, however, if he promptly informs his prospective heirs of the adoption.\textsuperscript{175} A number of states have statutes of limitations requiring that actions to vacate adoption decrees be brought within a certain period of time.\textsuperscript{176} California, for example, requires such actions, when founded on allegations of fraud or undue influence, to be brought within five years after entry of the decree.\textsuperscript{177} It was held in \textit{In re Adoption of Sewall},\textsuperscript{178} however, that "the period of limitations," at least in the case of adult adoptions, "commences to run only when the fraud is or reasonably should be discovered."\textsuperscript{179} One may infer from the above that if the homosexual adoptor informs his prospective heirs of the adoption as soon as it

\begin{itemize}
\item 174. Indeed, one case stated categorically that it is against public policy for one member of an adulterous couple to adopt the other. Stevens v. Halstead, 181 A.D. 198, 168 N.Y.S. 142 (1917) (dictum), although another case, decided only ten years later, had no difficulty upholding the adoption by a man of his married mistress, with the result that she inherited his intestate estate. Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896 (1927).
\item 175. The adoptor may very well be unwilling to inform his blood relatives of the adoption, but the mere fact that he keeps the adoption secret will not be regarded as grounds for setting aside the adoption decree. \textit{In re Adoption of Brundage}, 134 N.Y.S.2d 703 (Sup. Ct. 1954), \textit{aff'd}, 285 A.D. 1185, 143 N.Y.S.2d 611 (1955).
\item 176. \textit{E.g.}, \textit{Cal. Civ. Code} \S 227d (West 1954) (limitations period is either three years or five years, depending on the alleged ground for vacating the decree); \textit{Del. Code Ann. tit. 13, \S 918} (1975) (two-year limitations period); \textit{N.C. Gen. Stat.} \S 48-28 (1976) (no collateral attacks on adoption decrees are permitted); \textit{Ohio Rev. Stat.} \S 109.381 (1979) (one-year limitations period).
\item 179. \textit{Id.} at 226, 51 Cal. Rptr. at 381. There is language in the \textit{Sewall} opinion suggesting that if the prospective heirs are minors at the time of the adoption, the five-year limitations period does not begin to run as to them until they reach their majority. \textit{Id.} at 226, 51 Cal. Rptr. at 380-81.
\end{itemize}
occurs, it is likely that they will be compelled either to object to the adoption then and there or to acquiesce in it permanently, and they may be most unwilling to challenge the adoptor face to face. Even in the absence of a statute of limitations, an action to vacate an adoption decree may be barred by laches, though a court may be reluctant to apply the doctrine in the case of an adult adoption. There is clearly a need to maintain the finality of adoption decrees when children are involved, so that their home may not later be disrupted because of some procedural defect at the original hearing. This need is less compelling when the adoptee is an adult.

The great disadvantage of adoption as an estate planning technique is its irrevocability. Except in very narrow circumstances, once the testator adopts his lover, he may not abrogate the adoption. The adoptee will continue to be the testator's heir forever, unless by chance the adoptee is subsequently adopted by someone else. Consequently, although the testator always has the power to disinherit the adoptee by devising and bequeathing his property to others, the adoptee will always have standing to

180. If the adoption decree is rendered in a state other than that of the decedent's domicile (the forum state), the forum state's statute of limitations may not apply. See In re Estate of O'Dea, 29 Cal. App. 3d 759, 105 Cal. Rptr. 756 (1973), an unusual case in which the adoptee herself was challenging the adoption so that she might inherit from her natural mother.


182. See, e.g., Pierce v. Pierce, 522 S.W.2d 435 (Ky. 1975) (fraud or undue influence); Mo. ANN. STAT. § 453.130 (Vernon 1977) (adoption may be abrogated if the adoptee develops feebility, epilepsy, or, as a result of pre-adoption conditions, venereal disease).


184. Where an adopted child is, during the lifetime of the adoptive parent, adopted by another adoptive parent, there is disagreement among the cases as to the effect of the successive adoptions. Some cases hold that the second adoption cuts off the adoptee's rights as an heir of the first adoptive parent. Quintract v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957); In re Leichtenberg's Estate, 7 Ill. 2d 545, 131 N.E.2d 487 (1956); In re Klapp's Estate, 197 Mich. 615, 164 N.W. 381 (1917); In re Talley's Estate, 188 Okla. 338, 109 P.2d 495 (1941). Others hold that the adoptee continues to be an heir of the first adoptive parent (as well as of the second). Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920); Dreyer v. Schrick, 105 Kan. 495, 185 P. 30 (1919); Succession of Gambino, 225 La. 674, 73 So. 2d 800 (1954); In re Egley's Estate, 16 Wash. 2d 681, 134 P.2d 943 (1943).

185. Except in Louisiana, children of a testator are not accorded any "forced heirship" rights permitting them to take a statutory share of the estate notwithstanding a valid will. See generally T. Atkinson, Wills § 36 (2d ed. 1953).
contest the testator's will, even if he and the testator have long since terminated their relationship.

V. LIFE INSURANCE AND INTER VIVOS TRUSTS

The fundamental quality of testamentary transfers is revocability. Absent any desire to minimize taxes, a testator typically wishes to retain until death the power to determine who will enjoy his property after his death. Life insurance is one popular means of making such a wealth transfer.\textsuperscript{186} The insured, by purchasing an insurance policy on his life and naming a beneficiary, is in effect transferring wealth at death to that beneficiary while retaining (in the usual case) the inter vivos power to cancel the policy or alter the beneficiary designation whenever he wishes. Life insurance is therefore an excellent will substitute because it gives the transferor complete control during his lifetime over the wealth represented by the policy.

If the person who procures and owns the life insurance policy does not have an "insurable interest" in the insured's life, the insurance policy is void as a mere wagering contract on human life.\textsuperscript{187} "Such contracts are an incentive to crime in that where the required relationship is lacking[,] the person to be benefited by the policy is interested in the death rather than the life of the insured."\textsuperscript{188} Accordingly, an "insurable interest exists only if the beneficiary has some interest, or has a reasonably expectation of advantage, from the continuance of the insured's life, or would lose by his death."\textsuperscript{189} Everyone, however, has an insurable interest in his own life.\textsuperscript{190} An insured may procure and own an insurance policy on his own life and designate anyone he wishes as beneficiary, even if the designate does not have an insurable interest in the insured's life.\textsuperscript{191} A homosexual person, therefore, could use life in-

\begin{enumerate}
\item \textsuperscript{186} See generally A. Casner, ESTATE PLANNING 323-65 (4th ed. 1979).
\item \textsuperscript{188} 3 G. Couch, INSURANCE § 24:118, at 222 (2d ed. 1960).
\item \textsuperscript{189} 2 J. Appleman, INSURANCE LAW AND PRACTICE § 762, at 119 (1966).
\end{enumerate}
surance as a device for transferring wealth to his lover at death.

Unfortunately, the specter of undue influence haunts the world of life insurance as well. Where the owner of a life insurance policy has changed the designated beneficiary, if the original beneficiary can prove\textsuperscript{192} that the change resulted from the undue influence of the substituted beneficiary, the latter beneficiary will be barred from taking under the policy, and the wealth represented by the policy will pass to the original beneficiary.\textsuperscript{193} The original beneficiary has a choice of remedies: he may sue to enjoin the insurer from paying the proceeds to the substituted beneficiary and to require payment to himself instead,\textsuperscript{194} or he may bring an action for damages against the substituted beneficiary.\textsuperscript{195} The concept of undue influence is the same in this kind of case as in will contests.\textsuperscript{196} Therefore, a homosexual insured who changes a beneficiary designation from a blood relative to a lover will be subject to the same uncertainties as he would with a will. It is true that in a minority of jurisdictions it is held that the original beneficiary, because he had no vested rights in the policy proceeds while the insured was alive, has no standing to challenge the change of beneficiaries by charging undue influence.\textsuperscript{197} But it is unwise to rely on these cases, because they are badly reasoned: a prospective heir likewise has only an expectancy rather than a vested right in the intestate estate of his ancestor,\textsuperscript{198} yet there is no doubt that he has standing to contest any will the ancestor might execute.

Suppose the designation of the insured’s lover as beneficiary represents not a change of beneficiaries but the original designation. Can the insured’s blood relatives set aside the transaction as having been procured through the undue influence of the benefi-
ciary?199 It would seem that the issue here is the same as the more general one: can a gratuitous transfer be set aside at the behest of the transferor’s heirs or personal representative on the ground that the transfer was procured through the transferee’s undue influence? Since the issue is the same, it will be helpful to consider, in conjunction with life insurance, another popular device for transferring property at death while retaining control over the property until death: the revocable inter vivos trust.200

Suppose, during his lifetime, a homosexual settlor transfers certain property in trust, the terms of which provide that the income is to be paid to him for his life. In addition, he retains the right to invade the corpus for his own benefit and to amend or revoke the trust at any time. Upon his death, the remaining trust property is to go to his lover absolutely. After the settlor’s death, may the trust be set aside on the ground that it was procured through the lover’s undue influence?201

It is clear that an inter vivos transfer—revocable or irrevocable—may, if procured through undue influence, be set aside either at the behest of the donor himself during his lifetime202 or by the donor’s heirs or personal representative after the donor’s death.203 The applicable law of undue influence would be the same in such a proceeding as in a will contest.204 It is therefore apparent that the

199. When an inter vivos transfer is, after the death of the transferor, set aside on the ground that it was procured through undue influence, the transferred property becomes part of the transferor’s probate estate. See McEniry v. Coats, 333 So. 2d 568 (Ala. 1976); In re Estate of Herrn, 284 N.W.2d 191 (Iowa 1979). Consequently, it will pass pursuant to the transferor’s will, if the residuary clause is broad enough to encompass such property; in the absence of such a will, the property will pass to his intestate heirs.


201. Because the assets of a successfully challenged inter vivos trust become part of the settlor’s probate estate, see note 199 supra, the settlor’s blood relatives will have standing to attack the trust only if they would share in the probate estate. If, therefore, the settlor left a will bequeathing his estate entirely to his lover, it will be necessary for the blood relatives also to contest that will if they wish to attack the trust.


homosexual settlor must be as concerned about charges of undue influence as is the homosexual testator.

An inter vivos trust case that makes an interesting comparison with In re Kaufmann's Will205 is Knowles v. Binford.206 Although homosexuality is nowhere mentioned in the opinion, the facts are somewhat suggestive in that both settlor and beneficiary were women who had never married and who, during the last years of settlor's life, had lived in the same house and slept in the same bed.207 In 1959, the settlor created a revocable trust. The income was to be paid to her for her life, then to her elder brother for life, then to her younger brother for life. Upon the termination of the life estates, the trust was to terminate and the corpus was to be distributed equally to her nieces and nephews. In 1960, at the age of 71, she moved from her home in Baltimore, where she had lived all her life, to the suburban Philadelphia home of her friend, Florence Knowles, where she lived until her death. Settlor amended the trust twice: once in 1963 and once in 1969. As a result of the first amendment, all her nephews but one were excluded from the trust. As a result of the second amendment, the nieces were likewise excluded, and the trust thereafter provided that the income upon settlor's death was to go to Knowles for life, remainder to one nephew absolutely. It was this second amendment that was the subject of the lawsuit, the nieces alleging that it was procured through the undue influence of Knowles.

The proponents of the trust argued "that the disposition directed by the second amendment was natural in view of the fact that the two ladies had been like sisters for more than 70 years . . . ."208 Nonetheless, the court held that the trust instrument was the product of undue influence, not affection, and was accordingly invalid. As in Kaufmann, there was unrefuted testimony that Knowles censored settlor's mail, intercepting and de-

207. Id. at 11, 298 A.2d at 866.
208. Id.
stroying letters from the contesting nieces. Also, as in *Kaufmann*,
the attorney whom settlor employed to draft the second amend-
ment was not her customary attorney but rather Knowles' attor-
ney. Unlike *Kaufmann*, however, there was also unfututed testi-
mony that Knowles had physically prevented the settlor from
visiting her family in Baltimore and that settlor had in fact wanted
her nieces to share in the trust estate. All in all, the contestants in
*Knowles* made out a better case for undue influence than did the
contestants in *Kaufmann*, although it is certainly true that the
fruits of the alleged undue influence in *Knowles* (a life estate) were
considerably more modest than those in *Kaufmann* (virtually the
entire probate estate).

It is evident that the law does not provide a homosexual trans-
feror, when he uses a revocable inter vivos trust, with any greater
protection against challenges grounded on undue influence than
when he uses a traditional will. The inter vivos trust may, however,
have the advantage of secrecy. Although the terms of a will are
necessarily public (since, to be effective, a will must be validated
by a probate court), those of an inter vivos trust are not. 208 Of
course, it would hardly be reassuring to the homosexual transferor
to be advised that his testamentary plans will be kept intact only
so long as his relations do not find out about them.

**VI. CONCLUSION**

There is so little case law directly on point that any conclusions

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209. Generally, a revocable inter vivos trust instrument does not need to be admitted
to probate in order to be effective. *In re Estate of Meskimen*, 39 Ill. 2d 415, 235 N.E.2d 619
(1968). This does not mean, however, that the terms or existence of the trust will necessarily
remain secret. In Missouri, for example, the personal representative of the estate must file
with the court of probate an inventory of the decedent's assets that includes all property
Since transfers in revocable trust are subject to that tax, Mo. Ann. Stat. § 145.020 (Vernon
1976), the existence of the trust will eventually become a matter of public record. Mo. Ann.

Another practical advantage may flow from the use of a revocable inter vivos trust.
Because a will can be written casually and then forgotten, a jury may readily be persuaded
that the dispositive provisions therein represent only the testator's fancy at the moment of
execution, resulting from the influence of his lover. A funded revocable inter vivos trust, on
the other hand, because it generally provides for payments to the settlor throughout his life,
continually thrusts itself into the settlor's consciousness. A jury might therefore infer that
the settlor, unlike the testator, had constantly reaffirmed the dispositive provisions in the
trust by refraining from revoking it. In other words, a contestent might have more difficulty
persuading a jury that a revocable inter vivos trust was the product of the ephemeral influ-
ence of a beneficiary.
are necessarily speculative, but there is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a heterosexual testator who bequeaths the bulk of his estate to a spouse or lover. Although the homosexual testator might reduce this risk somewhat by employing the device of adoption or the revocable inter vivos trust, the risk would be by no means reduced to that borne by his heterosexual counterpart. His testamentary plans will continue to be unduly jeopardized so long as courts regard homosexuality as a special case.