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Attorneys: Scrivener as Beneficiary of Will

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a contemporaneous trier of fact.[35] The United States Court of Appeals for the Eighth Circuit in a recent decision seems to agree:

> The Ellis case was decided in 1943. Almost a quarter of a century later the empirical judgment of all courts, both state and federal, still follows the orthodox view, contrary to the liberal suggestions early espoused by Dean Wigmore. (See Wigmore, section 1018 (3rd ed Supp 1964).) The right to confront the witness at the time the statements are made is paramount in a criminal trial. U.S. Const. Amend. VI.[36]

The Sixth Amendment occupies much of the same ground as the hearsay rule[37] and the right to cross-examination is a facet of the right to confrontation guaranteed by this amendment. The passage of time and the altered circumstances since the witness' prior declaration may make the subsequent cross-examination inadequate. The question of what constitutes a cross-examination adequate to give the defendant his constitutional right of confrontation presents a potential problem for Wisconsin in its application of the *Gelhaar* rule.

HERBERT V. ADAMS

Attorneys: Scrivener as Beneficiary of Will—"An attorney has a duty not to harm but to maintain the integrity of the legal profession, even though this may call for a personal sacrifice . . . ."[1] This duty to the profession may become onerous when a problem arises concerning a will in which the attorney-draftsman is named as a beneficiary. In such a situation, the attorney not only risks undermining public trust in the integrity of the legal profession but also chances a charge of conflict of interest. He may also render himself incompetent to testify about the will because of a "dead man's statute." The most serious risk is that the will will be invalidated if contested, an especially harsh result in jurisdictions, including Wisconsin, which do not follow the rule of partial will invalidity in undue influence cases.[2]

In *State v. Collentine,*[3] the Wisconsin Supreme Court addressed itself to the problem and, exercising its supervisory authority over the Bar, promulgated the following rule:

> In order to prevent future misunderstandings, we conclude and establish as a rule for prospective application that a lawyer

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[35] The California court pointed out that the United States Supreme Court has been zealous in protecting Sixth Amendment rights from erosion. Smith v. Illinois, 390 U.S. 129 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Bridges v. Wixon, 326 U.S. 135 (1945).
[36] Goings v. United States, 377 F.2d 753, 762 n.12 (8th Cir. 1967).
[37] PRELIMINARY DRAFT Art. VIII [*Hearsay, Confrontation, and Due Process*], at pp. 156-58.
[1] State v. Horan, 21 Wis. 2d 66, 70, 123 N.W.2d 488, 490 (1963).
[2] *Id.*
[3] 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

> may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than could be received by law in absence of a will. Under any other circumstances in which the lawyer-draftsman is a beneficiary, this court will conclude that the preparation of such a will constitutes unprofessional conduct.
>
> When a testator wishes to have his attorney draft a will in which that attorney is entitled to any more than he would be at law, it is the absolute duty of the attorney to refuse to act. He has the responsibility of advising his client to consult another attorney if he wishes to pursue such a bequest.[4]

The rule appears absolute; it is henceforth unprofessional conduct for a lawyer to draft a will by the terms of which the lawyer is to receive a greater share than he would under the intestacy laws. Some members of the bar have criticized the *Collentine* decision as proscribing an attorney's engaging in estate planning for his family. Criticism has also been directed at the decision's silence with respect to its application to group practice.

The theory that the draftsman of a will commits an impropriety when he includes himself as a beneficiary dates back to ancient Rome where an ordinance of the Emperor Claudius decreed that the writer of another's will should not mark down a legacy for himself.[5] The ordinance's modern counterpart, though not nearly as prohibitive, is found in the American Bar Association Code of Professional Responsibility in Ethical Consideration 5-5 of Canon 5 which speaks generally in terms of clients' conflicting interest.[6]

In most jurisdictions, the mere existence of an attorney-client relationship between a testator and a beneficiary under a will does not by itself raise a presumption that the devise or bequest was procured by undue influence.[7] In many jurisdictions, however, a presumption of undue influence does arise where "additional circumstances of a suspicious character are present."[8] A New York case, for example, has held that:

> [W]here a client makes a will in favor of her lawyer, such a will, when made to the exclusion of the natural object of the testatrix' bounty, is viewed with great suspicion. In the absence of any explanation, a jury may be justified in drawing the inference of undue influence.[9]

More jurisdictions recognize that when a presumption of undue influence arises against such a gift, the burden of proof to overcome the

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[4] *Id.* at 332, 159 N.W.2d at 53.
[5] *In re* Blake's Will, 21 N.J. 50, 120 A.2d 745 (1956).
[6] ABA SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY, at p. 58 (Final Draft, July 1, 1969).
[7] Yribar v. Fitzpatrick, 91 Idaho 105, 416 P.2d 164 (1966).
[8] *In re* Estate of Smith, 68 Wash. 2d 145, 411 P.2d 879 (1966).
[9] *In re* Wharton's Will, 270 App. Div. 670, 674, 62 N.Y.S.2d 169, 171 (1946).

presumption is upon the attorney.[10] However, regardless of when the presumption arises, and regardless of the degree of proof necessary to overcome the presumption, virtually all jurisdictions indulge in a rebuttable presumption of undue influence when a scrivener takes under a will to the exclusion of natural objects of the testator's bounty.[11] The operation of the presumption has been extended to include the attorney's wife,[12] father,[13] son,[14] and agent.[15]

This traditional line of thinking was followed in Wisconsin as recently as 1962 when, in *Estate of Spenner,*[16] the Supreme Court held that a presumption of undue influence arose from the fact that the attorney who drafted the will was one of many cousins of the testatrix who were designated remaindermen. The court found, however, that the presumption was

> [O]vercome by the evidence which clearly establishes that the result accomplished by the will produces no special benefit for Stern, as distinguished from the benefits given to other members of the same class, to wit, all of the cousins of the deceased.[17]

One year later, in *State v. Horan,*[18] the Wisconsin Supreme Court established some guidelines as to what would be permissible when it said:

> A lawyer may draft a will for his wife, his children, or his parents, or other close relatives, in which he is a beneficiary . . . . [I]f the proposed legacy to himself or a member of his family is reasonable and natural under the circumstances or no more than would be received by law and no reasonable grounds in fact exist for the attorney to anticipate a contest or for the public to have reasonable cause to lose confidence in the integrity of the bar, such will may be drawn.[19]

It was against this backdrop of case law that *Collentine* entered and transformed what hitherto was a rebuttable presumption into an apparently conclusive one.

Interpretation of Collentine

Prior to *Collentine,* attorneys were permitted to draft non-natural object wills in some circumstances under the guidelines established in *Horan.* However, *Collentine* says the attorney must be "the natural object of the testator's bounty and . . . [receive] no more than would be

[10] *In re* Estate of Reid, 138 So. 2d 342 (Fla. App. 1962).
[11] *In re* Brown's Estate, 165 Ore. 575, 108 P.2d 775 (1941).
[12] Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915).
[13] *In re* Cooper's Will, 75 N.J.Eq. 177, 71 A. 676 (Prerogative Ct. 1909).
[14] *Id.*
[15] Yess v. Yess, 255 Ill. 414, 99 N.E. 687 (1912).
[16] 17 Wis. 2d 645, 117 N.W.2d 641 (1962).
[17] *Id.* at 652, 117 N.W.2d at 644-45.
[18] 21 Wis. 2d 66, 123 N.W.2d 488 (1963).
[19] *Id.* at 74, 123 N.W.2d at 492.

received . . . in the absence of a will."[20] It is this conjunctive qualification which appears to make the presumption of undue influence conclusive as to non-natural object wills under any circumstances.

The rule laid down in *Collentine* has been criticized for both procedural and substantive reasons as going beyond the facts of the case. First, because the facts of *Collentine* did not suggest the conjunctive qualification which the court imposed on attorneys, the qualification was not argued via amicus curiae briefs nor submitted to a hearing usually attendant upon such rule-rendering decisions. Secondly, since the Skidmore will in *Collentine* was unnatural only in that Collentine was not related to the testatrix, it has been urged substantively that the conjunctive qualification was totally unnecessary, rendering itself redundant of the prior clause which reads, "only when he stands in relationship to the testator as the natural object of the testator's bounty."

The latter criticism, however, depends upon the latitude given the definition of "natural object of testator's bounty"—a phrase subject to both a broad and a narrow interpretation. The phrase is "no more, no less, than a euphemistic way of defining . . . 'next of kin' . . . or . . . those who 'would take in the absence of a will. . . .' "[21] according to the narrow definition. However, the phrase may be extended to include more than mere kinsman under the broader definition which says, "the question of who come within the range of a testator's bounty depends largely upon the circumstances surrounding the testator."[22] It therefore appears that the Wisconsin Supreme Court had in mind the broader definition and felt that the conjunctive qualification was necessary to define better the closed class.

There are several areas where this decision will interfere with customary practice. The conjunctive qualification makes the *Spenner* situation impermissible in that the drafting attorney, although receiving no more than other cousins, would be prevented from taking under the will in that his share still would be greater than that provided for by the intestacy statutes. Similarly, an attorney could not utilize the maximum marital deduction benefits where there was a child, as the will would be in excess of the limits prescribed by the intestacy laws. The rule in *Collentine* also removes a testator's flexibility for handling dispositions which take into account the relative wealth of the testator's natural objects, when one of those objects is the drafting attorney.

The case leaves no doubt as to what the lawyer-draftsman may receive under the will, but how far-reaching is it with reference to other members of the lawyer's family? Does the rule extend to situations wherein other members of his family are left with more than their in-

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[20] 39 Wis. 2d at 332, 159 N.W.2d at 53.
[21] *In re* Estate of Hill, 198 Ore. 307, 256 P.2d 735, 738 (1953).
[22] Norris v. Bristow, 358 Mo. 1177, 219 S.W.2d 367, 370 (1949).

testate share on the theory that this may lead to the same result via an indirect route? These are the situations which are totally unresolved and unclarified by *Collentine.*

Aside from the scope of *Collentine,* practical problems are also presented because of the long standing principle that if a lawyer is barred from an employment for possible conflict of interest, the prohibition applies to all other members in his firm. This principle was enunciated in *In re Will of Lobb* where the Oregon Supreme Court said that "Advice from a law associate of an attorney for a fiduciary is not that independent and impartial advice necessary to sustain a transaction between the fiduciary and his principal."[23] From the language of *Collentine,* it appears that the court has in mind an independent lawyer chosen by the testator. However, even though it seems clear that an independent lawyer chosen by the testator is necessary, it is by no means clear how "independent" such counsel must be. As a practical matter, courts have not given precise guidelines in these areas. A New Jersey court has suggested that "[W]here a testator wishes to make the attorney the beneficiary—ordinary prudence requires that the will be drawn by some other lawyer of the testator's choosing."[25] Therefore, although other courts have indicated that the mere solicitation of independent counsel's advice in drafting the will is sufficient to overcome the presumption of undue influence,[26] it would appear that the safest avenue for the attorney-beneficiary to pursue is to have an independent attorney of the testator's choosing actually draft the will.

Alternatives

Having considered the problems created by *Collentine,* and the areas which need clarification, what avenues are presently available to the attorney-beneficiary drafting such wills? The first and most obvious solution is, of course, to conform the draftsman's share to that provided by the intestacy laws. Should this prove unsatisfactory, a second alternative is to avoid the intestacy laws altogether by placing the testator's assets in non-probate form. This suggestion presents another ethical problem, however, in that it may do indirectly that which *Collentine* prohibits directly. Therefore, although this alternative may be a logical solution for the typical husband-wife situation like that found in *Collentine,* attorneys still must be careful not to subject themselves to the charge of undue influence in an inter vivos situation. If the bequest to the scrivener-beneficiary is but a minor part of the estate disposition, the lawyer may draw the will, omitting the bequest, and advise the client that if such bequest is to be made, independent counsel should be con-

[23] *In re* Will of Lobb, 173 Ore. 414, 145 P.2d 808 (1944).
[24] 145 P.2d at 815.
[25] *In re* Will of Nixon, 136 N.J.Eq. 242, 41 A.2d 119, 120 (Ct. Err. & App. 1945).
[26] *In re* Will of Guidi, 259 App. Div. 652, 20 N.Y.S.2d 240 (1940).

sulted who can draw and attend execution of a codicil or a new will making such bequest. The final alternative is to advise the client at the outset to seek independent counsel.

Conclusion

In *Collentine,* the Wisconsin Supreme Court goes further than other jurisdictions by departing from the traditional notions of rebuttable presumptions with regard to undue influence in cases of attorneys-beneficiaries and by establishing a conclusive presumption which invalidates the entire will. In doing this, the court may have upset the delicate balance between ethical limitations and practical flexibility in that the line of demarcation beyond which the presumption of unprofessional conduct becomes conclusive is not clearly drawn.

MICHAEL C. ELMER

Criminal Law: Evidence—Use of a Hypothetical Question— In the case of *Rice v. State,*[1] the Wisconsin Supreme Court was confronted with the nature and use of the hypothetical question in a criminal trial, on both the direct examination of the defense's expert witness and on the cross-examination of the state's expert witness. The defendant was accused of first degree murder. A statement of the facts and circumstances leading to the shooting and death of the victim is necessary to understand the import of the hypothetical questions which were asked during the trial.

After a series of fights between the deceased and certain patrons of defendant Rice's bar, Rice and the deceased became involved in an altercation which resulted in the deceased being hit about the head a few times. The deceased was then carried out of the tavern and laid on a concrete area outside the bar. Rice then took a shotgun from behind the bar and walked to where the deceased was lying and shot him in the face. A post mortem examination of the deceased was conducted by a pathologist at the hospital. The pathologist testified at trial that he concluded, from the autopsy that he had performed, that the cause of death was "trauma and blood loss essentially due to [a] shotgun blast which destroyed the lower half of the face."[2] The evidence introduced during the trial showed that in the fights which had occurred prior to the shooting, the deceased had been beaten about the head in one or more of them. The evidence also disclosed that during one of these fights the deceased had struck his head on the corner of a table. The pathologist testified on direct examination that the trauma and blood loss resulted in a cardio-vascular collapse which caused the death of the deceased. The pathologist had drawn his conclusions as

[1] 38 Wis. 2d 344, 156 N.W.2d 409 (1968).
[2] *Id.* at 349, 156 N.W.2d at 412.