



Summer 1983

Undue Influence in Wills - Evidence - Testators' Position Changes after In re Will of Ferrill

Mary Catherine McCulloch

Recommended Citation

Mary C. McCulloch, *Undue Influence in Wills - Evidence - Testators' Position Changes after In re Will of Ferrill*, 13 N.M. L. Rev. 753 (1983).

Available at: <https://digitalrepository.unm.edu/nmlr/vol13/iss3/11>

UNDUE INFLUENCE IN WILLS—EVIDENCE— Testators' Position Changes After *In re Will of Ferrill*

INTRODUCTION

*In re Will of Ferrill*¹ changed the New Mexico test for invalidating a will on the ground of undue influence. The New Mexico Court of Appeals decided that dominance over the decedent by a primary beneficiary² is not a necessary element of proof in an undue influence claim.³ The court also concluded that a jury instruction containing both a preponderance of the evidence burden of proof and a clear and convincing burden of proof is harmless error.⁴ After *Ferrill*, a court may instruct juries to follow both standards even when the sole issue before them is whether a will should be invalid on the ground of undue influence.

This Note will discuss the difference between past New Mexico analysis of undue influence and the *Ferrill* court's modification of this analysis. This Note will also examine the internal conflict within the New Mexico Uniform Jury Instructions Directions for Use as applied to a claim of undue influence. It will demonstrate that the conflict between Directions for Use of Uniform Jury Instruction 3.6 (an instruction on the preponderance of the evidence), and Uniform Jury Instruction 3.7 (the clear and convincing evidence instruction), can result in an instruction which substantially impairs the rights of a party to an undue influence claim.

STATEMENT OF THE CASE

Hazel Cash Ferrill owned a large ranch near Galisteo, New Mexico. For many years she managed this ranch alone.⁵ Hazel raised and supported

1. 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981), *cert. quashed*, 98 N.M. 51, 644 P.2d 1040 (1982).

2. This Note will use the term "beneficiary" or "primary beneficiary" to denote the defendant in all will contests based on undue influence. It is possible that the person accused of undue influence may not be a will beneficiary. As noted in *Ferrill*, "it is immaterial whether such influence is exercised directly or indirectly." 97 N.M. at 387, 640 P.2d at 493.

3. The beneficiary, Joe Thorp, raised four issues on appeal: (1) whether there was substantial evidence to support the judgment; (2) whether the case should have been tried to a jury, especially a jury of six; (3) whether the trial court should have excluded certain testimony; and (4) whether the trial court erred in refusing certain proposed jury instructions. *Id.* at 386, 640 P.2d at 492.

4. *Id.* at 392, 640 P.2d at 498.

5. Don Cash testified that after leaving the ranch at the age of 18, he frequently returned on weekends to help his grandmother with ranch chores. Trial Record at 62-67, *In re Ferrill* [hereinafter referred to as Trial Record]. Although Hazel was married three times during her life, testimony from her grandson and other witnesses established she was primary manager of the ranch.

her grandson, Don Cash. She was known by many northern New Mexicans as strong-willed, stubborn, volatile, and perhaps vindictive.⁶

During the Spring of 1978, Hazel discovered that she might have cancer. The diagnosis was confirmed in September of 1978. During that same month, Hazel executed a will leaving most of her estate to her grandson, Don Cash.⁷ For several months following the discovery of cancer, Hazel underwent treatment. Don Cash drove his grandmother to Albuquerque for this first round of treatment. After a period of remission, Hazel again underwent treatment. During this second round of treatment, Hazel's neighbor asked his foreman, Joe Thorp, to help Hazel and her sister Beulah. While Hazel was ill, Joe and Betty Thorp helped Hazel by driving her to Albuquerque and eventually by caring for Hazel and Beulah from time to time.

In July of 1979, while in the hospital, Hazel asked that a new will be executed leaving her ranch to Joe Thorp. Hazel requested this specific disposition against the admonitions of her attorney.⁸ The July 1979 will was duly executed. Thorp knew of the will provisions and was present when the will was attested.⁹ Hazel's grandson did not know of the change in the testamentary plan.¹⁰ Following the will execution, the Thorps continued to help Hazel. In November of 1979, Hazel gave Joe Thorp a

6. Various witnesses described Hazel as being "tough as nails" or "cantankerous." Other descriptions of Hazel included "independent," Trial Record at 160, a "character," Trial Record at 264, "impossible," Trial Record at 287, and "I don't think she was mean. She just liked to handle her own affairs." Trial Record at 154. One witness testified that she

was a person that [when] something struck her wrong, she might want to change her Will. She got mad at Donny and she said, "I'm going to cut him off of the Will." And she got mad at James and she said, "I'm going to cut him off of the Will."

Trial Record at 198.

7. Hazel executed three wills between 1966 and 1979. Trial Record at 4, Contestant's Exhibit B. The September 1978 will was drawn after Hazel first discovered she had cancer and was attested while she was in St. Vincent Hospital. Trial Record at 284-85. The provisions of the 1978 will illustrated Hazel's intent to prefer certain family members over others. In this will, she gave \$1000 to her son, James, and some items of personal property to named beneficiaries. The bulk of her estate, the Galisteo ranch valued at nearly \$1 million, she devised to her grandson, Don Cash. Trial Record at 284-85. During the trial, various witnesses testified that Hazel spoke with others about changing her will on several occasions. *See, e.g.*, Trial Record at 149, 151.

8. Lyle Teutsch, Hazel's attorney for over ten years, testified that he had more than one discussion with her concerning the provisions of the 1979 will. Trial Record at 287. In May of 1979, Hazel had asked New Mexico Supreme Court Justice William Federici to visit her at the McKee Ranch. She told Justice Federici of her plans to change her will and disinherit her grandson. Trial Record at 151. Justice Federici wrote a memorandum to Teutsch suggesting he encourage Hazel to include her family in any new will. Trial Record at 156, 157 & 287, referring to Contestant's Exhibit A. Hazel's attorney stated that he discussed this plan with her, and "I just made a note to myself, 'she is impossible,' because I could not persuade her to do other than what she had instructed me to do." Trial Record at 287.

9. Trial Record at 289-90.

10. *See* Trial Record at 295.

power of attorney.¹¹ Thorp used this power to pay Hazel's bills and, with her knowledge, to sign a mineral lease for the ranch.

Hazel Cash Ferrill died December 18, 1979. Don Cash contested the probate of the July 1979 will on the grounds of undue influence. The trial judge, on his own motion, requested a six-man jury.¹² The jury returned a verdict in favor of Don Cash. The court of appeals affirmed this jury decision.

A. *Evolution of the New Mexico Approach to Proof of Undue Influence Claims*

New Mexico courts have refused to state a legal definition of undue influence.¹³ Instead, courts described the approach contestants must use to prove an undue influence claim.¹⁴ A valid will is suspect if a contestant shows two elements: a confidential relationship between a primary beneficiary and the testator and suspicious circumstances.¹⁵ The object of this approach is to prove that a beneficiary impaired the free will of the testator.¹⁶

The reason for avoiding a definition of undue influence was reluctance to commit to a single legal test. In *Brown v. Cobb*,¹⁷ the New Mexico Supreme Court explained the rationale underlying this attitude: "We make no attempt to define 'undue influence.' Neither is it susceptible of any fixed formula. . . . [A]ny attempt to define it may well suggest a clear path of evasion."¹⁸ In the mind of the *Brown* court, a clear definition of undue influence became a blue print for the commission of a wrongful

11. Trial Record at 298.

12. Thorp argued that a will contestant has no right to a jury trial. He further argued that if no right to a jury trial exists for will contestants, then the court is forbidden to exercise the discretionary power to appoint a jury when a party makes an untimely demand. N.M. R. Civ. P. 39(a). The court of appeals interpreted N.M. Stat. Ann. § 45-1-306 (1978) to mean that a court "cannot refuse a jury trial to a party in a formal testacy proceeding who demands it in accordance with Rule 38(a)." 97 N.M. at 389, 640 P.2d at 496. N.M. R. Civ. P. 38(a) (Cum. Supp. 1982), provides that a court cannot refuse a timely demand for a jury trial. Only parties having a right to jury trial may make a demand under Rule 38(a). Right to demand a jury trial triggers N.M. R. Civ. P. 39(a) and court discretion to appoint a jury. For further discussion of this issue, see 97 N.M. at 389, 640 P.2d at 496.

13. *Brown v. Cobb*, 53 N.M. 169, 172, 204 P.2d 264, 266 (1949), restated in *Ferrill*, 97 N.M. 383, 387, 640 P.2d 489, 493.

14. The *Ferrill* court used the following description of undue influence: "influence, improperly exerted, which acts to the injury of the person swayed by it." 97 N.M. at 387, 640 P.2d at 493.

15. 97 N.M. at 387, 640 P.2d at 493.

16. *McElhinney v. Kelly*, 67 N.M. 399, 366 P.2d 113 (1960). *McElhinney* described the effect that undue influence should have on the testator's state of mind: "In order to amount to undue influence, the means must not only influence testator to make the will, but the influence thus exerted must be too powerful for his mind to resist. . . ." *Id.* at 404, 366 P.2d at 116 (quoting 1 Page on Wills § 15.6 (Bowe-Parker rev. 1960)).

17. 53 N.M. 169, 204 P.2d 264 (1949).

18. *Id.* at 172, 204 P.2d at 266.

act. This reasoning ignores the possibility that an unclear definition of undue influence can as easily mislead well-intentioned practitioners and their clients.

1. Confidential Relationships Among Family Members: The Emergence of a Dominance Requirement in New Mexico.

The pattern of past New Mexico undue influence cases demonstrates that in addition to showing a confidential relationship, a successful undue influence contestant also must provide evidence pointing to dominance by one family member over another.¹⁹ The New Mexico Supreme Court first recognized the special nature of family relationships as applied to undue influence in *Gionvannini v. Turrietta*.²⁰ The court decided that a "deed between relatives will not be held invalid for undue influence absent a strong showing of dominance."²¹

*Galvan v. Miller*²² affirmed the policy established in *Gionvannini*. In *Galvan*, the New Mexico Supreme Court held that testamentary gifts to family members do not raise the presumption of undue influence unless accompanied by evidence of dominance.²³ The *Galvan* court reasoned:

Where a transfer of property is made by a parent to his child, a husband to his wife, a brother to his sister, etc., it is ordinarily a natural result of the affection which normally is a concomitant of these relationships. It would be unfair under such circumstances to impose a presumption of undue influence upon the transfer.²⁴

Family members are expected to influence one another. It is not unusual that one member make suggestions to a testator concerning the disposition of property. Courts, therefore, look for unusual family behavior before they consider applying an undue influence label to the relationship. As the *Galvan* court stated: "[W]here, in addition to the usual circumstances, it is shown that the beneficiary of the transfer occupies a dominant position in the relationship, a position which is not the usual circumstance in such relationships, then it is proper to impose a presumption of undue influence upon the transfer."²⁵

19. The dominance requirement can be traced to New Mexico's first undue influence case, *Cardenas v. Ortiz*, 29 N.M. 633, 226 P. 418 (1924). In *Cardenas*, the court held a deed from the Cardenas' to their nephew void on the grounds of undue influence. Judge Bratton found the Cardenas' age, inability to speak English, and general unfamiliarity with the law could easily lead them to be unduly influenced. Judge Bratton found that the acts of the nephew confirmed he was "much their superior in mental strength." *Id.* at 637, 226 P. at 420. *Cardenas* did not articulate what has later been called the dominance requirement. The New Mexico Supreme Court expressly stated this requirement in *Gionvannini v. Turrietta*, 76 N.M. 344, 348, 414 P.2d 855, 857 (1966).

20. 76 N.M. 344, 414 P.2d 855 (1966).

21. *Id.* at 348, 414 P.2d at 857.

22. 79 N.M. 540, 545, 445 P.2d 961, 966 (1968).

23. *Id.*

24. *Id.*

25. *Id.*

The minimum proof for an undue influence claim before the *Ferrill* decision included evidence of a confidential relationship plus a showing of dominance. The majority of New Mexico undue influence case fact patterns involved disputes between family members,²⁶ and the dominance requirement evolved from this background. Under the reasoning of *Galvan* and *Gionvannini*, the dominance requirement could be limited to confidential relationships between family members.

In *Ferrill*, the fact pattern differed from the majority of past cases. Jim Thorp and Hazel Cash were not related. Presented with a new type of relationship, the court of appeals could not easily justify the dominance requirement by applying the rationale used by previous courts. Past courts found it unfair to scrutinize the usual influence exerted by family members on related testators with an undue influence analysis.²⁷ The court in *Ferrill* faced no such restriction.

26. See, e.g., *Hummer v. Betenbough*, 75 N.M. 274, 404 P.2d 110 (1965) (brothers "dominated and coerced" testatrix "to the point that she was afraid of them, even when not in their presence." *Id.* at 284, 404 P.2d at 117); *Calloway v. Miller*, 58 N.M. 124, 266 P.2d 365 (1964) (half-brother caring for frail testator took dictated notes to attorney for preparation of will); *McElhinney v. Kelly*, 67 N.M. 399, 356 P.2d 113 (1960) (former housekeeper marrying 72 year-old testator did not exercise undue influence). The *McElhinney* court incorporated the following description of undue influence: "It must be influence of such compelling force that the apparant testator is but the instrument by which the mastering desire of another is expressed." *Id.* at 402, 356 P.2d at 116 (quoting *Wiley v. Gordon*, 181 Ind. 252, —, 104 N.E. 500, 505 (1914)). See also *Trigg v. Trigg*, 37 N.M. 296, 22 P.2d 119 (1933) (a "nagging" wife contradicts the general presumption that husbands are dominant in marriage. The *Trigg* court recognized that generally conveyances are set aside on grounds of undue influence when "the weaker or subservient [has] conveyed to the stronger or dominant." *Id.* at 301, 22 P.2d at 122. Judge Watson continued: "Here, however, we have the reverse, the clinging vine inducing the oak to convey to her all his interest in fourteen thousand broad acres on the Pablo Montoya grant. . . ." *Id.* at 301-302, 22 P.2d at 122).

Only two New Mexico cases presented a claim of undue influence not between family members. These are *Ostertag v. Donovan*, 65 N.M. 6, 331 P.2d 355 (1958) (relationship between physician and patient), and *Brown v. Cobb*, 53 N.M. 169, 204 P.2d 264 (1949) (relationship between employer and employee). In *Ostertag*, the court carved out a well-recognized exception in the confidential relationship/undue influence doctrine. The court found a gift by a patient to her physician gives rise to a presumption of undue influence. The legal presumption is that a professional/client relationship is one in which the professional stands in a position of superior strength or knowledge. This strong presumption is particularly applicable to wills cases when a lawyer drafting a will is also a beneficiary. New Mexico has never had a case in which the drafting attorney was also a beneficiary. The strong language of *Ostertag*, noting that gifts to professionals by their clients are seen by courts as highly suspicious unless independent or outside advice is secured, ought to predict the outcome of such a case. In fact patterns involving a professional and his client, the legal presumption of superior strength and knowledge can be seen to substitute for the "dominance" requirement when the relationship is between family members. This leaves *Brown* as the only case on which the *Ferrill* court could have based its decision that no dominance requirement exists when the confidential relationship is not between family members. The fact pattern of *Brown* centered on an inter vivos transfer. Sadie Brown, when she was physically disabled, leased her ranch to Cobb for an amount lower than prior leases. *Brown* relied heavily on contract theory in reaching its decision. However, the court in *Brown* stated that transactions should be viewed suspiciously, "when, by physical or mental superiority, one obtains an advantage in a transaction over another who is enfeebled. . . . The person obtaining such an advantage will be required to show that the transaction was a fair one." 53 N.M. at 173, 204 P.2d at 266.

27. *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968); *Giovannini v. Turrietta*, 76 N.M. 344, 414 P.2d 855 (1966).

2. Treatment of Undue Influence Analysis in Other Jurisdictions: Two Possible Analytical Avenues.

Other jurisdictions articulate two possible approaches for proving an undue influence claim.²⁸ Some courts explain these approaches in more detail than New Mexico courts, but their explanations avoid setting forth a "fixed formula," a problem that has concerned New Mexico courts in the past.²⁹

The first approach commonly used will be called the "four categories" analysis. In order to prove all undue influence claims, this approach requires a contestant to present sufficient evidence in the following categories:

- (1) Susceptibility of the testator to be unduly influenced;
- (2) Disposition of the beneficiary to influence the testator;
- (3) Coveted result; and
- (4) Opportunity of the beneficiary to influence the testator.³⁰

The Wisconsin Supreme Court, in *In re Estate of Kamesar*,³¹ discussed the meaning of these broad categories. Facts considered important in the "susceptibility" category include the testator's "age, personality, physical and mental health and ability to handle business affairs."³² Disposition to influence means "more than a desire to obtain a share of the estate."³³ Rather, it implies a willingness by the beneficiary to do something wrong or unfair.³⁴ For "coveted result," the courts applying the four categories approach look at the naturalness or expectedness of the bequest.³⁵ When a testator excludes a natural object of his bounty, courts frequently view this as a "red flag of warning."³⁶ They caution that if a trial record shows reasons why a testator excluded an expected beneficiary, the mere fact of exclusion does not make the result unnatural. Opportunity to influence is directed towards showing "ample" contact between the testator and the beneficiary.³⁷ The assumption is that one or a few sporadic encounters

28. The first approach is the four categories approach. See *In re Fritschi*, 60 Cal. 2d 367, 384 P.2d 656, 33 Cal. Rptr. 264 (1963); *Copley v. Craft*, 312 S.W.2d 899 (Ky. 1958); *Sheets v. Sheets*, 345 A.2d 493 (Me. 1975); *In re Estate of Kamesar*, 81 Wis. 2d 151, 259 N.W.2d 733 (1977). The other approach is the confidential relationship/suspicious circumstances approach. See *In re Red-daway's Estate*, 214 Or. 410, 329 P.2d 886 (1977), and *In re Komar*, 46 Wis. 2d 230, 175 N.W.2d 473 (1970), *cert. denied*, 401 U.S. 909 (1971).

29. See *supra* text accompanying notes 17-18.

30. 1 Page On Wills § 15.5 (Bowe-Parker rev. 1960), explains the evidentiary requirements of the "four categories approach."

31. 81 Wis. 2d 151, 259 N.W.2d 733 (1977).

32. *Id.* at 159, 259 N.W.2d at 738.

33. *Id.* at 161, 259 N.W.2d at 738.

34. *Id.* at 161, 259 N.W.2d at 738-39.

35. *Id.* at 162, 259 N.W.2d at 739.

36. *Id.* (quoting *Estate of Culver*, 22 Wis. 2d 665, 673, 126 N.W.2d 536, 540 (1964)).

37. 81 Wis. 2d at 161, 259 N.W.2d at 738.

between beneficiary and testator would not normally produce the type of influence labelled "undue."

A second avenue in undue influence analysis looks for a confidential relationship plus certain unquantified suspicious circumstances. Past New Mexico courts traditionally employed this general approach.³⁸ Unlike New Mexico courts, *Kamesar* explained the function of such an analysis. The *Kamesar* court looked to the confidential relationship to determine the ease with which a confidant "can dictate the contents and control or influence the drafting of a will."³⁹ In satisfying the suspicious circumstances requirement, the basic question to be answered is whether the free agency of the testator has been destroyed.⁴⁰

Prior to *Ferrill*, New Mexico courts applying the confidential relationship plus suspicious circumstances analysis concentrated primarily on the nature of the relationship.⁴¹ They looked for a particular type of confidant, one who had exercised dominance over the testator.⁴² Courts added to this analysis a compilation of those circumstantial facts which pointed to abuse of the relationship for the purpose of obtaining benefit from the will.

38. See *In re Will of Ferrill*, 97 N.M. at 387, 640 P.2d at 493, for past New Mexico cases that employed this approach.

39. 81 Wis. 2d at 164, 259 N.W.2d at 740 (quoting *In re Estate of Steffke*, 48 Wis. 2d 45, 51, 179 N.W.2d 846, 849 (1970)).

40. 81 Wis. 2d at 166, 259 N.W.2d at 741.

41. See, e.g., *Trigg v. Trigg*, 37 N.M. 296, 22 P.2d 119 (1933). Judge Watson's evaluation of the husband/wife relationship in *Trigg* illustrates a court's attempt to analyze the quality and essence of the particular relationship:

[I]f the husband, who because of his dominating position in the family relationship, has taken advantage of the weaker sex, [he] cannot in equity hold that which he has acquired through . . . undue influence, neither should the wife be permitted to hold that which she acquired through importunities, nagging, threats, and unfulfilled promises, if such importunities, nagging, threats and unfulfilled promises amount to a moral, social, or domestic force exerted upon the husband so as to control the free action of his will.

Id. at 302, 22 P.2d at 123.

42. Judge Bratton, in *Cardenas v. Ortiz*, 29 N.M. 633, 226 P. 418 (1924), provided a general description of the type of confidant courts have in mind when inferring undue influence:

Human experience teaches that a case could be rarely imagined where direct conversations of persuasion and coaxing such a feeble-minded person to execute such an instrument could be proven, except by the person so unduly influenced. Persons who resort to such shady transactions are too shrewd and designing to be thus caught. Such acts are practiced in the absence of witnesses or in the presence of those who are aiding or abetting the transaction.

Id. at 639, 226 P. at 421. Judge Bratton's observation raises an important distinction between undue influence in wills and undue influence in inter vivos transfers. In *Cardenas*, all parties involved in the conveyance were alive and able to testify at trial. Obviously, in a wills contest, the court is caught between two general policies in the law of wills: (1) the protection the Statute of Wills offers to a validly executed will and (2) the commitment to carry out the decedent's intent. An undue influence inquiry primarily is concerned with the second policy. The court tries to determine if there was lack of testamentary intent because of the influence of others upon the testator at the time the will was executed. See generally, 1 Page On Wills § 15 (Bowe-Parker rev. 1960).

B. *The Ferrill Decision: A Merging of Two Broad Analytical Approaches Into a Single Path*

The New Mexico Court of Appeals modified the confidential relationship plus suspicious circumstances approach used by prior New Mexico courts in its analysis of the *Ferrill* case. The court combined the two common approaches, collapsing a four categories analysis into the suspicious circumstances inquiry. While the court announced continued use of traditional New Mexico analysis, in reality the court applied the four categories analysis to the *Ferrill* case. It accomplished this outcome by first eliminating any meaningful inquiry as to the nature of the confidential relationship.⁴³ Second, instead of measuring the types of facts considered "suspicious," the court of appeals grouped the types of evidence needed for a showing of undue influence into four relevant categories.⁴⁴

1. The Dominance Requirement Disappears.

The court of appeals found that a confidential relationship for purposes of undue influence exists "whenever trust and confidence is reposed by one person in the integrity and fidelity of another."⁴⁵ Evidence that Hazel Cash trusted Joe Thorp and thought very highly of him satisfied this requirement.⁴⁶ On appeal, Thorp argued that a showing of dominance over the testator by the beneficiary is linked to the finding of a confidential relationship for purposes of establishing undue influence.⁴⁷ The court of appeals rejected this argument. Instead, the court added dominance evi-

43. The court of appeals stated that a confidential relationship exists for purposes of undue influence, "whenever trust and confidence is reposed by one person in the integrity and fidelity of another." 97 N.M. at 387, 640 P.2d at 493 (quoting 94 C.J.S. *Wills* § 230 (1956)).

44. The *Ferrill* court actually listed five general categories:

- (1) the testator is old and in a weakened physical or mental condition; . . .
- (2) there is a lack of consideration for the bequest; . . .
- (3) the disposition of the property is unnatural or unjust; . . .
- (4) the beneficiary participated in procuring the will; . . . and
- (5) the beneficiary dominated the testator. . . .

97 N.M. at 387, 640 P.2d at 493 (citations omitted). The second category, lack of consideration, is rarely relevant to undue influence in wills analysis; the exception is a will contract. A bequest by will is a gift; consideration is, therefore, of no consequence.

45. *Id.* (quoting 94 C.J.S. *Wills* § 230 (1956)).

46. The court also found Joe Thorp's presence at the signing of the will an indication that Hazel "trusted him concerning her most important affairs." 97 N.M. at 387, 640 P.2d at 493.

47. Thorp argued that *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968), required "a showing of strong dominance by the beneficiary" over the testator. 97 N.M. at 388, 640 P.2d at 494. The court of appeals changed Thorp's argument to a claim that "direct evidence of dominance by the legatee over the testatrix is necessary in order to show undue influence." *Id.* at 389, 640 P.2d at 495 (emphasis added). Since *Cardenas v. Ortiz*, 29 N.M. 633, 226 P. 418 (1924), it is settled that proof of undue influence is always accomplished with circumstantial evidence. *Cardenas* stated: "Such an influence is not susceptible of direct proof, but must be concluded from the facts and circumstances. . . ." 29 N.M. at 638, 226 P. at 420. Perhaps the *Ferrill* court was guilty of merely using words loosely, but the result was fatal to Thorp's claim.

dence to a list of possible suspicious circumstances: such a showing, "when susceptible of direct proof, is merely one factor which raises a presumption that the grantor was unduly influenced."⁴⁸

Uncoupling the dominance requirement from the confidential relationship analysis and placing it among other suspicious circumstances is analogous to placing the engine at the rear of the train. In a confidential relationship plus suspicious circumstances analysis, the suspect nature of the relationship gives rise to the possibility of undue influence. If the relationship between a testator and a devisee can be described by facts pointing to threat, fear, coercion, or lies, there is doubt as to the free will of the testator. The factual description of the relationship is the outline. Courts fill in this outline with other "suspicious" circumstances surrounding the execution of a will. The definition of confidential relationship offered by *Ferrill* practically eliminates any inquiry. Testators rarely leave estates to strangers. Beneficiaries who are not strangers fit the broad *Ferrill* definition.

The court offered no justification for eliminating the dominance requirement. It did not discuss the importance which past New Mexico courts placed on family member fact patterns when dealing with undue influence claims. Whether undue influence claims involving family members still require a dominance showing is unclear. The court's failure to recognize the special nature of family relationships makes it possible for future litigants to argue that the dominance requirement should be applied to family disputes. The policy followed by past New Mexico courts for including the dominance requirement when family disputes are at issue is sound. Practitioners are urged to support the requirement as applied to undue influence claims involving family members.

2. Mutation of a Suspicious Circumstances Inquiry Into a Four Categories Analysis.

The court of appeals collapsed the four categories analysis into its suspicious circumstances inquiry. The court first surveyed past New Mexico undue influence cases and compiled facts generally considered suspicious. It then grouped these facts into four general categories⁴⁹ of evidence relevant to a claim of undue influence:

- (1) Susceptibility: the testator is old and in a weakened physical or mental condition;
- (2) Disposition: the beneficiary participated in procuring the will;
- (3) Coveted Result: the disposition of the property is unnatural or unjust;

48. 97 N.M. at 389, 640 P.2d at 495.

49. *Id.* at 387, 640 P.2d at 493. This discussion does not include a fifth category listed by the court. See *supra* note 44 for an explanation of this exclusion.

(4) Dominance: the beneficiary dominated the testator.

The court of appeals' categories are similar to those articulated by the court in *Kamesar* and the descriptive labels used in *Kamesar* have been added. The "opportunity" category is absent, but is functionally part of the court of appeals' inquiry into the confidential relationship.⁵⁰ The segregation of "dominance" into category four is not particularly useful. Generally, a finding of evidence fitting into the categories of "susceptibility" and "disposition" leads to the inference of dominance.⁵¹ After the court of appeals grouped facts found to be suspicious in past New Mexico cases in order to create the categories, it then proceeded to use the categories as structural guidelines for analysis.⁵²

The *Ferrill* court concluded that evidence falling within two categories is sufficient to support an undue influence claim. These categories were the susceptibility of the testator and an unnatural or unjust result. The suspicious circumstances found sufficient to prove undue influence in *Ferrill* were the illness and the age of Hazel Cash Ferrill, the substantial value of the land disposed of by her in her will, and the disinheritance of her grandson, Don Cash.⁵³ The court of appeals' requirement of evidence in only two categories differs from other jurisdictions' use of the four categories approach. Courts generally require evidence in three of four categories before they find support for an undue influence claim.⁵⁴ When a contestant makes such a showing, courts require only slight evidence in the fourth category.⁵⁵

The court of appeals' approach removes the necessity of showing a link between the influential actions of a beneficiary and the resulting

50. The court of appeals gathered evidence of Thorp's contacts with Hazel into its confidential relationship analysis. *Id.* at 387, 640 P.2d at 493. The court characterized the relationship as continuous and pointed out that when Hazel and her sister Beulah resided at the McKee ranch for over a month, "the Thorps devoted much time and attention to them." *Id.* This type of evidence fits the "opportunity" category. It is directed at showing ample contacts to influence the testator.

51. Under the *Kamesar* approach, the weakness of the testator combined with the willingness of the beneficiary to do something wrong or unfair leads to the same conclusion as a finding of dominance. In both cases, a beneficiary in a position of strength or power uses this position unfairly and to his advantage.

52. The court of appeals did not articulate this fitting of fact to category. However, in stating the reasons for its conclusion, the persuasive facts mentioned by the court fit the general descriptions of the two categories also used by the court in *Kamesar*.

53. 97 N.M. at 388, 640 P.2d at 494. The court discussed Hazel's physical and mental condition and the difference between the amount of the gift to the Thorps (the ranch valued at a figure close to \$1 million), and the value of the Thorp's help to Hazel. It also described Don Cash's help to Hazel during his childhood, and found the fact that Hazel had left most of her estate to Don in the 1978 will significant. The court singled out the fact that Joe Thorp was present when the 1979 will was executed. It acknowledged that this fact was insignificant to its analysis of suspicious circumstances, but asserted that the fact demonstrated the trust existing between Hazel and Joe Thorp.

54. *See, e.g., In re Estate of Kamesar*, 81 Wis. 2d 151, 158, 259 N.W.2d 733, 737 (1977).

55. *Id.* at 158, 259 N.W.2d at 737-38.

influenced event.⁵⁶ Such analysis eviscerates the strength of proof requirement. Normally, when making inquiries relating to disposition and opportunity (categories numbered two and four in the *Kamesar*-type approach), courts applying the four categories approach look to proof of facts such as will procurement or solicitation, or a sudden unexplained change in the attitude of the testator. The New Mexico plaintiff attempting to invalidate a will on the ground of undue influence does not share this burden. A plaintiff need go no further than showing evidence of a testator susceptible to influence and evidence of an unnatural result.

The confidential relationship plus suspicious circumstances or the four categories approach may be used by courts, depending on the fit of facts to method.⁵⁷ Hazel Cash Ferrill and Jim Thorp's relationships did not fit into past New Mexico conclusions concerning confidential relationships among families. Thus, the court of appeals applied the four categories method, but it altered the method to fit the facts. The court's redefinition of what constitutes suspicious circumstances lightens the load of a prospective will contestant. Certainly *Ferrill* indicates a bias for testamentary disposition of substantial estates only to objects of natural bounty.

C. *Conflicting Jury Instructions: Creation of Discrimination or Harmless Error?*

The trial court in *Ferrill* refused Thorp's proposed jury instruction on the required burden of proof for an undue influence claim.⁵⁸ Instead of giving a "clear and convincing" evidence instruction,⁵⁹ the lower court gave a "preponderance of the evidence" instruction⁶⁰ combined with an instruction meant to incorporate the "clear and convincing" standard.⁶¹

56. Absent a showing of dominance or some evidence of will solicitation or procurement, the damning evidence becomes the physical and mental health of the testator and a will which disposes of property in an unnatural manner. A beneficiary generally has no influence upon or connection to the state of health of a testator. Nor does a beneficiary have any connection with the provisions of a testator's will unless it is shown that he in some manner tried to affect the testamentary plan.

57. The court in *Kamesar* performed both analyses.

58. The court of appeals agreed with Thorp's contention that clear and convincing evidence is the appropriate standard for undue influence claims. 97 N.M. at 392, 640 P.2d at 498. The court, however, disagreed with Thorp's further argument that also including the preponderance standard was reversible error. *Id.*

59. Clear and convincing evidence is defined by N.M. U.J.I. Civ. 10.17: "'Clear and convincing evidence' is that evidence which, when weighed against the evidence in opposition, leaves you in abiding conviction that the evidence is true."

60. N.M. U.J.I. Civ. 3.6.

61. The trial court gave the following instruction:

It is a general rule in all civil cases that a party making a claim has the burden of proving the propositions necessary to support his claim by the greater weight of the evidence or, as it [is] sometimes called, the *preponderance of the evidence*.

Evenly balanced evidence is not sufficient.

Therefore, when I say in these instructions that a party has the burden of proof

The court of appeals approved this practice.⁶² This action by the court conflicts with its assertion that in New Mexico, parties to an undue influence dispute are entitled to the application of the clear and convincing standard.⁶³ *Ferrill* leaves the applicable standard in undue influence claims in confusion.

1. The Dilemma of the Trial Court's Jury Instruction.

Thorp argued on appeal that combining a preponderance of the evidence burden of proof with a clear and convincing burden of proof was reversible error. The basis for this argument arises from the separate reading of both instructions and their accompanying Directions for Use.

New Mexico Uniform Jury Instruction 3.6 explains to juries the meaning of preponderance of the evidence. It states:

It is a general rule, applicable in all civil cases, that a party seeking a recovery . . . has the burden of proving every essential element of his claim . . . by the greater weight of the evidence. . . .

When I say, in these instructions, that the party has the burden of proof, I mean that you must be persuaded that what is sought to be proved is more probably true than not true.

The Directions for Use for Instruction 3.6 state that "[t]his instruction should be given in every civil case."⁶⁴ The trial court is led to believe it must give instructions in an undue influence case according to these directions. Rule 51(d) of the New Mexico Rules of Civil Procedure stresses trial court compliance with Uniform Jury Instruction Directions for Use.⁶⁵

on any proposition or use the expression "if you find" or "if you decide," I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which one has the burden of proof is probably more true than not true.

For a will to be invalid on the ground of undue influence, the evidence of undue influence, although it may be wholly circumstantial, must be *clear and convincing*. For evidence to be clear and convincing, it must tilt the scales in the affirmative when weighed against the evidence in opposition and leave your mind with a conviction that such evidence is true.

97 N.M. at 392, 640 P.2d at 498 (emphasis added).

The portion of this instruction describing the clear and convincing standard differs from its source, N.M. U.J.I. Civ. 10.17. The instruction given omits the word "instantly" before the phrase "tilts the scales." The court of appeals was not persuaded that the word "instantly" was essential in the definition of the clear and convincing standard. 97 N.M. at 392, 640 P.2d at 498.

62. 97 N.M. at 392, 640 P.2d at 498.

63. *Id.*

64. Directions for Use, N.M. U.J.I. Civ. 3.6.

65. N.M. R. Civ. P. 51(D) (Cum. Supp. 1982), states:

Whenever New Mexico Uniform Jury Instructions . . . contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the U.J.I. . . . shall be used unless under the facts or

Undue influence is a species of fraud,⁶⁶ as related to its order as fox to carnivore. This close relationship in the nature of the claims led to the common law determination that the law imposed the clear and convincing standard on parties to an undue influence claim.⁶⁷ The United States Supreme Court has classified the clear and convincing standard as an intermediate standard.⁶⁸ It requires a stronger showing by both parties than does the preponderance standard. New Mexico Uniform Jury Instruction 3.7 reflects this higher requirement:

In a case of this nature, the plaintiff has the burden of proving his claim by clear and convincing evidence. The evidence in support of a finding of fraud is not substantial unless it is clear, strong, and convincing. *A preponderance of the evidence is not sufficient.*⁶⁹

The Directions for Use for this instruction state that: "This instruction should be given only in those particular cases where clear and convincing evidence is required, such as a fraud case." A defendant in an undue influence case is entitled to nothing less than a clear and convincing instruction.

Undue influence was the only claim advanced by the plaintiff in *Ferrill*.⁷⁰ Therefore, the court of appeals had to decide whether the mandate of Uniform Jury Instruction 3.6, requiring the giving of that instruction in *all* civil claims, was proper. The *Ferrill* court concluded that following the form of the instruction scheme and giving the preponderance of the evidence instruction may have been error, but not reversible error.⁷¹

2. The Solution.

The court relied on *Echols v. Ribble Co.*⁷² as support for the general proposition that giving both instructions is usually appropriate.⁷³ *Echols* lends no support to such a broad reading. The court in *Echols* specifically limited the use of both instructions to cases in which (1) the plaintiff alleges both a claim requiring only preponderance proof and a claim such

circumstances of the particular case the published U.J.I. . . . is erroneous or otherwise improper, and the trial court so finds and states of record its reasons.

66. See, e.g., *Cardenas v. Ortiz*, 29 N.M. 629, 638, 226 P. 418, 421 (1924).

67. See *McElhinney v. Kelly*, 67 N.M. 399, 405, 356 P.2d 113, 117 (1960).

68. In *Santosky v. Kramer*, 455 U.S. 745 (1982), Justice Blackmun classified clear and convincing evidence as an intermediate standard of proof. *Id.* at 756. He further noted that this standard should be used "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

69. N.M. U.J.I. Civ. 3.7 (emphasis added).

70. Both parties stipulated that the will was validly executed, that Hazel Cash Ferrill was dead, and that venue was proper. Trial Record at 1-2.

71. 97 N.M. at 392, 640 P.2d at 498.

72. 85 N.M. 240, 511 P.2d 566 (Ct. App. 1973).

73. 97 N.M. at 392, 640 P.2d at 498.

as fraud, and (2) the use of two instructions adequately protects both parties.⁷⁴ An analysis of *Ferrill* reveals neither of the above circumstances existed in that case.⁷⁵ *Echols* did not address the issue of whether use of both instructions is appropriate when the only claim preserved requires application of a clear and convincing standard.

3. Is the 1-2 Punch Fair?

The *Ferrill* court failed to recognize the limits inherent in *Echols*. This failure prevented the court from addressing a vital question: whether, in itself, instructing the jury as to both a minimum and an intermediate burden of proof affects the substantial rights of a party. If the answer to this question is "yes," the error is reversible error.

*Jewell v. Seidenburg*⁷⁶ addressed the issue of whether deviation from the mandated use of certain uniform jury instructions is per se reversible error.⁷⁷ The New Mexico Supreme Court held that reversible error occurs only when substantial right of the party is affected.⁷⁸ The slightest evidence of prejudice to one party, however, is sufficient to find reversible error.⁷⁹ The court reasoned that although the use of the uniform jury instruction scheme is mandatory,⁸⁰ the intention of the supreme court was not to impose "form above substance."⁸¹

The thrust of the opinion in *Jewell* was a commitment by the supreme court to protect parties' substantive rights to a fair trial. This commitment should have guided the court of appeals in the *Ferrill* decision. The issue raised by Thorp would have received the analysis established by *Jewell* if the court had examined the instruction given by the trial court in *Ferrill* "in light of the standards . . . adopted for a fair trial."⁸² If the court of appeals had analyzed the instruction and had considered the standards

74. 85 N.M. at 245, 511 P.2d at 571.

75. In *Echols*, the plaintiff's complaint included not only the question of fraud but other allegations, such as scope of employment and mitigation of damages. In *Ferrill*, no other material allegations were made by the plaintiff, Don Cash. At the time of the *Echols* decision, N.M. U.J.I. Civ. 3.7 had not been adopted. Thus, the court in *Echols* did not face the same problem addressed in *Ferrill*. The "clear and convincing" standard was a common law doctrine, and the uniform jury instructions were silent on use of the standard. Later adoption of N.M. U.J.I. Civ. 3.7 might indicate a desire to assure parties entitled to the standard that they would receive proper application of the standard.

76. 82 N.M. 120, 477 P.2d 296 (1970).

77. The technicality that the defendant presented in *Jewell* was whether failure to give a general instruction on jury duty was per se prejudicial. The court found other explanatory instructions given to the jury, in addition to the swearing of the jury, sufficient to communicate the substance of the eliminated instruction.

78. 82 N.M. at 124, 477 P.2d at 300.

79. *Id.*

80. N.M. R. Civ. P. 51(D) (Cum Supp. 1982).

81. 82 N.M. at 124, 477 P.2d at 300.

82. *Id.*

for a fair trial, it could properly have concluded the particular instruction was prejudicial and cause for reversal.

Thorp was entitled to have the issue of undue influence decided according to a clear and convincing burden of proof. Combining this intermediate standard with the preponderance standard garbled the message given to the jury. The possible conclusions a juror could have reached listening to the instruction given by the trial court include:

- (1) the juror could believe he was expected to decide merely which evidence was more likely true than not;
- (2) the juror could have believed one set of facts must so impress him that his mind was left with an "abiding conviction" that such evidence is true;
- (3) the juror could have believed he was to base his decision on some state of mind in between numbers (1) and (2); or
- (4) as is likely, the juror could have been confused by the message and decided to apply some standard of certainty based on his own conscience.

The function of jury instructions with regard to burdens of proof is to communicate to each member of the jury the "degree of confidence our society thinks he should have in the correctness of [his] factual conclusions. . . ." ⁸³ The jury in *Ferrill* could not readily determine from the language of the instruction what degree of certainty they were expected to have before reaching a conclusion. Certainly, the possibility that the jury more likely than not received an incorrect impression of its duty meets the *Jewell* standard of "the slightest evidence of prejudice."⁸⁴

To meet the problem specifically encountered in *Ferrill*, it is suggested that Uniform Jury Instruction 3.6 be amended by adding the following sentence to the Directions for Use:

If the sole issue before the court is one such as fraud or undue influence, the court shall omit U.J.I. 3.6 and give only U.J.I. 3.7.

An amendment to Uniform Jury Instruction 3.7, Directions for Use, should advise trial courts how to appropriately use both Uniform Jury Instructions 3.6 and 3.7. The conclusion reached in *Echols*, and assumed to be accepted practice in New Mexico, ought to be communicated to trial judges who rely on the uniform jury instruction scheme for guidance. The Directions for Use accompanying Uniform Jury Instruction 3.7 presently state: "This instruction should be given only in those particular cases where clear and convincing evidence is required, such as a fraud

83. *Santosky v. Kramer*, 455 U.S. 745, 755 (1981) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

84. 82 N.M. at 124, 477 P.2d at 300.

case." These Directions for Use could be amended by including the following provisions:

When the sole issue presented by the plaintiff is one of fraud or undue influence, the appropriate instruction is U.J.I. 3.7.

If other material claims are alleged by a plaintiff in the same suit, the court may proceed by first giving U.J.I. 3.6 as it applies to those claims. For example:

In determining whether the party seeking recovery supported his claim of _____ [the specific claim to be named], the general rule is that the party seeking recovery. . . . [the court is to continue with the reading of U.J.I. 3.6].

However, in a case of _____ [the court is directed to name the claim entitled to U.J.I. 3.7], the plaintiff. . . . [the court is to continue with the reading of U.J.I. 3.7].

Adoption of the Directions for Use amendments proposed by this Note would prevent the mechanical application of Uniform Jury Instruction 3.6 in those few cases where it is irrelevant and prejudicial. Adoption would further guide trial courts in fairly instructing juries on both standards in the many cases where such instruction is appropriate.

CONCLUSION

The New Mexico Court of Appeals' efforts to structure an undue influence analysis are commendable. Weak policy was the basis for past court reluctance to describe a basic approach for proof of undue influence. Charting a general course for undue influence litigation is not like preparing a detailed blueprint. Outlining a proof approach will not promote evasion of the law. The court of appeals stepped forward in an effort to lend structure to the claim of undue influence. However, the effort created problems for future undue influence litigation.

The decision in *Ferrill* means that in order to prevail, future litigants wishing to invalidate a will on the ground of undue influence need only present evidence of a testator's susceptibility to wrongful influence and an unnatural disposition by will. Such minimum requirements may promote litigation. Overturning a will on the ground of undue influence should be a rare event. One goal of any Statute of Wills should be the protection of wills from later attack. A testator who follows the rituals of valid execution is entitled to have his testamentary plan honored by the state. The *Ferrill* decision treads heavily on an individual's freedom to dispose of his property as he chooses.

The court of appeals should have followed *Jewell v. Seidenberg*⁸⁵ in analyzing Thorp's claim that an instruction on two distinct burdens of proof is prejudicial when the sole issue before the jury is a claim of undue influence. The issue raised by Thorp pointed out the conflict between the Directions for Use in Uniform Jury Instructions 3.6 and 3.7. Although this conflict may arise only in single issue cases, clarification of the Directions of Use would be helpful to trial courts who rely on them for guidance.

MARY CATHERINE McCULLOCH

85. 82 N.M. 120, 477 P.2d 296 (1970).