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Recent Decisions

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RECENT DECISIONS

WILLS — ADEMPTION — SPECIFIC DEVISEE ALLOWED FULL CONTRIBUTION FROM RESIDUE AS SATISFACTION FOR SPECIFIC DEVISE EXTINGUISHED TO PROVIDE FUNDS FOR MENTALLY INCOMPETENT TESTATRIX. — Testatrix, Mary Mason, devised the bulk of her estate, a house valued at $21,000, to an old friend, providing that, in the event of her death, the house should pass to her son. After the execution of the will, Mary Mason became mentally incompetent. To care for her, the court appointed a guardian empowered to sell any part of the estate necessary to provide funds for such care. Since the residue of the estate amounted to only $6,000, too small an amount to finance the requirements of the testatrix, the guardian, with the consent of the court, sold the house. At the time of the sale, the house had become the devise of the plaintiff-son, as his mother had died shortly after the execution of the will.

At the death of the testatrix, all that remained of the proceeds from the sale of the house was $556. The residue of the estate totalled approximately $5500. In an attempt to recoup his losses, the plaintiff argued that he was entitled to full contribution from the residuary legatees as satisfaction for the extinguishment of his legacy.

The residuary legatees countered that the sale of the specific devise before the death of the testatrix constituted a de facto ademption of the property, and that plaintiff was entitled either to nothing or merely to the remaining proceeds from the sale. The lower court, persuaded by the ademption argument, awarded plaintiff $556. On appeal, *held:* plaintiff was entitled to full contribution from residuary legatees as satisfaction for the sale of the house to provide funds for the care of the mentally incompetent testatrix. *In Re Mason's Estate,* 42 Cal. Rptr. 13 (1965).

By selling the Mason house, the guardian of the testatrix inadvertently forced the California Court to re-examine their position on the doctrine of ademption. Simply defined,

> Ademption is the term used to describe the act by which a specific legacy has become inoperative by the withdrawal or disappearance of the subject matter from the testator's estate in his lifetime.[1]

> The primary incident of the ademption of a legacy or devise is, of course, that the right of the beneficiary to claim anything by virtue of the gift is barred, except so far as the doctrine of ademption pro tanto is recognized.[2]

To the consternation of many attorneys, ademption is not applied as simply as it is defined. Historically the doctrine has undergone many changes and even today conflicting theories exist as to its application.

Prior to 1786, the early English cases, borrowing strongly from Roman law,[3] construed ademption as a type of revocation which occurred only if the testator had manifested some intent to revoke the gift by a disposition of the property before death.[4] A positive intent, such as sale or gift of the property in question, was required; accidental destruction or damage to the property would not work an automatic ademption.

In *Ashburner v. Macguire,*[5] Lord Thurlow effectuated a substantial modification of the doctrine which remains the majority position today. In short, *Ashburner* holds that where a specific devise has been extinguished before it can pass to the named devisee, ademption has occurred, notwithstanding a contrary intent of the testator. The only consideration to be made under this theory is whether the

1 In Re Hill's Estate, 162 Kan. 385, 176 P.2d 515, 521 (1947).
2 57 AM. JUR. Wills § 1580.
3 See JUSTINIAN, INST. Lib. II, tit. I, § 12.
4 *E.g.,* Partridge v. Partridge, Cas. temp. Talb 226 (1736); Chapman v. Hart, 1 Ves. Sr. 271 (1749).
5 2 Bro. C.C. 108 (1786).

specific devise actually exists; if it does not, ademption has taken place and the devisee takes nothing.

In practice, however, many courts are reluctant to declare an ademption where it is contrary to the testator's intent or where there remains something in the estate which the beneficiary may take.[6] The majority of states have mitigated the strict *Ashburner* rule where a testator has become mentally incompetent and his guardian finds it necessary to dispose of estate property to provide funds for his care. In general, it may be stated that two theories predominate in this area — the intention theory (the majority position), and the identity theory (the minority position). The identity theory (strict ademption) is presently applied in only three American states — New York,[7] Pennsylvania[8] and Vermont.[9] These jurisdictions hold that if the identical item bequeathed is not in existence at the time of the testator's death, the beneficiary of that devise takes nothing. As might be expected, such adherence to *Ashburner* is beset with many shortcomings. In the normal situation where the testator remains competent until death, the courts feel that he has had full opportunity until the moment of death to reform his will to benefit a specific legatee whose devise has somehow become extinguished. When the testator becomes incompetent before death, the situation is radically changed, since he has no opportunity to adhere to his intentions. A devise extinguished before death but after incompetency occupies a sort of limbo, beyond the reach of testator, court and beneficiary. To alleviate the harshness of ademption applied to these circumstances, most courts ignore the ademption and give the devisee the economic equivalent of his legacy.

Avoidance of the *Ashburner* doctrine has been accomplished in four different ways. Pure intention theory is one such method, applied by the Seventh Circuit,[10] New Hampshire[11] and New Jersey,[12] and was once utilized by the New York courts.[13] Such an approach is a direct return to the pre-*Ashburner* view of the English courts that ademption does not occur unless there is some positive manifestation from the testator that he wished the beneficiary to take *only* that which constitutes the specific devise. Applied to the case of incompetency after execution of the will, this approach considers only the testator's intention before incompetency. The expression in the will is controlling unless some contrary intention has been manifested after execution and before lapse into incompetency.

Illinois[14] and Missouri[15] apply a slightly different doctrine, relying strongly on the Chancery doctrine of equitable conversion. These jurisdictions have determined that once a guardian has been appointed for the incompetent, the relation of trustee and cestui que trust automatically attaches between the parties, and the estate of the incompetent becomes a trust fund. Consequently, if a specific devise is sold to provide funds for the incompetent, the proceeds are a substitute for the specific property. Whatever is left after the incompetent has died passes under the will to the person to whom the property had been originally devised.

Identical in result but different in theory is the Massachusetts' approach, commonly referred to as ademption *pro tanto*. The leading case, *Walsh v. Gillespie*,[16] held that only the portion of the proceeds spent for the care of the incom-

6 For an extensive analysis of the means of avoidance of ademption, see generally, Note, 74 HARV. L. REV. 741, 743-45 (1961).

7 Re Ireland, 257 N.Y. 155, 177 N.E. 405 (1931); Application of Osterhoudt, 118 N.Y.S.2d 879 (1953).

8 In Re Graf's Estate, 34 Del. Co. 20 (Pa. 1946).

9 In Re Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931).

10 Wilmerton v. Wilmerton, 176 F. 896 (7th Cir. 1910).

11 Duncan v. Bigelow, 96 N.H. 216, 72 A.2d 497 (1950); Morse v. Converse, 80 N.H. 24, 113 Atl. 214 (1921).

12 In Re Cooper's Estate, 95 N.J. Eq. 210, 123 Atl. 45 (1923).

13 In Re Carter, 71 Misc. 406, 130 N.Y.S. 201 (1911).

14 Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944).

15 National Board of C.W.B.M. v. Fry, 293 Mo. 399, 239 S.W. 519 (1922).

16 338 Mass. 278, 154 N.E.2d 906 (1959).

petent testator is adeemed, while the remainder, if any, passes under the will to the specific beneficiary. This approach has received approval in Illinois[17] and Missouri,[18] although these states subscribe to the equitable conversion theory. Even Pennsylvania, New York and Vermont, adhering supposedly to the strict ademption concept, have on occasion applied it on a *pro tanto* basis.[19]

The fourth variation on the majority theme is the most simplistic, though perhaps not the most logically consistent. It is nothing more than a conscious effort to construe, whenever possible, a legacy as demonstrative rather than specific, thereby avoiding ademption altogether. Such an approach has been utilized by states adhering in theory to both the majority and minority views.[20]

In spite of the various devices employed to sidestep ademption, there is at present no holding as extreme as that of the California Court in *Re Mason*[21] permitting a specific devisee to completely extinguish the residuary legacies to satisfy his own specific legacy. Only one case, *Brandeth v. Brandeth*,[22] which has since been overruled,[23] has ever afforded so radical a remedy. In *Brandeth*, the testator devised a parcel of realty to his wife before coming incompetent. His wife, appointed guardian and unaware of the provisions of her spouse's will, sold that property for money to care for her husband. The New York Court determined that the wife was entitled to an amount equal to the proceeds of the sale of realty from the personal property remaining in the estate.

The opinion in *Re Mason*[24] clearly indicates the California Court was not influenced by this dubious precedent. Finding no statutory pronouncements answering this specific question, the court sought its solution by analogizing to the Probate Code provisions governing the abatement of testamentary gifts when the assets of the estate are insufficient to satisfy them in full.[25] No such path of argument appears in the briefs of either party; it was first raised on appeal before the Supreme Court of California.[26] Justice Traynor, speaking for the court, reasoned that:

> [E]xpenses of guardianship during an incompetency from which a testator does not recover are not substantially different from expenses and debts of a decedent's estate. It should make no difference in the distribution of an estate that a guardian rather than an executor paid those expenses, for it is no more the function of a guardian than it is of an executor to modify the decedent's testamentary plan. Accordingly, we adopt for the distribution of the estate in such a case the rules set forth in sections 750-753 of the Probate Code.[27]

Section 753 of the Probate Code[28] provides that residuary legatees shall be required to contribute, according to their interests, to satisfy a specific devisee whose legacy has been extinguished to pay the debts of the estate. The amount of contribution is discretionary with the Court.

On first glance, the *Mason* solution seems to be the perfect answer to the problem of the incompetent testator, for it balances the equities to best fulfill the

17 Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944).
18 Lamken v. Kaiser, 256 S.W. 558 (Mo. App. 1923).
19 Hoke v. Herman, 21 Pa. 301 (1853); In Re Gomez, 160 Misc. 503, 290 N.Y.S. 82 (1936); In Re Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931).
20 Application of Osterhoudt, 118 N.Y.S.2d 879 (1953); Semple's Estate, 22 Pa. Dist. 902 (1912); In Re Roth's Will, 183 Misc. 834, 51 N.Y.S.2d 617 (1944).
21 42 Cal. Rptr. 13 (1965).
22 54 Misc. 158, 103 N.Y.S. 1074 (1907).
23 Re Ireland, 257 N.Y. 155, 177 N.E. 405 (1931).
24 42 Cal. Rptr. 13 (1965).
25 West's Ann. Prob. Code, §§ 750-53.
26 Letter from Ardy V. Barton, counsel for plaintiff, on file in the Notre Dame *Lawyer* office. "The briefs do not contain the argument that the California Probate Code presently requires contribution from other distributees to a specific devisee whose property has been sold to satisfy the expenses of administration and probate. This argument was raised in oral argument before the Supreme Court. As you will notice the Supreme Court gives this argument greater weight than we had supposed."
27 In Re Mason's Estate, 42 Cal. Reptr. 13, 16 (1965).
28 West's Ann. Prob. Code, § 753.

testator's intention. Further inspection, however, leads one to recognize that the solution is only a partial one, designed solely for the situation where the testator has made a specific devise to the person or persons he most desires to benefit. It is, however, a common practice for testators to leave small specific bequests to friends, associates and neighbors, while leaving the residue to relatives and their closest friends. In such instances, the residuary legacy is the largest part of the estate.

In this situation, it would be absurd to take from the ones the testator intended to benefit the most to satisfy a small specific devise given to one more distant in affection to the testator. Instead, the court will find it incumbent upon itself to do what courts have been doing for centuries — determining the testator's intent at the time of execution of the will, and also taking into account any changes of that intention that the testator may have exhibited during periods of mental competency before his death.[29] It is submitted that in the great majority of such cases, the court will necessarily declare that strict ademption of the small specific bequest would best effectuate the testator's intent.

Of course, lengthy investigations become unnecessary in a jurisdiction with a statute governing the situation. Unfortunately, only a few states have such legislation.[30] and they are in accord with the majority judicial position prohibiting strict ademption and allowing recovery on a *pro tanto* basis. None permit the complete recovery that California now grants to a specific devisee.[31]

An oft stated but still pertinent admonition is ordinarily attached at the conclusion of articles concerning ademption — a bit of foresight on the part of an attorney alleviates all mention of ademption in a Probate Court. This comment echoes that warning. The multitude of decisions on ademption attest to the necessity of every testator making specific provisions for the possibility that he may become mentally or physically incompetent. He should clearly define the property to be liquidated to finance his care, or at least make clear those legatees he wishes to benefit above all others. However, since most warnings are rarely heeded, the California court in *Mason* has provided the most equitable substitute for a clear testamentary provision, provided that it is not extended beyond its facts.

Richard E. Steinbronn

EVIDENCE — CONSTITUTIONAL LAW — EVIDENCE SEIZED BY POLICE WITHOUT WARRANT OR PROBABLE CAUSE EXCLUDED IN FORFEITURE ACTION. — Early on a December morning in 1960, George McGonigle was driving his Plymouth sedan from Camden, New Jersey, to Philadelphia. Two officers of the Pennsylvania Liquor Control Board noticed his automobile was low in the rear and stopped him to search his car after he entered The City of Brotherly Love. McGonigle was carrying 31 cases of liquor which, unfortunately, did not bear Pennsylvania tax seals.

29 An excellent discussion of a most workable formula for determining testator's intent appears in Note, 74 HARV. L. REV. 741 (1961). The author proposes that the inquiring court should seek the answers to four basic questions. Affirmative answers to questions one and two, and negative answers to three and four would be a clear indication that ademption would defeat the testator's intention. These four questions are: (1) Did the testator desire to benefit the legatee economically, or merely to grant him a specific item of property; (2) Did a close relationship exist between the testator and legatee; (3) Did the testator at any time before incompetency manifest a contrary intention to that expressed in the will; and (4) Would a cash equivalent in any way conflict with any other intention expressed by the testator prior to his incompetency.

30 See 51 A.L.R.2d 770, 800-03, for a summary of statutes and their judicial interpretations.

31 The Mason remedy was subsequently applied by the California court in Re Packham's Estate, 43 Cal. Rptr. 318 (1965). There the guardian sold the testator's home, again a specific devise, to provide needed funds for the incompetent testator's care. The home was sold for $27,000; at the time of testator's death, $25,000 remained in the estate. The court allowed the specific devisee contribution of $2,000 from the residuary legacy to make up the full value of the devise.

The Commonwealth of Pennsylvania filed a petition for forfeiture of the sedan. On the ground that the forfeiture action depended for its success on the admission of evidence illegally obtained, the trial Court dismissed. The Superior Court of Pennsylvania reversed and directed that the automobile be forfeited. The Pennsylvania Supreme Court affirmed, holding that the Fourth Amendment guarantees, as applied to the states through the due process clause of the Fourteenth Amendment, did not apply to forfeiture actions which are civil in nature. Certiorari was granted by the United States Supreme Court. In an opinion by Justice Goldberg, the case was reversed and remanded. It was *held* that evidence seized without warrant or probable cause cannot constitutionally be used by the state in a forfeiture proceeding. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania,* —— U.S.——, 14 L.ed. 2d 170, 85 S. Ct. 1246 (1965).

The decision is an authoritative, definitive statement on the scope of the *Weeks v. United States*[1] — *Mapp v. Ohio*[2] exclusionary rule. It echoes a recent state decision, *People v. Reulman,* 41 Cal. Rptr. 290 (1964). Both decisions rejected the argument that the exclusionary rule did not apply because a forfeiture action is civil in nature. The California Court stated:

> Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property.[3]

The Supreme Court, in the *Plymouth Sedan* case, relied on *Boyd v. United States* to meet this argument. In *Boyd,* the Supreme Court was of the opinion that even though a forfeiture proceeding is civil in form, it is criminal in nature.[4] The 1965 Court agreed and held the Fourth Amendment protections, including the exclusionary rule, apply to forfeitures.

Although the *Weeks* and *Mapp* decisions applied the exclusionary rule to criminal actions, in "quasi-criminal" actions such as forfeiture, most courts held the exclusionary rule was applicable.[5] Some courts, however, were unwilling to extend the exclusionary rule to forfeiture actions.[6] It has been held not to apply to forfeiture under the Food, Drug, and Cosmetic laws,[7] nor to a liquor permit revocation.[8]

The basis of the exclusionary rule is not entirely clear. Justice Goldberg's

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1 232 U.S. 383 (1914).

2 376 U.S. 643 (1961).

3 *Id.* at 293.

4 Boyd v. United States, 116 U.S. 616, 633-34 (1886):

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. . . .

5 *E.g.,* United States v. $5,608.30 In United States Coin and Currency, 326 F.2d 358 (7th Cir. 1964); United States v. Physic, 175 F.2d 338 (2d Cir. 1949); City of Chicago v. Lord, 3 Ill. App.2d 410, 122 N.E.2d 439 (1954), aff'd, 7 Ill.2d 379, 130 N.E.2d 504 (1955); Kemper County v. Brown, 219 Miss. 383, 68 So.2d 419 (1953).

6 *E.g.,* Sanders v. United States, 201 F.2d 158 (5th Cir. 1953). (Court stressed that there is no violation of the Fourth Amendment since the government is entitled to certain property *before* it is seized, i.e., contraband. In the Plymouth Sedan case, the difference between contraband per se, *e.g.,* narcotics, and derivative contraband, *e.g.,* liquor not bearing tax stamps, was stressed in rejecting this argument.); United States v. One 1956 Ford 2-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960).

7 United States v. 62 Packages More or Less of Marmola Prescription Tablets, 78 F. Supp. 878 (W.D. Wis. 1943).

8 Camden County Beverage Co. v. Blair, 46 F.2d 648 (D.N.J. 1930), *appeal dismissed as moot,* 46 F.2d 655 (3d Cir. 1931).

opinion implies that it rests entirely on Fourth Amendment grounds, while Justice Black, concurring in the *Plymouth Sedan* case, would apply the exclusionary rule by reason of both the Fourth and the Fifth Amendments. Whatever its basis, it is now clear that the exclusionary rule extends to evidence obtained illegally by federal or state officials for use in forfeiture proceedings as well as in criminal actions.

The exclusionary rule has not been applied in purely civil actions,[9] nor to criminal actions where evidence has been obtained illegally by a private individual.[10] *Elkins v. United States*[11] made it clear that the federal government, in prosecuting a criminal action, could not use evidence illegally obtained by state officials and, presumably, that neither can state prosecuting officials introduce evidence illegally obtained by federal officials. There are those who urge that the Supreme Court's language in *Elkins* dictates that evidence illegally obtained by *anyone* be excluded in *any* action, civil or criminal.[12] Modern decisions which have considered such a possible expansion of the exclusionary rule have rejected it.[13]

Sackler v. Sackler,[14] a New York divorce proceeding, has provoked some comment on such an expansion.[15] The King's County Court in that case granted the wife's motion to suppress evidence of her adultery which was obtained illegally by her husband for use in the suit. The ruling was reversed by the Appellate Division, and the Court of Appeals agreed, two judges dissenting. One of the dissentors pointed out that, in light of the motives for an illegal search by public authorities for use in a criminal suit, *i.e.*, the common good of the community, and by a private citizen for use in a civil suit, *i.e.*, the purely personal individual advantage in his lawsuit, one might suppose that the courts would more readily suppress the latter.[16] Even though the force of the dissentor's reasoning cannot be denied, there is no solid authority for such a result.

It must be remembered that at common law all evidence, otherwise admissible, no matter how it had been obtained, was admissible.[17] Reliable evidence, after all, is the best indicator of the truth, and its exclusion renders ascertainment of the

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9 *E.g.*, Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195, 202 (2d Cir. 1929), *cert. denied*, 280 U.S. 579 (1929), where it was stated:

> While the federal courts hold that the use of evidence illegally obtained by federal officers violates the constitutional rights of a defendant in a criminal proceeding, the rule is not extended to illegal seizures by private persons, nor to civil suits.

and Walker v. Penner, 190 Ore. 542, 227 P.2d 316, 318 (1951), where the Oregon Supreme Court stated:

> The Federal rule respecting the suppression of evidence procured by an unreasonable search and seizure, and which rule has been adopted in many states, refers largely, if not entirely, to criminal and quasi-criminal proceedings. It does not apply in civil cases between individuals.

But see Lebel v. Swinciski, 354 Mich. 427, 438, 93 N.W.2d 281, 287 (1958) (dictum).

10 Burdeau v. McDowell, 256 U.S. 465 (1921).

11 369 U.S. 206 (1960).

12 See Sackler v. Sackler, 203 N.E.2d 481, 484 (N.Y. 1964) (dissenting opinion by Van Voorhis, J.).

13 See, *e.g.*, Geniviva v. Bingler, 206 F. Supp. 81, 83 (W.D. Pa. 1961):

> The rule as to the exclusion, in both federal and state courts, of evidence obtained by an unreasonable search and seizure in violation of the Fourth or Fourteenth Amendment has been broadened and expanded since Burdeau v. McDowell, supra. The rule, however, has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officers must be excluded.

E.g., state decisions following the same principle: People v. Randazzo, 34 Cal. Rptr. 65 (1963); Walker v. Penner, 190 Ore. 542, 227 P.2d 316 (1951); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959). *But see* Lebel v. Swinciski, 354 Mich. 427, 93 N.W.2d 281 (1958) (dictum).

14 203 N.E.2d 481 (N.Y. 1964), *affirming* 16 App. Div.2d 423, 229 N.Y.S.2d 61 (2d Dept. 1962), *which reversed*. 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962).

15 *E.g.*, 46 MINN. L. REV. 1119 (1962); 8 UTAH L. REV. 84 (1962).

16 203 N.E.2d 481, 485 (N.Y. 1964) (dissenting opinion by Van Voorhis, J.).

17 9 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

truth more difficult. In order for an exclusionary rule to exist, there must be a strong policy argument, such as the lawyer-client privilege, which outweighs the need of a court and jury to hear all available evidence before deciding an issue. The argument in favor of the exclusionary rule is that there is no other effective deterrent[18] against overly zealous law enforcement officials, to protect the vital right of the citizenry "to be secure in their persons, houses, papers, and effects, against unreasonable researches and seizures. . . ."[19] This argument is not available for illegal searches and seizures by private individuals. The law does, or, if it does not, it can, impose penalties upon those who obtain evidence illegally by theft or breaking and entering which will effectively deter obtaining evidence in such a manner. However, law enforcement officials can hardly be expected to report, apprehend, or punish themselves for conducting an illegal search and seizure. For this reason, the exclusionary rule may well be necessary to protect constitutional rights.

A *Shelley v. Kraemer*[20] type rationale might be used to support an extension of the exclusionary rule. The theory could be that a court, by admitting illegally obtained evidence, becomes a party or an accessory to an illegal search and seizure. Constitutional guarantees would thereby be invaded by a branch of the government, and the only way to avoid this result would be to exclude the evidence. No court has adopted this approach, but it is not beyond the realm of possibility. It is the opinion of this writer, however, that the policy of considering all pertinent evidence before deciding an issue outweighs the possible reasons for judicial adoption of such a general exclusionary rule.

The Supreme Court has adopted the exclusionary rule for evidence obtained by government agents contrary to the Fourth Amendment guarantees in criminal and, now, in forfeiture actions. The rule is neither explicitly nor implicitly contained in the Constitution. It is judge-made. It is considered the only effective method of protecting the constitutional guarantees against abuse of governmental authority. Because of this need the courts have sacrificed access to pertinent evidence. It is doubtful that such a judge-made provision of the Constitution should be extended beyond the bounds of necessity at such a price.

Thomas D. Ready

WILLS — EVIDENCE — PRESUMPTION OF UNDUE INFLUENCE ARISES WHERE ONE IN A CONFIDENTIAL RELATIONSHIP WITH THE TESTATOR RECEIVES A BENEFIT UNDER HIS WILL — REBUTTED PRESUMPTION REMAINS AS A PERMISSIBLE INFERENCE FOR THE JURY. In 1956, Albert F. Wood, a retired businessman, executed a will providing that any property in his name at the time of his death was to become a part of an inter vivos trust which he had established a year earlier. The inter vivos trust provided that the trustees, proponents May A. Flemming and the National Bank of Detroit, were to pay, upon the testator's death, 300 dollars per month to Countessa Wood Hall, the testator's niece and sole heir at law, and 150 dollars per month to May A. Flemming, the testator's secretary for thirty-seven years. In 1959, the testator amended the trust agreement to increase the monthly payment to May A. Flemming to 300 dollars and to remove a substantial part of the trust property and convey it to Miss Flemming. Later in 1959, after being advised by his lawyer that a codicil was necessary for the 1959 amendment to be given effect under the will, the testator executed the codicil.

When the testator died in 1960 at the age of ninety-one, Countessa Wood Hall contested the will and codicil on the grounds that their execution had been pro-

18 See People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).
19 U.S. CONST. amend. IV.
20 334 U.S. 1 (1948). For a discussion of this possibility and opinion against its adoption see 46 MINN. L. REV. 1119 (1962).

cured through undue influence exercised upon the testator by May A. Flemming. The trial court held that there was nothing in the contestant's proofs which could sustain a jury finding of undue influence and rendered a directed verdict for the proponents.

On appeal, the Supreme Court of Michigan *held:* that contestant's evidence established the existence of a confidential or fiduciary relationship between the proponent, Miss Flemming, and the testator. When one in such a relationship receives a benefit under the testator's will, the presumption arises that this benefit was secured through the exercise of undue influence upon the testator, placing the risk of nonpersuasion on the issue of undue influence upon the proponent. Although this presumption can be rebutted, as by evidence that the testator received independent legal advice in making the will, it still remains in the case as a permissible inference for the jury. Thus, the trial court erred in taking the case from the jury by directing the verdict for the proponents. *In re Wood's Estate,* 374 Mich. 278, 132 N.W.2d 35 (1965).

This case raises perplexing questions concerning the circumstances in which a presumption of undue influence should arise, and the effect which this presumption should have after rebutting evidence has been introduced. In fashioning answers to these questions, it is quite possible for a court to be so intent on safeguarding testamentary freedom by denying probate to a will, which does not represent the testator's free will, that it formulates a rule which raises the presumption too easily, even though just as great an infringement of testamentary freedom can result from a rule which too readily subjects the validity of a will to a jury determination. Such a rule appears to have been formulated by the Michigan Court.

The majority of jurisdictions do not raise the presumption of undue influence simply upon proof that the beneficiary was in a confidential or fiduciary relationship with the testator.[1] Rather, activity in the procurement or preparation or execution of the will is required.[2] Even then, some jurisdictions merely raise an inference of undue influence rather than a presumption.[3] The rule in *Wood's* is that more commonly applied to inter vivos transactions. There, the fact that the donee stood in a confidential relationship with the donor does raise the presumption of undue influence.[4] Few jurisdictions apply this rule to testamentary transactions.[5]

In holding that the effect of the presumption is to shift the risk of nonpersuasion on the issue of undue influence to the proponent, the Michigan Court has again adopted the minority rule.[6] Previous Michigan cases had adhered to the prevalent view that the risk of nonpersuasion remains on the contestant even though the presumption has been raised.[7]

On the question of what effect proof that the testator had independent legal advice in making the will should have on the presumption, the Michigan Supreme Court has adopted the majority position that such proof is merely one of several evidentiary factors which may be found by the jury to have rebutted the presumption.[8] Two previous Michigan cases,[9] which had held that such proof rebutted

1 ATKINSON, WILLS § 101, at 550 (2d ed. 1953) [hereinafter cited as ATKINSON].
2 *Ibid.*
3 Oglesby v. Harris, 130 S.W.2d 449 (Tex. Civ. App. 1939); ATKINSON § 101, at 550.
4 3 PAGE, WILLS § 29.84, at 600-01 (Bowe-Parker 1961) [hereinafter cited as PAGE].
5 *Ibid.*
6 ATKINSON § 101, at 548.
7 *E.g.,* Hill v. Hairston, 299 Mich. 672, 1 N.W.2d 34 (1941).
8 3 PAGE § 29.99, at 628. See Wilhoit v. Fite, 341 S.W.2d 806 (Mo. 1960); Sikes v. King, 224 Ala. 623, 141 So. 555 (1932); Zeigler v. Coffin, 219 Ala. 586, 123 So. 22 (1929); *In re* Hall's Estate, 158 Cal. App. 2d 531, 322 P.2d 1011 (2d Dist. Ct. App., Div. 2 1958).
9 *In re* Teller's Estate, 288 Mich. 193, 284 N.W. 696 (1939); *In re* Haskell's Estate, 283 Mich. 513, 278 N.W. 668 (1938).

the presumption as a matter of law and, in the absence of any real evidence of undue influence, called for a directed verdict for the proponent, were overruled by the *Wood's* decision.

Under the majority rule adopted by the *Wood's* case, proof of independent legal advice is not a prerequisite for rebutting the presumption.[10] However, proof of independent advice, though not necessarily legal advice, is required under a minority rule. In some of the jurisdictions which raise the presumption where the beneficiary in a confidential relationship is active in the procurement, preparation or execution of the will, the proponent must rebut the presumption by showing that: (1) the testator read and understood the will, and (2) the testator had independent advice and counsel.[11]

In dealing with the effect of rebutting evidence on presumptions, the Michigan Court acknowledged that it adopted a theory of the functions of presumptions which runs counter to language contained in earlier decisions. These decisions had stated that when evidence was introduced to rebut the presumption of undue influence, the presumption vanished from the case and a directed verdict for the proponent was in order, in the absence of any real evidence of undue influence.[12] The reason given was that a presumption had no evidentiary value and could not be weighed against real evidence.[13] The theory adopted in the *Wood's* case is the more modern and prevalent one that a presumption of undue influence remains in the case as a permissible inference for the jury even though rebutting evidence has been introduced.[14] Since the presumption is one having a "strong footing in probability," the facts which give rise to the presumption "also constitute circumstantial evidence raising a logical probative inference that such facts [the inferred facts] exist."[15] This conflict between the permissible circumstantial inference and the direct rebutting testimony is ordinarily to be resolved by the jury.[16] In such a situation, "a directed verdict against a litigant is proper only if the evidence *and permissible inferences therefrom,* viewed most favorably to that litigant leave no room for disagreement thereon among reasonable men."[17]

The importance of the *Wood's* case is that it raises a presumption of undue influence much more readily and attaches far more potency to the presumption than do the vast majority of other jurisdictions. By raising the presumption upon the mere fact that a beneficiary was in a confidential relationship with the testator and by then shifting to the proponent the risk of nonpersuasion on the issue of undue influence, the Michigan Court has adopted a doctrine which will result in a significantly increased number of wills being contested in the courts and their validity being subjected to a jury determination. The wisdom and desirability of this result must be evaluated in terms of the extent to which it causes more estates to be distributed in accordance with the free and uncoerced intention of the testator. Whether or not the *Wood's* doctrine will satisfy this criterion of testamentary freedom is open to debate.

Due to its very nature, "undue influence" is extremely difficult to prove by citing specific acts.[18] To be "undue," the influence exercised upon the testator

10 Authorities cited note 8 *supra.*

11 Anderson v. Davis, 208 Okla. 477, 256 P.2d 1099 (1953). In one state, this requirement is embodied in a statute. Kan. Stat. Ann. § 59-605 (1964).

12 *In re* Cochrane's Estate, 211 Mich. 370, 178 N.W. 673 (1920); Gillett v. Michigan United Trac. Co., 205 Mich. 410, 171 N.W. 536 (1919).

13 *Ibid.; In re* Wood's Estate, 374 Mich. 278, 132 N.W.2d 35, 47-48 (1965) (dissenting opinion).

14 McCormick, Evidence § 311, at 650-52 (1954) [hereinafter cited as McCormick].

15 *Id.* at 650. *Accord,* Schlichting v. Schlichting, 15 Wisc. 2d 147, 112 N.W.2d 149 (1961).

16 McCormick § 311, at 650.

17 *In re* Wood's Estate, 374 Mich. 278, 132 N.W.2d 35, 44 (1965). *Accord,* McCormick § 311, at 652.

18 Atkinson § 55, at 255-56.

must be so great as to substitute the volition of the one exercising it for that of the testator, destroying the testator's free agency and producing a will which is not the product of the testator's uncoerced volition.[19] Since undue influence is generally capable of proof only through circumstantial evidence,[20] it can be contended that the difficulty of proving undue influence requires the presumption to be raised in accordance with the liberal standard of the *Wood's* case. Furthermore, since the evidence of whether or not undue influence was exercised is more readily accessible to the proponent of the will, a strong case can be made for shifting the risk of nonpersuasion upon the issue of undue influence to the proponent, requiring him to show the absence of undue influence by a preponderance of the evidence. The application of the *Wood's* doctrine, then, according to this view, would make undue influence easier to prove, thereby preventing estates from being distributed contrary to the testator's uncoerced volition.

The converse can be argued with equal effectiveness. The fact that the beneficiary was in a confidential relationship with the testator should raise a presumption of the will's validity rather than of undue influence.[21] Confidential relationships are generally based on trust, respect and affection.[22] Thus, it should not be deemed unusual for the testator to regard one in a confidential relationship with him as a natural object of his bounty.[23] Because of the ease with which the law recognizes the existence of "confidential relationships,"[24] the *Wood's* doctrine of raising the presumption so readily might very well deter potential beneficiaries from entering into confidential relationships with the testator, much to the latter's detriment.[25]

The major objection to the *Wood's* doctrine, however, is that it is an unjustified infringement of testamentary freedom. The courts have long stated that it is their duty to honor the right of the testator to dispose of his property in accordance with his own wishes.[26] The purpose of the court's inquiry is to ascertain that the will reflects the testator's uncoerced volition, not to dispose of the estate in the way that it thinks the testator should have disposed of it.[27] The effect of the *Wood's* decision is to subject a will to the vagaries of a jury determination of its validity upon the mere fact that the beneficiary was in a confidential relationship with the testator, even though there is no real evidence of undue influence in the case.[28] Add to this the shifting of the risk of nonpersuasion on the issue of undue influence to the proponent, and it is doubtful that a secure system for establishing wills can be maintained in the face of the vast uncertainty that will result.[29]

A more general objection to the *Wood's* case is that it encourages the bringing of undue influence suits. One commentator has argued that since a survey has shown that such suits are won by the contestant in only seven per cent of the cases, the courts should not encourage the bringing of such fruitless suits.[30] This conclusion is not necessarily compelled by the data on which it is based, however.

19 *In re* Grow's Estate, 299 Mich. 133, 299 N.W. 836 (1941); ATKINSON § 55, at 256-57.
20 ATKINSON § 55, at 255.
21 3 PAGE § 29.84, at 600-01. See Lake v. Seiffert, 410 Ill. 444, 102 N.E.2d 294 (1951).
22 McQueen v. Wilson, 131 Ala. 606, 31 So. 94 (1901).
23 *Ibid.*
24 A "confidential relationship" is generally found to exist "if a relation of trust and confidence exists between the parties — that is to say, where confidence is reposed by one party and a trust accepted by the other. . . ." 3 POMEROY, EQUITY JURISPRUDENCE § 956a, at 794-96 (5th ed. 1941). Thus, this definition encompasses "both technical fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another." Van't Hof v. Jemison, 291 Mich. 385, 289 N.W. 186, 189 (1939).
25 *In re* Wood's Estate, 374 Mich. 278, 132 N.W.2d 35, 48 (1965) (dissenting opinion).
26 *In re* Colton's Estate, 11 N.J. Misc. 410, 166 Atl. 521 (Prerogative Ct. 1933), *aff'd*, 115 N.J. Eq. 327, 170 Atl. 610 (1934).
27 See *In re* Colton's Estate, *supra* note 26; ATKINSON § 36, at 140.
28 *In re* Wood's Estate, 374 Mich. 278, 132 N.W.2d 35, 48 (1965) (dissenting opinion).
29 ATKINSON § 101, at 549.
30 44 ILL. BAR J. 222 (1955).

This data could be used with equal merit to argue that such a low percentage of recoveries underscores the need for adopting the *Wood's* doctrine to facilitate the proof of undue influence.

A consideration of the arguments in favor of and opposed to the *Wood's* doctrine appears to indicate that a modification is needed to prevent an unwarranted infringement of testamentary freedom. The longstanding practice of applying inter vivos rules to testamentary transactions, raising the presumption very easily, functioned in a relatively satisfactory manner at one time. Then, the Michigan Court also adhered to the older view that presumptions vanished from the case upon the introduction of rebutting evidence and, in the absence of any real evidence of undue influence, a directed verdict was in order. However, by adopting the modern view that a presumption remains as a permissible inference for the jury despite the introduction of rebutting evidence, while retaining the practice of raising the presumption so quickly, the Michigan Court now allows cases to go to the jury upon no actual evidence of undue influence and in the face of evidence to the contrary. In view of the unassailable logic behind the modern rule on presumptions, any modification of the *Wood's* doctrine must be formulated in terms of the conditions under which the presumption will arise, rather than its effect, with the exception that the presumption should not have the effect of shifting the risk of nonpersuasion on the issue of undue influence to the proponent. There appears to be no valid reason for relieving the contestant of this burden.

One possible solution which would require the slightest modification of the *Wood's* doctrine would be to adopt the Connecticut rule that the presumption is raised upon the mere proof that a beneficiary was in a confidential relationship with the testator *only* where a stranger is the principal beneficiary to the exclusion of the natural objects of the testator's affection.[31] In the case of a relative of the testator being the beneficiary in the confidential relationship, the presumption does not arise in the absence of proof of his activity in the procurement, preparation or execution of the will.[32] By not raising the presumption so readily against a relative-beneficiary in a confidential relationship, this modification would eliminate the most undesirable aspect of the *Wood's* doctrine.

A more sweeping modification would be to simply adopt the majority rule as to both the relative-beneficiary and the stranger-beneficiary. In both situations, then, activity in the procurement, preparation or execution of the will would be required in addition to the confidential relationship to raise the presumption.

An even more liberal modification, one regarding the effect on the presumption of proof that the testator had the independent legal advice of his own attorney in making the will, might be justifiable in the relative-beneficiary situation. There, in the absence of any real evidence that the relative-beneficiary procured the will through the exercise of undue influence, this proof should prevent the presumption from arising. However, the argument can be made that the nature of undue influence does not necessarily suggest that it would be dispelled by independent legal advice. Yet, the force of this contention would appear to be weakened where this advice is given by the testator's own attorney. Evidence of undue influence would be more apt to come to light in such a conference. Nevertheless, this argument should be given weighty consideration before this effect of the proof of independent legal advice by the testator's attorney is extended to the stranger-beneficiary situation.

Which, if any, of these particular proposed modifications should be adopted is of secondary importance to the need for the Michigan Court to subscribe to the often-expressed principle that

> in the maze born of incriminations so common to the struggles over the leavings of the dead, we [the courts] must be ever mindful that our duty

31 Berkowitz v. Berkowitz, 147 Conn. 474, 162 A.2d 709 (1960).
32 *Ibid.*

> to the departed is to maintain their solemnly authenticated testament, and not suffer it to be defeated unless vitiated by the super-imposed will of another.[33]

Adherence to this principle can only be achieved through the formulation of a rule for raising the presumption of undue influence which is grounded in the realization that this presumption is a two-edged sword that can cut both for and against testamentary freedom, depending upon the relative ease with which it is placed in the hands of a jury. *Stephen A. Seall*

33 *In re* Colton's Estate, 11 N.J. Misc. 410, 421, 166 Atl. 521, 526 (Prerogative Ct. 1933), *aff'd*, 115 N.J. Eq. 327, 170 Atl. 610 (1934).