200.00

Will Contest

Introduction

A. General Principles

The statutory authority for a will contest is contained in 755 ILCS 5/8-1 and 8-2 (1994). Section 8-1 provides that within six (6) months after the admission to probate of a will, an interested person may contest the will.[1]

The representatives and all the heirs and legatees of the testator must be made parties to the proceeding. Any party to the proceeding may demand a jury trial on whether or not the instrument produced is the will of the testator. Section 8-2 contains the same statutory ability to contest the denial of an admission of a will to probate within six (6) months after entering the order denying the admission. In a will contest proceeding, all issues regarding the validity of the will are tried *de novo*; the order admitting the will to probate cannot be introduced into evidence and has no force and effect. *In re Ketter's Estate*, 63 Ill.App.3d 796, 380 N.E.2d 385, 389, 20 Ill.Dec. 407, 411 (1st Dist.1978), *citing Sternberg v. St. Louis Union Trust Co.*, 394 Ill. 452, 68 N.E.2d 892 (1946).

B. Standing

In order to contest a will, the plaintiff must have standing. This requires a direct, pecuniary, existing interest which would be detrimentally affected by the probate of the proffered will. *In re Estate of Keener*, 167 Ill.App.3d 270, 521 N.E.2d 232, 234, 118 Ill.Dec. 164, 166 (3d Dist.1988) (*citing Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist.1980)). This includes legatees[2] of a prior will who stand to inherit if the contested will is set aside. *Keener*, 167 Ill.App.3d at 271-72, 521 N.E.2d at 234, 118 Ill.Dec. at 166 (*citing In re Lipchik's Estate*, 27 Ill.App.3d 331, 326 N.E.2d 464 (1st Dist.1975)).

These requirements were strictly interpreted by the court of appeals in Keener, which held that the wife of the testator's grandson, who was named as a beneficiary in a prior will, lacked standing to contest the will because she was not an “interested person” in that she was not named in the will which immediately preceded the final will. *Keener*, 167 Ill.App.3d at 272, 521 N.E.2d at 234, 118 Ill.Dec. at 166. The dissent argued that this construction was too strict, and that the

[1] An action to set aside or contest validity of a revocable inter vivos trust to which a legacy is provided by will which is admitted to probate must also be commenced within the time allowed to contest the validity of a will (six months from admission of the will to probate). 735 ILCS 5/13-223 (1994).

[2] “Legatee” includes devisee. 755 ILCS 5/1-2.12 (1994).

majority was in conflict with the rule established in Kelley v. First State Bank of Princeton, 81 Ill.App.3d 402, 413, 401 N.E.2d 247, 255, 36 Ill.Dec. 566, 574 (3d Dist.1980), that a "prior will" is not necessarily limited to the "immediately preceding" will. *Keener*, 167 Ill.App.3d at 273, 521 N.E.2d at 234-35, 118 Ill.Dec. at 166-67.

The purpose of a will contest proceeding is to determine whether the writing produced is the will of the decedent. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 478, 46 Ill.Dec. 36, 38 (2d Dist.1980). A plaintiff with standing to contest a will[3] may assert any number of grounds to invalidate it. These grounds include undue influence, lack of testamentary capacity, fraud, forgery, revocation, ignorance of the contents of the will, partial invalidity, or any other ground that would show that the document is not the decedent's will. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d at 671, 413 N.E.2d at 478, 46 Ill.Dec. at 38. The party contesting the will has the burden of proving its invalidity. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 877, 69 Ill.Dec. 960, 965 (1983).

C. Grounds for Invalidity of a Will

1. Undue Influence

Influence is "undue" when it "prevents the testator from exercising his own will in the disposition of his estate" such that the testator's will is rendered more the will of another. *Id.*, 69 Ill.Dec. at 963. In order to invalidate a will, the undue influence must have been "directly connected with the execution of the will" and it must have operated at the time the will was made. *Schmidt v. Schwear*, 98 Ill.App.3d 336, 424 N.E.2d 401, 405, 53 Ill.Dec. 766, 770 (5th Dist.1981). Undue influence can be exerted by direct beneficiaries or by third parties, such as the spouse of a beneficiary. *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 234 N.E.2d 91, 98 (2d Dist.1968). Influence need not be exerted in an untoward manner to be undue. Even kindness and affection can constitute undue influence if they destroy the testator's "free agency." *Kelley v. First State Bank of Princeton*, 36 Ill.Dec. at 575.

a. Presumption of Undue Influence

A rebuttable presumption of undue influence can result when a fiduciary relationship exists between the testator and a legatee. A rebuttable presumption arises when the plaintiff proves (1) the existence of an attorney-client relationship or other fiduciary relationship between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will, and (4) that the beneficiary would receive a substantial benefit under the document. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473 (1945) (the leading case). *Accord Redmond v. Steele*, 5 Ill.2d 602, 610, 126 N.E.2d 619, 624 (1955); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984); *In re Estate of Mooney*, 117 Ill.App.3d 993, 997, 453 N.E.2d 1158, 1161, 73 Ill.Dec.

[3] "Will" includes testament and codicil. 755 ILCS 5/1-2.18 (1994).

169, 172 (3d Dist.1983); *In re Stuhlfauth's Estate*, 88 Ill.App.3d 974, 979, 410 N.E.2d 1063, 1066-67, 43 Ill.Dec. 930, 933-34 (3d Dist.1980); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413-14, 401 N.E.2d 247, 256, 36 Ill.Dec. 566, 575 (3d Dist.1980); *In re Basich's Estate*, 79 Ill.App.3d 997, 1002, 398 N.E.2d 1182, 1186, 35 Ill.Dec. 232, 236 (1st Dist.1979); *Estate of Letsche*, 73 Ill.App.3d 643, 646, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 436, 369 N.E.2d 1320, 1326, 12 Ill.Dec. 306, 312 (3d Dist.1977); Herbolsheimer v. Herbolsheimer, 46 Ill.App.3d 563, 565-66, 361 N.E.2d 134, 136, 5 Ill.Dec. 134, 136-37 (3d Dist.1977); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99, 234 N.E.2d 91, 97 (2d Dist.1968). By proving these elements, a party contesting a will establishes a *prima facie* case of undue influence. *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984).

A presumption of undue influence will not arise merely upon proof of a fiduciary relationship. Instead, the party contesting the will must demonstrate that the legatee who is the dominant party procured the execution of the will. *Estate of Letsche*, 73 Ill.App.3d 643, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979).

b. Proof of Fiduciary Relationship

The fiduciary relationships referred to in this four-part test are not limited to fiduciary relationships that exist as a matter of law, such as those between an attorney and client or a guardian and ward. A fiduciary relationship can also arise out of an informal relationship, which is “moral, social, domestic or even personal in its origin.” *Swenson v. Wintercorn*, 234 N.E.2d at 97. Thus, courts have found fiduciary relationships between an elderly or infirm testator and a devisee or legatee who was taking care of the testator or who was handling the testator's financial affairs at the time the will was executed. *See Nemeth v. Banhalmi*, *supra*; *Kelley v. First State Bank* of Princeton, *supra*. Where a fiduciary relationship does not exist as a matter of law, the existence of the fiduciary relationship must be established by proof that is “clear, convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion.” *Swenson v. Wintercorn*, 234 N.E.2d at 97.

c. Effect of Presumption

Once the plaintiff has raised the presumption of undue influence, the burden of producing evidence to rebut the presumption shifts to the persons standing in the fiduciary relationship to the testator. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 964. The burden of persuasion, however, remains with the plaintiff, since plaintiff has the burden of proving undue influence. *Id.* at 964-65. The amount of evidence necessary to rebut the presumption depends upon the facts of each case. *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 297, 115 Ill.Dec. 770, 772 (1st Dist.1987), citing *Nemeth v. Banhalmi*, 81 Ill.Dec. at 191. Establishment of a *prima facie* case of undue influence in the procurement of the will has been held to be sufficient to overcome a motion for summary judgment. *In re Estate of Jessman*, 197 Ill.App.3d 414, 554 N.E.2d 718, 143 Ill.Dec. 783 (5th Dist.1990).

The issues of whether a presumption of undue influence has been raised and whether sufficient evidence to rebut the presumption has been produced are questions of law for the court to decide. If the presumption of undue influence is not rebutted, the plaintiff is entitled to a judgment as a matter of law. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 965. If the presumption is rebutted, the presumption of undue influence ceases to exist, but an inference of undue influence remains. Plaintiff then has the burden of proving that the will was the product of undue influence on the basis of the evidence offered at trial. *Id.* In a case tried before a jury, the issue of undue influence must be submitted to the jury without any mention of the presumption if the presumption has been rebutted. *Id.* at 964, *citing Diederich v. Walters*, 65 Ill.2d 95, 357 N.E.2d 1128, 1130-31, 2 Ill.Dec. 685, 687-88 (1976).

2. Lack of Testamentary Capacity

Proof that a testator lacked testamentary capacity is another ground for invalidating a will. Testamentary capacity is defined as the "mental ability to know and remember who are the natural objects of [one's] bounty, to comprehend the kind and character of [one's] property, and to make disposition of the property according to some plan formed in [one's] mind." *Beyers v. Billingsley*, 54 Ill.App.3d 427, 369 N.E.2d 1320, 1328, 12 Ill.Dec. 306, 314 (3d Dist.1977). The law presumes the sanity and soundness of mind of every person until the contrary is proved. *Sloger v. Sloger*, 26 Ill.2d 366, 186 N.E.2d 288 (1962). The party contesting a will on grounds of lack of testamentary capacity has the burden of proving such. *Estate of Wrigley*, 104 Ill.App.3d 1008, 433 N.E.2d 995, 1003, 60 Ill.Dec. 757, 765 (1st Dist.1982). Evidence of physical impairment and evidence that a guardian was appointed for the testator can be considered on the issue of testamentary capacity, but neither piece of evidence is conclusive. *Manning v. Mock*, 119 Ill.App.3d 788, 457 N.E.2d 447, 457, 75 Ill.Dec. 453, 463 (4th Dist.1983); *In re Basich's Estate*, 79 Ill.App.3d 997, 398 N.E.2d 1182, 1185, 35 Ill.Dec. 232, 235 (1st Dist.1979). Evidence of a lack of testamentary capacity "must relate to a time at or near the execution of the will," *Manning v. Mock*, 75 Ill.Dec. at 462, since the will may only be invalidated on this ground if plaintiff can prove that the testator lacked testamentary capacity at the time the will was executed. *Id.* at 463.

3. Fraud or Forgery

The fraud which will invalidate a will relates to "such conduct as a trick or device by which a person may be induced to sign the paper under the impression it is something else, or to the alteration of the will after it is signed, or the substitution of another paper for part of the will after it has been signed, and matters of like character." *Swirski v. Darlington*, 369 Ill. 188, 15 N.E.2d 856 (1938). To establish forgery as a ground to invalidate a will, the contestant may show that (1) the witnesses to the will were unworthy of belief, or (2) the testator could not have been present at the time and place he was alleged to have signed the will, or (3) that the will was not signed in the testator's handwriting. Sellers v. Kincaid, 303 Ill. 216, 135 N.E. 429 (1922). The general rule is that when forgery and fraud are alleged, "courts permit evidence to take a wide range and every fact and circumstance, no matter of how little probative value, which throws any light on the issue, is admissible." *Shelby Loan & Trust Co. v. Milligan*, 372 Ill. 397, 24 N.E.2d 157 (1939). Fraud cannot be established on mere suspicion. It must be affirmatively proved by

clear and convincing evidence. *In re Gray's Estate*, 39 Ill.App.2d 239, 188 N.E.2d 379 (2d Dist.1963).

4. Revocation

Revocation is one ground that may be asserted for the purpose of invalidating an instrument. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 46 Ill.Dec. 36 (2d Dist.1980). A will may be revoked only by (1) burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (2) the execution of a later will declaring the revocation, (3) execution of a later will to the extent that it is inconsistent with the prior will, or (4) execution of an instrument declaring the revocation and signed and attested in the manner required for the signing and attestation of a will. 755 ILCS 5/4-7(a) (1994). However, the commission of one of the requisite acts of revocation, standing alone, is ineffectual unless accompanied by an intent to revoke. *In re Estate of Minsky*, 46 Ill.App.3d 394, 360 N.E.2d 1317, 4 Ill.Dec. 884 (1st Dist.1977).

A will last known to have been in the possession of the testator which cannot be found upon his death is presumed to have been destroyed by the testator with the intention of revoking it, and under these circumstances the burden is on the proponent to prove that the proffered will was valid at the time of the testator's death. *In re Estate of Marsh*, 31 Ill.App.2d 101, 175 N.E.2d 633 (1st Dist.1961). Factors to be considered in addressing the rebuttal of the presumption include (1) evidence as to statements from the testator that he did not intend to revoke the will, (2) evidence that he entertained a kind and loving attitude toward the proposed beneficiary under the will up to the time of death, and (3) evidence of other persons' access to the will prior to death. *In re Estate of Strong*, 194 Ill.App.3d 219, 550 N.E.2d 1201, 141 Ill.Dec. 155 (1st Dist.1990).

Where a will remains in the testator's possession until his death and is then found among his papers with erasures, alterations, cancellations, or tearings, the presumption is that such act, manifest upon the will, was done by the testator with the intention of revoking the will. *In re Estate of Deskins*, 128 Ill.App.3d 942, 471 N.E.2d 1018, 84 Ill.Dec. 252 (2d Dist.1984).

5. Ignorance of Contents of Will

Where a will is prepared for a testator, and he is not given an opportunity to read it, or if he is unable to read and its contents have not been explained to him, such an instrument will not, on contest, be sustained as his will. *Pepe v. Caputo*, 408 Ill. 321, 97 N.E.2d 260 (1951); *Downey v. Lawley*, 377 Ill. 298, 36 N.E.2d 344 (1941). It is likewise the rule that where the testator is shown to have executed an instrument as his will, it will be presumed, in the absence of evidence of fraud, imposition or mental incapacity, that he was aware of the content, and his signature is *prima facie* evidence of his having understandingly executed it. *Pepe v. Caputo*, *supra*; *Downey v. Lawley*, *supra*; *Sheer v. Sheer*, 159 Ill. 591, 43 N.E. 334 (1895). Where a will is shown to have been prepared at the request of the testator, though under general directions, and he afterwards executes the same in the manner provided by the law, it may not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact.

Pepe v. Caputo, *supra*; *Downey v. Lawley*, *supra*; *Sheer v. Sheer*, 159 Ill. 591, 43 N.E. 334 (1895); Compher v. Browning, 219 Ill. 429, 76 N.E. 678 (1906).

6. Partial Invalidation of Will

A will can be partially invalidated in certain circumstances. If a portion of a will is invalidated on any ground and if the remaining portion of the will can be enforced "without defeating the testator's intent or destroying the testamentary scheme," then the remaining portion of the will is enforceable. *See Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 804, 39 Ill.Dec. 820, 825 (1980). If, however, a portion of the will is invalidated and the remainder of the will cannot be enforced without violating the testator's overall testamentary intent, then the entire will must be invalidated. *Id.*

D. Tortious Interference With Expectancy

At times, certain activities that give rise to grounds to invalidate a will can also serve as the basis for a cause of action for intentional interference with an expectancy. The practitioner should be aware that when this tort action involves the validity of a will, the plaintiff must likewise file this action within the six-month period provided for contesting a will. For further discussion of this issue, see the introduction to IPI Chapter 205, Tortious Interference With Expectancy.

E. Notes on Use

The following instructions are for use when there is a will contest. These instructions anticipate the simple situation where the challenged will consists of one document. Where there is a more complex factual situation (i.e., a will with one or more codicils), the instructions will have to be modified accordingly.

200.01A Will Contest—Issues Made by the Pleadings—Entire Will Claimed Invalid

The plaintiff, ______________ claims that the document in question is not the valid last will of
plaintiff's name

______________ because:
decedent's name

[Set forth in simple form, without undue emphasis or repetition, those alleged grounds of invalidity which are supported by the evidence.]

The defendant, _____________ denies the claim[s] of the plaintiff and contends that the
defendant's name,

document is the valid last will of _____________
decedent's name .

You are to determine by your verdict whether the document is the valid last will of

____
decedent's name .

Notes on Use

This instruction should be given in every will contest case, except where IPI 200.01B is applicable. The statement of alleged grounds of invalidity used to complete this instruction must meet the standards of Signa v. Alluri, 351 Ill. App. 11, 19-20, 113 N.E.2d 475, 479 (1st Dist. 1953), which held that the issues must be concisely stated without characterization or undue emphasis. See Schulz v. Rockwell Manufacturing Co., 108 Ill.App.3d 113, 438 N.E.2d 1230, 1233-1234; 63 Ill.Dec. 867, 870-871, (2d Dist.1982). In Williams v. Crickman, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), our Supreme Court held that if the entire instrument was not procured by undue influence, it is proper for a trial court to invalidate only a portion of a will and to allow the remaining portions of the will to stand if the invalid provisions could be separate without defeating the testator's intent or destroying the testamentary scheme. The ultimate issue in a will contest case is "whether or not the instrument produced is the will of the testator" (755 ILCS 5/8-1(c) (1994)), and until the Williams decision the cases had generally held that courts could rule on the instrument as a whole and could not invalidate one provision only. If a contestant is attempting to invalidate the entire will by attacking the validity of one or more provisions only, that situation would be covered by this instruction. For example, in case of multiple allegations of invalidity, the instruction might read:

> "... because (a) the document was executed as a result of undue influence, and/or (b) [decedent's name] lacked the mental capacity to make a will and/or (c) a provision of the will was invalid and the remaining provisions of the will cannot be considered valid without defeating the testator's intent or destroying the testamentary scheme."

If the contestant was seeking to invalidate one or more provisions but otherwise sustain the will, IPI 200.01B would be used rather than this instruction.

200.01B. Will Contest--Issues Made By The Pleadings—Partial Invalidity Claimed

The plaintiff, [plaintiff's name], claims that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid because:

> [*Set forth in simple form, without undue emphasis or repetition, those alleged grounds of invalidity which are supported by the evidence*.]

[The plaintiff further claims that the remaining provisions of the will are valid because they carry out [decedent's name] overall testamentary intent and scheme.]

The defendant, [defendant's name], denies that the challenged provision is invalid and agrees that the remaining provisions of the will are valid [but contends that if such provision is invalid then the entire will is invalid because the remaining provisions do not carry out [decedent's name] overall testamentary intent and scheme].

You are to determine by your verdict whether the challenged provision is valid [and, if it is not, whether the remaining provisions of the document are the valid last will of [decedent's name].

Notes on Use

This instruction covers the situation where a contestant is attempting to invalidate only a portion of the will. In *Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), the Illinois Supreme Court held that a trial court can invalidate only a portion of the will and allow the remaining portions of the will to stand if the invalid provisions could be separated without defeating the testator's intent or destroying the testamentary scheme. IPI 200.01A should be given in all other cases.

In the first paragraph, the title of the provision (e.g., “Paragraph I” or “Article One” or “the codicil dated April 1, 1990”) will be inserted for the “designation of provision.” If more than one provision is challenged, then that paragraph will have to be modified to include a designation and description of all provisions challenged on the same ground. If different provisions are challenged on different grounds, then this paragraph will have to be repeated for each such provision.

If there is no dispute over the validity of the non-challenged provisions, then the second paragraph and the bracketed portions of the third and fourth paragraphs would not be used.

200.02A. Will Contest--Burden of Proof--Entire Will Claimed Invalid

The plaintiff has the burden of proving [one of] the claimed ground[s] of invalidity. [That] [Those] claimed ground[s] [has] [have] been stated to you elsewhere in these instructions.

If you find from your consideration of all the evidence that [any one of] the claimed ground[s] has been proved, then you should find that the document is not the valid last will of [decedent's name]. On the other hand, if you find from your consideration of all the evidence that [the claimed ground has not] [none of the claimed grounds has] been proved, then you should find that the document is the valid last will of [decedent's name].

Notes on Use

This instruction should then be preceded by IPI 200.01A. If the entire instrument is otherwise valid, it is proper for a trial court to invalidate only a portion of a will and to allow the remaining portions of the will to stand if the invalid provisions can be separated without defeating the testator's intent or destroying the testamentary scheme. *See Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980). A party seeking to invalidate the entire will might allege that “Provision A is invalid and the remaining provisions of the will cannot be considered valid without defeating the testator's intent or destroying the testamentary scheme,” in which case this burden of proof instruction would be used. If the contestant was seeking to invalidate one or more provisions but otherwise to sustain the will, then IPI 200.01B and 200.02B would be used.

IPI 21.01 defining burden of proof must be given with this instruction.

Comment

A will contest is purely statutory, having its purpose of determining whether the writing proffered is in fact the will of the testator. *Roeske v. First National Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 46 Ill.Dec. 36 (2d Dist.1980). An action to set aside a will is against the will itself and not the beneficiaries. *Merrick v. Continental Illinois Nat. Bank & Trust Co.*, 10 Ill.App.3d 104, 293 N.E.2d 767 (1st Dist.1973). It has been stated that a will contest is a *quasi in rem* proceeding, and not an action against any person to secure a personal judgment. *Estate of Mears*, 110 Ill.App.3d 1133, 443 N.E.2d 289, 66 Ill.Dec. 606 (4th Dist.1982). For this reason, references to the verdict contained in these instructions refer to verdicts either in favor of or against the validity of the decedent's will.

200.02B. Will Contest--Burden of Proof--Partial Invalidity Claimed

The plaintiff has the burden of proving that the challenged provision of the document is not valid. The claimed ground[s] of invalidity of the challenged provision [has] [have] been stated to you elsewhere in these instructions.

If you find from your consideration of all the evidence that the challenged provision is not valid, [but that the remaining provisions of the will carry out the decedent's overall testamentary intent and scheme,] then you shall find that the will, except for the challenged provision, is valid.

If you find from your consideration of all the evidence that the challenged provision is valid, then the entire will is valid.

[If you find from your consideration of all the evidence that the challenged provision is not valid and that the remaining provisions of the document do not carry out the decedent's overall testamentary intent and scheme, then you shall find that the entire will is not valid.]

Notes on Use

See Notes on Use to IPI 200.01A, 200.01B, and 200.02A.

This instruction should be used where the contestant is challenging one or more provisions but attempts to otherwise sustain the will. IPI 21.01 defining burden of proof should be This instruction should be used where the contestant is challenging one of more provisions but attempts to otherwise sustain the will. IPI 21.01 defining burden of proof should be given with this instruction. The bracketed material in the second paragraph and the fourth paragraph would be used only where the defendant is claiming that if the challenged provision is held invalid, then the entire will is invalid.

200.03. Will Contest--Undue Influence Based Entirely On Unrebutted Presumption Arising From Fiduciary Relationship

To establish undue influence as a ground of invalidity, the plaintiff must prove each of the following propositions:

1. That there was a [(principal-agent) (attorney-client) ([other fiduciary relationship arising as a matter of law]) relationship between [beneficiary's name] and [decedent's name]] [relationship between [beneficiary's name] and [decedent's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name];

2. That [decedent's name] reposed trust and confidence in [beneficiary's name];

3. That [beneficiary's name] [prepared] [or] [caused the preparation of] the document purporting to be the last will of [decedent's name]; and

4. That [beneficiary's name] received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to [decedent's name]'s bounty.

If you find that each of these propositions has been proved, then your verdict should be that the document is not the valid last will of [decedent's name].

If you find that any of these propositions has not been proved, then your verdict should be that the document is the valid last will of [decedent's name] [unless the plaintiff has proved one of the other alleged grounds of invalidity].

Notes on Use

This instruction should be given only when (1) the plaintiff relies upon the presumption of undue influence as described in the Comment below, and (2) the trial court has ruled that:

a. There is sufficient evidence to submit to the jury on each of the three propositions; and

b. Defendant has not introduced sufficient evidence to rebut the presumption. Whether the presumption has been so rebutted is for the court to decide.

If the presumption has been rebutted, the presumption disappears from the case and no presumption instruction should be given.

This instruction should not be used if the plaintiff also relies upon proof of specific conduct alleged to constitute undue influence. In that case, use IPI 200.04.

If the plaintiff claims that one or more provisions of the will are invalid because of undue influence but that the will is otherwise valid, then the instruction will have to be modified accordingly.

IPI 200.02A and 200.09 should be given with this instruction. If there is not a fiduciary relationship as a matter of law, then IPI 200.03.05 should be used with this instruction.

Comment

Former IPI 200.03 is no longer accurate and has therefore been rewritten.

When the plaintiff proves (1) that an attorney-client relationship or other fiduciary relationship existed between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will, and (4) that the beneficiary would receive a substantial benefit under the document, the law raises a presumption of undue influence. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473 (1945) (the leading case). *Accord: Redmond v. Steele*, 5 Ill.2d 602, 610; 126 N.E.2d 619, 624 (1955); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960; 466 N.E.2d 977, 992; 81 Ill.Dec. 175, 190 (1st Dist.1984); *In re Estate of Mooney*, 117 Ill.App.3d 993, 997; 453 N.E.2d 1158, 1161; 73 Ill.Dec. 169, 172 (3d Dist.1983); *In re Estate of Stuhlfauth*, 88 Ill.App.3d 974, 979; 410 N.E.2d 1063, 1066-1067; 43 Ill.Dec. 930, 933-34 (3d Dist.1980); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413-414; 401 N.E.2d 247, 256; 36 Ill.Dec. 566, 575 (3d Dist.1980); *In re Basich's Estate*, 79 Ill.App.3d 997, 1002; 398 N.E.2d 1182, 1186; 35 Ill.Dec. 232, 236 (1st Dist.1979); *Estate of Letsche*, 73 Ill.App.3d 643, 646; 392 N.E.2d 612, 614; 29 Ill.Dec. 915, 917 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 436; 369 N.E.2d 1320, 1326; 12 Ill.Dec. 306, 312 (3d Dist.1977); *Herbolsheimer v. Herbolsheimer*, 46 Ill.App.3d 563, 565-566; 361 N.E.2d 134, 136; 5 Ill.Dec. 134, 136 (3d Dist.1977); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99; 234 N.E.2d 91, 97 (2d Dist.1968).

Various relationships have been deemed to come within the rule. *See, e.g., Wiik v. Hagen*, 410 Ill. 158, 163; 101 N.E.2d 585, 587 (1951):

> A fiduciary relation exists in all cases where trust and confidence are reposed on one side and there is a resulting superiority and influence on the other. *Krieg v. Felgner*, 400 Ill. 113, 79 N.E.2d 60; *Brod v. Brod*, 390 Ill. 312, 61 N.E.2d 675. The relationship may exist as a matter of law, as between guardian and ward, principal and agent or the like, or it may be moral, social, domestic or even personal in its origin. *Stone v. Stone*, 407 Ill. 66, 94 N.E.2d 855; *Kester v. Crilly*, 405 Ill. 425, 91 N.E.2d 419. Where a fiduciary relation exists between the testator and a devisee or legatee receiving a substantial benefit under the will and the will is written or its preparation procured by that beneficiary, proof of these facts establishes *prima facie* the charge that the will resulted from undue influence exercised by the beneficiary. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473; *Donnan v. Donnan*, 256 Ill. 244, 99 N.E. 931 (1912).

If a fiduciary relationship does not exist as a matter of law, then there must be clear and convincing evidence establishing a dominant-subservient relationship. *See Chicago Land Clearance Com'n v. Yablong*, 20 Ill.2d 204, 170 N.E.2d 145 (1960); *In re Estate of Kieras*, 167 Ill.App.3d 275, 521 N.E.2d 263, 118 Ill.Dec. 195 (3d Dist.1988). Factors to be taken into consideration when determining the existence of a fiduciary relationship include the degree of kinship; disparity in age, health, mental condition, education, and business experience between the parties; the extent to which a party entrusts

the handling of business and financial affairs to the other party; and the degree of faith and confidence that one party bestows on the other. 167 Ill.App.3d at 283-284, 521 N.E.2d at 268, 118 Ill.Dec. at 200.

The strength of the presumption and amount of evidence necessary to rebut the presumption depends upon the circumstances of each case. *Wunderlich v. Buerger*, 287 Ill. 440, 122 N.E. 827 (1919).

> The amount of evidence that is required from an adversary to meet the presumption is not determined by any fixed rule. A party may simply have to respond with substantial evidence. If a strong presumption arises, the weight of the evidence brought in to rebut it must be great.

Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452, 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983). *See also In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 115 Ill.Dec. 770 (1st Dist.1987); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984).

In the case of an attorney-client relationship, the presumption has been defined as a strong presumption, which can be rebutted only by "clear and convincing" evidence that the transaction was fair, equitable and just and that the benefit did not proceed from undue influence. *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989).

Procedural Effect. For most presumptions, including this one, Illinois has adopted the Thayer-Wigmore "bursting bubble" theory. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983); *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989). Under this view, the plaintiff must first produce sufficient evidence to make a submissible case on each of the elements necessary to give rise to the presumption. *Powell v. Weld*, 410 Ill. 198, 204; 101 N.E.2d 581, 584 (1951). (These elements are sometimes called the "basic facts.") Having done so, the burden of going forward with the evidence (but *not* the burden of persuasion) shifts to the defendant. The defendant can attack either the basic facts, the presumed fact, or both.

If the defendant attacks *only* the basic facts (for example, claiming that there was no attorney-client relationship at the time of the transaction in question), then the case is submitted to the jury with this instruction. If the jury finds the basic facts in plaintiff's favor, then the presumption requires the jury to find in favor of the plaintiff.

If the defendant attacks the *presumed* fact (that is, produces evidence that he did not exert undue influence over the decedent), then the court must determine whether the presumption remains. Whether the presumption has been overcome is always a question for the court. *In re Estate of Berry*, 170 Ill.App.3d 454, 524 N.E.2d 689, 694; 120 Ill.Dec. 659, 664 (4th Dist.1988). If the court determines that the defendant has produced sufficient evidence to overcome the presumption, then the "bubble bursts" and the presumption disappears from the case. The plaintiff must then rely on specific evidence of actual undue influence or some other theory of invalidity. The jury is given the usual issues and burden of proof instructions, but the presumption is gone and the jury is told nothing about the presumption.

If the defendant's evidence is insufficient to rebut the presumption, then the presumption remains operative. If the defendant has not attacked the basic facts or if the evidence of If If the defendant's evidence is insufficient to rebut the presumption, then the presumption remains operative. If the defendant has not attacked the basic facts or if the evidence of the basic facts is so favorable to the plaintiff that it satisfies the *Pedrick* standard, then the court will direct a verdict for the plaintiff. Otherwise, the case will be submitted to the jury under this instruction for the jury to determine the basic facts.

200.03.05. Meaning of Burden of Proof--Presumption of Undue Influence—Fiduciary Relationship Must Be Proved

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

In this case, however, the plaintiff has the burden of establishing that there was a relationship between [decedent's name] and [beneficiary's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name]. To establish this relationship, the proof must be clear and convincing.

Notes on Use

Use this instruction with IPI 200.03 or 200.04 in those situations where the fiduciary relationship must be proved, as opposed to those in which a fiduciary relationship exists as a matter of law (e.g., attorney-client relationship).

Comment

A plaintiff seeking to raise the presumption of undue influence must establish, among other elements, the existence of a fiduciary relationship between the decedent and the beneficiary. In *Wiik v. Hagen*, 410 Ill. 158, 101 N.E.2d 585 (1951), the Illinois Supreme Court provided guidance on how to prove such a relationship:

> A fiduciary relation exists in all cases where trust and confidence are reposed on one side and there is a resulting superiority and influence on the other [citations omitted]. The relationship may exist as a matter of law, as between guardian and ward, principal and agent or the like, or it may be moral, social, domestic or even personal in its origin.

410 Ill. at 163, 101 N.E.2d at 587.

If a fiduciary relationship does not exist as a matter of law, then there must be clear and convincing evidence establishing the dominant-subservient relationship. *See Chicago Land Clearance Com'n v. Yablong*, 20 Ill.2d 204, 170 N.E.2d 145 (1960); *In re Estate of Kieras*, 167 Ill.App.3d 275, 521 N.E.2d 263, 118 Ill.Dec. 195 (3d Dist.1988). That is the reason why this instruction would be given in conjunction with IPI 200.03 or 200.04 where there is no fiduciary relationship as a matter of law.

This situation, where the plaintiff must present clear and convincing proof of a fiduciary relationship in order to raise the presumption of undue influence, should not be confused with a different factual situation where there is also a standard of clear and convincing proof--the evidence necessary to rebut the presumption of undue influence that exists when the presumption is a strong one (e.g., in an attorney-client relationship). *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989). Whether the evidence is sufficient in that situation is a matter of law for the court (*see* Comment to IPI 200.03), and the jury obviously need not be given any instructions for that factual situation.

200.04. Will Contest--Undue Influence--Proof of Specific Conduct And Presumption From Fiduciary Relationship

The plaintiff may establish undue influence as a ground of invalidity in two ways.

First, he may introduce proof of specific conduct alleged to constitute undue influence. If you find that the plaintiff has proved undue influence by evidence of specific conduct, then your verdict should be that the document is not the valid last will of [decedent's name].

Second, he may establish undue influence as a ground of invalidity by proving each of the following propositions:

1. That there was a [(principal-agent) (attorney-client) ([other fiduciary relationship arising as a matter of law]) relationship between [beneficiary's name] and [decedent's name]] [relationship between [beneficiary's name] and [decedent's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name]];

2. That [decedent's name] reposed trust and confidence in [beneficiary's name];

3. That [beneficiary's name] [prepared] [or] [caused the preparation of] the document purporting to be the last will of [decedent's name]; and

4. That [beneficiary's name] received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to [decedent's name]'s bounty.

If you find that each of these propositions has been proved, your verdict should be that the document is not the valid last will of [decedent's name].

If you find that the plaintiff has not proved undue influence by evidence of specific conduct, and if you further find that any of these propositions has not been proved, then your verdict should be that the document is the valid last will of [decedent's name] [unless the plaintiff has proved one of the other alleged grounds of invalidity].

Notes on Use

This instruction should be given only when (1) the plaintiff relies both upon evidence of specific conduct alleged to constitute undue influence and the presumption of undue influence as described in the Comment to IPI 200.03, and (2) the trial court has ruled that:

a. There is sufficient evidence to submit to the jury on each of the three propositions; and

b. Defendant has not introduced sufficient evidence to rebut the presumption. Whether the presumption has been so rebutted is for the court to decide.

If the presumption has been rebutted, then the presumption disappears from the case and no presumption instruction should be given.

This instruction should be used only if the plaintiff relies both upon specific proof of undue influence and on the presumption. If the plaintiff relies on the presumption alone, then use IPI 200.03.

If the plaintiff claims that one or more provisions of the will are invalid because of undue influence but that the will is otherwise valid, then the instruction will have to be modified accordingly.

IPI 200.02A and 200.09 should be given with this instruction. If there is not a fiduciary relationship as a matter of law, then IPI 200.03.05 must be used with this instruction.

Comment

Former IPI 200.04 is no longer accurate and has therefore been rewritten. *See* Comment to IPI 200.03.

200.05. Will Contest--Testamentary Capacity--Definition

A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:

(1) The ability to know the nature and extent of his property;
(2) The ability to know the natural objects of his bounty; and
(3) The ability to make a disposition of his property in accordance with some plan formed in his mind.

It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them.

Notes on Use

The instruction defines testamentary capacity. This instruction should be given in every case in which the mental capacity of the decedent to make a will is in issue.

This instruction does not relate to a challenge to the validity of a will on the ground that, because of fraud or mistake, the testator did not know that he was executing a will, or did not know its contents or effect. A will might be challenged on those grounds even though the testator did have testamentary capacity. If such a challenge is made, an appropriate instruction should be drafted.

IPI 200.08 should be used with this instruction.

Comment

Testamentary capacity has been defined many times in substantially these terms, e.g., *England v. Fawbush*, 204 Ill. 384, 398-400; 68 N.E. 526, 531, 532 (1903); *Sloger v. Sloger*, 26 Ill.2d 366, 370, 186 N.E.2d 288, 290 (1962); *Quellmalz v. First Nat'l Bank of Belleville*, 16 Ill.2d 546, 158 N.E.2d 591 (1959); *In re Estate of Jones*, 159 Ill.App.3d 377, 512 N.E.2d 1050, 1053; 111 Ill.Dec. 509, 512 (1987); *In re Estate of Dossett*, 159 Ill.App.3d 466, 512 N.E.2d 807, 811; 111 Ill.Dec. 418, 422 (1987); *In re Kietrys' Estate*, 104 Ill.App.3d 269, 273; 432 N.E.2d 930, 933-34, 60 Ill.Dec. 31, 34-35 (1st Dist.1982); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413; 401 N.E.2d 247, 255; 36 Ill.Dec. 566, 574 (3d Dist.1980); *Estate of Veronico*, 78 Ill.App.3d 379, 386-387, 396 N.E.2d 1095, 1100; 33 Ill.Dec. 371, 376 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 437; 369 N.E.2d 1320, 1328; 12 Ill.Dec. 306, 314 (3d Dist.1977). The requirement is that the testator had the capacity to know the elements mentioned in the instruction, not that he actually knew them. *George v. Moorhead*, 399 Ill. 497, 503; 78 N.E.2d 216, 219 (1948); *Down v. Comstock*, 318 Ill. 445, 453; 149 N.E. 507, 511 (1925); *Turnbull v. Butterfield*, 304 Ill. 454, 460-461; 136 N.E. 663, 666 (1922). *See also Akerman v. Trosper*, 95 Ill.App.3d 1051, 420 N.E.2d 1148, 51 Ill.Dec. 590 (1981) (comparing degrees of mental capacity).

200.06. Testimony of A Physician

During the course of this trial [a] physician[s] and [a] layman [laymen] have testified concerning the mental capacity of [decedent's name]. The testimony of the physician[s] is not entitled to any greater weight solely because [he] [they] is [are] [a] physician[s].

Notes on Use

This instruction must be used where a physician and a layman give conflicting testimony on the question of mental capacity of the testator. It should not be used where there is no conflict between the testimony of a physician and a lay witness.

Comment

Instructions which single out evidence or comment upon particular kinds of witnesses should be avoided. However, *Both v. Nelson*, 31 Ill.2d 511, 514-515; 202 N.E.2d 494, 496, 497 (1964), held it to be reversible error to refuse an instruction in substantially this language in a will contest case where a hospital intern and the family doctor testified. *See also Estate of Veronico*, 78 Ill.App.3d 379, 385; 396 N.E.2d 1095, 1099; 33 Ill.Dec. 371, 376 (1st Dist.1979), where the court held that an instruction indicating that the testimony of a physician is not entitled to any greater weight than that of a layman, is proper.

In *In re Estate of Clements*, 152 Ill.App.3d 890, 505 N.E.2d 7, 10; 105 Ill.Dec. 881, 884 (5th Dist.1987), where the administrator of the decedent's estate challenged pre-death transfers of property, the court noted that the testimony of physicians on the issue of mental capacity is not entitled to any greater weight than that of laymen. Instead, the value of an opinion on competency is measured by the facts and circumstances which form the basis of the evaluation. *Id.*

200.07. Testator's Right To Dispose of Property

Elsewhere in these instructions I have defined the term[s] ["mental capacity to make a will"] [and] ["undue influence."]

If [[decedent's name] had the mental capacity to make a will] [and] [the document in question was not executed as a result of undue influence], then you must not concern yourselves with the question of whether the decedent made a reasonable or wise disposition of his property. Every person has a legal right to dispose of his property as he sees fit.

However, you may consider the nature of the disposition for the limited purpose of determining [whether [decedent's name] had the mental capacity to make a will] [and] [whether the document in question was executed as a result of undue influence].

Comment

Although it is proper for the jury to consider the nature of the testamentary disposition as a circumstance bearing upon mental capacity and undue influence (*Catt v. Robins*, 305 Ill. 76, 83-85; 137 N.E. 101, 104-05 (1922); *Huffman v. Graves*, 245 Ill. 440, 446; 92 N.E. 289, 291 (1910); *Dowie v. Sutton*, 227 Ill. 183, 201, 202, 203; 81 N.E. 395, 402, 403 (1907) (instruction given); *England v. Fawbush*, 204 Ill. 384, 394; 68 N.E. 526, 529, 530 (1903) (instruction given); *Webster v. Yorty*, 194 Ill. 408, 419; 62 N.E. 907, 911 (1902)), the jury is not entitled to set aside the will simply because they disagree with the disposition made. *In re Bonjean's Estate*, 90 Ill.App.3d 582, 584, 586-587; 413 N.E.2d 205, 206-207; 45 Ill.Dec. 872, 873-874 (3d Dist.1980) (court held that the burden of proof was not met to set aside the will where testator disinherited her family); *In re Fordyce's Estate*, 130 Ill.App.2d 755, 758; 265 N.E.2d 886, 888-889 (4th Dist.1971) (alleged unequal distribution of estate to common heirs would not have any effect on validity of will attacked on testamentary capacity grounds); *Allen v. North*, 271 Ill. 190, 193; 110 N.E. 1027, 1028 (1915); *Brainard v. Brainard*, 259 Ill. 613, 631-632; 103 N.E. 45, 52 (1913).

200.08. Natural Objects of Bounty--Definition

When I refer to the natural objects of one's bounty, I mean those persons who might reasonably be expected to be his beneficiaries because of family relationship or ties of gratitude or affection.

Notes on Use

This instruction should be given in any case in which IPI 200.05 is given.

Comment

In *Hockersmith v. Cox*, 407 Ill. 321, 331-332; 95 N.E.2d 464, 470 (1950), the Court rejected the contention that the natural objects of a decedent's bounty are limited to his heirs-at-law and approved instructions to the effect that “the natural objects of a testator's bounty are those who have some natural claim upon his benevolence, affection or consideration” and that “the natural objects of the bounty of a person making a will are not necessarily confined to her legal heirs but may be those, who by reason of kinship may reasonably be supposed to have some claim on her.” *See also Kalnis v. Waitek*, 347 Ill. 253, 257; 179 N.E. 860, 861 (1932); *Brace v. Black*, 125 Ill. 33, 35; 17 N.E. 66, 67 (1888).

200.09. Undue Influence--Definition

When I use the expression "undue influence," I mean influence exerted at any time upon the decedent which causes him [her] to make a disposition of his [her] property that is not his [her] free and voluntary act.

Notes on Use

This instruction should be given whenever undue influence is an issue in the case.

Comment

A definition of undue influence from *Peters v. Catt*, 15 Ill.2d 255, 263; 154 N.E.2d 280, 285 (1958), is as follows:

> The undue influence which invalidates a will must be directly connected with the execution of the instrument and operate at the time it is made. It must be specifically directed toward procuring the will in favor of a particular party or parties and must be such as to prevent the testator from exercising his own will in disposition of his estate.

For similar expressions, *see Butler v. O'Brien*, 8 Ill.2d 203, 212; 133 N.E.2d 274, 279 (1956); *Hockersmith v. Cox*, 407 Ill. 321, 325; 95 N.E.2d 464, 467 (1950). For a further definition of undue influence *see* the cases cited in IPI 200.03 and 200.04. *See also Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 460; 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983); *In re Estate of Osborn*, 128 Ill.App.3d 453, 455; 470 N.E.2d 1114, 1117; 83 Ill.Dec. 694, 697 (5th Dist.1984); *In re Estate of Shedrick*, 122 Ill.App.3d 861, 867; 462 N.E.2d 581, 586; 78 Ill.Dec. 462, 467 (1st Dist.1984); *In re Estate of Veronico*, 78 Ill.App.3d 379, 386; 396 N.E.2d 1095, 1101; 33 Ill.Dec. 371, 377 (1st Dist.1979); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99-100; 234 N.E.2d 91, 96-97 (2d Dist.1968); *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 296; 115 Ill.Dec. 770, 771 (1st Dist.1987).

The phrase "at any time" is included in the instruction to make clear that the influence need not have been exerted at the time the document was signed in order to have caused its execution. It is necessary only that the influence be operative at the time the document is executed. *Wilbur v. Wilbur*, 138 Ill. 446, 450; 27 N.E. 701, 702 (1891); *Reynolds v. Adams*, 90 Ill. 134, 139 (1878).

This instruction embodies the elements of undue influence in simple language. There is no need to include the requirement that the influence be "directly connected" with the execution of the instrument since, if the influence were not so connected, it could not cause the challenged disposition. Also, it is unnecessary, and in some cases it would be inaccurate, to specify that the influence must be directed toward procuring the will in favor of a "particular person."

In *Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), the Illinois Supreme Court held that a trial court can invalidate only a portion of the will and allow the remaining portions of the will to stand if the invalid provisions could be separated without defeating the testator's intent or destroying the testamentary scheme.

200.10. Testamentary Capacity--Personal Characteristics of Decedent

If you believe that [decedent's name] [was unable to transact his ordinary business affairs] [had insane delusions] [was eccentric] [held radical or extreme notions or beliefs] [used in toxicating liquor to excess] [used drugs to excess] [had limitations due to advanced age] [suffered from a (psychosis) (or) (neurosis)] at the time he executed the document purporting to be his last will, you may consider this together with all the other evidence in determining whether [decedent's name] had the mental capacity to make a will.

However, if you find that [decedent's name] did have the mental capacity to make a will at the time the document in question was executed, then the fact that he might [insert pertinent characteristics] would not make the document invalid.

Comment

Even though it comments on particular evidence, this instruction is necessary because the jury could assume that evidence of any of these characteristics is, of itself, sufficient proof of a lack of testamentary capacity. Instructions of this kind have been approved: *DeMarco v. McGill*, 402 Ill. 46, 59; 83 N.E.2d 313, 320 (1948) (inability to transact ordinary business affairs); *Brace v. Black*, 125 Ill. 33, 38-39; 17 N.E. 66, 67 (1888) (delusion); *Schneider v. Manning*, 121 Ill. 376, 386; 12 N.E. 267, 270 (1887) (eccentricities or peculiarities); *American Bible Society v. Price*, 115 Ill. 623, 634; 5 N.E. 126, 128 (1886) (radical or extreme notions or beliefs); *Gilbert v. Oneale*, 371 Ill. 427, 433-434; 21 N.E.2d 283, 285 (1939) (intoxicating liquor); *Johnson v. First Union Trust & Savings Bank*, 273 Ill.App. 472, 506 (1st Dist.1934) (drugs); *Buerger v. Bue*rger, 317 Ill. 401, 415-416, 148 N.E. 274, 280 (1925) (age, sickness, debility of body); *Quellmalz v. First Nat. Bank of Belleville*, 16 Ill.2d 546, 548-549, 554-555; 158 N.E.2d 591, 592, 595 (1959) (eccentricity, age, feebleness, miserly habits); *Shevlin v. Jackson*, 5 Ill.2d 43, 47; 124 N.E.2d 895, 897 (1955) (intoxicating liquor); *Manning v. Mock*, 119 Ill.App.3d 788, 805; 457 N.E.2d 447, 456; 75 Ill.Dec. 453, 462 (4th Dist.1983) (inability to transact ordinary business affairs); *In re Estate of Kietrys*, 104 Ill.App.3d 269, 274; 432 N.E.2d 930, 934; 60 Ill.Dec. 31, 35 (1st Dist.1982) (intoxicating liquor); *In re Bonjean's Estate*, 90 Ill.App.3d 582, 584-585, 587; 413 N.E.2d 205, 207, 209; 45 Ill.Dec. 872, 874, 876 (3d Dist.1980) (depression, neurosis, suicide, insane delusions); *Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 408-409, 413; 401 N.E.2d 247, 252, 255; 36 Ill.Dec. 566, 569 (3d Dist.1980) (depression, drugs, physical disorders, inability to transact ordinary business affairs); *In re Jacobson's Estate*, 75 Ill.App.3d 102, 104, 107; 393 N.E.2d 1069, 1071, 1073; 30 Ill.Dec. 722, 724 (5th Dist.1979) (inability to transact ordinary business affairs); *In re Fordyce's Estate*, 130 Ill.App.2d 755, 758; 265 N.E.2d 886, 888 (4th Dist.1971) (age, feeble health); *Ennis v. Illinois State Bank of Quincy*, 111 Ill.App.2d 71, 79-80; 248 N.E.2d 534, 538 (4th Dist.1989) (eccentricity, uncleanliness); *Both v. Nelson*, 46 Ill.App.2d 69, 72, 196 N.E.2d 530, 532 (1st Dist.1964), *rev'd on other grounds*, 31 Ill.2d 511, 202 N.E.2d 494 (1964) (eccentricity, age, peculiarities, feebleness, miserly habits); *In re Gray's Estate*, 39 Ill.App.2d 239, 245-246; 188 N.E.2d 379, 382 (2d Dist.1963) (age, feebleness, memory); *Malone v. Malone*, 26 Ill.App.2d 291, 299-300; 167 N.E.2d 703, 707-708 (1st Dist.1960) (eccentricity, age, peculiarities, feebleness, miserly habits).

An “insane delusion” is present where a testator, without evidence of any kind, imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence of evidence, believe to exist. *In re Bonjean's Estate*, 90 Ill.App.3d 582, 413 N.E.2d 205, 45 Ill.Dec. 872 (3d Dist.1980).

In a case where the administrator of the decedent's estate challenged the validity of a pre-death transfer of property, the court noted that “[i]llness and impairment of the mind incident to old age do not necessarily indicate so great a deterioration of capacity that an individual is unable to understand the nature and effect of the transaction or to protect his own interests.” *In re Estate of Clements*, 152 Ill.App.3d 890, 505 N.E.2d 7, 9; 105 Ill.Dec. 881, 883 (5th Dist.1987). The court held that the decedent lacked the mental capacity of make a gift where the decedent's condition frequently fluctuated, being confused and combative one day, and quiet the next. The decedent also suffered from hallucinations and memory loss, all symptoms of organic brain disorder.

200.11. Testamentary Capacity--Effect of Prior Adjudication of Mental Incapacity

[A person who has been declared by a court (to be incompetent) (to be in need of mental treatment) (to be mentally retarded) (to be disabled)] [or] [a person who has had a (guardian) (conservator) appointed for him] can still make a valid will if he has the mental capacity to do so. The tests for mental capacity to make a will are stated elsewhere in these instructions.

Notes on Use

This instruction should be used only in that unusual case where evidence of a prior adjudication of incompetency or insanity or disability is before the jury. Although there are no longer "incompetents" in Illinois (P.A. 80-1415 §2, effective January 1, 1979, repealed 755 ILCS 5/11-2, defining incompetents), the term may remain because the will may have been drafted in another jurisdiction or an adjudication may have been made under the prior statute. *See* Comment.

IPI 200.05 must be given with this instruction.

Comment

Proof of prior adjudication of insanity or incompetency should not be admitted. *See, e.g., Pittard v. Foster*, 12 Ill.App. 132, 139-141 (2d Dist.1882); *Lewandowski v. Zuzak*, 305 Ill. 612, 614; 137 N.E. 500, 501 (1922). The adjudication, as distinguished from evidence of facts leading to the adjudication, is not relevant to the issue of mental capacity to make a will and constitutes hearsay.

However, there is some authority for the view that a prior adjudication of incompetency or insanity is admissible in a will contest "for what it is worth." *Holliday v. Shepherd*, 269 Ill. 429, 434-435; 109 N.E. 976, 978-979 (1915); *Belz v. Piepenbrink*, 318 Ill. 528, 535; 149 N.E. 483, 485-486 (1925); *see also Pendarvis v. Gibb*, 328 Ill. 282, 292; 159 N.E. 353, 357 (1927). The appointment of a conservator is not conclusive as to whether a person possesses sufficient mental capacity to execute a will, but it may be considered as evidence. *In re Basich's Estate*, 79 Ill.App.3d 997, 1001; 398 N.E.2d 1182, 1186; 35 Ill.Dec. 232, 236 (1st Dist.1979); *In re Estate of Letsche*, 73 Ill.App.3d 643, 392 N.E.2d 612, 29 Ill.Dec. 915 (1st Dist.1979).

This instruction is included for use only in the situation where the jury has learned of the prior adjudication.

200.12. Instruction On Verdict Forms--Entire Invalidity Claimed

When you return to the jury room, you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by this court.

If you decide that the document in question is the valid last will of [decedent's name], then you should use Verdict Form A.

> [When reading this instruction, the court should now say, “which reads as follows:” and should then read the corresponding verdict form to the jury.]

If you decide that the document in question is not the valid last will of [decedent's name], then you should use Verdict Form B

.

> [When reading this instruction, the court should now say, “which reads as follows:” and should then read the corresponding verdict form to the jury.]

200.13. Verdict Form A--For the Will— Entire Invalidity Claimed But Not Found

Verdict Form A

We, the Jury, find that the document in question is the valid last will of [decedent's name].

[*Signature Lines*]

200.14. Verdict Form B--Against the Will—Entire Invalidity Found

Verdict Form B

We, the Jury, find that the document in question is not the valid last will of [decedent's name].
[*Signature Lines*]

200.15. Instruction On Verdict Forms--Partial Invalidity

When you return to the jury room, you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by this court.

If you decide that [the contested provision is] [one or more of the contested provisions are] invalid, [but that the remaining provisions carry out the decedent's overall testamentary intent and scheme,] then you should use Verdict Form A.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

[If you decide that (the contested provision is) (one or more contested provisions are) invalid, and that the provisions which remain, without the invalid portion, do not carry out the decedent's overall testamentary intent and scheme, then you should use Verdict Form B.]

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

If you decide that [the contested provision is] [all of the contested provisions are] valid, then you should use Verdict Form [B] [C].

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

200.16. Verdict Form--Partial Invalidity Found

Verdict Form ____

[We, the Jury, find that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid.]

[We, the Jury, find the following contested provision or provisions invalid: (*Instructions to Jury: On the blank lines below, describe the provision or provisions that you have found invalid.*)

____
____________________________]

[We further find that the remaining provisions carry out the decedent's overall testamentary intent and scheme and represent the valid last will of ([decedent's name]).]

[*Signature Lines*]

Notes on Use

The first two bracketed paragraphs are alternates. Use the first bracketed paragraph when only one provision is contested. Insert the same description of that provision as is contained in the issues instruction (IPI 200.01B). If more than one provision is contested, use the second bracketed paragraph.

The third paragraph should be used only when a party claims that if the challenged provision is found invalid, then the entire will is invalid. In that case, IPI 200.17 should also be given.

200.17. Verdict Form--Partial Invalidity Found--Will Invalid

Verdict Form ____

[We, the Jury, find that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid.]

[We, the Jury, find the following contested provision or provisions invalid: (*Instructions to Jury: On the blank lines below, describe the provision or provisions that you have found invalid.*)
____]

[We further find that the remaining provisions do not carry out the decedent's overall testamentary intent and scheme and do not represent the valid last will of ([decedent's name]).]

[*Signature Lines*]

Notes on Use

This verdict form (together with IPI 200.16) should be given only when a party claims that if the challenged provision(s) is found invalid, the decedent's overall testamentary intent and scheme are destroyed and the entire will is therefore invalid. If no one claims that the invalidity of the contested provision(s) invalidates the remainder of the will, then use only IPI 200.16 without the last paragraph.

The two bracketed paragraphs are alternates. Use the first bracketed paragraph when only one provision is contested. Insert the same description of that provision as is contained in the issues instruction (IPI 200.01B). If more than one provision is contested, then use the second bracketed paragraph.

200.18. Verdict Form--Partial Invalidity Claimed But Not Found

Verdict Form ____

We, the Jury, find that the contested provision[s] [is] [are] valid.

[*Signature Lines*]