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In re Estate of Ulrich A. Fritschi, 33 Cal.Rptr. 264, 384 P.2d 656 (1963)

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should be compensation.[23] On the other hand, courts have held that if there is alternate access, there may be no compensation.[24]

Though the impairment of access may be claimed as a damage to the market value of the land in an eminent domain proceeding, the re-routing of traffic may not.[25] Such a re-routing is an element of the State's police power. Nonetheless, when compensation is given on the remainder of the property, as in the instant case, using the present-past market value test, loss of business due to deviation of traffic is vicariously considered and may have a direct effect upon that market value.

It is submitted that in the instant case the distinction between the impairment of access and the diversion of traffic is theoretically defensible, but, as a practical matter, is too subtle to be adequately handled by a jury of lay persons. Viewing the situation realistically, the distinction should not be used except in cases in which *only* traffic diversion is being claimed as the damage.

It is further submitted that courts have not made it clear whether they characterize access as a license or easement and allow this determination to control the nature of the proceeding; or conversely, whether the type of proceeding is defined and the nature of the property right simply made to fit. It appears no general procedure prevails. However, courts are more likely to decide the type of action before the character of the property right if the character of the right is considered at all.

HORTON B. KOESSLER.

JURIES ARE NOT CAPABLE TRIERS OF TESTAMENTARY CAPACITY OR UNDUE INFLUENCE IN WILL CONTEST CASES. — The testator, a successful opthalmologist, was married and had two sons aged 12 and 14 years. Five years before his death, the testator's wife obtained an interlocutory decree of divorce which precipitated from an intimate relationship between the testator and his receptionist.

[23]Mollandin v. Union Pac. Ry. Co., 14 Fed. 394 (1882); Idaho & W.N.R.R. v. Nagle, 184 Fed. 598 (9th Cir. 1911); Lund v. Idaho & W.N.R.R. 50 Wash 574, 97 Pac. 665 (1908). All the decisions were made under constitutional provisions which provided for both taking and damage. One court in determining compensation has said:

> When . . . ingress and egress to abutting property has been destroyed or substantially impaired he (the abutter) may recover damage therefore. The damages may be merely nominal or they may be severe. Other means of access . . . may be taken into consideration in determining the amount which would be just under the circumstances. (citing cases) Other means of access may mitigate damages (citing cases), but does not constitute a defense to the action.

State v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 992 (1960).

[24]See note 12 *supra*. It is also interesting to note, if a new road is constructed where none existed before and insufficient or no access is provided, there may be no claim for compensation because there was no access prior to the construction of the road. Schnider v. California, 38 Cal. 2d 439, 241 P.2d 1 (1952); see generally 43 A.L.R.2d 1068 (1955).

[25]See generally, 73 A.L.R.2d 680 and following annotations. 118 A.L.R. 921 indicates some contrary holdings which are in the minority.

On February 1, 1959, the testator entered a hospital with terminal cancer. On February 12, he executed a will in which he made his sons beneficiaries of a $100,000 insurance policy. His receptionist was designated the residuary legatee. On March 31, the testator executed his final will which differed in effect from the prior will only insofar as it provided that the insurance proceeds be placed in trust for the children and that all the estate taxes be satisfied solely from the proceeds of the insurance policy. The receptionist would benefit in excess of $10,000 by this change.

During the period of his confinement, the physical condition of the testator rapidly deteriorated and he was given large, sustained doses of drugs. The receptionist spent a great deal of time with the testator during his final illness and helped manage his business affairs during this time. The testator died the following April 5.

The testator's divorced wife contested the final will on behalf of the children claiming that the testator lacked testamentary capacity at the time of execution and that the will was a product of the undue influence of the receptionist proponent. The jury found for the contestant on both issues and the final will was denied probate. On appeal to the Supreme Court of California, *held,* reversed. The order denying probate is reversed and the trial court instructed to admit the will to probate. The record does not sustain the findings of the jury. *In re Estate of Ulrich A. Fritschi,* 33 Cal.Rptr. 264, 384 P.2d 656 (1963).

The instant case involves a will particularly susceptible to contest; the disposition of property is "unnatural"[1] and factors exist upon which allegations of undue influence and lack of testamentary capacity can be based. Further, it is illustrative of the common jury reaction to such a contested will. The court in the instant case noted that the jury finds for the contestant in over 75 percent of the cases submitted to it and that such has been said to be proper subject of judicial notice.[2] Robert Grant, a Probate Judge in Boston, in his book, LAW AND THE FAMILY, indicated the consistency with which contested wills are restored to probate by appellate courts:[3]

> [In spite of numerous attacks on wills, a steady average of less than 1 per cent have been disallowed by appellate courts.] . . . a result which is made more remarkable by the reminder that some of these were set aside because of defective attestation instead of the mental incapacity and undue influence of the maker, ordinarily urged by the rapacious. The statistics for the same period show a yearly average of less than 1% of wills compromised — that is, where the legatees and next of kin agreed to split their differences with the sanction of the court. . . .

[1]That is, the disposition is unlike that provided by intestate succession statutes. See CAL. PROB. CODE § 221 and REVISED CODES OF MONTANA, 1947, § 91-403.

[2]Instant case at 659.

[3]Noted in Taft, *Comments on Will Contests in New York,* 30 YALE L. J. 593, 599 (1920-21).

> It is rather surprising, however, that the showing on the side of validity should be so good considering the haphazard and hasty, if not sloppy, execution of so many wills.

Juries are prompted to find undue influence and lack of testamentary capacity by considering things other than the legal criteria involved. The "unnatural" disposition of property under the will often seems to influence their decision. Sympathy for the natural heirs and the emotional overlays of the trial interfere with impartiality.[4] Not only do their unwarranted findings give rise to further litigation but also they confront appellate courts with a conflict. Appellate courts are hesitant to overturn the factual findings of trial courts which have had the advantage of seeing and hearing the testimony of the witnesses. They will not do so unless there is no substantial evidence in the record to support that finding.[5] There is, however, a fundamental policy, which juries do not seem to appreciate, requiring that a testator be able to dispose of his property as he sees fit and that such right does not depend upon its judicious use.[6] The mental capacity required by law to exercise the right to dispose of property is less demanding than is regularly supposed by juries. Jury misunderstanding of these requirements leads, at least in part, to their consistent denial of the will. Laymen are inherently limited in dealing with the problem of mental capacity[7] and are prone to consider evidence touching their common knowledge but which is not a criterion set down by law.

In the instant case, part of contestant's attack was based upon the idiosyncracies and fatal illness of the testator. It was demonstrated that he had displayed irrationality and a "disturbed attitude" toward one of his children. Such evidence is often seized upon by contestants yet it fails to reach the legal standard of incapacity. A testator is presumed to be sane and to have sufficient mental capacity to make a valid will. The burden is on the contestant of the will to show a lack of the requisite capacity at the time of execution by a preponderance of the evidence.[8] When applied to the capacity required to make a valid will, the word incompetent should be construed to apply to any person, whether sane or insane, who is by reason of old age, disease, weakness of mind, or other cause, unable to understand what property he has, the relationship which he bears to those who would naturally be the objects of his bounty, and the disposition of his property he is making.[9]

The primary impact of contestant's arguments rested upon the assertion of drug induced incompetence. This evidence indicated a sustained administration of drugs to the testator capable of impairing men-

[4] ATKINSON, WILLS 140 (2d ed. 1953).

[5] *In re* Cissel's Estate, 104 Mont. 306, 66 P.2d 779 (1937).

[6] *In re* Silver's Estate, 98 Mont. 141, 38 P.2d 277 (1934); *In re* McDevitt's Estate, 95 Cal. 17, 30 Pac. 101 (1892).

[7] See ATKINSON, note 4 *supra.*

[8] *In re* Benson's Estate, 110 Mont. 25, 98 P.2d 868 (1940); *In re* Estate of Lingenfelter, 38 Cal. 2d 571, 580, 241 P.2d 990 (1952).

[9] *In re* Cummings' Estate, 92 Mont. 185, 11 P.2d 968 (1932); *In re* Estate of Smith, 200 Cal. 152, 252 Pac. 325 (1926).

tal ability because of known side effects.[10] The drugs used to alleviate pain caused by such diseases as cancer include morphine, codeine, Dilaudid, Demerol and methadone. These drugs are analgesics which act to suppress the pain registering function of the brain itself. They do so by: (1) raising the threshold of pain perception (the primary effect); (2) by the side effect of removing the usual responses to pain such as anxiety, fear, panic, withdrawal and flight; and (3) by inducing sleep which itself raises the pain threshold.[11] Side effects may act to relieve an individual of some of his natural inhibitions or precautionary instincts and it is known that the side effects outlast the pain relieving effects, sometimes by many hours.[12] The side effects do not prove mental impairment for a period following the administration of drugs but they are a factor to be considered.[13]

The development of tolerance to drugs provides a counter-balancing force to the side effects. Tolerance develops through a sustained usage of drugs and the presence of pain greatly increases tolerance.

> The more severe the pain, the larger is the dose of opiate required and the greater the amount of drug that can be tolerated. . . . . This is in keeping with the general principle that the degree of stupefication caused by a given amount of a depressant drug is directly proportional to the level of reflex excitability of the nervous system.[14]

As the tolerance to the drug itself increases, so increases the tolerance to the side effects.[15] In cases not involving drug usage, the jury's attention must be directed to the particular facts and circumstances surrounding the testator at the time of execution of the will. A consideration of all the effects of drugs and the awareness that reactions vary with the individual person under varying circumstances indicates that the criterion for drug induced incapacity should still be the observed mental condition of the patient. Certainly, contestant's testimony on general side effects and reactions because of drug usage falls short of establishing mental incompetence.

Despite this, an appealing case is made for the jury by displaying the available information in side effects. Such information coincides with the common knowledge and experience the jury is likely to possess. The treatment of drug usage in literature generally has not been to demonstrate its medical value but rather to portray an illegal, immoral use. The user is often set out as abnormal and incompetent. It is this concept of drug usage which is likely to exist in the mind of the jury.

Further, testimony as to side effects of drugs may be a particularly fine attack in jurisdictions such as Montana which indulge a presump-

[10]See generally, for an excellent discussion of this area, Sharpe, *Medication as a Threat to Testamentary Capacity*, 35 N.C.L. REV. 380 (1956-57).

[11]Wolff, Hardy, Goodell, *Studies on Pain*, 19 J. CLINICAL INVESTIGATION 659 (1940).

[12]HARDY, WOLFF, GOODELL, PAIN SENSATIONS AND REACTIONS 344 (1952).

[13]Nunn v. Williams, 254 S.W.2d 698 (Ky. 1953).

[14]GOODMAN AND GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 248 (2d ed. 1955).

[15]Miller v. Oestrich, 157 Pa. 264, 27 Atl. 742 (1893).

tion of continuing incapacity once such a condition is shown to exist and to be of a lasting and enduring variety. Section 93-1301(1) of the Revised Codes of Montana, 1947, provides: "A thing once proved to exist continues as long as is usual with things of that nature." Montana courts have made this statute applicable to will contests involving lunacy and insanity.[16] Such a presumption places a very substantial burden upon the proponents of the will to show that it was executed during a lucid interval. If the courts are willing to allow such a presumption in cases of insanity it is possible that it would also be allowed in cases of a sustained use of drugs.

The other ground proposed by the contestant for finding the will invalid was that of undue influence upon the testator by the proponent. The proponent did not actively participate in procuring the contested will. She was not present at the signing of the will nor at the discussions leading up to it. She did seek a witness at the request of the attorney and her pen was used for signing the will. A confidential relationship existed between the proponent and the testator and she had both the motivation and the opportunity to influence him. It is not sufficient that the testator may have been influenced by the beneficiary in consequence of their fiduciary relationship. Lawful influence arising from family and social relations may have its natural results even if it influences last wills. Only when the influence exercised is exerted over the very act of devising and prevents the will from being the act of the testator is it grounds for invalidating the will.[17] The influence must be such as to amount to coercion, destroying the free agency of the testator at the time of the execution of the will and must directly procure its execution.[18] The jury found undue influence in the instant case without a substantial basis in the evidence, much as they found testamentary incapacity.

No Montana decision involving a will contest based on drug induced testamentary incapacity has been found. However, the administration of drugs to those confined with terminal disease is not infrequent and an attorney should consider how he would approach the drafting of a will under such circumstances. A jury is less likely to find testamentary incapacity, as the jury did in the instant case, if certain precautionary measures are taken. Precautions can most effectively be taken at the time of the execution of the will since it is at that time that the testator must be possessed of testamentary capacity and free of undue influence.

Often an individual is faced with the possibility of an imminent death before he takes steps to procure the drafting of his will. In the instance of one confined with a terminal disease it is particularly important to execute the instrument as early as is practicable. As time passes, the condition of the testator may worsen and he may be administered larger dosages of drugs to dull increasing pain. In this regard, it may be beneficial to consult the attending physician. Doctors are generally not informed of the gravity of making a will nor are they likely

[16] *In re* Murphy's Estate, 43 Mont. 353, 373, 116 Pac. 1004 (1911).
[17] Hale v. Smith, 73 Mont. 481, 237 Pac. 214 (1925).
[18] *In re* Bright's Estate, 89 Mont. 394, 300 Pac. 229 (1931).

to understand the low degree of mental capacity required by law to exercise the right to dispose of property. Enlightening the doctor in these respects may encourage him to do what he can to put the testator in an improved mental condition, at least for a short time. If such an act would interfere with medical ethics, the doctor mught be able to indicate the time during which the testator is the least affected by drugs.

Further, the doctor should be made a witness to the execution of the will. Nurses also make effective witnesses.[19] These are the most influential attestors to sound mind and memory because professional training and ability allows them to arrive at the most accurate ascertainment of mental competency. An account of the testator's capacity from such witnesses based on firsthand knowledge is far more convincing than hypothetical questions directed to medical experts at the time of contest.

> The process of eliciting from medical experts answers to hypothetical questions concerning mental capacity, has come to be a highly artificial and a wholly unconvincing performance. Both juries and the courts largely ignore such evidence, seeking as a basis for their deductions evidence showing objectively capacity of a testator to attend intelligently to his current affairs. The refinements of the medical science applied as they are to facts postulated in an interminable question prepared by counsel, interests them chiefly as intellectual gymnastics. They usually dismiss the learned medical disquisitions with ill-concealed amusement.[20]

While the witnesses are present, the will should be read to the testator so that he can be positively said to know its contents and to assent thereto. This act will impress the occasion upon the minds of the witnesses and afford evidence that the testator is aware of his property, the objects of his bounty and the disposition of the property that he is making. A simple will rather than a complex disposition of property is advised under these circumstances as there is some authority that less mental capacity is needed for a simple disposition of property.[21] Certainly this proposition should be logical and appealing to a jury and make them more willing to credit the testator's ability to understand his property disposition.

Another precaution, that of having a psychiatric examination, is of somewhat limited application but may be worth considering under certain circumstances. Psychiatrists may not be available in a small community and there is a risk of creating doubt in the minds of the jury that the attorney himself believes the testator to be sane or competent. If, however, the premise of a lucid interval is to be established,[22] a psychiatric examination is particularly valuable.[23]

[19] *In re* Sales' Estate, 108 Mont. 202, 89 P.2d 1043 (1939).

[20] See note 3 *supra* at 603.

[21] *In re* Holmstrom's Estate, 208 Minn. 19, 292 N.W. 622 (1940); 57 AM. JUR. *Wills* § 66 at 83.

[22] See page 172 *supra* on the presumption of continued incapacity.

[23] Usdin, *The Psychiatrist and Testamentary Capacity*, 32 TUL. L. REV. 89, 100 (1957-58).

Although juries are notably incapable triers of testamentary capacity and undue influence, the foregoing precautionary measures in the drafting and execution of the will provide a means by which to avoid a jury denial of a will in a contest proceeding. These precautions should discourage one from a contest against even an "unnatural" will and afford a much stronger case with which to convince the jury if there is a contest.

ROBERT T. BAXTER.

PRELIMINARY HEARING IS A CRITICAL STAGE OF THE PROCEEDING AT WHICH THE INDIGENT DEFENDANT IS REQUIRED TO HAVE THE ASSISTANCE OF COUNSEL.—Defendant, Robert Galloway White, was arrested on May 27, 1960. He was charged with murder and both assault and robbery with a deadly weapon. The preliminary hearing was postponed and not held until August 9, 1960.[1] The defendant, who was not represented by counsel, entered a plea of guilty at the hearing. The defendant was called before the Criminal Court of Baltimore for arraignment on September 8, 1960, but because he was not represented by counsel at that time the arraignment was postponed. On the following day counsel was appointed to represent him. The arraignment was held on November 25, 1960 and the defendant entered pleas of "not guilty" and "not guilty by reason of insanity." At the trial the guilty plea which had been entered at the preliminary hearing was introduced into evidence without objection. The defendant was convicted and sentenced to death. On appeal to the Maryland Court of Appeals,[2] the defendant contended that the failure of the state to afford him appointed counsel at the preliminary hearing violated his constitutional rights to counsel. On certiorari to the Supreme Court of the United States, *held,* reversed. In a per curiam opinion the Court held the preliminary hearing to be a critical stage of the proceedings and stated that because the defendant had not been afforded counsel at this stage he was denied his constitutional right to counsel.[3] Setting aside any consideration of prejudice, the Justices agreed that the presence of counsel at the preliminary hearing was necessary to enable the accused to know how to plead intelligently. *White v. State of Maryland,* 373 U. S. 59 (1963).

The right of a defendant to representation by counsel of his own choosing has long been recognized and guaranteed in both state and fed-

[1]The August ninth hearing is not mentioned in the report of the appeal of the conviction to the Maryland Court of Appeals. White v. State of Md., 227 Md. 615, 177 A.2d 877 (1962). The record there indicates the defendant was charged before a magistrate on May 30, 1960. The reasons given for this four day delay were the continued investigation of a co-defendant's connection with the crime and a sharp curtailment of magistrates' sittings over the Memorial Day weekend. The United States Supreme Court report of the case mentions neither the May 30 hearing nor the reasons for the delay in having a preliminary hearing.

[2]White v. State of Md., 227 Md. 615, 177 A.2d 877 (1962).

[3]Upon return of the case to the Maryland Court of Appeals that court reversed the conviction in the Criminal Court of Baltimore and remanded the case for a new trial in accordance with the opinion of the United States Supreme Court. White v. State of Md., 231 Md. 533, 191 A.2d 237 (1963).