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I. INTRODUCTION

A properly executed will is presumed to be free from undue influence, and the burden of proving that such influence existed rests upon a contestant who alleges its existence.[1] However, most jurisdictions now recognize a special exception to this rule when the contestant can establish that a confidential relationship existed between the testator and the beneficiary, that the beneficiary actively participated in the procurement or preparation of the will, and that an unnatural disposition in favor of this beneficiary occurred. It is generally held that the proof of these three elements will give rise to a presumption of undue influence, requiring the proponent of the will to come forward with rebutting evidence or lose his case.[2]

The Montana supreme court has rejected the existence of a presumption of undue influence under this state's statutory scheme,[3] and this rejection was recently reaffirmed in *Blackmer v. Blackmer*.[4] Unfortunately, the facts upon which the court has based its holdings do not fit the pattern usually accepted by courts and commentators as giving rise to the presumption. Logic, public policy, and human nature all seem to demand the existence of such a presumption, in order to protect the aging, gullible, or weak-minded testator. This note is an attempt to demonstrate that in a proper fact setting, a means may exist by which to avoid the harshness of the holdings of the *Blackmer* line of cases.

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1. 94 C.J.S. *Wills* § 237 (1956); *see also* In re Choinier's Estate, 117 Mont. 65, 156 P.2d 635 (1945).

2. 94 C.J.S. *Wills* § 239 (1956); 3 BOWE-PARKER: PAGE ON WILLS §§ 29.95-29.96 (1961); *see* 13 A.L.R.3d 381 (1967).

3. Although located in the chapter concerning contracts, REVISED CODES OF MONTANA, (1947) [hereinafter cited as R.C.M. 1947], § 13-311 is accepted by the courts as applicable to the law of wills:

> Undue influence—in what it consists. Undue influence consists:
> 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
> 2. In taking an unfair advantage of another's weakness of mind; or
> 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

R.C.M. 1947, § 91-103 dictates that: "A will . . . procured to be made by . . . undue influence, may be denied probate." It is noteworthy that neither of these sections is affected by the *Montana Uniform Probate Code*, R.C.M. 1947, tit. 91A.

4. Blackmer v. Blackmer, ___ Mont. ___, 525 P.2d 559 (1974).

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II. BLACKMER v. BLACKMER

Fannie Blackmer executed her first will in 1959, and her second will, which was contested in the case, in 1969. Her son, a defendant and the proponent of the second will, had taken her to see her attorney, who had advised her to make the second instrument. Subsequent to changing her will, Fannie had stated in the presence of the attorney and all the legatees that "This is just the way I want it." Nevertheless, an action was commenced to set aside the will on the grounds of mental incompetence and undue influence.

At the trial, there was considerable dispute as to the facts of the case, with one group of witnesses testifying to the testator's neatness, care, intelligence, and decision-making ability, while another group testified to her confusion, poor eyesight, difficulty controlling her moods, and lack of business experience. The trial court concluded that

> . . . on December 29, 1969 . . . by reason of senility, her serious condition and love of [defendants], Fannie I. Blackmer was subject to undue influence.[5]
>
> 2. That because Mrs. Blackmer was 85 years of age, frail in body, nearly blind, dependent upon others for her well-being, inexperienced in business affairs, and suffered from . . . senility, the nature of the transaction and the reasons given therefor coupled with the confidential relationship, gives rise to a presumption that the will . . . [was] not freely, fairly and understandably made.[6]

The defendants appealed, and the Montana supreme court framed the central issue as follows:

> 2. Does the court's conclusion of law No. 2 give rise to a presumption of undue influence, or a presumption that a . . . will [was] not understandably and freely made?[7]

The court concluded that

> . . . these circumstances in Montana raise no presumption of any kind. Undue influence . . . is never presumed and must be proven, like any other fact. *In re Cocanougher's Estate*, 141 Mont. 16, 375 P.2d 1009.[8]

The following requirements were set forth as the minimum a contestant must establish to deprive a beneficiary of his legacy:

> (1). Confidential relationship of the person attempting to influence the testator;

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5. *Id.* at 561, 562.
6. *Id.* at 562.
7. *Id.* at 562.
8. *Id.*

(2). The physical condition of the testator as it affects his ability to withstand the influence;
(3). The mental condition of the testator as it affects his ability to withstand the influence;
(4). The unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence, and
(5). The demands and importunities as they may affect particular testator taking into consideration the time, the place, and all the surrounding circumstances.[9]

The court concluded that the mere fact that Fannie had lived with the defendants for two years was insufficient to support the plaintiff's contentions, since no additional proof had been offered to show that the defendants had actually exercised undue influence on the testator's mind to procure the execution of the will. The trial court's holding was therefore reversed because it was not supported by substantial evidence.

II. The Historical Foundation of the "No Presumption" Rule

The court in *Blackmer* cited both *Hale v. Smith*[10] and *In re Cocanougher's Estate*[11] for the proposition that undue influence is never presumed in Montana but must be proven like any other fact. As previously noted, the general rule in other jurisdictions is to the contrary in the following situation:

> Where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud . . . a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in preparation of the will.[12]

Upon close scrutiny, neither *Hale, Cocanougher*, nor *Blackmer* reveal facts which should have induced the court to apply the generally accepted rule. It is therefore arguable that the holdings in these cases were too broad for the facts presented, and were thus merely dicta.

In *Hale v. Smith*, the trial court did not find undue influence, and the issue on appeal was the sufficiency of the evidence support-

9. *Id.*, citing Estate of Maricich, 145 Mont. 146, 400 P.2d 873, 879 (1965).
10. Hale v. Smith, 73 Mont. 481, 237 P. 214 (1925).
11. In re Cocanougher's Estate, 141 Mont. 16, 375 P.2d 1009 (1962).
12. In re Estate of Graves, 202 Cal. 258, 259 P. 935 (1927).

ing the holding. The court was impressed by several factors: the will had been executed 2 ½ years prior to the testator's death; the testator was a "unique and positive character . . . strong minded . . . It was not easy for anyone to influence him . . ."[13]; and the beneficiaries were the natural objects of his bounty. The court found that

> . . . the evidence conclusively shows the testamentary capacity of the testator . . . and that in making (the will) he was wholly free from the undue influence of any person whomsoever.[14]

It was thus unnecessary for the court to add, without citing any authority, that

> [Undue influence] is never presumed, and must be proven like any other fact. The burden of proving it rests upon the contestant.[15]

Since there was not even a suggestion that the beneficiary was in any way active in the procurement or preparation of the will or that this beneficiary was an unnatural object of the testator's bounty, the case was clearly one in which it would have been illogical to presume undue influence. In light of the testator's personality and the long existence of the will, it was odd that the court stated such a broad and general rule without citing any authority.

The facts of *In re Cocanougher's Estate* are similarly unsuited to the application of the majority rule concerning presumptions of undue influence. Although the trial court found undue influence on the basis of a special interrogatory to the jury, the issue again concerned the sufficiency of the evidence. The facts were clear: the will had been executed 22 months prior to the testator's death; the will was drafted and witnessed by an independent attorney; no beneficiary was present at the execution; the contestant actually dealt with the decedent in business up to the time of death; the testator was active and healthy at the time of execution; and most importantly, the person who allegedly applied the undue influence did not even know of the existence of the will until *after* the testator's death! On the basis of these facts, especially the last one, the court held that

> There was no evidence, or at the very most just a suggestion of evidence, as to any undue influence being exercised, as the term is used in our statutes and cases . . .[16]

Citing extensively from *Hale v. Smith*, the court refused to follow

13. Hale v. Smith, *supra* note 10 at 214.
14. *Id.* at 215.
15. *Id.* at 216.
16. In re Cocanougher's Estate, *supra* note 11 at 1013.

the plaintiff's urging to adopt the California rule,[17] and again rejected any presumption in this area.

As in *Hale v. Smith*, the facts of this case did not fit the mold generally accepted as the basis of the presumption. There was no activity in the procurement of the will, the beneficiary was not an unnatural object of the testator's bounty, and there was independent advice by counsel to the testator.

Recalling the *Blackmer* case, in which the elements of active participation and unnatural disposition were similarly lacking, it can only be concluded that the rule against the presumption of undue influence in Montana rests on three rather infirm holdings. The court has guardedly recognized this infirmity on two occasions. In declining to adopt the California rule in *Cocanougher*, the court noted that the result would not be changed even if that line of cases were followed.[18] In *In re Choiniere's Estate*, the presumption, "if one existed" was found to have been effectively rebutted.[19]

Because the Montana rule is dicta, it is possible that in the proper factual setting it might be abandoned. An argument based upon the weight of authority in other jurisdictions[20] should be persuasive. An additional argument based on considerations of both policy and logic may aid in convincing the court to turn its back on past dicta. An examination of the basis of the general rule highlights this argument.

IV. The Basis of the Presumption of Undue Influence

Undue influences consists of the taking of an unfair advantage of another by means of such persons's weakness of mind, or distressed condition, or by means of a special confidence or authority.[21] The theory underlying the doctrine of undue influence in the law of wills is that

> . . . the testator is induced, by the means employed, to execute an instrument in form and appearance his will, but in reality expressing testamentary dispositions which he would not have voluntarily made . . .[22]

Special problems of proof will almost certainly be encountered when attempting to show that unfair advantage was taken in the form of

17. *See* textual statement of the rule in connection with note 12, *supra* and additionally *In re Arnold's Estate*, 16 Cal.2d 573, 107 P.2d 25 (1940); *In re Haywood's Estate*, 109 Cal. App.2d 388, 240 P.2d 1028 (1952); *In re Nelson's Estate*, 134 Cal. App. 561, 25 P.2d 871 (1933).

18. In re Cocanougher's Estate, *supra* note 11 at 1014.

19. In re Choiniere's Estate *supra* note 1 at 639.

20. *See* discussion, *supra* note 2.

21. *See* discussion, *supra* note 3.

22. Murphy v. Nett, 47 Mont. 38, 130 P. 451, 453 (1913).

an inducement, and also that the mental state of the deceased was not what he expressed in his will. Such difficulties as the close confidence of the testator and the will's proponent, the private nature of the exercise of influence, the possibility of a lengthy series of influential actions over an extended period of time, and the absence of clear information as to the actual intent of the deceased place a heavy burden on the will contestant.

With these problems inherent in proving undue influence, it seems incongruous to require the contestant to show any more than the direct evidence that is always present in such cases: that the testator and the beneficiary sustained a confidential relationship; that the latter actively participated in the procurement of the will; and that an unnatural bequest resulted from the activity. These facts alone will be quite difficult to establish. The less mental capacity and will power the testator has (and thus the more susceptible he is to influence), the easier it will be for the unscrupulous to take advantage of him. As the influencing becomes easier, the facts available to implicate the wrongdoer will become more scarce. In the extreme case, very little effort could result in easily overcoming the testator's intent, and in such a situation few facts will exist upon which a contestant could base his case. A presumption is demanded by logic to protect the weak-minded and aged, and to provide for disposition of property according to the true intent of the testator. The broad rule of the *Blackmer* case tends to lessen this protection by imposing too severe a burden of proof on the party attempting to expose the alleged wrongdoing.

A presumption of undue influence in this special situation may not be the ultimate solution to these evidentiary problems, but it offers a satisfactory compromise by forcing the proponent to come forward with information which only he may possess. Whether the presumption shifts the burden of proof or is merely used as another factor by the jury in weighing the evidence,[23] it results in easing the task faced by the contestant in establishing the wrong, and may actually discourage those attempting to work influence by providing a barrier in an otherwise open area.

Conversely, because of the limited application and stringent threshold requirements of the presumption, it should not result in overturning wills which truely express the testator's intent. The rule ideally serves to protect the rights of the testator and the legitimate beneficiaries, without causing hardship to any but those who take

23. 3 BOWE-PARKER: PAGE ON WILLS §§ 29.85, 29.96 (1961). Substantial disagreement exists among other jurisdictions as to the effect of the presumption, although a shift in the burden of proof seems to provide the best results.

unfair advantage. A proponent who is an intended beneficiary will easily be able to rebut the presumption with competent evidence; the undue influencer, by contrast, will find it difficult to overcome the burden placed on him with credible, provable facts.

V. CONCLUSION

The *Blackmer* case and its precedents have laid down an anamolous rule in Montana by holding that no presumption of undue influence exists in this state. The rule has no basis in authority or logic and it is apparently unique. Furthermore, it is not supported by the facts of the cases in which it was expounded. Fortunately, it can be argued under the proper facts that the rule should be abandoned, both on the grounds that it is dicta and that it is illogical and unfair in its results. Confusion and injury can only follow from further adherence to the no presumption rule.