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Wills--Evidence--Right of Subscribing Witness to Testify (Matter of Putnam, 257 N.Y. 140 (1931))

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WILLS—EVIDENCE—RIGHT OF SUBSCRIBING WITNESS TO TESTIFY.—The will of the testatrix was admitted to probate over the objection of her niece who was her only living relative. In previous wills made by the testatrix the niece was left the income of the estate for life. The same provision was made for her in this will, but the residuary estate was bequeathed to the lawyer who drew the will. In prior wills the residue was bequeathed to charity. The niece contested this will on the ground of undue influence. The Appellate Division affirmed the finding of the surrogate that there was no undue influence, and the will was admitted to probate.[1] An appeal was taken on the ground that certain testimony of a subscribing witness, who was an employee of the lawyer who drew the will, should have been excluded, and that questions calling for the state of the testatrix's feelings toward her lawyer after the making of the will should not have been excluded. *Held,* affirmed. *Matter of Putnam,* 257 N. Y. 140, 177 N. E. 399 (1931).

The claim of the appellant that the testimony of the lawyer's clerk related to confidential communications with the deceased and therefore should have been excluded disregards sections 353 and 354 of the Civil Practice Act (N. Y.). By these sections it must be presumed that the legislature intended the lawyer's clerk to share the privilege of the attorney in testifying, in a probate proceeding, where he has become a subscribing witness to a will.[2]

Evidence showed that the testatrix, on various occasions previous to making the will, had expressed fear and distrust of her attorney. Questions asked by the appellant's attorney regarding the state of her feeling after the making of the will were excluded, and rightly so. Such testimony is not entitled to any weight in proving external facts such as fraud and undue influence,[3] though it is competent to show the state of the testatrix's mind, her mental capacity, and her ability to resist the lawyer's influence.[4] The evidence of testatrix's attitude towards her lawyer who drew the will was freely given and evidence showing the continuation of such feeling after the making of the will would not have strengthened the case of the appellant. "The underlying fact is that, so far as the contestant herself is concerned, she has received the bounty which the testatrix always had in mind to give her." [5]

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[1] *In re* Putnam's Will, 231 App. Div. 707, 245 N. Y. Supp. 777 (1st Dept. 1930).

[2] Under §353 attorneys and their employees are forbidden to disclose a communication made to them by clients. Section 354 abrogates the above section where the attorney is a subscribing witness to a will. The word "employees" is missing from this section, but it is assumed that the clerk shares the privilege as well as the attorney. (1924) 2 N. Y. L. REV. 13, see also (1930) 4 ST. JOHN'S L. REV. 330.

[3] Smith v. Keller, 205 N. Y. 39, 98 N. E. 214 (1912); Matter of Levy's Will, 198 App. Div. 773, 191 N. Y. Supp. 95 (1st Dept. 1921).

[4] Marx v. McGlynn, 88 N. Y. 357, 374 (1882).

[5] Instant case at 146, 177 N. E. at 402.

A bequest to the lawyer who draws the will is most often viewed with suspicion, and the courts require the lawyer to explain the circumstances and to show that the gift was freely and willingly made.[6] Slight circumstances indicating a testator's susceptibility to attorney-beneficiary's influence would support a finding of undue influence over the testatrix.[7] The burden of coming forward with evidence in these cases is always on the attorney to show that the will expressed the free, untrammeled wishes of the testatrix.[8] In the absence of any explanation a jury may be justified in drawing the inference of undue influence.[9]

R. C. W.

WILLS—BEQUEST TO UNBORN GRANDCHILDREN.—The decedent, after bequeathing two thousand dollars to two specifically named grandchildren, further bequeathed a like sum to each of her "grandchildren who may be born after the making of this will and who may still be living at my death." About seven and one-half months after the death of the testatrix, a granddaughter was born. This action was brought to enforce the infant's right to one of these legacies. *Held,* the granddaughter was "born" and "living" within the meaning of the will and so was entitled to receive one of the legacies. *Matter of Gebhardt,* 139 Misc. 775, 249 N. Y. Supp. 286 (Kings Co. 1931).

Cases in point over a considerable period of time have not limited the word "born" to the strict construction of "delivered" but have held that for the purpose of taking under a devise a child *en ventre sa mere* is deemed born and alive.[1] The child is regarded as a legal entity in many respects. It may sue to recover for the wrongful death of its parent due to the culpable negligence of another.[2] Blackstone says that at no matter how early a stage it may have a guardian appointed, it may take under a marriage settlement; it may have an

[6] Matter of Smith, 95 N. Y. 516 (1884).

[7] Tarr v. Tucker, — Mass. —, 172 N. E. 257 (1930).

[8] *Supra* note 4, at 371, "Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the *factum* of the will before the will can be sustained."

[9] Matter of Kindberg's Will, 207 N. Y. 220, 228, 100 N. E. 789, 791 (1912).

[1] Heurtt v. Grum, 77 N. J. Eq. 345, 77 Atl. 25 (1910); Quinlen v. Welch, 69 Hun 584, 23 N. Y. Supp. 963 (5th Dept. 1893); Cooper v. Heatherstone, 65 App. Div. 561, 73 N. Y. Supp. 14 (2d Dept. 1901); Matter of Farmers Loan and Trust Co., 82 Misc. 330, 143 N. Y. Supp. 700 (1913); Matter of Voight, 178 App. Div. 751, 764 N. Y. Supp. 1117 (2d Dept. 1918); Matter of McEwan, 202 App. Div. 50, 195 N. Y. Supp. 460 (3d Dept. 1922); Matter of Wells, 129 Misc. 447, 221 N. Y. Supp. 714 (1927); (1908) 21 HARV. L. REV. 360; (1927) 12 ST. LOUIS L. REV. 85.

[2] Quinlen v. Welch, *supra* note 1.