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THE PITFALLS OF WILL CONTEST LITIGATION

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INTRODUCTION

Even the most experienced trial lawyers rarely have the opportunity to try a will contest to a jury. This is due, in part, to the relatively small number of such cases. In addition, the uncertainty of result, combined with the "all-or-nothing" aspect of the verdict,¹ tends to result in a larger percentage of settlements in will contests than in other areas of litigation. Thus, many practitioners may be unaware that, because of the peculiar nature of these cases, the application of certain general rules of evidence often gives rise to unusual and unexpected results. Evidentiary rules have also developed specifically in the will contest area which do not usually appear in other types of litigation.

Two rules of evidence are particularly troublesome when applied in will contests. The general prohibition in Illinois that prevents a witness from giving opinion testimony, especially as to the "ultimate fact" in a jury case,² can seriously interfere with either the proponent's or contestant's efforts to show the competence or incompetence of the testator. Even more significant is the operation of the Illinois "Dead Man's" Act,³ which often has the effect of rendering all the parties to the action incompetent to testify.⁴

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1. Because a will contested on grounds of undue influence or lack of testamentary capacity is found either valid or invalid *in toto*, there is no possibility that the litigation can benefit both parties.

2. See *infra* text accompanying notes 8-30.

3. ILL. ANN. STAT. ch. 110, § 8-201 (Smith-Hurd 1983) [hereinafter referred to as the Dead Man's Act]. Courts have also referred to this provision as section 2, since it was originally codified as § 2 of the Evidence Act. See ILL. ANN. STAT. ch. 51, § 2 (Smith-Hurd 1982 Supp.).

4. See *infra* text accompanying notes 32-54.

Two other evidentiary rules, unique to will contests, also may have important effects on the outcome of the litigation. To control juries and protect the validity of wills, Illinois courts have developed a rule excluding most evidence of "declarations" by a testator which tend to contradict the terms of the will.⁵ Secondly, a presumption of undue influence⁶ may arise in the case of certain fiduciaries which can greatly aid the contestant's case.⁷ This article will analyze these evidentiary issues under Illinois law, discuss some recent trends, and make recommendations for practitioners involved in will litigation, concluding with the suggestion that will contests be tried without a jury.

OPINION TESTIMONY IN WILL CONTESTS

It is generally recognized that nonexpert witnesses may testify only to facts within their personal knowledge and may not give opinion testimony.⁸ The reason for this rule is the concern that juries will rely upon witnesses' opinions in deciding cases without considering whether the opinions have adequate factual foundation. An exception to this rule has evolved where the witness' conclusions are needed to aid the jury's ability to understand and put the factual testimony in perspective.⁹

5. See *infra* text accompanying notes 55-75.

6. See ILL. PATTERN JURY INSTR. 200.03 and comment (Civil, 2nd ed. 1971) [hereinafter cited as IPI 200.03]. See also *infra* text accompanying notes 78-94.

7. The effect of this presumption may have been emasculated, however, by a recent Illinois Supreme Court case restricting the application of presumptions in jury trials. See *Diederich v. Walters*, 65 Ill. 2d 95, 357 N.E.2d 1128 (1976).

8. *Yarber v. Chicago & Alton Ry.*, 235 Ill. 589, 85 N.E. 928 (1908):

Opinion evidence is admissible only upon subjects not within the knowledge of men of ordinary experience, and upon the ground that the facts are of such a nature that they can not be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them in their relations and comprehend them sufficiently to form accurate opinions and draw correct inferences from them on which to base intelligent judgments. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the jury.

Id. at 593-94, 85 N.E. at 930. See also *Springfield & N.E. Traction Co. v. Warrick*, 249 Ill. 470, 478-79, 94 N.E. 933, 937 (1911); *Gerler v. Cooley*, 41 Ill. App. 2d 233, 190 N.E.2d 488 (1963).

9. In *Barnes v. Odum*, 304 Ill. 624, 136 N.E. 700 (1922), the Illinois Supreme Court set forth the reason why opinions of nonexpert witnesses on the subject of a person's sanity are admissible:

While the mere opinion of a non-professional witness predicated upon facts detailed by others is incompetent as evidence upon an issue of insanity, his judgment based upon personal knowledge of the circumstances involved in such an inquiry certainly is of value, because the natural and ordinary operations of the human intellect, and the appear-

Specifically, courts allow nonexpert witnesses to express opinions which lay persons usually form upon observing a certain set of facts.¹⁰ For example, nonexpert witnesses may testify that a person appeared to be intoxicated.¹¹ This exception is limited, however, to opinions which do not involve the "ultimate fact" in a case.¹²

ance and conduct of insane persons as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by everyone of ordinary intelligence who comes in contact with his species. . . . The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual whose appearance, manner, habits and conduct came under his personal observation is not the expression of mere opinion. . . . But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact. . . . *Id.* at 627-28, 136 N.E. at 702 (quoting *Connecticut Mutual Life Ins. v. Lathrop*, 111 U.S. 612, 619 (1884)).

10. *See, e.g.*, *West Chicago St. Ry. v. Fishman*, 169 Ill. 196, 48 N.E. 447 (1897) (health of an accident victim); *Estate of McCullough v. McTavish*, 62 Ill. App. 3d 1041, 379 N.E.2d 890 (1978) (intoxication); *Jackson v. Jackson*, 24 Ill. App. 3d 810, 321 N.E.2d 506 (1974) (spouse's mental health in a divorce case in which mental capacity was at issue).

The general rule against opinion testimony and the exceptions thereto as developed in the Illinois courts are mirrored in Rule 701 of the Federal Rules of Evidence, which provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

FED. R. EVID. 701.

11. *City of Aurora v. Hillman*, 90 Ill. 61, 63 (1878); *Dimick v. Downs*, 82 Ill. 570 (1876); *Estate of McCullough v. McTavish*, 62 Ill. App. 3d 1041, 1044, 379 N.E.2d 890, 893 (1978); *Nystrom v. Bub*, 36 Ill. App. 2d 333, 347, 184 N.E.2d 273, 279 (1962).

12. *LaSalle Nat'l Bank v. First City Corp.*, 58 Ill. App. 3d 575, 577-78, 374 N.E.2d 913, 915 (1978) (appellate court refused to allow lessee's agent to testify, in action for forcible detainer, that the premises were unlivable; that being the ultimate fact in the case). *See also* *Morton Grove v. Gelchsheimer*, 16 Ill. 2d 453, 458, 158 N.E.2d 70, 73 (1959) (in proceeding for special assessment, exhibit containing value of each improvement held inadmissible because it contained conclusions of ultimate fact); *Armstrong Paint & Varnish Works v. Continental Can Co.*, 308 Ill. 242, 245, 139 N.E. 395, 396 (1923) ("There are cases where a witness may state what is in the nature of a conclusion as to a material evidentiary fact based upon other facts within his knowledge; . . . but such testimony is not admissible where it is a conclusion of the witness as to the ultimate fact in issue to be determined by the jury, leaving nothing for the jury except to render a verdict according to the conclusion of the witness as to such ultimate fact.") (citations omitted). As to opinion evidence on the ultimate issue in will contests, see *infra* notes 21-25, 28 and accompanying text.

Mental Capacity

Of particular interest in will contests is opinion testimony by nonexperts on the issue of the testator's sanity. The Illinois Supreme Court has long held that such testimony is admissible.¹³ These witnesses play a crucial role when the testamentary capacity of the testator is under attack. Both proponents and contestants are eager to offer the opinions of relatives, neighbors, and acquaintances of the testator regarding his sanity at the time the will was executed.

To minimize the potentially prejudicial use of such opinion testimony, three limitations on admissibility and scope have been devised. First, a substantial foundation must be laid to show that the witness has sufficient knowledge of the facts to express an opinion.¹⁴ Second, the opinion must reasonably tend

13. Opinion testimony on the issue of a person's mental condition has long been one of the exceptions to the rule against the admission of lay witnesses' opinions. *Craig v. Southard*, 148 Ill. 37, 35 N.E. 361 (1893) (contestants should have been allowed to ask lay witnesses to describe the condition of the testator's mind during the last few years of his life). See also *Ergang v. Anderson*, 378 Ill. 312, 315-16, 38 N.E.2d 26, 28 (1941); *Speirer v. Curtis*, 312 Ill. 152, 143 N.E. 427 (1924); *Keithley v. Stafford*, 126 Ill. 507, 18 N.E. 740 (1888). Cf. *Bowman v. Illinois Central R.R.*, 11 Ill. 2d 186, 212, 142 N.E.2d 104, 120, *cert. denied*, 355 U.S. 837 (1957).

14. *Speirer v. Curtis*, 312 Ill. 152, 159, 143 N.E. 427, 430 (1924). The foundation requirement has been described as follows:

[A] person who is not an expert may give his opinion concerning the mental capacity of a testator if it appears that such witness has an acquaintance with the person whose competency is in question, and relates facts and circumstances which afford reasonable ground for determining the soundness or unsoundness of mind of such person. . . .

Ergang v. Anderson, 378 Ill. 312, 315-16, 38 N.E.2d 26, 28 (1941). See also *Quellmalz v. First Nat'l Bank*, 16 Ill. 2d 546, 158 N.E.2d 591 (1959); *Innis v. Mueller*, 403 Ill. 11, 84 N.E.2d 837 (1949); *Jackman v. North*, 398 Ill. 90, 75 N.E.2d 324 (1947); *Challiner v. Smith*, 396 Ill. 106, 71 N.E.2d 324 (1947); *Lewis v. Deamude*, 376 Ill. 219, 33 N.E.2d 440 (1941); *Ginsberg v. Ginsberg*, 361 Ill. 499, 198 N.E. 432 (1935). As an exception to this rule, attesting or subscribing witnesses may testify as to the mental capacity of a testator at the time of the execution of the will without the attorney first laying a foundation. See *Brownlie v. Brownlie*, 357 Ill. 117, 123, 191 N.E. 268, 271 (1934).

In *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920), a witness whose only contact with the testator was an hour-long conversation three months following execution was held incompetent to express an opinion on the testator's mental condition. *Accord Trojcek v. Hafziger*, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972). It should be noted that, even where a witness knew the testator all of his life, he may not be able to testify as to the testator's mental condition near the time of the will's execution if the witness' contact with the testator at that time was minimal. *Peters v. Catt*, 15 Ill. 2d 255, 154 N.E.2d 280 (1958). Cf. *McGovern v. McGovern*, 282 Ill. 97, 118 N.E. 454 (1918) (witness allowed to express opinion based upon his years of acquaintance and one incident of strange behavior by testator); *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N.E. 1085 (1911) (witness allowed to testify where she had only conversed with testator on mundane subjects such as weather, health, gardens, etc.).

to show the testator's mental condition *on the date of the execution of the will*.¹⁵ Third, the witness cannot give an opinion on the ultimate issue in the case; *i.e.*, whether the testator had the legal capacity to execute his last will.¹⁶ While a witness may testify as to the sanity of a testator without having seen him on the day the will was executed, the witness may not express an opinion regarding the condition of the testator on dates he or she had not seen the testator.¹⁷ These limitations reflect the court's distrust of a jury's ability to evaluate opinion testimony.

Within the parameters of this rule, courts are more receptive to opinions concerning the testator's mental condition before, rather than after, the will's execution. Some court decisions have indicated that opinions as to the testator's condition up to two years before the execution of a will are not too remote.¹⁸ Where a testator suffered from a physical or mental condition of a continuous nature, such as a stroke or senility, before the execution of the will, such condition is presumed to have existed at the time of execution.¹⁹ In contrast, an opinion regarding a testator's sanity based upon a physical or mental condition existing after the will's execution will not be admitted unless it is proved that the same condition existed when the will

15. *Milne v. McFadden*, 385 Ill. 11, 52 N.E.2d 146 (1943); *Knudson v. Knudson*, 382 Ill. 492, 46 N.E.2d 1011 (1943). *See also* *Wright v. Upson*, 303 Ill. 120, 135 N.E. 209 (1922) (opinions that testatrix was of unsound mind on certain date not admissible where it was not claimed and there was no evidence that testator lacked mental capacity on that date). *Accord In re Estate of Milligan*, 4 Ill. App. 3d 38, 280 N.E.2d 244 (1972). *But see* *Maher v. Maher*, 338 Ill. 102, 170 N.E. 221 (1930) (court allowed evidence—not opinions—of mental soundness six years prior to execution of will). *Flanigan v. Smith*, 337 Ill. 572, 169 N.E. 767 (1929) (witness who testified that testator engaged ably in business transactions held incompetent to testify that testator was mentally incompetent); *Innis v. Mueller*, 403 Ill. 11, 84 N.E.2d 837 (1949).

16. *See infra* notes 21-25 and accompanying text.

17. *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920); *Trojcak v. Haflinger*, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972).

18. *Trustees of Voodry v. University of Illinois*, 251 Ill. 48, 95 N.E. 1034 (1911). *See also* *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 115 N.E.2d 226 (1953) (two days prior to will); *Maher v. Maher*, 338 Ill. 102, 170 N.E. 221 (1930) (evidence of mental condition six years prior to will admitted); *Veer v. Hagemann*, 334 Ill. 23, 165 N.E. 175 (1929) (opinions that testator was sane on date shortly before will's execution admissible even though it was conceded testator was of sound mind on that date); *Trojcak v. Haflinger*, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972) (summer prior to execution of will). *Cf.* *Grantz v. Grantz*, 314 Ill. 243, 145 N.E. 398 (1924) (evidence as to mental capacity of testator two and one-half years after execution inadmissible).

19. *See, e.g.*, *Milne v. McFadden*, 385 Ill. 11, 52 N.E.2d 146 (1943) (stroke); *Ergang v. Anderson*, 378 Ill. 312, 38 N.E.2d 26 (1941) (stroke causing senility).

was signed.²⁰

Beyond the foundation requirements, courts also restrict opinion testimony as to the mental condition of a testator by limiting the type or form of opinion that can be elicited. While a nonexpert witness may testify that the testator was of sound or unsound mind, he may not "invade the province of the jury" by testifying as to his legal capacity to execute a will.²¹ Such opinions of ultimate fact interfere with the ability of the jury to reach a verdict based upon the facts. To complicate matters, it is not clear what constitutes the ultimate fact in a contest based upon capacity. The elements of testamentary capacity are knowledge of the nature and extent of one's property, knowledge of the natural objects of one's bounty, and an understanding of the nature and effect of executing a will.²² Although courts have consistently held that a witness may not testify that a testator did or did not possess testamentary capacity,²³ until recently, courts were split as to the admissibility of opinions concerning the *elements* of capacity.²⁴ Recent cases, however, suggest that such opinions are admissible.²⁵

Expert witnesses are often called by both proponents and contestants to testify on the issue of the testator's mental capacity. Unlike nonexpert witnesses, they may base their opinions upon either facts given in hypothetical questions²⁶ or facts

20. *See, e.g.*, *Eschmann v. Cawi*, 357 Ill. 379, 383, 192 N.E. 226, 228 (1934) (testator declared insane two years after execution of will); *Todd v. Todd*, 221 Ill. 410, 413, 77 N.E. 680, 681 (1906) (stroke after execution of will).

21. *See, e.g.*, *Simpson v. Anderson*, 305 Ill. 172, 178-79, 137 N.E. 88, 91 (1922); *Bailey v. Beall*, 251 Ill. 577, 582, 96 N.E. 567, 569 (1911); *Wetzel v. Firebaugh*, 251 Ill. 190, 195-96, 95 N.E. 1085, 1088 (1911); *Schneider v. Manning*, 121 Ill. 376, 386, 12 N.E. 267, 270 (1887).

While opinions about testamentary capacity are inadmissible, opinions as to the soundness of the testator's mind are admissible. *See, e.g.*, *Coleman v. Marshall*, 263 Ill. 330, 340, 104 N.E. 1042, 1045 (1914); *Hurley v. Caldwell*, 44 Ill. 448, 91 N.E. 654 (1910) (witness allowed to testify that testator was incapable of transacting business of any kind); *Craig v. Southard*, 148 Ill. 37, 35 N.E. 361 (1893); *Keithly v. Strafford*, 126 Ill. 507 (1888). *See also* *Wallace v. Whitman*, 201 Ill. 59, 66 N.E. 311 (1903) (opinions that testator was "truthful," "honest," and "wanted to do right" inadmissible as irrelevant).

22. W. JAMES, ILLINOIS PROBATE LAW AND PRACTICE § 812.1(1), at 395 n.14 (1st ed. 1951).

23. *See supra* note 21 and cases cited therein.

24. *Heideman v. Kelsey*, 7 Ill. 2d 601, 131 N.E.2d 531 (1956) (admissible); *Powell v. Weld*, 410 Ill. 198, 101 N.E.2d 581 (1951) (admissible on cross-examination); *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920) (inadmissible); *Trustees of Voodry v. University of Illinois*, 251 Ill. 48, 95 N.E. 1034 (1911); *Baker v. Baker*, 202 Ill. 595, 67 N.E. 410 (1903) (inadmissible).

25. *See, e.g.*, *Heideman v. Kelsey*, 7 Ill. 2d 601, 131 N.E.2d 531 (1956); *Trojca v. Hafziger*, 7 Ill. App. 3d 495, 288 N.E.2d 82 (1972).

26. *Garrus v. Davis*, 234 Ill. 326, 84 N.E. 924 (1908); *Schneider v. Manning*, 121 Ill. 376, 12 N.E. 267 (1887). The attorney in a will contest must be familiar with the rules which apply to the use of hypothetical questions. Hypotheti-

within their personal knowledge, *e.g.*, facts noted in a personal examination of the testator.²⁷ The rule that forbids nonexperts from giving an opinion concerning an ultimate fact, however, also applies to expert testimony. An expert witness may testify as to the soundness of the testator's mind, but he may not testify as to whether the testator possessed testamentary capacity.²⁸

In an attempt to prove or disprove sanity, both proponents and contestants are often tempted to offer opinion testimony relating to the testator's ability to transact business. Because the degree of competence required to transact business is higher than that required to execute a valid will, some courts have refused to allow nonexpert witnesses to testify as to whether they believe the testator was capable of transacting ordinary business.²⁹ Certainly, the proponent should not be precluded from offering testimony which meets the higher standard. However, having done so, the proponent may have "opened the door" for the admission of contradictory testimony that the testator was

cal questions must include all relevant, undisputed facts properly admitted into evidence, although they need not contain those *disputed* facts which tend to prove the opponent's case. *Opp v. Pryor*, 294 Ill. 538, 128 N.E. 580 (1920); *People v. Freeman*, 78 Ill. App. 2d 242, 223 N.E.2d 444 (1966). On cross-examination, the opposing attorney may recast the hypothetical questions after supplying the omitted facts. *Opp v. Pryor*, 294 Ill. 538, 128 N.E. 580 (1920). A hypothetical question may not include facts not in evidence. *See, e.g.*, *People v. Muniz*, 31 Ill. 2d 130, 198 N.E.2d 855 (1964); *People v. Freeman*, 78 Ill. App. 2d 242, 223 N.E.2d 444 (1966); *Piacentini v. Bonnefl*, 69 Ill. App. 2d 433, 217 N.E.2d 507 (1966). *But see Oudshoorn v. Warsaw Trucking Co.*, 38 Ill. App. 3d 920, 349 N.E.2d 648 (1976) (court implied that hypothetical question may include facts not in evidence where attorney represents evidence will later be introduced). Nor may the question include facts not relevant to issues at trial. *Wright v. Upson*, 303 Ill. 120, 135 N.E. 209 (1922) (hypothetical question cannot include incidents which occurred at a time there is no claim testator was of unsound mind). Finally, hypothetical questions must specify which facts are to be assumed. *Pyle v. Pyle*, 158 Ill. 289, 41 N.E. 999 (1895) (experts not permitted to form opinions based upon all the evidence). *But see Schneider v. Manning*, 121 Ill. 376, 12 N.E. 267 (1887) (expert may form opinion based upon one side's evidence).

27. *Norton v. Clark*, 253 Ill. 557, 97 N.E. 1079 (1912) (physician testified based upon personal examination of testator).

28. *Garrus v. Davis*, 234 Ill. 326, 84 N.E. 924 (1908).

29. *See, e.g.*, *DeMarco v. McGill*, 402 Ill. 46, 55-56, 83 N.E.2d 313, 319 (1948) (contestant's evidence admissible); *Speirer v. Curtis*, 312 Ill. 152, 160, 143 N.E. 427, 430 (1924) (proponent's evidence admissible); *Bundy v. West*, 297 Ill. 238, 242, 130 N.E. 709, 711 (1921) (proponent's evidence inadmissible); *Dowdey v. Palmer*, 287 Ill. 42, 49-50, 122 N.E. 102, 105 (1919) (contestant's evidence inadmissible); *Coleman v. Marshall*, 263 Ill. 330, 340, 104 N.E. 1042, 1045 (1914) (contestant's evidence admissible); *Trubey v. Richardson*, 224 Ill. 136, 145, 79 N.E. 592, 595 (1906) (contestant's evidence admissible); *Keithley v. Stafford*, 126 Ill. 507, 522-23, 18 N.E. 740, 745-46 (1888) (contestant's evidence admissible).

incapable of transacting business.³⁰

Undue Influence

No opinion testimony is admissible on the issue of undue influence. Nonexpert witnesses are not competent to testify as to whether they believe undue influence was exercised over the testator. Moreover, they may not testify to their belief that the decedent was easily influenced or susceptible to influence.³¹ The jury must decide that issue from the factual allegations and the evidence offered. While there are no Illinois cases dealing with expert opinions on the issue of undue influence, it is unlikely that a court would permit an expert to testify that the testator was under or susceptible to undue influence when executing the will.

THE ILLINOIS DEAD MAN'S ACT

It is difficult to imagine a will contest in which the Dead Man's Act does not play a crucial role.³² In general, the Act pro-

30. *Ravenscroft v. Stull*, 280 Ill. 406, 409-10, 117 N.E. 602, 603 (1917); *Trojczak v. Hafziger*, 7 Ill. App. 3d 495, 502, 288 N.E.2d 82, 87 (1972) (citing 3 W. JAMES, ILLINOIS PROBATE LAW AND PRACTICE § 92.4 (1st ed. 1951)).

31. *Buerger v. Buerger*, 317 Ill. 401, 417, 148 N.E. 274, 280-81 (1925); *Teter v. Spooner*, 279 Ill. 39, 45, 116 N.E. 673, 676 (1917); *O'Day v. Crabb*, 269 Ill. 123, 129, 109 N.E. 724, 726 (1915); *Adams v. First Methodist Episcopal Church*, 251 Ill. 268, 272, 96 N.E. 253, 254 (1911) (subscribing witnesses' testimony that fraud or undue influence was exercised held inadmissible); *Larabee v. Larabee*, 240 Ill. 576, 581, 88 N.E. 1037, 1040 (1909); *Compher v. Browning*, 219 Ill. 429, 445, 76 N.E. 678, 684 (1906). *But see* *Brownlie v. Brownlie*, 357 Ill. 117, 123, 191 N.E. 268, 271 (1934) (subscribing witnesses allowed to testify that to their knowledge no undue influence used).

32. The Dead Man's Act provides that:

[i]n the trial of any action in which any party sues or defends as the representative of a deceased. . .no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or. . .to any event which took place in the presence of the deceased. . . except in the following instances:

(a) If any person testifies on behalf of the representative to any conversation with the deceased. . .or to any event which took place in the presence of the deceased. . .any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

(b) If the deposition of the deceased. . .is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

(c) Any testimony competent under Section 8-401 [Account Books and Records] of this Act, is not barred by this Section.

(d) No person shall be barred from testifying as to any fact relating to the heirship of a decedent.

As used in this section:

...

vides that any person interested in the outcome of the litigation is incompetent to testify on his own behalf concerning any conversation or event which took place with or in the presence of the testator. Because those most likely to have relevant information as to the testator's mental condition and relationships are usually the testator's closest relatives, and the parties to the contest, the Dead Man's Act often excludes much of the best evidence.³³ The justification usually given for this sweeping exclusionary rule is that the opposing party cannot call on the testator to make a rebuttal.³⁴

The Dead Man's Act prevents an *interested person* from testifying *on his own behalf* concerning any *conversation or event* that took place *in the presence* of the testator if an adverse party in the contest is a *representative* of the testator.³⁵ Although

(b) "Representative" means an executor, administrator, heir or legatee of a deceased person and any guardian or trustee of any such heir or legatee. . . .

(c) "Person directly interested in the action" or "interested person" does not include a person who is interested solely as executor, trustee or in any other fiduciary capacity, whether or not he or she receives or expects to receive compensation for acting in that capacity. . . .

ILL. ANN. STAT. ch. 110, § 8-201 (Smith-Hurd Supp. 1983).

33. In cases where the testator may have been seen only by family members during the period near the will execution, application of the Act will force the parties to substitute remote or indirect evidence for available, but excludable, testimony. The bar can be so complete as to limit a witness's testimony to his name, address, and marital status. *See Lewandowski v. Bakey*, 32 Ill. App. 3d 26, 335 N.E.2d 572 (1975).

34. The rationale for the Act is found in *VanMeter v. Goldfarb*, 317 Ill. 620, 622, 148 N.E. 392 (1925):

The purpose of the exception in favor of one suing as administrator in statutes removing the incompetency of parties as witnesses is to guard against the temptation to give false testimony in regard to the transaction in question on the part of the surviving party, and to put the two parties to a suit upon terms of equality in regard to the opportunity of giving testimony. . . . The principal reason for the statutory exception is the supposed inability of the representative to oppose the statements of the adversary. . . .

Id. at 623, 148 N.E. at 392. *See also Schuppenhauer v. Peoples Gas Light & Coke Co.*, 30 Ill. App. 3d 607, 612, 332 N.E.2d 583, 588 (1975):

When one interested party is incapable of testifying, the danger of undetected perjury by the other party is increased. Furthermore, the influence of a personal interest is likely to alter a party's perception of events regardless of his intent. Since self-serving statements are difficult to evaluate even with the benefit of cross-examination, they should not be admitted unless they can be balanced by the equally self-serving testimony of the opposite party.

Id.

35. Each of the italicized phrases appear in the language of the Dead Man's Act. *See supra* note 32. Their interpretations are discussed below. *See infra* text accompanying notes 36-51.

each of the italicized phrases is a term of art under the Act, the key to appreciating the scope of the rule in will contests is the definition of "representative," which includes not only the personal representative, as that term is normally used,³⁶ but any "heir, legatee or devisee of a deceased person."³⁷ Because contestants usually come within the sweep of this definition, testimony of the proponents, as well as that of the contestants, is subject to the prohibition.³⁸

"Interested person" includes all parties to the litigation and all persons with an interest in the outcome, but is defined to exclude persons who merely receive fiduciary appointments under the will.³⁹ In addition, cases have held that neither the attorney who wrote the will⁴⁰ nor any person without a direct monetary interest in the outcome of the litigation⁴¹ is an interested person. While the spouse of an interested person is also deemed to be an interested person, the child of an interested person is not so considered merely by virtue of the parents' status.⁴²

36. The designation "personal representative" is usually reserved for a person who stands in the place of another for legal purposes, such as an executor, administrator, conservator, guardian, or bankrupt trustee.

37. ILL. ANN. STAT. ch. 110, § 8-201(d)(b) (Smith-Hurd Supp. 1983).

38. A proponent in a will contest will always be a "representative" under the Act, since he must be "an executor, administrator, heir or legatee" in order to qualify as a proponent. A contestant will be a "representative" unless he is neither an heir nor a beneficiary under the will, but seeks to benefit under a prior will.

39. See ILL. ANN. STAT. ch. 110, § 8-201(d)(c) (Smith-Hurd Supp. 1983). See also *supra* note 32.

40. See *In re Estate of Fordyce*, 130 Ill. App. 2d 755, 756-57, 265 N.E.2d 886, 887 (1971). In *Michalski v. Chicago Title & Trust Co.*, 50 Ill. App. 3d 335, 365 N.E.2d 654 (1977), the court specifically held that the possibility that the will scrivener might be sued for malpractice if the will was contested successfully did not make him a "person directly interested in the action." *Id.* at 339, 365 N.E.2d at 657. See also *In re Estate of Wolfner*, 27 Ill. 2d 221, 224, 188 N.E.2d 712, 714 (1963) (performance of legal services does not render attorney incompetent as witness); *Britt v. Darnell*, 315 Ill. 385, 392-93, 146 N.E. 510, 513-14 (1925) (attorney who represented testator not incompetent witness); *Truman v. Gentz*, 32 Ill. App. 3d 886, 889, 336 N.E.2d 766, 768 (1975) (drawing deed for decedent does not render attorney incompetent as witness).

41. See, e.g., *Bellman v. Epstein*, 279 Ill. 34, 36-37, 116 N.E. 707, 708 (1917) (witness would neither gain nor lose from suit); *Stephens v. Hoffman*, 263 Ill. 197, 202-03, 104 N.E. 1090, 1092 (1914) (witness divested property interest prior to trial, therefore witness was competent).

42. *Peters v. Peters*, 376 Ill. 237, 243, 33 N.E.2d 425, 427 (1941) (wife); *Boyd v. Boyd*, 163 Ill. 611, 614, 45 N.E. 118, 118-19 (1896) (children); *Crane v. Crane*, 81 Ill. 165, 170-71 (1876) (husband); *In re Estate of Franke*, 124 Ill. App. 2d 24, 31, 259 N.E.2d 841, 844 (1970) (wife). The reason for the distinction between spouses and children seems to be that the interest of a child in his parents' property is more speculative than is the interest of a spouse in the other spouse's property. See *Boyd v. Boyd*, 163 Ill. 611, 614, 45 N.E. 118, 118-19 (1896). The justification for this distinction is uncertain.

Although the Dead Man's Act sweeps broadly, its benefits are easily waived. If a party introduces evidence as to a conversation or event which took place in the presence of the testator, that party cannot invoke the Act to prevent the opponent from giving his own version of the same occurrence.⁴³ The meaning of "conversation or event" is pivotal to the scope of the waiver rule: the narrower its meaning, the narrower the scope of the waiver. Unfortunately, no court has construed the phrase because it has been part of the Act only since 1973.⁴⁴ Prior to the 1973 amendment, the operative language, "conversation or transaction," was construed rather broadly. In *Van Meter v. Goldfarb*,⁴⁵ the Illinois Supreme Court defined "transaction" as a "combination of acts and events."⁴⁶ In that case, the "transaction" included all of the events comprising an automobile accident. An appellate court adopted a similarly broad construction of "transaction" in *Bain v. Schnorr*.⁴⁷ There, the executor brought suit to collect money from an employee of the decedent. The executor based his claim on the contention that the employee lacked authority to cash checks on the decedent's behalf. After the executor introduced evidence to this effect, the court allowed the defendant to introduce his own "Dead Man's Act" evidence to show not only the presence of authority, but also the proper use of the funds obtained.⁴⁸

43. It has been stated that "the purpose of the exceptions in the Dead Man's Act permitting testimony as to the 'same conversation or transaction' was to allow both parties to be 'on equal ground. Otherwise there would be no one to confront the representative of a deceased person.'" *Bain v. Schnorr*, 35 Ill. App. 3d 761, 764, 342 N.E.2d 439, 442 (1976) (quoting *Firke v. McClure*, 389 Ill. 543, 551, 60 N.E.2d 220, 223 (1945)). It should be noted, however, that the making or answering of discovery requests does not constitute introduction of evidence and, therefore, does not result in a waiver. *See, e.g.*, *Premack v. Chicago Transit Authority*, 2 Ill. App. 3d 127, 130-31, 276 N.E.2d 77, 79 (1971) (propounding of interrogatory does not waive Dead Man's Act); *Pink v. Dempsey*, 350 Ill. App. 405, 409-10, 113 N.E.2d 334, 336 (1953) (taking discovery deposition does not waive the Dead Man's Act prohibition). In addition, there is no waiver where the person testifying is not an occurrence witness. *See, e.g.*, *Garrus v. Davis*, 234 Ill. 326, 84 N.E. 924 (1908) (witness called only to prove genuineness of documents); *DeYoung v. Ralley*, 329 Ill. App. 1, 67 N.E.2d 221 (1946) (witness called under § 60 regarding prior admission).

44. This amendment to the Dead Man's Act became effective October 1, 1973. *See* ILL. ANN. STAT. ch. 51, § 2 (Smith-Hurd Supp. 1982).

45. 317 Ill. 620, 148 N.E. 391 (1925).

46. *Id.* at 624, 148 N.E. at 392 (quoting *Scott v. Waggoner*, 48 Mont. 536, 139 P. 454 (1914)).

47. 35 Ill. App. 3d 761, 342 N.E.2d 439 (1976) (decided under pre-1973 language).

48. *Id.* In addition to *VanMeter* and *Bain* see *Newman v. Youngblood*, 394 Ill. 617, 627, 69 N.E.2d 309, 314 (1946) ("transaction" should be expanded where closely related aspects of an occurrence are "inextricably intermingled"); *Clifford v. Schaefer*, 105 Ill. App. 2d 233, 241, 245 N.E.2d 49, 54 (1969) ("entire conversation or transaction").

One commentator has suggested that because the common meaning of the word "event" is narrower than that of the word "transaction,"⁴⁹ the 1973 amendment narrowed the waiver provision. Despite the linguistic appeal of this argument, recent changes in the rules of evidence have rarely resulted in less evidence being admissible.⁵⁰ It seems unlikely, therefore, that the Illinois legislature intended this result. "Conversation or event" should be flexibly applied to each case in such a way that each side has a fair opportunity for rebuttal when the opponent, directly or indirectly, introduces evidence regarding a witness' impression of an event or chain of events.

An important and interesting illustration of the possibility of unfair application of the Dead Man's Act is provided when one party calls an adverse party to testify pursuant to section 2-1102 of the Illinois Code of Civil Procedure.⁵¹ Clearly, either side in a will contest is free to examine any adverse party under section 2-1102 despite the Dead Man's Act, since the party being examined need not testify in his own behalf.⁵² It is important to note, however, that the examining party cannot force the witness to waive the Dead Man's Act by making such an examina-

49. Note, *Illinois Dead Man's Act*, 1973 ILL. L. F. 700, 711. There are no decisions interpreting "event." Webster's Third New International Dictionary, however, defines "event" and "transaction" as follows:

Event: (1): something that happens: OCCURRENCE . . .
(2): course of events: ACTIVITY, EXPERIENCE

Transaction: Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract".

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968).

50. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 326-327 (2d ed. 1972) (discussing contemporary trend toward wider admission of evidence, particularly with regard to hearsay).

51. Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

ILL. ANN. STAT. ch. 110, § 2-1102 (Smith-Hurd Supp. 1983) (formerly codified at ILL. ANN. STAT. ch. 110, § 60 (Smith-Hurd 1972)).

52. See *Dempski v. Dempki*, 27 Ill. 2d 69, 75, 187 N.E.2d 734, 737 (1963); *Perkins v. Brown*, 400 Ill. 490, 497, 81 N.E.2d 207, 210-11 (1948); *Lathan v. Rihel*, 384 Ill. 478, 482-83, 51 N.E.2d 531, 533-34 (1943); *Duffy v. Duffy*, 243 Ill. 476, 481, 90 N.E. 697, 699 (1909); *Clifford v. Schaefer*, 105 Ill. App. 2d 233, 240, 245 N.E.2d 49, 54 (1969).

tion.⁵³ In addition, the examining party waives the right to assert the Act against the opposing party as to the conversations and events related by the adverse witness.⁵⁴

The fairness of this waiver depends upon its scope. For purposes of illustration, assume that only one of the parties had significant contact with the testator during a critical period, such as the two months preceding execution of the will. That party could be called by the opposing party under section 2-1102 and be compelled to testify to a few selected incidents during the period which, when isolated, create the impression of competence or incompetence. If a narrow construction of "conversation or event" is adopted, the witness could not then testify in his own behalf as to other important events during this period which tend to rebut the inference. Not only would this give the jury a one-sided version of the facts, but it would result in a party's knowledge being detrimental to his own case. In such a situation, fairness requires that the waiver be construed broadly enough to allow the witness (or other witnesses) to complete the picture.

INCONSISTENT DECLARATIONS OF THE TESTATOR

Much of the jury appeal of a contestant's case may rest upon declarations of the testator indicating an intention to leave property to the contestants or not to leave property to the will beneficiaries. Evidence of such declarations is not admissible to show the testator's dispositive intent.⁵⁵ This evidence may be admis-

53. "A person who is disqualified from testifying by [the Dead Man's Act] cannot overcome his disqualification by calling an adverse party or the party's agent under [§ 2-1102 of the Code of Civil Procedure] and using this involuntary testimony to open the door for his own testimony." *In re Estate of Colewell*, 9 Ill. App. 3d 247, 249-50, 292 N.E.2d 96, 98 (1972). See also *Garrus v. Davis*, 234 Ill. 326, 331, 84 N.E. 924, 926 (1908) (witness made competent as to issues raised by examination of adverse party); *Loeb v. Stein*, 198 Ill. 371, 381, 64 N.E. 1043, 1047 (1902) (same).

54. See *Perkins v. Brown*, 400 Ill. 490, 81 N.E.2d 207 (1948). The waiver applies only to the "conversation or event" covered by the § 2-1102 examination:

We do not, however, understand and construe the statute to have been intended to mean that if in such case the witness is called by the adverse party to testify as to one thing or upon one matter the disqualification against his testifying of his own motion and in his own behalf is waived or removed and that he is thereby rendered competent to testify upon all the issues involved in the case.

Id. at 496, 81 N.E.2d at 211. See also *Garrus v. Davis*, 234 Ill. 326, 331, 84 N.E. 924, 926 (1908); *Clifford v. Schaefer*, 105 Ill. App. 2d 233, 241, 245 N.E.2d 49, 54 (1969); *Blumb v. Getz*, 294 Ill. App. 432, 439, 13 N.E.2d 1019, 1022 (1938).

55. *Mosher v. Thrush*, 402 Ill. 353, 84 N.E.2d 355 (1949); *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927); *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920); *McCune v. Reynolds*, 288 Ill. 188, 123 N.E. 317 (1919); *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915); *Martin v. Beatty*, 254 Ill. 615, 98 N.E. 996

sible, however, for other purposes. For instance, a court may admit the declaration if the contestants are claiming lack of capacity and the declaration bears on the testator's mental condition at the time the contested will was executed.⁵⁶

The scope of the rule encompasses both written and oral declarations,⁵⁷ whether made before or after the date of the execution of the contested will,⁵⁸ but does not include declarations tending to support the will.⁵⁹ Thus, courts have consistently admitted evidence of declarations tending to support the scheme of disposition in the will⁶⁰ or tending to show the testator's capacity⁶¹ or absence of the exercise of undue influence.⁶² Although variously stated, the rule's purpose is to protect the validity of wills and to preserve the right of individuals to change their testamentary documents. Illinois courts have obviously felt that evidence of a "change of heart" has an unusually strong emotional appeal to juries, without necessarily indicating lack of testamentary capacity or the exercise of undue

(1912); *Floto v. Floto*, 233 Ill. 605, 84 N.E. 712 (1908); *Waters v. Waters*, 222 Ill. 26, 78 N.E. 1 (1906); *Compher v. Browning*, 219 Ill. 429, 76 N.E. 678 (1906).

56. *Norton v. Clark*, 253 Ill. 557, 97 N.E. 1079 (1912); *Wilkinson v. Service*, 249 Ill. 146, 94 N.E. 50 (1911); *Hurley v. Caldwell*, 244 Ill. 448, 91 N.E. 654 (1910); *Reynolds v. Adams*, 90 Ill. 134 (1878) (statements by testator concerning annoyances to which spouse subjected him were improperly excluded).

57. *Mosher v. Thrush*, 402 Ill. 353, 84 N.E.2d 355 (1949) (oral declaration); *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927) (written statement); *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920) (written statement); *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915) (written statement); *Martin v. Beatty*, 254 Ill. 615, 98 N.E. 996 (1912) (oral declaration); *Snell v. Welden*, 239 Ill. 279, 87 N.E. 1022 (1909) (written statement); *Floto v. Floto*, 233 Ill. 605, 84 N.E. 712 (1908) (written statement); *Waters v. Waters*, 222 Ill. 26, 78 N.E. 1 (1906) (oral declaration); *Compher v. Browning*, 219 Ill. 429, 76 N.E. 678 (1906) (oral declaration).

58. *Waters v. Waters*, 222 Ill. 26, 35, 78 N.E. 1, 4 (1906) ("[P]arties, making wills, cannot invalidate them by their own parol declarations, *made previously or subsequently*." (emphasis added)).

59. *Mosher v. Thrush*, 402 Ill. 353, 358, 84 N.E.2d 355, 357 (1949) ("declarations made by a testator in conformity with the provisions of a will are admissible as tending to show lack of undue influence. . ."); *O'Day v. Crabb*, 269 Ill. 123, 130, 109 N.E. 724, 727 (1915); *Waters v. Waters*, 222 Ill. 26, 35-36, 78 N.E. 1, 4 (1906); *Compher v. Browning*, 219 Ill. 429, 441, 76 N.E. 678, 683 (1906).

60. *O'Day v. Crabb*, 269 Ill. 123, 130, 109 N.E. 724, 727 (1915) ("It is proper to show the contents of a former will on behalf of the proponents. . . in order to show that the testator had a constant and enduring scheme for the distribution of his property. . .").

61. *Id.* at 130, 109 N.E. at 727 (held that former will would be admissible to "refute the charge of lack of testamentary capacity."). See also *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927).

62. *Mosher v. Thrush*, 402 Ill. 353, 84 N.E.2d 355 (1949); *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927); *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915); *Waters v. Waters*, 222 Ill. 26, 78 N.E. 1 (1906); *Compher v. Browning*, 219 Ill. 429, 76 N.E. 678 (1906).

influence.⁶³

The rule excludes two categories of potential evidence: (1) evidence showing the testator's intention to leave property in a manner different from that contained in his last will,⁶⁴ and (2) evidence showing disaffection toward will beneficiaries.⁶⁵ Application of the rule to the first category, exclusion of evidence of a dispositive intention inconsistent with the terms of the will, is especially important because such declarations are common⁶⁶ and, if their jury appeal is relied upon, they may mislead contestants as to the strength of their case. Of particular interest is the application of the rule to exclude prior wills made by the testator containing different dispositive schemes.⁶⁷ In the case of contestants who are not heirs of the testator, but legatees under a prior will, exclusion of the earlier will may make it impossible to demonstrate effectively to the jury why the contestants are challenging the will.

A testator's disparaging remarks about will beneficiaries, although potentially damaging to the proponents, are often excluded from evidence.⁶⁸ An example of this operation of the rule is found in *Snell v. Weldon*,⁶⁹ in which the court excluded the testator's written comments, on the back of a letter sent to him

63. The mere fact, however, that a testator by a prior will had made a disposition of his property different from that made by a later instrument of itself would be of little or no value, for, if mentally competent to make a will, he would have a right to change his mind so long as testamentary capacity continued.

Pollock v. Pollock, 328 Ill. 179, 185-86, 159 N.E. 305, 309 (1927). See also *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915).

64. See, e.g., *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927); *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915); *Martin v. Beatty*, 254 Ill. 615, 98 N.E. 996 (1912); *Floto v. Floto*, 233 Ill. 605, 84 N.E. 712 (1908); *Cheney v. Goldy*, 225 Ill. 394, 80 N.E. 289 (1907); *Waters v. Waters*, 222 Ill. 26, 78 N.E. 1 (1906); *Hill v. Bahrns*, 158 Ill. 314, 41 N.E. 912 (1895).

65. *Mosher v. Thrush*, 402 Ill. 353, 84 N.E.2d 355 (1949); *Miles v. Long*, 342 Ill. 589, 600, 174 N.E. 836, 840 (1931); *Snell v. Weldon*, 239 Ill. 279, 87 N.E. 1022 (1909) (written evidence of illicit relationship between testator and will beneficiary inadmissible).

66. See, e.g., *Waters v. Waters*, 222 Ill. 26, 78 N.E. 1 (1906). The court refused to admit testimony that the testatrix had stated that she wanted to treat her family equally. *Id.* at 35, 78 N.E. at 4.

67. See, e.g., *Pollock v. Pollock*, 328 Ill. 179, 159 N.E. 305 (1927); *Baddeley v. Watkins*, 293 Ill. 394, 127 N.E. 725 (1920); *McCune v. Reynolds*, 288 Ill. 188, 123 N.E. 317 (1919); *O'Day v. Crabb*, 269 Ill. 123, 109 N.E. 724 (1915); *Floto v. Floto*, 233 Ill. 605, 84 N.E. 712 (1908). In one aberrant case, *Blackhurst v. James*, 304 Ill. 586, 136 N.E. 754 (1922), a prior inconsistent will and codicils were admitted because they tended to show an ongoing conspiracy between proponents to cause the testator to distribute his property in a manner more favorable to their interests.

68. *Mosher v. Thrush*, 402 Ill. 353, 84 N.E.2d 355 (1949); *Miles v. Long*, 342 Ill. 589, 174 N.E. 836 (1931).

69. 239 Ill. 279, 87 N.E. 1022 (1909).

by the will beneficiary, which disclosed an illicit relationship between the testator and the beneficiary. The court stated that "moral delinquency" has nothing to do with capacity or undue influence, and found that the jury's erroneous verdict invalidating the will was based upon this improperly admitted "declaration."⁷⁰

The rule excluding inconsistent declarations of the testator is subject to an important, but poorly defined, exception. Where the contest is based, at least in part, on lack of testamentary capacity, declarations of the testator which tend to show the condition of his mind at the time of execution are admissible, whether or not they are in conformity with the will.⁷¹ However, a court normally will not allow the admission of such declarations under this exception unless there is independent proof of lack of testamentary capacity.⁷² Staking out the boundaries of this exception has proven to be a difficult task. In determining whether to admit the declaration, the court must weigh the importance of the jury's need to know of the declaration in order to determine the testator's capacity against the declaration's prejudicial impact. Of critical importance is the proximity in time of the statement to the date of execution.⁷³ The closer in time the declaration is to that date, the more valuable it is to the trier of fact. On the other hand, the occurrence of any significant changes in the testator's condition between the time of the declaration and the date of execution would reduce the value of the statement in determining capacity.⁷⁴ Finally, the substance of the statement itself must be carefully considered to determine whether the declaration should be admitted. For example, a statement by the testator on the day the will is executed that he intends to leave his money to his goldfish may have a great bearing on his capacity. A statement that he planned to leave his property to X (when the will beneficiary is Y) has less probative value as to capacity, but may have significant prejudicial value to the contestants. Because of the subjective nature of these pa-

70. *Id.* at 295-96, 87 N.E. at 1027.

71. *Norton v. Clark*, 253 Ill. 557, 97 N.E. 1079 (1912); *Wilkinson v. Service*, 249 Ill. 146, 94 N.E. 50 (1911); *Reynolds v. Adams*, 90 Ill. 134 (1878).

72. *See, e.g., Hurley v. Caldwell*, 244 Ill. 448, 91 N.E. 654 (1910).

73. *Knudson v. Knudson*, 382 Ill. 492, 46 N.E.2d 1011 (1943) (declarations of testator held inadmissible because not related to condition of testator at time will was executed); *Abbott v. Church*, 288 Ill. 91, 123 N.E. 306 (1919) (letters written to contestant two and four years prior to will's execution held inadmissible). *See also Dowie v. Driscoll*, 203 Ill. 480, 68 N.E. 56 (1903), where the same rule was applied in a suit to set aside the execution of a deed by an alleged incompetent.

74. For example, where contestants claim the testator became incapacitated following a stroke, declarations of the testator showing incapacity made before the stroke should not be admissible.

rameters, courts have been inconsistent in applying the exception.⁷⁵

PRESUMPTION OF UNDUE INFLUENCE

Developing facts which prove the exercise of undue influence over the testator can be a very difficult task for contestants, especially in light of the evidentiary pitfalls already discussed. It is difficult to find an independent party ready to testify that the individual accused of exercising undue influence stood menacingly over the testator as he drew up his will, directing him or her as to its contents.⁷⁶ Indeed, the legal standard for proving undue influence⁷⁷ is so difficult to meet that the law has developed a presumption to aid contestants. Where it can be shown that: (1) the proponent was in a fiduciary relationship with the testator; (2) the proponent procured the execution of the new will; and (3) the new will benefitted the proponent, a presumption arises that the new will was the product of the proponent's undue influence.⁷⁸ Unfortunately, the requirements for and the operation of the presumption are not as straightforward as they appear.

Of the three elements underlying the presumption, the requirement of benefit to the proponent is the least problematical. So long as the proponent receives substantially more money or

75. Courts have extended the exception to admit declarations by the testator which are more relevant to the issue of the relationship between the testator and heirs or will beneficiaries than upon the testator's capacity. For example, in *Wilkinson v. Service*, 249 Ill. 146, 94 N.E. 50 (1911), the Illinois Supreme Court held that "[d]eclarations. . . that certain of the testator's children were wanting in natural affection. . . are properly considered as showing his state of mind." *Id.* at 151, 94 N.E. at 53.

76. This appears to be a possible interpretation of the level and kind of showing needed to prove "undue influence." See *Sloger v. Sloger*, 26 Ill. 2d 366, 186 N.E.2d 288 (1962); *Sterling v. Dubin*, 6 Ill. 2d 64, 126 N.E.2d 718 (1955).

77. The law is settled that to avoid a will upon the ground of undue influence it must be directly connected with the execution of the will itself. It must operate when the will is made, must be directed especially toward procuring the will in favor of particular persons and must be of such a character as to destroy the testator's freedom of will, so as to render his will obviously the result of the mind and brain of some other person.

Mosher v. Thrush, 402 Ill. 353, 357-58, 84 N.E.2d 355, 357 (1949). See also *Lake v. Seiffert*, 410 Ill. 444, 448, 102 N.E.2d 294, 296 (1951); *Flanigon v. Smith*, 337 Ill. 572, 577, 169 N.E. 767, 769 (1930); *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 99, 234 N.E.2d 91, 96-97 (1968).

78. See, e.g., *Breault v. Feigenholtz*, 54 Ill. 2d 173, 182, 296 N.E.2d 3, 9 (1973); *Lynn v. Lynn*, 21 Ill. 2d 131, 135, 171 N.E.2d 53, 55 (1960); *Redmond v. Steele*, 5 Ill. 2d 602, 610, 126 N.E.2d 619, 623 (1955); *Tidholm v. Tidholm*, 391 Ill. 19, 25, 62 N.E.2d 473, 476 (1945); *Madden v. Keyser*, 331 Ill. 643, 650, 163 N.E. 424, 427 (1928); *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 99, 234 N.E.2d 91, 97 (1968).

property under the challenged will than he would otherwise have received, the benefit test is satisfied.⁷⁹ Since the contestants would not contest the "last will" unless their financial position was adversely affected, one or more of the proponents is certain to have been benefitted by the "last will."

The requirement that the proponent be in a fiduciary relationship with the testator is not as difficult to fulfill as it might appear. The meaning of "fiduciary" for these purposes is very broad and includes not only a variety of recognized fiduciary relationships,⁸⁰ but also any significant degree of practical domination and dependence between the proponent and the testator.⁸¹

The requirement that the will was "procured" by the proponent presents the greatest obstacle to use of the presumption. In early cases, it was implied that any degree of participation in the execution of the will would suffice,⁸² but recent cases sug-

79. In spite of the apparent simplicity of this requirement, a recent case has raised some question as to whether the benefit must be judged in relation to the defendant's intestate share. *Beyers v. Billingsley*, 54 Ill. App. 3d 427, 436-37, 369 N.E.2d 1320, 1327 (1977). See also *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 172, 115 N.E.2d 226, 232 (1953). Benefit does not appear to include fiduciary appointments. *Breault v. Feigenholtz*, 54 Ill. 2d 173, 182, 296 N.E.2d 3, 10 (1973).

80. Typically, these would include guardian-ward, trustee-beneficiary, agent-principal, attorney-client, and others. *Wiik v. Hagen*, 410 Ill. 158, 163, 101 N.E.2d 585, 587 (1951); *Apple v. Apple*, 407 Ill. 464, 470, 95 N.E.2d 334, 337 (1950); *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 100, 234 N.E.2d 91, 97 (1968); *In re Estate of Brumshagan*, 27 Ill. App. 2d 14, 22, 169 N.E.2d 112, 116 (1960).

81. In the following cases, an implied fiduciary relationship was found: *Wiik v. Hagen*, 410 Ill. 158, 163, 101 N.E.2d 585, 587 (1951); *Tidholm v. Tidholm*, 391 Ill. 19, 25, 62 N.E.2d 473, 476 (1945); *Madden v. Keyser*, 331 Ill. 643, 650, 163 N.E. 424, 427 (1928); *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 100-01, 234 N.E.2d 91, 98 (1968). Cf. *Redmond v. Steele*, 5 Ill. 2d 602, 610-11, 126 N.E.2d 619, 623-24 (1955); *Kolze v. Fordtran*, 412 Ill. 461, 468-69, 107 N.E.2d 686, 691 (1952) (care of testator during illness); *Pepe v. Caputo*, 408 Ill. 321, 326-27, 97 N.E.2d 260, 263 (1951) (parent and child). It should be noted that implied fiduciary relationships must be established by clear and convincing proof.

82. In the following cases, procurement was found: *Lynn v. Lynn*, 21 Ill. 2d 131, 135, 171 N.E.2d 53, 55 (1960) (defendant discussed terms of new will with attorney); *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 172-73, 115 N.E.2d 226, 232 (1953) (helped secure attorney); *Tidholm v. Tidholm*, 391 Ill. 19, 25, 62 N.E.2d 473, 476 (1945) (wrote out terms of will); *Dial v. Welker*, 328 Ill. 56, 62, 159 N.E. 286, 289 (1927) (actually prepared will); *Seavey v. Glass*, 315 Ill. 611, 614, 146 N.E. 536, 537 (1925) (procured the attorney); *Yess v. Yess*, 255 Ill. 414, 419, 99 N.E. 687, 688 (1912) (present during drafting of will); *Beyers v. Billingsley*, 54 Ill. App. 3d 427, 437, 369 N.E.2d 1320, 1327-28 (1977) (initiated attorney contact, provided transportation to attorney, oversaw execution in his home). Cf. *Sloger v. Sloger*, 26 Ill. 2d 366, 369, 186 N.E.2d 288, 289 (1962) (drove testator to lawyer, but waited in outer office); *Anthony v. Anthony*, 20 Ill. 2d 584, 587, 170 N.E.2d 603, 604 (1960) (drove testator to attorney's office); *Lake v. Seiffert*, 410 Ill. 444, 449, 102 N.E.2d 294, 296 (1951) (present at execution); *Ginsberg v. Ginsberg*, 361 Ill. 499, 510, 198 N.E. 432, 435 (1935) (drove testator to attorney's office and discussed will); *Flanigan v. Smith*,

gest that more direct participation is required.⁸³ The Illinois Supreme Court has apparently construed procurement to mean a degree of participation in the drafting and execution of the will which indicates that the proponent was in such a position that one could reasonably expect that he or she influenced the terms of the will.⁸⁴ In *Sterling v. Dukin*,⁸⁵ the court held that transcribing the testator's will and making arrangements for its execution did not constitute procurement sufficient to raise a presumption of undue influence. In *Sloger v. Sloger*,⁸⁶ the court held that driving the testator to the lawyer's office to discuss and then execute the will did not amount to procurement. By comparison, procurement was found in *Swenson v. Wintercorn*,⁸⁷ where the proponent suggested that the testator make a new will, called his own attorney, and was present during the discussions with the attorney and at the execution itself.⁸⁸

If the plaintiff has introduced some credible evidence as to each of the three elements of the presumption, Illinois Pattern Jury Instruction 200.03 and the comments thereto state that the court should instruct the jury concerning the presumption.⁸⁹ The Illinois Supreme Court's recent decision in *Diederich v. Walters*⁹⁰ suggests, however, that the comments to the Illinois Pattern Instructions may no longer reflect the law. *Diederich* involved a presumption that a child between the ages of seven and fourteen could not be contributorily negligent. In holding that the trial court correctly omitted an instruction to the jury on the presumption in the face of evidence of the child's negligence, the court purported to adopt the "bursting bubble" theory for all rebuttable presumptions in Illinois.⁹¹ If this theory is applied to

337 Ill. 572, 577-78, 169 N.E. 767, 769 (1930) (no evidence of undue influence); *Prinz v. Schmidt*, 334 Ill. 576, 585, 166 N.E. 209, 212 (1929) (no evidence); *Blackhurst v. James*, 293 Ill. 11, 29, 127 N.E. 226, 233 (1920) (no evidence concerning execution).

83. See, e.g., *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 234 N.E.2d 91 (1968).

84. *Sloger v. Sloger*, 26 Ill. 2d 366, 186 N.E.2d 288 (1962); *Sterling v. Dukin*, 6 Ill. 2d 64, 126 N.E.2d 718 (1955).

85. 6 Ill. 2d 64, 126 N.E.2d 718 (1955).

86. 26 Ill. 2d 366, 186 N.E.2d 288 (1962).

87. 92 Ill. App. 2d 88, 234 N.E.2d 91 (1968).

88. The presumption has not been applied in any case where it was not shown, or could not be reasonably inferred from the evidence, that the defendant knew the terms of the challenged will at or prior to its execution.

89. IPI 200.03, comment, *supra* note 6. See also *Powell v. Weld*, 410 Ill. 198, 204, 101 N.E.2d 581, 585 (1951).

90. 65 Ill. 2d 95, 357 N.E.2d 1128 (1976). See also *Franciscan Sisters Health Care, Corp. v. Dean*, 102 Ill. App. 3d 61, 429 N.E.2d 919 (1981).

91. Under this theory, once evidence is admitted which refutes the presumption, the presumption evaporates. 65 Ill. 2d at 102-03, 357 N.E.2d at 1131-33.

the presumption of undue influence, instruction 200.03 should not be given if the proponent has introduced any credible evidence that the will was not the product of undue influence, even if the contestant has made some showing of all of the elements of the presumption.⁹²

Commentators have defended broad use of the instruction on the ground that the presumption of undue influence is more than a rule of evidence. They assert that it is a substantive rule of law reflecting a public policy that fiduciaries be held accountable for their conduct.⁹³ These commentators contend that the presumption should remain in a case regardless of the introduction of evidence rebutting the presence of undue influence.⁹⁴ The analysis fails to consider several important points. First, the class of persons who are fiduciaries for purposes of the presumption is much broader than the class of fiduciaries to whom the special obligations of this capacity ordinarily apply.⁹⁵ It is one thing to make a trustee, who received compensation and is on notice of his special fiduciary status, subject to the highest standards of conduct, but quite another to apply the same legal standards to persons who are constructive fiduciaries only for the limited purposes of creating a presumption. Second, instructing the jury as to the presumption shifts the burden of proof from the contestant to the proponent.⁹⁶ This has the effect of requiring the proponent to prove a lack of undue influence,⁹⁷ proving a negative is often an unreasonably difficult task. Third, the absence of the instruction would not overly burden contestants because they could still build their case upon the logical inferences that the jury (or judge) could make from the facts underlying the presumption. Finally, retention of the presumption undermines the public policy of protecting the validity of wills from disgruntled heirs, the policy which gave rise to all of these complex evidentiary rules.

92. The proposition has been frequently expressed in contract cases. IPI 200.03, comment, *supra* note 6. See also *Miller v. Pettengill*, 392 Ill. 117, 63 N.E.2d 735 (1945) (contract case).

93. IPI 200.03, comment, *supra* note 6.

94. *Id.*

95. The class of fiduciaries in the cases cited by the comment is narrower, and those fiduciaries are on notice of their duties, whereas persons who may qualify as "fiduciaries" for the purposes of the presumption will rarely be aware of their position. It is, therefore, unfair to impose automatically the burdens of traditional fiduciaries upon them.

96. *Seavey v. Glass*, 315 Ill. 611, 146 N.E. 536 (1925), and *Leonard v. Burtle*, 226 Ill. 422, 80 N.E. 992 (1907), held that this shift in the burden of proof does not make IPI 200.03 objectionable. *But see McElroy v. Force*, 38 Ill. 2d 528, 232 N.E.2d 708 (1967).

97. See *Hecht & Pinzler, Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. REV. 527 (1978).

RECOMMENDATIONS

In evaluating the strength of a contestant's case, the proponent's attorney should not rely on opinion testimony because a significant part of it may not be admitted. This uncertainty can be especially problematical because of the trial court's broad discretion in ruling on opinion testimony. Proponents should make an effort to eliminate testamentary capacity as an issue prior to trial; disposing of this ground for setting the will aside will severely curtail a contestant's ability to introduce opinion testimony which could sway the jury on noncapacity issues.

Proponents should carefully consider the introduction of testimony to the effect that the testator was able to conduct business, since this is a higher level of competence than is required to execute a will. Once such evidence has been introduced, the contestants will be able to introduce potentially damaging rebuttal testimony which would not otherwise be admissible. Moreover, a long colloquy regarding the testator's ability to conduct business may lead the jury to believe that the ability to conduct business is the standard by which to judge competence. Where the contestants are relying upon showing the exercise of undue influence in the execution of the will, opinion testimony will normally be of no assistance. This is one of the reasons why proving undue influence is more difficult than most contestants imagine.

The importance and complexity of the Dead Man's Act cannot be overemphasized. As previously suggested, the rationale for the Dead Man's Act is that testimony concerning events that took place in the presence of the testator cannot be contradicted by the opposing parties since the testator is no longer alive to give his version. As applied, however, the rule excludes all such testimony even though an opposing party or disinterested person is present to verify or rebut the witness's testimony. As long as the legislature does not see fit to amend the Dead Man's Act, the courts must adjust the scope of the waiver rule to achieve the fairest possible result. Each side should prepare to try its case assuming that it will not be able to offer evidence precluded by the Act. Careful consideration must also be given to whether each bit of evidence to be offered may waive that party's ability to assert the Dead Man's Act. In some circumstances, it may be advantageous for counsel not to object to prohibited testimony if admission of the evidence offered would create a valuable waiver. To aid trial preparation and to avoid lengthy arguments on objections during trial, the parties and the court should agree, before trial begins, on general ground rules for application of the Dead Man's Act. This could be accomplished either

informally, *e.g.*, at a pretrial conference, or formally, by use of a motion *in limine*.

To enhance the likelihood of getting a testator's inconsistent declarations before the jury, contestants should include a count to the effect that the testator lacked the capacity to make a will, even though the contest may rest primarily upon the exercise of undue influence or some other ground. Conversely, proponents should make every effort to have the capacity count stricken on a motion to dismiss or for summary judgment to prevent application of the exception to the exclusionary rule. In ruling on such motions, the court ought to give careful consideration to the evidentiary effect of granting or denying such a motion on the case as a whole.

A contestant who relies on the presumption of undue influence should introduce as much evidence of the three elements as is possible to avoid a directed verdict and to support use of the presumption in the face of contrary evidence. In some cases, the proponent may be a fiduciary by both a personal relationship with the testator and a contractual relationship, *e.g.*, under a power of attorney. In such circumstances the contestant should emphasize the contractual relationship in order to enhance the "public duty of fiduciaries" rationale which underlies the presumption and to ensure its availability. As with other aspects of will contest litigation, the interplay between capacity and undue influence can be important. Where showing a fiduciary relationship between the defendant and the testator is difficult, a strong showing of the testator's feebleness will support evidence of fiduciary relation through implied domination.

Because of the potentially damaging effect of the presumption to the validity of the will, the proponent should make every effort to prevent its application. This can be done by showing that, as a matter of law, one or more of the three elements do not exist. Ideally, the proponent should dispose of the capacity issue early in the case. Since this will limit evidence which the contestants can introduce concerning the testator's condition, it may increase the burden on contestants to show the proponent's fiduciary status.

Procurement is the weakest link in most contestant's cases; the proponent's presence or absence at discussions concerning the will or at its execution is crucially important. No Illinois case has yet applied the presumption if the contestant failed to show that the proponent knew or had an opportunity to know the contents of the will prior to its execution. Although the benefit requirement is often straightforward, it has been suggested that a benefit exists only where the defendant received a dispropo-

portionate amount compared to other similarly situated objects of the testator's bounty.⁹⁸ It would seem, however, that the proper test should be whether the proponent receives more under the contested will than under the prior will or, if no such will exists, as an heir-at-law.

CONCLUSION

Judges have historically distrusted the ability of juries to determine the validity of wills; juries are seen as quick to replace the dispositive decision of the testator with their own and, in so doing, fail to accord the existing will its full presumption of validity. As this article has illustrated, courts have used a variety of mechanisms, including the development of new evidence-exclusion rules and the expansion of existing rules, to shield juries from inflammatory evidence. In one respect, limitations on admissibility have become so severe that a presumption has developed so that contestants have at least a chance of proving undue influence. Whatever the merits of these special evidentiary rules, their operation and interaction create enormous complexity in a will contest. This complexity not only increases the cost of will contests, but also tends to confuse the court and the parties as to the strength of a claim, making settlement more difficult. In addition, the confusion makes victory in weak contests appear attainable, thereby wasting time and the assets of estates on marginal claims.

Two solutions to this growing level of complexity are possible: eliminate the restrictive evidentiary rules, or eliminate juries in will contests. If the rules are not applied, it is presumed that more will contests will be brought and more wills held invalid. If this occurs, the disposition of property at death will become less certain, and testators will use devices other than wills to dispose of their property in order to avoid a will contest. These other devices include *inter vivos* transfers to intended beneficiaries, secretion of property to avoid probate, and the use of trusts and *in terrorem* clauses, which may foster even further litigation. It is the authors' view that such fundamental changes in the testamentary transfer of property are not supported by policy or responsible popular opinion.

One alternative is to have will contests tried to the court. The right to jury trials in will contests was created by statute,⁹⁹ and is mandated by neither the United States Constitution nor

98. *Beyers v. Billingsley*, 54 Ill. App. 3d 527, 369 N.E.2d 1320 (1977).

99. ILL. ANN. STAT. ch. 110½, § 8-1(c) (Smith-Hurd Supp. 1983) (formerly codified at ILL. ANN. STAT. ch. 110, § 92 (Smith-Hurd 1975)). This provision was derived from § 7 of the Wills Act of 1872. The statutory right to contest

the Illinois Constitution. Aside from saving expenses for the estate, bench trials would allow prompt resolution of claims. The detriment to the parties, if any, would be slight because a large percentage of jury verdicts in will contests are overturned, either by the trial judge or on appeal. Unlike many other kinds of litigation, will contests rarely involve compensation to an injured party. Instead, the issue is who among the parties is entitled to a windfall. Surely the state's resources ought not be used, except to the extent necessary, to settle such disputes.

a will derives from laws of the territory which became Illinois in the Act of February 10, 1821, at p. 119.