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The Ungrateful Living: An Estate Planner's Nightmare - The Trial Attorney's Dream

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The Ungrateful Living: An Estate Planner's Nightmare - The Trial Attorney's Dream

*John A. Warnick**

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I. INTRODUCTION

"If I had the World to give"[1]
The Grateful Dead

The advantage of estate planning is that the testator[2] can be assured his assets will pass at his death to those whom he intends to benefit in the manner in which he chooses to benefit them. Since it rarely happens that the decedent will have left his estate in a manner that will entirely please all of his family or friends, this article is intended to assist the draftsman as well as the litigant in protecting the client's estate plan.

The article will first focus on the effect of the statutory protections extended to surviving spouses, such as the elective share, homestead exemption and family allowance. Factual patterns that portend a high risk of contest are identified. The article will then review dispositive provisions, choice of instrument, and formalities of execution to reduce the likelihood of a successful challenge to the estate plan. The grounds for upsetting wills, as well as inter vivos instruments such as deeds and trusts, are explored in depth. The procedure for will contests, and evidentiary questions such as admissibility and burden of proof, are discussed. Finally, the author reviews trial strategies that the contestant's attorney may want to employ and which counsel for the proponent should be prepared for. While cases from jurisdictions other than Wyoming will be cited, the main emphasis of the article will be on the rather substantial body of Wyoming cases that have dealt with these issues.[3]

II. DEFUSING THE FORCED SHARE AND SPOUSAL SUPPORT PROVISIONS

"I Used to Love Her"
The Grateful Dead

Intentionally omitting a spouse is made difficult by the the spousal support[4] and the elective share (or the forced share)[5] provisions. However, a careful draftsman can avoid these provisions if the testator wishes.

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1. Titles to the Grateful Dead songs throughout this article can be found in P. GRUSHKIN, C. BASSETT & J. GRUSHKIN, GRATEFUL DEAD: THE OFFICIAL BOOK OF THE DEAD HEADS 156-65 (1983).

2. For simplicity's sake, the author uses the masculine gender when referring to the person for whom the estate planning is done and the female gender when referring to a surviving spouse.

3. There are twenty-seven Wyoming cases cited in this article dealing with just the issues of testamentary capacity and undue influence. At first blush this may seem remarkable considering the usual lack of depth of case law in Wyoming. Possible explanations for the large number of decisions in Wyoming in this area are: (i) will contests are often decided on circumstantial evidence which, depending on the facts, may lead to different outcomes on only slightly different fact patterns; (ii) the emotion of a will contest does not let the unsuccessful party, either proponent or contestant, easily accept the trial court's verdict, and (iii) the all-or-nothing stakes involved in a will contest may invite appeals.

4. WYO. STAT. §§ 2-7-501 (1977, Rev. 1980), 2-7-502 (1977, Rev. 1980) and 2-7-504 (1977 & Cum. Supp. 1988).

5. WYO. STAT. § 2-5-101 (1977, Rev. 1980).

A. Spousal Support Provisions

The spousal support provisions include an allowance for maintenance for the surviving spouse,[6] the homestead exemption and exempt property set aside,[7] and the temporary right of possession to the homestead, family wearing apparel and all household furniture of the decedent.[8]

In Wyoming the spousal support provisions can constitute an estate plan by rule of law for smaller estates. Wyoming Statute section 2-7-508[9] provides for a homestead exemption of $30,000. This amount is exempt from the payment of all debts of the decedent other than administration expenses and expenses of the decedent's funeral.[10] If the decedent is survived by minor children none of whom are the children of the surviving spouse, then the survivor only receives fifty percent of the amount set aside to satisfy the homestead exemption with the other fifty percent going to the decedent's minor children. In all other cases the surviving spouse may elect to receive all of the equity in the home, up to the $30,000 maximum.

B. The Elective (Forced) Share

All but one of the common law states[11] give the surviving spouse an election either to take those assets which she would receive by the terms of the will or to renounce the will and receive a statutory share. Wyoming's elective share is one-half of the decedent's estate if the decedent has no surviving issue or the spouse is the parent of any of the surviving issue of the decedent. In all other cases the spouse's elective share is one-fourth.[12]

In Wyoming the elective share applies to all property, subject to disposition under the will, remaining after funeral and administrative expenses, homestead allowance, family allowances and exemption, and enforceable claims are satisifed. Prior to its amendment in 1980 the Wyoming elective share provisions applied to the "estate, real and personal."[13] This raised the question whether property which might be subject to testamentary disposition, through a power of appointment,[14] would be sub-

6. WYO. STAT. § 2-7-502 (1977, Rev. 1980). This support provision accompanies the right to temporary possession, WYO. STAT. § 2-7-501 (1977, Rev. 1980). It is not clear from the statute whether this support provision can extend beyond the date when the inventory is filed. If it must cease at the date of filing the inventory, then it appears there would be no support available to the family once the inventory is returned but the appraisement has not been filed.

7. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988).

8. WYO. STAT. § 2-7-501 (1977, Rev. 1980). This right of temporary possession is only to last until the inventory is returned.

9. WYO. STAT. § 2-7-508 (1977, Rev. 1980).

10. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988) was amended in 1981 to take out the former reference to last illness and funeral expenses. Now only the administrative expenses and funeral expenses take priority over the homestead and other exemptions.

11. Georgia does not provide for elective share. GA. CODE ANN. § 53-2-9 (1982).

12. WYO. STAT. § 2-5-101 (1977, Rev. 1980).

13. WYO. STAT. § 2-5-101 (1977, Rev. 1980).

14. A power of appointment is the right given to a donee, the powerholder, to designate the transferees of the property which is the subject of the power, or the shares or interests the transferees will take in such property. Powers of appointment are usually classified as

ject to the elective share. In *Reno v. Reno,*[15] the court held that property over which the decedent held a power of appointment was not included among the assets to which the surviving spouse's elective share extended.[16]

A good argument could be made to limit the holding in *Reno* to its facts and to apply a different rule to an exercised testamentary general power of appointment. The creditors of the holder of an exercised general power of appointment can reach that property to the extent of their claims.[17] This makes the transfer of property by appointment under a testamentary general power of appointment more of a "disposition under the will" than a special power of appointment.

C. Damage Control-Planning Within the Will

Since the elective share applies after the homestead exemption, exempt property and family allowances are set aside, the amount which the electing spouse can take can be a very high percentage of the total estate, particularly in smaller estates. The Wyoming statutes[18] offer a very limited planning opportunity within the will. The decedent can, through a clear expression, provide a bequest to the surviving spouse in lieu of these rights. If there is such a bequest, then the surviving spouse is not entitled to these rights unless she renounces the provisions made for her benefit under the will. The application of this planning opportunity can best be illustrated by two examples. First, the testator may make a gift to his spouse in lieu of her homestead right because he wants his home to pass to his children. He could specify that the bequest to her of $30,000 in cash is in lieu of her homestead right. If she wanted the home, she would have to renounce the cash gift. Alternatively, the testator could leave property in trust under the will, which exceeds in amount the total of the elective share and the homestead exemption, exempt property and family allowances amount. The trust, however, would be subject only to a lifetime right to income in the surviving spouse, with the remainder to pass

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general or special. A general power of appointment is a "power exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate." I.R.C. § 2041(b) (West Supp. 1986). A special power of appointment is a power not exercisable in favor of the powerholder, his estate, his creditors or the creditors of his estate. A power of appointment can be testamentary, that is exercisable by the powerholder's last will and testament, or inter vivos. BLACK'S LAW DICTIONARY 1054 (5th ed. 1979).

15. 626 P.2d 552 (Wyo. 1981).

16. In *Reno* the court noted that the 1980 amendments to the Wyoming Probate Code had changed the language of the elective share provisions, but in dicta expressed the opinion that "the change in the statute in no way affects the result of this case; it being the same under either." *Id.* at 552 n.1. This is troubling because the language under the amended probate code says the elective share applies to "the property which is subject to disposition under the will." WYO. STAT. § 2-5-101 (1977, Rev. 1980). Arguably the reach of the new elective share is broader than the old statute and begs application to testamentary powers of appointment. Since Floyd Reno died in 1976 and the outcome of *Reno* was determined under the more restrictive language of the old probate code, it seems the issue of whether the elective share under the current probate code applies to testamentary powers of appointment is still an open question in Wyoming. Furthermore, it should be noted that in *Reno* the power was a special power and was never exercised. *Reno,* 626 P.2d at 555.

17. SIMES & SMITH, FUTURE INTERESTS, § 945, at 403-04 (2d ed. 1956).

18. WYO. STAT. § 2-5-103 (1977, Rev. 1980).

upon the survivor's death to the testator's children. The gift in trust for the survivor's benefit must include a statement that it is made "in lieu" of the rights granted the survivor, and the survivor must choose between a lifetime income or the smaller fractional share of the decedent's estate that would be the survivor's under the elective share, homestead exemption, exempt property and family allowance provision. For larger estates this technique is useful for estate tax purposes as the gift in trust could be to a QTIP[19] marital trust so as to generate a marital deduction for the testator's estate.

Another planning possibility is to have the husband and wife enter into a contract to make joint or mutual wills. Typically, such a contract would provide that upon the first spouse's death all of their property would pass to the surviving spouse. The will would then provide for distribution of the assets to their intended beneficiaries once both of them were deceased. This approach does avoid problems with the spousal support provisions and elective share since all of the couple's property passes at the first spouse's death to the survivor. However, it is not a satisfactory solution where one of the spouses is considerably younger than the other and the older spouse doesn't want to make his children, who may be older than the new spouse, wait until the death of the younger spouse to enjoy any of papa's assets. It is also of limited utility in smaller estates if the surviving spouse seeks to break the contract by renouncing the will and taking the spousal support provisions and elective share, leaving little if anything for the deceased spouse's beneficiaries. [20]

D. Avoidance Through Trusts and Other Will Substitutes

The Wyoming Probate Code only provides an elective share for "property which is subject to disposition under the will;"[21] therefore, it appears that transfers of property not included in the probate estate, or at least over which the decedent doesn't have the right to dispose of via testamentary appointment through his will, aren't subject to the elective share. The legislative history of the new Wyoming Probate Code seems to support such a position.

The new Wyoming Probate Code was adopted after a special committee was appointed by Governor Herschler to study the issue of revising the old probate code. The study was prompted by the 1970 publication of the Uniform Probate Code (U.P.C.) by the Commissioners on Uniform State Laws, and by literature which highlighted the advantages the U.P.C.

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19. I.R.C. § 2056(b)(7) (West Supp. 1986) allows a marital deduction for "qualified terminable interest" property which has been given the acronym QTIP. To qualify for the QTIP election, three requirements must be met: (1) the spouse must be entitled to all income from the interest for her life; (2) the income must be payable to her no less frequently than annually; and (3) no one may have the power to appoint the property during the spouse's lifetime to anyone other than the spouse.

20. For a more detailed discussion of enforceability of contracts to dispose of property at the death of two or more testators, see text discussion at III.C.

21. WYO. STAT. § 2-5-101(a) (1977, Rev. 1980).

offered over the old Wyoming Probate Code.[22] There was a groundswell of support for the U.P.C., initially evidenced by the fact that it was adopted in substantial form by all of the states which border Wyoming.[23]

The new Wyoming Probate Code was forged from a wide array of sources. Most of its provisions were taken from the old Wyoming Probate Code, which had been adopted originally from California. Some of its provisions were taken from Iowa.[24] Other provisions were adapted verbatim from the U.P.C., and others with either technical or grammatical changes. Finally, in some cases, and most notably in the case of the elective share, the drafters of the new Wyoming Probate Code used their own language.

The U.P.C. approach to the elective share is what is known as the augmented estate concept, which provides that nonprobate assets are subject to the elective share.[25] It is clear that the drafters of the new Wyoming Probate Code had the opportunity to incorporate into Wyoming's probate code the augmented estate concept and chose not to do so. For example, Wyoming Statute section 2-5-101(a)[26] (which defines what property is subject to the elective share and what that share amounts to) and section 2-5-101(d)[27] (which deals with the effect of a failure to make a timely election) are both original to the new Wyoming Probate Code. In contrast Wyoming statutes section 2-5-101(b)[28] (dealing with choice of law provi-

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22. *See* Averill, *Wyoming's Law of Decedent's Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code Part I,* 7 LAND & WATER L. REV. 169 (1972); *Part II,* 8 LAND & WATER L. REV. 187 (1973); *Part III,* 9 LAND & WATER L. REV. 567 (1974); and *Part IV,* 10 LAND & WATER L. REV. 155 (1975).

23. COLO. REV. STAT. §§ 15-10-101 to 15-17-101 (1973); IDAHO CODE §§ 15-1-101 to 15-7-307 (1971 & Cum. Supp. 1988); MONT. CODE ANN. §§ 72-1-101 to 72-5-502, and §§ 72-16-601 to 72-16-612 (1974); NEB. REV. STAT. §§ 30-2201 to 30-2902 (1974 & Cum. Supp. 1987); UTAH CODE ANN. §§ 75-1-101 to 75-8-101 (1975 & Cum. Supp. 1988). South Dakota had adopted the U.P.C. but repealed it on February 17, 1976.

24. The stimulus for adopting portions of the Iowa probate was most likely Roy Stoddard, Esq., a Cheyenne attorney who chaired the Governor's Probate Revision Committee's efforts. Mr. Stoddard had practiced in Iowa for many years before coming to Wyoming, where he has been in private practice emphasizing estate planning and administration, and has taught at the University of Wyoming Law School.

25. Section 2-201(a) of the Uniform Probate Code allows a decedent's spouse to claim an elective share in an amount equal to one-third of the decedent's augmented estate, whether the decedent died with or without a will. The augmented estate is comprised of the decedent's net probate estate plus (1) the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse and (2) the value of all property owned by the surviving spouse at decedent's death as well as certain lifetime transfers of property by the surviving spouse during marriage to donees other than the decedent, to the extent that the owned or transferred property was derived from the decedent. U.P.C. § 2-202 (1983). The objective of the Uniform Probate Code's elective share was to protect the surviving spouse while balancing the interests of allowing the decedent freedom of testation and the interests of other donees. The complexity of this approach, in terms of having to trace gifts and the origin of property ownership by the surviving spouse, has made it quite controversial. For an excellent discussion of the augmented estate concept, see Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share,* 62 IOWA L. REV. 981 (1977).

26. WYO. STAT. § 2-5-101(a) (1977, Rev. 1980).

27. WYO. STAT. § 2-5-101(d) (1977, Rev. 1980).

28. WYO. STAT. § 2-5-101(b) (1977, Rev. 1980).

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sions affecting the elective share when the decedent is not a domiciliary of Wyoming) is taken verbatim from the U.P.C.[29]

The elimination, either intentional or unintentional, of the surviving spouse's elective share through nonprobate assets was the very reason for the U.P.C.'s augmented estate concept. The significance of the Wyoming legislature's rejection of the augmented estate concept is that a Wyoming domiciliary can defeat the elective share by removing his property from the probate estate; through inter vivos trusts, joint tenancies, life insurance, annuities, and lifetime gifts. The surviving spouse who feels she has been victimized by such planning may attempt to set aside the transfers. The grounds for doing so could be that the transfers were (1) "illusory,"[30] (2) a fraud on the spouse's marital rights,[31] or (3) testamentary in nature and fail because they weren't executed with the formalities required of a will. No Wyoming cases have reached these issues.[32]

III. MAKING THE ESTATE PLAN IMPREGNABLE

"My Time Comin' Any Day"
The Grateful Dead

A. *Warning Signs*

Certain situations should immediately flag danger of a contest. If the attorney is aware of these patterns the estate planning conference can be used not only to elicit the client's testamentary objectives but also to discuss the techniques for minimizing post-mortem conflict. These situations include: a desire to limit the gift to or disinherit a spouse; total disinheritance of a child or children; disparate treatment of children; children from a prior marriage; dead-hand control through conditional gifts; "locking up" the assets through trusts; and nonfamily gifts.

Even when these patterns aren't present the suggestions for will execution ceremonies, document preservation, choice of instrument and applicable law, and selection of fiduciaries discussed below will assist the planner in making sure that the client's testamentary wishes are fulfilled.

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29. U.P.C. § 2-201(b) (1983).

30. "Deceiving by false appearances; nominal, as distinguished from substantial . . . ." BLACK'S LAW DICTIONARY 674 (5th ed. 1979). See Powell, *Illusory Transfers and Section 18*, 32 ST. JOHN'S L. REV. 193 (1958).

31. For a case in which the surviving spouse raised the doctrine of fraud on marital rights, *see* Methodist Episcopal Church v. Hadfield, 453 A.2d 145 (Md. App. 1982). In this case the wife was advised by her therapist to seek employment. She withdrew the savings she had brought into the marriage from a joint bank account with her husband after he started charging her 14 cents a mile for using the family automobile to commute to work. The husband then called her a "robber" and a "thief" and deeded a remainder interest in their residence, which was titled in his sole name as a result of an inheritance from his first wife, to his church. At his death his will left little to his widow and she sought to have the lifetime conveyance of the home set aside on the grounds it had been fraudulent. The appeals court felt her claim of fraud might be upheld but remanded the case to the lower court for further determinations.

32. For a discussion of the different approaches that other jurisdictions have taken to these attacks by a surviving spouse on efforts to avoid those spousal rights, see Schuyler, *Revocable Trusts—Spouses, Creditors and Other Predators*, 8 INST. ON EST. PLAN 1300 (1974).

1. The Wicked Stepmother or Stepfather

When the spousal support provisions are combined with the elective share, there may be little left of the probate estate to pass on to the testator's children. When the testator's children are also the surviving spouse's children this isn't a serious concern. But in the so-called "wicked stepparent" situation, the homestead exemption and the other spousal support provisions present special problems. Estate planning for the married client with children from a prior marriage also requires careful consideration of how jointly held property will interface with the testamentary plan embodied in the will.

The "home on the range" problem is the legal effect which the homestead exemption granted to a surviving spouse will have on the testator's personal residence. The largest source of equity in many testator's estates is the home. As discussed above,[33] the surviving spouse is given the right to ask the probate court to set over for her benefit the personal residence, or if it exceeds $30,000 in value, a specific portion thereof. If she is a stepmother of the decedent's minor child or children, then she is only entitled to one-half of the homestead and other exempt assets.[34]

In Wyoming, the probate court will, in determining the surviving spouse's entitlement to the homestead exemption, take into account a jointly owned residence which passed to the survivor at the decedent's death by operation of law.[35] If the testator doesn't want his personal residence to be divided between his surviving spouse and his minor children, none of whom are the children of the survivor, and who do not reside with her, then he may want to attempt to avoid the homestead exemption by titling that property in joint ownership.[36]

In the case of older clients with children from prior marriages, the testator may want to pass his home to his adult children. He should be informed that despite the language of his will and the fact that he has maintained title in his sole name, his widow will have a right to have the homestead exemption set-aside for her benefit. He may then choose to title the home jointly with his children, convey a remainder interest to the children while reserving only a life estate for his benefit, or create a revocable or irrevocable trust. Since these techniques will leave no interest in the home in his probate estate, they should avoid the effects of the homestead exemption.

In this situation the client should also consider, as additional protection, requesting his spouse to waive her rights to the homestead and/or

33. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988).

34. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988).

35. Wambeke v. Hopkin, 372 P.2d 470, 474 (Wyo. 1962). Although this case was decided prior to the revision of the Wyoming Probate Code, presumably the same law would apply since the homestead exemption was only modified grammatically and not substantively.

36. A trust might be considered if the client wants to be sure that the house passes to his children at the survivor's death. However, the practicalities of a trust with just the decedent's home in it are questionable. Additionally, a tenancy by the entireties ownership will offer greater protection against creditors during the client's lifetime than will a trust.

right to election.[37] This waiver must be obtained only after "fair disclosure." It can be done after marriage, although the client should be encouraged to raise this issue prior to saying "I do" at the altar.

The client must be advised on the effects of retirement plans and insurance benefits. The spousal consent provisions of the Retirement Equity Act[38] substantially restrict the client's ability to use his retirement plan benefits as a means of leaving assets to his children. There is no restriction on the client's designation of his insurance and annuity benefits. However, if the potential beneficiaries are minor children or spendthrifts the client may want to consider making those proceeds payable to a trust. If a testamentary trust is used, the benefits should be payable directly to the trustees of the trust rather than having them paid to the probate estate where they will be subject to the elective share and the spousal support provisions.[39]

2. The Forgotten or Despised Child

Omitted children frequently receive legislative protection. Wyoming offers a modest measure of protection to minor children through the family allowance[40] and the homestead exemption,[41] but statutory protection for adult children who are either forgotten or intentionally disinherited is conspicuously absent. Wyoming, Kansas, and the District of Columbia are the only jurisdictions in the nation which do not have some form of pretermitted heir statute.[42] The testator who intentionally disinherits a child will find Wyoming a favorable domicile.

Even though Wyoming has no pretermitted heir statute, estate planning clients are often mobile, and the prudent attorney will inquire into the existence of children, whether they will be beneficiaries or not.[43] The draftsman should include each child's name in the will and affirmatively declare the testator's intent not to leave anything to the disinherited child.[44]

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37. WYO. STAT. § 2-5-102 (1977, Rev. 1980).

38. The spouse's consent must be obtained to have a payout other than a qualified joint and survivor annuity or qualified preretirement survivor annuity. *See* 29 U.S.C.A. § 1055(c)(2) (West 1985).

39. It may be preferable to use an inter vivos insurance trust for this purpose since there is no case law in Wyoming yet to support the proposition that a testamentary trust is not subject to the elective share.

40. WYO. STAT. § 2-7-502 (1977, Rev. 1980).

41. WYO. STAT. § 2-7-501 (1977, Rev. 1980).

42. ATKINSON, WILLS 141 (2d Ed. 1953); DUKEMINIER & JOHANSON, WILLS, TRUSTS, AND ESTATES 623 n.137. The pretermitted heir statutes are generally of two classes: those which protect only those children who are born or adopted after the will is executed and those which protect any child who isn't mentioned in the will. If a testator fails to mention a child who falls in the class protected by the jurisdiction's statutes, then the usual remedy is to give the omitted child an intestate share while letting the balance of the will stand.

43. This practice will not only protect against the client dying in a state that does have a pretermitted heir statute but it is also helpful in probate practice because it preserves in the will a readily available list of the "heirs" to whom the notices required under WYO. STAT. § 2-7-205 (1980) must be sent.

44. Some courts have ruled that to disinherit a child the intention to disinherit must be manifested affirmatively rather than negatively. *In re* Estate of Padilla, 641 P.2d 539, 544 (N.M. App. 1982).

Most clients who want to disinherit a child have heard popular stories about the importance of leaving a dollar or some token bequest to each child. The efficacy given to such clauses varies among the jurisdictions.[45] In those jurisdictions where such clauses aren't effective, they may have a substantial negative effect if they sufficiently incense the "forgotten" child to become a costly obstructionist. The "beneficiaries" named in the will must be given notice, and presumably an opportunity to appear in opposition, to the actions of the personal representative.[46] Thus, such clauses give the token legatee standing to contest actions taken during the probate process.

In any event the draftsman must be careful to name the children without defaming them.[47] It's better to recognize the disinheritance without apology than to elaborate on the testator's justification. In one case the testatrix felt compelled to explain her reason for not including a former husband in her will. She reported in the will that he "abandoned me, made no provision for my support, treated me with complete indifference and did not display any affection or regard for me."[48] The ex-husband enjoyed the last laugh. He sued her estate for testamentary libel and was awarded almost half the estate.[49] If the testator insists on leaving a written explanation for disinheriting his issue, there must be sound basis for the beliefs he expresses. In addition to exposing the estate to attack for libel, unfounded allegations could be evidence of an insane delusion or otherwise create doubt as to testamentary capacity.

3. The Multi-Colored Coat Problem

Since Biblical times parents have often chosen one child over another as the object of their bounty.[50] Quite predictably parental favoritism can lead to extreme jealousy among siblings, and the potential for a will contest may not be as obvious to the parent as it is to the attorney.

Disparate treatment of children in itself is not grounds for a will contest. The estate planner in such circumstances should beware of providing grounds for challenge based on undue influence or insane delusion. The attorney who doesn't want to see his handiwork destroyed by the disappointed relatives should be careful to avoid joint meetings with the testator and his favorite son or daughter. Including the favorite child in those conferences could lead to charges of undue influence against the favored beneficiary. As a precaution against charges of insane delusion, the attorney might also discuss the inequality of distribution with the

45. A bequest of $1 to any claimant "by virtue of relationship or otherwise" was insufficient to disinherit an omitted child. *In Re* Torregano's Estate, 5 Cal. Rptr. 137, 54 Cal. 2d 234, 352 P.2d 505 (1960). However, a gift of $5 to any person who established that he was an heir at law was held sufficient to show an unambiguous intent to omit an illegitimate child. Bridgeford v. Estate of Chamberlain, 573 P.2d 694, 696 (Okla. 1977).

46. *See* WYO. STAT. § 2-7-205(b) and (c) (1977, Rev. 1980).

47. *See* Hudak, *The Sleeping Tort: Testamentary Libel*, 27 MERCER L. REV. 1147 (1976).

48. Brown v. DuFrey, 1 N.Y.2d 190, 134 N.E.2d 469, 471 (N.Y. 1956).

49. *Id.*

50. See the story of Joseph and the many colored coat which his father, Jacob, gave him. Genesis 37.

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testator in the presence of the attesting witnesses, and have them record in writing their impressions of the testator's state of mind and his cognizance of the favoritism.

4. The Isaac and Ishmael Problem[51]

Frequently the planner is presented with the problem of children from a prior marriage. The attorney must not only advise the client of the formidable obstacles presented by the elective share and spousal support provisions, but must also deal with the emotional estrangement which often occurs between a noncustodial parent and his child by a previous union. Often the testator's current spouse has importuned him not to include such children in the will. Occasionally the children from the second union have been raised without knowledge of the existence of the previous marriage or child.

If the testator's desire is to cut his life's "Ishmaels" out of the estate, the attorney must deal with the pretermitted heir problem. If the children to be disinherited are minors, the testator should be advised of the problems inherent in the homestead exemption and family allowance.[52]

The Wyoming family allowance provisions provide that the "spouse and minor children are entitled to remain in possession of the homestead, all wearing apparel of the family, and all household furniture of the decedent . . . ."[53] This raises an issue unanswered in Wyoming: whether the testator's minor child, not living in the testator's household, is only entitled to *remain* in possession of those items which were in her actual possession at the time of testator's death. The temporary possession problem can be solved by expeditiously filing the inventory in the probate court since possession is to last only until such time as the inventory is returned.[54]

The homestead exemption is more difficult to avoid. Wyoming apparently recognizes that the personal residence of the testator, if owned by a tenancy by the entireties with the surviving spouse, will pass free of any claim thereto by the minor "Ishmaels."[55] However, under Wyoming law it appears the minor "Ishmaels" are entitled to share in the value of the homestead exemption[56] regardless of their possession of such assets.[57] Thus, they are still entitled to one-half of the value of the homestead and exempt property set aside, such value to be drawn from the probate assets.[58]

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51. Father Abraham had a son, Ishmael, by his handmaiden, Hagar. When his wife Sarah bore Isaac problems began. Apparently Sarah's pleadings that Ishmael not inherit with Issac caused Abraham to reject his first son, as well as his mother, Hagar, and force them into the desert with scanty provisions. The circumstances of Ishmael's abandonment by his father are dramatized by the fact that were it not for miraculous intervention, he and his mother appeared destined to die in the desert. Genesis 21.
52. *See* text discussion at II.A, II.B, and II.C.
53. WYO. STAT. § 2-7-501 (1977, Rev. 1980).
54. WYO. STAT. § 2-7-501 (1977, Rev. 1980).
55. *Wambeke*, 372 P.2d at 474.
56. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988).
57. *Wambeke*, 372 P.2d 470.
58. WYO. STAT. § 2-7-504 (1977 & Cum. Supp. 1988).

If the "Ishmaels" are to be forever cast out of his estate plan their statutory rights may be avoided with the creation of a trust by the testator. Alternatively, he might consider joint ownership with his present spouse of his personal residence and minimization of whatever other assets are subject to probate. If the client cannot retitle his assets in a manner that avoids probate[59] he may consider leaving sufficient liquid funds to satisfy whatever claims could be made by his minor "Ishmaels."

5. Dead-Hand Control

Whenever a client confides that he must impose restrictions on a gift to an heir, the attorney should remind himself that if the client has been unable to control his child's or grandchild's behavior while he's alive, there is little likelihood that the conditional gift will curb the heir's rebelliousness once the testator is gone.

If the client is intent on using dead-hand control in his estate plan, the attorney should make sure that the proposed restraints do not violate public policy.[60] Perhaps the most typical of such gifts are those which impose restraints on marriage or religion.[61] Economic considerations seldom rule over matters of conscience or heart. Therefore, the client must consider not only the efficacy of the proposed restraint from a legal standpoint but also whether it is likely to achieve its desired result.

6. The Ugly Trustee Problem — Choice of Fiduciary

The selection of a personal representative or trustee is a fundamental step in the estate planning process. Yet, too often it is made simply on the basis of the client's uninformed predilection and made long before the actual details of the estate plan have been formulated.[62]

The attorney's counsel on choice of a fiduciary is essential to proper selection and design of the trustee arrangement. The discussion should be broader than a simple recitation of fees charged and the type of fiduciaries to choose from. The selection should be made with the client's proposed estate plan in mind. The advice on appropriateness of a particular type of fiduciary must take into consideration many factors, including:

1. The tax consequences of the trusteeship.
2. The duration of the trust.

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59. Certain assets, such as stock in a professional corporation or a bank director's qualifying shares, cannot be owned jointly due to statutory or regulatory restrictions. WYO. STAT. § 17-3-101 (1977, Rev. 1987).

60. See Girard Trust Co. v. Schmitz, 129 N.J. Eq. 444, 20 A.2d 21, 27 (1941), where the court refused to give effect to a restriction on a gift which prohibited the beneficiaries from communicating with a sibling the testator disliked intensely.

61. *See* Nevins, *Testamentary Conditions: The Principle of Uncertainty and Religion*, 18 ST. LOUIS U.L.J. 563 (1974); Browder, *Conditions and Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288 (1941).

62. It is the author's experience that most Wyoming testators know little, if anything, about the realities of estate and trust administration. Often their views are colored by a "horror" story they heard at some dinner party about an estate plan that went awry because of poor trustee selection. No matter how hard they try to improve their public image, corporate trustees, like Americans abroad, are too often stereotyped as "arrogant" and "insensitive" to the needs of those around them.

3. The need for impartiality.
4. The administrative complexity of the proposed arrangement in terms of the document and the assets to be administered.
5. The advantages and availability of professional investment expertise.
6. The advantages or disadvantages of family input into management decisions.
7. Succession.
8. Geographic location of the assets, beneficiaries and proposed fiduciaries.
9. State law considerations on domicile of personal representatives.

The attorney may propose a trustee arrangement where decision-making is shared between a family member and a professional trustee.[63] Such arrangements may be part of an effort to design a checks and balances approach to control over trust assets so that an independent trustee doesn't run through the family like a rogue elephant. The trustee's role can range from approving the sale of assets, to serving as a communicator with the other beneficiaries. The trustee may serve as mentor to the family trustee/beneficiary until that person has gained sufficient investment, tax, and accounting expertise to justify either taking total control of the trust or receiving the assets free of trust.

The attorney must also discuss the potential reaction of the trust or estate beneficiaries to the choice of a fiduciary. That choice may be a significant factor in avoiding a will contest, particularly where the proposed personal representative is the unexpected primary object of the testator's bounty or where the office will confer substantial authority over a key business asset.[64] In the case of a trust, the long-term role which the trustee will play in the lives of the beneficiaries means that careful selection of trustees may not only avoid a contest of the instrument, but also disputes years after the client's death over the trustee's actions or accountings.

7. The Overly Endowed Charity, Confidant or Caretaker

Bequests to nonfamily beneficiaries such as caretakers and charities have a tremendous propensity for inciting will contests. In such a setting the attorney should be careful to utilize the defensive mechanisms discussed in greater detail below.[65] Particular care should be given to drafting charitable bequests and trusts to satisfy tax law requirements,

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63. See ESPERTI AND PETERSON, THE HANDBOOK OF ESTATE PLANNING 105 (2d ed. 1988) for an excellent discussion of the relative merits of various combinations of family member(s), corporate trustee(s), and professional trustee(s).

64. See *In re* Estate of Getty, 85 Cal. App. 3d 755, 149 Cal. Rptr. 656 (1978) where the issue involved the standing of the testator's granddaughter to contest a codicil that eliminated her as a potential trustee of a $700,000,000 trust, the income from which was to go to the richest art museum in the world. The trusteeship was important, not only because of the potential fees to be earned as a trustee, but also because of the control a trustee would have over a major oil company.

65. See text discussion at III.E, III.F, III.G, and III.H.

correctly identify beneficiaries,[66] and avoid challenges due to ambiguities or indefiniteness.[67]

Where the testator intends to reward a longtime caretaker, or confidant, it would be helpful to have the testator express, not just to the attorney and witnesses, but in the document itself, the motivation for the gift to the outsider.

B. Choice of Instrument

In many situations the choice of instrument plays an enormous role in successfully avoiding a subsequent contest. The attorney must skillfully guide the client's selection of the proper instrument and, in some cases, may be able to suggest a choice of law that may prove advantageous in making the estate plan more impregnable.

Inter vivos trusts are increasingly popular with the public, in comparison with wills, because they avoid many of the publicized disadvantages[68] of the probate process. However, they are still often overlooked as a possible means of avoiding the elective share, homestead rights and exempt property set asides, and family allowances. Contests may be avoided because inter vivos trusts are not subject to court supervision in Wyoming. There is no requirement for notifying heirs of the death of the trustor or of the commencement of post-mortem trust administration. Where the heirs are neither included in the trust nor located in the trustor's hometown, they may not hear of the trustor's death until the passage of time[69] has barred a contest of the trust. In addition, a trust does not leave a broad trail in the public record and therefore may be more difficult to contest.

In some cases the client may be well advised to select a will. For example, the statute of limitations in probate which penalizes creditors who fail to file creditor claims or file tardy claims is an important consideration, particularly for those clients with professional practices whose estates

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66. The identification of the charitable beneficiary is critical. In one lawsuit the author is familiar with a California testator left a seven figure sum for the use of Boy Scouts in Teton County, Wyoming. Unfortunately, either the testator or draftsman incorrectly designated the Boy Scout Council that the bequest was to go to. It was left to a council which had no jurisdiction under its charter to supervise or assist scouting in Teton County, Wyoming. Litigation ensued as the local scouting organization challenged its out-of-state council for control of the funds.

67. In Branson v. Roelofsz, 52 Wyo. 101, 106, 70 P.2d 589, 591 (1937) the testatrix left her estate to an undefined "foundation" to be created for the benefit of the blind. Her plan failed because the jury found she lacked testamentary capacity and suffered from an insane delusion.

68. Wyoming recently allowed the personal representative of an estate to negotiate a fee with the attorney which is lower than the statutory fee. *See* WYO. STAT. § 2-7-804(d) (1977 & Cum. Supp. 1988). This removes perhaps the most criticized aspect of the probate process, that is, the disparity which often existed between the statutory fee and the amount of labor expended by the attorney.

69. The statute of limitations may bar their action. The constitutionality of trust administration without notice to intestate heirs who are not beneficiaries may be different than that of a probate proceeding where "state action" is involved. See the discussion of due process requirements at IV.A.1.

may be subject to malpractice claims that have yet to ripen at the time of the testator's death. The choice of instrument in this case won't alone suffice to cut off known or reasonably ascertainable creditors.[70] The attorney probating the professional testator's will should consider the advisability of sending actual notice to all of the decedent's patients or clients.

Likewise the testator who is faced with considerable debts may want to take advantage of the statutory priority for debts of the insolvent decedent.[71] For example, where the decedent owes substantial taxes, the surviving spouse and minor children may receive a family allowance in preference to the Internal Revenue Service (I.R.S.).[72] This is preferable to utilizing a trust, which may be subject to the claims of the I.R.S. on the basis of transferee liability.

Additional tax considerations may dictate that a will be used rather than a trust. For example, only certain types of trusts may qualify as S corporation shareholders.[73] A grantor trust, once it ceases to be treated as a grantor trust for income tax purposes because of the death of the grantor, is allowed to remain as a S corporation shareholder for two years after the grantor's death.[74] In contrast a probate estate can continue to hold S corporation stock without disqualifying the S corporation's election for as long as the probate estate has to be kept open for administrative purposes.[75]

C. Joint and Mutual Wills

A couple may execute joint, reciprocal, or mutual wills. A joint will is a single instrument containing the wills of two or more individuals, which is jointly executed by them. A reciprocal will is one in which two or more testators make a testamentary gift in favor of each other. Mutual wills are two or more separate wills, each executed by an individual testator, and each manifesting a common plan or intent. Wyoming has not followed those jurisdictions which require that mutual wills be executed as part of an agreement between the testators.[76]

Joint, reciprocal, and mutual wills often raise the issue of whether the surviving testator is contractually barred from revoking the provisions of the earlier will. The fact that joint or mutual wills are executed at the

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70. The United States Supreme Court recently ruled that notice by publication in a local newspaper is not constitutionally sufficient, for due process purposes, to bar the claims of creditors who were either known or reasonably ascertainable but did not receive actual notice. Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340, 1347 (1988).

71. WYO. STAT. § 2-7-701 (1977 & Cum. Supp. 1988).

72. WYO. STAT. § 2-7-701(iv) and (v) (1977 & Cum. Supp. 1988).

73. *See* I.R.C. §§ 1361(c)(2)(A) and 1361(d)(3)(A) (P-H, Fed. Taxes 1989). Formerly, no trust was a permissible shareholder of a Subchapter S Corporation.

74. I.R.C. § 1361(c)(2)(A)(ii) (P-H, Fed. Taxes 1989).

75. There is no specific time period imposed on an estate's ownership of S Corporation stock by the Internal Revenue Code but the attorney must remember that an estate cannot be kept open forever. *See* Old Virginia Brick Co. v. C.I.R., 367 F.2d 276, 279 (4th Cir. 1966).

76. *See* Shook v. Bell, 599 P.2d 1320, 1324 (Wyo. 1979) and 1 BOWE-PARKER, PAGE ON WILLS, §§ 11.1 and 11.3 (1960).

same time and as a result of a common plan does not raise the presumption or inference that there was a contract between the testators binding them to the will provisions.[77] If the contract is recited in the will itself, such as a statement that the testators "agree that this, our last will and testament, cannot be changed or varied by either of us without the consent in writing of the other," this is prima facie proof of the existence of the contract.[78]

Contracts between husband and wife to make mutual and reciprocal wills are favored in Wyoming.[79] It will be much more difficult to prove such a contract between unmarried individuals.[80] In proving such a contract greater evidentiary weight will be given to a joint will than to a mutual will.[81] However, the difficulties of proving an oral contract not to revoke a will are substantial.

The party seeking to establish the existence of an oral contract has a heavy burden.[82] The evidence of an oral contract to make a will must be clear and convincing.[83] The evidence must further establish that the minds of the joint or mutual testators met on definite terms. Thus, if there

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77. *See Matter of* Estate of Bell, 726 P.2d 71, 75 (Wyo. 1986). In this case a childless couple executed mutual and reciprocal wills which did not recite that they were made pursuant to a contract. There were allegations that there was an oral contract but the evidence did not support those contentions. The widow executed five codicils after her husband's death and the final codicil made significant changes in the estate plan in favor of certain ranch employees, reducing the share which the original beneficiaries were to receive.

78. *See* Flohr v. Walker, 520 P.2d 833, 834 (Wyo. 1974) (court imposes constructive trust upon property of surviving spouse, subject to joint will).

79. In *Shook,* 599 P.2d at 1324, a husband and wife executed mutual and reciprocal wills leaving all of their property to each other, but if their spouse did not survive then one-half of the property went to the husband's niece and the other half to the wife's niece. The husband died first and most of the property passed to the wife by operation of law. She subsequently changed her will, excluding the husband's niece. The wills did not recite a contract but evidence was introduced supporting an oral contract. The trial court found there was no contract but the Wyoming Supreme Court reversed with directions to the lower court to determine from all the evidence whether there was a contract and, if so, what the parties' intent was with respect to the property which would be subject to that agreement.

80. Canada v. Ihmsen, 33 Wyo. 439, 456, 240 P. 927, 932 (1925) (neighbors execute mutual wills leaving each other their property).

81. *Shook,* 599 P.2d at 1324. The theory is that a joint will could not be executed unless there had been some prior contractual understanding or arrangement between the parties.

82. In Pangarova v. Nichols, 419 P.2d 688, 694 (Wyo. 1966), the decedent was a Bulgarian immigrant who had amassed a considerable fortune prior to his death. He and his wife were childless and they had corresponded with his niece and her father about the possibility of bringing the niece to America and adopting her. Because she was living behind the Iron Curtain it was very difficult to secure a visa for her. After the aunt contracted a terminal illness the uncle wrote that if the niece would come they would adopt her and she would be their heir. Shortly thereafter the aunt passed away and the decedent wrote that he was going to make a new will and name the niece as his beneficiary, which he did shortly thereafter. He also subsequently wrote her that he was besieged with women who were after his property but that the niece would find, when she got to Casper, that he was all alone and asked that she not marry. He subsequently married a woman half his age and when the niece arrived she moved in with them but was forced to leave a month later to keep peace between the uncle and his new wife. Shortly thereafter he made a new will leaving everything to his second wife. The court found that the letters, along with other circumstantial evidence of the uncle's intent, satisfied the burden of proving the oral contract to make a will by clear and convincing evidence.

83. *Id.* at 695.

is only evidence of a common plan but no evidence that the testators ever said "we will not change our wills" the required meeting of the minds has not occurred.[84] If that evidence is oral conversations of the testators, those conversations must have occurred prior to the execution of the wills, and the wills must embody the oral agreement or the requirements of compliance with the statute of frauds will not be met.[85]

Once a meeting of the minds has been established, the court must examine whether the contract is enforceable. That analysis is twofold: 1) was there valid consideration for the agreement, 2) has it been timely revoked? The mere making of the contract and the execution of the wills are not sufficient.[86] Passing jointly owned property by operation of law isn't valid consideration to support such a contract, although such property can be the subject of the contract.[87] It is clear that the joint or mutual will may be revoked during the life of both testators provided there is notice to the other.[88] At the death of the first party, the survivor will be contractually bound if he or she accepts substantial benefits under the first party's will.[89] Presumably, a disclaimer by the survivor before accepting any benefits would be sufficient to revoke the contract.

If the contract is enforceable, then a will revoked by the survivor after the first party's death stands as evidence of the contract, although it cannot be admitted to probate. If the existence of the contract is proven, its terms will have to be fulfilled even though they are at odds with the subsequently executed will of the survivor.

In *In re Stringer's Estate,*[90] the issue of enforcement of an oral contract to make a will was raised in a contest of a subsequent will. The party seeking to uphold the mutual will, which had been revoked by a subsequent will that both parties admitted was valid, attempted to have the revoked mutual will admitted to probate in spite of its revocation. The Wyoming Supreme Court ordered the last will of the survivor admitted to probate, but instructed the probate court to see that the terms of the contract, as evidenced in the revoked mutual will, were fulfilled.

Filing a creditor's claim offers a more expeditious approach to enforcing the terms of the contract than contesting a later will, unless there are

84. *Estate of Bell,* 726 P.2d at 76.

85. In *Shook,* 599 P.2d at 1325, the son of one of the parties testified as to the statements of the parties prior to execution of their mutual wills, which were consistent with the provisions of their wills; *but see Canada,* 33 Wyo. at 448, 240 P. at 929, where the wills were silent on what conditions were attached to the alleged oral agreement.

86. *Canada,* 33 Wyo. at 448, 240 P. at 929.

87. In *Shook,* 599 P.2d at 1322, 1326, all of the property which passed from the husband to the wife was jointly held except for $263 in cash that passed under the will. Nevertheless the court noted that the oral agreement could pertain to the property owned as tenants by the entireties.

88. The notice requirement can be satisfied if the survivor receives notice at the first party's death and has an opportunity to revoke the will they had made in reliance on the agreement. See the discussion on that point in *Canada,* 33 Wyo. at 456, 240 P. 932.

89. *In Re* Stringer's Estate, 80 Wyo. 389, 406, 343 P.2d 508, 514 (1958), *reh. denied,* 80 Wyo. 426, 434, 345 P.2d 786, 784 (1959).

90. *Id.* at 404, 343 P.2d at 513.

independent reasons for contesting the will, such as not wanting the survivor's estate administered by the individual named in the revoking will. If the creditor's claim is rejected then the party seeking to enforce the terms of the contract will have to bring an action in contract against the personal representative of the surviving testator's estate. In Wyoming, there has been a longstanding controversy over what jurisdiction the probate court has.[91] However, recent amendments make it clear the probate court now has jurisdiction to consider the contract claim.[92]

In some cases the beneficiaries of the contract to make a will may anticipate a breach of the contract by the surviving testator, and if the assets which were the subject of the contract are readily alienable, they may not wish to wait for the death of the survivor to enforce the contract terms. An appropriate remedy in this instance is the constructive trust.[93] The constructive trust could be impressed upon property which was owned as an estate by the entireties or a joint tenancy with rights of survivorship, if it appears that it was the parties' intent to make that jointly owned property subject to the terms of the contract.[94] Although the agreement itself could provide otherwise, Wyoming recognizes that the surviving testator may use the income and "reasonable" portions of the principal for his support and ordinary expenditures.[95] The constructive trust would prevent the survivor from dissipating the estate or transferring the property with the intent of defeating the contract.

In counseling a couple which is considering the possibility of a joint will, the attorney needs to be mindful of the conflict of interest which is inherent in this situation.[96] The attorney is really representing multiple clients and should provide full disclosure to each of the effect of dual representation on the exercise of his independent professional judgment on behalf of each client.

The attorney should advise the couple that joint or mutual wills often invite litigation, and explore other alternatives, such as trusts, which have the advantage of "curing" during their lifetimes. If a couple decides to enter into a contract to make joint or mutual wills, the instrument should contain a statement of intent with regard to the scope of the property covered and the encroachment the survivor may make on these assets to maintain a standard of living. A testamentary trust might be used to assure compliance with the terms of the agreement.

D. No-Contest Clauses - Putting Up the Shields

A no-contest clause, often referred to as an "in terrorem" clause, is a clause which conditions a legacy upon the recipient refraining from contesting the validity of the will or its terms. The penalty for violating the

91. Church v. Quiner, 31 Wyo. 226-27, 224 P. 1073, 1074 (1924).
92. WYO. STAT. § 2-2-101 (1977 & Cum. Supp. 1988).
93. Hawkey v. Williams, 72 Wyo. 20, 62, 261 P.2d 48, 67 (1953).
94. *Flohr*, 520 P.2d 833, 837 (Wyo. 1974).
95. *Id.* at 838.
96. *See generally* Brosterhouse, *Conflicts of Interest in Estate Planning and Administration*, 123 TRUSTS AND ESTATES (June 1984).

condition is forfeiture of the contestee's benefits under the will.[97] The purpose of a no-contest clause is to insulate the administration of the decedent's estate from costly and time-consuming litigation. If a decedent's heirs or the beneficiaries of a revoked will receive a material benefit under the will, a no-contest clause minimizes the threat that a disappointed heir will challenge the will. If the contestee receives no benefit under the instrument being revoked, the no-contest clause is a hollow gesture.

1. Statutory and Judicial Exceptions

Many states have taken the chill out of in terrorem clauses.[98] For example, Indiana provides that conditions requiring forfeiture of testamentary gifts if a beneficiary contests the will are void.[99] Those states which have adopted the U.P.C. sanction a "probable cause" exception to the forfeiture provisions of no-contest clauses.[100] Other courts have refused to enforce a no-contest clause unless it is coupled with a "gift over."[101]

2. The Wyoming Approach - Thy Will Be Done

In 1983, Wyoming adopted the strict construction approach to no-contest clauses in *Dainton v. Watson*.[102] The contestant argued that enforcement of the clause depriving her of the gift made for her in the decedent's will was against public policy if the contest was made in good faith and with probable cause to question the will's validity. The court acknowledged that the U.P.C. had adopted a provision barring enforcement of no-contest clauses if "probable cause" existed for the contest.[103] However, it noted that the legislature had chosen not to incorporate that provision of the U.P.C. into our laws. It further noted that to judicially carve out an exception for good faith will contests would ignore the overriding and longstanding[104] policy of the court that the testator's clearly

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97. An example of such a clause is: "I hereby direct that if any person entitled to any legacy, bequest, interest or estate shall directly contest or dispute the probate of this Will, or institute or become a party to instituting any proceedings, or act in the interest of any person who shall institute any proceedings, suit or action for the purpose of changing the effect of this Will wholly or in part, then and in that event all the legacies, bequests, estate or remainder interest declared in favor of such person by this Will or herein provided, shall immediately thereupon be revoked, cease and determine and become wholly void and of no effect." Dainton v. Watson, 658 P.2d 79, 80 (Wyo. 1983).

98. *See* Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments,* 15 HASTINGS L.J. 45, 53 (1963).

99. IND. CODE ANN. § 29-1-6-2 (Burns 1972). However, a clause providing for a reversion to the decedent's estate of a legatee's gift if the beneficiary is "dissatisfied" has been enforced in Indiana. *See* Doyle v. Paul, 86 N.E.2d 98, 101, *reh. denied,* 87 N.E.2d 885 (Ind. 1949).

100. The Restatement of Property limits the probable cause exception to contests based on fraud or revocation by a later instrument. RESTATEMENT (SECOND) OF PROPERTY, § 9.1 (1983).

101. *In re* Arrowsmith, 147 N.Y.Supp. 1016 (1914), *aff'd* 108 N.E. 1089 (N.Y. 1915); Sherwood v. McLaurin, 88 S.E. 363 (S.C. 1916).

102. *Dainton,* 658 P.2d 79.

103. U.P.C. § 3-905 (1983).

104. See *In re* Gilchrist's Estate, 50 Wyo. 153, 180, 60 P.2d 364 (1936), where the University of Wyoming was asking the court to rule that a bequest of $100 to any of "my living blood relations" should be construed to be a per stirpes gift, rather than per capita. The court held it is "the intention of the testatrix, as expressed in the will" that must govern. For a more recent reaffirmation of the policy of letting the testator's unambiguous words control the disposition of his property see Kortz v. American National Bank of Cheyenne, 571 P.2d 985, 987 (1977).

expressed intent must govern. The court examined the no-contest clause and found nothing in it to exempt those who challenged the will in good faith or probable cause from the clearly expressed forfeiture language.[105]

3. Drafting Suggestions

Since Wyoming has given strict enforcement to a clearly expressed no-contest clause, this defensive tactic should be a vital part of the estate planner's arsenal. The draftsman's first consideration should be whether the testator wants to soften the impact of such a clause by excepting from its effect proceedings to ascertain the testator's intent. In *Dainton v. Watson*,[106] Justice Rose in a concurring opinion advocated that such clauses not be enforced against beneficiaries who are seeking to clarify the testator's intent as opposed to defeating it. Second, if the testator wants to penalize only the contestant, the clause should be drafted so that the contestant's issue would take as if the bequest had lapsed. Many testators feel that such "soft-pedaling" accomplishes little, and they want to cut off the contestant's issue and anyone who assists the contestant in any way. A third consideration is how much to provide to the beneficiary in the first place. This will depend on what he might gain by contesting. Fourth, if the instrument creates a testamentary trust, or if there are inter vivos trusts in existence which the testator controls, it is advisable to include a no-contest clause within these trusts which is tied back to actions taken to contest the will. Also, a contestant may challenge a subsequent codicil to the will. The draftsman can avoid any ambiguity on the effect of the no-contest clause by providing that it applies to a contest of a subsequently adopted codicil as well as to the original will.[107] Fifth, the testator must consider whether the no-contest clause provides that a contestant loses any fiduciary appointments which the will or trust provided for. Finally, to guard against the possibility that the court will rule that the forfeiture provision is inoperative, the testator may wish to provide that in such event the contestant's share of the testator's estate will bear all of the costs incurred in defending against the contest.

The draftsman should bear in mind that unduly restrictive clauses may invoke the jury's sympathy for the contestant. The trial attorney may attempt to use the no-contest clause to build his case for the client's lack of testamentary capacity or susceptibility to undue influence. The attorney has to be prepared for the inevitable question from the contestant's counsel: why did you feel it advisable to include this clause in testator's will? If the attorney uses these clauses routinely, with younger testators as well as the elderly, that argument is defused.

No-contest clauses should not be included in the will or trust without discussing their effect with the client. It would also be helpful to have in the attorney's file a letter to the client explaining the instrument and the particular consequences of the no-contest clause.

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105. *Dainton*, 658 P.2d at 81.
106. *Id.* at 82.
107. See Leavitt, *supra* note 98, at 45-46, for a comprehensive clause that defines a will to "include any codicil hereto."

E. Choosing Attesting Witnesses

If one or more of the warning flags of a contest are present, the selection of witnesses can be an important defensive maneuver. A good attesting lay witness has known the testator for many years, will be able to perform under the pressure of cross-examination in the courtroom, and has a good chance of surviving the testator. If there is concern about whether the witness will survive the testator it is worthwhile to include specific statements in the self-proving affidavits that will preserve the witness' observations of the testator's state of mind.

The attorney should, particularly if the client's affairs are being handled by a conservatorship, consider using a doctor, psychologist or psychiatrist as a witness. They might be present at the execution to conduct a preexecution evaluation without having them actually appear as an attesting witness. The fact that the testator was examined will be discoverable but if they aren't named as a witness the contestant's counsel will have to work harder to discover that examination. If the testator passes the evaluation with flying colors the attorney may want to have the expert act as an attesting witness as this may defuse the prospect of a contest. The courts in Wyoming seem to be giving increasing weight to medical testimony.[108] By having an expert witness present at the time of execution the attorney gains an additional advantage because the contestant's expert will probably concede on cross-examination that the opinion of one who has had an opportunity to observe the testator at the time of execution is more reliable than the testimony of one who is responding to mere hypothethical questions without the benefit of having seen the testator first hand.

It is clear in Wyoming that the attorney who is later selected by the personal representative as the attorney for the estate is a "disinterested" witness.[109] In one Wyoming case an attorney who served as an attesting witness had no specific recall of the conversation with the testator but he was able to testify, apparently convincingly, that he would not have witnessed the will without satisfying himself that it expressed the testator's intent.[110] The same effect could be obtained if the attorney/draftsman supervised the will execution ceremony and preserved a checklist indicating the steps which he took to make sure the will was properly executed.

F. Will Execution Ceremony

The will execution ceremony serves two functions. First, it fulfills a psychological need the client is seeking to fulfill. One commentator has noted:

> When a client comes in to do something about his estate planning problem, he wants a lot of things. He wants solace because he is thinking about the day when he will not be here. He wants

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108. *See* text discussion at V.D.
109. *See In Re* Lane's Estate, 50 Wyo. 119, 140, 58 P.2d 415, 421 (1936).
110. *Matter of* Estate of Roosa, 753 P.2d 1028, 1032 (Wyo. 1988).

> approval of what he has done and what he proposes to do. And he wants something else he almost never gets—a ceremony. Now life offers very few opportunities for high ceremony. Birth is not a very good time. It is too laborious. Marriage is handled in rather spectacular style. Nobody has been able to do much with divorce on the ceremonial side. For death, there is a ceremony, but it is hard for a decedent to be there to enjoy it. He is the principal.[111]

While the ceremonial aspect may be important in fulfilling the client's unexpressed expectations, if conducted properly the will execution ceremony can also serve as evidence of the proper execution of the will. It is vital that the attorney follow a checklist. A proper will execution checklist will enhance the probabilities that the execution ceremony will satisfy the requirements of most, if not all, states.[112]

G. Videotaping

Videotapes have become increasingly common in the courtroom. Ohio was the first state to experiment with videotaped trials.[113] A breakthrough in the probate potential of videotape occurred in 1985 when Indiana adopted legislation authorizing the admission of a videotaped will execution ceremony to show that the statutory requirements for execution were satisfied.[114] Wyoming has no such specific enabling legislation. However, it has been suggested that a videotaped will execution ceremony might be admissible under one or more of the exceptions to the hearsay rules.[115]

1. Possible Uses

Videotaped will execution ceremonies could be used for many purposes in addition to showing compliance with statutory execution requirements. The videotape could also demonstrate the testator's state of mind at the time the will was executed. It could, subject to overcoming the hearsay objection, be another means of proving the contents of the will.[116] On the videotape the testator could, in his own words, declare that the provisions of the will were his own desires. This would help defeat any presumptions of undue influence which might have been raised by a contestant. The possible uses for videotape in will contest actions and during the probate process are only limited by the attorney's imagination and the rules of evidence.

111. Estate Planning for Human Beings, 3 INST. EST. PLANNING 1902 (1969) (statement of Dean Willard H. Pedrick, panelist).

112. For a procedure that the commentator suggests will satisfy the requirements of all states other than Louisiana *see* Beyer, *The Will Execution Ceremony—History, Significance and Strategies,* 29 So. TEX. L. REV. 413, 427-44 (1988).

113. *See* McCrystal & Young, *Pre-Recorded Videotape Trials—An Ohio Innovation,* 39 BROOKLYN L. REV. 560 (1973).

114. IND. CODE ANN. § 29-1-5-3(d) (Burns 1972 & Cum. Supp. 1988). As early as 1956, audio recordings of a testator's statements at the time of the execution of his will were ruled admissible on the issues of testamentary capacity and undue influence once a proper foundation had been laid. *See* Belfield v. Coop, 134 N.E.2d 249, 255 (Ill. 1956).

115. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes,* 15 ST. MARY'S L.J. 1, 14-15 (1983).

116. WYO. R. EVID. 804(b)(5) and 803(3) offer two avenues to argue that the videotape is admissible.

2. The Production: Action - Lights - Camera

Care must be taken that the will execution ceremony isn't turned into an amateurish will execution production. The videotaping will be more effective if it doesn't appear to be staged. Yet, the testator generally won't be comfortable in front of the video operator and may require frequent prompting. If the attorney encourages the client to speak in his own words, prompts the client by asking questions that will lead the client into narrative responses, and tries to have the camera and lights situated to avoid having the testator speaking from a shadowy background, then the ceremony will be effectively preserved.[117] The attorney will have to decide whether to utilize a professional video operator or to attempt to make it an in-house production.[118] In either event, the attorney should keep in mind that the purpose of the video is for demonstration in the courtroom.[119]

H. Preserving the Document

The U.P.C. only requires that the contents of a lost will be proved by a preponderance of the evidence. Wyoming requires that the provisions of the will be "clearly and distinctly proven by at least two credible witnesses."[120] Furthermore, Wyoming requires that a lost or destroyed will must be proved to have been in existence at the time of the testator's death or else to have been fraudulently destroyed during his lifetime.[121] This places heavy emphasis on the need for safeguarding the client's will.

Many attorneys have experienced first hand the frustration of not being able to locate the original will after a testator's death.[122] Another fear is that the client, despite clear warnings by the attorney at the time of the will execution ceremony about the dangers of tampering with the document, will proceed at a later date with an artistic, but ineffective, job of writing in changes on the original and revoking substantial portions of the will with the scratch of his pen.[123] For these reasons, attorneys often suggest to clients that the will be kept on deposit at the attorney's office for safekeeping. One court has held that the will should only be kept by the attorney upon the specific unsolicited request of the client.[124]

117. *See* Beyer, *supra* note 115 at 27-32, for an excellent discussion of the preparation that is essential to have the videotaping pass muster, from an evidentiary standpoint.

118. For the pros and cons on professional videotaping versus in-house productions, see Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate Into the 21st Century,* 20 VAL. U. L. REV. 83, 90-92 (1985).

119. *See* Beyer, *supra* note 115, at 37-43 for a twenty-five step process for successfully conducting the will execution production on video.

120. WYO. STAT. § 2-6-207(b) (1977, Rev. 1980).

121. WYO. STAT. § 2-6-207(b) (1977, Rev. 1980).

122. *See* DUKEMINIER AND JOHANSON, *supra* note 42 at 326 n.45, for a hilarious example of the problems which can occur when the client and attorney have failed to communicate on the location of the original will.

123. *See Matter of* Estate of Dobson, 708 P.2d 422 (Wyo. 1985), for a classic illustration of this danger as it affects a holographic will.

124. State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972).

IV. ATTACKING THE WILL OR WILL SUBSTITUTE

"He's Gone, Ohnn and Nothin' Gonna Bring Him Back"
The Grateful Dead

Testamentary dispositions are a creature of statute.[125] In controlling the right of testation the legislature has imposed certain formalities that must be carefully observed in executing the will unless it is a holographic will.[126] Exempting a holographic will from the formalities of execution is justified by the evidentiary requirement that it be "entirely" in the testator's handwriting.[127]

Once proof is made to the probate court of the proper execution and attestation of the will, a presumption arises that the testator was of sound mind.[128] The effect of this presumption is to shift the burden of proof to the contestant who wants to deny the admission of the will to probate. This bias in favor of admitting a duly executed will to probate was best summed up in these words from the first reported Wyoming decision involving a will contest: Wills deliberately made by persons with testamentary capacity will not be lightly set aside.[129]

A. Procedural Aspects

Just as there was no right to make a will under the common law, there was no right to disprove or contest a will.[130] The contestant has only those rights as the law gives him and the courts insist that the procedures set up for contesting a will be followed strictly or even a timely brought contest proceeding will be denied, no matter how meritorious it may be.

1. Statute of Limitations

Wyoming formerly provided for different procedures to contest a will before[131] and after[132] it had been admitted to probate. Now a will contest can only be brought after the will has been admitted to probate.[133] However, it appears[134] that the contestant could appear and attempt to defeat the proponent's efforts to "prove" the will if he could find out when the hearing on the proponent's petition for probating a will was to be

125. *Matter of* Estate of Reed, 672 P.2d 829, 831 (Wyo. 1983).
126. WYO. STAT. § 2-6-113 (1977, Rev. 1980) requires only that the will be entirely in the testator's handwriting and must be signed by the testator.
127. Lorenzo v. Howard, 708 P.2d 422, 426 (Wyo. 1985). The requirement of WYO. STAT. § 2-6-113 that the holographic will be entirely in the handwriting of the testator was strictly enforced and a handwritten will was denied admission to probate because there were several notations on the document in the handwriting of a third party. This will may have been valid in the majority of states which recognize holographic wills and have adopted the less restrictive requirements of § 2-503 of the U.P.C. that the "signature and the material provisions are in the handwriting of the testator."
128. *Estate of Roosa*, 753 P.2d at 1032.
129. Cook v. Bolduc, 24 Wyo. 281, 291, 157 P. 580, 581 (1916).
130. Gaunt v. Kansas Univ. Endow. Ass'n., 379 P.2d 825, 826 (Wyo. 1963).
131. Law of 1890-91, ch. 70, art. 3, § 1 (repealed 1899).
132. Law of 1890-91, ch. 70, art. 3, § 6 (repealed 1899).
133. WYO. STAT. § 2-6-301 (1977 & Cum. Supp. 1988).
134. WYO. STAT. § 2-6-203 (1977 & Cum. Supp. 1988).

held.[135] If the will is "self-proving"[136] no hearing is required and the will is admitted to probate without further proof than the statements contained in the petition itself.[137]

One of the public policy purposes of the Wyoming Probate Code is to promote "a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors."[138] Towards that end, a will contest in Wyoming must be brought within three months,[139] which begins to run upon publication of the notice of filing the petition to have a will admitted to probate, with or without administration.[140] If no will contest is filed, then at the expiration of the three-month period the will probate is deemed conclusive.[141]

The probate arm of the district court is in fact a distinct court with its own docket.[142] Even when a will contest petition is filed within three months, it will not be given effect if it is filed in the wrong court.[143] The contestant must file the will contest petition in the "court in which the will was proved."[144]

2. Pleadings, Jury Demand, and Discovery

The petition must state the contestant's allegations against the validity of the will, such as undue influence, lack of testamentary capacity, fraud, duress, or revocation. Alternatively, the pleadings may make allegations against the sufficiency of the proof of execution, such as a lack of disinterested, competent witnesses or failure to witness in the prescribed manner. Finally, the petition's prayer for relief should ask for revocation of the order admitting the will to probate.[145]

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135. In the author's experience unless the judge is put on notice that there may be conflicting wills, the petition to admit a will to probate is generally done in an ex-parte fashion the same day the petition is filed.

136. WYO. STAT. § 2-6-114 (1977, Rev. 1980). A self-proving will is a will which is executed and then made self-proving by an affidavit procedure. That affidavit may be embodied in the will in which case it is called a one-step self-proving will. If the affidavit is a document separate from the will, it is called a two-step self-proving will. If it is the latter, the testator and witnesses must sign both the will and the separate affidavit for the will to be valid and self-proving. The affidavit is made in front of a notary public and attests to the facts evidencing proper execution, testamentary capacity, freedom from undue influence, etc.

137. WYO. STAT. § 2-6-204 (1977, Rev. 1980).

138. WYO. STAT. § 2-1-102(a)(iii) (1977, Rev. 1980).

139. WYO. STAT. § 2-6-306 (1977 & Cum. Supp. 1988).

140. These are the notices required at WYO. STAT. §§ 2-6-122 or 2-7-201 (1977 & Cum. Supp. 1988).

141. WYO. STAT. § 2-6-306 (1977 & Cum. Supp. 1988).

142. The probate court's jurisdiction is an exclusive jurisdiction on all matters touching the settlement and distribution of the estates for which letters have been granted. The probate court's subject matter jurisdiction is coextensive with the jurisdiction over subject matter of the district court in any civil action. *See* WYO. STAT. § 2-2-101 (1977 & Cum. Supp. 1988).

143. *Gaunt,* 379 P.2d at 827. The proper court for filing matters that may be probate related has been further defined by two recent Wyoming cases. *See Matter of* Estate of Harry B. Fulmer, 761 P.2d 658 (Wyo. 1988), and V-1 Oil Company v. District Court, No. 88-168, Slip. op. (Wyo. Jan. 12, 1989).

144. WYO. STAT. § 2-6-301 (1977 & Cum. Supp 1988).

145. WYO. STAT. § 2-6-301 (1977 & Cum. Supp. 1988).

While the probate court has subject matter jurisdiction, it does not obtain jurisdiction over the parties in the will contest proceeding until the summons has been issued.[146] The summons must be served on the executors and must be sent by certified mail, with a copy of the petition attached, to all the legatees and devisees mentioned in the will and all the heirs, so far as known to the petitioner.[147]

The Wyoming Rules of Civil Procedure govern the summons, service and proceedings of will contests.[148] Thus, if the contestant desires a jury trial he must make a timely demand.[149] Likewise, the proponent should file an answer to the petition brought on by the contestant. While the petition isn't a complaint per se, the reference in Wyoming Statutes section 2-6-302[150] that the Wyoming Rules of Civil Procedure shall govern the proceedings arguably leaves the door open for the allegations in the petition to be treated as a complaint, and failure to answer would subject the proponent to a motion for default judgment.

Because the Wyoming Rules of Civil Procedure apply to the proceedings, both counsel for proponent and contestant must consider the opportunities to conduct discovery. This may be particularly important in cases involving testamentary capacity or undue influence, as it will allow the respective parties to depose expert witnesses who will testify as to the mental or physical condition of the testator.[151] It also can enable counsel who is attacking the formalities of execution to gauge the credibility of the witnesses to the execution, and lay a foundation for impeachment if stories of the circumstances surrounding the will's execution should change between the deposition and the testimony at trial. Finally, discovery may assist in determining if there is a basis for settlement through the device of a family agreement, which is recognized in Wyoming.[152] Discovery may also be aided by the fact that costs, but not attorney fees, are awarded to the prevailing party in a will contest proceeding.[153]

3. Due Process Requirements

Attempts to bring a will contest beyond the statutory period of limitations have been unsuccessful in Wyoming. However, recent developments in the concept of due process as it relates to probate proceedings

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146. Merrill v. District Court of Fifth Judicial Dist., 73 Wyo. 58, 66, 272 P.2d 597, 599 (1954).

147. WYO. STAT. § 2-6-302 (1977, Rev. 1980).

148. WYO. STAT. § 2-6-302 (1977, Rev. 1980).

149. WYO. R. CIV. P. 38.

150. WYO. STAT. § 2-6-302 (1977, Rev. 1980).

151. *Estate of Dobson*, 708 P.2d 422.

152. *See* Augustine v. Gibson, 429 P.2d 314, 316 (Wyo. 1967).

153. *Matter of* Estate of Croft, 734 P.2d 59, 60 (Wyo. 1987). This decision turned on the court's interpretation of the statutory language under WYO. STAT. § 2-6-305 that authorizes the payment of "fees and expenses" by the contestant if the will is affirmed but only the payment of "costs" if the probate is revoked. The Wyoming Supreme Court held that the statutory reference to "fees and expenses" wasn't clear enough to satisfy its standard that attorney fees are only awarded if there is an express statutory or contractual obligation. *See* Bowers Welding and Hotshot, Inc. v. Bromley, 699 P.2d 299, 307 (Wyo. 1985) and Graves v. Utah Power & Light Company, 713 P.2d 187, 194 n.6 (Wyo. 1986).

call into question longstanding assumptions upon which Wyoming's probate code has been based.

The first Wyoming case to consider sufficiency of notice in probate was *Rice v. Tilton.*[154] In *Rice,* the executor named in the will did not receive the statutory notice of probate. Under the law in effect at the time of the *Rice* case, notice only had to be given to those heirs residing within the state who were known to the petitioner. The court held the failure to serve notice on the executor named in the will did not make the order admitting the will to probate and granting letters testamentary void.[155] Instead that order was merely voidable.

In 1936, the Wyoming Supreme Court again considered sufficiency of notice in probate in *In re Lane's Estate.*[156] In *Lane's Estate* one of the heirs did not receive the notice as required by law[157] and the heir appeared before the court. The court found that the order admitting the will to probate could not be attacked collaterally after the time for contesting the will had run.[158] The court in *Lane's Estate* suggested in rem jurisdiction attaches once the notice prescribed by the statute is given and that the "entire world is called before the court" and is bound by its decisions, whether or not they choose to appear.[159]

The validity of the *Rice* and *Lane's Estate* decisions was called into question by *Mullane v. Central Hanover Bank & Trust Co.,*[160] in which the United States Supreme Court held that due process requires notice reasonably calculated to apprise the person whose interests will be affected by the court's decree. After *Mullane,* Wyoming modified its statute to require that in addition to publication of the notice of probate notice be mailed to the surviving spouse and to "all of the heirs and beneficiaries named in the will."[161] However, the statute continued to treat the publication date of the notice of probate, rather than receipt of the notice by the heir, as the triggering point for running the will contest limitations period.

In *Hartt v. Brimmer,*[162] the Wyoming Supreme Court applied the modified statute and held that so long as the probate court had acquired proper jurisdiction by giving the requisite notice to the heirs, the order admitting the will to probate would stand even if an heir alleged that she was never mailed a copy of the notice of probate.[163] Proper publication of the notice of probate was made and the surviving spouse had signed a waiver

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154. 14 Wyo. 101, 82 P. 577 (1905).
155. *Id.* at 112, 82 P. at 579.
156. 50 Wyo. 119, 58 P.2d 415 (1936).
157. *Id.* at 138, 58 P.2d at 421. *See also* WYO. STAT. § 2-6-201 (1977, Rev. 1980) which provides that no defect in the form or the statement of jurisdictional facts in the petition makes an order admitting a will to probate void.
158. *Lane's Estate,* 50 Wyo. at 139, 58 P.2d at 421.
159. *Id.* at 137, 58 P.2d at 420.
160. 339 U.S. 306, 320 (1949).
161. WYO. STAT. § 2-7-205 (1977, Rev. 1980).
162. 74 Wyo. 356, 287 P.2d 645 (1955).
163. *Id.* at 365, 287 P.2d at 648.

of notice which was filed by the will's proponents in the probate court. The court noted that the waiver of notice or personal service would be sufficient to confer personal jurisdiction over the heirs, even though the widow contended the waiver was invalid because she had signed it while under sedatives prescribed by her doctor on the night of her husband's funeral. The court held that this temporary aberration of her mental faculties did not vitiate her consent.[164]

In *Matter of Estate of Reed,*[165] the most recent Wyoming Supreme Court decision in the probate area, the issue was whether sufficient notice was given to the heir of a decedent to start the three months limitation time for a will contest. Although the court could have addressed the constitutional issue of due process in interpreting the Wyoming statute requiring notice to the decedent's heirs of the commencement of probate proceedings,[166] it never had to reach that issue because it found that the notice sent and published did not comply with the statutory requirements.[167]

Reed involved a will contest between a daughter and her stepmother over the deceased father's estate. The stepmother filed a petition to have the California will admitted to probate in Wyoming. Upon the commencement of the Wyoming probate a notice of probate, along with the will and the order admitting the will to probate, was allegedly mailed to a California attorney who had some years before represented the daughter but who was not her attorney of record in the California probate proceedings. No notice was mailed to the daughter. Neither the published notice nor the notice which was mailed to the daughter's former attorney contained the proviso, embodied in the form which the legislature has provided,[168] advising potential will contestants that any action to set aside the will must be filed within three months.

The stepmother argued that there had been "substantial compliance" with the statute and cited *Hartt v. Brimmer.*[169] The court easily distinguished that case, because the published notice in *Hartt* complied with the statute and the widow had signed a waiver of notice which was filed in the probate court. The court then held that the "special public policy," which it had previously recognized in *Hartt,* of prompt settlement of estates "cannot be achieved unless the published notice is initially statutorily sufficient to trigger the three months time."[170]

If the published notice had contained the clear and concise language of the statutory notice of probate, the court would have had to address the issue of whether the mailing itself was constitutionally defective. Since the stepmother resided in the same town in California as the daughter

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164. *Id.* at 371, 287 P.2d at 650.
165. No. 88-137, slip op. (Wyo. Jan. 31, 1989).
166. WYO. STAT. § 2-7-205(a) (1977, Rev. 1980).
167. No. 88-137, slip op. (Wyo. Jan. 31, 1989).
168. *Id.* at 8. WYO. STAT. § 2-7-201 (1977, Rev. 1980) contains a form which the court noted could have been easily utilized by the stepmother.
169. 74 Wyo. 356, 287 P.2d 645 (1955).
170. *Estate of Reed,* No. 88-137, slip op. at 10.

and the daughter's mailing address was contained in the local phone book, the case would have presented the court with a classic opportunity to decide whether the "reasonably ascertainable" standard which the United States Supreme Court recently adopted in a creditors claim context should apply to heirs as well as to creditors.

In *Tulsa Professional Collection Services, Inc. v. Pope*,[171] the United States Supreme Court considered the constitutionality of a two-month limitations period on filing creditors claims. The Oklahoma statute in question was triggered by publication of a notice of probate for two consecutive weeks. The creditor in *Pope* failed to file its claim within that two-month period but subsequently filed suit against the personal representative for payment of the fees owed its parent corporation, a hospital, under an Oklahoma statute which provided that the personal representative pay the last illness expenses of the decedent. The creditor argued that the statute providing for payment of last illness expenses excused it from having to file a claim, an argument which was rejected by the Oklahoma Supreme Court but not reached by the Supreme Court.[172]

In an opinion by Justice O'Connor, the Supreme Court found that the probate court's involvement in the administration of the decedent's estate constituted "state action." The Court found that the Oklahoma statute operating in connection with the probate court proceedings "adversely affected" the creditor's property interest so as to require, under the due process clause, that actual notice be given to the known and reasonably ascertainable creditors.[173]

In *Pope* the Supreme Court left several issues unresolved. The application of the due process clause was grounded on its finding that the probate court proceedings constituted state action. It may be argued that revocable trusts or estate administration which is substantially independent of the court system (such as the simplified probate procedure by affidavit available in Wyoming under Wyoming Statute section 2-1-201,[174] or the so-called independent administration available under the U.P.C.[175]) do not constitute "state action" and, therefore, do not require actual notice to creditors or heirs. It also can be expected, but isn't totally clear yet, that an heir or other interested party in a decedent's estate must receive actual notice of the proceeding in order to satisfy the due process requirements laid out in *Pope*.[176]

In light of this new definition of the due process requirement in probate, it appears likely that the limitation on contesting a will will not begin

171. 108 S. Ct. 1340 (1988).
172. *Id.* at 1344.
173. *Id.* at 1348.
174. WYO. STAT. § 2-1-201 (1977 & Cum. Supp. 1988).
175. U.P.C. §§ 3-1201 to 3-1204 (West 1983).
176. For a discussion of due process requirements in probate prior to *Pope*, see Borron, *Due Process of Law and the Sufficiency of Published Notice of Letters Granted*, 7 PROBATE L. J. 61, 71 (1985). That commentator reached the conclusion, prior to *Pope*, that due process constraints would require reasonable notice to all "interested parties" by a method more certain than notice by publication.

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to run against an heir until that heir has received notice reasonably calculated to apprise him of the proceeding.[177]

The current Wyoming Probate Code does not require that a copy of the will be sent to those entitled to the notice of probate. In *Kortz v. American Nat. Bank of Cheyenne*, the contestant, who had filed her will contest after the three-month period had run, argued that someone had substituted a page into the will filed with the court other than the page which was in the will when the testator executed it.[178] This defect could only be ascertained by actual examination of the will and apparently the contestant had not seen the will filed with the probate court within the three-month period. Nevertheless, the court held that the will which was admitted to probate became conclusive once no one had contested it within the statutorily prescribed three-month period.[179]

There is nothing in the *Pope* decision that would seem to call into question the *Kortz* decision. *Pope* only demands that creditors, whose property interests will be affected by the nonclaim statute of limitations, be given actual notice of the probate proceedings. The Court didn't require that they receive anything more than the notice of the commencement of the probate. Presumably once they have been notified it is up to each creditor to take whatever steps, including making an investigation of the probate court file, to protect its interests. There seems to be no policy reason to require that the will be sent to the heirs along with the notice of probate. Once they have received notification each heir must take steps to protect his interest and those steps would include an investigation of the probate court's file.

B. Mistake in Execution

All attested wills must satisfy the formalities of execution set out in the Wyoming statutes,[180] or the requirements of a foreign jurisdiction that meets the statutory test of contacts.[181] Wyoming requires that the attested will be witnessed by two "competent" witnesses and be signed by the testator, or by some person in his presence and at his express direction. A subscribing witness who is benefitted by the attested will executed in Wyoming will lose all but what interest would have passed to him by intestacy unless there are at least two other disinterested and competent witnesses.

Wyoming also requires that the attested will be in writing or typewritten.[182] This requirement has produced some of the more interesting Wyoming cases, including one which has attracted national attention.

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177. Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445, 451 (1976).
178. *Kortz*, 571 P.2d 986.
179. *Id.* at 987.
180. WYO. STAT. § 2-6-112 (1977, Rev. 1980).
181. WYO. STAT. § 2-6-116 (1977, Rev. 1980).
182. Wyoming has not recognized the nuncupative will, sometimes called an oral or deathbed will, since 1895. *See In Re* Thornton's Estate, 21 Wyo. 421, 435, 133 P. 134, 137 (1913).

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In *Estate of Reed*[183] the testator spoke into a tape recorder his "truest and strongest feelings" and then left testamentary instructions on tape. The tape was then placed in a sealed envelope on which was handwritten "Robert Reed To be played in the event of my death only! (signed) Robert G. Reed."[184] These instructions were transcribed after the testator's death by the police. The "will's" proponents argued that this recorded will should be admitted to probate as a holographic will. They cited a recent California case[185] where the court admitted a preprinted stationer's form containing the testator's handwriting as a holographic will, finding that none of the preprinted words were either material to the substance of the will or essential or necessary to its validity. The Wyoming Supreme Court found that a voiceprint was not equivalent to the testator's handwriting. In denying the will's admissibility to probate they held that the decision to extend the concept of a testamentary instrument to a tape recording was something that only the legislature could do.[186]

The attested will may be imprinted on carbon paper as long as the carbon copy contains the signature of the testator and two subscribing witnesses.[187] It must describe the property to be bequeathed and the recipient. Thus, a writing on a hospital form without any description of the property being bequeathed, other than the nominal sum of one dollar, was denied probate.[188]

Wyoming does not require publication by the testator. Thus, a will was admitted to probate where the attesting witness was not told by the testatrix that it was her last will and testament but was merely requested to verify her signature.[189]

Wyoming's statutes[190] do not appear to require that the testator sign in the presence of the witnesses, although they clearly require that if someone else signs the will for the testator it be done at his request and in his presence. The affidavit which is intended to provide written proof of proper execution requires that (1) the testator declared the instrument to be his will; (2) the testator requested that the witnesses witness the will; (3) the testator subscribed the instrument; (4) the subscription of the witnesses be made in the presence of the testator; (5) the witness knew the other witness; and (6) the process occurred in the presence of the other

183. 672 P.2d 829 (Wyo. 1983).
184. *Id.* at 833.
185. Estate of Black, 641 P.2d 754, 759 (Cal. 1982).
186. *Estate of Reed*, 672 P.2d at 832. *See* Note, *Probate—The Enforcement of Unwritten Wills*, 20 LAND & WATER L. REV. 279 (1985) for a comprehensive discussion of the *Estate of Reed* case and a suggestion for statutory reform to accommodate those who, for whatever reason, desire to leave their will on recorded media. A recent article suggesting the use of videotapes as a substitute for written wills is Nash, *A Videowill; Safe and Sure*, 70 A.B.A.J. 87 (October 1984).
187. *Stringer*, 80 Wyo. at 424, 343 P.2d at 522.
188. *In Re* Boyd's Estate, 366 P.2d 336, 337 (Wyo. 1961).
189. *Estate of Carey*, 504 P.2d at 800. The Wyoming Supreme Court noted that under a statute such as Wyoming's the great weight of authority is that publication is not necessary and the witnesses do not need to know they are signing and attesting a will. *Id.* at 801.
190. WYO. STAT. § 2-6-112 (1977, Rev. 1980).

witness.[191] This has apparently led Wyoming courts to impose a "presence" requirement that the legislature may not have intended. For example, in *Matter of Estate of Altman*[192] one witness' affidavit satisfied the six requirements outlined above but his oral testimony was contradictory. He testified that he did not sign the will in the presence of the testator. The other subscribing witness as well as the proponent testified that they were present, along with the witness who had contradicted his sworn affidavit, when the testator signed, and then the two subscribing witnesses signed in his presence. The court held that there was sufficient evidence for the jury to conclude that the requirements for execution had been met.[193] But the troubling aspect of the opinion is that the court did not clearly articulate whether the statutory requirements of Wyoming Statutes section 2-6-112[194] are somehow modified by the written proof requirement of Wyoming Statutes section 2-6-205.[195] The opinion might be interpreted to require that the testator and the subscribing witnesses sign in each other's presence. Alternatively, it could be read to mean that when there is a contradiction between the written proof and the oral proof, the jury must find sufficient evidence from which it can conclude that the will was in fact signed by the testator and witnessed by two competent witnesses. Until another decision on this point, the only safe means to execute a will in Wyoming would be to follow the procedure contained in section 2-6-205, *and* to have the testator sign the will in the witnesses' presence.

C. Undue Influence

To warrant setting aside a will on grounds of undue influence, it must be shown that the alleged undue influence destroyed the testator's free agency. It must result in substituting the will of another for that of the testator.[196]

Contestants commonly combine claims of undue influence with claims that the testator lacked capacity because there is a presumption that a weakened mentality is more easily influenced.[197] In many cases the same evidence is presented to prove both claims. If the evidence shows that testamentary capacity does not exist, the issue of undue influence need not be considered because a will is void if the testator lacks capacity.[198] However, the mere fact that a testatrix is highly eccentric, filthy, forgetful, miserly, or inattentive does not compel conclusion of susceptibility

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191. WYO. STAT. § 2-6-205 (1977, Rev. 1980).
192. 650 P.2d 277 (Wyo. 1982).
193. *Id.* at 280.
194. WYO. STAT. § 2-6-112 (1977, Rev. 1980).
195. WYO. STAT. § 2-6-205 (1977, Rev. 1980).
196. *In re* Draper's Estate, 374 P.2d 425, 432 (Wyo. 1962).
197. *In re* Nelson's Estate, 72 Wyo. 444, 478, 266 P.2d 238, 251 (1954).
198. *In re* Faragher's Estate, 367 P.2d 972, 973 (Wyo. 1962). This case was submitted to the jury on both issues. The will was not admitted to probate because the jury found the testator lacked testamentary capacity. Compare *Matter of* Estate of Waters, 629 P.2d 470, 472 (Wyo. 1981). *See* WYO. STAT. § 2-6-101 for a definition of testamentary capacity.

to undue influence, any more than the same showing requires a conclusion of lack of testamentary capacity.[199]

1. Character of Evidence Showing Undue Influence

Direct evidence of undue influence is seldom found. The more skillful the schemer the more subtle and secretive his techniques. Recognizing the difficulties of proof, Wyoming courts have allowed undue influence to be proven by circumstantial evidence.[200] Thus, it is only necessary to prove facts from which undue influence may be fairly and reasonably inferred,[201] and then connect the circumstantial evidence to show that undue influence was actually exercised.[202]

Before the proponent of the contested will has any obligation to present evidence showing that undue influence did *not* exist the contestant carries the heavy burden of proving the following elements: (1) the relations between the one charged with exercising undue influence and the decedent afforded an opportunity to control the testamentary act; (2) the decedent was susceptible, due to mental or physical weakness, to influence; (3) the person charged with exercising undue influence did engage in some influencing activity; and (4) such person unduly profited as a beneficiary under the will.[203] It is not sufficient to merely show that a party benefited by a will had the motive and opportunity to exert undue influence. There must be evidence that she exerted undue influence[204] and that the effort in fact influenced the behavior so that the will doesn't really reflect the testator's wishes.[205]

The courts often consider the naturalness and justness of a will's provisions. Excluding the natural object of the testator's bounty can be a "red flag of warning,"[206] but in Wyoming, the courts have made it clear that the unnaturalness of the will standing alone is not dispositive,[207] particularly when there is evidence of a strained relationship between the testator and the natural objects of his bounty.[208] Most of the Wyoming will contest cases dealing with undue influence have involved collateral relatives rather than children. In fact, not having children makes it more likely that the testator will become fond of one relative who becomes the main object of his bounty.[209] Also, it may be perfectly natural for the testator to favor one heir over the others when the testator's chief desire is to perpetuate an asset, such as a ranch or business, which cannot be easily divided from an operational or economic standpoint.[210] The courts have

199. *Nelson's Estate,* 72 Wyo. at 455-62, 266 P.2d at 241-44.
200. *Estate of Waters,* 629 P.2d at 473.
201. *Matter of* Estate of Brosius, 683 P.2d 663, 667 (Wyo. 1984).
202. *Nelson's Estate,* 72 Wyo. at 462, 266 P.2d at 244.
203. *Id.* at 479, 266 P.2d at 252.
204. *See Estate of Brosius,* 683 P.2d at 666, citing four previous Wyoming cases in support of this requirement.
205. *Draper's Estate,* 374 P.2d at 431. *See also Estate of Carey,* 504 P.2d at 800.
206. *In re* Culver's Estate, 22 Wis.2d 665, 673, 126 N.W.2d 536, 540 (1964).
207. *In re* Estate of Morton, 428 P.2d 725, 733 (Wyo. 1967).
208. *Estate of Brosius,* 683 P.2d at 666.
209. *Nelson's Estate,* 72 Wyo. at 463, 266 P.2d at 244.
210. *Id.*

frequently said there is no legal duty to make an equal division of one's property among one's relatives.[211]

The following circumstances can enhance the contestant's effort to make a prima facie case of undue influence: the testator suffers from the ravages of alcohol;[212] the testator is feeble of mind and body and dies shortly after the will is executed;[213] the testator is adjudged an incompetent immediately after the execution of the will;[214] a family history of insanity;[215] the draftsman is a beneficiary;[216] the beneficiary holds a power of attorney and acts as a go-between with an attorney who isn't the testator's longtime legal counsel;[217] the draftsman is never allowed to talk to the testator without the beneficiary being present;[218] the beneficiary is present and takes an active part in the execution of the will and then takes the instrument into his possession;[219] evidence of a sexual relationship between the testator and the unrelated beneficiary;[220] and the execution of the will, and its contents, are shrouded in secrecy. The following circumstances have been given little if any weight in the determination of whether there was sufficient proof of undue influence: insisting that a will be drawn;[221] making arrangements with an attorney to set up a conference;[222] and taking the testatrix to the attorney's office but not being present at the execution of the will.[223]

Since no single factor is generally sufficient to prove undue influence,[224] the contestant must open a broad field of inquiry to assert a combination of "suspicious circumstances" sufficient to persuade the trier of fact.

2. Burden of Persuasion - Undue Influence

The general rule for the burden of proof is that it rests upon the will contestant.[225] The so-called English rule that the burden of persuasion always rests on the proponent of the will is clearly a minority view and several states which had adopted it have retreated from the rule.[226]

211. *Id.* at 246; *In Re* Johnston's Estate, 63 Wyo. 332, 344, 181 P.2d 611, 615 (1947).
212. *Estate of Waters*, 629 P.2d at 473.
213. *In Re* Conroy's Estate, 29 Wyo. 62, 78, 211 P. 96, 100 (1922). *But see In re* Anderson's Estate, 71 Wyo. 238, 246, 255 P.2d 983 (1953), where the testator died eleven days after signing the will.
214. *In Re* Ingram's Estate, 384 P.2d 1020, 1021 (Wyo. 1963).
215. *Branson*, 52 Wyo. at 115, 70 P.2d at 594.
216. *Conroy's Estate*, 29 Wyo. at 76-77, 211 P. at 99. *But see* Baldwin v. Birchby, 346 P.2d 278 (Wyo. 1959).
217. Brug v. Case, 600 P.2d 710, 715 (Wyo. 1979).
218. *Estate of Waters*, 629 P.2d at 473.
219. *Conroy's Estate*, 29 Wyo. at 78, 211 P. at 100.
220. *In Re* Kelly's Estate, 150 Or. 598, 46 P.2d 84, 92 (1935). In *Estate of Brosius*, 683 P.2d at 664, while the record didn't contain evidence of a sexual relationship it did involve a situation where a woman rented a room to an elderly gentleman. For a collection of cases dealing with undue influence by lovers *see* Annotation, *Existence of Illicit or Unlawful Relation Between Testator and Beneficiary as Evidence of Undue Influence*, 76 A.L.R. 3d 743 (1977).
221. *Nelson's Estate*, 72 Wyo. at 469, 266 P.2d at 247.
222. *Estate of Carey*, 504 P.2d at 800.
223. *Draper's Estate*, 374 P.2d at 431.
224. *Estate of Waters*, 629 P.2d at 473.
225. Wood v. Wood, 25 Wyo. 26, 37, 164 P. 844, 847 (1917); *In Re* Merrill's Estate, 80 Wyo. 276, 286, 341 P.2d 506, 509 (1959).
226. *Wood*, 25 Wyo. at 37, 164 P. at 847.

The Wyoming Supreme Court has vacillated somewhat on whether the burden of persuasion is by mere preponderance or whether "clear and convincing" evidence is required in order to set aside a will. In an early Wyoming case the court held that only a preponderance of the evidence was required for each claim the contestant made.[227] Later cases introduced the requirement that "clear proof" was required to establish undue influence.[228] Recent cases held that, once suspicious circumstances are established by clear proof,[229] the contestant is "no longer saddled with a 'clear proof' standard under remaining issues."[230]

3. Presumption of Exercise of Undue Influence in Will Contests

Most of the authorities support the view that "a presumption of undue influence arises upon a showing that one who drew the will, or was otherwise active directly in preparing it or procuring its execution, obtains under the will a substantial benefit, to which he has no natural claim, or a benefit which, in amount, is out of proportion to the amounts received by other persons having an equal claim to participate in the bounty of the testator."[231] Once the contestant has established the presumption of the existence of undue influence, the burden of proof shifts to the proponent.[232]

A majority of the courts, including Wyoming's, do not treat the presumption of the exercise of undue influence as anything more than a permissible inference.[233] Justice Blume's opinion in *In re Nelson's Estate*[234] discusses at length the effects of presumptions.[235] In that case the court refused to require a jury instruction that if they found certain facts the burden of proof would shift to the proponent so that he would have to come forward with evidence that at least balanced the contestant's. Under the Wyoming Supreme Court's *In re Nelson's Estate* holding it appears that the contestant who proves that the beneficiary participated in procuring the will should avoid having a verdict directed against him, but that evidence doesn't compel a verdict for the contestant.[236]

227. *Id.* at 46, 164 P. at 850.

228. *Anderson's Estate,* 71 Wyo. at 249, 255 P.2d at 986, quoted with approval in *Draper's Estate,* 374 P.2d at 431.

229. *Brug,* 600 P.2d at 715; *Estate of Waters,* 629 P.2d at 473.

230. *Estate of Waters,* 629 P.2d at 473.

231. 79 AM. JUR. 2D *Wills,* § 429.

232. Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 448 N.E.2d 872, 877 (1983).

233. W. PAGE, WILLS, § 29.85 (Bowe-Parker 1961).

234. 72 Wyo. at 483-88, 266 P.2d at 254-56.

235. Presumptions may either be of law or of fact. If the presumption is one of law, then the jury must draw a particular inference once the circumstances raising the presumption have been shown. Under a presumption of fact the jury may infer, from a fact that is proved, a fact that is otherwise doubtful but the jury cannot be charged that it must, as a matter of law, so find. The Wyoming Supreme Court has left open the door that under a certain combination of facts, the inference to be drawn would be so strong as to treat it as a presumption of law. *Nelson's Estate,* 72 Wyo. at 487, 266 P.2d at 256.

236. *Id.* at 261.

4. Effect of Suspicious Circumstances on Inter Vivos Transfers

Somewhat akin to the so-called presumption of undue influence in testamentary instruments is the presumption raised by "suspicious circumstances" surrounding an inter vivos instrument. The burden of persuasion generally rests on the person challenging an inter vivos transfer except in the case of gifts to strangers. Wyoming has adopted the position that when a parent delivers *personal property* to a child and the child retains possession it is presumed that a gift is intended.[237] Only when the parent's physical and mental condition is so weak as to make him susceptible to undue influence, does the burden of proof to uphold an inter vivos transaction of personal property shift to the child.[238]

The question of who bears the burden of proof in upsetting an inter vivos conveyance of real property is not as clear. In one case the Wyoming Supreme Court held that once a dominant relationship had been shown, the court would presume undue influence had been exerted and that the burden was then imposed on the recipient of the transferred asset to show "by clear and convincing proof" that the transaction was fair.[239] In subsequent opinions, however, the same court narrowed that holding. In *Brug v. Case*,[240] decided in 1979, the clear and convincing proof standard seems to apply only to the existence of a dominant relationship and the activity of the influencer in procuring the deed.[241] Once there is clear proof of suspicious circumstances, a presumption of undue influence is raised and a simple preponderance of the evidence will support a finding of undue influence. Unfortunately, the court did not clearly define what "suspicious circumstances" may be, but it appears that they include activity by the influencer in the preparation or procuring of the deed.[242]

5. Confidential and Dominant Relationships Defined

The concept of confidential relationships is important in both will contests and inter vivos transactions. Confidential relationships commonly include fiduciary relationships, such as those which exist between an

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237. *In Re King's Estate*, 49 Wyo. 453, 465, 57 P.2d 675, 678.
238. *Id.*
239. Bergren v. Berggren, 77 Wyo. 438, 455, 317 P.2d 1101, 1107 (1957).
240. 600 P.2d 710 (Wyo. 1979). For a history of cases narrowing the *Bergren* holding, *see Brug*, 600 P.2d at 714 n. 3. The Wyoming Supreme Court has apparently assumed the same burden of proof would apply with respect to undue influence in a challenge of an inter vivos transaction as applies to will contests. In many jurisdictions the burden of proof required to raise a presumption of undue influence in wills is considerably more stringent than it is with deeds. *See* Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 GONZ. L. REV. 1 (1984).
241. *Brug*, 600 P.2d at 715.
242. Proof of a confidential or fiduciary relationship between the grantor and the grantee sufficed to shift the burden of showing fairness, good faith and lack of undue influence to the grantees with respect to a deed in *Baldwin*, 346 P.2d at 280. In that case there were two deeds, one prepared by the alleged influencer and the other by another attorney. Subsequently, in Zullig v. Zullig, 502 P.2d 198 (Wyo. 1972) the court included in the requirements for shifting the burden that the influencer have exercised some activity in procuring the deed or that the deed was without consideration. The opinion in *Brug* impliedly incorporates those requirements into the suspicious circumstances test.

attorney and client,[243] conservator and ward, and trustee and beneficiary. Also commonly held to be confidential are the relationships between doctor and patient, nurse and patient, and pastor and parishioner.

However, a confidential relationship in and of itself is not dispositive.[244] It must be a dominant confidential relationship. A dominant relationship may arise in two contexts, either as a matter of law,[245] or as a question of fact to be established by the evidence. In the first category are the relationships between trustee and cestui que trust, guardian and ward, attorney and client, principal and agent. In the second category are transactions between parent[246] and child or between a donor and a stranger.

While uncommon in other jurisdictions, there are two Wyoming cases in which circumstances established a confidential, dominant relationship between a husband and wife. This, in conjunction with other facts, created a presumption of undue influence so that the contestant's burden of proof was lessened.[247]

6. Rebutting the Presumption of Undue Influence

Since Wyoming apparently does not shift the burden of persuasion from the contestant to the proponent, but merely reduces the standard of proof required of the contestant, it is logical that the evidence required to rebut the so-called presumption of undue influence, once raised, varies with the strength of the contestant's evidence supporting the presumption. Rebutting a presumption of undue influence generally requires evidence that the testator acted freely and voluntarily during the execution of his will or deed. Such evidence could include: (1) the testator received disinterested, competent advice independent of his beneficiaries before executing his will or before making an inter vivos transaction;[248] (2) the disposition in question was essentially fair or the testator had good reasons for making the disposition;[249] (3) the testator or grantor was remarkably alert and capable of transacting his own business;[250] and (4) the

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243. *See* York v. James, 62 Wyo. 184, 165 P.2d 109 (1946) (deed obtained by attorney, grantee, from client set aside due to inadequate consideration).

244. Leseberg v. Lane, 369 P.2d 533, 535 (Wyo. 1962).

245. *Bergren*, 77 Wyo. at 455, 317 P.2d at 1107.

246. It should be noted that the dominant position of a child is not presumed from the blood relationship alone. In fact in Wyoming for purposes of contesting a will or a deed on grounds of undue influence, family relationships and friendships by themselves are not presumed to be dominant relationships. *Zullig*, 502 P.2d at 202 (family relationship); Matter of Estate of Obra, 749 P.2d 272, 277 (Wyo. 1988) (friendship).

247. *Brug*, 600 P.2d at 710, involved a husband's deathbed deed of his ranch to his wife. The supreme court found that the wife's uncontradicted active involvement in the procurement of the deed and as liaison between her husband and his attorneys, the evidence of her husband's weakened condition, and the fact that she had been granted power of attorney by her husband were clear proof of suspicious circumstances surrounding the husband/grantor's deed of his ranch to his wife. *Id.* at 715. Once the suspicious circumstances were established the burden of proof shifted from clear proof to a mere preponderance. In a will contest case, the evidence indicated that the testator, who was suffering from alcoholism, was completely dependant upon his wife and under her domination at the time of the execution of his will. *Water's Estate*, 629 P.2d 470.

248. *Leseberg*, 369 P.2d at 536 (where the donor had the benefit of her own legal advice).

249. *Id.*

250. *Baldwin*, 346 P.2d at 281.

testator or grantor had an unhampered opportunity to revoke his will or cancel the transaction subsequent to the alleged operation of undue influence upon him, and either failed to do so or executed another will with substantially the same terms.[251]

D. Testamentary Capacity

The Wyoming legislature has imposed two additional conditions on testation. The testator must be of legal age and of sound mind.[252] The age requirement is defined at Wyoming Statutes section 14-1-101.[253] The boundaries of testamentary capacity have been explored frequently by Wyoming courts in will contests.

Wyoming courts have framed the requirements for sound mind as follows:

> Testator must have sufficient strength and clearness of mind and memory, to know, in general, with prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them. He must have sufficient mind and memory to understand all of these facts, and to comprehend these elements in their relation to each other, and a charge in negative form, that capacity is lacking if testator is not about to know all of these facts, is erroneous, since he lacks capacity if he is unable to understand any one of them. He must be able to appreciate the relation of these factors to one another, and to recollect the decision which he has formed.[254]

Wyoming only requires that the testator know these requisite elements in a "general" way.[255] Other states have insisted that the testator be able to demonstrate an "intelligent" comprehension of these elements.[256] One commentator has noted that if a person had to have average intelligence to make a will almost half of the population would be ineligible.[257]

The requirements of testamentary capacity can be minimal. In *Morton,* a testator, who was up until about six months before the execution

251. *King's Estate,* 49 Wyo. at 464, 57 P.2d at 678 (inter vivos gift); In re Wilson's Estate, 397 P.2d 805, 810 (Wyo. 1964) (subsequent will made). *See also Draper's Estate,* 374 P.2d 425 where the testatrix apparently evidenced a continuity of purpose over several years regarding the bequests in the will which were alleged to evidence undue influence.

252. WYO. STAT. § 2-6-101 (1977, Rev. 1980).

253. WYO. STAT. § 14-1-101 (1977, Rev. 1986). In most states the age requirement is only 18. *See, e.g.,* COLO. REV. STAT. ANN. § 15-11-501 (1974). In Georgia it is 14. GA. CODE ANN. § 113-203 (1975 & Supp. 1988). Query whether a 14 year old domiciled in Wyoming, who otherwise is of sound mind, could execute a valid will by going to Georgia and executing the will in that state with the appropriate formalities required by that state. See WYO. STAT. § 2-6-116 (1977, Rev. 1980). This issue could be important where the minor holds a testamentary general power of appointment.

254. *Estate of Morton,* 428 P.2d at 729.

255. *Id.*

256. *See* Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform,* 35 TEMP. L.Q. 231, 237 (1962).

257. DUKEMINIER AND JOHANSON, *supra* note 42, at 140.

of the will always neat and tidy, underwent a complete change of personality, "physically and forgetfulness both."[258] Shortly after the execution of the will, the testator was placed under the auspices of a guardianship, largely on the recommendation of the doctor who felt that he "was not able to physically take care of his affairs, and I felt he might not be using the best judgment."[259] The court held that the evidence did not establish mental incompetency to make a will.[260]

1. Proving the Unsound Mind - Problems of Admissibility

The elements of testamentary capacity must be present at the time the will is executed.[261] However, consideration of the testator's soundness of mind is not confined to the time of execution.[262] Any and all conduct of the testator is admissible in the discretion of the trial court to prove testamentary capacity.[263] However, because evidence that is remote in time lacks the probative weight of circumstantial evidence contemporaneous with the execution ceremony, the courts generally restrict such evidence to those statements and acts of the testator which occur shortly before or after execution.[264]

Prior wills are generally admissible. A prior will that was executed at a time when the testatrix's capacity was unquestioned, and was in substantial conformity with provisions of the contested will, was admitted into evidence in *Nelson.*[265] Even if the testatrix's capacity at the time of execution is in issue, the will has been held admissible where it wasn't freakish or abnormal and evidenced a pattern that the testatrix acted in the same or similar manner at various stages of her life.[266] The court reasoned that if the testatrix acted in the same manner at various stages of her life, when faced with the same basic facts, then the conduct is evidence that her mind was rational and normal at each stage and the evidentiary weight increases with the number of occurences in which the same

258. *Estate of Morton,* 428 P.2d at 730. During that period he would go out and come back to his apartment unaware that his pants were soiled from voiding in public. He had previously been a good checkers player but completely lost his ability. He had lost his grasp of money. He knew what property he owned except he was mistaken about certain property he had previously deeded to his wife's brother. He was admitted to the hospital just three weeks prior to execution of the will but at that time the admitting physician found his mental condition to be good although he was suffering from arteriosclerosis. During the stay in the hospital he threatened to sue the hospital and its attendants and to kill the nurse. Some of the entries in his medical chart noted that he was in the first few days after admittance "lethargic," "confused" and "weaker and more malaise." However, in the week prior to execution of the will the entries showed that he was "more alert" and was "talking more clearly." The doctor also testified that he was undergoing a gradual aging process and that the arteriosclerosis affected the brain but that he observed no "abnormal change" for a man of the testator's age.

259. *Id.*

260. *Id.* at 734.

261. *Estate of Roosa,* 753 P.2d at 1032.

262. *Branson,* 52 Wyo. at 124, 70 P.2d at 598.

263. *Faragher's Estate,* 367 P.2d at 975.

264. *Estate of Carey,* 504 P.2d at 798.

265. *Nelson's Estate,* 72 Wyo. at 488, 266 P.2d at 256.

266. *Id.* at 463, P.2d at 257.

state of mind is manifested.[267] If the prior will's provisions are inconsistent with the contested will at least one state has ruled that the contestant cannot introduce the prior will to prove the testator's lack of testamentary capacity.[268]

2. The Shifting Burden of Persuasion - Testamentary Capacity

The contestant has the burden of proving the alleged incompetency of the testator.[269] However, that burden will shift to the proponent if the testator's prior incompetency is either admitted or sufficient evidence on that point is introduced.[270]

3. Presumptions or Inferences Which Affect Testamentary Capacity

Wyoming has adopted the general rule of presumption that a person is sane and possesses testamentary capacity.[271] This presumption arises upon proof of proper execution and attestation of the will. The effect is to assign to the contestant the burden of showing, by a preponderance of the evidence, that the testator lacked testamentary capacity.[272]

Another presumption that affects testamentary capacity is the continuance of incapacity or insanity. If insanity of a general or permanent nature is shown to have existed at one time, it is presumed to have continued until sufficient evidence is introduced to show a restoration of sanity, or that the testator was competent at the time the will was executed.[273]

4. Effect of Guardianship Proceedings on Presumption of Sanity

Adjudications of insanity or guardianship proceedings may be admissible for the purpose of defeating the presumption of sanity.[274] The term guardianship is a generic one. In 1985 Wyoming revised its statutory scheme for guardianships. Wyoming now refers to the guardian of the property or estate of the ward as a "conservator." The guardian of the ward's person remains the "guardian."[275] The law recognizes that a person may be able to manage his personal needs but requires a conservator to manage his property. Likewise, an individual may be able to oversee his financial affairs but is unable to care for himself physically and thus a guardian is required. An individual may be subject to both a guardianship and a conservatorship but nevertheless be found to possess testamen-

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267. *Id. See also Estate of Brosius,* 683 P.2d at 665, where the court noted in a footnote that the record contained evidence of two prior wills, neither of which included provisions for the contestant who was also left out of the will finally admitted to probate.

268. O'Day v. Crabb, 269 Ill. 123, 109 N.E. 724 (1915). *See also* Annotation, *Admissibility, on Issue of Testamentary Capacity, of Previously Executed Wills,* 89 A.L.R. 2d 177 (1963).

269. *Wood,* 25 Wyo. at 50, 164 P. at 852.

270. *Lane's Estate,* 50 Wyo. at 135, 58 P.2d at 419.

271. *Estate of Obra,* 749 P.2d at 277.

272. *Estate of Roosa,* 753 P.2d at 1032.

273. *Ingram's Estate,* 384 P.2d at 1021.

274. *See Merrill's Estate,* 80 Wyo. at 283, 341 P.2d at 507, where the court assumed but did not determine that guardianship proceedings were admissible evidence.

275. WYO. STAT. § 3-1-101 (1977, Rev. 1985).

tary capacity.[276] Also, it remains possible, even where evidence is presented of an individual's prior signs of incompetency or insanity, that attesting witnesses' testimony demonstrates the testator executed the will during a "lucid interval."[277]

A subsequent adjudication of incompetency can, but will not conclusively, raise a presumption of incompetency. If the presumption is raised it causes the burden of proof to shift. The greater the time lapse between a subsequent adjudication of incompentency or insanity and the execution of the will, the lesser the likelihood that such evidence will be admitted. If admitted its strength is diminished, which causes the burden of persuasion to shift to the proponent.[278] Furthermore, even if a subsequent guardianship file contains admissible evidence, the entire file may be excluded where it contains some inadmissible hearsay.[279] It appears that this evidentiary problem can be solved by trial counsel's separation of the wheat from the chaff, rather than expecting the trier of fact to do so.[280]

5. Insane Delusions and Testamentary Capacity

Often claims of lack of testamentary capacity are coupled with assertions that the testator was mentally deranged. This derangement is sometimes referred to as "mental delusion" but is more frequently called an "insane delusion."[281] To upset a will, the mental derangement must be related to the testator's testamentary capacity. Thus, an insane delusion will not prevent a finding of testamentary capacity unless it appears that the objects of the delusion are those persons having a special claim to the bounty of the testator.[282]

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276. For example, WYO. STAT. § 3-1-201 provides that the appointment of a guardian or conservator does not constitute an adjudication that the ward lacks testamentary capacity or is of unsound mind. *See also Estate of Roosa*, 753 P.2d at 1037; *Estate of Morton*, 428 P.2d at 733.

277. For example, where the evidence showed that the testator had been placed under a Veteran's Guardianship under WYO. STAT. §§ 3-6-101 through 3-6-119 three years prior to executing his will and that his behavior was eccentric and delusional, the court nevertheless sustained a summary judgment verdict on the testimony of the attesting witnesses, two attorneys, that on the day he executed the will he appeared "lucid and well oriented." *Estate of Roosa*, 753 P.2d at 1032. The witnesses for the contestants testified that the testator lived in a dream world; thought he was a partner in a business that he had no interest in and attempted to contribute money to it; told people he was working for the Attorney General of the United States; solicited help from individuals, apparently in connection with his imagined duties as a guard, to prevent aliens from coming across the border. *Id.* at 1033.

278. For example, a subsequent adjudication of insanity was admissible and resulted in shifting the burden of proof where it occurred two days after the execution of the will and was accompanied by evidence of testator's bizarre and dangerous acts immediately prior to signing the will. *Ingram's Estate*, 384 P.2d at 1021. *See Admissibility of Evidence on Question of Testamentary Capacity or Undue Influence in a will contest as affected by remoteness, relative to the Time that the Will was Executed, of the Facts or Events to which the Evidence Relates*, 124 A.L.R. 433.

279. *Estate of Carey*, 504 P.2d at 799.

280. *Estate of Morton*, 428 P.2d at 731-32. In this case, the court refused to admit the hospital records or the guardianship file but the contestant was allowed to introduce selected portions of those files, such as an extract of the petition for appointment of a guardian. The disallowed exhibits were regarded as merely cumulative, and therefore there was no error in excluding their introduction into evidence.

281. *Faragher's Estate*, 367 P.2d at 977.

282. *Estate of Roosa*, 753 P.2d at 1032.

Mere prejudice and bias do not rise to the level of an insane delusion.[283] It must be a false belief which no sane person in the testator's circumstances would entertain. Thus, if the testator's belief is based upon evidence, no matter how slight and inconclusive, it cannot be an insane delusion.[284]

In *Matter of Estate of Obra*,[285] the testator was a Philippine immigrant who began residing in Wyoming sixty years before his death. Almost ten years before his death he executed a will leaving his estate to some apparent relatives. Then approximately a year before he passed away he called up a friend and told him that "all of his relatives were deceased and that he had nobody to leave his property and to pick up his will as it was no good anymore." Shortly thereafter he executed a will leaving all his estate to his former employer. The court found that the testator was either mistaken or estranged by inattention and that such mistake, uncoupled with any other evidence of irregularities such as false representations or that the mistaken conception was an insane delusion, did not establish that testamentary capacity was lacking.[286]

It appears that the court in *Obra* was influenced by the fact that the testator may have naturally concluded that his relatives were all deceased because he had no contact with them,[287] although the record apparently lacked any explanation for the revocation of the prior will other than the belief expressed to his acquaintance at the time he instructed him to pick the will up from the attorney. In essence the court recognized that the testator's mistaken belief concerning the death of his relatives did not establish lack of testamentary capacity. A different result might have been reached, however, if the revoking will had contained an erroneous statement that the prior legatees were dead and that this was why the testator was revoking that instrument.[288]

Medical testimony alone is not always sufficient to establish the existence of an insane delusion.[289] In *In re Johnston's Estate*,[290] the Wyoming Supreme Court held that a medically unsound mind may be legally sound. In that case the testatrix had been diagnosed as suffering from paranoia and the expert medical testimony concluded that this mental condition was incurable.[291] The proponents successfully countered that medical testimony with numerous lay witnesses who testified that for many years,

283. *Johnston's Estate*, 63 Wyo. at 347, 181 P.2d at 617.

284. *Id.*

285. 749 P.2d 272 (Wyo. 1988).

286. *Id.* at 277.

287. The *Obra* opinion offers this advice to distant relatives: " 'If you want the old codger to remember you by will, keep in close touch,' for in fact, as with older ages of relatives, 'absence does not make the heart grow fonder.' Attention, as the elderly have little else, may not be something—it is near everything." *Id.*

288. *See* Gifford v. Dyer, 2 R.I. 99 (1852) and Comment, *Proof and Effect of Mistake as to the Provisions of Wills*, 38 Mo. L. REV. 48 (1973).

289. For an excellent discussion of the legal and medical definitions of insanity, mental deficiency and mental derangement *see* Rein-Francovich, *supra* note 240, at 17-27.

290. 63 Wyo. at 348, 181 P.2d at 617.

291. *Id.*

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up to and including the time she executed her will, she was of a "sound and disposing mind and memory" and "careful in business matters." The contestants failed to convince the court that the delusion produced by the paranoia directly influenced the terms of the will.[292]

The more persistent the belief in the supposed facts about one's family, which have no real existence except in the deranged testator's mind, and the more pervasive the conduct which such an insane delusion excites, the more likely it is that the trier of fact will be convinced that the delusion eroded an otherwise apparently sensible individual's testamentary capacity. Thus, even though the testatrix was clearly able to manage her own property, a will which left one dollar each to her brothers and sisters and nieces and nephews and most of the balance of her estate to a foundation to be created for the benefit of the blind, was not admitted to probate.[293] The evidence showed that the testatrix's father and brother were insane, that she had tried to commit suicide in a fit of despondency, that she lost her sight, believed that her mother was not her true mother and that her brothers and sisters were of the half blood, had extreme fits of anger, believed her relatives were trying to poison her, and that shortly before the execution of the will she stayed in a car without food for a full day and night out of fear of being poisoned.[294] But if there is any connection between the delusion the testator harbors against his family members and reality, testamentary capacity will be found.[295]

E. Fraud, Duress, and Forgery

A will purportedly executed by an individual with sufficient testamentary capacity may still fail if a contestant can show that it is the product of duress or forgery. Provisions of a properly attested will, or the will itself, may fail if they are the product of fraud.[296]

Fraud occurs where there is an intentional, deceitful misrepresentation made with the purpose of altering the testamentary disposition.[297] The fraud may be in the inducement or in the execution. The outcome of the will contest will vary according to the nature of the fraud and its pervasiveness.

When a person misrepresents facts and the testator is influenced thereby in making or revoking a testamentary disposition there has been

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292. *Id.* 343, P.2d at 614.
293. *Branson*, 52 Wyo. at 106, 70 P.2d at 591.
294. *Id.* at 594-95.
295. *In Re* Estate of Edwards, 433 So. 2d 1349 (Fla. Dist. Ct. App. 1983) where the testator's distrust of his family arose out of his concern over shoplifting in his business and the fact that some of his family members had entered his property without his permission during one of his hospital stays.
296. The ability to challenge a will or a probate decree procured by fraud is affected by statutory limitation periods for contesting a will or its probate. The fraudulent conduct may toll the statute of limitations. *See Fraud as Extending Statutory Limitations Period for Contesting Will or Its Probate,* 48 A.L.R. 4TH 1094 (1986).
297. *See* DUKEMINIER & JOHANSON, *supra* note 42, at 345-46.

fraud in the inducement. Courts will strike down the fraudulently induced inheritance if the testator would not have left the inheritance or made the bequest if he had known the true facts.[298] The balance of the will stands unless it is shown that fraud affects the entire will or the fraudulently induced bequest cannot be separated from the rest of the will.

Fraud in the execution occurs when someone misrepresents the contents or nature of a will and in reliance on that representation the testator signs the instrument. For example, if the testator signs a will, a portion of which was prior to execution removed without the testator's knowledge and another portion inserted, this would constitute fraud in the execution. In this case the balance of the document will stand and a constructive trust will be imposed on the interest received by the wrongdoer as a result of the fraud.[299] This must be distinguished from the case where the testator, without another's intervention, executes a different person's will. In that case, the will generally will not be admitted to probate.[300]

Another species of fraud is the forged will or codicil. Some states have a specific statute of limitations dealing with wills which have been forged or fraudulently induced.[301] Wyoming only has a general statute of limitations which deems the probate of the will to be conclusive if no action to set aside the will is filed during that period,[302] and a curative statute which has been interpreted to apply only to non-jurisdictional procedural flaws.[303]

In a recent case an individual forged a will which purported to appoint him as personal representative and to leave all of his mother's assets in excess of $20,000 to him.[304] The forged document was admitted to probate and distribution was made under the terms of the forged document. Fifteen years later the forger died. During the administration of his estate a creditor's claim was filed in the forger's probate estate; however, it failed to specifically raise a charge of fraud. The creditor's claim was rejected and an untimely suit was filed against the forger's estate, based on the rejected claim, and also against the distributees of the estate alleging that the forger's conduct had prevented the plaintiff, the forger's brother, from receiving his proper share of their mother's assets. The plaintiff further alleged that the forger had promised but failed to provide for the plaintiff in his will. The distributees of the forger's estate relied upon the defense of the four-year statute of limitations for fraud,[305] and the estate raised

298. ATKINSON, WILLS § 56 (2d ed. 1953).
299. 76 AM. JUR. 2D *Trusts* § 247 (1975).
300. *But see In re* Snide, 52 N.Y.2d 193, 418 N.E.2d 656 (1981). Mistake in the execution is discussed extensively in Comment, *Proof and Effect of Mistake as to the Provisions of Wills,* 38 MO. L. REV. 48 (1973).
301. ARIZ. REV. STAT. ANN. § 14-1106 (1974) (two years after discovery but not more than five years after commission of fraud); TEX. PROB. CODE ANN. § 93 (Vernon 1980) (two years after discovery).
302. WYO. STAT. § 2-6-306 (1977 & Cum. Supp. 1988).
303. WYO. STAT. § 2-2-111 (1977, Rev. 1980). *See* Addison v. Fleenor, 65 Wyo. 119, 196 P.2d 991 (1948).
304. Taylor v. Estate of Taylor, 719 P.2d 234 (Wyo. 1986).
305. WYO. STAT. § 1-3-105(a)(iv)(D) (1977, Rev. 1988).

the bar of the probate statute of limitations for rejected claims.[306] The Wyoming Supreme Court held that the distributees were not barred by the doctrine of equitable estoppel from raising the statute of limitations—since there was no evidence that the forger had done anything to prevent the claimant from discovering the forgery and raising the issue of fraud during the prior probate proceeding.[307] It also held that the statute of limitations began to run when the claimant could have reasonably discovered the forgery, which was when the document was admitted to probate. Since more than four years had elapsed since the forged will was admitted to probate both the fraud and creditor claims were time-barred.[308]

F. Trial Strategy

In a will contest, the first decision is whether to ask for a jury trial. Statistics compiled in California indicate that when mental capacity or undue influence were at issue, the jury found for the contestants in seventy-seven percent of the cases. Ultimately, more than half of the verdicts for the contestants were reversed by the California Supreme Court on the grounds of insufficient evidence.[309] In Wyoming five out of nine jury cases involving testamentary capacity or undue influence issues resulted in verdicts for the will contestant, while only twenty percent of the will contest cases on the same issues which were tried to the court resulted in verdicts for the contestant.[310]

On appeal the court will give the successful party's evidence every favorable inference that can be drawn therefrom.[311] It is therefore essential to build a solid prima facie case at trial. In asserting undue influence the contestant must accentuate the odious conduct of the alleged influencer. In dealing with testamentary capacity, it is not sufficient to rely solely on hypothetical post-mortem expert testimony. Such testimony must be buttressed with the testimony of as many close associates of the

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306. WYO. STAT. § 2-7-718 provides that the suit on a rejected claim must be brought within thirty days after the mailing of the notice of rejection. In this case, the plaintiff waited almost eleven months before filing suit.

307. *Taylor*, 719 P.2d at 239-40.

308. *Id.* at 239.

309. Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953).

310. The following cases resulted in a jury verdict for the contestant: *Cook v. Bolduc*, 24 Wyo. 281, 157 P. 580; *Branson v. Roelofsz*, 52 Wyo. 101, 70 P.2d 589; *Merrill's Estate*, 80 Wyo. 276, 341 P.2d 506; *Faragher's Estate*, 367 P.2d 972; *Estate of Waters*, 629 P.2d 470.

The following cases resulted in a jury verdict for the will's proponents: *Wood*, 25 Wyo. 26, 164 P. 844; *Lane's Estate*, 50 Wyo. 119, 58 P.2d 415; *Nelson's Estate*, 72 Wyo. 444, 266 P.2d 238; *Estate of Morton*, 428 P.2d 725.

Draper's Estate, 374 P.2d 425, was tried to a jury but resulted in a hung jury. The court finally entered an order admitting the will to probate.

Conroy's Estate, 29 Wyo. 62, 211 P. 96, and *Ingram's Estate*, 384 P.2d 1021, both resulted in bench verdicts denying admission of the wills to probate. Bench verdicts or summary judgments in favor of the will's proponents were entered in *Johnston's Estate*, 63 Wyo. 332, 181 P.2d 611; *Anderson's Estate*, 71 Wyo. 238, 255 P.2d 983; *Wilson's Estate*, 397 P.2d 805; *Estate of Carey*, 504 P.2d 793; *Estate of Brosius*, 683 P.2d 663; *Estate of Obra*, 749 P.2d 272; *Estate of Roosa*, 753 P.2d 1032; May v. Estate of McCormick, slip op., No. 88-319, Wyo. Feb. 27, 1989).

311. *Merrill's Estate*, 80 Wyo. at 284, 341 P.2d at 508.

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testator as possible. If there has been a guardianship proceeding it is important to underscore the reasons for the proceeding so as to shift the burden of proof to the will's proponent.[312]

Contestant's counsel should be sensitive to the weight of his burden: the law and the public have an aversion to "greedy heirs." To overcome the stigma of the "ungrateful living," the contestant should be portrayed, as the facts will permit, as the caring relative of the deceased. Not only will this be an important psychological point at trial, but on appeal the courts seem to be influenced by the close contact of the relatives to the testator, as opposed to sole reliance on lineage.[313]

Counsel should carefully review the facts and circumstances concerning execution or possible revocation of the will. Wyoming recognizes the validity of a will that was executed in any state so long as its execution satisfies the formalities of state law at the place of testator's domicile, either at death or at the time of execution. If valid at the time and place of execution it remains valid when probated in Wyoming.[314] If proof of due execution can be defeated, the presumption of the will's validity and the court's policy arguments favoring freedom of testation do not become factors. Revocation may open the door for the contestants to probate a prior will, if intent to do so is shown,[315] or it may at least throw the probate into intestacy.

IV. DEFENDING THE WILL CONTEST

"You Can't Go Back and You Can't Stand Still"
The Grateful Dead

A. Draftsman as Defense Attorney?

One mistake that the shortsighted, or perhaps shorthanded, scrivener makes, is to act as an attesting witness. This creates an ethical dilemma as the draftsman will undoubtedly be called to testify at trial to establish proof of due execution and, as is customary, will expect to serve as attorney for the personal representative. Under Rule 3.7 of the Wyoming Rules for Professional Conduct a "lawyer is not to act as advocate at a trial in which the lawyer is likely to be a necessary witness except where . . . disqualification of the lawyer would work substantial hardship on the client."[316]

The South Dakota Supreme Court has emphatically stated that it is a "grave breach" of the attorney's ethical duties to testify when he also

312. *Id.* at 510. The trial counsel apparently successfully influenced the jury by repeatedly using the term "incompetent" to refer to the testatrix whose physical condition, rather than mental, required a guardianship to manage her property.

313. See *Estate of Obra*, 749 P.2d 272; *Estate of Brosius*, 683 P.2d 663, two recent cases where the Wyoming Supreme Court apparently took cognizance of the estrangement between the testator and his blood relatives.

314. WYO. STAT. § 2-6-116 (1977, Rev. 1980). *See Estate of Campbell*, 673 P.2d 645. Counsel should carefully examine the statutes of the foreign jurisdictions.

315. *Wilson's Estate*, 397 P.2d 805.

316. WYO. RULES OF PROFESSIONAL CONDUCT Rule 3.7.

acts as advocate for the will's proponent.[317] Kentucky on the other hand has found that it is proper for the draftsman to represent the proponent.[318] While Wyoming has not expressly ruled on the ethical propriety of the draftsman/attesting witness serving as attorney for the estate, it has held that the fact that the attesting witness is being paid a fee for serving as the estate's attorney does not disquality her as a witness.[319] It would seem that the estate's inability to have the draftsman/attesting witness serve as trial counsel, imposes insufficient hardship to justify the attorney's role as both witness and advocate. This is particularly true considering the fact that the attorney can continue to handle the routine administrative matters, while delegating to a litigator outside of his firm the duties of trial counsel.[320] Ethical considerations require that the litigator be unconnected with the witness/attorney's law firm.[321]

Another thorny issue raised by the advocate/witness situation, is whether the draftsman can testify since the attorney/client privilege would bar his testimony if the testator were still alive. In one will contest case, the issue was apparently raised but the Wyoming Supreme Court did not address the fact that the attorney had been allowed to testify.[322] Courts usually admit such testimony in will contests on the theory that the testator intended the privilege only to last during his lifetime.[323] Alternatively, such testimony can be admitted on the theory that the personal representative, as the legal representative of the testator, can waive the privilege.[324] Another argument would be that the privilege is a statutory privilege intended to apply only to civil matters and does not extend to a probate matter since it is not incorporated into the Wyoming Probate Code.[325] It should also be noted that some courts have allowed a draftsman, who also served as attesting witness, to testify on the theory that by asking the draftsman to serve as a witness the testator is deemed to have waived the privilege.[326]

B. First Things First—The Prima Facie Case

Once a will contest petition is filed, counsel for the proponent should file a reply. While it is unclear at this point that an answer is required, failure to file an answer will bring up the needless exercise of defending a motion for default judgment by the contestant.[327] The next step is to

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317. *In re* Estate of Evans, 90 S.D. 126, 238 N.W.2d 677, 679 (1976).

318. Adams v. Flora, 445 S.W.2d 420, 422 (Ky. 1969).

319. *Lane's Estate,* 50 Wyo. at 140, 58 P.2d at 420-21. But the result might be different if the attorney were also a beneficiary under the will. See WYO. STAT. § 2-6-112 and *Matter of* Estate of Campbell, 673 P.2d 645 (Wyo. 1983).

320. This appears to be the course chosen by the draftsman in *Estate of Roosa,* 753 P.2d at 1028.

321. WYO. RULES OF PROFESSIONAL CONDUCT Rule 3.7 (comment).

322. *Lane's Estate,* 50 Wyo. at 140, 58 P.2d at 421.

323. 8 J. WIGMORE, EVIDENCE § 234 (McNaughton rev. 1961).

324. *See* Annotation, *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or By Guardian or Incompetent,* 67 A.L.R. 2D 1268 (1959).

325. WYO. STAT. § 1-12-101 (1977, Rev. 1988).

326. *In re* Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1952).

327. WYO. STAT. § 2-6-302 (1977, Rev. 1980).

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prepare to show that all of the required formalities were observed in the execution of the will. In conjunction with that effort the attorney should prepare affidavits, based on the testimony of the attesting witnesses, that the will was duly executed and that the testator possessed the requisite testamentary capacity. These affidavits should be filed along with a motion for summary judgment relying on the presumptions of sanity and possession of testamentary capacity that arise once proper execution and attestation have been proven.[328] Finally, counsel should initiate discovery so as to discover the basis for the contestant's case and prepare his rebuttal.

C. Using the Testator's Declarations

The testator's declarations can be extremely helpful in proving proper execution and testamentary capacity, and showing lack of undue influence or fraud. However, these statements, if offered to show the truth of the matter asserted, will often be deemed hearsay.[329]

If the testator's declarations are made contemporaneous with the execution of the will then they are generally deemed admissible since the statement was made as part of the res gestae.[330] Thus, they can be used to show that the testator understood the will's provisions[331] and that it was duly executed.[332] However, if the testator's declarations are not made contemporaneously, then they are inadmissible except when offered to show the testator's mental state or susceptibility to duress, undue influence, etc.[333] Likewise, such statements may be admitted to show the testator's intent regarding the disposition of his property[334] or his relations with and feelings towards friends or relatives.[335] However, they may not be used to show due execution of the will if not made as part of res gestae.[336] Even if the testator's declarations are deemed to be hearsay, counsel should be mindful of the exceptions to the hearsay rule that may overcome the contestant's hearsay objection.[337]

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328. See *Estate of Roosa*, 753 P.2d at 1037, where a summary judgment was affirmed despite affidavits filed by the contestant which showed that the testator lacked capacity to sign a will. The court pointed out that the contestant's affidavits did not specifically relate to the date of execution of the will and therefore didn't "directly refute" the affidavits of the proponent.

329. *See generally* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. 1972).

330. *Nelson's Estate*, 72 Wyo. at 473, 266 P.2d at 249.

331. *In Re* Lane's Estate (Lane's Estate II), 50 Wyo. 119, 150, 60 P.2d 360, 362 (Wyo. 1936).

332. Throckmorton v. Hill, 180 U.S. 552 (1901). *See generally* Note, *In a Will Contest, When and for What Purpose Are the Statements of the Testator Admissible?* 11 VA. L. REV. 601, 601-06 (1925).

333. Note, *Testamentary Hearsay*, 38 HARV. L. REV. 959, 960 (1925).

334. *Estate of Morton*, 428 P.2d at 732.

335. *Estate of Obra*, 749 P.2d at 277.

336. *Throckmorton*, 180 U.S. at 572.

337. WYO. R. EVID. 803.

D. Use of Experts

The choice of witnesses, both lay and expert, is critical to the defense of the will. In early Wyoming cases the courts gave little extra deference to medical testimony. In fact, one court held that nonexperts may be equally able to form conclusions concerning the testator's mental state as experts.[338] Later cases, however, recognized the danger of relying upon nonexpert opinion testimony on testamentary capacity.[339] If the expert testimony comes from the testator's personal physician who has had a longstanding relationship with the patient, the trier of fact may attach greater weight to such testimony than that of a clinical psychologist who is conducting a post-mortem diagnosis based on his review of the testator's medical records.[340] Clearly, the modern trend favors expert testimony although the trier of fact will be careful not to let experts express an opinion as to the ultimate issue of the case.[341]

E. To Appeal or Not to Appeal

In Wyoming the odds are greatly stacked against the will contestant for all of the reasons discussed above. If after trial the contestant is unsuccessful, he and his counsel must seriously consider the advisability of an appeal. Formerly, the contestant not only had to evaluate the cost of pursuing an appeal but he also had to be prepared to pay for the appellee's attorney fees even if the appeal proved to be meritorious.[342] Under the new Wyoming Probate Code,[343] the unsuccessful contestant's liability for fees and expenses is limited to the costs incurred.[344]

The most persuasive reason for the will contestant to forego appeal is that only two verdicts have been reversed, and both of those were verdicts in favor of the contestant.[345] The presumptions which favor the will's proponents should make an appeal by an unsuccessful proponent more attractive.

VII. CONCLUSION

"Nothin' Left To Do But Smile Smile Smile"
The Grateful Dead

The tactics and defenses suggested in this article are clearly not a substitute for a testator of sound mind who is impervious to influence from any source. However, the skillful use of these defensive techniques can

338. *Johnston's Estate*, 63 Wyo. at 349, 181 P.2d at 618.
339. *Merrill's Estate*, 80 Wyo. at 286, 341 P.2d at 508; *Estate of Carey*, 504 P.2d at 798-99.
340. *Faragher's Estate*, 367 P.2d at 975.
341. *Estate of Carey*, 504 P.2d at 798-99.
342. *Merrill's Estate*, 80 Wyo. at 292, 341 P.2d at 511.
343. WYO. STAT. § 2-6-305 (1977, Rev. 1980).
344. *Estate of Croft*, 734 P.2d 59.
345. *Wood*, 25 Wyo. at 52, 164 P. at 852; *Merrill's Estate*, 80 Wyo. at 292-93, 341 P.2d 511. The Wyoming experience is similar to the trend reported in the State of Wisconsin, where in undue influence cases the appellate courts rarely reverse the trial court decision. *See* Note, *Undue Influence—Judicial Implementation of Social Policy*, 1968 WIS. L. REV. 569.

be an effective antidote to the emotional and financial disappointment heirs experience when they discover the 'ol geezer has deprived them of their birthright. Even if the heirs are not persuaded that the defensive walls the estate planner assisted the testator in building are impregnable, trial counsel's job will be made easier because of efforts to preserve and document the testator's capacity and freedom from influence.

When the attorney has skillfully drafted the will, religiously observed the formalities of execution with the assistance of a checklist, and gathered and preserved evidence to corroborate the testator's mental capacity, the client will appreciate those efforts, even if his heirs do not.