Unmasking Undue Influence

Ray D. Madoff
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INTRODUCTION

Every year over $100 billion passes hands at death in the United States.1 This passage of wealth brings into focus the tension between the belief that people should be able to dispose of their wealth as they wish and society's interest in maintaining social stability. Nowhere is this tension more apparent than in the doctrine of undue influence.

The concept of undue influence is part of the popular culture, with cases often rising to the level of "media events." One need only open a newspaper to see a case involving this doctrine—Doris Duke,2 Georgia O'Keeffe,3 J. Seward John-

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2. Duke, the tobacco heiress, left an estate of $1.2 billion upon her death in 1993. Duke left the bulk of her estate to charity. The will (which she signed six months before her death) named her butler, Bernard Lafferty, as a beneficiary as well as co-executor of the estate with the United States Trust Company. Under the will, Lafferty would receive a five million dollar execu-
son, and Pearl S. Buck are just some of the famous people whose wills have been challenged based on the undue influence of a will drafter's fee and a lifetime annuity of $500,000 per year. Lafferty would also become a trustee of the newly created Doris Duke Charitable Foundation, which is expected to be one of the largest charitable trusts in the country. Several parties challenged the will on the basis that Lafferty unduly influenced Duke to make changes in her will. In a separate action, the Manhattan Surrogate's Court removed Lafferty as co-executor of the estate in 1995 due to his profligate lifestyle after Duke's death. The court also removed the United States Trust Company as co-executor for its failure to control Lafferty's spending and to exercise independent judgment. Final legal action on the will is still pending. See Margaret A. Jacobs, U.S. Trust and Butler Dismissed as Duke Co-Executors, WALL ST. J., May 23, 1995, at B5 (discussing the dismissal of the co-executors due to mismanagement of the Duke fortune); James C. McKinley, Jr., Judge Removes the Executors of Duke Estate, N.Y. TIMES, May 23, 1995, at A1 (same); James C. McKinley, Jr., Stakes in the Duke Case: A Long Reputation and a Lot of Dollars, N.Y. TIMES, May 31, 1995, at B1 (examining the questionable conduct of United States Trust and the Chicago law firm that drafted Duke's will).

3. When O'Keeffe, the painter, died in 1986 at age 98, the principal beneficiary of her will was Juan Hamilton, who was 58 years her junior. An aspiring but nearly destitute artist, Hamilton had knocked on O'Keeffe's door one morning in August of 1973 seeking work. He never left. O'Keeffe initially employed Hamilton as her secretary, but he ultimately became her assistant, agent, business manager, companion and caretaker. After O'Keeffe's death, her 92-year-old sister and a niece challenged the will, claiming Hamilton exercised undue influence. Although the family members had not maintained contact with O'Keeffe while she was living (her niece stated that she met the artist only twice), the parties reached a settlement whereby the two contestants each received one million dollars in art. The remainder of the estate was split between Hamilton, eight museums and a foundation to be run by Hamilton, two family members, and two institutional representatives. See Andrew Decker, The Battle over Georgia O'Keeffe's Multimillion-Dollar Legacy, ARTNEWS, Apr. 1987, at 120 (discussing the value of O'Keeffe's estate and the eventual settlement between Hamilton and family members); Jo Ann Lewis, The War over O'Keeffe: The Artist's Heir, Juan Hamilton, and the Legal Wrangling that Followed Her Death, WASH. POST, Mar. 3, 1987, at D1 (recounting Hamilton's relationship with O'Keeffe).

4. Johnson, the heir of the Johnson & Johnson fortune, died in 1983, leaving an estate of just over $400 million. He left the bulk of his estate to his third wife, the former Barbara Piasecka. Johnson first met Piasecka in 1968 when she was working as a cook at Johnson's New Jersey estate. At the time, Johnson was 73 years old and married; Piasecka was 31 and single. Johnson began almost immediately to give Piasecka increasingly responsible positions, to spend time with her regularly, and to lavish expensive gifts on her. Johnson divorced his wife in 1971 and married Piasecka eight days later. Over the following years, Johnson executed a series of wills and codicils, increasing his new wife's share of the estate and disinheriting his children. Upon his death, his six children and a charitable foundation named in the will challenged Johnson's final will, executed weeks before his death, on the basis of insufficient mental capacity and undue influence by Johnson's new wife and lawyer. The parties finally settled the case. Johnson's new wife received about $340 million outright, the children each received about $6 million, the charitable
doctrine in recent years. Moreover, the prevalence of this doctrine is not limited to the rich and famous. In conjunction with lack of mental capacity, undue influence is the most frequent ground for invalidating a will. In addition, for every reported case there are many more cases that settle before trial or even before the filing of a suit. And yet, despite its prominence, little scholarly work has been done examining the parameters and justification of the undue influence doctrine.

foundation received $20 million, and the lawyer's fee as executor was slashed to $1.8 million. See generally David Margolick, Undue Influence: The Epic Battle for the Johnson & Johnson Fortune (1993) (recalling Piasecka's life, her relationship with the Johnson family and the controversial settlement of the Johnson estate).

5. Buck, the novelist, left the majority of her estate to Theodore Harris, a former Arthur Murray dance instructor who first met her in 1963 when he was assigned to give her private dance instruction. At the time, he was 32 and she was 71. Mr. Harris became her business manager and constant companion until her death ten years later. Her will effectively disinherited her seven adopted children. The court rejected the will based on undue influence. Pearl Buck's Will Is Upset by Jury, N.Y. Times, July 27, 1974, at A27.


7. See John H. Langbein, Will Contests, 103 Yale L.J. 2039, 2043 (1994) for a discussion of the prevalence of strike suits in this area of law as well as suggestions for how to change our system to avoid such suits.

8. The literature on undue influence generally falls into three distinct categories: (1) descriptive articles, usually in the form of student notes or case comments, laying out the elements of the undue influence doctrine and describing case law (see, e.g., A.J. White Hutton, Undue Influence and Fraud in Wills: What Constitutes Undue Influence and Fraud, and How They Are Proven, 37 Dick. L. Rev. 16, 17-20 (1932) (distinguishing undue influence from the subject of testamentary capacity and discussing forms of undue influence); Christopher B. Swartley, Blackmer v. Blackmer: The Presumption of Undue Influence in Montana, 37 Mont. L. Rev. 250, 254 (1976) (maintaining that Montana should adopt a rule that allows for a presumption of undue influence); Joseph Warren, Fraud, Undue Influence, and Mistake in Wills, 41 Harv. L. Rev. 309, 327 (1927) (listing instances of undue influence in case law); Wendell B. Will, Comment, Wills-Undue Influence, 50 Mich. L. Rev. 748, 749 (1952) (discussing the definition and elements of undue influence)); (2) empirical studies exploring the application of the doctrine (see, e.g., Schoenblum, supra note 6, at 647 (stating that undue influence is one of the most common grounds for invalidating a will)); and (3) articles criticizing courts for using the undue influence doctrine to impose their views as to appropriate testamentary norms (see, e.g., Melanie B. Leslie, The Myth of Testamentary Freedom, 38 Ariz. L. Rev. 285, 236 (1996) (criticizing courts for using undue influence to impose testamentary norms); Josef Athanas, Comment, The Pros and Cons of Jury Trials in Will Contests, 1990 U. Chi. Legal F. 529, 545-46 (1990) (arguing that juries should not decide will contests); Michael Falker, Comment, A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity, 2 Conn. L. Rev. 616, 621 (1970) (proposing that dispositive elements of a will should not factor into a determination of testamentary capacity)).
All wills are the result of influence. The law recognizes this by drawing a distinction between influence and undue influence. According to the dominant paradigm, the key distinction is that undue influence involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, resulting in an instrument that would otherwise not have been made. Understood in

9. See John P. Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253, 264 (1947) (stating that complete freedom of testation is never realized). Professor Dawson has noted that it is not possible to "entirely eliminate the pressures that operate on [individuals] . . . or insulate them from all the multiplied stimuli of a complex social environment. The problem . . . is to select the means of pressure that are permissible." Id.

10. This is unusual in the law of wills. Compare this to other doctrines such as fraud and duress. These doctrines do not recognize degrees of permissibility. If a will is brought about as the result of lies then it is irrelevant that the lies were only little ones. It is sufficient that the bad conduct had the desired result.

11. See Wingrove v. Wingrove, 11 P.D. 81, 82-83 (1885) (discussing when influence becomes undue influence under the law). Lord Hannen gave a classic explanation of undue influence more than 110 years ago in the often quoted English case of Wingrove v. Wingrove:

We are all familiar with the use of the word "influence"; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eye of the law there must be—to sum it up in a word—coercion . . . . It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

Id. at 82.

For further discussion of this distinction, see Thomas E. Atkinson, Handbook of the Law of Wills 256, 260 (2d ed. 1953) and William M. McGovern, Jr. et al., Wills, Trusts and Estates 278 (1988), which explain the legal definition of undue influence. For recent case examples discussing this distinction see Caudill v. Smith, 450 S.E.2d 8, 10 (N.C. Ct. App. 1994), which states that undue influence prevents the testator from exercising his or her own will; Taliaferro v. Green, 622 S.W.2d 829, 832 (Tenn. Ct. App. 1981), overruled on other grounds by Matlock v. Simpson, 902 S.W.2d 384.
this way, the undue influence doctrine is akin to the doctrines of fraud and duress in its attempt to protect testators' rights to freely dispose of their property. Thus, if an aged testator leaves everything to his nurse of one month, disinheriting his family, a court's finding of undue influence will be justified on the basis that the will does not represent the testator's true wishes. Because the dominant paradigm presents the undue influence doctrine as providing the double benefit of protecting freedom of testation as well as preventing overreaching by others, the doctrine has received wide support.

In this article I challenge the dominant paradigm. I show that rather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families. Although some scholars have recognized that the undue influence doctrine has sometimes been used by courts and juries to impose their views as to appropriate testamentary norms, they have consistently presented this phenomenon as a misapplication of the undue influence doctrine. These scholars believe

(Tenn. 1995), also noting that undue influence prevents a testator from exercising his or her own will; and Schmidt v. Schwear, 424 N.E.2d 401, 405 (Ill. App. Ct. 1981), which held that legal undue influence deprives the testator of free agency.

12. The doctrine of fraud prevents wills from being given effect when the will is brought about through lies told to the testator. The doctrine of duress prevents wills from being given effect when the wills are brought about through threats of harm. The undue influence doctrine is broader than the doctrines of fraud and duress in that it invalidates wills when they are the result of any action that subverts the will of the testator and replaces the will of the testator with that of the one doing the influencing. See generally McGovern et al., supra note 11, at 278-79, 580 (comparing the doctrines of fraud, duress, and undue influence in will contests).

13. For example, although scholars have at various times suggested eliminating the requirement for mental capacity (see, e.g., Mary Louise Fellows, The Case Against Living Probate, 78 Mich. L. Rev. 1066, 1109-12 (1980)) and eliminating the requirements of testamentary formalities (see, e.g., James Lindgren, Abolishing the Attestation Requirement for Wills, 68 N.C. L. Rev. 541, 543 (1989) (discussing the developments in the law that make attestation unnecessary)), the undue influence doctrine has remained sacrosanct (see, e.g., Fellows, supra, at 1113 (reaffirming the importance of the undue influence doctrine)).

14. See, e.g., Joseph W. deFuria, Jr., Testamentary Gifts Resulting from Meretricious Relationship: Undue Influence or Natural Beneficence?, 64 Notre Dame L. Rev. 200, 202-07 (1989) (discussing courts' use of the undue influence doctrine to show disfavor for meretricious relationships); Jeffrey G. Sherman, Undue Influence and the Homosexual Testator, 42 U. Pitt. L. Rev. 225, 243-48 (1981) (criticizing the higher burden of showing testamentary ca-
that the doctrine protects freedom of testation so long as courts resist the temptation to impose their views as to appropriate testamentary norms. In this article, I argue that this approach fails to recognize that family protectionism is built into the very fabric of the undue influence doctrine. Rather than resulting from a misapplication of the doctrine, I show how the correct application of the doctrine imposes a preference for the biological family over non-family members. The doctrine does not act to protect the intent of the testator, but rather to protect the testator's biological family from disinheritance.

Part I looks at how case law, treatises and other authoritative sources describe undue influence as a doctrine that protects testamentary freedom. Part II studies the dominant paradigm more closely by looking at the application of the doctrine to a specific undue influence case, In re Will of Kaufmann. In this case the court set aside a will in which the testator left the majority of his estate to his long time live-in companion. While commentators have criticized the case as a misapplication of the undue influence doctrine, I show that its result flows directly from the standard undue influence doctrinal analysis. Part III explores the paradox of the undue influence doctrine. The doctrine purports to protect freedom of testation, yet, as Kaufmann illustrates, the standards for undue influence can be met even when the will reflects the wishes of the testator. I show how this seeming paradox results from presumptions underlying the undue influence doctrine, namely the confidential relationship/natural bequest dichotomy. This dichotomy can be understood in the broader context of the market/family dichotomy, which views the market as a place...
governed by an ethic of selfish individualism and the family as a place governed by an ethic of altruism.

Part IV tests this new paradigm of the undue influence doctrine as a family protection doctrine by looking at how the existence or nonexistence of other provisions protecting the family against disinheritance affects the operation of the doctrine. By examining the application of the undue influence doctrine in two states that represent the extremes in terms of family protection, I reveal the strong correlation between the existence of other family protection provisions and the application of the undue influence doctrine. Part V concludes by exploring whether the undue influence doctrine can be justified once it is understood in terms of family protection, rather than as a doctrine committed to preserving freedom of testation. In particular, I look at three possible justifications for the operation of the undue influence doctrine as a family protection doctrine regardless of evidence of testamentary intent.

I. UNDUE INFLUENCE UNDER THE DOMINANT PARADIGM

According to authoritative sources, undue influence occurs when a person is subject to such psychological domination by another that he cannot help but carry out the other person's wishes. The distinction between permissible influence and impermissible undue influence is that the latter involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, causing him to make an instrument that he otherwise would not have made. According to the dominant paradigm, courts should not give effect to this instrument because it does not accurately

18. PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 40 & n.66 (2d ed. 1994).
19. See, e.g., Schmidt v. Schwear, 424 N.E.2d 401, 405 (Ill. App. Ct. 1981) ("Undue influence sufficient to invalidate a will is that influence which prevents the testator from exerting his own will in the disposition of his estate."); Taliaferro v. Green, 622 S.W.2d 829, 832 (Tenn. Ct. App. 1981), overruled on other grounds by Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995) (explaining that to render a will nugatory, undue influence must "amount to coercion"); ATKINSON, supra note 11, at 256, 260 (noting that undue influence is often defined as coercing the testator to do something that the testator did not desire to do); McGOVERN ET AL., supra note 11, at 278 ("Most judicial definitions of undue influence speak of domination of the testator's mind; was it so controlled that the will is actually 'the will of another person,' or did the testator act of his own accord.").
reflect the wishes of the testator. In signing a will that is the result of undue influence, the testator is said to be in such a condition that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."20

The dominant paradigm views the undue influence doctrine as related to, but different from, the doctrines of fraud and duress. The doctrine of fraud prevents a will from being given effect when the will is brought about through lies told to the testator.21 The doctrine of duress prevents a will from being given effect when the will is brought about through threats


Before a will may be set aside because of undue influence, a contestant must prove the existence and exertion of an influence that subverted or overpowered the mind of the testator at the time of execution of the instrument so that the testator executed an instrument he would not otherwise have executed but for such influence. Not every influence exerted on a person is undue. It is not undue unless the free agency of the testator was destroyed and the will produced expresses the wishes of the one exerting the influence. One may request, importune, or entreat another to create a favorable dispositive instrument, but unless the importunities or entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument.


The degree of influence to be exerted over the mind of the testatrix in order to be regarded as undue must be such as to subjugate [her] mind to the will of another, to overcome [her] free agency and independent volition and to compel [her] to make a will that speaks the mind of another and not [her] own.

Id.

21. See, e.g., Wall v. Heller, 486 A.2d 764, 773 (Md. 1985) ("Fraud connotes that the testator either did not know that [he] was signing a will, or that [he] was misled or deceived as to the provisions of the will."); Matter of Estate of Vick, 557 So. 2d 760, 767 (Miss. 1989) ("The basic ingredient of fraud . . . is that the testator is deceived through the use of false information, so that his free will or free agency, of which he is not deprived, is exercised upon the basis of false information."); Matter of Weickum's Estate, 317 N.W.2d 142, 146 (S.D. 1982) ("Fraud in the inducement of a will consists of false statements of fact willfully made by a beneficiary to a testator, which are made in bad faith or with the intent of deceiving the testator, and which do deceive him and induce him to make a will he would not otherwise have made."); Union Planters Nat'l Bank of Memphis v. Inman, 588 S.W.2d 757, 762 (Tenn. Ct. App. 1979) ("In order to set aside a will on the basis of fraud, the fraud must be of the active, tortious, deceitful kind and not of the constructive or resultant nature.").
of harm to the testator.\textsuperscript{22} The undue influence doctrine is broader than each of these in that it invalidates a will when it is the result of any action that subverts the will of the testator and replaces the will of the testator with that of the one influencing.\textsuperscript{23} As one court stated, "[I]t is immaterial how this is done, whether by solicitation, flattery, putting in fear or some other manner."\textsuperscript{24} Indeed even kindness and affection can result in undue influence.\textsuperscript{25} Although the doctrines of fraud and

22. See McGovern et al., supra note 11, at 279 (explaining that "[d]uress is closely associated with undue influence" and that "[i]t requires an 'unlawful' threat"). Compare Bailey v. Arlington Bank & Trust Co., in which the court stated:

It has been held that duress is the threat to do some act which the threatening party has no right to do. The threat must be of such a character to destroy the free agency of the party to whom it is directed. It must overcome his will and cause him to do that which he would not otherwise do, and which he was not legally bound to do. The restraint caused by such duress must be imminent, and must be such that the person to whom it is directed has no means of protection.


23. As one prominent commentator has stated: "It is not the nature and extent of the influence, but its effect upon the mind of the testator which determines whether it is undue influence or not." 1 William J. Bowe & Douglas H. Parker, Revised Treatise: Page on the Law of Wills § 15.6 (1960). For the most part, courts continue to honor the traditional definition of undue influence. However, "[a] few courts have defined it as unethical conduct in relation to a testator to obtain an advantage which the law will not countenance." Haskell, supra note 18, at 43. Other courts have historically viewed influence in terms of coercion. See Atkinson, supra note 11, at 256 (discussing undue influence in terms of coercion); George B. Collins, Undue Influence in Wills, 7 Ark. L. Rev. 116, 116-18 (1952-1953) (same).

English courts have gone the other way and view undue influence as something separate and apart from fraud. According to the English courts, undue influence does not involve falsehoods. See Shaffer, supra note 17, at 259.

24. In re Estate of Holmes, C.A. No. 13034, 1994 Del. Ch. LEXIS 122, at *13 (Del. Ch. July 19, 1994); see also Bowe & Parker, supra note 23, § 15.7 (noting that "no exhaustive list can be made of the means by which undue influence can be exerted").

25. See Estate of Auen, 35 Cal. Rptr. 2d 557, 565 (Cal. Ct. App. 1994) (explaining that "although kindness and attention alone would not constitute undue influence, they might, when combined with other factors, amount to such influence"). But see In re Estate of Weir, 475 F.2d 988, 992 (D.C. Cir. 1973) ("Influence gained by kindness and affection will not be regarded as 'undue' if no imposition or fraud be practiced even though it induces the testator to make an unequal disposition of his property in favor of those who have contributed to his comfort."). In Weir, the fact that the testator was a lifelong bachelor who had no children and was predeceased by his siblings may have influenced the court's decision. Weir left the bulk of his estate to his longtime female friend and companion. Although they had separate apartments, they
duress in the context of testamentary dispositions continue to exist in theory, the law of undue influence has largely supplanted them. The reason for this is that undue influence is much easier to prove, requiring no direct evidence of malfeasance by (or on behalf of) the named beneficiary.\textsuperscript{26}

According to the doctrine's precepts, in applying the undue influence doctrine, a court should always be mindful of the overarching principle of freedom of testation. Thus, when a court rejects application of the undue influence doctrine, it often does so with strong rhetoric in support of freedom of testation. As one court stated in refusing to apply the undue influence doctrine:

\begin{quote}
We remind ourselves that neither judge nor jury may make a will for the decedent. If he had the mental capacity to make a will, and if he made it of his own volition, so that it may be said to be his will and not that of another, then it is not our place to pass judgment on his motives or his wisdom in making the will he made, nor to substitute our own judgment for his. One has the right to do as he pleases with what is his.\textsuperscript{27}
\end{quote}

\begin{flushright}
\textit{Id.} at 990. Wier's niece unsuccessfully challenged the will.
\end{flushright}

26. In order to prove fraud, the contestant needs to put forward evidence of deceit. See, e.g., Himmelfarb v. Greenspoon, 411 A.2d 979, 983 (D.C. 1980) ("To establish an action for fraud in the inducement, appellant would have to prove that (1) willful false statements of fact were made to the testator; (2) the statements were made by a beneficiary under the will that was induced; (3) the statements were intended to deceive the testator; (4) the testator was actually deceived; (5) the statements actually induced the testator to make a will; and (6) the testator would not have made the induced will absent the false statements."); Gill v. Gill, 254 S.E.2d 122, 125 (Va. 1979) ("Fraud... [is] not to be presumed, but must be proven by evidence clear, cogent, and convincing. The ultimate burden of proof is always upon him who alleges fraud.").

In order to prove duress, the contestant needs to put forward evidence as to threats of harm.

The test of what act or threat constitutes duress is determined by considering whether the threat placed the party entering into the transaction in such fear as to preclude the exercise by him of free will and judgment... By definition, an act or threat to constitute duress must be wrongful.


27. \textit{In re} Estate of Hague, 894 S.W.2d 684, 687 (Mo. Ct. App. 1995); see also Will of Bartel, 613 N.Y.S.2d 798, 800 (Surr. Ct. 1994) (failing to find undue influence absent proof that the primary beneficiary acted so as to substitute the testator's will with his own), \textit{aff'd sub nom.} Cordovi v. Karnbad, 625 N.Y.S.2d 519 (App. Div. 1995); Wendell B. Will, Comment, 50 MICH. L. REV. 748, 749 (1951) (arguing that undue influence exists when a testator lacks the ability to weigh all influences against him, both due and undue).
Rhetoric notwithstanding, however, rather than protecting individual autonomy, the standards for proving undue influence instead can have the effect of denying freedom of testation for those individuals who deviate from judicially imposed societal norms as to appropriate testamentary behavior.28

A. PROVING UNDUE INFLUENCE

Under the dominant paradigm, the existence of undue influence is a question about the state of mind of a person who is dead at the time of inquiry. Thus, it is not surprising that it can be proved only by circumstantial evidence.29 This only begs the question, however, of what circumstances indicate that a will is the product of another's wishes.30

Courts have looked to a variety of factors in determining whether the testator was subject to undue influence. Four elements of proof have emerged: 1) a confidential relationship existed between the testator and the person allegedly exercising the influence; 2) the confidant played some role, however indirect, in the formulation, preparation or execution of the

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28. See infra notes 98-107 and accompanying text (discussing how the Kaufmann court used the undue influence doctrine to impose societal norms of the time regarding appropriate testamentary behavior).

29. As one commentator has stated, "That an individual may come under such influence of another that he cannot resist what the other wants him to do is plausible, but proving such psychological domination directly is virtually impossible." HASKELL, supra note 18, at 40; see also, e.g., Pruss v. Pruss, 514 N.W.2d 335, 346 (Neb. 1994) (noting that undue influence "is usually shown through inferences drawn from the facts and circumstances surrounding the testator"); In re Andrews' Will, 261 S.E.2d 198, 199 (N.C. 1980) (explaining that "after testator's death, only circumstantial evidence remains from which the trier of fact... could find undue influence").

30. One authority has provided this rather tautological answer: "[T]o establish undue influence it must be proved that the testator was susceptible to undue influence, that the influencer had the disposition and opportunity to exercise undue influence, and that the disposition is the result of the influence." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 161 (5th ed. 1995). However, this answer begs the question insofar as it does not tell us what influence is undue. Another commentator describes the difficulty of proving undue influence as follows: "As in the case of mental capacity, we are dealing largely with subjective elements. Furthermore any objective phases of undue influence are apt to be veiled in secrecy." ATKINSON, supra note 11, at 255. As one court has stated, "The overriding question in deciding if a will has been executed under undue influence is whether the influencer, by his or her conduct, has gained an unfair advantage by means that reasonable persons regard as improper." Van Marter v. Van Marter, 832 P.2d 134, 137 (Or. Ct. App. 1994) (citing In re Reddaway's Estate, 329 P.2d 886, 890 (Or. 1958)).
will; 3) the testator was susceptible to undue influence; and 4) the testator made a testamentary gift to the confidant which was unnatural. The following discussion outlines how each of these factors has been interpreted by the courts.

1. Confidential Relationship

The confidential relationship is the linchpin of the undue influence inquiry. Many courts have taken the position that the mere existence of a confidential relationship combined with a benefit to the dominant party in the relationship is enough to raise the presumption of undue influence.

What is a confidential relationship? It is generally defined as a relationship of trust and reliance whereby the testator reasonably believed that the confidant was acting in the testator’s best interest. The rationale for the presumption of undue influence seems to be that where the testator is dependent or relies on a person, then that person can use his position to overwhelm the testator’s free will.

Confidential relationships can be understood as both a form and an extension of fiduciary relationships. Confidential relationships are forms of fiduciary relationships in that certain relationships are categorized as “confidential” as a matter of law. A classic example of such a de jure confidential relationship is that of a lawyer and client. Similarly, confidential

31. HASKELL, supra note 18, at 42. Factors that other courts will consider include changes from a previous will and whether the new will was drawn hastily or in secret. See, e.g., Evans v. Liston 568 P.2d 1116, 1118 (Ariz. 1977) (stating that a hastily executed will serves as evidence of undue influence); Moore v. Smith, 582 A.2d 1237, 1239 (Md. 1990) (stating that changes from a former will serve as evidence of undue influence). Some courts have refused to set forth any test at all, stating:

It is impossible to set forth all the various combinations of factors and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.


32. See, e.g., Summit Bank v. Quake, 631 N.E.2d 13, 15 (Ind. Ct. App. 1994) (stating that undue influence is presumed when a plaintiff establishes the existence of a confidential relationship and an advantage received by the dominant party).

33. See infra notes 34-39 and accompanying text (describing the fiduciary nature of a confidential relationship).

34. See McGOVERN ET AL., supra note 11, at 280 (stating that an attor-
relationships also presumptively exist between a conservator and ward, trustee and beneficiary, doctor and patient, nurse-companion and patient, and pastor and parishioner. In all of these relationships one person is under a legal or ethical obligation to act in the best interest of the other person.

A confidential relationship is also an extension of fiduciary relationships in that, under the undue influence doctrine, confidential relationships may also exist between people who do not fall within any specifically defined category. A de facto confidential relationship comes about "whenever trust and confidence are placed by one person in the integrity and fidelity of another." It exists "whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other." Some examples of these types of confidential relationships are friends, neighbors and lovers on whom the testator has become dependent. De facto confidential relationships differ from de jure confidential relationships because there is no generally recognized legal or ethical obligation to act in the other person's best interest.

An obvious example of relationships in which people re- pose special confidences in one another are family relationships. However, the undue influence doctrine only categorizes family relationships as "confidential" in very limited circumstances.

ney-client relationship is presumed confidential); see also, e.g., Estate of Auen, 35 Cal. Rptr. 2d 557, 562 (Cal. Ct. App. 1994). (stating that the law presumes a confidential relationship when an attorney acts for a client); Tracey v. Tracey, 153 A. 80, 84 (Md. 1931) (same).

35. See McGovern et al., supra note 11, at 280 & nn.29-34 (describing relationships that are presumed confidential).

36. Id.; see also In re Estate of Maheras, 897 P.2d 268, 273 (Okla. 1995) (stating that confidential relationships are not limited "to persons who stand vis-à-vis one another in certain limited classes . . . since dependent relations may occur in any number of different settings").

37. Maheras, 897 P.2d at 272 n.10 (citing Fipps v. Stidham, 50 P.2d 680, 683 (Okla. 1935)).

38. In re Clark's Estate, 359 A.2d 777, 781 (Pa. 1976) (citation omitted). Another court recently defined a confidential relationship as one which would induce a reasonably prudent person to repose trust and confidence in another. Maheras, 897 P.2d at 272.

39. See Haskell, supra note 18, at 48 & nn.83-84 (giving examples of relationships which courts have found to be confidential).

40. The term "confidential relationship" has different meanings in different contexts. For purposes of determining the existence of a constructive
The parent-child relationship is one in which there is frequently dependence: a child is dependent on a parent when the child is young and a parent is often dependent on a child when the parent is old. Nonetheless, courts are reluctant to categorize such relationships as confidential. For example, in one recent case there was ample evidence of dependence by the mother on her son, who handled all of her financial and personal affairs. The court, in refusing to find a confidential relationship, stated:

From our perspective, the only reasonable inference to be drawn from the evidence with regard to the question of dominance is that the defendant cared for his mother in an attempt to make her life easier at a time when she needed him most. Evidence of concern and care on the part of a child and the acceptance of that care by the parent should not be equated with subservience on the part of the parent or dominance on the part of the child.41

Courts are particularly reluctant to characterize a relationship as confidential in the situation where the court finds the disposition to that child to be “natural.”42 Presumably this is in silent recognition that to do so would raise an inference that a disposition to that child was procured through undue influence.

Courts are even more reluctant to characterize a relationship between a husband and a wife as confidential.43 Many courts have held that there is no presumption of a confidential relationship between a husband and wife even where there is evidence of a spouse using influence to compel the execution of trust, a confidential relationship typically involves those related by blood or marriage. GEORGE E. PALMER, IV THE LAW OF RESTITUTION § 19.3, at 112 & n.22 (1978).

41. Wilson v. Wehunt, 631 So. 2d 991, 995 (Ala. 1994). In this case, the evidence [was] undisputed that the defendant helped his mother write her checks and handle her affairs and arranged to have the deed prepared and her signature notarized. However, . . . evidence of this nature, without more, is simply not sufficient to justify a finding of subservience on the part of the parent, so as to create a legal presumption of undue influence.

Id. at 994.

42. See infra notes 59-60 and accompanying text (discussing how courts have determined what constitutes a "natural" disposition).

43. This seems particularly peculiar in light of the fact that a common feature of the traditional marital relationship is reliance on a spouse to act in one's best interest. See, for example, Estate of Grace, 395 U.S. 316, 318 (1969), in which the Court described a situation in which "[the wife] took no interest and no part in business affairs and relied upon her husband's judgment" and "[w]henever some formal action was required regarding property in her name, decedent would have the appropriate instrument prepared and she would execute it."
a will favorable to the spouse. Indeed, some courts have gone so far as to hold as a matter of law that there is no such thing as a confidential relationship between a husband and wife.

In states that recognize the possibility of a confidential relationship between spouses, courts generally limit this application to situations in which the spouse is a second spouse and the testator’s children from a prior marriage have been disinherited.

2. Confidant’s Role in the Execution of the Will

The second factor that courts examine in determining whether a will is the result of undue influence is whether the confidant played some role in the execution of the will. One of the strongest examples of such involvement is when a lawyer drafts a will of which he is a primary beneficiary. However,

44. See, e.g., Boggs v. Boggs, 87 N.W. 30, 42 (Neb. 1901) (stating that although confidential relations generally raise a strong suspicion of undue influence, “this is not true to the same extent of the relation of husband and wife, where the relation has subsisted for a long time, under circumstances which give rise to a very strong legitimate influence, and the disposition in question is not unjust or unnatural”); In re Detsch’s Estate, 229 P.2d 264, 266 (Or. 1951) (stating that “the influence of a... spouse to make a will in [his or her] favor, in the absence of a showing that it was improperly exercised, does not vitiate the will, even though there may be proof that such a provision would not have been made but for such importunity” and that “[t]he mere fact that a wife guides or even dominates her husband, or has acquired an ascendancy over him, does not render his will made in her favor invalid”) (quoting 68 C.J. Wills § 442, at 752).

45. Robert Whitman & David Hoopes, The Confidential Relationship in Will Contests, TRUSTS & ESTATES, Feb. 1985, at 53 (citing Knight’s Estate, 108 So. 2d 629, 631 (Fla. Dist. Ct. App. 1959)). The authors note that in justifying this restriction on the presumption of undue influence, some courts have found that influence arising between a husband and wife is always proper, going so far as to state that it would be “monstrous” to deny faithful spouses the right to express their desires in disposing of each other’s property. Id. at 54 (citing Estate of Robinson, 644 P.2d 420, 426 (Kan. 1982)).

46. See, e.g., Needels v. Roberts, 879 S.W.2d 550, 555 (Mo. Ct. App. 1994) (finding that a second wife used threats of divorce to unduly influence her husband into changing his will so as to disinherit his natural children in favor of his step-son).

47. See, e.g., Estate of Auen, 35 Cal. Rptr. 2d 557, 563 (Cal. Ct. App. 1994) (holding that a presumption of undue influence arises when an attorney, acting as such, participates in the making or execution of a will of which he is a beneficiary); Kirschbaum v. Dillon, 567 N.E.2d 1291, 1297 (Ohio 1991) (holding that naming as a beneficiary in a client’s will an attorney who is not related to the testator in blood or marriage creates a presumption of undue influence). Going one step further, California enacted a statute invalidating any bequest to a lawyer who drafts the particular will unless the lawyer is related to the testator by blood or marriage. CAL. PROB. CODE § 21350 (West
such direct involvement is not required to prove undue influence. Involvement is sufficient if the beneficiary directed the testator to the drafting lawyer, made the appointment for the testator, or even merely knew of the contents of the will.\textsuperscript{48} Indeed, some courts have dispensed with this requirement altogether if the drafting lawyer is found not to have been sufficiently diligent in questioning the motives of the testator.\textsuperscript{49}

Just as courts are reluctant to find a confidential relationship between family members,\textsuperscript{50} courts are similarly often reluctant to find that the participation requirement has been met

\textsuperscript{48} See, e.g., Smith v. Welch, 597 S.W.2d 593, 595 (Ark. 1980) (holding that the procurement of a will by a beneficiary created a rebuttable presumption of undue influence); \textit{In re} Estate of Larson, 394 N.W.2d 617, 619 (Minn. Ct. App. 1986) (finding undue influence when a beneficiary, the decedent's son, suggested that the will be changed and participated with lawyers in drawing up the new will); \textit{In re} Estate of Skrtic, 108 A.2d 750, 753 (Pa. 1954) (holding a will invalid when a beneficiary, the decedent's daughter and caretaker, procured a lawyer and directed the drafting of the will's terms); \textit{In re} Estate of Forde, No. 85-0724, 1986 WL 217312, at *4 (Wis. Ct. App. June 25, 1986) (finding undue influence when a beneficiary took the testator to an attorney and was present during the drafting of the will); \textit{Atkinson, supra} note 11, at 262 (stating that an attorney-beneficiary "who participates in procuring the will is in the same position as the actual draftsmen").

\textsuperscript{49} See, e.g., \textit{In re Moses' Will}, 227 So. 2d 829, 837 (Miss. 1969) (setting aside a will on the basis of undue influence when the testator's will left most of her estate to an attorney with whom she had a long-term personal relationship). Although the beneficiary played no role in the execution of the will, the court held that the testator did not receive "meaningful independent advice or counsel" because the drafting attorney's role had been "little more than that of a scrivener." \textit{Id.} at 834. As such, there was insufficient evidence to overcome the presumption of undue influence. This case may have been affected by the fact that the beneficiary was an attorney. In \textit{In re Henderson}, the New York Court of Appeals stated that even bequests to an attorney who did not draft the testator's will should be subject to special scrutiny "since the intensely personal nature of the attorney-client relationship . . . places attorneys in positions that are uniquely suited to exercising a powerful influence over their clients' decision." 605 N.E.2d 323, 327 (N.Y. 1992).

\textsuperscript{50} See \textit{supra} notes 40-46 and accompanying text (describing the reluctance of courts to label a relationship between family members as "confidential").
when family members are involved, in spite of the low standard of proof usually required for this element. Courts often view such involvement as natural and therefore characterize participation in the execution of the will as "'perfunctory physical activities' rather than active procurement."  

3. Testator’s Susceptibility to Undue Influence

It is often said that in order to sustain a claim for undue influence, there must be some proof that the testator was susceptible to it. A testator is considered to be susceptible if he is elderly, sick, or has mental problems. However, susceptibility to undue influence can also be shown by circumstantial

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51. Carter v. Carter, 526 So. 2d 141, 143 (Fla. Dist. Ct. App. 1988) (citations omitted). The Carter court described the sons’ involvement in the preparation of their mother’s will as “the acts of dutiful sons who helped their mother draw up her will and execute it” and noted that the mother “was aging and needed helpful information and even advice.” Id.

52. See, e.g., Bryan v. Norton, 265 S.E.2d 282, 284 (Ga. 1980) (stating that a showing that a testator acted freely and voluntarily, rather than under coercion from a beneficiary, in the making of a will rebuts a presumption of undue influence); Maurath v. Sickles 586 S.W.2d 723, 732 (Mo. Ct. App. 1979) (reversing the trial court on examination of the testatrix’s susceptibility to influence and finding that the evidence did not support a finding of weakness of mind or susceptibility to the influence of others); Lipper v. Weslow, 369 S.W.2d 698, 702 (Tex. Ct. App. 1963) (finding that the test for undue influence involves an examination of whether a testatrix acted of her own will as evidenced by her susceptibility to the control of another).

53. The standards for mental capacity for purposes of writing a will are generally very low. To make a will, the testator typically needs to know only that he is selecting the persons to receive his property, what his property is, who the natural objects of his bounty are, and what his duties are to such persons and to his actual devisees. See Giurbino v. Giurbino, 626 N.E.2d 1017, 1026 (Ohio Ct. App. 1993); see also ATKINSON, supra note 11, § 51 at 232 nn.1-4 (citing cases which held that an evaluation of the capacity of a testator was the ultimate task of a court judging the validity of a will regardless of the will’s contents). For an early statement of this concept, see Wise v. Foote, 81 Ky. 10, 15 (1885).

In contrast, to make a contract, the individual’s mental capacity must be such that the individual understands not only the nature of the contract, but the probable consequences as well. See, e.g., Mills v. Kopf, 31 Cal. Rptr. 80, 83 (Cal. Ct. App. 1963) (“The mental incapacity to avoid such a contract must amount to an inability to understand the nature of the contract and to appreciate its probable consequences.”); DiPietro v. DiPietro, 460 N.E.2d 657, 661 (Ohio Ct. App. 1983) (stating that it is the general rule that it takes more mental capacity to enter into a contract than it does to make a valid will). As such, the lower standard of mental capacity for wills theoretically allows transfers that are more arbitrary and capricious. See, e.g., Abel v. Dickinson, 467 S.W.2d 154, 155 (Ark. 1971) (stating that the “fact that a will is unjust, unreasonable or unnatural does not affect its validity”).
evidence. A will that shows the effects of undue influence through an "unnatural" bequest or gifts during life to a beneficiary suspected of exerting undue influence can also serve as proof of weakened intellect and susceptibility to undue influence. This ability to prove susceptibility through an unnatural will has the effect of eviscerating any independent meaning from this requirement.

4. Unnatural Disposition

The rhetoric of undue influence frequently involves statements that an unnatural will does not necessarily show that undue influence caused the will. In accordance with freedom of testation, it is said that "[t]he law does not constrain a testator to be just, or to recognize natural claims upon his bounty" and that "[s]o long as the will is his own and not another's, it must stand." That being said, the catalyst and strength of all undue influence cases is the perceived "unnaturalness" of the testamentary disposition.

When someone is unexpectedly disinherited from a will, it is not surprising that the first thought may be that of foul play. After all, it is easier to believe that one was disinherited due to


55. See, e.g., Estate of Auen, 35 Cal Rptr. 2d 557, 564-65 (Cal. Ct. App. 1994) (holding that inter vivos transfers of property, jewelry, and money were evidence that testator was susceptible to exploitation by her attorney and that undue influence was exerted in procuring a will by which the testator's attorney benefited).

56. See Abel, 467 S.W.2d at 155 ("The fact that a will is unjust, unreasonable or unnatural does not affect its validity."); ATKINSON, supra note 11, at 255 ("Undue influence is not established by the inequality of the provisions of the will."); BOWE & PARKER, supra note 23, § 15.8 ("The fact that a testator . . . makes a foolish, unnatural or unjust will does not necessarily show that undue influence caused the will.").


58. As one court explained it:

Where the provisions of a will are unjust, unreasonable, and unnatural, doing violence to the natural instincts of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.

the Svengali-like influence of another over the testator rather than as a reflection of the testator's true feelings. Thus, the decision to challenge a will based on undue influence is almost always the result of the heirs at law perceiving a will as "unnatural." The strength of the undue influence claim is also dependent on the perception of a disposition as "unnatural." It is extremely difficult to convince a court that a disposition that the court perceives as "natural" for the testator is the result of someone imposing their will on that of the testator. For example, in one case in which a son was named as the primary beneficiary of his mother's estate, the court, in refusing to set aside the will based on undue influence, noted that "the law simply does not presume undue influence in the absence of evidence of subservience on the part of the parent, especially when, as here, conveying the property to the child was such a natural thing for the parent to do."60

Thus, a critical question in the undue influence inquiry is what makes a disposition "natural." One might be tempted to posit that the determination of a "natural" disposition for a testator would involve a detailed factual inquiry into that person's life and his or her subjective feelings. Instead, what one frequently finds in the case law is a surprisingly straightforward and objective response to the question of what constitutes a "natural" disposition: a "natural" disposition is one which provides for a testator's heirs at law. As one court succinctly put it: "[T]he natural object of a will maker's bounty is one related to him/her by consanguinity."61 The status of the beneficiary, rather than the quality of the beneficiary's relationship to the testator, determines what is a natural disposition for purposes of the undue influence analysis. In determining status, courts have generally relied on the intestacy statutes as a model for

59. See Schoenblum, supra note 6, at 618 (suggesting that the prime motivation for will contests may not be financial, but rather that the contestants may be motivated by a deeper psychological or emotional need to contest).


naturalness. A recent case involving a helpful neighbor who was also a distant relative of the testator by marriage illustrates this approach. The neighbor had a long-term personal relationship with the testator and had been provided for in an earlier will, but was later effectively disinherited. The court described the neighbor solely in terms of his consanguinity to the testator and upheld the subsequent will, noting that “[a] will leaving the bulk of [testator’s] property to first cousins rather than to a distant relative by marriage is not an unnatural disposition of property as claimed by [the neighbor] even if it is not what others would have expected.” In sum, connections through affinity are generally considered only if the blood relatives have behaved in such a way as to fall from their preferred status. Thus, reliance on people outside of the formal family structure is only countenanced when the family has done something to “deserve” being disinherited.

Courts sometimes look to a prior will, if one exists, as evidence of the naturalness of the disposition. However, the ef-

62. Based on this model, spouses and blood relatives are at the top of the hierarchy for those who are considered to be the natural objects of a testator’s bounty. Thereafter it is siblings, and then more distant relatives, such as nieces and nephews and cousins.


64. Id. In Green v. Holland, 657 S.W.2d 572 (Ark. Ct. App. 1983), the issue of status was applied in a notable way. In determining that it was natural for the testatrix to prefer one nephew over other nephews and nieces the court noted that although she had other kinsmen including nieces and nephews, her relationship with Cliff Holland (the named beneficiary) was much closer than with the others. Cliff Holland and his deceased brother, Jack, were the children of one of her sisters. Their father was the brother of testatrix’s second husband. For this reason they were referred to as “double nephews.” Id. at 576. The implication of this seems to be that in determining status, a “double nephew” trumps a “single nephew.”

65. Morse v. Volz, 808 S.W.2d 424, 433 (Mo. Ct. App. 1991). In this case, the testator’s adult son had disclaimed kinship as a result of his widower father’s remarriage to a long-standing acquaintance. The new wife had driven the testator to his attorney’s office immediately after the wedding ceremony in order to execute a new will which devised everything to her and her children from a previous marriage in the event that she predeceased the testator. The Missouri Court of Appeals held the will to be valid, questioning what disposition was “owed by a father to a son who has disclaimed their kinship.” Id.

66. One court stated:

A prior will, executed when the testator’s testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that
fect of this rarely differs from the above standard of naturalness. The reason for this is that if a testator provided for his family in an earlier will and then provided for a person with whom he had a confidential relationship, then the former will frequently serves as evidence of the unnaturalness of the subsequent disposition. However, if instead the prior will provided for a disposition to someone other than a family member (i.e., a disposition which is perceived by the court as "unnatural"), then rather than being taken as evidence of the naturalness of the subsequent disposition, courts tend instead to view the prior will as evidence of a testator's susceptibility to undue influence.

II. FROM THE ANNALS OF UNDUE INFLUENCE: THE KAUFMANN CASE

In this Part, I test the dominant paradigm that the undue influence doctrine acts to preserve freedom of testation by examining the doctrine through the lens of a particular undue influence case from the 1960s: In re Estate of Kaufmann. In this case the testator, Robert Kaufmann, left the majority of his estate to his long time live-in companion, effectively disinheriting his brothers and nephews. Kaufmann wrote a letter to his family explaining his reason for the bequest. Despite ample evidence that the testator intended to make the bequest that he did, three courts set aside his will based on undue influence. Unique aspects of this case make it particularly useful for testing the dominant paradigm. This is one of the few cases in which the testator's view of the relationship and his reasons for the bequest are presented in his own words. Moreover, it is particularly illuminating to look at a case from the past because it is easier to see how such a case reflects the societal values of its times. This is particularly true when it involves

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the testator (and grantor) had a constant and abiding scheme for the distribution of his property.

In re Estate of Camin, 323 N.W.2d 827, 836 (Neb. 1982) (quoting In re Estate of Bose, 285 N.W. 319, 329 (1939)).

67. See Needels v. Roberts, 879 S.W.2d 550, 555 (Mo. Ct. App. 1994) (emphasizing a change from an earlier will that disinherit the testator's children); In re Will of Kauffman, 247 N.Y.S.2d 664, 668 (App. Div. 1964) (noting that an earlier will left the bulk of the testator's estate to his relatives), aff'd, 205 N.E. 2d 864 (N.Y. 1965).

68. See Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 507 (Ark. App. 1987) (stating that evidence of an unnatural disposition by a testator can be used to show that the testator is susceptible to undue influence).

69. For a discussion of our inability to see many forms of discrimination,
an issue about which views have changed, namely, what makes a family.\textsuperscript{70}

\textbf{A. CONFLICTING NARRATIVES}

The story of Robert Kaufmann is told by two voices: Robert Kaufmann's own, countered by that of the court.\textsuperscript{71}

1. Background

Robert Kaufmann was a millionaire by birth\textsuperscript{72} and an artist by temperament. Robert had two brothers, Joel and Aron.\textsuperscript{73} Aron was disabled and physically unable to participate in the operation of the family business, and Robert had very little interest in business matters.\textsuperscript{74} Therefore, after the death of Robert's parents, the family businesses were run primarily by Joel. Until the age of thirty-four, Robert lived with his brother Joel and Joel's two sons, Richard and Lee, in Washington, D.C.\textsuperscript{75}

In 1948 when Robert was thirty-four, he took up painting and moved to New York City.\textsuperscript{76} Shortly thereafter he met Walter Weiss.\textsuperscript{77} Robert and Walter's relationship was both professional and personal. Walter was initially employed to be Rob-

\textsuperscript{70} Increased recognition of same-sex couples constituting a family is reflected in part in judicial approvals of second parent adoptions by lesbian partners. \textit{See, e.g.,} Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993) (allowing the lesbian companion of a natural mother to become a co-parent by adoption).

\textsuperscript{71} \textit{See, e.g.,} Kim Lane Scheppele, Forward: Telling Stories, Legal Storytelling, 87 Mich. L. Rev. 2073, 2074 (1989) (noting that the importance of looking at the law from different perspectives is reflected in the legal scholarship on narratives).

\textsuperscript{72} He was born in 1914 into a family that had a number of successful family businesses including Kaufmann Furniture and Kay Jewelry Stores. \textit{In re Will of Kaufmann}, 247 N.Y.S.2d 664, 673 (App. Div. 1964), \textit{aff'd}, 205 N.E.2d 864 (N.Y. 1965).

\textsuperscript{73} \textit{Id.} at 666.

\textsuperscript{74} \textit{Id.} at 669. "The record shows beyond dispute that prior to 1948 Robert had no financial authority and had assumed none. His affairs were in the hands of his brother Joel, whose holdings and financial interests were the same as Robert's." \textit{Id.} at 678.

\textsuperscript{75} \textit{Id.} at 666.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{In re Will of Kaufmann}, 247 N.Y.S.2d 664, 666 (App. Div. 1964), \textit{aff'd}, 205 N.E.2d 864 (N.Y. 1965). Weiss was an attorney, but was not practicing law at the time he met Robert.
Robert's financial advisor at a salary of $10,000 a year. Robert gave Walter a power of signature on all of Robert's accounts and a general power of attorney including unrestricted access to Robert's safe deposit box. Walter continued as Robert's financial advisor until the time of Robert's death in 1959. During those years, Robert (as advised by Walter) and his brother Joel frequently argued over the management of Robert's investments.

Robert and Walter's relationship was primarily a personal one. In 1949, Walter moved into Robert's apartment where they lived together for ten years until Robert's death. Robert and Walter shared interests in art and literature and traveled together extensively. For many years of their relationship Robert gave Walter annual gifts of $3,000 (the maximum amount which could be given free of gift tax in those years). Robert also gave Walter the power to make decisions in the event of Robert's illness or death. In the event that Robert was incapacitated by reason of mental or physical disability, Walter had the power to consent on Robert's behalf to the performance of any operation he deemed necessary after consultation with Robert's physicians. As Robert stated in this document, Weiss was to act "as though he were my nearest relative." In the event of Robert's death, Walter had exclusive power over Robert's corporeal remains and the authority to make all funeral arrangements.

Robert executed a series of wills over the course of his relationship with Walter. In 1950, Robert's will provided for most of his property to go to his brothers, Joel and Aron, and to

78. Id. To enable Walter to manage Robert's financial affairs, the books and records of Robert's family investments were moved from Washington, where they had been kept in the Kaufmann family office, to New York, where they were managed by Walter. Id. at 667.
79. Id. at 669
80. Id. at 686.
81. Id. at 687-88.
82. In re Will of Kaufmann, 247 N.Y.S.2d 664, 673 (App. Div. 1964), aff'd, 205 N.E.2d 864 (N.Y. 1965). This was a health care proxy which is now recognized as a standard component to any estate plan. As evidence of the changing times, in this 1964 opinion the court referred to this health care proxy as a "most unusual document." Id.
83. Id.
84. Id. The court appeared particularly troubled by this in that it noted that "the complete, almost sacrificial surrender of his corporeal remains to Weiss is most unusual." Id.
Joel's children, Richard and Lee.\textsuperscript{85} From 1951 to 1959 Robert revised his will five times. Each time he gave Walter a larger share of his estate. In his final will, executed in June 1958, one year before his death, Robert gave his interest in Kaufmann Furniture to his two nephews and left the remainder of his estate to Walter.\textsuperscript{86}

2. Robert Kaufmann's View of His Relationship with Walter Weiss

Determining whether a will is the result of undue influence requires an inquiry into the state of mind of the testator. As such, the difficulty with defending against charges of undue influence lies in the fact that the best evidence, the testimony of the testator, is not available at the time the will is being probated.\textsuperscript{87} However, the Kaufmann case is unusual in that Robert Kaufmann's statement about his view of his relationship with Walter Weiss was presented in part through a letter that Robert wrote to his family at the time that he executed his 1951 will. This letter was kept with all of the wills that Robert Kaufmann executed until the time of his death. Robert wrote that the purpose of this letter was to provide an explanation for the disposition of a substantial portion of his estate to a man who was "not a member of my family."\textsuperscript{88} The letter describes how when Robert first met Walter, Robert's outlook was then "approaching the nadir"; he was a "frustrated time-wasting little boy"; he was "terribly unhappy, highly emotional and filled to the brim with a grandly variegated group of fears, guilt and assorted complexes."\textsuperscript{89} It expresses Robert's appreciation for

\textsuperscript{85} Id. at 687.
\textsuperscript{86} Id. at 677.
\textsuperscript{87} Three states have adopted ante-mortem probate statutes in an attempt to address this problem. See ARK. CODE ANN. § 28-40-202 (Michie 1987); N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1991); OHIO REV. CODE ANN. § 2107.081 (Anderson 1987). This is a procedure whereby a testator can have his will probated during his life to ensure that the will was properly executed, that the testator had the requisite mental capacity, and that the will was free from fraud and undue influence. The ante-mortem probate procedure has been criticized by scholars, see, e.g., Fellows, supra note 13, at 1113 (arguing that the undue influence doctrine protects testators from deception and duress), and was not adopted by the Uniform Probate Code. It appears unlikely that it will be widely adopted.
\textsuperscript{89} Id.
meeting Walter, who encouraged him to submit to psycho-
analysis. The letter goes on to state:

Walter gave me the courage to start something which slowly but
eventually permitted me to supply for myself everything my life had
heretofore lacked: an outlet for my long-latent but strong creative
ability in painting * * * a balanced, healthy sex life which before had
been spotty, furtive and destructive; an ability to reorientate myself
to actual life and to face it calmly and realistically. All of this adds
up to Peace of Mind—and what a delight, what a relief after so many
wasted, dark, groping, fumbling immature years to be reborn and be-
come adult!

I am eternally grateful to my dearest friend — best pal, Walter A.
Weiss. What could be more wonderful than a fruitful, contented life
and who more deserving of gratitude now, in the form of an inheri-
tance, than the person who helped most in securing that life? I can-
not believe my family could be anything else but glad and happy for
my own comfortable self-determination and contentment and equally
grateful to the friend who made it possible.

Love to you all,
Bob.91

3. The Court’s View of Robert Kaufmann’s Relationship with
Walter Weiss

The court was considerably less impressed with Walter
Weiss than Robert Kaufmann appeared to be. The court’s
opinion is replete with statements that make it clear the court
viewed Walter Weiss as an opportunist who took advantage of
a naive and innocent Robert Kaufmann. One subtle way that
the court expressed its view was in its nomenclature.
Throughout its opinion the court makes Robert Kaufmann ap-
pear child-like and innocent by referring to him as “Robert.”
This contrasts sharply with the court’s reference to Walter
Weiss as “Weiss.” More directly, the court characterizes the
relationship as one in which Walter tricked Robert into believ-
ing that he was independent while all the time encouraging his
dependence on Walter:

Weiss and Robert lived together from 1949 to the date of Robert’s
death. The evidence enabled the jury to find that Robert became in-
creasingly dependent on Weiss socially and businesswise. Moreover,
it supports the view that this dependence was encouraged and that
Weiss took affirmative steps to insulate Robert from his family and
persons he sought to cultivate.

90. Id.
91. Id.
Robert gave Weiss his unbounded confidence and trust. Weiss exploited Robert, induced him to transfer to him the stewardship formerly exercised by Joel, increased Robert's need for dependency, prevented and curtailed associations which threatened his absolute control of Robert and alienated him from his family.\(^{92}\)

The court dismissed Robert's letter to his family, saying that "the emotional base reflected in the letter of June 13, 1951 is gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."\(^{93}\) The court also criticized the letter as "not based on reality"\(^{94}\) and proceeded to reinterpret Robert's life, refuting each point that Robert made in the letter:

Robert had become aware of his desire to paint, had received instruction and had started painting prior to his meeting with Weiss. . . . Weiss had nothing to do with Robert's creative ability in painting. In attributing to Weiss the "start [of] something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting," the letter is not in accord with the record. Weiss in his pre-trial statement acknowledged he did not know why Robert attributed to him his painting career.

The letter refers to the "courage" acquired from Weiss "to supply for myself * * * a balanced, healthy sex life which before had been spotty, furtive and destructive." The implication is that Weiss in some fashion was identified with Robert's sex life. Weiss' pre-trial statement emphatically denied it.

To the extent that the letter implies or suggests a marked improvement of a previously disoriented and fearful personality, it is again at odds with reality as will appear.\(^{95}\)

Finally, even accepting the letter from Robert as "true," the court noted that the "services" provided by Walter did not warrant such a large bequest.\(^{96}\)

The court viewed the will as:

the end result of an unnatural, insidious influence operating on a weak-willed, trusting, inexperienced Robert whose natural warm family attachment had been attenuated by false accusations against Joel, subtle flattery suggesting an independence he had not realized and which, in fact, Weiss had stultified, and planting in Robert's

\(^{92}\) Id. at 679.

\(^{93}\) Id. at 674.


\(^{95}\) Id.

\(^{96}\) Id. "Assuming, however, the content of the letter, it completely fails to explain the extent of the testamentary gift to Weiss tantamount to over a half million dollars." Id.
mind the conviction that Joel and other members of the family were resentful of and obstructing his drive for independence.97

In short, the court found influence in the most significant sense: Walter's influence was so insidious that Robert didn't even recognize it.

B. THE PARADOX OF KAUFMANN

The decision in the Kaufmann case to set aside the will based on undue influence seems to be in contradiction with freedom of testation—the very principle that the undue influence doctrine purports to uphold. Yet, three courts determined that this will was the result of undue influence.

It would be easy to dismiss Kaufmann as just another example of judicial homophobia from an era in which courts and society at large were openly prejudiced against homosexual relationships.98 However, to categorize this case as an aberration, a misapplication of the undue influence doctrine, is to miss the more significant lesson that this case offers. What is notable about the Kaufmann decision is that it rests on firm ground under the standard doctrinal undue influence analysis. Changing mores have given us the opportunity to see this doctrine for what it is: an imposition of societal norms as to appropriate testamentary behavior.

Under the testamentary freedom model, the inquiry for the court was purportedly whether the will accurately reflected the wishes of the testator or of someone else. This inquiry is structured by the factors of the undue influence doctrine,99 all of which existed in Kaufmann.

By holding a power of attorney and managing all of Robert's personal affairs, Walter easily fit the mold as the dominant party in either a de jure or a de facto confidential relationship.100 The establishment of a confidential relationship in

97. Id. at 684.

98. See Sherman, supra note 14, at 245-48 (suggesting that homosexual "lover-legatee[s]" face greater obstacles at probate than their heterosexual counterparts). Legal history is replete with unjust decisions that operate against members of disfavored groups, and it is not surprising that such biases should extend into the law of wills as well.

99. Haskell, supra note 18, at 44 (outlining the undue influence factors); see supra notes 29-68 and accompanying text (describing how courts have interpreted these factors).

100. Numerous cases have held that the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between the parties. See, e.g., Estate of Lakatosh, 656 A.2d
UNDEINFLUENCE and of itself goes a long way toward proving undue influence since many courts have taken the position that the existence of a confidential relationship combined with a benefit to the dominant party in the relationship is enough to raise the presumption of undue influence.\(^{101}\) However, the other factors were also easily established in the \textit{Kaufmann} case.

There was abundant evidence that Walter played a role in the preparation and execution of the will.\(^{102}\) Robert was also easily portrayed as a person who was susceptible to undue influence, as the court described him as "weak-willed, trusting, and inexperienced."\(^{103}\) Robert had had little interest in business and had been taken care of by his brother Joel.\(^{104}\) The

\(1378, 1383\) (Pa. Super. Ct. 1995) (finding that an elderly woman became dependent on a person who had become her "advisor, counselor, and confidant"). The court here observed that "no clearer indication of a confidential relationship [can] exist than giving another person the power of attorney over one's entire life's savings." \textit{Id.} (quoting \textit{In re Estate of Bankovich}, 496 A.2d 1227, 1229 (Pa. Super. Ct. 1985)). The court further noted that "[t]his is particularly true . . . when the alleged donee is shown to have spent a great deal of time with the decedent or assisted in the decedent's care." \textit{Id.} (quoting \textit{Hera v. McCormick}, 625 A.2d 682, 691 (Pa. Super. Ct. 1993)). In addition, a confidential relationship may have resulted as a matter of law because Walter was Robert's financial advisor.

A de facto confidential relationship also existed in that, as the court noted, "the evidence enabled the jury to find that Robert became increasingly dependent on Weiss socially and businesswise." \textit{In re Will of Kaufmann}, 247 N.Y.S.2d 664, 679 (App. Div. 1964), \textit{aff'd}, 205 N.E.2d 864 (N.Y. 1965). Walter handled all of Robert's financial affairs. He kept his books and records, \textit{id.} at 667, had access to all of his bank accounts and safe deposit box, \textit{id.} at 670, and advised him as to his choice of lawyers and doctors, \textit{id.} Walter also handled all of their living arrangements. He furnished their house, employed domestic help, maintained the household and handled all mail and incoming calls. \textit{Id.} at 667.

\(101.\) \textit{See supra} note 32 and accompanying text (discussing a case in which the court presumed undue influence when the plaintiff established the existence of a confidential relationship and the dominant party received an advantage).

\(102.\) Walter was responsible for displacing the attorneys who drafted Robert's earlier will, \textit{Kaufmann}, 247 N.Y.S.2d at 679, he left Robert notes telling him that he needed to revise his will, \textit{id.} at 673, he introduced Robert to the new attorney who eventually drafted the will that named Walter as the beneficiary, \textit{id.} at 679, and he sent the attorney copies of Robert's old wills with a letter stating that Robert wanted his will changed, \textit{id.} at 674. Moreover, the fact that the will was prepared by a prominent Wall Street law firm with reputable, competent attorneys did not preclude a finding of undue influence. \textit{Id.} at 684. As the court noted, "far more extensive interposition by independent counsel has been held to be conclusive on the existence of undue influence." \textit{Id.} (citing \textit{Smith v. Keller}, 98 N.E. 214, 215 (N.Y. 1912)).

\(103.\) \textit{Id.}

\(104.\) \textit{Id.} at 679.
court’s theory of the case was that Robert tended to be dependent on others and that he merely switched the object of his dependence from his brother Joel to Walter. The fact that Robert had made many gifts to Walter during his life served as further evidence of his susceptibility. Finally, applying the doctrinal theory of “naturalness,” the court easily determined that Robert’s bequest to Walter was “unnatural.” Comparing Walter to Joel and his family under the standards of formal status, Joel and his family were the clear winners. The fact that four prior wills provided for Walter and that each succeeding will gave Walter a larger share was used as evidence of Walter’s influence and Robert’s susceptibility to undue influence. Therefore, it was considered irrelevant for purposes of determining what would constitute a natural disposition for Robert.

105. Id. at 681. Professor Shaffer concurs with this analysis and explains it in terms of the psychological concept of transference. SHAFFER, supra note 17, at 242-46.

106. The standard of formal status explains the court’s conclusion that “the 1950 will [the one providing for his brothers and nephews] reflects a natural testamentary disposition in the light of the nature and extent of Robert’s estate, his family and his known relations to and with others.” Kaufmann, 247 N.Y.S.2d at 668. Evidence was presented in the case that Robert’s feelings changed towards his brother Joel between the time of the 1950 will and the time of his later wills; however, this was merely interpreted as further evidence of the undue influence exercised by Walter. As the court stated, “The jury could have found, in addition, that Weiss conveyed to Robert false accusations as to Joel’s integrity and mismanagement of the family enterprises. If the accusations were intended to and did cause Robert to disinherit members of his family in whole or in part, Weiss exercised undue influence.” Id. at 674. It is not at all apparent that Weiss’s accusations concerning Joel were false. In addition to their ownership interest in the family chain of jewelry stores, Joel and Robert each owned stock in the Fairfax Company, which was the purchasing agent for the jewelry stores. At some time after December 1953, Fairfax merged with the jewelry stores. Weiss had opposed the merger based on the ratio at which stock in the new Fairfax corporation would be exchanged for stock of the old Fairfax company. Weiss strongly advised Robert against the merger, which Robert conveyed to Joel in a letter. Id. at 673. Moreover, there was evidence that Joel received a higher price per share than Robert was initially offered. Id. at 689. As a minority holder, Robert was entitled to a statutory appraisal after the merger was completed. After litigation Robert ultimately received $60,000 more than he was originally offered for his shares. Id. at 673-74. The court largely dismissed the significance of this matter by noting that this gain was “considerably less” than the $120,000 loss incurred in another investment project that Weiss had promoted to Robert. Id. at 680.

107. Id. at 683-85.
III. UNDERSTANDING THE PARADOX OF THE UNDUE INFLUENCE DOCTRINE: THE CONFIDENTIAL RELATIONSHIP/NATURAL BEQUEST DICHOTOMY

The analysis of the *Kaufmann* case in Part II illustrates a paradox in the undue influence doctrine. The doctrine purports, and in many cases acts, to protect an individual's freedom of testation by not admitting wills that represent the wishes of someone other than the testator. Yet, as illustrated in *Kaufmann*, the doctrine can also deny freedom of testation for some individuals irrespective of the existence of substantial evidence that their will represented their true wishes. This is paradoxical because both results occur from the correct application of the established doctrinal standards.

This paradox is the result of a misfit between the standard for proving undue influence and its purported purpose of protecting freedom of testation. As *Kaufmann* illustrates, the standard is over-inclusive for purposes of determining the existence of undue influence in that all of the factors can be present in the situation where a will reflects the true wishes of a testator. Moreover, the standard is also under-inclusive in that the factors may be absent in the situation where the will actually represents the wishes of someone other than the testator. For example, consider the situation in which an aged testator has two children—one who is well-off financially with a secure career and the other who has no job and a child to support. The parent wants to give the bulk of her estate to the child with the greater financial need. However, the other child exerts pressure on the parent to provide for both children equally. Responding to the pressure, the parent executes the will benefiting both children equally (all the while saying to herself, "This is not my wish but I must do it"). Regardless of the fact that the will does not reflect the parent’s true wishes, it will not be set aside. The perceived "naturalness" of the disposition combined with the reluctance of courts to find a confidential relationship among family members will prevent a finding of undue influence.

Part III explores how the misfit between the standard for proving undue influence and the stated purpose of the doctrine of preserving freedom of testation is a result of the underlying presumption behind the application of the undue influence doctrine: the confidential relationship/natural bequest dichotomy. I suggest that the presumptive power of this dichotomy is so
strong that it drives the undue influence doctrine, regardless of
evidence of testamentary intent.

A. THE EXISTENCE OF THE DICHOTOMY

The confidential relationship/natural bequest dichotomy provides the underlying structure to the undue influence fac-
tors. That is, if there is a confidential relationship and the
confidant receives a benefit under the will, that raises the pre-
sumption that the will is the result of undue influence. On
the other hand, if the will represents a "natural" bequest—
traditionally meaning one in which all or most of the estate is
given to the testator's spouse or blood relatives—that generally
serves as overwhelming evidence that there was no undue in-
fluence.

The dichotomy is also reflected in courts' interpretation of
the term "confidential relationship." Courts are reluctant to
find a confidential relationship among spouses and blood rel-
atives. As discussed above, many courts take the position that
as a matter of law, there is no such thing as a confidential re-
lationship between a husband and a wife. For those states
that do recognize the possibility of a confidential relationship
between a husband and a wife, the application of the rule is
generally limited to second marriages where children from the
first marriage are disinherited. Moreover, in the spousal
situation, greater proof of undue influence is required because
of courts' determination that a person "naturally" has influence
over his or her spouse. In cases involving other blood rel-
atives, courts are reluctant to categorize the relationship be-
tween the testator and the beneficiary as a confidential rela-
tionship (thus raising the presumption of undue influence) if

108. See supra notes 30-31 and accompanying text (describing the ele-
ments that create a presumption of undue influence).
109. See supra notes 40-46 and accompanying text (describing the reluc-
tance of courts to recognize confidential relationships among family mem-
bers).
110. See supra note 46 and accompanying text (describing one of the few
cases in which a spouse was found to have exerted undue influence). Pres-
umably this is allowed due to a sense that it is "unnatural" to disinherit one's
children, even in the event of remarriage.
111. See HASKELL, supra note 18, at 45 (noting that undue influence often
reflects a "sense of offense" at outsiders who are disinheriting family mem-
bers).
the disposition to the dominant party is perceived of as "natural."\textsuperscript{112}

This failure to find a confidential relationship in the context of the family is not because family relationships lack the characteristics of dependence and reliance—indeed it is these very characteristics that are the hallmark of the family relationship.\textsuperscript{113} Rather, this systematic exclusion of families from the confidential relationship category can be understood as a result of an unconscious recognition of the problematic nature of the confidential relationship/natural bequest dichotomy.

What are the characteristics presumed to be associated with each of these categories such that they are treated as being in a dichotomous relationship? The presumptive characteristics can be understood in terms of two related but separate categories: the dependability of the relationships and the appropriate ways of recognizing them. In particular, the unstated assumptions of the undue influence doctrine as expressed in the dichotomy are: (1) people can depend on spouses and blood relatives to look out for their best interests; (2) non-family members can generally not be depended on because they will act selfishly; (3) people want to leave the bulk of their property to spouses and blood relatives (regardless of the level of services provided by the members of the family); and (4) people want to benefit non-family members based on a contract model (with bequests relative to the value of the services provided by the non-family member).

The \textit{Kaufmann} case illustrates how these presumptions operate in the context of the undue influence analysis. The court described Robert's relationships with both his brother Joel and with Walter Weiss in terms of Robert's role of depend-

\textsuperscript{112} See, e.g., Wilson v. Wehunt, 631 So. 2d 991, 995 (Ala. 1994) (holding that the trial court did not prove that the son unduly influenced the testator); \textit{supra} text accompanying note 42 (noting that courts are reluctant to characterize a parent-child relationship as confidential if the disposition to the child would be "natural").

\textsuperscript{113} The substantive similarity between confidential relationships and family relationships was presented with unusual candor in a recent case in which the court, in rejecting the will based on undue influence, described the beneficiary as "a very skillful manipulator of emotionally immature, needy, dependent women who were looking for someone to control their every action and who had not found that need fulfilled by the husband or father in their lives." Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 508 (Ark. Ct. App. 1987).
ence and reliance in the relationships. Indeed, it was the court's theory of the case that Robert merely switched the object of his dependency from his brother Joel to Walter Weiss. However, where the dependence on Joel was described as being a "natural warm family attachment," the dependence on Walter Weiss was described as "unnatural" and "insidious." The court interpreted Robert's explicit statement that Walter was to be treated "as though he [Weiss] were my nearest relative" as merely further evidence of the unnaturalness of Walter's influence. The court was so locked in to the confidential relationship/natural bequest dichotomy that it was unable to accept that to Robert Kaufmann, Walter Weiss was family.

The notion that it is "natural" to leave the bulk of one's property to blood relatives, whereas non-family members should be compensated on a contract model relative to the value of their services, is also well illustrated in Kaufmann. Robert Kaufmann's 1950 will divided the bulk of his estate into four parts, giving three of the four parts to Joel's family. Even though at the time of the bequest Robert was living with, and entirely dependent on, Joel for management of his financial affairs, the court did not use the term "confidential relationship" (which, in conjunction with the bequest, could have resulted in a presumption of undue influence). Instead the court described this as a "natural testamentary disposition in the light of the nature and extent of Robert's estate, his family and his known relations to and with others." The court was able to recognize the relationship between dependence and bequests as natural in the context of the family.

114. With respect to Joel, the court noted that "unquestionably Robert was dependent on Joel as to matters of investments and management of his various interests." In re Will of Kaufmann 247 N.Y.S.2d 664, 678 (App. Div. 1964), aff'd, 205 N.E.2d 864 (N.Y. 1965). Similarly, the court noted that "Robert gave Weiss his unbounded confidence and trust. Weiss . . . induced [Robert] to transfer to him the stewardship formerly exercised by Joel, increas[ing] Robert's need for dependency . . . ." Id. at 679.

115. Id. at 684.
116. Id. at 681.
117. Id. at 682.
118. Id. at 673.

119. The will left one part to Joel and one part to each of Joel's two children. Id. at 667. The remaining part was left to Robert's other brother, Aron. Id.

This contrasts sharply with the court's approach to the bequest to Walter Weiss under Robert Kaufmann's final will, when the court applied a contract model to Robert's relationship with Walter. After reviewing Robert's letter explaining the bequest to Walter, the court noted that even if the letter to Robert's family explaining the reason for his bequest to Walter was "true," Walter's "services" did not merit such a large bequest. Under the court's view, since Walter was not a family member, Robert, left to his own devices (i.e., without the undue influence), would have compensated Walter under the contract model.

These assumptions also operate in the context of the more traditional undue influence case. For example, one typical undue influence fact pattern involves the helpful neighbor who becomes involved with the aged testator late in the testator's life. Typically in this situation the neighbor begins by doing odd jobs around the house and eventually becomes very involved in the testator's life—shopping, cooking, managing finances, and sometimes even feeding and providing other types of basic home nursing care. If the testator leaves everything

121. See id. at 672 (noting that the letter "completely fails to explain the extent of the testamentary gift to Weiss tantamount to over a half million dollars").

122. Id. For a discussion of the limitations of applying the contract model to personal relationships, see Grace G. Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. REV. 1125, 1161-67 (1981).

123. See, e.g., Estate of Lakatosh, 656 A.2d 1378, 1381 (Pa. Super. Ct. 1995) (describing how an isolated elderly woman gave power of attorney to a man who performed odd jobs for her). A similar situation involved the estate of Pearl Rose of West Warwick, Rhode Island. Rose died in 1989 at the age of 86. She was a widow with no children. Her will made a number of specific bequests and left "[a]ll the rest . . . to Lewis Everett Peck." The "rest" amounted to about $20 million. Peck, who was 62 at the time, claims to have known Rose since he was 10 years old. Both were active in town politics. Peck claimed that he and Rose had made an oral agreement over a series of years beginning in 1978. Under the agreement, Peck was to care for Rose if she became ill; in return, she would leave him the bulk of her estate. Rose executed the will that was submitted to probate in 1980, though it would be 1985 before Peck actually began to care for her. In 1986, Rose moved into Peck's house, where Peck and his wife cared for Rose until her death. Rose's family (which had been explicitly excluded in the will) told a different story, claiming that Rose's mental state began to deteriorate in 1968 and that she had suffered delusions for many years (though she was never hospitalized for anything but physical ailments). The family noted that despite Rose's wealth, her home had no heat, electricity or bathrooms. Various relatives claimed that dogs, goats and livestock had free range of the house, that Rose ignored personal hygiene and that portions of the home were in collapse. Other relatives claimed that Peck had not allowed them to contact Rose while she was
to the neighbor, disinheriting the family, the family will typically bring an undue influence case. These cases will frequently be successful due to the acceptance of the unstated undue influence assumptions. Because the neighbor is not a relative, there is suspicion as to motives—why is he all of a sudden doing this? It must be for the money (blood relatives act selflessly, but strangers act selfishly). The suspicions are confirmed if the testator leaves the bulk of her estate to the neighbor because of the assumptions that the old woman would not disinherit her family of her own free will unless they had done something to "deserve" disinheritance, and any bequest to the neighbor would most naturally be based on the value of his services.

B. CHALLENGING THE DICHOTOMY

The confidential relationship/natural bequest dichotomy can be understood in terms of the larger context of the market/family dichotomy discussed by Frances Olsen in her article The Family and the Market: A Study of Ideology and Legal Reform. She describes the market/family dichotomy as a "structure of consciousness . . . a shared vision of the social universe that underlies a society's culture and also shapes the society's view of what social relationships are 'natural' and, therefore, what social reforms are possible." According to Professor Olsen, the marketplace and the family have been seen to exist in radical opposition to each other:

The marketplace was considered competitive, the family cooperative. The marketplace was the arena in which individuals were supposed to be most free to pursue their own interests without being responsible for the effects of their behavior on others. Indeed, an important tenet of liberal ideology was that self-interested behavior in the marketplace not only was acceptable, but also benefited society in general. The marketplace was animated by an individualist ethic; to act selflessly was considered foolish as well as unnecessary.

In contrast the family was based on the ethic of altruism. Marriage was seen as a decision to share a life together, and the common goals of family life were supposed to supersede the egoistic goals of individual members of the family. Neither husband nor wife was ex-


125. Id. at 1498.
pected to pursue selfish interests over interests of the other. Sharing and self-sacrifice were considered appropriate family behavior.\textsuperscript{126}

Although Professor Olsen did not discuss this dichotomy in the context of wills law, the market/family dichotomy provides a context for the undue influence assumptions. The dichotomy between confidential relationships and natural bequests makes sense in a structure of consciousness in which the family is perceived to be governed by an ethic of altruism, and relationships outside the family are seen to be governed by an individualist ethic.

Courts have interpreted natural bequests to be those bequests that are made to the testator's spouse and blood relatives.\textsuperscript{127} In the context of the market/family dichotomy, a bequest to family can be understood as natural because family can be trusted to always act in the testator's best interest (because this interest is governed by an ethic of altruism).

Confidential relationships, on the other hand, can be understood as relationships of the marketplace. The de jure confidential relationships—lawyer-client, conservator-ward, trustee-beneficiary, doctor-patient, nurse companion-patient, and pastor-parishioner—all occur in the marketplace. De facto confidential relationships are characterized as relationships of the marketplace by the undue influence factors which effectively exclude family relationships from this category. In the context of the market/family dichotomy, bequests to people in a confidential relationship can be understood as problematic since the marketplace is a place where people act selfishly. If a person, governed by an individualistic ethic, nonetheless performs services for someone else, then it is appropriate to compensate such services on a contract model basis, but a gratuitous transfer in this context seems inappropriate.

\textsuperscript{126} Id. at 1520-21. The continuing prevalence of this view is illustrated by a recent California case in which the court held that a contract between a husband and wife whereby the husband promised to transfer property to his wife in exchange for her taking care of him at home after he suffered a stroke was invalid for lack of consideration since the wife already owed her husband such care because of her duty of support. Borelli v. Brusseau, 12 Cal. App. 4th 647, 654 (1993). The dissent noted that to contend in 1993 that such a contract is without consideration means that if Mrs. Clinton becomes ill, President Clinton "must drop everything and personally care for her." Id. at 660.

\textsuperscript{127} See supra notes 56-58 and accompanying text (noting that courts are more likely to view bequests to family members as "natural").
The market/family structure of consciousness provides justification for the undue influence doctrine assumptions on the ground that people "naturally" leave most of their estates to spouse and blood relatives because those are caring relationships, and people do not leave bequests to those with whom they are in a confidential relationship because they are market relationships which people "naturally" recognize based on the value of services provided. Thus, embedded in the undue influence analysis are two assumptions about the world: (1) family relationships are co-extensive with caring relationships and (2) confidential relationships are market relationships governed by an ethic of selfish individualism.

1. Family Relationships as Caring Relationships

The undue influence doctrine is built on the presumption that family relationships are co-extensive with relationships of trust and caring.\textsuperscript{128} No doubt, many relationships between spouses and among blood relatives are categorized by this ethic of altruism. Moreover, there are clearly many relationships outside the family which are governed by self-interest. However, one must question whether the correlation between caring relationships and traditional family relationships is so significant that it should serve as a presumption—particularly when evidence exists in the form of a will that the testator believed otherwise.

There is an abundance of evidence that families are not always governed by an ethic of altruism. Statistics on spousal abuse, elder abuse and child abuse belie the notion that the family relationship is always a relationship of trust and caring.\textsuperscript{129} Moreover, short of abusive situations, many individuals are estranged from their families.\textsuperscript{130}

\textsuperscript{128} This is an issue that comes up in many areas of the law: whether it is in the best interest of the child to be with adopted parents or biological parents; whether parents can make the decision to institutionalize their children against their children's wishes; and whether family members can make the decision to remove someone from artificial life support. These are just some of the areas of the law in which there are built-in presumptions that the family is a place of caring governed by the ethics of altruism.

\textsuperscript{129} See, e.g., ABA, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (estimating that the number of women who experience domestic violence ranges from 1.8 to four million annually); ABA WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 45 (ABA 1993) (detailing the large increase in child abuse rates); DEFENDING OUR LIVES: STUDY & RESOURCE GUIDE 6-7 (Karen Strassler ed., 1993) (detailing the large increase in child
Just as many family relationships are not always caring relationships, the converse is also true—caring relationships are not always found in traditional family relationships. Many loving and caring relationships occur outside of the traditional family structure. Relationships between same-sex couples are particularly likely to fall into this category since the prohibition against marriage for same-sex couples denies them the option of becoming a family in the traditional sense. However, caring relationships outside the traditional family structure are not limited to same-sex couples. People frequently form family-type relationships with neighbors, friends, religious groups, and many other people outside of the traditional family structure.

2. Confidential Relationships as Market Relationships

The undue influence doctrine is also premised on the assumption that confidential relationships are appropriately rec-
ognized on a contract model. This is presumably based on the notion that they are market relationships governed by an ethic of selfish individualism. However, this assumption fails to recognize that the definition of confidential relationship is such that people would often "naturally" want to recognize such relationships with gratuitous bequests.

As discussed above, a confidential relationship occurs whenever one is in a relationship of trust with and reliance on another. The ability to depend on someone is entirely consistent with wanting to benefit them under a will. In fact, confidential relationships are the very type of relationships that frequently (i.e., "naturally") result in bequests. As one testator explained in her will:

I, Frances Owen, am quite alone in this world and I trust my cousin, Mildred Hensel, to help me and I hereby consider that she is the council [sic] and guide, and in the goodness of our hearts—I intend to leave the assets that I have for my keep [sic] and declare the [sic] Mildred is my heir. 132

It is as if she said, "I am in a confidential relationship with Mildred and therefore she is the natural object of my bounty." 133

Ironically, it is this ability to depend and rely on others that categorizes a family. Thus, the dichotomy between confidential relationships and natural bequests reflects not only a false dichotomy, but a polarization of equivalents.

C. THE EFFECT OF THE DICHOTOMY: A NEW PARADIGM—FAMILY PROTECTION

The assumptions underlying the undue influence doctrine as reflected in the dichotomy between confidential relationships and natural bequests are nominally descriptive. They purport to assist in determining the true intent of the testator


133. This is entirely consistent with results of studies on the sociology of bequests. One study found that the social setting in which people live is a major determinant of how much wealth they eventually leave to family members. This study found that elderly benefactors involved with cohesive peer groups named family members as beneficiaries less often than those with strong family connections. JEFFREY P. ROSENFELD, THE LEGACY OF AGING: INHERITANCE AND DISINHERITANCE IN SOCIAL PERSPECTIVE 62 (1979).
by providing general norms for the way the world operates. To the extent that the testator has deviated from such norms, such deviance provides evidence that the testator was not acting of his or her own free will.

However, although these assumptions are nominally descriptive, the effect of the undue influence doctrine is to make them prescriptive insofar as deviance from the norms serves as compelling evidence that the testator was not acting freely.¹³⁴ Thus, understood in terms of normative rules, the undue influence doctrine dictates that unless the family has done something to “deserve” disinheritance, the bulk of a person's property should be left to his or her spouse and blood relatives.¹³⁵ This normative rule becomes prescriptive in that it is enforced through the power of the undue influence doctrine. If the bequest fails to meet the prescribed norms, the will is set aside and the property passes under the laws of intestacy.¹³⁶ The rules of intestacy provide for the property to pass to the surviving spouse and blood relatives. Thus, the impact of the undue influence doctrine is to act as a form of forced heirship. People can either provide for a “natural” disposition of their property themselves (i.e., to their families) or the court will do it for them via the intestacy statutes.

IV. TESTING THE PARADIGM OF UNDUE INFLUENCE AS FAMILY PROTECTION: A TALE OF TWO STATES

The construct of the undue influence doctrine as a family protection doctrine can be tested by checking for correlations within jurisdictions between the level of protections against disinheritance for family members and the standards for undue influence. If the purpose of the undue influence doctrine is, as it is presented under the dominant paradigm, to protect testator autonomy, then application of the doctrine should not be affected by the level of protection provided for the family against disinheritance because that would be irrelevant to whether the testator’s free will was overridden. On the other

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¹³⁴ The unnatural will does triple duty in that it provides proof of (1) the testator's susceptibility; (2) the opportunity to exert influence; and (3) the unnaturalness of the disposition.

¹³⁵ In contrast, non-family members should receive benefits relative to the value of their services, based on a contract model with such services being evaluated under an objective arm's length standard.

¹³⁶ Or, as in Kaufmann, property will pass under the terms of the last “natural” will.
hand, if the undue influence doctrine is primarily concerned with protecting the family against disinherintance, then it would be reasonable to expect that application of the doctrine would be affected by the level of other protections for the family against disinherintance. The greater the protections available for the family against disinherintance, the less the need for the application of the undue influence doctrine. Conversely, the fewer protections for the family against disinherintance, the greater the need for the undue influence doctrine.

Georgia and Louisiana provide two useful examples for testing the family protection construct of the undue influence doctrine. Georgia provides fewer protections for family members against disinherintance than other states in that it is the only state in the country that fails to protect a surviving spouse against disinherintance. Louisiana provides greater protections against disinherintance than other states in that it is the only state in the country that protects children against disinherintance. Examination of the application of the undue influence doctrine in these states confirms the strong correlation between the existence of other family protection provisions and the application of the undue influence doctrine. This provides further support for my argument that the dominant purpose of the undue influence doctrine is not to protect testators' autonomy, but rather to protect testators' families against disinherintance.

A. GEORGIA

In every state except Georgia, a surviving spouse has statutory protections against disinherintance. This protection takes the form of community property in community property states and elective share (sometimes called forced share) in

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137. Under the community property system, a husband and wife are deemed to be co-owners of all property earned during the marriage. The community property system is based on the notion that a husband and wife form an economic partnership and that they should share jointly the fruits of their joint labors. Each spouse is an owner of an undivided half-interest in the community property. The death of a spouse dissolves the community, giving the surviving spouse outright ownership in half of the community property. The community property system limits the problem of spousal disinherintance since each spouse automatically owns a half-interest in all property acquired during the marriage. For a recent review of an economic partnership justification for community property, see generally Lawrence W. Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21 (1994).

The community property system exists in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Wis-
If the fundamental purpose of the undue influence doctrine is to protect the family against disinherition, as opposed to protecting testator autonomy, we should expect to see a more liberal standard for the application of the undue influence doctrine in Georgia in order to compensate for the absence of these other statutory protections. This is precisely the result.

Wisconsin, through its adoption of the Uniform Marital Property Act, has a system which is very similar to the community property system. WIS. STAT. ANN. §§ 766.001-766.97 (West 1993). The remaining forty-one states and the District of Columbia use the separate property system.

Under the separate property system, marital status does not affect the ownership of property. Each spouse owns all that he or she earns and there is no sharing of earnings. If one spouse is the wage earner while the other spouse works at home, the wage-earning spouse owns everything. The non-earning spouse has no ownership interest in any of the property held in the other spouse's name. With the exception of Georgia, all separate property states provide certain safeguards to protect the non-wage-earner from disinherition by the wage-earning spouse.

Under the common law, surviving spouses were protected under the doctrines of dower and curtesy. These doctrines gave the surviving spouse a fractional interest in the decedent spouse's real property. Most states have supplemented or replaced common law dower and curtesy with some form of an elective share statute.

Under conventional elective share statutes, the surviving spouse is granted a right to claim a certain percentage share of the decedent's probate estate (usually between twenty-five and fifty percent). The percentage share depends upon whether the decedent left issue or other relatives in addition to the surviving spouse. The percentage share allowed under conventional elective share statutes does not take into account the length of marriage. Thus, the surviving spouse is entitled to the same portion of the decedent's probate estate regardless of whether the marriage lasted for two weeks or fifty years. Recently there has been a trend to move away from giving the surviving spouse a flat percentage share based on the probate estate. For example, the Uniform Probate Code (UPC) has a new system in which a surviving spouse is given a percentage share (ranging from three to fifty percent) based on the length of marriage. UNIF. PROBATE CODE § 2-202 (1993).

Many states have moved away from basing the elective share on the probate estate since, due to the prevalence of will substitutes (including life insurance and revocable trusts), the probate estate no longer provides an accurate picture of the decedent spouse's assets. Under conventional elective share statutes, a surviving spouse is entitled to claim his or her elective share even if the decedent provided generously for the spouse through non-probate transfers (e.g., life insurance) and even if the surviving spouse is wealthier than the decedent spouse. In an attempt to more closely approximate community property systems, the UPC has adopted the concept of the "augmented estate," which takes into account probate and nonprobate assets of both the decedent spouse and the surviving spouse. UNIF. PROBATE CODE § 2-203 (1993). For a more detailed discussion of the augmented estate (including examples of how to calculate the augmented estate), see John H. Langbein and Lawrence W. Waggoner, Redesigning the Spouse's Forced Share, 22 REAL PROP., PROB. AND TR. J. 303, 317-25 (1987).
1. Statutory Protections for Families in Georgia

Georgia is the only separate property state that fails to provide any protection for a surviving spouse, either in the common law form of dower/curtesy or pursuant to a forced share for a surviving spouse. Georgia abolished dower in 1969. In that same year, the Georgia legislature specifically rejected the notion of a forced share for a surviving spouse by providing that "[a] testator may bequeath his entire estate to strangers, to the exclusion of his spouse and children." At the death of a spouse there is no guarantee that a surviving spouse in Georgia will receive any property from the decedent's estate.

2. Undue Influence in Georgia

Although the Georgia legislature ostensibly provided that a surviving spouse has no right to inherit, a disinherited spouse was not left without recourse. The same provision allowing disinherance of a spouse went on to provide that "[i]n such a case the will should be closely scrutinized; and, upon the slightest evidence of aberration of intellect, collusion, fraud, undue influence, or unfair dealing, probate should be refused." Courts have interpreted "slightest evidence" to mean

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139. See GA. CODE ANN. § 53-1-1 (1995) (abolishing the right of dower in Georgia); id. § 53-1-2 (stating that there is no tenancy by curtesy in Georgia).

140. See id. § 53-2-9(b) (expressly allowing disposition of a testator's entire estate to strangers); see also Ralph C. Brashier, Disinheritance and the Modern Family, 45 CASE W. RES. L. REV. 83, 136-37 n.177 (citing both supporting and contrary authority for the proposition that Georgia should allow a testator to disinherit spouses and children).


142. The only exception to this is that a surviving spouse and minor children may receive some short-term relief in the form of an allowance from the estate for temporary support. Id. § 53-5-1. This statute provides that a decedent's spouse may apply to the probate court for an award of a portion of the decedent's estate sufficient to enable that spouse to financially support the family for at least one year. However, a decedent spouse may easily avoid this provision. See Peter H. Strott, Note, Preventing Spousal Disinheritance in Georgia, 19 GA. L. REV. 427, 439 (1985) (noting that one spouse could easily disinherit the other by transferring his or her assets into nonprobate assets).

143. GA. CODE ANN. § 53-2-9(b) (1995) (emphasis added). In addition to its undue influence provision, Georgia law has three other statutory protections for heirs against disinheritance. The most substantial protection is in the form of the "Year's Support" provision, providing that a decedent's spouse may apply to the probate court for an award of a portion of the decedent's estate sufficient to enable that spouse to have economic resources to support the family for at least one year. Id. § 53-5-1. The two remaining protections are
"the superlative degree of the adjective slight, and therefore must mean very slight."144 This provision changed the common law rule that a presumption exists in favor of probate of a will.145

The effect of this provision is to give freedom of testation with one hand while taking it back with the other. If a testator in Georgia chooses to disinherit his spouse and children, his will is much more likely to be overturned based on the undue influence doctrine. The irony of this is that as the testator's will is being thrown out, it will be done so under the pretext of preserving freedom of testation.

B. LOUISIANA

Louisiana is on the opposite end of the spectrum from Georgia in terms of protecting the family from disinheretance. Whereas all states with the exception of Georgia provide statutory protections against spousal disinheretance, Louisiana is the only state to protect children from disinheretance.146 The protection for children is in the form of forced heirship, also known as the legitime. If the purpose of the undue influence doctrine is to preserve freedom of testation, then the existence of this provision affecting the family should not affect application of the doctrine. However, if the purpose of the undue influence doctrine is to protect the family against disinheretance, then the existence of this strong family protection provision would reduce the need for the undue influence doctrine. If this is the case, then we should see less frequent application of the undue influence doctrine in a state like Louisiana, which pro-

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144. Deans v. Deans, 156 S.E. 691, 699 (Ga. 1931). The Deans court further noted that in adopting § 53-2-9(b) the general assembly sought to give added protection to wives or children of testators. Id. at 698; see also Bowman v. Bowman, 55 S.E.2d 298, 308 (Ga. 1949) (noting that a transfer to a stranger is permitted, but will be closely scrutinized); Smith v. Davis, 45 S.E.2d 609, 612-13 (Ga. 1947) (noting that the provisions of § 53-2-9 apply only when the will completely excludes the party covered by the statute).

145. Strott, supra note 142, at 435.

146. Spouses in Louisiana are protected from disinheretance through community property. See supra note 137 (discussing the community property system generally).
vides statutory protections for the family, than we see in other states. This turns out to be the case.

1. Statutory Protections for Families in Louisiana

Although there is a general duty for parents to support their children while the parents are alive, in every state, with the exception of Louisiana, people are free to disinherit their children at death. Louisiana is the only state in the country that provides statutory protection for children in the form of forced heirship. Forced heirship protects children against disinheritance by securing for them a minimum share (ranging between twenty-five and fifty percent of the decedent's estate) which cannot be defeated by will or inter vivos transfers. The effect of forced heirship is a statutory system whereby the children of a testator cannot be disinherited unless they do something to "deserve" disinheritance.

Forced heirship has deep historical roots in Louisiana where it has existed since its settlement by the French in the beginning of the eighteenth century. In 1921, Louisiana ele-

147. The ability of a testator to disinherit his or her minor children has been criticized, particularly in light of the support obligation during life. See Brasher, supra note 140, at 133-37 (citing the common law's commitment to testamentary freedom, subject only to temporal financial allowances to spouses or children awarded at the court's discretion).

148. Texas is the only other state that has ever tried forced heirship, a remnant of the state's Spanish law history. After Texas entered the Union in 1846, the common law influence in this area became stronger and more expansive. Texas abolished forced heirship altogether in 1856. See Joseph Dainow, The Early Sources of Forced Heirship; Its History in Texas and Louisiana, 4 La. L. Rev. 42, 56-57 (1941) (discussing the origins and ultimate abolition of forced heirship in Texas).

149. See La. Civ. Code Ann. art. 1493 (West 1987) (providing that donations inter vivos or mortis causa may not exceed three-fourths of the property of the disposer if he leaves one child and one-half if he leaves two or more children); see also Mary Ann Glendon, Family Law Reform in the 1980's, 44 La. L. Rev. 1553, 1570-73 (1984) (discussing Louisiana's forced heirship provisions vis-a-vis community property and common law systems).


151. Forced heirship was originally brought to Louisiana by the French settlers. The French cession of Louisiana to Spain had no effect on the institution of forced heirship since Spanish law had its own forced heirship provisions. After France regained Louisiana and conveyed the territory to the United States, the inhabitants continued their civil law traditions, including forced heirship. See Succession of Lauga, 624 So. 2d 1156, 1159 (La. 1993) (discussing the history of forced heirship in Louisiana). The Louisiana Civil Code of 1808 followed the Spanish rules regarding the *legitime* that a parent's donations, either during life or at death, could not exceed one-fifth of his
vated forced heirship to constitutional status by enacting an amendment to the Louisiana Constitution that "[n]o law shall be adopted that abolishes forced heirship." 152 Although various minor changes were made to the forced share statutes over time, 153 Louisiana continued to protect children of all ages from disinheritance until 1989.

In 1989, the Louisiana legislature adopted changes to the forced heirship provisions that essentially eliminated protections for adult children against disinheritance. The most critical change was that the Louisiana legislature limited the protected class of children who are forced heirs to those children under the age of twenty-three or those who, because of mental incapacity or physical infirmity, are unable to care for themselves. 154 These changes were widely perceived as effectively ending forced heirship in Louisiana. 155 However, no sooner had forced heirship been repealed in Louisiana, than the Louisiana Supreme Court declared the repeal to be unconstitutional un-
der their state constitution.156 Louisiana subsequently amended its constitution to allow for the limitation of forced heirship, and the statutory provision was reenacted in 1996.157

2. UNDUE INFLUENCE IN LOUISIANA

At the time of the adoption of the Civil Code of 1808, providing for forced heirship, the Louisiana legislature also adopted a provision limiting the grounds on which a will could be set aside. Specifically, the Civil Code provided that for those attempting to annul inter vivos or testamentary transfers, no proof would be admitted that the disposition was made through hatred, anger, suggestion or captation.158 Judicial decisions in Louisiana interpreted the term "captation" to be identical to the common law concept of undue influence.159 Thus, until recently a contestant could not generally upset a will based on undue influence.160

The link between undue influence and family protection was implicitly recognized by the Louisiana legislature through its subsequent legislative actions. In 1989, when the Louisiana legislature adopted the provision limiting forced heirship, it repealed the statute prohibiting challenges based on captation, or undue influence.161 The effect of this repeal was to introduce the common law doctrine of undue influence162 into Louisiana.163 The judiciary also implicitly recognized the undue influence doctrine as a family protection provision. When the Louisiana Supreme Court ruled that the repeal of forced heirship was unconstitutional, it also reinstated the provision

156. The court's holding of unconstitutionality was announced in the companion cases of Succession of Lauga, 624 So. 2d 1156, 1165-66, 1172 (La. 1993) and Succession of Terry, 624 So. 2d 1201, 1202 (La. 1993).
158. LA. CIV. CODE ANN. art. 1492 (West 1987).
159. See Spaht et al., supra note 155, at 469 & n.247 (noting that a series of cases from the Louisiana Supreme Court determined that undue influence can be used in the same sense as captation and suggestion).
160. This rule did not apply to influence imposed at the time of the execution of the will.
162. See Spaht et al., supra note 155, at 470-74 (discussing the common law doctrine of undue influence).
163. Id. at 411, 452-54.
disallowing claims of undue influence.\textsuperscript{164} The subsequent amendment to the Louisiana constitution and reenactment of the limitation of forced heirship was coupled with the repeal of the provision prohibiting challenges based on undue influence.\textsuperscript{165}

The irony of the Louisiana system is that although it was widely perceived as limiting freedom of testation in that it imposed a forced share for the testator's family, in actuality it afforded greater freedom of testation than other states in that a testator was truly free to dispose of that portion of his estate (between fifty and seventy-five percent) that was not governed by the forced share. This is in contrast to the forty-nine other states that ostensibly have complete freedom of testation, subject only to a surviving spouse's share,\textsuperscript{166} but where the entire will is subject to being thrown out if the undue influence doctrine is found to apply.

\textbf{V. JUSTIFYING FAMILY PROTECTION: SOME PRELIMINARY THOUGHTS}

In the foregoing discussion I have shown how the effect of the operation of the undue influence doctrine is not, as presented in the dominant paradigm, to protect freedom of testation, but rather to protect the testator's family against disinheritance. This part explores whether such a result can be justified. If it can, the problem becomes merely one of disclosure. However, if protection of the family at the expense of testamentary freedom cannot be justified, then the undue influence doctrine imposes a more substantive harm.

Let us return to the typical undue influence case of the person who writes a will leaving everything to her "helpful" neighbor on whom she has become dependent, effectively disinheriting her children. What are some possible justifications for throwing out this will? The dominant paradigm says that the will is not given effect because it does not reflect the wishes

\textsuperscript{164} See Succession of Lauga, 624 So. 2d 1156, 1171-72 (La. 1993) (noting that the undue influence provision was void since the legislature only passed it in connection with the limitation on forced heirship).


\textsuperscript{166} This is true under both community property and elective share systems. See supra notes 137-38 (discussing the community property and separate property systems in the United States and the right of surviving spouses under those systems).
However, as we saw in Kaufmann, the undue influence doctrine can apply irrespective of the testator's wishes, because the doctrine is driven by a false dichotomy between confidential relationships and natural bequests. The effect of this is that rather than protecting the testator's freedom of testation, the doctrine instead acts to protect family members from being disinherited. In this section, I explore some possible justifications for this result imposed by the application of the undue influence doctrine. In particular, I examine the following possible justifications for rejecting the will in spite of the testator's intent: (1) the will does not represent what would be the wishes of the testator if the testator was not in a dependent relationship (I call this the "modified testamentary freedom model"); (2) children have a reasonable expectation that they will inherit their parents' property and this expectation should be fulfilled (I call this the "expectation model"); or (3) children have a right to inherit their parent's property (I call this the "family rights model").

I will consider each of these proposed justifications below.

A. THE MODIFIED TESTAMENTARY FREEDOM MODEL

The modified testamentary freedom model is similar to the dominant paradigm in that both attempt to justify throwing out the testator's will based on a determination of the testator's intent. Whereas the dominant paradigm justifies throwing out the testator's will on the presumption that the will does not reflect the testator's wishes at the time of execution, the modified testamentary freedom model acknowledges that the testator may have intended to make the disposition under the will, but nonetheless rejects the will in recognition of the fact that dependencies affect people's decisions. Under this justification

167. Another justification which is sometimes put forward is that if we let the neighbor inherit, it will encourage gold-digging which could result in people benefiting from their wrongdoing. However, I have shown how the doctrine does not prevent wrongdoing, it merely prevents wrongdoing which results in wills that a court perceives as unnatural. If a person exerts efforts on a testator that cause her to make a will for the benefit of her children in equal shares (even if she feels that such a will is not the one she would ordinarily want to make) then that will not be set aside based on undue influence. The undue influence doctrine prevents both wrongdoing and right-doing in favor of non-family members and does not prevent wrongdoing in favor of family members.

168. See supra notes 135-136 and accompanying text (arguing that the undue influence doctrine is primarily a tool to protect family members from disinheritance).
for the undue influence doctrine, the will is rejected because it does not reflect what the testator would have intended had the testator not been dependent. As applied to the *Kaufmann* case, the issue would not have been what Robert intended, but instead would have involved a determination of what Robert would have intended had he not been dependent on Walter.\(^\text{169}\)

This distinction between intent and presumed intent can be illustrated by reference to the story about the snake pit and the ladder presented by Joseph Singer in his article *The Reliance Interest in Property*:

Suppose that you have fallen into a deep pit filled with poisonous snakes. I come along and observe you in the pit. I am not responsible for your predicament and have no legal duty to help you. I offer to sell you a ladder in exchange for half your future earnings. You agree to buy; I agree to sell. It is a Pareto superior exchange; you are happier with your life and half your future earnings than the alternative; I am happier as well with this outcome. Is the contract voluntary? There is no simple answer to this question. You obviously felt forced to agree; you paid an awful lot for the ladder. But you also benefited substantially by the deal.\(^\text{170}\)

There are many public policy reasons why this contract should not be given effect by a court. At the very least, the person with the ladder is engaging in price gouging. Moreover, even if the person in the pit intended to make this exchange (because he is better off with it than without it), the intent is not pure because without the situation of the snake pit, the person would not have entered into this arrangement.

This story is easily modified to appear to provide compelling support for the undue influence doctrine as justified by the modified testamentary freedom model. Under the modified testamentary freedom model, the dependent testator who gives everything to her neighbor is in much the same position as the person in the snake pit. By virtue of her dependence, the testator is willing to give everything to the neighbor. She might freely execute the will (meaning she has the intention to do so), but she does so with the knowledge that if she was not dependent then she would not do it.\(^\text{171}\) This construct makes undue

\(^{169}\) Professor Shaffer likens dependence in the context of undue influence to the concept of transference. *SHAFFER, supra* note 17, at 242-46.


\(^{171}\) Presumably she would instead compensate the neighbor under the contract model relative to the value of the services he provided. *See supra* notes 121-122 and accompanying text (discussing the application of the contract model of personal relationships to the *Kaufmann* case).
influence similar to duress in that in both situations there are external forces that make the testator do that which she otherwise would not. The difference is that in duress, the beneficiary created the source of difficulty which caused the will to be made (for example, by holding a gun to the testator's head) whereas in this construct of the undue influence doctrine, the person merely took advantage of the situation in which he found the testator.

Although initially appealing, this model is premised on several troubling assumptions about the world. In particular, this model relies on the notions that (1) a person's natural state is one of independence from others (just as a person's natural state is one outside a snake pit) and (2) for people who are dependent on other people, it is possible to determine what their intentions would be if they were not dependent.

The notion that people's natural state is one of independence from one another belies everything that we know about human anthropology. Humans are social creatures who most commonly depend on others for survival. Indeed, to the extent it can be said that humans have a "natural" state, that state has to be a state of dependence.\textsuperscript{172}

The other premise on which the modified testamentary freedom model is based is that for people who are dependent, it is possible to determine what their intentions would be if they were not dependent. Just as we can determine that the person in the snake pit would not make that arrangement if he were not in that situation, the modified testamentary freedom model presumes that we can determine that if the testator were not dependent, then she would not leave the bequest to her neighbor. However, the reason that we can determine that the contract in the snake pit story is unfair is because we can compare the value of the ladder relative to the price that was paid. Because these values (as established by people in their natural state, i.e., out of a snake pit) are not even remotely comparable, we say that the contract is arguably unfair. However, unlike a transfer pursuant to a contract, a bequest is a gratuitous transfer for which there is never any direct consideration. This absence of consideration makes bequests inherently unbalanced and makes it impossible to determine what a rational person would do in the absence of a dependent relationship.

\textsuperscript{172} This state of dependence, in large part, may explain the importance of family in human relations.
B. THE EXPECTATION MODEL

When one thinks about the paradigmatic undue influence story from the disinherited children's point of view, it is easy to sympathize with their plight. Loss of inheritance is upsetting for financial reasons, but even more so for its psychological toll. Disinheritance is often experienced as a statement about the testator's feelings. The testamentary freedom model is most satisfying from the children's point of view because it explains the disinheritance as an overbearing of the testator's will. However, even without this independent justification, one could justify invalidating the will based solely on the legitimate expectations of the children.

The law fulfills expectations in many situations. However, in order to have expectations to receive property fulfilled, these expectations must be based on some recognized right or interest. An art thief might expect to be able to acquire and keep a valuable Matisse painting, but expectation on its own is not sufficient justification for a court to fulfill it. Moreover, in cases arising under the undue influence doctrine, expectations have often developed on both sides. When the testator disinherit her children in favor of her neighbor, arguably the neighbor as well as the children expect to inherit. Thus, expectations alone are not sufficient to justify a result in a particular case. In order for the children's expectations to be fulfilled, they need to combine their expectations with an independent rightful claim. Thus, the expectation model on its own cannot justify the undue influence doctrine in its current form. How-

173. For example, in contract law, courts under certain circumstances will uphold the expectations of an offeree based on the offeree's reliance on the promises of the offeror. E. ALLAN FARNsworth, CONTRACTS § 3.24 (2d ed. 1990). In extreme cases, the court may even uphold the reliance based expectations of a would-be offeree even in the absence of an actual offer. See Hoffman v. Red Owl Stores, 133 N.W.2d 267, 275 (Wis. 1965) (holding that if a promisor has reason to foresee the action of a third party in reliance on a promise, in some cases justices may require compensation for the broken promise). Similarly, property law will uphold the expectations of an adverse possessor of real property if the adverse possessor establishes and maintains certain interests in the property. See generally JESSE DUKeminier & JAMES E. KRIER, PROPERTY 121-25, 135-41 (3d ed. 1993) (discussing the series of requirements necessary to gain title to property through adverse possession and the policy considerations behind that doctrine). Adverse possession may also extend to personal property under conditions similar to those applied to real property. See, e.g., David A. Thomas, Adverse Possession: Acquiring Title to Stolen Personal Property, 10 PROB. & PROP., Mar./Apr. 1996, at 12 (noting that in certain circumstances even a thief or bona fide purchaser of stolen goods can obtain title by meeting the requirements of adverse possession).
ever, the family rights model described below may provide the rightful claim which, combined with the expectation model, could justify the undue influence doctrine acting as a form of forced heirship.

C. THE FAMILY RIGHTS MODEL

Should an individual's family (meaning spouse and blood relatives) have a right to inherit that person's property, such that the family's right should trump the individual's ability to dispose of his or her property at death? This has been the understanding in many different cultures, both historically and today. The justifications for this right stem from notions that (1) the family is an economic unit and therefore, regardless of how wealth is nominally titled, it represents the property interests of all the members of the family, and (2) there should be a general obligation of support among family members such that family property should always devolve among family members. However, as I show below, societal changes as well as changes in patterns of wealth transmission suggest that the family rights model can no longer justify the undue influence doctrine operating as a form of forced heirship.

174. A spouse is already granted a right to a portion of a decedent's estate in every state, with the exception of Georgia, under community property law or the elective share. See supra notes 137-140 and accompanying text (discussing the community property and elective share system in the United States and Georgia's unique method of distributing the property of a decedent's estate to a spouse). However, this right generally only attaches to a small portion of the decedent spouse's estate. For example, in Massachusetts the surviving spouse typically receives a life estate in one-third of the decedent spouse's estate. Mass. Gen. Laws Ann. ch. 191, § 15 (West 1994).

175. The institution of requiring people to provide for their families (called "forced heirship") has a long history. An early French commentator, Louet, writing in 1693 claimed to find scriptural authority for forced heirship in the books of Genesis and Numbers. Thomas B. LeMann, In Defense of Forced Heirship, 52 Tul. L. Rev. 20, 20 (1977). However, most authorities trace forced heirship back to Roman law in the form of the Querela Inofficiosi Testamenti ("plaint of an unduteous will") through which disappointed heirs could claim a portion of a testator's estate. W.D. Macdonald, Fraud on the Widow's Share 280 (1960). The Querela was based upon the ancient idea of family ownership that a testator is under a duty to provide after his death for those related to him by near kinship. Id. The amount that could be obtained was at first discretionary, but eventually was fixed by statute as one-fourth of what the claimant would have received as his intestate share. Id. Justinian later increased this amount in the case of children to one-third if there were not more than four children and one-half if there were more than four children. Id.
The family rights model can be best understood in the context of a pre-industrialized world in which the majority of family wealth was held in the form of a family farm or business in which the whole family participated. Education consisted of the older generation teaching the younger generation the tools of the family trade, and the whole family was involved in the production of wealth through their labor. In addition, in earlier times it was much more difficult to live by one's skills alone; therefore, ownership of a farm or business played an important role in securing family wealth.

The transmission of this wealth generally occurred upon the death of the father by means of intestacy or through the father's will. To the extent there was a surviving spouse, she was generally provided a life estate in the form of dower. The purpose of giving the surviving spouse only a life estate was to ensure that the family wealth would eventually pass to the next generation whose members had already been employed in the enterprise.

In this world, it is easy to understand the importance of an undue influence doctrine acting as a form of forced heirship. Participation in the family enterprise can be seen as having created an implied contract between the generations. The younger generation committed to learning and supporting the family business in exchange for which the older generation agreed to transfer the enterprise to the younger generation upon death. This intergenerational contract was also evident in the social structure in which they lived. The younger generation frequently shared living space with the older generation and thus was able to provide care for the elderly in their own home. This system required a level of trust by the younger generation that they were not going to lose their livelihood because of a last minute whim by the father. Thus,

177. Id.
178. Id.
179. Id. at 725-26.
180. Id. at 726.
181. The children did not need to worry about actions by their mothers due to the numerous factors which led to women generally not being in the position to transfer property at death. In particular, the separate property states continued to follow the basic principles of the English marital property system through much of the early history of this country. The English system traced its origin to feudal roots and was based on the needs of the patriarchal landed
the undue influence doctrine served as a valuable safeguard against this potential "breach of contract."

Fast forward to the late-twentieth century and the world of family wealth has changed dramatically. The corporation, rather than the family, is the typical unit of production.\textsuperscript{182} The notion of partnership no longer characterizes the family as a whole, but instead applies to the marital unit.\textsuperscript{183} People earn their wealth through salaries, from their individual participation in the predominantly corporate world, and through their investments in this world in the form of stock and other financial instruments.\textsuperscript{184} Moreover, education has become the dominant mode of transmitting wealth from the older generation to the younger generation for most American families.\textsuperscript{185}

class to keep their estates intact, under the control of one male. A married woman was to be supported and maintained for her entire life, but she was generally not entitled to exercise powers of ownership. At the instant of marriage, the woman's ownership was limited to her \textit{paraphernalia} (i.e., clothing and ornaments). \textit{Dukeminier \& Krier, supra} note 173, at 367. In all other respects, she became a \textit{femme covert}, under the coverture of her husband. All other personal property owned by the woman at the time of her marriage or acquired thereafter (including her earnings) became the property of her husband. \textit{Id.} Marriage did not deprive the woman of title to her real property, but the husband had the right of possession (known as \textit{jure uxoris}) to all real property that the woman owned at the time of the marriage or acquired during the marriage. Further, this real property was alienable by the husband and could be reached by the husband's creditors. \textit{Id.} at 368.

This transfer of property rights upon marriage was largely a one way street. The wife received only a right of dower, which remained inchoate until the death of the husband. \textit{Id.} at 400. Upon the husband's death, the wife received a life estate in one-third of the husband's freehold lands. \textit{Id.}

In 1839, Mississippi passed the first \textit{Married Women's Property Act} in this country. \textit{Id.} at 368. By the end of the nineteenth century, all separate property states had adopted similar Acts. \textit{Id.} These statutes removed the provision of coverture and gave a married woman (like a single woman) control over her property. The woman's property remained separate property, immune from her husband's debts. The woman also retained control over all her earnings from outside the home. \textit{Id.}


183. \textit{See generally Waggoner, supra} note 137, at 23-27, 43-44 (discussing the partnership theory of marriage and its implications upon the allocation of property within a marriage upon death or dissolution).

184. \textit{See Langbein, supra} note 176, at 729 (suggesting that the three dominant modes of financial intermediation are the corporation, banking, and the insurance industry).

185. \textit{Id.} at 730. According to \textit{Langbein}, only two percent of the population of the United States was graduating from high school in 1870. \textit{Id.} In that year, institutions of higher learning conferred 9,371 bachelor's degrees in this country and exactly one doctorate. \textit{Id.} By 1970, over seventy-five percent of the population was graduating from high school and more than one million degrees from institutions of higher learning were conferred, including some
change in the patterns of wealth transmission is described by John Langbein as follows:

[In modern times the business of educating children has become the main occasion for intergenerational wealth transfer. Of old, parents were mainly concerned to transmit the patrimony—prototypically the farm or the firm, but more generally, that "provision in life" that rescued children from the harsh fate of being a mere laborer. In today's economic order, it is education more than property, the new human capital rather than the old physical capital, that similarly advantages a child.186

A critical feature of this new form of wealth transmission is that, rather than occurring at death thorough wills or intestate succession, such transfers typically occur during the lifetime of the older generation in the form of tuition and other support through our lengthy education process.187 The younger generation is expected to make its livelihood based on its development of this investment in human capital rather than through holding property. Moreover, due to changing demographics and the increased geographical distances among fam-

30,000 doctorate-level degrees. Id. Even as recently as 1940, less than five percent of the American population had completed four or more years of university study; by 1985, this figure had reached 19.4%. Id.

The equivalent monetary figures associated with education have increased equally dramatically. Total expenditures for formal education in the United States are estimated at $9.2 million in 1840. This figure increased to $290 million in 1900, id., and to $282 billion by 1987. This latter figure was the equivalent of seven percent of the gross national product. About forty percent of this amount went to higher education. Id.

While Langbein notes a number of weaknesses in looking at the gross statistics, he nonetheless concludes that even after allowing for scholarships, loans and student labor, the main burden for the vast expansion in education expenses falls upon parents. Id. at 732.

186. Id. at 782-83. It is interesting to note that these same societal changes have been credited with allowing the development of the gay identity. John D'Emilio has argued that the decline of a system in which the nuclear family is an economic unit of production, and the corresponding rise of a capitalist wage labor market, enabled the "formation of urban communities of lesbians and gay men and, more recently, of a politics based on a sexual identity." John D'Emilio, Capitalism and Gay Identity, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100, 104 (Snitow et al. eds., 1983).

187. Langbein, supra note 176, at 785. "Education is displacing inheritance, lifetime transfers are displacing succession on death." Id. As Langbein notes, this displacement effect occurs even for those families that get substantial amounts of student loans. Id. First, the loan amounts depend to a large extent on the family's existing wealth. Id. at 734-35. The greater the family wealth, the higher the fraction of college costs that parents are expected to transfer to the child in support of the child's education. Id. at 735. Second, the loans eventually have to be repaid. In effect, money for college comes either from savings (i.e., the family's current capital) or from borrowing against the family's future capital. Id. at 734-35.
ily members, the younger generation is often not able to provide direct care for its elders.

These changes in family wealth have already been reflected in recent changes which have taken place in the area of spousal shares. As discussed above, one of the justifications for limiting a surviving spouse's share to a life estate was the notion of a family partnership. To protect the younger-generation partners it was important to limit the surviving spouse's rights. Today we view the marital union, rather than the entire family, as participating in the partnership. When one spouse stays at home to raise the children, that is recognized as assisting the out-of-home spouse participate in the labor force. With the notion of marriage as a partnership, protecting children's interests at the expense of the surviving spouse has lost some of its legitimacy. Thus, intestate laws and spousal share provisions have moved towards giving a surviving spouse outright control of a larger portion of the decedent spouse's estate.

The components of the implied intergenerational contract that were evident in earlier times are missing from the social structure of the late-twentieth century. Given that this is the case, the extent to which the undue influence doctrine should

188. See supra notes 179-80 and accompanying text (discussing how limiting a surviving spouse's share to a life estate facilitates enforcement of the intergenerational contract).

189. In contrast to the marital union, which is characterized as a bilateral partnership, the relationship between the parent and child is better understood as imposing unilateral obligations on parents. Parents owe a duty of support to their minor children regardless of their feelings. See KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY 44-56 (Diana T. Myers et al. eds., 1993) (arguing that the nonconsensual, involuntary relationship between family members creates a type of communal responsibility which varies according to an individual's membership within the family unit).

190. This contrasts with children's labor which, in upper income families, typically does not go to support the other members of the family.

191. See IRA M. BLOOM, STUDY OF ELECTIVE SHARE SYSTEMS IN THE UNITED STATES (1992), at A-5, A-9 (listing the elective share percentages for the forty-one states using a non-community property system and noting which of these states has an elective share system that entitles a surviving spouse to outright ownership of the property) (on file with author). See generally Waggoner, supra note 137 (discussing the historical transitions of the marital property regime and its implications on spouses, particularly with respect to the division of property at divorce and death). The exception is the situation when the decedent has children from a prior marriage. The Uniform Probate Code recognizes this in its intestacy statute which provides a greater share for issue when there are children from a prior marriage. UNIF. PROBATE CODE § 2-102(4) (1993).
be available to serve as an enforcement mechanism to this implied intergenerational contract is also brought into question.

CONCLUSION

The undue influence doctrine has consistently been presented under the dominant paradigm as a doctrine that protects freedom of testation. Understood in this way, the doctrine has received widespread support. In this article I have demonstrated that rather than protecting freedom of testation, the doctrine denies freedom of testation to those testators who deviate from prescribed testamentary norms in failing to provide for their families.

The issue of whether family protection can be justified is one which is in need of further inquiry. I have begun this inquiry by considering three different models for justifying family protection. My initial analysis suggests, however, that modern trends of family wealth transmission combined with the prevalence of non-traditional families make family protection much more difficult to justify than in the past.

What is the future of undue influence? The answer to this question depends on which version of undue influence is at issue: the mythical doctrine which protects freedom of testation or the actual doctrine which protects family members from disinherition. If the mythical version which protects freedom of testation beyond the doctrines of fraud and duress is to become reality, then the confidential relationship/natural bequest dichotomy must be abandoned. On the other hand, if the doctrine is to be maintained in its current form, then courts and commentators must seriously explore its justifications before rushing to surround it with a new myth.