

TRUSTS AND SUCCESSION

SUPREME COURT REVIEW

The Nebraska Supreme Court did not review many trusts and succession cases during the survey period. Only two of those dealt with new or ambiguous areas of the law. Both cases involved questions of undue influence on a testator or testatrix in the making of a will.

In the case of *In re Estate of McGowan*,¹ the court considered the effect of the Nebraska Evidence Rules on presumptions of undue influence.² The rules provide that "[i]n all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."³ The court decided that a "presumption of undue influence" is not a presumption within the meaning of the evidence rule.⁴

The court reasoned that the basic facts giving rise to a presumption of undue influence are not specific, readily determined, or easily applied.⁵ Rather, presumptions of undue influence have been formulated in Nebraska on a case-by-case basis, and "[i]n most instances the term 'presumption' seems to have been intended to mean a permissible or probable inference when used in undue influence cases."⁶

The court said that policy considerations also demand that the Nebraska Evidence Rule not apply to presumptions of undue influence.⁷ The right of a competent testator to make a will requires that the burden of proof on this issue be placed on

1. 197 Neb. 596, 250 N.W.2d 234 (1977).

2. *Id.* at 601-04, 250 N.W.2d at 237-39.

3. NEB. REV. STAT. § 27-301 (Reissue 1977).

4. 197 Neb. at 604, 250 N.W.2d at 239. Under prior Nebraska law it did not matter if a permissible inference was termed a presumption as a presumption was not evidence, did not shift the burden of proof, and disappeared when evidence was introduced to rebut the presumption. *Id.* at 603, 250 N.W.2d at 238 (citing *Loomis v. Estate of Davenport*, 192 Neb. 461, 464, 222 N.W.2d 369, 371 (1974)); *In re Estate of Goist*, 146 Neb. 1, 16, 18 N.W.2d 513, 521 (1945).

5. *Id.* at 603-04, 250 N.W.2d at 238-39.

6. *Id.* The court said that an analysis of Nebraska cases would verify this statement, but it did not cite any examples.

7. *Id.* at 604-05, 250 N.W.2d at 239.

those contesting the will.⁸ The court therefore held that "in a will contest the burden of proof or risk of nonpersuasion is on the contestant and remains there throughout the trial."⁹

*In re Estate of Claussen*¹⁰ raised questions about the relationship of undue influence and competence. In that case, the plaintiff contested the validity of the second will of the testatrix on the grounds of improper execution, lack of testamentary capacity, and undue influence.¹¹ The jury returned a general verdict for the plaintiff and three special verdicts finding proper execution, undue influence, and incompetency.¹² On appeal, the defendant argued that the last two special verdicts were inconsistent and irreconcilable and therefore the general verdict could not stand.¹³

The defendant argued that a finding of undue influence concedes testamentary capacity, while, on the other hand, there can be no undue influence of a person devoid of mental competency.¹⁴ The Nebraska Supreme Court said the two issues involve separate and distinct elements, but they are also closely related.¹⁵ It held that if either special verdict could be supported by the evidence, a general verdict denying the validity of the will should be sustained.¹⁶

The court pointed out that a determination of mental capacity is an important consideration in determining whether a testatrix is the type of person who would be subject to undue influence¹⁷ and that a will made by a testatrix of diminished mental capacity is likely to present questions both of competency and undue influence.¹⁸

The court refused to accept cases holding that a finding of undue influence is unnecessary if there is a finding of incompetence¹⁹ as authority for the proposition that a finding of both is

8. *Id.*

9. *Id.* at 605, 250 N.W.2d at 239.

10. 196 Neb. 787, 246 N.W.2d 586 (1976).

11. *Id.* at 788, 246 N.W.2d at 587.

12. *Id.* at 789, 246 N.W.2d at 587.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 791-92, 246 N.W.2d at 588.

17. *Id.* at 790, 246 N.W.2d at 587 (citing *In re Estate of Gloe*, 191 Neb. 395, 400, 215 N.W.2d 98, 101 (1974)); *In re Estate of Paisley*, 91 Neb. 139, 145-48, 135 N.W. 435, 437-38 (1912).

18. 196 Neb. at 790, 246 N.W.2d at 587-88 (citing *In re Estate of Strelow*, 120 Neb. 242, 243-44, 233 N.W. 889-90 (1931)).

19. See, e.g., *In re Estate of Metz*, 78 S.D. 212, —, 100 N.W.2d 393, 398 (1960) (application of undue influence presupposes mental competency) cited in *In re Estate of Melcher*, 232 N.W.2d 442, 445 (S.D. 1975).

in irreconcilable conflict.²⁰ The court found that findings of both undue influence and lack of mental capacity have been upheld in Nebraska, although the question on appeal was whether the evidence was sufficient to support the verdict.²¹ Jurisdictions which have specifically considered the issue have found no conflict in a simultaneous finding of undue influence and incapacity.²² The Nebraska Supreme Court therefore found a verdict of undue influence superfluous but not necessarily in conflict with a verdict of incompetency.²³

20. 196 Neb. at 790-91, 246 N.W.2d at 588.

21. *Id.* at 791, 246 N.W.2d at 588 (citing *In re Estate of Kubat*, 109 Neb. 671-78, 192 N.W. 202-05 (1923)).

22. 196 Neb. at 791, 246 N.W.2d at 588 (citing, *e.g.*, Board of Regents of the Univ. of Tex. v. Yarbrough, 470 S.W.2d 86, 93 (Tex. Civ. App. 1971) (no conflict between a finding of undue influence and a finding of mental incapacity)).

23. 196 Neb. at 791, 246 N.W.2d at 588.