ELDERS AND TESTAMENTARY UNDUE INFLUENCE IN AUSTRALIA

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I INTRODUCTION

In two recent articles,[1] the doctrine of testamentary undue influence was re-evaluated and found deficient. In both articles it was argued that the doctrine as presently applied does not protect vulnerable testators,[2] most particularly elderly people who make wills.[3] The concern that elderly testators[4] making wills for the first time, changing wills or adding codicils to their wills are subject to influence is certainly warranted. It is well known that social demography is changing and that elderly persons comprise an increasing proportion of the population.[5] Therefore, it is likely that there will be a larger number of persons making or changing wills in their old age.

Increasing longevity has several other important consequences in the will-making process, generally, and for undue influence, in particular. Longevity leads to greater susceptibility to mental and physical diseases associated with old age.[6] The process of ageing may lead to significant physical and/or mental decline, so that elders may be unable to care for themselves and make decisions

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1 Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59 *Cambridge Law Journal* 310; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617.

2 The author acknowledges and endorses the need for gender inclusive language. However, for the purposes of clarity and brevity, in this article a reference to a testator or testatrix in general discussion refers to both, where appropriate.

3 Kerridge, above n 1, 310; Ridge, above n 1, 626.

4 For the purpose of this article an elderly testator or testatrix will be a person who made his or her will when over the age of 65 years, which is the age of retirement and when persons are able to apply for the aged pension.

5 For example, the Australian Bureau of Statistics ('ABS') has found that in 2001, 12.4 per cent of the Australian population was aged 65 years or older, and that 3 per cent were over the age of 80 years. By 2051 the ABS estimates that 26.1 per cent of the population will be 65 years or older and 9.4 per cent of the population will be over the age of 80 years: Australian Bureau of Statistics, *Australian Social Trends 2002*, ABS Catalogue No 4102.0 (2002) 2.

6 In respect to debate about the nature and extent of the decline, see John McCallum, 'Health in the "Grey" Millennium: Romanticism Versus Complexity' (2001) 24 *International Journal of Law and Psychiatry* 135.

about their life[7] and the distribution of their assets after their death. However, in many other cases, elders may still be able to care for themselves and make crucial decisions concerning finance and assets, despite health problems. Even in those cases where formal care or informal assistance is required, elders may be able to retain control of central aspects of their lives, including making a will. Nevertheless, such elders may be vulnerable to undue influence perpetrated by those who are tempted to exercise it. Adult relatives may face the prospect of the delayed inheritance of family assets.[8] Adult relatives or carers may consider that they have a 'right' to what remains of an elder's assets because of their relationship with the elder and/or the care and assistance which has been given over a long period of time. They may exercise persuasion, pressure and coercion on the elder in order to ensure that they are beneficiaries under the elder's will or codicil, particularly as the elder may have accumulated significant and valuable assets over a long period of time. Longevity may also mean that there might be a number of persons who could argue that they have a 'natural' claim to an elder's assets. It would not be uncommon for a testator to have married a second time or to have lived in several de facto relationships.[9] Therefore, for example, children of a first marriage may consider that they have a greater claim to the elder's assets than a second spouse or a de facto spouse. Alternatively, longevity and the diseases associated with age may require greater assistance from formal and informal carers. At the end of their lives, elders may rationally decide that the person who cared for them when they were ill is more deserving of their assets than relatives who have abandoned them or only visited sporadically.[10] Disputes may arise concerning the validity of gifts in favour of carers rather than children (or other relatives) and there may be allegations of undue influence.

The purpose of this article is to re-evaluate and consider the doctrine of testamentary undue influence from the perspective of the elderly testator in Australia. As noted above, there have been two important articles where the relevance and functionality of the doctrine have been considered from a theoretical and practical perspective.[11] The suggestions for reform in these articles will be appraised later in this article.[12] However, this article departs from the approach of the earlier commentaries in two important ways. First, whereas the earlier articles have discussed testamentary undue influence at length, noting its relevance to vulnerable elderly testators, this article will more closely focus on the application and effectiveness of the doctrine in Australian cases where elders have made wills or codicils. The article will trace how testamentary undue influence was initially formulated in Australian 19th century cases in relation to older and elderly testators, and how the impact of English case law significantly

7 See, eg, Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997).

8 See generally G Clare Wenger, 'Across the Generations: Family Care Dynamics into the New Millennium' in David N Weistub et al (eds), *Aging: Caring for Our Elders* (2002) 1.

9 See *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

10 See *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

11 Kerridge, above n 1; Ridge, above n 1.

12 See Part IV.

limited the nature and scope of undue influence thereafter. It will be argued that it is necessary to appreciate the connection between testamentary capacity and testamentary undue influence where elderly testators are concerned. Second, a third approach to redefining and applying the doctrine of testamentary undue influence will be suggested. It will be argued that this approach would give the doctrine flexibility and utility, without necessitating the drastic reforms suggested by earlier commentators.

This article will be divided into five parts. In Part II, the traditional and orthodox model of testamentary undue influence is explained by reference to the English case law that settled the doctrine. It will be argued that there are several features of the doctrine which make it particularly difficult to prove. The testamentary doctrine will then be compared to equitable undue influence. In Part III, there will be a short analysis of the cases in respect to elderly testators in the Australian colonies in the 19th century. What is crucial to understand is that testamentary undue influence appeared to have been more fluid during that period, until it was frozen into the strict modern doctrine. Thereafter, Part III examines those cases where testamentary undue influence has been pleaded when elderly testators have made wills or codicils. It will be argued that while testamentary undue influence has been restrictively applied, testamentary capacity (rather than the suspicious circumstances rule) has been the main determinant of whether probate will be granted. Nevertheless, neither testamentary capacity nor the suspicious circumstances rule deal satisfactorily with all situations. Some situations specifically require a workable doctrine of undue influence. Recent recommendations for reform or discontinuation of testamentary undue influence will be considered in Part IV. A third suggestion for reform of the doctrine will be made in Part V, taking into account several recent cases. In Part VI some brief concluding remarks will be made.

II THE ORTHODOX MODEL OF TESTAMENTARY UNDUE INFLUENCE

A The Orthodox Model

Prior to the 19th century, the ecclesiastical courts refused probate of a will that had been made under pressure, constraint, compulsion or coercion.[13] In the 19th century such conduct was described as undue influence in the probate courts.[14] The reference point for an understanding of modern testamentary undue influence is the seminal decision of the House of Lords in *Boyse v*

13 See, eg, *Hacker v Newborn* (1634) Sty 427; 82 ER 834; *Lamkin v Babb* (1752) 1 Lee 1; 161 ER 1.

14 See *Williams v Goude* (1828) 1 Hagg Ecc 577; 162 ER 682; W H D Winder, 'Undue Influence and Coercion' (1939) 3 *Modern Law Review* 97, 104; Matthew Tyson, 'An Analysis of the Differences between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 38, 43.

Rossborough.[15] In that case it was claimed that a wife had, inter alia, exercised undue influence over her husband in the execution of his will. The House of Lords considered that there had been a misdirection by the lower court and that there had been no exercise of undue influence. In doing so, the House of Lords set down the foundation of the doctrine.

First, the House of Lords arguably provided two different versions of what would constitute undue influence. During the course of the proceedings in 1856, Lord Cranworth commented that undue influence was:

> influence which can justly be described, by a person looking at the matter judicially, to have caused the execution of a paper pretending to express a testator's mind, but which really did not express his mind, but expressed something else, something which he did not really mean.[16]

What is noteworthy is that the House of Lords neither referred to coercion nor conduct which was tantamount to coercion. Rather, it was necessary to show that the will did not constitute the genuine testamentary intention of the testator. However, in the following year in handing down its judgment, the House of Lords distinguished mere influence or importunity from undue influence which constituted coercion.[17] In order to prove coercion, it was not necessary to show actual violence towards the testator. It was sufficient to excite terror or imaginary terror in the testator so that he signed a will he would not have otherwise executed.[18]

In subsequent key authorities following *Boyse v Rossborough*, 'coercion' became the hallmark and shorthand definition of testamentary undue influence.[19] The choice and use of this word was inexact because neither force, nor the threat of force, was necessary; and it did not encapsulate subtle behaviour which may go beyond persuasion, but could not be considered to be coercive in the strict sense. Moreover, whether undue influence had been exerted was a relative concept dependent upon the state of health and well-being of the testator. Where the testator was weak, feeble and close to death, the courts anticipated that a small amount of pressure would be sufficient to constitute undue influence.[20] As Sir James Wilde pointed out in *Hall v Hall*,[21] three years after the decision in *Boyse v Rossborough*:

> pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to

15 (1857) 6 HL Cas 1; 10 ER 1192. See also Winder, above n 14, 105.
16 Ibid 34, 1205.
17 Ibid 44, 1209.
18 Ibid 48-9, 1211.
19 *Parfitt v Lawless* (1872) LR 2 P&D 462, 470 (Lord Penzance); *Wingrove v Wingrove* (1885) 11 PD 81, 82 (Sir James Hannen); *Baudains v Richardson* [1906] AC 169, 185 (Lord Macnaghten). In *Craig v Lamoureux* [1920] AC 349, 357, Viscount Haldane outlined both approaches to testamentary undue influence but it was evident that whether undue influence was exercised was determined by reference to coercive or overhearing behaviour. As will be shown below, Canadian cases have utilised the broader statement in *Boyse v Rossborough* to frame a wider interpretation of testamentary undue influence.
20 *Wingrove v Wingrove* (1885) 11 PD 81, 83 (Sir James Hannen).
21 (1868) LR 1 P&D 481.

> for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgement, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened.[22]

Secondly, the House of Lords in *Boyse v Rossborough* held that undue influence cannot be presumed from the facts of the case, but must be proved directly.[23] The House of Lords set a very high threshold for proof which appeared not only well beyond the civil standard of balance of probabilities, but also possibly stricter than the criminal standard of beyond reasonable doubt.[24] Lord Cranworth stated:

> in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with the contrary hypothesis.[25]

This formidable standard of proof has been conscientiously and vigorously followed in the foremost English authorities in respect of testamentary undue influence.[26] It is not sufficient to show that there was an opportunity to exercise undue influence over the testator. It must be demonstrated that undue influence was exercised and that as a result the will was made.[27] The imposition of such a high standard of proof has meant that it has been very difficult to prove undue influence. In the absence of direct and indisputable evidence of coercive conduct, it has been virtually impossible to infer that undue influence has taken place where it has been possible to explain the making of the will on a basis other than undue influence. The effect of this particular standard of proof is that undue influence must be the only possible explanation for the existence of the will. The party who alleges that undue influence has been exercised also bears the onus of proof.[28] In subsequent cases, courts have held that where the person who alleges undue influence fails to prove it, that party bears the costs of the action.[29] Consequently, a party may decline to allege undue influence or may couple it with other allegations such as want of testamentary capacity.

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22 Ibid 482.

23 *Boyse v Rossborough* (1857) 6 HL Cas 1, 49; 10 ER 1192, 1211. See also *Parfitt v Lawless* (1872) LR 2 P&D 462, 469–70 (Lord Penzance); Ridge, above n 1, 621. It is important to note that there was a transfer of ecclesiastical jurisdiction to the common law courts in the mid-19th century. It has been pointed out that ecclesiastical courts had developed a different standard of proof which may not have been equivalent to one of the two standards in the modern legal system: *Briginshaw v Briginshaw* (1938) 60 CLR 336, 363 (Dixon J).

24 In respect to the civil and criminal standards of proof, see generally J D Heydon, *Cross on Evidence* (5th ed, 1996) [9005].

25 *Boyse v Rossborough* (1857) 6 HL Cas 1, 51; 10 ER 1192, 1212. It is a high standard of proof: see Rolfe J in *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) [163].

26 *Wingrove v Wingrove* (1885) 11 PD 81, 83 (Sir James Hannen); *Craig v Lamoureux* [1920] AC 349, 357 (Viscount Haldane).

27 *Wingrove v Wingrove* (1885) 11 PD 81, 83 (Sir James Hannen); *Baudains v Richardson* [1906] AC 169, 185 (Lord Macnaghten); *Craig v Lamoureux* [1920] AC 349, 357 (Viscount Haldane).

28 *Boyse v Rossborough* (1857) 6 HL Cas 1, 49; 10 ER 1192, 1211; *Parfitt v Lawless* (1872) LR 2 P&D 462, 474-5 (Lord Penzance).

29 *Re Cutcliffe's Estate; Le Duc v Veness* [1959] P 6, 16–21 (Hodson LJ).

Thirdly, the general position is that the alleged undue influence must be exercised in relation to the will itself rather than other transactions involving the testator.[30] However, Lord Cranworth stated that 'this principle must not be taken too far'.[31] Instead, he opened the way for an inference of undue influence based on circumstantial evidence in what could be described as a relationship of control. In this situation, if it could be proved that the testator was not a free agent and was entirely under the control of the person who benefited under the will, then even where there was no evidence presented in respect to the execution of the will, a court could hold that undue influence had in fact been exercised. A relationship of control as proof of undue influence has been raised in a few cases,[32] but in general it appears to have been overlooked. Although it is not clear why this has occurred, one possible explanation lies in the fact that the headnote of *Boyse v Rossborough* completely omits reference to this type of situation.[33]

Finally, while Lord Cranworth implicitly acknowledged that a healthy person could act coercively towards a person who was 'feeble in body, even though not unsound in mind,'[34] elderly testators were not singled out for a special status or special treatment. In subsequent cases, it was acknowledged that coercion or pressure was a relative concept, dependent upon the particular facts of the case.[35] Therefore, theoretically speaking it was possible to rely on proof of relatively minimal pressure where an elder was suffering severe illness or the medical effects of ageing. Nevertheless, the doctrine was framed in a general way without any particular attention to or protection of a specific group. This remains the case today.

B The Equitable Doctrine of Undue Influence

It is well known that the equitable doctrine of undue influence which operates in respect of inter vivos dispositions is considerably wider than testamentary undue influence.[36] Equitable undue influence was originally formulated by the Court of Chancery.[37] It comprises two classes of undue influence: actual undue influence and presumed or relational undue influence. The former bears some similarity to testamentary undue influence. It requires proof that undue influence was in fact exerted, thereby negativing consent in relation to the transaction.

30 *Boyse v Rossborough* (1857) 6 HL Cas 1, 51; 10 ER 1192, 1212.

31 Ibid.

32 See, eg, *Parfitt v Lawless* (1872) LR 2 P&D 462, 470 (Lord Penzance); *Baudains v Richardson* [1906] AC 169, 183 (Lord Macnaghten); *Re Harden* [1959] CLY 3488.

33 *Boyse v Rossborough* (1857) 6 HL Cas 1, 3; 10 ER 1192, 1193.

34 Ibid 49, 1211.

35 *Wingrove v Wingrove* (1885) 11 PD 81, 83 (Sir James Hannen).

36 See *Parfitt v Lawless* (1872) LR 2 P&D 462, 496 (Lord Penzance); *Re Teddy: Hockey v Honeychurch* [1940] SASR 354; *Newton v Taylor* (Unreported, Supreme Court of New South Wales, Powell J, 2 August 1991); Keith Mason and Leslie G Handler, *Wills, Probate and Administration Service in New South Wales* (1999) [1017.4.1].

37 Jill E Martin, *Hanbury & Martin: Modern Equity* (15th ed, 1997) 828–36; Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (5th ed, 1998) 356; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) [1-075] and [15-005].

Unlike duress, however, it is not necessary to prove violence or that violence was threatened.[38] The party alleging the undue influence also bears the onus of proof.[39] However, presumed or relational undue influence does not require proof that undue influence was exercised. Rather, a claimant must prove that a relationship of trust and confidence existed between the parties.[40] Upon proof of the existence of the antecedent relationship of trust and confidence, a rebuttable presumption arises that undue influence has been exerted. The burden of proof shifts to the defendant to demonstrate that the influence was not exercised and that the inter vivos transaction was the result of the claimant's independent and fully informed intention.[41]

In *Barclays Bank plc v O'Brien*[42] the House of Lords confirmed that there were two ways in which the presumption of undue influence could be proved. On the one hand there were certain relationships (sometimes referred to as Class 2A relationships) which automatically raised a presumption[43] that undue influence had been exercised, such as parents and young children,[44] solicitors and clients,[45] doctors and patients[46] and religious advisors and followers.[47] Alternatively, in cases where such relationships did not exist, it was possible to prove as a matter of fact that the plaintiff reposed trust and confidence in the defendant, so that a presumption of undue influence arose. These were known as Class 2B relationships. In the subsequent House of Lords decision, *Royal Bank of Scotland plc v Etridge (No 2),*[48] ('*Etridge (No 2)*') the Court retained the automatic presumption, but appeared to dispense with the Class 2B category because it lacked forensic utility.[49] Instead, cases outside the automatic presumption simply illustrated 'a shift in the evidential onus on a question of fact'.[50] The plaintiff

38 In respect of actual undue influence, see M Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985) [146]–[156]; Anthony J Duggan, 'Undue Influence' in Patrick Parkinson (ed) *The Principles of Equity* (2nd ed, 2003) [1109]. In respect of testamentary undue influence, see Winder, above n 14, 105; Ridge, above n 1, 621.

39 Duggan, above n 38, [1108]; Martin, above n 37, 828–9; Goff and Jones, above n 37, 358–9; John McGhee, *Snell's Equity* (30th ed, 2000) [38-10].

40 Martin, above n 37, 829–30; Goff and Jones, above n 37, 357, 359–61; Meagher, Heydon and Leeming, above n 37, [15-055]–[15-115]; Cope, above n 38, ch 5; Duggan, above n 38, [1112]–[1115]; McGhee, above n 39, [38-11]–[38-24].

41 Martin, above n 37, 829–30; Goff and Jones, above n 37, 363; Meagher, Heydon and Leeming, above n 37, [15-125]–[15-145]; Duggan, above n 38, [1117]; *Credit Lyonnais Nederland NV v Burch* [1997] 1 All ER 144, 156 (Millet LJ).

42 [1994] 1 AC 180.

43 Ibid 189–90.

44 For example *Hatch v Hatch* (1804) 9 Ves Jr 292; 32 ER 615; *Archer v Hudson* (1844) 7 Beav 551; 49 ER 1180; *Allfrey v Allfrey* (1847) 10 Beav 353; 50 ER 618; *Wright v Vanderplank* (1856) 2 Kay & J 1; 44 ER 340; *Bainbrigge v Browne* (1881) 18 Ch D 188; McGhee, above n 39, [38-14].

45 *Gibson v Jeyes* (1801) 6 Ves Jr 266; 31 ER 1044; *Wood v Downes* (1811) 18 Ves Jr 120; 34 ER 263; McGhee, above n 39, [38-19].

46 *Dent v Bennett* (1839) 4 My & Cr 269; 41 ER 105; *Gibson v Russell* (1843) 2 Y C Ch 104; 63 ER 46; McGhee, above n 39, [38-18].

47 *Huguenin v Baseley* (1807) 14 Ves Jr 273; 33 ER 526; *Allcard v Skinner* (1887) 36 Ch D 145; [1886-90] All ER Rep 90; McGhee, above n 39, [38-14].

48 [2002] 2 AC 773.

49 Ibid 842–3 (Lord Scott), 822 (Lord Hobhouse), 816 (Lord Clyde).

50 Ibid 797 (Lord Nicholls).

would raise a rebuttable evidential presumption of undue influence, which shifted the onus of disproving the presumption to the defendant. In addition, the House of Lords confirmed that in raising an evidential presumption of undue influence it was necessary for the plaintiff to show that the transaction was only explicable by the exercise of undue influence.[51] The criterion of explicability by undue influence only is an important determinant of, and constraint on, whether an inter vivos transaction should be set aside. It indicates that not all gifts made in the context of a relationship of trust and confidence will necessarily be set aside.

Broadly speaking, there are two major explanations why undue influence in equity and probate differed. It has been argued that the two forms of undue influence were simply the historical by-products of the dual administration of law and equity in which the Court of Chancery did not interfere in the ecclesiastical administration of wills, subject only to a few exceptions.[52] Accordingly, there was no comprehensive explanation by the courts why the probate doctrine was narrower than the equitable doctrine. Based on this interpretation, it has been contended that in a post-judicature system the difference between testamentary and equitable undue influence is ripe for review in respect of the making of gifts generally. It may be possible to eliminate the probate doctrine (which has limited utility anyway) and replace it with the equitable doctrine.[53] The suggestion for reform based on this analysis will be considered in Part IV below.

Alternatively, there is evidence showing that English courts deliberately chose to retain the approach of the ecclesiastical courts because attempts to extend equitable undue influence to testamentary cases failed. In the probate context, courts were faced with the choice of either undue influence based on coercion or equitable undue influence based on a presumption. They chose the former because it conformed to earlier ecclesiastical practice and would not raise controversy.[54] In addition, a number of reasons have been given by courts and commentators to justify the narrower concept of undue influence in probate, although there appears to be no case where a court set down a comprehensive justification. For example, it has been argued that that the automatic inter vivos presumption targets relationships where undue influence is likely to occur, whereas it is precisely these kinds of relationships (in which persuasion falling short of coercion could be expected) which would attract the beneficence of the testator.[55] If an automatic presumption operated in respect to wills in the same way as inter vivos transactions, then there would be a large group of wills which would have to be proved in a formal manner, resulting in considerable inconvenience and expense.[56] Moreover, while a party to an inter vivos gift will generally be aware of the transaction and may be able to insist that the donor

51 Ibid 799–800.

52 Tyson, above n 14, 48.

53 See generally Ridge, above n 1, 627–34.

54 *Hindson v Weatherill* (1854) 5 De G M & G 301; 43 ER 886; Winder, above n 14, 105–6.

55 *Parfitt v Lawless* (1872) LR 2 P&D 462; *Hall v Hall* [1968] 1 P&D 481; *Nye v Sewell* (1894) 15 LR (NSW) 18; John Gareth Miller, *The Machinery of Succession* (1972) 125; Clive V Margrave-Jones, *Mellows, The Law of Succession* (5th ed, 1993) [5.47]; Rosalind F Atherton and Prue Vines, *Succession: Families, Property and Death* (2nd ed, 2003) [6.21].

56 Caroline Sawyer, *Principles of Succession, Wills and Probate*, (2nd ed, 1998) [4.8.1].

obtain independent advice, it is conceivable that a party may not be aware of the testamentary gift until after the testator has died.[57] In any event, the inter vivos transaction may be both contrary to the intention of the donor and in an immediate financial sense, improvident. In contrast, the making of a will does not deprive a testator of assets during his lifetime, so that the making of the will is not improvident.[58] Finally, it has been pointed out that the fact that testamentary undue influence is difficult to establish reflects the underlying policy of freedom of testation. Whereas in most inter vivos cases the donor will often bring the action to have the gift set aside and will be available to give evidence,[59] in probate cases the testator cannot bring an action and is not available to testify as to what occurred at the time that he made the will. The only document upon which the court can rely is the will, and it may unnecessarily challenge a testator's freedom of testation to introduce the equitable doctrine based on a presumption of undue influence.[60] While such reasons have been described as cogent,[61] the fact remains that undue influence in probate has been extraordinarily difficult to prove in modern times, so that it does lack the utility that it could otherwise have.

III TESTAMENTARY UNDUE INFLUENCE AND ELDERS IN AUSTRALIAN LAW

A 19th Century Case Law

In the 19th century, unlike the English doctrine of undue influence, the Australian doctrine was initially in an unsettled state. In several early cases concerning elders, colonial courts initially adopted a broad interpretation of testamentary undue influence. In these cases concerning elderly testators, undue influence became a doctrine of great utility. First, it was not necessary to prove actual coercive conduct (or even coercive conduct in a relative sense) on the part of the beneficiary or another party. Instead, the courts considered the overall circumstances of the case, including the susceptibility of the testator to undue influence, the testator's health and age at the time when the will was made, the involvement of the beneficiary in the will-making process and the relationship of the beneficiary to the testator.[62] Secondly, in the light of the evaluation of the

57 *Parfitt v Lawless* (1872) LR 2 P&D 462; Miller, above n 55, 125; Margrave-Jones above n 55, [5.47].

58 W A Lee, *Manual of Queensland Succession Law* (5th ed, 2001) [310]. The making of an inter vivos gift remains optional, while property must devolve after death: Roger Kerridge, *Parry & Clark: The Law of Succession* (11th ed, London) [5-34], fn 23.

59 Cf *Bridgewater v Leahy* (1998) 194 CLR 457.

60 Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: *Bridgewater v Leahy* as Backdoor Probate Law?' (2003) 10 *Australian Property Law Journal* 53, 63.

61 Tyson, above n 14, 48.

62 *Buckley v Millar* (1869) NSWSCR (Eq) 74, 90–4 (Hargrave J), 95 (Cheeke J); *Callaghan v Myers* (1880) 1 LR (NSW) 351, 356 (Sir James Martin CJ); *In the Estate of Alfred Stillingfleet White* (1892) 18 VLR 715, 720 (a'Beckett J).

overall facts of the case, the courts did not apply the strict threshold articulated in *Boyse v Rossborough* and find that the existence of the will could only be explained by the exercise of undue influence. Rather, the courts determined that undue influence was the most likely explanation for the will.[63] Thirdly, undue influence was either the only[64] or the predominant[65] core principle upon which the will was challenged and probate refused. In comparison, the question of testamentary capacity appears to have been a secondary consideration in these cases. Finally, in respect to elders, Hargrave J in *Callaghan v Myers*[66] held that a court would not only interfere with respect to a will where fraud or coercion had been proved, but also where testators were sick and weak and there were 'certain relationships existing in the persons about testators when they are dying'.[67] Implicitly referring to the vulnerability of the very old, he commented that 'if people are in their second childhood, the law protects them from making either deeds or wills'.[68]

However, the Australian case law in the 19th century also reveals the increasing absorption of the principles enunciated in *Boyse v Rossborough* and the English case law which assiduously followed it.[69] Not only was the English case law cited and/or discussed,[70] but it was also generally followed without any acknowledgement that it represented a radical departure from the looser doctrine of undue influence applied in some colonial cases (other than to emphasise strongly that undue influence would not be presumed from the relationship of the testator and the beneficiary).[71] Therefore, it became difficult to prove undue influence in the form of coercive conduct[72] and merely presenting evidence which may have suggested that some improper influence had been exercised was no longer sufficient to satisfy the court that it had been in fact exercised.[73] It must be emphasised that Australian courts continued to affirm that it was not necessary to provide direct evidence of coercion. Undue influence could be

63 *Callaghan v Myers* (1880) 1 LR (NSW) 351, 356 (Sir James Martin CJ); *In the Estate of Alfred Stillingfleet White* (1892) 18 VLR 715, 720 (a'Beckett J).

64 *Buckley v Millar* (1869) NSWSCR (Eq) 74.

65 *Callaghan v Myers* (1880) 1 LR (NSW) 351.

66 Ibid.

67 Ibid 357.

68 Ibid.

69 See, eg, *Wingrove v Wingrove* (1885) 11 PD 81.

70 *Watson v Kerridge* (1888) 9 NSW Eq 35, 41–3 (Windeyer J); *Buckley v Maddocks* (1891) 12 NSW Eq 277, 282–3 (Stephen J); *The Perpetual Trustee Company Ltd v Clarke* (1895) 16 NSW Bky C & P 20, 29 (Owen CJ); *In the Will of George Lamont* (1881) 7 VLR (I) 86, 103 (Molesworth J);

71 *Nye v Sewell* (1894) 15 NSWR 18, 21 (Manning J), *Buckley v Maddocks* (1891) 12 NSW Eq 277, 287 (Stephen J).

72 *Watson v Kerridge* (1888) 9 NSW Eq 35, 43 (Windeyer J); *Buckley v Maddocks* (1891) 12 NSW Eq 277, 282–3 (Stephen J); *The Perpetual Trustee Company Ltd v Clarke* (1895) 16 NSW Bky C & P 20, 34 (Owen CJ); *In the Will of George Lamont* (1881) 7 VLR (I) 86, 103; *In the Will of Mary Wilson* (1827) 23 VLR 197, 199 (Hood J).

73 *Watson v Kerridge* (1888) 9 NSW Eq 35, 43 (Windeyer J); *Buckley v Maddocks* (1891) 12 NSW Eq 277, 287 (Stephen J); *The Perpetual Trustee Company Ltd v Clarke* (1895) 16 NSW Bky C & P 20, 34 (Owen CJ); *In the Will of George Lamont* (1881) 7 VLR (I) 86, 103 (Molesworth J); *In the Will of Mary Wilson* (1827) 23 VLR 197, 199 (Hood J); *Miller v Farr* (1872) 3 AJR 257.

inferred from the circumstances of the case,[74] although in practice it was very difficult to prove undue influence simply on the basis of circumstantial evidence.

The incorporation of the English case law into Australian law in the 19th century had a dramatic effect upon the utility and prominence of testamentary undue influence in cases where a will made by an elderly testator was subject to dispute. Whereas earlier cases had been pleaded and argued predominantly or solely on undue influence, the assimilation of the strict doctrine meant that a person challenging the will could no longer rely on undue influence exclusively. While undue influence continued to be pleaded in cases concerning elderly testators, by the end of the 19th century it was raised as a principle that was secondary or subordinate to other principles, most particularly testamentary capacity. *In the Will of Thomas Walsh*[75] ('*Walsh*') is a helpful example. In this case, a 78 year old testator gave a considerable portion of his estate to institutions and persons associated with the Catholic Church, including a priest who assisted him with the preparation of the will. During his lifetime, the testator had been a regular and generous contributor to the Church. Accordingly, a'Beckett J held that in the light of the testator's past conduct, the provisions of the will could not be said to provide evidence of undue influence.[76] Moreover, his Honour held that there was no evidence of 'spiritual duress' on the part of the priest.[77] Instead, he held that the testator lacked the requisite testamentary capacity. While the testator was ill and was confined to bed, there was no evidence that the testator lacked capacity to communicate his wishes or suffered any debilitating delusions.[78] The witnesses to the will did not observe any indication of testamentary incapacity.[79] Nevertheless, a'Beckett J held that the dying testator lacked the necessary 'sustained mental effort'[80] to make a valid will and the will was not the outcome of a sound mind. In order to justify his decision in the light of evidence to the contrary, a'Beckett J applied what he described as 'a high standard of competency.'[81] In the absence of evidence of undue influence (or a presumption of undue influence on the part of the priest as spiritual advisor), his Honour used the issue of testamentary capacity to determine the validity of the will. In so doing, he presaged a trend which has become important in the modern cases. Testamentary capacity, rather than undue influence (even in highly irregular circumstances), is the main determinant or 'filter' for the validity of wills made by the elderly testator. It has been suggested that the suspicious circumstances rule was applied to find a lack of testamentary capacity in this case.[82] A'Beckett J did not specifically refer to the rule, nor did he state that he was applying it.

74 *Buckley v Maddocks* (1891) 12 NSW Eq 277, 287 (Stephen J).
75 (1892) 18 VLR 739.
76 Ibid 747.
77 Ibid 752.
78 Ibid 741–5.
79 Ibid 745.
80 Ibid 752.
81 Ibid 753.
82 Ridge, above n 1, 624.

Rather, he relied on cases that required a high standard of soundness of mind.[83] As will be shown below, in Australia this has become one of two possible versions of the suspicious circumstances rule.[84]

B Modern Case Law

The surprising hallmark of modern case law, generally, and cases in which wills have been made by frail and enfeebled elders, in particular, is that most courts have consistently adopted and applied the orthodox model of testamentary undue influence described above. Therefore, in cases where wills made by elderly testators have been subject to dispute, the test for undue influence has remained coercion.[85] As mentioned above, coercion cannot be presumed,[86] but must be proved as either having been exercised,[87] or as the only possible hypothesis in the circumstances.[88] In some cases, coercion as a relative concept dependent upon the health and condition of the testator has been noted, but not necessarily applied.[89] Therefore, whether the beneficiary acted coercively has been more important than appraising the vulnerability of the testator to coercion in the circumstances. While it is theoretically possible to rely entirely on circumstantial evidence[90] to prove undue influence,[91] it has been very difficult to do so.[92]

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83 *Walsh* (1892) 18 VLR 739, 747–9. Note *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA, 16 December 2004).

84 Below Part IV(B).

85 *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985) [19]; *Estate of Fourlanos: Maszkowski v Public Trustee* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987) [39]–[40]; *Estate of Phillips; Legg v Duncan* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987) [24]–[25]; *Winter v Crichton* (1991) 23 NSWLR 116, 121; *Newton v Taylor* (Unreported, Supreme Court of New South Wales, Powell J, 2 August 1991) [13]; *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992) [19]; *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [141]; *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [24]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [86]; *Miller v Jones* [1999] NSWCA 467 (Unreported, Meagher, Beazley and Fitzgerald JJA, 17 December 1999) [12]; *Re Barnett* [1940] VLR 389, 393 (O'Bryan J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 359 (Napier J); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000) [128].

86 *Winter v Crichton* (1991) 23 NSWLR 116, 121 (Powell J); *Newton v Taylor* (Unreported, Supreme Court of New South Wales, Powell J, 2 August 1991) [13]; *Re Barnett* [1940] VLR 389, 392 (O'Bryan J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 358 (Napier J).

87 *Estate of Phillips; Legg v Duncan* (Unreported , Supreme Court of New South Wales, Needham J, 11 March 1987) [24]–[25]; *Winter v Crichton* (1991) 23 NSWLR 116, 122 (Powell J); *Newton v Taylor* (Unreported, Supreme Court of New South Wales, Powell J, 2 August 1991) [16]; *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [25].

88 *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985) [20]; *Winter v Crichton* (1991) 23 NSWLR 116, 122 (Powell J); *Newton v Taylor* (Unreported, Supreme Court of New South Wales, Powell J, 2 August 1991) [16]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [86].

89 *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [24]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [86].

90 Circumstantial evidence is any fact or evidentiary fact from which the judge or jury may infer the existence of a fact: see generally, Heydon, above n 24, [1100]–[1105].

In the light of the adoption and application of the strict doctrine of testamentary undue influence in modern Australian cases in which wills made by elders have been the subject of dispute, there are five discernible trends. First, there are only a few cases where the court held that undue influence has been perpetrated[93] because it has been difficult to prove.[94] Secondly, there are only a few cases in which testamentary undue influence has been solely pleaded.[95] Thirdly, undue influence has been pleaded and determined as a subordinate and secondary principle to other doctrines upon which a will could be open to challenge. Fourthly, the doctrine of testamentary capacity, in particular, has played a predominant role in cases where a will made by an elderly testator has been challenged on the basis of undue influence. Finally, it could be argued that a robust suspicious circumstances rule has been applied as a substitute for undue influence.

Regarding the third trend, in most cases, undue influence has been coupled with an allegation that the testator lacked testamentary capacity,[96] although there have been several cases where want of knowledge and approval,[97] suspicious

91 *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985) [19]; *Estate of Fourlanos: Maszkowski v Public Trustee* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987) [39]–[40]; *Winter v Crichton* (1991) 23 NSWLR 116, 122 (Powell J); *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992) [19]; *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [23]–[24]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [85]; *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659, 679 (Smith J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 359 (Napier J).

92 *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985) [19]; *Estate of Fourlanos: Maszkowski v Public Trustee* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987) [39]–[40]; *Winter v Crichton* (1991) 23 NSWLR 116, 123 (Powell J); *The Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992) [19]–[20]; *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [26]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [104]–[105]; *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659, 679 (Smith J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 359 (Napier J).

93 See *Bool v Bool* [1941] St R Qd 26; *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 19 December 1991).

94 *Tonkiss v Graham* [2002] NSWSC 891 (Unreported, Campbell J, 4 October, 2002) [60].

95 See, eg, *Winter v Crichton* (1991) 23 NSWLR 116 (Powell J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 359 (Napier J).

96 *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985); *Estate of Fourlanos: Maszkowski v Public Trustee* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991); *Permanent Trustee Co Ltd v McDermid (Estate of Odgers)* (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991); *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995); *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [24]; *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996); *Re Barnett* [1940] VLR 389; *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659; *Bool v Bool* [1941] St R Qd 26; *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

97 *Blundell v Curvers* (Unreported, Supreme Court of New South Wales, Windeyer J, 19 November 1998).

circumstances,[98] fraud[99] or forgery[100] were also raised. In some cases, where the court was able to refuse probate on a basis other than undue influence, the court either dealt with the allegation of undue influence summarily[101] or did not finally determine whether undue influence had been exercised.[102] Therefore, the testamentary doctrine of undue influence has remained unexplored, under-developed and unevaluated in these cases.

For example, in *Estate of Fourlanos: Maszkowski v Public Trustee,*[103] ('*Fourlanos*') a 91 year old and enfeebled testator had been reliant on the plaintiff, his granddaughter, to assist him with his banking, shopping and washing. Allegations were made by the testator's daughter and son-in-law (Mr and Mrs Scoot) that the plaintiff had wrongfully withdrawn funds from the testator's account. During the course of investigations at the bank, the Scoots decided to take the testator to the Public Trustee's Office to make a will. At the initial interview the testator appeared vacant and said nothing. A solicitor acting for the Public Trustee queried whether the testator had testamentary capacity and requested a medical certificate stating that the testator did have testamentary capacity. A doctor provided a medical certificate which confirmed that the testator was 'all right', but the examination was not directed to whether the testator possessed testamentary capacity. At a later interview at the Public Trustee's Office, the solicitor decided to allow the testator to sign the will, so as not to deprive him of the right to do so. In order to determine whether the testator knew what he was signing and its significance, the solicitor asked the testator a series of questions to which the testator wrote answers, after some prompting.

Justice Needham held that the testator lacked testamentary capacity. He opined briefly that there was insufficient evidence to suggest that the plaintiff had been coerced.[104] However, it is submitted that there may have been sufficient evidence of undue influence. Mr Scoot, in particular, appears to have created an unsettled and agitated situation in which the testator was confronted with allegations of wrongdoing by the plaintiff. Justice Needham confirmed that the involvement of the Scoots in respect of the will was far from disinterested. He observed that the facts were open to the interpretation that the testator would not have made the

98 *Estate of Phillips; Legg v Duncan* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

99 *Estate of Phillips; Legg v Duncan* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987); *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992); *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

100 *McKinnon v Voigt & Smits* (Unreported, Supreme Court of Victoria, Balmford J, 3 May 1996); *McKinnon v Voigt & Smits* [1998] 3 VR 543.

101 See, eg, *Estate of Fourlanos: Maszkowski v Public Trustee* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); *Estate of Phillips; Legg v Duncan* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987).

102 See, eg, *Grynberg v Muller: Estate of Bilfeld* [2001] NSWSC 532 (Unreported, Hamilton J, 27 June 2001).

103 (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987).

104 Ibid [40].

will if he had not been persuaded to do so[105] and that 'it is a fair inference from this evidence that the instructions for the will, more probably than not, came from one or other of the Scoots'.[106]

In short, it is arguable that despite the absence of direct evidence of coercion by the Scoots, there was adequate evidence from which undue influence, as described by Sir James Wilde in *Hall v Hall*,[107] could have been inferred. It was most likely that the Scoots had supplanted any testamentary wishes that the testator may have had; and that the testator probably made the will under their directions to ensure peace.

In regard to the fourth trend, Santow J identified the connection between testamentary undue influence when he observed that:

> There are of course distinct legal principles applicable to claims of undue influence and lack of testamentary capacity ... The connection between the two however is found in the vulnerability of the old and frail to such influence (though one is not an essential concomitant of the other); thus evidence in the one is frequently relevant to the other.[108]

The same evidence could be used to test the testamentary capacity of the testator and establish the testator's mental frailty and vulnerability to undue influence. However, the case law regarding elders who make wills demonstrates that courts have adopted a flexible and accommodating standard in respect of proof of testamentary capacity, while they have applied undue influence strictly and sought proof of coercion.[109] An understanding of how testamentary capacity has been determined in cases in which elderly testators have made wills, explains in part why in recent times testamentary undue influence has been criticised for being redundant.[110] In the absence of a broad doctrine of testamentary undue influence, the issue of testamentary capacity has been used to review not only whether the testator had a sound mind and understanding in the narrow sense, but also other factors. In short, the issue of testamentary capacity has been used effectively to offset the limited utility of undue influence in probate.

In the foremost authority on testamentary capacity, *Banks v Goodfellow*,[111] Cockburn CJ stated which characteristics the testator must possess in order have testamentary capacity:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in

105 Ibid.

106 Ibid [30].

107 (1868) LR 1 P&D 481, 482.

108 *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [73].

109 It will be recalled that in *Walsh* (1892) 18 VLR 739, a'Beckett J considered that it was necessary set a high threshold of testamentary competence and that it was on this basis that he refused to grant probate of the will. In contrast, the key authorities on testamentary capacity have not imposed such a threshold.

110 Ridge, above n 1, 638. However, a discussion of the role of testamentary capacity has not prefigured greatly in the articles by either Kerridge or Ridge.

111 (1870) LR 5 QB 549.

> disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[112]

The burden and standard of proof for testamentary capacity markedly differs from the burden and standard of proof for undue influence. The legal burden of proving testamentary capacity lies and remains on the propounder of the will, who is required to show on the civil standard of proof, on the balance of all the evidence, that the testator was of sound memory and understanding.[113] An evidential burden is borne by the party who challenges the will and contends that it ought not be admitted to probate.[114] Certoma has pointed out that the legal burden on the propounder shall be satisfied initially if the propounder proves due execution of the will by the testator and addresses any suspicious circumstances, such as the advanced age or illness of the testator.[115] Therefore, in principle, such circumstances as age or mental illness may raise a doubt whether the testator had testamentary capacity. Courts have indicated that they will scrutinise the evidence very carefully before admitting such a will to probate.[116] However, it is unclear whether it can be said that this treatment of testamentary capacity falls within the specific suspicious circumstances rule discussed below or whether it only explains how the burden and standard of proof ought to be applied when there are suspicions about the testator's testamentary capacity.[117] Some judges and commentators appear to treat the suspicious circumstances rule as mainly pertaining to the issue of knowledge and approval that is quite distinct from testamentary capacity,[118] while others indicate that matters such as mental enfeeblement may also raise the suspicious circumstances rule.[119]

Advanced age, physical infirmity, and illness associated with old age are not conclusive evidence that the testator lacked testamentary capacity.[120] An aged testator may suffer from poor physical health, but this may not affect his capacity

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112 Ibid 565.

113 *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [20]; *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA, 16 December 2004) [15]–[24]; G L Certoma, *The Law of Succession in New South Wales* (3rd ed, 1997) 79; Robert S Geddes, Charles J Rowland and Paul Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [5.08].

114 *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [1]; Certoma, above n 113, 78.

115 Certoma, above n 113, 78. See also *Worth v Clasohm* (1953) 86 CLR 439; *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA**,** 16 December 2004).

116 *Permanent Trustee Co Ltd v McDermid (Estate of Odgers)* (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991) [39]–[40]. However, the standard of proof remains the civil standard: *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA**,** 16 December 2004) [22], [58].

117 In *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA, 16 December 2004) the members of the Court of Appeal treated the issue of suspicious circumstances concerning the dementia of the testatrix in respect to testamentary capacity as one concerned with how the burden and standard of proof of testamentary capacity would be applied rather than the application of the suspicious circumstances rule considered below, Part IV(B).

118 Geddes, Rowland and Studdert, above n 113, [5.16].

119 *Re Stott (dec'd)* [1980] 1 All ER 259, 264 (Slade J); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000) [94].

120 *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [20]; Certoma, above n 113, 78.

to appreciate the three requirements stated in *Banks v Goodfellow*.[121] Therefore, advanced age and illness will be a material circumstance[122] raising suspicions that the testator lacked capacity.[123] In order to establish that the testator lacked testamentary capacity, it must be shown that the testator's mental faculties were so detrimentally affected by age or illness that he was unable to appreciate the nature of the will, the property in question and the persons who would have a claim on his bounty.[124] It is contended that the decision in *Walsh* falls for consideration under this category rather than the suspicious circumstances rule, discussed below.[125] In *Walsh*, the Court acknowledged that the circumstances were unusual, applied a high standard of proof of testamentary capacity and refused probate of the will because the testator lacked the mental stamina to make a will. In contrast, in *Permanent Trustee Co Ltd v McDermid (Estate of Odgers)*[126] ('*Odgers*') an 82 year old testatrix executed a will several months before she suffered a stroke and was diagnosed as suffering dementia of a moderate severity.[127] It was impossible to determine to what extent the testatrix suffered dementia before the stroke.[128] The Court held that the testatrix had testamentary capacity at the time she made the will, particularly in light of the intelligent way she dealt with her solicitor in giving instructions.[129]

Medical evidence that the testator suffered an ongoing medical impairment which would be likely to affect the testator's capacity to make a will, is also relevant. However, such medical evidence is not necessarily determinant.[130] Any general mental impairment or delusion must specifically affect the testator's disposal of the property.[131] Therefore, it is possible that a testator who suffers mental illness, disabilities or insanity may understand adequately the nature of the will, the property in question and the persons who would have a claim on his bounty in a lucid interval at the time the instructions were given or when the will

121 *Bailey v Bailey* (1924) 34 CLR 558, 571 (Isaacs J); *Banks v Goodfellow* (1870) LR 5 QB 549, 566 (Cockburn CJ); Geddes, Rowland and Studdert, above n 113, [5.04].

122 *Bailey v Bailey* (1924) 34 CLR 558, 571 (Isaacs J).

123 *Kinleside v Harrison* (1818) 2 Phil Ecc 449, 462; 161 ER 1196, 1200. See also *Bull v Fulton* (1942) 66 CLR 295; *West Australian Trustee Executor and Agency Company Ltd v Holmes* [1961] WAR 144; Geddes, Rowland and Studdert, above n 113, [5.04].

124 See *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [20].

125 See below, Part IV(B).

126 (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991).

127 Ibid [30].

128 Ibid.

129 Ibid [40].

130 See *Ridge v Rowden*, (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996) [77]–[79].

131 Certoma, above n 113, 77–8; Geddes, Rowland and Studdert, above n 113, [5.05].

was made.[132] Moreover, mild forms of mental illness suffered by elders will not preclude them from making a valid will.[133]

In respect of testamentary capacity, generally, and elderly testators, in particular, courts have not been limited to considerations of age, illness or mental impairment. Rather, other factors (either separate from, or in combination with, age, illness or mental impairment) have constituted part of the review of the material circumstances of the case. In the 19th century Australian cases referred to above,[134] such evidence would otherwise have been scrutinised in a plea of undue influence. In the 20th century courts have considered the rationality of the testator's disposition in light of the nature and extent of the testator's property and the persons who would naturally have a claim on the testator's bounty.[135] In *Odgers*, the testatrix had changed her will in favour of a friend, who had assisted her during various illnesses. The provisions of the new will reduced the share of the nearest relative, the defendant, and the friend had not known the testatrix as long as the defendant.[136] Nevertheless, Powell J held that the evidence of the solicitor who drafted the will confirmed that the testatrix understood the nature of her estate, the members of her family who could expect a claim on her bounty and had explained to him rationally why she wished to change her will.[137]

Where the testator is advanced in age and feeble at the time the will is made, and the will is made in favour of a person who was involved in some direct way in the making of the will or its execution, the court may suspect that the testator lacked capacity and will examine the entire evidence very carefully before granting probate.[138] As will be shown below, there may be an overlap with the specific suspicious circumstances rule, but this is not necessarily the case where there is evidence of testamentary incapacity. In *Pates v Craig & Public Trustee (Estate of the late Joyce Jean Cole)*[139] ('*Pates v Craig*') a 73 year old testatrix made a new will in which she appointed her informal carer, Mrs Pates, as her executor and sole beneficiary. Mrs Pates arranged for her own solicitor to visit the home of the testatrix to take instructions for a new will. The solicitor testified

132 Certoma, above n 113, 78; Geddes, Rowland and Studdert, above n 113, [5.05]. A testator who suffered severe depression at the time he made his will and then later committed suicide was considered to have had testamentary capacity at the time he made the will: *Re Estate of Paul Francis Hodges (dec'd); Shorter v Hodges* (1988) 14 NSWLR 698.

133 See, eg, *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659 where a testatrix suffered from arthritis, falls, and hearing loss and mild dementia, but Smith J concluded (677–9) that the testatrix had testamentary capacity in all respects. Conversely, in *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) a 67 year old testatrix suffered delusions concerning her son's inability to handle money, despite the attempts of friends and relatives to disabuse her of her error, the Court held that she lacked testamentary capacity [32]–[34]).

134 Above Part III(A).

135 Certoma, above n 113, 78; *Bailey v Bailey* (1924) CLR 558, 571 (Isaacs J).

136 *Odgers* (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991) [39].

137 Ibid [39]–[40].

138 Certoma, above n 113, 78–9; See, eg, *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); *Blundell v Curvers* (Unreported, Supreme Court of New South Wales, Windeyer J, 19 November 1998); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

139 (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

that the testatrix was lucid and clear at the time of the meeting,[140] but admitted that she did not take any precautions in respect of the will even though the testatrix was old and frail, lived in untidy conditions and wanted to leave her assets to an established client of the solicitor.[141] Later, the testatrix and Mrs Pates attended the solicitor's office and the testatrix signed the will in the presence of Mrs Pates.[142] Both the solicitor[143] and Mrs Pates[144] stated that the testatrix said that she wanted Mrs Pates to have her assets. Santow J found neither the evidence of Mrs Pates[145] nor the solicitor[146] convincing. Instead, his Honour relied on the evidence of several disinterested witnesses[147] including medical evidence which confirmed that the testatrix was suffering from a deteriorating dementia and was not able to make a rational decision about the 'ordinary aspects of her existence'.[148] He held that while there was no evidence of coercion,[149] the evidence as a whole raised doubts about the testatrix's testamentary capacity at the time the will was made. The executor had not satisfied the Court that the will ought to be admitted to probate.[150]

Finally, it could be argued that, in some cases, a robust suspicious circumstances rule has been applied as a substitute for undue influence.[151] Despite this, some courts have held that it is not a screen behind which undue influence may be raised.[152] Suspicious circumstances must be pleaded separately from undue influence.[153] In *Nock v Austin*[154] Isaacs J confirmed that where there are no circumstances raising suspicions, the proof of capacity of the testator and due execution of the will creates an assumption that he knew of and assented to the contents of the will. However, where there are circumstances which raise the suspicions of the court, the presumption of knowledge and approval does not arise and the proponents of the will have the burden of satisfying the court that the testator knew and approved the contents of the will. A court's suspicions will be aroused where a beneficiary prepared a will[155] or where the beneficiary was

140 Ibid [98].
141 Ibid [102].
142 Ibid [105]–[106].
143 Ibid [107].
144 Ibid [95], [105], [113], [114].
145 Ibid [105], [116].
146 Ibid [100]–[101], [112], [142].
147 Ibid [37]–[84].
148 Ibid [87].
149 Ibid [141].
150 Ibid [141].
151 See, eg, Kerridge, above n 1, 321–5; Geddes, Rowland and Studdert, above n 113, [5.21]. There have been several decisions where courts have suggested that the rule of suspicious circumstances may be used where it is not possible to prove testamentary undue influence: *Re Stott* [1980] 1 All ER 259; *Re Herbert Brothers* (1990) 101 FLR 279.
152 *Low v Guthrie* [1909] AC 278, 281–2 (Lord Loreburn LC).
153 *Re Barnett* (1949) VLR 389, 392 (O'Bryan J).
154 (1918) 25 CLR 519.
155 Ibid 528.

involved in having it prepared.[156] However, the categories of matters that would excite the suspicion of the court are not closed. Courts have held that suspicions of mental or physical enfeeblement could raise the suspicious circumstances rule,[157] although it is arguable that the question is whether the testator possessed testamentary capacity rather than whether the testator knew and approved of the contents of the will. The suspicious circumstances rule places a burden on the propounder to prove affirmatively that the testator knew and approved the contents of the will.[158]

While the suspicious circumstances rule may be a useful one, there appears to have been only a few cases where the rule has been raised as an alternative to undue influence[159] regarding wills made by elderly testators in Australia. The fact that it may be a way of raising undue influence indirectly ought not be overstated. In most cases, the basis of the challenges have been testamentary capacity coupled with undue influence, even where the beneficiaries have been intimately involved in procuring the will.[160] Where the court has found that the testator lacked capacity, then in most cases there has been no need to consider knowledge and approval at all.[161] This is because the issue of knowledge and approval only has significance where the testator had capacity.[162] Where the court has been satisfied that the testator had capacity and there was no coercion, the issue of knowledge and approval was only considered[163] if the suspicious circumstances rule was raised in the pleadings.[164] In such cases, the beneficiary was involved in the making of the will and there was evidence to suggest that the testatrix could not have known and approved the contents of the will. In *Estate of Phillips; Legg v Duncan*[165] ('*Phillips*') the testatrix was considered to be alert and independent.[166] However, there was evidence that the will she executed had been changed from a draft sent by the testatrix to the solicitor without her

156 *Fulton v Andrew* (1875) LR 7 HL 448, 472 (Lord Hatherley); *Re Nickson* [1916] VLR 274, 281 (a'Beckett J); *Re Stott* [1980] 1 All ER 259, 264 (Slade J); *Re Herbert Brothers* (1990) 101 FLR 279, 290–1 (Gallop J).

157 *Tyrrell v Painton* [1894] P 151; *Kenny v Wilson* (1911) 11 SR (NSW) 460, 469 (Rich AJ); *Re Stott* [1980] 1 All ER 259, 264 (Slade J); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000) [94]; *Re Estate of Paul Francis Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 705 (Powell J); *Tonkiss v Graham* [2002] NSWSC 891 (Unreported, Campbell J, 4 October 2002) [71]–[72].

158 Geddes, Rowland and Studdert, above n 113, [5.21].

159 *Estate of Phillips; Legg v Duncan* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987).

160 See, eg, *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987).

161 *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997) [24]; *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992); *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); cf *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

162 Note the comments of Cullity J in *Scott v Cousins* (2001) 37 ETR (2d) 113, [111].

163 *Kenny v Wilson* (1911) 11 SR (NSW) 460; *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985); *Odgers* (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991); *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659.

164 See also *Re Barnett* [1940] VLR 389, 393 (O'Bryan J); *Re Teddy; Hockey v Honeychurch* [1940] SASR 354, 358–9 (Napier J).

165 (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987).

166 Ibid [25].

knowledge and consent.[167] Moreover, the specific instructions for the will were given by the person who benefited under it and by the change. The Court refused to grant probate of the will because the preparation and making of the will attracted the suspicious circumstances rule, and there was insufficient evidence that the testatrix did know and approve of the contents of the will when she signed it.[168]

In *Brand v Brand*,[169] the suspicious circumstances rule was applied, although the Court also took the opportunity to reformulate the doctrine of undue influence.[170] The testatrix had suffered from depression and mood changes which made her susceptible to the influence of others and her 'environment',[171] but it appeared that she possessed testamentary capacity. Suddenly, she made a new will in favour of her grandchildren, including a grand-daughter who was closely involved in the making of the new will. She effectively disinherited her son, to whom she had promised to devise land upon which he had worked after leaving school. Rolfe J revoked probate of the will on the basis that suspicions arose as to whether the testatrix knew and approved the will. Important evidence included: the age and mental condition of the testatrix, the complete change of the content of the will, the absence of evidence that the testatrix gave the instructions for the will, the poor language and construction of the will, the fact that a carbon copy rather than the original was signed and the fact that the grand-daughter accompanied the testatrix to the solicitor's office (although she was not present at the execution of the will).[172] The evidence disclosed that the will was read to the testatrix. However he was unwilling to find that it was carefully read to her or that she understood the will because of its poor expression.[173]

C Comment

At the commencement of this article, it was pointed out that in view of the strict approach to testamentary undue influence prescribed in *Boyse v Rossborough*, there have been calls for reform, particularly in light of vulnerable elderly testators. In order to understand why there have been calls for reform, it is necessary to appreciate not only the narrow practical application of the doctrine, but also that on the facts of any particular case it may not be possible to raise another doctrine to challenge the will. In particular, it may not be appropriate to query whether the elderly testator lacked testamentary capacity or to raise the suspicious circumstances rule. Regarding the elderly, there are three situations to note.

There are cases where there is strong evidence suggesting that the elder lacked testamentary capacity. The will may be rational on its face, comply with formal requirements and the executor may have even established a prima facie case of

167 Ibid [17].
168 Ibid [28]. See also *In the Will of Steward (dec'd)* [1964] VR 179.
169 (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).
170 Ibid [162]–[164]
171 Ibid [45]–[46].
172 Ibid [155]–[161].
173 Certoma, above n 113, 85.

testamentary capacity and knowledge and approval. Nevertheless, the age and mental health of the testator, the circumstances surrounding the execution of the will and the terms of the will itself raise strong doubts that the testator possessed testamentary capacity. Ultimately the executor may be unable to dispel those concerns to the court's satisfaction and the court will refuse to grant probate. The fact that testamentary undue influence has been raised but not proved does not matter, because the will has been successfully challenged on the basis of lack of testamentary capacity.[174] However, in determining whether the testator had a sound mind, memory and understanding, the court may have taken into account a broad array of facts. Some of these facts may suggest undue influence indirectly.

There are situations where the evidence of the testator's testamentary capacity is equivocal. Yet matters such as old age, health, the terms of the will and events surrounding its execution lead the court to conclude that the testator lacked capacity. However, this may not always be the outcome of the court's deliberations. Although the testator suffered from some very moderate mental disability or episodic mental impairment, it may be difficult for the court to hold that the testator lacked testamentary capacity at the time that the will was made. Alternatively, the medical evidence may disclose that a testator's medical condition predisposed the testator to changes in mood and attitudes to others around him. Therefore, the testator was susceptible to his environment and the people with whom he had immediate contact. This may not indicate lack of testamentary capacity, but a susceptibility to undue influence (as defined in *Hall v Hall*).[175] If the court were unable to find that the testator lacked testamentary capacity and there was no direct or unequivocal circumstantial evidence of coercion, then a challenge based on both testamentary capacity and undue influence would be unsuccessful. It would then depend on the facts whether the suspicious circumstances rule could be raised as in *Brand v Brand* or *Phillips*. Unlike the facts in these cases, there may still be sufficient evidence that the testator knew and approved of the contents of the will.

Finally, there may be cases where there can be no legitimate suggestion that the testator (despite an advanced age) lacked testamentary capacity due, for example, to his reputation for independent action.[176] In such cases it may be arguable that there were circumstances which raise concerns that the testator was subject to environmental influences which affected his ability to exercise independent judgment. For example, the testator may have lived alone, was not close to his family or a family member,[177] may have been dependent upon a carer or a live-in friend,[178] or dependent on informal assistance for day to day necessities.[179] In the absence of direct or unequivocal circumstantial evidence of

174 See *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

175 (1868) LR 1 P & D 481, 482.

176 See, eg, *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

177 See, eg, *Blundell v Curvers* (Unreported, Supreme Court of New South Wales, Windeyer J, 19 November 1998); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

178 See, eg, *Phillips* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987) [25].

179 *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

coercion, it is unlikely that a challenge based on undue influence would succeed. Again, it would depend on the facts whether the suspicious circumstances rule could be relied on. It remains a possible avenue where the testator was dependent upon a carer, gave the bulk of his assets to the carer and the carer was involved in the will-making process.[180] However, on the facts the testator's knowledge and approval of the will may still be proved. Therefore, the suspicious circumstances rule would not directly address what might be considered an unusual and irregular situation.

In short, where there is evidence that an elderly testator possessed testamentary capacity or, at best, evidence of capacity was equivocal, it cannot be assumed that a challenge based on undue influence or the suspicious circumstances rule would be successful. Respectively, there may be no evidence of coercion and there may be clear evidence that the testator understood, knew and approved of the will. Yet, doubts remain whether the will represented the testator's genuine and independent wishes.

IV RECENT SUGGESTIONS FOR THE REFORM OF TESTAMENTARY UNDUE INFLUENCE

In recent times, there have been two major suggestions for reform of testamentary undue influence.

A Kerridge's Proposal[181]

Writing in the context of testamentary undue influence in the United Kingdom, the central theme of Kerridge's seminal article is that: 'it is too easy … to coerce, or deceive a vulnerable testator into making a will and it is not easy enough to challenge a suspicious will when one comes to light.'[182]

He argues that a significant aspect of this problem is the very narrow doctrine of testamentary undue influence, the fact that the person who raises undue influence unsuccessfully bears the cost of the action and the traditional reluctance of probate courts to find that a person exercised undue influence in the will-making process.[183] He demonstrates the problem by examining several cases, in particular the decision of the House of Lords in *Wintle v Nye*.[184] In that case, an elderly woman who lacked business experience signed a will and codicil prepared by her solicitor in which she left the bulk of her residuary estate to him.[185] The will could not be challenged on lack of testamentary capacity, or the perpetration of undue influence or fraud.[186] Instead, the specific suspicious circumstances rule requiring proof of knowledge and approval was raised. The

180 *Phillips* (Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987).
181 Kerridge, above n 1.
182 Ibid 328.
183 Ibid 324.
184 [1959] 1 All ER 552.
185 Ibid 286. The testatrix made the will some ten years, and the codicil some eight years, before her death.
186 Therefore, the will fell within the third situation discussed in above Part III(C).

House of Lords set aside the decision of the lower court in favour of the solicitor because the trial judge had misdirected the jury on how to interpret the evidence.[187] This would have allowed a retrial of the matter, but the challenge may not have been successful if it had been shown that the testatrix did know and approve of the will. Kerridge argues that the pleading and outcome in *Wintle v Nye* was representative of a system that has been inherently flawed by 'the obscure (or polite, or timid) approach' of probate to undue influence.[188] Suspicions of possible undue influence and fraud were linked to, and masked by, the suspicious circumstances rule and a plea that the testatrix did not have knowledge of and did not approve of the will. Yet, there was no direct allegation of impropriety in *Wintle v Nye*, only an unstated implication from the facts.[189]

In contrast to Kerridge's assessment of the situation in the United Kingdom, the above discussion of elders and undue influence in Australia[190] shows that testamentary undue influence continues to be raised directly in Australian case law. Despite this, it must be acknowledged that it has been difficult to prove and has been pleaded in conjunction with other doctrines, most notably testamentary capacity (and to a lesser extent the suspicious circumstances rule).[191] Irregular or dubious circumstances, which may indirectly suggest undue influence, have further supported a finding that the testator lacked capacity. For example, in *Fourlanos* the beneficiaries created an atmosphere of crisis and the Court found that they probably gave the instructions for the will. These were additional factors substantiating the Court's decision that the testator lacked testamentary capacity. Therefore, in Australia to some extent it can also be said that other doctrines have been used implicitly or indirectly to shed light on the possibility of undue influence.

Kerridge has made several proposals for reform aimed at ensuring that a vulnerable testator has the opportunity to make a will unhindered by undue influence or fraud, and to allow wills to be set aside where there are suspicions, but inadequate evidence, of coercion. He argues that wills ought to be executed in the presence of solicitors or notaries who took no part in the will-making process and have no connection to the beneficiaries. These lawyers ought to ensure that there is no hint of pressure or fraud and that the testator knows what he is doing.[192] In addition, potential beneficiaries ought to be placed on notice that if they, or someone linked to them, assisted in the will-making process, then they will be required to rebut a presumption of undue influence and fraud. They will be required to prove that the will was made independently and the testator

187 In particular, the House of Lords pointed out that in *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089, Parke B had decided that where a party prepares a will in which he or she benefits, this excites the suspicion of the court which must be vigilant in the examination of the document. The court must be satisfied that the document does represent the will of the deceased. This ought to have been carefully explained to the jury in the summing up: [1959] 1 All ER 552, 557–9.

188 Kerridge, above n 1, 328.

189 Ibid 323.

190 Part III(B), above.

191 Cf *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).

192 Kerridge, above n 1, 333.

was neither coerced nor misled.[193] Kerridge acknowledges that in respect to the rebuttable presumption, his 'solution is … to throw the net wide'.[194] The costs of a claim based on the presumption of undue influence and fraud would be met by the estate rather than by the party challenging the will.[195]

The advantage of Kerridge's reform proposal is that it provides some additional and impartial protection to elderly vulnerable testators at the time the will was executed. If implemented, it would dissuade potential beneficiaries from initiating the will, intermeddling in the will-making process or drafting the will. Moreover, the concern that undue influence had been perpetrated would be raised directly. Therefore, the beneficiaries in the disputed wills in such cases as *Wintle v Nye, Fourlanos,* or *Brand v Brand* would have assumed an automatic burden of demonstrating that the testator or testatrix acted independently, was under no pressure and was not misled. It is likely that the beneficiaries in these cases would have had difficulty discharging such a burden of proof.

However, the presumption of undue influence will be triggered when the beneficiary has been instrumental in the preparation of the will. It is not clear to what extent it would cover other activity that was necessary in order for the will to be made. There may be a distinction between simple and helpful assistance, occasional intermeddling and outright domination and control in the preparation of the will. Moreover, there could be situations where a dominating beneficiary deliberately avoids taking part in any aspect of the preparation of the will. Instead, he or she lets the testator know how the will ought to be drawn. Fearful of offending the beneficiary, the testator makes the will in accordance with the beneficiary's desires. In the absence of any direct evidence of participation in the preparation of the will, it appears unlikely that a rebuttable presumption would be imposed on the beneficiary. Alternatively, it would also place into question gifts which were otherwise explicable by the close positive relationship of the testator and the beneficiary. It may be difficult for a beneficiary to prove that the testator was independent of that beneficiary and that no pressure was exerted or misrepresentations made because there is insufficient extraneous evidence. Sometimes the physical, psychological and financial circumstances of an elderly testator must lead to the inevitable conclusion that the testator was very dependent upon the beneficiary for continuous assistance. Yet it cannot be assumed that the testator did not sign a will which expressed his independent wishes.

B Ridge's Proposal[196]

Ridge suggests that equitable undue influence could be incorporated into probate law either by the imposition of a trust after probate is granted or by direct incorporation of the doctrine into probate law. She acknowledges that the utilisation of equitable undue influence may cause some difficulties and that the

193 Ibid 331.
194 Ibid. It is unclear whether the presumption is a presumption of law or a presumption of fact.
195 Ibid 331–2.
196 Ridge, above n 1.

case for reform she outlines is not clear-cut. Nevertheless, she contends that the treatment of inter vivos and testamentary gifts is the outcome of the historical law and equity divide, the continuation of which may neither be compelling nor in keeping with contemporary society.[197] At the heart of Ridge's proposal is that, if possible, inter vivos and testamentary gifts ought to be subject to the same rules, despite traditional arguments that the probate context is inherently different.[198]

Based on equitable undue influence, she argues that where a testamentary gift was made in favour of a person in a strong relationship of trust and confidence with the testator and that gift was not readily explicable by the ordinary motives by which people act, a factual inference of actual undue influence ought to be raised. It will then be incumbent on the beneficiary to demonstrate that the gift was made by a testator who exercised an independent and free will.[199] She contends that while the presence of suspicious circumstances means that the propounder of the will must prove affirmatively that the testator knew and approved of the will, equitable undue influence does not require this. Rather, even if there were evidence of knowledge and approval, the testamentary gift would be voidable because of the inference of undue influence from the relationship of trust and confidence and the inexplicability of the gift.[200] The strength of the proposal is that it would unshackle undue influence from its strict criteria in a probate context and it is broadly consistent with other calls for reform.[201] It would also open the way for greater scrutiny of wills directly because equitable undue influence shifts the evidentiary burden and broadens the kind of evidence which the court may examine in order to determine whether undue influence was perpetrated.

However, the issue is whether the proposal is the best alternative to orthodox testamentary undue influence, particularly where elderly testators are involved. In this respect, it must be emphasised that there is no objection to the fusing or rationalisation of separate doctrines where it is practical and effective to do so. Initially, the key questions are: how would a relationship of trust and confidence be defined; and is this relationship a necessary prerequisite in a probate context? In situations where the relationship between the beneficiary and testator was, respectively, doctor and patient, solicitor and client or devotee and religious advisor – situations where courts have automatically found that there was a relationship of trust and confidence in inter vivos cases[202] – there would be no major difficulty. However, whether the proposal would have great practical

197 Ibid 630. Her proposal for reform must be seen in the broader context of the drive for the substantive fusion of doctrines and principles advocated by some academics in the United Kingdom. This will not be explored in this article, but see Andrew Burrows, 'We Do This at Common Law But That in Equity' (2002) *Oxford Journal of Legal Studies* 1.

198 Above pp 10–11; Ridge, above n 1, 627–34.

199 Ridge, above n 1, 619.

200 Ibid 625.

201 Ibid 626.

202 With respect to doctors, see *Dent v Bennett* (1839) 4 My & Cr 269; 41 ER 105; Cope, above n 38, [186]; solicitors: *Gibson v Jeyes* (1801) 6 Ves Jr 266; 31 ER 1044; Cope, above n 38, [179]–[180]; religious advisors: *Huguenin v Baseley* (1807) 14 Ves Jr 273; 33 ER 526; *Allcard v Skinner* (1887) 36 Ch D 145; [1886-90] All ER Rep 90; Cope, above n 38, [176]–[178].

utility in probate cases in light of these relationships is debatable. There are relatively few cases where elderly testators have given substantial assets to their doctor,[203] solicitor[204] and religious advisor (including a religious organisation associated with the advisor)[205] and undue influence has been raised. In addition, some steps have been taken to regulate these relationships, requiring actions which would prevent any imputation that there has been an abuse of the relationship.[206] In any event, wills made by elders have been mainly challenged where there were gifts to relatives,[207] friends,[208] formal[209] or informal carers.[210] Generally, the relationship of spouses has not constituted a relationship of trust and confidence in inter vivos transactions because there is nothing unusual in a spouse conferring a benefit on his or her spouse.[211] However, there are several important cases where undue influence of a spouse has been alleged in probate cases.[212] In respect of other relatives and carers, it is not clear whether courts would automatically consider that there was a relationship of trust and confidence and it ought not be assumed that courts would find such a relationship. For example, it has been suggested that the presumption of undue influence is triggered in inter vivos cases only when the donor is significantly

203 *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996). In this case, a doctor who was a beneficiary under an earlier will challenged a later will made by a testatrix (under which the doctor was not a beneficiary).

204 Note *Wintle v Nye* [1959] 1 All ER 552.

205 *Walsh* (1892) 18 VLR 739; see also *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659.

206 Consider Rule 11 of the *Revised Professional Conduct and Practice Rules* 1995 (NSW) which, inter alia, requires a solicitor to decline to act on instructions to draft a will under which the solicitor would obtain a substantial benefit, and to refer the client to another practitioner who is not an associate of the practitioner. There are exceptions, for example, where the client is a member of the practitioner's immediate family or a member of the immediate family of a practitioner who is a partner or employee of the practitioner. Under these rules, the solicitor in *Wintle v Nye* [1959] 1 All ER 552 would not have been able to draft a will substantially in his favour.

207 See, eg, *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985); *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987); *Re Brokenshire (dec'd); The Equity Trustees Executors & Agency Co Ltd v Worts* (1998) 8 VR 659; *Re Teddy; Hockey v Honeychurch* [1940] SASR 354.

208 See, eg, *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, Powell J, 12 June 1992); *Odgers* (Unreported, Supreme Court of New South Wales, Powell J, 25 September 1991); *Ridge v Rowden* (Unreported, Supreme Court of New South Wales, Santow J, 10 April 1996); *Blundell v Curvers* (Unreported, Supreme Court of New South Wales, Windeyer J, 19 November 1998).

209 See, eg, *Re Stott* [1980] 1 All ER 259.

210 See, eg, *Winter v Crichton* (1991) 23 NSWLR 116; *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997); *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

211 *Etridge (No 2)* [2002] 2 AC 773, 800 (Lord Nicholls); Cope, above n 38, [185]. Therefore, courts have developed special rules to deal with a spouse who wishes to guarantee the liability of his or her spouse: see generally *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 and *Etridge (No 2)* [2002] 2 AC 773.

212 *Moneypenny v Brown* (1711) 2 Eq Cas Abr 766; 22 ER 651; *Mynn v Robinson* [1828] 2 Hagg Ecc 169; (1828) 162 ER 823; *Boyse v Rossborough* (1857) 6 HL Cas 1; 10 ER 1192; *Craig v Lamoureux* [1920] AC 349. Note also *Estate of Featherstone: Featherstone v Zorn* (Unreported, Supreme Court of New South Wales, McClelland J, 8 March 1985).

dependent on the donee.[213] In any event, it is likely that the relationship between the beneficiary and the testator would have to be examined carefully before the explicability test was applied and probate was refused or a trust imposed. This raises the wider issue of whether the criterion of a relationship of trust and confidence is a necessary precursor to relief in a probate context. It is possible that a person who is not in an ongoing relationship of trust and confidence with the testator may exercise some kind of control, influence or even coercion over the testator in respect to the will. In this case, equitable undue influence would provide no assistance unless the court defined the concept of relationship of trust and confidence so broadly that it was effectively dispensed with altogether.

It is also questionable whether the explicability test would provide an adequate or helpful gauge of whether the gift was justifiable. As has been shown above,[214] the explicability of gifts is taken into account by courts when they consider whether the elderly testator had testamentary capacity. If the court had decided that the gift was explicable for the purpose of testamentary capacity, then it is possible that a court would conclude that the gift was also explicable under undue influence. It could be argued that explicability ought to have no place when a court is establishing testamentary capacity. However, the gift may be so peculiar or outlandish that it may provide evidence supporting the contention that the testator suffered delusions, memory loss or misapprehensions that directly affected his mind, memory or understanding.

Naturally, large gifts to a testator's doctor, solicitor or religious advisor would be called into question today and would not be considered readily explicable by the association of the parties. Moreover, it cannot always be assumed that because the will has not been revoked and there has been a lengthy period between the making of the will and the death of the testator, that this renders the will explicable.[215] In *Wintle v Nye* nearly a decade elapsed, yet it is doubtful that the will and codicil would have passed the explicability test. However, gifts acquired by the exercise of significant influence by a person in a relationship of trust and confidence with the testator may be readily explicable by that relationship. Take the situation where an adult child cares for a parent and exercises an inordinate amount of influence on that parent in respect of the will, although the adult child takes no part in the preparation or execution of it. A court may decide that there was a relationship of trust and confidence between the adult child and the aged parent which calls for the application of the explicability test. It may conclude that the gift is nonetheless explicable because of the parent/child relationship and the child's devotion to the parent. Apparent conformity to 'social norms' may mask the exercise of undue influence.

A court applying an explicability test needs to take great care, particularly where elderly testators are involved. Whereas the explicability of a gift may be one of a number of factors which will determine testamentary capacity, explicability based on how ordinary people act (and social norms) is one of the

213 Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (1995) 57, 67–74.

214 Part III(B).

215 Cf Ridge, above n 1, 630.

two tests in the proposed framework. There may be very good reasons why the testator has decided to bestow a large gift to a person who is not readily recognised as a 'natural' beneficiary. Over a long period, relationships change.[216] There are cases where people are estranged from relatives or decide that their relatives do not deserve or need all or part of their assets.[217] Testators exercise their right to freedom of testation. They do not necessarily conform to social norms[218] and are not available to explain their reasons for not doing so. Refusing to grant probate of a will may lead to the application of the intestacy rules,[219] and the outcome may not bear any resemblance to the deceased's intentions. After all, unlike the application of equitable undue influence in respect of most inter vivos transactions,[220] the proposal would favour persons challenging the will rather than the testator who is not even available to give evidence.[221] In short, the problem is that an inference of undue influence is made within an artificial framework rather than from an analysis of all the evidence.

Finally, there is the issue of the standard of proof which the House of Lords required for equitable undue influence in *Etridge (No 2)*. In that case, Lord Nicholls[222] relied on the statement of Lord Scarman in *National Westminster Bank plc v Morgan*[223] that undue influence would be proved where the inter vivos gift or transaction 'was explicable only on the basis that undue influence had been exercised to procure it'.[224] This standard of proof has been criticised as too high.[225] However, it is similar to the standard that was articulated in *Boyse v Rossborough* in the sense that courts set aside inter vivos gifts which cannot be explained except by the exercise of undue influence. It is understandable that such a high standard would be imposed in the context of what is only a factual presumption of undue influence, rather than proof of undue influence. However, it is arguable that this may limit the effectiveness of the presumption, particularly as the testator neither brings the action nor is available to give evidence.

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216 Lawrence A Frolik, 'The Biological Roots of the Undue Influence Doctrine: What's Love Got To Do With It?' (1996) 57 *University of Pittsburgh Law Review*, 841, 854; Lawrence A Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?' (2001) 24 *International Journal of Law and Psychiatry* 253, 259.

217 See, eg, *Roebuck v Smoje* [2000] WASC 312 (Unreported, Hasluck J, 20 December 2000).

218 Ridge, above n 1, 633.

219 With respect to the distribution under intestacy rules, see, eg, Certoma, above n 113, ch 3; Geddes, Rowland and Studdert, above n 113, [61A]–[61F.01]; Atherton and Vines, above n 55, ch 5.

220 Cf *Bridgewater v Leahy* (1998) 194 CLR 457.

221 Vines, above n 60, 63.

222 *Etridge (No 2)* [2002] 2 AC 773, 799.

223 [1985] AC 686.

224 Ibid 704. Lord Scarman relied on *Allcard v Skinner* (1887) 36 Ch D 145, 185; [1886-90] All ER Rep 90, 100–1.

225 Rick Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65 *Modern Law Review* 435, 449–50.

V A THIRD APPROACH TO REFORMING TESTAMENTARY UNDUE INFLUENCE

The preceding discussion has demonstrated that the present doctrine of testamentary undue influence lacks utility and does not address the potential for the exercise of undue influence over elders making wills. It also demonstrates that earlier suggestions for reform may not be appropriate. It is submitted that a new approach to undue influence ought to be composed of two parts:

(a) A strict legislative regime in respect to the execution of wills by very old testators; and

(b) A modified doctrine of testamentary undue influence, which inter alia, would take into account the susceptibility of elders to undue influence.

A A Strict Legislative Regime in Respect to the Execution of Wills by Elderly Testators

Kerridge has perceptively identified the need for solicitors to take greater care in the will-making process.[226] This point was also made by Santow J in *Pates v Craig*. While his Honour was careful not to criticise the solicitor in that case,[227] he observed that solicitors ought to avoid a conflict of interest that may arise between the interests of an intended beneficiary and the testator.[228] Moreover, he suggested that where a testator is aged and enfeebled and there may be some doubts whether the testator possesses testamentary capacity, then additional care ought to be taken.[229] Such measures include: the solicitor personally taking instructions from the testator; the solicitor ensuring the presence at the meeting of a person who can give evidence as to the testamentary capacity of the testator, such as a doctor treating the testator; the solicitor and the other party at the initial meeting executing the will as witnesses; and the solicitor making comprehensive notes.[230] However, these common sense recommendations are not obligatory and the question is whether there ought to be stricter legislative requirements imposed in respect of wills made by very elderly testators.

One possibility is the scheme advocated by Kerridge, in which wills would only be valid if they were executed before solicitors and notaries who played no part in taking instructions or drafting the will.[231] Briefly stated, the duty of the independent practitioners would be to ensure that the testator understood what he was doing and was not subject to undue influence or fraud. Where there was concern that the testator lacked testamentary capacity or was under pressure, the independent practitioner would be obliged to seek medical advice about his

226 Kerridge, above n 1, 333.

227 *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) [142].

228 Ibid [144].

229 Ibid [147].

230 In this regard he quoted, at length, Mason and Handler, above n 36, [10.019]. Since the decision the authors of the text have referred with approval to the decision in *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

231 Kerridge, above n 1, 333–4.

condition.[232] While it could be argued that in many cases this whole process would constitute an unnecessary additional administrative burden where the testator was young and was acting independently, it would be particularly important in respect of aged and enfeebled elders whose testamentary capacity was subject to some doubt and/or who were susceptible to undue influence because of poor health or dependency on carers. Therefore, even if Kerridge's scheme were not generally implemented, it is strongly arguable that a similar scheme particularly for the execution of wills made by those who are 80 years or older ought to apply. It has been highlighted that this group is most likely to experience physical and mental decline and the need for constant care.[233] However, as the evidence establishing testamentary capacity and susceptibility of an older testator to undue influence may overlap, it ought to be obligatory for a medical practitioner to both interview the testator with the independent practitioner and witness the will with the independent practitioner.

It is acknowledged that there may be objections to a strict scheme based on the age of a testator because it appears discriminatory and ageist.[234] Many elders are able to look after their affairs competently. While this is undoubtedly true, some proactive action at the time the will was signed by a very old testator would give him the opportunity to raise his concerns and true desires. It would also constitute a measure of protection for an otherwise valid will and could avert the initiation of costly litigation in which the age of the testator is likely to be pleaded.

B A Modified Doctrine of Undue Influence in Probate Cases

Whether or not legislatures impose stricter requirements for the execution of wills made by elders, a modified doctrine of undue influence in probate cases is warranted. The preceding discussion of the orthodox doctrine of testamentary undue influence and recommendations for reform indicate that courts and commentators alike have assumed that there were two drastic and opposed approaches to undue influence: coercion or presumptive undue influence. It is very difficult to prove the former. In the latter, the requirements of direct proof are avoided by imposing an artificial framework. A modified doctrine of testamentary undue influence in probate cases would fall between these two extremes. It is arguable that this approach was presaged in a few Australian colonial cases, but was never fully developed.[235]

As will be recalled, the utility of testamentary undue influence has been significantly limited by several important features, namely its definition, the kind of proof required, the standard of proof and the burden of costs. This is evident in cases where elderly testators were subject to some kind of pressure or manipulation falling short of coercion.[236] In order to modify the doctrine, it

232 Ibid.

233 Wenger, above n 8, 12–13.

234 See generally Bill Bytheway, *Ageism* (1995); note also Linda S Whitton, 'Finding the Elder Voice in Social Legislation' (2001) 24 *International Journal of Law and Psychiatry* 149, 152–3.

235 See, eg, *Callaghan v Myers* (1880) 1 LR (NSW) 351.

236 See, eg, *Fourlanos* (Unreported, Supreme Court of New South Wales, Needham J, 17 July 1987).

would be appropriate to redesign some individual elements, the combined effect of which would be to improve its practical utility while simultaneously acknowledging the testamentary context.

1 *Independent Intention*

It is necessary to shift testamentary undue influence from the predominating notion of coercion to the question of whether the testator has executed a will which expresses his independent wishes. As demonstrated above,[237] testamentary undue influence has become almost exclusively defined as coercion. The emphasis on coercion as the benchmark of undue influence has had the effect of concentrating a court's attention on the wrongful conduct of the beneficiary, rather than taking into account the condition of the testator and the circumstances in which he found himself. However, even some of the foremost English authorities did not require proof of actual coercive conduct. In determining whether undue influence had been exercised, it was appropriate to evaluate the testator's situation. In *Wingrove v Wingrove*[238] the Court envisaged that the concept of pressure was relative to the circumstances of the case and the testator's condition. In *Hall v Hall*,[239] Sir James Wilde broadened the notion of undue influence to include importunity or moral commands which the testator could not resist or to which the testator succumbed in order to have peace or to avoid social discomfort.

While these broader parameters of undue influence have not generally been embraced in modern cases in Australia,[240] in *Carey v Norton*[241] the New Zealand Court of Appeal endorsed an approach that was consistent with the statements in *Wingrove v Wingrove* and *Hall v Hall*. In *Carey v Norton*, an ill, elderly woman made a will three weeks before her death. In an earlier will, she had left her estate to the plaintiff and to her niece equally because she had considered that they were the more needy members of the family. Before her death, the testatrix consulted her two brothers about how she ought to leave her estate to her family in a fair way. In light of their advice, the testatrix provided in her later will that her estate would be divided into eight equal shares with one share going to the children of each of her six siblings and the remaining two shares to the plaintiff and her niece. There was little discussion of alternative ways in which the estate could be distributed, taking into account the needs of particular family members. The brothers arranged for the testatrix to see her solicitor about the new will.

At first instance, Elias J found that the testatrix 'was unusually dependent upon and deferential to the advice she received on important matters from her

237 See above Parts II, III.

238 (1885) 11 PD 81, 83 (Sir James Hannen).

239 (1868) LR 1 P&D 481, 482 .

240 One exception may be *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) in which Rolfe J boldly held that the manipulative conduct of the grand-daughter was the only explanation for the sudden and complete change in the deceased's will; and that this manipulative conduct constituted undue influence ([163]–[164]).

241 [1998] 1 NZLR 661.

brothers'.[242] Her will could be easily overborne because the testatrix feared damaging her relationship with her brothers who were used to making decisions and exercising authority.[243] She suppressed her own views as to what would be a fair distribution in the circumstances. These facts together with her illness and the lack of independent advice, led Elias J to conclude that the brothers, however well-meaning, had exercised undue influence.[244] On appeal, it was argued that Elias J had erroneously applied equitable undue influence because she had recognised that there was a relationship of confidence between the testatrix and the brothers. The New Zealand Court of Appeal disagreed. Williams and Keith JJ (with whom Thomas J concurred) held that Elias J had applied the probate doctrine, although the situation was unusual in that the actions of the brothers were 'benign', in the sense that there was no evidence of coercion.[245] Both the trial judge and the Court of Appeal considered the relative strength and capacities of the parties, and the fact that considerations other than what the testatrix had really wanted had determined the content of the will.[246] It could be said that the will did not express the testatrix's independent wishes.

Some courts in Canada have taken the further step of redefining what constitutes undue influence in a probate context. In so doing, these courts have not suggested that coercion is no longer a definition of undue influence, but have underlined the importance of coercion as one aspect of undue influence rather than the sole benchmark. In several cases, some courts, including the Supreme Court of Canada,[247] have restored the first definition of undue influence provided by Lord Cranworth in *Boyse v Rossborough* and restated in *Craig v Lamoureux*.[248] The question is whether the testator's will 'really did not express his mind, but expressed something else, something which he did not really mean'.[249] In *Re Kohut Estate*[250] Kennedy J held:

> The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances and determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to

242 Ibid 670 (Williams J, quoting Elias J in the court below).
243 Ibid.
244 Ibid 670–1 (Williams J, quoting Elias J in the court below).
245 Ibid 672. Thomas J held that the influence was no longer benign once it was characterised as undue: 663.
246 In respect of the fear of alienating persons upon whom the deceased was dependent, see also *Johnson v Pelkey* (1997) 36 BCLR (3d) 40, [142] (Baker J).
247 *Vout v Hay* (1995) 125 DLR (4th) 431; [1995] 2 SCR 876, [29] (Sopinka J). Cited or quoted in *Re Muise Estate* (2002) 45 ETR (2d) 121, [17] (Stewart J); *Stephens v Austin* (Unreported, Supreme Court of British Columbia, Neilson J, 5 December 2003) [163]. Note also the statement of Sigurdson J in *De Araujo v Neto* (2001) 40 ETR (2d) 169, [131]: 'the person asserting undue influence must establish that there is coercion such that if the testator could speak his wishes he would say, "this is not my wish but I must do it."'
248 [1920] AC 349, 357.
249 *Boyse v Rossborough* (1857) 6 HL Cas 1, 34; 10 ER 1192, 1205. Note also *Carey v Norton* [1998] 1 NZLR 661, 671 (Williams J quoting Elias J in the court below).
250 (1993) 90 Man R (2d) 245.

> intervene but as has been said, the will must be 'the offspring of his own volition and not the record of someone else's'.[251]

In this case, the testatrix had testamentary capacity.[252] The only issue was whether undue influence had been exerted. Over time, the testatrix had instructed several solicitors and executed wills with markedly different provisions. There was a correlation between the making of new wills, the beneficiaries thereunder and the particular daughter with whom she was living at the time. There was no suggestion that the testatrix had been subject to coercion or even moderate pressure. The Court found several wills had been the result of environmental factors, namely 'the result of what those around her had in mind and not the exercise of the deceased's own volition, albeit influence innocently exerted'.[253] As in *Carey v Norton*, the age and health of the testatrix made her very susceptible to influences which easily supplanted her true wishes. Highly manipulative behaviour has also been considered to constitute undue influence where the testator has been aged, ill and frail.[254]

2 *Circumstantial Evidence*[255]

From the 19th century onwards it has been possible to prove coercion by circumstantial evidence, but it has been difficult to do so.[256] Circumstantial evidence is an evidentiary fact from which a judge or jury may infer the existence of the fact in issue. Often circumstantial evidence is not comprised of one evidential fact, but a combination of several evidentiary facts from which a reasonable inference of the fact in issue may be made.[257]

Circumstantial evidence of coercion was permitted in *Boyse v Rossborough* where Lord Cranworth contemplated that evidence of a relationship of complete domination would provide convincing evidence of the exercise of undue influence in the will-making process.[258] This was not direct evidence of coercion. Rather, it constituted circumstantial evidence from which coercion could be inferred. Consistent with this view, some courts have held that there was strong circumstantial evidence of coercion where an ill testator was isolated from friends and family, the beneficiary controlled the testator's affairs, fostered the

251 Ibid [38]. Kennedy J quoted a statement from *Hall v Hall* (1868) LR 1 P&D 481, 482.
252 Ibid [35].
253 Ibid [42].
254 See *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991); *Scott v Cousins* (2001) 37 ETR (2d) 113.
255 Heydon, above n 24, [1100]–[1105].
256 See above Part III(A). See especially *Winter v Crichton* (1991) 23 NSWLR 116; Vines, above n 60, 54–5.
257 *R v Exall* (1866) 4 F & F 922, 929, 176 ER 850, 853 (Pollock CB).
258 (1857) 6 HLC 3; 10 ER 1192, 51; 1212.

testator's unfounded suspicions about his friends and family and took steps to have the new will made in the beneficiary's favour.[259]

However, it is submitted that undue influence may be reasonably inferred not only from proof a relationship of domination. It ought to be clearly acknowledged that in most cases a challenge will be based on circumstantial rather than direct evidence, because the exertion of relevant influence is unlikely to take place in front of witnesses.[260] Therefore, courts ought to identify the kind of circumstantial evidence which either separately, or in combination, will be likely to lead to an inference of undue influence. For example, in the Canadian case *Scott v Cousins*,[261] Cullity J assisted in this process when he commented:

> In determining whether undue influence has been established by circumstantial evidence, courts have traditionally looked to such matters as the willingness or disposition of the person alleged to have exercised it, whether an opportunity to do so existed and the vulnerability of the testator or testatrix … Other matters that have been regarded as relevant, within limits, are the absence of moral claims of the beneficiaries under the will or of other reasons why the deceased should have chosen to benefit them. The fact that the will departs radically from the dispositive pattern of previous wills has also been regarded as having some probative force.[262]

In this case, the Court found not only that the testatrix lacked testamentary capacity, but that she had been subject to the undue influence of her husband. The marriage had been the second marriage for both spouses and they had executed an agreement to the effect that they would keep their property separate, even after death. Notwithstanding the agreement, the husband contrived to obtain control of her assets. Under the disputed will the testatrix gave the husband a condominium, and the residue of her estate to his children. Cullity J found that most of the circumstantial evidence which he identified as helpful was present in the case including: the testatrix's health, susceptibility to undue influence, the last minute and significant changes to the pattern of earlier wills and the absence of any plausible reason why she would substitute her husband's relatives for her closer relatives, whom she always intended to benefit.[263]

The statement of Cullity J contained a significant moderation of the orthodox model of undue influence for two reasons. First, courts have traditionally eschewed mere opportunity to influence as insufficient evidence of coercion.[264] Moreover, it is probable that courts would still consider that mere opportunity to

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259 Consider *Re Timlick Estate; Timlick v Crawford* (1965) 53 WWR 87, 106–7 (Ruttan J). In *Newton v Taylor* (Unreported, Supreme of New South Wales, Powell J, 2 August 1991) Powell J opined, [18], but did not decide, that where the deceased's mental and physical condition was poor, the deceased had been isolated from family and friends, the beneficiary had control of the deceased's affairs and had given the instructions for the new will, an inference of undue influence could be made out. However, it is submitted that such a case could have been equally decided on the basis of the relationship of control (as evidence of undue influence) elucidated in *Boyse v Rossborough.*

260 See *Banton v Banton* (1998) 164 DLR (4th) 176, 209 (Cullity J).

261 (2001) 37 ETR (2d) 113.

262 Ibid [114]. This statement has been met with approval in *De Araujo v Neto* (2001) 40 ETR (2d) 169, [133] (Sigurdson J); *Stephens v Austin* (Unreported, Supreme Court of British Columbia, Neilson J, 5 March 2003) [165]; Note also *Streisfield v Goodman* (2001) 40 ETR (2d) 98, [138] (Carnwath J).

263 Ibid [115] and [123].

264 *Wingrove v Wingrove* (1885) 11 PD 81, 83 (Sir James Hannen); *Baudains v Richardson* [1906] AC 169, 185 (Lord Macnaghten); *Craig v Lamoureux* [1920] AC 349, 357 (Viscount Haldane).

influence without other significant evidence would be insufficient proof. However, together with other circumstantial evidence,[265] opportunity to influence could be powerful evidence. In *Scott v Cousins*, the husband's opportunity to influence his wife was implied from the circumstances, including his meetings with lawyers and his presence at the meeting when the testatrix gave her instructions for the will.[266] Opportunity was a specific element in *Streisfield v Goodman*,[267] where the Court found that the nephew had control over his aunt's assets and organised the instructions for and the making of the aunt's will. He had ample opportunity to exercise influence over her in respect of the will.[268] Secondly, in *Scott v Cousins*, Cullity J not only considered evidence (actual or circumstantial) in respect of the party against whom allegations of undue influence were made. His Honour also evaluated evidence about the testatrix's health and condition and her likely predisposition or susceptibility to undue influence on the basis of this evidence.[269] The importance of this modification of the orthodox approach in respect to elders cannot be overstated, as it refocuses the evaluation of the evidence on the broad circumstances of the case, rather than the conduct of a beneficiary. Therefore, circumstantial evidence such as the testator's physical, emotional and financial dependence on a carer, fear of abandonment or desperate desire to please would be highly relevant.

3 *Balance of Probabilities*[270]

The higher civil standard of proof[271] demanded under testamentary undue influence needs serious reconsideration. In *Boyse v Rossborough*[272] Lord Cranworth held that it was necessary to show not only that the evidence was consistent with the exercise of undue influence, but that it was inconsistent with the contrary hypothesis. In short, the only plausible explanation was that the will was the result of undue influence. Unfortunately, he did not elucidate why this higher standard of civil proof was imposed, and most courts have vigilantly and literally applied it since without offering any justification. Yet, on the contrary, it has been authoritatively stated that 'there was never more than two standards of persuasion'.[273] One possible explanation is that it was considered preferable to grant probate of a will in respect of which there were only some slight doubts,

265 Opportunity is one recognised form of circumstantial evidence: Heydon, above n 24, [1155].
266 (2001) 37 ETR (2d) 113, [117].
267 (2001) 40 ETR (2d) 98, [138].
268 Ibid [141]–[143] (Carnwath J).
269 Note also in this regard *Streisfield v Goodman* (2001) 40 ETR (2d) 98, [143] (Carnwath J).
270 See generally Heydon, above n 24, [9005].
271 See Rolfe J in *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) [163].
272 (1857) 6 HL Cas 1, 51; 10 ER 1192, 1212.
273 *Murray v Murray* (1960) 33 ALJR 521, 524 (Dixon CJ); Heydon, above n 24, [9085].

rather than granting probate of a much earlier will or leaving the intestacy rules to determine the distribution of the estate.[274]

There have been several cases where this higher standard has not been applied and the civil standard was appropriately and properly accommodated. In the early case, *Bool v Bool*,[275] the Full Court of the Supreme Court of Queensland was asked to review the decision of a jury which had, inter alia, found that certain parties had exercised undue influence over the testator. The Court did not apply the rigorous standard in *Boyse v Rossborough*.[276] Webb CJ held that the facts disclosed an hypothesis which was inconsistent with a finding of undue influence, but decided that it was for the jury, as the trier of fact, to determine whether there was a foundation for this alternative explanation.[277] Justice Douglas held that the Court was not obliged to apply the standard and that, nevertheless, the preponderance of evidence showed that undue influence had been exercised.[278]

In several recent cases where a will was challenged on the basis of undue influence, the strict standard was not applied. In *Carey v Norton*, referred to above, Elias J weighed the evidence according to the usual civil standard concluding that 'the probabilities' were that the testatrix 'did not exercise her own free and informed judgment in making the will'.[279] The New Zealand Court of Appeal quoted her determination on this matter with approval.[280] In *Scott v Cousins*, Cullity J referred to an earlier decision of the Supreme Court of Ontario[281] and commented that:

> I do not believe the court intended to suggest that the burden of proving undue influence cannot be discharged on a balance of probabilities by circumstantial evidence … If this were not possible, undue influence would cease to have much practical application in the law of wills.[282]

In this case he stressed that he measured and weighed the considerable circumstantial evidence on the balance of probabilities.[283]

The decisions in *Bool v Bool*, *Carey v Norton* and *Scott v Cousins* do not undermine the integrity of the doctrine of testamentary undue influence, rather

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274 Another explanation may be that in the 19th century, when the ecclesiastical jurisdiction was transferred to the common law courts, these courts did not adequately consider how previous or other standards of proof would fit in a system where there would be a civil and a criminal standard of proof. See, eg, *Briginshaw v Briginshaw* (1938) 60 CLR 336, 363–369 (Dixon J); *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA**,** 16 December 2004) [15]–[25] (Ormiston JA).

275 [1941] St R Qd 26.

276 (1857) 6 HL Cas 1, 51; 10 ER 1192, 1212.

277 [1941] St R Qd 26, 35.

278 Ibid 45.

279 [1998] 1 NZLR 661, 672 (Williams J quoting Elias J in the court below).

280 Ibid.

281 *Crompton v Williams* [1938] OR 543; [1938] 4 DLR 237.

282 (2001) 37 ETR (2d) 113, [48].

283 Ibid [123]. This approach has significant influence in several subsequent Canadian cases: *De Araujo v Neto* (2001) 40 ETR (2d) 169, [132] (Sigurdson J); *Streisfield v Goodman* (2001) 40 ETR (2d) 98, [137] and [143]; *Stephens v Austin* (Unreported, Supreme Court of British Columbia, Neilson J, 5 December 2003) [164]. Note also *Re Kohut Estate* (1993) 90 Man R (2d) 245, [42] (Kennedy J). Note also *Banton v Banton* (1998) 164 DLR (4th) 176, 209 (Cullity J).

they represent a necessary modernisation of it. While the standard of proof remains the balance of probabilities, it is likely that a court would exercise care and caution taking into account all the evidence before determining that undue influence had been proved.[284]

4 *Costs Awarded by A Court Exercising Its Discretion*

As discussed, the party who unsuccessfully challenges a will on the basis of undue influence bears the cost of the action.[285] Courts have not fully explained why this ought to be the situation in modern cases (other than to rely on earlier authority). Probate courts wanted to deter litigation based on flimsy evidence.[286] However, the application of this principle has been challenged[287] because it adds another disincentive to the inordinate burden of proving coercion. It is submitted that courts ought not automatically burden parties with the costs of an unsuccessful challenge, particularly where there was some circumstantial evidence from which undue influence could have been inferred. Rather, the court ought to exercise its discretion to award costs and may order that costs be borne by the estate, taking into account the general principles for making orders in respect to costs.[288]

C Comment

It is submitted that there are several advantages associated with the modified doctrine of testamentary undue influence. First, before granting probate a court wants to be assured that the will expresses the authentic and independent intention of a testator. The modified doctrine of undue influence shifts the focus of the litigants and the court away from the narrow consideration of whether a beneficiary (or a person acting in his or her interests) acted coercively, to what is the substantial issue: whether the testator executed a will which expressed his true desires where there may have been competing influences to bear.

Secondly, in order to determine this issue, the evidential focus is reallocated. Rather than seeking to present direct evidence of the beneficiary's coercive conduct, a party challenging a will presents all relevant direct and circumstantial evidence which may assist in constructing what was the likely course of events leading up to instructions for and execution of the disputed will. Therefore, not only will the beneficiary's conduct be relevant, but also the conduct of legal advisors, friends and family members. The testator's health, attitude, vulnerability to undue influence and past actions, such as making earlier testamentary dispositions, will be carefully considered. In this regard, the

284 With respect to the standard of proof which may be applied in probate suits concerning testamentary capacity, see *Kantor v Vosahlo* [2004] VSCA 235 (Unreported, Ormiston, Buchanan and Phillips JJA, 16 December 2004) [15]–[24].

285 *Re Cutcliffe's Estate; Le Duc v Veness* [1959] P 6, 15–21 (Hodson LJ); Geddes, Rowland and Studdert, above n 113, [5.21].

286 *Spiers v English* [1907] P 122, 124 (Sir Gorell Barnes P).

287 Kerridge, above n 1, 331–2; Ridge, above n 1, 631. There appears to have been authority which suggested that courts exercised discretion: *Re Herbert Brothers* (1990) 101 FLR 279, 312–7 (Kearney J).

288 Geddes, Rowland and Studdert, above n 113, [Cost.01]–[Cost.02].

modified model is preferable to the framework of equitable undue influence. While equitable undue influence arguably demands an evaluation of a broad range of facts, it is primarily directed to establishing that there was a relationship of trust and confidence and that there were testamentary gifts which were not explicable. The evidentiary focus is not whether the will represents the testator's true intention. These are two separate issues, resulting in two different outcomes. For example, in *Carey v Norton*, Elias J acknowledged that a relationship of trust and confidence existed between the testatrix and her brothers. This relationship was only one part of the evidence which determined that undue influence had been exercised.[289] However, if equitable undue influence had applied, it is arguable that the gifts made by the testatrix were explicable by the natural bonds existing between the testatrix, her siblings and their children.

Thirdly, the modified model directly achieves a workable standard of proof, which Kerridge and Ridge have tried to realise indirectly. It will be recalled that they seek to infer undue influence from circumstantial evidence[290] by raising a presumption of undue influence and then shifting the burden of disproving the undue influence to the beneficiary. In this way, the party who alleges undue influence is not burdened by specifically proving undue influence.[291] The problem with such an approach is that a presumption of undue influence may arise from a narrow set of facts, without recourse to the full circumstances of a case and where no proper inference of undue influence ought to be made because there was neither coercion nor undue influence in the broader sense. By acknowledging that undue influence may be proved by inferences made from circumstantial evidence on the balance of probabilities, courts are able to weigh the evidence presented in the case and impose an attainable standard of proof.

Fourthly, consistent with the probate doctrine, the burden of proof does not shift from the party alleging undue influence. Therefore, a party challenging the will must produce evidence upon which to base an allegation of undue influence, not merely a presumption of undue influence. Accordingly, it is anticipated that the fact that the burden of proof remains on the challenger will deter spurious or vexatious litigation.[292]

Fifthly, the modified doctrine can be applied effectively in those cases where there are no doubts about the testator's testamentary capacity and the specific suspicious circumstances rule cannot be relied on because it can be demonstrated that the deceased knew and approved of the will. For example in *Carey v Norton* the testatrix had testamentary capacity and the suspicious circumstances rule was not raised, although the brothers were involved in the will-making process.[293] Both the trial judge and the New Zealand Court of Appeal held that the brothers had exercised undue influence.

Finally, it has been pointed out that there remains a division of duties with respect to wills. A probate court, rather than a court of construction, ought to

289 [1998] 1 NZLR 661, 672 (Williams J quoting Elias J in the court below).
290 For the link between presumption of fact and circumstantial evidence, note Heydon above n 24, [7255].
291 Kerridge, above n 1, 330–1; Ridge, above n 1, 619.
292 Cf Ridge, above n 1, 630–1.
293 [1998] 1 NZLR 661, 668 (Williams J quoting Elias J in the court below).

determine whether testamentary gifts are invalid due to undue influence.[294] If equitable undue influence were to be applied by way of a trust after the grant of probate had been made, then it still remains debatable whether a court exercising equitable jurisdiction could impose such a trust.[295] Moreover, there is the prospect of ongoing and multiple proceedings to determine whether, from the perspective of a court exercising equitable jurisdiction, undue influence had in fact been exercised.[296] Under the modified doctrine of undue influence the probate court would determine decisively whether the will had been made under undue influence without the need to commence an action in another court.

In short, the modified doctrine would permit a person to make a direct challenge based on undue influence with a reasonable prospect of success, but still take into account the probate context.

VI CONCLUSION

The doctrine of testamentary undue influence was finalised and settled during the 19th century. During this period, freedom of testation was the guiding principle for courts and legislatures alike. Subject to certain formal requirements for wills, testators were free to leave their assets to whomever they wished. The will became an inviolable document, except in the most unusual and compelling circumstances. Accordingly, courts demanded very strong proof of undue influence before probate was refused. Unfortunately, English and Australian courts in the 19th and 20th centuries adopted two extreme approaches to undue influence. Either undue influence could be coercion or it could be based on a presumption. The latter was considered to be unsuitable in a probate context. Therefore, they embraced a doctrine of undue influence based on coercion which was almost unusable, even when the testator or testatrix was old, frail and highly vulnerable to influence. Accordingly, litigators sought to rely on other doctrines to preclude the granting of probate. Undue influence was left to atrophy while testamentary capacity and, to a lesser extent, the suspicious circumstances rule were explored and augmented. Nevertheless, the problem is that even in this process there remained significant gaps in the coverage of the law.

It is evident that the law is in urgent need of review and reform, particularly in light of the likely increase in the number of elderly people, many of whom may possess testamentary capacity, but who do not possess the physical or mental independence or resilience to withstand the influences of family, friends and carers. Previous suggestions for reform may be too drastic, may inadequately target whether the will records the testator's true desires, or may fall into the error of earlier generations where the choice was only between coercion and a presumption of undue influence. It is submitted that the third approach to reforming undue influence offers the best way to protect vulnerable persons,

294 Geddes, Rowland and Studdert, above n 113, [5.21].
295 Ridge, above n 1, 631; 635–6.
296 Note Vines, above n 60, 63.

particularly elderly testators. The testamentary desires of capable older people deserve protection at two levels: at the time the will is executed and when the will is challenged on the basis of undue influence. Otherwise, the phrase 'freedom of testation' will continue to have a hollow ring for vulnerable elders who are subject to undue influence and suffer its pernicious effects.