[Brief to the Maine Law Court in contested will case, on appeal from Probate Court. Decision of the Probate Court upheld. Names changed for privacy.]

INTRODUCTION

This is an appeal from a decision of the Washington County Probate Court allowing the will of John Smith for probate. Although Mr. Smith had only a small estate, less than $75,000 worth of assets, the probate of that will has been fiercely contested by Appellant, the disappointed brother of the decedent, who thinks that he and three other siblings of Mr. and Mrs. Smith should have received the estate pursuant to a previous will. The litigation so far has taken over three years, with four depositions, five days of trial, twenty-one witnesses, hundreds of pages of documents, and of course thousands of dollars in legal fees. Like the case of *Jarndyce and Jarndyce*[1], it is an embarrassment to the legal profession.

It has now culminated in an appeal in which the Appellant apparently has no error of law to present to this Court, but instead wishes to re-argue his interpretation of the evidence.

The Appellant's brief is twenty-one pages long. Except for six paragraphs, that brief is entirely a selective recitation of testimony before the Probate Court, misstatements of the testimony, and argument about Appellant's interpretation of the testimony. Of those six paragraphs in the brief which actually mention the law, two of them refer to a statute that has nothing to do with any issue before the Court. The remaining four paragraphs, reciting only basic principles of the law pertaining to contested wills, amount to about five percent of the Appellant's brief.

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[1] *Bleak House*, Charles Dickens, (1853).

That brief even fails to make the one claim of error that might warrant Appellant's total reliance on a discussion of the evidence presented below: That would be the assertion that there was no evidence to substantiate some finding of fact by the trial judge. Since there is indeed sufficient evidence to substantiate every single finding made by the Probate Court, the Appellant at least realizes that he should not attempt to make that argument.

The conclusion that the Appellant seeks nothing more than a *de novo* review of the evidence in this case is inescapable and strongly suggests that his appeal should be treated as frivolous.

STATEMENT OF FACTS

The Appellee has no intention of presenting the Court with an additional twenty pages reciting her interpretation of the evidence before the Probate Court. The most lucid recitation of the significant facts of this case can be found in the decision of the probate judge[2], a copy of which is attached to this brief as Addendum I. It is the facts found by that judge which, after all, are relevant to this appeal, not the Appellant's rendition of facts he would have preferred the judge to find.

The Appellee will, however, summarize the evidence in the case, with references to the record, in order to demonstrate the evidentiary basis for the more important findings of the Probate Court.

John and Mary Smith were an elderly, childless couple who had lived all their lives in western Washington County, Maine. They had been married 57 years and were devoted to each other.[3] Testimony from several witnesses established that John Smith was a strong willed person, right up to the time of

[2]Appendix, pp. 29-35.

[3]Appendix, nursing home "social progress notes", pp.44-47.

his death.[4] He was not a person who was manipulated by others, not even by his wife who otherwise seemed to handle the financial affairs in their family. Even John Smith's brother, Edward Smith, the Appellant in this case, testified that John was the real decision maker in the family.[5]

More than fifteen years before their deaths in 1990, the Smiths had become friends with Sally Brown, the Appellee, a woman who was a generation younger, married, with two children at home. Over the years that relationship became quite close,[6] particularly between Mrs. Smith and Appellee, but also between her and Mr. Smith,[7] and the friendship included the Appellee's husband and children.[8]

It became common for Mrs. Smith to praise the Appellee and refer to her in talking to others as "her daughter,"[9] to send her and her children gifts and cards, to rely on her for driving, running errands, and companionship. Although some of the errands that the Appellee performed for the Smiths were compensated[10] because of the Smiths' strong sense of wanting to be self-reliant,[11] their relationship with Appellee was by no means solely financial.

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[4]Appendix, testimony of Dr. Carl Peters, pp. 92-94, 99, and testimony of Larry Brown, pp. 240-241.

[5]Appendix, testimony of Edward Smith, pp. 219-220.

[6]Appendix, testimony of Sally Brown, pp. 246-255.

[7]Appendix, testimony of social worker Joan White, pp. 81-84, 138-139.

[8]Appendix, testimony of Appellant's husband Larry Brown, pp. 238-240.

[9]Appendix, testimony of Joan White, p. 83, testimony of visiting homemaker Ramona West, pp. 227-230, and testimony of Sally Brown, p. 249.

[10]Appendix, testimony of Sally Brown, pp. 176-177.

[11]Appendix, testimony of Larry Brown, p. 231.

Mr. and Mrs. Smith apparently came to think of the Appellee and her family as the natural object of their bounty, such as they had. Approximately five years before their deaths the Smiths gave the Appellee and her husband four acres of land across the road on which to build a new home after theirs had been lost by foreclosure.[12] They also provided the lumber for the house as a loan; that debt was forgiven as a gift the following Christmas.[13] Mr. Smith, a retired carpenter, supervised and performed much of the labor in the construction of the new house, without payment.[14] Another loan was made to the Appellee so she could purchase a used car and it was similarly later forgiven as a gift.[15]

To the Appellee's children, Mr. and Mrs. Smith were "Aunt Mary" and "Uncle John," and the children were always remembered by the Smiths on their birthdays and at Christmas.[16]

During the months near the end of her life, Mrs. Smith became increasingly ill with the progression of cervical cancer, suffering the discomfort and humiliation of uncontrollable bouts of hemorrhaging and diarrhea. Even though she had the services of visiting nurses and homemaker services, she relied upon the Appellee to perform the intimate tasks of bathing and bed cleaning. This was done with the kind of open, unembarrassed relationship that could only exist between two persons who cared deeply for each other.[17]

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[12]Appendix, testimony of Larry Brown, pp. 231-232.

[13]Appendix, testimony of Larry Brown, pp. 232-233.

[14]Appendix, testimony of Larry Brown. pp. 234-237.

[15]Appendix, testimony of Sally Brown, p. 177.

[16]Appendix, testimony of Larry Brown, pp. 242-244.

[17]Appendix, testimony of Sally Brown, pp. 255-256.

For her part, the Appellee felt closer to the Smiths than to her own parents.[18] The two women saw each other daily and additionally spoke on the phone as much as six or seven times a day.[19]

The relationship between both of the Smiths and Sally Brown became, in short, like that of parents and adult child. It was a relationship in fact far closer than many parent/child relationships. The testimony as a whole in the Probate Court made it easy to conclude that it was out of love, not expectation of riches, that the Appellee provided so much care to her "adopted" parents.

Although the Smiths had prepared a will in 1976 which left their estate, after the death of the survivor of them, to their four siblings, it was not surprising that they came to think near the ends of their lives of making a change to leave what they had to their close friend, Sally Brown. Since both of them are now deceased, and did not fully discuss such personal matters even with the Appellee, we do not know the extent to which the Smiths discussed such a change between themselves. We do know that John Smith had been thinking about changing his will for several months before his death, because he had mentioned it the prior November to the Appellee.[20]

We can also infer that an incident at the Smith home about five days before their deaths may have been a precipitating factor in going ahead with the plan to change their beneficiary.

At that time John Smith was in the hospital in Ellsworth recovering from a broken ankle. His brother Edward Smith, the Appellant in this case, and his wife were visiting Mary Smith in Cherryfield. Mary Smith told Edward that she

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[18]Appendix, testimony of Sally Brown, pp. 245-246.

[19]Appendix, testimony of Sally Brown, pp. 258-259.

[20]Appendix, testimony of Sally Brown, p. 165.

was giving Sally Brown her power of attorney so she could handle all the Smiths' financial affairs. Edward reacted with anger, stating that she should go ahead and give everything to Sally since there "wasn't anything here worth stealing anyway." Mary Smith appeared upset by this treatment and instructed Sally Brown to request the Smith's attorney to draw up new wills making Sally the principal beneficiary.[21]

There is additionally a clear inference created by the facts of this case that such a change in beneficiary had been previously discussed by the Smiths between themselves: When the proposed new will was read a few days later to John Smith he expressed no surprise[22] or dissatisfaction with any of its provisions, including naming the Appellee as principal beneficiary.[23] Furthermore, there is corroboration of the fact that the change of beneficiary had been requested by Mrs. Smith which results from the fact that she also appeared satisfied with the terms of the new will when it was separately read to her by the nursing home's social worker.[24]

Besides the issue of the relationship between the Smiths and the Appellee, which goes to the "naturalness" of their desire to bequeath their property to her, and therefore the claim of undue influence, the other potential issue in this case arises from the unusual fact that John Smith died about twenty minutes after signing the new will. He had had a heart attack an hour

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[21]Appendix, testimony of Sally Brown, pp. 154-155, and testimony of Edward Smith himself, pp. 216-218.

[22]Although the Appellant's brief repeatedly makes the assertion that John Smith was surprised to be shown a new will the day before his death, there is no testimony in the record to that effect; that is Appellant's assumption.

[23]Appendix, testimony of Joan White, p. 66.

[24]Appendix, testimony of Joan White, pp.69-70.

or two earlier that morning, apparently brought on by learning about his wife's death.

There is no question that Mr. Smith was physically very weak at the time he signed his will. However, the evidence established without contradiction that he was mentally sound and that he knew what he wanted to do about the will. The persons present at the bedside included the doctor who had been treating Mr. Smith that morning (and who knew him from earlier examinations),[25] the social worker employed by the nursing home, who had had several conversations with Mr. Smith that week[26] (and who had read the will to him word for word[27] the previous day), and a nurse's aide who had had an opportunity to meet Mr. Smith during the preceding days and could therefore also judge his state of mind.[28] All of them were completely impartial witnesses with professional qualifications and with experience working with elderly people. They all firmly believed that Mr. Smith knew what he wanted to do about the will and that he was competent. No witnesses to the signing of the will have testified to the contrary.

That will, dated February 3, 1990, was admitted for probate by the Washington County Probate Court. It bequeaths a rifle that had a family history to the Appellant and the rest of the small estate to the Appellee.

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[25]Appendix, testimony of Dr. Peters, pp. 89-121.

[26]Appendix, testimony of Joan White, pp. 75-81.

[27]Appendix, testimony of Joan White, p. 61. (The testimony clearly stated this, contrary to the assertion in Appellant's brief that the will had only been paraphrased to Mr. Smith.)

[28]Appendix, testimony of Melanie Green, pp. 123-124, 128-130.

ARGUMENT

I. THE APPELLANT HAS FAILED TO ESTABLISH THAT THE FINDINGS OF THE PROBATE COURT WERE "CLEARLY ERRONEOUS."

While it is not clear from the Appellant's brief what his legal argument is, the only basis for appeal that is even suggested by his facts-only brief is that the evidence below was insufficient to support the findings by the Probate Court. But the applicable standard of appellate review is perfectly clear and it easily defeats such an argument in this case.

In order to succeed on an appeal asserting incorrect findings of fact, those findings must be shown to be "clearly erroneous." Rule 52(a) of the Rules of Civil Procedure, which is incorporated by reference into Rule 52 of the Rules of Probate Procedure, establishes this appellate standard:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Findings are clearly erroneous only when there is no evidence to support them. In *Harmon v. Emerson*, 425 A.2d 978, 981 (Me. 1981), this Court thus held that

> ...any finding, whether express or assumed, is tested under the "clearly erroneous" standard by determining whether there is *any* competent evidence in the record to support it.
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> If there is such evidence, the finding must stand. [Emphasis in original.]

Although *Harmon* was a civil case on appeal from the District Court to the Superior Court, that situation calls for the same standard of appellate review applicable to this Court when it reviews the findings of the Probate

Court. See *Estate of Bridges*, 565 A.2d 316, 317 (Me. 1989). The *Harmon* decision went on to hold that:

> In applying this standard in an appellate proceeding, the factual findings of the District Court are not to be altered or overturned by the Superior Court simply because an alternative finding *also* finds support in the evidence.
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> The essential impact of the "clearly erroneous" rule is that the trial judge's findings stand unless they clearly cannot be correct because there is *no* competent evidence to support them. 425 A.2d, 982. [Emphasis in original.]

The deference given to the trial judge's findings is explicitly stated in Rule 52(a) as arising out of that judge's opportunity to evaluate witness credibility. In the case of *The Luce Company v. Hoefler*, 464 A.2d 213 (Me. 1983), this Court explained that concept further by saying:

> Even if oral testimony is uncontradicted, an appellate court must accept the trial court's evaluation of it, "save where the physical evidence and the written record rationally forbid his conclusion on the credibility issue, 'no matter what the unknown factors'." *Qualey v. Fulton*, 422 A.2d 773, 776 (Me. 1980). As we said in an analogous case involving a motion for a directed verdict by the party bearing the burden of proof,
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> > There is no law that can compel a human mind to believe ... oral testimony. It may be impossible. It may be inherently improbable. It may be exaggerated. The silent facts and circumstances may raise doubts. It may not "ring true." The appearance, manner, or interest of a witness makes a vast difference to the mind of him who hears testimony and who must decide as to truth or value. [Citing directed verdict cases.] 464 A.2d, at 215-216.

The Appellant's brief in this case does not even make an *assertion* that there was insufficient evidence to support one or more factual findings of the Probate Court in this case. The Appellant instead only presents his

interpretation of selective evidence, as if he were making a summation to a jury. As *Harmon* indicates, however, it is not enough that Appellant can find evidence in the record which he thinks supports an alternate conclusion than that reached by the probate judge. It is too late for that approach.

By seeking to re-argue the weight to be given the testimony of twenty-one witnesses taken during the course of five days of trial, the Appellant is effectively making this appeal into nothing more than a request for *de novo* fact finding by this Court. That effort completely ignores the clearly established principles of appellate review described above.

II. THE APPELLANT HAD THE BURDEN AT TRIAL OF PROVING ALL OF HIS GROUNDS FOR OBJECTING TO PROBATE OF THE WILL.

The Probate Code establishes the burdens of proof in contested will cases. Pursuant to 18-A M.R.S.A. §3-407, the proponent of a will has the burden of proving due execution of the will, proof of death, and venue. Thereafter, a will *contestant* bears the burden of establishing lack of testamentary capacity, lack of testamentary intent, or undue influence. Prior to the adoption of the Probate Code, Maine law required the proponent of a will to establish testamentary capacity; therefore, Maine cases decided prior to 1981 must be read with caution.

This Court has increased the burden carried by a will contestant who asserts undue influence by requiring him to prove it with "clear and convincing evidence." See *Estate of Dodge*, 576 A.2d 755 (Me. 1990). That level of proof requires that the party with the burden of persuasion can prevail only if he can place in the ultimate fact-finder "an abiding conviction that the truth of [his] factual contentions are 'highly probable'." *Taylor v. Commissioner of Mental Health*, 481 A.2d 139, 153 (Me. 1984). This Court's most recent application of

this framework for the burden of proof in contested will cases appears in *Estate of Langley*, 586 A.2d 1270 (Me. 1991).

The decision from the Probate Court in this case correctly recites the foregoing applicable burdens of proof. Appellant therefore has no error of law that he can claim in that regard. And, having failed to convince the trial judge that his version of the facts should be accepted, the Appellant's burden of proof makes it now virtually impossible for him to establish on appeal any fact-finding legal error. When the trial court determines that the party with the burden of proof has failed to carry it, that determination

> ...may be reversed on appeal only if the evidence in support of the defense was of such a nature that the fact-finder was *compelled* to believe it and to draw therefrom the requested inference to the exclusion of any other. [Emphasis added.]

The Luce Company v. Hoefler, *supra*, 464 A.2d, at 215. [Emphasis added.]

III. THE APPELLANT'S TESTAMENTARY INTENT ARGUMENT IS WITHOUT MERIT.

It appears to be the Appellant's argument that John Smith had nothing to do with the preparation of his new will, therefore he did not want it, and therefore he lacked testamentary intent. The premise for this tenuous argument is an assumption by Appellant which is not based on any evidence.

The Appellant basically ignores the fact that there is evidence to the contrary in the record. That evidence is the testimony showing that John Smith had spoken months earlier about changing his will to make Appellee his beneficiary.[29] Although there was not much evidence about such plans available in this case, that was probably because the person with whom he

[29]Appendix, testimony of Sally Brown, p. 165.

most likely would have discussed such changes was his wife, Mary Smith, who was not available to testify.

The Appellant attempts to disprove testamentary intent by pointing out that John Smith never discussed the will changes with his attorney. However, there is no legal requirement that a testator have prior discussions with a lawyer before executing a valid will; wills can still be made without any legal assistance at all. The failure to discuss the changes personally with his lawyer is an "absence of evidence" which in itself is not proof one way or the other regarding intent.

Although we have no way of knowing what conversations occurred privately between John and Mary Smith on the subject of making will changes, it is erroneous to assume (as Appellant does) that such conversations therefore did not occur. Again the Appellant seems illogically to equate an absence of evidence with proof of a fact that he would like to prove.

If the Appellant's assertion were correct that the proposed will came as a surprise to Mr. Smith when it was read to him by the nursing home's social worker, Joan White, surely there would have been some indication of that surprise or some sign of disagreement noticed by that social worker. Besides being impartial in this case, she was by profession and experience presumably well able to observe reactions from her clients.[30] The absence of such reactions by Mr. Smith actually supports an inference that he had planned making these changes along with his wife.

Even if it had been the conclusion of the trial judge that the proposed will which was read to John Smith on February 2, 1990 came as a complete

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[30]The ability of a trial judge to size up a witness for this kind of skill and sensitivity, and the inability of an appellate court to do so, is an example of why appellate courts defer to the trial judge's factual conclusions.

surprise to Mr. Smith, which was not the case, that still would have left open the probability (based on Mr. Smith's statements the next day) that he developed an intent to execute it as his will. This appears to be a possibility completely overlooked by Appellant.

The evidence clearly shows that the new will had been read to Mr. Smith word for word by the social worker, Joan White, the day before his death, and that she discussed its meaning with him as she went through it. When Mrs. White asked Mr. Smith the next day if he wanted to sign it, he twice indicated yes, so she went to her office and got it to bring back to him.[31] She then again asked Mr. Smith in the presence of all the witnesses whether he wanted to sign it, and whether he remembered the will from the day before; she reminded him that everything "goes to Sally" except for the gun to his brother; he again responded affirmatively each time.[32] This in itself would have been a sufficient basis for the trial judge to determine that the Appellant had failed absolutely in carrying his burden of proving lack of testamentary intent.

IV. THE APPELLANT'S TESTAMENTARY CAPACITY ARGUMENT IS WITHOUT MERIT.

Testamentary capacity in the eyes of the law is a very minimal level of mental competence. It requires only that the testator had a "disposing mind" and a "disposing memory." In *Estate of Rosen*, 447 A.2d 1220 (Me. 1982), this Court adopted the pre-code explanation of this required mental state as it had evolved by judicial decision:

> A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of

[31]Appendix, testimony of Joan White, pp. 75-76.

[32]Appendix, testimony of Joan White, pp. 77-78.

> sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to recollect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. 447 A.2d, at 1222.

Note that *physical* strength and well being are not part of the requirements of testamentary capacity. The facts of *Rosen* are instructive. The decedent had leukemia and the evidence showed that he was under medication, that he required frequent hospitalization, that he may have been confused about the extent of his property, and that according to his physician he "would be mentally deadened for a day or two while in shock in the hospital." On the other hand, the physician testified that normal mental function would be regained thereafter and that the decedent was able despite the medication to conduct his business until soon before his death. The actual witnesses to the will were all lay people, yet their testimony that at the time of signing the will the decedent was of sound mind was accepted as admissible to show testamentary capacity. This Court upheld the Probate Court's finding that a lack of testamentary capacity had not been proven.

In *Estate of Dodge*, 576 A.2d 755 (Me. 1984), the evidence of the testatrix's weakness of body and mind was even stronger, but still this Court upheld the Probate Court's conclusion that the contestants had failed to prove

a lack of testamentary capacity. There the facts showed that the decedent had a brain tumor, had undergone radiation treatment, and "displayed signs of fatigue, confusion and difficulty in communicating." On the other side "considerable evidence was presented that she possessed at least the modest degree of competence sufficient to uphold the court's finding of testamentary capacity." 576 A.2d, at 757.

The present case is comparable. Although the evidence shows that John Smith signed his will while experiencing the effects of a heart attack, and that he died therefrom about twenty minutes later, there was overwhelming evidence presented at trial of his mental competence, awareness of what he was doing, and desire to execute his new will. There was no evidence from any witness that the testator was not mentally alert when he signed.

The Appellee of course relied at trial primarily on the expert testimony of the attending physician, Dr. Peters, who was present at the testator's bedside when he signed the will. It is hard to imagine stronger evidence of competence than the contemporaneous opinion of the attending physician. His testimony can be illustrated with the following excerpts:

> [John Smith] was a very independent, irascible man who really, virtually, refused any medical care other than what was forced on him.[33]
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> [Although experiencing the sequelae of a heart attack when he signed the will] Mr. Smith was oriented and making appropriate responses.[34]
>
> He was in character. Sometimes he's difficult to communicate with. As I said before, he was irascible, stubborn -- he was very independent. And some of

[33]Appendix, testimony of Dr. Peters, p. 92.

[34]Appendix, testimony of Dr. Peters, p. 99.

> those qualities I really admired. He made up his own mind and then he followed through with it.[35]
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> It was to my satisfaction that I would witness it, that he was alert and, again, oriented to the situation, and agreed to sign the will.[36]
>
> [He] knew what he was doing.[37]

Although Mr. Smith was experiencing oxygen deprivation as a consequence of his heart attack when he signed the will, that was a physical effect and in the doctor's opinion had no effect on Mr. Smith's mental abilities.[38]

The testimony of Melanie Green, one of the subscribing witnesses, was corroborative of Dr. Peters's conclusions. As aide at the nursing home she had seen many other elderly people experiencing heart attacks. She was sure that there was no question about Mr. Smith's competence. She confirmed that he remained "in character" while experiencing the heart attack.[39] The following exchange occurred during her re-direct examination:

> Q: What was your opinion about whether he knew what he was doing when he signed his will?
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> A: I believe he knew what he was doing. He was very positive or straightforward when he was asked if he would like to sign it, and he said yes, very infatically [sic], you know.[40]

The testimony of the nursing home's social worker, Joan White, was further corroborative of competency. While she was asking Mr. Smith

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[35]Appendix, testimony of Dr. Peters, p. 99.

[36]Appendix, testimony of Dr. Peters, p. 102.

[37]Appendix, testimony of Dr. Peters, p. 104.

[38]Appendix, testimony of Dr. Peters, pp. 118-119.

[39]Appendix, testimony of Melanie Green, pp. 127-129.

[40]Appendix, testimony of Melanie Green, p. 130.

questions to make sure that he knew what the will was about and that he wanted to sign it, he made "good eye contact" and was "very alert."[41]

There is no question that when John Smith signed his will he was in a very weakened physical condition from the effects of a heart attack, and that he had only a short time to live. Nevertheless, the evidence is uncontroverted that his mental condition at the time of signing was sound. This conclusion is established not just by the opinions of lay people, as in the *Rosen* case, *supra*, but by a physician, a nurse's aide, and a social worker. Short of having a member of this Court as an additional bedside witness, it is hard to imagine circumstances where proof of competency would be more persuasive.

The Appellant, on the other hand, produced no evidence of lack of testamentary capacity and appeared to rely only on the theoretical effects of medications and lack of oxygen, and the short period of time between signing the will and Mr. Smith's death. Those suppositions were more than adequately disposed of by the testimony from impartial and skilled observers about the reality of John Smith's mental state.

In his brief the Appellant cites the definition contained in 18-A M.R.S.A. §5-101 of an "incapacitated person" in an apparent effort to avoid the clear holdings of the case law that testamentary capacity is only a question of mental competence, not physical condition. Given the context of this statutory definition, including its location in Part V of the Probate Code instead of in Part III, it is obvious that it is only relevant to guardian/conservator issues, and has nothing to do with testamentary capacity. See also the Uniform Probate Code Comment to §5-101 explaining its context.

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[41]Appendix, testimony of Joan White, pp. 79-80.

V. THE APPELLANT'S UNDUE INFLUENCE ARGUMENT IS WITHOUT MERIT.

In *Estate of Bridges*, 565 A.2d 316, 317 (Me. 1989), this Court stated that undue influence means

> ...influence in connection with the execution of the will, and *operating at the time the will is made*, amounting to moral coercions, destroying free agency, or opportunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it. [Emphasis in original.]

Since undue influence can rarely be shown by direct evidence, it usually must be proven by circumstantial evidence, and the inferences that can be drawn therefrom. *Bridges*, 565 A.2d., at 317. Nevertheless, as discussed in the first part of this brief, a will contestant must prove undue influence by clear and convincing evidence, by establishing that it is "highly probable" that it occurred. And, according to *Bridges*, any inferences must "be based on more than 'mere suspicion and conjecture,' and mere opportunity, interest or inequality in distribution is insufficient proof of undue influence." 565 A.2d., at 317.

Although direct evidence is seldom available to prove undue influence, it is useful to look at the direct evidence which shows the extent to which undue influence was *absent*. In this case, in addition to the evidence from Sally Brown about how the will changes originated with the Smiths, not her, there is substantial impartial evidence, primarily from Joan White, that corroborates that Sally Brown did not pressure Mr. Smith in any way to execute a will in her favor.

For example, Mrs. White's testimony regarding the reading of the will to Mr. Smith on the day before he died shows that, although Mrs. Brown was present, she spoke only to mention the history of the gun referred to in the

will,[42] and did nothing to encourage Mr. Smith to either sign the will or even to agree that that was what he wanted. And, although Mrs. White indicated at one point in her testimony that the only times the will was mentioned it was brought up by Sally Brown, she later clarified this because there was only once that Mrs. Brown brought up the subject; that was when she came out of Mr. Smith's room to tell Joan White that he wanted to sign it,[43] a fact that was immediately confirmed by Mrs. White before she went to get the will from her office.

All of the evidence further indicates that although the Appellee was in Mr. Smith's room when he signed the will, she played no part in the discussions with him just prior to signing. In fact, she was so inconspicuous that the other witnesses were either of the impression that she was not in the room or they were not sure.[44]

Also, there was no rushing of Mr. Smith into signing the will. See, for example, the testimony of Dr. Peters who said "I wouldn't have permitted that."[45] In his opinion enough time was taken so that he was convinced that signing the will was what Mr. Smith wanted to do.

A type of circumstantial evidence mentioned in almost all of the cases on undue influence is cited by the Appellant in his brief. That is the inference that arises from a "confidential relationship" and an "unnatural disposition" of

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[42]Appendix, testimony of Joan White, p. 139.

[43]Appendix, testimony of Joan White, p. 143.

[44]See for example the testimony of Mrs. Green at Appendix, p. 125, and the testimony of Mrs. White at Record, Transcript of Testimony on January 29, 1991, pp. 196-197.

[45]Appendix, testimony of Dr. Peters, p. 121.

the estate. The Appellee, however, does not believe this inference to be even applicable to this case.

The inference mentioned was described in *Estate of Bridges, supra*, in the following way:

> The most prominent circumstances regarded as evidence of undue influence are:
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> > 1) the existence of a confidential relationship between the testator and the one who is asserted to have influenced him;
> >
> > 2) the fact that the testator has disposed of his property in an unexpected or unnatural manner.

The Court then went on to emphasize that even if this two-part test is met, no presumption of undue influence is created, it only permits the drawing of an inference. 565 A.2d., at 317.

It is the Appellee's position that the evidence in the present case established only one part of the two-part test, so that not even an inference could be claimed by the Appellant. The Appellee had agreed, and in fact stipulated, that she had a "confidential relationship" with the Smiths. She was very close to them, both physically and emotionally. She kept their bank books, ran their errands, helped them around their home, and generally did necessary, important, and confidential business for them such as applying for Medicaid and contacting their lawyer for them.

As several witnesses agreed, the Smiths, particularly Mary Smith, treated Sally Brown as a daughter. In fact, the overwhelming evidence about the closeness of the Smiths to Sally Brown, the love and affection between them, and indications that the Smiths treated Mrs. Brown as their daughter, causes the Appellee to believe that the second part of the two-part test completely fails. In other words, there was nothing "unnatural or unexpected" about the

Smiths, who were childless, deciding to leave most of their estates to Sally Brown.

If this were a case in which the Appellee *was* the only child of the Smiths, with otherwise identical facts, there would clearly be no inference of undue influence arising solely because she was devised a larger portion of the estate than the testator's brother. The evidence of this case showed a close, affectionate, mutually assisting relationship between the Smiths and the Appellee (and her family), going back over fifteen years. Those facts, together with the substantial evidence of the Smiths' past generosity to Appellee, established that she was their *de facto* daughter. Accordingly, Appellee believes that it would have been inappropriate for the Probate Court to have drawn even a bare inference of undue influence from these facts.

Certainly the Appellant provided no "clear and convincing" evidence of undue influence. Going back to this Court's definition of that concept in *Bridges, supra*, there is not a scintilla of evidence in this case, direct or circumstantial, that John Smith had lost his "free agency" when he signed his will. As Dr. Peters said of Mr. Smith staying in character even while experiencing a heart attack, "He made up his own mind and then followed through with it."

CONCLUSION

For the reasons stated above the Appellee believes that the Appellant's appeal in this matter is so without substance as to be frivolous within the meaning of Rule 76(f). Not only does Appellant's brief fail to establish any error of law, but also it fails even to allege one. Therefore the judgment of the

Probate Court should be affirmed, with an award to Appellee of her costs, reasonable expenses, and attorneys fees incurred in this appeal.

Dated: April 2, 1993

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