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ADMISSIBILITY IN INDIANA OF DECLARATIONS MADE BEFORE OR AFTER EXECUTION OF A WILL

An exception to the hearsay rule permits a declaration by a declarant concerning his then-existent state of mind to be admitted into evidence as proof of his mental state at the time of the declaration.¹ This exception has been extended, under certain circumstances to allow such declarations into evidence as a basis for the inference that the then-existent state of mind produced subsequent conduct in accordance with that state of mind;² declarations also have been admitted, but to a much lesser extent, to infer previous conduct.³ Even though the courts have been reluctant to expand this exception, declarations by a testator uttered before and after the ex-

36. In *Gray v. Wallace*, 319 S.W.2d 582 (Mo. Sup. Ct. 1958) the action was for malicious prosecution. Under the Missouri survival act, MO. REV. STAT. §§ 537.020-.030 (1953), actions for slander, libel, assault and battery and false imprisonment were specifically excluded from survival. Nevertheless, the action for malicious prosecution was held to survive due to the legislature's failure to specifically name it in the statute.

37. *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

1. A brief discussion of declarations of mental state is found in *McCormick*, Evidence 567-578 (1954).

2. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892); *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922).

3. *Whitlow v. Durst*, 20 Cal. 2d 523, 127 P.2d 530 (1942); *Moyer v. Moyer*, 64 Utah 260, 228 Pac. 911 (1924); *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922). But most courts would probably argue as Justice Cardozo did in *Shepard v. United States*, 290 U.S. 96, 105, 106 (1933), where he said: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."

execution of a will have been consistently admitted in some jurisdictions.⁴ The cases on the question, in nearly all jurisdictions, seem confused, but many of the problems would disappear if the courts properly distinguished the different purposes for which the declarations are offered into evidence.⁵ When analyzing the Indiana law in relation to the admissibility of a testator's declarations in a will contest, one should keep in mind not only these purposes, but also the necessity for admitting such declarations and the declarant's trustworthiness in making them.

An allegation of undue influence or fraud is present in most of the contested will cases in which the admissibility of a testator's declarations is in issue. The Indiana Supreme Court has emphatically stated that "declarations of a testator, not made contemporaneously with the execution of a will, are not admissible for the purpose of showing that the will was procured by undue influence."⁶ If the declarations are offered as direct evidence of the truth of undue influence or fraud, the Indiana courts say that they are merely hearsay and do not fall within any of the exceptions.⁷ This position seems to be in accord with the weight of authority.⁸ The supreme court has said that "this rule also applies to written declarations of the testator, as letters written by him and other wills executed by him."⁹

Although declarations not made at the time of execution are inadmissible as direct proof of undue influence, they are admissible to show the testator's state of mind, feelings, affections and mental capacity.¹⁰

4. McCormick, *op. cit. supra* note 1, at 573 and 577, 578.

5. Wigmore has classified the utterances of a testator as follows: "(1) That he does or does not *intend to make a will* of a particular tenor; (2) That he *has* or has not *made a will* of a particular tenor; (3) That he *has* or has not *made a will*, or that a particular will is or is not in *existence*, or is or is not *genuine*; (4) That a particular will has or has not been *destroyed* or otherwise *revoked*; (5) That a particular will was procured by *fraud* or *undue influence*; (6) That certain persons have been or are the object of his *affection* or *dislike*; and (7) Utterances indicating *insanity*, mental feebleness, or the like." 6 WIGMORE, EVIDENCE § 1734 (3rd ed. 1940) (hereinafter cited as WIGMORE).

6. Hayes v. West, 37 Ind. 21, 24 (1871).

7. Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946); Loeser v. Simpson, 219 Ind. 572, 39 N.E.2d 945 (1942); Emry v. Beaver, 192 Ind. 471, 137 N.E. 55 (1922); Jones v. Beasley, 191 Ind. 209, 131 N.E. 225 (1921); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920); Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911); Westfall v. Wait, 165 Ind. 353, 73 N.E. 1089 (1905); Conway v. Vizzard, 122 Ind. 266, 23 N.E. 771 (1890); Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883); Todd v. Fenton, 66 Ind. 25 (1878); Bunday v. McKnight, 48 Ind. 502 (1874); Hayes v. West, 37 Ind. 21 (1871); Runkle v. Gates, 11 Ind. 95 (1858); Evans v. Evans, 121 Ind. App. 104, 96 N.E.2d 688 (1951).

8. 6 WIGMORE § 1738.

9. Ditton v. Hart, 175 Ind. 181, 189, 190, 93 N.E. 961, 965 (1911).

10. Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946); Emry v. Beaver, 192 Ind. 471, 137 N.E. 55 (1922); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920); Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911); Staser v. Hogan, 120 Ind. 207, 21 N.E. 911 (1889); Rice v. Rice, 92 Ind. App. 640, 175 N.E. 540 (1931).

Thus, if there is some independent evidence of undue influence, declarations of a testator made before or after the execution of a will may be proper, not as evidence that the undue influence was actually exerted, but as evidence of the testator's susceptibility to deception or his incapacity to resist importunities.¹¹ These declarations are admissible to show the effect of such acts on the testator and are used as a basis for inferring his mental state at the time of the execution. In one early case,¹² the Indiana Supreme Court admitted the testator's declarations which indicated that his memory was failing and that his son had great influence over his conduct. The court felt that "it was proper to show the condition of the testator's mind at any time, to enable the jury to determine its condition at the date of the will" and "to show what influence, if any, the son had over the testator, under the issue that the will was procured by undue influence."¹³ The testator's state of mind, feelings, and affections also indicate a standard by which his conduct at the time of the execution can be tested. In order to establish the testator's normal tendencies, statements indicating his state of mind, feelings, and affections are relevant.¹⁴ This rationale is illustrated in one Indiana case where a will was made in conformity with prior declarations; the supreme court admitted the declarations as evidence tending to rebut an undue influence attack.¹⁵

Declarations concerning the testator's susceptibility to deception, incapacity to resist pressure and normal tendencies are admitted whether before or after execution of the will. The strongest argument in favor of the admissibility of such utterances is necessity¹⁶ since "it very rarely occurs that this state of mind can be shown by declarations made at the very moment of the execution of the will."¹⁷ The distinction between declarations that are direct evidence of the truth of undue influence or fraud and those that merely show the condition of mind is indeed subtle, if not impossible. Wigmore realized this:

It is doubtful if often they amount to anything more than logical quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to *all the utterances* of a

11. Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1918); Goodbar v. Lidikey, 136 Ind. 1, 35 N.E. 691 (1893); Staser v. Hogan, 120 Ind. 207, 21 N.E. 911 (1889); Rice v. Rice, 92 Ind. App. 640, 175 N.E. 540 (1931).

12. Staser v. Hogan, 120 Ind. 207, 21 N.E. 911 (1889).

13. *Id.* at 217, 21 N.E. at 914.

14. Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1885).

15. Goodbar v. Lidikey, 136 Ind. 1, 35 N.E. 691 (1893).

16. Emry v. Beaver, 192 Ind. 471, 137 N.E. 55 (1922); Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1918); Rice v. Rice, 92 Ind. App. 640, 175 N.E. 540 (1931).

17. Rice v. Rice, 92 Ind. App. 640, 645, 175 N.E. 540, 541 (1931).

testator, without discrimination as to the admissibility, and then to leave them to the jury with careful instructions how to use them.¹⁸

The Indiana law is more definite when a will is attacked on the ground of unsoundness of mind or insanity of the testator at the time of execution of the will. The statements made by a testator before, after, or contemporaneously with, such execution are admissible as tending to show his mental capacity to make a will at the time of its execution.¹⁹ This position seems justified by necessity. Post-testamentary declarations, however, should not be admitted when the testator states that he *was* insane because there is no present mental condition from which a prior mental condition can be inferred.²⁰

The Indiana courts also have been definite when the matter of due execution is in issue, but here they have refused to admit the testator's declarations.²¹ In *Barger v. Barger*,²² a will was attacked on the ground that it was forged. The defendant offered to prove that after the date of the execution of the will, the decedent said that he had made a will. The court stated that when such declarations "are offered as evidence of the primary fact of execution, contents, or revocation, they are hearsay and are generally excluded."²³ The court went on to say, "it is clear . . . that in all of our decisions it has been concluded that such declarations were not admissible to prove the execution of the instrument, and that is the purpose for which they were offered here."²⁴ The court's position might be tenable in situations where there is *prima facie* a valid will and it is merely attacked by declarations of the testator that are inconsistent with it; but in situations where the declarations substantiate other evi-

18. 6 WIGMORE § 1738. This section deals with a testator's statements as to undue influence or fraud in will cases.

19. *Allman v. Malsbury*, 224 Ind. 177, 65 N.E.2d 106 (1946); *Emry v. Beaver*, 192 Ind. 471, 137 N.E. 55 (1922); *Robbins v. Fugit*, 189 Ind. 165, 126 N.E. 321 (1920); *Ditton v. Hart*, 175 Ind. 181, 93 N.E. 961 (1911); *Bower v. Bower*, 142 Ind. 194, 41 N.E. 523 (1895); *Hayes v. West*, 37 Ind. 21 (1871). At times the Indiana Supreme Court has over-stated its position. For instance, in *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, 438 (1883), the court stated that the testator's declarations made at times other than at the execution of the will "are admissible for no purpose except upon the question of his mental capacity to make a will." This is not an accurate statement because such declarations are admitted for other purposes.

20. 6 WIGMORE § 1740.

21. *Allman v. Malsbury*, 224 Ind. 177, 197, 65 N.E.2d 106, 114 (1946) (the court made the broad statement that "statements of the testator made at any time other than at the time of execution are not competent on any issues except the one of unsoundness of mind"); *Barger v. Barger*, 221 Ind. 530, 48 N.E.2d 813 (1943); *Hayes v. West*, 37 Ind. 21 (1871).

22. 221 Ind. 530, 48 N.E.2d 813 (1943).

23. *Id.* at 533, 48 N.E.2d at 814.

24. *Id.* at 535, 48 N.E.2d at 815.

dence, such as the will itself, they should be admitted. This latter position was taken by the Kentucky Court of Appeals in a will contest based on the sole ground of forgery.²⁵ The court held that both ante-testamentary and post-testamentary declarations²⁶ were admissible in corroboration of other evidence tending to show the genuineness of the will. This would seem to be the better position on all questions involving due execution.²⁷

A multitude of problems arise when a will has been lost or destroyed. Not only the prior existence of the will, but also its contents, must be determined. Further, if the testator retains possession of his will and upon his death it cannot be found, the law presumes that it has been revoked.²⁸ In one proceeding which was initiated to establish a lost will,²⁹ the testimony indicated that the testatrix had told numerous people that she "had given her entire estate to the girls." Upon her death the will could not be found, but it was last seen in her possession. The court said that this "gives an inference or presumption of its destruction by the decedent, which presumption must be overcome by sufficient evidence."³⁰ The court allowed the post-testamentary declarations concerning the disposition of the estate to the girls to come into evidence, but in this case they were not sufficient to overcome the presumption of revocation. The presumption of revocation in lost will situations may be rebutted, however, where a testator tells others that he made a will and left it in the custody of another person.³¹

25. *Atherton v. Gaslin*, 194 Ky. 460, 293 S.W. 771 (1922).

26. It seems that no distinction should be made between ante-testamentary and post-testamentary declarations when the question of forgery is in issue. If the date of the will were used to determine which declarations would be admitted and which would not, a forger could pick a "convenient" date and be assured that certain relevant declarations would be excluded from evidence.

27. The Indiana statute on execution of wills reads as follows: "The execution of a will, other than nuncupative will, must be by the signature of the testator and of at least two [2] witnesses as follows:

(a) The testator shall signify to the attesting witnesses that the instrument is his will and either (1) Himself sign, or (2) Acknowledge his signature already made, or (3) At his discretion and in his presence have someone else sign his name for him, and (4) In any of the above cases the act must be done in the presence of two [2] or more attesting witnesses.

(b) The attesting witnesses must sign (1) In the presence of the testator, and (2) In the presence of each other." IND. ANN. STAT. § 6-503 (Burns 1953).

28. *McDonald v. McDonald*, 142 Ind. 55, 41 N.E. 336 (1895); *Fye v. Hamilton*, 75 Ind. App. 99, 129 N.E. 237 (1920).

29. *Fye v. Hamilton*, 75 Ind. App. 99, 129 N.E. 237 (1920).

30. *Id.* at 106, 129 N.E. at 239.

31. Such a situation did arise in *Gfroerer v. Gfroerer*, 173 Ind. 424, 90 N.E. 757 (1910), where a testatrix told witnesses that she had made a will and left it with a scrivener to keep for her. There was no evidence that she later called upon him for the will. The scrivener testified that he had never parted with the custody of it; nevertheless, he could not find it. The court found in favor of the parties who had sought to establish the existence of such will.

In *McDonald v. McDonald*,³² the court held that post-testamentary declarations were admissible to show the contents of a lost or destroyed will and its non-revocation. In the words of the court:

It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud, or undue influence. . . . But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator.³³

Despite the language of the supreme court in *McDonald*, the Indiana Appellate Court has held that post-testamentary declarations concerning the provisions of a lost will are competent only "if sufficiently definite, by way of corroboration in the furnishing of the clear proof by two witnesses of the provisions of the will, as matters of fact within their knowledge, which is required by the statute."³⁴ Further, in the *Barger* case, the supreme court, in dictum, indicated that such declarations are generally excluded when offered as the primary fact of contents or revocation.

It seems that on grounds of necessity, all related declarations of the testator on the issues of existence, contents or revocation of lost wills should be admitted into evidence, at least when given in corroboration of direct evidence. The courts, of course, must use some caution because, as the court, in *McDonald*, pointed out, the statements "are sometimes made by [the testator] . . . for the express purpose of misleading or satisfying curious friends or expectant relatives."³⁵ If both the elements of trustworthiness and necessity are present, and they usually are in lost

32. 142 Ind. 55, 41 N.E. 336 (1895). In this case, an action was brought to set aside what was alleged to be a pretended will of the deceased. The contention of the plaintiffs was that the true will of the deceased had been lost or stolen, and that the will in contest was substituted for the missing one. The court, in setting aside the will in contest, admitted into evidence certain statements made by the testator to his law partner concerning the existence and contents of the testator's will. The court said: "If the declarations of the testator are legitimate evidence to prove the contents in a proceeding to have a lost will admitted to probate, which the authorities, we think, seem to fully authorize and support, in reason they must equally so under the issues in the case at bar, to show the contents of the lost will in question, in order that the interest of the appellees in the estate might appear, and the presumption of revocation rebutted." 142 Ind. at 84, 41 N.E. at 346.

33. *Id.* at 81, 82, 41 N.E. at 345.

34. *Inlow v. Hughes*, 38 Ind. App. 375, 395, 396, 76 N.E. 763, 769, 770 (1906).

35. 142 Ind. at 84, 41 N.E. at 345.

will situations, then the *McDonald* rationale should be followed.

The problem of revocation is somewhat different when the will has not been lost or destroyed. In Indiana, as in most jurisdictions, there are statutory requirements pertaining to the manner of revocation;³⁶ thus, a parol revocation of a will by a testator's declarations is not sufficient to satisfy the statute. But where there has been an act of revocation by mutilation, cancellation, alteration, or destruction of the will, declarations both before and after the act should be admitted to show the intent of the testator at the time of the act.³⁷

As the above discussion indicates, the Indiana law does not provide a pat answer as to whether a testator's declarations, made before or after the execution of a will, will be admitted into evidence. The Indiana courts, however, as well as courts in other jurisdictions, have not hesitated to nibble at the hearsay rule in will cases.³⁸ This is especially true when post-testamentary declarations are in question. In most fields, the cases indicate that declarations which look backward are more likely to be colored than those which look forward. Perhaps this is true since the risk of recollection is involved in the former and not in the latter. Also, since there has been more time for reflection when post-testamentary declarations are involved, it is argued that the motivation towards falsehood may be stronger. Nevertheless, the will cases in Indiana, for the most part, have treated ante-testamentary and post-testamentary declarations in the same manner.

When undue influence or fraud is in issue in a contested will case, the Indiana courts have refused to admit into evidence any declarations of a testator, not made contemporaneously with the execution of the will, if such declarations are offered as direct evidence of the truth of undue influence or fraud. The courts will admit these declarations, however, if they are offered, not as direct proof of the truth of undue influence or fraud, but rather, to show the testator's state of mind, feelings and

36. The Indiana statute reads as follows: "Manner of Revocation—Republication.—No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed and attested as required in section 503 [§ 6-503]. A will can be revoked in part only by the execution of a writing as herein provided. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or unless, after such revocation, he shall duly republish the previous will." IND. ANN. STAT. § 6-506 (Burns 1953).

37. 6 WIGMORE § 1737.

38. The various issues involved in this note have been probate issues; there has been no attempt to discuss the admissibility of a testator's declarations to aid in the construction of a will.

affections. They are used as evidence of the testator's susceptibility to deception, incapacity to resist pressures, and normal tendencies. If unsoundness of mind or insanity is the issue in question, the Indiana courts will admit both types of declarations. If the question of due execution is involved, the Indiana courts have refused to allow either into evidence. A better position has been taken by the Kentucky courts where both antetestamentary and post-testamentary declarations are admissible when used to corroborate other evidence. The Indiana decisions have not been consistent in cases pertaining to lost or destroyed wills; such cases usually involve a question of revocation, non-revocation, or contents. One theory is that the declarations are admissible; another is that they are admissible only if used in corroboration of other evidence; a third is that they should be excluded when offered as direct proof of contents or revocation. Despite the dictum in the *Barger* case, the Indiana courts have tended to adopt the first or second theory. The hearsay prohibition is weakening in will cases—representing a desired trend. The trustworthiness and necessity of a testator's declarations should be more determinative than whether such declarations fall within an exception to the hearsay rule.