Oregon Undue influence cases relying on the inference of undue influence

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Greenwood v. Cline, 7 Or 17 (1879)	Yes	No	Children	Daughter who lived with decedent	Decedent showed strong signs of senility. Will 10/12/72 DOD 8/9/75 Age 64	[7 Or 26] When a will is shown to have been duly executed, the law presumes competency in the testator, and that it contains his unconstrained wishes in regard to the disposition of his property. But this presumption may be rebutted by showing that it was obtained by fraud and imposition practiced on the testator, or undue influence. "What constitutes undue influence is a question which must depend very much on the circumstances of each case. It is in its nature one of those inquiries which can not be referred to any general rule." (11 Harris 375; 2 Leading Cases in Eq., 1271). While "it is always allowable to employ argument, persuasion or even importunity to induce one to do that from which no rule of law or morals bids him to refrain;" yet "if where a legatee obtains a preference by a false statement concerning one who has a legal or paramount claim on the testator's bounty, there is a palpable fraud which avoids the bequest." (2 Leading Cases in Eq. 1273.) It is laid down by the author of the Notes in Leading Cases in Equity that "the weight of authority accordingly is that although the mere existence of a confidential relation does not shift the burden of proof; yet where the will is one which the testator could not make consistently with the claims of duty and affection, and therefore, presumably would not have made if he had been left to the dictates of his own judgment, the bequest should be pronounced invalid, unless some evidence is adduced which overcomes the unfavorable influence arising on the face of the transaction." * * * [7 Or 27] While the above doctrine may be a little too strong, we think "it is clear that where an arbitrary and unjust will is made in favor of one occupying a relation of special confidence who might have influenced the testator's mind, slight evidence that he did exercise his power may suffice to invalidate the will." * * * It is said that "fraud and undue influence are not ordinarily susceptible of direct proof, and in the majority of cases can only be inferred from the nature of the transaction or from the relations of the parties to each other. In *Marsh v. Tyrrel*, Sir John Nicholl said: "The ground for imputing it must be looked for in the conduct of the parties and in the documents rather than in oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the court.." In New York "the fact that the donor was brought before the execution of the instrument to a state of causeless alarm as to the condition of his property, and groundless suspicion against the members of his family, was held to be a circumstance indicative of undue influence." * * * * * [7 Or 35] As in Tyler v. Gardner [35 NY 559], it appears that the will was made under two false impressions, which go to the very root of its provisions; * * * * * * * * [7 Or 36] The evidence shows that this impression was not correct and Mrs. Cline knew it. The evidence fails to show that the testatrix had any such impression until after she took up her residence with the Newsoms and Clines. Mrs. Cline occupying a relation of special confidence towards the testatrix, equity and good conscience required her to disabuse her mind of such false impressions. But, instead thereof, we are led to infer, from the facts established in the case, that she and those acting in concert with her did everything they could to create these impressions. * * * The facts of this case and the relation of the parties, and circumstances surrounding the various transactions connected with the execution of the will, are very similar to those in the case of *Tyler v. Gardner* (35 N.Y. 559). What the court said in that case is equally applicable in this case: "The studied privacy of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and grandson of her approach to death, are familiar and marked Indicia of the exercise of undue influence under circumstances like those developed by the evidence." * * * "The will was made by the testatrix under two false impressions, which went to the very root of its provisions; * * *" The court further said: "It is true that the burden of establishing impositions and undue influence rests, in the first instance, upon the party by whom it is alleged. Fraud is never to be presumed from the mere concurrence of temptation and opportunity, or from the mere fact that the chief actor is the principal beneficiary. It must be established by affirmative evidence. It is thus established, however, when the facts are proved from which it results as an unavoidable inference. When such evidence is furnished, the burden of [7 Or 37] repelling the presumption to which it leads is cast upon the party to whom the fraud is imputed. It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured. The purposes to be served are such as court privacy rather than publicity." In the *Parish will case* [25 NY 41] the court, in commenting upon the circumstances raising a presumption of undue influence by the principal beneficiary, said: "Direct evidence of her control in these matters, of her actual exercise of undue influence in procuring her will to be executed by him, could hardly be expected. The means of keeping the influence out of sight were too many and too easy of application. But when such is the array of circumstances, when such a result is attained without any more substantial apparent cause, we are justified in saying, from the evidence, that the only cause to be inferred which is in the least degree adequate to produce the result, is a long-continued, persistent, overpowering influence , to which his condition rendered him peculiarly subject, and which she was a s peculiarly in a position to exercise." * * *

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Holman's Will, 42 Or 345, 70 P 908 (1902)	No	Yes	Son by second wife	Nephew with whom the decedent had a long close social relationship	Decedent and his second wife (of 17 years at time of will) were estranged, and he had will prepared by attorney which provided minimally for second wife and two children by her. Nephew was present, but not significant participant, in will preparation. Decedent suffered from Bright's disease. After executing will and related transfers he went to California. Strong testimony of attorney indicated will was product of decedent's stated intentions, and strong testimony of actions by widow put blame on her for estrangement. Will 10/15/1899 DOD 2/18/1902 [? - possible error] Age	[356] The right of one's absolute domination over his property is sacred and inviolable, so that he may do what he will with his own, if it is not to the injury of another. He may bestow it whithersoever he will and upon whomsoever he pleases, and this without regard to natural or legitimate claims upon his bounty; and if there exists no defect of donative capacity, [357] whereby his individual will or judgment does not have intelligent and conscious play in the bestowal, or undue influence or fraud, whereby an unconscionable advantage may be taken of him through the wicked designs of another, the law will give effect to the disposition; and the right to dispose of one's property by will, and bestow it upon whomsoever he likes, is a most valuable incident to ownership, and does not depend upon its judicious use. In re Kaufman's Estate, 117 Cal. 288, 49 Pac. 192, 59 Am.St.Rep. 179; In re McDevitt, 95 Cal. 17, 30 Pac. 101; Cramer v. Craumbaugh, 3 Md. 491. And this court has held, in effect, that "while it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion or spite or prejudice, is not resolvable into mental perversion, no court can interfere." Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L.R.A. 161. To the same purpose is Hubbard v. Hubbard, 7 Or. 42; Clark's Heirs v. Ellis, 9 Or. 128; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; In re Darst's Will, 34 Or. 58, 54 Pac. 947. The burden of proof in the probate of a will rests with the proponent, as it relates to the due and regular execution, the testamentary capacity of the testator, and his voluntary act, free from the domination of fraud, undue influence, or coercion. This is the doctrine announced in Hubbard v. Hubbard, supra, and, in principle, has been reaffirmed in the Chrisman Case, supra. In the latter case the only ground of contest was as to the testamentary capacity of the testator, but it is just as essential to show that the will was not superinduced by fraud, deceit, or undue influence, to make it his act and will, as it is to establish a disposing mentality. It must be "the last will," says Baron Parke in Barry v. Butlin, 1 Curt.Ecc. 637. "of a free and capable testator." It is said in Greenwood v. Cline, 7 Or. 17, that, "where a will is shown to have been duly executed, the law presumes competency in the testator, and that it contains his unrestrained wishes in the disposition of his property." The presumption is a disputable one, however, and may be overcome or refuted by other proofs. It is, [358] notwithstanding, sufficient prima facie to establish the will, but it does not shift the burden of proof. That rests from first to last with the proponent, and, if he would prevail, he must have the stronger case in the end. The fraud, force, or undue influence that will suffice to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. This may be accomplished not alone by physical coercion or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subjected to the former, and induced to do its bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated undue or fraudulent, as a friend or relative, or even those in confidential relation, may employ argument, or even persuasion, to induce a bequest, so that notwithstanding it leaves the mind free to act upon its own considerations and judgment. Common understanding suggests that a will should be natural; that is, conformable to the nature and disposition of the person who makes it. Where it does not conform to this idea, it is a circumstance, no doubt, to be considered in connection with other proof bearing upon the question as to whether or not it was the result of undue influence, but, within itself, affords no conclusive or sufficient proof for the purpose, and does not, therefore, raise a presumption that it was so procured. Salisbury v. Aldrich, 118 Ill. 199, 8 N.E. 777. In the case of gifts inter vivos, and contracts made in favor and to the advantage of a person standing in a fiduciary or close confidential relation with the donor, or other contracting parties, such as trustee and cestui que trust, guardian and ward, attorney and client, physician and patient, or priest or religious adviser and his parishioner, and the like, the burden of showing that the transaction was fairly conducted, and that [359] no advantage was taken of the relationship, lies with the one having secured the advantage. The reason, however, for this rule, is that the person receiving the benefit has actively participated in the transaction, as a party thereto, and the explanation required is very naturally within his knowledge and power. Such a reason does not obtain, as it related to a bequest, as the person to whom it is made may not, in point of fact, have had any part in, or even knowledge of, the act which gives him the advantage; and no such presumption arises from the mere relationship of the parties,--that the donee has abused his position of confidence and turned it to his own advantage. Parfitt v. Lawless, L.R. 2 Prob. & Div. 462. Some authorities deduce a presumption of undue influence, however, where the two conditions exist together, namely, where the will is one that the testator could not have made, consistent with the claims of duty and affection, and a close confidential relationship between him and the object of his bounty. Marx v. McGlynn, 88 N.Y. 357. And see 2 White & T. Lead.Cas.Eq. 1275. This court, however, in Greenwood v. Cline, supra, refused to adopt this view, but declared that, where such conditions exist together, slight evidence that the legatee or devisee has abused the confidence reposed in him will suffice to invalidate the will; and we are not now disposed to overturn the doctrine thus established. It simply means that the two conditions combined and existing together will not suffice within themselves to overcome the prima facie case made, or presumption arising from proof of the due and regular execution of the instrument, in favor of testamentary capacity and the exercise of an unconstrained volition. Something more will be required to be shown, and slight evidence that advantage has been taken of the confidential relations will suffice to establish the undue influence as against the prima facie case or initial presumption. After all, the difference in practical operation between the two theories is very slight. In order to show that the testator has made an unnatural disposition of his possessions, it requires evidence aside from the will, and so where it is sought to establish the existence of a close confidential re [360] lationship. If undue influence, fraud, or coercion has been practiced, slight evidence thereof will almost necessarily have been developed in the course of the establishment of these conditions; and as circumstances to be considered in connection with all the evidence in the case for the determination of the question as to whether the testator has been unduly wrought upon, the fact of an unjust disposition and a subsisting confidential relationship will be slight or strong in their evidentiary weight as they are shown to exist in degree. A slight departure from a natural disposition would be of little moment, while one shockingly unjust would have much greater weight; and so with the relationship, it would have force, as it may be shown to be intimate and familiar. So it comes at last, in a case of contest, to a simple determination as to the weight of the testimony when the case is closed. There may arise, and possibly have arisen, cases where they were dependent alone upon the naked presumption of the exercise of a sane mind, and the operation of a free and unconstrained will, from a due execution, counterbalanced by a presumption of an undue influence, arising by the conjoined existence to the two conditions discussed. As to such the rule becomes most important, as the establishment or invalidity of the will would depend entirely upon the two presumptions. But in the great generality of cases, if not in all, it can have no practical effect, as the testimony adduced leaves no room for operation of the latter presumption, and affords the more satisfactory criteria for determining the

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In re Diggins' Estate, 76 Or 341, 149 P 73 (1915)	No	Yes	Son by prior marriage	Wife and stepson. Stepson had lived with decedent since stepson was 3.	Male decedent Will executed after several drafts prepared by attorney. Father had provided substantial assistance to son, who was financially well off, and had indicated earlier that he would give son nothing more, despite having good relations with son. Will 3/13/12 DOD 9/2/12 Age 79	[3] Undue influence sufficient to set aside a will-- "must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. * * * It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated undue or fraudulent, as a friend or relative, or even those in confidential relation, may employ argument, or even persuasion, to induce a bequest, so that, notwithstanding it leaves the mind free to act upon its own considerations and judgment." Holman's Will, 42 Or. 345, 358, 70 Pac. 908; Pickett's Will, 49 Or. 127, 153, 89 Pac. 377; Turner's Will, 51 Or. 1, 8, 93 Pac. 461. [4] If a close confidential relationship existed between the testator and the beneficiary, and the will as made is not consistent with the claims of duty and affection, then slight evidence that the legatee or devisee has abused the confidence imposed in him will suffice to invalidate the will. Holman's Will, 42 Or. 345, 359, 70 Pac. 908, Turner's Will, supra.
In re Dale's Estate, 92 Or 57, 179 P 274 (1919)	No	Yes	Daughter	Granddaughter's husband, who assisted in managing finances	Female decedent expressed concern that anything she left to daughter would be dissipated by son-in-law. Neutral non-attorney prepared will. Will ?? DOD ?? Age 87	[4][5] Undue influence of this character is never presumed, but must be proved, like any other fact; but, as it is frequently incapable of being established by direct testimony, circumstantial evidence is often admitted for that purpose. [6][7] In considering the question as to whether or not undue influence has been exerted in a particular case, one is naturally led first to inquire into the opportunities which the person accused of this species of fraud had to exert such control over the intention of the testator. Among these is the existence of confidential relations between the testator and the person so charged. While the existence of such a relation will not of itself, according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to put upon a beneficiary the burden of showing by at least equal evidence, and in many jurisdictions by the preponderance of evidence, that no such influence was exerted. Activity in the preparation of a will, which inures to the benefit or enrichment of the person accused or members of his family, is one of these circumstances.
In re Will of Pittock, 102 Or 159, 199 P 633 (1921)	No	Yes	Daughter		Will 8/23/16 DOD [probate 2/19] Age 81 on date of will	[4][5] As to the matter of undue influence, the testimony goes no further than to show that for some years the defendant Morden had been in the employ of the Oregonian Publishing Company, officiating as manager of the newspaper published by that corporation, of which the decedent held the majority of the stock, and that for a like period the defendant O. L. Price had been the private secretary of the testator, who had large business interests, having accumulated a fortune estimated in millions of dollars. These two defendants manifestly had the confidence of the testator and had opportunity to exercise over him such influence as they possessed. This is the utmost that the testimony shows. But the evidence is convincing that at no time or place did either of the defendants exercise or attempt to exercise any influence over the decedent in the matter of making his will. On the contrary, the testimony is clear that the initiative in the matter came from him, and that the will was the product of his own mind and of his own dictation, without the least suggestion from any one, so far as the record discloses, about what the document should contain or what disposition should be made of his property. In other words, as disclosed by the record before us, it is apparent that he had very much more influence over the defendants than they had over him; that his word was the law of his business; and that it was theirs to obey and not to influence or dictate. On the question of undue influence, it is not enough to show that the defendant had an opportunity to exercise such influence, but it must also appear that the influence was actually exercised, and not only so, but that it was pushed to such an extent that the resultant will was not that of the testator but that of the parties procuring its execution. Hubbard v. Hubbard, 7 Or. 42; In re Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207; In re Shell's Estate, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024.

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Estate of Allen, 116 Or 467, 241 P 996 (1925)	No	Yes	Son and 4 daughters	Wife	Decedent had left estate to widow and given deeds to two farm properties to two of his sons, excluding other 5 children. Will and deeds 8/13/21 DOD 1/14/23 Age "elderly"	[2] As to what constitutes undue influence in the law of wills much has been written. But we believe that the following is plainly and clearly expressive of that term: " 'Undue influence' is that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist." 4 Words and Phrases, Second Series, 1059. Gross inequality of distribution of a testator's estate may be considered as a circumstance, although not of itself sufficient to establish undue influence: 1, The American Law of Administration, Woerner (3d Ed.) Sec. 31, p. 62. It is said that, though in strictness fraud and undue influence are distinguishable, more often than otherwise it is a mere choice of terms. Ginter v. Ginter, 79 Kan. 721, 101 P. 634, 22 L. R. A. (N. S.) 1024. Undue influence has in many cases been held to be a species of fraud. Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Whitcomb v. Whitcomb, 205 Mass. 310, 91 N. E. 210, 18 Ann. Cas. 410. The "undue influence" that will avoid a will must be such as to overcome the free volition or conscious judgment of the testator and to substitute the wicked purposes of another instead, and such influence must be the efficient cause without which the obnoxious disposition would not have been made. In re Holman's Will, 42 Or. 345, 358, 70 P. 908, 913; In re Pickett's Will, 49 Or. 127, 89 P. 377. In the early case of Greenwood v. Cline, supra, this court held: "What constitutes fraud and undue influence are questions that must depend on the circumstances of the case. They are in their nature inquiries which cannot be referred to any general rule. Where an arbitrary and unjust will is made in favor of one occupying a relation of confidence towards the testator, and who might have influenced his mind, slight evidence that he did exercise his power may suffice to invalidate the will. It is the duty of one occupying such a relation to disabuse the testator's mind of any false impressions he may have concerning others entitled to his bounty, and the omission to do so may afford ground for imputing to him undue influence." Syl. point 2. In Tyler v. Gardiner, 35 N. Y. 559, it appeared that the testator had for some time been under the controlling influence of the principal beneficiary. In rendering its opinion, the court said: "The will was made by the testatrix under two false impressions, which went to the very root of its provisions; one, that her daughter was poor, and the other, that her son was faithless and dishonest, and that he had purchased his farm with her money." Page 593. "It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured. The purposes to be served are such as court privacy rather than publicity." Page 594. "It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose which the undue influence was employed to accomplish." Page 595. * * * * * The law casts upon the contestants the burden of proving their allegation that the will is the result of undue influence brought to bear upon the testator. If any part of the will is the product of undue influence, such part is void. If the entire will is the result of undue influence, then the whole will is invalid. It has been held that neither advice nor persuasion, nor argument nor ascendancy gained by legitimate affection, can avoid a will made freely. Estate of Elizabeth Hoge, 2 Brewst. (Pa.) 450. The fact that the testator preferred his wife over all others can have no effect on his will. His reason for placing full confidence in his companion of half a century is not our concern. He but exercised the right which the law gives to him, and it is not profitable or fit that we speculate upon the justice or wisdom of his act. The law is plain. We have no right to substitute our judgment for his. The burden of testimony does not show undue influence. There is much testimony tending to show that the will is the will of the testator and of nobody else. The most effective testimony negativing the charge of undue influence is that of A. S. Cooley, the attorney who drew and witnessed the will, and of Mary E. Allen, the beneficiary named therein. If Cooley tells the truth, the testator was not acting under undue influence at the time he executed his will. The chief beneficiary has been a very frank witness. She testified that she frequently discussed the matter of the disposition of the testator's property with him. She admits and declares that the execution of the deeds and will met with her "sanction." She further swears that Joe and Jess have been provided for, and says, in substance, that the property devised to her shall be divided among the remaining heirs as they deserve it, and that, in any event, it shall descend to them at her death. Contestants have stated no rule of law which declares it wrongful for a lawful wife to use her influence for her own benefit or for the benefit of another unless she acts fraudulently or coerces her husband to such an extent that he is unfit to act as a free agent. When the will is the free and voluntary act of the husband, it is a valid will. When the will is the result of undue influence upon the part of the wife, it is the wife's will and is invalid. In the case at bar, the will is the will of the testator, the husband and father. In Latham v. Udell, 38 Mich. 238, it was pertinently written by Mr. Chief Justice Campbell: "A faithful wife ought to have very great influence over her husband, and it is one of the necessary results of proper marriage relations. It would be monstrous to deny to a woman who is generally an important agent in building up domestic prosperity, the right to express her wishes concerning its disposal." We have heretofore stated the nature and extent of influence that will invalidate a will. Undue influence is measured, not by degree, but by effect. If it destroys free agency, it is undue. Moreover, the undue influence that constrains must be present, operating upon the mind of the testator in the very act of making the will: In re Shaw's Will, 11 Phila. (Pa.) 51. This the contestants have failed to establish.

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Wayne v. Huber, 134 Or 464, 291 P 356, 294 P 590 (1930)	No	Yes	Widow by second marriage to whom decedent had been married 3 years	Niece whom widow accused of falsely accusing her of trying to poison the decedent. The court clearly did not believe the accusations.	Male decedent leaving widow by short second marriage and no children. Widow had suded for divorce in 7/27, but the parties reconciled shortly thereafter. Prior will 7/26 made similar bequest to wife Will 12/22/27 DOD 8/15/28 Age 56	[1] The law casts upon a litigant alleging undue influence the burden of proving it. II Alexander, Commentaries on Wills, Sec. 593; I Underhill on the Law of Wills, Sec. 128; Rood on Wills (2d Ed.) Sec. 189; Simpson v. Durbin, 68 Or. 518, 136 P. 347; In re Sturtevant's Estate, 92 Or. 269, 178 P. 192, 180 P. 595; Rice v. Rice, 95 Or. 559, 188 P. 181; In re Estate of Moore, 114 Or. 444, 236 P. 265; In re Estate of Allen, 116 Or. 467, 241 P. 996; In re Severson's Estate, 125 Or. 545, 267 P. 396. [2] In this state, the law relating to the subject of undue influence is well settled. See Rowe v. Freeman, 89 Or. 428, 172 P. 508, 174 P. 727, In re Sturtevant's Estate, supra, and Rice v. Rice, supra, where this court held that, to establish undue influence, it was not enough to show mere opportunity to exercise undue influence over the mind of a testator. The case of Carr v. Ryan, Executrix, 121 Or. 574, 582, 256 P. 390, 392, is more farreaching in effect than those just cited. In rendering its decision in that case, the court said: "Friendly advice, or influence arising from gratitude, affection, or esteem, is not undue influence, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed. Estate of Allen, 116 Or. 467, 499, 241 P. 996." In Riggs v. Riggs, 120 Or. 38, 63, 241 P. 70, 250 P. 753, 759, the subject is treated in the following language: "Undue influence is not ordinary influence. It must be such as to overcome the free volition or conscious judgment of the testator and to substitute the wicked purposes of another. Suggestion or advice by a friend or relative, or one in confidential relation, is not undue influence, if it leaves the mind free to act on its own judgment (citing 28 R. C. L. 137-154, and a number of Oregon cases)." The contestant relies largely upon the case of Greenwood v. Cline, 7 Or. 17, a case which presents an altogether different setting of facts. In that case the appellant's petition alleged, and the evidence proved, that the testatrix at the time of making her will was not of sound mind, and, further, that, in consequence of old age and other causes, her mind was seriously impaired and shattered, her memory destroyed, and that her mental condition was such that she was easily persuaded in her course of conduct. In the instant case, there is no contention that the testator was not of sound mind. Furthermore, a number of witnesses, among them well-known attorneys, have testified that the testator was a man of intelligence, very firm in his opinions, and that, when he had made up his mind on any particular matter, it was with great difficulty that he was swerved. On the subject of the burden and sufficiency of proof to establish undue influence, Rood on Wills (2d Ed.) at Sec. 189, says: "It cannot be presumed from the mere fact that the principal legatees had both the motive and the opportunity to exercise undue influence; nor from the additional fact that the will is unreasonable and unjust. * * * "Concealment of the fact of making the will raises no presumption." * * * * * In the case of Estate of Heaverne, 118 Or. 308, 246 P. 720, this court, speaking through Mr. Justice Coshow, held that the declaration made by the testatrix that an attempt was made to influence her in making her will was hearsay and inadmissible. See, also, In re Dale's Estate, 92 Or. 57, 66, 179 P. 274. In the case of Griffith v. Benzinger, 144 Md. 575, 125 A. 512, 516, appears a valuable discussion relating to the admissibility of declarations of a testator to show undue influence. In the course of that discussion the court states that the law relating to testamentary dispositions induced by undue influence is too well settled to justify any elaborate exposition, "but the difficulty lies in determining whether a given state of facts will support an inference that such a disposition of property in a given case is the result of fraud or undue influence." Continuing, the opinion reads: "The general principles controlling such an inquiry are stated in the case of Grove v. Spiker, 72 Md. 301 [20 A. 144], where it was said: 'Undue influence is that degree of importunity which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act. It is closely allied to actual fraud; and like the latter, when resorted to by an adroit and crafty person, its presence often becomes exceedingly difficult to detect. Indeed the more skillful and cunning the accused, and the more helpless and secluded the victim, the less plainly defined are the badges which usually denote it. Under such conditions the results accomplished, the divergence of those results from the course which would ordinarily be looked for, the situation of the party taking benefits under the will towards the one who has executed it, and their antecedent relations to each other, together with all the surrounding circumstances, and the inferences legitimately deducible from them, furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud or undue influence has been resorted to and successfully employed.' " The court then quotes from the case of Frush v. Green, 86 Md. 501, 39 A. 863, as follows: "It [undue influence] often closely resembles and is near akin to actual fraud, and like the latter when most cunningly employed is exceedingly difficult to expose. From the very nature * * * of the wrong itself, it is rare that direct evidence can be procured to unmask it, and hence the results accomplished in a given case, the divergence of those results from the course which would ordinarily and naturally be looked for, the situation of the parties taking benefits under an instrument, alleged to be the product of its dominion towards the person who has executed that instrument, their antecedent relations to and intercourse with each other; the legitimate, but unrecognized claims of others upon the bounty of the one who has discarded them; their dependence upon him; his prior declaration; the instincts of justice and the promptings of gratitude of which every unbiased mind is sensible; the natural ties of affection, together with all the circumstances surrounding the entire transaction under investigation, and the inferences legitimately deducible from them, often furnish, even in the teeth of directly contradictory testimony, ample ground for the conclusion that undue influence has been successfully resorted to, to accomplish an end which is grossly unjust and whose very existence cannot be satisfactorily accounted for or explained except upon the theory that undue influence has produced it." *[Extensive discussion of rule that alleged statements by the decedent concerning alleged undue influence by niece are hearsay and inadmissible.]*

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Wayne v. Huber, 134 Or 464, 294 P 590 (1930) On rehearing						[1] The contestant has filed a petition for rehearing, in which it is asserted, in part, that we erred in our original opinion in holding that the law cast upon her the burden of proof to establish that the will was the result of undue influence. Let us see. Contestant alleged that the will of Wayne, her husband, was not the expression of his own wishes, but that he was coerced to make the same by Lenna Huber, his niece. The allegations charging undue influence were denied. This put the cause at issue, the contestant assuming the affirmative, and the contestee the negative. It is not only established by text-writers and court decisions that evidence shall be produced by the party having the affirmative of the issue, but that rule is codified as section 9-1001, Or. Code 1930. That section reads: "The party having the affirmative of the issue shall produce the evidence to prove it. Therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." This question was before our court in Branch v. Lambert, 103 Or. 423, 205 P. 995, 996, and it was there held that, under the section just quoted, "actions against executors and administrators are governed by the general rules that in civil actions the party having the affirmative of the issue shall produce the evidence to prove it, and that, when the evidence is contradictory, the findings shall be in conformity with the preponderance of the evidence." [2] In support of the charge of undue influence, counsel cite Holman's Will, 42 Or. 345, 70 P. 908, 913. For a thorough understanding of that case and the reasoning employed therein, the opinion should be read in its entirety. However, from that opinion, written for the court by Mr. Justice Wolverton, it will be helpful to set out the following declaration, which seems to the writer to be based upon sound doctrine, and one holding squarely with our former decision in this case. The learned jurist wrote: "Common understanding suggests that a will should be natural; that is, conformable to the nature and disposition of the person who makes it. Where it does not conform to this idea, it is a circumstance, no doubt, to be considered in connection with other proof bearing upon the question as to whether or not it was the result of undue influence, but, within itself, affords no conclusive or sufficient proof for the purpose, and does not, therefore, raise a presumption that it was so procured. Salisbury v. Aldrich, 118 Ill. 199, 8 N. E. 777. In the case of gifts inter vivos, and contracts made in favor and to the advantage of a person standing in a fiduciary or close confidential relation with the donor, or other contracting parties, such as trustee and cestui que trust, guardian and ward, attorney and client, physician and patient, or priest or religious adviser and his parishioner, and the like, the burden of showing that the transaction was fairly conducted, and that no advantage was taken of the relationship, lies with the one having secured the advantage. The reason, however, for this rule, is that the person receiving the benefit has actively participated in the transaction, as a party thereto, and the explanation required is very naturally within his knowledge and power. Such a reason does not obtain, as it related to a bequest, as the person to whom it is made may not, in point of fact, have had any part in, or even knowledge of, the act which gives him the advantage; and no such presumption arises from the mere relationship of the parties, --that the donee has abused his position of confidence, and turned it to his own advantage." This language, we reiterate, is particularly clear and persuasive, and is impossible of misinterpretation. We direct attention also to the expression of Mr. Justice Burnett, speaking for the court in the case of In re Sturtevant's Estate, 92 Or. 269, 178 P. 192, 194, 180 P. 595, where the question is analyzed thus: "The reason underlying the rule as to the burden of proof respecting testamentary capacity and undue influence may be thus stated: If there is no will in existence, the property of a testator is distributed according to statute of descents. If any one would interrupt this course of distribution, he must show not only a properly executed will, but that there was a testator competent to publish such a document. The persons naturally interested in the estate under the statute of descents have not had their day in court where the will has been admitted to probate in common form. Consequently the burden of making a different disposition of the property lies upon him who propounds the will to show that the testator had testamentary capacity, and that the instrument in question was executed in due form of law. On principle, the question is different where the effort is to overturn the will on the allegation that it is the product of undue influence. This is a species of fraud, by the exercise of which the nominal testator is supposed to have been deluded into making a disposition of property which is not the product of his own mind. "It is hornbook law that he who alleges fraud must prove it, so that in good reason, as stated in Simpson v. Durbin, supra [68 Or. 518, 136 P. 347], the burden of establishing undue influence lies upon those alleging it." The able justice cites the case of In re Will of Hiram V. Allred, 170 N. C. 153, 158, 86 S. E. 1047, 1049, L. R. A. 1916C, 946, 949, Ann. Cas. 1916D, 788, calling attention to the following quotation therein from Bancroft v. Otis, 91 Ala. 279, 8 So. 286, 288, 24 Am. St. Rep. 908: "With respect to testamentary dispositions, the primary presumption, upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts inter vivos rests, is entirely lacking. They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be with respect to them no assumption that the donor would not voluntarily part with his property, since, in the nature of things, it must then pass from him to others selected by himself according to the dictates of his affections, or appointed by the law of descent and distribution; and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality, that the property should cease to be his, and should become that of another; and the very considerations which lead to suspicion, which must be removed in transactions, inter vivos. --friendship, trust and confidence, affection, personal obligations, --may, and generally do, justly and properly, give direction to testamentary dispositions."

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Brumbaugh v. Barber, 135 Or 392, 296 P 42 (1931)	Yes	No	Husband (whom decedent married in 1927) and daughter by prior marriage	Married couple friends of the decedent since 1913 who handled her business for her.	Woman decedent had a history of mental illness from 1926. Indication that proponents created friction between decedent and daughter. Decedent suffered paralyzing stroke on 2/12/28, after which daughter was kept from seeing her by proponents. Will 1/17/28 DOD 4/29/28 Age 68	[2] J. S. Barber, during all the transactions referred to, sustained fiduciary relations with Mrs. De Haas. Confidential relations existed between the testatrix and J. S. Barber, the beneficiary, and the will is inconsistent with the claims of duty and affection. In such case slight evidence that the beneficiary has abused the confidence will suffice to invalidate the will. In re Diggins' Estate, 76 Or. 341, 149 P. 73. See, also, In re Dale's Estate, 92 Or. 57, 179 P. 274; In re Le Gault's Estate, 99 Or. 621, 196 P. 254. [3][4] The burden of proving the testamentary capacity of Clara C. De Haas, deceased, at the time of the execution of the will, January 17, 1928, by a preponderance of the testimony, devolved on the proponents. In re Faling's Will, 105 Or. 365, 441, 208 P. 715; In re Sturtevant's Estate, 92 Or. 269, 178 P. 192, 180 P. 595; In re Will of Sue Parrot King, 87 Or. 236, 170 P. 319. The proponents undoubtedly have not sustained such burden.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Knutson's Will, 149 Or 467, 41 P2d 793 (1935)	No	Yes	8 Nieces and nephews by deceased sister. Decedent had been friendly with them, but they drifted apart.	Niece by living brother for whom the decedent had shown fondness from time she was a child until his death. She worked as a teacher and helped him study for his citizenship.	Decedent a childless bachelor. Decedent had repeatedly over the years expressed to proponent and others that he wanted to leave estate to niece. Will executed in hospital while recovering from surgery. [149 Or. 482] "On five occasions in the period between October 17, when the will was signed, and April 9, 1932, when the testator died, he mentioned the will to others in a way that indicated that he fully knew what he did on October 17th." Will 10/17/31 DOD 4/9/32 Age 72	[4] The burden of proof on the issue of undue influence rests upon the contestants. Wayne v. Huber, 134 Or. 464, 291 P. 356, 294 P. 590, 79 A. L. R. 1427; Talbert v. Skilbred, 125 Or. 545, 267 P. 396; In re Estate of Moore, 114 Or. 444, 445, 236 P. 265; In re Will of Robert Carr, 121 Or. 574, 256 P. 390. The contestants concede that they have the burden of proof upon the issues we are now considering, but claim that they are aided by a presumption that undue influence was actually exercised. At this juncture we deem it helpful to quote the following from In re Dale's Estate, 92 Or. 57, 64, 179 P. 274, 276: "In considering the question as to whether or not undue influence has been exerted in a particular case, one is naturally led first to inquire into the opportunities which the person accused of this species of fraud had to exert such control over the intention of the testator. Among these is the existence of confidential relations between the testator and the person so charged. While the existence of such a relation will not of itself, according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to put upon a beneficiary the burden of showing by at least equal evidence, and in many jurisdictions by the preponderance of evidence, [149 Or. 487] that no such influence was exerted. Activity in the preparation of a will, which inures to the benefit or enrichment of the person accused or members of his family, is one of these circumstances." From In re Turner's Will, 51 Or. 1, 93 P. 461, 464, we quote: "A mere confidential relation existing between the testator and a beneficiary under a will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will. The fraud or undue influence that will suffice to set aside a will, 'must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made.' Holman's Will, 42 Or. 345-358, 70 P. 908. Or, as put by Mr. Justice Moore, in Re Darst's Will, 34 Or. 58-65, 54 P. 947, 'Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts.'" The editor of 66 A. L. R., after citing and reviewing many of the decisions, states, at page 228, their holding thus: "It is the generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, and does not cast upon the beneficiary the burden of disproving undue influence. Those consequences follow only when the beneficiary has been actively concerned in some way with the preparation or execution of the will." See, to same effect, Brumbaugh v. Barber, 135 Or. 392, 296 P. 42; In re Estate of Heaverne, 118 Or. 308, [149 Or. 488] 246 P. 720; In re Le Gault's Estate, 99 Or. 621, 196 P. 254. Two recent decisions of an exhaustive nature are In re Llewellyn's Estate, 296 Pa. 74, 145 A. 810, 66 A. L. R. 222, and Zeigler v. Coffin, 219 Ala. 586, 123 So. 22, 63 A. L. R. 942. * * * * * * * * While he was in the hospital, as we have also seen, he did not depend upon Thelma to take care of his property but telephoned requests to his friend, Nepple. Nevertheless, it is true that Thelma was there, bringing him comfort, and was undoubtedly, in part, the recipient of his affection. For a definition of the term "confidential relationship" we turn to Zeigler v. Coffin, 219 Ala. 586, 123 So. 22, 63 A. L. R. 942, from which we quote: "Confidential relations 'exist wherever confidence is reposed and accepted, and the one has it in his power, in a secret manner, for his own advantage, to sacrifice those interests of the other which he is bound in honor and good conscience to protect. 1 Story, Eq. Jur. Sec. 323. The rule embraces both technical fiduciary relations and those informal relations whenever one man trusts and relies upon another.' Coghill v. Kennedy, supra, pages 658, 659 of 119 Ala. [641] (24 So. [459] 468); Raney v. Raney, supra, page 34 of 216 Ala. [30] (112 So. [313] 316)." This definition, like all others of the term which have come to our attention, is very broad and inclusive. Possibly they are intentionally so. In its above form, however, it is too inclusive to be of service unless its application is restrained by discretion. We assume that every testator has confidence in those to whom he makes a bequest or a devise, and in many of them he also, no doubt, reposes trust and reliance. For instance, his wife, especially if she has helped him create his [149 Or. 490] estate, has surely won his confidence, trust, and reliance. In fact, all to whom a testator gives the larger bequests and devises invariably have won his confidence. If we place all of these in the confidential relation group, we are proceeding to defeat the will rather than to probate it. It is not unlikely that the wife, son, daughter, and others in whom the testator has confidence will be in some manner concerned about the preparation of the will, especially if it is made in the course of an illness. Any inference of undue influence arbitrarily drawn from the circumstances mentioned in this paragraph would rarely be sustained by the facts themselves. The truth of the matter is, as was pointed out in Waters v. Waters, 222 Ill. 26, 78 N. E. 1, 113 Am. St. Rep. 359, and Goodbar v. Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296, that bequests and devises to those in whom the testator has confidence and who have won his affection are more likely to be free from undue influence than bequests and devises to others. * * * * * In the instances above reviewed, the relationship between the testator and the beneficiary was personal. It was based upon esteem, gratitude, or affection, arising out of friendship, kinship, or marriage. It was not based upon contractual or legal duties. The occasional item of business which the one transacted for the other was incidental, and in the nature of a favor. The influence that the beneficiary had with the other was not based upon any secret information which he had gained through the relationship, nor through superior position. The bequests or devises under the circumstances were natural ones, and there was nothing about the making or the execution of the wills that excited suspicion. Under these circumstances the courts did not invoke the doctrine of confidential relations, and thus bring to the avail of the contestants a presumption that undue influence had been employed. In our present case Thelma's relationship to Anton was a personal one. The occasional item of business which she transacted for him was in the nature of a favor. In fact, she never charged for any of the services which she performed for her uncle. There is nothing about the incidents that occurred on October 16th and 17th that arouse suspicion, and the provisions of the will are natural. She possessed no advantage arising out of money, property, or legal power over him. She had [149 Or. 494] knowledge of no secret information concerning him. The only influences that exerted themselves at the time of the making and execution of the will were gratitude and affection. But, before closing this matter, let us examine the charges still further.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Kelly's Estate, 150 Or 598, 46 P2d 84 (1935)	Yes	No	Brothers and sister	Nurse who shortly after being hired to care for decedent entered long term meretriciious relationshp. She was 37 at the time of trial and married throughout the period of time she was involved with decedent. "Without quoting from these letters or going into detail, we state that many of them indicate that the relationship between Kelly and Mrs. Northrop had become an intimate one. There is much other evidence in the record which also reveals the character of the relationship between the two. In short, it sustains the conclusions of the circuit court judge who presided over the trial that the relationship was "more than a platonic[150 Or. 605] friendship." It is our belief that the relationship was illicit and meretricious."	Male decedent's wife and two chldren had pre-deceased him. He suffered serious medical problems. Decedent made very large gifts to proponent shortly before his death. Will left her residue of estate after specific bequests of about half the value of estate. Will included substantial gift to nephew of deceased spouse which was voided by effect of decision reverting to intestacy. Nephew was among contestants. Proponent first met decedent in 1930, when she was hired to nurse him during heart related illness. Extensive evidence of proponent excluding others from house and making requests and demands on decedent for share of estate. Proonent was involved in procuring attorney, who was previously known to decedent. Will 10/11/33 DOD 10/18/33 Age 70	We come now to the preparation of the will. About a week or ten days before it was signed the attorney who later prepared it made a friendly call upon Kelly. He had never before performed professional services for Kelly, but was a young man of good standing whom Kelly had known favorably since the attorney's boyhood. As the attorney was leaving, Kelly stated that in a few days he would like to talk to him about "my business affairs." Two or three days later Mrs. Northrop telephoned to the attorney, stating that Kelly desired to see him. Upon this visit Kelly mentioned his heirs and inquired about the possibility of disposing of his estate through deeds so as to avoid litigation similar to that which he said had occurred over a will left by his sister. Upon this occasion the attorney gave advice and, at Kelly's request, prepared a deed by which Kelly conveyed a city lot as a gift to a young friend. As the attorney left the house, Mrs. Northrop made her inquiry about her divorce. On the morning of October 11th Mrs. Northrop telephoned to the attorney, requesting that he come again, this time as promptly as possible. Kelly had been very ill during [150 Or. 615] the preceding night. The attorney arrived at the Kelly home at 10:30 a. m., had a conference with Kelly, received instructions from him to prepare a will, and retired to a downstairs room where he wrote the will. Early in the afternoon Kelly signed it. Acording to Minnie Cargill, Kelly's housekeeper, Mrs. Northrop said to her the morning the attorney was summoned: "Mr. Kelly, he hasn't any will, and I am going to get-tell him that he should get Mr. _____." * * * According to Mrs. Northrop, she left Kelly's room after the attorney had arrived, but concedes that she returned to it a few times while the attorney was conferring with Kelly. On one occasion, upon request, she brought to Kelly some mortgage papers. On another occasion she returned to the room and, after a few minutes' search, found Kelly's pen for him. While the attorney was downstairs drafting the will she brought Kelly his lunch, remaining in the room for approximately an hour. During the times she was absent from the room she remained across [150 Or. 616] the hall from Kelly's room or was downstairs. * * * * * * * * [1] Let us now consider the principles of law applicable to the above facts. In Re Estate of Riggs, 120 Or. 38, 241 P. 70, 250 P. 753, 759, the term "undue influence" is defined thus: "Undue influence is not ordinary influence. It must be such as to overcome the free volition or conscious judgment of the testator and to substitute the wicked purposes of another. Suggestion or advice by a friend or relative, or one in confidential relation, is not undue influence, if it leaves the mind free to act on its own judgment." From In re Holman's Will, 42 Or. 345, 70 P. 908, 913, we quote: "The fraud, force, or undue influence that will suffice to set aside a will must be such as to overcome the [150 Or. 617] free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. This may be accomplished not alone by physical coercion or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subjected to the former, and induced to do its bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated undue or fraudulent, as a friend or relative, or even those in confidential relation, may employ argument, or even persuasion, to induce a bequest, so that notwithstanding it leaves the mind free to act upon its own considerations and judgment." [2][3][4] Scarcely any one can be said to possess a "free volition." Every one who is conscious of family and social duties is constrained in his volition by the obligations which he thus recognizes. These obligations affect constantly his thinking and his conduct. They assert themselves when he writes his will. In fact, they are the only forces or convictions which determine the provisions of that instrument. Only a hermit or a hobo may be said to possess a free volition. But constraints of the kind above mentioned are not under the ban of the legal principles mentioned in the definition above quoted. Those influences have been exerted upon the mind and have convinced the judgment. They are to be distinguished from importunities, machinations, and subtle appeals which overcome the will but do not convince the judgment. The latter, but not the former, constitute undue influence. Nor is it essential that the motive which prompted the testator to include in his will the contested bequest was a meritorious one. [150 Or. 618] It is usual to find kindness, friendship, affection, and beneficent ministrations rewarded in testamentary documents; but the testator, if he chooses, may be actuated by base motives. The only essential is that the will which prompted him to make the bequest must be the will of the testator. This single essential negatives all imputations that a bequest, preceded by an appeal or other importunity, is invalid. Importunities and appeals which do not overcome the will without convincing the judgment are not prohibited. [5][6][7] As we have seen, the evidence indicates that a meretricious relationship existed between P. J. Kelly and Mrs. Northrop. The mere existence of such a relationship does not render invalid a bequest made to the paramour, because one possessed of an estate may settle his bounty upon an immoral person if he chooses; nor does such a relationship create a presumption that the beneficiary exerted undue influence in obtaining the testamentary recognition. But, since the relationship which arises out of illegal amours may provide favorable opportunities for the exertion of undue influence, proof of the relationship is admissible when undue influence is charged. It is frequently said that the relationship casts suspicion upon the will, and cautions the court to examine the evidence with unusual care. Proof that the relationship existed and that the will makes an unnatural disposition of the estate, when accompanied with only a small amount of evidence that undue influence was exerted, may overcome positive denials from the paramour and her witnesses. This is due to a conviction that the usual difficulty of unmasking deceit and wrongful conduct is greatly increased when the alleged wrongdoer has employed as an aid sensual pleasures. The decisions are many in which the above-mentioned principles were [150 Or. 619] applied. * * * * * * * * * * * From the time that the attorney arrived until he departed, Mrs. Northrop, according to her own admissions, was in the room four times. Once she brought tax receipts, another time some mortgages, [150 Or. 625] another time she remained for a few minutes searching for a pen, and the fourth time (while the attorney was downstairs) she remained an hour while Kelly ate his lunch. Somehow this man's determination not to make a will in Mrs. Northrop's favor had been overcome, but not until he lay helpless upon his deathbed, and Mrs. Northrop had been with him night and day for more than two weeks. * * * * * In cases of this character the courts frequently dwell upon the unlikelihood of direct evidence of the wrongful acts being available, especially if the wrongdoer was cunning, crafty, and secluded his victim. See, for instance, Wayne v. Huber, 134 Or. 464, 291 P. 356, 294 P. 590, 79 A. L. R. 1427 * * * * * * * * [11] Proponents further contend that the entire will should not be held invalid merely because a portion is defeated. They argue that the executors should be permitted to proceed with the administration of the estate. The executors nominated in the will are Mrs. Northrop, Jack Kelly, and the aforementioned attorney. Jack refused to serve, and

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Rupert's Estate, 152 Or 649, 54 P2d 274 (1936)	Yes	No	PR named in prior will (for nephew, beneficiary of prior will, and brother, sole heir)	Naturopath physician who was caring for decedent and living in his home with his own family.	Never married childless male decedent. He had same attorney, who prepared first 3 wills, since 1916. Nephew worked for decedent in his business and lived with him for some years prior to his marriage, and they were quite close. In 1933 decedent sold his interest in restaurant to nephew on terms assuring him a lifetime income. Decedent had stroke in 1931, which began deterioration. Court found him to be senile. In 1933 proponent, an unsuccessful naturopath, began treating decedent, who began drinking and gambling to excess. After collapsing decedent requested his long time attorney to have nephew made his guardian, and nephew agreed. Proponent borrowed money from decedent and drove wedge between decedent and nephew. Decedent told attorney that proponent had told him nephew was stealing things from him. Decedent then went to other attorneys to challenge guardianship, and nephew resigned in favor of long time friend of decedent. Proponent falsely accused nephew of being $1,000 short on his final account. Proponent moved in with decedent and continued to accuse nephew and nephew's wife of stealing. Prior wills in 1927 and 1931 named brother as beneficiary, but brother died in 1932. Prior will 9/16/32 Will 7/19/34 DOD 7/27/34 Age 72	* * * Mr. W. E. Richardson, the attorney who prepared the contested will, saw Rupert once on July 17, 1934, and twice on July 19th. None of the conferences lasted for more than an hour's time. He had never seen nor known the decedent before. He expressed his opinion concerning Rupert's mentality thus: "There was no question in my mind as to his testamentary capacity; I think he was strong mentally. *** He discussed what property-discussed his property with me, how he wanted to leave it, his family affairs; and when he wanted to write a letter setting forth the details of what he thought that his nephew had done and his wife, and, and I suggested-" At this point he was interrupted, but later added, "I suggested to him that many things would be better unsaid," as a result of which the letter was not written. Mr. Richardson's wife, as well as himself, was present at the execution of the will as attesting witness. This was July 19th. She thought this visit lasted 15 or 20 minutes. * * * * * * * * * * * Thus, the principal beneficiary of the will now under consideration had taken possession of his testator's property and had also assumed charge of his person. Under these circumstances, a conclusion is certainly warranted that a personal or confidential relationship existed between the two men. In re Knutson's Will, 149 Or. 467, 41 P. (2d) 793. Appellant argues that influence arising from friendship and esteem is not undue. But the record does not show that the appellant rendered his patient any service through friendship. He charged for everything he did, even for the gasoline he used when he took his patient upon trips. * * * [2][3][4] In Re Knutson's Will, supra, we reviewed at length the principle frequently employed in will contest proceedings which holds that a beneficiary of a will who sustained to the testator a confidential relationship, and who actively participated in making the will, must assume the burden of proving that he exerted no undue influence in the making of the will; that is, the [152 Or. 678] burden of coming forward with evidence is reversed. A presumption of undue influence arises from the two circumstances just mentioned. The ultimate burden of producing conviction still must be discharged by the contestants of the disputed will, but they have the benefit of the presumption of irregularity. In addition to the authorities reviewed in the decision just noted, see, also, the citations accompanying the text in 68 C.J., Wills, p. 758, Sec. 451. We believe that the facts bring the present case clearly within that rule. * * * Since the appellant had possession of his patient's home and person, that presumption is peculiarly applicable. He had the means of keeping his fraud, if any, out of sight. Fraud, deceit, and undue influence are rarely susceptible [152 Or. 679] of direct proof, especially when the victim and his property are in the possession of the alleged wrongdoer, and the victim has since passed to the grave. We have carefully read the appellant's denials that he did not influence the decedent against his relatives and friends, nor in the preparation of this will. But denials alone will not suffice. * * * Likewise, although the appellant denied that he sought to influence his patient in the disposition of his estate, he does not claim that he called to the decedent's attention his duty to his relatives, Mr. and Mrs. Arthur Rupert, who had been devoted to him for many years. Possessed of the influence which he held over the decedent, the latter's mention of an intention to make a will, and include a devise in it for appellant, should have caused the latter promptly to retire from the scene. If he wanted to participate, he should have surrounded the decedent with those of his old-time friends who would have given him disinterested advice. * * * [152 Or. 680] But in endeavoring to determine whether the appellant abused his confidential relationship, we are not dependent upon appellant's denials alone. The record contains positive testimony that he alienated Rupert from his relatives and instituted an active campaign to work himself into his patient's gratitude. * * * We believe that the amount of pressure that constitutes undue influence is dependent upon the power of resistance of the prospective testator. * * * Surrounded by a loving family, one with Rupert's limited ability to reason correctly might have written a just will; but when all other influences had been excluded and there was present with the testator only the person who had designs upon his estate, even a slight suggestion might suffice to gain the estate and produce an unnatural will. Moreover, such an influence would be hard to detect[152 Or. 681] because the testator would be as happy with his new purpose as he was with his old one. The will of July 19, 1934, is at total variance with Rupert's three previous wills. The only explanation that we have for this radical departure, unless it be undue influence, is afforded by the following paragraph taken from the new will: "I have heretofore given to my relatives what property I desired them to have and it is not my desire to make further gifts to them."

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Bliss v. Bahr, 161 Or 79, 87 P2d 219 (1939)			Male grantor seeking rescission of deed for property that was only substantial asset	Sister of dying wife	Wife was dying of cancer. Had not seen her widowed youngest sister, who lived in New York, for 40 years. Sister arrived 9/20/36, accompanyied by younger widower who also stayed at house for several months before he was made to leave. Deed transferred their home and acreage to sister was prepared by attorney initially called by sister at request of wife after he discussed deed as compared to probate. Husband testified sister nagged wife to get deed done. Husband soon decided he wanted deed back so he could sell the property, and wife joined in suit just before her death. Prior will left residue of joint estates to sister and brother equally Deed 11/2/36 DOD W 8/1/37 Age H 73; W 70	Since there is no evidence tending to show that the deed was executed in consideration of any promise by the defendant to render services, it follows that the deed, if sustained, must be based upon the theory of a gift. The vital question in the case, therefore, is whether this deed evidencing a gift was procured through undue influence or was the free and voluntary act of the grantors who understood and appreciated what they were doing. Did Edith Bahr, by reason of her position of trust and confidence, exert such an influence over her sister that the latter was unable to act upon her own judgment? Was Edith able to substitute her will and judgment for that of her sister? [1] The burden of proving undue influence rests upon the party who asserts it. Undue influence, being a species[161 Or. 89] of fraud, is rarely susceptible of direct proof. Those who are actuated by wrongful motives generally operate in the dark. No hard and fast rule can be laid down to determine whether undue influence has been so exercised as to destroy the free agency or will of a grantor in a deed. Each case must be determined upon its own facts and circumstances. [2][3][4] In the instant case a confidential relationship existed between the defendant and her sister. As stated in Rowe v. Freeman, 89 Or. 428, 437, 172 P. 508, 511, 174 P. 727: "A fiduciary relation may exist in the absence of a trust or agency. It is found with its accompanying burdens and disqualifications wherever there is confidence reposed on one side and resulting superiority and influence on the other. ***" In view of the evidence tending to show that Edith sought to use such relationship to procure this conveyance by way of a gift when her sister was in a weakened physical and mental condition, the deed is presumed to be invalid, and the burden of proceeding shifts to the defendant who is the recipient of the gift to offer evidence that no undue influence was exercised and that the transaction is fair and equitable. It is not the existence of the confidential relationship alone that constitutes undue influence, but it is the wrongful use thereof which invalidates the conveyance. In re Rupert's Estate, 152 Or. 649, 54 P.2d 274; In re Knutson's Will, 149 Or. 467, 41 P.2d 793; In re Dale's Estate, 92 Or. 57, 179 P. 274; Sawyer v. White, 8 Cir., 122 F. 223. In 12 R.C.L. 953, the rule applicable is thus stated: "A gift between persons occupying confidential relations toward each other is, if its validity is attacked, always jealously scrutinized by a court of equity, and [161 Or. 90] unless found to have been made freely, voluntarily, and with a full understanding of the facts, will be invalidated. The existence of confidential or fiduciary relations imposes upon the recipient of a gift the onus of establishing its absolute fairness. * * * * * We are not unmindful of the will which, it is urged, shows a continuity of purpose or a fixed plan of Sam and Maggie thus to make the defendant the beneficiary of their estate. Ordinarily, a former will substantially conforming to the terms of one being contested refutes the idea of undue influence. Blochowitz v. Blochowitz, 122 Neb. 385, 240 N.W. 586, 82 A.L.R. 949, and cases in note. It will be recalled, however, that, in the instant case, the will devised and bequeathed the property to Edith Bahr and her brother Henry Pritchard. It is significant that Henry Pritchard was not named as a grantee in the deed. Furthermore, it was far more reasonable for Sam and Maggie to execute joint wills-since they would still retain their property until death-than to execute a deed taking effect upon delivery. While the will is an important factor, it is not considered of sufficient weight to overcome the presumption of undue influence arising by reason of the confidential relationship and the evidence indicating that such relationship was used by defendant to accomplish the purpose which she had in mind in coming west.
In re Brown's Estate, 165 Or 575, 108 P2d 775 (1941)	Yes	No	Sister	Decedent's attorney (who prepared the will) and a storekeeper (who was present when the will was executed) who had taken advantage of decedent in past business transactions	Decedent a childless male half Indian who had difficulty with liquor and was illiterate. He had been a successful cattle broker. Decedent had a good relationship with his sister, who had lived with and cared for him for many years. Will 3/8/37 DOD 6/21/38 Age over 80	[1][2][3] It is settled in this jurisdiction that the burden of proving the execution of a will to have been the result of undue influence rests upon the party who alleges it. In re Rupert's Estate, 152 Or. 649, 54 P.2d 274; In re Knutson's Will, 149 Or. 467, 41 P.2d 793; Wayne v. Huber, 134 Or. 464, 291 P. 356[165 Or. 585] , 294 P. 590, 79 A.L.R. 1427. But slight evidence is sufficient to set aside a will on the ground of undue influence when a confidential relationship exists between the testator and the beneficiary. In re Edwards' Estate, 141 Or. 595, 17 P.2d 570. The burden of proof never shifts from the contestant. Bliss v. Bahr, 161 Or. 79, 87 P.2d 219; In re Rupert's Estate, supra; In re Putnam's Will, 257 N.Y. 140, 177 N.E. 399, 79 A.L.R. 1423. However, when it is shown, as in the instant case, that the lawyer who drafted the will for his client is one of the chief beneficiaries, a presumption of undue influence is created which must be rebutted or overcome by proof that he did not abuse the confidence reposed in him and that the execution of the will was the free and voluntary act of the testator. In re Dale's Estate, 92 Or. 57, 179 P. 274; In re Putnam's Will, supra; In Re Butts' Estate, 201 Cal. 185, 256 P. 200; Hunter v. Battiest, 79 Okl. 248, 192 P. 575; McQueen v. Wilson, 131 Ala. 606, 31 So. 94; Weston v. Teufel, 213 Ill. 291, 72 N.E. 908. See note 66 A.L.R. 244; Alexander's Commentaries on Wills, Vol. II. p. 898, Sec. 595; Rood on Wills, 2d Ed., Sec. 191; 5 Am.Jur., Attorneys at Law, Sec. 51; 28 R.C.L. 146. [4][5][6] The strength of the presumption of undue influence depends upon the particular facts and circumstances in each case. It varies with the strength or weakness of the mind of the testator. Of course, it requires much less influence to control the will of a person of weak mind and infirm purpose than that of one of vigorous intellect and determined character. As stated in 1 Woerner's American Law of Administration, 60: "What degree of influence will vitiate a will depends much upon the bodily and mental vigor of the [165 Or. 586] testator, for that which would overwhelm a mind weakened by sickness, dissipation, or age might prove no influence at all to one of strong mind in the vigor of life."

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Lobb's Will, 173 Or 414, 145 P2d 808 (1944)	Remand	Reman d	Heirs (nieces and nephews)	Decedent's attorney for 5 years	Childless woman decedent who was showed by testimony to be susceptible to influence by men and who had in recent past been indecisive and made changes in wills. The proponent declined to do the will himself, but dictated its terms to another attorney with whom he shared office space and worked Will 4/22/39 Codicile 6/8/40 DOD 1/5/42 Age 88	[2][3] In view of the evidence of confidential relations between Wilson and the testatrix and of her susceptibility and changeable nature, we think that there was also evidence from which the trier of the fact could have properly concluded that Wilson exerted undue influence upon her which resulted in the making of the will. "Slight evidence is sufficient to set aside a will on the ground of undue influence when a confidential relationship exists between the testator and the beneficiary." In re Brown's Estate, 1941, 165 Or. 575, 108 P.2d 775, 778 * * * * * [4][5] We turn to the rules of law and principles of equity which are applicable to the evidence. The burden of proof of undue influence in its true sense (the risk of non-persuasion) is upon the party who asserts it. In re Brown's Estate, 1941, 165 Or. 575, 108 P.2d 775; In re Knutson's Will, 1935, 149 Or. 467, 41 P.2d 793. The mere fact alone of the existence of a confidential relation between the testatrix and the beneficiary does not create a presumption of undue influence, but that fact, if taken with other suspicious circumstances, may justify an inference of undue influence. Upon this point we have said: "In considering the question as to whether or not undue influence has been exerted in a particular case, one is naturally led first to inquire into the opportunities which the person accused of this species of fraud had to exert such control over the intention of the testator. Among these is the existence of confidential relations between the testator and the person so charged. While the existence of such a relation will not of itself, according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances,[173 Or. 432] may justify such an inference of undue influence as to put upon a beneficiary the burden of showing by at least equal evidence, and in many jurisdictions by the preponderance of evidence, that no such influence was exerted. Activity in the preparation of a will, which inures to the benefit or enrichment of the person accused or members of his family, is one of these circumstances." In re Dale's Estate, 1919, 92 Or. 57, at page 64, 179 P. 274, 276. In the case at bar we find evidence not only of confidential relationship but also of susceptibility plus activity on the part of the beneficiary in the preparation of the will. So far as the record now discloses, the dictation of the will by Mr. Clark was a mere formality. It required only the most rudimentary familiarity with legal forms, and the record affirmatively discloses that he gave no independent advice. The inference of undue influence would have been no different if Wilson had himself dictated the will. [6] Notwithstanding the suggestion in the case of In re Dale's Estate, supra, it is clear that the burden of proof of undue influence never shifts. It rests upon the contestant. This is made clear in the case of In re Rupert's Estate, 1936, 152 Or. 649, at page 677, 54 P.2d 274 at page 285. "In Re Knutson's Will, supra, we reviewed at length the principle frequently employed in will contest proceedings which holds that a beneficiary of a will who sustained to the testator a confidential relationship, and who actively participated in making the will, must assume the burden of proving that he exerted no undue influence in the making of the will; that is, the burden of coming forward with evidence is reversed. A presumption of undue influence arises from the two circumstances [173 Or. 433] just mentioned. The ultimate burden of producing conviction still must be discharged by the contestants of the disputed will, but they have the benefit of the presumption of irregularity." More recently we said: "However, when it is shown, as in the instant case, that the lawyer who drafted the will for his client is one of the chief beneficiaries, a presumption of undue influence is created which must be rebutted or overcome by proof that he did not abuse the confidence reposed in him and that the execution of the will was the free and voluntary act of the testator." In re Brown's Estate, supra, 165 Or. at page 585, 108 P.2d at page 779 [7] If proponent still argues that Wilson was not active in the preparation of the will and that Clark's activity amounted to independent advice, he is confronted with the holding in Peyton v. William C. Peyton Corporation, 1939, 23 Del.Ch. 321, 7 A.2d 737, 123 A.L.R. 1482, in which it was held that "Advice from a law associate of an attorney for a fiduciary is not that independent and impartial advice necessary to sustain a transaction between the fiduciary and his principal." (Headnote 7.) That case goes beyond the position taken by this court in Re Brown's Estate, supra, and appears to make the giving of independent advice a strict requirement of law, whereas we view it only as highly relevant in the eyes of equity, but we are in accord with the Peyton case on the point for which it is here cited.
In re Lobb's Will, 177 Or 162, 160 P2d 295 (1945)	Yes	No	Heirs (nieces and nephews) of childless woman decedent	Decedent's attorney for 5 years - "We think there is no question but that a fiduciary relationship existed between Mrs. Lobb and Mr. Wilson."	Relatives were geographically remote, but had a good relationship with the childless decedent. When decedent asked attorney to prepare will naming him, he declined and referred her to attorney who shared space in his office. Will 4/22/39 Codicile 6/8/40 DOD 1/5/42 Age 88	Where a principal beneficiary under a will sustains a confidential or fiduciary relationship toward the testator, and actively participates in the preparation of the will, he must assume, when the will is attacked upon the ground of undue influence, the burden of proving that he did not exert such influence. * * * When Mrs. Lobb told Mr. Wilson that she desired him to draft her will, and that she wished to make him the beneficiary of a substantial portion of her estate, his situation, as her attorney and intimate friend, should have prompted him to insist upon her procuring independent advice. In re Rupert's Estate, supra; In re Brown's Estate, supra. By 'independent advice', we do not mean necessarily the advice of a lawyer. The necessities of the situation would have been satisfied if the testator, before executing the will, had had the privilege of conferring fully and confidentially with a disinterested and competent person who was disassociated from the interests of the proposed beneficiary. * * *We imply no criticism of Mr. Clark's professional character or conduct. He was not, however, disinterested in the sense in which that word should be construed for the purposes of this case, and his own testimony shows that he considered that he had fulfilled his duty when he had satisfied himself that Mrs. Lobb was mentally competent and knew the contents of the will. This was not enough to constitute 'independent advice'. In re Kuhn's Will, 120 Kan. 13, 241 P. 1087. We are not required to pass judgment upon Mr. Wilson. We lay no claim to omniscience, and it may be that his motives and his actions in the premises were beyond reproach. Basing our decision upon the narrow ground that he failed satisfactorily to repel the inference of undue influence which the circumstances raised against him, we hold that the will should be set aside.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Southman's Estate, 178 Or 462, 168 P2d 572 (1946)	No	Yes	Sister and sole heir of childless male decedent. She lived in Europe and apparently had little contact with the decedent	37 year old close woman friend (for 4 years) of single male lightship operator. She was appointed his guardian 2/40 after prior guardian resigned because court felt guardian needed. Decedent was happy with that arrangement.	Had lived independently but suffered debilitating stroke in early 1939. "The evidence discloses that the mental condition of the testator varied considerably from time to time. * * * The direct evidence relative to his condition on and near July 8, 1940, overwhelmingly establishes that he was competent on that day." Will leaving all to different friend 10/28/38. Beneficiary of first will had a guardian appointed 8/39 will for proponent without her involvement during legal fight with prior friend Will 7/8/40 DOD 9/3/40 Age 66	[482] As to the claim of undue influence, the burden of proof was upon the contestant. *Estate of Allen*, 116 Or. 467, 241 P. 996; *In re Sturtevant's Estate*, supra; *In re Dale's Estate*, 92 Or. 57, 179 P. 274. And the burden never shifts. *In re Brown's Estate*, 165 Or. 575, 108 P. (2d) 775. The existence of a confidential relationship, such as that of a guardian and ward, when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference. The fact that Mrs. Rice was the guardian of the testator requires that we examine the record with great care in search of any other suspicious circumstances, but the fact of such confidential relationship is not determinative in view of the evidence which strongly preponderates in favor of the beneficiary. The rule is well settled in this state that undue influence must operate at the very time of the execution of the will. *Estate of Allen*, supra; *In re Sturtevant's Estate*, supra. In the case at bar there is no evidence [482] of any undue influence operating at the time of the execution of the will. The mere fact that Mrs. Rice was present though not participating at the time of the execution of the will is a circumstance for consideration, but it is not controlling. *In re Faling Will*, supra; *In re Knutson's Will*, supra. In a case of this kind much depends upon the apparent reliability of the witnesses as they appear on the stand. * * *
Allen v. Breding, 181 Or 332, 181 P2d 783 (1947)	No	Yes	Beneficiary of prior will	25 year neighbor of childless female decedent "We think that counsel for Mr. Allen lay too much emphasis upon the fact that the testatrix was colored and the beneficiary white. In some situations, that fact might have weight, but, under the peculiar circumstances of the case at bar, it does not either raise or sufficiently support an inference of undue influence."	Decedent indepently contacted attorney to have will prepared and took it to home of beneficiary for execution. Prior will 1931to friend Prior will 7/30/41 similar to 1931 will Friend then filed to be appointed her guardian Will 8/5/41 DOD 4/27/45 App. 80	Fiduciary relationship includes not only legal and technical relations. It is found wherever there is confidence reposed on one side and resulting superiority and influence on the other. The relationship may be moral, social, domestic, or merely personal. Rowe v. Freeman, 89 Or. 428, 172 P. 508, 174 P. 727; Egr v. Egr, 170 Or. 1, 131 P.2d 198. Mrs. Breding is middle-aged; she is much younger than was Mrs. Perry. She was evidently Mrs. Perry's superior in education and in sophistication. Assuming that there existed a confidential relationship between these two women, undue influence is not to be inferred therefrom. Proof is lacking of the abuse of such relationship, and such proof was essential to make out a case sufficient to justify the setting aside of the will. In re Knutson's Will, supra; Bliss v. Bahr, supra. Motive and opportunity to exert undue influence were shown, but this was not enough. There should have been proof of facts from which influence amounting to moral coercion might have been inferred. * * * Mrs. Breding, indeed, knew that Mrs. Perry intended to make her the beneficiary of her will, and admitted telling Ernest Allen that 'it was an awful dirty trick to force her (Mrs. Perry) to make her will and then file papers to have her made an incompetent person'. She testified, however, that she did nothing to influence Mrs. Perry against Mr. Allen. Whatever influence may have arisen in Mrs. Perry's mind in favor of Mrs. Breding as the result of gratitude, affection or esteem, was not undue influence, unless it was so powerful as to have destroyed the free agency of the testatrix at the time of the execution of the will.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Legler v. Legler, 187 Or 273, 211 P2d 233 (1949)					Suit to set aside deed. This is only included to show old law imposing higher standard of proof on grantee of deed as compared to devisee under will	[8] This court has held that more mental capacity is required to engage in a transaction involving the execution and delivery of a deed than to write a will. Gilliam v. Schoen, 176 Or. 356, 157 P.2d 682, and Miller v. Jeffery, 129 Or. 674, 278 P. 946. Generally, a grantor, [187 Or. 308] unlike a testator, must cope with another party to the transaction, that is, with a grantee. He must be able to look out for himself concerning such matters as consideration, warranty and terms of sale. When a deed, like the present one, is testamentary in character, it might seem that no more mental capacity should be required of the grantor than if he executed a will. But deeds, even though testamentary in nature, unlike wills, are not revocable. They afford no opportunity for giving effect to afterthoughts. Moreover, this deed recites a 'purpose of creating an estate in entirety between myself the grantor herein and my wife.' Since allonges of that kind can be included in testamentary deeds, we think that there is wisdom in the rule which requires a grantor to possess greater competency than a testator. [9][10] In Dodds v. Mayer, 135 Or. 43, 294 P. 1040, we held that a grantor must have at least sufficient intelligence to enable him to understand the transaction in which he is engaged, and Miller v. Jeffery, supra, pointed out that a grantor must be able to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction. In 26 C.J.S., Deeds, Sec. 54, at page 261, it is said: 'The test of mental capacity to executed a deed lies in the capacity to understand the nature of the act and to apprehend its consequences. One possessing such capacity may execute a valid deed although mentally weak or infirm, at least in the absence of attendant circumstances of an inequitable character, although one lacking such capacity may not execute a valid deed even though he is not totally bereft of understanding. Capacity should be measured as of the date of the execution and delivery of the instrument.' [187 Or. 309] Thus, we see that the deed before us cannot be valid unless Mr. Legler, on February 6, 1947, possessed sufficient mental powers so that he could not only exercise judgment and reason, but be able to apprehend the consequences of signing the paper that was submitted to him. [11] If there are doubts upon the subject, the question occurs: Upon whom rested the burden of dispelling the doubts. Wigmore on Evidence, 3d Ed., Sec. 2503, says: 'Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied. But it is impossible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case.' [12] From Restatement of the Law, Restitution, Sec. 166, we quote: 'Where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor.' Comment (d) which follows that rule points out: 'A constructive trust arises where one person acquires the title to property from another by undue influence (see Restatement of Contracts, Sec. 497). It arises where one person acquires title to property from another by an abuse of a fiduciary or confidential relation between them (see Restatement of Contracts, Sec. 498). * * * 'Although the relation between two persons is not a fiduciary relation, it may, nevertheless, be a [187 Or. 310] confidential relation. A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation is particularly likely to arise where there is a family relationship * * *. If one person is in a confidential but not in a fiduciary relation to another, a transaction between them will not be set aside at the instance of one of them unless in fact he placed confidence in the other and the other abused the confidence placed in him * * *.' [13] This court has many times employed the rule which we quoted from Wigmore and the Restatement. The most recent instance is Evans v. Anderson, Or., 207 P.2d 165, 176, wherein the rule is expressed as follows: 'Ordinarily, the burden of proving undue influence rests upon the party alleging it. However, where a fiduciary relationship exists between donor and donee, there is a presumption of undue influence and the donee is required to produce evidence sufficient to establish that the gift was the free and voluntary act of the donor and that the transaction was fair and equitable. Gilliam v. Schoen, 176 Or. 356, 363, 157 P.2d 682, and authorities therein cited.' [14] As long ago as 1879 this court said: 'The law seems to be well settled that when one accepts a confidential or fiduciary relation to another, as that of guardian and ward, attorney and client, and the like, where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, courts will set aside the conveyance, unless the grantee can show the transaction was fair, and without fraud or undue influence.' Gilmore v. Burch, 7 Or. 374, 33 Am.Rep. 710. [187 Or. 311] Jenkins v. Jenkins, 66 Or. 12, 132 P. 542, 543, has been frequently cited. It reasoned: 'A gift obtained by any person standing in a confidential relation to the donor is prima facie void, and the burden is thrown upon the donee to establish to the satisfaction of the court that it was the free, voluntary, unbiased act of the donor. A court of equity, on grounds of public policy, watches such transaction with a jealous scrutiny, and to set them aside it is not necessary to aver or prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal incapacity to make a will or execute a valid deed or contract.' Egr v. Egr, 170 Or. 1, 131 P.2d 198, in setting aside a trust instrument and two deeds signed by aged parents in favor of one of their sons, depended much upon provisions of the Restatement which we have cited. The appellant does not challenge the rule of which we have taken notice, and, hence, we shall resort to the authorities no further. Egr v. Egr, supra, and In re Knutson's Will, 149 Or. 467, 41 P.2d 793, mentioned the fact that it is never safe to infer fraud from the mere fact that the donee possessed the confidence of the donor. The chances are that every kind, considerate, dutiful wife possesses the confidence of her husband. Gifts are made, not to enemies, but to those who have won the donor's esteem, affection, good will or confidence. As was said in Bliss v. Bahr, 161 Or. 79, 87 P.2d 219, 223: 'It is not the existence of the confidential relationship alone that constitutes undue influence, but it is the wrongful use thereof which invalidates the conveyance.'

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Meier, 190 Or 140, 224 P2d 572 (1950)	No	Yes	Children, each of whom received $1,000 under contested will.	45 years younger niece of male decedent who lived with him, having just moved in when will was done. She later married and moved with husband to Nevada	The mother of the children divorced the decedent in 1919 and had custody of the children. When the niece was 23, decedent offered to give her "everything I got" if she would move in and make a home for him. Will done immediately after she moved, and at that time decedent changed accounts to joint with niece Will 8/38 DOD 10/12/47 Age 68 at time of will	Besides making his will in favor of Agnes, Fred, at about the same time, made arrangements whereby his bank accounts were changed over from his name alone to the joint names of Fred Meier and Agnes Meier. Into one or other of those accounts, each of the parties thereafter made deposits, although Agnes's deposits were undoubtedly relatively inconsiderable in amount. In view of the family relationship which had been assumed by them, and other evidence of their close association and mutual dependence upon each other, it is obvious that Agnes occupied towards her uncle a highly confidential and fiduciary relation. In considering whether or not Fred Meier's will was the result of undue influence exercised by Agnes Meier, the principal beneficiary, upon the testator to the extent of overcoming his free agency, the existence of a confidential relationship between beneficiary and testator is important. Such a relationship does not of itself give rise to a presumption of undue influence, but it may be considered along with other suspicious circumstances, and, so considered, may justify an inference of undue influence sufficiently to put upon the beneficiary the burden of proving that no undue influence was exercised in fact. *[citing]* Activity by a principal beneficiary in the preparation of a will is one such suspicious circumstance. In re Dale's Estate, supra. But there is an absence of any satisfactory evidence that Agnes participated in any manner, except as a typist, in the preparation of the will.* * * When a fiduciary relationship existed between testator and beneficiary, and a will is executed which is unjust or unnatural in its terms, by favoring the beneficiary over persons who were the natural objects of the testator's bounty, then slight evidence thst such beneficiary did exercise undue influence to bring about the execution of the will may be sufficient to invalidate it. *[citing]*
Trombly et al. v. McKenney, Ex., et al., 191 Or 90, 228 P2d 417 (1951)	No	Yes	Siblings, nieces and nephews	Nephew who was the decedent's conservator from 10/16/47 at decedent's request. Visited her regularly and arranged for her care.	Decedent, a female twice married, had no children. She had consulted with an attorney about doing a will, but repeatedly changed her mind. She had contacted the nephew contestant to visit her, and he provided some assistance to her, but promised and failed to build a house on her property with funds she provided. She suffered a succession of illnesses requiring stays in nursing nomes Will 3/17/48 DOD 7/31/48 Age 79	The burden of proof of undue influence is usually upon the party who asserts it. However, there are some exceptions to this rule. In Allen v. Breding, 181 Or. 332, 181 P.2d 783, 787 this court, at page 341, said: 'The existence of a confidential relationship between testator and beneficiary, however, coupled with proof that the beneficiary participated actively in the preparation or execution of the will, casts upon the beneficiary the burden of disproving undue influence.' (Italics ours.)
Detsch v. Detsch, Administratrix, 191 Or 161, 229 P2d 264 (1951)	No	Yes	Son, whose parents were divorced when he was 3 and who had friendly, but not close, relationship to decedent	Widow by 1934 marriage	Son relied upon alleged history of father's infidelity as leverage by widow Will 8/24/47 DOD 3/24/48	There is no rule of law which holds or infers that a power or influence born of a confidential relation such as husband and wife has been ipso facto wrongly employed to compel a testator to make a provision in the other's favor contrary to decedent's free will and volition. In Turner's Will, 51 Or. 1, 8, 93 P. 461, 464, this court said: 'A mere confidential relation existing between the testator and a beneficiary under a will, [191 Or. 166] or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will.' In 68 C.J., Wills, 752, Sec. 442, we find: 'The influence of a * * * spouse to make a will in [his or her] favor, in the absence of a showing that it was improperly exercised, does not vitiate the will, even though there may be proof that such a provision would not have been made but for such importunity. The mere fact that a wife guides or even dominates her husband, or has acquired an ascendancy over him, does not render his will made in her favor invalid.' We know of no better statement of a wife's normal and proper influence than that so pertinently made by Mr. Chief Justice Campbell in Latham v. Udell, 38 Mich. 238, where he said: 'A faithful wife ought to have very great influence over her husband, and it is one of the necessary results of proper marriage relations. It would be monstrous to deny to a woman who is generally an important agent in building up domestic prosperity, the right to express her wishes concerning its disposal.'

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Andersen, 192 Or 441, 235 P2d 869 (1951)	No	Yes	Niece and nephew who had little contact with decedent	Late husband's niece We do not find that there was proof of the existence of a fiduciary relationship between the testatrix and Mrs. Amundson. No doubt they were intimate friends, and probably their relationship was sufficiently close to have been regarded as confidential. In re Knutson's Will, 149 Or. 467, 488, 41 P.2d 793. However, there is no proof whatever, in our estimation, that Mrs. Amundson took undue advantage of the relationship, or exercised any influence whatever in the disposition which testatrix' will made of her property. It is true that Mrs. Amundson was assiduous in her attentions to testatrix in her illness, but the mere kindly attentions of a close friend are not undue influence.	Decedent a childless widow Five days prior to her death the decedent was hospitalized with a heart attack and congestive heart failure. She remained in the hospital until her death, and the will was signed there. Prior to the hospitalization she and the attorney who drew the will had scheduled meetings for a will, but they were cancelled due to other matters. The attorney was arranged by a legal secretary friend of the decedent. The court found that the decedent had in an "intelligent and detailed manner" described her property and beneficiaries. The will made eight gifts to others than the proponent, some of which were substantial Will 3/29/49 DOD 4/2/49 Age 85	The burden of proving undue influence is usually upon the party who asserts it. Wayne v. Huber, 134 Or. 464, 470, 29 P. 356, 294 P. 590, 79 A.L.R. 1427; In re Southman's Estate, supra, 178 Or. 462, 482, 168 P.2d 572. Where, however, a fiduciary or confidential relationship exists between testator and beneficiary, and there is proof that the beneficiary was actively concerned with the preparation of the will, then the beneficiary is required to produce evidence sufficient to establish that no undue influence was in fact exerted. Allen v. Breding, 181 Or. 332, 341, 181 P.2d 783; In re Knutson's Will, supra, 149 Or. 467, 488, 41 P.2d 793. There was testimony by Mrs. Yarbrough, as has been stated, to the effect that Mrs. Amundson made certain suggestions to testatrix with respect to matters which should be in the will, but we think that this testimony is entitled to little weight. There was nothing in the evidence, in our opinion, to indicate that the testatrix was in any respect deprived of the free exercise of her own judgment in the premises. Evans v. Anderson, 186 Or. 443, 470, 207 P.2d 165; In re Carr's Will, supra, 121 Or. 574, 581, 256 P. 390; Allen v. Breding, supra, 181 Or. at page 343, 181 P.2d 783. Moreover, as we have said, there was no showing, apart from their relationship, that the contestants were the natural objects of the testatrix' bounty. We think, therefore, that the fact that contestants received only minor legacies did not tend to show that the will was an unnatural one. Talbert v. Skilbred, supra, 125 Or. 545, 551, 267 P. 396; In re Walther's Estate, supra, 177 Or. 382, 397, 163 P.2d 285; Allen v. Breding, supra, 181 Or. at page 343, 181 P.2d 783. Motive and opportunity for the exercise of undue influence are not enough. There must be proof that undue influence actually was exercised. Rice v. Rice, 95 Or. 559, 563, 188 P. 181; In re Carr's Will, supra, 121 Or. 574, 581, 256 P. 390; In re Lobb's Will, 177 Or. 162, 185, 160 P.2d 295. The facts that Mrs. Amundson accompanied Mr. Levenson and Miss. Shuholm to Mrs. Andersen's home, where Mr. Levenson secured data to assist him in drawing the will, and thereafter continued with them to Mr. Levenson's office where he dictated the will to Miss Shuholm, and returned with them to the hospital with the will after it had been typed, and was present when the will was executed, are not necessarily proof of undue influence, in the absence of any showing that Mrs. Amundson took an active part in the preparation of the will. In re Meier's Estate, supra, Or., 224 P.2d 572, 577. These are matters for consideration upon the question of undue influence, but are not controlling. In re Southman's Estate, supra, 178 Or. 462, 483, 168 P.2d 572; In re Knutson's Will, supra, 149 Or. 467, 476, 495, 41 P.2d 793. More particularly is this true when the will is prepared by a disinterested person and executed in the presence of disinterested witnesses, as was the case here. In re Faling's Will, 105 Or. 365, 450, 208 P. 715. Obviously there was considerable esteem and affection between the testatrix and Mrs. Amundson. Influence arising from such is not undue. In re Darst's Will, 34 Or. 58, 65, 54 P. 947; Holman's Will, supra, 42 Or. 345, 358, 70 P. 908; Evans v. Anderson, supra, 186 Or. 443, 470, 207 P.2d 165. According to Mr. Levenson's testimony, the only time when Mrs. Amundson joined in the conversation regarding the will was when Mrs. Andersen stated to Miss Shuholm that she desired to have the residue of her estate go to Mrs. Amundson and her husband, whereupon Mrs. Amundson said: 'You don't have to do that, Randi,' and Mrs. Anderson answered: 'You've been good to me, and I want you to have whatever I leave.'

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Porter, 192 Or 483, 235 P2d 894 (1951)	Yes	Remand for more evidence	Son	Daughter, who was also trustee of a trust which provided the sole source of income to the decedent and under which she was sole residuary beneficiary. "Though in full possession of her mental faculties, nevertheless, at the time the will of May 8 was executed, as well as during the days while the daughter was in Portland, Mary Porter, then 84 years of age, was suffering physical pain and was weak in body. It might be reasonable to infer that to secure 'peace and harmony,' Mary Porter could easily be persuaded by her daughter, as she had been persuaded respecting the claim against her deceased husband's estate."	Trial court had held against contestant at close of his evidence, and Supreme Court disapproved of that procedure and remanded. The court also ruled that the trial court erroneously excluded evidence of a trust relationship between daughter and decedent. Prior will 11/23/43 divided estate between son and daughter, but designated debt to be paid to daughter. Prior will 2/47 divided estate between son and daughter. Prior will 12/3/47 left estate to son "The employment of Mrs. Butler's attorney to draw the will, instead of the attorney who had long represented the Porters, and who was then representing Mary Porter as executrix of her deceased husband's estate; the appointment of the bank as executor, instead of David L. Skidmore, her friend, who had been named as such in her prior wills; the secrecy maintained about the will's execution; the fact that the execution of the new will followed so closely upon the heels of Mrs. Butler's more or less hurried visit with her mother, as did the approval of the disputed claim against her father's estate follow so closely her visit in December before; the fact that this will was retained under the control of Mr. Mead, instead of being deposited in the safety deposit box as all prior wills had been; the attempt to keep Guy away from C. E. McCulloch and to destroy his confidence in both McCulloch and Skidmore; the withholding of the information from Guy respecting the will of December 3, together with the other evidence to which attention has been directed, were such suspicious circumstances in connection with the confidential	This court has repeatedly stated that 'undue influence is a species of fraud' and, like fraud, 'is rarely susceptible of direct proof.' Those who undertake to substitute their will for that of a testator do not ordinarily shout their plans or advertise their actions from the housetops. They usually operate surreptitiously. For those reasons, evidence has a wide range where undue influence is charged and, in most cases, is established by proof of circumstances from which the inference of undue influence is drawn. Newman v. Stover, supra; In re Kelly's Estate, 150 Or. 598, 627, 46 P.2d 84; In re Estate of Allen, 116 Or. 467, 474, 241 P. 996 * * * The burden of proof of undue influence is usually upon the party who asserts it. However, there may be circumstances which cast upon the beneficiary the burden of disproving undue influence. Each case must be decided upon its own peculiar facts. There is no rule applicable to all situations. Where a confidential relationship exists between a beneficiary and a testator, it takes but slight evidence to cast upon the beneficiary the burden of explanation and, in some instances, the burden of disproving undue influence. Therefore, in all cases where undue influence is charged, it is pertinent to the inquiry whether a confidential relationship between the testator and the beneficiary did exist prior to and at the time the contested will was executed. In re Scott's Estate, Or., 228 P.2d 417; Allen v. Breding, 181 Or. 332, 181 P.2d 783; 2 Page on Wills, 599, Sec. 813, 607, Sec. 814. In 2 Page on Wills, 607, Sec. 814, the rule is stated: 'If confidential relations are shown to exist between the testator and the beneficiary, slight evidence of additional facts may shift the burden to the beneficiary. * * * It is also said that the burden of proof shifts to the proponent if the contestant has made out a prima facie case of undue influence.' In Re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572, 581, Mr. Justice Brand, speaking for this court, said: 'The existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference.' See also In re Knutson's Will, 149 Or. 467, 41 P.2d 793. In Re Meier's Estate, Or., 224 P.2d 572, 577, Mr. Justice Hay again stated the rule thus: 'In considering whether or not Fred Meier's will was the result of undue influence exercised by Agnes Meier, the principal beneficiary, upon the testator to the extent of overcoming his free agency, the existence of a confidential relationship between beneficiary and testator is important. Such a relationship does not of itself give rise to a presumption of undue influence, but it may be considered along with other suspicious circumstances, and, so considered, may justify an inference of undue influence sufficiently to put upon the beneficiary the burden of proving that no undue influence was exercised in fact. * * * Activity by a principal beneficiary in the preparation of a will is one such suspicious circumstance.' See also 68 C.J., Wills, 759, Sec. 451. Where, in addition to the relationship of parent and child, there exists between a testator and the child a confidential relationship, as where the child attends to all of his parent's business, the rule of presumption with reference to confidential agents applies, not the rule with reference to parent and child. 2 Page on Wills, 626, Sec. 821. As to what constitutes undue influence in the law of wills has been repeatedly stated by this court, and it is unnecessary, therefore, for us to again restate the same. In re Kelly's Estate, supra; In re Estate of Riggs, 120 Or. 38, 241 P. 70, 250 P. 753; In re Estate of Allen, supra; In re Diggins' Estate, 76 Or. 341, 149 P. 73; In re Holman's Will, 42 Or. 345, 70 P. 908. In Re Estate of Allen, supra, 116 Or. at page 473, 241 P. at page 998, the late Justice Brown, speaking for the court, quoted favorably the following from 4 Words & Phrases (2d Series) 1059: "Undue influence' is that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist.' (Italics ours.) See also 43 Words and Phrases, p. 160. The theory which underlies the doctrine of undue influence is that the testator is induced by various means to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator. Such an instrument, in legal effect, is not a will at all. Although executed by the testator, his intention to make a will is so defective that the instrument is invalid. 1 Page on Wills, 368, Sec. 184.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Urich, 194 Or 429, 242 P2d 204 (1952)	Yes	No	Brothers and nephew, who resided in Yugoslavia	Unrelated. Decedent was single male immigrant with no children, and proponent was son of owners of boarding house where decedent had lived for 20 years some 16 years earlier. "We are of the opinion that a confidential relationship did exist between Albert Solari and decedent at the time this alleged will was executed. Decedent was seriously ill. He had no relatives living in Portland. No friends, other than Solari and his brother, were near at hand to advise or to help. He had no independent legal advice. He was compelled to rely upon and trust them, if he was to place his dependence upon anyone; there was no one else. They owed him a duty of utmost good faith. In 57 Am.Jur. Wills, 281 Sec. 390, it is said: '* * * At least, the presumption of undue influence is raised where such circumstances are combined with the existence of a confidential relation between the testator and the beneficiary who was thus active in drawing the will. The rule embraces both technical fiduciary relations and those informed relations which arise where one man trusts and relies upon another. Any relation existing	Decedent lived in boarding house owned by proponent's parents from about 1913 to about 1933. Proponent claimed to have a close personal relationship with the decedent, but the court obviously did not believe that. Evidence indicated that decedent corresponded with relatives and wanted to benefit them. At the time of signing the will the decedent was hospitalized with pneumonia. Court notes "oxyen was frequently administered to him in the hospital." Proponent on learning of hospitalization came with his brother and dictated will over telephone to his own attorney, who came to have it signed. Will 12/31/48 DOD 1/4/49 Age 55	Proponent, in his brief, says: 'There is absolutely no direct evidence of undue influence in the [194 Or. 445] record in this cause.' If direct evidence were essential to the proof of undue influence, it is doubtful that a successful attack upon a will on that ground could ever be made. The law does not make that requirement. Undue influence may be, and it generally is, established by circumstantial evidence. In the case of In re Porter's Estate, Or., 235 P.2d 894, 897, we said: 'This court has repeatedly stated that 'undue influence is a species of fraud' and, like fraud, 'is rarely susceptible of direct proof.' Those who undertake to substitute their will for that of a testator do not ordinarily shout their plans or advertise their actions from the housetops. They usually operate surreptitiously. For those reasons, evidence has a wide range where undue influence is charged and, in most cases, is established by proof of circumstances from which the inference of undue influence is drawn.' Also see Newman v. Stover, 187 Or. 641, 213 P.2d 137; 2 Page on Wills, 595, Sec. 812; Rood on Wills 2d ed, 149, Sec. 190. Ordinarily, the burden of proof of undue influence is upon the party who asserts it. But there may be circumstances which cast upon the beneficiary the burden of disproving undue influence. Each case must be decided upon its own peculiar facts. There is no fixed rule that is decisive in all situations. If confidential relations are shown to exist between the testator and the beneficiary, sight evidence of additional facts may be sufficient to shift the burden to the beneficiary to disprove undue influence. In re Porter's Estate, supra; In re Scott's Estate (Trombly v. McKenney), 191 Or. 90, 108, 228 P.2d 417; Allen v. Breding, 181 Or. 332, 181 P.2d 783; 2 Page on Wills, 607, Sec. 814. In the instant case, in addition to the evidence disclosing a confidential relationship between the testator[194 Or. 446] and the sole beneficiary under the will, there is abundant evidence of strongly suspicious circumstances giving rise to a well-founded belief that undue influence was in fact exercised upon decedent by proponent, and that, by reason thereof, the testator was induced to execute the instrument which, although his, in outward form, is in reality not his will at all, but the will of the beneficiary. Such an instrument, in legal effect, is not a will at all. In re Porter's Estate, supra; 1 Page on Wills, 368, Sec. 184. First, and perhaps most important, is the fact that Solari actively participated in the preparation and execution of the proposed will. He secured the services of his own attorney in that connection; an attorney who did not know the testator, and who held no communication whatever with him prior to the will's execution. He gave the only information given to the attorney as to what the contents of the will should be. He admitted that the testator had not told him to have himself appointed as executor to serve without bond, yet he told Joyce to put that in the will. He personally read the will to the testator in his native tongue. He had his brother sign as one of the witnesses, and arranged for the attendance of the other. The testimony does not disclose that testator actually requested either to act as a witness.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Elsie Rosenberg, 196 Or 219, 246 P2d 858 (1952)	Not decided	No	Cousins who were beneficiaries under old wills	"That there was a confidential relationship between Elise and Clara cannot be doubted. Clara moved in to be company for Elise and to do housework on September 10, 1947, during the Pendleton Round-Up. She remained there as housekeeper and practical nurse until Elise's death in 1949. After Elise's illness of September 15, 1947, she was bedfast and dependent almost exclusively on Clara, who was her constant companion, took care of her communications--mail, telegraph and telephone--did her banking and tended to all of her personal needs."	The decedent, a childless woman German immigrant, had married the father of five children by his prior marriage. Her husband pre-deceased her, and she never got along with his children. His son deprived her of her inheritance. Decedent received an inheritance from her brother after promising him to make sure her husband's children would receive none of it. Her cousin had promised to care for her in event of illness. Proponent failed to send for cousin, claiming the decedent had told her not to. 9/5/47 decedent became seriously ill and was bedridden for rest of her life. 5 prior wills, of which 4 were in 1947 Will 12/18/47 DOD 6/12/49 Age in her 80's	In the case of In re Dale's Estate, 92 Or. 57, 64, 179 P. 274, 276, Chief Justice McBride clearly set out the law relative to undue influence as follows: 'Undue influence of this character is never presumed, but must be proved, like any other fact; but, as it is frequently incapable of being established by direct testimony, circumstantial evidence is often admitted for that purpose. 'In considering the question as to whether or not undue influence has been exerted in a particular case, one is naturally led, first to inquire into the opportunities which the person accused of this species of fraud had to exert such control over the intention of the testator. Among these is the existence of confidential relations between the testator and the person so charged. While the existence of such a relation will not of itself, according to the weight of authority, create a presumption of undue influence, it is a circumstance which, taken in connection with other suspicious circumstances, may justify such an inference of undue influence as to put upon a beneficiary the burden of showing by at least equal evidence, and in many jurisdictions by the preponderance of evidence, that no such influence was exerted.' See In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572; In re Lobb's Will, 173 Or. 414, 431, 145 P.2d 808; In re Porter's Estate, 192 Or. 483, 235 P.2d 894. Where a confidential relationship exists between a testator and the beneficiary, slight evidence is sufficient to set aside a will on the ground of undue influence. In re Estate of Meier, 190 Or. 140, 150, 224 P.2d 572; Greenwood v. Cline, 7 Or. 17. Among the circumstances to be considered in determining whether undue influence was exercised are a decided discrepancy between a new and previous wills of the testator; a continuity of purpose running through former wills indicating a settled intent in the disposition of his estate; and, the disregard of natural objects of testator's bounty. Newman v. Stover, 187 Or. 641, 656, 213 P.2d 137; In re Hart's Estate, 107 Cal.App.2d 60, 236 P.2d 884; In re Walther's Estate, 177 Or. 382, 397, 163 P.2d 285. Undue influence may be exerted through the medium of fraud, and a will procured through fraud is void. Estate of Allen, 116 Or. 467, 474, 241 P. 996. A will may be voided where there is fraud in its inducement, as well as fraud in its execution, and where a beneficiary deceives a testator as to extrinsic facts, which facts are material and known by the beneficiary to be false and which cause the execution of the will, the same is invalid. In re Bottger's Estate, 14 Wash.2d 676, 129 P.2d 518, 528; McCartney v. Homquist, 70 App.D.C. 334, 106 F.2d 855, 126 A.L.R. 375; 57 Am.Jur., Wills, 270, Sec. 371; 1 Page on Wills, 353, Sec. 179. Where a beneficiary under a will conceals or suppresses facts where it was his duty to disclose such facts where there is a confidential relation existing between them, such may constitute fraud sufficient to void a will. In re Nutt's Estate, 181 Cal. 522, 185 P. 393; 68 C.J., Wills, Secs. 434, 741. We find the following language in 57 Am.Jur., Wills, 270, Sec. 371: '* * * Fraud invalidating a will is said to be any trick, deception, or artifice by which the testator is so circumvented, cheated, or deceived as to fall into error respecting the disposition of his property.' Where a will was executed on false data brought about by fraudulent representation by or on behalf of a party or parties benefiting from the will, although the will may express his wishes and be his free and voluntary act at the time, such will may be set aside on the grounds of fraud, such fraud being a species of undue influence. Greenwood v. Cline, supra; In re Bottger's Estate, supra; In re Newhall's Estate, 190 Cal. 709, 214 P. 231, 28 A.L.R. 778; 68 C.J., Wills, Secs. 433, 740. Where undue influence or fraud brings about the execution of a will, the whole will is void, even though such fraud is perpetrated by only one of the beneficiaries. Estate of Allen, supra; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459. If a will is invalid when made, there can be no ratification of the same even though, after the discovery of the misrepresentation, the testator allows the will to stand. Haines v. Hayden, 95 Mich. 332, 54 N.W. 911, 916; Chaddick v. Haley, 81 Tex. 617, 17 S.W. 233, 235; 1 Page on Wills, 392, Sec. 194; Atkinson, Wills (1937) 225, Sec. 100.
In re Estate of Verd Hill, 198 Or 307, 256 P2d 735 (1953)	No	Yes	Widow and Daughter whose mother divorced decedent shortly after her birth.	Niece by the decedent's sister who grew up close to him and moved into his house out of economic necessity after death of her parents until her marriage in 1941	Will executed with great ceremony left minimal life share to widow, $1 to daughter, substantial gifts to others, and bulk of estate to niece Will 5/14/48 DOD 12/18/50 Age 74	The burden of proof of undue influence is ordinarily upon the party who asserts it and never shifts, but there may be circumstances when it is cast upon a beneficiary. Such is the rule when there is proof of the existence of a confidential relationship between the testator and the beneficiary, coupled with proof that the beneficiary actively participated in the will's preparation. Evident activity of that character casts upon the latter the burden of disproving undue influence. In re Estate of Urich, 194 Or. 429, 445, 242 P.2d 204; Detsch v. Detsch, supra, 191 Or. 165, 229 P.2d 266; Trombly v. McKenney, supra, 191 Or. 108, 228 P.2d 424; Allen v. Breding, supra, 181 Or. 341, 181 P.2d 787; In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572; In re Brown's Estate, 165 Or. 575, 584, 108 P.2d 775. As was well put by Mr. Justice Moore in In re Darst's Will, 34 Or. 58, 65, 54 P. 947, 949: 'Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts. * * *' Also see Evans v. Anderson, 186 Or. 443, 470, 207 P.2d 165; In re Will of Carr, supra, 121 Or. 582, 256 P. 392; Turner's Will, 51 Or. 1, 8, 93 P. 461. We think evidence of this character is entirely too flimsy and tenuous to warrant a conclusion that these visitations which Constance had with her uncle were clandestine in character or fraudulent in purpose. Kind treatment and even reasonable solicitation do not constitute undue influence, In re Sturtevant's Estate, supra, 92 Or. 300, 178 P. 200, nor do gratitude, affection or esteem, unless they were so powerful as to destroy the free agency of the testator at the time of the execution of the will. Allen v. Breding, supra, 181 Or. 343, 181 P.2d 787. The circumstances and the time attending the making of the will tend to negative the force of the influence springing from these natural associations, if, indeed, any undue influence can be justly said to have been conjured thereby. These pastoral associations, like so much of what Verda Hill relies upon to prove the existence of a sinister purpose on the part of her cousin, do not transcend the level of mere suspicion. Suspicion is not a substitute for such proof of undue influence. Trombly v. McKenney, supra, 191 Or. 111, 228 P.2d 425; Detsch v. Detsch, supra, 191 Or. 169, 229 P.2d 267, 268; In re Will of Carr, supra, 121 Or. 581, 256 P. 392; Rice v. Rice, 95 Or. 559, 563, 188 P. 181.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Estate of Manillus Day, 198 Or 518, 257 P2d 609 (1953)	Yes	No		"We are persuaded that a confidential relationship existed between Day and Harkey, the sole beneficiary. Day lived alone. His nearest of kin were cousins and second cousins with whom he had infrequent contact, and then only with the few in the county who lived closest to him. He had learned to rely on his neighbors, and upon Harkey in particular, for advice in business matters with which he had little familiarity. He was distressed by his mother's recent death and confused about matters relating to the closing of her guardianship estate and the proper steps to be taken in the administration of her property after her demise. Harkey tells us that on the evening of their intimate conversation, closing with directions to prepare a will, Day declared, "You may not know it, Harkey, but you are the best friend I have got." Day's conduct not only gives substance to this assertion but does more. It demonstrates that Harkey was not only his 'best friend' in Day's estimation but a friend in whom he reposed the highest degree of confidence, the one to whom he looked in the last analysis for persuasive advice and	Decedent was an eccentric, single male without children. His mother died 18 days before him, leaving him distraught and upset. The proponent claimed that the decedent was upset at being accused of being a peeping Tom, although there was no other evidence of this, and some to the contrary. The proponent procured a lawyer and told him what should be in the will. Prior will 6/13/50 Will 6/16/50 DOD 6/17/50 (suicide) Age 51	In the recently-decided case of In re Hill's Estate (Hill v. Henderson), Or., 1953, 256 P.2d 735, 747, this court said: 'The burden of proof of undue influence is ordinarily upon the party who asserts it and never shifts, but there may be circumstances when it is cast upon a beneficiary. Such is the rule when there is proof of the existence of a confidential relationship between the testator and the beneficiary, coupled with proof that the beneficiary actively participated in the will's preparation. Evident activity of that character cast upon the latter the burden of disproving undue influence. * * *' A confidential relationship, as the words are used in the foregoing quotation from Hill v. Henderson, supra, and the citations relied upon in support thereof, means a fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other. It may be a moral, social, domestic or merely a personal relationship. In re Estate of Urich, 194 Or. 429, 444, 242 P.2d 204; Allen v. Breding, 181 Or. 332, 342, 181 P.2d 783; 57 Am.Jur., Wills, 281, Sec. 390. Once such a confidential relationship is shown to exist, slight evidence of additional facts may be sufficient to cast upon a beneficiary the burden of going forward to disprove that the will was not the product of that type of influence which the law abhors. In re Estate of Urich, supra, 194 Or. at page 445, 242 P.2d 204, and cases there cited. Even though 'Such a relationship does not of itself give rise to a presumption of undue influence, * * * it may be considered along with other suspicious circumstances, and, so considered, may justify an inference of undue influence sufficiently to put upon the beneficiary the burden of proving that no undue influence was exercised in fact.' In re Estate of Meier, 190 Or. 140, 149, 224 P.2d 572, 577. Also see In re Estate of Porter, 192 Or. 483, 490, 235 P.2d 894; In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572. It is also well established that where a confidential or fiduciary relationship exists between testator and beneficiary and the will is unjust or unnatural in its terms, by favoring the beneficiary over the natural objects of the testator's bounty, then slight evidence of the exercise of undue influence may be sufficient to invalidate it. In re Rosenberg's Estate, Or., 246 P.2d 858; In re Estate of Meier, supra, 190 Or. at page 150, 224 P.2d 572 There is here an amplitude of suspicious circumstances to justify an inference of undue influence. Those which are partently evident are: (1) The activity of the beneficiary, Harkey, in the preparation of the will. In re Estate of Urich, supra, 194 Or. 446, 242 P.2d 204; In re Estate of Meier, supra, 190 Or. at page 149, 224 P.2d 572. (2) The secrecy and haste attendant upon the making of the will. Sizemore v. Miller, Or., 247 P.2d 224, 227; Legler v. Legler, 187 Or. 273, 315, 211 P.2d 233; In re Johnson's Estate, 162 Or. 97, 132, 91 P.2d 330; In re Rupert's Estate, 152 Or. 649, 681, 54 P.2d 274. (3) The testator's failure to obtain disinterested or independent advice. In re Estate of Urich, supra, 194 Or. at page 446, 242 P.2d 204; In re Lobb's Will, supra, 177 Or. at page 188, 160 P.2d 295. (4) The total variance between the terms of the will which Day two days before had directed Mr. McMinimee to prepare and the terms of the will here challenged. In re Rupert's Estate, supra, 152 Or. at page 681, 54 P.2d 274. (5) Another circumstance that cannot be overlooked is the distressed and overwrought mental condition in which Harkey says he found Day when he called at his home on the evening of Day's self-destruction.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Clauder v. Morser, 204 Or 378, 282 P2d 352 (1955)	No	Yes	Brother	Daughter	Brother and daughter actively competed for the very small estate of this widow. Prior will 12/14/49 prepared by brothers attorney left estate to brother Will 6/3/52 DOD 6/14/52 Age 79	The will was read to the testatrix twice, once by her daughter while waiting for the coming of the nurses who were to act as witnesses, and again by Mrs. Adams, the superintendent, before its execution. After these readings Mrs. Fredricks expressed her understanding and approval of the will. In this procedure the circumstances parallel to a large degree a like situation reported in In re Estate of Andersen, supra, 192 Or. 453, 235 P.2d 874, where we noted our approval in these words: 'Such method of proof was very proper in view of the testatrix' age and infirm condition. In re Pickett's Will, supra, 49 Or. [127] at page 141, 89 P. 377.' While we have repeatedly frowned upon wills drawn by attorneys for a beneficiary enjoying confidential relations with the testator, as did Mrs. Morser in this matter, and have held that such conduct gives rise to a presumption of undue influence, In re Estate of Day, 198 Or. 518, 532, 257 P.2d 609; In re Lobb's Will, 177 Or. 162, 188, 160 P.2d 295, we feel that in this matter the presumption is overcome by the following circumstances: (1) the beneficiary is the sole heir of the decedent and would have taken the entire estate in the absence of a will; (2) the drawing of the will was done at Mrs. Fredricks' repeated and urgent request addressed to Mrs. Morser; and (3) Mrs. Morser first attempted to reach Mr. Alderton, who had recently acted as counsel for Mrs. Fredricks. She advised him of her mother's desire to consult with him [204 Or. 390] but found that he could not call upon Mrs. Fredricks because of a contemplated absence from the city. Mrs. Morser then sought the help of Mr. Brown, her own attorney, but only to learn that he was out of town for two weeks. In response to Mrs. Fredricks' continued insistence, Mrs. Morser turned to her neightbors and friends for help--Mr. and Mrs. Grabb, the former a business man and his wife a former employee for many years in a title company. On a printed form supplied by Mrs. Morser, the Grabbs composed and typed the document which Mrs. Fredricks eventually signed. The pattern of disposition embodied in the will was that which Mrs. Fredricks had previously indicated to the nurses as being what she wanted and was the same pattern she again approved after it was read to her before signing. Notwithstanding what we have heretofore said concerning the presumptions raised by the activities of a potential beneficiary in securing an attorney of his own selection to prepare an instrument of this kind on the basis of information allegedly supplied to the beneficiary by the testator, we do not mean thereby to convey the impression that we condemn such activity in every instance. It is easy to conceive situations demanding immediate attention wherein it would be palpably unjust to impugn the motives of a beneficiary who, in an atmosphere of urgency, thus served the testator in good faith and at the testator's pressing request. The circumstances attending the preparation of Mrs. Fredricks' will exemplify such an exonerating exception. [6][7] The court said in 198 Or. at page 344, 256 P.2d at page 751 of In re Estate of Hill, supra: 'The malignant influence contemplated as being of sufficient force to invalidate a will is that which was the efficient cause of the challenged benefaction [204 Or. 391] and without which the will would never have been made. In re Lobb's Will, 177 Or. 162, 185, 160 P.2d 295. We have held that motive and opportunity are not enough. More is required. There must be proof that undue influence was actually exercised. In re Estate of Andersen, supra, 192 Or. 461, 235 P.2d [869] 877; In re Will of Carr, supra, 121 Or. [574] 581, 256 P. [390] 392. Moreover, such offending influence must operate at the very time the will is executed. In re Estate of Hill, supra, 198 Or. at page 345, 235 P.2d 869. We find no proof that such undue influence existed or was actually exercised.
Doneen v. Craven, Executor et al, 204 Or 512, 284 P2d 758 (1955)	No	Yes	Sister	4th cousin and her husband who lived with the decedent for less than two years before his death	Male decedent never married Will 1/14/52 DOD 10/20/52 Age 82	On this evidence we cannot say that there was such a relationship of trust and confidence between Felix Comegys on the one side and Anne and Jim Mischel on the other as to cast on them the duty of proving [204 Or. 522] that the will was not the product of their undue influence. In the recent case of In Re Estate of Day, 198 Or. 518, 530, 257 P.2d 609, 614, we said: 'A confidential relationship * * * means a fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other. It may be a moral, social, domestic or merely a personal relationship.' (Italics added.) We agree with counsel for the contestant that the rule is not limited to fiduciaries in the commercial or business sense. But, before a person may have cast upon him the duty of proving innocence of wrongdoing, it must appear that that relationship is such as to indicate a position of dominance by the one in whom confidence is reposed over the other. There is no such state of affairs revealed by the evidence in this case. The superiority was all on the other side. The initiative was with Felix Comegys, and his beneficiaries are not to be penalized simply because he had affection for them and confidence in their integrity and good purposes.
Meister et al. v. Finley et al., 208 Or 223, 300 P2d 778 (1956)	Not decided	Yes	Siblings	Friends and tenants	Male decedent never married Will 2/23/49 Deed 1952 DOD 3/10/54 Age 76	The circuit judge carefully analyzed the evidence in a well-prepared opinion. He found that there was a confidential relationship between Alvin and the Finleys, but that the defendants had sustained the burden of proving that the execution of the instruments under attack was not induced by the exercise of undue influence[208 Or. 231] on their part. On the contrary, he commended the Finleys for their fairness in their dealings with Alvin, their uniform kindness to him, and the strong interest they showed in his welfare, and criticized Arthur as one having 'designs on Alvin's interest in the property.' He found that Alvin was 'shunned by his nieces and nephews' and said: 'In view of his relations with his nieces and nephews and his only brother, I feel that the Finleys, the people who had befriended him for twenty years, were more logical objects of his bounty than his next of kin.' With these conclusions we agree; * * *

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Roblin v. Shantz, Executrix, 210 Or 371, 311 P2d 459 (1957)	No	Yes	Son	Daughter who had previously cared for fathers affairs while he recovered from surgery and who resumed handling his affairs after her mother died the day before the will was signed.	The decedent became so upset over his wife's support of their wondering son that he left the family home. After medical problems he ended up in a nursing home. His wife died on 7/8/53, leaving her probate estate divided equally between the children, but with son receiving substantially entire estate by survivorship. Decedent requested an attorney after she told him this, and she arranged for her husband's cousin, an attorney, who wrote the will. Will 7/9/53 DOD 9/6/53 Age 83	[4] All agree that the burden of establishing undue influence is upon the contestant. The latter urges that in this case but slight evidence is required to cast upon Ruth the burden of explanation and of disproving undue influence, because of the purported confidential relationship. [5][6] In order even that the burden of coming forward with the evidence shift to the respondent, more than the bare confidential relationship must be established. We must be shown suspicious circumstances. In re Southman's Estate, supra; In re Estate of Porter, 192 Or. 483, 235 P.2d 894. Chief among these is the beneficiary's[210 Or. 379] participation in preparing and executing the will. In re Rupert's Estate, 152 Or. 649, 54 P.2d 274; In re Scott's Estate, 191 Or. 90, 228 P.2d 417. The only evidence from which we might deduce such participation is that Ruth suggested to her father the name of the draftsman, Steelhammer; that he was Ruth's husband's cousin; and that, after the will was drafted, Ruth drove Steelhammer, at his request, to the nursing home in order that the will might be executed. Ruth was not present at the execution. The uncontested testimony of Steelhammer negatives any influence he might have had over the testator in determining the import of the dispositive provisions. * * * We must conclude that the contestant was never relieved of any element of the burden of proof in this case. No suspicious circumstances have been proved. Even the confidential relationship has been assumed for purposes of our discussion when its actual existence is questionable. The principal thrust of contestant's attack upon the will is that, according to him, Ruth's statement to her father that she received nothing from her mother but a ring while her brother took all, was knowingly false and fraudulent and that its effect was, as intended, to cause Mr. Roblin to give his entire estate to Ruth. Contestant submits that, though his father may have executed his will voluntarily, the execution resulted from a misunderstanding of fact intentionally created by a false statement made to him. [7] Courts set aside wills whose provisions reflect the testator's belief in false data arising from fraudulent[210 Or. 380] misrepresentation made to him by a beneficiary. In re Estate of Rosenberg, 196 Or. 219, 246 P.2d 858, 248 P.2d 340. 'Fraud which causes testator to execute a will consists of statements which are false, which are known to be false by the party who makes them, which are material, which are made with the intention of deceiving testator, which deceive testator, and which cause testator to act in reliance upon such statements.' I Page on Wills, 3d Ed. 347, Sec. 176. Absent any one of the elements of that definition of fraud, no ground for contest is established.
Harritt v. Linfoot, Exec. et al, 210 Or 354, 311 P2d 450 (1957)	No	Yes	Brother, who was not on good terms with decedent "As to the question of natural disposition, it is plain that decedent's brother was not a natural object of her bounty, due to a long-standing disagreement between them * * *"	"Regarding the beneficiary Mrs. Bynon, the evidence shows that she and decedent were friends of long standing; * * * Mrs. Bynon cared for decedent in her [210 Or. 363] home during an illness, and received no compensation. * * * Mrs. Low also assisted in the care of decedent and arranged for her to leave the sanitarium, which decedent thoroughly disliked. These are friends of the type that would be considered natural objects of the testatrix' bounty. "	Decedent, a spinster, was committed to a sanitarium by contestant for alcoholism. The proponent "rescued her" from the sanitarium, and brought her to her home. Contestant claims the proponent plied the decedent with liquor to get the will done. Evidence of capacity included that of her docter. Court said contestant proved nothing contrary to capacity. The court rejected the alleged suspicious circumstances. Will 6/24/53 DOD 7/23/53 Age 66	[5][6] On the issue of undue influence, the burden of proof rests on the contestant. In re Southman's Estate, 178 Or. 462, 168 P.2d 572; In re Lobb's Will, 173 Or. 414, 145 P.2d 808; In re Knutson's Will, 149 Or. 467, 41 P.2d 793; In re Allen's Estate, 116 Or. 467, 241 P. 996; Rice v. Rice, 95 Or. 559, 188 P. 181. However, a confidential relationship between the decedent and the beneficiary coupled with the fact that the beneficiary took an active part in the execution of the will, or other suspicious circumstances may create a suspicion of undue influence, requiring the beneficiary to come forward with evidence sufficient to overcome the adverse inference. In re Perry's Estate, 181 Or. 332, 181 P.2d 783; In re Southman's[210 Or. 360] Estate, 178 Or. 462, 168 P.2d 572; In re Lobb's Will, 173 Or. 414, 145 P.2d 808; In re Dale's Estate, 92 Or. 57, 179 P. 274. It is then necessary to examine the eight alleged suspicious circumstances to which contestant calls attention.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Reddaway's Estate, 214 Or 410, 329 P2d 886 (1958)	Yes	No (revoc a-tion not upheld)	Son by second marriage and principal beneficiary under 1931 will	Son by first marriage who received only $100 under 1931 will. His mother-in-law was employed as a nurse for the decedent and was alleged to be the primary vehicle for the undue influence.	The decedent was almost helpless due to parlyzing strokes and required caretakers after death of his second wife in 9/56. "The circumstances leading up to and attending the destruction of the will were as follows: Approximately two months after Golda began her employment in the Reddaway home, William requested that his will be brought to him. This request was made by way of a note which the contestants allege was written by William. The note was carried by Dallas to William's attorney. There was testimony that William was not able to write except 'in case of someone holding his hand and guiding his hand.' On a previous occasion William had signed some bonds by a mark because he could not sign his name. When the will was obtained it was handed to William. William then requested that Dallas read the will aloud. The contestants testified that William read the will. There is testimony that he was unable to read at this time. After the will was read, William said 'No good.' At William's request Dallas burned the will. The only persons present were William, Dallas, Zena and Golda. All of this occurred about midday. The only explanation for Zena's presence on this occasion was the fact that she had often accompanied her husband on his visits to his father. The attorney who drew the will was not present at the time the will was burned. According to the testimony of Zena, William said that 'he felt good that it was burnt and thought that things had been made right that had been wrong for a number of years.' The evidence is quite clear that William [214 Or. 417] was emotionally unstable, probably senile, during the period that	[214 Or. 418] [2] We shall now consider the principles of law which are applicable to the facts in this case. It may first be noted that in the usual case in which undue influence is relied upon as a basis of attack, the object of the suit is to set aside the will. In the instant case the object of the suit is to sustain the will, it being asserted that undue influence was exerted upon the testator so as to cause him to destroy his will. However, the underlying principle is the same. Briefly stated, that principle is that the law will not permit improper influences to control the disposition of a person's property. We speak of this in the law as 'undue influence.' The term, like so many other legal terms, cannot be specifically defined. A typical definition is found in Porter v. United States National Bank of Portland, 1951, 192 Or. 483, 492, 235 P.2d 894, 898, where it was said: 'The theory which underlies the doctrine of undue influence is that the testator is induced by various means to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator. Such an instrument, in legal effect, is not a will at all. Although executed by the testator, his intention to make a will is so defective that the instrument is invalid.' This is simply a manner of expressing the idea that but for the wrongful influence exercised upon the testator he would not have executed the will. As pointed out by Mr. Justice Rossman in In re Kelly's Estate, 1935, 150 Or. 598, 617, 46 P.2d 84, every will is the product of some kind of influence. It is the task of the courts to determine whether the influence in the particular case is 'undue'. [3] The definition set out above comes at the problem by considering the effect of the influencer's conduct [214 Or. 419] on the mind of the testator. Rather than approach the problem from the standpoint of the testator's freedom of will, it would be more profitable to focus the emphasis on the nature of the influencer's conduct in persuading the testator to act as he does. The question is, has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper? The idea is expressed in Morris v. Morris, 1942, 192 Miss. 518, 6 So.2d 311, 312, where the court says that undue influence 'denotes 'something wrong, according to the standard of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal. * * * The nature of the influence can be judged only by its result. It is the end accomplished which colors the influence exerted, and entitles us to speak of it as wrongful, fraudulent, or undue, on the one hand, or as proper or justifiable on the other hand. * * * We are to understand the word 'undue' as describing not the nature or the origin of the influence existing, nor as measuring its extent, but as qualifying the purpose with which it is exercised or the result which it accomplishes. * * *" It is not expected that all courts would hold to the same moral standard in appraising the influencer's conduct, and further, the consequences of upholding the influenced gift are important. It would be expected that there would be less concern with the influencer's motive in a contest between him and the state claiming by escheat than there would be in a contest between him and the donor's deserving spouse. Definitions of undue influence couched in terms of the testator's freedom of will are subject to criticism in that they invite us to think in terms of coercion and duress, when the emphasis should be on the unfairness of the advantage which is reaped as the result[214 Or. 420] of wrongful conduct. 'Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.' 3 Modern L.Rev. 97, 100 (1939). Said in another way, undue influence has a closer kinship to fraud than to duress. It has been characterized as 'a species of fraud.' [4][5] We shall now consider the application of the law more specifically as it relates to the facts recited above. We first consider the burden of proof. The burden of proving that the will was destroyed free from influence was on the contestants. This court has held that where a confidential relation exists between a testator and the beneficiary, slight evidence is sufficient to establish undue influence. In re Estate of Rosenberg, 196 Or. 219, 246 P.2d 858, 248 P.2d 340. The rule is more specifically stated in In re Southman's Estate, 1946, 178 Or. 462, 482, 168 P.2d 572, 581, as follows: 'The existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference. It will be noted that the burden does not exist unless there are circumstances in addition to the confidential relation. As was said in Roblin v. Shantz, 1957, 210 Or. 371, 378, 311 P.2d 459, 462, 'We must be shown suspicious circumstances.' Suspicious circumstances are abundant in the case at bar. We also find that there was a confidential relation between William and his son Dallas, and between William and Golda. The facts fall within the text stated by Mr. Justice Lusk in Doneen v. Craven, [214 Or. 421] 204 Or. 512, 522, 284 P.2d 758, 762, because here the 'relationship is such as to indicate a position of dominance by the one in whom confidence is reposed over the other.' The record shows that during the crucial period immediately preceding and during the burning of the will, William was guided by the judgment and advice of Dallas with respect to a variety of matters, some of which have been recited above. The inference is strong that Golda participated in these activities. See In re Estate of Rosenberg, supra.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
In re Reddaway's Estate, 214 Or 410, 329 P2d 886 (1958) (cont.)					Will 6/25/31 alleged to have been revoked as a result of undue influence on 1/3/57 DOD 3/14/57 Age 68	It has been held that a confidential relation may exist between patient and nurse. Hollon's Executor v. Graham, Ky.1955, 280 S.W.2d 544; Bolander v. Thompson, 1943, 57 Cal.App.2d 444, 134 P.2d 924; In re Schwartz's Estate, 1940, 340 Pa. 170, 16 A.2d 374; Rich v. Hallman, 1932, 106 Fla. 348, 143 So. 292; Hyatt v. Wroten, 1931, 184 Ark. 847, 43 S.W.2d 726; Mors v. Peterson, 1914, 261 Ill. 532, 104 N.E. 216. See also, Note, Undue Influence in Intervivos Transactions, 41 Col.L.Rev. 712 (1941). For discussion of the Oregon cases see 1 Jaureguy & Love, Oregon Probate Law and Practice, Sec. 316 (1958). We shall now consider the factors of importance in determining whether undue influence was exercised upon the testator in the present case. [6] Procurement. One of the circumstances frequently relied upon in the cases as indicating improper influence is the participation of the beneficiary in the preparation of the will, or in its destruction, if it is urged, as here, that the destruction of the will did not revoke it. In re Estate of Day, 1953, 198 Or. 518, 257 P.2d 609; In re Estate of Urich, 1952, 194 Or. 429, 446, 242 P.2d 204; In re Estate of Meier, 1950, 190 Or. 140, 149, 224 P.2d 572. The participation may be through an agent. Porter v. United States [214 Or. 422] National Bank of Portland, supra; Atkinson on Wills, 2d Ed., 1953, p. 551. * * * * * [7] Independent Advice. As stated by Mr. Justice McAllister in Toomey v. Moore, Or.1958, 325 P.2d 805, 810: 'This court has uniformly held that it is the duty of a beneficiary who participates in the preparation of a will and who occupies a confidential or fiduciary relationship to the testator to see that the testator receives independent and disinterested advice. * * *' See also In re Estate of Day, supra, 198 Or. at page 533, 257 P.2d at page 615. * * * * * [8] Secrecy and Haste. Among the circumstances justifying an inference of undue influence is the 'secrecy and haste attendant upon the making of the will.' In re Estate of Day, supra, 198 Or. at page 533, 257 P.2d at page 615. * * * In re Kelly's Estate, supra. See In re Carson's Estate, 1925, 74 Cal.App. 48, 239 P. 364; cf. Harritt v. Linfoot, 1957, 210 Or. 354, 311 P.2d 450. [9] Change in Decedent's Attitude Toward Others. * * * In re Estate of Rosenberg; In re Kelly's Estate, both supra, and, In re Rupert's Estate, 1936, 152 Or. 649, 54 P.2d 274. * * * [10] Change in the Testator's Plan of Disposing of [214 Or. 424] His Property. In the case of In re Estate of Rosenberg, supra, it was said, 196 Or. 230, 246 P.2d 863: 'Among the circumstances to be considered in determining whether undue influence was exercised are a decided discrepancy between a new and previous wills of the testator; and continuity of purpose running through former wills indicating a settled intent in the disposition of his estate; and, the disregard of natural objects of testator's bounty. Newman v. Stover, 187 Or. 641, 656, 213 P.2d 137; In re Hart's Estate, 107 Cal.App.2d 60, 236 P.2d 884; In re Walther's Estate, 177 Or. 382, 397, 163 P.2d 285.' The 'variance' between the testator's first will and a later will was regarded as a 'suspicious circumstance' justifying an inference of undue influence in the case of In re Estate of Day, supra, 198 Or. at page 533, 257 P.2d at page 615. See also Harritt v. Linfoot, supra, 210 Or. at page 360, 311 P.2d at page 453; 1 Jaureguy & Love, Oregon Probate Law and Practice, supra, Sec. 324. [11] Unnatural or Unjust Gift. A person may make a legally effective disposition of his estate which reasonable men would regard as unfair. He may favor his mistress over his wife, or he may disinherit a deserving son, and the law will not concern itself with his moral duty. In re Estate of Riggs, 1926, 120 Or. 38, 241 P. 70, 250 P. 753. But if he does make an unfair or unnatural disposition it is a circumstance to be weighed in determining whether improper influence had been used. In re Estate of Day, supra, points out that [214 Or. 425] where a confidential or fiduciary relation exists and the will is unjust or unnatural, slight evidence of the exercise of undue influence may be sufficient to invalidate it. The 'disregard of natural objects of testator's bounty' is listed as one of the indicia of undue influence in Re Estate of Rosenberg, supra, 196 Or. 219, at page 230, 246 P.2d 858, at page 863. See also in Re Estate of Meier, supra, 190 Or. 140, at page 150, 224 P.2d 572 at page 577; and 1 Jaureguy & Love, Oregon Probate Law and Procedure, supra, at Sec. 323, where other Oregon cases are collected. [12][13][14] * * * We recognize that influence resulting from kindness and affection may not be 'undue' under the proper circumstances. The rule is accurately stated in MacMillan v. Knost, 1942, 75 U.S.App.D.C. 261, 126 F.2d 235, 236, as follows: 'Influence gained by kidness and affection will not be regarded as 'undue', if no imposition or fraud be practiced, even though it induce the testator to make an unequal * * * disposition of his property in favor of those who have contributed to his comfort, * * * if such disposition is voluntarily made.' (Italics supplied.) The portion of the quotation in italics is important. It is the key to an understanding of the legal concept of undue influence. The word we stress here is 'imposition',[214 Or. 426] as distinct from the word 'fraud'. Cf. Green, Fraud, Undue Influence and Mental Incompetency, 41 Col.L.Rev. 176 (1943). As we have stated above, in determining whether a gift is legally effective the law does not disregard the donee's purpose or motive in eliciting the donor's affection. See Allen v. Breding, 1947, 181 Or. 332, 340, 181 P.2d 783. If it is established that the donee generated the donor's affection for him solely for the purpose of inducing a gift, a court will ordinarily find a way to deprive the donee of the fruits of his deception. Cf. In re Kelly's Estate, supra. And fraud, in the strict sense, is not necessary. This is what we meant earlier in speaking of 'unfair advantage'. [15] Where there is a confidential relation between the donor and donee and the gift results in shunting the property away from those who had a reasonable expectation of being the recipients of the donor's bounty, the law places the burden on the donee to produce evidence that improper influence was not used. In re Estate of Urich, supra. When the transfer results in an unnatural distribution of the donor's estate 'not in accord with the mores of the community', it is 'searchingly questioned'. See Note, Undue Influence in Intervivos Transactions, 41 Col.Law Rev. 707, 720 (1941). [16][17] Donor's Susceptibility to Influence. The physical and mental condition of the donor is regarded as a factor of importance in determining whether a disposition of property was the result of undue influence. In many of the cases the fact that the person alleged to have been unduly influenced was enfeebled in mind or body is pointed to as evidence that his free will had been affected. In re Estate of Day, supra, 198 Or. 518, at page 534, 257 P.2d 609, at page 615; In re Estate of Urich, supra, 194 [214 Or. 427] Or. 429, at page 448, 242 P.2d 204, at page 212; and see Note, 50 Mich.L.Rev. 748 (1952). * * * As we understand undue influence, we need not find that the donor's mind is captured by another. The mental and physical weakness of the donor is merely a circumstance in determining whether the persuasion was improper and an unfair advantage

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Erickson v. Davidson, 216 Or 547, 339 P2d 1081 (1959)	No	Yes	Distant cousin	"It is charged that the Davidsons, particularly Mrs. Davidson, lavished care and attention upon her, excluded her from her other friends, influenced her in the choice of an attorney to prepare the will and through the attorney exerted influence upon the nature of the testamentary disposition."	Decedent a childless widow "We have examined the entire record and find the so-called 'suspicions' or inferences to be baseless. There is not one word of evidence to indicate that the so-called 'influencers' had any personal knowledge that the deceased was contemplating a will; suggested to her or solicited any consideration thereof; had discussed it with the attorney who prepared it or had the slightest participation or influence in its terms or considerations." Will 12/21/54 DOD Age 78	
Dean et al v. First Nat'l Bank et al, 217 Or 340, 341 P2d 512 (1959)	No	Yes	Nephew who would have benefitted had power of appointment not been exercied	Bank trust officer whose bank became trustee for great grand nephew under terms of exercise of power of appointment	Single childless woman decedent, no claim of lack of capacity. Real focus of the case was on other issues. Prior will 8/25/49 Will 8/2/50 DOD 3/13/51 Age 92	[8] Every will is the product of some kind of influence. In re Kelly's Estate, 150 Or. 598, 617, 46 P.2d 84. But the undue influences against which the law inveighs[217 Or. 351] are the improper influences to control the disposition of one's property. It is not a term which can be specifically defined. In re Reddaway's Estate, Or.1958, 329 P.2d 886, 889. The charge, when advanced, as here, poses the question: '* * * has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper?' 329 P.2d at page 890, supra. [9] The burden of proof of undue influence is ordinarily cast upon the party who asserts it. In re Estate of Hill, 198 Or. 307, 334, 256 P.2d 735. However, when there is proof of the existence of a confidential relationship, which, taken in connection with other suspicious circumstances, may justify a suspicion of undue influence, the beneficiary may be required to go forward with the proof and present evidence sufficient to overcome the adverse influence. In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572. But, as emphasized in Reddaway's Estate, supra: 'It will be noted that the burden [on the beneficiaries] does not exist unless there are circumstances in addition to the confidential relation.' 329 P.2d at page 891, supra. Contestants mistakenly seek to invoke the foregoing rule here. But, notwithstanding the presence of a confidential relationship, we find the record to be devoid of any suspicious circumstances which cast upon any of the beneficiaries a burden to overcome.
Pluchos et al v. Boehle, 219 Or 164, 346 P2d 634 (1959)	Yes	No	collateral relatives	Tenant operator of tavern located in building where decedent resided. She had known him for 17 months.	Single childless male decedent. Consistent pattern of prior wills had left bulk of estate to Catholic charities. 12 days after last will decedent was committed to state hospital. Court also found decedent lacked capacity. Undue influence was described as so blatant that there was no need to explain it. Will 7/9/54 & 7/14/54 DOD 11/6/55 Age 84	[1] In this venal enterprise both wills were drawn by attorneys of Mrs. Boehle's choosing. When a will is drawn by an attorney for the beneficiary who enjoys a confidential relationship with the testator, a presumption[219 Or. 167] of undue influence arises. In re Lobb's Will, 177 Or. 162, 188, 160 P.2d 295; In re Estate of Day, 198 Or. 518, 532, 257 P.2d 609; Clauder v. Morser, 204 Or. 378, 389, 282 P.2d 352. The evidence adduced by the appellant did not overcome this presumption. The attorney who drew the first will, deceased at time of trial, was long known to her both professionally and socially. There is sufficient testimony, if true, which would warrant describing that attorney's part as conspiratorial in view of his expected participation in one-half of what Mrs. Boehle hoped to obtain as the sole residuary legatee thereunder. [2] The young attorney engaged by Mrs. Boehle to draw the second will had also known her for some time. We doubt, however, that he was knowingly a party to her fraud. He had never met the decedent before and having been selected to serve by one who was in a confidential relationship with the testator and his principal beneficiary, the second attorney failed to meet the professional standards and responsibility to the testator that those known circumstances entailed. See In re Estate of Day, supra, 198 Or. at page 535, 257 P.2d at page 616. His failure in this respect was probably due in part to the fact that he had been admitted to practice only a few months before and, as he stated, he had had very little experience in drawing wills. We note his fee of $10 was paid by a Boehle check, later destroyed after payment. * * * * * The provisions made in the wills of July, 1954, when compared with the consistent testamentary pattern of Mr. Farrell's bounty found in his earlier wills, discloses such a striking departure that it becomes a most significant factor which gives additional justification for our determination of the undue influence exercised by the appellant. In re Estate of Rosenberg, 196 [219 Or. 169] Or. 219, 230, 246 P.2d 858, 248 P.2d 340; Newman v. Stover, 187 Or. 641, 653, 213 P.2d 137.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Weisensee et al v. Hoyt et al, 220 Or 159, 347 P2d 609 (1959)	No	Yes	Brothers	Partner in a long term open affair (his wife refused to give him divorce) who was also active in numerous joint business ventures with the decedent	Childless single woman who was large and manly in operation of family trucking business, but who suffered a series of debilitating strokes beginning in 1943. In March, 1953, the brothers initiated unsuccessful guardianship proceedings against her, which upset her greatly. Will was executed day before hearing. Will was prepared by attorney who was also handling her business affairs jointly with proponent. Execution was carefully documented, including three physicians who examined decedent. Court had no doubt that decedent had capacity. Will 4/28/53 DOD Age	[2] Before we consider the specific evidence on this issue it is necessary to consider which party bore the burden of proof. There is no doubt that a confidential relationship existed between Gertrude and Hoyt. However, as we have already seen, and from the evidence to be mentioned, it appears that the relationship was not 'such as to indicate a position of dominance by the one in whom confidence is reposed over the other.' Doneen v. Graven, 204 Or. 512, 522, 284 P.2d 758, 762. And, as indicated, there is no evidence that Hoyt had any actual participation in the preparation and execution of the will. In re Estate of Meier, 190 Or. 140, 224 P.2d 572. In the trial court the contestants, Lloyd and George, acknowledged that they bore the burden of proving undue influence. In that we think they were correct. * * * * * In this case we cannot say that the will was unnatural from the point of view of the testatrix, Gertrude. She had more reason to feel a testamentary affection for Hoyt than for anyone else. There is stronger reason to believe that the ill-advised petition to have her declared incompetent was more the cause of minimizing her gifts to her brothers and their families than anything that Hoyt had to do with the will. * * * * * [220 Or. 183] From the evidence just mentioned we take another important consideration: This was not a case like In re Kelly's Estate, 150 Or. 598, 46 P.2d 84, and many others that could be cited, where the conduct of the alleged influencer isolated the testator from other people or where the principal acts of influencing were committed in a bedroom or similar confined place. The relationship between Gertrude and Hoyt, although admittedly improper and unlawful, was open and notorious. Not only did Hoyt not attempt to restrict her visitors or friends, the evience would indicate that he invited and welcomed them. Gertrude's contact with the members of her family has already been examined at length. [4] We have measured the conduct of Hoyt against the specific criteria set forth in In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886, and many of the cases cited therein; also, 1 Jaureguy & Love, Oregon Probate Law and Practice, Sec. 319 et seq. We conclude that the only basis at all for finding undue influence is the impropriety of the relationship. That fact alone is not enough to establish the type of conduct denounced in the cases. In re Kelly's Estate, supra, 150 Or. at page 618, 46 P.2d at page 91. * * * The evidence is much more conclusive that the influence to which Gertrude reacted was that of the affection, satisfaction and profit which she derived from her relationship with Hoyt. Allen v. Breding, 181 Or. 332, 181 P.2d 783.
Weisensee et al v. Hoyt et al, 220 Or 159, 348 P2d 1090 (1960)					On petition for rehearing	The vigorous petition for rehearing in this case presents one issue which probably requires notice: It is said that the burden of proving undue influence was 'erroneously imposed' upon the contesting brothers of the deceased. The reference to the burden of proof in the original opinion can stand clarification. The opinion stated [347 P.2d 616]: 'There is no doubt that a confidential relationship existed between Gertrude and Hoyt. However, as we have already seen, and from the evidence to be mentioned, it appears that the relationship was not 'such as to indicate a position of dominance by the one in whom confidence is reposed over the other.", citing Doneen v. Craven, Executor, 204 Or. 512, 522, 284 P.2d 758. The opinion then proceeded to hold that contestants bore the burden of proof. The petition for rehearing contends that when a confidential relationship is established, that fact alone shifts the burden of proof to the proponent. We have consistently held that a confidential relationship, in and of itself, does not place on the proponent of a will the burden of proving lack of undue influence. The cases touching the subject are discussed in 1 Jaureguy and Love, Oregon Probate Law and Practice, Sec. 316, p. 306 et seq. [220 Or. 186] Specific reference to some of these cases may help to eliminate any confusion resulting from the opinion in this case. 'The burden of proof of undue influence is ordinarily upon the party who asserts it and never shifts, but there may be circumstances when it is cast upon a beneficiary. Such is the rule when there is proof of the existence of a confidential relationship between the testator and the beneficiary, coupled with proof that the beneficiary actively participated in the will's preparation. Evident activity of that character casts upon the latter the burden of disproving undue influence. [Citing cases]' In re Estate of Hill, 198 Or. 307, 334, 256 P.2d 735, 747. The above language was quoted in In re Estate of Day, 198 Or. 518, 529, 257 P.2d 609. The latter case was, in turn, quoted with approval in Doneen v. Craven, supra. In an earlier case, In re Knutson's Will, 149 Or. 467, beginning at page 486, 41 P.2d 793, at page 799, Justice Rossman reviewed many of the decisions of this court on the same subject as well as decisions from other courts. The latter cases may be summarized in a quotation utilized by Justice Rossman taken from 66 A.L.R. at page 228: "It is the generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, and does not case upon the beneficiary the burden of disproving undue influence. Those consequences follow only when the beneficiary has been actively concerned in some way with the preparation or execution of the will." 149 Or. at page 487, 41 P.2d at page 800. At 149 Or. page 488, at page 800 of 41 P.2d, the opinion in the Knutson case concludes: 'From the above it is clear, therefore, that no [220 Or. 187] presumption exists that the beneficiary exercised undue influence upon the testator, unless the evidence indicates that a confidential relationship existed between these two individuals, and that the beneficiary was actively concerned with the preparation of the will. * * *' See op. cit. 149 Or. at page 490 et seq., 41 P.2d at page 801. The most recent expression by the court was by Justice O'Connell in In re Reddaway's Estate, 214 Or. 410, at page 420, 329 P.2d 886, at page 890, where it was also held that the burden does not shift from the contestant unless there are other suspicious circumstances in addition to a relationship of confidence.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
McCaslin v. Mummery et al, 222 Or 599, 352 P2d 1111 (1960)	No	Yes	Brother	Retirement home, but all personnel there denied discussing will with him at all	Decedent was childless bachelor who left his estate to Oregon Methodist Homes, which operated the retirement home in which he lived at time of will. Will prepared by attorney for OMH, who decedent had selected because he intended to leave everything to them. Two weeks elapsed between interview and execution Will 8/15/55 DOD 1957 Age 72 at execution	As shown in the cases to which we have made reference and wherein the draftsman of the will is a principal beneficiary or attorney for the beneficiary, we have never allowed ourselves to be bound by that single circumstance. To the contrary, we have attempted to place that particular fact in its proper context and have examined the record in its entirety to ascertain the existence of sufficient evidence, if any, to dispel the shadow of undue influence cast by the existence of such relationships. [4] This court has recently suggested that the test of undue influence is: 'has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper?' In re Reddaway's Estate, 214 Or. 410, 419, 329 P.2d 886, 890. [5] Before reaching our discussion of the facts, we refer to another well-settled rule prevailing in this jurisdiction. It is: influence arising from gratitude, affection or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make therein results from the fraud, imposition and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts. In re Darst's Will, 34 Or. 58, 65, 54 P. 947; Evans v. Anderson, 186 Or. 443, 470, 207 P.2d 165; In re Estate of Hill, supra, 198 Or. at page 335, 256 P.2d at page 747. * * * * * [7] Nor did he change his will or threaten to do so in the period of nearly two years which ensued before his death, a cogent circumstance bearing on the question of undue influence. See 94 C.J.S. Wills Sec. 261, p. 1143, reading: 'Although conclusive weight should not be given it, the fact that a testator having the capacity and ability to do so failed for a substantial period of time to change or revoke a will alleged to be the [222 Or. 613] product of undue influence negatives the claim of undue influence.' See, also, 57 Am.Jur. 312, Wills Sec. 439. This court has spoken to the same effect in Laberee v. Laberee, 112 Or. 44, 53, 227 P. 460, 462, 228 P. 686, with respect to a will which also continued unchanged for two years prior to the testator's death, calling it 'strong evidence that he [the testator] was not coerced into making it, but that it was entirely satisfactory to him when made and that that satisfaction continued until his death.'

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Soumie v. McLean, 234 Or 485, 382 P2d 1 (1963)	No	Yes	Cousins, none of whom was a beneficiary under the decedents four prior wills	Theosophical Society, of which she was a member, through some other members	Single woman decedent with no children Court found that the decedent had testamentary capacity Will DOD 4/10/61 Age app 61	[5][6][7] The burden of proving that the will was the product of improper influence is upon the contestants. In re Reddaway's Estate, 214 Or. 410, 420, 329 P.2d 886 (1958). It is true that such influence is seldom capable of direct proof and that circumstantial evidence may be admitted to show that it existed. In re Estate of Porter, 192 Or. 483, 489, 235 P.2d 894 (1951). But [234 Or. 501] '* * * the effect thereof, if the will is to be set aside, must be to prove that undue influence actually was exercised, and a court cannot 'accept in lieu of substantial evidence mere suspicion, innuendo, insinuation, and speculation." 1 Jaureguy and Love, Oregon Probate Law and Practice 319, citing Trombly v. McKenney, 191 Or. 90, 112, 228 P.2d 417 (1951). It has, however, been held that the existence of a confidential relationship, when taken in connection with 'suspicious circumstances,' may justify an inference of improper influence which, in turn, will demand an explanation by the beneficiary who sustains the confidential relationship. In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572 (1946). Contestants assert that the requisite confidential relationship and suspicious circumstances were present in the case at bar and that the proponents have not sustained their burden of explaining those circumstances. [8] In assessing the weight to be given a confidential relationship in determining whether improper influence has been exerted, it is well to keep in mind that an individual who is writing a will generally does not devise his property to those in whom he has no confidence. It is to be expected that a testator will leave his estate to those in whom he trusts and who he infers will dispose of it wisely. It is also natural that when he requires assistance in the preparation of his will he may consult those very persons, that is, those in whom he has confidence. To impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence would in many instances defeat the will rather than probate it. In re Knutson's Will, 149 Or. 467, 489, 41 P.2d 793 (1935). The mere fact that a beneficiary has occupied a confidential relationship to the testator does not, therefore,[234 Or. 502] of itself allow an inference of improper influence. It serves rather to alert the court to the possibility of such influence and warns it to examine the record carefully for additional circumstances which, in combination with the fiduciary relationship may support an inference of improper influence. For purposes of our consideration of the case before us we will assume that some members of the Society stood in a confidential relationship toward the testatrix, although it is not at all clear from the record that such a relationship existed. * * * * * [9] It is well settled that where a beneficiary sustained to a testator a confidential relationship and actively participated in the preparation of the will a presumption of improper influence arises. Such presumption may, however, be rebutted by a reasonable explanation for the beneficiary's active role. But active participation contemplates more than that the beneficiary[234 Or. 503] merely types the will or that he is present during its execution. In re Estate of Meier, 190 Or. 140, 150, 224 P.2d 572 (1950); In re Llewellyn's Estate, 296 Pa. 78, 81, 145 A. 810, 812, 66 A.L.R. 222 (1929). The latter case, which was discussed with approval in In re Knutson's Will, 149 Or. 467, 491, 41 P.2d 793 (1935), said: '* * * Furthermore, even in case of confidential relation, the burden of proof is placed upon the legatee only where he is instrumental in procuring the legacy. Here, Swartley did not draw the will or suggest that it be drawn or that he be made legatee. On the contrary, it was drawn by a lawyer he had never seen before and who was called at the decedent's request. In summoning the attorney and in handing the draft of the will to Llewellyn, Swartley acted merely as his messenger. The active part which gives rise to the presumption must go to the substance of the testamentary act, not to some mere formal matter. In the absence of such procurement, no burden of proof rests on the legatee. * * *' In the Llewellyn case the testator and his sole beneficiary had been close friends for many years. The beneficiary summoned the attorney who drafted the will at the testator's request. The draft of the will was delivered by the attorney to the beneficiary who, in turn, delivered it to the testator. The subscribing witnesses were called by the beneficiary, also at the testator's request. And the beneficiary was present at the execution of the will. At the time the will was executed a power of attorney was also executed in the beneficiary's favor. The bequest was for an amount approximating a million dollars. Yet the court found that the circumstances of that case did not warrant an inference of improper influence. [10] Mrs. McLean's participation in the will's preparation[234 Or. 504] consisted first, of typing the will after it had been drafted and written in longhand by Emilie, and second, of retyping the will incorporating the changes which had been suggested by Mr. Caldwell and Emilie herself. Mrs. Clehm's participation was limited to procuring the subscribing witnesses at Emilie's request and of being present at the execution of the will. No other member of the Society assisted in the preparation of the will. In light of our analysis which has gone before, we must conclude that these favors to Emilie are not the kind of participation which, in combination with a confidential relationship, gives rise to a presumption of improper influence.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Cline v. Larson, 234 Or 384, 383 P2d 74 (1963) (5-2 decision)	Yes	Yes	Cousins	Secretary to attorney who prepared will	Decedent a retired woman school teacher with no children. She had known her attorney since he was in high school, when his father was her attorney. The attorneys secretary had also been his father's secretary and became a friend of decedent's. "The bases of the challenged decree are the facts that (1) Miss Larson was the secretary of Edward R. Robnett, the attorney whom Mrs. Stack employed to prepare the will, (2) Miss Larson was a friend of Mrs. Stack, (3) Miss Larson typed the will and was consulted by Mrs. Stack concerning its residuary clause, and (4) Miss Larson is the residuary legatee of the will." Will 8/3/55 with five subsequent codicils in 1957-1959 DOD 11/10/60 Age 88	[2] In short, the law of wills, unlike the law of torts, does not create for testators a standard such as a reasonably prudent person, and demand that all testators and their wills conform to it. Each is left free to do with his property as he wishes provided his disposition of it does not run afoul of other legal principles. However, an unnatural will, as Justice O'Connell's words indicate, 'is a circumstance to be weighed in determining whether improper influence had been used.' We take the following from In re Easton's Estate, 140 Cal.App. 367, 35 P.2d 614: '[I]t is well settled that collateral heirs, such as brothers and sisters, are not 'natural objects of bounty' as that term is used in the interpretation of wills, and therefore, in cases such as this, where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons, in order to establish that the instrument is unnatural, must show affirmatively that they had peculiar or superior claims to the decedent's [234 Or. 395] bounty; and, if no such claim is adduced, the instrument cannot be held to be unnatural.' * * * * * If Mrs. Stack was the victim of undue influence, coercion, dominance, or other wrongful means that were exercised upon her when she directed Miss Larson to insert her name in the will, it is evidence that she had many opportunities to speak about it and to relieve herself from its effect. More than five years and three months passed from the day when she signed the will until her death. She did not lead a hermit-like [234 Or. 405] life, but had many friends; and if she had been made the victim of a wrong, she could have summoned their help. Her will and her estate commanded much of her attention in the later years of her life, as is evident from the fact that she wrote five codicils, made several sizeable gifts and after so doing made appropriate changes in her will. * * * * * [4][5][6] The burden of showing the exercise of undue influence at the time of the execution of a will is upon the contestant. In re Robin's Estate, 210 Or. 371, 311 P.2d 459; In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886. However, where a beneficiary of the will who sustained to the testatrix a confidential relationship participated in the drafting of the will, as in this case, a presumption of improper influence comes to the aid of the contestant. The presumption arises from the confidential relationship and the participation in the drafting. It requires the beneficiary to come forward with a satisfactory explanation for his actions. He must show that he did not abuse the confidential relationship and did not employ improper influence. The contestant need not offer at the outset any evidence that undue influence was exerted. The presumption suffices to call upon the proponent for an explanation. If a persuasive reasonable explanation is laid before the court, the contestant must meet it if he expects to prevail. McCaslin v. Mummery, 222 Or. 599, 352 P.2d 1111; Toomey v. Moore, 213 Or. 422, 325 P.2d 805; In re Estate of Meier, 190 Or. 140, [234 Or. 410] 224 P.2d 572; In re Southman's Estate, 178 Or. 462, 168 P.2d 572; In re Lobb's Will, 177 Or. 162, 160 P.2d 295; In re Lobb's Will, 173 Or. 414, 145 P.2d 808; In re Rupert's Estate, 152 Or. 649, 54 P.2d 274; In re Knutson's Will, 149 Or. 467, 41 P.2d 793. In short, if a will which results from a situation such as the one now before us is to be set aside, the record--whether consisting of presumptions or evidence--must show that undue influence was actually exercised, and a court cannot 'accept in lieu of substantial evidence mere suspicion, innuendo, insinuation, and speculation.' 1 Jaureguy & Love, Oregon Probate Law and Practice 319, citing Trombly v. McKenney, 191 Or. 90, 228 P.2d 417. The rules just noted have been stated and employed by this court many times. They are not unique with this jurisdiction but reflect the law virtually everywhere. Obviously, no two cases are exactly alike; and when facts vary, the presumption which issues from them and which accuses the attorney of having exercised undue influence is dependent upon their persuasiveness. In re Brown's Estate, 165 Or. 575, 108 P.2d 775. In McCaslin v. Mummery, 222 Or. 599, 352 P.2d 1111, Mr. Justice Warner, author of the opinion, took occasion to quote from In re Estate of Urich, 194 Or. 429, 242 P.2d 204 as follows: 'Each case must be decided upon its own peculiar facts. There is no fixed rule that is decisive in all situations.' The case at bar presents a situation which warrants prima facie a deduction of improper influence. The evidence shows that Miss Larson stood in a confidential relation to Mrs. Stack and that she participated in the preparation of the will. [234 Or. 411] [7] A bequest to an attorney who drafts a will, or to his secretary, is not void per se. The rule goes no further than to create a presumption of invalidity. The presumption is not conclusive; it is disputable. The presumption permits an explanation and if the explanation passes all tests as to reason and truthfulness, it will be accepted by the court. The explanation must, of course, show that the attorney exercised no undue influence and that the will is in truth the will of the deceased and not the product of the beneficiary's machinations.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Cline v. Larson, 234 Or 384, 383 P2d 74 (1963) (continued)						[8] We mentioned that each case must be decided upon its own peculiar facts and that the strength of the presumption which suggests undue influence is dependent upon the cogency of the evidence. That statement is well illustrated by a comparison of McCaslin v. Mummery, supra, and the two cases entitled In re Lobb's Will, supra. * * * * * We have seen that Miss Larson produced a coherent reasonable explanation of her role which is entirely consistent with other evidence tending to show that no improper influence was exercised by her or Mr. Robnett in the preparation and execution [234 Or. 414] of the will. We believe that Miss Larson's explanation reflects the truth. She met the demand that the presumption had placed upon her. [10] There is still another reason which requires a conclusion that no wrongful means was employed in the drafting and execution of the challenged will. It centers in the five codicils. From the day that the first of them was executed until Mrs. Stack's death more than five years passed. Miss Larson typed each of the five codicils, but she was not named as beneficiary in any of them. Some of the codicils canceled paragraphs of the will that made bequests, but in so doing, with a single exception, they explained that the gifts had already been made. Obviously, cancellations of that kind did not increase the residue that would be available for Miss Larson. The fifth codicil made additional bequests that totalled $3,000. When we take into consideration bequests canceled by other codicils, the latter reduced the residue to the extent of $1,000. Accordingly, the codicils which Miss Larson typed diminished the amount of the residue. * * * * * We quote the following from 95 C.J.S. Wills Sec. 303, page 95: 'A codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will, as far as it is not altered or revoked by the codicil, if the codicil is valid and if the intention of the testator is not thereby defeated; and the will and codicil are to be regarded as but one instrument speaking from the date of the codicil.' The five codicils were executed in the manner required of wills. Each codicil was read to Mrs. Stack or she herself read it. In some instances, possibly in all, she not only read the instrument but also listened to a reading of it. It is clear that she was familiar with the meaning and future effect of each. The section of the text from which we just quoted continues as follows: 'Although it has been held that a codicil does not republish an unattested will, the general rule is that a codicil duly executed will operate as a republication of an earlier will or codicil, although the latter is inoperative or imperfectly executed or attested, as where a codicil duly executed by a [234 Or. 416] testator of sufficient capacity has been held to republish and validate a prior will or codicil which was invalid because of alterations after execution, absence of testamentary capacity, presence of undue influence, violation of the then existing statute against perpetuities, or failure to comply with statutory formalities with respect to execution.' We take the following from the annotation in 21 A.L.R.2d 831: 'All the authorities agree that a will which was invalid as originally executed because of fraud or undue influence is republished and validated by the execution of a codicil thereto by the testator at a time when he was not subject to fraud or undue influence.' The applicable rule is stated as follows in 57 Am.Jur., Wills, Sec. 626, page 428: 'A duly executed codicil operates as a republication of the original will and makes it speak from the new date, in so far as it is not altered or revoked by the codicil, although the codicil is not physically annexed to the will, and although the will is not in the presence of the testator at the time of executing the codicil, where it refers to the will in such a way as to identify that instrument beyond doubt. If a codicil revokes in terms portions of the will, it republishes the will as of the date of the codicil in respect of all parts not revoked.' Oregon employs the rule which is expressed in the quoted language, as we see from a succinct summary of this court's holdings that is given in Jaureguy and Love's Oregon Probate Law and Practice, Sec. 380. '* * * Thus, the term has been applied to the case of a valid codicil to a will which had been void for mental incapacity at the time of its execution, the effect of the reference in the codicil to the void will being to validate it. [234 Or. 417] 'True revival, however, takes place when after a will has been revoked the testator executes a codicil stating that it is a codicil to that will. The result is that the revoked will is revived; and if the revocation of the will thus revived had been by means of a later will, that later will is thereby revoked to the extent it is inconsistent with the former one. 'The apparent theory is that as the republication of a will once revoked makes it speak as of the time of the republication, a codicil republishing an earlier will, operates as a revocation of a later one, making inconsistent disposition of the property.'' The Oregon decisions cited by Jaureguy and Love fully support their statements. We are satisfied that Mrs. Stack's execution of the codicils republished her will, if any republication of it was required to give it validity. None was needed; and accordingly, our treatment of the codicils is merely an additional reason.
Albers v. Herbring, 244 Or 602, 419 P2d 3 (1966)	No	Yes	Children of deceased half brother	Sisters	Decedent a single childless woman who suffered a life-long mental illness which did not deprive her of capacity. Will 2/5/64 DOD 2/18/64 Age 66	There is nothing to indicate that either of the beneficiaries of the will had any part in its preparation, except the fact of prior intimate association with Hermine. The will was prepared and executed with independent advice of an attorney without any evident participation by the proponents. There is no evidence of any change in Hermine's attitude towards contestants in the months or years before the execution of the will. The 1948 will demonstrates that the 1964 will did not depart from an apparent long held plan by Hermine for the disposition of her estate. It was a natural and not an unjust gift.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Golden v. Stephan, 5 Or App 547, 485 P2d 1108 (1971)	No	Yes	Chldren of deceased half sibling	Neighbor and 19 year friend	Prior will had also excluded nieces and nephews. No evidence of undue influence. Will 3/67 DOD 2/69 Age 69	[3] Contestants' second assignment of error attacks the court's findings that there was no undue influence exerted upon decedent. There was evidence and the court found that Mr. Stephan was in a confidential relationship with the decedent. However, the burden of proving undue influence rests upon the contestant and the existence of a confidential relationship in and of itself does not place upon the proponent of a will the burden of proving lack of undue influence. It is, however, a circumstance which should alert the court and warn it to examine the record carefully. Ehry et al. v. Blackford et al., supra; Soumie v. McLean, 234 Or. 485, 382 P.2d 1 (1963); Weisensee et al v. Hoyt et al, 220 Or. 159, 347 P.2d 609, 348 P.2d 1090 (1959). There was no evidence that the Stephans played any part in the preparation or execution of the will. The Oregon Supreme Court in Trombly et al. v. McKenney, Ex., et al, 191 Or. 90, 228 P.2d 417 (1951), held that a beneficiary's participation must be coupled with a confidential relationship before the burden of proving the absence of undue influence is placed upon the proponent. Neither was there any evidence of any activity, dominance or insidious conduct on behalf of either of the proponents. See Weisensee et al v. Hoyt et al, supra, 220 Or. at 185, 347 P.2d 609. There was no evidence either direct or circumstantial in the entire record to show undue influence. Mr. Stephan and the decedent were friends. Stephan visited his friend often and assisted him in his affairs. Mr. Stephan's testimony is uncontradicted that he knew [5 Or.App. 557] nothing of the will until the decedent showed it to him after its execution. (FN3) As the Supreme Court of Oregon said in the case of McCaslin v. Mummery et al, 222 Or. 599, 352 P.2d 1111 (1960): '* * * (M)otive and opportunity to exercise undue influence upon a testator are not enough. There must be proof that undue influence was actually exercised and not only so, but that it was pushed to such an extent that the resultant will was not that of the testator but that of the parties procuring it. * * *' 222 Or. at 602, 352 P.2d at 1112
Nease v. Wilson, Clark, 6 Or App 589, 488 P2d 1396 *rev den* (1971)	No	Yes	Daughter	Son who predeceased	Prior will and codicil left estate to two children, or the survivor of them. Second codicil provided for spouse of deceased child to take child's share. Son discovered he had cancer and asked decedent to change will to benefit his wife. Will 12/2/59 Codicil 5/21/62 Codicil (at issue) 8/7/67 DOD 6/68 Age 94	[8] The law will not permit improper influences to control the disposition of a person's property. In re Reddaway's Estate, 214 Or. 410, 418, 329 P.2d 886 (1958). In approaching questions of undue influence we must ask ourselves, '* * * (H)as the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper? * * *' 214 Or. at 419, 329 P.2d at 890. [9][10][11] The burden of proof as to undue influence is upon the contestant. In re Estate of Hill, 198 Or. 307, 334, 256 P.2d 735 (1953); Nelson v. O'Connor, Or.App., 90 Adv.Sh. 2007, 2011, 473 P.2d 161 (1970). However, where a confidential relationship exists between the testator and a beneficiary, (FN1) along with other suspicious circumstances, the burden of production is placed upon the proponent, In re Reddaway's Estate, supra, 214 Or. at 420, 329 P.2d 886, although the burden of proof never shifts from the contestant, In re Lobb's Will, 173 Or. 414, 432, 145 P.2d 808 (1944). The parties agree that Jerome was a fiduciary as to his mother and that a confidential relationship existed between them. We turn now to the circumstances surrounding the execution of the codicil and Jerome's activities therein. We first examine the opportunities which he [6 Or.App. 597] had to influence his mother. During the period when it is alleged that undue influence was exerted, Jerome was too ill to travel to Portland to visit his mother. The only contact between them was a single phone call made by Jerome after he discovered that he had cancer. He telephoned his mother from Eugene and asked her to change her will to provide that his wife would take his share of her estate in the event that he predeceased his mother. He also telephoned Herman Lind and asked him to have Mr. Greene prepare a codicil to that effect, and to ask Mr. Greene and Mrs. Newman to go to the nursing home and see if his mother would be willing to make the change. The contestant alleges that Mr. Greene and Mrs. Newman were acting in advancement of Jerome's interest, rather than the interest of Mrs. Clark, and, therefore, that their conduct in the execution of the codicil should be imputed to Jerome. Mr. Greene and Mrs. Newman had, for decades, been associated with Mrs. Clark both as friends and professional advisers. It is unquestioned that up to the present instance their conduct had been consistent with the advancement of Mrs. Clark's interests. However, the contestant asserts that a letter sent by Mr. Greene to Jerome contains language from which an inference may be drawn that Mr. Greene and Mrs. Newman were acting for Jerome in furtherance of a scheme to foist Jerome's wishes upon his mother. (FN2) [6 Or.App. 598] [12] We do not feel that the language of the letter supports the inference which the contestant asks us to make. The past relationship between Mrs. Clark, Mr. Greene and Mrs. Newman, the lack of any past connection between them and Jerome other than in the conduct of the mother's business, and the absence of any motive for them to act in Jerome's interest effectively rebuts any possible inference from the letter. [13] It is undisputed that the second codicil resulted from Jerome's request to his mother. However, reasonable solicitations, without more, do not constitute undue influence. In re Estate of Hill, supra, 198 Or. at 337, 256 P.2d 735. Impropriety with regard to Jerome's conduct is alleged in that he did not tell his mother he had cancer. We are unable to condemn this omission in view of the fragile state of his mother's health. She knew he was ill and must have suspected that Jerome thought it was a fatal illness. Otherwise, there would have been no purpose for his request, as it would be highly unlikely that he would predecease his mother in the normal course of events. [14] We have reviewed the facts in light of the tests set forth in In re Reddaway's Estate, supra, 214 Or. at 419-427, 329 P.2d 886, in accordance with our duty to consider the matter De novo. Although by necessity will contests must generally be decided on circumstantial evidence, we cannot accept mere suspicion and innuendo in lieu of substantial evidence. In re Estate of Hill, [6 Or.App. 599] supra, 198 Or. at 338, 256 P.2d 735; Trombly et al. v. McKenney, Ex. et al., 191 Or. 90, 112, 228 P.2d 417 (1953). [15] We are of the opinion that there has not been sufficient evidence of suspicious circumstances introduced to warrant a shift in the burden of going forward.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Whitteberry v. Whitteberry, 9 Or App 154, 496 P2d 240 (1972)	Yes	Yes	Nephew and nephew of deceased wife, both named in prior will	Brother, who was appointed guardian of person and estate at about same time will signed	Decedent had repeatedly requested an attorney to revise his will Strongly disputed evidence of incapacity, including medical testimony from treating physicians that decedent did not have capacity. Prior will 2/18/63 Will 7/8/69 DOD 11/14/69 Age 71	[7] The appointment of Richard Whitteberry, one of the principal beneficiaries under the challenged will, as guardian of the testator's person and estate created a fiduciary relationship between them. 'The existence of a confidential relationship, such as that of guardian and ward, when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference * * *.' In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572, 581 (1946). This principle is applicable to the present case because of the beneficiary's position as a fiduciary in combination[9 Or.App. 160] with the additional factor that it was his attorney who drafted the will. [8] A careful scrutiny of the circumstances surrounding the execution of the will convinces us that the evidence is sufficient to rebut any inference of undue influence. The uncontradicted testimony was that William repeatedly asked Richard to get him an attorney so that he could make a will. The attorney who drafted the will went to the testator's home in June to discuss the disposition the testator wished to make of his property. The attorney drafted the will and returned at the end of the month to have it executed. The will was executed in spite of the fact that one of the beneficiaries, Grace Winn, had been improperly designated as Grace Whitteberry. On July 8, 1969, Mr. Robertson returned with a corrected will, which was then executed. With the exception of Mr. Martin, who went along to witness the execution of the wills, no one else was present on any of these occasions. Jack Bird testified that his relationship with the testator and his wife, Alice, was almost a father, mother and son relationship, but after the death of the testator's wife, it was his brother Richard who visited him three and four times a week and saw to his care. On several occasions the testator said that he would like to see Jack Bird and wondered where he was. There was testimony that in April, Grace Winn had made statements to the effect that Richard was trying to get his hands on his brother's money and that Richard said he would not look after his brother's affairs unless he signed over his will to him. Richard and Grace denied making these statements. [9 Or.App. 161] This is a close case, the result of which in the final analysis is dependent upon the credibility of the various witnesses. Although this is an equitable proceeding in which we review the facts De novo, where the credibility of the witnesses is a material issue we place great reliance on the findings of the trial judge. Clauder v. Morser, supra, 204 Or. at 391, 282 P.2d 352
Sheppard v. Kartes, 19 Or App 567, 528 P2d 88 (1974)	No	Yes	Estranged daughter	Two other daughters who were living with decedent	Decedent, a twice divorce female with 5 children, objected to daughter seeing man daughter then married in app 1965. Will 4/14/71 DOD 4/20/73 Age 87	The claim of undue influence centers around the execution of the will while decedent was hospitalized in Grants Pass during her first illness in 1971. [19 Or.App. 571] The evidence establishes that while decedent was en route to the hospital she requested Dorothy othy and Emily Kartes, who were bringing her to the hospital, to go to an attorney and have him prepare her will and certain deeds disposing of her real property. The will of decedent was drafted by Louis Schultz, a Grants Pass attorney, whose name apparently was chosen at random from the telephone director by the Kartes sisters. * * * * * [2] Second, having read the entire record we can find nothing to indicate any record we can find nothing to indicate any undue influence surrounding the execution of the will. We note that a period [19 Or.App. 572] of two years elapsed between the execution of the will and the decedent's death. We are persuaded, as was the trial judge, that if the testatrix had wished to change her will she could certainly have done so during this two-year period. Although not in the best of health, she was mentally competent up to her death. [3] Nor did the trial judge err in not according a presumption of undue influence based upon alleged confidential relationship between the decedent and Dorothy and Emily Kartes. Nease v. Wilson, Clark, 6 Or.App. 589, 488 P.2d 1396, Sup.Ct. review denied (1971).

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Carlton v. Wolf, 21 Or App 476, 535 P2d 119 (1975)	Yes	No	Daughters	Farm hired hand with long criminal record who had come to work and live on farm year prior to death. After decedent's accident he cared for her, bathed, her, etc. Bad relationship between him and daughters	Decedent lived on farm, but suffered severe medical problems and was crippled by accident. Decedent had expressed to neutral witnesses up to 3 months before death wish that daughters inherit farm. Hired hand's father and friend, both of whom had criminal records, also stayed at farm at times. The friend prepared the will. Hired hand testified that attorneys had refused to do so. Hired hand called decedent "Mom" and displayed affection toward her. Prior will 12/28/71 named daughters as sole beneficiaries Will 11/19/73 DOD 11/23/73 Age 77	As in most will contest cases, the facts are of extreme importance. * * * * * The Supreme Court of Oregon held in In re Reddaway's Estate, 214 Or. 410, 419--20, 329 P.2d 886, 890 (1958), that: 'Definitions of undue influence couched in terms of the testator's freedom of will are subject to criticism in that they invite us to think in terms of coercion and duress, when the emphasis should [21 Or.App. 483] be on the unfairness of the advantage which is reaped as the result of wrongful conduct. 'Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.' 3 Modern L.Rev. 97, 100 (1939). Said in another way, undue influence has a closer kinship to fraud than to duress. It has been characterized as 'a species of fraud.' '* * * This court has held that where a confidential relation exists between a testator and the beneficiary, slight evidence is sufficient to establish undue influence. In re Estate of (Elise) Rosenberg, 196 Or. 219, 246 P.2d 858, 248 P.2d 340. The rule is more specifically stated in In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572, 581 (1946), as follows: "The existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference. * * *' 'It will be noted that the burden does not exist unless there are circumstances in addition to the confidential relation. * * *' As in Reddaway, we find that there was a confidential relationship between Mrs. Weir and Mr. Wolf and that the 'relationship (was) such as to indicate a position of dominance by the one in whom confidence (was) reposed over the other.' As in Reddaway, we also find that in this case 'suspicious circumstances are abundant.' In Reddaway the Oregon Supreme Court listed and discussed the various 'factors of importance' to be considered in determining whether undue influence was exercised. * * * (1) Procurement, i.e., 'participation the beneficiary in the preparation of the will.' Wolf provided for Ogden the description of the farm for the purposes of the will, despite his contention that he did so at the request of Mrs. Weir. Aside from the fact that Wolf's friend Ogden typed the will and Wolf's own father and his friend Ogden witnessed the will, he also procured a notary public to witness the will and was 'in and out' of the room during its execution, at which time he called Mrs. Weir 'Mom' and offered to get her a cup of coffee. (2) Independent advice. No independent advice was provided to Mrs. Weir relative to the preparation of the will. (FN2) (3) Secrecy and haste. One reason that no lawyer was engaged to prepare the will was the desire to keep it a secret. The circumstances are such as also to indicate considerable haste in its preparation. The only reason for waiting until the next day for the execution of the will was the mistaken belief of Wolf that it had to be witnessed by a notary public. (4) Change in decedent's attitude toward others. As in Reddaway, there was a change in the attitude of [21 Or.App. 485] the testator toward her own child. Although Wolf testified that the reason for the change was her displeasure with her daughter, it is 'just as probable' in this case that Wolf 'played a part in effecting this change in attitude,' as it was that similar conduct played a similar part in Reddaway. (5) Change in the testator's plan of disposing of her property. As in Reddaway, there was such a change in the plan of the testator and there was evidence of a previously 'settled intent in the disposition of (her) estate' and of a 'variance' between the testator's previous will and the will in question. (6) Unnatural or unjust gift. Although, as recognized in Reddaway, one may make a legal disposition of his estate which reasonable men would regard as 'unfair,' it is a 'circumstance' to be weighed in determining whether undue influence existed. This is not a case in which the beneficiary who cared for an ill and aged testator was rewarded by the will for faithful service and would otherwise have received little or no compensation. Wolf already had procured a five year 'management agreement,' including title to all timber on the property. (7) Susceptibility to influence. Finally, as in Reddaway, this testator, although a person of 'strong will,' was physically sick and infirm and was susceptible to influence by reason of her dependence upon Wolf as the result of her physical infirmities. As in Reddaway, there was also other evidence in the record which was relevant to the issue of undue influence, including other 'suspicious circumstances,' but the combination of the foregoing circumstances is sufficient, in our judgment, to require that this court sustain the contention of the contestants that undue influence was exercised upon this testator. [2] We recognize that in Reddaway the trial court [21 Or.App. 486] had made a finding of undue influence and that the Oregon Supreme Court, in affirming the trial court, recognized the weight to be given to its findings. Nevertheless, this court has the responsibility to hear appeals in such cases de novo and to make its own determination on questions of fact. * * *

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Kugel v. Pletz, 22 Or App 248, 538 P2d 962 (1975)	Yes	No	3 daughters	Son who lived with the decedent	Widowed decedent with four children. In 1960 she had given son $9,000 to avoid a foreclosure. In 1969-70 she made gifts in total amount of $38,000 to three daughters, expressing a desire to see them enjoy it while she was living. Mental capacity was limited by artereosclorosis, etc. Court upheld gifts against a claim of lack of capacity based on medical testimony that decedent could understand simple single acts, such as gifts. Prior will 10/13/67 divided residue equally among children Will 2/5/70 left half to son DOD 1/11/73 Age	[2][3] In In Re Reddaway's Estate, 214 Or. 410, 419, 329 P.2d 886, 890 (1958), the Supreme Court stated: '* * * The question is, has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper? * * *' The facts in Reddaway are similar to those of the instant case. The proponent was in a position of dominance and had lived with testatrix continuously for the 16 years prior to execution of the 1970 will. The testatrix was susceptible to influence due to probable senility. See Reddaway, 214 Or. at 417 and 426, 329 P.2d 886. These circumstances alone, of course, do not establish undue influence. However, the question arises whether there was a confidential relationship between the testatrix and the proponent-beneficiary. The Supreme Court has said that: "A confidential relationship * * * means a fiduciary relationship, either legal or technical, [22 Or.App. 253] wherein there is a confidence reposed on one side with A resulting superiority and influence on the other. It may be a moral, social, domestic or merely a personal relationshiph. (Italics added.)' Doneen v. Craven, Executor et al, 204 Or. 512, 522, 284 P.2d 758, 762 (1955). In this case there does appear to be that 'confidence reposed on one side with A resulting superiority and influence on the other' which marks a confidential relationship. Therefore, the following statement by the Supreme Court in In re Estate of Elise Rosenberg, 196 Or. 219, 230, 246 P.2d 858, 863, 248 P.2d 340 (1952), becomes relevant: '* * * Where a confidential relationship exists between a testator and the beneficiary Slight evidence is sufficient to set aside a will on the ground of undue influence. (Citing cases.)' (Emphasis supplied.) We conclude that the (1) confidential relationship between the testatrix and the proponent, (2) doubling of proponent's share of the estate, (3) execution of the new will on a trip accompanied by the proponent, and (4) susceptibility of testatrix to influence because of probable senility, were sufficient to establish that the new will was executed as the result of undue influence
Penn v. Barrett, 273 Or 471, 541 P2d 1282 (1975)	No	Yes (deeds)	Children	Spouse by ineffective marriage	The female decedent and male donee had known each other many years began living together in 1972, shortly before they also learned she had terminal cancer. In June, 1973, they married in Reno, but they subsequently learned that marriage was three days before his divorce was final. Deeds 8/27/73 DOD 9/18/73 Age	There were circumstances in this case which justified a 'suspicion' of undue influence. In considering the various 'factors of importance,' as listed and discussed in Reddaway, for the purpose of determining whether undue influence was exercised in this case, we shall assume, without deciding, that the relationship between decedent and defendant was a 'confidential relationship' of such a nature, when considered with such 'suspicious circumstances,' as to give rise to an inference of undue influence and require defendant to offer sufficient evidence to overcome that inference. *[This case is unusual in the the court expressly applied the Reddaway rules outside the context of a will contest. Court applied each individual factor to case and came up with very inconclusive results. There was evidence of decedent's consistent wish that donee receive property. There was no evidence of procurement or exactly how it happened that deeds were executed.]*

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Walls v. Small, 26 Or.App. 105, 551 P2d 1310, *rev den* (1976)	No	Yes	Widow of son who died 4 days before new will and nieces and nephews, all of whom were in prior will	Sister and brother-in-law who lived with decedent since 1/67	Widow whose only son died 4 days before will was executed. Prior will and codicil 1963 & 1964 Will 10/30/67 DOD 1974 Age 90 at death	[1] First, we agree with contestants that a confidential relationship existed between the Smalls and the testatrix. They lived together for 10 months before the execution of the will. The Smalls to a large extent handled the testatrix's financial affairs during that period. We believe that the above, plus the fact that the testatrix and Mrs. Small were sisters, is sufficient proof of a confidential relationship. [2] We now must determine whether sufficient suspicious circumstances existed to shift to proponent the [26 Or.App. 109] burden of proving a lack of undue influence. Where a confidential relationship exists, only slight additional evidence is necessary to cause the burden to shift. In re Reddaway's Estate,supra; In re Estate of Elise Rosenberg, 196 Or. 219, 246 P.2d 858,248 P.2d 340 (1952). [3] Considering first the question of the participation by the beneficiaries in the preparation of the will, the evidence is conflicting and highly speculative. * * * * * * * * [4] The evidence on this point obviously conflicts. The crucial factor in determining the persuasiveness of conflicting evidence is the credibility of the witnesses involved. Here, the trial court saw and heard the witnesses; we, of course, did not. The trial court by finding the will not to be the product of undue influence, necessarily found the testimony of the proponent to be credible and persuasive. In such cases the decision of the trial court is entitled to great weight. Clauder v. Morser, 204 Or. 378, 282 P.2d 352 (1955); Whitteberry v. Whitteberry, 9 Or.App. 154, 496 P.2d 240 (1972). The contention that the testatrix acted without independent advice is simply against the weight of the evidence. Garthe Brown, the testatrix's long-time [26 Or.App. 110] attorney and adviser, stated that he talked to the testatrix once on the telephone prior to the preparation of the new will and at the time of its execution. He stated that he was convinced that the testatrix was acting freely, was not being influenced by anyone and had intended the disposition made by the will in question. * * * * * Lastly, we consider the donor's susceptibility to influence. The testatrix was 82 at the time of the execution of the will but she lived seven years past the execution of the will and it remained unchanged. Whilt she was seeing doctors periodically as do many people of her age, there is no evidence that she was overly susceptible to the influence of others. It is interesting that the Smalls did not move in with her to take care of her, but only so that Mr. Small could be near his doctor. Also, it is interesting that the members of the family affectionately referred to the testatrix as 'the General' because of her independence and strong will. In short, we are not convinced that the testatrix was susceptible to the influence of others as contestants urge.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Hoover v. Trowbridge, 27 Or App 231, 555 P2d 785 (1976) *rev den* (1977)	No	Yes	Daughter	Daughter	Proponent daughter lived near her parents from 1950 and (after mother's death) decedent father and brother and had cared for them for many years before he moved in 1966. After brother died in 1968 decedent had expressed to friend that all he had belonged to proponent due to care she provided. Decedent had will prepared independently, and proponent did not know its contents until after it was signed. Will 10/2/68 DOD ?? [1970 or later] Age ??	Here the evidence is uncontradicted that Opal Trowbridge at, prior to and for some time after the execution of the will transacted much financial business for her father and, prior to his death, for her brother Norman; that she was a joint signatory on their bank accounts, continued so on her father's after her brother's death, and on occasion mingled her own funds with her father's in his account. She regularly exercised this power. She also resided across the street from him for many years and was a frequent visitor in [27 Or.App. 238] his home, performing many tasks for her father, and in general assisted and was relied upon by him in a wide variety of ways. As in Walls v. Small, supra, therefore, we conclude that prior to, at, and for some time after the execution of the will a confidential relationship existed between Mrs. Trowbridge and the decedent. The burden was therefore upon the proponents to establish the absence of undue influence by Opal Trowbridge upon the decedent. In In Re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), the Supreme Court discussed the effect in a will contest of the existence of a confidential relationship as follows: '* * * This court has held that where a confidential relation exists between a testator and the beneficiary, slight evidence is sufficient to establish undue influence. In re Estate of Elise Rosenberg, 196 Or. 219, 246 P.2d 858. The rule is more specifically stated in In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572 (1946), as follows: "The existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference. * * *' It will be noted that the burden does not exist unless there are circumstances in addition to the confidential relation. As was said in Roblin v. Shantz, Executrix, 210 Or. 371, 378, 311 P.2d 459 (1957), 'We must be shown suspicious circumstances.' * * *' 214 Or. at 420, 329 P.2d at 890. It there found that suspicious circumstances existed 'because here the 'relationship is such as to indicate a position of dominance by the one in whom confidence is reposed over the other.' * * *' 214 Or. at 421, 329 P.2d at 891. We do not here find, however, that Opal Trowbridge exercised 'a position of dominance' over her father. The court in Reddaway considered both what constitutes undue influence and, when present, what its effect may be. Concerning the latter, the court said: * * * * * This is simply a manner of expressing the idea that but for the wrongful influence exercised upon the testator he would not have executed the will. As pointed out by Mr. Justice ROSSMAN in In re Kelly's Estate, 150 Or. 598, 617, 46 P.2d 84 (1935), every will is the product of some kind of influence. It is the task of the courts to determine whether the influence in the particular case is 'undue'. '* * * '* * * The question is, has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper? * * *' 214 Or. at 418--19, 329 P.2d at 889--90. In Walls v. Small, supra, we said: '* * * The crucial factor in determining the persuasiveness[27 Or.App. 240] of conflicting evidence is the credibility of the witnesses involved. Here, the trial court saw and heard the witnesses; we, of course, did not. The trial court by finding the will not to be the product of undue influence, necessarily found the testimony of the proponent to be credible and persuasive. In such cases the decision of the trial court is entitled to great weight. Clauder v. Morser, 204 Or. 378, 282 P.2d 352 (1955); Whitteberry v. Whitteberry, 9 Or.App. 154, 496 P.2d 240 (1972).' 26 Or.App. at 109, 551 P.2d at 1312. See also: In re Reddaway's Estate, supra, 214 Or. at 427, 329 P.2d 886; Nease v. Wilson, Clark, 6 Or.App. 589, 488 P.2d 1396, Sup.Ct. Review denied (1971). [3] Applying the foregoing rules to the facts of this case, we do not find that Opal Trowbridge by her conduct 'gained an unfair advantage by devices which reasonable men regard as improper' over her father prior to or at the time of the execution of the will. Thus we conclude that proponents established that undue influence was not exercised by Opal Trowbridge to secure the drafting or execution of the challenged will. THIS IS A VERY CONFUSED OPINION

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Barber v. Johnston, 37 Or App 39, 586 P2d 103 (1978) *rev den* (1978)	Yes	No	Three chldren	"Dwight Johnston, decedent's uncle, had a close relationship with decedent. Her father, Dwight Johnston's twin brother, was deceased, as was her mother. She relied on Dwight Johnston for financial and personal advice and consulted with him regarding major purchases. He was given a general power of attorney by decedent which he utilized to vote her shares of stock in a family corporation. He was also a co-signator on her checking account and had issued checks to pay some of her bills. Dwight Johnston characterized himself as decedent's confidant.	Female decedent had long history of mental illness. She had received custody of two children after 1972 divorce; third child was mentally retarded and in institution. At time will was executed decedent was under treatment for schizophrenia, but proponent thought she was overmedicated and urged her to stop medications, which she did. Decedent's former husband took the children shortly before will done, and decedent and proponent were outraged at this. Proponent prepared the will. Decedent later said it was not what she wanted and visited attorney, who was unable to prepare will due to decedent's silence and dominance of her grandmother. Will made uncle trustee first for grandmother, then for himself and brothers, with any residue to children. Will 2/8/75 DOD 3/13/76 (suicide) Age 39	The Supreme Court in In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), discussed the various "factors of importance" to be considered in determining whether undue influence was exercised. None of the categories of inquiry set forth by the Supreme Court are to be given priority, they are merely decisional guidelines in assessing the evidence respecting undue influence. The "factors of importance" are grouped in seven categories: (1) participation of the beneficiary in preparation of the will; (2) independent [37 Or.App. 44] advice; (3) secrecy and haste; (4) change in the decedent's attitude toward others; (5) change in the testator's plan of disposing of her property; (6) unnatural or unjust gifts in the will; and (7) the susceptibility of the testator to influence. Ordinarily the will contestant has the burden of establishing the existence of undue influence in the making of the will, Harritt v. Linfoot, Exec. et al., 210 Or. 354, 311 P.2d 450 (1957). However, the Supreme Court has adopted a rule that: "The existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference. * * * " In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572, 581 (1946). See also In re Reddaway's Estate, supra; Carlton v. Wolf, 21 Or.App. 476, 535 P.2d 119 (1975). The burden does not shift unless there are suspicious circumstances in addition to the confidential relationship. The evidence establishes that there was a confidential relationship between the decedent and Dwight Johnston. The personal representative does not dispute this conclusion. He argues, however, that Dwight Johnston and his two brothers are only technically beneficiaries of the estate. They are, he contends, persons of substantial means and would have no necessity to receive monies from the trust. The fact remains, however, that the will makes them beneficiaries. The trustee is given authority to pay the income to them and discretion to invade the corpus of the trust for their proven needs. The present intention of the trustee not to distribute any portion of the estate to the three brothers does not affect the legal status of these persons as beneficiaries. Having determined that Dwight Johnston is a beneficiary of the estate and was in a confidential relationship with the testatrix, we next determine if there were sufficient suspicious [37 Or.App. 45] circumstances to justify an inference of undue influence and whether such inference is overcome by the proponent of the will. We discuss the evidence in terms of the seven factors set out in Reddaway. * * * * * (6) Unnatural or Unjust Gifts. While a testator may dispose of the estate as he sees fit, the fact that the disposition is in an unnatural or unjust manner is a circumstance to be weighed in determining whether undue influence is present. In re Reddaway's Estate, supra. [37 Or.App. 47] " '(C)ollateral heirs, such as brothers and sisters, are not "natural objects of bounty" as that term is used in the interpretation of wills, * * *.' " Cline v. Larson, 234 Or. 384, 394, 383 P.2d 74 (1963). In light of the fact that her grandmother, Mrs. Queener, had cared for decedent and her children on many occasions and was subsisting on a limited income, she may be considered, under these circumstances, a natural beneficiary of the estate. The same cannot be said of decedent's three uncles. Decedent's children are the natural objects of her bounty and placing them in an inferior position to the uncles in the estate plan is an unnatural gift. See In re Reddaways Estate and Carlton v. Wolf, supra
Troyer v. Plackett, 48 Or App 497, 617 P2d 305 (1980)	Yes	No	Daughters	"Cora Plackett bore a confidential relationship to decedent. She was decedent's "friend"; she bathed decedent, gave her drugs, shopped for her, wrote her checks and transported her." Proponent had known the decedent less than two months.	"Decedent was physically sick, suffering from numerous ailments and injuries. She was unable to walk without help. She could not drive an automobile. She was dependent upon drugs and frequently used alcohol to excess. She had recently lost her husband of 40 years. She mistakenly accused one of her daughters of stealing her property. Her susceptibility to being taken advantage of was amply demonstrated by her dealings with a husband and wife, realtors, who befriended her and then took advantage of her in a series of transactions." Will 7/21/77 DOD ?? (Probate filed 3/78) Age ??	In In Re Reddaway's Estate, 214 Or. 410, 419-20, 329 P.2d 886 (1958), the Supreme Court said: "Definitions of undue influence couched in terms of the testator's freedom of will are subject to criticism in that they invite us to think in terms of coercion and duress, when the emphasis should be on the unfairness of the advantage which is reaped as the result of wrongful conduct. 'Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.' 3 [48 Or.App. 500] Modern L.Rev. 97, 100 (1939). Said in another way, undue influence has a closer kinship to fraud than to duress. It has been characterized as a 'species of fraud.' " [1][2][3] The burden of proving undue influence is upon the contestants. In Re Southman's Estate, 178 Or. 462, 168 P.2d 572 (1946). A confidential relationship between the testator and a beneficiary, considered together with other suspicious circumstances, may require the beneficiary to carry the burden of proof and present evidence to overcome the adverse inference of undue influence. In Re Reddaway's Estate, supra; In Re Southman's Estate, supra ; and Carlton v. Wolf, 21 Or.App. 476, 535 P.2d 119 (1975). * * * [4] The factors to be considered in determining whether undue influence is exercised were set out by the Supreme Court in In Re Reddaway's Estate, supra, and reiterated by this court in Carlton v. Wolf, supra. * * * * * [5] The second factor is independent advice. A beneficiary who participates in preparation of a will and occupies a confidential relationship to the testator has a duty to see that the testator receives independent, disinterested advice. In Re Reddaway's Estate, supra; In Re Estate of Manillus Day, 198 Or. 518, 257 [48 Or.App. 501] P.2d 609 (1953). Cora Plackett did not seek to have decedent call either Mr. Hammond or Mr. Herbrand, attorneys, each of whom had drawn a will for decedent within ten months immediately preceding the drawing of this will. Instead, she helped the decedent contact a lawyer unknown to decedent. The attorney chosen had been in the practice of law less than two years and he relied in part on misinformation provided him by either decedent or Cora Plackett. The record discloses that he acted as little more than a scrivener. * * * * * The fourth factor is change in attitude toward others. Decedent had made two wills in the ten months prior to making this will. In September, 1976, she made a will leaving her entire estate to her two daughters to be shared equally. In February, 1977, by a second will, she left her entire estate to both daughters, with one receiving but $5 and the residue going to the other. Though Cora Plackett testified that she did not seek to have decedent leave her entire estate to her, the record is also entirely void of any effort by her to urge upon decedent any reconciliation with her daughter, Jane Troyer, from whom she had become [48 Or.App. 502] estranged. Jane Troyer was a friend of Cora Plackett's sister and had engaged Cora Plackett's services for the decedent.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Albright v. Medoff, 54 Or App 143, 634 P2d 479 (1981)	Yes	No (deed)	Estate (brother)	Niece who handled financial matters for decedent	Niece arranged paperwork signed by decedent at the end of hospitalization to sell home worth $12,500 to her for $5,000 Earnest money 4/24/78 and deed 5/2/78 1972 will left estate to brother, or alternatively to niece. All thought will was good. After death all discovered that will was defective and void. DOD ?? Age ??	[1][2] Carla attended to Edward's many needs. He relied on her advice and took her word on business matters without question. She had a confidential relationship with him. Plaintiff had the burden of proof in contesting a transfer on grounds of undue influence. However, where a confidential relationship and suspicious circumstances exist, the beneficiary of the disputed transfer must overcome the inference of undue influence. In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958); In re Estate of Manillus Day, 198 Or. 518, 257 P.2d 609 (1953); In re Estate of Elise Rosenberg, 196 Or. 219, 246 P.2d 858 (1952); In re Southman's Estate, 178 Or. 462, 168 P.2d 572 (1946). (FN2) Suspicious circumstances exist in this case. [3] [54 Or.App. 147] A variety of factors may be examined to determine whether undue influence has been exercised in a given case by a person enjoying a confidential relationship with a donor. Penn v. Barrett, 273 Or. 471, 541 P.2d 1282 (1975); In re Reddaway's Estate, supra. 634 P.2d 479, 54 Or.App. 143, Albright v. Medoff, (Or.App. 1981). The first is procurement or participation in preparation of a deed. Here, Carla, acting as agent for defendants, asked her attorney to prepare the deed. She then took the deed to the hospital to obtain decedent's signature. Carla knew the deed would be to her advantage, for unless her uncle Louis predeceased her, she would not receive the property under Edward's will. A second factor is independent advice. A beneficiary who occupies a confidential relationship with the grantor and participates in the preparation of a document has a duty to see that the grantor receives independent advice. Troyer v. Plackett, 48 Or.App. 497, 500, 617 P.2d 305 (1980). Carla failed to insure that the decedent obtained independent advice. Failure to secure independent advice may by itself constitute sufficient grounds to set aside a transfer. Gilliam v. Schoen, 176 Or. 356, 364, 157 P.2d 682 (1945). A third factor is secrecy and haste. Carla did inform the family that she intended to purchase the property. The trial court found, and we agree, that the transfer was not characterized by secrecy or undue haste. A fourth factor is change in attitude toward others. Edward and Louis enjoyed a close relationship throughout their lives. Louis had cared for Edward for several years preceding the time Carla started managing the decedent's affairs. The decedent's attitude shifted significantly away from his brother and toward his niece in the mid-1970's. This is some evidence of undue influence. A fifth factor is the change in decedent's plan of disposing of his property. Louis was the primary beneficiary under Edward's will. Until Edward's death, he, Carla and Louis all thought Edward's will was valid. The property transfer removed the only significant asset from Edward's estate and, consequently, constituted a significant change in his plan for disposing of his assets. A sixth factor is whether the property transfer was unnatural or unjust. [54 Or.App. 148] Here, the facts do not show an unnatural or unjust disposition which would necessarily suggest undue influence. A seventh factor is the donor's susceptibility to influence. Edward was in poor health and about to be discharged from the hospital for the second time within a few months. He suffered from alcoholism and was subject to periods of incoherency. The trial court found however, that Edward was not especially susceptible to influence, and we agree. Another factor to be considered is lack of adequate consideration for a property transfer.
Larson v. Naslund,73 Or App 699, 700 P2d 276 (1985)	No	Yes	First son	Second son	Widow with two sons who changed will shortly after husband died to favor one son. Very little discussion of background. Prior will 1970 equally to sons Will 9/73 and codicil 9/80 left 7/8 to second son DOD 5/81 Age ??	[2] Plaintiff also failed to show the existence of either a confidential relationship or suspicious circumstances necessary to raise an inference of undue influence. In re Reddaway's Estate, 214 Or. 410, 420-26, 329 P.2d 886 (1958); see Roblin v. Shantz, Executrix, 210 Or. 371, 378, 311 P.2d 459 (1957). What the record does show is that, although Gladys depended on William for assistance in caring for her property and in some financial matters, she was not an enfeebled elderly woman who relied on her son for everything. She led an independent and active life insofar as her health allowed, and there is no evidence to show that William controlled her thoughts or actions. The record does not show the presence of undue influence. We also find, as did the trial court, that Gladys Larson had the mental capacity to make the inter vivos transfers and that she did so freely and voluntarily.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Ryan v. Colombo, 77 Or App 71, 712 P2d 139 (1985)	Yes	No (deed)	Grantor's conservator (son)	Second wife	In 1971 male grantor married Svea after they signed antenuptial agreement protecting her property. Both were about 73. He sold his house and gave her proceeds, and her house was changed to tenancy by the entirety. In 12/80 Svea had terminal cancer and executed living trust under which decedent could occupy house for life or if it was sold would get half proceeds. Trust left residue to Svea's relatives in Sweden Court ruled decedent had capacity to sign deed. Deed to trust 1/22/81 Svea died 5/7/81 DOD n/a Age 83	[77 Or.App. 77] [4] Whether the deed was the product of undue influence is a closer question. That subject has been discussed frequently by the courts, particularly in connection with wills, and not always with the same thrust. Some cases have emphasized that, when undue influence is exercised over another to execute a will, the will, in reality, is not his will but is the will of another person. See In Re Estate of Porter, 192 Or. 483, 492, 235 P.2d 894 (1951). Other cases have emphasized the unfairness of the advantage which is reaped as the result of wrongful conduct and pose the question as being whether the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper. See In Re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958). Whatever the test, it is the same for both wills and deeds, Albright v. Medoff, 54 Or.App. 143, 634 P.2d 479 (1981), although some factors, such as the absence of independent advice and counsel, may weigh more heavily in the case of a deed than in the case of a will. See Gilliam v. Schoen, 176 Or. 356, 157 P.2d 682 (1945). [5] Generally, when a confidential relationship exists between the grantor and the one receiving an advantage, with a resulting superiority and influence over the grantor, In Re Estate of Manillus Day, 198 Or. 518, 530, 257 P.2d 609 (1953), it is said that only slight evidence is sufficient to establish undue influence. In Re Estate of Elise Rosenberg, 196 Or. 219, 246 P.2d 858 (1952). If, in addition to the confidential relationship and position of dominance, there are suspicious circumstances, the one receiving the advantage has the burden of going forward with evidence sufficient to overcome the adverse inference resulting from the existence of those factors. In Re Southman's Estate, 178 Or. 462, 168 P.2d 572 (1946). Here, it is undisputed that a confidential relationship existed between Thomas and Svea; from the evidence, it is reasonably clear that Svea was in a position of dominance over Thomas. She was the dominant partner and played the managerial role; he wanted what she wanted. Whether there exist here what have been termed "suspicious circumstances" involves further analysis of the facts in the light of the factors identified by the court in In Re Reddaway's Estate, supra. It is clear that Svea wanted to retain and control all of her property to the exclusion of Thomas. That was the [77 Or.App. 78] purpose of the prenuptial agreement that Svea had had prepared and that Thomas had signed immediately before their marriage. * * * * * * * * In short, we think that this was a situation which cried out for independent advice and counsel. That factor has been considered an important one in every case in which the person gaining the benefit participates actively in the transaction. In Gilliam v. Schoen, supra, the court said that the failure of the grantee to safeguard the grantor's interest by insisting upon her receiving such advice was, in itself, sufficient to vitiate the deed. Here, as in that case, we consider that factor to be of tantamount importance, but, as indicated above, there are other factors that have been characterized as "suspicious circumstances." [6] Under all of the circumstances, we conclude that the trustee has not adduced sufficient evidence to overcome the adverse inference of undue influence. Although we attribute no malevolence to Svea, we conclude that she, by her conduct, gained an unfair advantage by devices which reasonable people regard as improper, In Re Reddaway's Estate, supra, and that plaintiff is entitled to a judgment setting aside the deed.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Stricklin v. Stricklin, 97 Or App 227, 776 P2d 18, *rev den* 308 Or 660 (1989)	Yes	Yes (deed)	Plaintiff	Attorney son	Plaintiff executed deed prepared by attorney son to convey family farm to sons. After extended negotiations for creation of tenancy in common agreement between sons failed, mother sought to rescind deed.	[97 Or.App. 231] Plaintiff argues that a confidential relationship existed between plaintiff and William and that the conveyance documents were the result of William's undue influence on plaintiff. In In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), the court rejected a definition of "undue influence" as the deprivation of the exercise of the grantor's free will and instead held that the definition poses the question as whether "the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper." 214 Or at 419. In her complaint, plaintiff alleges that William represented to her that, if she would convey the farm to William and Robert as co-tenants, William would execute a management agreement with Robert, and that William also represented to her that it was necessary that plaintiff convey the property before the end of 1981 for tax and estate planning purposes, instead of waiting for the preparation and execution of the agreement. We understand those allegations to be the "conduct" by which plaintiff alleges William "gained an unfair advantage." (FN2) [1][2] Ordinarily, the grantor would have the burden of establishing the existence of undue influence. However, the Supreme Court has adopted a rule that "the existence of a confidential relationship * * * when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference." In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572 (1946). Here, plaintiff and William had a confidential relationship. Plaintiff relied on her lawyer son for advice and was justified in placing confidence in the belief that he would act in her interests. See Osterberg v. Osterberg, 278 Or. 277, 282, 563 P.2d 696 (1977). Additionally, there are circumstances in this case [97 Or.App. 232] which "justify a suspicion of undue influence." For example, William prepared the documents and procured plaintiff's signature without Robert's knowledge or presence. See In re Reddaway's Estate, supra, 214 Or. at 421-22, 329 P.2d 886. (FN3) [FN3. Suspicious circumstances that will give rise to an inference of undue influence in a confidential relationship are: (1) procurement by the grantee; (2) lack of independent advice; (3) secrecy or haste; (4) change in the grantor's attitude toward others; (5) change in the grantor's plan of disposing of property; (6) unnatural or unjust gift; and (7) grantor's susceptibility to influence. In re Reddaway's Estate, supra, 214 Or. at 421-22, 329 P.2d 886.] [3] The issue, then, is whether defendants' evidence is sufficient to overcome the inference of undue influence that arises from the circumstances of the transaction and plaintiff's relationship with William. In her testimony, plaintiff did not claim that, in December, 1981, and before the execution of the deed, William represented that he would sign a co-tenancy agreement if plaintiff would convey the farm. (FN4) William testified that the first discussion about a co-tenancy agreement occurred just after the signing of the deed. Plaintiff's attorney testified that he did not hear about a co-tenancy agreement until after the deed was recorded. Plaintiff's accountant testified that, before the execution of the deed, plaintiff had never mentioned a co-tenancy agreement as a condition to her deeding the property. Although the need for an agreement may have been discussed previously, and although plaintiff may have had an expectation that William would sign such an agreement, there is no evidence that he agreed to do so until after the deed was signed. [4] Both plaintiff and William are strong willed, well educated, articulate individuals. The evidence is clear that plaintiff hoped that a co-tenancy agreement would be entered [97 Or.App. 233] into by William and Robert. However, the test for undue influence emphasizes "the nature of the influencer's conduct" in persuading the grantor to act. In re Reddaway's Estate, supra, 214 Or. at 419, 329 P.2d 886. Here, William did nothing to gain an unfair advantage by devices which reasonable men regard as improper. He simply pursued the execution of the document without mention of a proposal to which he was not agreeable. Any promise that may have been made to enter into the agreement occurred after the execution of the deed and was not an inducement to plaintiff to sign the deed. We conclude that defendants have overcome the inference that the deed was signed because of undue influence and that plaintiff is not entitled to rescission. (FN5)

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
McKee v. Stoddard, 98 Or App 514, 780 P2d 736, *rev den* 308 Or 660 (1989)	Yes	No	Children by prior marriage	Second wife	Decedent's first wife died in 1979, when he was 73, leaving him depressed and lonely. He began seeing recently widowed neighbor, age 59, and they were married in 1980. Prior to marriage decedent discussed antenuptial agreement with his attorney, but became upset at his attorneys suggestion of independent counsel for bride. Later thought attorney had revealed confidences. First wife had left note asking decedent to make substantial immediate gifts to children, and childrens' demand became substantial source of friction between them and decedent. Prior will 1972 left estate to children. Decedent consulted wife's attorney about will, and could not decide on what to do. After argument with children he told attorney to prepare will leaving estate to wife. Will 4/16/81 DOD 2/84 Age 81	[1] The burden of proving undue influence is usually on the contestants of a will but, when there are both a "confidential relationship" and "suspicious circumstances," an inference of undue influence arises, and the beneficiary is required to "go forward with the proof and present evidence sufficient to overcome the adverse inference * * *." In re Reddaway's Estate, 214 Or. 410, 420, 329 P.2d 886 (1958). The same test applies to wills and to deeds. Ryan v. Colombo, 77 Or.App. 71, 77, 712 P.2d 139 (1985). Defendant contends that there was no confidential relationship between Edward and Lucille, that there are no suspicious circumstances and that there was no undue influence. [2][3] We conclude that there was a confidential relationship between Edward and Lucille as husband and wife. See Osterberg v. Osterberg, 278 Or. 277, 282, 563 P.2d 696 (1977); Hanscom v. Irwin, 186 Or. 541, 566, 208 P.2d 330 (1949). The next inquiry is whether there are suspicious circumstances giving rise to an inference of undue influence. The appellate courts have identified several factors to assist in that determination. See, e.g., Penn v. Barrett, 273 Or. 471, 476-80, 541 P.2d 1282 (1975); In re Reddaway's Estate, supra, 214 Or. at [98 Or.App. 521] 421-27, 329 P.2d 886; Stricklin v. Stricklin, 97 Or.App. 227, 231, 776 P.2d 18 (1989); Ryan v. Colombo, supra, 77 Or.App. at 77, 712 P.2d 139. In this case, numerous circumstances arouse suspicion: Lucille's involvement in the preparation of Edward's will and the inter vivos transfers, her failure to seek independent legal advice for Edward, Edward's change in the disposition of his property, his change in his attitude toward plaintiffs and his disinheritance of them, although as his children, they were the natural objects of his bounty. The remaining question is whether defendant's evidence is sufficient to overcome the inference of undue influence. We conclude that it is not. Regarding Edward's change in attitude toward plaintiffs and his disinheritance of them, defendant contends that it was plaintiffs' conduct, and not Lucille's, that caused Edward to disinherit them. There is evidence that Edward altered his will and the ownership of his other assets to exclude plaintiffs shortly after Virginia became angry after his refusal to make further distributions of his property and then refused to see him for several months. The change also occurred after George contacted Killeen to learn how the children could get more of his assets. We infer that Edward learned of that contact, because he became upset with Killeen for discussing his financial situation with George. That evidence provides reasons why Edward could decide to disinherit Virginia and George. Edward, however, also disinherited Vera, and the record does not disclose any conduct on her part that would have placed her in disfavor, nor does it explain why she was excluded from his testamentary plan. Defendant has failed to overcome the adverse inference that arises from Edward's inexplicable disinheritance of Vera. Additionally, Lucille participated in the preparation of Edward's will and the inter vivos transactions by contacting her attorney and setting up an appointment for Edward and by being present when he signed his will and when the deeds were prepared. She also failed to obtain or advise of the need for independent and disinterested legal advice for Edward. There is no indication in the record that she encouraged him to contact Killeen or that she made efforts to communicate with plaintiffs or some other person to secure independent advice for him. See Troyer v. Plackett, 48 Or.App. 497, 501, 617 P.2d 305 (1980). [98 Or.App. 522] The Supreme Court has held that a beneficiary who participates in the preparation of a will and occupies a confidential relationship to the testator has a duty to see that the testator receives independent, disinterested advice. In re Reddaway's Estate, supra, 214 Or. at 422, 329 P.2d 886; Toomey v. Moore, 213 Or. 422, 431, 325 P.2d 805 (1958); see also Gilliam v. Schoen, 176 Or. 356, 364, 157 P.2d 682 (1945). Although independent advice is not a strict necessity in every case involving a gift between lay persons, we conclude that, under the circumstances here, where the testator-grantor had had a previous marriage of 47 years and a good relationship with his children and where the transactions in favor of the new spouse resulted in the sudden and complete disinheritance of the children, the lack of independent counsel is a significant factor in determining whether there was undue influence. See Atkeson v. Holly, 258 Or. 276, 281 n. 1, 482 P.2d 737 (1971); Ryan v. Colombo, supra, 77 Or.App. at 80, 712 P.2d 139. Defendant contends that Edward received independent advice from Scott and Galton, both of whom testified that they had discussed "other alternatives" with Edward and that he knew what he was doing when he altered his will and the ownership of his other assets. However, the record does not indicate what alternatives were discussed or whether Edward understood the finality of making Lucille a joint owner on the deeds and the accounts. Scott also testified that he never thought of recommending independent counsel. The attorneys' testimony addresses Edward's legal competency only and not whether he was unduly influenced. Under those circumstances, we are not able to say that either Scott, who had been Lucille's family attorney for many years, or Galton gave Edward independent advice and counsel.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Masters v. Bissett, 101 Or App 163, 790 P2d 16, *on recons* 102 Or App 290, 794 P2d 445 (1990), *rev den* 311 Or 87 (1991)	No	Yes	Grandchildren	Son - trustee	Woman decedent forgave loan to son-trustee Will DOD Age	[101 Or.App. 177] [15] One who asserts undue influence has the burden to prove it. However, an inference of undue influence arises when there exists a confidential relationship and there are suspicious circumstances. In re Reddaway's Estate, supra, 214 Or. at 420, 329 P.2d 886; McKee v. Stoddard, 98 Or.App. 514, 520, 780 P.2d 736, rev. den. 308 Or. 660, 780 P.2d 1101 (1989). A confidential relationship is a "fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other." In re Estate of Manillus Day, 198 Or. 518, 530, 257 P.2d 609 (1953); Doneen v. Craven, Executor et al., 204 Or. 512, 522, 284 P.2d 758 (1955). When an inference of undue influence arises as a result of a combination of a confidential relationship and suspicious circumstances, the inference, if unexplained, may be sufficient, although the burden of proof remains with the one asserting undue influence. See In re Southman's Estate, 178 Or. 462, 168 P.2d 572 (1946). If, however, a confidential relationship is not shown to exist, no inference arises, even if there are some suspicious circumstances surrounding the transaction. [16][17] Here, grandchildren rely on the existence of both a confidential relationship and suspicious circumstances. There is no doubt that Rose had trust and confidence in Larry, her son and trustee. However, there must be, in addition, a showing that the one in whom confidence is reposed held a position of dominance over the other. Doneen v. Craven, supra; Larson v. Naslund, 73 Or.App. 699, 700 P.2d 276 (1985). Undoubtedly, Rose relied on Larry to manage the family investments and had confidence in his advice. There was testimony that Rose did not always read documents that Larry presented to her for signature; rather, she signed some of them after listening to Larry's explanation. There is also evidence that Larry attempted to influence his mother with respect to her dealings with her grandchildren. However, grandchildren's own witness testified that Larry's attempts in this regard were ineffective. (FN11) [101 Or.App. 178] The record also shows that Larry resisted the premature termination of the Hefty Trust, which Rose and beneficiaries wanted. Rose insisted, and Larry finally acceded to the termination. Rose then became upset with grandchildren for refusing to sign the release that Larry required of them before he would distribute the assets. However, the dispute lasted so long that she finally became upset with Larry. According to Janet Bissett, Rose told her: "Well, this has just gone on long enough, and I'm going to phone Larry up right now and tell him to pay that money to the children. I want them to have it now, and it's my money, and I can do what I want with it." Although there is some evidence of Larry's attempts to get the upper hand with respect to grandchildren, we find that Rose had a mind of her own and acted on it. She led a vigorous life, independently of her son. Having remarried after Dr. Bissett's death, she did not live with Larry. She was not financially dependent on him, even though she received monthly income from Trust B. She managed her own personal finances without any assistance or direction from Larry. Even in complicated financial transactions, Rose actively participated in the discussions. There is no evidence that Rose was incompetent or was an "enfeebled elderly woman who relied on her son for everything." Larson v. Naslund, supra, 73 Or.App. at 702, 700 P.2d 276; compare Stricklin v. Stricklin, 97 Or.App. 227, 776 P.2d 18, rev. den. 308 Or. 660, 784 P.2d 1102 (1989). Grandchildren have failed to prove a confidential relationship as that term is defined in undue influence cases. Accordingly, no inference of undue influence arises to aid beneficiaries' burden of proof, even if there are some suspicious circumstances. * * *
O'Brien v. Belsma, 108 Or App 500, 816 P2d 665 (1991)	No	Yes (deed)	Husband	Daughter by previous marriage	Husband on behalf of decedent's estate sought to rescind deed and gifts. Transfers 1987. Decedent was in first phase of Alzheimer's disease in 1987. DOD Age	[3][4][5] Plaintiff's second and third assignments of error are that the court assigned him the burden of proving undue influence and that the court concluded that Helen's deeds of property and gifts of money were not induced by the exercise of undue influence. The court correctly assigned the burden of proof to plaintiff. See In re Lobb's Will, 173 Or. 414, 431, 145 P.2d 808 (1944). The party asserting undue influence must establish that a confidential relationship exists between a grantor and a grantee, that the grantee has a position of dominance over the grantor and that suspicious circumstances exist. If the evidence is sufficient to prove those facts, [108 Or.App. 506] the burden to produce countervailing evidence shifts to the party resisting the claim to overcome a presumption of undue influence. See Ryan v. Colombo, supra, 77 Or.App. at 77, 712 P.2d 139. [6] The presumption of undue influence never arose here. Plaintiff proved a confidential relationship between Helen and defendant but did not prove that defendant was dominant over Helen or that there were suspicious circumstances surrounding the transfers. The evidence was overwhelming that defendant was not only not dominant over her mother but that she was subservient to her mother, that Helen alone arranged the transfers and that in doing so she was merely continuing a long-term pattern of supporting her daughter. As to suspicious circumstances, In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), lists seven factors that may signal the presence of suspicious circumstances. 214 Or. at 421, 329 P.2d 886. Only two need concern us: whether there was a change in the grantor's attitude toward those for whom she had previously expressed affection and the grantor's susceptibility to influence. Helen had always intended that the property at issue pass to defendant. The fact that she conveyed it rather than devised it shows only a change in her timing choices, not in her attitude. Helen intended to benefit defendant by her will originally. In 1986, she decided instead to make a gift of the property, when she clearly was competent. There is no evidence that she was susceptible to her daughter's influence in carrying out her plan. The court correctly ruled that defendant did not exercise undue influence to obtain the deeds or the money in their joint names.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Wismer v. U.S. Nat. Bank of Oregon, 112 Or App 650, 829 P2d 1052 (1992)	Yes	No	Not explained	Lived with decedent	"Tibbett lived with testator between June 1, 1987, and January, 1988. Testator was in his eighties and was dying of cancer. Tibbett performed household chores and yard work, provided transportation for him, cooked his meals and generally served as his companion. She also consumed alcoholic beverages with him and drove him to the liquor store so that he could make purchases. According to her, he consumed alcoholic beverages at the rate of one fifth every one to one and one-half days. On July 22, 1987, he changed his will to include Tibbett and her brother, Embum, as beneficiaries and to exclude Morris as a beneficiary. Testator died September 29, 1988. Until his death, Tibbett spent most of her time at testator's home, except when she was at work." Will 7/22/87 DOD 9/29/88 Age ??	[1][2] The burden of proving undue influence is on the contestants, Wismer and Morris. A confidential relationship between a testator and a beneficiary, when considered with other suspicious circumstances, may give rise to an inference of undue influence that, to prevail, the beneficiary must rebut. In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572 (1946). A list of potentially suspicious circumstances is set out in In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958). (FN1) [3] We find that Tibbett had a confidential relationship with testator when he executed the codicil and that suspicious circumstances surrounded the execution of the codicil. (FN2) The trial court found Tibbett's testimony not credible. We give substantial weight to that finding, because the judge had the opportunity to observe the witnesses. See Troyer v. Plackett, 48 Or.App. 497, 502, 617 P.2d 305 (1980). In the light of all the circumstances, we conclude that the evidence gives rise to an inference that the codicil was a product of Tibbett's undue influence. Because defendants did not rebut the inference, the trial court did not err.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Knutsen v. Krippendorf, 124 Or App 299, 862 P2d 509 (1993), *rev den* 318 Or 381 (1994)	Yes	No	Son	Proponent did all of decedent's banking, managed her finances and received at least one loan from decedent that may not have been repaid. In addition, although proponent testified that he told decedent that she would receive his entire estate under his 1987 will, his will actually made gifts of $5000 to each of five beneficiaries before giving the residue of the estate to decedent. They lived together for several years as if they were married.	In 1981female decedent moved from Portland to Astoria, and proponent, age 56, left wife and moved in with her. In late 1988 decedent expressed unhappiness with proponent and asked for help getting him out of her home. Son initiated guardianship proceedings, was named guardian, and brought her to his home. She was displaying substantial disorientation and confusion. Proponent sought removal of son and appointment as guardian. At end of deposition on 4/7/89 decedent said she wanted to leave with proponent. At 4/10/89 hearing after spending weekend with proponent decedent asked that he be her guardian, and he was appointed. From 1989 to mid 1991, decedent lived with proponent. In mid 1991 she was hospitalized and complained of being abused. Proponent was removed as guardian. Decedent went into nursing home. Prior will 1987 left 30% of estate to proponent. Prior will 4/3/89 left estate to son. Will 4/24/89 DOD 1/5/92 Age 86	We review de novo, ORS 19.125(3); Sanders v. U.S. National Bank, 71 Or.App. 674, 694 P.2d 548, rev. den. 299 Or. 31, 698 P.2d 964 (1985), and reverse. * * * * * [1][2] Knutsen assigns error to the trial court's finding that Krippendorf did not exert undue influence over Smith when she executed her will. The burden of proving undue influence is usually on the contestant of a will; however, certain circumstances "may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference." In re Southman's Estate, 178 Or. 462, 482, 168 P.2d 572 (1946). The party asserting undue influence first must prove that a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator. Doneen v. Craven, 204 Or. 512, 522, 284 P.2d 758 (1955). Next, the contestant must establish the existence of suspicious circumstances surrounding the procurement or execution of the will. In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958); McKee v. Stoddard, 98 Or.App. 514, 780 P.2d 736, rev. den. 308 Or. 660, 784 P.2d 1101 (1989). If a confidential relationship and suspicious circumstances are shown, the proponent assumes the burden of producing evidence sufficient to overcome the inference of [124 Or.App. 309] undue influence. In re Southman's Estate, supra, 178 Or. at 482, 168 P.2d 572; O'Brien v. Belsma, 108 Or.App. 500, 506, 816 P.2d 665 (1991). [3][4] Smith and Krippendorf clearly shared a confidential relationship. Additionally, we find that, at the time that the will was executed, Krippendorf held a position of dominance over Smith. Although the evidence suggests that Smith was a "strong-willed" person, a finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence. * * * * * [5] As to suspicious circumstances, In re Reddaway's Estate, supra, 214 Or. at 421-25, 329 P.2d 886, lists seven "factors of importance" to consider in deciding if circumstances exist to support an inference of improper influence. The first factor is procurement; that is, participation by the beneficiary in the preparation or execution of the will. Krippendorf testified that he called and scheduled an appointment with attorney Larson at Smith's request, drove her to Larson's office, and escorted her into the office. Larson testified that, because he anticipated a future challenge to the will, he took notes of that meeting in case he needed to refresh his memory at a later date. Although his notes stated "Conference, Mildred, and Arnold present," Larson testified that he recalled asking Krippendorf to leave before any discussion of the will's contents. Krippendorf did participate, at least to some extent, in [124 Or.App. 310] the procurement of the will. However, viewed in isolation, his participation was insufficient to support an inference of undue influence. * * * * * [124 Or.App. 313] We agree that coercion was not involved in the execution of Smith's will; however, coercion is not a necessary prerequisite to a finding of undue influence. As the Supreme Court has explained: "Definitions of undue influence couched in terms of the testator's freedom of will are subject to criticism in that they invite us to think in terms of coercion and duress, when the emphasis should be on the unfairness of the advantage which is reaped as the result of wrongful conduct. 'Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.' " In re Reddaway's Estate, supra, 214 Or. at 419, 329 P.2d 886 (quoting 3 Modern L Rev, 97, 100 (1939)). (Emphasis supplied.) [14] After considering all of the relevant factors, we conclude that suspicious circumstances surrounded the execution of Smith's will. This finding, coupled with the existence of the confidential relationship between Krippendorf and Smith, gives rise to an inference that Krippendorf unduly influenced Smith in executing her will. We further conclude that Krippendorf failed to overcome that adverse inference and that his conduct allowed him to gain an unfair advantage. Accordingly, we hold that the last will of Mildred Smith was the product of undue influence and is invalid. (FN6)

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Van Marter v. Van Marter, 130 Or App 500, 882 P2d 134 (1994)	n/a remanded	n/a	Children by first marriage	Second wife	Male decedent a paraplegic. First wife died in 1985. In 2/86 proponent became his caretaker. In 6/86 she moved in, and they announced marriage plans. In 12/86 they moved from Heppner to Portland. Prior will 3/87 left half estate to children. Prior will 12/87 left half residue to children after few specific gifts. Will 6/89 added specific gifts to proponent DOD 9/91 Age 71	[130 Or.App. 503] [1][2] Although we review a will contest de novo, Sanders v. U.S. National Bank, 71 Or.App. 674, 681, 694 P.2d 548, rev. den. 299 Or. 31, 698 P.2d 964 (1985), this is an appeal from a summary judgment. In a motion for summary judgment, the moving party must show that there are no material issues of fact and that he or she is entitled to judgment as a matter of law. Seeborg v. General Motors Corporation, 284 Or. 695, 699, 588 P.2d 1100 (1978). All inferences must be drawn in favor of the party opposing the motion. Uihlein v. Albertson's, Inc., 282 Or. 631, 580 P.2d 1014 (1978). The parties have been unable to point to any reported Oregon decision reviewing summary judgment in an undue influence case, and we have found none. Appellants argue that a summary judgment should never be granted in a will contest when the contestants claim undue influence, because proof in such a proceeding is "by a number of facts, each of which standing alone may have little weight, but taken collectively may satisfy a rational mind" of the existence of undue influence. They contend that here, the facts support a reasonable inference that respondent "got" testator to marry her, drove a wedge between his children and him, prevailed on him to make a will that eliminated two of his children and drastically reduced the inheritance of the third, and, as a result of her machinations, ended up with almost the entire estate either through inter vivos transfers or by devise. [3][4] In the abstract, ORCP 47 does not preclude summary judgment in a claim for undue influence. In reality, such cases may, indeed, be virtually nonexistent. Each case of undue influence must be decided on its own peculiar facts which, in turn, may reasonably support varying, often conflicting, inferences. Cline v. Larson, 234 Or. 384, 410, 383 P.2d 74 (1963); see Knutsen v. Krippendorf, 124 Or.App. 299, 862 P.2d 509 (1993), rev. den. 318 Or. 381, 870 P.2d 221 (1994). That choice of inferences often turns on credibility determinations made by the fact finder, who has the advantage of determining the truth after seeing the witnesses at trial. See In re Estate of Elsie Rosenberg, 196 Or. 219, 243, 246 P.2d 858 (1952). [5][6][7] The overriding question in deciding if a will has been executed under undue influence is whether the influencer, by his or her conduct, has gained an unfair advantage by means [130 Or.App. 504] that reasonable persons regard as improper. In re Reddaway's Estate, 214 Or. 410, 419, 329 P.2d 886 (1958). The party seeking to revoke probate must show evidence of a confidential relationship between the testator and the influencer. 214 Or. at 420, 329 P.2d 886. The relationship must be one in which the person in whom confidence is reposed has dominance over the other. Doneen v. Craven, Executor et al, 204 Or. 512, 522, 284 P.2d 758 (1955); Knutsen v. Krippendorf, supra, 124 Or.App. at 308, 862 P.2d 509. The exercise of undue influence must be contemporaneous with the making of the will. Roblin v. Shantz, Executrix, 210 Or. 371, 378, 311 P.2d 459 (1957). [8][9] A showing of such a confidential relationship does not, by itself, give rise to a presumption of undue influence. There must also be the presence of suspicious circumstances, including such things as: (1) the participation of the beneficiary in the preparation or destruction of the will; (2) the lack of independent and disinterested advice regarding the will; (3) secrecy and haste in making the will; (4) an unexplained change in the donor's attitude toward those for whom he or she had previously expressed affection; (5) a change in the testamentary plan that ignores the natural objects of the testator's bounty or disregards the continuity of purpose running through former testamentary dispositions; (6) an unnatural or unjust gift, and (7) the donor's susceptibility to influence. In re Reddaway's Estate, supra, 214 Or. at 420, 329 P.2d 886. All factors need not be present before undue influence may be inferred. The most important circumstance is the beneficiary's participation in preparing and executing the will. Roblin v. Shantz, Executrix, supra, 210 Or. at 378, 311 P.2d 459; see Knutsen v. Krippendorf, supra, 124 Or.App. at 309, 862 P.2d 509. * * * * * We need not choose between the parties' contending definitions of "confidential relationship" because, even under respondent's approach, there are material factual disputes here as to the nature of respondent's relationship with testator. Appellants presented evidence that respondent started caring for testator after he had lost his wife of almost 40 years, that respondent moved in with testator five or six months after starting to care for him, that two weeks after their marriage the couple moved from Heppner where testator had spent his adult life, and that respondent interfered with the efforts of testator's children to continue a relationship with him. Viewing the inferences from those facts in the light most favorable to appellants, as we must, we conclude that there are issues of fact as to whether respondent was in a position of domination or superiority over testator. See Doneen v. Craven, Executor et al., supra, 204 Or. at 522, 284 P.2d 758; Knutsen v.Krippendorf, supra, 124 Or.App. at 309, 862 P.2d 509; McKee v. Stoddard, supra, 98 Or.App. at 523, 780 P.2d 736 (Buttler, J. concurring). [130 Or.App. 506] [11] We also conclude that there are issues of fact as to the existence of some suspicious circumstances. We agree with respondent that there was no evidence that respondent participated in the preparation of testator's will. There was also no evidence of secrecy or haste, and the disposition to decedent's wife, one son and grandchildren cannot be said to be an unnatural or unjust gift solely because other children were omitted. Nonetheless, we conclude that the facts surrounding decedent's change in attitude toward those children, his change in testamentary plan and his possible susceptibility to influence--all of which are interrelated--preclude summary judgment.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Rea v. Paulson, 131 Or App 743, 887 P2d 355 (1994)	Yes	No (deed)	Estate (Son by first marriage)	Son by second marriage who moved in with decedent in 1987	Action to set aside deed. Decedent had numerous medical problems and was dependent upon others for help. Decedent secretly obtained deed to residence. Will DOD Age	[2] Clearly, decedent had trust and confidence in Larry and was completely dependent on him in her daily life. He helped her with her finances and held her power of attorney. She was unable to write checks; Larry wrote them for her, and "she signed them as best she could." She was unable to come and go as she wished; after she moved in with Larry, she depended on him to take her places. Because Larry made it clear to decedent's other children that they were not welcome in his home, he succeeded in driving a wedge between them and their mother, with whom they had had a very close relationship until he appeared on the scene and took control of her life. He did not advise them of her death. We conclude that there was a confidential relationship between decedent and Larry and that, under the circumstances, he held a position of dominance over her; he was, literally, in the driver's seat. In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958). [3][4][5] Although one who claims that another has asserted undue influence has the burden to prove it, an inference of undue influence arises when, in addition to a confidential relationship, there are suspicious circumstances. In re Reddaway's Estate, supra, 214 Or. at 420, 329 P.2d 886. That inference, if unexplained, may be sufficient, although the burden of proof remains with the one asserting undue influence. In Re Reddaway's Estate, supra. Circumstances that give rise to suspicions of undue influence are set out in In re Reddaway's [131 Or.App. 748] Estate, supra, and several are present here. Larry took his mother to the title company in St. Helens, where he procured the deed, filled it out in his own handwriting and then took his mother to Longview, where she signed it before a notary public. He not only procured the deed, he also participated in its preparation. Although he contends that it was his mother's idea, if it was, it was the result of his having persuaded her that she would lose the house if she did not deed the property to him, and of his repeatedly telling her to make up her mind "about the deed." At that time, Larry knew that the state would not take her home away from her as long as it was her primary residence, even if she was receiving Medicaid. Therefore, his persistence in raising the question was false, and he knew it was false. He did not argue that, because the Rainier house was no longer her primary residence, there was a risk that the state would take it. That argument would have been disingenuous, given that it was he who had suggested that she rent her house and move in with him. Another important factor is the absence of independent advice. Although Ken and Barbara had advised decedent long before the deed was executed that she would not lose her house to the state if she maintained it in her name instead of deeding it to Ken, as she was contemplating at the time, Larry had persuaded her that Ken was wrong and that she should deed it to him. Under the circumstances, independent advice was essential, and Larry breached his fiduciary duty to her by not seeing to it that she get independent advice. We also consider the change in attitude of decedent toward her other children after Larry took charge of his mother. Larry conceded that he had little good to say to his mother about his half-brothers and -sister. More than that, the record shows that he told them that they were not welcome at his home, and that when Barbara tried to call her mother on the telephone, he would get on another line to interfere with the call. As a result, the relations between decedent and her other children deteriorated after Larry took over the care of their mother. We have no reason to doubt that decedent was grateful to Larry for his having helped her during her final days, or that she loved him. However, the circumstances leading up to [131 Or.App. 749] the conveyance, and the preparation and signing of the deed, lead us to conclude that it was the product of undue influence exerted by Larry on his mother.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
McNeely v. Hiatt, 138 Or App 434, 909 P2d 191 (1996)	Yes	No	Grandchildren by deceased daughter	Daughter (CPA) who returned home in late 1970's to help parents manage "Ranch" and who was trustee of her father's credit shelter trust	In 1979 decedent's husband became terminally ill, and he and decedent executed wills and living trusts which would distribute valuable "Ranch" property equally among three children plus grandchildren by deceased daughter to share one quarter. Husband then died, and half of Ranch went into credit shelter trust of which proponent was trustee. In 1984 proponent personally arranged to have decedent's will revised to exclude grandchildren by deceased daughter. As trustee she also sold trust's interest in "Ranch" to decedent for less than market value. Will 1984 DOD 11/25/1991 Age	[440] Hiatt first challenges the trial court's invalidation of the will. According to Hiatt, the trial court erred in setting aside the 1984 will without having made a specific finding that Hiatt held a position of "dominance" over Dollie Crockett. Plaintiffs argue that no such finding is required. We conclude, on *de novo* review, that, regardless of whether such an explicit finding is required, the evidence in the record shows that Hiatt held a position of dominance over Dollie Crockett. Dollie relied exclusively on Hiatt, largely because of Hiatt's experience and professional training. Hiatt exercised near exclusive control over the preparation of the 1984 will and took steps to ensure that others would not be in a position to influence Dollie Crockett in the process. Hiatt alternatively argues that the trial court erred in invalidating the will, because its decision was based on an incorrect application of the burden of proof. Hiatt notes that the trial court held that, once plaintiffs demonstrated undue influence, the burden "shifted" to Hiatt to disprove undue influence. Plaintiffs argue that the trial court's remark must be understood to mean only that Hiatt failed to controvert their proof of undue influence. We agree with plaintiffs. Although the trial court referred to a "burden" being "shifted," it is clear, in context, that the trial court was not attempting to shift plaintiff's burden of proof. Instead, the trial court, quite correctly, was referring to Hiatt's "burden" of overcoming the adverse presumption of undue influence that follows from proof of a confidential relationship in the context of suspicious circumstances. As the Supreme Court [441] explained in *In re Reddaway's Estate*, 214 Or 410, 329 P2d 886 (1958): "The existence of a confidential relationship * * * may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference.'" *Id*. at 420 (quoting *In re Southman's Estate*, 178 Or 462, 482, 168 P2d 572 (1946)). Similarly, in *Nease v. Wilson, Clark,* 6 Or App 589, 488 P2d 1396, *rev den* (1971), this court commented that "[t]he burden of proof as to undue influence is upon the contestant. However, where a confidential relationship exists between the testator and a beneficiary, along with other suspicious circumstances, the burden of production is placed upon the proponent[.]" *Id*. at 596. (Citations and footnote omitted.) That is what the trial court said in this case, and it was not error to do so. Hiatt argues that, even if it was not error to impose on her an evidentiary burden, the fact is that she carried it, by establishing that Dollie Crockett was not unduly influence by Hiatt. We disagree. Where a confidential relationship has been shown to exist between a testator and a beneficiary, 'slight evidence' is sufficient to establish undue influence. *In re Reddaway's Estate*, 214 Or at 420. The evidence in this case shows that Hiatt, a beneficiary, participated in the preparation of Dollie Crockett's 1984 will; that Hiatt failed to ensure that Dollie Crockett obtained independent and disinterested advice; that the 1984 will and sale of the Zahnie Crockett's trust's interest in the Ranch was accomplished with haste and in a shroud of secrecy; that the change in Dollie Crockett's estate plan followed a close association with [proponent] and resulted in Hiatt obtaining a larger interest in the Ranch at the complete expense of plaintiffs, who otherwise would naturally be expected to have received at least some interest in it. Indeed, the evidence demonstrates nearly all of the factors that are to be considered in determining whether undue influence has occurred. *Id.; Van Marter v. Van Marter*, 130 Or App 500, 504, 882 P2d 134 (1994). Hiatt's evidence to the contrary is unpersuasive. It consists of testimony from witnesses to the signing of the will [442] that Dollie had said that it reflected her wishes and from other witnesses who knew Dollie for many years and were of the opinion that she knew what she was doing. On *de novo* review, we conclude that that evidence is insufficient to overcome plaintiffs' demonstration of undue influence. The fact that Dollie Crockett appeared fit and active and expressed a desire to follow the advice of Hiatt does not disprove that Hiatt exercised undue influence in the process. The trial court did not err in declaring the 1984 will invalid. [The court also affirmed the decision setting aside the sale of the "Ranch" interest by the trust.]

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Sangster v. Dillard, 144 Or App 210, ____ P2d ____ (1996)	Yes (conceded)	No	Grandchild by son's first wife	Son	Decedent did not raise her son, but left him with father and later her sister until she married second husband and son moved in with her at age 15. Decedent developed fondness for grandchildren by son's first wife. Decedent and husband moved to Cooper Spur resort and operated it with son, but complained of excessive loans to son. In 1988 decedent did will benefitting grandchildren and excluding son. She and husband then sued son for fraud, but suit dropped after husband's death. Decedent's health was failing. Son arranged with attorney who had represented him in suit to prepare will leaving estate to son. Will signed in son's truck outside law office. No independent advice or contract with attorney who drew prior will. Will 2/9/93 DOD 3/6/93 Age 76	[215] Underlying the doctrine of undue influence is the principle that "the law will not permit improper influences to control the disposition of a person's property." *In re Reddaway's Estate*, 214 Or 410, 418, 329 P2d 886 (1958). Although [216] undue influence is difficult to define, the question is generally whether the beneficiary, by his or her conduct, gained an unfair advantage by means that reasonable persons would regard as improper. *Id*. at 419; *Van Marter v. Van Marter*. 130 Or App 500, 503-504, 882 P2d 134 (1994). Undue influence is not the equivalent of coercion or duress; the focus is not so much on the testator's lack of consent as on the alleged influencer's lack of conscience in persuading the testator to act as he did. *Reddaway*, 214 Or at 419-20. The burden of proving undue influence is on the party contesting the will. *Knutsen v. Krippendorf*, 124 Or App 299, 308, 862 P2d 509 (1993), *rev den* 318 Or 381 (1994). Undue influence is rarely susceptible to direct proof of actual influence on the testator. *Reddaway*, 214 Or at 427; *In re Estate of Urich*, 194 Or 429, 445, 242 P2d 204 (1952). Instead, an inference of undue influence arises where the evidence establishes the existence of a confidential relationship, the beneficiary's dominance over the testator and the presence of suspicious circumstances surrounding execution of the will. *Knutsen*, 124 Or App at 308; *Van Marter*, 130 Or App at 504; *O'Brien v. Belsma*, 108 Or App 500, 505, 816 P2d 665 (1991). The will's proponent then bears the burden of producing evidence negating the inference. *McNeely v. Hiatt*, 138 Or App 434, 440-41, 909 P2d 191, *adhered to on recon* 142 Or App 522, 920 P2d 1150 (1996); *Knutsen*, 124 Or App at 308-09; *O'Brien,*, 108 Or App at 505-06. * * * Dominance does not necessarily require proof of an authoritative, controlling person by bullying or directing the actions of a subservient one. It may exist more subtly "such as by suggestion or persuasion or by fostering a sense of need and dependence." *Knutsen*, 124 Or App at 309. We have found dominance where the testatrix is isolated from the outside world and relies almost exclusively on the beneficiary to meet her daily needs. *Carlton v. Wolf*, 21 Or App 476, 477, 483, 535 P2d 119 (1975) (beneficiary routinely bathed and helped into bed elderly testatrix, who lived alone, [217] had broken him and suffered from variety of health problems); *see also Wismer v. U.S. National Bank*, 112 Or App 650, 651 and n 2, 829 P2d 1052 (1992) (beneficiary lived alone with testator, provided transportation and did chores, yard work and cooking); *In re Estate of Elise Rosenberg*, 196 Or 219, 232, 246 P2d 858 (1952) (beneficiary tended to all personal needs, took care of correspondence and was sole companion to ill, bedridden testatrix). * * * * * [218] Although the record contains no direct evidence of defendant's dominance, undue influence is ordinarily established by circumstantial evidence. *Reddaway*, 214 Or at 427; *Urich*, 194 Or at 445. * * * Where such a confidential relationship exists, "slight evidence" of suspicious circumstances is sufficient to raise an inference of undue influence. *Reddaway*, 214 Or at 420; *McNeely*, 138 Or App at 441. These circumstances include: " (1) the participation of the beneficiary in the preparation or destruction of the will; (2) the lack of independent and disinterested advice regarding the will; (3) secrecy and haste in making the will; (4) an unexplained change in the donor's attitude toward those for whom he or she had previously expressed affection; (5) a change in the testamentary plan that ignores the natural objects of the testator's bounty or disregards the continuity of purpose running through former testamentary dispositions; (6) an unnatural [219] or unjust gift, and (7) the donor's susceptibility to influence." *Van Marter*, 130 Or App at 504, *citing Reddaway*, 214 Or at 421-26.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Ramsey v. Taylor, 166 Or App 241 (2000)	No	yes	son	"Significant other" much younger woman caretaker, last of a series of woman companions whose affections the decedent had won with gifts	The decedent's wife died in 1984, after which he suffered depression and alcoholism. He had a bad relationship with his family, accusing them of stealing from him. Made repeated revisions to will and trust over years. Son claimed decedent manipulative and that he wanted family "to kiss his ass more than we did". Beneficiary took decedent to his attorneys when will and trust re-done, but did not stay in room during discussions. She took him to all appointments. Beneficiary helped arrange for friends to visit over last days. Trial court found undue influence, but Court of Appeals reversed. Will and trust 8/10/95 DOD 8/21/95 Age "in his 80s"	[In Reddaway, the Supreme Court noted that there are two distinct approaches to analyzing undue influence. In one approach, the basic question is whether the testator was induced to execute an instrument that, in reality, did not express the testator's wishes but the wishes of another. 214 Or at 418. The other approach, and the one the court ultimately adopted, focuses not on the testator's freedom of will but on "the nature of the influencer's conduct in persuading the testator to act as he does." Id. at 419. Under that approach, undue influence "denotes something wrong, according to the standards of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal." Id., quoting Morris v. Morris, 192 Miss 518, 6 So 2d 311 (1942) (internal quotations marks omitted). Under this "moral standard" approach, "the consequences of upholding the influenced gift are important. It would be expected that there would be less concern with the influencer's motive in a contest between him and the state claiming by escheat than there would be in a contest between him and the donor's deserving spouse." Reddaway, 214 Or at 419. The court went on to devise a test by which this "moral standard" could be applied in undue influence cases. [262] First, a court must determine whether a "confidential relation" existed between the testator and the challenged beneficiary. Such a relationship is one "'such as to indicate a position of dominance by the one in whom confidence is reposed over the other.'" Id. at 421, quoting Doneen v. Craven, Executor, et al., 204 Or 512, 522, 284 P2d 758 (1955). The court specifically noted that such a relationship may exist where the testator is guided by the judgment and advice of another, and it may exist between a patient and a nurse. Id. If a confidential relationship exists and "suspicious circumstances" are shown, then "'the beneficiary [must] go forward with the proof and present evidence sufficient to overcome the adverse inference.'" Id. at 420, quoting In re Southman's Estate, 178 Or 462, 482, 168 P2d 572 (1946). The Reddaway court then enumerated seven criteria by which to evaluate whether "suspicious circumstances" are present: (1) whether the challenged beneficiary participated in the preparation of the will; (2) whether the testator received independent advice from an attorney in preparing the will; (3) whether the will was prepared in secrecy and haste; (4) whether the decedent's attitude toward others had changed by reason of his or her relationship with the challenged beneficiary; (5) whether there is "a decided discrepancy between a new and previous wills of the testator; and continuity of purpose running through former wills indicating a settled intent in the disposition of his estate"; (6) whether the disposition of the estate is such that a reasonable person would regard it as unnatural, unjust or unfair; and (7) whether the testator was susceptible to undue influence. Id. at 421-27. We turn to the application of these factors to the present case. I. Confidential Relationship We agree with the trial court that a confidential relationship existed between Senior and Taylor. Evidence in the record establishes not only that Taylor and Senior spent most of their time together in the last few months of his life but also establishes that Taylor took increasing responsibility over that time in managing all aspects of Senior's day-to-day life, including procuring and administering his medications, arranging and driving him to medical and business appointments, caring for his house and clothes, providing his food,]263] and managing his checkbook. Taylor and First Interstate argue that no confidential relationship has been established because there is no direct proof that Taylor offered, or Senior accepted, business or financial advice from her. They further point out that an abundance of evidence demonstrates that Senior had strong opinions and ideas about what to do with his money. As to the question of direct evidence that Taylor gave business or financial advice, we disagree that direct evidence is necessary to establish a confidential relationship under these circumstances. Unrebutted evidence establishes that Senior reposed confidence in Taylor to handle most aspects of his daily life, including his finances. See Albright v. Medoff, 54 Or App 143, 145, 634 P2d 479 (1981) (evidence that testator added beneficiary as authorized signatory to checking account was evidence of confidential relationship). The evidence also amply demonstrates that Senior made numerous financial decisions in the final months of his life that provided monetary benefits to Taylor. Moreover, evidence that Senior was strong-minded does not directly bear on the question of whether he had a confidential relationship with Taylor; that evidence is more properly considered in conjunction with the "susceptibility to influence" factor discussed below. Given the circumstances, we conclude that a confidential relationship existed between Senior and Taylor. The question, then, is whether "suspicious circumstances" are present that would require Taylor to go forward with "'evidence sufficient to overcome the adverse inference'" of undue influence. Reddaway, 214 Or at 420, quoting Southman's Estate, 178 Or at 482. We turn to each of the factors listed by the Reddaway court to evaluate "suspicious circumstances." A. Procurement This factor concerns whether the beneficiary participated in the preparation of the challenged will. There is evidence that, before Senior's meeting with his attorneys on August 7, Taylor assisted Senior in preparing a revision of the previous trust document, substituting herself for Philomena King as a beneficiary. It is undisputed that the documents that Senior actually signed on August 10 did not reflect the same changes in the disposition of his estate as did [264] the changes that Taylor assisted in preparing. However, it also is undisputed that the documents actually executed on August 10 did, in fact, give a greater amount of Senior's estate to Taylor than did the revision that Taylor helped to prepare. In sum, we find that there is sufficient evidence of "procurement" to suffice as a "suspicious circumstance." More attention is given to this factor in the section below, concerning whether evidence was presented to overcome the "adverse inference" drawn from the presence of a confidential relationship and suspicious circumstances. B. Independent Advice This factor concerns whether Senior "had the benefit of the independent advice of his own attorney in drawing up the new will" that benefitted Taylor. Reddaway, 214 Or at 422. Also relevant to this factor is whether the beneficiary was present during the meeting with the attorneys. Id. at 423. That a beneficiary made the appointment and escorted a testator to an attorney's office do not, in themselves, support an inference of undue influence. See Knutsen v. Krippendorf, 124 Or App 299, 309-10, 862 P2d 509 (1993), rev den 318 Or 381 (1994). Evidence in the record establishes that Senior met with his attorneys on two occasions to prepare his final will and trust and that Taylor was not present at those meetings. Although we have found it to be a suspicious circumstance where a testator is taken to a beneficiary's attorney rather than his or her own attorney to prepare a will, see Sangster v. Dillard, 144 Or App 210, 218, 925 P2d 929 (1996), mod. on other grounds 146 Or App 105, 931 P2d 815 (1997), it is undisputed that Senior consulted his own attorneys, who had previously prepared a will and trust for him. Moreover, one of the attorneys testified that Senior told him that Taylor had been of no help to him in deciding how to dispose of his estate. Also, the attorneys discussed with Senior his intent to benefit Taylor and the reasons why he was benefitting Taylor to a greater extent than he was benefitting his family. We conclude that no "suspicious circumstance" was present regarding whether Senior received independent advice concerning his last will and trust.

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Ramsey v. Taylor, 166 Or App 241 (2000) (cont.)						attendant on the making of Senior's final will and trust. As stated in the facts recited above, Senior attempted to talk to both John II and John III about the changes he planned to make to his will and trust on August 4, several days before consulting his attorneys. This precipitated the disagreement described above. Senior again attempted to discuss the changes with John III on August 10. There is no evidence from which it can be inferred that Senior's final will and trust were prepared in secrecy. Given Senior's history of threatening and following through on his threats to cut family members from his will, it is entirely consistent with Senior's past behavior that he would inform his family of his intent to reduce their prospective inheritances. As to haste, the evidence shows that Senior's final will and trust were prepared in relative haste, undoubtedly due to his deteriorating physical condition. We do not believe, however, that haste in preparing and executing a will because the testator understands that he is terminally ill is the type of haste that the court had in mind when it declared that "haste and secrecy" could be a "suspicious circumstance." We do not consider the relative haste with which Senior prepared and executed his final will and trust to be a "suspicious circumstance" in light of the fact that no secrecy was involved. D. Change in Decedent's Attitude Toward Others This factor concerns whether there has been an unexplained change in the testator's "attitude toward those for whom he had previously expressed affection[.]" Reddaway, 214 Or at 423. The trial court found that, although Senior had had negative feelings toward his family before Taylor even met Senior, Senior "had been kept away from his family and friends by Ms. Taylor during the last two months of his life which had an effect on his attitude toward his family." On de novo review, we disagree with the trial court's factual conclusion. There was evidence that Senior spent a great deal of time with Taylor in June and July 1995 and therefore often was not at home. He also spent a great deal of time with Taylor in August during his final illness, when she stayed at his home with him. There also was evidence that Senior did not wish to see John II, as shown by his statement on August 4 to his nurse that "I haven't talked to him in a long time and I don't want to talk to him now." Further evidence is John II's [266] behavior in choosing to remaining outside of Senior's house on August 16 while John III attempted to have the sheriffs deputy remove Taylor from the house, because the Ramseys understood that John II's presence would upset Senior. There was evidence that Taylor was protective of Senior, that she was upset by John II's behavior in causing Senior to cry on August 4, and also when John III pulled Senior from his bed on August 16th, causing him pain. There is also evidence that Taylor was irate with guests such as Kasser and her friends when they were rude to her and that she engaged in verbal battles with John II and John III when they threatened her. However, there also was evidence that John II, John III, and Ron Ramsey all had occasion to be alone with Senior during the last month of his life without Taylor's interference (although there is no evidence that Ron Ramsey made any effort to visit Senior until the day before his death). There also was evidence that Taylor facilitated visits by Senior's friend Jill Brogdon and his niece Nan May during the final week of his life, at his request. The evidence does not support the trial court's conclusion that Taylor kept Senior from his family and friends during the final months of his life. As to whether Senior's attitude toward others changed during the final months of his life when he was involved in a relationship with Taylor, there is some evidence that his relationship with his family, and in particular, his relationship with John II, deteriorated during this time. The question, however, is whether there was an "unexplained" change in attitude toward one for whom the testator "had previously expressed affection." Reddaway, 214 Or at 423. As the trial court acknowledged, Senior's disaffection for John II had begun well before Senior even met Taylor. In fact, from the time that John II moved out of Senior's house in 1991 due to their disagreements, until Senior executed his 1994 will and trust, Senior had entirely disinherited John II. Even from that time in 1994 to mid-1995, when Senior's and John II's relationship arguably had improved, Senior expressed his dissatisfaction with John II to his attorney and also told the Age Wise worker Gordon that John II invited him to coffee only to get Senior to pay for it. Given the history of the stormy relationship between Senior and John II and the [267] details of the argument between them on August 4 that culminated with Senior ordering John II from his house, it would be difficult to say that there was an "unexplained" change in Senior's attitude toward John II that can be attributed to Taylor's influence. Compare Sangster, 144 Or App at 217-18 (testator who underwent an "extreme change in attitude" toward the grandchildren to whom she intended to leave her estate up until the last month of her life was under "undue influence"); cf. Knutsen, 124 Or App at 309 (testator's."drastic change" in attitude toward new beneficiary and previous beneficiary shortly before will was executed was indicative of new beneficiary's dominance over testator). E. Change in the Testator's Plan of Disposing of His Property This factor concerns whether there is "a decided discrepancy between a new and previous wills of the testator; and continuity of purpose running through former wills indicating a settled intent in the disposition of his estate[.]" Reddaway, 214 Or at 424 citing In re Estate of Elise Rosenberg, 196 Or 219, 230, 246 P2d 858 (1952). Frankly, the only continuity of purpose that can be gleaned from Senior's prior wills and trusts is his purpose of disinheriting beneficiaries with whom he had recently fought and disinheriting or reducing the inheritance of those to whom he had already given substantial gifts. To summarize: In the mid to late 1980s, Senior had Brogdon write out revisions to his will on several occasions after threatening to cut off family members who either asked for or received funds from him. In 1990, after buying a house in which he allowed John III's family to live, Senior executed a will leaving John III 10 percent less than he was leaving to John II and Ron Ramsey. After giving the house to John III in 1991, Senior disinherited him entirely in his next will. After John II moved out of Senior's new house in 1991 due to their disagreements, Senior disinherited him, as well. Evidence showed that Senior provided living accommodations to his granddaughter Davis around that time and that the next trust, the one prepared but never executed in 1993, disinherited Davis, but reinstated John II, John III and Ron Ramsey as minor beneficiaries. There was evidence that Senior gave money to his granddaughter Zabel and that she later was omitted from the 1994 will and trust. [268] It is also notable that the will and trust benefitting Taylor was not the first to provide generous benefit to one of Senior's "significant others." In short, over the last decade of his life, Senior's various wills and trusts did not reveal any settled intent as to the disposition of his estate. Although all of them, including the last, benefitted family members to some extent, which family members were benefitted varied greatly, apparently based on Senior's most recent dealings with them. F. Unnatural or Unjust Gift This factor was described by the Reddaway court as follows: If a testator "make[s] an unfair or unnatural disposition, it is a circumstance to be weighed in determining whether improper influence had been used." 214 Or at 424. This factor is, perhaps, one of the most elusive. The Reddaway court indicated that a testator may "favor his mistress over his wife, or he may disinherit a deserving son," id., but that such a disposition would be considered "unnatural" and would constitute a circumstance to be

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Ramsey v. Taylor, 166 Or App 241 (2000) (cont.)						solely for the purpose of inducing a gift, the court will ordinarily find a way to deprive the donee of the fruits of his deception." Id. at 426. Here, the testator has chosen to favor a "significant other," or "mistress" as the Reddaway court would put it, to a greater extent than he has favored his family members. Moreover, the testator had known this "significant other" for only a little more than two months at the time of his death. Also, although there is no direct evidence that Taylor generated Senior's affection "solely for the purpose of inducing" [269] him to make gifts, we can infer from the circumstances that Senior's generosity toward her may have had something to do with her willingness to show him affection. We take into account the fact that Senior was in his 80s at the time he met Taylor and clearly was not easy to get along with and the fact that Taylor was in her 30s. We also take into account that, within weeks of meeting Senior, Taylor took a vacation with him and began accepting very generous gifts of cash from him. We conclude that this evidence is sufficient to describe Senior's choice to benefit Taylor as a "suspicious circumstance" under the test of Reddaway. However, we will address this topic again in the section below concerning whether sufficient evidence was presented to overcome the "adverse inference" drawn from the presence of a confidential relationship and suspicious circumstances. G. Donor's Susceptibility to Influence Finally, the court must consider the "physical and mental condition of the donor" in determining whether a disposition of property was the result of undue influence. Id. at 426. The court in Reddaway concluded that, under the facts of that case, the testator's "mental and physical condition made him an easy mark for one who might wish to influence him." Id. at 427. The court did not, however, "think that it is necessary to recite this evidence." Id. Looking back to the statement of facts in that case, though, we can discern the evidence to which the court referred. The testator in Reddaway came under the care of the caretaker/mistress at a time when he was "almost helpless, due to a series of paralytic strokes." Id. at 414. Although there was evidence by a physician that the testator's mind was clear, id. at 415, there also was evidence that a written request was made to his attorney, ostensibly by the testator, at a time when he was unable to write without someone guiding his hand. Id. at 416. The court concluded that the evidence was "quite clear" that the testator "was emotionally unstable, probably senile, during the period that influence was alleged to have been exerted." Id. at 416-17. Similarly, in Knutsen, 124 Or App at 312, the court found that a testator who was "physically ill, on medication, confused, disoriented and suffering from memory loss" was susceptible to influence. [270] By comparison, the evidence in this case shows that Senior remained fairly physically active until the last few days of his life, when the pain of his cancer rendered him relatively immobile. Although he clearly was deteriorating quickly due to the rapid spread of his cancer, he was not physically helpless or feeble until after he executed his final will and testament. Concerning Senior's mental susceptibility to undue influence, we find no evidence of senility or instability or that his mental condition made him an "easy mark." Reddaway, 214 Or at 427. Also, there is no evidence that he was confused, disoriented, or suffering from memory loss. Knutsen, 124 Or App at 312. The testimony of a great number of the fact witnesses, and even the expert testimony of Dr. Luther who opined that Senior was susceptible to influence, convinces us that Senior was not, in fact, susceptible to undue influence. The evidence demonstrates that Senior had, for approximately the last decade of his life, consciously chosen to get attention, indeed homage, from others either by giving them generous gifts or promising them generous parts of his estate. He appears to have been fully aware that he was using his money to obtain attention from his family and friends. We do not agree with Dr. Luther's assessment that Senior's use of his money in this manner demonstrates vulnerability to undue influence. Rather, it demonstrates that Senior was intent on influencing others, not that he was influenced by others. II. Did Taylor Overcome the Adverse Inference? Under the rubric provided by Reddaway, we have concluded that Taylor had a confidential relationship with Senior and that two suspicious circumstances were attendant on the making of his final will and trust. The question, then, is whether there is evidence in the record to overcome the adverse inference that must be drawn from our findings thus far. We believe that there is. The first suspicious circumstance that we found was that Taylor assisted Senior in drafting revisions to his 1994 trust before he consulted his attorneys in August 1995. In [271] light of other evidence in the record, however, we find that any adverse inference to be drawn by this circumstances has been overcome. The record shows that Senior had, for about the last decade of his life, relied on his female companions to write down potential changes to his wills and trusts. Taylor certainly was not the first companion to do so. Moreover, although Senior had assistance from his companions in drafting potential revisions, it is clear from the testimony of his attorneys that, at least for the 1994 and 1995 revisions, he sought and received independent advice from his attorneys, then made additional changes in the disposition of his estate before executing the documents. Furthermore, one of Senior's attorneys testified that, before Senior executed his final will and trust, Senior stated that Taylor had been of no help to him in deciding how to dispose of his estate. We conclude that Taylor has overcome any adverse inference to be drawn from her participation in preparing a preliminary draft of Senior's final will and trust. The other suspicious circumstance that we have found to be present in this case is that Senior's choice to benefit a "significant other" whom he had known for only a few months rather than leave his entire estate to family members and that this may be termed an "unnatural" disposition under the Reddaway test. There are two facets to our analysis of whether a gift is, in fact, an "unnatural" one. The focus in our discussion above, in which we concluded that the disposition here qualified as "unnatural," was on Taylor's reasons for fostering a friendship and accepting large gifts from a much older man. Our focus in considering whether she has overcome the adverse inference to be drawn from those circumstances is on the other facet of the equation--did the testator, by making such a disposition, actually "disinherit a deserving" family member, Reddaway, 214 Or at 424, or make the "gift at the expense of a faithful" family member? Id. at 425. First, we note that this case is unlike many of the cases that find a gift to be "unnatural" when it deprives a family member of an amount that the child would have expected to take under previous dispositions. In this case, the record reflects that, under most of his previous wills and trusts, Senior wished John II either to receive nothing or to [271] receive a relatively small portion of the estate. Even the previous will and trust most beneficial to John II allocated to him only 36 percent of the estate. There is no indication in the record that Senior ever intended John II to be the primary beneficiary of any will and trust. Second, the record amply demonstrates that Senior did not perceive John II as either "deserving" or "faithful" for a long period of time before Taylor came on the scene. Clearly, Senior felt he was entitled to more attention and respect from his family, as shown by his numerous comments to others. John II, on the other hand, testified that Senior wanted him to "kiss his ass" and that he was unwilling to "lick his feet." The final disagreement between John II and Senior, which occurred only days before he executed his

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Ramsey v. Taylor, 166 Or App 241 (2000) (cont.)						Finally, and perhaps most important to our analysis, we take seriously Senior's sworn declarations of August 10 and 17, in which he made it clear why he was choosing to benefit Taylor to a greater extent than John II: Senior declared that John II had been "irresponsible, contentious, and constantly seeking financial support" from Senior, whereas Taylor had been providing him with "care and support." Senior also declared that John II had, in recent years, "been more concerned with my wealth than my well being." On this record, we feel compelled to honor Senior's wishes as to the disposition of his estate. Although Taylor was on the scene only for a short time, she provided Senior the care and comfort that he wanted and needed during the final stages of a very painful illness. The Ramsey relatives, on the other hand, and we refer specifically to John II and John III, provided Senior no support at the end of his life, expressed opinions that he needed no support or care and was only acting ill or upset to get attention from Taylor and [273] his nurses, fought with him about his money and estate and, in general, acted exactly as Senior said: "more concerned with [Senior's] wealth than [his] well being." Senior's declarations on August 10 and 17, as supported by other evidence in the record, overcome any adverse presumption that his bequest to Taylor is "unnatural" or "unjust" under the circumstances. We therefore conclude that the trial court erred in setting aside the portions of Senior's final will and trust that benefitted Taylor. For essentially the same reasons set forth above, we also conclude that the trial court erred in setting aside Senior's inter vivos gifts to Taylor.
Smith v. Ellison, 171 Or App 289 (2000)	yes	(Deed) Part yes part no	Grantor on deed	Daughter who helped on purchase of property and was on joint account	Mother moved from California to be near daughters to help care for husband with Altzheimer's. Daughter found home and helped get it purchased in mother's name, then moved in before mother arrived. Daughter received one-third interest in exchange for promise to care for husband if grantor died. Shortly after husband died daughter prepared deed for remaining 2/3 interest while grantor a "basket case". Trial court upheld both deeds; Court of Appeals set aside second deed.	NOTE: Respondent did not appear in Court of Appeals. [293] "Undue influence" has been defined as "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." *Restatement (Second) of Contracts § 177*(1) (1981). *See also Egr v. Egr et al,* 170 Or 1, 7, 131 P2d 198 (1942) (quoting substantially similar passage from *Restatement of Contracts § 497*). When undue influence is exerted by one party to a contract [294] on the other party and that influence induces assent, the contract is voidable by the victim of the influence. *Restatement (Second) of Contracts* §177(2). Moreover, when there is a confidential relationship between the parties, only slight evidence is necessary to establish undue influence. *Penn v. Barrett,* 273 Or 471, 475, 541 P2d 1282 (1975). Finally, when there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. That inference may be sufficient to establish undue influence. *Rea v. Paulson,* 131 Or App 743, 747, 887 P2d 355 (1994). The Supreme Court has identified several "suspicious circumstances" that bear on the existence of undue influence, including: (1) whether the recipient of the gift participated in arranging or executing the deeds, (2) whether the alleged victim of the influence received independent advice, (3) whether the conveyances were conducted in secrecy and with haste, (4) whether there was a change in the donor's attitude toward others, (5) whether the conveyance deviated from the donor's previous plans for disposing of the property, (6) whether the gift is unnatural and unjust, and finally (7) whether the donor is susceptible to influence. *Penn,* 273 Or at 476-80. As the court has pointed out, the emphasis in undue influence cases should be on "the unfairness of the advantage which is reaped as a result of wrongful conduct. * * * Equity acts because there is a want of conscience on the part of the donee, not want of consent on the part of the donor." *Id.* at 474-75 (citations and internal quotation marks omitted). In this case, we conclude that a confidential relationship existed between the parties. "A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interests in mind." *Knight v. Woolley Logging Co.,* 278 Or 691, 696, 565 P2d 748 (1977) (citations and internal quotation marks omitted); *see also In re Reddaway's Estate,* 214 Or 410, 329 P2d 886 (1958) (describing a confidential relationship as a "relationship * * * such as to indicate a position of dominance by the one in whom confidence is reposed over the other") (citations and internal quotation marks omitted); *Kugel v. Pletz,* 22 Or App 248, 252-53, 538 P2d 962 (1975) ("A [295] confidential relationship * * * means a fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other.") (citations, emphasis, and internal quotation marks omitted). Although the relationship between a parent and child is often confidential, whether a confidential relationship exists in a given case is a question of fact. *Restatement (Second) of Contracts § 177,* comment a; *see also Egr, 170* Or at 7.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Anderson v. Hagedorn, 171 Or App 425 (2000)	no	yes	siblings, nieces and nephews	Paid care giver	Decedent lifelong bachelor who suffered disabling stroke in 1996. Niece began taking care of his finances. executed first estate plan in 1997 with family as beneficiaries. Niece hired caretaker. Relations deteriorated as soon as decedent returned home after hospital/nursing home stay. He complained about nieces financial management, and family complained about care taker. Siblings wanted to put him in nursing home and initiated protective proceedings. New will provided life estate/trust for care taker and remainder at her death to hospice Will and trust 2/98 DOD 3/98 Age 82	[429] We follow the framework established by *In re Reddaway's Estate,* 214 Or 410, 329 P2d 886 (1958), to analyze plaintiffs' undue influence claim. That framework requires us first to determine whether a "confidential relationship" existed between the testator and the challenged beneficiary and, if one did exist, to evaluate whether "suspicious circumstances" were present as defined by seven enumerated factors. The presence of a confidential relationship under suspicious circumstances raises an inference of undue influence, and the beneficiary must then produce evidence to overcome that inference. *See Ramsey v. Taylor,* 166 Or App 241, 262, 999 P2d 1178, *rev den* 331 Or 244 (2000) (describing process). Because it resolves the issue before us, we analyze only the February 1998 will. We agree with the trial court's conclusion that a confidential relationship existed between Hone and Hagedorn. That conclusion warrants no further discussion, so we proceed to the remainder of the *Reddaway* analysis. [Court applied a ritualistic factor by factor review and concluded that all suspicious circumstances were overcome "by testimony and evidence in the record".]
Walker v. Roberds, 182 Or App 121 (2002)	no	yes	son	son and "primary family contact for physicians and social service personnel" while in nursing home	Decedent executed multiple wills changing shares between sons by first and second marriage. 1996 will left estate to son by second marriage. 1997 will left estate half to each son. Second marriage son probated 1996 will, and first marriage son contested by offering 1997 will (rolls of contestant and respondent reversed in pleading, since issue was validity of 1997 will) At time of 1996 will decedent was living with son by second marriage. Some history of stress with son from second marriage. At time of 1997 will decedent lived in nursing home. At decedent's request son by first marriage took her to attorney who had done 1994 will to prepare 1997 will without other participation by that son. Will 3/18/97 DOD9/97 Age	[126] In evaluating first Roberds' contention that the 1997 will was executed as a result of Walker's undue influence, we bear in mind that the burden of proving undue influence is on Roberds. In re Reddaway's Estate, 214 Or 410, 418, 329 P2d 886 (1958); Sangster v. Dillard, 144 Or App 210, 216, 925 P2d 929 (1996), mod 146 Or App 105, 931 P2d 815 (1997). Roberds can meet that burden by raising an inference of undue influence by virtue of evidence establishing (1) the existence of a confidential relationship between Walker and Luella, (2) Walker's dominance over Luella, and (3) the presence of suspicious circumstances surrounding the execution of the will. Sangster, 144 Or App at 216. We have considered the evidence anew and find that Walker and Luella had a confidential relationship and that he dominated her by reasons of their personalities and her weakened health. For the following reasons, however, there were no suspicious circumstances surrounding the execution of the will. In evaluating whether suspicious circumstances existed surrounding the execution of the 1997 will, we consider each of the factors discussed in Reddaway, 214 Or at 421-26. [128] We are not in a position to second-guess a trial court's evaluation of the demeanor of witnesses. Although our review is de novo, the trial court's findings based on the credibility of witnesses are entitled to great weight. Krueger v. Ropp, 282 Or 473, 478-79, 579 P2d 847 (1978). However, the trial court's findings with regard to Walker's influence over Luella's finances and her execution of the 1997 will do not match up with the undisputed evidence that, in the last years of her life, Luella was fiercely independent with regard to her personal finances. She guarded her finances closely, keeping her check book and paper work in her room or by her side. * * * [129] Considering each of the Reddaway factors, we find that there were no suspicious circumstances giving rise to an inference of undue influence in the execution of the 1997 will. Nor has Roberds met his-burden of proving undue influence in any other manner. There is no indication that Walker had any influence on Luella with respect to her execution of the 1997 will or that he had any motive to so influence her. The only evidence is that he did not learn of the March 1996 will disinheriting him until after Luella's death. He was aware of the contents of the next most recent will, which had disposed of Luella's property equally between Sommers and Walker; the 1997 will renewed that disposition. Even if Walker had influenced Luella's decision to rewrite her will, we find that that conduct did not result in his obtaining an unfair advantage over other beneficiaries. See Reddaway, 214 Or at 419 (in evaluating evidence of undue influence, the question is generally whether the beneficiary, by his or her conduct, gained an unfair advantage by means that reasonable persons would regard as improper). The disposition dividing her estate equally between her two sons with whom she had a relationship was natural and equitable. We accordingly conclude that there was no undue influence in the execution of the 1997 will and that the trial court erred in so finding. Because of our disposition, we do not reach Walker's remaining assignments of error.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Church v. Woods, 190 Or App 112 (2003)	n/a	n/a	grandniece with whom decedent was staying temporarily	n/a	Decedent 83-year-old bachelor with no children and Alzheimer's disease. Lived with brother, who cared for him. Brother temporarily left decedent with grandniece, telling her he had Alzheimer's disease. During weekend grandniece arranged for decedent to transfer his real property, accounts and vehicles to survivorship ownership with her. Brother then was appointed guardian and conservator and initiated action against grandniece. Decedent died while action pending Transfers 2/2000 DOD 8/01 Age 83	Trial court ruled decedent lacked capacity and dismissed undue influence case and financial abuse claim. Issue on appeal was financial abuse claim, since it entitled plaintiff to attorney fees. Court of Appeals determined that allegations met the statutory standard and remanded.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Slusarenko v. Slusarenko, 209 Or App 307 (2006)	yes	yes	Children by prior marriage	wife based on living together and her managing his medical care	Plaintiffs are all but one of Jack's children from his first marriage. Jack's first wife, Juanita Slusarenko, died in 1986. Jack and Wilma married in 1990, separated and reconciled in 1991, separated again in 1997, divorced in January 1998, and remarried in December 1998. In the latter part of his life, Jack suffered from serious health problems. Between 1986 and 1998, he made five different written estate plans, including a will executed shortly before his remarriage to Wilma in 1998 that left all his property to Wilma. At that same time, Jack signed a bargain-and-sale deed (the 1998 deed) transferring the farm from himself individually to himself and Wilma with a right of survivorship. Jack died in July 2000. After Wilma claimed to be the sole beneficiary of his estate and the sole owner of the farm, litigation ensued. Will 12/16/1998 DOD 7/2000 Age Not disclosed (26 years older than wife)	Plaintiffs first contend that Wilma exerted undue influence over Jack when he executed the 1998 will and deed. Undue influence "has been characterized as 'a species of fraud'" involving a beneficiary's reaping unfair advantage from wrongful conduct. In re Reddaway's Estate, 214 Or 410, 419, 420, 329 P2d 886 (1958). As the court explained, "every will is the product of some kind of influence. It is the task of the courts to determine whether the influence in the particular case is 'undue.'" Id. at 418 (citation omitted). The emphasis in such cases is on the conduct of the person allegedly exercising undue influence and whether that person "gained an unfair advantage by devices which reasonable [people] regard as improper[.]" Id. at 419. The same test for undue influence applies to wills and deeds, although the absence of independent advice may be more significant in the case of deeds than wills. Ryan v. Colombo, 77 Or App 71, 77, 712 P2d 139 (1985) (citations omitted). In such cases, the first question is whether there was a confidential relationship, in which the testator placed confidence in the beneficiary and the beneficiary exercised dominance over the testator. Knutsen v. Krippendorf, 124 Or App 299, 308, 862 P2d 509 (1993), rev den, 318 Or 381 (1994). Plaintiffs contend that, given Wilma's role in administering Jack's medication and taking him to medical appointments, among other factors, there was a confidential relationship. See In re Reddaway's Estate, 214 Or at 421 (recognizing that a caregiver and patient relationship may be confidential); Ramsey v. Taylor, 166 Or App 241, 262-63, 999 P2d 1178, rev den, 331 Or 244 (2000) (finding a confidential relationship under similar circumstances). Although Wilma emphasizes Gallaher's testimony that Jack appeared to be the dominant person in their relationship and Hoehn's testimony that he did not observe manipulative behavior around the time that the 1998 will and deed were executed, she does not seriously dispute that a confidential relationship existed. Because Jack was living with Wilma and relying on her to manage his medications and doctor's appointments, we conclude that theirs was a confidential relationship. See Knutsen, 124 Or App at 309 ("Dominance can be expressed * * * subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence."). When a confidential relationship exists, we consider whether suspicious circumstances were present. If the will contestant presents slight evidence of suspicious circumstances, then a presumption of undue influence arises, and the beneficiary must come forward with evidence to rebut the presumption. In re Reddaway's Estate, 214 Or at 420. The following factors may constitute suspicious circumstances: (1) the participation of the beneficiary in the preparation of the will; (2) a lack of independent and disinterested advice; (3) secrecy and haste in the preparation of the will; (4) an unexplained change in the testator's attitude toward others; (5) a change in the testator's estate plan; (6) an unnatural or unfair disposition of property; and (7) the testator's susceptibility to undue influence. Id. at 421-27. We also examine "the consequences of upholding the influenced gift." Id. at 419. For example, "[i]t would be expected that there would be less concern with the influencer's motive in a contest between him and the state claiming by escheat than there would be in a contest between him and the donor's deserving spouse." Id. Plaintiffs contend that multiple suspicious circumstances were present in the execution of the 1998 will and deed: that Wilma participated in preparation of the documents, that the documents were prepared in secrecy and haste, that there was an unexplained change in Jack's attitude toward his children, that there was a change in prior plans, that there was an unnatural or unjust gift, and that Jack was susceptible to undue influence. We conclude that some, but not all, of those circumstances were present. Wilma did participate in the making of the will and the deed, making specific demands in those regards. There also was some degree of secrecy: Jack instructed Gallaher not to tell Jack's children until his plans were complete. Jack deviated from his previous plans: the 1998 will marks the first time that Jack made no testamentary provision whatsoever for his children. Even if Jack had wished to treat Wilma as he did Juanita in his 1986 will, that earlier will made gifts to Jack's children if Juanita predeceased him; there was no such provision in the 1998 will. As to the deed, by putting the orchards and the home place up for sale before, Jack demonstrated that he did not necessarily intend to pass on the farm to his children; however, he previously had been unwilling to give Wilma an ownership interest. Finally, because of medical problems, Jack was susceptible to influence in November and December 1998. During that period, he suffered from serious illnesses and was very concerned about living alone. (7) Because some suspicious circumstances were present, we examine whether sufficient evidence was present to overcome the inference of undue influence. Ramsey, 166 Or at 270. Here, we conclude that there was, because the suspicious circumstances are accounted for by Jack's desire to have Wilma take care of him for the rest of his life. Both Wilma's participation in the preparation of the will and deed and Jack's deviation from his earlier estate plans were the result of a bargaining process between Wilma and Jack. Hoehn observed Jack and Wilma bargaining about their respective needs and potential reconciliation during and after the dissolution of their first marriage, with Jack trying to get Wilma back and Wilma insisting that they first reach some financial understandings. That view of the bargaining between Jack and Wilma is borne out by the testimony of Gallaher, who thought that Jack was making a decision to trade his assets in exchange for Wilma's care and that Jack knew what he was doing. We further note that the effect of Wilma's participation in the preparation of the 1998 will and deed was lessened by Jack's obtaining independent advice from Gallaher. See Ryan, 77 Or App at 80 (noting that independent advice is an important factor in evaluating the effect of a beneficiary's participation in the transaction). Although there was some secrecy, Jack was not entirely secretive about his plans. He talked with Overstreet about his estate plans and had opportunities to talk with his children alone, if he wished to do so. Cf. In re Reddaway's Estate, 214 Or at 423 (finding secrecy where the beneficiary, his wife, and his mother-in-law were the only ones who knew of the change in the testator's plans and the mother-in-law discouraged people from visiting the testator and kept a watchful eye when people did visit). Moreover, the initial secrecy was Jack's choice, a result of his understanding that his children would not approve of his reunion with Wilma. In any event, after Gallaher wrote to Patricia in late December 1998 about the revocation of the family trust, Patricia was aware that Jack's estate plans had likely changed. Jack's susceptibility to influence is troubling. However, Jack began to pursue reconciliation with Wilma long before he was hospitalized in November and December 1998. Hoehn counseled them about their relationship and was aware that they were considering reconciling as early as July 1998. The initial appointment with Gallaher to discuss estate planning also was made before Jack's hospitalizations, and Gallaher, meeting with Jack alone, observed that Jack appeared to be in control of his situation. By the time that Jack executed the 1998 will and deed, he had known Wilma about a decade. Their relationship had been stormy. However, after going through with the dissolution of his marriage to Wilma, Jack tried to reunite with her for months before he became ill and required hospitalization. Witnesses who saw them together after the dissolution believed that their relationship had improved. Jack knew Wilma well and chose to give her the financial promises that she had long desired in exchange for her returning to him and taking care of him. Despite conflicts between Wilma and Jack's children and Wilma's occasional interference with the children's access to Jack, he continued to see his children, as well as other family and friends, and was not isolated. He received independent legal advice regarding the deed and will, and his lawyer and doctor seem to agree that Jack sometimes manipulated Wilma. After he executed the will and deed, he lived with Wilma for one and one-half years and appeared to be fairly content; he did not try to rearrange his finances after executing the will. In short, Jack's disposition of his property was a result of his choices regarding the care that he wanted to receive at the end of his life, not wrongful conduct by Wilma. We accordingly affirm the trial court's rejection of plaintiff's undue influence claims.

Case citation	Infer Undue?	Will upheld	Relationship of contestant	Confidential relationship	Case facts	Statements of law
Harris v. Jourdan, 218 Or App 470 (2008)	yes	no	long time acquaintance and beneficiary under prior will	Comins trusted and depended on Harris and Harris exercised a considerable amount of control during their relationship. Among other things, he assumed control of her finances, selected her attorney, directed her to write letters to her attorney regarding her donative intent, provided her with physical care, cooked for her, and took care of her property.	Elderly widow with no family made successive deed and wills Will 8/2003 DOD8/2004 Age ? app 85	We turn, then, to Harris's argument that the trial court erred in concluding that the October 2003 will was the product of undue influence. Undue influence "has been characterized as 'a species of fraud'" by which a beneficiary gains an unfair advantage from wrongful conduct. In re Reddaway's Estate, 214 Or 410, 420, 329 P2d 886 (1958). To some extent, "every will is the product of some kind of influence. It is the task of the courts to determine whether the influence in the particular case is 'undue.'" Id. at 418 (citation omitted). The focus of the inquiry is on the conduct of the person allegedly exercising undue influence and whether that person "gained an unfair advantage by devices which reasonable [people] regard as improper[.]" Id. at 419. The burden of proving that a will is the product of undue influence is on the contestant, in this case, Jourdan. Id. at 420. However, under certain circumstances, there may arise a "suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference." Id. (quoting In re Southman's Estate, 178 Or 462, 482, 168 P2d 572 (1946)). Specifically, a suspicion of undue influence arises where (1) the contestant first proves that a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator; and (2) the contestant establishes the existence of "suspicious circumstances" surrounding the procurement or execution of the will. Id.; Knutsen v. Krippendorf, 124 Or App 299, 308, 862 P2d 509 (1993), rev den, 318 Or 381 (1994) (explaining the burden-shifting approach in undue influence cases). Here, Harris concedes that he and Comins had a confidential relationship, but he contends that the relationship was not one in which he exercised the type of dominance over Comins that would trigger the burden shifting identified in In re Reddaway's Estate. 214 Or at 421 (finding a confidential relationship where "the relationship is such as to indicate a position of dominance by the one in whom confidence is reposed over the other"). We disagree. The record demonstrates that Comins trusted and depended on Harris and that Harris exercised a considerable amount of control during their relationship. Among other things, he assumed control of her finances, selected her attorney, directed her to write letters to her attorney regarding her donative intent, provided her with physical care, cooked for her, and took care of her property. Moreover, as the trial court noted, after Harris arrived, Comins began spending money on objects like leather coats and a new convertible, objects that she never previously would have purchased. Under the circumstances, we readily conclude that Harris and Comins were in a confidential relationship in which Harris exercised some degree of dominance. See Knutsen, 124 Or App at 309 ("[A] finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence."); see also Sangster v. Dillard, 144 Or App 210, 218, 925 P2d 929 (1996), modified on recons, 146 Or App 105, 931 P2d 815 (1997) ("[D]ominance is found where the testator is guided by the beneficiary's judgment and advice in the period leading up to execution or destruction of a will."). Besides the fact that Harris was in a confidential relationship with Comins in which he exercised dominance, we consider the existence of "suspicious circumstances," as outlined in In re Reddaway's Estate, to assess whether the October 2003 will is the product of undue influence: A. Procurement "One of the circumstances frequently relied upon in the cases as indicating improper influence is the participation of the beneficiary in the preparation of the will * * *." 214 Or at 421. Here, Harris was intimately involved in the preparation of the will, from selecting an attorney, to directing Comins to document certain events and feelings for purposes of the will, to suggesting that his son be named as a beneficiary in the will. B. Independent Advice Although Comins had the benefit of an attorney during the drafting of the October 2003 will, Harris was closely involved in the relationship between Swift and Comins. He selected Swift, participated in some meetings with the two of them, and directed Comins to write letters to Swift. On this record, as in In re Reddaway's Estate, "[a]lthough there was the opportunity for independent advice under these circumstances it is quite possible that it would not have been heeded." 214 Or at 422-23. C. Secrecy and Haste Twelve days after Harris began living on the property, he contacted Swift about the possibility of Comins drafting a new will. Moreover, the beneficiaries of Comins's previous wills--the Copelins and Jourdan--were not notified of Comins's intent until they received a request from Swift to return the earlier wills. D. Change in Decedent's Attitude Toward Others After the arrival of Harris, Comins manifested an unexplained change in attitude toward a number of her friends. For example, she accused both Jourdan and the Copelins of caring only about her property. She also developed an unexplained fear of Retzlaff, whom she had previously trusted with her finances. Although the record suggests that Comins was predisposed to feeling abandoned by those around her, the fact that many of her previous relationships became strained after the arrival of Harris--and particularly that she rejected Retzlaff--suggests that Harris may have been partly responsible for or encouraged Comins's change in attitude. E. Change in the Testator's Plan of Disposing of Her Property In certain circumstances, a variance between a new will and previous wills will be regarded as a suspicious circumstance justifying an inference of undue influence. 214 Or at 424. Here, this factor is not particularly helpful, given the multiple changes in Comins's plans. Because it is difficult to discern any settled purpose running through previous wills--other than to leave the property to whomever was helping her the most at the time--the fact that she changed the donative object of her property is not particularly suspicious. However, when coupled with the unexpected change of attitude toward previous objects of donative intent, and the fact that Harris contacted an attorney to draft the will just 12 days after moving onto the property, the change in plans becomes more suspicious. F. Unnatural or Unjust Gift "Where there is a confidential relation between the donor and donee and the gift results in shunting the property away from those who had a reasonable expectation of being the recipients of the donor's bounty, the law places the burden on the donee to produce evidence that improper influence was not used." 214 Or at 426. Here, it is particularly curious that Harris's son--whom Comins apparently had not met--was a beneficiary under the will, but that Jourdan (who was Comins's longtime friend) and the Copelins (who were beneficiaries under a previous will) were not even mentioned. G. Donor's Susceptibility to Influence "The physical and mental condition of the donor is regarded as a factor of importance in determining whether a disposition of property was the result of undue influence." 214 Or at 426. That is, "[i]n many of the cases the fact that the person alleged to have been unduly influenced was enfeebled in mind or body is pointed to as evidence that [her] free will had been affected." *Id*. Harris does not dispute that Comins was susceptible to influence. In this case, this factor is particularly significant, given the degree to which Comins sought to please those who offered affection--even in the case of a financial predator in Canada. III. CONCLUSION For the reasons explained above, Jourdan is an "interested person" within the meaning of ORS 113.075(1). Accordingly, we reject Harris's "lack of standing" argument. Moreover, considering all the above factors, we conclude that the circumstances surrounding the execution of the October 2003 will were sufficiently suspicious that, when coupled with the relationship between Harris and Comins, there arises an inference of undue influence. We further conclude that Harris has not offered evidence that sufficiently dispels that inference. Accordingly, we agree with the trial court's conclusion that the October 2003 will is invalid because it is the product of undue influence. (15)