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## Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?

François du Toit

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**CRITICISM OF THE TESTAMENTARY UNDUE INFLUENCE  
DOCTRINE IN THE UNITED STATES: LESSONS FOR  
SOUTH AFRICA?**

François du Toit\*

|                                                                                                  |     |
|--------------------------------------------------------------------------------------------------|-----|
| I. Abstract.....                                                                                 | 510 |
| II. Introduction .....                                                                           | 510 |
| III. Testamentary Undue Influence: Criticism of the Doctrine in the<br>United States .....       | 513 |
| A. The “Undue Influence Paradox” .....                                                           | 513 |
| B. Associated Complexities .....                                                                 | 518 |
| IV. The South African Position .....                                                             | 521 |
| A. Family Protectionism in South African Inheritance Law ..                                      | 521 |
| B. The Conceptualization of Testamentary Undue Influence in<br>South Africa .....                | 524 |
| C. Undue Influence and the South African Wills Act .....                                         | 529 |
| D. South African Testamentary Undue Influence Case Law..                                         | 532 |
| 1. Testamentary Freedom Undermined in Instances of<br>Unnatural Bequests .....                   | 533 |
| 2. Familial Wealth Retention .....                                                               | 537 |
| 3. Family Protection Devices Curtail the Unorthodox Use of<br>Testamentary Undue Influence ..... | 541 |
| 4. Secondary Undue Influence Findings Are Superfluous..                                          | 543 |
| V. Evaluation and Conclusion .....                                                               | 545 |

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## I. ABSTRACT

This article analyzes undue influence in the South African law of wills in light of scholarly criticism of the testamentary undue influence doctrine in the United States. The article assesses in particular whether the so-called “undue influence paradox” identified in American scholarship is manifest in the South African law of wills: is testamentary undue influence’s role as guardian of testamentary freedom undermined by the judicial pursuit of family protectionism? The article proceeds, with due recognition of the differences between the American and South African legal traditions, from American scholars’ conceptualization of the paradox and their views on other complexities associated with the doctrine, to an exposition on the conceptualization, the statutory regulation, and the judicial utilization of testamentary undue influence in South Africa. The article determines whether or not the South African legal position conforms to some or all of the assertions made with regard to the undue influence paradox and further complexities associated with the testamentary undue influence doctrine in the American context. The article provides a mixed jurisdiction’s response to the call for the abolition of the testamentary undue influence doctrine in recent scholarship from the United States.

## II. INTRODUCTION

Jurisdictions that acknowledge freedom of testamentary disposition recognize generally that a will or testamentary bequest is invalid if it was obtained through influence that destroyed the testator’s free agency and substituted the testator’s dispositive preferences with those of another. The aforementioned constitutes the usual test for testamentary undue influence in such

jurisdictions.<sup>1</sup> Over the past two decades scholars from the United States have voiced various concerns regarding the testamentary undue influence doctrine's operation in the American context. While some American commentators support the doctrine,<sup>2</sup> a number of others have criticized it and called for reform,<sup>3</sup> with at least one demanding that the doctrine be abolished in the United States.<sup>4</sup>

The South African law of wills, which is a branch of the law of successions, acknowledges that undue influence invalidates a will or testamentary bequest. However, neither South African case law nor South African scholarly texts on succession law typify testamentary undue influence as an independent legal doctrine in the South African legal system. In fact, Scholtens,<sup>5</sup> in his analysis of undue influence in Roman-Dutch law—the civil law component of South Africa's common law to this day—concludes that apart from the restricted doctrine of *metus reverentialis* (fear by reason of awe, respect or deference) a general doctrine of undue influence was not part of Roman-Dutch law.

Notwithstanding differences between the South African and American positions on testamentary undue influence at a doctrinal level, both legal systems acknowledge that destruction of a testator's free agency and displacement of testamentary intent constitute grounds for the invalidation of a will or testamentary bequest. Moreover, both systems have a history of judicial

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1. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 279 (1999).

2. See, e.g., Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preference?*, 24 INT'L J. L. & PSYCH. 253 (2001).

3. See, e.g., Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U. C. DAVIS L. REV. 129 (2008).

4. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245 (2010).

5. J.E. Scholtens, *Undue Influence*, ACTA JURIDICA 276, 287 (1960).

engagement with these principles. It is submitted, therefore, that an instructive comparative analysis on testamentary undue influence is possible despite dogmatic differences between the South African and American jurisdictions.

South African scholars generally regard testamentary undue influence as a benign construct that protects the testamentary freedom of particularly aged or otherwise vulnerable testators against the importunities of false persuaders or enterprising impostors.<sup>6</sup> However, South African judgments in which testamentary undue influence was found to have been present are few and far between. Can this dearth of South African cases be explained by reflecting on the criticism of the testamentary undue influence doctrine in the American context? Do aspects of South African testamentary undue influence judgments conform to the assertions made by critics of the doctrine in regard to its problematic, unorthodox and paradoxical operation in the United States? Are these assertions appropriate to the South African legislature's treatment of testamentary undue influence? Insofar as American scholarly critique of the doctrine can be distilled into general themes unconfined by jurisdictional or doctrinal peculiarities, is the South African legal position on testamentary undue influence, when measured against such a critical thematic perspective, satisfactory, or in need of reform? Can South Africa learn some lessons from the criticism of the testamentary undue influence doctrine in the United States?

This article attempts to answer these questions. The case against testamentary undue influence, as presented in American scholarship, is analyzed first. In particular, the so-called "undue influence paradox" that negates the traditional view of undue influence as protective of testamentary freedom is outlined. Other

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6. See, e.g., Jean C. Sonnekus, *Freedom of Testation and the Ageing Testator* in EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE 78 (Kenneth G.C. Reid, Marius J. De Waal & Reinhard Zimmermann eds., Edinburgh Univ. Press 2007).

complexities associated with testamentary undue influence raised by American commentators are also highlighted, particularly insofar as these complexities reinforce the paradox. Second, and in light of the centrality of family protectionism in the criticism leveled at the American doctrine, aspects of familial solidarity in South African inheritance law are outlined. Third, the South African legal position on testamentary undue influence is contextualized. It is shown that English law influenced its reception and development in South Africa, but that the South African law on testamentary undue influence is rooted, by and large, in the civil law, particularly Roman-Dutch law. Fourth, an investigation is undertaken to determine whether the undue influence paradox, or aspects thereof, and some of the American doctrine's associated complexities, are manifest in the South African law of wills. To this end, the South African legislature's engagement with testamentary undue influence, as well as South African courts' utilization of testamentary undue influence, is investigated. The article concludes with an assessment, in light of calls for abolition of the doctrine in American scholarship, of the need for reformative measures regarding the South African legal position on testamentary undue influence.

### III. TESTAMENTARY UNDUE INFLUENCE: CRITICISM OF THE DOCTRINE IN THE UNITED STATES

#### A. *The "Undue Influence Paradox"*

Conventional wisdom casts testamentary undue influence in the role of guardian of freedom of testation through the invalidation of wills or testamentary bequests when the testator's will is substituted with that of the person who exercised the influence. Madoff calls this the "dominant paradigm" of undue influence in the United States; within this paradigm, undue influence is related to, but distinct from, fraud and duress insofar as all three doctrines protect testators' rights to dispose freely of

their property.<sup>7</sup> She contends that courts, when invoking the doctrine, invariably do so “with strong rhetoric in support of freedom of testation.”<sup>8</sup> Paradoxically, according to Madoff, the doctrine can, and frequently does, occasion a disregard of testators’ freedom of testation when it is judicially utilized in an unorthodox manner to quash testamentary dispositions. This occurs despite ample evidence that such dispositions represent the testators’ true wishes.<sup>9</sup>

What causes the undue influence paradox? Some American commentators advance judicial pursuit of family protectionism as a principal reason. Courts seek to ensure, ostensibly for the greater social good, that wealth will remain within the testators’ biological family, thus protecting, in particular, intestate heirs against disinheritance. According to this view, a judge or jury will favor, for example, an estranged child’s argument that a will, in which her father instituted as sole heir a caring remote blood relative or a non-consanguineous relation (such as a supportive neighbor or helpful friend), is the product of undue influence exercised by an unscrupulous legacy hunter on a vulnerable testator. Invalidation of such a will on the ground of undue influence secures the child’s intestate inheritance and satisfies society’s normative insistence on wealth transfer upon death between (close) consanguineous relatives. The testator’s probable intention to benefit the remote relative, neighbor or friend, so the argument goes, is effectively negated by a finding that the act of testation was a product of undue influence.<sup>10</sup>

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7. Madoff, *supra* note 3, at 575-76, 578. See also Leslie, *supra* note 3, at 244; Ronald J. Scalise, *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41, 54-55 (2008).

8. Madoff, *supra* note 3, at 581.

9. *Id.* at 601. See also Leslie, *supra* note 3, at 236-37.

10. Leslie, *supra* note 3, at 236-37; Madoff, *supra* note 3, at 576-77; Spitko, *supra* note 1, at 280; Scalise, *supra* note 7, at 55, 101; Spivack, *supra* note 4, at 246; Tate, *supra* note 3, at 143. Even supporters of the doctrine concede that it permits significant leeway for courts to supplant testamentary directions: see, e.g., Frolik, *supra* note 2, at 261, who admits that the doctrine allows a court to substitute its opinion of the reasonableness of a dispositive plan for that of the

Madoff illustrates the existence of the paradox through a comparison between two American jurisdictions.<sup>11</sup> The first jurisdiction, Georgia, affords no statutory protection against disinheritance of spouses; the other, Louisiana, not only provides statutory protection against spousal disinheritance, but also protects children against disinheritance through a statutorily imposed *legitime*. Madoff's analysis of undue influence judgments from these two states shows that a will in which a testator disinherited a spouse and children is much more likely to be invalidated on the ground of undue influence by courts in Georgia than by their counterparts in Louisiana. Madoff asserts that these judicial tendencies are indicative of a strong correlation between the existence of family protection devices, on the one hand, and the application of the undue influence doctrine, on the other. She concludes that the doctrine's dominant purpose is not to protect testators' autonomy, but rather to protect testators' families against disinheritance.<sup>12</sup>

Interestingly, Madoff,<sup>13</sup> and some of the doctrine's other critics,<sup>14</sup> acknowledge the fundamental changes in patterns of family wealth transmission in the twentieth century described by Langbein in his seminal article on the topic.<sup>15</sup> Langbein shows, among other things, that traditional wealth transmission from parents to children through the latter's inheritance of the farm or firm was supplanted gradually in the twentieth century by parents' investment in human capital. *Inter vivos* wealth transfer to ensure that children are well-educated and enjoy a good start in life has

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testator; moreover, that wills failing to provide for spouses and close blood relatives, and for equal divisions among children, are most vulnerable to judicial invalidation on the ground of undue influence.

11. Madoff, *supra* note 3, at 611-19.

12. *Id.* at 612.

13. *Id.* at 625-29.

14. *E.g.*, Tate, *supra* note 3, at 163-66.

15. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

become the modern trend in intergenerational wealth transfer.<sup>16</sup> This phenomenon occasions significant consumption of wealth during the parents' lifetimes, leaving children with less of an expectation that they will inherit from their parents upon their death.<sup>17</sup> Notwithstanding this change in wealth transmission practices, many critics of the testamentary undue influence doctrine in America advocate for the introduction of measures to retain wealth within families upon death, either through instituting typically civilian forced heirship devices, or by recognizing judicial discretion to order family maintenance. They argue that such measures will alleviate pressure on courts to use the testamentary undue influence doctrine to attain the goal of family protectionism.

Spivack, who argues for the abolition of the doctrine, is a proponent of this approach:

The unsatisfactory doctrine of undue influence challenges us to decide what we, as a society, care about. If we care about protecting families, let legislatures institute forced heirship. If we value testamentary freedom over protecting families, let courts give it effect.<sup>18</sup>

Scalise similarly advocates that the greater and more significant a legal system's family protective scheme is, the less necessary a doctrine such as undue influence becomes.<sup>19</sup> In this light, it is interesting that in the Netherlands, a typical civilian jurisdiction with extensive forced heirship devices, a frequently-advanced argument for retaining imperative inheritance law focuses on the adverse consequences that follow from a parent disinheriting, under undue influence, his children in favor of outsiders.<sup>20</sup> The potency of this argument is, however, suspect by

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16. *Id.* at 723.

17. *Id.* at 740-43.

18. Spivack, *supra* note 4, at 246.

19. Scalise, *supra* note 7, at 81.

20. Martin Jan A. Van Mourik, *Perspective 5: Comparative Law—the Netherlands* in IMPERATIVE INHERITANCE LAW IN A LATE-MODERN SOCIETY

reason of the Dutch Civil Code's prescripts aimed specifically at eliminating opportunities for testamentary undue influence.<sup>21</sup>

It is nevertheless understandable that forced heirship, along the lines decreed in the civil codes of many continental European jurisdictions,<sup>22</sup> appears attractive to American scholars as a cure for the perceived unorthodox judicial utilization of the undue influence doctrine in order to accomplish familial economic protectionism. This is because the introduction of imperative inheritance law will constitute a novel addition to the American legal tradition, with its roots in the English common law (with the exception of Louisiana, a typically mixed jurisdiction, where a *legitime* protects children's inheritance rights). It must be noted, however, that forced heirship has come under increased criticism in contemporary scholarship from civil law jurisdictions, primarily because of its inflexibility and consequent inability to respond in a refined manner to changing socio-economic realities. Castelein, for example, criticizes mandatory succession in continental European jurisdictions for the constraints it imposes on the freedom to dispose of property, as well as for its limiting effect on human self-

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107, 111 (Christoph Castelein, René Foqué & Alain Verbeke eds., Intersentia 2009).

21. *Id.* The Code's Book 4 on inheritance law prescribes that a testator cannot make a testamentary disposition in favor of, among others, any professional in the field of individual healthcare who attended to the testator during the time of the illness that resulted in death as well as those who provided mental care and support to the testator during that time (art. 4:59), nor in favor of caregivers and nurses at institutions for elders or institutions for those who suffer from mental disorders (in respect of wills made during a stay at such institutions) (art. 4:59). Such dispositions are, however, not void but only voidable in favor of those invoking a ground for nullification (art. 4:62). The aforementioned prohibitions are aimed at negating undue influence occasioned by the relationship between a testator and the indicated persons: see F.W.J.M. Schols, *Wie Uiterste Wilsbeschikkingen Kunnen Maken en Wie Daaruit Voordeel Kunnen Genieten*, in HANDBOEK ERFRECHT 248 (M.J.A. Van Mourik ed., Kluwer 2011).

22. Spivack, *supra* note 4, at 305-306.

development.<sup>23</sup> This criticism suggests that imperative inheritance law is, arguably, an imperfect solution to the demand for economic protectionism in the family context. The South African experience, among others, suggests that Spivack's alternative proposal, namely the override of wills through a family maintenance order,<sup>24</sup> is a more effective way of achieving such a goal.<sup>25</sup>

### *B. Associated Complexities*

A number of other factors that complicate the testamentary undue influence doctrine in the American context are evident from the scholarship under discussion. Spivack argues that the evidentiary difficulties associated with the doctrine are among these factors.<sup>26</sup> Averments of undue influence are invariably adjudicated on circumstantial evidence because the person whose state of mind is at issue is dead at the time of the inquiry.<sup>27</sup> Therefore, the success of a challenge to a will's validity on the ground of undue influence depends largely on whether the party bearing the burden of proof can establish or refute the existence of undue influence. American jurisdictions generally permit burden-shifting in the course of an undue influence inquiry: initially the *onus* rests on the party who alleges undue influence, but if this party can raise a presumption of undue influence, the burden shifts to the will's proponent to disprove the existence of undue influence. In some American jurisdictions, a will's challenger needs to show no more than the existence of a confidential relationship between the testator and the alleged influencer in order to raise a presumption of undue influence.<sup>28</sup> Therefore, it is

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23. Christoph Castelein, *Introduction and Objectives* in IMPERATIVE INHERITANCE LAW IN A LATE-MODERN SOCIETY 1, 38 (Christoph Castelein, René Foqué & Alain Verbeke eds., Intersentia 2009).

24. Spivack, *supra* note 4, at 305.

25. *See infra*, Part IV.A on the South African position.

26. Spivak, *supra* note 4, at 263-65.

27. Madoff, *supra* note 3, at 582.

28. *Id.* at 583. *See also* Leslie, *supra* note 3, at 245, 253; Spivack, *supra* note 4, at 263; Tate, *supra* note 3, at 190.

relatively easy in those jurisdictions for a will's challenger to effect burden-shifting, particularly if the bequest that the testator is alleged to have made under undue influence does not take the form of a so-called "natural bequest."<sup>29</sup> Madoff argues that the undue influence paradox is rendered more pronounced by the "confidential relationship/natural bequest dichotomy."<sup>30</sup> She explains that, on the one hand, the existence of a confidential relationship between the testator and alleged influencer is often sufficient to raise the presumption of undue influence. If, on the other hand, the will contains a "natural bequest"—one in which, typically, the whole or the greatest portion of the deceased's estate is bequeathed to the testator's spouse and/or (close) blood relatives—it generally serves, notwithstanding a confidential relationship between the parties concerned, as a strong indicator that the testator's will was not displaced by that of the alleged influencer.<sup>31</sup>

Some American scholars are even skeptical of a judicial inquiry into the displacement of a testator's will by that of someone else. Scalise acknowledges that the concept of undue influence is notoriously difficult, but bemoans the fact that it has frequently degenerated into "nothing more than platitudes about 'substituting one's volition for another' and generalities concerning whether a testator is 'susceptible' to a kind of influence considered 'undue' by the law."<sup>32</sup> Spivack questions whether, given the psychology and relational power dynamics at play, judges or juries are best suited to be adjudicators of undue influence.<sup>33</sup> She argues that testamentary capacity (or the lack thereof) is much easier to prove than undue influence<sup>34</sup> and,

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29. Madoff, *supra* note 3, at 602.

30. *Id.*

31. Madoff, *supra* note 3, at 602, 607.

32. Scalise, *supra* note 7, at 43.

33. Spivack, *supra* note 4, at 268-76.

34. *See also*, Madoff, *supra* note 3, at 574, who states that lack of mental capacity and undue influence are the most frequent grounds for invalidating wills in America.

because the two doctrines are closely related, many challenges of wills can be resolved if decided on capacity alone, without the need for adjudication on undue influence. Spivack favors *ante mortem* capacity determinations to prevent spurious and vexatious challenges of wills on capacity grounds.<sup>35</sup> Moreover, she regards the few cases that would not be brought before a court if the undue influence doctrine were abolished in America as not constituting sufficient harm to justify the doctrine's continued existence in the American context.<sup>36</sup>

Frolik opines that the judicial preference for finding undue influence, rather than declaring a will invalid for want of testamentary capacity, can be explained by judicial reluctance to raise the level of capacity that is required to make a will.<sup>37</sup> He contends that disqualifying wills with questionable dispositive provisions on the ground of testators' incapacity will seriously erode freedom of testation.<sup>38</sup> Frolik, therefore, supports the testamentary undue influence doctrine because it permits courts to protect vulnerable testators by creating a middle-ground between testamentary capacity and incapacity; one where a testator possesses marginal capacity that renders will-making possible, but leaves the testator, potentially at least, open to undue influence.<sup>39</sup> Spivack disagrees, contending that the level of capacity required to make a will is generally extremely low (compared to, for example, the capacity required for concluding a contract) and that this suggests that a "safety valve of undue influence" is not required—once minimal capacity has been shown to exist, the testator's dispositive preferences must prevail.<sup>40</sup>

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35. Spivack, *supra* note 4, at 291. *See also* Tate, *supra* note 3, at 144.

36. Spivack, *supra* note 4, at 307-308.

37. Frolik, *supra* note 2, at 264.

38. *Id.*

39. *Id.* at 265. *See also* Scalise, *supra* note 7, at 75.

40. Spivack, *supra* note 4, at 292-93.

## IV. THE SOUTH AFRICAN POSITION

A. *Family Protectionism in South African Inheritance Law*

American scholarly critique of the testamentary undue influence doctrine, highlighted in the foregoing part of this article, advances American jurisdictions' general dearth of devices that safeguard wealth retention for a testator's close consanguineous relatives, and the consequent judicial pursuit of such wealth retention through the testamentary undue influence doctrine at the expense of testamentary freedom, as foundational to the undue influence paradox. In light of these opinions on the interrelationship between the undue influence doctrine and familial wealth retention in the American context, a brief exposition on economic familial solidarity in South African inheritance law is apposite.

Family protectionism features in numerous common law constructs of South African inheritance law.<sup>41</sup> More pertinent to this article, however, is the South African legal position on imperative inheritance and the provision of family maintenance. Forced heirship was part of Roman-Dutch law introduced by Dutch settlers at the Cape of Good Hope (present-day Cape Town) from the middle of the seventeenth century.<sup>42</sup> However, all manifestations of compulsory succession, such as the legitimate

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41. *E.g.*, a general presumption, founded thereon that a parent is deemed not to intend the disinheritance of children in favor of remoter relatives or outsiders, operates against disinheritance and in favor of equal treatment of children in parents' testamentary dispositions; the duty of collation (*collatio bonorum*), based on the presumption that a parent or grandparent intends an equal division of assets among children and further descendants, is imposed on a deceased's descendants to account to the estate for certain gifts or advances received from, or debts incurred to, the ascendant during the latter's lifetime; and one of the principles that governs implied *fideicommissa* states that a gift-over from a testator's descendant to a third person is regarded as being subject to an implied condition of *si sine liberis decesserit*—that the descendant left no issue. This implied condition is founded on the notion that a testator would not pass over grandchildren (or other descendants) in favor of remoter beneficiaries.

42. N.J. VAN DER MERWE & C.J. ROWLAND, *DIE SUID-AFRIKAANSE ERFREG*, 616 (6th ed., J.P. van der Walt 1990). See *infra* Part IV.B on Roman-Dutch law as part of South Africa's common law.

portion, the *Lex hac edictali*, as well as the Falcidian and Trebellian fourths, were abolished by statute under English influence in the latter half of the nineteenth and early twentieth centuries.<sup>43</sup> Modern South African law is, therefore, devoid of the typical Romanist-Continental forced heirship devices.<sup>44</sup>

South African law nevertheless recognizes that a person's indigent minor child, whether born in or out of wedlock, has a common law claim for maintenance against that person's estate.<sup>45</sup> This claim is secondary to those of estate creditors, but is preferred to the claims of legatees and heirs.<sup>46</sup> An adult child in need of maintenance can also bring such a claim.<sup>47</sup> A child's maintenance claim against a deceased parent's estate is lodged, along with all other charges on the estate, with the estate's executor and does not require judicial confirmation.

A deceased's indigent surviving spouse enjoys a statutory maintenance claim under the Maintenance of Surviving Spouses Act 27 of 1990. This claim, also lodged with the executor, is for the provision of the surviving spouse's reasonable maintenance needs until death or remarriage, insofar as the spouse is unable to provide for such needs from his or her own means and earnings.<sup>48</sup>

The traditional meaning attributed to "survivor" for the purpose of the Maintenance of Surviving Spouses Act, namely that of the surviving spouse to a valid civil marriage concluded under the Marriage Act 25 of 1961, has been broadened by South African courts under constitutional direction. This meaning now includes the surviving spouse of a *de facto* monogamous unrecognized

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43. Act 23 of 1874 (Cape); Law 7 of 1885 (Natal); Proc 28 of 1902 (Transvaal); Law Book of 1902 (Orange Free State).

44. M.M. CORBETT, H.R. HAHLO, GYS HOFMEYR & ELLISON KAHN, *THE LAW OF SUCCESSION IN SOUTH AFRICA* 34 (1st ed., Juta 1980).

45. *Carelse v. Estate De Vries* (1906) 23 SC 532; *Glazer v. Glazer* 1963 (4) SA 694 (A).

46. *Ex parte Zietsman: In re Estate Barnard* 1952 (2) SA 16 (C).

47. *Hoffmann v. Herdan* 1982 (2) SA 274 (T).

48. Art. 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990.

Muslim marriage;<sup>49</sup> the surviving spouse or spouses of a valid customary law marriage concluded by Black South Africans either under customary law or under the Recognition of Customary Marriages Act 120 of 1998;<sup>50</sup> and each surviving spouse of an unrecognized polygynous Muslim marriage.<sup>51</sup> The South African Constitutional Court nevertheless refused extension of such a claim to the surviving partner of a permanent heterosexual life-partnership.<sup>52</sup> However, the Civil Union Act 17 of 2006 provides that the legal consequences of a marriage as contemplated in the Marriage Act apply to all civil unions. The Civil Union Act provides further that any reference to “marriage” in any other law, including the common law, includes a civil union, and that “husband,” “wife” or “spouse” in any other law, including the common law, includes a civil union partner.<sup>53</sup> Consequently, a surviving civil union partner, whether heterosexual or of the same sex, fully enjoys the benefits of the Maintenance of Surviving Spouses Act.

In light of the foregoing, De Waal is correct when he lists, in his analysis of the socio-economic underpinnings of South African inheritance law, the support of the family as one of the basic functions of the law of succession. De Waal explains that socially-based restrictions on freedom of testation, such as the aforementioned rules on family maintenance, serve to attain this goal.<sup>54</sup> The question arises whether the principles regarding testamentary undue influence—in conformity with the undue influence paradox as described in American scholarship—function as a (further) socially-based restriction on testamentary freedom in

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49. Daniels v. Campbell 2004 (5) SA 331 (CC).

50. Kambule v. The Master 2007 (3) SA 403 (E); Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (Sch.).

51. Hassam v. Jacobs [2008] 4 All SA 350 (C).

52. Volks v. Robinson 2005 (5) BCLR 446 (CC).

53. Art. 13 of the Civil Union Act 17 of 2006.

54. M.J. de Waal, *The Social and Economic Foundations of the Law of Succession*, 8 STELL. L. REV. 164, 170-71 (1997). See also, generally, François du Toit, *The Constitutional Family in the Law of Succession*, 126 S. AFRICAN L. J. 463 (2009).

South Africa. Does economic family protectionism underpin statutory engagement with, and judicial utilization of, testamentary undue influence in South African law? Next, before these questions are addressed, the conceptualization of undue influence in the South African law of wills will be explained.

*B. The Conceptualization of Testamentary Undue Influence in South Africa*

The South African legal system can best be described as mixed or hybrid in nature. It originated as an outgrowth of the interplay between Roman-Dutch and English common law legal traditions. Roman-Dutch law is a legal system which was developed in the Netherlands in the latter part of the fifteenth, through the sixteenth and into the seventeenth centuries. It is the product of the reception of Roman law and its synthesis with Germanic customary law, feudal law and canon law, and it was introduced to South Africa at the Cape of Good Hope by Dutch settlers in the seventeenth century. Roman-Dutch law remains part of South Africa's law to this day. However, it no longer exists in its pure form because of extensive judicial and legislative adaptation and development. In the aftermath of the second British occupation of the Cape in 1806, the ideas from the English system began to affect Roman-Dutch law. The new English rulers retained Roman-Dutch law, but English legal influence on the existing civilian legal system was unavoidable.<sup>55</sup> The convergence of Roman-Dutch law and English law is particularly manifest in South African inheritance law, especially its law of wills. Formal aspects of wills, especially their execution, are regulated statutorily in the Wills Act 7 of 1953,<sup>56</sup>

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55. For a concise overview of the development of South Africa's common law and its mixed legal system, see A.B. EDWARDS, *THE HISTORY OF SOUTH AFRICAN LAW—AN OUTLINE* (LexisNexis South Africa 1996); Reinhard Zimmermann & Daniel Visser, *Introduction: South African Law as a Mixed Legal System*, in *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 2* (R. Zimmermann & D. Visser eds., Clarendon Press 1996).

56. The Act commenced on 1 January 1954, but was subsequently amended on a number of occasions. The most significant recent amendment of the Wills

which takes its precepts largely from legislation that mirrored the English Wills Act of 1837. On the other hand, the majority of typical testamentary institutions and constructs encountered in modern South African wills (such as the *fideicommissum*, the *modus*, and the right of accrual (*ius accrescendi*)) originated in Roman law and were received as such into Roman-Dutch law and ultimately into South African law.<sup>57</sup>

Freedom of testation is a foundational principle of South African testate succession, and relatively few impediments restrict testators' dispositive caprice.<sup>58</sup> The principles pertaining to testamentary undue influence, ostensibly designed to foster free expression of testamentary wishes, are part of the South African law of wills.

Considering English influence that pervaded the law after 1806, it is unsurprising that early South African jurisprudence on testamentary undue influence relied greatly on English legal authority. In *Finucane v. MacDonald*,<sup>59</sup> for example, the court opined that the South African legal position on testamentary undue influence accords with that espoused in the leading English case of *Craig v. Lamoureux*.<sup>60</sup> Even earlier, in one of the first South African judgments to find testamentary undue influence, *Executors of Cerfonteyn v. O'Haire*,<sup>61</sup> the court cited the English case of *Parfitt v. Lawless*<sup>62</sup> in support of its findings that the burden of

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Act occurred in 1992 through the Law of Succession Amendment Act 43 of 1992, which commenced on 1 October 1992.

57. For a concise overview of the hybrid nature of the South African law of wills, see François du Toit, *Succession Law in South Africa – A Historical Perspective* in *EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE* 67 (Kenneth G.C. Reid, Marius J. De Waal & Reinhard Zimmermann eds., Edinburgh University Press 2007).

58. M.M. CORBETT ET AL., *THE LAW OF SUCCESSION IN SOUTH AFRICA* 40 (2d ed., Juta Law 2001), who contend that South African law takes “the principle of freedom of testation further than any other Western legal system.”

59. *Finucane v. MacDonald* 1942 CPD 19 33-34.

60. *Craig v. Lamoureux* 1920 AC 349.

61. *Executors of Cerfonteyn v. O'Haire* 1873 Buch 47.

62. *Parfitt v. Lawless* (1872) LR 2 P&D 462.

proof must be borne by the party asserting undue influence, and that no presumption of undue influence arises on the basis of the relationship between the parties.<sup>63</sup>

In light of this reliance on English authority, it is equally unsurprising that South African courts initially conceptualized testamentary undue influence, in accordance with the then-prevailing view in English law, as a manifestation of force or coercion.<sup>64</sup> In *Taylor v. Pim*,<sup>65</sup> for example, the court cited the English case of *Wingrove v. Wingrove*,<sup>66</sup> where it was said that, to establish undue influence, it must be shown that “the will of the testator was coerced into doing that which he did not desire to do.”<sup>67</sup> Engagement with Roman-Dutch authority on testamentary undue influence is conspicuously absent from the *Finucane*, *Cerfonteyn* and *Taylor* judgments.

Later South African cases moved away from coercion as the hallmark of testamentary undue influence and embraced the notion of substituted volition, although not forsaking entirely the interplay between undue influence and coercion. In *Spies v. Smith*,<sup>68</sup> the *locus classicus* of testamentary undue influence in South Africa, the court said:

[A] last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated by reason of their effect to the exercise of coercion or fraud to make a bequest which he would not otherwise have made and which therefore expresses another person's will rather than his own. In such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition and the will is thus not upheld.<sup>69</sup>

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63. *Cerfonteyn*, *supra* note 61, at 72. *See also* *Tregea v. Godart* 1939 AD 16 22.

64. *See, e.g.*, *Cerfonteyn*, *supra* note 61, at 72, 78.

65. *Taylor v. Pim* (1903) 24 NLR 484.

66. *Wingrove v. Wingrove* (1885) 11 PD 81.

67. *Taylor*, *supra* note 65, at 490.

68. *Spies v. Smith* 1957 (1) SA 539 (A).

69. *Id.* at 547 (translation from the original Afrikaans taken from M.J. DE WAAL & M.C. SCHOEMAN-MALAN, *LAW OF SUCCESSION* 44 (4th ed. Juta 2008).

A feature of the *Spies* case is the court's contextualization of undue influence within South Africa's Romanist-Civilian common law, and thus its break from earlier judicial reliance on English authority to resolve undue influence challenges to wills. The court made note of Roman-Dutch legal scholars' insistence that "the pen of the dying must be free" and that it is *contra bonos mores* to deprive a testator of this freedom.<sup>70</sup> However, these scholars acknowledged that not all interferences with expressions of testamentary intent occasion nullity—the interference must have negated a testator's volition and caused the making of a will contrary to the testator's intent.<sup>71</sup> The scholars used the typical examples of severely ill or dying testators whose resistance to influence is easily overcome by reason of their physical and/or mental infirmity. The *Spies* court recognized, therefore, that the relationship between the parties is not the only factor to be considered in an undue influence inquiry, but that the mental ability of the testator, as well as the time that elapsed between the making of the disputed will and the testator's death, are also matters pertinent to such an inquiry.<sup>72</sup>

The court emphasized in *Spies v. Smith* that the mere existence of a relationship between the testator and the alleged influencer that could occasion, for example, *metus reverentialis* does not give rise to a presumption of displacement of volition. This is because *cum sola potentia metum non arguat* (power alone does not prove fear)—a will's challenger bears the *onus* throughout, and each instance must be decided on the particular facts at hand.<sup>73</sup>

This finding in *Spies v. Smith* was confirmed in two commentaries on undue influence in Roman-Dutch law published by South African scholars in the judgment's aftermath. First,

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70. *Spies*, *supra* note 68, at 545-46, relying on JOHANNES VOET, COMMENTARIUS AD PANDECTAS 29.6.1 (1698-1704) and CORNELIUS VAN BIJNKERSHOEK, DE CAPTATORIIS INSTITUTIONIBUS Ch. 10 (1743).

71. *Spies*, *supra* note 68, at 547.

72. *Id.* at 547-48.

73. *Id.*

Scholtens concluded that, although a leading legal scholar such as Johannes Voet recognized that undue influence invalidates a will, a general doctrine of undue influence (aside from a restricted doctrine of *metus reverentialis*) was not part of pure Roman-Dutch law.<sup>74</sup> Joubert went even further and found that “*metus reverentialis* was never in itself a sufficient ground for attacking the validity of a legal act”<sup>75</sup>—insofar as the legal scholars acknowledged *metus reverentialis* as a ground for nullifying a will, it was “always with the qualification that the law does not recognize any presumption of improper action because of any special relationship existing between the parties.”<sup>76</sup>

Notwithstanding undue influence’s (and, possibly, *metus reverentialis*’s) lack of doctrinal status in Roman-Dutch law, the conceptualization of testamentary undue influence in *Spies v. Smith* and subsequent academic commentaries provides strong support for the assertion that its role in South African law is *prima facie* to protect testamentary freedom by invalidating testamentary dispositions where the testator’s will was substituted for that of the influencer. In light of South African inheritance law’s firm stance in favor of family protectionism,<sup>77</sup> this assertion raises the question: is testamentary undue influence, despite its aforementioned role, primarily applied in the South African context to retain familial wealth and, in so doing, to safeguard the testator’s biological family, particularly those who stand to inherit on intestacy, from disinheritance? Is the undue influence paradox and complexities associated with the American doctrine also manifest in the South African law of wills? These questions will be addressed in the article’s next two parts through a consideration of, first, the single provision dealing with undue influence contained

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74. Scholtens, *supra* note 5, at 287.

75. D.J. Joubert, *Some Aspects of Metus Reverentialis*, 87 S. AFRICAN L. J. 94, 98 (1970).

76. *Id.*

77. *See supra* Part IV.A.

in the South African Wills Act and, second, the engagement of South African courts with testamentary undue influence.

*C. Undue Influence and the South African Wills Act*

The South African Wills Act regulates testamentary capacity.<sup>78</sup> Testamentary undue influence, on the other hand, is governed, for the greater part, by the South African common law.

Article 4A(1) of the Wills Act, imported through the Law of Succession Amendment Act,<sup>79</sup> nevertheless disqualifies certain persons who participated in the making or execution of a will from benefiting under that will. People who witnessed a will, or who signed a will as a testator's amanuensis, or who wrote a will or any part thereof in their own handwriting, and the person who was the spouse of any of the aforementioned people at the time of the will's execution, are so disqualified. This prescript is not novel to the Wills Act. Article 4A(1) replaced the Act's former disqualification provisions contained in the now-repealed articles 5 and 6. These two articles prohibited a witness, an amanuensis, the spouse of a witness or amanuensis, or any person claiming under a witness, amanuensis or their spouse, from benefiting under the particular will, or from being nominated as testamentary executor, administrator, trustee or guardian in that will. Significantly, the South African Law Commission (as it was formerly called<sup>80</sup>), in its report that preceded the Law of Succession Amendment Act,<sup>81</sup> recommended that the disqualifications contained in the aforementioned articles 5 and 6 be abolished. The legislature

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78. Art. 4 of the Act prescribes that every person of the age of sixteen years or older may make a will unless such person is, at the time of making the will, mentally incapable of appreciating the nature and effect of will-making; moreover, that the burden of proof in respect of mental incapacity rests on the person alleging the same.

79. Art. 4A was inserted into the Wills Act by art. 7 of the Law of Succession Amendment Act.

80. The Commission is now called the South African Law Reform Commission.

81. PROJECT 22, *Reform of the Law of Succession*, June 1991, 93-94.

rejected this recommendation, and retained these disqualifications, in amended form, under article 4A, to effect disqualification from testamentary benefit of the designated persons who participated in the making or execution of a will.

Article 4A(1) is aimed at preventing fraud and undue influence; this is apparent from article 4A(2)(a), which stipulates that the High Court may order that any person who is disqualified under article 4A(1) is nevertheless competent to receive a benefit from the will concerned if the court is satisfied that such person did not defraud or unduly influence the testator in the execution of the will.<sup>82</sup>

Article 4A(2)(b) of the Act contains a further exception to the general disqualification in article 4A(1), which exception has a distinct family protectionism flavor:

- (2) Notwithstanding the provisions of subsection (1). . . .  
(b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse received, shall not exceed the value of the share to which that person would have been entitled in terms of the law relating to intestate succession.

This paragraph is a novel addition to the Wills Act. It negates the disqualification imposed by article 4A(1), and enables a deceased estate's executor to effect distribution to the testator's otherwise-disqualified family members despite their involvement in the making or execution of a will. The executor can do so purely on the basis that they are the testator's intestate heirs; however, they will receive no more than their intestate shares from the deceased's estate. Significantly, the executor can act independently in this regard;<sup>83</sup> alternatively, the Master of the High Court, a

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82. See *In re Estate Barrable* 1913 CPD 364 368 and *Smith v. Clarkson* 1925 AD 501 503-504, regarding the corresponding common law position.

83. DE WAAL & SCHOEMAN-MALAN, *supra* note 69, at 124.

judicial officer charged with aspects of the administration of justice, will make a determination.<sup>84</sup> Therefore, unlike the exception contained in article 4A(2)(a), no court order is required for the executor to effect distribution to the family members mentioned.<sup>85</sup>

Paragraph (b) has been described as the “central provision” in article 4A(2),<sup>86</sup> and effects legislative ring-fencing of at least an intestate share of a deceased’s estate in favor of the testator’s spouse and consanguineous relatives. This occurs regardless of their involvement in the making or execution of a will, and notwithstanding the possibility that they might have unduly influenced the testator during those processes. Moreover, the South African Supreme Court of Appeal held in *Blom v. Brown* that the availability of the relief under article 4A(2)(a) based on the absence of fraud or undue influence is not dependent on the inapplicability of the intestate-inheritance-exception of article 4A(2)(b). The court opined that the legislature did not intend for a testator’s spouse or consanguineous relatives to rely solely on article 4A(2)(b), without recourse to article 4A(2)(a), in order to escape the disqualification imposed under article 4A(1).<sup>87</sup>

In this light, the statutory attention given to undue influence in the Wills Act, although confined to the narrow aspect of participation in the making or execution of wills, conforms to the familial solidarity paradigm insofar as paragraph (b)—the central provision in article 4A(2)—ensures *ex lege* wealth retention (albeit limited to shares on intestacy) by a testator’s spouse and consanguineous relatives who participated in the making or execution of a will. Moreover, the *Blom* judgment confirms that these persons are free also to invoke the broader protection

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84. Mohamed Paleker, *Capacity to Inherit* in THE LAW OF SUCCESSION IN SOUTH AFRICA 111 (Juanita Jamneck & Christa Rautenbach eds., Oxford Univ. Press Southern Africa 2009).

85. *Blom v. Brown* [2011] 3 All SA 223 (SCA) § 19.

86. Paleker, *supra* note 84, at 111.

87. *Blom*, *supra* note 85, at § 19, § 20.

afforded by article 4A(2)(a) in order to escape the legislative limitation regarding the award of intestate shares.

It is submitted, therefore, that the Wills Act's engagement with testamentary undue influence yields familial wealth protection as a consequence, particularly insofar as a testator's surviving spouse and biological family members are protected against wealth loss.

#### *D. South African Testamentary Undue Influence Case Law*

In order to determine whether South African courts' engagement with testamentary undue influence is susceptible to criticism similar to that raised against the testamentary undue influence doctrine's application in the United States, it is useful to restate four principal assertions regarding the undue influence paradox and complexities associated with testamentary undue influence gleaned from American scholarly critique of the doctrine:<sup>88</sup>

1) Courts hail the undue influence doctrine as protective of testamentary freedom, but utilize it in an unorthodox manner to negate that very freedom by quashing *prima facie* unnatural bequests (bequests under which outsiders benefit to the exclusion of a testator's surviving spouse and (close) consanguineous relatives) (hereinafter "the first assertion");

2) The courts' unorthodox use of testamentary undue influence can be explained by a judicial pursuit of wealth preservation for a testator's surviving spouse and (close) consanguineous relatives, thereby protecting them against disinheritance (hereinafter "the second assertion");

3) Courts in jurisdictions where inheritance systems recognize economic familial solidarity through the operation of family protection devices are less inclined to use testamentary undue influence to achieve this goal of wealth retention (hereinafter "the third assertion"); and

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88. See *supra* Parts III.A & B.

4) Other inheritance law doctrines and constructs such as testamentary capacity, fraud, and coercion ensure that testamentary dispositions are made validly and freely, thus rendering the undue influence doctrine superfluous (hereinafter “the fourth assertion”).

It is useful to note that South African courts have found testamentary undue influence in only a handful of cases: *Executors of Cerfonteyn v. O’Haire*;<sup>89</sup> *Kirsten v. Bailey*;<sup>90</sup> *Du Toit v. Van der Merwe*;<sup>91</sup> and *Longfellow v. BOE Trust Ltd.*<sup>92</sup> can be counted among them. The extent to which these cases conform to the aforementioned assertions is investigated hereafter by dealing with each assertion in turn.

### *1. Testamentary Freedom Undermined in Instances of Unnatural Bequests*

The “strong rhetoric in support of freedom of testation” that, according to Madoff,<sup>93</sup> emanates from undue influence judgments in the United States, is also apparent in corresponding South African case law.<sup>94</sup> Does this pro-freedom-of-testation stance hold true in instances where South African testators made *prima facie* unnatural bequests to remote relatives or outsiders to the exclusion of spouses and/or close consanguineous relatives? Two of the abovementioned four South African cases were indeed decided in favor of testators’ family members who challenged wills. In

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89. Cerfonteyn, *supra* note 61.

90. Kirsten v. Bailey 1976 (4) SA 108 (C).

91. Du Toit v. Van der Merwe [2000] JOL 5920 (NC).

92. Longfellow v. BOE Trust Ltd. [2010] ZAWCHC 117 (28 April 2010) [unreported judgment, accessible at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2010/117.html&query=longfellow> (last visited on March 11, 2014)].

93. See *supra* Part III.A.

94. E.g., in *Tregea v. Godart*, *supra* note 63, at 22, the court typified undue influence as an “encroachment upon the freedom of the testator”, and in *Thirion v. The Master* 2001 (4) SA 1078 (T) 1091I, the court cautioned that one is free to dispose of one’s property even in an unreasonable manner, but that the law does not permit undue attempts by exploiters to manipulate dying, ill or otherwise vulnerable persons.

*Kirsten v. Bailey*<sup>95</sup> the successful challengers were the testatrix's sole intestate heirs, and in *Du Toit v. Van der Merwe*<sup>96</sup> the testator's daughters from his first marriage invoked undue influence successfully against the testator's second wife and a non-consanguineous outsider. On the other hand, in *Executors of Cerfonteyn v. O'Haire*<sup>97</sup> the successful challengers were non-consanguineous outsiders—the executors of the testatrix's estate, and in *Longfellow v. BOE Trust Ltd.*<sup>98</sup> the court's finding that the applicant exercised undue influence with regard to a formally-defective will precedent secured the operation of the testatrix's existing will in terms of which her former husband was the sole heir.

Of the aforementioned judgments, only the *Kirsten* and *Du Toit* cases conform to the first assertion in regard to the undue influence paradox. However, the *Cerfonteyn* case concerned a fairly unique scenario<sup>99</sup> and, it is submitted, is not instructive on this point. Moreover, it will be shown below that the *Longfellow* court's engagement with undue influence is open to criticism, and it is arguable that this case, despite its outcome, in fact supports the first assertion.

In some judgments where undue influence was alleged but not found, South African courts have made emphatic pronouncements in favor of testamentary freedom. In *Thirion v. The Master*,<sup>100</sup> for example, the testator benefited his girlfriend to the exclusion of his biological family. She brought an application to have the formally non-compliant document that contained her appointment as heir condoned under the Wills Act's condonation (dispensing) provision.<sup>101</sup> The testator's mother opposed this application on the

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95. *Kirsten*, *supra* note 90.

96. *Du Toit*, *supra* note 91.

97. *Cerfonteyn*, *supra* note 61.

98. *Longfellow*, *supra* note 92.

99. *See infra* Part IV.D.2.

100. *Thirion*, *supra* note 94.

101. Art. 2(3) of the Wills Act.

ground that the girlfriend had unduly influenced the testator. The court found that undue influence did not occur, and Judge Van der Westhuizen reasoned:

The one thing that is apparent is that he wanted to make the applicant his heir. Even in his earlier will in which he benefited his parents, he made provision for the possibility of meeting and marrying his dream wife . . . and that she would then receive preference over his parents. . . . It is clear that [the testator] did exactly what he intended to do with fervency. Whether his reasons were sensible and morally acceptable to others, and whether it attests to immaturity, is beside the point. . . . The law recognizes a deceased's disposition of property, even at the expense of others, whether out of respect for death or out of respect for the concept of ownership.<sup>102</sup>

In this case the testator was party to a confidential relationship with the applicant and made a *prima facie* unnatural bequest (one to the exclusion of his biological family) in her favor; moreover, no family protection devices were available to his mother (and other family members) to secure wealth retention. If ever a court was intent on conforming to the first assertion, and on invoking undue influence at the expense of freedom of testation to quash the disinheritance of consanguineous relatives in order to secure familial wealth retention, *Thirion's* case provided the ideal opportunity to do so. The court nevertheless ruled, notwithstanding the testator's non-conforming dispositive plan, that undue influence did not occur.<sup>103</sup>

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102. *Thirion*, *supra* note 94, at 1095H-1096A (author's translation from the original Afrikaans).

103. A similar approach was followed in the earlier case of *Finucane*, *supra* note 59, where a testatrix benefited the defendant—her attorney—to the exclusion of her biological family and her adopted son. The court ruled that “however extraordinary it may seem that [the testatrix] should have passed over her relatives and adopted son for MacDonald . . . the Court cannot deduce from that that MacDonald exercised undue influence over her and that it was by means of the exercise of such influence that he obtained the benefit under the will.” *Id.* at 35-36.

In *Longfellow v. BOE Trust Ltd.*,<sup>104</sup> on the other hand, the testatrix made a natural bequest (one in favor of a close relative and, according to American scholarship, usually a strong indicator of the absence of undue influence) to the applicant, her second husband, in a will precedent completed by the applicant and, according to his evidence, approved by the testatrix. The court found that the applicant had unduly influenced the testatrix. Therefore, this natural bequest yielded before the court's view on the applicant's exploitation of his confidential relationship with the testatrix. As a result, the testatrix's existing will, in terms of which her first husband was the sole heir, remained intact. But the *Longfellow* court's undue influence ruling is suspect because the facts before the court showed that the testatrix and the applicant were ostensibly happily married for more than a decade; the applicant called on a commercial bank for assistance in drafting the testatrix's will, and only when the bank failed to respond, did he resort to the will precedent. Furthermore, two persons (the testatrix's nurse as well as a colleague of hers) were present when the will precedent was completed, and two weeks had elapsed between the completion of the will precedent and the testatrix's death. This was sufficient time for her, although terminally ill, to express a change of heart in another will. When these facts are measured against the test for undue influence in South African law laid down in *Spies v. Smith*, it is certainly arguable that the court erred in its finding that the applicant had unduly influenced the testatrix. It seems highly probable that the testatrix in fact intended to benefit her (second) husband.<sup>105</sup> In this light, it is submitted that *Longfellow*, despite its outcome, supports the assertion that findings of testamentary undue influence can occasion, in South

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104. *Longfellow*, *supra* note 92.

105. See A. van der Linde, *Longfellow v BOE Trust Ltd NO (13591/2008) [2010] ZAWCHC 117*, *Mabika v Mabika [2011] ZAGPJHC 109*, *Taylor v Taylor [2011] ZAECPEHC 48: Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law*, 45 DE JURE 412, 417 (2012).

Africa as in the United States, the negation of testamentary freedom.

The above exposition shows that, generally, South African cases in which wills were challenged successfully on the ground of testamentary undue influence secured wealth for testators' consanguineous relatives, thus protecting them from disinheritance. However, in *Thirion v. The Master*<sup>106</sup> the court rejected an averment of undue influence and upheld a non-conforming bequest to an outsider with emphatic reliance on testamentary freedom. The *Thirion* court's pro-freedom-of-testation stance is, however, undermined by the *Longfellow* court's negation of testamentary freedom where, as it was argued above, it erroneously found that undue influence was present based on the facts at hand.

In light of this mixed picture, the next two assertions regarding the undue influence paradox and its associated complexities require investigation: were the South African judgments in which testamentary undue influence was found motivated primarily by the judicial pursuit of familial wealth retention? And does the availability of family protection devices in South African law nullify the (potential) unorthodox use of testamentary undue influence?

## 2. *Familial Wealth Retention*

The second assertion posits the unorthodox judicial utilization of testamentary undue influence as a means to secure wealth retention by a testator's spouse and/or consanguineous relatives through the negation of wealth acquisition at their expense by either the influencer or by a third-party outsider. The South African judgment in *Executors of Cerfonteyn v. O'Haire*<sup>107</sup> is somewhat of an enigma on this point. The court opined that "[t]he

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106. *Thirion*, *supra* note 94.

107. *Cerfonteyn*, *supra* note 61.

nature or quality of the object sought to be attained by the use of the influence does not guide the decision of the Court. The ‘undueness’. . . of the influence is in the use of it.”<sup>108</sup> This observation is appropriate in light of the *Cerfonteyn* case’s unique feature—the fact that the influencer was wholly disinterested. In this case it was alleged that the defendant, a Roman Catholic priest who was the testatrix’s spiritual adviser and who received no benefit under her will, unduly influenced the testatrix to execute a codicil in which he was appointed as guardian and tutor of the testatrix’s minor children. Judge Fitzpatrick said:

I have searched every law book to which I have access, and have not been able to find one case like the present, where the person charged with having exercised undue influence to procure the execution of a will had not a personal interest of one shilling in the transaction, and did not gain one farthing as the result of his influence.<sup>109</sup>

A two-judge majority held, the absence of personal gain on the defendant’s part notwithstanding, that undue influence was present insofar as the “persistent importunity of the defendant, continued for years and culminating on the morning of the death” defeated the testatrix’s resistance and occasioned the execution of the disputed codicil.<sup>110</sup> Therefore, the peculiar *Cerfonteyn* judgment refutes the second assertion insofar as the court’s finding that undue influence was present did not negate financial gain by the influencer, nor did it prevent wealth loss for, or disinheritance of, the testatrix’s consanguineous relatives.

The judgment in *Longfellow v. BOE Trust Ltd.*<sup>111</sup> also does not fit the familial wealth retention paradigm. The undue influence ruling against the testatrix’s second husband of twelve years in this case secured operation of the testatrix’s will, in terms of which her first husband was the sole heir. Familial wealth retention was

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108. *Id.* at 73.

109. *Id.* at 79.

110. *Id.* at 74.

111. *Longfellow*, *supra* note 92.

clearly not achieved through this ruling. However, it was argued earlier<sup>112</sup> that the *Longfellow* case is susceptible to criticism; and, as it will be shown later,<sup>113</sup> the undue influence rulings in both *Cerforteyn* and *Longfellow* were secondary to other grounds of invalidity of the respective documents.

*Du Toit v. Van der Merwe*<sup>114</sup> stands alone among the four South African undue influence judgments under discussion in that the challenge of the will in this case was decided on the common law ground of testamentary undue influence alone (the plaintiffs abandoned lack of testamentary capacity as an alternative ground for the challenge). The challengers were the testator's three daughters, while the will's principal proponent—the first defendant—was the testator's second wife, to whom he was married for more than a decade prior to his death. The testator, seventy-nine years of age and in poor health, executed the disputed will seventeen days after having made a will in which his daughters were appointed as his sole heirs. In the disputed will, the testator appointed W—the second defendant—as legatee in respect of, among others, the testator's farm, and designated the first defendant as sole heir to the estate residue.

The court noted the history of discord between the plaintiffs and the first defendant, which arose primarily because the first defendant convinced the testator that his daughters were not his biological children.<sup>115</sup> The court further opined that the first defendant and W were unreliable witnesses and that their evidence was fraught with lies.<sup>116</sup> As a result, it held that the evidence pointed strongly to the conclusion that the disputed will came about through the first defendant's and W's undue influence of the testator, and that the will had to be set aside.<sup>117</sup>

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112. See *supra* Part IV.D.1.

113. See *infra* Part IV.D.4.

114. *Du Toit*, *supra* note 91.

115. *Id.* at 47, 59.

116. *Id.* at 50.

117. *Id.* at 54.

The bequests in this case conform partly to the confidential relationship/natural bequest dichotomy. The legacy of the farm to W corresponds to the dichotomy in that a confidential relationship of sorts existed between the testator and W (W was the lessee of the testator's farm for some years prior to the latter's death), while the legacy to W was not a natural bequest (W was not a consanguineous relative of the testator), thus raising the suspicion that the testator might have acted under undue influence with regard to the legacy of the farm. On the other hand, the natural bequest to the first defendant as the testator's wife of more than ten years, presented in American scholarship as a strong indicator of the absence of undue influence, yielded before the court's view on the confidential and exploitive relationship that existed between the first defendant and the testator.

The *Du Toit* judgment conforms to the second assertion with regard to the undue influence paradox insofar as the court attached particular weight to evidence adduced on behalf of the plaintiffs that the testator would never have contemplated the disinheritance of his daughters; particularly not to let the farm fall into an outsider's (W's) hands.<sup>118</sup> The judgment leaves the distinct impression that the court was very concerned with the harm caused by the daughters' loss of the family estate. Judge President Steenkamp opined, for example, that W had forsaken a legal duty that rested on him to correct the testator's misperceptions regarding his daughters, and said:

In this case the inference can be drawn against [W] that . . . [W] should have realized that the deceased, by reason of the misperception, was going to disinherit his children and would nominate him [W] . . . and first defendant as heirs of his estate. *The plaintiffs were consequently prejudiced* and he [W] and first defendant benefited from the misperception.<sup>119</sup>

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118. *Id.* at 13, 45.

119. *Id.* at 54 (author's translation from the original Afrikaans; emphasis added).

This judgment, one of only a handful of South African cases in which testamentary undue influence was established and the only one in which the challenge to the will was decided on undue influence alone, fits the familial wealth retention paradigm. It raises the question, however, whether the dearth of South African judgments in which testamentary undue influence was invoked successfully is attributable to the presence of family protection devices as stated in the third assertion.

*3. Family Protection Devices Curtail the Unorthodox Use of Testamentary Undue Influence*

The undue influence ruling in *Executors of Cerfonteyn v. O'Haire*<sup>120</sup> was handed down prior to the statutory abolition of Roman-Dutch law's forced heirship devices in the erstwhile Cape Colony—at a time, therefore, when family protectionism was particularly potent. *Cerfonteyn* seemingly disproves the assertion that the availability of family protection devices decreases judicial utilization of undue influence to achieve family protectionism. However, given the disinterestedness of the influencer in this case,<sup>121</sup> it is submitted that the *Cerfonteyn* judgment is not instructive on this point. The undue influence ruling in *Kirsten v. Bailey*<sup>122</sup> was handed down at a time when only a testator's children enjoyed maintenance-based protection against disinheritance under South African law. In this case, the undue influence ruling favored the testatrix's only intestate heirs who, significantly, were not her own children but those of her brother, thus not claimants under the common law maintenance dispensation. Therefore, *Kirsten's* case conforms to the third assertion in regard to the undue influence paradox insofar as the ruling that undue influence was present secured wealth on intestacy for the testatrix's only consanguineous relatives, who not

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120. *Cerfonteyn*, *supra* note 61.

121. *See supra* Part IV.D.2.

122. *Kirsten*, *supra* note 90.

only fell outside the ambit of existing family protection devices but who were also disinherited under the disputed wills.

*Du Toit v. Van der Merwe*<sup>123</sup> also supports the third assertion, if evaluated from the perspective of the court's ruling in favor of the successful challengers of the will. The plaintiffs were the adult daughters of the testator, born from his first marriage. They had no recourse to the common law maintenance dispensation for dependent minor children and were, moreover, disinherited under the disputed will. The undue influence ruling in their favor undeniably procured wealth for them through the reinstatement of the first will under which they were the testator's sole heirs.

The judgment in *Longfellow v. BOE Trust Ltd.*,<sup>124</sup> on the other hand, does not conform to assertion three—it was handed down after the enactment of the Maintenance of Surviving Spouses Act which allowed the applicant, if he met the prescribed criteria, a maintenance claim against his deceased wife's estate (the judgment is silent, however, on whether he instituted such a claim). The court nevertheless made an undue influence ruling against the testatrix's husband and the potential availability of a family protection device did not deter the court from ruling that the husband unduly influenced the testatrix.

South African judgments in which testamentary undue influence was alleged but not found, paint a different picture. The challengers of the wills in these judgments were, for the greater part, not claimants under any maintenance dispensation and were, therefore, without recourse to family protection devices as means of procuring wealth from the estates of the allegedly unduly influenced testators.<sup>125</sup> Yet, the challenges of the wills were not successful. In some of these cases, the unsuccessful challengers

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123. *Du Toit*, *supra* note 91.

124. *Longfellow*, *supra* note 92.

125. *E.g.*, *Finucane*, *supra* note 59 (challenger of the will was the testatrix's adult child); *Spies*, *supra* note 68 (challenger of the will was the testator's stepmother, on behalf of the testator's minor half-sister); *Katz v. Katz* [2004] 4 All SA 545 (C) (challengers of the will were the testator's adult children).

were indeed heirs under earlier wills, but they still could not procure findings that undue influence was present with respect to the disputed wills (which findings would have secured the operation of such earlier wills in their favor).<sup>126</sup> Evidently, neither the unavailability of family protection devices, nor the procurement of wealth through earlier wills swayed courts in favor of undue influence rulings in these cases. South African judgments are, therefore, dichotomous with respect to the third assertion. Judgments in which testamentary undue influence was found conform, by and large, to the third assertion; however, judgments in which testamentary undue influence was not found generally left the unsuccessful challengers of the wills without recourse to family protection devices as a means of wealth procurement.

#### *4. Secondary Undue Influence Findings Are Superfluous*

South African testamentary undue influence judgments conform, by and large, to the fourth assertion. In *Executors of Cerfonteyn v. O'Haire*<sup>127</sup> the two-judge majority found, first, that the testatrix, by reason of pulmonary consumption (tuberculosis) and the taking of opiates, lacked testamentary capacity. Clearly, the case should have rested there. Both judges nevertheless proceeded to a secondary undue influence inquiry, probably because it was pleaded in the alternative. Similarly, in *Kirsten v. Bailey*<sup>128</sup> the plaintiffs pleaded lack of testamentary capacity on the testatrix's part, and undue influence in the alternative, in regard to three wills made by the testatrix shortly before her death. The court held that the testatrix lacked the requisite capacity when she made each of the three wills and, as a result, set all three wills aside.<sup>129</sup> The court ruled, moreover, that the first and third wills were "in any event obtained as a result of undue influence exerted upon the

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126. *E.g.*, Finucane, *supra* note 59; Spies, *supra* note 68.

127. Cerfonteyn, *supra* note 61.

128. Kirsten, *supra* note 90.

129. *Id.* at 111.

testatrix by the first defendant [the sole heir in terms of both these wills] and that they could, for this reason also, be set aside.”<sup>130</sup> Evidently, this finding was secondary to the capacity ruling and, again, superfluous. As in *Cerfonteyn*, the case should have rested with the capacity ruling.

This tendency persisted in *Longfellow v. BOE Trust Ltd.*,<sup>131</sup> where the court ruled that a will precedent completed by the applicant did not comply with the Wills Act’s formal requirements, and could not be rescued under the Wills Act’s condonation (dispensing) provision.<sup>132</sup> The court, having made this ruling, proceeded to an undue influence ruling on synoptic evidence regarding the testatrix’s physical and mental state, and did so in two meager paragraphs of the judgment.<sup>133</sup> Such a secondary finding typecasts testamentary undue influence as the “safety valve” that Spivack bemoans<sup>134</sup>—Judge Baartman admitted in *Longfellow* that she made the undue influence finding to allow for the possibility that she was wrong on the condonation ruling<sup>135</sup>—and fortifies the conclusion that South African undue influence judgments conform, by and large, to the fourth assertion.

A survey of case law reveals that South African courts opt frequently to resolve challenges to wills where undue influence is averred (invariably as one among a number of alternatives) on grounds other than undue influence. The *Cerfonteyn* and *Kirsten* cases show that testators’ lack of testamentary capacity is the alternative ground on which such judgments are most commonly based. In another case, the court concluded that testamentary undue influence did not occur, but ruled that the alleged influencer was unworthy to inherit by reason of reprehensible conduct towards the testatrix, which disqualified him from testamentary

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130. *Id.* at 111, 113.

131. *Longfellow*, *supra* note 92.

132. *Id.* at § 24.

133. *Id.* at § 29-§ 30.

134. *See supra* Part III.B.

135. *Longfellow*, *supra* note 92, at § 29.

benefit.<sup>136</sup> This state of affairs leads one to conclude that in South Africa, contrary to the position in the United States, testamentary undue influence is readily averred or pleaded, but, certainly because of evidentiary difficulties of meeting the burden of proof, it is very difficult to procure a ruling that undue influence was in fact perpetrated.<sup>137</sup> It is submitted, therefore, that South African courts generally underplay pleas of testamentary undue influence in challenges to wills, thus conforming, by and large, to the fourth assertion insofar as testamentary undue influence is frequently displaced by other inheritance rules or statutory prescripts.

#### V. EVALUATION AND CONCLUSION

The exposition in Part IV of this article on testamentary undue influence in South Africa showed that some points of contact exist between the South African legislature's and courts' engagement with this aspect of the law of wills, on the one hand, and issues raised in scholarly criticism of the testamentary undue influence doctrine in the United States, on the other hand. Do these similarities warrant the conclusion that the undue influence paradox and the American doctrine's associated complexities are manifest in the South African law of wills? And, even if this question is answered in the negative, can South Africa learn some lessons from scholars' critical appraisal of testamentary undue influence in the American context?

The South African Wills Act's engagement with testamentary undue influence, although limited, yields family protectionism through article 4A(2)(b)'s<sup>138</sup> ring-fencing of wealth in favor of a testator's intestate heirs. It is certainly arguable that article

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136. Taylor, *supra* note 65.

137. Roger Kerridge, *Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator*, 59 CAMBRIDGE L. J. 310, 328 (2000), laments a similar state of affairs in England when he argues that "it is too easy in England to coerce, or deceive, a vulnerable testator into making a will and it is not easy enough to challenge a suspicious will when one comes to light."

138. See *supra* Part IV.C.

4A(2)(b) functions as a family protection device in South African inheritance law, alongside the devices highlighted in Part IV.A of this article. Critics of the testamentary undue influence doctrine in the United States will undoubtedly register their lack of surprise at the fact that South African courts have issued very few orders in favor of testators' consanguineous relatives under article 4A(2)(a). Evidently, article 4A(2)(b) protects these relatives adequately against wealth loss; consequently they need not resort to court orders under article 4A(2)(a) to secure wealth on the ground that they had not perpetrated undue influence when testators made or executed their wills. It is submitted, therefore, that the South African legislature's limited engagement with testamentary undue influence in the Wills Act conforms generally to the familial economic solidarity paradigm that underpins the undue influence paradox in the American context.

South African courts' use of testamentary undue influence also conforms to elements of the paradox and assertions made with regard to the testamentary undue influence doctrine in the United States. Significantly, such conformity is manifest in *Du Toit v. Van der Merwe*,<sup>139</sup> a case in which the challenge of the will was decided on undue influence alone, and especially insofar as the *Du Toit* court, in its reasoning on the presence of undue influence, voiced concern regarding wealth loss by the testator's disinherited daughters.

It is submitted, however, that, notwithstanding the South African legislature's aforementioned stance in favor of familial solidarity, it is difficult to conclude from the judgments surveyed in Part IV of this article that South African courts are driven *primarily* by family protectionism in their engagement with testamentary undue influence. Even in *Du Toit* the undue influence ruling was a two-edged sword: the finding of undue influence made against the testator's wife indeed prevented wealth loss by

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139. *Du Toit*, *supra* note 91.

the testator's daughters through their disinheritance under the disputed will, but denied the wife wealth in spite of her spousal status (of more than a decade) and of the natural character of the bequest to her.

In this light, the first lesson that South Africa must learn from scholarly criticism of the testamentary undue influence doctrine in the United States is that testamentary undue influence lends itself to unorthodox usage that can contort it into a mechanism for familial wealth retention at the expense of its role as guardian of testamentary freedom. It cannot be said definitively that South African courts have followed their American counterparts into what its critics find to be testamentary undue influence's paradoxical trap. Nevertheless, South African judgments in which testamentary undue influence was found to have been present were generally decided in favor of consanguineous relatives who were disinherited under the disputed wills, and who were, moreover, without recourse to family protection devices to secure wealth retention. The broad contours of a familial economic solidarity paradigm are, therefore, detectable in South African courts' engagement with testamentary undue influence. Consequently, it is imperative for these courts to be alerted to the dangers associated with the unorthodox and paradoxical judicial utilization of undue influence in the law of wills.

The second lesson that South Africa must learn from American scholars' criticism of the testamentary undue influence doctrine's operation in the United States concerns the necessity of affirming testamentary undue influence in its role as guardian of testamentary freedom. Regrettably, South African courts' engagement with testamentary undue influence has not consistently reinforced this truism. On the one hand, a judgment such as *Thirion v. The Master*<sup>140</sup> should satisfy all but the fiercest critics of the undue influence doctrine in the United States: in this

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140. *Thirion*, *supra* note 94.

case the court rejected a claim of undue influence and upheld a bequest to a non-consanguineous outsider; moreover, it founded its ruling on a firm adherence to testamentary freedom, even with regard to the non-confirming dispositive plan that excluded the testator's biological family. On the other hand, scholars who are critical of the way the undue influence doctrine operates in the United States may share the view that in *Longfellow v. BOE Trust Ltd.*,<sup>141</sup> the court's ruling that testamentary undue influence was present was artificial on the facts at hand and indeed negated the testatrix's testamentary freedom in that case. The *Longfellow* judgment shows that South African courts are not immune to derogating from freedom of testation through ill-conceived findings of testamentary undue influence.

The third lesson that South Africa must learn from the criticism of the testamentary undue influence doctrine in American scholarship concerns the condemnation of undue influence to a subsidiary role in challenges of wills. South African courts have made secondary, often superfluous, testamentary undue influence rulings in the past which, as Spivack points out,<sup>142</sup> cast testamentary undue influence in the role of a mere "safety valve". This unfortunate tendency is exacerbated in South African law by the fact that it is apparently difficult for the challengers of wills to prove that undue influence was in fact perpetrated. Placing the *onus* exclusively on the plaintiff throughout may lie at the heart of this problem.

How can this situation be remedied? The American experience suggests burden-shifting as a possible solution. Although burden-shifting does not accord with the South African common law position on testamentary undue influence, the South African legislature can decree a departure from the common law. Some South African scholars have called for burden-shifting in challenges of wills in the past. For example, Sonnekus proposed

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141. *Longfellow*, *supra* note 92.

142. *See supra* Part III.B.

that the South African legislature should amend the Wills Act's provision on testamentary capacity by placing the burden of proof on the wills' proponents in challenges of wills based on lack of capacity if such wills were executed after the testators attained a statutorily-determined age.<sup>143</sup> In this light, it must be noted that the South African judgments in which testamentary undue influence was found to have been present concerned mostly testators who were of advanced age. Building on Sonnekus's suggestion, the Wills Act's testamentary capacity provision could be amended also in the sense of placing the burden of proving the absence of undue influence on wills' proponents in all undue influence challenges where testators exceeded, at the time of the wills' execution, a statutorily-determined age. The introduction of such an age-based rule to regulate burden placement is, arguably, preferable to a "confidential relationship rule" or a "suspicious circumstances rule" because an age-based rule would not violate the South African common law's firm stance that a special relationship or suspicious circumstances do not in themselves raise a presumption of undue influence.

Manipulating burden placement in challenges of wills may, however, not be acceptable to South African law reformers. It is submitted that, in the alternative, Spivack's assertion that prevention is better than cure points the way for possible South African legal development: *ante mortem* mechanisms should be instituted to ensure the valid and free expression of testamentary wishes.<sup>144</sup> Again, South African scholars have proffered solutions akin to those advocated in American scholarship to achieve this goal.<sup>145</sup> But perhaps an answer lies in South Africa's common law

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143. Jean C. Sonnekus, *Testeerbevoegdheid en Testeervryheid as Grondwetlik Beskermdede Bates (1)*, 75 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 1 (2012). Sonnekus proposes seventy-five years of age as appropriate to this end.

144. See *supra* Part III.B.

145. E.g., Jean C. Sonnekus, *Freedom of Testation and the Ageing Testator*, *supra* note 6, at 88, who advocates for the amendment of the South African Wills Act to require every witness to a will to supplement the attesting signature

insofar as the notarial will was, until its abolition under the current Wills Act, a recognized Roman-Dutch will form. The common law notarial will required the involvement of a notary, either as will drafter or to confirm a will as expressing freely a testator's final wishes. It is submitted that a statutory reintroduction of the notarial will, particularly if made compulsory in regard to testators who have attained a statutorily-fixed age and/or in regard to wills made in institutions for the mentally and/or physically infirm, would be an important safeguard for South African testators' free expression of wishes.

The foregoing proposals suggest that the South African legal position on capacity-related and undue influence challenges of wills can be enhanced through relatively simple law reform. And herein lies, arguably, the greatest lesson that South Africa must learn from scholarly critique of the testamentary undue influence doctrine in the United States: South African scholars have subjected the South African law on testamentary undue influence to analysis and criticism only infrequently. American scholars, on the other hand, have highlighted the shortcomings of the testamentary undue influence doctrine in their legal system in a sustained manner, and at least one scholar called for the abolition of the doctrine in the United States.<sup>146</sup> South African scholarship has, for the most part, shied away from a critical appraisal of undue influence in the South African law of wills. While the rules pertaining to testamentary undue influence are integral to South African testamentary succession, these rules can certainly be

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with full disclosure of identity in order to allow such witnesses to be traced and questioned with regard to the circumstances of the will's execution. Sonnekus (*id.* at 95) also proposes that the South African legislature should introduce statutory prescripts that permit an officer of the court to execute a will on behalf of a mentally infirm testator. *See also* Jean C. Sonnekus, *Testeerbevoegdheid, Herroeping van 'n Testament en Kuratele Sorg*, 15 *STELL. L. REV.* 450 (2004). François du Toit, *Mental Capacity as an Element of Testamentary Capacity*, 122 *S. AFRICAN L. J.* 661 (2005), calls for the involvement of a testator's attending physician or psychologist to confirm capacity.

<sup>146</sup>. *See supra* Part III.A.

enhanced to provide, as Frolik reasons,<sup>147</sup> optimal protection to vulnerable testators with marginal capacity. Sustained comparative research by South African inheritance law scholars on the way testamentary undue influence functions in other jurisdictions will contribute significantly to attaining such enhancement.

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147. *See supra* Part III.B.