

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
VIOLA CAROLYN LUCAS,)	Case No. 01-12092
)	Chapter 7
)	
Debtor.)	
_____)	
)	
ORVEY R. COUSATTE, Administrator of the)	
ESTATE OF IMOGENE COLLIER,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01-5116
)	
VIOLA CAROLYN LUCAS a/k/a)	
CAROLYN LUCAS,)	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

This adversary proceeding comes before the Court on plaintiff Orvey R. Cousatte’s, Administrator of the Estate of Imogene Collier (“Cousatte”) complaint pursuant to 11 U.S.C. § 523(a)(4) and (a)(6)¹ to except from discharge a state court judgment entered against the defendant Carolyn Lucas (“Lucas”). Cousatte also requests affirmative relief from this Court, namely to impose a constructive trust upon Lucas’ homestead and vehicle – tracing trust assets and property which Lucas allegedly converted or liquidated to acquire this property. Cousatte relies principally upon the collateral estoppel effect of a state court judgment of undue influence to establish nondischargeability

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

under §523(a)(4) (fiduciary fraud, embezzlement and larceny) and (a)(6) (willful and malicious injury).

Factual Background

Debtor Viola Carolyn Lucas lived at 2768 Hiram, Wichita, Kansas, across the street from the decedent Imogene Collier, whom Lucas knew for eighteen years as a neighbor and friend. Collier was elderly and had, up to 1996, lived with her husband and her sister at the house on Hiram. According to findings made by the state court Collier was a recluse with, at best, a dim understanding of worldly matters. Her other relatives, cousins and her half-brother Orvey Cousatte, had little contact with her. The state court further found that Collier at one time harbored an intent to leave some of her estate to the cousins, but no intent whatsoever to leave anything to Cousatte. When Collier sought advice from Intrust Bank about making a will, the Bank referred her to Patricia Coffey, then a lawyer in Wichita. Ultimately, Coffey drafted trust and will documents for Collier, albeit after considerable consultation with Lucas.

Collier executed the Imogene Collier Revocable Trust on October 10, 1996; Collier and Lucas were named co-trustees. Collier's will provided that, at her death, all of her remaining assets would be bequeathed to the Trust. Under the Trust, upon Collier's death, Lucas would receive all of the residue after payment of last expenses and taxes. All of Collier's assets were deposited in the Trust and her accounts were maintained jointly with Lucas as co-trustee.

Collier died on February 19, 1997. Lucas, acting as trustee of the Trust, took no precipitous action concerning the trust assets other than seeking to have Collier's will admitted to probate in Sedgwick County. Cousatte filed written defenses to the admission of the will to probate and the appointment of Lucas. Cousatte also filed for and received Letters of Administration in a separate proceeding.

On March 12, 1997 Cousatte filed a civil lawsuit in Sedgwick County District Court, challenging the validity of the will and Trust.² Cousatte alleged that the will and Trust had been obtained by Lucas' exercise of undue influence over Collier. The civil suit culminated in a five day trial in December of 1997, wherein the trial court concluded that the evidence did not support a finding of undue influence. The trial court specifically held that because Collier never intended to leave anything to Cousatte, the undue influence issue was immaterial and the court need not address the "suspicious circumstances" surrounding the creation of the will and Trust. A final journal entry of judgment was entered on January 21, 1998.

Cousatte appealed the judgment to the Kansas Court of Appeals.³ In an unpublished opinion, the Court of Appeals reversed and remanded the case with instructions that the trial court consider "suspicious circumstances" and determine whether the burden of proof to defend the transactions should be shifted to Lucas.⁴ The Court of Appeals' mandate was issued January 21, 2000. At no time in the appellate process did Cousatte obtain an order of stay pending appeal or post a supersedeas bond.

During the pendency of the appeal between December of 1997 and January of 2000, Lucas disposed of various trust assets. Lucas testified at trial that she considered the matter closed after the

² *Orvey R. Cousatte, Administrator of the Estate of Imogene Collier v. Viola Carolyn Lucas, a/k/a Carolyn Lucas*, Case No. 97 C 806, Sedgwick County District Court.

³ *Orvey R. Cousatte, Administrator of the Estate of Imogene Collier v. Viola Carolyn Lucas, a/k/a Carolyn Lucas*, No. 80,637 (Kan. App. Jan. 21, 2000) (unpublished).

⁴ The Court of Appeals concluded that the trial court erred in finding that suspicious circumstances were immaterial because as a prospective heir at law, Cousatte had standing to challenge the will. It remanded the case for application of the undue influence analysis as described in *Logan v. Logan*, 23 Kan. App. 2d 920, 937 P.2d 967, rev. denied 262 Kan. 962 (1997).

state court judgment in December 1997 and, while she remained the trustee under the Trust, she considered the trust funds and Collier's house hers to dispose of. In July 1998, she closed out various accounts and paid Collier's last expenses. In May 1998, pursuant to a court order, she liquidated certificates of deposit and paid her counsel, Jerry Bogle, some \$38,000 in legal fees incurred in the will contest litigation. Lucas utilized some of the cash for her personal purposes. In March of 1999, Lucas sold Collier's home and received net proceeds of approximately \$65,000. The proceeds from the sale of Collier's home were applied by Lucas to pay off the loan on *her* own home. Lucas did not pay inheritance taxes, although her counsel Mr. Bogle prepared an inheritance tax return which is, as yet, unsigned and unfiled. Lucas stated that she did not file the return on the advice of counsel and that she relied on the lawyers in determining what actions to take. It did not appear to this Court that the defendant is a person of much legal sophistication.

Following remand of the state court action, the trial court convened another trial and entered its journal entry of judgment on July 27, 2000.⁵ This time, the trial court found sufficient "suspicious circumstances" existed to shift the burden of proving good faith in the various transactions onto Lucas. The trial court further found that Lucas failed to meet this burden of proving that the transfers were made in good faith and failed to rebut the presumption of undue influence. Accordingly, the trial court held that the will and Trust were obtained by Lucas' undue influence over Collier. The trial court set aside the will and Trust, struck its order issuing letters testamentary to Lucas, and reinstated Cousatte as administrator of Collier's estate. The trial court also ordered Lucas to turnover all of Collier's property or proceeds thereof to Cousatte and settled title to the Collier house in Cousatte. Of course, Lucas had sold Collier's house by the time this order was entered. The trial court's order further

⁵ It is not apparent that further evidence was presented or received; rather, the state court merely reconsidered the former record in light of the Kansas Court of Appeals' ruling.

authorized the issuance of writs of assistance to the Sedgwick County Sheriff to take possession of the property that was ordered to be turned over.⁶ It does not appear that Cousatte requested the trial court to grant relief in the form of imposition of a constructive trust on the property Lucas had subsequently acquired, and which Cousatte was able to trace, from Lucas' liquidation of trust property and assets.

Lucas appealed the second state court judgment. On March 1, 2002, the Kansas Court of Appeals affirmed the state court judgment and issued its mandate accordingly.⁷ In the meantime, Lucas filed this Chapter 7 bankruptcy on May 7, 2001 and Cousatte commenced this adversary proceeding on June 4, 2001.

Most of the testimony at trial of the adversary proceeding focused on Lucas' conduct concerning the trust assets during the two-year period between the entry of the first state court judgment and the reversal and remand of the case by the Kansas Court of Appeals. There was virtually no testimony concerning the alleged undue influence exerted on Collier or the suspicious circumstances involved in procuring the will and Trust. The parties offered exhibits which include a transcript of the trial court's ruling in December of 1997, the two journal entries of judgment filed in the state court action, and the two unpublished opinions of the Kansas Court of Appeals, but there is no record of the evidence presented in the state court trials in evidence here. Plaintiff asks this Court to apply the doctrine of collateral estoppel and conclude that, as to Lucas' conduct vis-a-vis Collier before her death, her exertion of undue influence amounted to either fiduciary fraud under

⁶ From this Court's reading of the Journal Entry of Judgment, a money judgment was not entered against Lucas. It is not apparent from the record what property, if any, was recovered by Cousatte, nor the extent of any proceeds of property recovered by Cousatte by enforcement of the judgment against Lucas.

⁷ *Orvey R. Cousatte, Administrator of the Estate of Imogene Collier, Deceased v. Viola Carolyn Lucas, a/k/a Carolyn Lucas*, No. 86,463 (Kan. App. Mar. 1, 2002) (unpublished).

§523(a)(4) or malicious damage to Collier's property interests under §523(a)(6). Plaintiff also seeks a finding that Lucas' disposal of Collier's assets during the years between the entry of the January 21, 1998 journal entry of judgment and its reversal two years later, violated her fiduciary duties and amounted to embezzlement or larceny.

While the trial court's legal conclusion concerning application of suspicious circumstances in the first trial was ultimately reversed by the Kansas Court of Appeals, the factual findings were left undisturbed. This Court has reviewed the findings of the trial court made from the bench on December 19, 1997, as well as the appellate court's factual statement in the memorandum opinion of the first appeal.

In describing Collier, the trial court first concluded that, while Imogene possessed a low IQ, she did have knowledge of her assets as well as to whom they could be left and therefore had testamentary capacity when she executed the trust and will. He also noted that Collier not only disliked her half-brother, the plaintiff here, but also Lucas. He then discussed her reclusive nature and lifestyle which "clearly created a situation, a woman, a person who pushed and alienated every member of the family. . . . So the whole family just accepted Imogene for what she was and what she wanted, and that is she wanted to be left alone . . ." *See Ex. A, p. 7.*

The trial court also observed that the death of Imogene's husband in 1994 and her sister (her principal caretaker) in 1996 created a "large, large vacuum in her life, one that was partly to her creation. *That vacuum then was obvious to Carolyn Lucas, and she stepped in.*" *See Ex. A, p. 8* (Emphasis supplied). The trial court further noted that most of attorney Coffey's contacts and discussions concerning the trust and will were with Lucas rather than Collier and that Collier had even commenced making inter vivos gifts. The trial court characterized the circumstances as "pretty peculiar" and necessitating "another look at it." *See Ex. A, p. 9.*

The trial court acknowledged that “it is clear factually there was a fiduciary relationship between Carolyn Lucas and the deceased. There’s no doubt about that.” But the trial court’s remarks reflect uncertainty concerning Lucas’ intent as evidenced by her actions. Returning to the “vacuum” metaphor, the trial court stated:

This vacuum by chance was filled . . . by Carolyn Lucas. Whether she did it be design or was just fortunately in the right spot at the right time or she did it because she was a neighbor who cared for her neighbor in the fashion she did, I do not know, nor am I going to make that judgment, but that vacuum was filled by Carolyn Lucas. She’s the one who ended up with the property, and whether it was because Imogene wanted it that way or was influenced to go that way . . . is another issue, but it all ends up in the same spot.

Ex. A, pp. 11-12.

Later in his findings, the trial court stated:

Factually Carolyn Lucas was the only person around this woman’s waning months. There was no one else that was with her on a day-to-day or had contact with her on a day-to-day basis or even a week-to-week basis, and, I mean, she truly filled a vacuum left by Glenn and Norma Lee’s death . . .”

Ex. A, p. 13.

The Court of Appeals characterized the relationship between Lucas and Collier in this way:

Imogene’s condition deteriorated rapidly after Norma Lee’s death in July 1996. Thereafter, Lucas cared for Imogene by driving her to the grocery store, helping her shop, writing checks for her, and taking her to appointments. Lucas had been twice convicted of theft and was supporting herself and her two children with the help of social security and welfare assistance.

Ex. C, p. 2.

On those facts, and after a discussion of Kansas precedent concerning undue influence, the Court of Appeals held that the trial court erred in concluding that the undue influence issue was immaterial; as a prospective heir at law, Cousatte had standing to challenge the will. The case was

remanded to the district court to consider and apply the undue influence analysis as described in *Logan v. Logan*.⁸ Under Kansas law, if an individual is in a fiduciary relationship with another *and* suspicious circumstances exist with regard to a transaction, there is a *presumption* of undue influence. The burden of proof then shifts to the beneficiary of the transactions (*i.e.* Lucas) to rebut the presumption and show that the transactions were in good faith and without undue influence.⁹ Thus, on remand, the district court was instructed to determine whether suspicious circumstances existed in the execution of the will and Trust and, if so, whether Lucas could show the transactions were in good faith and free of undue influence, thereby rebutting the presumption of undue influence.

After remand the trial court made the following findings:

. . . that there were suspicious circumstances surrounding the relationship between the defendant Lucas and Imogene M. Collier, deceased. That the defendant Lucas failed to rebut the presumption of undue influence and the court finds that the Will executed by Imogene Collier, deceased, dated October 10, 1996, designed [sic] Imogene Collier Revocable Trust as the sole beneficiary is null and void.

Ex. D, p. 2. The journal entry of judgment also states that the Trust “was obtained by the undue influence of the defendant and it is therefore void.”

Unfortunately, the district court did not elaborate on these conclusions in the second ruling, leaving this Court at somewhat of a loss to determine the bases for the conclusions, other than its previous fact findings. The district court made no findings of fact in addition to those from the first trial. It is not even apparent to this Court that the district court conducted further trial proceedings or heard any additional evidence from Lucas to rebut the presumption of undue influence; it appears that the district court reached its conclusions based solely upon the evidence presented at the first trial

⁸ 23 Kan. App. 2d 920, 937 P.2d 967, *rev. denied* 262 Kan. 962 (1997).

⁹ *Logan v. Logan*, 23 Kan. App. 2d at 924.

some two and one half years earlier and the findings of fact made at that time.

With this as the record before it, this Court is asked to apply collateral estoppel and conclude that the presumption of undue influence which Lucas failed to overcome in the state court litigation, is sufficient to establish fiduciary fraud under §523(a)(4) or willful and malicious injury under §523(a)(6) and except the state court judgment from Lucas' discharge.

Analysis

In this Court's view, the state court determination of undue influence pertains solely to Lucas' conduct prior to Collier's death, namely in procuring Collier's execution of the will and Trust. Here, Cousatte asks this Court to conclude that Lucas' undue influence prior to Collier's death, as well as her conduct after Collier's death, during the two year period while the first judgment was on appeal,¹⁰ constitutes fiduciary fraud, embezzlement or larceny under § 523(a)(4) or willful and malicious injury under § 523(a)(6). The Court analyzes Lucas' conduct separately because the latter conduct is not the subject of the state court judgment of undue influence; therefore, as to the latter conduct, collateral estoppel provides no basis for an (a)(4) or (a)(6) discharge exception.

Lucas' Conduct During the Pendency of the First Appeal

After reviewing the evidence, the Court is not persuaded that Lucas' liquidation or disposal of Trust assets during the pendency of the first appeal provides a basis to except the state court judgment from discharge. During the two year period January 21, 1998 to January 21, 2000, Lucas sold Collier's home and used the proceeds to pay off her own home loan; Lucas sold her home at 2768 Hiram and purchased a new home at 2803 North Bellwood Court in June of 1999, and at about the same time, purchased a Ford Taurus for approximately \$13,000. Lucas closed the Trust account and

¹⁰ It is undisputed that during the pendency of the first appeal (between December 1997 and January 21, 2000) is when Lucas began liquidating and disposing of the Trust assets.

all of Collier's accounts in July 1998. In addition to this activity, Lucas paid \$38,000 from trust funds for attorney fees in connection with the state court litigation.

By the time the first Court of Appeals' opinion was handed down in January of 2000, Lucas had liquidated all of the Trust assets. During this time period, Lucas had a valid judgment that declared she was the rightful beneficiary and owner of the Trust assets. Lucas was operating under the authority of the first judgment. While she ran the risk of having to turn over the trust property or proceeds thereof if the judgment was reversed on appeal, she was *at that time* acting pursuant to a lawful order of the court. If Cousatte had wanted to prevent the liquidation and disposal of Trust assets during the pendency of the appeal, he could have posted a supersedeas bond to obtain a stay of the judgment pending the appeal.¹¹ If Lucas had then liquidated the Trust in violation of the stay, a different result might obtain. But here, where Lucas acted pursuant to a lawful order of the Court, it cannot be concluded that she committed fiduciary fraud, embezzlement, larceny, or willful injury by liquidating the Trust. Thus, Lucas' conduct during the pendency of the first appeal provides no basis for a §523(a)(4) or (a)(6) exception to discharge.

Lucas' Undue Influence in the Procurement of the Will and Trust

The more difficult issue presented here is whether the state court determination of undue influence by Lucas is sufficient under the doctrine of collateral estoppel to establish nondischargeability under §523(a)(4) or (a)(6). It is well-settled that the doctrine of collateral estoppel may be applied in bankruptcy dischargeability proceedings.¹² Four elements are required to preclude relitigation of issues in the dischargeability proceeding: (1) the issue previously decided

¹¹ See KAN. STAT. ANN. § 60-262(d) and § 60-2103(d).

¹² *Grogan v. Garner*, 498 U.S. 279, 284-85 n. 11, 111 S.Ct. 654, 658-59 n. 11, 112 L.Ed. 2d 755, 759-60 n. 11 (1991).

is identical with the issue presented in the dischargeability proceeding; (2) there is a final adjudication of the prior action on the merits; (3) the party against whom collateral estoppel is invoked was a party to the prior action; and (4) the party against whom collateral estoppel is raised had a full and fair opportunity to litigate the issue in the prior action.¹³

The main point of contention here is that not all of the elements for application of collateral estoppel are satisfied by the undue influence determination by the state court. Lucas concedes that the second, third, and fourth elements of collateral estoppel are satisfied. However, she argues that the first element – an *identical issue* is lacking. Specifically, Lucas contends that the undue influence determination by the state court does not establish all of the elements of proof required for a § 523(a)(4) or (a)(6) exception. This question requires the Court to examine the elements of fiduciary fraud under § 523(a)(4) and willful and malicious injury under § 523(a)(6) and to match up those elements to the issues necessarily established by the state court’s determination of undue influence.¹⁴

In applying the undue influence analysis of *Logan*, the state court clearly found that a confidential relationship existed between Lucas and Collier. After remand, the state court further found that the confidential relationship was coupled with suspicious circumstances. As a result of these two findings, the burden shifted to Lucas under *Logan* to prove that the execution of the will and Trust were done in good faith and without undue influence. The state court, without elaboration, concluded that Lucas did not meet her burden and failed to rebut the presumption of undue influence.

Section 523(a)(4) Fiduciary Fraud

¹³ *In re Klippel*, 183 B.R. 252, 258 (Bankr. D. Kan. 1995).

¹⁴ The Court would note that it has not been provided with the entire record of the state court undue influence action, but only the court’s ruling from the bench, journal entries, and appellate opinions. The Court is in a better position to determine the application of collateral estoppel where it has the benefit of the entire record from the first action. See *In re Zanetti-Gierke*, 212 B.R. 375, 379-80 (Bankr. D. Kan. 1997).

Under § 523(a)(4), two elements are required to except the state court judgment from discharge: (1) a fiduciary relationship between the Lucas and Collier; and (2) fraud or defalcation by Lucas *while acting in the fiduciary relationship*.¹⁵ This court concludes that Cousatte has not proven the first element, with or without collateral estoppel.

In re Young instructs that the fiduciary relationship necessary for §523(a)(4) is an express or technical trust relationship.¹⁶ A general fiduciary duty based upon confidence, trust, loyalty, or inequality between the parties is insufficient to establish a fiduciary relationship for dischargeability.¹⁷ It is readily apparent from a reading of the trial court's ruling that the existence of the fiduciary relationship determined by the state court was founded upon the confidence and trust placed in Lucas by Collier, Lucas' superior knowledge and intellect, and Collier's weakened health and mental capacity. As such, the fiduciary relationship supporting the state court judgment was a general fiduciary duty and insufficient for purposes of §523(a)(4). Thus, an identity of issues is lacking for application of collateral estoppel and the state court's determination of a fiduciary relationship under state law does not establish the requisite fiduciary relationship under §523(a)(4).

The Court further concludes that at the evidentiary hearing of this matter, Cousatte failed to present any evidence independently of the state court determination to establish an express or technical trust between Lucas and Collier. Accordingly, Cousatte may not prevent discharge of the state court

¹⁵ *In re Young*, 91 F.3d 1367, 1371 (10th Cir. 1996).

¹⁶ A technical trust is a trust imposed by law that arises by statute. *In re Parker*, 264 B.R. 685, 700 (10th Cir. BAP 2001).

¹⁷ *In re Young*, 91 F.3d at 1371-72 (An attorney-client relationship is insufficient to establish a fiduciary relationship for purposes of section 523(a)(4)); *In re Klippel*, 183 B.R. 252 (Bankr. D. Kan. 1995) (State court determination of fiduciary relationship between joint venturers did not meet the fiduciary relationship required under §523(a)(4)).

judgment on the basis of the fiduciary fraud exception of §523(a)(4).¹⁸

Section 523(a)(4) Embezzlement and Larceny

Cousatte also asserts the embezzlement and larceny exceptions to discharge. The embezzlement and larceny exceptions of § 523(a)(4) were discussed in *In re Zanetti-Gierke*.¹⁹ Larceny under federal common law is defined as the fraudulent and wrongful taking of property of another with the intent to convert such property without the consent of the owner. Embezzlement is distinguished from larceny in that the property originally comes to the person lawfully, and then is fraudulently appropriated.

Cousatte focuses on Lucas' actions in liquidating and disposing of the trust assets after the first state court judgment was handed down.²⁰ The problem with Cousatte's position is that he cannot show a *fraudulent* taking or appropriation of the trust property. At the time that Lucas liquidated and disposed of the trust assets, she was acting pursuant to a valid judgment in her favor. Moreover, collateral estoppel does not help Cousatte's position; the ultimate undue influence determination by the state court pertained to the execution of the will and trust, not to Lucas' conduct in liquidating the

¹⁸ Even if the requisite fiduciary relationship were present, this Court is not persuaded that a determination of undue influence based upon suspicious circumstances and an un rebutted presumption of undue influence, rises to the commission of fraud as required by §523(a)(4). Undue influence under Kansas law is merely a determination whether a party has exercised his or her free agency and acted voluntarily in the transaction. *Logan, supra* at 924. Cousatte has not presented the Court with any authority holding that undue influence is the equivalent of fraud. On the facts of this case, the Court declines to so rule. Moreover, the fraud that Lucas is alleged to have committed was the liquidation and disposal of trust property. As noted previously, Lucas was acting pursuant to a valid, lawful judgment when she liquidated the assets and therefore, it cannot be concluded that she acted with fraudulent intent.

¹⁹ 212 B.R. 375, 381 (Bankr. D. Kan. 1997).

²⁰ The Court cannot deem Lucas' conduct in procuring the execution of the will and Trust by the exercise of undue influence on Collier as embezzlement or larceny. There was no taking of property by Lucas – an essential element of both embezzlement and larceny. *In re Zanetti-Gierke*, 212 B.R. at 381.

trust. Under these circumstances, Lucas committed neither embezzlement nor larceny and Cousatte may not prevent discharge of the state court judgment under this exception.

Section 523(a)(6) Willful and Malicious Injury

Section 523(a)(6) provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt – . . .

(6) for willful and malicious injury by the debtor to another entity [person] or to the property of another entity [person];

Cousatte, as the party objecting to discharge of the state court judgment, has the burden of proving by a preponderance of the evidence both willfulness and maliciousness.²¹

The meaning of a “willful and malicious injury” has been narrowly interpreted by the United States Supreme Court to carry out the fresh start philosophy of the Bankruptcy Code.²² In *Kawaauhau v. Geiger*, the Supreme Court held that the standard of conduct necessary for a “willful” injury requires an intentional act *with an actual intent to cause injury*.²³ A reasonably foreseeable injury that results from the debtor’s intentional act is not sufficient to satisfy the willful injury standard.²⁴

²¹ *In re Diel*, 277 B.R. 778, 783 (Bankr. D. Kan. 2002).

²² Since the Supreme Court’s decision in *Kawaauhau v. Geiger*, *infra*, there is little, if any distinction drawn between a “willful injury” on the one hand and a “malicious injury” on the other. The maliciousness element has never required a showing of the wrongfulness of the debtor’s act or been based on other “moralistic notions.” *In re Feiner*, 254 B.R. 266, 269 (Bankr. D. Kan. 2000).

²³ 523 U.S. 57, 118 S.Ct. 974, 977, 140 L.Ed. 2d 90 (1998). *See also*, *In re Parker*, 264 B.R. 685, 700 (10th Cir. BAP 2001) (Nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury).

²⁴ *See In re Budig*, 240 B.R. 397 (D.Kan. 1999) (debtor who converted health insurance benefits for own use instead of paying the hospital provider did not commit a willful injury where there was no evidence debtor understood consequences of assignment when signing the hospital admissions agreement)

Proof of the intent to injure may be established directly or indirectly. As described in *In re Longley*²⁵:

Willful injury may be established by direct evidence of specific intent to harm a creditor or the creditor's property. . . . Willful injury may also be established indirectly by evidence of both the debtor's knowledge of the creditor's . . . rights and the debtor's knowledge that the conduct will cause particularized injury. [citation omitted]. See also RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

In reviewing the undue influence judgment, and more specifically, searching the state court's original bench ruling, this Court gleans no language from which a willful injury can be found. And the Court is not provided with the transcript from the state court trial(s) to determine whether there was any evidence presented in the state court action showing that Lucas intended to injure Collier or Cousatte and understood their rights in Collier's property. The Court is mindful of the posture in which the undue influence determination was made by the state court. A determination of undue influence was reached because Lucas could not overcome the *presumption* of undue influence. In the state court action, Cousatte only had to prove the existence of a fiduciary relationship coupled with suspicious circumstances to obtain the benefit of the presumption. These elements are not identical to, and far less stringent than, the proof required for a willful injury.²⁶

This Court is hard pressed to find that Lucas deliberately intended to injure Cousatte or his rights as a lawful heir to Collier's property, particularly where the undisputed evidence in the state

²⁵ 235 B.R. 651, 657 (10th Cir. BAP 1999).

²⁶ This is not to say that collateral estoppel and an undue influence judgment can never satisfy the willful and malicious injury exception to discharge. See *In re Scott*, 227 B.R. 918 (Bankr. S.D. Fla. 1998). The instant case is factually distinguishable, however, from *In re Scott*.

court action was that Collier never had any intention of leaving any of her property to Cousatte.²⁷ Moreover, the trial court painted a picture of Collier, while living, as a person who had isolated herself from others, disliked most people around her, and, apparently had expressed no desire to leave her property and possessions to anyone in particular. There is no finding or language from the trial court's ruling that Lucas understood the consequences of Collier making the will and Trust and its legal effect on Collier, her property, or her heirs at law. As observed previously, Lucas did not strike this Court as a person of legal sophistication and relied heavily upon her attorney to carry out her trustee duties.

With the record before it, the Court is not persuaded that Lucas committed a willful injury. Thus, the Court concludes that the collateral estoppel effect of the undue influence judgment affords no basis on which to find a willful injury and Cousatte has failed independently of the state court judgment to prove a willful injury. The state court judgment may not be excepted from discharge under §523(a)(6). Having ruled against Cousatte on both §523(a)(4) and (a)(6), this Court finds it unnecessary to reach the constructive trust issue.

For all of the foregoing reasons, Cousatte's dischargeability complaint under §523(a)(4) and (a)(6) is denied and dismissed.

Dated this 5th day of December, 2002.

ROBERT E. NUGENT, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

²⁷ This Court reaches the same conclusion if it applies the "substantial certainty" standard for a willful injury. *See In re Budig, supra* at 400-401.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion** were deposited in the United States mail, postage prepaid on this 5th day of December, 2002, to the following:

Richard V. Foote
727 North Waco
Suite 275
Wichita, KS 67203

Russell W. Davisson
301 N. Market
Wichita, KS 67202

Kiehl Rathbun
727 North Waco
Suite 275
Wichita, KS 67203

Viola Carolyn Lucas
20803 Bellwood Ct.
Wichita, KS 67205

U.S. Trustee
500 Epic Center
301 N. Main
Wichita, KS 67202

Janet Swonger,
Judicial Assistant