IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

IN RE: ESTATE OF

JOHN A. DOE,
Deceased.

PROBATE DIVISION
CASE NO. XX-CP-XXXX

_____

JACK A. DOE
Petitioner
vs

LIARETTA DOETTE
Respondent

_____

PETITIONER'S TRIAL BRIEF

The Petitioner, JACK A. DOE, by and through their undersigned attorney, submits the following trial brief in support of his Petition to Revoke the Last Will of JOHN A. DOE.

1. **THE EVIDENCE ADMITTED AT TRIAL WILL DEMONSTRATE THE FOLLOWING:**

* * * * * *

2. **FLORIDA LAW:**

(a) In a will contest, the party objecting to the will has the burden of proof and must prove undue influence by a preponderance or greater weight of the evidence.

Once a party offering a will for probate has proved the formal execution and attestation of the will, the party objecting to admission of the will to probate must prove undue influence by the greater weight (i.e., preponderance) of the evidence. See *Flohl v. Flohl,* 764 So.2d 802, 803 (Fla. 2nd DCA 2000).

(b) What is "undue influence"

The Second District has defined undue influence as follows:

> Undue influence, as it is required for invalidation of a will, must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a

> degree that there is a destruction of the free agency and will power of the one making the will or gift.

Heasley v. Evans, 104 So. 2d 854, 857 (Fla. 2nd DCA 1958) (*Emphasis added)*

It is important to note that there is not one case in Florida that requires a person contesting a will to prove that the one exerting undue influence "intended" to commit undue influence. In most cases the person committing undue influence does not know what undue influence is.

(c) What considerations are relevant in examining an undue influence case?

First, undue influence is usually not exercised openly in the presence of others. Rarely can undue influence be directly proved. Undue influence is usually proved by indirect evidence of facts and circumstances from which undue influence may be inferred. *Gardiner v. Goertner* 110 Fla. 377, 385-386 (Fla. 1932).

It is important to consider the mental and physical condition of the testatrix at the time the will was executed when determining whether undue influence was exercised in the making of a will. See *In re Estate of* Reid, 138 So.2d 342, 349 (Fla. 3rd DCA 1962), overruled in part on other grounds; *In re Estate of Carpenter*, 253 So.2d 697, 698 (Fla. 1971). The amount and degree of influence exerted by the influencer upon the testatrix will depend upon the "bodily and mental vigor of the testatrix, for that which would overwhelm a mind weakened by sickness, dissipation, or age might prove no influence on someone with a strong mind in the vigor of life". *Gardiner,* 110 Fla. at 385.

(d) A presumption of undue influence is established when a person with a confidential relationship actively procures a benefit (i.e., a will, T.O.D. account, deed et cetera) from another.

i. The statutory presumption of undue influence

In will contests, the party opposing the admission of a will to probate has the burden to produce evidence that supports that position. See *Hack v. Janes,* 878 So.2d 440, 442 (Fla. 5th DCA 2004). Florida Statute §733.107 describes the procedure followed in will contest cases as follows:

> (1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.
>
> (2) The presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

Subsection (2) of §733.107 supersedes *Carpenter v. Carpenter,* 253 So.2d 697 (Fla. 1971) and *Cripe v. Atlantic First National Bank of Daytona Beach,* 422 So.2d 820 (Fla. 1982) to the extent that *Carpenter* and *Cripe* prohibited the shifting of the burden of proof in undue influence cases. See *Hack, 8*78 So.2d at 443. "Because §733.107(2) specifically mandates that the presumption shifts the burden of proof under §90.301 through 90.304 when a presumption of undue influence arises, . . . the alleged wrongdoer [now bears] the burden of proving that there was no undue influence." *Id.* The parts of *Carpenter* and *Cripe* "that explain the circumstances giving rise to the presumption of undue influence are not superseded by statute." *Id.*

A presumption of undue influence arises when a will opponent establishes that "a person who is a primary beneficiary of a will had a confidential relationship with the [testatrix] and there was active procurement of a bequest." *Cripe,* 422 So.2d at 823.

A. Confidential Relationship

In *Carpenter (*quoting *Quinn v. Phipps,* 113 So. 419 (1927)), a confidential relationship was defined as follows:

> "The term 'fiduciary or confidential relation,' is a very broad one * * * The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.
>
> * * *
>
> "'The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal.'"

Carpenter, 253 So.2d at 701.

A confidential relationship is simply a relation of trust and confidence between two people where trust is reposed by one party and a trust accepted by the other. *In re Estate of Gay,* 201 So.2d 807, 811 (Fla. 4th DCA 1967).

B. Active Procurement of a Bequest

The Florida Supreme Court summarized general guidelines describing active procurement for trial courts in *Carpenter* as follows:

> (a) the presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution.
>
> We recognize that each case involving active procurement must be decided with reference to its particular facts. Therefore, the criteria we have set out **cannot be considered exclusive; and we may expect supplementation by other relevant considerations appearing in subsequent cases.** Moreover, we do not determine that contestants should be required to prove all the listed criteria to show active procurement. We assume that in the future, as in the past, it will be the rare case in which all the criteria will be present. We have troubled to set them out

> primarily in the hope that they will aid trial judges in looking for those warning signals pointing to active procurement of a will by beneficiary.

Carpenter, 253 So.2d at 702. (*Emphasis added*)

The court in *Carpenter* was very careful to point out that the criteria articulated in that decision was a guide to trial judges that would be supplemented when presented with various fact patterns. This was clearly demonstrated in the Florida Supreme Court's last pronouncement of what constitutes active procurement under a different fact pattern in the *Cripe* case.

In *Cripe,* an elderly woman began to trust a man who would help the elderly woman manage her apartment rental business. Over several years, the elderly woman became dependent upon Mr. Cripe and began to trust him. Mr. Cripe argued on appeal that the Court should robotically apply the seven factors listed in the *Carpenter* case, and by applying those several factors there was no active procurement of a benefit.

The Florida Supreme Court rejected that argument stating the following:

> Petitioners argue that there was insufficient proof of active procurement with regard to the deposit of the condemnation proceeds into a joint account. There was evidence, however, that Mrs. Hare's mental condition had deteriorated and she had become totally dependent on the Cripes. Where there is such inequality of mental strength, active procurement can be shown by evidence, as there was here, of a request or suggestion by the dominant party.

Cripe, 422 So.2d at 824. (*Emphasis added*)

A different example of active procurement was articulated in *Hack v. Helling*, 811 So.2d 822 (Fla. 5th DCA 2002) where the court found active procurement when there was a inequality of mental capacity and strength between the testatrix and the parties with the confidential relationship, the will proponents were present when the decedent expressed a desire to make a change in her will, the proponents dictated the contents of the will to the attorney, the will

proponents arranged for the decedent's transportation to the place where the will was executed, and the proponents sat nearby in the reception room when the decedent executed the will. "Not all of the criteria listed in Carpenter need be shown in order to establish active procurement, but in this case enough was shown." *Hack* at 826.

Thus, in cases applying the *Carpenter* guidelines**,** you have the Florida Supreme Court in *Cripe* finding active procurement when: (1) when there is inequality of mental strength and (2) there is evidence of a suggestion or request by the dominate party. Further, you have appellate court in *Hack* finding active procurement when: (1) the will proponent was present when the decedent expressed a desire to make a change in her will, (2) there was inequality of mental capacity and strength between the testatrix and will proponent, (3) the will proponent arranged transportation to the lawyer's office where the will were executed, and (4) the will proponent was in the waiting room when the wills were executed.

Other factors the courts have considered when determining whether a party procured a will through undue influence include whether the party: (1) had access to the person to be influenced, (2) administered to the needs and wants and wishes of such person, (3) kept those for whom the person to be influenced has love for and confidence in away from the person to be influenced, and (4) tears down this love and confidence to her natural heirs by insinuations and accusations. See *In Re Ates' Estate,* 60 So.2d 275, 279 (Fla. 1952). See also *Kelley v. Gottschalk,* 196 So. 844 (Fla. 1940) where the Florida Supreme Court held that a will was procured through undue influence when: (1) a decedent had a long relationship with her natural heirs, but then a few years before her death, (2) a younger man with no visible means of support moved in her house as a tenant, proposed marriage, had ample opportunity to influence the

testatrix, (3) and after decedent's death produced a will that was kept secret from the lawful heirs until after the death of the testatrix.

C. Primary Beneficiary of a Will

This element of the presumption does not require much analysis other than to say that one cannot find a presumption of undue influence if the will proponent does not benefit directly or indirectly from the document he or she procured.

ii. If the trial court finds that a presumption of undue influence has been proven by a preponderance of the evidence, then the burden of proof shifts to the proponent of the will to prove by a preponderance of the evidence that undue influence did not occur.

If the party opposing the will establishes the proponent of the will had a confidential relationship with the testator (man) or testatrix (woman) and then procured a benefit for himself or herself, then the burden of proof shifts to the proponent to disprove undue influence. The quantum of proof required to disprove undue influence under Florida law is the preponderance or greater weight of the evidence. See *Hack v. Janes*, 878 So.2d 440, 444 (Fla. 5th DCA 2004).

iii. This court's overriding consideration in deciding an undue influence case is not adherence to technical procedural rules, but in providing justice.

The court's goal in an undue influence case was beautifully articulated in *Kelley v. Gottschalk*, 196 So. 844 (Fla. 1940) where the Florida Supreme Court said:

> The administration of justice is the most precious function a democracy is called on to perform and no rule of procedure was ever intended to defeat it. **Courts must have rules to guide them in the performance of this function but it has never been considered improper to toss right and common sense in the scales and weigh them with the evidence to reach a just result.** Rules of procedure

> are as essential to administer justice as they are to conduct a baseball game but they should never be permitted to become so technical, fossilized, and antiquated that they obscure the justice of the cause and lead to results that bring its administration into disrepute.
>
> Rules of procedure are of value only as they point the path to justice or lead the litigants to the truth of the controversy. Any other purpose in their observance is beside the question. There is nothing sacrosanct about them; they should never be permitted to overshadow the main purpose of the litigation, to lead the court to detachment from the more vital issues or to absorption in shop-worn technicalities that defeat the very purpose of the litigation.

(e) Even if the evidence presented by the party seeking to revoke admission of the will to probate fails to create a presumption of undue influence, the party seeking to revoke the admission of the will to probate will prevail if that party establishes the will was procured by undue influence by a preponderance of the evidence.

While establishing a presumption of undue influence is one way to prove undue influence occurred, a party seeking to revoke a will does not need to establish a presumption of undue influence in order to prevail. Instead the party opposing the will mush establish undue influence occurred by a preponderance or the greater weight of the evidence. *Carpenter* at 705.

Under Florida law, the following behaviors or facts may indicate undue influence: **1.** Confidential Relationship between testator and alleged undue influencer. *Carpenter* at 701; **2.** Fiduciary Relationship between the testator and the undue influencer. *Jordan v. Growney*, 416 So. 2d 24, 25 (Fla. 4th DCA 1982); **3.** Presence of undue influencer at the execution of the will or trust. *Carpenter* at 702; **4.** Presence of undue influencer on those occasions when testator expressed a desire to make the will or trust. *Id.;* **5.** Recommendation by undue influencer of counsel to draft will and relationship between counsel and the undue influencer. *Id.*; *Herman v. Kogan*, 487 So.2d 48, 49 (Fla. 3d DCA 1986); **6.** Knowledge of the contents of the will or trust by the undue influencer prior to execution. *Carpenter* at 702; **7.** Giving instructions on

preparation of will by the undue influencer to the attorney drawing the will. *Id*.; **8.** Payment of will or trust preparer by the undue influencer. *Id*.; **9.** Securing witnesses to the will by the undue influencer. *Id*.; **10.** Safekeeping of the will by the undue influencer subsequent to the execution. *Id*.; **11.** Execution of will or trust is kept secret from will contestants by the undue influencer. *In re Estate of Burton*, 45 So. 2d 873, 875 (Fla. 1950); **12.** Advanced age of the testator or settlor. *Id*.; **13.** Opportunity for the exercise of undue influence. *Id*.; **14.** Weak mental and physical health of testator or settlor. *In re Estate of Reid*, 138 So. 2d 342, 349-50 (Fla. 3d DCA 1962), overruled in part on other grounds, *Carpenter,* 253 So.2d at 698; **15.** Beneficiary caring for testatrix during final months of testatrix's life. *Elson v. Vargas*, 520 So. 2d 76 (Fla. 3d DCA 1988), *review denied,* 528 So. 2d 1181 (Fla. 1988); **16.** Undue Influencer meeting alone at the attorney's office and instructing the attorney to prepare the testatrix's will designating the beneficiary as the sole beneficiary and personal representative. *Id*.; **17.** The unnatural disposition of testatrix's property. *Burton*, 45 So. 2d at 875; **18.** Beneficiary taking complete charge of testatrix's estate, thereby placing herself in a highly fiduciary capacity. *Clark v. Grimsley*, 270 So. 2d 53, 58 (Fla. 1st DCA 1972); **19.** Beneficiary treating the will execution process as an urgent matter. *Carpenter*, 253 So. 2d at 702; **20.** Beneficiary is the sole, not just a substantial beneficiary. *In re Estate of Van Aken*, 281 So. 2d 917, 918 (Fla. 2d DCA 1973); **21.** Beneficiary arranging the appointment with the beneficiary's attorney. *Id*; **22.** A dramatic change from former testamentary intentions. *Newman v. Smith*, 77 Fla. 667, 675 82 So. 236, 248 (1919), *rehearing denied*, 77 Fla. 688, 82 So. 236 (Fla. 1919); and **23.** Opportunity and motive (or interest). *Gardiner v. Goertner*, 110 Fla. 377, 386, 149 So. 186, 190 (Fla. 1932); **24.** Accused kept those for whom the person to be influenced has love for and confidence in away from the person to be

influenced *Ates* at 279, and **25.** Accused tears down this love and confidence to her natural heirs by insinuations and accusations. *Id.*

3. APPLYING FLORIDA LAW TO THE EVIDENCE DEMONSTRATES THAT THE WILL SHOULD BE SET ASIDE

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4. CONCLUSION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Facsimile and U.S. mail upon: ********** on this ***** day of ***** 20XX.

MATTHEW A. LINDE P.A.

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