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Make It an Even 10: Courts Rely on More Than the Seven Carpenter Factors to Analyze a Claim for Undue Influence of a Will or Trust

by David P. Hathaway

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In probate litigation, parties might contest the validity of a will or trust by arguing that the decedent was unduly influenced by a substantial beneficiary when the will or trust was made. To prove undue influence, one must demonstrate that the beneficiary had a confidential relationship with the decedent and actively procured the will or trust. Active procurement can be difficult to prove because the maker of the will or trust is deceased and the challenging party usually has to rely on circumstantial evidence.[1]

In *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971), the Florida Supreme Court reviewed prior case law on active procurement and listed "[s]everal criteria to be considered" in determining active procurement. These are the seven "*Carpenter* factors":

1) Presence of the beneficiary at the execution of the will;

2) Presence of the beneficiary on those occasions when the testator expressed a desire to make a will;

3) Recommendation by the beneficiary of an attorney to draw the will;

4) Knowledge of the contents of the will by the beneficiary prior to execution;

5) Giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;

6) Securing of witnesses to the will by the beneficiary; and

7) Safekeeping of the will by the beneficiary subsequent to execution.[2]

The *Carpenter* court stated that these factors are neither mandatory nor exclusive. "[W]e do not determine that contestants should be required to prove all the listed criteria to show active procurement ... [as] it will be the rare case in which all the criteria will be present."[3] "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 a beneficiary."[4] Furthermore, "the criteria we have set out cannot be considered exclusive; and we may expect supplementation by other relevant considerations appearing in subsequent cases."[5]

In *Carpenter*, the testator, by her last will and testament, left her entire estate outright to her daughter, and nothing to her three surviving sons.[6] Two sons contested probate of the will on the ground that it was procured by undue influence. The trial court found that the testator was exceptionally fond of one of her sons, who substantially assisted her financially and otherwise, and that she expressed an intention on numerous occasions to leave her estate equally to her four children. The trial court also found that the testator's daughter made all of the arrangements for the preparation of her mother's last will, and that she kept it a secret from her brothers. When the daughter appealed the trial court's ruling that the will was procured by undue influence, the court of appeals affirmed in part and remanded with directions regarding the burden of proof.[7]

In 2002, the Florida Legislature amended F.S. Â§733.107 and created a legal presumption of undue influence shifting the burden of proof as a public policy against abuse of fiduciary or confidential relationships. Specifically, the statute provides:

733.107 Burden of proof in contests; presumption of undue influence. — 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. 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.

In 2004, the Fifth District in *Hack v. Janes*, 878 So. 2d 440 (Fla. 5th DCA 2004), discussed the effect of the amended statute:

The effect of the amended statute is "to make clear that the presumption of undue influence by an actively involved substantial beneficiary who is in a fiduciary or confidential relationship with the testator is a policy-based shifting of the burden of proof. This insures that the presumption does not 'vanish' upon production of rebuttal evidence by the proponent of the [w]ill."[8]

The court observed that the new statute superseded *Carpenter* as to the legal effect of the presumption of undue influence, but not as to the circumstances giving rise to the presumption.

In addition to the seven *Carpenter* factors, however, Florida law recognizes at least three other indicators of active procurement: a) isolating the testator and disparaging family members; b) mental inequality between the decedent

and the beneficiary; and c) the reasonableness of the will or trust provisions. This article analyzes the case law surrounding these additional factors to assist practitioners in fully developing a case for or against undue influence.

Isolating the Testator and Disparaging Family Members

As early as 1919, the Florida Supreme Court found undue influence where a beneficiary purposefully isolated the decedent by denying access to family and friends, with hopes of breaking down whatever ties of affection existed between the decedent and his family and friends.[9] In *Newman v. Smith*, 82 So. 2d 236 (Fla. 1919), a beneficiary of a will had intercepted letters and telegrams sent to the decedent by his daughter, ignored all requests contained within them, and responded only to prevent the decedent's daughter from visiting the decedent.[10] The beneficiary's isolation of the decedent denied the daughter all access to the decedent, such that "the ties of fatherly affection [were] destroyed."[11] The court stated that based on these facts, it would have invalidated the will on the grounds of undue influence alone without any evidence of lack of testamentary capacity.[12]

Thirty years later, the Florida Supreme Court again found a will was created by undue influence where a wife isolated the decedent not only to destroy the affection between him and his sons from a previous marriage, but also to turn the decedent against them and instead favor the wife's son from her former marriage.[13] In the case of *In re Auerbacher's Estate*, 41 So. 2d 659 (Fla. 1949), the decedent's wife attempted to diminish the decedent's sons' access to him by withholding all mail from the sons and repeatedly causing tense and heated arguments with the sons and their families.[14] The wife was able to convince the decedent to stop contributing to his mother's support and stop attending traditional Christmas family dinners, "a practice of years standing."[15] As such, the court found the will to have been procured by undue influence.[16]

Just a few years after *Auerbacher* was decided, the Florida Supreme Court expressly recognized that isolation of the decedent and disparaging the family can be "essential steps in asserting undue influence."[17] In the matter of *In re Ates' Estate*, 60 So. 2d 275 (Fla. 1952), the beneficiary denied other members of the decedent's family access to the decedent during the last few months of the decedent's life when the beneficiary had exclusive care and control of the decedent.[18] The beneficiary made unsupported accusations to the decedent that the rest of the family was stealing the decedent's cattle.[19] The court said the "essential steps in asserting undue influence" are "keep[ing] those for whom the person to be influenced has love for and confidence in away from the person to be influenced" and "tear[ing] down this love and confidence by insinuations and accusations."[20]

Though the Florida Supreme Court has recognized isolation and disparagement of the family as an indicator of undue influence, a will or trust may still be upheld due to countervailing factors. In the case of *In re Baldridge's Estate*, 74 So. 2d 658 (Fla. 1954), the majority ordered a will to be admitted to probate while the dissenting opinion of Chief Justice Barns found undue influence by isolation and disparagement. In *Baldridge*, the beneficiary had placed the decedent in a hospital for six weeks, unbeknownst to the decedent's family and friends.[21] While the decedent was in the hospital, the beneficiary instructed the staff to not allow anyone but herself to see the decedent.[22] During that time, the decedent made substantial changes to her will, substituting the beneficiary in place of the decedent's family and friends.[23] According to the trial court, and the dissent agreed, the beneficiary's purpose was "to create a hostility toward [and] estrangement for [the decedent's] family and lifelong friends."[24] Nevertheless, the majority found no undue influence.[25]

The Florida district courts of appeal have followed these holdings by the Florida Supreme Court. For example, in

1962, the Second District decided *In re Estate of Winslow*, 147 So. 2d 613 (Fla. 2d DCA 1962), and found undue influence in the procurement of a will where the beneficiary had isolated the decedent and made false accusations that the decedent's niece engaged in misconduct. Specifically, the beneficiary intercepted letters written by the decedent's niece and returned them, falsely informing the niece that the letters upset the decedent and that the decedent did not want to see her anymore.[26] The trial court found that the beneficiary "deliberately planned to insulate [the decedent] from her relatives and to prejudice her against them ... to the end that she ... could dominate [the decedent] and control the disposition of her estate."[27] Thus, the Second District held that the will had been procured by undue influence.[28]

Likewise, the Fifth District has considered a beneficiary's isolation of the decedent in finding a will to be the product of undue influence. In the case of *In re Estate of Lamberson*, 407 So. 2d 358 (Fla. 5th DCA 1981), the Fifth District found undue influence in the procurement of a will where, among other things, the beneficiary had "moved [the] decedent into her home, failed to notify his family, refused to notify his friends of his whereabouts, and never told decedent of his wife's death."[29] Essentially, the beneficiary cut the decedent off from the outside world in order to be the sole figure in the decedent's life. Considered along with several of the *Carpenter* factors, the Fifth District held that these acts of isolation were "further evidence" in finding undue influence in the procurement of the decedent's will.[30]

Mental Inequality Between the Decedent and the Beneficiary

Florida courts have considered the inequality of mental acuity between the decedent and beneficiary to determine whether a will was procured by undue influence. Although this factor is similar to the issue of voiding a will for lack of testamentary capacity, it differs in that it assumes the decedent does have testamentary capacity, but is weak-minded and, therefore, easily influenced. Essentially, the factor compares the decedent and the influencer rather than merely evaluating the testamentary capacity of the decedent.

The Florida Supreme Court alluded to the mental inequality factors as early as 1925 in *Peacock v. Du Bois*, 105 So. 2d 321 (Fla. 1925). In *Peacock*, the decedent had deeded all of her assets to a young man she had known a very short while, thereby disinheriting her family for no apparent reason.[31] The court stated that "the mental condition of the person whose act is in question, and the relationship of the parties concerned to each other, are all elements that may be taken into consideration" in determining whether undue influence occurred.[32] The court went on to consider the fact that the decedent "was a novice in business, could be readily influenced, and easily became the dupe and tool of any one with whom she came in contact."[33] Accordingly, the court affirmed the trial court's decision that the young beneficiary, a man in his late twenties with normal mental abilities, had exerted undue influence.[34]

Florida's district courts of appeal also have considered the mental inequality of the decedent and a beneficiary in undue influence cases. In the case of *In re Estate of Reid*, 138 So. 2d 342 (Fla. 3d DCA 1962), the Third District found the decedent had testamentary capacity at the time of making the will, but reconsidered the decedent's mental condition in its analysis of undue influence.[35] The Third District stated, "[i]t is important in considering whether undue influence was exercised in the making of this will to consider the mental and physical condition of the testatrix at the time the will was executed."[36] The court ruled that the undue influence analysis must be factually specific to the decedent and influencer and not based on a reasonable or ordinary person standard. Thus, even if "the influence exerted on the testatrix was such that under ordinary circumstances or if exercised over ordinary persons of ordinary powers of resistance, it would be regarded as insufficient, if in the particular case

it resulted in the disposition of property contrary to the testatrix' desire, the influence was undue."[37] Because the decedent in *Reid*, although not lacking testamentary capacity, was of "extremely weak" mental health, the Third District found that she could be influenced easily.[38]

By contrast, courts have analyzed the relative mental abilities of the decedent and beneficiary and determined that the decedent was "strong willed" and, therefore, not susceptible to the beneficiary's influence. For example, in the matter of *In re Estate of Duke*, 219 So. 2d 124 (Fla. 2d DCA 1969), the Second District found that "[t]he testimony taken as a whole indicates rather conclusively that the decedent ... was a strong willed woman of sound mind ... amply able to form her own opinion" and that "[t]hese factors would also tend to dissipate any probability that she would be unduly influenced by anyone whether relative or stranger."[39] Thus, the court affirmed that the decedent's will was not a product of undue influence.[40]

The Third District's decision of *In re Estate of Dalton*, 246 So. 2d 612 (Fla. 3d DCA 1971), was similar. In *Dalton*, the record on appeal showed that the decedent was a "strong willed woman" who possessed testamentary capacity.[41] Thus, the Third District held that the presumption of undue influence by the beneficiary who held a confidential relationship with the decedent could not arise.[42] Likewise, in *Elson v. Vargas*, 520 So. 2d 76 (Fla. 3d DCA 1988), the Third District declined to find undue influence exerted against "a very strong-willed woman who wanted things done her way ... and controlled [the beneficiary] and not vice versa."[43] The Third District held that such facts would rebut any presumption that the decedent was overly susceptible to the beneficiary's influence.[44]

In 1988, the Florida Supreme Court applied the *Carpenter* factors to analyze undue influence for inter vivos transfers in *Cripe v. Atlantic First National Bank of Daytona Beach,* 422 So. 2d 820 (Fla. 1988). The court stated that "[w]here there is such inequality of mental strength, active procurement can be shown by evidence, as there was here, or a request or suggestion by the dominant party."[45] Here, the Florida Supreme Court expressly recognized inequality of mental acuity as relevant factor for consideration in addition to the *Carpenter* factors of undue influence.[46]

Reasonableness of the Will or Trust Provisions

A sometimes obvious sign of undue influence in the procurement of a will or trust is the instrument itself. The 1919 case of *Newman v. Smith*, discussed earlier, stated that a suspicion of undue influence was inevitable because the will seemed to contradict, ignore, and disregard the promises and assurances made by the decedent to his needy child, yet provided substantial bequests to an "affluent wife, held in slight regard."[47] In *Newman*, the decedent had promised and assured his beloved daughter that he would provide for her upon his death and had an original will reflecting such intent.[48] However, this "equitable, rational, and just" will was replaced by a subsequent will which disinherited the daughter and devised all of the decedent's property to his affluent wife.[49] The Florida Supreme Court stated that a will should not be revoked "merely because it is unreasonable and unjust." However, where "it does violence to the natural instincts of the heart, to the dictates of fatherly affection, to natural justice, to solemn promises, to moral duty, such unexplained inequality and unreasonableness is entitled to great influence in considering the question of testamentary capacity and undue influence."[50] The court also stated "[i]n doubtful cases the reasonableness or not of a will, in its various provisions is entitled to great weight."[51]

In *Peacock v. Du Bois*, a case discussed above in the context of mental inequality, the decedent had deeded her home and property to a young man she barely knew, thereby disinheriting her children.[52] In considering the reasonableness of the transfer, the court stated, "it is repulsive to every rule of law and right and love and justice to

argue that she would uninfluenced deed this property ... to a young man who was a stranger to her ... thereby disinheriting the children she had mothered, and to whom she was bound by all the ties of love and affection."[53] The court held that the deed was procured by undue influence.[54]

However, in the case of *In re Donnelly's Estate*, 188 So. 108 (Fla. 1939), the decedent disinherited all of her family and left the bulk of her estate to her financial advisor. In *Donnelly*, the evidence showed that the decedent had lost all sentimental connection with them after they had declared her brother-in-law insane, whereas the financial advisor had shown the decedent much attention.[55] Therefore, the court held that the decedent's will was not unreasonable and that it was "not unnatural that she decided to ignore [her family] in her will."[56] In any event, the court stated that "it is proper, on this issue, to consider ... the reasonableness or unreasonableness of the will."[57]

Moreover, the case of *In re Ates' Estate*, discussed earlier regarding isolation and disparagement of family, also expressly considered the reasonableness of the will as a criterion of undue influence.[58] In *Ates*, the decedent's will provided for seven of his 10 children, thereby disinheriting the three sons who contested the will's validity.[59] After describing the "essential steps in asserting undue influence" in terms of isolation and disparagement, the court further expanded the analysis to include "the reasonableness, or unreasonableness, of the will."[60] Because several indicators of undue influence were present and the will appeared unreasonable by disinheriting the three sons, the court held that the will was procured by undue influence.[61]

Nearly 10 years after the Florida Supreme Court's decision in *Ates*, the Second District addressed the reasonableness of a will in the decision of *In re Estate of Witt*, 139 So. 2d 904 (Fla. 2d DCA 1952). In *Witt*, the Second District quoted *Newman v. Smith*: "[U]nexplained inequality and unreasonableness is entitled to great influence" in considering the question of undue influence.[62] However, the only issue in *Witt* was whether the decedent possessed testamentary capacity at the time she executed her will, and not whether there was undue influence.[63] The decedent's will bequeathed all of her property to several hospitals, thereby disinheriting her brother, her only heir.[64]

However, a few years later in 1966, the Second District stated that a will contestant cannot contest a will merely on the ground that the will is unreasonable and unjust. Rather, the claimant must assert the unreasonableness in the context of undue influence, fraud, or lack of testamentary capacity.[65] In the case of *In re Estate of Tobias*, 192 So. 2d 83 (Fla. 2d DCA 1966), the court reviewed the provisions of a will that left the decedent's only heir, a daughter, only $5,000, despite testimony that the decedent had previously and consistently expressed an intent to leave most of her estate to her daughter.[66] The court stated, "the unreasonableness of the terms of a will cannot be considered in determining its validity except in connection with some legal attack on the will," as for undue influence, and held that the will reflected the true wishes of the decedent.[67]

Conclusion

Whereas the *Carpenter* decision provides seven criteria for courts to consider in analyzing active procurement in undue influence cases, Florida courts also consider at least three other factors not listed in *Carpenter*. Lawyers should be aware of these additional factors in order to fully develop a case for or against undue influence in the making of a will or trust.

[1] *Peacock v. Du Bois*, 105 So. 2d 321, 323 (Fla. 1925).

[2] *In re Estate of Carpenter*, 253 So. 2d 697, 702 (Fla. 1971).

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id*. at 698.

[7] *See id.* at 705.

[8] *See Hack v. Janes*, 878 So. 2d 440, 443 n.4 (Fla. 5th D.C.A. 2004).

[9] *See Newman v. Smith*, 82 So. 2d 236, 252 (Fla. 1919).

[10] *See id.*

[11] *See id*.

[12] *See id.*

[13] *In re Auerbacher's Estate*, 41 So. 2d 659, 661 (Fla. 1949).

[14] *Id.*

[15] *Id*.

[16] *Id.* at 662.

[17] *In re Ates' Estate*, 60 So. 2d 275, 279 (Fla. 1952).

[18] *Id.* at 278.

[19] *Id.* at 277.

[20] *Id.* at 279.

[21] *In re Baldridge's Estate*, 74 So. 2d at 661 (Fla. 1954) (Barns, J., dissenting).

[22] *Id*.

[23] *Id.* at 662 (Barns, J., dissenting).

[24] *Id.* at 663 (Barns, J., dissenting).

[25] About two years subsequent to *Baldridge*, the Florida Supreme Court again faced the isolation issue and found that a will was procured by undue influence in the matter in *In re Estate of Krieger*, 88 So. 2d 497, 498 (Fla. 1956). *Krieger* involved a beneficiary who moved into the decedent's home after having only known her less than eight months. The beneficiary then took complete charge of the decedent, telling her what to eat, when to stand, how to dress and otherwise "directing all her activities." *See id.*

[26] *In re Estate of Winslow*, 147 So. 2d at 616 (Fla. 2d D.C.A. 1962).

[27] *Id.*

[28] *Id.* at 618. In *Davidson v. Feuerherd*, 391 So. 2d 799 (Fla. 2d D.C.A. 1980), the Second District again held that a defendant tortiously interfered with an expected bequest by exerting undue influence upon the decedent. Although couched in a tort context rather than a will contest, the issue of undue influence was the same, and the same factors and elements were considered. *See id.* at 802.

[29] *In re Estate of Lamberson*, 407 So. 2d 358, 363 (Fla. 5th D.C.A. 1981).

[30] *Id.* In addition to isolating the decedent, the beneficiary had recommended the attorney who drew up the will, instructed the attorney in preparing the will, secured witnesses, attended the execution of the will, and maintained possession of the will during and after its execution. *See id.* at 360.

[31] *Peacock v. Du Bois*, 105 So. 2d at 322-23 (Fla. 1925).

[32] *Id.* at 322.

[33] *Id.*

[34] *Id.* at 323.

[35] *In re Estate of Reid*, 138 So. 2d 342, 347-49 (Fla. 3d D.C.A. 1962), *overruled in part by In re Estate of Carpenter*, 253 So. 2d 697, 702 (Fla. 1971).

[36] *Id.* at 349.
[37] *Id.*

[38] *Id.* at 350. In *Estate of Brock*, 692 So. 2d 907, 912 (Fla. 1st D.C.A. 1996) ("[w]here there is inequality of mental strength, active procurement can be shown by evidence of a request or suggestion by the dominant party").

[39] *In re Estate of Duke*, 219 So. 2d 124, 125 (Fla. 2d D.C.A. 1969).

[40] *Id.* at 127.

[41] *In re Estate of Dalton*, 246 So. 2d at 614 (Fla. 3d D.C.A. 1971).

[42] *Id.* at 615-16.

[43] *Elson v. Vargas*, 520 So. 2d 76, 77 (Fla. 3d D.C.A. 1988).

[44] *Id.* In *In re Siddons*, 297 So. 2d 54 (Fla. 3d D.C.A. 1974), the Third District found that the "[t]estator was a strong-willed, self-determined individual" and held there was no undue influence by the beneficiaries even though they had received the most valuable property, helped the decedent type the will, lived with the decedent, and secured the witnesses to the will. *See id.* at 57.

[45] *Cripe v. Atlantic First Nat'l Bank of Daytona Beach*, 422 So. 2d at 824 (Fla. 1988).

[46] *See id.*; *see also Estate of Brock*, 692 So. 2d 907, 912 (Fla. 1st D.C.A. 1996) (citing, *Cripe* and finding undue influence in part due to inequality of mental strength). The Fifth District relied upon the *Brock* decision in *Hack v. Estate*, 811 So. 2d 822 (Fla. 5th D.C.A. 2002), where the court listed the seven *Carpenter* factors for active procurement and then stated, "[i]n addition, although not part of the *Carpenter* criteria, the inequality of mental capacity and strength between the testatrix and the party with the confidential relationship is a factor in determining active procurement." *See Hack*, 811 So. 2d at 826 (internal citations omitted).

[47] *Newman v. Smith*, 82 So. 236, 251-52 (Fla. 1919).

[48] *Id.*

[49] *Id.* at 252.

[50] *Id.* at 251.

[51] *Id.*

[52] *Peacock v. DuBois*, 105 So. 2d at 322-23.

[53] *Id.* at 323.

[54] *Id.*

[55] *In re Donnelly's Estate*, 188 So. 108, 114 (Fla. 1939).

[56] *See id.*

57 *Id.*

58 *In re Ates' Estate*, 60 So. 2d 275, 280 (Fla. 1952).

59 *Id.* at 275.

60 *Id.* at 280.

61 *See id.* at 279-80.

62 *In re Estate of Witt*, 139 So. 2d 904, 909 (Fla. 2d D.C.A. 1952) (quoting, *Newman v. Smith*, 82 So. at 251).

63 *Id.* at 905.

64 *Id.* at 904.

65 *In re Estate of Tobias*, 192 So. 2d 83 (Fla. 2d D.C.A. 1966).

66 *See id.* at 84-86.

67 *See id.* at 86.

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