

PROBATE CORNER

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ARTICLE: “Active Procurement” Defined

This is the fourth and final article in a four part series pertaining to undue influence. There is a presumption of undue influence when the undue influencer: (1) occupies a confidential relationship with the decedent; (2) is a substantial beneficiary under the will; and (3) was *active in procuring the will*.

In *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971), the Florida Supreme Court listed several criteria to be considered in determining active procurement. The seven “Carpenter factors” are:

- 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.

The Carpenter court made clear that these factors are neither mandatory nor exclusive:

“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.”

Case law recognizes at least four additional indicators of active procurement: (a) isolating the decedent from family and friends; (b) reduced mental capacity; (c) a dramatic change in the decedent’s testamentary bequests, and (d) execution of the will was kept secret from the anticipated beneficiaries.

(a) Was the decedent intentionally isolated from family and friends with hope of breaking down whatever ties of affection existed between them? See *Newman v. Smith*, 82 So. 2d 236 (Fla. 1919); *In re Auerbacher's Estate*, 41 So. 2d 659 (Fla. 1949); *In re Ates' Estate*, 60 So. 2d 275 (Fla. 1952); *In re Baldrige's Estate*, 74 So. 2d 658 (Fla. 1954); *In re Estate of Winslow*, 147 So. 2d 613 (Fla. 2d DCA 1962); and *In re Estate of Lamberson*, 407 So. 2d 358 (Fla. 5th DCA 1981).

(b) Did the decedent have reduced mental capacity, even if arguably insufficient to show lack of testamentary capacity? See *In re Palmer's Estate*, 48 So. 2d 732 (Fla. 1950); *In re Estate of Duke*, 219 So. 2d 124 (Fla. 2d DCA 1969); *In re Estate of Dalton*, 246 So. 2d 612 (Fla. 3d DCA 1971); and *Elson v. Vargas*, 520 So. 2d 76 (Fla. 3d DCA 1988). A higher degree of proof may be required to overcome an inference of undue influence where the decedent is shown to have impaired mental powers or clouded intellect. See *Estate of Reid*, 138 So.2d 342 (Fla. 3d DCA 1988). Additionally, where there is inequality of mental capacity and strength between the decedent and the undue influencer, active procurement may be shown by evidence of a request or suggestion by the undue influencer. See *Hack v. Estate of Helling*, 811 So.2d 822 (Fla. 5th DCA 2002) and *Estate of Brock*, 692 So. 2d 907 (Fla. 1st DCA 1996).

(c) Is there a dramatic change in the decedent's testamentary bequests? See *Newman v. Smith*, 82 So. 2d 236 (Fla. 1919); *Peacock v. Du Bois*, 105 So. 2d 321 (Fla. 1925); *In re Donnelly's Estate*, 188 So. 108 (Fla. 1939); *In re Ates' Estate*, 60 So. 2d 275 (Fla. 1952); *In re Estate of Witt*, 139 So. 2d 904 (Fla. 2d DCA 1952); *In re Estate of Tobias*, 192 So. 2d 83 (Fla. 2d DCA 1966); and *Estate of Burton*, 45 So.2d 873(Fla. 1950).

(d) Was the execution of the will kept secret from the anticipated beneficiaries? See *Estate of Burton*, 45 So.2d 873(Fla. 1950).