

## PROBATE CORNER

By: David M. Garten, Esq.

### ARTICLE: Presumption Of Undue Influence

Undue Influence is defined as over persuasion, duress, force, coercion or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower. The crucial issue is whether the decedent's free agency and willpower were destroyed, to make her actions the product of another person. See *Derovanesian v. Derovanesian*, 857 So. 2d 240 (Fla. 3rd DCA 2003); *Coppock v. Carlson*, 547 So. 2d 946 (Fla. 3d DCA 1989); and *Peacock v. Du Bois*, 90 Fla. 162, 105 So. 321 (1925).

In contrast, if the undue influencer gave advice, or persuaded the decedent to make a certain devise, or that a great amount of affection existed between the undue influencer and the decedent, those facts alone would be insufficient to establish a presumption of undue influence. See *In re Estate of Whitehead*, 248 So. 2d 186 (Fla. 4th DCA 1971). The fact that a decedent was aged or feeble does not, without more, constitute evidence of undue influence. The courts recognize that old people may be "reasonably easily influenced," but also recognize that "the only weapon these old people have to enforce consideration and good treatment of themselves, and proper care, is the power to dispose of their estate by will." See *In re Starr's Est.*, 170 So. 620, 624 (Fla. 1935).

The Florida Supreme Court long ago held that because of the difficulty of obtaining direct evidence of undue influence, an individual claiming undue influence can satisfy her initial burden of proof by presenting facts sufficient to raise a presumption thereof. See *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971). Thus, 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. See *Newman v. Brecher*, 887 So. 2d 384 (Fla. 4th DCA 2004), quoting *Carpenter*.

Section 733.107(2) reads: "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 §§ 90.301 through 90.304." This statute, which became effective in 2002, supersedes *Carpenter* and *Cripe v. Atlantic First National Bank*, 422 So. 2d 820 (Fla. 1982) to the extent that they prohibit a shifting of the burden of proof in undue influence cases. See *Hack v. Janes*, 878 So. 2d 440 (Fla. 5th DCA 2004). When a presumption of undue influence arises, the undue influencer must rebut the presumption by the greater weight of the evidence by showing facts which indicate that the decedent made the disposition of her own free will. See *Hack v. Janes* and *RBC Ministries v. Tompkins*, 974 So. 2d 569 (Fla. 2d DCA 2008).