WILL AND TRUST CONTESTS

Florida ACTEC Fellows Institute
February 19, 2016

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I. TIME LIMITATIONS FOR CONTESTING

A. **Wills** (including testamentary trusts)

Asserting the invalidity of a will (and the grounds) is not subject to any traditional statute of limitations because it is essentially a defensive matter raised in opposition to a petition to probate a will. However, the time within which the invalidity of a will must be asserted in a probate proceeding is subject to certain procedural time limitations.

1. Adjudication before issuance of letters. Although not required to do so, the proponent of a will may obtain an adjudication of its validity before the issuance of letters by serving formal notice of the petition for administration on interested persons. §733.2123, Fla. Stat. When that procedure is invoked, any defenses to the petition must be served within 20 days after service of the notice, and the validity of the will may not be otherwise challenged. Fla. Prob. R. 5.040(a)(1); §733.2123, Fla. Stat.

2. Adjudication after issuance of letters. When it appears that a petitioner who has filed a petition for administration is entitled to preference of appointment as personal representative and no caveat has been filed by an interested person other than a creditor, letters of administration may be issued to the petitioner without notice. Fla. Prob. R. 5.201(a) and 5.260(f); §731.110(3), Fla. Stat.

After the issuance of letters, an interested person who has not already been barred pursuant to §733.2123, Fla. Stat., may bring a proceeding to revoke probate of a will by filing a petition for revocation of probate (stating the interest of the petitioner in the estate and the facts constituting the grounds on which revocation is demanded) in the court having jurisdiction over the administration. §733.109(1), Fla. Stat.; Fla. Prob. R. 5.270(a). The deadline for filing a petition for revocation of probate is the earlier of:

a. If a copy of the notice of administration was served by the personal representative on the petitioner in the manner provided for service of formal notice, the date that is 3 months after the date of service. This 3-month deadline may only be extended based upon a misstatement by the personal representative regarding the time period within which the objection or petition must be filed, in which event the deadline is 1 year after service of the notice of administration. §733.212(3), Fla. Stat.; Fla. Prob. R. 5.240(a) and (d).

b. Entry of an order of final discharge of the personal representative. §§733.109(1) and 733.212(3), Fla. Stat.

Note: In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence, and that the will was unrevoked on the testator's death. §733.103(2), Fla. Stat.

B. Trusts

1. Pursuant to §736.0604, Fla. Stat., as to trusts that were revocable at the settlor's death, the earlier of:

a. Six months after the trustee sends the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding [this notice is optional and not required]; or

b. The time as provided in chapter 95, Fla. Stat., to wit:

(1) For trust contests based upon undue influence, duress, or other species of fraud, the action must be commenced within 4 years from the time the cause of action accrues (i.e, death of settlor). §§95.11(3)(j) and (o) and 95.031, Fla Stat. The 4-year time period for commencing an action for fraud (of which undue influence is a species) does not begin to run until the facts giving rise to the cause of action are discovered, or should have been discovered with the exercise of due diligence. §95.031(2), Fla. Stat. However, in any event, an action founded on fraud must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered. §95.031(2), Fla. Stat.

(2) For trust contests based upon lack of capacity, mistake, or lack of due execution, it would appear that the 4-year limitation period of §95.11(3)(p) ("Any action not specifically provided for in these statutes") would control, and would commence upon the death of the settlor. See §736.207, Fla. Stat.

2. For trusts that were irrevocable prior to the settlor's death:

a. For trust contests based upon undue influence, duress, or other species of fraud, the action must be commenced within 4 years from the time the cause of action accrues. §§95.11(3)(j) and (o) and 95.031, Fla Stat. The 4-year time period for commencing an action for fraud (of which undue influence is a species) does not begin to run until the facts giving rise to the cause of action are discovered, or should have been discovered with the exercise of due diligence. §95.031(2), Fla. Stat. However, in any event, an action founded on fraud must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered. §95.031(2), Fla. Stat. Also, as a matter of law, facts giving rise to a cause of action based on undue influence do not become discoverable by the exercise of

reasonable diligence until termination of the undue influence. *In re Guardianship of Rekasis*, 545 So.2d 471 (Fla. 2d DCA 1989).

b. For trust contests based upon lack of capacity, mistake, or lack of due execution, it would appear that the 4-year limitation period of §95.11(3)(p) ("Any action not specifically provided for in these statutes") would control, and would commence upon the death of the settlor. See §736.207, Fla. Stat.

II. TYPE OF PLEADING CREATING CONTEST

A. **Wills** (including testamentary trusts)

1. Proceedings "for revocation of probate of a will" are, by definition, adversary proceedings which, after service of formal notice, must (as nearly as practicable) be conducted similar to suits of a civil nature and are governed by the Florida Rules of Civil Procedure. Fla. Prob. R. 5.025(a) and (d)(2).

2. When adjudication is sought before the issuance of letters by serving formal notice of the petition for administration on interested persons, the validity of the will may only be challenged by asserting its invalidity as a defense in an answer to the petition for administration. §733.2123, Fla. Stat.; Fla. Prob. R. 5.040(a)(1). Insofar as will contest proceedings before the issuance of letters are literally not proceedings "for revocation of probate of a will," it is arguable that they are not automatically adversary proceedings and it may be advisable for the parties to declare them as such pursuant to Fla. Prob. R. 5.025(b).

3. When adjudication is sought after issuance of letters, proceedings to revoke probate of a will are commenced by filing a petition for revocation of probate (stating the interest of the petitioner in the estate and the facts constituting the grounds on which revocation is demanded). §733.109(1), Fla. Stat.; Fla. Prob. R. 5.270(a).

B. Trusts

Judicial proceedings concerning trusts, including those to determine the validity of all or part of a trust, are commenced by filing a complaint and are governed by the Florida Rules of Civil Procedure. §736.0201(1) and (4)(a)109(1), Fla. Stat.

III. PARTIES

A. **Wills** (including testamentary trusts)

1. Petitioner/Standing

a. Only an "interested person" has standing to challenge the validity of a will. Proceedings to obtain an adjudication before the issuance of letters are commenced by serving formal notice of the petition for administration on "interested

persons." §733.2123, Fla. Stat. After the issuance of letters, a petition for revocation of probate may be filed by "any interested person, including a beneficiary under a prior will." §733.109(1), Fla. Stat. An "interested person" is "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved," including a contingent beneficiary. §731.201(23), Fla. Stat.; *In re Estate of Watkins*, 572 So.2d 1014 (Fla. 4th DCA 1991).

b. The burden is on the petitioner seeking revocation of probate to plead and prove his or her interest or standing. Fla. Prob. R. 5.270(a). Conversely, the lack of standing is not an affirmative defense that must be pled or proved by the proponent of the will. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002, 1005-1006 (Fla. 5th DCA 2005). The test of "interest" or "standing" in the context of contesting the validity of a will is whether the petitioner will benefit if he or she is successful. See *Cates v. Fricker*, 529 So.2d 1253 (Fla. 2d DCA 1988). The petition must allege facts which, if true, will cause the petitioner (as an heir-at-law or beneficiary under a prior will), if successful, to benefit by receiving more of the estate. In many cases, the issue of the petitioner's standing may be affected by the invalidity or revocation of prior wills (which, in turn, may depend on whether the revocation clause in the last will is invalid or conditional under the doctrine of dependent relative revocation). See *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002 (Fla. 5th DCA 2005).

c. A personal representative under a prior will has standing to contest a later will. *Wheeler v. Powers*, 972 So.2d 285, 289 (Fla. 5th DCA 2008); *Engelberg v. Birnbaum*, 580 So.2d 828 (Fla. 4th DCA 1991).

2. Respondents/Necessary or Indispensable Parties

Subject to narrow exceptions, every petition for an order determining rights of an interested person must be served on interested persons. Fla. Prob. R. 5.041. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative is an interested person. §731.201(23), Fla. Stat.

B. Trusts

1. Plaintiff/Standing

a. Civil actions may be prosecuted in the name of the real party in interest. Fla. R. Civ. P. 1.210(a). The test of "interest" or "standing" for purposes of bringing a will contest (i.e., whether the plaintiff will benefit if he or she is successful) should be fully applicable to actions to contest the validity of a trust.

b. The only person who has standing to contest the validity of a trust while it is revocable is the guardian of the property of an incapacitated settlor. §736.0207, Fla. Stat. However, a guardian does not have the power to bring such an action unless authorized to do so by the guardianship court upon a finding that the action appears to be in the ward's best interests during the ward's probable lifetime. §744.441(11), Fla. Stat.

2. Defendants/Necessary or Indispensable Parties

a. The trustee and all beneficiaries, including contingent beneficiaries, are indispensable parties. See *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed 2d 1283 (1958); *Byers v. Beddew*, 142 So. 894 (Fla. 1932); *Carter v. Howarth*, 285 So.2d 442 (Fla. 1st DCA 1973); and *First National Bank of Hollywood v. Broward National Bank of Fort Lauderdale*, 265 So.2d 377 (Fla. 4th DCA 1972).

b. Any person may be made a defendant who has or claims an interest adverse to the plaintiff, and any person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause. Fla. R. Civ. P. 1.210(a).

IV. PROCESS AND SERVICE

A. **Wills** (including testamentary trusts)

Because proceedings "for revocation of probate of a will" are, by definition, adversary proceedings, the "process" by which a petition for revocation of probate must be served is a formal notice. Fla. Prob. R. 5.025(a) and (d)(1). The methods by which formal notice may be served are set forth in Fla. Prob. R. 5.040(a).

B. Trusts

Because proceedings to determine the validity of all or part of a trust are governed by the Florida Rules of Civil Procedure, the "process" by which the complaint must be served is a civil summons. §736.0201(1) and (4)(a), Fla. Stat.; Fla. R. Civ. P. 1.070. The methods by which a summons may be served are set forth Fla. R. Civ. P. 1.070 and in Chapter 48, Fla. Stat. In some circumstances, service may be made by publication of a notice of action under Chapter 49, Fla. Stat.

V. BURDEN OF PROOF - GENERALLY

A. **Wills** (including testamentary trusts)

In proceedings contesting the validity of a will, the initial burden is upon the proponent of the will to establish *prima facie* its formal execution and attestation. That burden may be satisfied by the live testimony of an attesting or non-attesting witness, a self-proving affidavit executed in accordance with §732.503, Fla. Stat., or an oath of an attesting witness executed as required in §733.201(2), Fla. Stat. Thereafter, the contestant has the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought. §733.107(1), Fla. Stat.

B. Trusts

In actions to contest the validity of all or part of a trust, the contestant has the burden of establishing the grounds for invalidity. §736.207(1), Fla. Stat.

C. See the below materials concerning undue influence as a ground for contesting a will or trust and explaining how the presumption of undue influence can shift the burden of proof on the question of undue influence to the proponent of the will or trust.

VI. GROUNDS

A. Incapacity/Insane Delusion of Testator/Settlor

1. Wills (including testamentary trusts)

Any person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will. §732.501, Fla. Stat.

2. Trusts

a. A settlor must have capacity in order to create a trust. §736.0402(1)(a), Fla. Stat.

b. The capacity required to create or amend a revocable trust is the same as that required to make a will. §736.0601, Fla. Stat.

B. Lack of Due Execution

1. Wills (including testamentary trusts)

A will, in its entirety, is subject to the statutory requirement of due execution. §732.502, Fla. Stat.

2. Trusts

a. Trusts that are irrevocable at the time of their creation are not required to be executed with the formalities required for the execution of a will.

b. However, the testamentary aspects of a revocable trust or trust amendment executed on or after October 1, 1995, by a settlor who is a domiciliary of Florida are invalid unless it was executed with the formalities required for the execution of a will in Florida. §736.0403(2)(b) and (4), Fla. Stat. (which incorporates former §737.111, Fla. Stat., with respect to revocable trusts created before the effective date of the Trust Code).

C. Procured by Fraud - §§732.5165 and 736.0406, Fla. Stat.

D. Procured by Duress - §§732.5165 and 736.0406, Fla. Stat.

E. Procured by Mistake - §§732.5165 and 736.0406, Fla. Stat.

F. Procured by Undue Influence - §§732.5165 and 736.0406, Fla. Stat.

1. Undue Influence Measured by Impact on Victim

a. Undue influence is influence that overcomes or destroys a person's free agency or willpower and substitutes the will or wishes of another for the will of that person. It may also be described as influence that so controls or affects the mind of a person that he or she is not left to act intelligently, understandingly, and voluntarily, but is subject to the will or purposes of another.

(1) Overcomes the will of the grantor, deprives the grantor of free agency, and substitutes the will of another for that of the grantor. *Pratt v. Carns*, 85 So. 681 (Fla. 1920).

(2) So controls or affects his mind that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purposes of another. *Beatty v. Strickland*, 186 So.542 (Fla. 1939); *In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925); *Taylor v. Johnson*, 581 So.2d 1333 (Fla. 1st DCA 1991).

(3) It cannot be said that the testator was acting voluntarily, of his or her own free will and volition. *In Re Starr's Estate*, 170 So. 620 (Fla. 1936).

(4) Dethrones the free agency of the person making it and renders his act the product of the will of another, instead of his own. *In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Gardiner v. Goertner*, 149 So. 186 (Fla. 1933); *Hamilton v. Morgan*, 112 So. 80 (Fla. 1927); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925).

(5) Destroys or hampers the free agency and willpower of the testator. *In Re Starr's Estate*, 170 So. 620 (Fla. 1936)*; RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008).

(6) Destroys the free agency and willpower of the testator *Taylor v. Johnson*, 581 So.2d 1333 (Fla. 1st DCA 1991); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

(7) Destroys the free agency of the donors and substitutes therefor the will of another. *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925).

(8) Induces the testator to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of the testator. *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015); *In re Winslow's Estate*, 147 So.2d 613, 617 (Fla. 2d DCA 1962).

b. Undue influence may result from insidious influences of persons in close confidential relations with the person influenced, artful or fraudulent contrivances, persuasion, overpersuasion, pressure, duress, coercion, or force.

(1) **Insidious influences**: *Adams v. Sauders*, 191 So. 312, 314 (Fla. 1939*); In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So.321 (Fla. 1925); *Genova v. Florida National Bank of Palm Beach County*, 433 So.2d 1211 (Fla. 4th DCA 1983) approved, 460 So.2d 895 (Fla. 1984); *In Re Estate of Duke*, 219 So.2d 124 (Fla. 2d DCA 1969). An "insidious" influence is one that is sneaky, subtle, or underhanded.[1]

(2) **Artful or fraudulent contrivances**: *Adams v. Saunders*, 191 So. 312, 314 (Fla. 1939); *In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925); *Genova v. Florida National Bank of Palm Beach County*, 433 So.2d 1211 (Fla. 4th DCA 1983) approved, 460 So.2d 895 (Fla. 1984); *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1982); *In Re Estate of Duke*, 219 So.2d 124 (Fla. 2d DCA 1969); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958); An "artful contrivance" is a plan or scheme that is cunning or devious.[2]

(3) **Persuasion**: *In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925); *Genova v. Florida National Bank of Palm Beach County*, 433 So.2d 1211 (Fla. 4th DCA 1983) approved, 460 So.2d 895 (Fla. 1984); *In Re Estate of Duke*, 219 So.2d 124 (Fla. 2d DCA 1969).

(4) **Overpersuasion**: *Adams v. Saunders*, 191 So. 312, 314 (Fla. 1939); *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Taylor v. Johnson*, 581 So.2d 1333 (Fla. 1st DCA 1991); *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1982); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

(5) **Pressure**: *Adams v. Saunders*, 191 So. 312, 314 (Fla. 1939); *In Re Starr's Estate*, 170 So. 620 (Fla. 1936); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925); *Genova v. Florida National Bank of Palm Beach County*, 433 So.2d 1211 (Fla. 4th DCA 1983) approved, 460 So. 2d 895 (Fla. 1984); *In Re Estate of Duke*, 219 So.2d 124 (Fla. 2d DCA 1969).

(6) **Duress**: *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1982); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

(7) **Coercion**: *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Taylor v. Johnson*, 581 So.2d 1333 (Fla. 1st DCA 1991); *Jordan v.*

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[1] Definitions and synonyms from dictionary and thesaurus for "insidious"—intended to entrap; working or spreading in a hidden and usually injurious way; a subtle poison; proceeding in a gradual, subtle way, with harmful effect; subtle; cunning; crafty; treacherous; sly; underhanded; sneaky.

[2] Definitions and synonyms from dictionary and thesaurus for:
Artful—clever, skillful, sly, crafty, cunning, devious.
Contrivance—a plan or scheme; ploy; plot; a clever or complicated method of achieving a particular effect.

Noll, 423 So.2d 368 (Fla. 1st DCA 1982); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

(8) **Force**: *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Taylor v. Johnson*, 581 So.2d 1333 (Fla. 1st DCA 1991); *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1982); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

c. The doctrine of undue influence is based on the idea that a person is induced by various means to execute a document such as a will, trust, or trust amendment which outwardly appears to be her document, but in reality does not reflect her will or wishes and instead reflects the will or wishes of another that have been substituted for those of that person. *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015) ("The doctrine of undue influence is based on the theory that the 'testator is induced by various means, to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator.' *In re Winslow's Estate* (147 So.2d 613,617 (Fla. 2d DCA 1962). . . .").

2. Proof

a. Presumption of Undue Influence

(1) Statement of Presumption

If a substantial beneficiary of a gift or devise occupies a fiduciary or confidential relationship of trust and confidence with a decedent and is active in procuring the gift or devise, Florida law presumes that the gift or devise is the product of undue influence. *Cripe v. Atlantic First National Bank of Daytona Beach*, 422 So.2d 820 (Fla. 1981); *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971) ("It is established in Florida that if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises."); *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Newman v. Brecher*, 887 So.2d 384 (Fla. 4th DCA 2004); *Jacobs v. Vaillancourt*, 634 So.2d 667 (Fla. 2d DCA 1994); *Sun Bank/Miami, N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1988).

(2) Confidential Relationship

i. A "confidential relationship" arises whenever one person trusts in and relies upon another person who accepts that trust. *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002); *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *Wilkins v. Wilkins*, 192 So. 791 (Fla. 1940); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927); *Jacobs v. Vaillancourt*, 634 So.2d 667 (Fla. 2d DCA 1994).

ii. The term "confidential relation" is very broad and includes all cases in which trust and confidence has been reposed and accepted. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *Wilkins v. Wilkins*, 192 So. 791 (Fla.

1940); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927); *Jacobs v. Vaillancourt*, 634 So.2d 667 (Fla. 2d DCA 1994) ("An informal type of fiduciary relationship may exist under a variety of circumstances and does exist in cases where there has been a special confidence reposed in one, who in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.").

iii. The origin of the relationship is immaterial. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927).

iv. The relation need not be technical, formal or legal; it may be informal, moral, social, domestic, or merely personal. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *Wilkins v. Wilkins*, 192 So. 791 (Fla. 1940); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927).

v. The law does not permit the use of confidential relations to become the vehicle for the acquisition of personal gain or to acquire property without full, fair and adequate compensation. *Wilkins v. Wilkins*, 192 So. 791 (Fla. 1940) ("The law is a zealous guardian of confidence and trust and will not permit even the casual use of such relations to become the vehicle for the acquisition of personal gain or to acquire property without full, fair and adequate compensation." "A fiduciary will not be allowed to reap a harvest planted upon the fields of fiduciary relationship without a clear showing of good faith and no unfair advantage having been indulged."); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927) ("He who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of one relying upon his integrity.").

vi. When persons occupy positions of trust and confidence they are held to a strict measure of candor in their dealings, and any transactions between them predicated on a grossly inadequate consideration will be viewed as suspicious. *Wilkins v. Wilkins*, 192 So. 791 (Fla. 1940) ("When persons occupy positions of trust and confidence . . . they are held to a strict measure of candor in their dealings, and any transactions between them predicated on a grossly inadequate consideration will be viewed as suspicious.").

vii. A fiduciary or confidential relationship also exists where one person is under a duty to act for or to give advice for the benefit of the other party. *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002) ("Moreover, '[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another . . . . '").

(3) Active Procurement

i. The following factors and warning signals have been identified as evidence of undue influence or active procurement of a gift or devise:

- The beneficiary discussing the document or its contents with the decedent prior to it being prepared or signed.

- The beneficiary's knowledge of the contents of decedent's prior documents that are being changed or replaced.

- The beneficiary recommending the attorney to prepare the document.

- The beneficiary discussing the document or its contents with the attorney preparing the document.

- The beneficiary giving instructions to the attorney for the preparation of the document.

- The beneficiary bringing the client to the attorney's office to discuss or sign the document.

- The beneficiary being present when the document or its contents were discussed by the decedent and the attorney.

- The beneficiary knowing the contents of the document prior to it being signed.

- The beneficiary securing presence of witnesses to the signing of the document.

- The beneficiary being present at the signing of the document.

- The beneficiary having possession of the document after the signing.

In re Estate of Carpenter, 253 So.2d 697 (Fla. 1971); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015); *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Diaz v. Ashworth*, 963 So.2d 731 (Fla. 3d DCA 2007); *Hack v. Estate of Helling*, 811 So.2d 822 (Fla. 5th DCA 2002); *Sun Bank/Miami, N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1988).

ii. All of the listed factors do not have to be proven to show active procurement, and it would be a rare case in which all of them are present. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); *RBC Ministries v. Tompkins*, 974 So.2d 569 (Fla. 2d DCA 2008); *Newman v. Brecher*, 887 So.2d 384 (Fla. 4th DCA 2004); *Sun Bank/Miami, N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1988). They are examples of facts that show active procurement or undue influence. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971) ("[T]he facts giving rise to the presumption are themselves evidence of undue influence . . . ."); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015) ("The Florida Supreme Court has established a set of non-exhausitive factors for courts to consider on the issue of undue influence or active procurement . . . ."); *Sun Bank/Miami, N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1988).

(4) Reasons for Presumption

i. Undue influence is not usually exercised openly in the presence of others. *Gardiner v. Goertner*, 149 So.186, 190 (Fla. 1933) ("Undue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred."); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015). Primarily because of the secret nature of the dealings between the beneficiary and the decedent, undue influence is rarely susceptible of direct proof. *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971) ("We acknowledge that undue influence is rarely susceptible of direct proof, primarily because of the secret nature of the dealings between the beneficiary and the testator…"). Therefore, it may be proved by indirect evidence of facts and circumstances from which it may be inferred. *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933); *Blinn v. Carlman*, 159 So.3d 390, 391 (Fla. 4th DCA 2015).

ii. The presumption implements a public policy against abuse of fiduciary or confidential relationships. §733.107(2), Fla. Stat.

(5) Effect of Presumption on Burden of Proof

i. The presumption of undue influence that arises when a substantial beneficiary who occupies a fiduciary or confidential relationship with the decedent is active in procuring the contested will or trust may be rebutted. The burden is on the party seeking to rebut the presumption to prove by a preponderance of the evidence that the will, trust, or devise was free from undue influence.

- §733.107(2), Fla. Stat. ("[The rebuttable] presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof."); §§90.301-303, Fla. Stat.

- *Rich v. Hollman*, 143 So. 292, 293 (Fla. 1932).

- *RBC Ministries v. Tompkins*, 974 So.2d 569, 572 (Fla. 2d DCA 2008) ("[O]nce a will contestant establishes the existence of the basis for the rebuttable presumption of undue influence, the burden of proof shifts to the proponent of the will to establish by a preponderance of the evidence the nonexistence of undue influence.").

- *Diaz v. Ashworth*, 963 So.2d 731, 735 (Fla. 3d DCA 2007) ("[W]here . . . the contestant . . . satisfies, *prima facie*, a presumption of undue influence . . ., the *proponent of the will* has the burden of proving [by a preponderance of the evidence] the will was not the product of undue influence.").

- *Newman v. Brecher*, 887 So.2d 384, 386 (Fla. 4th DCA 2004) ("[The] burden shifts to the proponents when the contesting party presents sufficient facts to raise a presumption of undue influence.").

- *Hack v. Janes*, 878 So.2d 440, 443 (Fla. 5th DCA 2004) ("[S]ection 733.107(2) specifically mandates that the presumption shifts the burden of proof under sections 90.301 through 90.304 when a presumption of undue influence arises . . . [and the alleged wrongdoer] "bore the burden of proving that there was no undue influence.").

ii. If the person against whom the presumption operates fails to prove that the will, trust, or devise is not the product of undue influence, the presumption controls and a finding of undue influence is required. §§733.107(2) and 90.301-303, Fla. Stat.

b. Other Circumstantial Proof of Undue Influence

(1) Relationship of Parties

i. Generally: *Gardiner v. Goertner*, 149 So. 186, 189, 191 (Fla. 1933); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925).

ii. Meritricious Relationship Presumption: *Beatty v. Strickland*, 186 So. 542, 544 (Fla. 1939) ("Transactions Inter Vivos between parties living in illicit sexual relations where the consideration is inadequate or wanting altogether are generally presumed prima facie to have resulted from the practice of undue influence on the part of the one deriving the advantage. And this is especially true where natural objects of bounty are excluded and the person on whom it is alleged the undue influence is exercised is aged and afflicted, or is impaired in mind and body by dissipation.' [Citation omitted.]"); *Benner v. Pedersen*, 143 So.2d 722, 726 (Fla. 2d DCA 1962) ("[W]here there is a confidential relationship or a *quasi* confidential relationship through meretricious association between a legally unrelated donee and donor, a presumption of overreaching or undue influence arises which may justify a voidance of the transaction in the absence of positive evidence of good faith and fair dealing.")

(2) Susceptibility - Age - Physical & Mental Condition: *In re Estate of Aldrich*, 3 So.2d 856, 858 (Fla. 1941) ("Proof of a sound mind and body does not preclude the possibility of undue influence; nor does proof of a weak mind and feeble body alone establish undue influence; yet it is well known that a person in feeble health or with a weak mind is more susceptible to improper influences than one of robust health and strong mind."); *Gardiner v. Goertner*, 149 So. 186, 189-190 (Fla. 1933); *Washington Loan & Trust Co. v. Hutchinson*, 144 So. 343, 344 (Fla. 1932); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925).

(3) Other Acts or Transactions: Evidence of undue influence in one transaction may be considered in determining the existence of undue influence in other subsequent and related transactions. *Hopkins v. McClure,* 45 So.2d 656, 657 (Fla. 1950) ("When undue influence of one person over another is being investigated a broad latitude should be allowed in the presentation of evidence of the relationship between the parties both before and after the particular time around which the inquiry centers. Acts and

circumstances tending to show undue influence even far removed in time should be considered."); *Gardiner v. Goertner*, 149 So.186, 190 (Fla. 1933) ("[T]he circumstance that other acts were the result of undue influence may be material as evidence that the particular act was also the result of such influence").

(4) Opportunity to Exercise Undue Influence: *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933).

(5) Motive to Unduly Influence: *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933).

(6) Dramatic Change in Plan: *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1933).

(7) Character of Devise (Reasonableness/Natural): *In Re Estate of Starr*, 170 So. 620 (Fla. 1936); *Gardiner v. Goertner*, 149 So. 186, 189-190 (Fla. 1933); *Peacock v. Du Bois*, 105 So. 321 (Fla. 1925).

3. Species of Fraud

The law recognizes undue influence as a type of fraud and treats it as fraud in general. *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) ("[U]ndue influence has been classified as either a species of fraud or a kind of duress, and in either instance is treated as fraud in general."); *O'Hey v. Van Dorn*, 562 So.2d 405, 406 (Fla. 4th DCA 1990) ("[U]ndue influence and fraudulent inducement are both species of fraud. . . . "); *In re Guardianship of Rekasis*, 545 So.2d 471, 473 (Fla. 2d DCA 1989) ("Undue influence is a species of fraud. . . . Undue influence is treated as fraud in general [citation omitted]."); *Heasley v. Evans*, 104 So.2d 854 (Fla. 2d DCA 1958).

4. Concedes Capacity

A contention of undue influence concedes the existence of testamentary capacity. *Gardiner v. Goertner*, 149 So. 186 (Fla. 1933); *Hamilton v. Morgan,* 112 So. 80 (Fla. 1927); *Bartsch v. Estate of Wirth*, 136 So.2d 648 (Fla. 3d DCA 1962).

VII. PARTIAL INVALIDITY

Florida law provides that all or any part of a will, trust, or trust amendment may be the product of undue influence, fraud, or mistake. §§732.5165 and 736.0406, Fla. Stat.

VIII. RIGHT TO JURY TRIAL

A. No right to trial by jury exists for proceedings to contest a will or trust. *Lavey v. Doig*, 25 Fla. 611, 6 So. 259 (1889); *In re Estate of Ciccorella*, 407 So.2d 1044 (Fla. 3d DCA 1981); *Allen v. Estate of Dutton*, 394 So.2d 132 (Fla. 5th DCA 1981). Interestingly, a right to trial by jury in all will contests existed in Florida by statute between 1853 and 1868. *Lavey*.

B. The test in Florida for whether there is a right to jury trial for a particular claim "is whether the party seeking a jury trial is trying to invoke rights and remedies of the sort traditionally enforceable in an action at law." *King Mountain Condominium Ass'n, Inc. v. Gundlach*, 425 So.2d 569, 571 (Fla. 4th DCA 1983). The right does not extend to equitable demands that traditionally were enforced in the courts of chancery. *Hughes v. Hannah*, 39 Fla. 365, 22 So. 613 (1897). See also *In re Estate of DuVal*, 174 So.2d 580 (Fla. 2d DCA 1965).

C. It has been noted that "[h]istorically, matters [to be determined by the probate court] . . . are not subject to the constitutionally protected right to a jury trial." *In re Estate of Howard*, 542 So.2d 395, 397 (Fla. 1st DCA 1989). See also *Allen v. Estate of Dutton*, 394 So.2d 132 (Fla. 5th DCA 1981); *In re Fanelli's Estate*, 336 So.2d 631 (Fla. 2d DCA 1976).