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Undue Influence in Will Contests

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Up From *Carpenter*: Undue Influence in Will Contests

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TABLE OF CONTENTS

I. INTRODUCTION

Florida's law on undue influence in testamentary matters, like Caesar's Gaul, may be divided into three historical phases. In the first phase, Florida courts developed what might be called a totality of the circumstances test to determine the presence of undue influence exercised upon a testator. In the second phase, a burden-shifting evidentiary presumption was developed. The third phase, that began with the landmark *Carpenter*[1] case, saw a marked, fundamental change in the significance accorded the presumption of undue influence developed in the second phase. This article will trace the development of Florida's law of undue influence and examine the possible effect of Florida's evidence code on the strength of presumptions. Finally, this article will suggest that the *Carpenter* presumption has occupied too central a role in undue influence litigation and that both the Bench and Bar should reexamine the approach to undue influence developed in the first phase.

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

II. THE INITIAL PHASE

Florida courts initially developed a fact-specific test to determine the presence of undue influence. The 1919 case of *Newman v. Smith*[2] is illustrative of this approach. In *Newman*, the testator, shortly before his death, executed a will that left all his property to his second wife and disinherited his only child, a daughter.[3] The facts of the case indicated that a prior will provided for an equal division of the estate between the daughter and the stepmother.[4] Moreover, the testator had on numerous occasions expressed an intention to provide for his daughter.[5] There was also considerable medical evidence concerning his mental capacity insofar as it related to his susceptibility to the influence of others.[6] Additional evidence suggested that the stepmother, during the father's last illness and hospitalization, attempted to prevent the daughter from seeing her father.[7] Finally, the evidence revealed a close, affectionate relationship between the daughter and the father,[8] as contrasted with the less than cordial relations between the decedent and the stepmother.[9] This antipathy also extended to the stepmother's family.[10]

The *Newman* court initially defined undue influence as "over-persuasion, coercion, or force that destroys or hampers the free agency and willpower of the testator."[11] The court also recognized that "undue influence can seldom, if ever, be established by direct evidence," but is often "conclusively shown by its results."[12] Undue influence, the court held, must "be proven when it appears the testator was of sound mind."[13] The burden of proof can be satisfied if a "legitimate inference from the facts and circumstances in the case"[14] supports such a conclusion. The *Newman* court found that the following factors in the case supported a finding of undue influence: 1) an entire change from for-

2. 82 So. 236 (Fla. 1918).
3. *Id.* at 237.
4. *Id.* at 238.
5. *Id.* at 242.
6. *Id.* at 242-45.
7. *Newman*, 82 So. at 249.
8. *Id.*
9. *Id.* at 242.
10. *Id.*
11. *Id.* at 246.
12. *Newman*, 82 So. at 251.
13. *Id.* at 246.
14. *Id.* at 251-57.

mer testamentary intentions; 2) an unnatural disposition of property; 3) the circumstances surrounding the execution of the will; 4) the susceptibility of the testator to influence; 5) the conduct of the stepmother in preventing the daughter from visiting her father; and 6) the poor relations between the wife and testator.[15] The court found in this case what it characterized as "numerous indications of undue influence."[16] *Newman* also illustrates the difficulty of the issue itself. The court's initial opinion which upheld the disputed will was withdrawn, a motion for rehearing granted,[17] and a switch of one Justice resulted in a finding of undue influence.[18]

In a subsequent case, *Hamilton v. Morgan*,[19] the decedent's children attacked their father's will on grounds of undue influence. That will, by its terms, virtually disinherited the children and left the bulk of the decedent's estate to his nephews.[20] The court once again stated that duly-executed wills should be given effect "unless it clearly appears that the free use of a sound mind by the testator was in fact prevented by deception, undue influence or other means . . . otherwise the right given by statute to dispose of property by will would be thwarted."[21] The court, like the court in *Newman*, employed a fact-specific analysis that looked to "(1) the character of the transaction; (2) the mental condition of the parties; and (3) the relationship of the parties."[22] The facts of the case revealed, in the court's words, that "family relations in the Hamilton home had long been turbulent and rent by domestic cyclones."[23] The decedent had been totally alienated from his children and had been ignored by them during the period shortly before his death when he was an invalid.[24] In the court's view, the evidence showed "conclusively a deliberate purpose on the part of the testator, actuated by resentment . . . to disinherit the contestants who had become estranged from and neglected him and to make the objects of his bounty those who had consoled and comforted him in the years of his

15. *Id.* at 251-52.
16. *Id.* at 251.
17. *Newman*, 82 So. at 246.
18. *Id.* at 252.
19. 112 So. 80 (Fla. 1927).
20. *Id.* at 82.
21. *Id.* at 81.
22. *Id.* at 83.
23. *Id.* at 81.
24. *Hamilton*, 112 So. at 81.

decline and misfortune."[25] It is interesting that one of the beneficiary nephews was a physician and treated the decedent.[26] The court, however, apparently felt that this circumstance was of no consequence in view of the other evidence in the case. In addition, a close examination of the three-part test used by the court indicated that it was a shorthand method of categorizing evidence relevant to the issue of undue influence and the court used the categories in determining if undue influence was present.[27]

In the 1932 case of *Gardiner v. Goertner*,[28] the court again employed a fact-specific approach that looked to the totality of the evidence to determine the presence of undue influence. The three-part test described in *Hamilton* was again used to categorize relevant evidence rather than as a presumption or litmus test. In *Gardiner*, the court reiterated the difficulties of proof by observing that "undue influence is usually not 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."[29] The court provided what may be characterized as relevant facts to be considered in determining the presence of undue influence.[30]

The factors to be considered on the issue of undue influence included:

> (1) opportunity to exercise, (2) susceptibility of the testator, (3) a disposition to (by the beneficiary) exercise it, (4) a result that is indicative, (5) unnatural disposition, (6) persuasion, (7) solicitation (even if wife or husband), (8) other acts resulting from demonstrated undue influence, (9) apparent inequality or unreasonable testamentary disposition, (10) change in former testamentary dispositions, (11) interest or motive of a beneficiary, (12) circumstances attending execution of the will, (13) will being drawn by the beneficiary or at his direction, (14) will drawn by a beneficiary who stands in a confidential relation, and (15) the relations existing between the testator and the beneficiary.[31]

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25. *Id.* at 82.
26. *Id.*
27. *Id.* at 83.
28. 149 So. 186 (Fla. 1933).
29. *Id.* at 190.
30. *Id.*
31. *Id.* at 190-91.

The *Gardiner* court, in recognizing this last factor, made reference to a presumption of undue influence where a confidential relationship exists between the beneficiary and the testator.[32] A close reading of the case, however, supports a conclusion that this merely was dicta. In *Gardiner*, the supreme court adhered to and arguably refined the fact-specific totality of the circumstances test first used in *Hamilton*.

In an even later case, *In re Donnelly's Estate*,[33] the court again continued adherence to the fact-specific test. Adequate resolution, in the court's view, still required that:

> A very wide range of testimony is permissible on the issue of undue influence. This is due to the fact that undue influence can seldom be shown except by circumstantial evidence. It results from the facts and circumstances and surroundings of the testator and his associations with the person or persons exercising the undue influence. For this reason, it is proper to consider the testator's dealings and associations with the beneficiaries; his habits, motives, feelings; his strength or weakness of character; his confidential family, social and business relations; the reasonableness or unreasonableness of the will; his mental and physical condition at the time the will was made; his manner and conduct; and generally every fact which will throw any light on the issue raised by the charge of undue influence.[34]

As in *Gardiner*, the court referred to other states that utilized presumptions when a beneficiary stood in a confidential relationship to the testator.[35] The court did not, however, squarely address that issue.

In summary, the Florida Supreme Court initially used a fact-specific totality of the circumstances test to determine the presence of undue influence. This approach recognized the difficulties inherent in proving undue influence and allowed a searching inquiry into the character of the transaction, the mental condition of the testator and the relationship between the parties.[36] When using this test, a confidential relationship and active procurement of the will did not create a presumption of undue influence, but were used as relevant factors in the

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32. *Id.* at 191.
33. *In re* Donnelly's Estate, 188 So. 108 (Fla. 1938).
34. *Id.* at 113.
35. *Id.* at 113-14.
36. *Id.*

evidentiary equation.[37] Thus, during this initial period, no presumption of undue influence based on a confidential relationship was developed or recognized.

III. The Presumption Emerges in Phase Two

The second phase of Florida's law on undue influence began with the 1940 case of *In re Gottschalk's Estate*.[38] This case was the earliest case to squarely hold that a presumption of undue influence could arise when a specific factual pattern was demonstrated. In *Gottschalk*, a companion of the decedent attempted to obtain probate of a will in his favor.[39] The favorable will represented a total and radical change in the testatrix' previous will.[40] Not unsurprisingly, the new will omitted all family members, including her adopted daughter who had been the decedent's constant companion for almost 27 years.[41] Chief Justice Terrell, writing for the court, observed:

> When a total stranger moves into the home with an old lady, secures her confidence, and shows up after her death with a will to what she has that none of her lawful heirs know anything about, and which is surrounded by other suspicious circumstances, the *burden is on him* to show he came by it as the free voluntary act of the testatrix.[42]

The *Gottschalk* court seemed to erect the presumption because "[t]he direct evidence in support of undue influence . . . is not as strong as such issues are sometimes supported."[43] The facts of the case would seem, however, to support the conclusion of undue influence even in the fact-specific approach used in the previously discussed cases. Factually, as indicated earlier, there was a complete change in testamentary scheme. The new disposition omitted the testatrix' "main sup-

37. For other Florida cases applying a fact-specific totality test, see Marston v. Churchill, 187 So. 762 (Fla. 1939); Henson v. Deniston, 169 So. 624 (Fla. 1936); Theus v. Theus, 161 So. 76 (Fla. 1935); *In re* Starr's Estate, 170 So. 620 (Fla. 1935); Ziegler v. Brown, 150 So. 608 (Fla. 1933).

38. 196 So. 844 (Fla. 1940).

39. *Id.*

40. *Id.* at 845.

41. *Id.*

42. *Id.* at 845 (emphasis added).

43. *Gottschalk*, 196 So. at 844.

port, natural beneficiary, and constant companion,"[44] and was, therefore, unnatural.[45] In the court's view, the later will was itself evidence of undue influence because it was executed secretly under suspicious circumstances.[46] The beneficiary's marriage proposal, in view of the wide disparity in ages, also was a factor of some significance in the court's opinion.[47] Finally, the court looked to the beneficiary's "ample opportunity to influence the testatrix."[48] Thus, it could quite convincingly be argued that considering the shorthand relationship of the parties, the character of the transaction and mental condition of the parties, the totality of the circumstances supported a finding of undue influence. The *Gottschalk* presumption itself, therefore, appeared to be fact specific and, unfortunately, provided no guidance with regard to which facts would raise the presumption.

Therefore, the *Gottschalk* presumption offered no guidance to trial courts or the Bar. Indeed, a broad reading of *Gottschalk* seems to support a conclusion that the fact-specific approach, if indicative of undue influence, was not elevated to a burden-shifting presumption. Unfortunately, the supreme court never addressed the questions raised by the *Gottschalk* decision. The court, instead of refining or defining the new presumption, was to render a decision at that time that would change the entire focus of Florida law on the issue of undue influence. That case, *In re Aldrich's Estate*,[49] will therefore require extended discussion with special emphasis on Chief Justice Brown's concurring opinion.

The court, in the first phase of *Aldrich*, affirmed per curium, both the probate and circuit courts' finding of no undue influence.[50] This would have been unremarkable except for the court's next step. Affirmance, the court observed, was appropriate "even though the burden of proof on the issue of undue influence was technically on the proponents of the will, a confidential fiduciary relation of patient and his physician and his business manager existing between the testator and a leading beneficiary . . . ."[51] Affirmance was appropriate due to record evidence that the beneficiaries "served the physical necessity of the testa-

44. *Id.* at 845.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Gottschalk*, 196 So. at 845.
49. 3 So. 2d 856 (Fla. 1941).
50. *Id.* at 857.
51. *Id.*

tor during a long illness before and after the will was executed and the testator had only collateral surviving relatives who had not rendered him service or attention."[52] *Aldrich*, like *Gottschalk*, recognized a presumption of undue influence that appeared to be burden-shifting; i.e., requiring the proponent of the will to demonstrate the absence of undue influence.[53] The *Aldrich* presumption was, however, more clearly defined as it centered on a fiduciary benefitting from the relationship.[54] The court did not, unfortunately, stop there, but went on in a majority concurring opinion to sow seeds of confusion that would blossom until pruned by *Carpenter*.

The concurring opinion, by Chief Justice Brown, provided both a comprehensive discussion of prior case law on testamentary undue influence and a systematic exposition of an undue influence presumption based on a confidential relationship.[55]

In his opinion, the Chief Justice conceded that prior Florida case law had not clearly recognized a presumption of undue influence based on possible abuse of a confidential relationship.[56] The *Gottschalk* presumption, to the Chief Justice, was "raised by a set of circumstances somewhat unusual" and not dispositive.[57] The Chief Justice also observed that prior case law had treated confidential relationships as only "a circumstance which may be considered on this issue."[58]

From this historical vantage point, the Chief Justice then developed what he viewed as the correct test to support a presumption of testamentary undue influence.[59] That test was based on three primary sources: two treatises and Alabama case law.[60] A testamentary presumption of undue influence would arise from: 1) a confidential relationship between the testator and the beneficiary; 2) active procurement of the will by the beneficiary; and 3) substantial benefit to the beneficiary.[61] The opinion also discussed the impact of the Probate

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52. *Id.*
53. *Id.*
54. *Aldrich*, 3 So. 2d at 857.
55. *Id.*
56. *Id.* at 857-58.
57. *Id.* at 858.
58. *Id.*
59. *Aldrich*, 3 So. 2d at 861.
60. *Id.* at 858-61.
61. Bancroft v. Otis, 8 So. 286 (Ala. 1890); Lyons v. Campbell, 7 So. 250 (Ala. 1890); DANIEL H. REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA (1933).

Code upon the proposed presumption.[62] The applicable probate statute provided that:

> In all proceedings contesting the validity of a purported will, . . . the burden of proof, in the first instance, shall be upon the proponent thereof to establish, prima facie, the formal execution and attestation thereof, whereupon the burden of proof shall shift to the contestant to establish the facts constituting the grounds upon which the probate of such purported will is opposed or revocation thereof is sought.[63]

In his view, the presumption was consistent with the statute because it required the opponent of the will to establish the facts that supported the presumption itself.[64] The resulting presumption was, to Chief Justice Brown, "one of fact and not of law. Consequently this presumption may be rebutted by any evidence which shows that the testator acted freely and voluntarily in making his will and not under the coercion or the constraint of the person charged with undue influence."[65] Thus, the presumption did not in the strict sense effect the burden of proof, but rather operated on the burden of producing evidence which "rests throughout upon the party asserting the affirmative of the issue . . . . This burden of proof never shifts during the course of a trial . . . ."[66]

The presumption could then be rebutted factually by an evidentiary showing that,

> the testator had independent advice, or the opportunity to avail themselves of independent advice; or that the beneficiary was not present at the interview between the testator and the draftsman of the will, nor present at its execution; nor that the will as made was not an unnatural will, but such a will as the testator might have reasonably been expected to make under the circumstances or that the testator was of sound mind and discussed with his attorney or the draftsman of the will the amount and character of his property and the party or parties whom he wished to devise the said property to, and, their respective shares, in such a way as to show the testator was of sound mind and was able to and did, of his own

62. *Aldrich*, 3 So. 2d at 861.
63. *Id.* at 862.
64. *Id.*
65. *Aldrich*, 3 So. 2d at 858.
66. *Id.* at 861.

> volition, designate the objects of his bounty, giving good reasons therefor, or that the disposition of his property as made by the will was a reasonable or natural one under all the circumstances of the situation.[67]

Upon this showing the court could determine the issue "in light of all the evidence, as to whether the weight of the evidence did, or did not, show that the will was secured by the exercise of undue influence."[68]

It would seem then that a fair reading of the concurring opinion would result in the conclusion that the proposed presumption was a Thayer or bursting bubble presumption.[69] The opinion apparently left intact the totality of the circumstances test utilized in earlier cases because, as indicated previously, rebuttal evidence required the court to determine the issue from all the evidence in the case and not from use of the presumption.[70] In terms of traditional Florida evidence law, the presumption, when unrebutted, compelled a finding of undue influence. If such evidence was introduced, however, the presumption vanished and the issue would be decided by a review of all the evidence.[71]

Subsequent decisions involving a presumption of undue influence based on a confidential relationship did not follow the approach outlined by the concurring opinion in *Aldrich*. The presumption was, as subsequent discussion will demonstrate, treated as one that shifted the burden of proof to the party who stood in a confidential relationship to the testator; i.e., as one of law not fact.[72]

The 1941 case of *In re Eustis' Estate*[73] demonstrated *Aldrich*'s immediate impact. In *Eustis*, the decedent's nephew, an attorney,

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67. *Id.* at 861.

68. *Id.* at 862.

69. A Thayer or bursting bubble presumption bursts or vanishes from the case when contradictory evidence is introduced by the opponent. The underlying facts giving rise to the presumption will, however, still permit the fact-finder to draw a permissive inference. A Morgan or burden-shifting presumption places upon the adversary the burden of proving the non-existence of the presumed fact. This latter presumption can seriously change the course of a trial. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE 62-72 (2d ed. 1982); SPENCER A. GARD, FLORIDA EVIDENCE 768-80 (2d ed. 1980). The impact of Florida's Evidence Code on the presumption of undue influence that arises from benefit obtained by one in a relationship of trust and confidence to a decedent will be the subject of further discussion.

70. *Aldrich*, 3 So. 2d at 861.

71. *Id.* at 858.

72. *Id.*

73. 5 So. 2d 254 (Fla. 1941).

drafted the will and was a principal beneficiary.[74] The supreme court affirmed the trial court's findings of undue influence and observed, the "[l]egal presumptions that may have arisen against the appellee because of his fiduciary relations (attorney) to the testatrix were held by the lower court *to have been overcome* by the evidence as to the circumstances preceding and attendant upon the execution of the will . . . ."[75] Those circumstances included free intentions by the testatrix, communication of the contents to other persons before and after execution, a clear showing of competency of the decedent, and close relations between the testatrix and the nephew.[76] This language would support a conclusion that the presumption was indeed of the burden-shifting variety.

Aldrich and the presumption it created also played a prominent role in the 1945 case of *In re Peters' Estate*.[77] In *Peters*, the decedent's long-time physician was a principal beneficiary.[78] The evidence also established that the doctor, although present with others when the contents of the will was discussed by the testatrix, was not present when the will was drafted or executed.[79] The court approved the trial court's finding that mere presence when the will was discussed did not constitute active procurement.[80] Thus, the presumption did not arise. In addition, the court approved the trial court's determination that the facts were sufficient to *overcome* the presumption even if it was present.[81] Those facts, in summary, were knowledge and approval of the contents by the decedent, disclosure of the will to her attorney, the relations existing between the decedent and her distant relatives, and the natural nature of the disposition.[82]

In re Palmer's Estate[83] continued the *Aldrich* trend. The trial court in *Palmer* found factually that the proponent of the will occupied a confidential relationship with the decedent, actively participated in the drafting and execution of the will, and was a principal benefi-

74. *Id.*
75. *Id.* (emphasis added).
76. *Id.*
77. 20 So. 2d 487 (Fla. 1945).
78. *Id.* at 488.
79. *Id.* at 491-92.
80. *Id.* at 492.
81. *Id.* (emphasis added).
82. *Peters*, 20 So. 2d at 492. *Peters* is also notable because its definition of active procurement was later accepted by the *Carpenter* court.
83. *In re* Palmer's Estate, 48 So. 2d 732 (Fla. 1950).

ciary.[84] The trial court also determined that the testatrix' mental capacity was impaired and the beneficiary kept the disputed will exclusively in his possession until after the death of the testatrix.[85] Based on the foregoing factual determinations, the court determined a presumption of undue influence was established.[86] The presumption placed upon the will's proponent the burden "to produce evidence . . . to show that the will was executed freely and without . . . [undue] influence."[87] The Florida Supreme Court, citing Redfearn and *Peters*,[88] affirmed and found "such facts . . . would be universally held to give rise to a presumption that undue influence was executed on the testatrix . . . [and that] [i]t then *became the burden of the appellant* (proponent) *to prove* the absence of undue influence . . . ."[89]

The post-*Aldrich* shift reflected in the previously described cases continued when district courts of appeal began to address the issue of undue influence. *In re Estate of Knight*,[90] a 1959 First District Court of Appeal decision, illustrated this development. In *Knight*, the trial court entered a summary judgment sustaining a disputed will.[91] Evidence in the record supported a conclusion that the testator's brother who enjoyed a confidential relation with his deceased brother was both active in procuring the will and was a substantial beneficiary.[92] In reversing, the First District cited *Aldrich* and *Palmer*, and held that under these facts, "a presumption of undue influence arises, and the burden rests upon him (the proponent) to *overcome* the presumption."[93] Thus, in the First District's view, "a summary judgment cannot be entered in favor of one who has the burden of *overcoming* the presumption of undue influence . . . ."[94]

The Third District, in the 1962 case of *In re Estate of Reid*,[95]

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84. *Id.* at 733.
85. *Id.*
86. *Id.*
87. *Id.*
88. REDFEARN, *supra* note 61; *Peters*, 20 So. 2d 487.
89. *Palmer's*, 48 So. 2d at 733 (emphasis added).
90. 108 So. 2d 629, (Fla. 1st Dist. Ct. App. 1959).
91. *Id.* at 630.
92. *Id.*
93. *Id.* at 631 (emphasis added).
94. *Id.* (emphasis added). The *Knight* court also relied on the 1955 case on Zinnser v. Gregory, 77 So. 2d 611 (Fla. 1955). The court, in *Zinnser*, held that the presumption, while one of fact, did place upon the beneficiary the burden of showing undue influence was not exercised.
95. 138 So. 2d 342 (Fla. 3d Dist. Ct. App. 1962).

appeared to add an even heavier burden of proof upon a will proponent when the presumption was operative. In *Reid*, the decedent executed a will naming her attorney as a principal beneficiary.[96] The will was prepared and executed by the attorney's law partner.[97] The evidence also established that the attorney beneficiary socialized frequently with the decedent and took part in her business affairs.[98] He also received money from the decedent, who was many years his senior, for "escort" service.[99] Finally the evidence indicated the decedent viewed the attorney, to use a current phrase, as her significant other.[100]

The Third District initially made reference to the presumption of undue influence created by three factors; a confidential relationship, active procurement, and a principal beneficiary. The court then seemingly expanded the presumption by observing "[a] much higher degree of proof is required to overcome an inference of undue influence where the testator is shown to have impaired mental powers or clouded intellect than where the testator is strong mentally and in good health."[101] In the court's view, the evidence justified a conclusion that the foregoing situation was present and attendant upon the proffered will.[102] Therefore, the testimony of Mr. Stafford denying the use of undue influence was apparently insufficient, as a matter of law, "to rebut the presumption . . . [created by] the confidential relationship . . . ."[103] This testimony was, in the court's view, "not enough to sustain the *great burden* the appellee had to carry to rebut the presumption of undue influence."[104]

Florida decisions in this second phase expanded the presumption of undue influence, which was first defined in the *Aldrich* case. As indicated previously, the *Aldrich* court viewed the presumption as merely

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96. *Id.* at 343.
97. *Id.*
98. *Id.* at 350.
99. *Id.*
100. *Reid*, 138 So. 2d at 350.
101. *Id.* at 349 (citing 57 AM. JUR. *Wills* § 356 (1948)).
102. *Id.*
103. *Id.*
104. *Id.* at 350-51 (emphasis added); *see also In re* Estate of MacPhee, 187 So. 2d 679 (Fla. 2d Dist. Ct. App. 1966). The presumption of undue influence from confidential relations, active procurement, and substantial benefit operates to place heavy burden on proponent to overcome presumption of undue influence. *In re* Estate of Smith, 212 So. 2d 74 (Fla. 4th Dist. Ct. App. 1968) (citing *Peters* and *MacPhee* with approval).

one that required production of evidence.[105] The presumption could be rebutted by any evidence that the testator acted freely. Evidence, if presented, would then require the court to decide the issue on all the evidence in the case. Thus, the presumption affected only the burden of producing evidence and allowed a party to make a prima facie case of undue influence. Thus, the burden of proof did not shift to the proponent of the will, but rather remained with the party seeking revocation at all times in the trial. These subsequent decisions, however, treated the presumption as one which shifted the burden of proof to the proponent of the will. This shift, unfortunately, occurred with little or no discussion and created an area of uncertainty in Florida law. It would remain for the *Carpenter* court to finally resolve the issue of the effect of the presumption on the burden of proof in will cases.[106]

IV. *CARPENTER* AND ITS PHASE THREE PROGENY

Carpenter, decided in 1971, provided the first comprehensive discussion of the presumption of undue influence since *Aldrich*. Justice McCain, writing for the court, first pointed to the reason for the presumption by observing that,

> the difficulty of obtaining direct proof in cases where undue influence is alleged [has permitted] will contestants to satisfy their burden initially by showing sufficient facts to raise a presumption of undue influence. If this is done, and the presumption remains unrebutted, the county judge is *required* to find undue influence and deny the will probate.[107]

The opinion next provided a systematic and exhaustive definition of both confidential relationship and active procurement.[108]

The opinion then turned to the effect of the presumption, once established, on the burden of proof.[109] The court initially observed that previous decisions "consistently held that the burden of proof shifts to

105. *Aldrich*, 3 So. 2d at 858.

106. *See Carpenter*, 253 So. 2d 697.

107. *Id.* at 701 (emphasis added). This is clearly cast in Thayer terms as it is based on access to evidence and not public policy grounds. The proponent is, on a common sense basis, the person in the best position to explain the reasons for the suspect disposition. This is entirely consistent with the concurrence in *Aldrich*.

108. *Id.* at 701-02.

109. *Id.* at 702.

the proponent when the presumption of undue influence arises."[110] This effect was, in Justice McCain's view, at variance with the "general rule in respect to the effect of presumptions on the burden of proof . . . ."[111] To Justice McCain, a presumption that arises in the course of a case assists a party in discharging their particular burden of proof.[112] The adversary, in most instances, must then give an explanation so as to avoid the effect of the presumption.[113] In this sense, most presumptions really affect the order of proof and not the burden of proof.[114] In the case of a presumption that assists a plaintiff, the burden is on a defendant to produce evidence to rebut the effect of the presumption.[115] The risk of non-persuasion; i.e., the strict burden of proof remains with the plaintiff throughout the trial.[116]

This, to the *Carpenter* court, created two types of presumptions; the general rule discussed above and the burden-shifting presumption applicable in will contest cases.[117] In the court's view, this was incorrect on both policy and statutory grounds.[118]

From a policy standpoint, the court recognized the difficulty of proof of undue influence because "in will contests the testator is not available as a witness to tell his version of such dealings, that in fact usually the only person who is available to testify is the confidential adviser whose self-interest furnishes a motive for him to take advantage of his superior position."[119] These considerations were not sufficient to justify burden-shifting presumption because "it is frequently as difficult to disprove undue influence as to prove it, the practical effect of shifting the burden of proof is to raise the presumption virtually to conclusive status and require a finding of undue influence . . . ."[120] This result was also undesirable because "much of the discretion of the trial judge to evaluate and weigh the evidence before him is lost and with it one of the most valuable services we call on trial judges to perform in

110. *Id.*
111. *Carpenter*, 253 So. 2d at 703.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Carpenter*, 253 So. 2d at 703.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 703-04.

non-jury cases."[121]

The court also felt this result was compelled by the intent of the applicable statute then in effect, Florida Statute section 732.31.[122] That intent, in the court's view, required that "the burden of proof in will contests shall be on the contestant to establish the grounds constituting the facts upon which the probate of the purported will is opposed."[123]

The practical effect of this approach was threefold:

> First, the burden will be satisfied when the beneficiary comes forward with a reasonable explanation for his or her active role in the decedent's affairs. The precise nature of the explanation will vary depending on the facts giving rise to the presumption, and the sufficiency of the explanation to rebut the presumption will be for the county judge to determine subject to review by the appellate court. Second, when the burden is satisfied the presumption will vanish from the case and the county judge will be empowered to decide the case in accord with the greater weight of the evidence without regard to the presumption. Third, since the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony.[124]

Carpenter was, of course, a pre-Evidence Code case, but it is apparent that the court targeted the *Aldrich* presumption of undue influence as a Thayer or bursting bubble type of presumption. This is apparent from the effect of rebuttal testimony in a given case and from the basis the court gave for the presumption. The court, in reducing the effect given to *Aldrich*, was clearly concerned with the obvious difficulty of obtaining direct evidence of undue influence.[125] Thus, the presumption's basis is the superior knowledge of the beneficiary who occupied the confidential relationship, was active in the decedent's affairs, and who drew the benefit.[126] Viewed in this sense, the *Carpenter* court treated it as a device designed to facilitate determination of an action. In Evidence Code terms, the presumption in *Carpenter* did not involve public policy considerations at all. In rejecting a burden-shifting type

121. *Carpenter*, 253 So. 2d at 704.
122. *Id.* at 703-04.
123. *Id.*
124. *Id.* at 704.
125. *Id.* at 703-04.
126. *Carpenter*, 253 So. 2d at 704.

of presumption, the *Carpenter* court mentioned policy, but a close examination reveals that these factors such as access to proof are, to most commentators, ones designed to facilitate an action and are, thus, of the bursting bubble or Thayer type.[127]

Carpenter, in effect, attempted to correct a perceived imbalance in Florida case law that had occurred after the presumption of testamentary undue influence was recognized and defined in *Aldrich*.[128] Viewed in this historical context, *Carpenter* is totally consistent with *Aldrich*. In addition, *Carpenter*, as *Aldrich*, recognized a permissible inference arising from the same three factors that gave rise to the presumption if contrary evidence was presented.[129] As indicated, the weight of the inference was again directed to the sound discretion of the trial court.[130]

Taken as a whole, the *Carpenter* decision expresses a preference for a determination of undue influence from all the evidence in the case.[131] The decision also can be viewed as one which places great reliance on the initial fact-finder.[132] Viewed in this context, *Carpenter* marks, in my view, an attempted return to the initial approach discussed previously in this paper; the fact-specific test. This conclusion is further strengthened by the simple fact that no Florida case has ever rejected the approach approved and utilized in the pre-*Aldrich* cases.

In view of the *Carpenter* court's preference for a broadened role for the fact-finding process, one might have expected the confidential-relations presumption to occupy a less central role in subsequent undue influence decisions. This has not been the case. In addition, with one exception, appellate decisions have not addressed the impact of the Evidence Code on the role of the presumption in undue influence cases. The balance of the discussion will, therefore, be devoted to post-*Car-*

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127. *Id.* at 703. Petitioners urged that policy considerations inherent in the difficulty of proof of undue influence dictate that the burden of proof should shift in this case. They note that in will cases the testator is not available as a witness to tell his version of such dealings. That, in fact, usually the only person who is available to testify is the confidential advisor whose self-interest furnishes a motive for him to take advantage of his superior position. This rationale, unlike the presumption of innocence or presumption of the validity of a second marriage, was centered on an access to evidence basis. Viewed in this context, it remained, to Justice McCain, a Thayer presumption.

128. *Id.* at 704.

129. *Id.*

130. *Id.*

131. *Carpenter*, 253 So. 2d at 704.

132. *Id.*

penter decisions and the Evidence Code as it relates to the presumption.

Clark v. Grimsley,[133] *In re Siddon's Estate*,[134] and *In re Estate of Van Aken*,[135] were early post-*Carpenter* cases involving the *Aldrich-Carpenter* presumption. In *Clark*, the testatrix, a 97-year-old woman confined to a nursing home, executed a will shortly before her death which left the bulk of her estate to one daughter. This disposition revoked a prior will that allowed the daughters to share equally.[136] There was also direct documentary evidence, consisting of letters written by the testatrix, of undue influence by the beneficiary daughter.[137] Additionally, the evidence clearly demonstrated the beneficiary daughter's involvement in the preparation and execution of the will.[138] Finally, the record demonstrated that the daughter, due to her dominant role in her mother's financial affairs, was in a "highly fiduciary capacity."[139] In the court's view, these unrebutted facts established a presumption of undue influence; thus, the court reversed and directed that the proffered will be denied probate.[140]

The record in *Clark* also contained factors that under the pre-*Aldrich* fact-specific approach alone would have been probative of undue influence. Those factors included: the physical condition of the testatrix, the unnatural testamentary disposition, a change in testamentary scheme, solicitation of the challenged will by the beneficiary, persuasion by the beneficiary, will drawn for the beneficiary by a fiduciary, unequal disposition, circumstances surrounding execution, and finally the obvious interest of the beneficiary.[141] Thus, apart from the presumption itself, the evidence pattern supported a finding of undue influence under the fact-specific approach. This aspect of the evidence, due to the emphasis placed on the presumption and its effect, received no discussion.

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133. 270 So. 2d 53 (Fla. 1st Dist. Ct. App. 1972).
134. 297 So. 2d 54 (Fla. 3d Dist. Ct. App. 1974).
135. 281 So. 2d 917 (Fla. 2d Dist. Ct. App. 1973).
136. *Clark*, 270 So. 2d at 54.
137. *Id.* at 55.
138. *Id.* at 58.
139. *Id.*
140. *Id.* The *Clark* court, despite *Carpenter*, treated the presumption as burden shifting. In reaching this conclusion, the court relied on *Carpenter*, *Knight* and *Aldrich*. *Id.* at 58 n.10-12. *Knight*, discussed previously, so held; *Carpenter* clearly did not; *Aldrich*, when closely read, also did not. *Id.*
141. *Clark*, 270 So. 2d at 57.

In re Siddon's Estate provided yet another example of the continuing dominance of the presumption in probate litigation. The facts in *Siddons* established that the beneficiary-brother enjoyed a confidential relationship with his father, the decedent. The evidence also revealed that the beneficiary-brother's wife typed the will in question and secured the witnesses. Needless to say, the beneficiary-brother was a major devisee under the purported will.[142]

The trial court, in its detailed findings, found the presumption operative but explained by the surrounding circumstances.[143] In affirming, the Third District Court of Appeal apparently[144] accepted the court's conclusion and affirmed.

A fact-specific analysis produces a less convincing picture. The following additional factors, apart from the presumption, were also present: an opportunity to exercise undue influence existed because the decedent lived with the beneficiary; an unnatural disposition occurred when the beneficiary profited at the expense of brothers and sisters; unusual circumstances surrounded the execution where the beneficiary both arranged for and obtained witnesses; and the will was drawn at the direction of the beneficiary who was in a confidential relationship.[145]

The court found that the record also revealed that the decedent was cared for in his last illness by the beneficiary and his wife. Further, the decedent was described as a strong-willed, opinionated and self-determined character.[146] In addition, the evidence revealed that the testator-father retained the will and that all involved knew of the will's existence and its provisions.[147]

Once again, however, the presumption occupied center stage to the exclusion of evidentiary factors that were indicative of possible undue influence apart from the presumption. In addition, those factors indicative of a reasonable explanation, while mentioned, do not receive a sys-

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142. *Siddon's*, 297 So. 2d at 55.

143. *Id.* at 57.

144. The inexplicably characterized opinion states that the actions of the beneficiary and his wife in preparing the will and arranging for its execution are perfunctory and not active procurement. Therefore, in the Third District Court of Appeal's view, the presumption was not operative. As further discussion will demonstrate, under a fact-specific analysis, these facts were of great significance.

145. *Siddon's*, 297 So. 2d at 55-57.

146. *Id.* at 57.

147. *Id.* Under the fact-specific approach, these latter facts would, of course, be relevant on the issue of undue influence.

tematic analysis.

In re Estate of Van Aken, noted above, continued the post-*Carpenter* trend.[148] In *Van Aken*, the facts revealed that the beneficiary was active in the decedent's affairs, arranged for execution of the will, dictated its terms, obtained the attorney who drafted it and was, of course, the sole beneficiary.[149] The Second District Court of Appeal had no difficulty in determining that the confidential relation presumption was present and that evidence of family discord was an insufficient explanation.[150]

What is again significant about the opinion is the lack of discussion concerning factors that would clearly support a conclusion of undue influence even if the presumption were not present. Those factors were abundant and consisted of: 1) opportunity—the beneficiary lived with the testator; 2) susceptibility—the testator was described as a sick, depressed man who had not recovered from the death of his wife; 3) unnatural disposition—his children were excluded; 4) change in former testamentary dispositions—children and grandchildren were beneficiaries under prior will; and 5) obvious motive of the beneficiary. Furthermore, the record reveals that after execution of the questioned will the beneficiary took possession of it.[151] Under a fact-specific approach, even without the presumption, the evidence of undue influence was overwhelming.

The pattern has continued in more recent cases. The 1979 Third District case of *In re Estate of Robertson*[152] provided yet another example. Both the trial and appellate courts' decisions centered on the presence or absence of the presumption. The facts in *Robertson* established that shortly before her death, the decedent executed a will that excluded two grandchildren and left the bulk of her estate to the remaining grandchild.[153] The evidence clearly established that while the beneficiary-granddaughter had a confidential relationship with dece-

148. *See In re* Estate of Van Aken, 281 So. 2d 917 (Fla. 2d Dist. Ct. App. 1973). The *Van Aken* court, as did the *Clark* court, also apparently misread *Carpenter*. The court described the presumption as placing the burden of "overcoming the presumption" of undue influence on the proponent of the will. *Id.* at 918.

149. *Id.* at 917-18.

150. *Id.* at 918.

151. *Id.*

152. *In re* Estate of Robertson, 372 So. 2d 1138 (Fla. 3d Dist. Ct. App. 1979); *see also In re* Estate of Lomax, 395 So. 2d 286 (Fla. 3d Dist. Ct. App. 1981).

153. *Robertson*, 372 So. 2d at 1139.

dent, there was no active procurement of the will by the beneficiary.[154] Therefore, both the trial and appellate court found the presumption inapplicable to the case.[155]

Once again, salient factors indicative of undue influence received no extended analysis or discussion. Similarly, countervailing factors that contraindicated a finding of undue influence were not analyzed. In addition to a confidential relationship, there was evidence of a change in testamentary scheme, an unnatural disposition, and an opportunity to exercise undue influence. Moreover, the record is silent as to the decedent's relationship with excluded grandchildren, containing no explanation for exclusion of the other grandchildren.[156]

The record also contained evidence showing that the will in question was the product of the decedent's own choice in that she selected the attorney, dictated its terms, and was fully competent. The questioned will was also publicly made and its execution was videotaped. Finally, the will was kept in the possession of the attorney and the beneficiary was unaware of its contents until the death of her grandmother.[157] The result in *Robertson* is undoubtedly correct, but once again demonstrated the continued dominance of the presumption.

Williamson v. Kirby,[158] a 1980 decision authored by Justice Grimes, also illustrated both the dominance of the presumption and the continuing difficulties that its proper application engenders. In *Williamson*, a 90-year-old woman conveyed, for no consideration, her home to a woman who stood in a confidential relationship to her.[159] The trial court found, in detailed findings, that the evidence demonstrated undue influence both from the presumption and as a whole.[160]

The record amply demonstrated that the trial court applied a totality of the circumstances, fact-specific approach, in addition to the presumption. The evidence convincingly demonstrated that under both a totality test and a presumption approach, the trial court's conclusion was supported by competent substantial evidence.[161]

Justice Grimes, writing for the court, approved the trial court's finding that the presumption was applicable. Justice Grimes then set

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154. *Id.* at 1141-42.
155. *Id.* at 1142.
156. *Id.* at 1141-42.
157. *Id.* at 1142.
158. 379 So. 2d 693 (Fla. 3d Dist. Ct. App. 1980).
159. *Id.* at 694.
160. *Id.* at 695.
161. *Id.*

forth his view as to the effect of the presumption on a given case by stating that

> the beneficiary then has the burden of explaining his active involvement in the preparation of the will [or gift]. He does not have the burden of disproving undue influence. If the explanation is reasonable, the presumption vanishes and it becomes the court's responsibility to determine whether the contestant has established undue influence by the great weight of the evidence.[162]

The opinion, in view of the trial court's specific findings on the evidence as a whole, arguably reweighed the evidence and substituted the view of the panel for the findings of the trial court. This conclusion is supported by the trial court's extensive factual findings apart from the presumption.

In addition, the opinion ignored the permissive inference of undue influence that remained when the presumption was rebutted. As indicated earlier in this discussion, *Carpenter* clearly permitted a permissive inference of undue influence to be drawn by the fact-finder even when the presumption is rebutted. *Williamson* would, then, appear both to misapply *Carpenter* and engage in unwarranted appellate fact-finding.[163]

Three more recent decisions illustrated that the presumption continued its role as the prominent factor in probate litigation in which undue influence was an issue.

Elson v. Vargas[164] involved a housekeeper who was made sole beneficiary of her employer's estate.[165] The trial judge found factually that the *Aldrich-Carpenter* presumption was applicable, but that the beneficiary had demonstrated a reasonable explanation for involvement in the decedent's affairs.[166] In affirming, the Third District Court of Appeal noted that while this was a "close case,"[167] the trial court's finding of no undue influence, which was based on the housekeeper's explanation for her role in the decedent's affairs, was supported by record

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162. *Id.*

163. *See also* Allen v. Estate of Dutton, 392 So. 2d 132, 135 (Fla. 5th Dist. Ct. App. 1981) ("When that happens, the presumption vanishes, and the trial court is left to decide the case in accordance with the greater weight of the evidence.").

164. 520 So. 2d 76 (Fla. 3d Dist. Ct. App. 1988).

165. *Id.* at 77.

166. *Id.* at 78.

167. *Id.*

evidence.[168]

Fogel v. Swann[169] involved testamentary provisions and gifts made by the decedent to her sister and brother-in-law.[170] The will in question was prepared at the direction of the brother-in-law, who was the decedent's attorney. There was also record evidence that established that the will represented a change in testamentary scheme occurring shortly before her death.[171] The Third District approved the trial court's factual determination that the close family relationship between the sister and the decedent provided an evidentiary basis for a determination that undue influence was not present.[172]

In *Sun Bank v. Hogarth*,[173] the trial court found that the challenged will was the product of undue influence.[174] The record contained numerous indicia of undue influence apart from the presumption. These factors, applying a fact-specific approach, would have supported a conclusion of undue influence even absent the presumption. However, neither the trial court's nor the appellate court's opinions discussed this possibility; rather the case was decided on the basis of the presence and effect of the *Aldrich-Carpenter* presumption.[175]

These latest cases demonstrated that the historical trend begun by *Aldrich* has continued to the present. The presumption, therefore, continues to dominate to the exclusion of other evidentiary factors. This over-emphasis has, in my view, stilted Florida case law on this issue and in some instances produced unfortunate results.

V. A Critical Look at *Carpenter* and the Code

Carpenter was, of course, decided prior to enactment of the Evidence Code. In view of Codal provisions governing presumptions, it is necessary to discuss the possible treatment that may be given to the presumption in the future. That issue remains an open question at this juncture. What follows, therefore, is an analysis of the *Carpenter* presumption from the Evidence Code perspective.

The Code provides for two types of rebuttable presumptions in

168. *Id.*
169. 523 So. 2d 1227 (Fla. 3d Dist. Ct. App. 1988).
170. *Id.* at 1228.
171. *Id.*
172. *Id.* at 1229-30.
173. 536 So. 2d 263 (Fla. 3d Dist. Ct. App. 1988).
174. *Id.* at 265.
175. *Id.* at 266-67.

civil cases. The first affects the burden of producing evidence and is designed to facilitate the determination of a proceeding. When unrebutted, it requires the fact-finder to find the presumed fact. If rebutted, however, the presumption vanishes from the case.[176] This type of presumption is described as a Thayer or bursting bubble presumption and, as indicated, operates in a given case so as to place upon the party best able to furnish it the burden of producing evidence to rebut the presumed fact.[177] Even after being rebutted, however, a bursting bubble or Thayer presumption permits the fact-finder to draw a permissive inference.

The second type of presumption, which by definition involves public policy considerations, operates in a much different manner.[178] The second type of presumption shifts the burden of proof to the party against whom the presumption operates. Under this type of presumption, the fact-finder must be convinced that the presumed fact does not exist.[179] The Code further provides that unless "otherwise provided by Statute, a presumption established primarily to facilitate the determination of the particular proceeding in which the presumption is applied rather than to implement public policy is a presumption affecting the burden of producing evidence."[180]

Gard, noted previously, has described the operation and effect of Thayer presumptions in the following manner:

> Presumptions which owe their existence only to facilitating the determination of the action actually can be expected to have very little to support them on the basis of strong probative value of the basic facts. Quite the opposite is true of those presumptions which rest on basic facts so strong as to promote a public policy principle arising from experience with human conduct.[181]

Gard then noted prophetically, "It will be up to the courts to sort out the presumptions . . . ."[182] The Thayer presumption can be viewed as a utilitarian device while the Morgan presumption is one reflective

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176. FLA. STAT. § 90.302(1) (1989).
177. *See* EHRHARDT, *supra* note 69, at § 302.1; GARD, *supra* note 69, at § 3:05.
178. FLA. STAT. § 90.302(2) (1989).
179. *See* EHRHARDT, *supra* note 69, at § 304.1; GARD, *supra* note 69, at §§ 3:01-:03.
180. FLA. STAT § 90.303 (1989).
181. GARD, *supra* note 69, at § 3:05.
182. *Id.*

of societal values that require protection.

A close examination of *Carpenter* reveals that its author viewed the presumption of undue influence as a procedural utilitarian device. Justice McCain clearly indicated that a burden-shifting presumption would be an anomaly in Florida case law. He was also concerned that a policy presumption would be virtually unrebuttable. Finally, McCain saw the beneficiary accused of undue influence as the person usually uniquely situated to explain his role with the decedent and thus rebut the presumption.[183] This view was also consistent with the historical development of the presumption post-*Aldrich*. That development reflected that the presumption, without apparent explanation or analysis, underwent a metamorphosis from a procedural device to a statement of public policy; that is, from a utilitarian device to a doctrinal imperative.

To use a reverse flip, *Carpenter* viewed the presumption as a butterfly which became a caterpillar. This view is also consistent with the opinion's *Sotto Voce* major theme. That theme expresses a clear preference for comprehensive fact finding in contrast to decisions based on a rigid, inflexible and, in McCain's view, largely unwarranted legal device.[184]

The statutory construction basis advanced in *Carpenter* for a Thayer-type presumption appears, in light of the Code today, to be more questionable. As noted by both Ehrhardt and Gard, the Code envisions a judicial determination of the basis and operation of presumptions. At least one post-Code case has attempted to classify the *Aldrich-Carpenter* presumption along lines envisioned by the Code.

Judge Glickstein, writing for a Fourth District panel, attempted to address the basis for the presumption of undue influence in the 1983 case of *In re Estate of Davis*.[185] In *Davis*, the panel held that on public policy grounds, "[t]he presumption [of undue influence] in this case was non-vanishing because, we believe, a strong social policy exists when the issue is the alleged exercise of undue influence by one enjoying, as here, a confidential relationship with a decedent."[186] Subsequently, the Fourth District Court of Appeal receded from *Davis* in a somewhat cryptic opinion which merely held the correct and applicable principles of law were announced in *Carpenter* and followed by the

183. *Carpenter*, 253 So. 2d at 703.
184. *See generally id.* at 702.
185. 428 So. 2d 774 (Fla. 4th Dist. Ct. App. 1983).
186. *Id.* at 776.

trial court.[187]

It becomes necessary, therefore, to examine the presumption in view of the Evidence Code. *Carpenter*, in my opinion, clearly viewed the presumption as a proof facilitation device. This, in turn, is based on the common sense proposition that the beneficiary who enjoyed the relationship and procured the will is in the best position to explain those events and to give the reasonable explanation. Although *Carpenter* speaks somewhat in policy terms, the *Carpenter* decision as well as the *Aldrich* decision, rested on the notion that the beneficiary was in the best position to explain the circumstances of the bequest.[188]

The public policy grounds supporting a burden-shifting presumption also appear obvious. The law abhors coercion and the basic public policy considerations must reject testamentary dispositions that are the result of coercion. Additionally, public policy considerations peculiar to a confidential relationship are also operative. It is well settled law that such a relationship imposes the highest duty on the dominant party in the relationship. These policy considerations would seem to dictate that, on policy grounds, the presumption of undue influence should operate to shift the burden of proof onto the party who stood in such a relationship to the decedent. This position is further buttressed by a factor somewhat unique to Florida, its large elderly population. Unfortunately, in many instances due to illness, death of a spouse, or isolation from extended families in their native states, elderly Floridians are vulnerable to improper influence in testamentary dispositions. Countervailing considerations do, however, exist.

The public policy of Florida has long supported the right of a person to freely devise his or her property in any way that person desires. A burden-shifting presumption possibly could be antithetical to that policy. The very breadth of *Carpenter's* definition of a confidential relationship and active procurement make the presumption a rather easy one to raise in a given case. Thus, the *Carpenter* court's concern with the presumption becoming virtually conclusive appears legitimate.

Finally, also militating against a burden-shifting presumption is

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187. *In re* Estate of Davis, 462 So. 2d 12 (Fla. 4th Dist. Ct. App. 1984). Judge Glickstein's concurrence in *Davis I* provides an excellent and comprehensive discussion of the purpose and effect of presumptions in general and of the presumption of undue influence in particular. *Davis II* also appears in conflict with another Fourth District opinion also authored by Judge Glickstein, *Insurance Company of Pennsylvania v. Estate of Guzman*, 421 So. 2d 597 (Fla. 4th Dist. Ct. App. 1982). *Guzman* recognized the necessity of evaluating existing presumptions in light of the Code.

188. *See Carpenter*, 253 So. 2d at 703; *Aldrich*, 3 So. 2d at 856.

another sad reality of life: family estrangement. Not uncommonly, elderly people may for one reason or another become alienated from those who the law might regard as the natural objects of their bounty and turn to a particularly trusted friend or relative for assistance and support. This is particularly true in times of illness or disability. The foregoing would seem to be valid public policy considerations in opposition to a burden-shifting presumption. Thus, it could be argued that policy considerations are in rough equipoise. In such a situation, according to Gard, neither presumption should prevail.[189] In the context of this discussion, then, the Evidence Code may not resolve this issue. Resolution, in my view, lies with a proper reading of *Carpenter* and a return to the more comprehensive approach to fact finding that was employed in the pre-*Aldrich* and pre-*Carpenter* decisions.

The *Aldrich-Carpenter* presumption of undue influence has become a shibboleth in Florida law. As indicated, it has itself exercised undue influence over the Bench and the Bar. In this sense, *Carpenter* was profoundly correct. The subject presumption grew without analysis from a sound procedural device that permitted the fact-finder to draw a permissive conclusion based on experience to an evidentiary runaway freight train that obliterated the finely crafted decisions that were developed prior to the historical detour beginning with *Aldrich*.

Oliver Wendell Holmes observed that the distinctions of the law are founded on experience, not logic.[190] Experience in this case demonstrates that a case-specific approach provides the analytical format that *Carpenter* does not provide; i.e., what constitutes a reasonable explanation for a suspect devise. The fact-specific pre-*Aldrich* approach will also broaden the evidentiary equation in undue influence cases so as to focus on all relevant factors that should be considered in determining whether undue influence invalidates a testamentary disposition. It will also improve the accuracy of case-by-case determinations by putting more focus on the total evidence picture and less on a procedural device designed to facilitate the proceedings.

VI. Conclusion

The *Aldrich-Carpenter* presumption is an excellent procedural device that can assist the fact-finder in determining the issue of undue influence by requiring that the beneficiary who stood in a confidential

189. Gard, *supra* note 69, at § 3:55.

190. Oliver Wendell Holmes, The Common Law (1949).

relationship to the decedent provide a reasonable explanation for the devise in question. The beneficiary is obviously in the best position to do so. At present, however, the presumption occupies too central a role in undue influence cases. To correct this imbalance, Florida courts should once again use the earlier fact-specific approach to determine if, apart from the presumption, undue influence exists in a given case. This would improve the accuracy of probate proceedings in which the issue of undue influence is present.