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Will Contests: The Shifting Burdens of Proof

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stituted Court[38] approving the positions of Oregon and Louisiana would not be totally unexpected. The essence of our criminal justice system hinges on a verdict of guilty by the entire jury based on proof beyond any reasonable doubt. Therefore, regardless of the outcome of *Apodaca*, this writer maintains that in criminal trials, the prosecution must not only prove guilt beyond a reasonable doubt to the jury as a whole, but must make that showing to each individual juror. If *any* juror does not believe that the defendant is guilty, a verdict of guilty cannot be rendered, and rather than convict a defendant when such doubt exists, a retrial should be ordered. Any other standard would lessen the responsibility placed on the prosecution for a conviction by the burden of proof required, and the presumption of innocence would be fatally weakened. It is therefore submitted that the unanimity rule for criminal jury verdicts is not merely an historical antique, but is a necessity for a fair trial.

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WILL CONTESTS: THE SHIFTING BURDENS OF PROOF

Petitioners were lineal descendants, who had not been included in their mother's will. They contested probate of the will on the grounds that the testamentary instrument had been obtained as a result of the exercise of undue influence by their sister, the sole beneficiary. The county judge found that a "confidential relationship" existed between mother and daughter and that the daughter actively procured the will. Consequently, the judge ruled that a presumption of undue influence arose and that the burden of proof shifted to the daughter, requiring her to prove that there was no undue influence. The court then found that the daughter's evidentiary showing was insufficient to carry the burden of proof necessary to rebut the presumption and refused to admit the will to probate. The District Court of Appeal, Fourth District, reversed the county judge and held that the raising of a presumption of undue influence did not shift the burden of proof to the proponent of the will. According to the Fourth District, the daughter was only required to introduce "credible evidence" to rebut the presumption; once such evidence was introduced, the presumption and the persuasiveness of its supporting evidence disappeared. Having determined that the presumption failed and after reviewing the other remaining evidence in the record, the court ruled that there was insufficient evidence to support a finding of undue influence as a matter of law.[1] On certiorari, the Supreme Court of Florida

38. At the time of the writing of this Note, Mr. Justice Harlan and the late Mr. Justice Black announced their resignations to the Supreme Court, and since that time President Nixon has appointed two new Justices to the Court including William Rehnquist.

1. *In re* Carpenter, 239 So.2d 506 (Fla. 4th Dist. 1970).

affirmed in part the holding of the Fourth District and *held*: When a presumption of undue influence is raised, only the burden of production is shifted, not the burden of persuasion, and that presumption is neutralized when the proponent presents a reasonable explanation for his active role in the preparation of a will. At the same time, the supreme court overruled the holding of the district court of appeal regarding the effect of evidence once a presumption is rebutted and *held*: Even when a presumption of undue influence is rebutted, the evidence which supported the rebutted presumption does not disappear; such evidence will still be available to support an inference of undue influence. Consequently, what constitutes a confidential relationship and undue influence in any particular situation is a factual question to be determined by the trier of fact, not by the appellate courts. *In re Carpenter*, 253 So.2d 697 (Fla. 1971).

The use of the ambiguous statement, a presumption shifts the burden of proof, continues to cause judicial confusion since the term, burden of proof, often conveys a double meaning in Florida.[2] The instant decision reflects the view that the burden of persuasion remains with the complainant while only the burden of production shifts from one party to the other during trial. Under this view, the presumption does not relieve the complainant of the burden of persuasion. Rather, it merely transfers the burden of production to the opposing party once a presumption has arisen in favor of the complainant.[3]

While the general rule is that a presumption does not shift the burden of persuasion, Florida courts have "created an exception to the general rule . . . applicable only to will contests."[4] This exception has been applied despite the contrary language of Florida Statutes section

2. *In re* Ziy, 223 So.2d 42, 43 (Fla. 1969), *quoting* Alabama G.S. R.R. v. Hill, 34 Ala. App. 466, 468, 43 So.2d 136, 137 (1949) [*citing* "Shifting of Burden," 10 R.C.L. 897, § 45]:

> The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof [production], meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

3. *In re* Ziy, 223 So.2d 42, 43 (Fla. 1969).

4. *In re* Carpenter, 253 So.2d 697, 703 (Fla. 1971). This statement, however, is not entirely correct. This exception has been applied in situations other than will contests where parties share a confidential or fiduciary relationship. A majority of jurisdictions, including Florida, have applied the exception in cases involving transactions between corporate officials and the corporations they represent. *See* Pepper v. Litton, 308 U.S. 295 (1939); Orlando Orange Groves v. Hale, 107 Fla. 304, 144 So. 674 (1934); Chipola Valley Realty Co. v. Griffin, 94 Fla. 1151, 115 So. 541 (1927); Shlensky v. South Parkway Bldg. Corp., 119 Ill. 2d 268, 166 N.E.2d 793 (1960). A majority of jurisdictions also apply the exception to transfers of inter vivos gifts between principal and fiduciary. *See* 38 AM. JUR. 2d *Gifts* §§ 92-94 (1968), *citing* Amado v. Aguirre, 63 Ariz. 213, 161 P.2d 117 (1945); McDonald v. Hewlett, 102 Cal. App. 2d 680, 228 P.2d 83 (1951). This is presently the law in Florida. Adams v. Sanders, 139 Fla. 730, 191 So. 312 (1939); Lesperance v. Lesperance, 233 So.2d 859 (Fla. 3d Dist. 1970).

732.31 (1969).[5] Under this exception, when a will contestant demonstrated facts which raised a presumption of undue influence, there was a shift of the burden of persuasion from the contestant to the proponent of the will.[6] The basis for this exception had apparently developed because of the nature of the relationship[7] existing between a testator and a beneficiary who had enjoyed a confidential relationship with the testator. Despite concern for this special relationship, *Carpenter* has eliminated this exception. Although the supreme court advanced a variety of reasons for its decision, the desire for conceptual uniformity in the law of presumptions was apparently the paramount consideration.

Notwithstanding the benefits to be derived from such uniformity, the result in *Carpenter* may contravene public policy considerations which demand that fiduciaries and confidants exercise good faith in their dealings. Thus, fiduciaries who reap unusual profits as a result of their confidential and privy status naturally arouse a degree of distrust. When such suspicion arises, the better policy would require the fiduciary to prove that the transaction was conducted in complete good faith.[8] These critical public policy considerations appear to have been completely ignored in the two appellate decisions in *Carpenter* since neither the supreme court nor the district court of appeal cited even one case dealing with a confidential or fiduciary relationship to support their holdings.[9]

The "undue influence" exception (in will contests) was recently applied by the District Court of Appeal, Fourth District, in Wrobble v. Walda, 217 So.2d 341 (Fla. 4th Dist. 1969). Only a small minority of jurisdictions have applied this exception as Florida has done, and Florida may have begun doing so by accident. At one time, the factors raising a presumption of undue influence in inter vivos gift transfers and will preparations were identical, and proof that the donee or primary beneficiary had a confidential or fiduciary relationship with the donor or testator was sufficient to raise the presumption. The factors have remained the same for inter vivos gift transfers, but in the case of wills, the requirement of proof of active participation in preparation was added in the case of *In re* Aldrich, 148 Fla. 121, 3 So.2d 856 (1941). The similarity of factors would seem to indicate that the effect given presumptions in inter vivos gift transfers was extended to situations where undue influence was raised in connection with the preparation of a will.

5. FLA. STAT. § 732.31 (1969) provides:

> In all proceedings contesting the validity of a purported will, whether before or after such will is admitted to probate, the burden of proof, in the first instance, shall be upon the proponent thereof to establish, prima facie, the format 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. (Emphasis added.)

6. Consequently, the county judge in the instant case properly applied the body of existing case law as it stood in Florida at the time he handed down his decision. *See In re* Palmer, 48 So.2d 732 (Fla. 1950). *But see* FLA. STAT. § 732.31 (1969), *supra* note 5.

7. *See, e.g.*, Peacock v. Dubois, 90 Fla. 162, 105 So. 321 (1925) (transfer of a deed).

8. Marquette v. Hathaway, 76 So.2d 648 (Fla. 1954). The fiduciary proves the validity of the transaction by showing

> that the other party had competent and disinterested advice or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by the reason of the power and influence to which the relationship might be supposed to give rise.

Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, 197, 91 N.E. 1041, 1047 (1910), *quoting* Uhlich v. Muhlke, 61 Ill. 499, 511 (1869).

9. *See* Gulle v. Boggs, 174 So.2d 26 (Fla. 1965) and Leonetti v. Boone, 74 So.2d 551

The conclusion reached by the supreme court in *Carpenter* was certainly not the only alternative open to the court. Dean Wigmore, for one, has balanced the vying considerations of public policy and uniform application of the law of presumptions and developed a much more sensible approach.[10] This approach reconciles the special rule in will contests which shifts the burden of persuasion to the proponent when an undue influence presumption arises with the general rule which holds that the burden of persuasion never shifts when a presumption is raised, only the burden of production. Under the Wigmore approach, the proponent of the will must establish all elements essential to its validity. Of course, good faith is mandatory, and where the proponent of the will is a fiduciary, he carries the burden of persuasion on that element.

Generally, for reasons of public policy, courts permit a presumption of a will's validity to arise when it appears from evidence presented that the will has been properly executed. Such a presumption, however, rests upon other presumptions including that of the testator's sanity and the absence of undue influence, both essential to the validity of a will. These initial presumptions shift only the burden of production to the will contestant. If a contestant produces evidence of insane acts by the testator or of undue influence by the fiduciary, the presumption of validity is rebutted. The proponent must then present positive evidence of the sanity of the testator or the absence of undue influence because such proof is essential to the validity of any will. Under this view, since the burden of persuasion never shifts from the proponent of the will, he must produce evidence to outweigh any evidence produced by the contestant.

Despite the insistence of the Supreme Court of Florida that presumptions do not shift the burden of persuasion, *Carpenter* gives precisely that effect to the statutory presumption of validity which arises as soon as a will is shown to have been properly executed.[11] This is a particularly novel position since ordinarily statutory presumptions have no greater effect than court-created presumptions which serve only to shift the burden of production. In fact, this was the holding in *Leonetti v. Boone*,[12] which interestingly enough was cited as primary authority in

(Fla. 1954) (statutory presumption that person driving a car does so with the owner's consent); Nationwide Mut. Ins. Co. v. Griffin, 222 So.2d 754 (Fla. 4th Dist. 1969) (presumption of natural death rather than suicide); Seaboard A.L. R.R. v. Lake Region Packing Ass'n, 211 So.2d 25 (Fla. 4th Dist., 1968); Shaw v. York, 187 So.2d 397 (Fla. 1st Dist. 1966) (presumption of negligence in rear end auto collision); Locke v. Stuart, 113 So.2d 402 (Fla. 1st Dist. 1959) (presumption of validity of tax deed).

10. *See* J. WIGMORE, WIGMORE ON EVIDENCE §§ 2502-03 (3d ed. 1940); J. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE §§ 453-54 (1935).

11. *In re* Carpenter, 253 So.2d 697, 702-04 (Fla. 1971), *citing* FLA. STAT. § 732.31 (1969).

12. 74 So.2d 551 (Fla. 1954). In this decision, the Supreme Court of Florida adopted language from 20 AM. JUR. *Evidence* § 133 (1939), stating:

> Statutes of the various states contain numerous enactments creating or declaring presumptions or specifying that certain facts shall constitute prima facie evidence of other facts, the effect of which is to relieve the party in whose favor they operate of the necessity of producing evidence upon an issue and cast upon the other party the burden of going forward with the evidence. *They do not, however, shift the*

Carpenter. Nevertheless, the *Carpenter* court viewed the statute and its legislative history as intending to place the burden of proving the non-admissibility of a will to probate on the contestant.[13]

While the statutory construction appears to do no more than require the contestant to prove the affirmative of his proposition, in reality it has a much greater effect. Now, the contestant must raise his objections to the will in a fashion similar to pleading an affirmative defense. This is a peculiar development since the will contestant is not seeking to avoid the effect of a valid testamentary instrument by alleging undue influence in the same fashion that a tortfeasor seeks to avoid liability by pleading contributory negligence. Rather, the will contestant is directly challenging the *validity* of the instrument.

The supreme court, however, justifies its result in *Carpenter* by stating that the decision will lend

> greater credence to the traditional view in Florida that a properly executed will should be given effect unless it *clearly appears* that the free use . . . of the testator's sound mind . . . was in fact prevented by deception, undue influence or other means.[14]

Perhaps the need for certainty and respect for a testator's intent should override the potential concern for overreaching by fiduciaries or confidants in will preparations. Even so, courts advocating the desirability of adopting a presumption of validity for testamentary instruments based upon public policy considerations should not ignore those same considerations as they relate to the exploitation of confidential relationships by fiduciaries in will matters. It remains to be seen whether *Carpenter* will be extended to other cases involving confidential relationships. Hopefully, though, the unique relationship of confidence and influence between certain parties which by its very nature militates for special treatment and protection will again be recognized, and the present decision will be limited to cases involving family relationships. In any event, future changes in the law which apply to areas of public concern which require as high a degree of protection as do probate matters should not be made for the purpose of mere conceptual uniformity.

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burden of proof, but simply permit one to make a prima facie case in a way that he could not make it without the statute. (Emphasis added.)

Id. at 553.

13. *In re* Carpenter, 253 So.2d 697, 704 (Fla. 1971).

14. *Id.* (emphasis added by court).