How Much Influence is Undue? An Analysis of Family Law and Probate Perspectives
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The phenomenon of undue influence, which finds its most basic and broad definition in the California *Civil Code* at § 1575[1], appears in probate and family law in contrasting guises and must be dealt with by courts in methods specific to the circumstances giving rise to such a claim.

Disposition of property upon death and upon divorce are very different operations. In the former, donative intent – if it existed – must be interpreted from documents present after the passing of the decedent. In the latter, either force of law or an agreement between two living parties serves to form the determination, which agreement at the very least must be given cursory approval by a court.

Regardless of the differences, the law recognizes the potential for parties to gain an unfair advantage over spouses or co-beneficiaries. This unfair advantage is of especial concern in the family law and probate contexts by virtue of confidential or fiduciary relationships that arise as a function of marriage and domestic partnerships or as a result of the compromised position of testators due to mental or physical illness or incapacity. Unlike in the family law context, however, where the relationship between husband and wife itself is presumed to be fertile ground for undue influence, such claims in probate matters must show both the testators' potential susceptibility to undue influence by a beneficiary and the opportunity for the beneficiary to exercise that undue influence.

In the probate context, counsel must be very cautious in their role in a friend's, relative's or client's estate plan in which they are made a beneficiary. California *Probate Code* § 21350 makes invalid any donative transfer benefiting the person who drafted the testamentary instrument (as well as that person's spouse, relative, cohabitant, or partner or employee in a law partnership). Section 21351, however, provides that donative transfers that fall under the rubric of § 21350 can be made valid either by court order or after independent counsel meets with the transferor and determines that the transfer at issue is in fact not a product of undue influence.

With regard to the practice of family law, counsel must ensure that any agreement between the parties – whether pre-marital or post-marital agreement, settlement agreement, or interspousal transfer of assets – is entered into willing and voluntarily and with full disclosures by both parties and most preferably with each party represented by independent counsel.

UNDUE INFLUENCE IN PROBATE PROCEEDINGS

One of the most common stratagems used by parties who wish to set aside wills and living trusts is to assert that the document does not express the true intent of its maker but rather the intent of the benefited person. This is achieved through a claim of undue influence, and the *Probate Code* at § 6104 ensures that one proven to have taken unfair advantage in this way will not profit from the exercise. That section reads in its entirety: "The execution or revocation of a will or a part of a will is ineffective to the extent the execution was procured by duress, menace, fraud or undue influence."

There is no corresponding definition of unfair advantage in the *Probate Code*, but courts have defined it at times as the subjugation of one person's will to that of another,[2] the subversion of one's independent free will,[3] and the imposition of pressure that is so great that the mind gives way[4].

When dealing with undue influence in the arena of contracts, and therefore of conveyances and agency appointments, *Civil Code* § 1575 provides the practitioner with the explicit statutory guidance that is lacking in the *Probate Code*. In fact, § 1575 sets forth three separate grounds for undue influence: the use of authority or confidence to obtain an unfair advantage over another; taking advantage of another's weakness of mind; or taking a grossly oppressive and unfair advantage over another's necessities or distress. Courts hearing challenges to testamentary instruments can apply § 1575 in defining undue influence.[5]

"(D)irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances."[6] Several reported cases of undue influence in the area of testamentary instruments point to various indicia of undue influence. The indicia include:

- Provisions in the instruments that are unnatural, such as those that cut off the natural object of the decedent's bounty;
- Dispositions that are at variance with the decedent's intentions as expressed before and after the document's executions;
- Relations existing between the principal beneficiaries and the decedent that afford those beneficiaries an opportunity to control the testamentary act;
- A decedent whose mental or physical condition was such as to permit a subversion of the decedent's free will; and
- A chief beneficiary under the testamentary instrument who was active in procuring the execution of the instrument.[7]

Further, undue susceptibility combined with excessive pressure may result in undue influence sufficient to warrant rescission of a contract or conveyance.[8] These circumstances may include discussion of the transaction at unusual or inappropriate times; an insistent demand that the business be finished at once; extreme emphasis on assertedly untoward consequences of delay; use of multiple persuaders against a single, unadvised servient party; and statements that there is no time to consult advisors or attorneys.

The most powerful tool at the disposal of the contestant in undue influence litigation involving testamentary documents is the shifting of the burden of proof. With wills and living trusts, initially the contestant has the burden of proving lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.[9] However, the landmark decision of *Estate of Sarabia*[10] held that the contestant can shift the burden of proof to the proponent if the contestant can show:

1. The existence of a confidential relationship between the testator or settlor and the person alleged to have exerted undue influence;
2. The alleged undue influencer's active participation in procuring the instrument; and
3. Undue profit received by the alleged influencer.

Some elucidation of the foregoing is in order -- especially for attorneys assisting in the drafting of instruments. To act as attorney for a testator and to assist in the procurement of the instrument act as two strikes against a beneficiary. *Any* disposition for the benefit of the attorney donee will be brought into suspicion in a will contest.[11] The burden of proof, of course, shifts to the attorney proponent of the will to demonstrate that the provision benefiting the attorney was in fact the product of the testator's free agency. Furthermore, to successfully rebut the presumption, the attorney beneficiary must do more than merely demonstrate that the contestant has presented insufficient evidence.[12] The lawyer must show that the instrument is the outcome of the testator's free will.

Attorneys are not the only potential beneficiaries against whom the law raises a presumption of undue influence. *Probate Code* § 21350 provides a list of persons who are disqualified as beneficiaries. This list includes persons who drafted the instrument and their relatives, as well as "care custodians" of an adult transferor.[13] This presumption can be overcome in any one of the ways established in *Probate Code* § 21351, including proof that the prohibited beneficiary is related by blood or marriage, cohabits with the transferor or is a domestic partner of the transferor.[14] As well the presumption can be overcome by clear and convincing evidence to the contrary[15]. Naturally the presumption can also be overcome if the instrument was reviewed by an attorney, who provided counsel to the transferor with regard to the nature of the specific disposition. The reviewing attorney must also sign a certification to that effect.[16]

Normally undue influence must be established by inferences derived from circumstantial evidence. Typically the transaction occurred behind closed doors; the testator or settlor is deceased or is otherwise unavailable to testify or has no clear memory of what occurred; and there are no other percipient witnesses.[17]

A court making a determination with regard to undue influence in the probate context must maintain "vigilance" in protecting the testator's ultimate wishes in disposition of his or her property – especially in the face of "a legion of decisions [that] strike down attempts of juries to invalidate wills upon the grounds of undue influence in order to indulge their own concepts of how testators should have disposed of their properties."[18] Although juries no longer are called to decide cases of will contest,[19] the sentiment remains accurate with regard to the actions of judges. Despite this onerous task, the bulk of authority states that the standard of proof is that of a preponderance of the evidence[20] – both in establishing the presence of undue influence[21] and, upon its activation, the rebutting of that presumption.[22]

Although evidence that the person charged with undue influence did not actually benefit as a result of the testamentary instrument does tend to refute the charge,[23] the charge may stand if the undue influence comes from one who is an agent or representative of the beneficiary.[24] This includes undue influence brought to bear on a testator in order to make a disposition in favor of the influencer's spouse.[25]

UNDUE INFLUENCE IN THE FAMILY LAW CONTEXT

The relationship that arises upon marriage[26] has statutory and lawfully mandated obligations that can and will have long-term effects on the spouses, their off-spring, and their bounty. In particular, *Family Code* § 721 provides for a relationship between spouses of ultimate good faith and fair dealing. This code section states in pertinent part: "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither of them shall take any unfair advantage of the other."

As a result of this confidential relationship, which the statute expressly likens to the relationship between two business partners[27], any interspousal transaction that benefits one spouse to the detriment of the other raises a presumption of undue influence on the part of the advantaged spouse.[28] "The burden of dispelling the presumption rests on the spouse advantaged by the transaction."[29]

This confidential relationship is tantamount to a "super-fiduciary" relationship. In marriage, unlike, for instance, the attorney-client relationship, ***both*** parties are bound by ***mutual*** duties. This particular dynamic has been recognized in California courts for well over a hundred years.[30]

In the past this confidential relationship was considered to survive until the actual entry of a judgment of dissolution, i.e., when the parties were no longer spouses.[31] In a decision from 1984, however, the Court of Appeal found that parties who have taken steps toward dissolution (i.e., separation or the filing of a petition for dissolution) have ended their confidential relationship and are at that point dealing with each other at arms' length.[32] But compare the provisions of the *Family Code* at § 1100, which may explicitly contradict this by imposing on spouses the fiduciary duties found at § 721 "until such time as the assets and liabilities have been divided by the parties or by a court."[33]

Vital to a court's analysis of the presence of undue influence is the actual nature of the transaction giving rise to the claim, especially with regard to who benefited from the transaction and under what circumstances. The relationship between spouses is not held to the same standard as that of trustee and beneficiary, wherein any transaction that benefits the trustee is presumed to be a violation of the trustee's fiduciary duties.[34] "(W)hile principles governing trustee-beneficiary relationships are obviously similar to those governing marital relationships, in that both are fiduciary in nature, the two relationships are not identical."[35] The "mere existence of the marriage relation alone will not, in and of itself, suffice to initiate and support the presumption of undue influence . . ."[36] If the scrutinized transaction is itself *unfair* i.e., connoting "an unfair advantage, not

merely a gain or benefit obtained in a mutual exchange . . ." then there may be a finding of undue influence.[37]

Overcoming the presumption requires the advantaged spouse to prove by a preponderance of the evidence that the parties entered into the transaction "freely and voluntarily" and "with full knowledge of all of the facts, and with the complete understanding of the effects of the transfer."[38] A finding that the advantaged spouse made a "full and fair disclosure of all that the other spouse should know for his or her benefit and protection concerning the nature and effect of the transaction" will overcome the presumption, as will a finding that the spouse "deal[t] with the other spouse at arm's length, giving him or her the opportunity of independent advice."[39]

There are a number of relatively recent family law cases that have addressed undue influence in the divorce context. All of these cases have served to delineate and reinforce the duties of spouses when engaging in financial transactions with each other. Further they have provided guidance in determining which litigants and what transactions fall within the purview of the law of undue influence.

The Court of Appeal in the Second District, in an extensive and authoritative opinion, considered undue influence claims brought by a wife against her former husband in *In re Marriage of Burkle*[40] and found no undue influence in the actions of the husband with regard to disclosures prior to the parties' execution of a post-marital agreement. The agreement, entered into by the parties during a period of reconciliation following separation, was by most measures extremely lucrative for the wife, who would upon dissolution be awarded over $30,000,000 as her share of community assets alone, as well as $1,000,000 every year that they remained together after the execution of the agreement.[41]

In the negotiations prior to execution of the agreement, Ms. Burkle was represented by an army of lawyers and accountants and was given *carte blanche* by the husband to conduct formal discovery into his finances (which she declined). Despite these apparent safeguards, upon filing the petition for dissolution, the wife asserted that the agreement was void and unenforceable.

Among her claims at trial was that her husband had achieved an unfair advantage over her in the signing of the agreement. This was evidenced, according to Ms. Burkle, by the completion, following execution of the agreement, of mergers of her husband's two major business assets, transforming them "from privately held regional supermarket chains to publicly merged national supermarket chains."[42] Ms. Burkle claimed that her husband had failed to disclose these contemplated mergers on the schedules to the agreement and that the mergers had benefited him to her detriment. And as a result of this, her husband had achieved an unfair advantage over her in their post-marital agreement.[43]

The trial court disagreed with Ms. Burkle, found *inter alia* no undue influence in Mr. Burkle's actions, and further found that Ms. Burkle had entered "into the Agreement

freely, willingly and voluntarily, and free of any fraud, duress, medical condition or undue influence."[44]

Ms. Burkle appealed the decision, claiming reversible error *per se*[45] in the trial court's failure to allocate the burden of proof to her husband with regard to the validity of the agreement.[46]

The Court of Appeal, however, upheld the decision by the trial court. To get there, the Court engaged in a careful analysis of the undue influence doctrine and particularly of what constitutes an "unfair advantage" as contemplated therein. The Court reached the conclusion that not all advantages arising from interspousal transactions are necessarily unfair and that unfairness giving rise to a detriment to the other spouse is a necessary component of a successful claim of undue influence.[47] "(A) spouse is presumed to have induced a transaction through undue influence only if he or she, in the words of Family Code § 721, has obtained an 'unfair advantage' from the transaction."[48]

In the Court's opinion, undue influence and unfair advantage require a lack of consideration supporting the transaction between the spouses.[49] "(P)roperty transfers without consideration[] necessarily raise a presumption of undue influence, because one spouse obtains a benefit at the expense of the other, who receives nothing in return."[50]

In support of her position, Ms. Burkle insisted that the reasoning in *Bradner v. Vasquez*[51] controlled. *Bradner*, which addresses undue influence between attorney and client, stands in large part for the proposition that "in an action between a fiduciary and his beneficiary, a statutory presumption of undue influence applies when the fiduciary 'gains, benefits, or profits' from the transaction, without regard to whether the advantage gained is fair or unfair."[52] As noted above, the relationship between fiduciary and beneficiary and the relationship between spouses is similar but not identical. The former is unilateral, while the latter is bilateral.

But an analysis at that level is unnecessary, as the prohibition on any trustee enrichment whatsoever is evident from the plain language of *Probate Code* § 16004(c): “A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties.” The prohibition in the context of interspousal transaction as stated in *Family Code* § 721, however, is plainly stated as only in the event of ***unfair advantage***.

So, while Ms. Burkle saw the results of the above-mentioned mergers, which doubtlessly advantaged Mr. Burkle, as a breach of the duty that he owed her at the execution of the agreement, the Court recognized that the test is not whether Mr. Burkle was in any way advantaged as a result of the agreement but rather whether that advantage was in some way unfair. As explained below, the Court found no unfairness in the transaction between the parties in light of the later merger of Mr. Burkle's business interests.

The trial court ruled that both parties to the agreement in *Burkle* received an advantage as a result. The Court of Appeal agreed.[53]

> "A presumption of undue influence cannot logically be applied in a case where benefits are obtained by both spouses, where the spouses are represented by sophisticated counsel, and where the spouses expressly acknowledge that neither has obtained an unfair advantage as a result of the agreement. The trial court did not err in concluding that no presumption of undue influence arose, and that Ms. Burkle therefore had the burden of proving, by a preponderance of the evidence, that the post-marital agreement was invalid."[54]

Even if the presumption of undue influence had arisen, both the trial court and the Court of Appeal agreed that Mr. Burkle presented "substantial evidence"[55] sufficient to rebut the presumption.[56]

In re Marriage of Kieturakis[57] addressed a wife's claims of undue influence by her husband in her execution of a marital settlement agreement that was reached in the context of mediation with a third-party neutral. The Court of Appeal upheld the trial court's denial of her motion to set aside the agreement. They made this decision on three grounds. First, they found that "the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation."[58] To rule otherwise could "undermine the practice of mediating such agreements. Application of the presumption would turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated."[59]

Second, the Court found that "the presumption of undue influence should not apply . . . where the influence is alleged with respect to a judgment that has long been final." Within the first six months after entry of judgment, a party can seek such a set-aside under either *Civil Code* § 473 or *Family Code* § 2122.[60] After that period, however, a set-aside under the *Family Code* section is the only option, and that statute requires *inter alia* actual fraud, perjury, duress, or mental incapacity. More importantly in *Kieturakis*, when moving to set aside a judgment under § 2122, "the burden of proof would rest where it has always rested, with the moving party, . . . In that event, there would be no 'transaction' that could give rise to a burden-shifting presumption of undue influence."[61] The Court struggled somewhat with the implications present in such an analysis. But in the end it found that:

> "The policy favoring the finality of judgments [as expressed in *In re Marriage of Stevenot*[62]] has not changed. . . . (A) party seeking relief from a judgment that incorporates an unequal marital settlement agreement must bear the burden of proof under *Family Code* section 2122, at least where the judgment . . . is at

least six months old."[63]

Finally, the Court in *Kieturakis* looked at the marital settlement agreement itself, which stated that the parties "affirmed that they had entered into the MSA 'voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind.'"[64] Although not dispositive, the Court did find that the representations "should count for something, where, as here, the parties' capacity is not in question."[65] The agreement itself supported the finding by the trial court that there was no undue influence. The wife bore the burden of proof needed to overturn that presumption, and the trial court did not err in finding that she failed to carry that burden.

California law imposes upon each spouse an obligation to deal with the other fairly, openly and without clandestine motives or intentions. This understanding remains in place not only at the advent of the marriage but, as noted above, throughout the marriage or at least until settlement, trial or specific orders are imposed.

Family Code § 1101 provides in pertinent part for various remedies that may apply when such incidents occur. In the event of a breach by one spouse of the fiduciary duties under §§ 721 or 1100, the court may make "an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs."[66] If by virtue of the breach the spouse is found to be guilty of oppression, fraud, or malice,[67] the award by the court "shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty."[68]

INTERSPOUSAL UNDUE INFLUENCE IN TESTAMENTARY INSTRUMENTS

As comfort and mate, spouses are certainly obligated to provide counsel to each other in all matters of life, including testamentary dispositions. But despite – or perhaps because of – the law's respect for that unique relationship, it is possible for one spouse to exercise undue influence over the testamentary intent of the other.[69]

Mere opportunity to exert undue influence, however, does not raise a presumption that the spouse in fact did so.[70] As with a testamentary disposition that benefits a fiduciary, the court must determine whether the presence of such a relationship "is combined with unduly profiting by the will, and [the will's] being unnatural, and activity on the part of the proponent in procuring its execution" sufficient to rise to the level of undue influence.[71] Only in the event that the court makes findings to that extent will the presumption of undue influence be raised.

Indeed, assistance in procurement or preparation of the will is vital to the raising of the presumption of undue influence by a spouse on a testator.[72] Merely contacting an attorney on behalf of a spouse in order to make a will has been held insufficient to support this element of the analysis.[73]

Likewise the requirement of undue profit must be proved before the presumption is raised. The case *Estate of Sarabia,*[74] mentioned above, although not a case involving intraspousal undue influence, is highly instructive with regard to how courts should determine whether profit is undue when the beneficiary was in a confidential relationship with the testator. The Court of Appeal upheld a decision by the judge to instruct the jury that the term "unduly" meant "unwarranted, excessive, inappropriate, unjustifiable or improper."[75] The contestant objected to the instruction, believing the term "unduly" to be a solely quantitative concept and claiming that the trier of fact's analysis must be limited to the terms of the will itself.[76]

On appeal, however, the Court reasoned that for the jury to determine the undue profit on a quantitative basis would "assume the amount of that entitlement [to the contestant] is somehow self-evident; only by knowing what has been shifted from the contestant to the proponent can it be determined whether the proponent is taking 'substantially more' than he or she would take in the absence of the will."[77] "The implicit premise (of the contestant's position) is that the omitted heir has some entitlement to the decedent's bounty that is superior to the beneficiary designated by the testator."[78] The Court called this standard "unworkable."[79] And to limit the inquiry only to the four corners of the will would act to supplant testamentary independence with the law of intestate succession. Any gift to a beneficiary not in close sanguinity with the testator would be viewed as "undue profit."[80] As well, to limit the inquiry merely to the provisions of the will would be to ignore previous instruments executed by the testator, as well as other expressions of intent that do not appear in the will.[81]

The undue influence analysis is not limited to the effect of the influence on the testator. Testators, too, it would seem, can exercise undue influence from beyond the grave. In *Estate of Mader*[82]husband directed his attorney to create a will and a form reflecting an election and waiver on the part of his wife. Wife was called into the attorney's office to sign the documents and declined to have the documents explained to her by the attorney. Upon husband's death, the result of husband's will, should wife elect to take under it, would have been to provide for her less than her share of the community assets.[83] The Court of Appeal wrote as follows: "If the value of the wife's benefits under the will is less than the value of her interest in the community property, it will be presumed that she made her election under undue influence and she may repudiate it after the husband's death."[84]

COMPARING VARIOUS ELEMENTS OF UNDUE INFLUENCE IN THE PROBATE AND FAMILY LAW CONTEXTS

Although in both family law and probate the law seeks to root out what could be termed the unjust or unearned award of wealth, there are fundamental differences in the way judges are asked to make that determination, depending on the nature of the proceeding before them.

There are only two parties to a divorce proceeding and therefore only two parties who may be subject to the undue influence analysis. The predicate of undue influence in the family-law context is that of the confidential relationship between spouses. The trust and mutual respect that husbands and wives give each other also can give rise to the advantage-taking against which the law is intended to guard.

In the process of property division, any such transfer can be subject to an undue-influence analysis. While the burden rests on the party claiming undue influence in an intra-spousal transfer to show that the advantage to the benefited spouse was indeed unfair, once that burden is met, it is up to the benefited spouse to show that the other party received something in return for the transfer.

In the probate context, comparatively, the scrutiny can be cast on anyone who might benefit from the donative transfer. While a special relationship between donor and donee, e.g., lawyer-client, caregiver-patient, etc., will automatically raise a presumption of undue influence and might act to disqualify that recipient, such a relationship is not necessary.

The types of relationships – and the attendant duties -- between parties to divorce proceedings and beneficiaries and testators in probate proceedings can vary considerably. The confidential relationship between two married persons brings with it the reciprocity of duties between the two. The duty of the highest good faith and fair dealing, as between business partners, is shared. The law does not recognize a duty on the part of one spouse that it does not demand of the other. As well, by virtue of the nature of divorce proceedings, the only person who can raise a claim of undue influence is the other spouse.

In probate proceedings, however, the court is concerned with duties that run only one-way. That is, the testator owes no duty to anyone. It is his or her will that is preeminent. The focus in that context is on the "one-way" duties owed by lawyers to their clients and between anyone with what could be considered "special" access to the testator, e.g., caregivers or anyone in a confidential relationship with the testator who was active in procuring the testamentary instrument and who received an "undue" profit by way of that instrument. Furthermore a probate contest can theoretically be initiated by "any interested person," [85] and with decedent estates, the interest must be a pecuniary interest in the devolution of the estate that may be impaired or defeated by probate of the will or benefited by having it set aside. [86]

The operation of the burdens of proof differs in the family law and probate context, as well. In family law, as stated above, the disadvantaged spouse bears the initial burden to show to the court that the advantage gained by the other spouse was somehow unjust or otherwise without reciprocal benefit. As seen in *Burkle*, one spouse's coming out "on top" in the division of property does not always justify a finding by the court that the benefit to the advantaged spouse was unjust. But once the court is satisfied that there was no adequate consideration in the intra-spousal transfer, the burden shifts to

the advantaged spouse to show that both parties made a knowing and informed decision in the transfer of title to property.

In the probate context parties contesting testamentary dispositions carry the initial burden of proof to establish "unnatural dispositions," dispositions that are at variance with the testator's previously stated wishes, opportunities by beneficiaries to exercise undue influence, the mental or physical condition of a testator that would make that person susceptible to undue influence, etc. This is not an easy burden for a contestant to carry. However, as stated above, the contestant can shift the burden of proof by showing that the beneficiary was in a confidential relationship with the settlor, was active in procuring the instrument, and received an undue profit thereby. Although by no means an easy hurdle to clear, especially with regard to what constitutes undue profit, the establishment of these three factors is often easier than the fact-finding associated with the contestant's initial burden of proof.

Over all, however, the goal in both family law and probate proceedings is the same: to determine whether a spouse or a beneficiary has in some way benefited unjustly and at the expense of another. Furthermore, in both circumstances, even the strongest showing of undue influence by the person challenging the transfer of property can be overcome with an even stronger showing by the benefited party.

In the context of a divorce this means a showing that the benefit received was not unjust or that the disadvantaged spouse made an informed and well-counseled decision to transfer the property.

In the probate context, the beneficiary must show that the testator's actual intent is represented by the challenged disposition. A higher standard, however, does apply if the beneficiary falls within the rubric of *Probate Code*§ 21350; that is, either an order of the court, finding that the transfer was not the product of undue influence, or a signed certification by an independent examining attorney that the disposition represents the true will of the testator.

CONCLUSION

Both probate and family law demand that practitioners enmesh themselves in the often very private goings-on of nuclear and extended families, other close but non-familial relationships, and the relationships of former or current business partners. Practitioners themselves might become the subject of a court's scrutiny if in the process of providing legal services they are remembered in the testamentary transfer of a client. The diligent lawyer will keep in mind the strictures of professional responsibility, the interests of third-parties, and their own reputations when dealing with probate and family law clients.

The foregoing undue influence analyses are geared at their most basic to ensure that valuable property winds up in the hands of those who most deserve it – whether by virtue of the goodwill and actual, uninfluenced intent of a testator or the operation of

California community property and contract law. To the untutored, these determinations can seem subjective and open to interpretation. With proper education, however, anyone practicing in probate or family law can learn to recognize undue influence when they encounter it and thereafter work to rectify situations that could later give rise to costly and unnecessary litigation.

At the end of the day, it must be remembered, a career as an attorney is a highly-educated, generally well-compensated service position. It is in the true spirit of client service that potential trouble spots be identified and resolved before parties are haled into court to answer questions of undue influence.

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[1] Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.
[2] See *Estate of Ricks*(1911) 160 Cal. 467, 480; see also *Rice v. Clark*(2002) 28 Cal.4th 89, 96.
[3] See *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605.
[4] See *Estate of Anderson*(1921) 185 Cal. 700, 707.
[5] *In re Estate of Ramey* (1923) 62 Cal. App. 413
[6] *Keithley v. Civil Service Bd.* (1970) 11 Cal. App. 3d 443, 451.
[7] *Estate of Yale* (1931) 214 Cal. 115, 122; *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585; *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296
[8] *Odorizzi v. Bloomfield School District* (1966) 246 Cal.App.2d 123.
[9] *Probate Code* § 8252(a)
[10] (1990) 221 Cal.App.3d 599
[11] See *Estate of Auen*(1994) 30 Cal.App.4th 300.
[12] *Id.* at 313.
[13] With regard to the parsing of the term "care custodian," see *Bernard v. Foley*(2006) 39 Cal.4th 794.
[14] § 21351(a)
[15] § 21351(d)
[16] *Probate Code*§ 21351 provides in part that "(s)ection 21350 does not apply if . . . (t)he instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter . . ." The reader is directed to that portion of the *Probate Code* for an example of this form.
[17] In cases involving contracts there is no statute expressly establishing who has the burden of proof.
[18] *Estate of Fritschi* (1963) 60 Cal.2d 367, 373. See also *In re McDevitt* (1892) 95 Cal. 17, 33: " The beneficiaries of a will are as much entitled to protection as any other

property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just or proper . . ." Note that, under *Probate Code* § 825, there is no right to a jury trial in proceedings under the *Probate Code* except as otherwise "expressly provided" in the *Code*, and there is no such provision regarding will or trust contests.
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[20] *Evidence Code* § 115. But see *Probate Code* § 21351, which provides that a prohibited beneficiary under § 21350 must rebut the presumption of undue influence with clear and convincing evidence; accord *Bernard v. Foley, supra*.
[21] *In re Lingenfelter's Estate*(1952) 38 Cal.2d 571.
[22] *David v. Hermann*(2005) 129 Cal.App.4th 672, 684. Contra 14 Witkin, *Summary of California Law, Wills* (10th Ed.) § 130, which states: "It is frequently said that a strong showing is necessary, or that the proof must be by clear and convincing evidence." Witkin's citation of authority to buttress this departure is not well-supported and includes one reference to a case citing the very text; Witkin also references *Estate of Anderson*(1921) 185 Cal. 700, 707 ("The evidence which would justify the conclusion that [undue influence] had occurred in any particular case of that character would have to be very strong indeed.")
[23] *In re Ventura's Estate* (1963) 217 Cal.App.2d 50 (holding that an executor, who was left no specific bequest but who was given the right to choose which orphans' home would receive a bequest, did not personally benefit)
[24] See *In re Lekos' Estate*(1952) 109 Cal.App.2d 42.
[25] *Id.*
[26] The term "marriage" will be used throughout to indicate both the institution as defined in *Family Code* § 300 and that of domestic partnership as defined in § 297. The domestic partnership legislation was intended to provide all of the rights, protections and responsibilities of traditional marriage. Although there is no reason to doubt the application by courts of the presumption arising from *Family Code* § 721 to an analogous situation between divorcing domestic partners, the way forward with regard to the law's treatment of domestic partnership is by no means certain – on either a state or a federal level. See *Velez v. Smith* (2006) 142 Cal. App. 4th 1154; but see *In re Rabin* (2005) 336 B.R. 459.
[27] The statute directs the reader to §§ 16403, 16404 and 16504 of the *Corporations Code* for guidance with regard to the duties between two non-married business partners.
[28] See *In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 27; see also *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996.
[29] *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 297.
[30] See *Dimond v. Sanderson* (1894) 103 Cal. 97, 101; see also *In re Marriage of Burkle*(2006) 139 Cal. App. 4th 712, 733.
[31] See *Dolliver v. Dolliver*(1892) 94 Cal. 642; see also *Simmons v. Briggs*(1924) 69 Cal.App. 667.
[32] *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051.
[33] The automatic mutual temporary restraining orders – or "ATROs" – that inhere following a filing of a Petition for Dissolution serve to enforce these fiduciary duties

during the liminal period between separation and the divorce decree. *See* California Family Code §§ 231-235 and 2040(a).

[34] *Probate Code*§ 16004

[35] *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 733. See also *Dimond v. Sanderson, supra,* 103 Cal. at 101.

[36] *Estate of Cover* (1922) 188 Cal. 133, 144.

[37] *In re Marriage of Burkle, supra,* 139 Cal.App.4th at 731, citing *In re Marriage of Haines* (1995) 33 Cal.App.4th 277.

[38] *In re Marriage of Haines, supra,* 33 Cal.App.4th at 296, quoting *Brown v. Canadian Industrial Alcohol Co.* (1930) 209 Cal. 596, 598.

[39] *In re Marriage of Baltins* (1989) 212 Cal. App. 3d 66, 88.

[40] 139 Cal.App.4th 712

[41] *Id.* at 719-720. Also included in the agreement was the purchase by the husband, in the event of the parties' separation, of a home worth at least $3,000,000 as of June 1997.

[42] *Id.* at 723-724.

[43] *Id.*

[44] *Id.* at 725.

[45] A claim that the Appellate Court flatly rejects: "Contrary to Ms. Burkle's claim, misallocation of the burden of proof is not 'reversible error *per se*' . . ." *Id.* at 736 ""(A)n error in allocating the burden of proof must be prejudicial in order to constitute reversible error." *Id.*at 738

[46] *Id.* at 728.

[47] *Id.* at 729 – 736.

[48] *Id.* at 732

[49] *Id.* at 730 – 731, citing *inter alia Dimond v. Sanderson, supra,* 103 Cal. at 102; *Estate of Cover* (1922) 188 Cal. 133; *In re Marriage of Baltins, supra,* 212 Cal.App.3d at 88; *In re Marriage of Haines, supra,* 33 Cal.App.4th 277; *In re Marriage of Delaney, supra,* 111 Cal.App.4th at 996.

[50] *Id.* at 731

[51] (1954) 43 Cal.2d 147

[52] *In re Marriage of Burkle, supra,* 139 Cal.App.4th at 732, citing and quoting in part *Bradner, supra,*43 Cal.2d at 152. The Court explained the holding in *Bradner* thusly:

> "In *Bradner*, the Supreme Court construed the presumptions in Civil Code § 2235 (now Probate Code section 16004). Section 2235 then provided that all transactions between a trustee and his beneficiary, by which the trustee obtains 'any advantage' from his beneficiary, were presumed to be entered into by the beneficiary 'without sufficient consideration, and under undue influence.' (citations omitted)" *In re Marriage of Burkle, supra,* 139 Cal.App.4th at 732.

[53] *Id.* at 735-736

[54] *Id.* at 736

[55] The standard of proof to rebut a presumption of undue influence is that of substantial evidence. See *In re Marriage of Matthews*(2005) 133 Cal.App.4th 624, 632.
[56] *Id.* at 738-740
[57] 138 Cal.App.4th 56
[58] *Id.* at 85.
[59] *Id.*
[60] *Id.* at 87.
[61] *Id.* 88-89.
[62] (1984) 154 Cal.App.3d 1051, 1071 (finding that "the public policy in favor of finality of judgments predominates, and the power to set aside valid final judgments and marital settlement agreements incorporated therein should be exercised only when exceptional circumstances require that the consequences of res judicata be denied")
[63] *In re Marriage of Kieturakis, supra,* 138 Cal. App. 4th at 90.
[64] *Id.*
[65] *Id.*
[66] *Family Code*§ 1101(g)
[67] See *Civil Code* § 3294
[68] *Family Code*§ 1101(h)
[69] See *In re Hetterman's Estate* (1941) 48 Cal.App.2d 263 (finding undue influence by a wife who threatened to divorce husband, commit suicide or otherwise cause trouble should husband execute will leaving half of his property to his relatives).
[70] See *In re Ricky's Estate*(1923) 64 Cal.App. 733.
[71] *In re Teel's Estate*(1944) 25 Cal.2d 520, 528. This case, although it provides an adequate statement of the combination of factors necessary to raise the presumption of undue influence, may have in fact been wrongly decided. Testator therein was a suicide. Her (second) husband accompanied her to her attorney's office, wherein she executed a will that disinherited her daughter and left all to her husband. The attorney testified that at the time of execution, she was of sound mind, and the husband testified that he had attempted to discourage her from making the disposition. Some witnesses, however, did give testimony about the testator's "mental peculiarities." Basing its decision on the profit to the husband, the disinheriting of the daughter, and the woman's abnormal conduct, the California Supreme Court denied probate of the will, despite an utter lack of evidence of the husband's undue influence. See 6 Stanf. L. Rev. 91.
[72] See *In re Holloway's Estate*(1925) 195 Cal. 711
[73] *Id.*
[74] (1990) 221 Cal.App.3d 599
[75] *Id.* at 604
[76] *Id.* at 608
[77] *Id.* at 607
[78] *Id.*
[79] *Id.*
[80] *Id.* at 608
[81] *Id.* at 607
[82] (1970) 11 Cal.App.3d 409
[83] *Id.* at 417

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[84] *Id.*
[85] *Probate Code* §§ 1043, 8004, 8250, 8270
[86] *Estate of Plant*, 27 Cal.2d 424 (1945)