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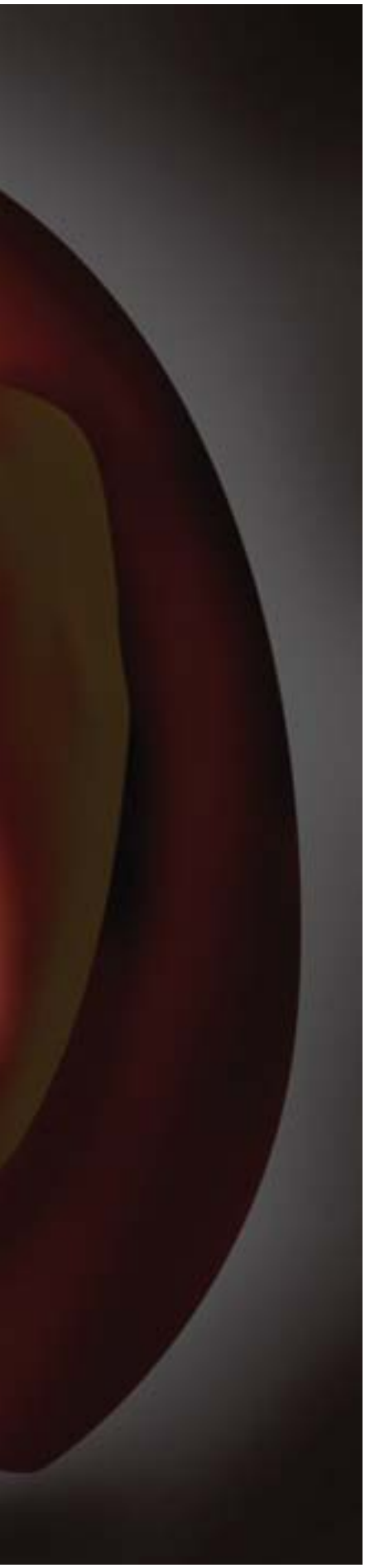

By HOWARD S. KLEIN, ROBERT C. BRANDT, and GEOFFREY MURRY

Under THE Influence

CLAIMS OF UNDUE INFLUENCE ARE CONSIDERED UNDER DIFFERENT STANDARDS IN FAMILY LAW AND PROBATE MATTERS

THE PHENOMENON OF UNDUE INFLUENCE—which finds its most basic and broad definition in California Civil Code Section 1575[1]—appears in probate and family law matters in contrasting guises. For claims of undue influence, courts must use methods that address the specific circumstances giving rise to the claims. Indeed, the disposition of property is handled differently when it occurs upon death as opposed to divorce. 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 of what happens to property—and an agreement, at the very least, must be given cursory approval by a court.

Still, regardless of the differences between probate and family law dispositions, the law recognizes the potential for parties to gain an unfair advantage over spouses or co-beneficiaries. This unfair advantage is of special concern in family law and probate matters because of the confidential or fiduciary relationships formed through marriage and domestic partnership or as a result of the compromised position of testators due to mental or physical illness or incapacity.

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In probate, an attorney must be very cautious regarding his or her role when the attorney is made a beneficiary in the estate plan of a friend, relative, or client. Probate Code Section 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 Section 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.

In family law matters, counsel must ensure that any agreement between the parties—whether premarital or postmarital, a settlement, or an interspousal transfer of assets—is entered into willingly and voluntarily, with full disclosures by both parties, and most preferably with each party represented by independent counsel.

Probate Proceedings

One of the most common stratagems of parties who wish to set aside a will or living trust 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 Probate Code Section 6104 ensures that those proven to have taken unfair advantage in this way will not profit from their actions. 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]

As the court noted in *Keithley v. Civil Service Board*, "[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."[5] Several reported cases in the area of testamentary instruments point to various indicia of undue influence, including:

- 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 execution of the documents.
- 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 allowed the possibility of the decedent's free will to be subverted.
- The fact that a chief beneficiary under the testamentary instrument was active in procuring the execution of the instrument.[6]

Further, undue susceptibility combined with excessive pressure may result in a finding of undue influence sufficient to warrant rescission of a contract or conveyance.[7]

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.[8] However, the landmark decision of *Estate of Sarabia*[9] held that the contestant can shift the burden of proof to the proponent if the contestant can show the presence of three factors:

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.
3) Undue profit received by the alleged influencer.

Attorneys assisting in the drafting of instruments should know that serving as attorney for a testator and assisting in the procurement of the instrument act as two strikes against a beneficiary. Any disposition for the benefit of an attorney donee will attract suspicion in a will contest.[10] The burden of proof will shift 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.[11] 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 Section 21350 provides a list of persons who are disqualified as beneficiaries, including those who drafted the instrument and their relatives as well as "care custodians" of an adult transferor.[12] This presumption can be overcome in any one of the ways established in Probate Code Section 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.[13] Moreover, the presumption can be successfully rebutted by clear and convincing evidence to the contrary.[14] Further, the presumption can be countered by evidence that the instrument was reviewed by an attorney who provided counsel to the transferor regarding the nature of the specific disposition. The reviewing attorney must sign a certification to that effect.[15]

Normally undue influence is 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.[16]

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,[17] the claim of undue influence may stand if the undue influence comes from one who is an agent or representative of the beneficiary.[18] This includes undue influence brought to bear on a testator in order to make a disposition in favor of the influencer's spouse.[19]

A challenge to a provision in an estate plan based upon the asserted exercise of undue influence on the testator or settlor may bring into play a no contest clause in the will or trust. No contest clauses comprise a constantly evolving area of the law—and one that is confusing at best. However, there are some guidelines to assist the practitioner. A "contest" means any action identified in a no contest clause as a violation of the clause.[20] No contest clauses are not to be extended beyond the testator's plain intent: "Such clauses must be strictly construed, and no wider scope is to be given to their language than is plainly required." Only where an act comes strictly within the express terms of the forfeiture clause may a breach of the clause be declared.[21] In fact, by statute, "[i]n determining the intent of the transferor, a no contest clause shall be strictly construed."[22]

The challenger's ability to evade the scope of a no contest clause may well depend upon the nature of the challenge, the execution date of the testamentary instrument, and the wording of that instrument's no contest clause. A "direct contest" means a pleading in a court proceeding alleging the invalidity of an instrument or any of its terms based upon any of 10 stated grounds, one of which is undue influence.[23] A direct contest would appear to place the challenger squarely within the ambit of the forfeiture provision of the no contest clause. By contrast, a different section of the Probate Code—expressly affecting only instruments executed on or after January 1, 2001, and not affecting instruments executed prior to that date—provides in part that an action or proceeding to determine the character, title, or ownership of property, or a challenge to the validity of an instrument, contract, agreement, beneficiary des-

ignation, or other document other than the instrument containing the no contest clause, does not constitute a contest unless the action is "expressly identified" in the no contest clause as a violation of the clause.[24]

Normally, counsel for any would-be challenger of a provision in a will or trust that has become irrevocable is well advised to begin the process by seeking declaratory relief under Probate Code Section 21320—known as the safe harbor provision. This process involves a beneficiary applying to the court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of the no contest clause. If the court determines that the beneficiary's action does not constitute a contest, counsel may proceed with impunity to file the petition in chief for the relief sought. If the court does not grant the safe harbor, then counsel understands that if the petition in chief is filed and the requested relief is not granted by the court, the client will suffer the forfeiture set forth in the no contest clause.

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.

Family Law Matters

The relationship arising from marriage[25] has statutory and lawfully mandated obligations that can and will have long-term effects on the spouses, their offspring, and their bounty. In particular, for spouses under Family Code Section 721, "[t]his 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."

The statute expressly likens the confidential relationship of spouses to the relationship between two business partners.[26] 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.[27] As a result, "[t]he burden of dispelling the presumption rests on the spouse advantaged by the transaction."[28]

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 has been recognized in California courts for well over a hundred years.[29]

In the past this confidential relationship was considered to survive until the actual entry of a judgment of dissolution—that is, when the parties were no longer spouses.[30] In 1984, however, the California Court of Appeal found that parties who have taken steps toward dissolution—such as separation or the filing of a petition for dissolution—have ended their confidential relationship and are at that point dealing with each other at arm's length.[31] But Family Code Section 1100 may explicitly contradict this ruling by imposing on spouses the fiduciary duties contained in Family Code Section 721 "until such time as the assets and liabilities have been divided by the parties or by a court."[32]

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, under which any transaction that benefits the trustee is presumed to be a violation of the trustee's fiduciary duties.[33]

Overcoming the presumption of undue influence 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."[34] 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."[35]

A number of relatively recent family law cases have addressed undue influence in the context of divorce. For example, an extensive and authoritative opinion by the Second District Court of Appeal addressed undue influence claims brought by a wife against her former husband in *In re Marriage of Burkle*.[36] The court found no undue influence in the actions of the husband with regard to disclosures prior to the parties' execution of a postmarital 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 million as her share of community assets alone as well as $1 million every year that the parties remained together after the execution of the agreement.[37]

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." 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. As a result, her husband had achieved an unfair advantage over her in their postmarital agreement.[38]

The trial court disagreed with Ms. Burkle, finding inter alia no undue influence in Mr. Burkle's actions, and further finding that Ms. Burkle had entered "into the Agreement freely, willingly and voluntarily, and free of any fraud, duress, medical condition or undue influence."[39] Ms. Burkle appealed the decision, claiming reversible error per se[40] in the trial court's failure to allocate the burden of proof to her husband with regard to the validity of the agreement.[41]

The court of appeal, however, upheld the

decision of 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 by the doctrine. 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:[42] "[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."[43] In the court's opinion, undue influence and unfair advantage require a lack of consideration supporting the transaction between the spouses:[44] "[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."[45]

The trial court ruled that both parties to the agreement in *Burkle* received an advantage as a result. The court of appeal agreed:[46]

> 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.[47]

Even if the presumption of undue influence had arisen, the trial court and the court of appeal agreed that Mr. Burkle presented "substantial evidence"[48] sufficient to rebut the presumption.[49]

The court in *In re Marriage of Kieturakis*[50] addressed a wife's claims of undue influence by her husband in her execution of a marital settlement agreement that was reached via mediation with a third-party neutral. The court of appeal upheld the trial court's denial of her motion to set aside the agreement. The court made this decision on three grounds. First, it found that "the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation." 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."[51]

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 a set-aside under either Civil Code Section 473 or Family Code Section 2122.[52] After that period, however, a set-aside under the Family Code section is the only option, and that statute requires, among other things, actual fraud, perjury, duress, or mental incapacity. More importantly, in *Kieturakis*, the court held that when a party moves to set aside a judgment under Section 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."[53]

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 throughout the marriage or at least until settlement, trial, or specific orders are imposed.

Family Code Section 1101 provides, in pertinent part, for various remedies. In the event of a breach by one spouse of the fiduciary duties under Sections 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."[54] If by virtue of the breach the spouse is found to be guilty of oppression, fraud, or malice,[55] 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."[56]

Public policy in California requires both spouses to avoid conduct that may cause or give rise to undue influence. The Fourth District Court of Appeal in *In re Marriage of Feldman*[57] recently held that a trial court in a dissolution proceeding properly ordered a husband to pay $250,000 in sanctions and $140,000 in attorney's fees to his wife as a result of his nondisclosure of financial information regarding a million-dollar bond purchase, the existence of a 401k account, a multimillion-dollar home purchase, and the existence of several privately held companies. The *Feldman* court made reference to pertinent Family Code statutes concerning disclosure and, in particular, held that sanctions may be imposed on a spouse who breaches his or her fiduciary duties regardless of whether harm resulting from the breach has been established. *Feldman* requires litigants and lawyers to be especially cognizant of the sanctity of full and clear disclosure and avoidance of bad faith conduct.

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.[58]

Mere opportunity to exert undue influence, however, does not raise a presumption that the spouse in fact did so.[59] 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.[60] 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.[61] Merely contacting an attorney on behalf of a spouse to make a will has been held insufficient to support this element of the analysis.[62]

Likewise the requirement of undue profit must be proved before the presumption is raised. *Estate of Sarabia*,[63] although not a case involving intraspousal undue influence, is highly instructive regarding 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."[64] 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.[65]

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." According to the court, "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." The court called this stan-

dard "unworkable."[66] Moreover, limiting the inquiry to the four corners of the will would 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."[67] Also, by limiting the inquiry merely to the provisions of the will, the previous instruments executed by the testator would be ignored, as well as other expressions of intent that do not appear in the will.[68]

The undue influence analysis is not limited to the effect of the influence on the testator. It seems that testators, too, can exercise undue influence from beyond the grave. In *Estate of Mader*[69] a husband directed his attorney to create a will and a form reflecting an election and waiver on the part of his wife. The wife was called into the attorney's office to sign the documents and declined to have the documents explained to her by the attorney. The result of the husband's will was that the wife, if she elected to follow its dictates upon her husband's death, would have provided her with less than her share of the community assets. The court of appeal stated that "[i]f 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."[70]

Fundamental Differences

In family law and probate the law seeks to root out what could be termed the unjust or unearned award of wealth. Nevertheless, fundamental differences exist between the two areas in the way judges are asked to make that determination.

A divorce proceeding involves only two parties, and therefore only those two parties 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.

In the process of property division, any transfer between the spouses can be subject to an undue influence analysis. While the burden rests on the party claiming undue influence in an interspousal 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 probate, as a comparison, scrutiny can be cast on anyone who might benefit from the donative transfer. While a special relationship between donor and donee—such as lawyer-client, caregiver-patient, and the like—will automatically raise a presumption of undue influence and might act to disqualify the recipient, such a relationship is not necessary for a finding of undue influence.

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. Spouses share the duty of the highest good faith and fair dealing—the same as between business partners. The law does not recognize a duty on the part of one spouse that it does not demand of the other. Indeed, 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 in one direction. The testator owes no duty to anyone. It is his or her will that is preeminent. The focus is on the one-way duties owed by lawyers to their clients and anyone with what could be considered "special" access to the testator, such as caregivers or persons in a confidential relationship with the testator who were active in procuring the testamentary instrument and received an "undue" profit by virtue of that instrument. Furthermore, a probate contest can theoretically be initiated by "any interested person."[71] 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.[72]

Burdens of proof also operate differently in family law than in probate. In family law, the disadvantaged spouse bears the initial burden of showing the court that the advantage gained by the other spouse was somehow unjust or otherwise without reciprocal benefit. As in *Burkle*, that fact that one spouse has a clear advantage 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 the interspousal transfer was not supported by adequate consideration, 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 probate, parties contesting testamentary dispositions carry the initial burden of proof to establish "unnatural dispositions"—including those that are at variance with the testator's previously stated wishes, made when opportunities existed for beneficiaries to exercise undue influence, or involve testators whose mental or physical condition made them susceptible to undue influence. This is not an easy burden for a contestant to carry. However, the contestant can shift the burden of proof by showing that the beneficiary 1) was in a confidential relationship with the settlor, 2) was active in procuring the instrument, and 3) as a result received an undue profit. Although by no means an easy hurdle to clear, especially regarding 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.

Despite the differences, however, the overall goal in 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 probate, the beneficiary must show that the testator's actual intent is represented by the challenged disposition. A higher standard, however, will apply if the beneficiary falls within the rubric of Probate Code Section 21350; that is, a court issues an order finding the transfer was not the product of undue influence, or an independent examining attorney offers a signed certification that the disposition represents the true will of the testator.

Probate and family law demand that practitioners enmesh themselves in the very private affairs of nuclear and extended families as well as other close but nonfamilial relationships and the relationships of former or current business partners. To the untutored, determinations of undue influence can seem subjective and open to interpretation. With proper and informed awareness, 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. ■

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[1] According to Civil Code §1575:

> 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, 160 Cal. 467, 480 (1911); *see also* Rice v. Clark, 28 Cal. 4th 89, 96 (2002).

[3] *See* Estate of Sarabia, 221 Cal. App. 3d 599, 605 (1990).

[4] *See* Estate of Anderson, 185 Cal. 700, 707 (1921).

[5] Keithley v. Civil Serv. Bd., 11 Cal. App. 3d 443, 451 (1970).

[6] Estate of Yale, 214 Cal. 115, 122 (1931); Estate of Lingenfelter, 38 Cal. 2d 571, 585 (1952); Estate of Gonzalez, 102 Cal. App. 4th 1296 (2002).

[7] Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123 (1966).

[8] PROB. CODE §8252(a).
[9] Estate of Sarabia, 221 Cal. App. 3d 599 (1990).
[10] *See* Estate of Auen, 30 Cal. App. 4th 300 (1994).
[11] *Id*. at 313.
[12] For further parsing of the term "care custodian," *see* Bernard v. Foley, 39 Cal. 4th 794 (2006).
[13] PROB. CODE §21351(a).
[14] PROB. CODE §21351(d).
[15] Probate Code §21351 provides:

> Section 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….

[16] In cases involving contracts, no statute expressly establishes who has the burden of proof.
[17] In re Ventura's Estate, 217 Cal. App. 2d 50 (1963) (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).
[18] *See* In re Lekos' Estate, 109 Cal. App. 2d 42 (1952).
[19] *Id*.
[20] PROB. CODE §21300(a).
[21] Scharlin v. Superior Court, 9 Cal. App. 4th 162, 169 (1992).
[22] PROB. CODE §21304.
[23] PROB. CODE §21300(b).
[24] PROB. CODE §21305(a).
[25] The term "marriage" here and later indicates both the institution defined in Family Code §300 and domestic partnerships as defined in §297.

The California Supreme Court's *In re Marriage Cases* decision recently opened state-sanctioned civil marriage in California to same-sex couples. In re Marriage Cases, 43 Cal. 4th 757 (May 15, 2008). The court's decision also explicitly ruled as unconstitutional Proposition 22, the Knight Initiative, which was passed by California voters in March 2000. Proposition 22 added §308.5 to the Family Code: "Only marriage between a man and a woman is valid or recognized in California."

California's domestic partnership scheme remains intact despite the recognition by the supreme court that the right to marriage extends to same-sex couples. Many consider it in the best interests of California same-sex couples who are considering marriage to also register as domestic partners. One reason is the possibility that Proposition 8, on the November 2008 ballot, may win the approval of California voters. This proposition seeks to amend the California Constitution in an identical fashion as Proposition 22 amended the Family Code. If it passes, the marriages between same-sex couples would be considered nullities. Proposition 8 will do nothing, however, to alter the grant of rights and responsibilities under the domestic partnership scheme. A remaining issue is whether the legislature or the courts will extend domestic partnership rights to opposite-sex couples in which both members are younger than 63—a segment of the population currently excluded from domestic partnerships.
[26] The statute references Corporations Code §§16403, 16404, and 16504 regarding the duties between two nonmarried business partners.
[27] *See* In re Marriage of Bonds, 24 Cal. 4th 1, 27 (2000); *see also* In re Marriage of Delaney, 111 Cal. App. 4th 991, 996 (2003).
[28] In re Marriage of Haines, 33 Cal. App. 4th 277, 297 (1995).
[29] *See* Dimond v. Sanderson, 103 Cal. 97, 101 (1894); *see also* In re Marriage of Burkle, 139 Cal. App. 4th

712, 733 (2006).
[30] *See* Dolliver v. Dolliver, 94 Cal. 642 (1892); *see also* Simmons v. Briggs, 69 Cal. App. 667 (1924).
[31] In re Marriage of Stevenot, 154 Cal. App. 3d 1051 (1984).
[32] The automatic mutual temporary restraining orders—or ATROs—that follow a filing of a petition for dissolution serve to enforce these fiduciary duties during the liminal period between separation and the divorce decree. *See* FAM. CODE §§231-235, 2040(a).
[33] PROB. CODE §16004.
[34] In re Marriage of Haines, 33 Cal. App. 4th 277, 296 (1995) (quoting Brown v. Canadian Indus. Alcohol Co., 209 Cal. 596, 598 (1930)).
[35] In re Marriage of Baltins, 212 Cal. App. 3d 66, 88 (1989).
[36] In re Marriage of Burkle, 139 Cal. App. 4th 712 (2006).
[37] *Id.* at 719-20. 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 million in June 1997.
[38] *Id.* at 723-24.
[39] *Id.* at 725.
[40] 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.
[41] *Id.* at 728.
[42] *Id.* at 729-36.
[43] *Id.* at 732.
[44] *Id.* at 730-31 (citing, inter alia, Dimond v. Sanderson, 103 Cal. 97, 102 (1894); Estate of Cover, 188 Cal. 133 (1922); In re Marriage of Baltins, 212 Cal. App. 3d 66, 88 (1989); In re Marriage of Haines, 33 Cal. App. 4th 277 (1995); In re Marriage of Delaney, 111 Cal. App. 4th 991, 996 (2003)).
[45] *Id.* at 731.
[46] *Id.* at 735-36.
[47] *Id.* at 736.
[48] The standard of proof to rebut a presumption of undue influence is that of substantial evidence. *See* In re Marriage of Matthews, 133 Cal. App. 4th 624, 632 (2005).
[49] Burkle, 139 Cal. App. 4th at 738-40.
[50] In re Marriage of Kieturakis, 138 Cal. App. 4th 56 (2006).
[51] *Id.* at 85.
[52] *Id.* at 87.
[53] *Id.* at 88-89.
[54] FAM. CODE §1101(g).
[55] *See* CIV. CODE §3294.
[56] FAM. CODE §1101(h).
[57] In re Marriage of Feldman, 153 Cal. App. 4th 1470 (2007).
[58] *See* In re Hettermann's Estate, 48 Cal. App. 2d 263 (1941) (finding undue influence by a wife who threatened to divorce her husband, commit suicide, or otherwise cause trouble should the husband execute a will leaving half of his property to his relatives).
[59] *See* In re Ricky's Estate, 64 Cal. App. 733 (1923).
[60] In re Teel's Estate, 25 Cal. 2d 520, 528 (1944).
[61] *See* In re Holloway's Estate, 195 Cal. 711 (1925).
[62] *Id.*
[63] Estate of Sarabia, 221 Cal. App. 3d 599 (1990).
[64] *Id.* at 604.
[65] *Id.* at 608.
[66] *Id.* at 607.
[67] *Id.* at 608.
[68] *Id.* at 607.
[69] Estate of Mader, 11 Cal. App. 3d 409 (1970).
[70] *Id.* at 417.
[71] PROB. CODE §§1043, 8004, 8250, 8270.
[72] Estate of Plant, 27 Cal. 2d 424 (1945).