PINELLAS COUNTY FL OFF. REC. BK 16369 PG 484

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
PROBATE & GUARDIANSHIP DIVISION
CASE NO. 06-6744ES-4

IN RE: THE ESTATE OF

VIRGINIA MURPHY,
Deceased.
_____/

JACK S. CAREY,

Petitioner,

Vs.

JACQUELINE ROCKE

Respondent.
_____/

ORDER ON OBJECTION TO PETITION FOR ADMINISTRATION AND ORDER ADMITTING WILL TO PROBATE

THIS CAUSE having come on to be heard upon the Petitioner's Objection to Petition for Administration and Objection to Appointment of Personal Representative, and the court having heard the testimony of the witnesses, arguments of counsel and, being otherwise fully advised in the premises, finds as follows:

Statement of Facts

Virginia Murphy, the decedent in the matter, died on September 6, 2006, leaving a gross estate of approximately $12 million. Born in 1899, she lived to be 107 years old. Most of those years were spent in the city of St. Petersburg, Florida. Virginia moved to St. Petersburg at the age of 3. She attended St. Petersburg High School and following

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graduation attended a music conservatories in Cincinnati, Ohio and Chicago, Illinois. While in Chicago, she met her first husband, Dr. Clarence Neymann, a psychiatrist on the faculty of Northwestern University Medical School. After his death in 1951, Virginia moved to Coral Gables and eventually returned to St. Petersburg in the early 1960's.

Upon her return, she became reacquainted with C. Frank (Cy) Harrison, an attorney, with whom she had attended high school. Cy Harrison, Jack Carey, William Carey (Jack's brother) and Jack and William's father composed the firm of Carey & Harrison. Virginia married Dr. Ralph Murphy, a pediatrician in St. Petersburg, in the late 1960's. Harrison drafted estate plans for Virginia and Dr. Murphy. After a brief marriage of just a few years, Dr. Murphy passed away in 1972. Dr. Murphy left a marital trust and a residual trust. Virginia had inherited from each of her husbands, but her income was principally derived from the estate of her first husband, Dr. Clarence Neymann. It was during this same period that Virginia became acquainted with her accountant, George Tornwall. Tornwall would later become her CPA, co-trustee and a named residuary beneficiary of her will.

In October 1983, C. Frank (Cy) Harrison, her attorney passed away. Subsequently, Jack Carey, assumed responsibility for Virginia Murphy's legal needs. He was assisted by Gloria DuBois, Mr. Harrison's legal assistant. At the time she engaged Mr. Carey as her lawyer, Virginia Murphy was 84 years old.

Carey and DuBois developed a personal relationship with Murphy. In 1984, less than a year after Harrison's death, Murphy executed a durable power of attorney, designating Carey and DuBois to make medical decisions for her and granting them access to her safe deposit box. In 1987, at the age of 88 years old and in failing health,

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Murphy employed DuBois to prepare checks for her to sign and to balance her checkbook. Later, DuBois would have a durable power of attorney which allowed her to manage every aspect of Murphy's life.

Virginia Murphy executed a number of wills between 1984 and 1994. In evidence are the wills of:

May 10, 1989, in which Jack Carey and Gloria DuBois are both beneficiaries of specific devises of $50,000.00. Murphy was 90 years old.

June 11, 1991, in which Jack Carey and Gloria DuBois are both beneficiaries of specific devises of $100,000.00 and one fourth of the residuary estate. Murphy was 92 years old.

February 4, 1992, in which Jack Carey and Gloria DuBois are both beneficiaries of specific devises of $100,000.00 and one fourth of the residuary estate. Murphy was 92 years old.

August 25, 1992, in which Jack Carey was the beneficiary of a specific devises of $100,000.00 and one third of the residuary estate; Gloria DuBois was the beneficiary of a specific devise of $150,000.00 and one third of the residuary. Murphy was 93 years old.

January 29, 1993, in which Jack Carey was the beneficiary of a specific devise of $100,000.00 and one third of the residuary estate; Gloria DuBois was the beneficiary of a specific devise of $150,000.00 and one third of the residuary estate. Murphy was 93 years old.

February 2, 1994, in which Jack Carey was the beneficiary of a specific devise of $100,000.00 and one third of the residuary estate; Gloria DuBois was the beneficiary of a specific devise of $150,000.00 and one third of the residuary estate. Murphy was 94 years old.

July 11, 1995, separate writing disposing of jewelry to Gloria DuBois, Delight Carey, and Claire Tornwall. Murphy was 96 years old.

The other residuary beneficiary of the February 2, 1994 will, George Tornwall, died in November 2005. Because there was no provision for any right of survivorship, Jack Carey and Gloria DuBois are the surviving residuary beneficiaries of the 1994 will. The gross estate is close to $12 million. After payment of costs and federal estate taxes,

the residuary estate is estimated to be approximately $7.2 million. In addition, Jack Carey is the nominated personal representative and presumably would be entitled to a reasonable fee as personal representative and an additional fee if he chose to serve as attorney for the personal representative.

The contestant in this matter is Jacqueline (Jackie) Rocke, Virginia Murphy's second cousin. Jackie was also a longtime resident of St. Petersburg. She visited Virginia in Chicago in the early 1960's. Over the years, Jackie and Virginia socialized in the St. Petersburg area, meeting for lunch, shopping and attending family and holiday gatherings. Virginia had often spent Christmas Eve and Christmas morning with Jackie's family. In addition to naming Jackie as a beneficiary of a specific devise of $400,000.00 in her 1994 will, Virginia chose to specifically devise a sum of $50,000.00 to each of Jackie sons in the last four wills that she executed.

Jackie Rocke, the petitioner, has contested the admission of the 1994 Last Will and Testament to probate. A counter-petition to admit the will executed in 1991 was withdrawn, *ore tenus*, on the first day of trial. The petitioner requests the court to find the residuary bequests to Carey and DuBois were a product of undue influence and revoke those residuary bequests in the 1994 will and allow the remainder of the bequests to stand. In the alternative, the petitioner has argued that the estate should pass by intestacy or according to the theory of dependent relative revocation.

Undue Influence

The probate of a will may be denied when it can be shown that the choices of the person exercising undue influence over the testator have been substituted for those of the

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testator. Under Florida law, this renders a will offered for probate invalid as the will is not the plan of the testator. Undue influence has been defined as that degree of force or persuasion exerted by another which is sufficient to destroy the desire and free agency of the testator. *See In re Dunson's Estate*, 141 So. 2d 601 (Fla. 2d DCA 1962). The Second District Court of Appeals has defined undue influence as follows:

> Undue influence, as it is required for invalidation of a will, must amount to over-persuasion, duress, force, coercion or artful or fraudulent contrivances to such a degree that there is destruction of the free agency and will power of the one making the will. Mere affection, kindness or attachment of one person for another may not of itself constitute undue influence.
> *Heasley v. Evans*, 104 So. 2d 854, 857 (Fla. 2d DCA 1958).

Although competency is not the issue in a case of undue influence, a testator who is weak-minded or unsophisticated may well be more susceptible to the influence of another than the average person. A degree of influence that would not be undue if exercised upon an average person may yet be undue if exercised upon a testator in weakened condition, if the result was the making of a will contrary to the testator's intent. *In re Reid's Estate*, 138 So. 2d 342 (Fla. 3d DCA 1962). In any case involving undue influence, the court may either void the portion of the will benefiting the undue influencer or invalidate the will in its entirety. *See In re Estate of Lightfoot*, 433 So. 2d. 607 (Fla. 4th DCA 1983); §732.5165, Fla. Stat.

Burden of Proof

There is no strict test to determine the existence of undue influence. Each case must be determined on its own facts. *Estate of MacPhee*, 187 So. 2d 679 (Fla. 2DCA

1966). Often the only evidence of undue influence is circumstantial evidence, because undue influence is rarely exercised in the presence of others. *Gardiner v. Goertner*, 149 So. 186 (Fla. 1933). For example, the domination of the testator's daily life by another person is often accomplished by separation of the testator from other people, conduct of the testator's business affairs and regulation of the testator's daily life. Circumstances which support an allegation of undue influence are described in *In re Estate of Carpenter*, 253 So. 2d. 697 (Fla. 1971).

The standard of proof in a case of undue influence as found by the Court in *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971) is a preponderance of the evidence. In order to find a presumption of undue influence, the Court in Carpenter required finding of (1.) a confidential or fiduciary relationship; (2.) the active procurement of the will by the beneficiary; (3.) and a substantial benefit to that beneficiary. In Florida, the presumption of undue influence is a rebuttable presumption. §733.107, Fla. Stat. Once proper and due execution of the will has been established, the contestant has the burden of presenting evidence to prove the elements of undue influence by a preponderance of the evidence. Once a prima facie case of undue influence has been established, the proponents of the will must come forward with evidence that the will was not the product of undue influence. *Diaz v. Ashworth*, 963 So. 2d. 731 (Fla. 3d DCA 2007).

The quantum of proof necessary to overcome a presumption of undue influence exercised by an attorney is arguably more than "a preponderance of the evidence". Some commentators have argued that "clear and convincing" evidence is required to rebut a presumption of undue influence on the part of the attorney. Citing *Ritter v. Shamas*, 452 So. 2d. 1057 (Fla. 3d DCA 1984), Rohan Kelley insists that *Carpenter* did

not supersede earlier cases requiring "clear and convincing" evidence. See *Rohan Kelley, Probate Litigation, PRACTICE UNDER FLORIDA PROBATE CODE §21-17(Fla. Bar CLE 2005).* Although this court may agree that a higher standard of proof is warranted when an attorney drafts a will in which the attorney becomes a beneficiary, this court believes that matter is more appropriately left to the legislature to clearly mandate. Although sound policy arguments may certainly be made to support a higher standard of proof in the instance of attorney self-dealing, the preponderance or greater weight of the evidence is the generally accepted burden of proof in civil matters. This court finds no authority to deviate from that standard here. *Hack v. Janes*, 878 So.2d 440 (Fla. 5th DCA, 2004).

The issue of whether an attorney may draft a will in which he is named as a beneficiary is not a new or novel question. Under Roman law, the scrivener of a will could not inherit under it. See Dig. 48.15 (supplement to the *lex* cornelia ordered in edict by Emperor Claudius). Although Florida law does not necessarily prohibit such a practice, an attorney naming themselves a beneficiary of a client's will opens himself/herself up to a charge of undue influence because of the peculiarly confidential relationship between an attorney and client. "The greatest trust between man and man is the trust of giving counsel". SIR FRANCIS BACON, *Of Counsel, in* Essays, Civil and Moral Ch. XX (Charles W. Eliot, ed. 1909-1914). at p. 181 (1846). "The duty to deal fairly, honestly, and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest over the lawyer's" *In re Cooperman*, 633 N.E. 2d 1069 (N.Y. 1994). Indeed, "the lawyer may not place himself in a position where a conflicting

interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship." *In re Kelly*, 244 N.E. 2d 456, 460 (N.Y. 1968).

The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client. "The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children and other next of kin." *Kirschbaum v. Dillon*, 567 N.E. 2d 1291, 1296 (Ohio 1990).

The Florida Bar has adopted ethical standards to provide professional guidelines for lawyers who find themselves in the situation of a client wishing to leave them a bequest.

> **Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any substantial gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.**
>
> R. Regulating Fla. Bar 4-1.8(c)

The Comment to Rule 4-1.8(c) this section provided a suggested procedure which might be curative of the inherent conflict of interest of an attorney/beneficiary.

> If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel.
>
> R. Regulating Fla. Bar 4-1.8, Comment "Gifts to Lawyers."

The court recognizes that a violation of a rule of professional conduct does not constitute per se proof of undue influence. The rule and its comment should be instructive to any lawyer on how to properly effectuate the testamentary wish of a client who wishes to make a gift to their lawyer without encumbering his client's estate with the time and expense of a will contest. Sadly, these suggestions were not followed in this case.

Confidential Relationship

Both Jack Carey and Gloria DuBois maintained a confidential relationship with Virginia Murphy. Carey had acted as her attorney since October 1983. In September 1987, Carey and DuBois became the medical decision makers for Murphy and were given access to her safe deposit box.

Virginia Murphy began to rely on Gloria DuBois in the mid-1980's. During this period, she became unable to balance her own checkbook. She began paying DuBois to prepare checks which Murphy would sign. At some later date, DuBois wrote and signed all of Murphy's checks. In November 1992, Murphy executed a durable power of attorney, naming DuBois her attorney-in-fact.

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It is unclear when DuBois' duties expanded beyond "helping" with Murphy's day-to-day finances. The medical records from her general physician, Dr. Aucreman, reflect that she began to steadily decline mentally and physically in 1985. She developed difficulty in seeing and hearing. He noted in 1985 that Murphy was forgetful and easily confused. In 1987, Dr. Aucreman wrote "memory is horrible". In 1989, "confusion, memory diminishing". Sometime during this period, DuBois began to go to Murphy's condominium at least twice a week. She collected and opened her mail including bank statements. Later, she was employed by Murphy for $850.00 per month. She paid, hired and fired the round-the-clock nurses who were employed after Murphy fell and broke her shoulder in December 1992. Currently, pending in the estate administration is a claim against the estate by DuBois for $54,981.67. DuBois is seeking compensation for "personal expenses paid for decedent in accordance with her wishes as discussed with the undersigned (Gloria DuBois) over the course of years acting as Decedent's Power of Attorney." Ultimately, all of the trust accountings were sent to DuBois' private residence. Clearly, DuBois became a controlling force in Murphy's life, sharing unusual knowledge of her personal affairs. Carey and DuBois, in their respective capacities as attorney and attorney-in-fact had a fiduciary, and therefore, confidential relationship with the testator.

Substantial Beneficiaries

At the time of her demise, Murphy had a substantial estate. The majority of her assets could be characterized as stocks and bonds. For sentimental reasons, she had insisted upon retaining and not selling stock in the Esso and Wrigley Corporations. She

had owned these stocks for decades. As co-trustee of her trust, George Tornwall (now deceased) was instructed to make sure the bank[1], also a co-trustee, did not sell the stock. Those stocks account for a substantial amount of the estate value, as well as the estate tax. The initial estimate of taxes owed by the estate is approximately $4.2 million.

In the 1980's, many of the devises contained in Virginia Murphy's estate were charitable. The largest bequest was to Northwestern University Medical School. In a letter to Virginia Murphy in February 1986, Carey advised her that the school was to receive over $500,000.00. In fact, at the time, as a residuary beneficiary, she was informed that the school would have been the recipients of $1,750.000.00. Murphy subsequently removed the school as a residuary beneficiary and made a specific bequest of $500,000.00. This seems to be the only documented instance when Jack Carey advised Murphy on the size of her residual estate. In doing so, both he and DuBois ultimately benefitted by being substituted as beneficiaries of a large residuary estate.

After the execution of the 1989 will, there is no evidence that Carey ever discussed with or mentioned the size of her estate to Murphy or anyone else. Significantly, the bank as co-trustee, never received a copy of any subsequent wills after the 1985 will. In correspondence to the bank, Carey asked the bank not to contact his client, but rather to contact him because his client "became flustered". This was contradicted by his own testimony that he never saw Murphy flustered. This court can only conclude that Carey did not want anyone from the outside lending their opinions and advice to Murphy.

[1] "The Bank" refers to Union Trust National Bank and all of its subsequent incarnations: Landmark, C&S, Barnett, Bank of America.

By his own admission, Carey stated be never did any tax planning for Murphy. Despite the fact that his office had a partner with an LL.M in taxation, none of this expertise was brought to bear in handling an estate with an evergrowing, taxable residuary estate. When asked about this, Carey admitted her estate was growing "like top seed" (sic). This could only mean, that as long as Murphy's customary specific monetary bequests remained proportionately modest, the residue and benefit to the residuary beneficiaries would only increase over time. Any attempt to minimize the tax consequences through charitable bequests or other available estate planning devices would necessarily reduce the size of the residuary estate.

Presently, there are only two remaining residuary beneficiaries: Jack Carey and Gloria DuBois. If the tax estimates are accurate, they each stand to inherit more than $3.5 million. In addition, there are specific monetary devises of $100,000.00 to Jack Carey and $150,000.000 to Gloria DuBois. Under any measure, these two individuals must be considered substantial beneficiaries of Murphy's estate under the 1994 will offered for probate.

Active Procurement

The Court in *Carpenter* outlines a fact-finding approach to the issue of active procurement. The Court suggested several criteria to be considered in determining active procurement: (1.) presence of the beneficiary at the execution of the will; (2.) presence of the beneficiary on those occasions when the testator expresses a desire to make a will; (3.) recommendation by the beneficiary of an attorney to draw the will; (4.) knowledge of the contents of the will by the beneficiary prior to execution; (5.) giving of instructions on

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preparation of the will by the beneficiary to the attorney drawing the will; (6.) securing of witnesses to the will by the beneficiary; (7.) safekeeping of the will by the beneficiary subsequent to execution. This is not an exhaustive list of possible indictors of active procurement. As the *Carpenter* Court points out, not all criteria must be proven to demonstrate active procurement. Indeed, other relevant considerations are present in this case besides those identified in *Carpenter*.

While the court is only concerned with the validity of the 1994 will, Carey and DuBois had established a pattern of conduct with Virginia Murphy by assisting her with six wills between May 1989 and February 1994. Beginning with the will of June 11, 1991, when Carey and DuBois first became residuary beneficiaries of Murphy's estate, DuBois would receive the changes to the will from Carey; type the will; contact an outside lawyer to supervise the execution; make the appointment for the will execution; arrange for Murphy's transportation (if not executed in Murphy's condo); remain present in another room during the execution; confiscate the original will immediately following execution and return it to Jack Carey; and have the invoice from the supervising attorney submitted to Carey & Harrison for payment.

In the present case, the 1994 will was marked by the same pattern. By the time, the 1994 will was drafted and executed, DuBois was virtually in control of all of Murphy's affairs, supervising her financial and personal needs. She controlled the nursing staff, the mail, and the finances. By now, DuBois was retired as a legal secretary and devoted her professional time and attention solely to Murphy. Jack Carey closed his practice in June 1993, after the departure of the only remaining partner, Marian McGrath.

After the closing of his office Carey sold his practice, with the exception of one case: Virginia Murphy. Her client files remained in his residence. He agreed to go to work at Harris, Barrett, Mann & Dew as an associate, not wishing to have the responsibilities of a shareholder or partner. He remained at Harris, Barrett, Mann & Dew until 2001 when he retired from the practice of law. When he retired he again retained one client: Virginia Murphy. In his own words:

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Q: Did you retire after you left Harris, Barrett, Mann & Dew?
A: Yes.
Q: So you retired in approximately 2001?
A: Formally. And, actually, I remained there a year after I retired winding down some ongoing estates that I was personal representative to them and a trust in which I was trustee.
Q: Did you take any clients from Carey & Harrison to Harris, Barrett, Mann & Dew?
A: I took all my clients.
Q: Approximately how many clients did you

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have?
A: No way of knowing.
Q: More than twenty?
A: I would say so.
Q: More than fifty?
A: I had a cabinet full of wills.
Q: Did you take any clients that were not estate and trust clients?
A: I think so.
Q: Was Virginia Murphy a client that you took with you between firms?
A: No. That was by the employment contract she was expressly excluded.
Q: And when you say she was expressly excluded, what does that mean?
A: Well, I sold my practice to Harris, Barrett expressly excluding Virginia Murphy.
Q: Okay. So all other clients of yours were sold with your practice except for Virginia

Murphy?
A: Right.
Q: How come she was excluded?
A: Well, you have seen her will, I just wanted to retain control of that matter. And as it turned out there was nothing to do after that.

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Q: When you say you wanted to retain control of the matter based on the will, you mean because you were named as a beneficiary and personal representative?
A: Primarily personal representative.
Q: Were you named as a personal representative for the will of any client as part of the practice that was sold to Harris, Barrett, Mann & Dew?
A: Yes.
Q: Approximately how many wills would you estimate that you were personal representative that were sold to Harris, Barrett, Mann & Dew.
A: I have no way of even hazarding a guess.
Q: Okay. How come you didn't also retain those clients?
A: Primarily because I wasn't beneficiary.
Q: Have you ever been a beneficiary in a will of a client that wasn't related to you other than Virginia Murphy?
A: Yes.
Q: Okay. How many occasions?
A: Right now I can only think of one. I know there have been others, but I can only think of one.

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Q: And with respect to that client is that client still alive?
A: No.
Q: So did you receive a bequest under the will of that client?
A: Yes.
Q: And what year was that?
A: I would say twenty years ago.
Q: Twenty years ago?
A: Approximately, give or take
Q: Approximately mid 1980s somewhere?

A: Something like that, yeah.
Q: And what bequest did you take from the client, was it monetary sum or was it property?
A: No, it was monetary.
Q: What was the amount?
A: Approximately six figures.
Q: Okay. When you say -- can you be more specific? Was it just north of a hundred thousand dollars?
A: Approximately.
Q: Was there a will contest in that matter?
A: Nope.
Q: With that particular client what was your relationship with that client that caused you to

Page 22 Lines 1 through 25

be named a beneficiary in the will, to your knowledge?
A: Nothing special.
Q: Did you know that you were beneficiary to that client's will prior to the person dying9
A: Yeah.
Q: How did you know that?
A: She told me she wanted to do it and I got another attorney to prepare the will.
Q: And what other attorney prepared the will?
A: I don't recall at this point.
Q: And why did you have another attorney prepare the will?
A: Pretty much the regulations required it.
Q: When you say regulations, what regulations are you referring to?
A: Attorney-client.
Q: Was it your understanding it was improper for an attorney to prepare a will in which the attorney is a beneficiary?
A: Yes.

Record, Deposition of Jack Carey.
September 20, 2007

In addition to retaining the original client file and will, Carey continued to communicate with his former legal assistant DuBois concerning Murphy.

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The final will prepared for Murphy was executed on the February 2, 1994 will. The execution of this will was overseen by attorney N. Jack Thomas. Thomas testified that Carey contacted him concerning the changes to the will. Carey conceded at trial that he prepared the will. Although Thomas had supervised a 1993 will execution, he had no contact with Murphy between the 1993 and 1994 will signings. Thomas recalls taking witnesses and the will to Murphy's condo. DuBois had made the appointment and was present in another room. Thomas provided no independent legal advice to Murphy. He returned the original signed will to Jack Carey. There was conflicting testimony regarding who typed the 1993 and 1994 wills. If Gloria DuBois did not actually prepare the will, she was aware of all changes to the will nonetheless. Documentary evidence indicates that after retiring from Carey & Harrison, she was supplied with copies of Murphy's wills by Jack Carey.

The court cannot look at the 1994 will alone. In attempting to divine the testator's intent, it is often helpful to analyze previous wills and patterns of giving. Over many years, Murphy had made a number of specific devises to individuals who had helped her. She consistently made charitable bequests to St. Petersburg Junior College, All Children's Hospital, Christ United Methodist Church, Pioneer Park Foundation, Bayfront Medical, Disabled American Veterans, Salvation Army, Museum of Fine Arts of St. Petersburg and Northwestern University Medical School. While he was alive, Murphy named Cy Harrison, her attorney, as a specific beneficiary of $35,000.00 in her 1983 will. This court accepts that making a gift to her attorney and his office legal staff was not out of the ordinary for Murphy.

However, what is out of character and the court finds suspicious is the size of the bequest to Carey and DuBois because of all of the surrounding circumstances, including evidence that Murphy's physical health was declining and her dependence on others was increasing. Even Jack Carey testified that he doubted she knew the size of her estate.

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Q: Do you recall that she would get flustered?

A: Nope, I don't think she did. I think I just put that as an excuse for him to contact me because I'm not real sure that Mrs. Murphy was aware of the magnitude of her estate. Because,

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like top seed (sic) it was continuing to grow.

Q: Didn't you think it was important for her to be aware of the magnitude of her estate?

A: Well, she got her statements and was able to review them. I'm just not sure to what extent that she comprehended.

Q: And why do you believe she might not have been aware of the magnitude of her estate?

A: Because just of the size of the numbers and they changed, you know, they changed every month.

Q: I'm not sure I understand. You mean the numbers were so large she just couldn't get her arms around it?

A: Yes, that's a good way to put it. Yes.

Record, Deposition, Jack Carey
September 20, 2007

The evidence shows it is unlikely that Virginia Murphy saw her monthly statements because DuBois collected them. Copies of her bank statements were also provided to Jack Carey. The evidence also shows that Murphy had cataracts and difficulty with her eyesight dating back to 1987.

To further illustrate her lack of understanding of her assets, one must only look at the facts surrounding the execution of her will in August 1992. On this occasion, attorney Luanne Ferguson was asked by Jack Carey to supervise a will execution. Significantly, this is the only matter he ever referred to Ferguson. Ferguson had previously supervised the 1991 will (which is the first time Tornwall, Carey and DuBois appear as residuary beneficiaries) and the 1992 will. The 1992 will was prepared by Jack Carey and typed by Gloria DuBois. It was provided to Ferguson the night before the signing on August 25, 1992. Gloria DuBois scheduled the appointment and brought Murphy to Ferguson's office. DuBois remained in an outer office, but once the will was signed, DuBois took the original document and returned it to Carey & Harrison. DuBois instructed Ferguson to submit her bill for her services to Carey & Harrison.

Attorney Ferguson is the only lawyer who has provided the court with any contemporaneous memoranda concerning a will execution. The execution of the August 25, 1992 was detailed in a memo of the same date. After reviewing the will prepared by Carey, Ferguson noticed that there had been "substantial changes in format." She contacted Marian McGrath at Carey & Harrison and questioned the changes. Ferguson also questioned McGrath regarding the size of the estate and the tax consequence of the changes. McGrath contacted Ferguson the next day and told her the will had been restored to the former format and she had prepared a summary of assets, estimated taxes and dispositions.

On the morning of August 25, 1992, Murphy was transported to the office by Gloria DuBois to execute a new will. When questioned by Ferguson, Murphy was able to recall the specific devises she wished to include. She also had removed her cousin

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Jackie Rocke as a residuary beneficiary, stating she thought Jackie "had enough". Not feeling comfortable about the bequests to Carey, Tornwall, and DuBois, and the concomitant removal of the only close relative as a residuary beneficiary, Ferguson made an appointment with Murphy and went to Murphy's residence the same afternoon. Ferguson pointed out certain facts that might subject the will to challenge: the will had been prepared in the offices of Carey & Harrison; DuBois scheduled her appointment and brought her to the office; DuBois asked her to send the bill to her; and DuBois took the original will with her. Murphy expressed surprise that anyone would find it unusual that she was bequeathing more than $200,000.00 to her attorney, his secretary, and her accountant. Murphy attempted to correct Ferguson by stating she was only leaving them each $100,000.00 (in fact, she left DuBois $150,000.00). Ferguson offered that she was including the residue. Murphy indicated that she believed her medical care would consume most of the residue and "there would not be enough left to amount to anything". Certainly she did not understand the nature and extent of her bounty. (At that time, her gross estate was $4.45 million.) Ferguson recommended to Murphy that she seek independent legal advice and never saw Murphy again.

The court has detailed the facts of the August 1992 will execution in order to demonstrate how little Murphy understood of her assets. While understanding the nature and extent of one's bounty is not an element of undue influence, it is indicative of the extent to which Virginia Murphy was kept in the dark by those she blindly trusted. In addition, Luanne Ferguson was not the only lawyer whose advice on how to shield Virginia Murphy's last wishes from challenge was ignored by Jack Carey. Marian McGrath, Carey's former law partner, testified that her departure from the law firm was a

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result of a disagreement between her and Carey concerning the Murphy will. She considered the inclusion of Carey and DuBois as beneficiaries of the will, without Murphy having the benefit of independent counsel, unethical. Carey respectfully disagreed and was indifferent to her concerns.

The 1994 will also contains a separate writing which was executed on July 11, 2005. The separate writing is incorporated by reference in the 1994 will be Article 5. This separate writing was prepared by Gloria DuBois and provided for the disposition of tangible personal property as follows:

To my friend, Clarie W. Tornwall	my diamond half moon pin
To my friend, Delight T. Carey	my diamond sunburst pin
To my friend, Gloria DuBois	my gold two stone diamond ring and my mother's wedding band

All the rest of her personal property, including jewelry, furniture and fixtures was to be first offered to the Tornwalls, the Careys and the Duboises. After they completed their choices, the nurses and Murphy's friends could choose, subject to Gloria DuBois' approval. The medical records placed in evidence show that Murphy was suffering from senile dementia in 1995. Consequently, the preparation of this separate writing was improper at best, and an act of gross overreaching at worst.

The document in evidence which the court finds most convincing is, and will be subsequently referred to, as "The Agreement" (see attached Exhibit B). Reducing it to its simplest form, The Agreement signed by Tornwall, Carey, DuBois and all of their spouses, is a self-serving statement that no breach of fiduciary duty had occurred, as of the date of signing: August 28, 2002. It further provided that should any of the parties

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have a mind to upset the grand plan, they should first check with the other two parties. They further agreed that, if one of the parties took action which appeared to be a conflict of interest, they would not sue each other unless the other party engaged in an act of moral turpitude or gross negligence. The Agreement assumes that no overt conflict of interest had previously existed as to Carey and DuBois, as the beneficiaries of the six wills executed between 1989 and 1994. This is the contractual equivalent of "Pay no attention to that man behind the curtain." This document wreaks of a consciousness of fraud, and the court finds it to be persuasive evidence of undue influence. The Agreement is also compelling evidence that the perpetrators knew all of the elements of undue influence were present. The consistent and repetitive failure to conform their behavior to the ethical guidelines, which could have saved all concerned from an expensive and protracted trial is reminiscent of the *South Indian Monkey Trap*[2]. Tempted by the value of the bequest, Carey and DuBois could not let go. Indeed, Jack Carey has done exactly what Jackie Rocke testified he promised her: "We'll fight you tooth and nail."

The plaintiffs have established, by a preponderance of the evidence, the elements necessary to raise the presumption of undue influence.

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[2] The "South Indian Monkey Trap" was developed by villagers to catch the ever-present and numerous small monkeys in that part of the world. It involves a hollowed-out coconut chained to a stake. The coconut has some rice inside which can be seen through a small hole. The hole is just big enough so that the monkey can put his hand in, but too small for his fist to come out after he has grabbed the rice.

Tempted by the rice, the monkey reached in and is suddenly trapped. He is not able to see that it is his own fist that traps him, his own desire for the rice. He rigidly holds on to the rice, because he values it. He cannot let go and by doing so retain his freedom. So the trap works and the villagers capture him.

See Robert M. Persig, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES Ch. 26 (William Morrow & Co. ed. 1974).

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Will Proponents

Pursuant to §733.107(2), Fla. Stat., the presumption of undue influence by a fiduciary implements public policy and is, therefore, a presumption shifting the burden of proof under §§ 90.301-90.304, Fla. Stat. Thus, when the presumption of undue influence arises, the fiduciary alleged to have committed undue influence bears the burden of proving there was no undue influence.

In this case, the proponents of the will, Carey and Dubois, have not disputed with the facts that constitute undue influence. Neither of them have denied any of the circumstances surrounding the execution of the will. Neither of them have denied their fiduciary relationship with the decedent. Instead, the proponents have argued that the appearance of undue influence is simply based on innuendo and suspicion.

Contrary to the proponents' contention that the will expressed the intentions of the testator is the substantial evidence of a shockingly laissez faire attitude toward providing any financial/tax advice or any estate planning. Virginia Murphy had no concept of the size of her estate or how rapidly it was expanding. The court acknowledges that tax savings are not always the overarching goal of every testator. It is relatively clear from the correspondence of George Tornwall to Virginia Murphy on February 26, 1985, that the costs of probate and related taxes were of no concern to her. For this reason, the proponents argue that the absence of any efforts to minimize taxes or the costs of probate is immaterial and that the 1994 will reflects the testator's intent.

To be sure, the court's primary consideration is to effectuate the testator's intent. "[T]he intention of the testator is the polar star by which a probate court sets chart and compass....." *In re Estate of Roberts*, 367 So. 2d. 269, 271 (Fla. 3d DCA 1979). The

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proponents contend that when Murphy died, her will was exactly as she wanted it. The court accepts that the character of the disposition of her property had been consistent over time. She was a benefactor to the charities and the same individuals for years with few changes to the specific bequest in her wills. (see attached Exhibit A.) This fact alone makes the execution of so many wills surprising and puzzling.

Further, the proponents argue that there was no ethical violation in the preparation of the wills by Carey and Dubois. This court must respectfully disagree. This court has never viewed a will contest where so many *Carpenter* factors were present. Other suspicious circumstances surrounding Carey and DuBois' dealings with Murphy include "The Agreement"; the failure to inform Murphy of the present value of her estate or to project the future value of her assets; the concerted effort to keep the bank, as co-trustee, from contacting Murphy; Murphy's statements to attorney Ferguson demonstrating her lack to knowledge of her assets; Jack Carey's own statements reflecting his doubts about her understanding; and Murphy's personality and physical condition.

Virginia Murphy never came alive for the court during this litigation. In most every will contest, there is a moment when the court begins to see a portrait of who the decedent was. That did not happen in this case. No evidence was presented, of her personality: whether she was strong willed, knew her own mind; was good with figures; loved to dance; had a good sense of humor, etc. No evidence was presented to guide the court in evaluating her testamentary resolve or her ability to resist the suggestions of others.

The court is, however, aware of many factors which made Virginia Murphy dependent. By everyone's account, she never learned to drive. There was no testimony

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that she had ever held a job. She was the widow of two doctors who left her financially comfortable. She never had children. She outlived most of her friends and family. In 1994, at the age of 95, Virginia Murphy was in declining health. She regularly had dizzy spells, was hard of hearing, suffered from cataracts, depression, progressive senile dementia, hypertension, and congestive heart failure. In fact, Virginia Murphy became so hard of hearing that she avoided social functions and became more and more isolated and dependent on Gloria DuBois and her nurses. She had round-the-clock care in home for the last 14 years of her life. Yet, despite all of these conditions, she lived to be 107 years old.

The respondent has argued that a violation of the Rules of Professional Conduct does not provide a basis for a finding of undue influence in this case. This court agrees. In Florida, a violation of the Rules does not directly prove undue influence. The attorney-client relationship simply establishes one element of undue influence. The Rules establish a standard of conduct which, if followed, might avoid allegations of undue influence. To ignore that established standard of care when, in fact, the Rules are common knowledge within the profession, and one has been advised of the ethical problems, demonstrates a consciousness of the conflict of interest. The behavior demonstrated by the alleged undue influencers, in the face of knowledge of the curative steps which could have been taken to insure a valid bequest, was no more than a half-hearted attempt to comply with the ethical standard expected of the legal profession. This bears on the credibility of the testimony and the knowing, planned and measured conduct of the two beneficiaries in question: Jack Carey and his legal assistant, Gloria DuBois.

It is difficult to completely separate the allegation of undue influence from the disciplinary rule because of the inherently confidential nature of the attorney-client relationship, which is an element of undue influence. Additionally, the attorney whose bequests are at issue in this case was himself sixty-eight years old and retired at the time of the 1994 will. This court must acknowledge that Mr. Carey has had an exemplary career in the legal profession. He enjoys a reputation as an honest professional and a civic-minded citizen of great integrity. For this reason, deciding the facts and issues in this case has been especially painful and troubling. The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct.

Conclusion

The court finds, by the greater weight of the evidence that the proponents of the 1994 will have not sustained their burden to show that the residuary bequests to them were free from the taint of undue influence. Pursuant to § 732.5165, Fla. Stat., the residuary clause (Article 15) contained in the February 2, 1994 document and the separate writing of the July 11, 1995 are void. The remainder of the provisions of the will are valid and shall control the disposition of those assets specifically devised; it is therefore

ORDERED AND ADJUDGED that the objection to the Petition for Administration is granted in part and denied in part; it is

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FURTHER ORDERED AND ADJUDGED that the instrument presented to the court as the Last Will and Testament of Virginia E. Murphy, deceased, bearing the date of February 2, 1994 is admitted to probate according to law as the last will of the decedent; except Article 15 and the separate writing, incorporated by reference, are void and the rest, residue and remainder shall pass by the laws of intestate succession; it is

FURTHER ORDERED AND ADJUDGED that the court retains jurisdiction of the subject matter and the parties to this action to enter such other and further orders as are necessary, including reasonable fees and costs.

DONE AND ORDERED this 1st day of August, 2008 in St. Petersburg, Pinellas County, Florida.

Original Signed

AUG 01 2008

Lauren C. Laughlin
Circuit Judge

LAUREN C. LAUGHLIN
Circuit Judge

Exhibit 4

WILLS OF VIRGINIA E. MURPHY

BENEFICIARY'S NAME	5/10/1989	6/11/1991	2/4/1992	8/25/1992	1/29/1993	2/2/1994
ST. PETERSBURG COLLEGE	$ 75, 000.00			$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
ALL CHILDREN'S HOSPITAL, INC	$ 75, 000.00			$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
CHRIST UNITED METHODIST CHURCH	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00
PIONEER PARK FOUNDATION	$ 15, 000.00	$ 15, 000.00	$ 15, 000.00	$ 15, 000.00	$ 15, 000.00	$ 15, 000.00
BAY FRONT MEDICAL CENTER	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
DISABLED AMERICAN VETERANS NATIONAL HEADQUARTERS	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
THE SALVATION ARMY	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00	$ 100, 000.00
THE STUART SOCIETY OF THE MUSEUM OF FINE ARTS OF ST. PETERSBURG	$ 25, 000.00	$ 25, 000.00	$ 25, 000.00	$ 25, 000.00	$ 25, 000.00	$ 25, 000.00
MEMORIAL SLOAN-KETTERING CANCER CENTER	$ 25, 000.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
WESLEY HOSPITAL	$ 100, 000.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
BEATRICE FRETWELL	$ 75, 000.00	$ 200, 000.00	$ 200, 000.00	$ 100, 000.00	$ 100, 000.00	$ 0.00
JAMES FRETWELL (SON OF BEATRICE FRETWELL)	N/A	N/A	N/A	N/A	N/A	$ 50,000.00
JOHN FRETWELL, DECEASED (SON OF BEATRICE FRETWELL)	N/A	N/A	N/A	N/A	N/A	$ 50,000.00
JACQUELINE ROCKE	$ 150, 000.00	$ 400, 000.00+1/4 Res	$ 400, 000.00+1/4 Res	$ 400, 000.00	$ 400, 000.00	$ 400, 000.00
MARY JEAN WALKER	$ 50, 000.00			$ 0.00	$ 0.00	$ 0.00
ROBERT ROCKE	$ 50, 000.00	$ 0.00		$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
MICHAEL S. ROCKE	$ 50, 000.00	$ 0.00		$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
JAMES THURMAN	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 0.00
JAMES E. THURMAN, JR.	N/A	N/A		$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
BILLIE JAPOUR AND MARGARET JAPOUR	$ 150, 000.00	$ 75, 000.00		$ 50, 000.00	$ 50, 000.00	$ 100, 000.00
MARY ANN HARRISON	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
GEORGE E. TORNWALL	$ 50, 000.00	$ 100, 000.00+1/4 Res	$ 100, 000.00+1/4 Res	$ 100, 000.00+1/3 Res	$ 100, 000.00+1/3 Res	$ 100, 000.00+1/3 Res
JACK S. CAREY	$ 50, 000.00	$ 100, 000.00+1/4 Res	$ 100, 000.00+1/4 Res	$ 100, 000.00+1/3 Res	$ 100, 000.00+1/3 Res	$ 100, 000.00+1/3 Res
BARBARA J. THOMAS	$ 10, 000.00	$ 10, 000.00	$ 10, 000.00	$ 10, 000.00	$ 10, 000.00	$ 10, 000.00
GLORIA R. DUBOIS	$ 50, 000.00	$ 100, 000.00+1/4 Res	$ 100, 000.00+1/4 Res	$ 150, 000.00+1/3 Res	$ 150, 000.00+1/3 Res	$ 150, 000.00+1/3 Res
E.E. KNUTSON	$ 10, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
JANE LANGENDORFER (MRS. IRVING)	$ 5, 000.00	$ 10, 000.00	$ 10, 000.00	$ 5, 000.00	$ 5, 000.00	$ 5, 000.00
MARILYN HAUN *	$ 25, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00	$ 50, 000.00
NORTHWESTERN UNIVERSITY MEDICAL SCHOOL	Residual	$ 500,000.00	$ 500,000.00	$ 500,000.00	$ 500,000.00	$ 500,000.00
MARY ANN GRIFFIN***	N/A	N/A	N/A	N/A	N/A	$ 50, 000.00
SALLY S. BOISSY***	N/A	N/A	N/A	N/A	N/A	$ 50, 000.00
ZOE MACKENZIE***	N/A	N/A	N/A	N/A	N/A	$ 50, 000.00
OTHER CAREGIVERS EMPLOYED BY VIRGINIA E. MURPHY AT THE TIME OF HER DEATH	N/A	N/A	N/A	N/A	N/A	$ 10, 000.00

***** MUST BE EMPLOYED, BY VIRGINIA E. MURPHY , AS HER NURSES AT THE TIME OF HER DEATH**

In Re: Estate of Virginia E. Murphy
Case No. 06-6744-ES-04
I.D. _____ Evidence _____
Respondent Exhibit #51
Deputy Clerk _____

EXHIBIT
CAREY
11
9-20-07

AGREEMENT

THIS AGREEMENT made this 28th day of August A. D. 2002, between **GEORGE E. TORNWALL**, First Party, **GLORIA R. DUBOIS**, Second Party and **JACK S. CAREY**, Third Party;

Witnessth:

WHEREAS, First Party is Co-trustee of the Virginia E. Murphy Trust, dated March 7, 1975, hereafter referred to as "Trust" and in addition has been the long time, trusted friend and C.P.A. for Virginia E. Murphy, and

WHEREAS, Second Party is likewise a long time trusted friend of Virginia E. Murphy and for the many years has been serving as her Attorney-in Fact taking care of her day to day financial affairs, supervising her health care and generally managing all of her personal business, and

WHEREAS, Third Party has been the personal attorney for Virginia E. Murphy for approximately twenty years and in such capacity has performed those legal duties required, furnished such legal advise as requested and assisted First and Second Parties as needed, and

WHEREAS, the Parties hereto have been remembered by Virginia E. Murphy as her residuary beneficiaries following a number of specific bequests.

NOW THEREFORE, in consideration of the premises and the mutual promises of the Parties, each to the other, it is hereby covenanted and agreed as follows:

1. That the recitations set forth above are true and correct and constitute the basis for this agreement.

2. That each Party has full faith in the ability of each of the other Parties in the performance of their duties in the representation of Virginia E. Murphy and the "Trust". That if any Party, in the performance of their duties, feels uncomfortable with what they are doing or are being asked to do, they will consult with the other two Parties before making a commitment.

3. Each Party realizes, that as the residuary beneficiaries of Virginia E. Murphy's will, that decisions they make during her lifetime could have an effect on the size of her estate and therefore indirectly upon them. This condition creates a conflict of interest situation which to the date of this agreement none of

EXHIBIT B

Parties has taken advantage of to the detriment of Virginia E. Murphy or the "Trust".

4. Each Party, for themselves, their heirs, successors and assigns do hereby covenant and agree, each with other, that they will take no action nor perform any function for or on behalf of Virginia E. Murphy or the "Trust" that in their best judgment and good conscience would not be in the best interest of Virginia E Murphy or the "Trust". In addition each Party, for themselves, their heirs, successors and assigns covenant and agree that they will take no action against any of the other Parties, unless such other Party engages in conduct representing an act of moral turpitude or constituting gross negligence.

5. The spouse of each Party; CLAIRE W. TORNWALL, the wife of First Party, FRED M. DUBOIS, Jr., the husband of Second Party and DELIGHT T. CAREY, the wife of Third Party, also execute this Agreement thereby showing their concurrence and willingness to be bound by its terms and conditions.

IN WITNESS WHEREOF, the Parties and their spouses hereto have hereunto set their hands and seals the day and year first above written.

Witnesses:

HOWARD E. WARNS

MARJORIE A. WARNS
As to First Party and Spouse

AMY SENDIO

SONYA HECKE
As to Second Party and Spouse

PETE KRUGER

JILL N. EMERY
As to Third Party and Spouse

First Party

First Party's Spouse

Second Party

Second Party's Spouse

Third Party

Third Party's Spouse