

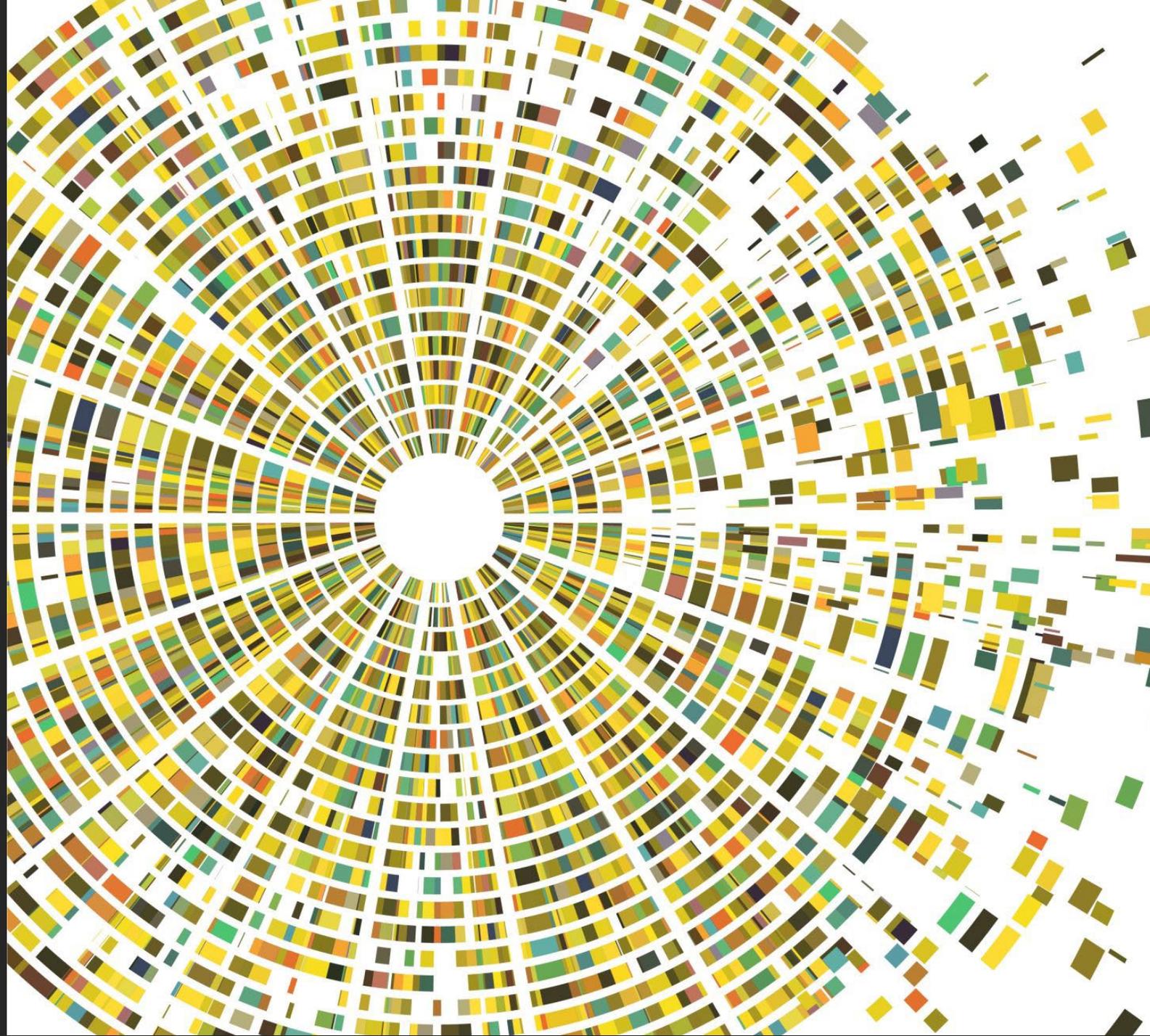
Undue Influence: The Dutiful Child Exception

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In Re Carpenter, 253 So.2d 697 (1971)

5 factors to show active procurement:

1. presence of beneficiary at execution of document

2. beneficiary's recommendation of an attorney to prepare the document

3. beneficiary's knowledge of the document's contents prior to execution

4. the beneficiary giving instruction to the drafting attorney

5. the beneficiary securing witnesses and safekeeping the documents

Hack v. Estate of Helling—added mental capacity and strengths of testator



Once there is sufficient evidence to raise the presumption of undue influence, the burden of proof is on defendant.

Section 733.107(2)—the presumption of undue influence implements public policy and is therefore a presumption shifting the burden of proof under section 90.301—90.304.



Historical Exception to Presumption of Undue Influence: Spouses

Goertner v. Gardiner, 125 Fla 477 (1936)

“In the law governing will contests there is no such thing as a confidential relation between husband and wife...”

“As between husband and wife, no presumption of undue influence flows from that relation.”

Tarsagian v.
Watt, 402
So.2d 471

Third District in 1981 follows Goertner and specifically found that the principle of Goertner—that a confidential relationship cannot be found as between spouses—survived In Re Carpenter.

“Were the confidential relationship between spouses not exempted from that presumption of undue influence rule, the presumption would arise in nearly every case in which the spouse is a substantial beneficiary, since the required active procurement would almost always be present. “


Carter v.
Carter, 526
So.2d 141
(Fla. 1st
1981)

The Dutiful Son case—applied the principle in Tarsagian regarding no presumption of undue influence between spouses, to the naturally close relationship that can exist between parent and child.



Jacobs v.
Vaillancourt,
634 So.2d
667 (Fla. 2nd
DCA 1994)

Extended the case law of Carter (dutiful son) to facts involving a dutiful son in law.

“If members of a family cannot discuss these matters without it being considered improper active procurement, we have finally demolished the family ties of love and natural affection.”

Estate of
Kester v.
Rocco, 117
So.3d 1196
(Fla. 1st DCA
2013)

Dutiful Daughter case

“Where communications and assistance are consistent with a dutiful adult child towards an aging parent, there is no presumption of undue influence.”



Breaking down Kester

Court found that “other witnesses described Mrs. Kester’s intelligence, mental acuity and her longstanding active participation in her own financial planning, such as investing in CD’s and shopping for favorable interest rates during the months prior to her death.”

Key finding

“The evidence that Glenna had a close relationship with her mother was insufficient to infer any undue influence. “

Translate: It is not enough to show a presumption of undue influence based upon a **parent-child relationship**.

Compare this to Goertner—the focus there was that husband-spouse relationship **was not the type of confidential relationship** that gives rise to the presumption of undue influence.

Other important facts to consider in Kester

Court noted that all of the kids had a close relationship with mother; and all assisted her with various tasks and transportation.

No witness testified that mother had lost her free agency prior to her death; no evidence of confusion.

Court found there was insufficient evidence of active procurement—Glenna was NOT present when mother changed beneficiaries on the financial accounts.

Mom gifted some her assets to her kids prior to her death

Equal treatment of her kids did not mean equal assets.



Question

Does Kester and Carter mean that you can never show a presumption of undue influence between a child and a parent?

NO—don't forget it must be a “dutiful” child

Look for ways to argue that the child was not dutiful

Question:

If you have facts supporting a dutiful child, must the court find that the presumption of undue influence does not apply?



Kester and Carter would suggest that the court cannot find that the presumption of undue influence applies.



Real Examples of trial courts applying Kester

Levine v. Stimmel (Orange County 2015)

Judge Don Meyers wrote: “A close and loving relationship between a daughter and her father is not, however, synonymous to a confidential relationship....Where communications and assistance are consistent with a ‘dutiful’ adult child towards an aging parent, there is no presumption of undue influence.”

Tampa
decision:
Kennedy v.
Kennedy
(Judge Don
Barbee, Jr)

Court found that daughter's involvement in dad's asset transferred satisfied nearly all of the Carpenter factors .

“The reason that the analysis cannot end here and find the presumption of undue influence is Florida's line of cases recognizing an exception for the “dutiful” sons and daughters.”

“Of all the people in the world, Kathleen would be the most logical person to assist her aging father in completing the tasks necessary to effectuate these transfers.

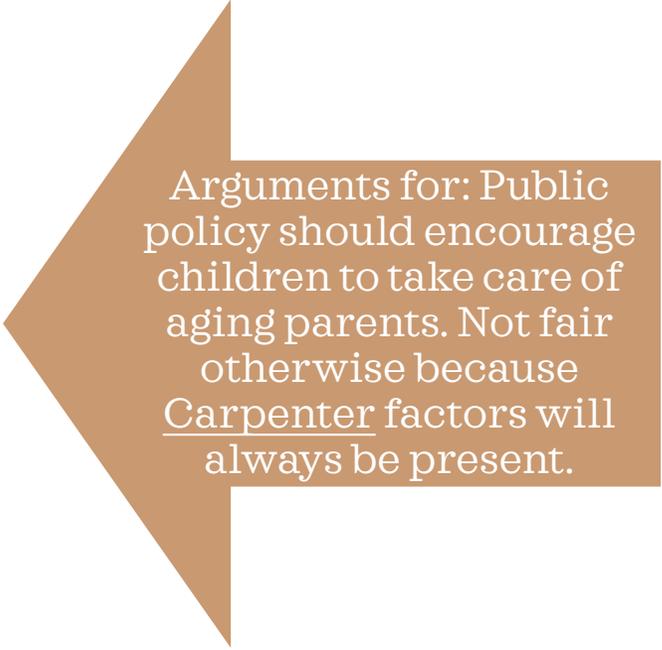


Does Kester
go too far ?

Is it “bad”
law” ?



Should it be the law that
the presumption of
undue influence does
not applies where there
is a dutiful child ?



Arguments for: Public
policy should encourage
children to take care of
aging parents. Not fair
otherwise because
Carpenter factors will
always be present.



Arguments Against Kester

Carpenter, a supreme court case, did not make an exception for dutiful children. There is no supreme court case that adopts the Kester/ Carter exception.

In fact, Carpenter involved a daughter who had a close relationship with her mother and who said she was doing what her mother asked her to do.



Look for Tarsagian/ Kester like arguments

Tarsagian (spouses) and Kester (dutiful child) may be extended to other similar relationships, regardless of legal or blood relationships.

Example: couples who have lived together for years but not married; stepkids/ step-parents.

Look for these opportunities and consider these cases!



Questions ?

(That's All)