

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE NO. SC05-71

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DR. GARY BRECHER

Petitioner,

v.

HUGH BRECHER AND ANNE GUTTENBERG, ETC. ET AL.

Respondents.

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**PETITIONER'S BRIEF ON JURISDICTION**

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ON DISCRETIONARY REVIEW FROM A DECISION OF THE  
FOURTH DISTRICT COURT OF APPEAL

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## **STATEMENT OF FACTS AND CASE**

1. The following statement of facts and of the case is based upon the Fourth District Court of Appeal's decision in *Newman v. Brecher*, 887 So.2d 384, 29 Fla. L. Weekly D2176, rendered in this case on September 29, 2004 ("Decision"). (A1).[A1 refers to Appendix at page 1].

2. Petitioners in the lower court sued to invalidate a trust based upon Respondents' alleged undue influence.(A1) Petitioners are two nephews of Rose Lipson ("Decedent") who died in 2000.(A1) Respondents are a nephew and niece of the Decedent.(A1)

3. In 1988, the Decedent's spouse died.(A1) In that same year, Decedent executed a will leaving her assets equally to her sister, Petitioners, and Respondents.(A1) In 1988, the Respondent who lived near the Decedent began to assist her.(A1) The Respondent who lived elsewhere began to visit the Decedent on a regular basis and later moved to Florida.(A1)

4. In 1991, Decedent executed a will and trust at Attorney Rubin's office leaving her residual trust estate equally to Respondents, with specific distributions of \$20,000 to Decedent's grand nieces and grand nephews.(A1) Decedent's prior equal devises to Petitioners were eliminated completely.(A1) One of the Respondents had taken the Decedent to Attorney Rubin's office and waited in Attorney Rubin's waiting room for over an hour.(A1, 2) Attorney

Rubin had been the attorney for the father of the other Respondent.(A2) That Respondent knew Attorney Rubin.(A2)

5. A physician specializing in psychology and human behavior testified that the Decedent may have been suffering from anxiety, could have had symptoms of early dementia in 1991, and was susceptible to undue influence.(A2)

6. In 1992, Decedent executed a trust amendment that reduced the prior specific distributions to her sister and grand nieces and grand nephews and added specific distributions to Petitioners for \$1000 each.(A1) Under the Trust amendment, Respondents continued to receive the residual assets.(A1)

7. Attorney Rubin testified that the Decedent told him "she had been told she had to leave a token payment to [Petitioners]", and that she insisted on doing that even after Attorney Rubin advised her to the contrary.(A3)

8. One of the Respondents had the Decedent's power of attorney and undertook responsibility for her personal affairs.(A1) The Respondents acted as the Decedent's primary caregivers until her death.(A1)

9. One of the Respondents had a copy of the trust before the Decedent died and received several gifts from the Decedent during the 1990's, including her home.(A2) The other Respondent received a \$74,000 certificate from the Respondent in 1994 and other monetary "gifts" between 1997 and 2000.(A2)

10. The trial court found that there was “evidence of undue influence”.(A2) However, at the close of Petitioners’ case to the jury, the trial judge granted Respondents' motion for directed verdict, finding the evidence insufficient to establish a prima facie case for undue influence.(A1)

11. The Fourth District Court of Appeal affirmed with written opinion, cited *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971), and stated that under Florida's new statutory presumption of undue influence [Fla. Stat. § 733.107 (2) (2003)] a presumption of undue influence only arises "if the plaintiff establishes that the defendant. . . was active in processing the instrument." (A2,3)

### **SUMMARY OF THE ARGUMENT**

12. Petitioner has properly invoked this Court’s jurisdiction because the Decision misapplies the landmark decision of *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971) and expressly and directly conflicts with *Carpenter* and *Hack v. Janes*, 878 So.2d 440, 443 (Fla. 5<sup>th</sup> DCA 2004) on the same question of law. The Decision misapplies *Carpenter* and conflicts with *Carpenter* and *Hack* by purporting to establish a new and different standard for determining when Florida’s new statutory presumption of undue influence arises.

13. *Carpenter* established that a presumption of undue influence arises when a substantial beneficiary under a will occupies a confidential relationship

with the testator “and is active in procuring the contested will.” (emphasis added) *Carpenter* stated that the critical issue regarding the latter element was “whether the facts . . . permitted an inference of . . . active procurement”(emphasis added).

14. *Carpenter* applies to undue influence actions involving inter vivos transfers and trusts.

15. Although *Carpenter* was partially superseded in 2002 by Florida's new statutory presumption of undue influence, *Hack v. Janes*, 878 So.2d 440, 443 (Fla. 5<sup>th</sup> DCA 2004) holds that *Carpenter* still establishes when the presumption of undue influence arises.

16. The Decision attempts to apply *Carpenter*, but incorrectly declares that Florida's new statutory presumption of undue influence arises only "if the plaintiff establishes that the defendant. . . was active in processing the instrument." (emphasis added). This new and different requirement that the plaintiff must prove that the defendant was “active in processing” the instrument rather than simply produce facts which permit an “inference” that the defendant was “active in procuring” the instrument, creates a state of confusion concerning when the presumption of undue influence arises under the new statutory presumption of undue influence.

## **ARGUMENT**

17. Petitioner has properly invoked this Court's jurisdiction because the Decision misapplies the landmark decision of *In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971) and expressly and directly conflicts with *Carpenter* and *Hack v. Janes*, 878 So.2d 440 (Fla. 5<sup>th</sup> DCA 2004) on the same question of law. See Art. V, s. 3(b) (3), *Fla. Const*; see also *Knowles v. State*, 848 So. 2d 1055, 1056 (Fla. 2003) (stating that misapplication of Florida Supreme Court decision creates conflict jurisdiction). Contrary to *Carpenter* and *Hack*, the Decision applies a new and different standard for determining when Florida's new statutory presumption of undue influence arises.

18. *Carpenter* is Florida's landmark case on the presumption of undue influence in will contests. It is cited in numerous appellate decisions from Florida and other states, law review articles, and other legal publications.

19. *Cripe v. AtlanticFirst National Bank of Daytona Beach*, 422 So.2d 820 (Fla. 1982) established that the "rule of *Carpenter* is properly applied to *inter vivos* transfers." *Carpenter* likewise applies to undue influence cases involving trusts. *Gorman v. Ellenharrison*, 559 So.2d 643, 643 (Fla. 3rd DCA1982).

20. In 2002, the Florida Legislature superseded *Carpenter* and *Cripe* regarding the legal effect of the presumption of undue influence. See Fla. Stat. § 733.107 (2) ("New Statute"). However, *Hack v. Janes*, 878 So.2d 440, 443

(Fla. 5<sup>th</sup> DCA 2004), holds that *Carpenter* and *Cripe* continue to establish when the presumption of undue influence arises.

21. *Carpenter* established that the presumption of undue influence arises when a substantial beneficiary under a will occupies a confidential relationship with the testator “and is active in procuring the contested will.” *Carpenter* at 701. (emphasis added). *Carpenter* noted that the critical issue regarding the latter element was “whether the facts . . . permitted an inference of . . . active procurement”. *Id.* (emphasis added)

22. *Carpenter* listed six criteria to be considered in determining active procurement. *Id.* at 702. This Court specifically noted that the six factors are not exclusive and that “each case involving active procurement must be decided with reference to its particular facts.” *Id.* *Cripe* recognized that a sufficient inference of active procurement can exist based upon a single factor that is not any of the six *Carpenter* criteria. *Cripe*, 422 So.2d at 824. (“active procurement can be shown by evidence, as there was here, of a request or suggestion by the dominant party”).

23. *Carpenter* noted that-

undue influence is rarely susceptible of direct proof, primarily because of the secret nature of the dealings between the beneficiary and the testator, and because of the death of one of the principals to the transaction, the testator. *Id.* at 703.

Consistent with *Carpenter*, this Court has recognized that-

“[u]ndue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred. . . No one of such facts or circumstances, when considered alone, may be of much weight, but, when combined with other facts, may be sufficient to establish the issue.” *In re Burton's Estate*, 45 So. 2d 873, 875-76 (Fla. 1950).

24. The facts noted in the Decision were more than sufficient to permit an “inference” of active procurement under the *Carpenter* standard, especially in light of the controlling standard for directed verdicts that “the court must evaluate the evidence in the light most favorable to the nonmoving party and every inference must be drawn in favor of that party at the trial level, and on appeal”. *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42, 44 (Fla. 4<sup>th</sup> DCA 2004) (emphasis added). One or both Respondents were active in procuring the trust in question that favored them to the significant detriment of Petitioners. The Respondents took an increased interest in the Decedent after her husband died and she was in a weakened mental condition. Although one of the Respondents had the Decedent's power of attorney and undertook responsibility for her personal affairs, and both Respondents were caregivers for the Decedent with an obvious fiduciary duty to act in her best interest, the evidence shows an unmistakable pattern of Respondents obtaining substantial "gifts" from the Decedent, including the trust, her home and a \$75,000

certificate of deposit. One Respondent took the Decedent to have her will and trust executed at the office of an attorney who had a pre-existing relationship with the other Respondent. One Respondent waited at the attorney's office for more than an hour while the trust instrument was being executed. The trust completely altered the Decedent's existing estate plan by eliminating Petitioners as equal beneficiaries and leaving the residual share of the trust/estate to Respondents. Subsequently, one or both Respondents<sup>1</sup> told the Decedent "she had to leave a token payment to [Petitioners]", and such an amendment was done even though an attorney advised Decedent that no such provision was needed.

25. Instead of applying *Carpenter* and determining whether the foregoing evidence, taken as a whole, was sufficient to permit an "inference" that Petitioners were "active in procuring" the contested trust, the Decision ignored the *Carpenter* standard and declared that under the New Statute a presumption of undue influence only arises "if the plaintiff establishes that the defendant . . . was active in processing the instrument." (Appx. p. 2) (emphasis added).

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<sup>1</sup> Note: the identity of "one or both Respondents" on the latter point is reached by inference under *Union Carbide*

26. By ignoring *Carpenter's* controlling presumption of undue influence standard and introducing a new and different standard that required Petitioners to **prove** that Respondents were "**active in processing the instrument**," the Decision misapplied *Carpenter*, created conflict with *Carpenter* and *Hack*, and placed Florida's new statutory presumption of undue influence in an uncertain state of confusion.

### CONCLUSION

27. Wherefore, based upon the foregoing reasons and authorities, Petitioners respectfully request this Court to accept jurisdiction in this case.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction, along with a copy of the separate Appendix to Brief on Jurisdiction, have been furnished to Edward J. Welch, Esquire, attorney for Respondents, at Anderson St. Denis & Glenn, P.A., 2201 N.W. Corporate Blvd., Ste 100, Boca Raton, Florida 33431 via facsimile and regular U.S. Mail, postage prepaid, this \_\_ day of January 2005.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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