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Estate Planning: Everything You Need to Know But Didn't Think to Ask!

The 2019 Lavender Law Conference & Career Fair

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Trust, Estates, and Guardianship Litigation and Why You Avoid It

An Aging Population

- The number of people 65 and older in the US is expected to double from 46 million in 2015 to 98 million in 2060.
- That number is expected to increase by almost 18 million between 2020 and 2030, as the baby boomers reach age 65.
- Resource (source): Mark Mather, Linda A. Jacobsen and Kelvin M. Pollard, *Aging in the United States*, POPULATION REFERENCE BUREAU– POPULATION BULLETIN, Vol. 70, No. 2 (December 2015), available at https://assets.prb.org/pdf16/aging-us-population-bulletin.pdf
- With an aging population, we will see an increase in people suffering from dementia.
    - The "prevalence of dementia is estimated to double every five years in the elderly, growing from a disorder that affects 1 percent of persons 60 years old to a condition afflicting approximately 30 percent to 45 percent of persons 85 years old."
- Resource (source): ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), available at https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.
- According to the CDC, 1 out of 10 persons, age 60 or over and who live at home, experience elder abuse.
    - The CDC considers this number as underestimated because of fear or inability of the victim to report the crime.
- Resource (source): *Elder Abuse Prevention*, Centers for Disease Control and Prevention, at https://www.cdc.gov/features/elderabuse/index.html

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Benefits of Planning

- Provides opportunity to exercise the right to self-determination.
- Protects clients and prevents indignities of court proceedings
- Avoid questions of the validity of documents prepared at the onset of dementia or reduced capacity by preparing and executing while capacity is clear
- Give clarity and peace of mind to loved ones
- Avoid family conflict
- Family will not have to make emergency decisions – only honor your decisions
- Critical when family members may not respect a person's relationship, particularly for LGBT clients

Types of Litigation to Expect with Trust, Estates, and Guardianships

- Will and Trust Disputes:
  - Capacity
  - Undue Influence
  - Second Marriages and Dissolution of Marriages
    - Prenuptial Agreements
    - Elective Shares
    - Failure to Update Estate Plan
- Incapacity, Guardianship, and Conservatorship
  - Advance Directives
    - Disputes Over Validity vs. Use as Alternatives to Guardianship
  - Living Wills and End of Life Decisions
  - Use of Power of Attorney Designations
  - Disputes Over Appointment of a Guardian or Conservator
  - Protection of Vulnerable Adult vs. Paternalistic Approach and Due Process Violations
- Financial Exploitation of the Elderly or Vulnerable Persons
  - "Convenience" Bank Accounts
  - Power of Attorney Designations
  - "Gifts"
- Fiduciary Litigation
  - Breach by Trustee, Guardian, or Attorney In Fact

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Forms of Planning (to avoid… or at least minimize, litigation)

The following items are various devices that allow a person to exercise their right to self-determination. They permit your clients to express their wishes and assure that their needs are met and to avoid the indignity, intrusion, and cost of a proceeding to determine whether they are no longer able to care for themselves. In the event of incapacity, the devices may serve as an alternative to guardianship or conservatorship and to assist clients as they age.

Advance Medical Directives

Declaration of Heath Care Surrogate

A Declaration of Heath Care Surrogate informs the principal's physician, hospital or other health care providers that in the event the principal is unable to make medical decisions, the person named can make those decisions instead. Generally, this document contains a HIPAA release or waiver indicating that the principal allows the surrogate to have access to the principal's health records so they can make informed decisions. The attorney-in-fact may also make these decisions for the principal if granted that right, however, many physicians and hospitals prefer a form specifically designating a heath care surrogate. This document only becomes effective if the principal cannot make his or her own decisions and terminates when the principal's capacity to make decisions returns. Capacity in this document has a slightly different meaning than legal capacity. No Court designation or physician's affidavit is required as the incapacity can be temporary such as being under anesthesia, under the effects of strong pain medication, in an induced coma, or other medically defined incapacities. In most cases, it is recommended that a principal name one or two surrogates who are to be contacted sequentially. It is also recommended that the principal provide copies of this document to family members or counsel and physicians and that they have a list of who has a copy in the document. This document terminates upon revocation, during capacity, or upon death.

Omnibus Advance Directive

This document incorporates the Health Care Surrogate and Living Will (discussed below). The individual provisions of each of these documents are incorporated into each section of the Omnibus document and can be as specific or broad as desired, even giving direction that if the principal is placed in a nursing home and unable to make their wishes known, such as a desire to have classical music played in their memory. While this document is convenient, it is also recommended that a principal has the individual documents as well. It might not be desirable for a physician or the hospital to have any more information in any one document than is necessary. Of course, the proxy designee may find it more convenient to have the two documents combined.

Nomination of Preneed Guardian or Conservator

The Nomination of Preneed Guardian or Conservator is a legal document that is filed with the court. It is a document signed during capacity indicating who the signer wishes to serve as their Guardian (or conservator) of the person, property or both in the event that there are not separate documents in place or the documents cannot be located or in the case of a question or challenge to the nomination of a person named in the other documents. This document does not become effective until the person signing the document is adjudicated incapacitated through a court proceeding, at which time the Judge will consider the signer's wishes. The judge is not obligated to follow this nomination, but must look to the nominated individual as a first choice. This document can be revoked by the signer at any time during capacity. This can be a critical document because there is a higher burden of proof for a court to disregard this designation.

Authorization for Release of HIPAA Information

There may be times when someone may wish to authorize others to obtain their protected medical information. This can be important in the case of a trustee, personal representative, prior medical provider, domestic partner, spouse or even a Health Care Surrogate or Living Will nominee if they are not granted this right in the document, or if the provider does not accept the authorization when it is incorporated into another document.

As children turn 18, it is important to obtain his or her authorization for the parent to receive their child's HIPAA information. A parent's right to secure medical information without their child's permission terminates at the child's attainment of age 18 in many states. An age when many teens are leaving home for college.

Authorization for Medical Treatment

For those who have younger children, an Authorization for Medical Treatment will allow an outside party, such as a non-custodial parent, grandparent, day care center worker, principal, etc. to have the child treated in an emergency rather than forcing the hospital or medical provider to locate and speak with a parent. This document contains a limited release of HIPAA information that is restricted to information necessary for treatment decisions. It also gives on its face information regarding allergies, special medical conditions the child may have and a listing of any medications the child is taking.

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Delegation of Financial and Contractual Rights

Durable Power of Attorney

A Durable Power of Attorney allows the party designated to act as the principal's attorney-in-fact during the principal's lifetime. This ability becomes effective on the date it is granted and terminates only by revocation or death. The person or institution who receives instruction from the designee is not required to look any further than the document for their authority to act. As such, a Durable Power of Attorney is a powerful document that allows a designee to 'stand in the shoes' of the principal and perform any actions the principal could perform with full authority of law. Many powers of attorney are generally not exercised by a designee except in certain circumstances such as by the principal's permission or in the event of incapacity. Additionally, a well-drafted power of attorney will enumerate those actions that a designee is permitted to exercise and those which the designee may not exercise and may limit the manner that a designee can exercise other actions. The benefit of durable power of attorney is that it is not affected by incapacity and will allow the designee to continue to act for the principal if the principal is found to be incapacitated. While it might be advisable to name a successor to the designee in the document, it is generally not recommended to name multiple attorneys-in-fact.

Springing Power of Attorney

Some states allow a springing Power of Attorney, which only becomes effective upon the incapacity of the principal.

Other Power of Attorney Designations

The principal can execute a Power of Attorney designation that becomes ineffective upon determination of incapacity. In addition, a principal can sign a power of attorney that gives limited authority. These are often executed to authorize certain sales of real property. The form can restrict the authority given to the agent.

Trusts

Trust declarations are a written recognition of a legal relationship in which a grantor gives to a Trustee the right to control and manage property for the benefit of the trust's beneficiaries. Trusts are created during a person's life to hold assets for themselves or others. They can help avoid the probate process and can assist a person if that person is no longer able to manage his or her financial affairs.

If a person who has created and funded a trust is found to be incapacitated, any funds held in trust are managed by the successor Trustee. The individual creating the Trust, the grantor, has the ability to name in the document who becomes the trustee if that person is deemed incapacitated. Many Trusts include language to permit a successor Trustee to step in as Trustee if doctors write letters indicating that the grantor is no longer able to manage their own finances or make financial decisions. This eliminates the need for a successor Trustee to initiate Court proceedings to step in and manage the Trust assets. The Court in a guardianship/conservatorship has no authority over the Trust assets, so it maintains privacy and control over those finances. The Court recognizes the express wishes of the alleged incapacitated person from prior to their incapacity.

Authorization for Final Rites

Many people express their burial wishes in their Wills. While this can be effective, a Will may not be located or opened until well after death and burial or final rites have taken place. An Authorization for Final Rites designates who may give direction for the disposal of the signer's remains, what ceremonies or services they desire and whether or not they wish cremation. This document can be given to a spouse, partner, loved one or friend and serves as a stand-alone document expressing the signer's wishes.

Do Not Resuscitate Orders and Organ Donation Considerations

Living Will

A Living Will informs physicians, hospitals, and family, of the signer's wishes in the event of a terminal illness. It is a document that signed during the principal's capacity, of their free will, and pertains to their wishes regarding life-prolonging procedures, medication, food, and/or hydration in the event of a terminal condition. Additionally, the signer selects at which time they want the document to become effective based on the degree of quality of life available to them. This document also names a surrogate to carry out the signer's wishes if the signer is unable to, and contains a HIPAA release; however, it allows the surrogate to act only within the confines of the stated wishes. A Living Will can be as broad or restrictive as desired. It can also contain provisions for anatomical gifts. In most cases, it is recommended that the Living Will name one or more surrogates who are to be contacted sequentially. It is also recommended that the signer provide copies of this document to family members or their attorney or physician and that they list who has a copy in the document. This document terminates with revocation during capacity or death.

Organ Donation

Depending on state law, a person can designate their desire to make anatomical gifts in a Declaration of Health Care Surrogate and to designate themselves as an organ/tissue donor by joining registries, such as Florida's Joshua Abbott Organ & Tissue Donor Registry at www.donatelifeflorida.org. Neither action is intended to take the place of the designation on a driver's license, but these additional notifications of the donor's desires will allow medical providers to make timely arrangements to insure a successful harvest. These expressions of donation do not require any consent from the Health Care Surrogate and will be effective under any circumstances providing the medical providers check the Registry and/or have the document.

Testamentary Documents

Will or Trust

A Will is a testamentary expression of a person's desires regarding disposition of the person's property after death. The Will typically also nominates a personal representative, or multiple personal representative, although more than two is not advisable. A Will may refer to a separate writing that permits a person to prepare a list of tangible personal property and who the items should go to. Each State will have a law regarding the formalities required of a document to determine if it is a valid Will.

Property held in a Trust is not subject to the terms of a Will, although a Will may "pour over" property into a Trust or establish a Trust. In addition, beneficiary designations, such as those associated with bank accounts, life insurance policies, retirement accounts, and pensions, are likely not subject to the terms of a Will. Those designations relate to contracts between a person and an institution.

Prenuptial Agreement

Sometimes referred to an antenuptial agreement, a prenuptial agreement is an agreement between spouses regarding what happens with each person's property, or joint property, in the event of dissolution of marriage or the death of one of the spouses. These agreements can be entered into before or after marriage (postnuptial agreements) and determine how property that the spouses bring into the marriage, or acquire during the marriage, will be held or separated. Prenuptial agreements can be used to alter, define, or avoid benefits that a spouse may be entitled to upon the death of the other.

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Resources

- *Elder Abuse Prevention*, Centers for Disease Control and Prevention, at https://www.cdc.gov/features/elderabuse/index.html
- Barry A. Nelson, ESTATE PLANNING AND ASSET PROTECTION IN FLORIDA, (Juris Publishing 2019) (Chapter 15: *Financial Elder Exploitation*)
- *Education*, National Center on Elder Abuse, at https://ncea.acl.gov/What-We-Do/Education.aspx
- *Diminished Capacity: What Every Financial Services Professional Should Know*, National Adult Protective Services Association, *available at* https://www.sec.gov/divisions/marketreg/seniorinvestors.htm
- *Defining Undue Influence*, ABA Comm'n on Law and Aging (Oct. 15, 2018), at https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_35/issue_3_feb2014/defining_undue_influence/
- *Capacity, Assessment*, ABA Comm'n on Law and Aging (Oct. 15, 2018), at https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/
- Danielle and Andy Mayoras, *Are Aretha Franklin's Homemade Wills Valid, and What Happens Next*, FORBES (May 23, 2019), *available at* https://www.forbes.com/sites/trialandheirs/2019/05/23/are-aretha-franklins-homemade-wills-valid-and-what-happens-next/#2742bfa658e1
- Adam Walser, *Judge removes professional guardian from nearly 100 cases for alleged violations*, ABC Action News Tampa (Jul. 12, 2019), at https://www.abcactionnews.com/news/local-news/i-team-investigates/the-price-of-protection/judge-removes-professional-guardian-from-nearly-100-cases-for-alleged-violations
- ABA Model Rule 1.14: Client with Diminished Capacity, *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/
- *In re Guardianship of Atkins*, 868 N.E.2d 878, 880 (Ind. App. 2007) (upholding lower court's appointment of a man's parents as his guardians, despite evidence of "the Atkinses' lack of support of their son's personal life through the years and given his mother's astonishing statement that she would rather that he never recover than see him return to his relationship with Brett" because the son never gave his partner a power of attorney).
- *Covey v. Shaffer*, No. 2D18-3084, 2019 WL 2844163 (Fla. Dist. Ct. App. July 3, 2019) ("Trial court abused its discretion by granting life partner's petition for emergency temporary guardianship of ward ex parte; court was required to hold hearing prior to ruling on appointment of emergency temporary guardian.").
- *Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997) (thoroughly defines testamentary capacity and undue influence)

golis v. United Airlines, Inc., 811 F.Supp. 318, 324–25 (E.D.Mich.1993) (holding that because Congress has not provided any remedy for an airline passenger who suffers personal injury due to the negligence of the airline and its employees, preemption should not apply to a claim under common law negligence to recover for personal injury). For these reasons, we conclude that the trial court erred in granting UPS's motion for summary judgment.[4]

The judgment of the trial court reversed, and this cause is remanded to the trial court for trial.

FRIEDLANDER, J., and CRONE, J., concur.

In re the GUARDIANSHIP OF Patrick ATKINS, Adult.

Brett Conrad, Appellant–Petitioner,

v.

Thomas Atkins and Jeanne Atkins, Appellees–Cross–Petitioners.

No. 29A02–0606–CV–471.

Court of Appeals of Indiana.

June 27, 2007.

Background: Incapacitated individual's life partner filed a guardianship petition, requesting that he be appointed guardian of individual's person and property. Individual's parents filed an answer to the petition, a motion to intervene, and a cross-petition requesting that they be appointed co-guardians of their son's person and property. Life partner subsequently filed a petition for an order requiring parents to allow him to visit and have contact with individual. The Hamilton Superior Court, Steven R. Nation, J., issued an order that, among other things, appointed parents as co-guardians of their son and his estate. Life partner appealed.

Holdings: The Court of Appeals, Baker, C.J., held that:

(1) trial court did not abuse its discretion when it found that it was in individual's best interest to appoint his parents as co-guardians of his person;

(2) trial court erroneously denied life partner's request for visitation and telephonic contact with individual;

(3) trial court erroneously declined to require individual's presence at guardianship hearing;

(4) life partner did not have standing to enforce individual's right to be present at the guardianship hearing;

(5) trial court did not abuse its discretion by ordering that individual's brokerage account be set aside to the guardianship estate; and

(6) trial court erroneously denied life partner's request that the guardianship estate reimburse a portion of his attorney fees.

4. Because we conclude that the trial court erred in granting summary judgment for UPS when considering the relevant provisions of the FAAAA, we need not address the parties' arguments regarding the applicability of the Carmack Amendment under the Interstate Commerce Act. In any event, the purpose of the Carmack Amendment is to provide an exclusive remedy for breach of contract for interstate ground shipments, including lost, delayed, or damaged packages. *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134, 138, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). The cases to which UPS directs us for the proposition that negligence claims are preempted do not involve state-based tort law claims for personal injury. Appellee's Br. p. 10.

Affirmed in part, reversed in part, and remanded with instructions.

Darden, J., filed a dissenting opinion.

1. Guardian and Ward ⚿2

Trial court is vested with discretion in making determinations as to the guardianship of an incapacitated person; this discretion extends to both its findings and its order. West's A.I.C. 29–3–2–4.

2. Guardian and Ward ⚿10

Trial court did not abuse its discretion when it found that it was in incapacitated individual's best interest to appoint his parents as co-guardians of his person, as opposed to individual's life partner; individual did not designate life partner for guardianship consideration in a durable power of attorney, evidence presented established that parents' home was appropriate for their son's care, and parents were committed to providing their son with the best possible care by applying their own personal efforts, employing outside assistance, and pursing potentially helpful therapies. West's A.I.C. 29–3–5–1, 29–3–5–5(a, b).

3. Guardian and Ward ⚿29

Trial court, which determined that it was in incapacitated individual's best interest to appoint his parents as co-guardians of his person, as opposed to individual's life partner, erroneously denied life partner's request for visitation and telephonic contact with individual; the overwhelming wealth of evidence in the record, as well as common sense, established that it was in individual's best interest to continue to have contact with his life partner of over 25 years. West's A.I.C. 16–36–1–8(d), 29–3–5–3(b).

4. Guardian and Ward ⚿13(1)

Trial court erroneously declined to require incapacitated individual's presence at guardianship hearing; there was no evidence presented that individual was unable to appear, and, although there was evidence in the record establishing that individual was incompetent to testify, there was absolutely no evidence that his mere presence at the hearing would have endangered his health or safety. West's A.I.C. 29–3–5–1(d).

5. Guardian and Ward ⚿13(1)

The right to be present at a guardianship hearing is akin to a due process right belonging to the allegedly incapacitated person. U.S.C.A. Const.Amend. 14; West's A.I.C. 29–3–5–1(d).

6. Guardian and Ward ⚿13(1)

Incapacitated individual's life partner, who sought to be appointed guardian of individual's person, did not have standing to enforce individual's right to be present at the guardianship hearing; it was the duty of individual's court-appointed guardian ad litem (GAL) to represent individual's interest and insist that he be present at the hearing. West's A.I.C. 29–3–5–1(d).

7. Guardian and Ward ⚿33

Trial court, which determined it was in incapacitated individual's best interest to appoint his parents as co-guardians of his person, as opposed to individual's life partner, did not abuse its discretion by ordering that individual's brokerage account be set aside to the guardianship estate; by awarding life partner one-third of a separate checking account, the trial court gave life partner a greater portion of the account than would be attributable to him had he deposited all of his earnings into it, and the checking account and brokerage account were titled solely in individual's name.

8. Guardian and Ward ⚿58

Trial court, which determined it was in incapacitated individual's best interest

to appoint his parents as co-guardians of his person, as opposed to individual's life partner, erroneously denied life partner's request that the guardianship estate reimburse a portion of his attorney fees; trial court explicitly found life partner's attorney fees and costs to be reasonable, and there was no evidence in the record that life partner had not acted in good faith. West's A.I.C. 29–3–4–4.

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David S. Richey, Kent M. Frandsen, Parr Richey Obremskey & Morton, Lebanon, IN, Attorneys for Appellees.

OPINION

BAKER, Chief Judge.

Appellant-petitioner Brett Conrad [1] appeals from the trial court's order that, among other things, appointed appellees-cross-petitioners Thomas and Jeanne Atkins (collectively, the Atkinses) as co-guardians of Patrick Atkins and Patrick's estate. Specifically, Brett raises the following arguments: (1) Brett should have been appointed as Patrick's guardian or, at a minimum, should have visitation rights; (2) the trial court erred by declining to require Patrick's physical attendance at trial and refusing to interview or meet with Patrick; (3) Patrick's Charles Schwab account should not have been entirely set off to the guardianship estate; and (4) a portion of Brett's attorney fees and expenses should have been paid from the guardianship estate.

We find, among other things, that although the trial court did not abuse its discretion by naming the Atkinses to be Patrick's co-guardians, there is overwhelming evidence in the record establishing that it is in Patrick's best interest to continue to have contact with Brett, his life partner of twenty-five years. We also find that the trial court erroneously refused Brett's request to have a portion of his attorney fees and costs paid by the guardianship estate. Thus, we affirm in part, reverse in part, and remand with instructions to grant Brett the visitation and contact with Patrick that he requested and to calculate the amount of Brett's attorney fees and costs to be paid by the guardianship estate.

FACTS

Patrick and Brett met and became romantically involved beginning in 1978 when they attended Wabash College together. Since that time—for twenty-five years—the men have lived together and have been in a committed and loving relationship.

Patrick's family vehemently disapproves of his relationship with Brett. Patrick, however, was able to reconcile his religious faith with his homosexuality and in 2000, Patrick wrote a letter to his family, begging them to accept him and welcome Brett:

> I want you all to know that Brett is my best friend in the whole world and I love him more than life itself. I beg all of you to reach out to him with the same love you have for me, he is extremely

1. On June 9, 2006, Brett filed a motion to permit identification of the parties by their initials. The motions panel directed the parties to use full names in their pleadings and reserved the ruling on Brett's motion for the writing panel. Brett has offered no citation to authority or rule in support of his request to identify the parties herein by their initials and we see no compelling reason to grant this request. Consequently, the motion is denied.

special and once you know him you will understand why I love him so much. Trust me, God loves us all so very much, and I know he approves of the love that Brett and I have shared for over 20 years.

Appellant's App. p. 569.

Patrick's family, however, has steadfastly refused to accept their son's lifestyle. Jeanne believes that homosexuality is a grievous sin and that Brett and his relatives are "sinners" and are "evil" for accepting Brett and Patrick's relationship. *Id.* at 42, 45, 274. She testified that no amount of evidence could convince her that Patrick and Brett were happy together or that they had a positive and beneficial relationship.

Neither Patrick nor Brett earned a degree from Wabash College. In 1982, Patrick began working for the family business, Atkins, Inc. d/b/a Atkins Elegant Desserts and Atkins Cheesecake, and he ultimately became the CEO of that business. Patrick's annual income prior to his incapacitation was approximately $130,000. Brett is a waiter, has been working for Puccini's restaurants for the past ten years, and has an annual income of approximately $31,800. Patrick and Brett pooled their earnings, depositing them into a checking account that was titled solely in Patrick's name but was used as a joint account for payment of living expenses. They used some of their accumulated savings to make extra mortgage payments and periodically transferred the remaining savings into a Charles Schwab account that was titled solely in Patrick's name.

Between 1980 and 1992, Brett and Patrick lived together in various apartments. In 1992, they bought a house together in Fishers as joint tenants, and the home is still titled jointly.

On March 11, 2005, Patrick was on a business trip in Atlanta when he collapsed and was admitted to a hospital. Doctors determined that he had suffered a ruptured aneurysm and an acute subarachnoid hemorrhage. Patrick remained in the Intensive Care Unit (ICU) of the Atlanta hospital for six weeks. At some point during his stay in the ICU, Patrick suffered a stroke.

Brett traveled to the Atlanta hospital to be with Patrick; Patrick's family did as well. Patrick's brother testified that Brett's mere presence in the hospital was "hurting" Jeanne and offending her religious beliefs. Jeanne told Brett that if Patrick was going to return to his life with Brett after recovering from the stroke, she would prefer that he not recover at all. Appellant's App. p. 285.

Shortly after Brett's first visit with Patrick in the ICU, Patrick's family restricted the times and duration of Brett's visits. Subsequently, Brett was allowed to see Patrick for only fifteen minutes at a time after the close of regular visiting hours so that Patrick's family would not have to see Brett at all. Eventually, a sign was placed in Patrick's ICU space reading "immediate family and clergy only," purporting to exclude Brett altogether. *Id.* at 180–81. Nevertheless, hospital staff defied the family's instructions and allowed Brett to continue to visit with Patrick early in the morning and in the evenings, outside of regular visiting hours.

On April 27, 2005, Patrick was moved from the Atlanta hospital to ManorCare at Summer Trace (Summer Trace), a nursing facility in Carmel. In May and June 2005, Brett visited Patrick daily at Summer Trace, with his visits usually taking place after regular visiting hours so that Patrick's relatives would not see him. Brett was well-received by the Summer Trace staff, who observed that his visits had a positive impact on Patrick's recovery.

On June 20, 2005, Brett filed a guardianship petition, requesting that he be appointed guardian of Patrick's person and property. The Atkinses filed an answer to the petition, a motion to intervene, and a cross-petition requesting that they be appointed co-guardians of Patrick's person and property. Brett eventually voluntarily withdrew his request to be appointed guardian of Patrick's property, seeking only to be named as guardian of Patrick's person.

In mid-August 2005, Patrick was admitted to Zionsville Meadows, another nursing facility, for physical rehabilitation and speech therapy. Brett continued to visit Patrick after regular visiting hours at Zionsville Meadows. Notwithstanding the conclusions of the court-appointed guardian ad litem (GAL) and a neuropsychologist that it would be beneficial to Patrick and his recovery process for Brett to continue to have contact with Patrick, in early November 2005, the Atkinses moved Patrick into their home and have refused to allow Brett to visit with Patrick since that time. The Atkinses have refused phone calls from Brett and requests from Brett and his family members to visit Patrick.[2]

At the time of trial, Patrick was able to walk, dress, bathe, and feed himself with some supervision or prompting, to read printed matter aloud with good accuracy but only 25% comprehension, to engage in simple conversations, to communicate his basic wants and needs, and to answer questions with some prompting. He still required close and constant supervision and had significant problems with short-term memory, attention span, problem-solving, multi-step commands, reacting in urgent situations, and decision-making. The Atkinses took turns supervising or caring for Patrick in their Carmel home and were assisted by a certified home health aide who worked with Patrick daily from 8:30 a.m. until 5:00 p.m.

A trial was held beginning on November 23, 2005. On that same day, Brett filed a motion seeking the payment of a portion of his attorney fees and costs from the guardianship estate.

On January 11, 2006, Brett filed a petition for an order requiring the Atkinses to allow him to visit and have contact with Patrick. At trial, the Atkinses acknowledged that it was "probably true" that if the trial court did not order them to allow visitation between Patrick and Brett, they would not allow any contact between the life partners. Appellant's App. p. 301–02.

On May 10, 2006, the trial court entered two orders, making very limited findings of fact and disposing of the case by:

- Appointing the Atkinses as co-guardians of Patrick's person and estate;
- Denying Brett's visitation petition and ordering that "it is and shall be the ultimate and sole responsibility of [the Atkinses] to determine and control visitation with and access of visitors to Patrick Atkins in his best interest";
- Denying Brett's attorney fee petition;
- Determining that the home owned by Patrick and Brett should be split equally between Brett and the guardianship estate after reimbursing the estate for mortgage payments, taxes, insurance, utilities, and maintenance expenses incurred after March 10, 2005, and permitting the Atkinses to

2. Brett's relatives accepted Brett and Patrick's relationship and consider Patrick to be a member of their family. Therefore, they have also suffered a loss stemming from Patrick's incapacitation and the Atkinses' refusal to allow Brett or any members of his family from talking with or visiting Patrick.

maintain the real estate, to sever and sell it, or to bring an action for partition;

- Ordering that $16,469.73—approximately one-third of the balance in Patrick's checking account—be disbursed to Brett as the portion attributable to his earnings and contributions, with the rest to be set off to the guardianship estate;
- Ordering that the funds in the Charles Schwab account be set off to the guardianship estate;
- Ordering that the household goods and other tangible property be split equally between Brett and the guardianship estate; and
- Ordering Patrick's interest as a shareholder in the family business to be set off to the family estate.

Id. at 12–14. Brett now appeals.

DISCUSSION AND DECISION

[1] As we consider Brett's challenges to the trial court's judgment, we observe that the trial court is vested with discretion in making determinations as to the guardianship of an incapacitated person. *See* Ind.Code § 29–3–2–4. This discretion extends to both its findings and its order. *Id.* Thus, we apply the abuse of discretion standard to review the trial court's findings and order. *In re Guardianship of V.S.D.*, 660 N.E.2d 1064, 1066 (Ind.Ct.App. 1996). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind.Ct.App.2006), *trans. denied.*

I. Guardianship

[2] Brett first argues that the trial court erroneously appointed the Atkinses as Patrick's guardian. A guardianship action is initiated by filing a petition seeking appointment to serve as guardian of an incapacitated person. *See* I.C. § 29–3–5–1. The guardianship statutes provide that the following

> are entitled to consideration for appointment as a guardian ... in the order listed:
>
> (1) a person designated in a durable power of attorney;
>
> (2) the spouse of an incapacitated person;
>
> (3) an adult child of an incapacitated person;
>
> (4) a parent of an incapacitated person, or a person nominated by will of a deceased parent of an incapacitated person ...;
>
> (5) any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six (6) months before the filing of the petition;
>
> (6) a person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

I.C. § 29–3–5–5(a). With respect to persons having equal priority, however, "the court shall select the person it considers best qualified to serve as guardian." *Id.* at § –5(b). Additionally, the trial court is authorized to "pass over a person having priority and appoint a person having a lower priority or no priority" if the trial court believes that action to be in the incapacitated person's best interest. *Id.* The trial court's paramount consideration in making its determination of the person to be appointed guardian is "the best interest of the incapacitated person." *Id.*

Patrick did not designate Brett for guardianship consideration in a durable power of attorney. Therefore, only if the trial court concluded that it was in Patrick's best interest that Brett be appointed

his guardian would his appointment have been proper. Brett makes a sincere and compelling argument that, based on his long-term relationship with Patrick and his heartfelt desire to take care of his life partner, "Patrick's best interest will be served by appointing Brett as guardian over Patrick's person." Appellant's Br. at 22. Under these circumstances, however, our standard of review does not permit us to conduct a de novo analysis of what is in Patrick's best interest. Instead, we must assess whether the trial court abused its discretion when it found that it was in Patrick's best interest that the Atkinses be appointed co-guardians of his person and estate.

The evidence presented established that the Atkinses' home was appropriate for Patrick's care. The Atkinses were actively involved in Patrick's care from the time of his hospitalization in Atlanta until his release to their care, and they have adequately cared for Patrick in their home since November 2005. Other family members are willing and able to assist with Patrick's care as might be necessary in the future. The Atkinses were committed to providing Patrick with the best possible care by applying their own personal efforts, employing outside assistance, and pursing potentially helpful therapies.

We conclude that there is sufficient evidence in the record supporting a conclusion that the Atkinses and Brett are equally well-equipped to care for Patrick's physical needs. Given the Atkinses' lack of support of their son's personal life through the years and given his mother's astonishing statement that she would rather that he *never recover* than see him return to his relationship with Brett, we are extraordinarily skeptical that the Atkinses are able to take care of Patrick's emotional needs. Appellant's App. p. 285. But we cannot conclude that the record shows that the trial court abused its discretion in denying Brett's guardianship petition. Under these circumstances, therefore, the trial court had two passable options from which to choose, neither of which was presumptively incorrect. Based upon the evidence presented, the trial court did not abuse its discretion when it found that it was in Patrick's best interest to appoint the Atkinses as co-guardians of his person.

II. Visitation

[3] Brett next argues that the trial court erroneously denied his request for visitation and telephonic contact with Patrick. Turning to the record herein, we note that after observing interactions between Brett and Patrick and between Patrick and his family, the GAL concluded, among other things, as follows:

> . . . It also seems evident that Patrick loves Brett very much and it is evident that Brett loves Patrick.
>
> The challenge in this case seems to be how to provide for all parties to coexist in the best interest of Patrick. It appears that the involvement of *all parties* is paramount to Patrick's continued improvement. . . .
>
> * * *
>
> . . . [T]his Guardian Ad Litem strongly believes that an order should be implemented ensuring that *all parties* have regular access to Patrick regardless of who is appointed guardian. All parties to this litigation appear to be truly committed to Patrick's best interest and have no ulterior motives that this Guardian Ad Litem can determine.

Appellant's App. p. 58–60 (emphases added). The GAL later testified that "cutting back on one of those sources of stimulation or one of those sources of familiarity would

just seem to me not to be in Patrick's best interest." *Id.* at 768.

An impartial neuropsychologist who evaluated Patrick testified that people in his profession treating someone with memory problems, such as Patrick, strive to have as many "familiar cues" as possible for the patient "to help try to trigger access to long-term memory as well as to facilitate or try and promote his learning or recognition of new information." *Id.* at 236. The neuropsychologist went on to testify as follows:

> A. [A]ssuming that there was a long relationship [between Brett and Patrick] and assuming that . . . that relationship was a significant relationship emotionally and in time it would ordinarily be our objective to reintegrate the patient into that environment so that they can participate in activities and situations with which they're familiar.
>
> Q. Based on your examination and evaluation of Patrick do you have a professional opinion as a neuropsychologist within a reasonable certainty about whether it is appropriate in terms of Patrick's long-term care and rehabilitation and recovery for Patrick's parents to have him continue to live in their home and to prohibit visits from or with Brett?
>
> A. Well, my experience in interacting with the patient and his family were that it seemed that [the Atkinses] were indeed generally interested in his care and were very invested in it. I think, however, that if this relationship [between Brett and Patrick] has persisted as long as you describe that *including Brett in that situation would be at least from a clinical standpoint something that we would recommend.*
>
> * * *
>
> Q. Based on what you know and your, of Patrick's background, his family situation, his history, and also on your examination and evaluations of Patrick, do you believe as his neuropsychologist within a reasonable certainty that it would be detrimental to Patrick's health or recovery if he were to see Brett or spend time with Brett outside Patrick's parents' home?
>
> A. I have no reason to believe that it would be detrimental. *I suspect it would be helpful.*

Id. at 236–39 (emphases added).

Although the Atkinses argue that there was evidence that "visitation with Brett poses a risk of diminishing Patrick's chance for normalcy of life and possibly causing irreparable psychological harm," appellees' br. p. 14, they provide no citation in support of this assertion and, indeed, the overwhelming evidence in the record supports a contrary conclusion. The only evidentiary support to which the Atkinses direct our attention in support of their position that Brett should be barred from visiting Patrick is testimony from their expert witness, psychologist Dr. Jonathon Mangold. Dr. Mangold met with Patrick only once for one hour, performed no psychological testing on Patrick, never spoke with Brett, and never observed Patrick and Brett together. On January 10, 2006, Dr. Mangold testified that he did not have enough factual background to form an opinion as to whether visitation with Brett would be harmful to Patrick. *Id.* at 630. Three weeks later, at trial, Dr. Mangold suddenly testified that he *could* give an opinion regarding visitation, opining that visitation with Brett may not be positive for Patrick from a psychological standpoint. *Id.* at 400–03, 626–31, 636–37. He reached this new conclusion based solely upon second-hand information that he obtained in interviews with Patrick's family members. *Id.* at 403–08.

Thus, the *sole* support of the trial court's conclusion that Brett should be barred from visiting Patrick consists of the changed opinion of the Atkinses' expert witness who based his opinion *not* on testing of Patrick, an interview of Brett, or observations of the two men interacting, but on secondhand information gleaned from Patrick's family members. Indeed, the overwhelming wealth of evidence in the record, as well as common sense, establishes that it is in Patrick's best interest that he continue to have contact with Brett, his life partner of over twenty-five years. We cannot conclude, therefore, that the evidence in the record supports the trial court's order denying Brett's request for visitation.[3]

The trial court was required to enter orders to "encourage development of the incapacitated person's self-improvement, self-reliance, and independence" and to "contribute to the incapacitated person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm to the incapacitated person." I.C. § 29–3–5–3(b). The trial court was also required to order appropriate relief if it found that the Atkinses were not acting in Patrick's best interest. Ind.Code § 16–36–1–8(d). Given that the evidence overwhelmingly establishes that it is in Patrick's best interest to spend time with Brett and that the Atkinses have made it crystal clear that, absent a court order requiring to do so, they will not permit Brett to see their son, it was incumbent upon the trial court to order visitation as requested by Brett. Consequently, we reverse the judgment of the trial court on this basis and direct it to amend its order to grant Brett visitation and contact with Patrick as Brett requested.

III. Patrick's Presence at the Hearing

[4] Brett next argues that the trial court erroneously declined to require Patrick's presence at the hearing. Indiana Code section 29–3–5–1(d) provides as follows:

> (d) *A person alleged to be an incapacitated person must be present at the hearing* on the issues raised by the petition and any response to the petition unless the court determines by evidence that:
>
> (1) it is impossible or impractical for the alleged incapacitated person to be present due to the alleged incapacitated person's disappearance, absence from the state, or similar circumstance;
>
> (2) it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person as determined by the court;
>
> (3) the incapacitated person has knowingly and voluntarily consented to the appointment of a guardian or the issuance of a protective order and at the time of such consent the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from knowingly and voluntarily consenting; or
>
> (4) the incapacitated person has knowingly and voluntarily waived notice of the hearing and at the time of such waiver the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from making a knowing and voluntary waiver of notice.

3. To the extent that the Atkinses complain about the hours at which Brett visited Patrick in various medical facilities, we note that he did so only because the Atkinses barred him from visiting during business hours.

(Emphasis added). Likewise, Hamilton County Local Probate Rules require that "[i]n all guardianship matters seeking to declare an adult incapacitated for any reason, the incapacitated person *shall* be present at the hearing or sufficient evidence shall be presented showing that the incapacitated person is unable to appear." Hamilton County Local Rule 714.10 (emphasis added).

None of the exceptions to the rules mandating Patrick's presence are at issue herein, nor was there evidence presented that Patrick was unable to appear. Although there was evidence in the record establishing that Patrick was incompetent to *testify,* there is absolutely no evidence that his mere presence at the hearing would have endangered his health or safety. The trial court, therefore, erroneously declined to require Patrick's presence at the hearing.

[5, 6] That said, however, the right to be present at the guardianship hearing is akin to a due process right belonging to the allegedly incapacitated person. Here, therefore, it was *Patrick's* right to be present at the hearing; neither Brett nor the Atkinses have standing to enforce that right. It was the duty of Patrick's court-appointed GAL to represent Patrick's interest and insist that he be present at the hearing. The GAL did not do so. Consequently, this right has been waived and we decline to remand for a new trial on this basis.

IV. Charles Schwab Account

[7] Brett next argues that the trial court erred when it set off the entire $85,000 Charles Schwab account in Patrick's name to the guardianship estate. The trial court determined that Brett was entitled to approximately one-third of the balance in the checking account that was solely in Patrick's name, having found the one-third "portion ... attributable to Brett's earnings and contributions" to the checking account. Appellant's App. p. 13. Brett emphasizes that the evidence indicated that the Charles Schwab account was funded by checks written from Patrick's checking account. Therefore, Brett insists that one-third of the Charles Schwab account should also be found to be attributable to his earnings and contributions.

According to the evidence presented, at the time of his aneurysm, Patrick's annual salary was approximately $130,000. Appellant's App. p. 608. Brett's 2004 tax return showed that Brett earned about $31,800 annually. *Id.* at 297–98, 319–21, 644. Patrick's earnings, therefore, were more than four times greater than Brett's. Brett testified that he had deposited most of his earnings into the checking account. But Brett also testified that all of Patrick's earnings had been deposited into that account as well. Thus, by awarding Brett one-third of the checking account, the trial court gave Brett a greater portion of the account than would be attributable to him had he deposited all of his earnings into it. We also observe that the checking account and Charles Schwab account were titled solely in Patrick's name.[4] Under these circumstances, we cannot conclude that the

4. The Atkinses urge us to consider the fact that Brett received half of the equity in the parties' jointly-owned home as we analyze the proper recipient of the Charles Schwab account. But Brett and Patrick do, in fact, own the home as joint tenants. Consequently, Brett is entitled to half of that equity regardless of his contribution to mortgage payments and it would have been erroneous for the trial court to have awarded less than half of the home's value to Brett. *See Cunningham v. Hastings,* 556 N.E.2d 12, 13–14 (Ind.Ct.App. 1990) (holding that "[r]egardless of who provided the money to purchase the land, the creation of a joint tenancy relationship entitles each party to an equal share of the pro-

trial court abused its discretion by ordering that Patrick's Charles Schwab account be set aside to the guardianship estate.

V. Attorney Fees and Costs

[8] Finally, Brett argues that the trial court erroneously refused to order that a portion of his attorney fees and costs be reimbursed from the guardianship estate. Indiana Code section 29–3–4–4 requires that "any ... attorney ... whose services are provided in good faith and are beneficial to the protected person ... is entitled to reasonable compensation and reimbursement for reasonable expenditures on behalf of the protected person." This statute requires only that the attorney's services be provided in good faith and be beneficial to the protected person. There is no evidence in the record here that Brett has not acted in good faith, nor is there evidence that this dispute between these parties, all of whom love and want the best for Patrick, has been anything but beneficial for Patrick's care. Additionally, we emphasize that the trial court explicitly found Brett's attorney fees and costs to be reasonable. Appellant's App. p. 12. Consequently, it was erroneous for the trial court to deny Brett's request that the guardianship estate reimburse a portion of his attorney fees and we remand for a calculation of the amount to be reimbursed.

VI. CONCLUSION

We are confronted here with the heartbreaking fracture of a family. Brett and Patrick have spent twenty-five years together as life partners—longer than Patrick lived at home with his parents—and their future life together has been destroyed by Patrick's tragic medical condition and by the Atkinses' unwillingness to accept their son's lifestyle.

Although we are compelled to affirm the trial court's order that the Atkinses be appointed Patrick's co-guardians under our standard of review, we reverse the trial court with respect to Brett's request for visitation, inasmuch as all credible evidence in the record establishes that it is in Patrick's best interest to continue to have contact with his life partner. We also find that the trial court should have required Patrick's presence at the hearing but that Patrick's GAL waived that right by failing to enforce it. Additionally, we conclude that the trial court properly set off the entirety of the Charles Schwab account to the guardianship estate. Finally, we find that the trial court erroneously refused Brett's request that the guardianship estate pay a portion of his attorney fees and costs and remand for a calculation of the amount to be paid therefrom.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to grant Brett visitation and contact with Patrick and to calculate the amount of Brett's attorney fees and costs to be paid by the guardianship estate.

ROBB, J., concurs.

DARDEN, J., dissents with opinion.

DARDEN, Judge, dissenting.

I would respectfully dissent from the majority's conclusion that the trial court erred when it did not enter an order granting Brett's request for his visitation and contact with Patrick.

I begin by summarizing the perspective from which we review the appeal of that

ceeds of the sale upon partition" and an equal right to share in the enjoyment of the real estate while both joint tenants are alive).

decision. Neither party requested, and the trial court did not make *sua sponte,* findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A) with respect to Brett's motion seeking an order of visitation. "In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence." *Perdue Farms, Inc. v. Pryor,* 683 N.E.2d 239, 240 (Ind.1997); *see also Brandeis Machinery & Supply Co., LLC v. Capitol Crane Rental, Inc.,* 765 N.E.2d 173, 176 (Ind.Ct.App. 2002); *In re Estate of Highfill,* 839 N.E.2d 218, 224 (Ind.Ct.App.2005). Moreover, "due regard must be given the trial court's opportunity to judge the credibility of witnesses, and the judgment should not be set aside unless clearly erroneous." *Brandeis,* 765 N.E.2d at 176.

Further, as we have held, when reviewing the trial court's judgment in a guardianship proceeding, "we consider only the evidence most favorable to the prevailing party, and we neither reweigh the evidence nor reassess witness credibility." *Chavis v. Patton,* 683 N.E.2d 253, 255 (Ind.Ct.App.1997). I view the trial court's decision with respect to an order that the Atkinses, as co-guardians, allow Brett's visitation and contact with Patrick to be akin to that of a custody determination or modification. In such determinations, we also apply an abuse of discretion standard. We define such an abuse of discretion as occurring when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Higginbotham v. Higginbotham,* 822 N.E.2d 609, 611 (Ind.Ct.App.2004); *Pawlik v. Pawlik,* 823 N.E.2d 328, 330 (Ind.Ct. App.2005); *Stratton v. Stratton,* 834 N.E.2d 1146, 1151 (Ind.Ct.App.2005). In the appeal of such determinations, we have repeatedly stated that we will not substitute our judgment for that of the trial court unless no evidence or legitimate inferences support its judgment, *id.,* and noted that "the trial court is in a better position than we are to render a decision ... because [it] can observe the parties' conduct and demeanor and listen to their testimony." *Pawlik,* 823 N.E.2d at 330, *Stratton,* 834 N.E.2d at 1151. *Id.* We have further emphasized that we will not reweigh the evidence, judge witness credibility, or substitute our judgment for that of the trial court. *Higginbotham,* 822 N.E.2d at 611, *Pawlik,* 823 N.E.2d at 330, *Stratton,* 834 N.E.2d at 1151; *see also In re Adoption of T.L. W.,* 835 N.E.2d 598, 600 (Ind.Ct.App.2005) (On appeal of order denying motion to enforce visitation, "we will not reweigh the evidence or substitute our judgment for that of the trial court.").

The majority concedes that Dr. Jonathon Mangold, a psychologist recognized by the majority as an expert, testified that he had personally met with Patrick, and that visitation with Brett might not be positive for Patrick from a psychological standpoint. Further, when Dr. Mangold opined that no visitation between Patrick and Brett should be ordered, he testified that he had reached this conclusion after having heard all of the testimony at trial. Therefore, the trial court's order denying the motion to order visitation was supported by evidence before it, and we should affirm. *See Perdue Farms, Inc.,* 683 N.E.2d at 240; *Higginbotham,* 822 N.E.2d at 611; *Pawlik,* 823 at 330; *Stratton,* 834 N.E.2d at 1151. When the majority concludes that "the overwhelming wealth of evidence in the record, as well as common sense" supports the determination that visitation should be ordered, Op. at 886, I believe that it has impermissibly substituted its judgment for that of the trial court. *Id.; T.L. W.,* 835 N.E.2d at 600.

I further note that the majority relies upon Indiana Code section 29–3–5–3(b) to declare that the trial court was required to enter orders to encourage development of Patrick's self-improvement, self reliance and independence, and to contribute to his living as normal a life as possible under the circumstances. Op. at 886. I can agree that such would indeed by a laudable goal of a guardianship order, but I cannot agree that this is what the statute requires. According to the statute,

> if it is alleged and *the court finds that the welfare of an incapacitated person would be best served by limiting the scope of the guardianship,* the court shall make the appointive or other orders under this chapter to
>
> (1) encourage development of the incapacitated person's self-improvement, self-reliance, and independence; and
>
> (2) contribute to the incapacitated person's living as normal a life as that persons condition and circumstances permit without psychological or physical harm to the incapacitated person.

I.C. § 29–3–5–3(b) (emphasis added). Here, the trial court did not find that Patrick's welfare would be best served by limiting the scope of the Atkinses' co-guardianship. The majority opinion necessarily implies such a finding by the trial court. To such a conclusion I would also respectfully dissent and suggest that the majority has impermissibly reweighed the evidence and assessed witness credibility in violation of our long accepted standard of review.

Jeff DOERR, Appellant–Plaintiff,

v.

LANCER TRANSPORT SERVICES, Appellee–Defendant.

No. 93A02–0606–EX–515.

Court of Appeals of Indiana.

June 28, 2007.

Background: Workers' compensation claimant filed a claim for benefits after he was struck by a motorist, and after the stay in employer's insurer's liquidation proceedings was lifted, employer filed a motion to dismiss the claim. A single member of the Workers' Compensation Board granted the motion to dismiss. Claimant appealed. The full Workers' Compensation Board reversed and stated that to reinstate his claim against his employer, claimant was required to pay employer the sums he obtained in a settlement reached with a third-party tortfeasor without employer's knowledge or consent. Claimant appealed and employer filed a cross-appeal.

Holding: The Court of Appeals, May, J., held that claimant was prohibited from receiving workers' compensation benefits.

Reversed.

Workers' Compensation ⚿1107

Workers' compensation claimant was prohibited from receiving workers' compensation benefits, where claimant settled his claim against third-party tortfeasor, employer and its insurer had no knowledge of the settlement when it was made, and statute provided that if settlement was made with a third-party, then the employer or the employer's insurer had no liability for payment of compensation. West's A.I.C. 22–3–2–13.

2019 WL 2844163

Covey v. Shaffer

District Court of Appeal of Florida, Second District. | July 3, 2019 | --- So.3d ---- | 2019 WL 2844163 | 44 Fla. L. Weekly D1713 *(Approx. 4 pages)*

District Court of Appeal of Florida, Second District.

Beulah COVEY, Appellant,

v.

Linda SHAFFER and Phyllis Covey, Appellees.

Case No. 2D18-3084
Opinion filed July 3, 2019

Synopsis

Background: Life partner petitioned for emergency temporary guardianship of ward, alleging that ward's niece was preventing life partner from confirming ward was taking medications and being properly cared for. The Circuit Court, Collier County, Frederick Hardt, J., granted life partner's petition ex parte and denied ward's motion to vacate guardianship order. Ward appealed.

Holding: The District Court of Appeal, Northcutt, J., held that trial court abused its discretion by granting life partner's petition ex parte.

Reversed and remanded.

West Headnotes (2)

Change View

1 **Guardian and Ward**
A circuit court is required to hold a hearing prior to ruling on a petition for the appointment of an emergency temporary guardian. Fla. Stat. Ann. § 744.3031.

2 **Guardian and Ward**
Trial court abused its discretion by granting life partner's petition for emergency temporary guardianship of ward ex parte; court was required to hold hearing prior to ruling on appointment of emergency temporary guardian. Fla. Stat. Ann. § 744.3031.

Appeal pursuant to Fla. R. App. P. 9.170 from the Circuit Court for Collier County; Frederick Hardt, Judge.

Attorneys and Law Firms

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Opinion

NORTHCUTT, Judge.

*1 The circuit court granted Linda Shaffer's petition to appoint an emergency temporary guardian for Beulah Covey. Covey challenges the order on several grounds, but we address only her assertion that the court erred in granting the petition without a hearing. We agree and reverse.

Background

On June 27, 2018, Shaffer filed petitions to determine Covey's incapacity and for the appointment of an emergency temporary guardian for Covey, whom Shaffer asserted was suffering from Alzheimer's disease and diminished capacity. Shaffer was Covey's life partner for thirty-six years. She alleged that Covey's niece had taken Covey with her to Michigan two months earlier and was not allowing Shaffer to speak with her, preventing Shaffer from confirming that Covey was taking her medications and being properly cared for. Shaffer also alleged that Covey had since revoked a power of attorney that she had previously given to Shaffer and had been writing checks to the benefit of others.

On July 2, the circuit court issued an ex parte order appointing Shaffer as Covey's emergency temporary guardian. The court also appointed counsel to represent Covey and to serve as elisor. Covey's attorney was able to make contact with Covey by phone, and he then filed an emergency motion to vacate the letters of guardianship and the order appointing Shaffer as emergency temporary guardian. A hearing on the motion was scheduled for July 31. Several days before the hearing, Covey and her niece traveled to Florida. Covey's attorney was then able to meet with Covey for the first time and serve her with Shaffer's petitions.

At the hearing on the motion to vacate, Covey's counsel argued, among other things, that the court could not appoint a temporary guardian without holding an evidentiary hearing. Shaffer responded that the court could still hold an evidentiary hearing on the petition, even after it had been granted. Covey's niece, who had filed a counterpetition and sought to serve as guardian, suggested that the court take testimony then and there, as all of the parties were present, but the court rejected that proposal, citing a lack of notice. The court then denied Covey's motion to vacate, and her counsel filed this appeal under Florida Rule of Appellate Procedure 9.170(b)(8).

During the pendency of the appeal, the circuit court extended the temporary guardianship for a further ninety days, as is permitted by section 744.3031(4), Florida Statutes (2018). At oral argument in January 2019, the parties' attorneys informed us that the circuit court had since determined that Covey was incapacitated and that it had appointed Shaffer as permanent guardian of Covey's person and a professional guardian to serve as permanent guardian of Covey's property. [1]

Jurisdiction

*2 The appointment of permanent guardians for Covey effectively moots Covey's challenge to the appointment of Shaffer as the temporary guardian. See In re Smith, 05-09-00913-CV, 2010 WL 4324434, at *2 (Tex. App. Nov. 3, 2010) (“Complaints about an order regarding temporary guardianship ordinarily become moot if a permanent guardian is appointed.”). However, because an emergency temporary guardianship can last for a maximum of only 180 days, see § 744.3031(4) (providing that an emergency temporary guardianship expires after ninety days or when a guardian is appointed, whichever occurs first, and may be extended for “an additional 90 days”), the issues here are capable of repetition while evading appellate review. We therefore decline to dismiss the appeal as moot. See Enter. Leasing Co. v. Jones, 789 So. 2d 964, 965 (Fla. 2001) (“Although the issue presented in this appeal may be moot as it relates to these parties, the mootness doctrine does not destroy our jurisdiction when the question before us is of great public importance or is likely to recur.”); Gould v. State, 974 So. 2d 441, 444 (Fla. 2d DCA 2007).

Analysis

Covey contends that appointing the emergency temporary guardian without first holding a hearing on the petition violated her Fourteenth Amendment right to due process as well as the procedural requirements of section 744.3031. We need not address the constitutional issue because we can instead resolve the issue on nonconstitutional grounds. See Anderson v. City of St. Pete Beach, 161 So. 3d 548, 550 n.1 (Fla. 2d DCA 2014) (noting that under the principle of judicial restraint “courts should avoid considering a constitutional question when a case may be disposed of on nonconstitutional grounds”).

Section 744.3031 and Florida Probate Rule 5.648 together set forth the procedures for the appointment of an emergency temporary guardian. Section 744.3031 provides:

> (1) A court, prior to appointment of a guardian but after a petition for determination of incapacity has been filed pursuant to this chapter, may appoint an emergency temporary guardian for the person or property, or both, of an alleged incapacitated person. The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The subject of the proceeding or any adult interested in the welfare of that person may apply to the court in which the proceeding is pending for the emergency appointment of a temporary guardian. The powers and duties of the emergency temporary guardian must be specifically enumerated by court order. The court shall appoint counsel to represent the alleged incapacitated person during any such summary proceedings, and such appointed counsel may request that the proceeding be recorded and transcribed.
>
> (2) Notice of filing of the petition for appointment of an emergency temporary guardian and a hearing on the petition must be served on the alleged incapacitated person and on the alleged incapacitated person's attorney at least 24 hours before the hearing on the petition is commenced, unless the petitioner demonstrates that substantial harm to the alleged incapacitated person would occur if the 24-hour notice is given.

(Emphasis added.)

1 We read the language of the statute as requiring a hearing prior to the appointment of an emergency temporary guardian. It states that the petitioner is required to serve the alleged incapacitated person and his or her attorney with a notice of filing the petition "and a hearing on the petition." The requirement that the petitioner serve a notice of hearing plainly contemplates that a hearing is to be held. The statute goes on to specify that the notice must be provided at least 24 hours before "the hearing on the petition." The use of the definite article "the" in lieu of an indefinite article such as "a" or "any" indicates that the statute has a particular hearing in mind, i.e., the hearing for which the petitioner is required to serve notice, rather than merely a possible, optional hearing. See Myers v. State, 696 So. 2d 893, 900 (Fla. 4th DCA 1997), quashed on other grounds 713 So. 2d 1013 (Fla. 1998) ("The indefinite article a has an accepted sense of 'any,' while the definite article, the, used before a noun specifies a definite and specific noun, as opposed to any member of a class."). Section 744.3031(1) also provides that counsel for the alleged incapacitated person may request that "the proceeding" be transcribed, thus indicating that there is to be a proceeding capable of being transcribed, i.e., a hearing.

***3** We discern further support for this reading of the statute in the language of rule 5.648. Prior to its amendment in 2015, rule 5.648 required the petitioner to serve "[n]otice of filing of the petition for appointment of an emergency temporary guardian and any hearing on the petition." Fla. Prob. R. 5.648(b) (2014). But the 2015 amendment removed the word "any," further indicating that a hearing is not optional but rather should be held as a matter of course. See In re Amendments to Fla. Prob. Rules, 181 So. 3d 480, 484 (Fla. 2015).

Conclusion

2 In sum, we hold that section 744.3031 requires a circuit court to hold a hearing prior to ruling on a petition for the appointment of an emergency temporary guardian. In this case, the court erred by granting Shaffer's petition ex parte. Accordingly, the order appointing Shaffer as Beulah Covey's emergency temporary guardian is reversed.

Reversed and remanded.

VILLANTI, J., Concurs.

SALARIO, J., Concurs in result only.

All Citations

--- So.3d ----, 2019 WL 2844163, 44 Fla. L. Weekly D1713

Footnotes

1 Because this is an appeal under rule 9.170, rather than rule 9.130, the circuit court retained jurisdiction to appoint permanent guardians during this appeal and did not run afoul of rule 9.130(f)'s prohibition against the entry of a final order during the pendency of a nonfinal appeal brought under that rule. See Jannette Billot Pigna v. Messianu, —— So.3d ——, 43 Fla. L. Weekly D2260

(Fla. 3d DCA Oct. 3, 2018) (noting the distinction between appeals under rules 9.170 and 9.130).

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pellant's activities do not satisfy the "connexity" or "causal connection" requirement of specific personal jurisdiction because Appellee's suit does not arise out of or relate to Appellant's contacts with Florida. *American Overseas, supra*, at 1127 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 80 L.Ed.2d 404 (1984)); *R.F. Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977)("[T]he relationship among the defendant, the forum, and the litigation ... [is] the central concern of the inquiry into personal jurisdiction."). This conclusion is supported by the instant trial court's failure to identify a causal connection that would support specific jurisdiction. Accordingly, the trial court's order is REVERSED and the case is REMANDED for dismissal.

BOOTH, JOANOS and VAN NORTWICK, JJ., concur.

Manuel RAIMI, Individually and as Co-Personal Representative and Trustee of the Evelyn S. Gruber Last Will and Testament and Evelyn S. Gruber Revocable Trust Both Dated July 8, 1994; Renee Raimi and Frieda Pantzer, SunTrust f/k/a SunBank/Miami, N.A.; Theresa Heidel, Individually and as an Officer of SunBank/Miami, N.A., Lucille Clum, Individually and as Vice President and Trust Officer of SunBank/Miami, N.A.; Ida Raimi and Edward L. Schultz, Appellants,

v.

Estelle G. FURLONG, Appellee.

Nos. 96-954, 96-998, 96-1002, 96-1011 and 96-1012.

District Court of Appeal of Florida, Third District.

Sept. 17, 1997.

Rehearing Denied Jan. 8, 1998.

Testator's nephew filed petition for administration of testator's final will. Testator's stepdaughter filed petitions to set aside final will as product of undue influence and for administration of earlier will. Stepdaughter subsequently brought equitable action against testator's sister, brother, and nephew, testator's bank, and certain bank officers alleging conspiracy to deprive testator of her estate through undue influence or breach of fiduciary duty and that testator lacked testamentary capacity. The Circuit Court, Dade County, Moie J.L. Tendrich, J., determined that there was conspiracy, found that bank was additionally negligent in its hiring, training, retention, and supervision of its employees, and declined to admit final will to probate. Appeal was taken. The District Court of Appeal, Green, J., held that: (1) evidence was insufficient to establish conspiracy; (2) bank did not impliedly consent to trial of unpled negligence theory; (3) evidence was insufficient to establish lack of capacity; and (4) final will was not product of undue influence.

Reversed and remanded with directions.

1. Conspiracy ⇐1.1

Civil conspiracy requires agreement between two or more parties to do unlawful act or to do lawful act by unlawful means, the doing of some overt act in pursuance of conspiracy, and damage to plaintiff as a result of acts done under the conspiracy.

2. Conspiracy ⇐1.1

Actionable civil conspiracy requires actionable underlying tort or wrong.

3. Conspiracy ⇐8

Testator's sister's telephonic request to her son that he contact testator to render assistance to her after her late husband's death was insufficient to establish civil conspiracy to deprive testator of her money and assets during her lifetime through exercise of undue influence or breach of fiduciary duty.

4. Conspiracy ⇐19

While civil conspiracy may be proven by circumstantial evidence, this may be done only when inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.

5. Conspiracy ⇐19

Receipt of some benefits from testator, without any evidence of knowledge of alleged conspiracy to deprive testator of her money and assets during her lifetime through exercise of undue influence or breach of fiduciary duty, was insufficient to establish parties' participation in alleged conspiracy.

6. Contracts ⇐96

Mere affection, kindness, or attachment of one person for another does not itself constitute undue influence.

7. Banks and Banking ⇐51
Pleading ⇐427

Trial court should not have found testator's bank negligent for the hiring, retention, and supervision of its employees, in testator's stepdaughter's equitable action, as this theory was not pled or tried by consent. West's F.S.A. RCP Rule 1.190(b).

8. Pleading ⇐427

Testator's bank's failure to object to evidence of its failure to supervise and train employees, in testator's stepdaughter's equitable action, was not implicit consent to trial of unpled negligence theory, as evidence was also directly relevant to issue of bank's breach of fiduciary duty to testator. West's F.S.A. RCP Rule 1.190(b).

9. Pleading ⇐427

Failure to object cannot be construed as implicit consent to try unpled theory when evidence introduced is relevant to other issues properly being tried. West's F.S.A. RCP Rule 1.190(b).

10. Wills ⇐50

To execute valid will, testator need only have testamentary capacity, that is, ability to mentally understand in general way the nature and extent of property to be disposed of, testator's relation to those who would naturally claim substantial benefit from his will, and general understanding of practical effect of will as executed.

11. Wills ⇐36, 43, 44

Testator may still have testamentary capacity to execute valid will even though he may frequently be intoxicated, use narcotics, have enfeebled mind, failing memory, or vacillating judgment.

12. Wills ⇐37

Insane individual or one who exhibits queer conduct may execute valid will as long as it is done during lucid interval.

13. Wills ⇐21

For valid will, it is only critical that testator possess testamentary capacity at time of execution of will.

14. Wills ⇐400

Appellate court will not interfere with probate court's finding of testamentary capacity unless there is absence of substantial competent evidence to support finding or unless it appears that probate court has misapprehended effect of evidence as a whole.

15. Wills ⇐400

It is duty of appellate court to examine all of the evidence to determine whether there is substantial and competent evidence to support probate court's finding of testamentary capacity and whether probate court may have misinterpreted legal effect of evidence as a whole.

16. Wills ⇐400

When probate court has misinterpreted legal effect of evidence in its entirety, its finding of testamentary capacity will not be affirmed merely because there is evidence that is contradicted on which findings may be predicated.

17. Evidence ⇐571(2)

Neurologist's testimony that testator suffered from severe dementia was insufficient to establish lack of testamentary capacity, given that neurologist categorically testified that he was unable to offer any opinion as to testamentary capacity at any given time and will contestant offered no evidence that testator was incompetent or not lucid at time she executed contested will.

18. Wills ⇐155.1

When will is challenged on grounds of undue influence, influence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such extent that there is destruction of free agency and willpower of testator.

19. Wills ⇐163(2, 8)

Presumption of undue influence arises in favor of will contestant if it is established that substantial beneficiary under will occupied confidential relationship with testator and was active in procuring contested will.

20. Wills ⇐163(8)

Once presumption of undue influence arises, burden shifts to beneficiary of will to come forward with reasonable explanation of his or her active role in preparation of decedent's will.

21. Wills ⇐166(1)

If presumption of undue influence goes unrebutted, it alone is sufficient to sustain will contestant's burden.

22. Wills ⇐166(1)

If presumption of undue influence is rebutted, will contestant must establish undue influence by preponderance of evidence.

23. Wills ⇐164(6)

Any undue influence used to procure earlier will was wholly irrelevant to question of whether subsequent will was also product of undue influence.

24. Wills ⇐163(2)

Although testator's nephew was beneficiary under challenged will and enjoyed confidential relationship with testator, presumption of undue influence was not raised, as nephew did not procure attorney for testator, nephew did not give any instructions to attorney as to preparation of challenged will, nephew did not have knowledge of dispositive provisions of will, nephew was not present at execution of challenged will, and nephew did not take possession of will after its execution.

25. Wills ⇐163(2)

Even if presumption of nephew's undue influence had arisen in connection with contested will, presumption was rebutted by nephew's explanation that he merely facilitated testator's independent decision to change her will after her bitter dispute with stepdaughter over proceeds of treasury bill.

26. Wills ⇐155

Testator's final will, which disinherited her stepdaughter's family, was not product of nephew's undue influence, as testator's sole motivation for disinheriting stepdaughter's family was testator's anger and animosity towards stepdaughter due to dispute over proceeds of treasury bill.

Bunnell, Woulfe, Kirschbaum, Keller & McIntyre, P.A. and Nancy W. Gregoire, Ft.Lauderdale, for appellants Manuel Raimi, Renee Raimi and Frieda Pantzer.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., and Arthur J. England, Jr., and Charles M. Auslander, and John G. Crabtree, Miami; Bergman and Jacobs, P.A. and Richard H. Bergman, Miami; Muskat, Odessky and Miller, P.A. and Robert B. Miller, North Miami Beach, for appellants SunBank/Miami, N.A., Theresa Heidel and Lucille Clum.

Deutsch & Blumberg, P.A. and James C. Blecke, Miami, for appellant Ida Raimi.

Holland & Knight, and Daniel S. Pearson, and Lenore C. Smith, Miami, for appellant Edward L. Schultz.

Heller and Kaplan, and Daniel Neal Heller, and Dwight Sullivan, and Joseph Currier Brock, Miami, for appellee.

Before LEVY, GERSTEN and GREEN, JJ.

GREEN, Judge.

This is a consolidated appeal of five appeals from an adverse final judgment entered after a non-jury equitable action and a will contest action. In its final judgment of the equitable action, the lower court, in essence, found that all of the appellants had conspired using undue influence to deprive the decedent (Evelyn S. Gruber) of her money and assets prior to her death in March 1995 and had caused her to execute her final will in their favor which they sought to admit to probate. As a result, the lower court awarded both compensatory and punitive damages against each of the appellants in the equitable action. Further, the court refused to admit the decedent's last will to probate in favor of an earlier executed will. The appellants argue, on this appeal, that the lower court's findings and conclusions are unsupported by competent substantial evidence in the record and/or the court misapprehended the effects of the evidence. We agree for the reasons which follow and reverse.

FACTUAL BACKGROUND

The undisputed evidence adduced at trial, taken in the light most favorable to appellee, reflects that prior to her death, the decedent, Evelyn Gruber, was the widow of Jacob Gruber. Evelyn and Jacob had been married for approximately 18 years when he died in March 1993. It had been a second marriage for both and had produced no children. Appellee, Estelle Furlong was Jacob's only child from his prior marriage and the decedent's stepdaughter. The decedent had no children of her own. Jacob and Evelyn had each amassed considerable wealth prior to their marriage to each other, Jacob as a successful New York attorney and investor and Evelyn as a buyer for a women's clothier. Evelyn's net worth, however, was considerably more than Jacob's.

Jacob's daughter, Estelle, a practicing probate attorney in Miami, rendered legal services to her father and stepmother, which included the drafting of their respective wills. Estelle's husband, Dr. James Furlong, was the personal physician to both Evelyn and Jacob. During their lifetime, Jacob and Evelyn interacted and socialized frequently with the Furlongs and bestowed generous gifts upon the Furlongs. Evelyn rarely saw or visited her blood family members which consisted of her sister, appellant, Ida Raimi and brother, appellant, Edward L. Schultz, both of whom resided in Michigan, or her nephew (i.e., Ida's son) and his wife, appellants, Manuel ("Manny") and Renee Raimi, who resided in St. Petersburg, Florida. Despite their lack of frequent interaction, however, Evelyn did generously bestow both monetary and non-monetary gifts upon her sister Ida due to her limited financial resources.[1]

A. "THE LOST WILL" DATED JANUARY 23, 1992

On January 23, 1992, Jacob and Evelyn executed identical wills which were prepared by Estelle Furlong. As for Jacob's will, the bulk of his estate, estimated as being between $1.5 and $1.8 million, was left to Evelyn. Estelle and Evelyn were named co-personal representatives of Jacob's estate. Evelyn's will similarly left the bulk of her estate, estimated at approximately $3.3 million to Jacob. Jacob and Estelle were named co-personal representatives of Evelyn's estate. In the event that Evelyn predeceased Jacob, it was provided that 75% of the residue of Evelyn's estate (as well as 100% of her jewelry, tangible property and $200,000) would go to Estelle Furlong and 25% of the residue would go to Evelyn's sister, Ida.[2] In the event that Ida predeceased Evelyn, a third of her $1 million share would go to appellant, Manny Raimi.

Shortly before Jacob's death in March of 1993, Evelyn asked Estelle for the original of her January 23, 1992 will. Estelle returned the original of Evelyn's will to her as requested and it was never seen again. This will, dubbed "The Lost Will" in the proceedings below, was the will ultimately admitted to probate by the lower court in the will contest action.

B. "THE BLAUSTEIN WILL" DATED APRIL 8, 1993

Approximately one week after the death of her husband Jacob, Evelyn had a friend, Rose Alpert, drive her to see Donna Blaustein, Esq., a probate attorney with the law firm of Broad and Cassel in Miami, for the purpose of procuring a new will. According to Ms. Blaustein's unrefuted testimony, Evelyn was anxious to have a new will drawn which would divide her estate equally between her sister, Ida and brother, Edward Schultz, and their heirs, and completely disinherit Estelle and Dr. Furlong. Although Ms. Blaustein had some initial concerns that Evelyn did not have a complete understanding of the size of Jacob's or her estate,[3] she

1. Evelyn's brother Edward owned a business and was financially secure in his own right.

2. In this will, Evelyn also made a $15,000 bequest to Ida's son, Manny Raimi and his wife, Renee.

3. For example, Ms. Blaustein testified that even though Jacob had left Evelyn 77% of his estate, Evelyn believed that Jacob had disinherited her. Ms. Blaustein further testified that Evelyn feared that she was going to be left destitute despite her being worth more than $3 million dollars in her own right.

deemed Evelyn competent to execute a new will and dispose of her estate. Ms. Blaustein explained that in her experience as a probate lawyer, it was not uncommon for elderly widows such as Evelyn not to fully comprehend probate matters.

Ms. Blaustein then proceeded to draft a new will in accordance with Evelyn's instructions. In this new will, ("The Blaustein Will"), Evelyn divided her estate evenly between her brother Edward and sister Ida[4] and made no provisions whatsoever for the Furlongs. Alvin Cassel was named the personal representative in this will. Evelyn executed "The Blaustein Will" on April 8, 1993, and at the time, Ms. Blaustein was satisfied that Evelyn fully understood the size of her and Jacob's estate, its income, and disbursements. Ms. Blaustein thereafter retained the original of this will for six weeks. During this period, Ms. Blaustein wrote a letter to Evelyn memorializing Evelyn's instruction that she "did not wish to waive any of [her] inheritance from [her] husband, especially since [she was not] anxious to have those assets passed directly to Estelle and her family."

Approximately one and a half months after Evelyn's execution of "The Blaustein Will," Estelle learned of its existence. Dr. Furlong testified that Estelle was upset when she learned about "The Blaustein Will" and thought it "only fair" that the Furlongs be put back into Evelyn's will. Thereafter, Estelle telephoned Ms. Blaustein to terminate her services as Evelyn's lawyer. Estelle also prepared a letter signed by Evelyn which directed Ms. Blaustein to return to Evelyn "the original interim will which you prepared for me dated April 8, 1993, which I intend to destroy."

Estelle and Evelyn picked up "The Blaustein Will" on May 24, 1993 from Ms. Blaustein's office. At that time, Ms. Blaustein gave Evelyn a letter memorializing her concern of Estelle's inherent conflict of interest in representing Evelyn where Estelle had borrowed stock from her late father which was still owed and unpaid to the estate and hence, Evelyn. Estelle's loan was documented by five notes from Jacob which instructed Evelyn to recoup the stock or deduct its value (i.e., approximately $96,000) from Estelle's inheritance under Jacob's will. Within two days of their visit to Ms. Blaustein, Estelle drafted a disclaimer for Evelyn's signature wherein Evelyn disclaimed any interest in the stock. Evelyn executed the disclaimer and Estelle maintained in the proceedings below that Evelyn was completely lucid and competent during this time.

Later, Estelle, as co-personal representative of her late father's estate, wrote to appellant, SunTrust Bank, formerly known as SunBank Miami, N.A., to inquire about her father's assets at the bank. Appellant, Theresa Heidel, a private banker at SunTrust responded in a letter. Later, Estelle and Evelyn, acting as co-personal representatives of Jacob's estate, then personally met with Heidel. At that time, Estelle asked to be the sole signatory of Jacob's estate to facilitate the payment of expenses as needed and Heidel explained that that would require Evelyn's written authorization. Evelyn did provide such authorization in writing.

C. "THE FURLONG WILL" DATED JUNE 1, 1993 AND THE ALLEGED INCEPTION OF THE CONSPIRACY

After Evelyn retrieved the original "Blaustein Will," Estelle drafted another will for Evelyn which she executed on June 1, 1993. In this will, Estelle was named as the personal representative and pursuant to its terms, the Furlongs were to receive 40% of Evelyn's estate and the remaining 60% of her estate was to be divided evenly between Evelyn's sister, Ida and brother, Edward.

At or about the time of Evelyn's execution of this will, Ida telephoned her son, Manny in St. Petersburg, Florida, to express her concern about Evelyn. According to Manny's unrefuted testimony, his mother told him that Evelyn was very depressed about Jacob's death and did not understand what Estelle was doing with Jacob's estate matters. Manny further testified that his mother wanted him to do whatever he could to

4. In "The Blaustein Will," Evelyn's friend, Rose Alpert was made a beneficiary of a $50,000 bequest.

help Evelyn. Shortly thereafter, Manny telephoned Evelyn at her home and re-introduced himself as he and Evelyn had not been particularly close prior to that time. He subsequently visited his aunt at her home.

According to Manny's testimony, Evelyn asked him to review and explain some documents for her, namely, the stock disclaimer that Estelle had asked her to sign, the five stock notes, the SunTrust document designating Estelle to serve as the sole signator on Jacob's estate account, and "The Furlong Will" dated June 1, 1993. Manny stated that Evelyn was unhappy with the terms of her latest will and that Estelle had not adequately explained these documents to her. Manny detected that his elderly aunt who was 82 at the time of his arrival had "difficulty understanding documents." Manny further testified that Evelyn asked if he knew of an attorney who could draft another will for her.

D. THE BROIDA WILL DATED JULY 9, 1993

Because Manny was unfamiliar with any attorney in the Miami area, he procured an attorney and friend, Joel Broida, from his hometown of St. Petersburg to prepare a new will for Evelyn. He immediately flew back to St. Petersburg alone to meet with Mr. Broida with both Evelyn's latest will and Jacob's will in hand.[5] Mr. Broida drafted a new will ("The Broida Will") for Evelyn without ever meeting or speaking to her. Manny was named as the personal representative for "The Broida Will." In this will, Ida received 20% of Evelyn's estate plus 100% of all tangible property, jewelry, and autos. Manny and his wife, Renee received 19% of Evelyn's estate. Edward and Evelyn's niece each received 5% of the estate and the remaining 51% of the estate was divided among Evelyn's other family members. With the exception of the bequest of a piano, the Furlongs were completely disinherited under "The Broida Will." Manny also had Mr. Broida draft a durable power of attorney for Evelyn's signature which, among other things, gave Manny the unrestricted and unlimited power to sell and dispose of Evelyn's assets.

When Manny returned to Miami with "The Broida Will" and power of attorney, he learned that Evelyn had arranged a meeting with Estelle to discuss the return of Jacob's stock. At this meeting, held on June 25, 1993 in Estelle's office, Evelyn requested Estelle to return the stock. Estelle declined to return the stock and insisted that Evelyn had voluntarily relinquished this stock to her as a gift. During this same meeting, Manny requested Estelle, as co-personal representative of Jacob's estate, to place some of Jacob's securities into the names of Evelyn and Manny or Renee, as joint tenants with rights of survivorship. Estelle declined this request as well. Prior to the conclusion of this meeting, Manny and/or Evelyn requested the return of the original "The Furlong Will" dated June 1, 1993.

At or about this time, Evelyn executed the durable power of attorney in favor of Manny which had been prepared by Mr. Broida. Manny immediately took possession of it. At this time, Evelyn also notified Heidel of SunTrust that she wanted Jacob's personal bank account transferred into her [Evelyn's] own name. Heidel, in turn, notified Estelle who agreed to the transfer. Later, Evelyn and Manny went to see Heidel at the bank for the purpose of having Evelyn named the sole signatory on Jacob's estate account. Heidel notified Estelle of the requested change and informed Estelle that she needed to immediately fax a letter of authorization for the same as Evelyn wanted to effectuate the change without delay.

On July 9, 1993, Evelyn executed "The Broida Will," bequeathing approximately 77% of her estate to Manny and his immediate family, at SunTrust Bank where Heidel and two other bank employees served as witnesses. Heidel testified that she never detected a lack of understanding or mental incapacity on Evelyn's part when she executed this will. Manny kept the original Broida Will and power of attorney in his home in St. Petersburg. Evelyn placed a copy of the will in her safe deposit box, where Estelle later found it. During this same time, Evelyn also

5. While he was away, Evelyn travelled with the Furlongs to Atlantic City, New Jersey to gamble and attend Dr. Furlong's 45th high school reunion.

rescinded Estelle's authority as sole signatory on Jacob's estate account.

During the summer and fall months of 1993, Manny increasingly spent more time with Evelyn and actually stayed at her home several days per week. In addition to serving as Evelyn's chauffeur, Manny became increasingly involved in her financial affairs. For example, he wrote out checks for Evelyn's signature and reconciled her bank statements.

On or about July 14, 1993, Evelyn and Manny went to see Heidel at the bank about the purchase of some securities because Evelyn was concerned that her assets were not generating sufficient income. Heidel introduced them to Blanca Lola–Teriele, an investment consultant at the bank. Teriele believed Evelyn to be in full control of her faculties and recommended that Evelyn purchase either a Franklin Insured Tax Free Income Mutual Fund or Putnam Municipal Fund. After discussing various options, Evelyn read and signed the application completed by Teriele and purchased approximately $450,000 in tax free securities. In purchasing these securities, Evelyn specifically requested that they be issued jointly in her name and either Ida or Manny's name so that no one else could gain control of them. Evelyn made it clear, however, that she wanted the income checks from these securities to be placed in her name alone as it was not her intent to make a present gift of the same to Ida or Manny.

Subsequently, Evelyn decided that she wanted these tax free securities to be placed in her name alone rather than jointly with Ida or Manny and informed Estelle of the same. Estelle, who had no reason to question Evelyn's competency to make this change, called Teriele at the bank to arrange for the transfer of securities. Estelle then told Ida and Manny of the requested transfer and procured their signatures on the requisite paperwork to effectuate the change. Thereafter, the securities were reregistered in Evelyn's name alone.

Sometime at or around this time period, Estelle became concerned about what she perceived as Manny's increasing influence over Evelyn's financial affairs. Estelle testified that she went to the bank to voice her concerns to Heidel and to solicit her assistance. Specifically, Estelle warned Heidel that "there is a shark in the water." Heidel responded "oh, she's all right, they're all right." Heidel took no actions as a result of Estelle's statements or concerns.

In late August, Estelle telephoned Heidel to inquire whether Manny had been in the bank with Evelyn. When Heidel replied yes, Estelle stated that she was very concerned that "there may be overreaching going on." Heidel testified that during her 1½ year interaction with Evelyn both inside and outside of the bank, Evelyn never demonstrated any lack of understanding or mental defect. She characterized Evelyn as being "sharp as a tack" and "feisty."

Thereafter, on September 2, 1993, Evelyn went to Heidel for the purpose of cashing a check in the amount of $9,800. Heidel wrote the check for Evelyn's signature. Heidel then authorized this check to be cashed. On the next day, Evelyn again cashed another check for $9,800 with Heidel's authorization. Heidel never questioned Evelyn about her need for any of this money. There is no record evidence of whether Manny was physically present inside of the bank with Evelyn when either of these checks were cashed.

Sometime late in the summer or early in the fall of 1993, Manny notified Dr. Furlong, Estelle's husband, that Evelyn was experiencing continuing depression and having memory problems. Dr. Furlong referred Evelyn to his friend, Dr. Peritz Scheinberg, a neurologist. On the day before her scheduled visit with Dr. Scheinberg, however, Evelyn went in to see Dr. Furlong. According to Dr. Furlong, Evelyn appeared to have understood and responded to his questions appropriately. He opined that she seemed to suffer from a type of aphasia (i.e., word forgetting) typical in octogenarians. Dr. Furlong saw no signs of Alzheimer's disease, incompetence, or dementia of any kind.

On September 2, 1993, Evelyn met with Dr. Scheinberg for a thirty minute examination. Dr. Scheinberg asked Evelyn questions and made clinical observations. Based upon his examination, Dr. Scheinberg opined and testified at the trial below on behalf of Estelle that Evelyn was suffering from "[p]rob-

able senile dementia of the Alzheimer's type" which impaired her judgment. Dr. Scheinberg further opined that her dementia was so severe that it pre-existed her visit to him by at least one year and that he expected this condition to progressively worsen. This opinion was based upon his experience in general with Alzheimer patients rather than his particular examination of Evelyn. Notwithstanding his general conclusions about Evelyn, Dr. Scheinberg could not opine that the dementia affected her cognitive ability to understand the extent of her estate and heirs at any given time.[6] He further allowed for the possibility of variations in that Evelyn could have had good days and bad days in terms of her decision-making process.[7]

Dr. Scheinberg testified that after he examined Evelyn, he told Manny of his findings and gave him a copy of the medical report. Dr. Scheinberg also immediately telephoned Dr. Furlong to apprise him as well. Dr. Furlong testified that he, in turn, withheld Dr. Scheinberg's findings about Evelyn from Estelle because Estelle was a "sick girl" and the news about Evelyn might be devastating to her health. Neither Dr. Furlong nor Manny ever told anyone at SunTrust about Dr. Scheinberg's findings. Manny later mailed a copy of Dr. Scheinberg's medical report to Manny's nephew, an internist in Michigan, to see if he could suggest any treatment. Manny's nephew informed him of a new memory drug which Dr. Furlong, at Manny's request, then prescribed for Evelyn. Evelyn never had any follow-up visits with any other doctors regarding Dr. Scheinberg's findings.

During the fall of 1993, Evelyn's relationship with the Furlongs was amicable as Evelyn, Manny, and the Furlong family dined out together frequently. It was during this period that Evelyn informed Manny that she was no longer satisfied with the terms of "The Broida Will" and the power of attorney. According to Manny's testimony, Evelyn

6. Dr. Scheinberg testified as follows:

Q. Did she have the cognitive ability to know approximately what her estate consisted of, or are you unable to venture an opinion on that?

A. I can't answer that. I suspect that she had the cognitive ability to know a figure. Whether she understood the significance of that figure, I don't really know. She definitely had problems with arithmetic calculations, and with reading comprehension.

* * * * * *

Q. Did she have the cognitive ability to know who her heirs were?

A. I didn't ask her that question. I can't really—I can't decide that.

* * * * * *

Q. Does [sic] judgment impairment prevent her from knowing what her estate consists of and who her heirs are?

A. I don't think necessarily. It depends on the extent of the dementia.

* * * * * *

7. In this regard, Dr. Scheinberg further testified as follows:

Q. Is it reasonably possible that some five, six, seven months before you saw her, that she had a far greater cognitive ability than what you saw on September 2, 1993?

A. Is it possible?

Q. Reasonably possible.

A. What does that mean, 51 percent?

Q. Okay, 51 percent.

A. I would have to say that based in medical probability, that for the preceding year, that her judgment was impaired to the point that I would have viewed her as demented.

Is there a possibility, yes I mean, there can be variations. Her depression might not have been as severe. And she may have been an aberrant or unusual case, I don't know, I didn't see her before.

* * * * * *

Q. If some approximately six months prior to the time that you saw her she's asked a series of questions, such as when did your husband die; she answers appropriately: How long have you been married; and she answers appropriately: Where do you live; and she gives the address and the telephone number of where she lives and gives the zip code number. And is asked what her purpose in visiting the lawyer is, and she tells the lawyer that she wants to be represented in connection with her husband's estate, and she wants to prepare a new will: That she gives the lawyer her maiden name: That she tells the lawyer who her heirs are, and that she tells the lawyer how she wants her estate distributed, do you have an opinion as to whether or not that's an indication that she intellectually understood what was going on and knew what she was doing at that time?

A. It suggests it. It suggests that there were—that superficially at least she knew the things which you have described.

I want to remind you that my role in this process was to see her as a neurologist on a specific occasion, and then was subsequently asked to extrapolate backwards and determine how long I thought there had been the same kind of problem present. But I cannot quantitate it.

* * * * * *

wanted the will to be redrafted and the power of attorney destroyed.

Prior to having her will redrafted, Estelle took Evelyn to SunTrust in November 1993 to inquire about a custodial account for Evelyn. There they met with appellant Lucille Clum, a trust officer at the bank. Estelle explained to Clum that Evelyn was recently widowed and needed assistance with her checks and finances. During this meeting, Estelle told Clum that Manny had taken over Evelyn's affairs and that she "was very concerned that there might be some overreaching." Evelyn said little except that she was sad about the death of Jacob and stated that she wanted to know what the bank's role would be in a custodial account. Clum explained to her that the bank could do as much or as little as she wanted—"safe-keep the assets, collect the income, and pay ... out the income to her in whatever form she wanted." Evelyn told Clum that she would think about it and get back to her. On their way out of the bank building, Estelle and Evelyn ran into Heidel, at which time Estelle repeated her concerns about Manny.

E. THE FURLONG WILL A/K/A "THE HAPPY FAMILY WILL" DATED DECEMBER 22, 1993

Sometime in late December 1993, Estelle and Evelyn went to Evelyn's safe deposit box where Estelle read "The Broida Will" and power of attorney. Estelle testified of her "shock" when she saw these documents as she was certain that they were the product of undue influence. Subsequently, she met with Evelyn and Manny to discuss the terms for a new will which Estelle intended to prepare herself. The new Furlong will ("The Happy Family Will") gave 40% of Evelyn's estate to the Furlongs, 10% to Ida, 30% to Manny, 15% to Edward and 5% to Edward's daughter. Estelle and Manny would be appointed co-personal representatives. Evelyn executed this will on December 22, 1993 in Estelle's office. Manny was not present. Prior to Evelyn's execution of the will, Estelle again explained its terms and Evelyn appeared to be contented. According to Lynee Blum, an attorney who witnessed the execution, Evelyn seemed to have understood the terms of the will and appeared to be lucid. After Evelyn's execution of this new Furlong will, Estelle testified that all of the relatives were "one big happy family." Estelle, however, never told anyone at SunTrust about this new will because "it was none of their business."

From December 1993 until May 1994, Evelyn lavished both her immediate family and the Furlong family with cash and other nonmonetary gifts. Even Manny's mother-in-law, appellant Freida Pantzer, who occasionally stayed over at Evelyn's apartment, received gifts. At no time did any of the gift recipients question Evelyn's competency to make such gifts or offer to return them. With the exception of her brother Edward who was not a gift recipient, Evelyn gave gifts and cash to Manny and his family totalling approximately $1.5 million dollars. The Furlong family received gifts and cash totalling over $500,000. Dr. Furlong testified that Evelyn's generosity was not new as she has always been "a very generous lady."

One of Evelyn's "gifts" to Estelle led to the ultimate rift between the two and the end of the "happy family" relationship. On or about May 20, 1994, Estelle accompanied Evelyn to the bank where Evelyn signed the proceeds of a maturing $350,000 treasury bill over to Estelle. Estelle then deposited the same into her personal checking account. Within a few weeks thereafter, Evelyn sought the return of this money and explained to both, Estelle and Dr. Furlong, that she had mistakenly given Estelle the treasury bill and had not intended it as a gift. Estelle refused to return the money and responded that Evelyn knew exactly what she was doing when she made the gift. This exchange between Evelyn and Estelle was extremely bitter and Estelle thereafter testified that she deemed herself "out of the picture" as a result of this incident.

F. "THE BARASH WILL" DATED JULY 8, 1994

Thereafter, on June 30, 1994, Evelyn and Manny went to see Miami attorney, Jeffrey Barash, about a new will for Evelyn. Evelyn and Manny selected Barash by virtue of his ad in the telephone book and his office's proximity to Evelyn's home. When they arrived at Barash's office, Manny initially re-

mained in the waiting room while Evelyn had her consultation with Barash. Barash testified that Evelyn told him that she had been born in Russia and when her family came to America, they settled in Detroit. She also told him about her career as a purchaser for a women's clothier, her life with Jacob, and her sadness at his passing. She further told him of her family and her deteriorating relationship with the Furlongs which was the reason that she desired a new will. Evelyn explained to Barash that the Furlongs were no longer treating her the way they had when Jacob was alive.

When Evelyn described her estate as being approximately $2½ to $3 million dollars, Barash recommended that she have a revocable trust. Evelyn then requested that Manny be allowed in so that Barash could explain the workings of a trust to both of them. Manny then joined this consultation. Evelyn questioned Barash about her control of the trust and how it would operate in the event of her disability. After Barash explained about the trust, Evelyn selected Manny as successor trustee. Because Manny wasn't a resident of Dade County, Barash suggested that Evelyn also appoint a local successor co-trustee such as a bank. Evelyn selected appellant, SunTrust.

On her next visit to Barash's office, Evelyn discussed the dispositive provisions of her proposed new will. Evelyn told Barash that she wanted 40% of her estate to be left to Manny and his wife, Renee; 30% to be left to Edward; and 30% to be left to Ida. She further bequeathed $100,000 to Dr. and Mrs. Furlong and $25,000 to each of their children. Manny was not present in the room with Evelyn and Barash at this time or at any other time when the will provisions were being discussed.

Evelyn executed the "The Barash Will and Trust" on July 8, 1994. Barash had arranged for Clum from SunTrust to serve as a witness for Evelyn's execution of the will and trust as he anticipated an attack on Evelyn's testamentary capacity by virtue of the fact that Evelyn had substantially disinherited the Furlongs. Although Manny had driven Evelyn to Barash's office, he remained outside during the execution of these documents. Prior to her execution of the documents, Barash reviewed them with Evelyn to make sure that she understood all of the provisions. Barash testified that Evelyn appeared to have fully understood what was explained to her.

After her execution of "The Barash Will and Trust," Evelyn later returned to Barash's office to express her frustration at Estelle's refusal to return the proceeds of the $350,000 treasury bill. Barash suggested that she could compensate for the loss by merely amending her trust to further decrease her gifts to the Furlongs. Accordingly, on August 11, 1994, Evelyn executed an amendment to "The Barash Will and Trust" which reduced the bequest to the Furlongs to just $1,000. The reason for the reduction was explicitly stated in the amendment. "The Barash Will and Amended Trust" ultimately was the final will executed by Evelyn.

At or about the time that Evelyn was preparing to execute "The Barash Will and Trust," during the summer of 1994, Dr. Furlong contacted Evelyn's brother, Edward, to find out why Manny was sequestering Evelyn. Dr. Furlong testified that he told Edward that Evelyn could be "the victim" of stealing and financial draining by Manny. Edward thanked him for calling and told Dr. Furlong that he would get back to him within two weeks. Edward never telephoned Dr. Furlong again.

Further, during this period, Manny's mother-in-law, Frieda, increasingly spent more time with Evelyn and drove her around town. As a result of their friendship, Evelyn began to see Frieda's personal doctor, Dr. Ernest Herried, instead of Dr. Furlong. Dr. Herried found Evelyn to be mentally alert and responsive to his questions about her medical problems.

EVELYN'S FINAL MONTHS

In January 1995, Jacob's estate was closed and Estelle forwarded the closing documents to Evelyn for her signature along with the remaining $9,400 from his estate account. Evelyn executed and returned the documents along with $9,400 to Estelle.

Evelyn became ill in early March 1995. She went to see Dr. Harried but refused to comply with his suggestion that she be hospi-

talized. Evelyn died from her illness in her apartment on March 3, 1995.

I

PROCEEDINGS BELOW

Approximately two weeks after Evelyn's death, Manny and SunTrust as co-personal representatives of Evelyn's estate of "The Barash Will and Amended Trust" filed a petition for administration of that will. Shortly thereafter, Estelle filed a petition for administration of "The Furlong Will" (a/k/a "The Happy Family Will") dated December 22, 1993 and a verified petition to set aside "The Barash Will and Amended Trust" on the grounds that they had been procured through undue influence and overreaching. Edward and Ida as named beneficiaries under "The Barash Will and Amended Trust" were granted permission to intervene in this proceeding.

Subsequently, Estelle filed a "Substituted Petition for Administration" requesting that "The Lost Will" dated January 23, 1992 be admitted to probate rather than "The Happy Family Will" dated December 22, 1993. Estelle also filed a two count amended petition against appellants alleging that they conspired to deprive Evelyn of her estate through undue influence, duress, and intimidation and that Evelyn lacked testamentary capacity.[8] Estelle sought equitable relief in the form of an accounting, restitution, and the imposition of a constructive trust. Estelle also sought to have "The Barash Will and Amended Trust" declared void and of no effect. Later, Estelle amended these pleadings to allege that all of Evelyn's wills after "The Lost Will" dated January 23, 1992 were the products of Evelyn's incompetency and/or appellants' undue influence. Estelle never sought compensatory or punitive damages in any of her pleadings. Rather, ten days prior to trial, Estelle moved to amend her petition to assert a claim for punitive damages. The lower court did not entertain this motion to amend until two days prior to the end of the eleven day trial. When the appellants objected to the proposed amendment on the grounds that Estelle had made no threshold showing of an entitlement to punitive damages, the trial court decided to take the matter under advisement pending its final judgment in the cause.[9]

II

FINAL JUDGMENT OF LOWER COURT

The trial court entered its final judgment finding that there was clear and convincing evidence that a reprehensible conspiracy had been formed by the appellants to deprive Evelyn of her money and assets during her lifetime through undue influence and in the case of the bank and its employees, through a breach of their fiduciary duty. The court found that the bank was additionally negligent in its hiring, training, retention, and supervision of its employees, Heidel and Clum. Accordingly, the lower court entered a

8. Specifically, Count I alleged that:

> [b]eginning approximately April/May, 1993 and continuing to the date of Evelyn S. Gruber's death, Manuel Raimi, Renee Raimi and Ida Raimi, enjoying a confidential and/or fiduciary relationship with Evelyn S. Gruber, conspired, using undue influence, duress and intimidation to deprive Evelyn S. Gruber of her money and assets. That conspiracy was later joined by Frieda Pantzer, Edward Schultz, Theresa Heidel, Lucille Clum, and SunBank/Miami, N.A., each of whom also enjoyed a confidential and/or fiduciary relationship with Evelyn S. Gruber.
>
> As a result of the conspiracy, the conspirators deprived Evelyn S. Gruber of substantial monies and other assets.

Count II alleged the same conspiracy and continued as follows:

> On July 8, 1994, in furtherance of said conspiracy, the respondents caused Evelyn S. Gruber to execute a Last Will and Testament and a Revocable Trust. On August 11, 1994, in furtherance of said conspiracy, the respondents caused Evelyn S. Gruber to execute a First Amendment to Evelyn S. Gruber Revocable Trust dated July 8, 1994. A copy of these respective documents are [sic] attached hereto as Exhibits 1, 2 and 3.
>
> On the date of the execution of Exhibits 1, 2 and 3, Evelyn S. Gruber lacked testamentary capacity. Alternatively, and/or additionally, the execution of Exhibits 1, 2 and 3 was procured by the conspirators by duress, intimidation and undue influence.

9. We note also that counterclaims and cross-claims for fraud, undue influence, and tortious interference were likewise filed against Estelle and Dr. Furlong which were ultimately dismissed by the lower court. Because the appellants have not elected to appeal their dismissal, we do not address the same.

final judgment in the equitable action in favor of Evelyn's estate and against the appellants, jointly and severally, in the amount of $1,533,689.55, including prejudgment interest. The court further assessed punitive damages against SunTrust Bank in the amount of $4,500,000; Manny in the amount of $2,000,000; Edward and Frieda each in the amount of $1,000,000.

In the will contest litigation, the lower court declined to admit "The Barash Will and Amended Trust" to probate on the grounds that it had been procured by undue influence and overreaching by Manny and that the decedent lacked testamentary capacity to execute the same. In fact, the court declared that all of the decedent's wills executed subsequent to "The Lost Will" dated January 23, 1992 had been procured by undue influence and/or the decedent lacked testamentary capacity to execute the same. Accordingly, the lower court admitted "The Lost Will" dated January 23, 1992 to probate. This appeal followed.

III

EQUITABLE CLAIMS LITIGATION

We first address the final judgment as it relates to the equitable claims litigation. Appellants assert, among other things, that the judgments entered against them must be reversed where the evidence adduced by appellee Furlong was insufficient to make a prima facie showing of any civil conspiracy to deprive the decedent of her money and assets during her lifetime through undue influence and/or breach of a fiduciary duty. The bank further asserts that the lower court erred in imposing liability against it for the negligent hiring, training, and retention of Clum and Heidel where these theories were never pled or tried by consent.

[1, 2] Based upon our careful review of the record, we agree with the appellants that all of the judgments entered against them must be reversed where the evidence was insufficient to establish the existence of a civil conspiracy [10] in the first instance. A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy. *See Florida Fern Growers Assoc., Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 565 (Fla. 5th DCA 1993); *Nicholson v. Kellin*, 481 So.2d 931, 935 (Fla. 5th DCA 1985). Additionally, an actionable conspiracy requires an actionable underlying tort or wrong. *See Florida Fern Growers*, 616 So.2d at 565; *Wright v. Yurko*, 446 So.2d 1162, 1165 (Fla. 5th DCA 1984).

> Thus, a cause of action for civil conspiracy exists . . . only if 'the basis for the conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person.'

Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So.2d 949, 951 (Fla. 3d DCA 1984) (citing *American Diversified Ins. Servs., Inc. v. Union Fidelity Life Ins.*, 439 So.2d 904, 906 (Fla. 2d DCA 1983)). In this case, the appellee apparently maintained below that the underlying actionable torts were the appellants' undue influence and the bank's breach of fiduciary duty.

[3–6] Appellee Furlong's sole proof of the inception of the conspiracy was Ida's telephonic request to her son, Manny, that he contact the decedent to render assistance to her after her late husband's death. Without more, we find this evidence to be wholly insufficient for the establishment of a conspiracy. As Manny and Ida were the only parties privy to this telephonic conversation, Furlong obviously had no direct proof of any agreement to use undue influence to loot the decedent of her assets during her lifetime. While Furlong correctly asserts that a conspiracy may be proven by circumstantial evidence, this may be done "only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary." *Diamond v. Rosenfeld*, 511 So.2d 1031, 1034 (Fla. 4th DCA 1987), *rev. denied*, 520 So.2d 586 (Fla. 1988). Here, it cannot be said that the inference of a conspiracy outweighs all reasonable inferences to the contrary. A reasonable inference can be made that Ida's sole motiva-

10. Our holding in this regard thus obviates our need to address the appellants' further challenge to the entry of a judgment for compensation and punitive damages in an equitable proceeding.

tion for telephoning Manny was her sheer concern for the well-being of her elderly, recently widowed sister who had always been kind to her. The finding of the formation of a conspiracy during this telephone conversation would be pure speculation at best, and insufficient to sustain the civil judgment. Moreover, there was absolutely no evidence that the remaining appellants had knowledge of the alleged conspiracy or that they knowingly participated in it. *See James v. Nationsbank Trust Co. Nat'l Assoc.*, 639 So.2d 1031, 1033 (Fla. 5th DCA 1994) (mortgagors failed to establish bank's involvement in conspiracy where it was alleged only that bank had knowledge that development company's continuing fraud was aided if bank supplied the loan); *see also Menendez v. Beech Acceptance Corp.*, 521 So.2d 178, 180 (Fla. 3d DCA 1988) (some proof of knowledge of a conspiracy and participation by tortfeasor must be shown to survive summary judgment); *Trautz v. Weisman*, 809 F.Supp. 239, 246 (S.D.N.Y.1992) (mere knowledge of the conspiracy is insufficient; there must be an actual knowing participation). To assume or speculate, as appellee would have us do, that the remaining appellants participated in a conspiracy formed by Ida and Manny merely because they ultimately received some benefits from the decedent is insufficient for the imposition of liability against them.[11] *See Karnegis v. Oakes*, 296 So.2d 657, 659 (Fla. 3d DCA 1974), *cert. denied*, 307 So.2d 450 (Fla.1975). Thus, we find that the lower court erred in finding that the appellants participated in a conspiracy to extract gifts and benefits from the decedent during her lifetime through the exercise of undue influence or the breach of a fiduciary duty.

[7–9] We also agree with the appellant bank that the lower court erred in finding it negligent for the hiring, retention, and supervision of appellants Heidel and Clum where this theory was never pled or tried by consent. Appellee asserts, however, that this theory was implicitly tried by consent where the bank failed to lodge an objection below. We disagree. A failure to object cannot be construed as implicit consent to try an unpled theory when the evidence introduced is relevant to other issues properly being tried. *See Bilow v. Benoit*, 519 So.2d 1114, 1116 (Fla. 1st DCA 1988); *Wassil v. Gilmour*, 465 So.2d 566, 569 (Fla. 3d DCA 1985). Here, we think that appellee's evidence of the bank's failure to supervise and train Heidel and Clum was directly relevant to the issue of the bank's breach of fiduciary duty to the decedent. Thus, the bank's failure to object to this evidence cannot properly be construed as its implicit consent to the trial of this unpled theory. Rule 1.190(b), Fla. R. Civ. P., which permits unpled issues to be expressly or implicitly tried by consent of the parties was never intended to allow one party to catch the opposing party off guard and inject new unpled issues that are relevant and related to other issues properly before the court.

For all of these reasons, we reverse all the judgments entered against the appellants and remand with instruction that final judgment be entered in their favor on the main action.

IV WILL CONTEST LITIGATION

Finally, we address that portion of the final judgment which relates to the will contest litigation. Appellants, with the exception of the bank and its employees,[12] urge that the lower court erred as a matter of law in admitting "The Lost Will" dated January 23, 1992 to probate upon its conclusion that the decedent's last executed will, "The Barash Will and Amended Trust," was void due to the decedent's lack of testamentary capacity and/or Manny's undue influence. We agree and reverse this portion of the final judgment as well.

11. The entire basis for appellee's conspiracy claim appears to be that the appellants were the recipients of the decedent's generosity in some manner during her lifetime. The undisputed record evidence, however, disclosed that the decedent had a long history of being generous to others and mere affection, kindness, or attachment of one person for another does not itself constitute undue influence. *See In re Dunson's Estate*, 141 So.2d 601, 605 (Fla. 2d DCA 1962). Ironically, if we were to follow appellee's reasoning, she and her family members would also have to be declared co-conspirators since they too were benefactors of the decedent's generosity during her lifetime.

12. These appellants take no position on this issue.

TESTAMENTARY CAPACITY

[10–13] It has long been emphasized that the right to dispose of one's property by will is highly valuable and it is the policy of the law to hold a last will and testament good wherever possible. *See In re Weihe's Estate*, 268 So.2d 446, 451 (Fla. 4th DCA 1972), *quashed on existing facts*, 275 So.2d 244 (Fla.1973); *In re Dunson's Estate*, 141 So.2d at 604. To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed. *See In re Wilmott's Estate*, 66 So.2d 465, 467 (Fla. 1953); *In re Weihe's Estate*, 268 So.2d at 448; *In re Dunson's Estate*, 141 So.2d at 604. "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment." *In re Weihe's Estate*, 268 So.2d at 448. Moreover, an insane individual or one who exhibits "queer conduct" may execute a valid will as long as it is done during a lucid interval. *See Id.* Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will. *See Id.; see also Coppock v. Carlson*, 547 So.2d 946, 947 (Fla. 3d DCA 1989) (whether testator had the required testamentary capacity is determined solely by his mental state at the time he executed the instrument), *rev. denied*, 558 So.2d 17 (Fla. 1990).

[14–16] An appellate court will not interfere with a probate court's finding of testamentary capacity unless there is an absence of substantial competent evidence to support the finding or unless it appears that the probate court has misapprehended the effect of the evidence as a whole. *See In re Weihe's Estate*, 268 So.2d at 449. It is the duty of the appellate court to examine all of the evidence to determine whether there is substantial and competent evidence to support the findings of the probate court and whether the probate court may have misinterpreted the legal effect. Further, where the probate court has misinterpreted the legal effect of the evidence in its entirety, its findings will not be affirmed merely because there is evidence that is contradicted on which the findings may be predicated. *See Lambrose v. Topham*, 55 So.2d 557, 558 (Fla.1951) (citing *Hooper v. Stokes*, 145 So. 855, 857, 107 Fla. 607, 610 (1933)). Any rule to the contrary would render a probate court's finding of testamentary capacity virtually unassailable on appeal.

[17] In the instant case, the lower court, citing to Dr. Scheinberg's testimony, concluded that the decedent lacked the requisite testamentary capacity to execute "The Barash Will and Amended Trust." Our review of the evidence leads us to find that the lower court's conclusion in this regard was erroneous as a matter of law and that the court simply misinterpreted the legal effect of Dr. Scheinberg's testimony. Although Dr. Scheinberg opined that the decedent suffered from severe dementia which would progressively worsen, and that her judgment was significantly impaired on the date of his exam, he categorically testified that he was unable to offer any opinion as to her testamentary capacity at any given time. Moreover, Dr. Scheinberg did allow for the possibility of the decedent having "lucid intervals" in her decision-making process. The appellee offered no evidence that the decedent was incompetent or not lucid at the time she made the "The Barash Will and Amended Trust." *See Coppock* 547 So.2d at 947. In fact, the evidence was to the contrary. Given that the presumption of testamentary capacity is so strong in Florida that it allows for a demented or insane person to execute a valid will during a "lucid interval," *see Murrey v. Barnett Nat'l Bank*, 74 So.2d 647, 649 (Fla. 1954), the trial court's conclusion that the decedent lacked testamentary capacity to execute "The Barash Will and Amended Trust" simply did not comport with the evidence adduced at trial and may not stand as a matter of law.

UNDUE INFLUENCE

[18, 19] The lower court additionally found that "The Barash Will and Amended Trust" was void because it was procured by "undue influence and overreaching by Man-

ny in violation of a confidential or fiduciary relationship." When a will is challenged on the grounds of undue influence, the influence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator. *See In re Carpenter's Estate*, 253 So.2d 697, 704 (Fla.1971); *In re Dunson's Estate*, 141 So.2d at 605; *see also Estate of Brock*, 692 So.2d 907, 911 (Fla. 1st DCA 1996), *rev. denied*, 694 So.2d 737 (Fla. 1997). A presumption of undue influence arises in favor of a will contestant if it is established that a substantial beneficiary under the will occupied a confidential relationship with the testator and was active in procuring the contested will. *See In re Carpenter's Estate*, 253 So.2d at 701; *Brock*, 692 So.2d at 911; *Elson v. Vargas*, 520 So.2d 76, 76 (Fla. 3d DCA), *rev. denied*, 528 So.2d 1181 (Fla.1988). The origin of the confidence between the benefactor and testator is immaterial and the confidential relationship is broadly defined:

> The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.
>
> * * * * * *
>
> The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal.

In re Carpenter's Estate, 253 So.2d at 701 (citing *Quinn v. Phipps*, 113 So. 419, 421, 93 Fla. 805, 810 (1927)). As for a determination of whether a substantial beneficiary was active in the procurement of the will, our supreme court in *In re Carpenter's Estate* outlined the following nonexclusive list of factors for the court's consideration:

> a) presence of the beneficiary at the execution of the will;
>
> b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
>
> c) recommendation by the beneficiary of an attorney to draw the will;
>
> d) knowledge of the contents of the will by the beneficiary prior to execution;
>
> e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
>
> f) securing of witnesses to the will by the beneficiary; and
>
> g) safekeeping of the will by the beneficiary subsequent to execution.

253 So.2d at 702. These listed criteria are only general guidelines and a will contestant is not required to prove them all to establish active procurement. *See Id.* Each case is fact specific and the significance of any (or all) of such criteria must be determined with reference to the particular facts of the case.

[20–22] Once the presumption of undue influence arises, the burden shifts to the beneficiary of the will to come forward with a reasonable explanation of his or her active role in the preparation of the decedent's will. *See Brock*, 692 So.2d at 912. If the presumption goes unrebutted, it alone is sufficient to sustain the contestant's burden. *See Id.* On the other hand, if the presumption is rebutted, the contestant must establish undue influence by a preponderance of the evidence. *See Tarsagian v. Watt*, 402 So.2d 471, 472 (Fla. 3d DCA 1981).

[23] With reference to "The Barash Will and Amended Trust," the lower court found that a presumption of undue influence was created by virtue of Manny's: 1) role in finding Mr. Barash; 2) role in procuring "The Barash Will and Amended Trust"; and 3) control of the decedent's personal and financial affairs.[13] The court further found

13. Curiously, the lower court also justified the presumption of undue influence on Manny's role in procuring the earlier Broida will and durable power of attorney and retaining these documents for safekeeping after their execution. Assuming without deciding that the creation and execution of these documents were the products of Manny's undue influence, it is undisputed that they were both destroyed at the decedent's request a year prior to the execution of "The Barash Will and Trust." Any undue influence utilized to procure the Broida documents was wholly irrelevant to the question of whether the subsequent Barash documents were also the product of undue influence. Consequently, we think that appellee, as the contestant to the Barash documents, was required to come forth with independent evidence that "The Barash Will and Amended Trust" was likewise the product of Manny's undue influence. *See Martin v. Martin*, 687 So.2d 903, 906 (Fla. 4th DCA 1997) ("A finding that the decedent was susceptible to undue influence on one of the dates would not have been conclusive as to his state of mind on the other date."); *see also In re Dunson's Estate*, 141 So.2d at 604

that the presumption had not been rebutted by a reasonable explanation for Manny's acts and conduct. Alternatively, the lower court found that even in the absence of the presumption, Manny's undue influence had been proven by the greater weight of substantial and competent evidence. We do not agree that the evidence supports either of the lower courts' alternative conclusions.

[24] First of all, we do not agree that the record evidence was sufficient to create a presumption of undue influence. Although Manny was a substantial beneficiary under the challenged will and does not contest the fact that he enjoyed a confidential relationship with the decedent during her final years, there was insufficient evidence to establish that he was active in the procurement of this will. Although Manny was present when the decedent expressed her desire to revoke the Furlong "The Happy Family Will" and make a new will, the unrefuted evidence below does not support the lower court's finding that Manny procured attorney Barash for the decedent or that Manny was even familiar with this attorney for that matter.[14] According to the only evidence adduced, Barash was randomly selected from the yellow pages by virtue of his proximity to the decedent and specialty. There was no evidence that Manny gave any instructions to attorney Barash as to the preparation of the challenged will and trust; nor was there any evidence that Manny had knowledge of the dispositive provisions of the decedent's proposed final will.[15] Further, Manny was not present at the execution of the challenged will and all of the witnesses to the decedent's execution of this will were independently procured by Barash. Finally, Manny did not see or take possession of these documents after the decedent's execution of the same.

(mental capacity of testator at the time he executed will is determinative factor).

14. Indeed, the unrefuted evidence was that Manny was totally unfamiliar with any attorney in the Dade County area.

15. Although Barash brought Manny into his office briefly to explain the mechanics of a trust, Barash testified that at no time was Manny present when the dispositive provisions of the will and trust were discussed with the decedent.

[25] Under these facts, we do not believe that a presumption of undue influence properly arose. Even assuming, arguendo, that such a presumption could be created, we find that there was a clear and reasonable explanation to rebut this presumption. The decedent expressed her desire to revoke the Furlong "Happy Family Will" and disinherit the Furlongs in the aftermath of her bitter dispute with appellee over the proceeds of the $350,000 treasury bill. It was uncontroverted that the decedent was extremely angry because she perceived (whether correctly or incorrectly) that her stepdaughter had wrongfully taken advantage of her by misappropriating the proceeds of the treasury bill. The expressed reason given by the decedent for further diminishing her bequest to Estelle with the amendment to the challenged will was to compensate for the unreturned proceeds from the treasury bill. Given these unrefuted facts, Manny's explanation that he merely facilitated the decedent's independent decision to change her will after her dispute with Estelle was reasonable under these circumstances.[16]

[26] In the absence of the presumption, we similarly cannot agree that appellee met her burden of establishing undue influence by the greater weight of the evidence. *See In re Carpenter's Estate*, 253 So.2d at 704–05; *Coppock*, 547 So.2d at 947. The unrefuted record evidence indicates that the decedent's sole motivation for disinheriting the appellee's family from her final will was the decedent's anger and animosity towards appellee over the treasury bill incident. Thus, the lower court's finding that the decedent was somehow "duped" into making her last will by Manny is not sustainable by the record evidence and must be reversed.

16. It is noteworthy that the decedent's decision to disinherit the Furlongs in "The Barash Will and Amended Trust" was not without precedent. Prior to Manny's arrival and alleged undue influence, the decedent had disinherited the Furlongs in the Blaustein Will. This occurred at or about the time of the decedent's dispute with appellee over the appellee's failure to repay the borrowed securities from Jacob's estate. Thus, the record evidence suggests that the decedent appears to have disinherited her stepdaughter's family during those times when she believed that they were mistreating her.

In conclusion, given the sound policy of this state to effectuate the last wishes of a decedent as expressed in his or her final will and given the dearth of substantial evidence of lack of testamentary capacity or undue influence, in this cause, we are compelled to respect the decedent's last wishes as expressed in "The Barash Will and Amended Trust." *See Coppock*, 547 So.2d at 947. Accordingly, we reverse that portion of the final judgment directing that the decedent's will dated January 23, 1992 (i.e., "The Furlong Will" or "The Lost Will") be admitted to probate and remand with instructions that the decedent's last executed will and amendment thereto, "The Barash Will and Amended Trust," be admitted to probate.

Reversed and remanded with directions.

Don T. KOZICH, Appellant,

v.

Thomas R. SHAHADY, Individually, and Houston & Shahady, P.A., a Florida professional association; f/k/a Houston, Shahady & Hatch, P.A., a Florida professional association, Appellees.

No. 95-3377.

District Court of Appeal of Florida, Fourth District.

Sept. 24, 1997.

Rehearing and Clarification Denied Jan. 6, 1998.

Former client brought legal malpractice action against law firm which had represented him in underlying action, and filed amended complaint in which he added as defendant second firm to which he had initially paid retainer, which was separate corporation and which had some of same principals. The Circuit Court, Broward County, Patti Englander Henning, J., granted summary judgment to defendants, and plaintiff appealed. The District Court of Appeal, Stone, C.J., held that: (1) initial complaint was subject to dismissal for failure to join indispensable party, but (2) amended complaint in which second firm was added related back for limitations purposes.

Affirmed in part, and reversed and remanded in part.

1. Assignments ⇐24(1)

Legal malpractice action may not be transferred.

2. Attorney and Client ⇐129(1)

Fact that former client had previously assigned his right to "jury award" in underlying action to his brother did not deprive client of standing to bring legal malpractice action against attorneys who had represented him in action.

3. Attorney and Client ⇐129(1)

Law firm to which client had paid initial retainer was indispensable party in legal malpractice action brought by client after separate law firm, which included some of same principals and was separate corporation, represented client during trial.

4. Limitation of Actions ⇐124

Generally, amendment to complaint which adds new party to action does not relate back to date of filing of original complaint. West's F.S.A. RCP Rule 1.190(c).

5. Limitation of Actions ⇐124

Addition of party in amended complaint will relate back to date of filing of initial complaint, for limitations purposes, where new and former parties have identity of interest which does not prejudice opponent. West's F.S.A. RCP Rule 1.190(c).

6. Limitation of Actions ⇐124

Law firm initially named as defendant in legal malpractice action, which had represented client during trial, and second firm to which client had initially paid retainer, which was separate corporation with some of same principals, had identity of interest which did not create prejudice, so that amendment adding second firm as party related back for limitations purposes; law firms operated out of same office, shared telephone and fax numbers, and received process through same individuals, and no demonstrated prejudice