Case of Dana and Jan Putnam - Confidential Information for Jan's Lawyer

Important: Please "get into" your character and react as realistically as you can. If someone says something that your character would respond to cooperatively, be cooperative. If something makes you angry, express that the way you think your character would. Please do not exaggerate conflict or be too cooperative.
I encourage you to continue parts of the simulation outside of class periods. For example, lawyers and clients or counterpart lawyers may want to confer – in role – outside of class.

You have a general business practice and have worked with Jan on other matters in Jan's work as an accountant, though Jan has never been a client of yours. You have a good professional relationship in which you have referred matters to each other. Although Jan seems to be a bit dull, you have always found that s/he is very competent and easy to work with.

You understand that Jan will see you about his/her mother's will. The will is apparently generous to Jan's sibling, Dana, as compared to Jan, who may want to contest the will. Your paralegal thought that Jan might allege undue influence and summarized some applicable case law in the material below.

You have three goals for your initial interview: (1) learn the basic facts of the case, (2) learn your client's goals in this matter, and (3) identify what additional information you want to obtain. Regarding the last item, you will identify the information you want to obtain from your client, in discovery, or otherwise.

You will do the best you can to interview your client during your appointment (in class) but you may not have time to get all the information you want during that time. So you might arrange to talk with your client – in role – after class to complete your interview.

No later than March 4 at noon, you must submit a list of information you want to get.

This list will not be in form of actual discovery requests, such as interrogatories or requests for production of documents. Instead, you will simply identify the type of information you want. For example, you will almost certainly want a list of assets in the estate and their values. For this, you can simply say that you want a list of assets and their values.

You may want to conduct specific types of discovery (e.g., depose a certain party) and you can indicate that if you like. If so, you must indicate the type of information you want from that discovery process. In other words, it is not sufficient to

simply say that you want to conduct a deposition of X or obtain all documents about Y. **You must indicate what you are looking for as specifically as possible.**

The students playing clients have been instructed not to make up legally-relevant facts that are not provided to them, so you may include in your list things that your clients would normally know in real life but have not been provided to the student playing your client.

As in real life, you may or may not get all the information you want.

Missouri Law on Undue Influence

Basic Rule

In Missouri, "a testator who has enough mind and memory to understand the ordinary affairs of life, to know the nature and extent of his property and who are the natural objects of his bounty, his natural obligation to those persons, and that he is giving his property to the persons mentioned in his will, has testamentary capacity." *Crum v. Crum*, 231 S.W. 1070, 1073 (1910).

A will is voidable under Missouri law if it was created while the testatrix was under undue influence. Undue influence inducing revocation of a will must be such as to control mental operations of testatrix, and may consist of importunities such as testatrix has not courage to resist and are yielded to for the sake of peace and quiet. To establish undue influence, inducing revocation of will, it must appear influence was actually exercised to extent controlling will of testatrix against her will. *Neal v. Caldwell*, 34 S.W.2d 104, 110 (Mo. 1930).

Evidence that demonstrates "force, coercion or overpersuasion sufficient to destroy the free agency and will power of the testator" renders a will invalid. *Morse v. Volz*, 808 S.W.2d 424, 432 (Mo. App. W.D. 1991). Undue influence occurs when four elements are established: "(1) an influenceable testator; (2) the influencer had an opportunity to influence unduly; (3) the influencer had a motive and disposition to exert undue influence; and (4) the influence produced a result." *Needels v. Roberts*, 879 S.W.2d 550, 554 (Mo. App. W.D. 1994).

In *Allee v. Ruby Scott Sigears Estate*, the Missouri Court of Appeals set forth several factors considered in determining whether a testator executed a will under undue influence, including:

> (1) an unnatural disposition, (2) an onset of solicitude of the [testator] by the proponent, (3) a change in predetermined testamentary intent, (4) unusual circumstances surrounding the execution of the will, (5) hostile feelings of the beneficiary toward the expected recipients, (6) remarks of the beneficiary to the [testator] derogatory of contestants, (7) the source of the [testator's] property being such as to make the disposition to the beneficiary unlikely, and (8) recitals of the will itself indicates undue influence. 182 S.W.3d 772 (Mo. App. W. Dist. 2006).

Burden of Proof

"The proponent of a will has the burden of proof concerning testamentary capacity of the testator. Once the proponent makes a prima facie case showing due execution and attestation of the will as provided by statute and that the decedent was of sound and

disposing mind when the will was signed, the contestants must then produce substantial evidence to overthrow the prima facie case and to prove that the testator lacked sufficient mental capacity. Lewis v. McCullough, 413 S.W.2d at 504–505. See also Wright v. Kenney, 746 S.W.2d 626, 631 (Mo.App.1988); Keifer v. St. Jude's Children's Research Hospital, 654 S.W.2d 236, 237 (Mo.App.1983). The burden of proof, however, remains with the proponent of the will throughout the case. Brug v. Manufacturers Bank & Trust Co., 461 S.W.2d 269, 276 (Mo. banc 1970)." *Hugenel v. Est. of Keller*, 867 S.W.2d 298, 304-05 (Mo. App. S. Dist. 1993).

Presumption

A presumption of undue influence will arise if contestants of a will can sufficiently establish three elements: (1) that a confidential or fiduciary relationship existed between the testatrix and beneficiary; (2) that the fiduciary has been given a substantial bequest by the will; and (3) that the fiduciary was active in procuring the execution of the will. *Simmons v. Inman*, 471 S.W.2d 203, 206 (Mo. 1971). In order for there to be a presumption of undue influence, *substantial* evidence must show: "1) a confidential and fiduciary relationship; 2) benefaction to the fiduciary; and 3) some addition evidence from which undue influence may be inferred." *Est. of Gross v. Gross*, 840 S.W.2d 253, 257 (Mo. App. E. Dist. 1992). "A presumption of undue influence arises … when the evidence shows: (1) a fiduciary relationship existed between the testator and the beneficiary, (2) the beneficiary received a substantial bequest in the will, and (3) the beneficiary was active in procuring the execution of the will." *Vancil*, 935 S.W.2d at 44. *Disbrow v. Boehmer*, 711 S.W.2d 917, 925 (Mo.App. E.D. 1986).

And, when supported by probative evidence, the presumption makes a prima facie case which does not disappear upon the introduction of rebutting testimony and raises an issue for the jury. *Id*.

Once a court finds a fiduciary relationship, it "takes a very liberal attitude toward the quantum of proof necessary to establish that the fiduciary was actively concerned in some way which caused or contributed to the execution of the will." *Vancil*, 935 S.W.2d at 45. A presumption of undue influence creates a prima facie case that creates a jury question, regardless of whether proponents of the will introduce evidence to rebut the presumption. *Vancil*, 935 S.W.2d at 44 (quoting *Disbrow*, 711 S.W.2d at 925).

In *Estate of Dean*, 967 S.W.2d 219 (Mo.App. W.D. 1998), the settlor of a trust had physical problems such as congestive heart failure, bronchitis, high blood pressure, lack of hearing, and poor eyesight. Additionally, the settlor was confined to a nursing home. The court found that this evidence was not dispositive in finding the settlor lacked the mental capacity to make sound decisions.

Nature of Relationship

A "fiduciary relationship" is a "confidential relationship between two persons where one trusts and relies on the other." *Vancil*, 935 S.W.2d at 44-45 (quoting *Disbrow v. Boehmer*, 711 S.W.2d 917, 926 (Mo. App. E.D. 1986)). *Davis v. Pitti*, 472 S.W.2d 382 (Mo.1971).

The mere influence of affection or attachment or the desire to gratify the wishes of the one loved and trusted by the testator will not reveal the exercise of undue influence upon the testator without proof of such a degree of influence as to amount to an over persuasion, coercion, or force, overcoming and destroying the testator's free will and judgment. *Carl v. Ellis*, 110 S.W.2d 805, 810 (Stl. App. Ct. 1937). *In re Estate of Hock*, 322 S.W.3d 574, at 585 (Mo. Ct. App. 2010) (citing Dickinson v. Dickenson, 87 S.W.3d 438 (Mo. App. 2002), and In re Estate of Davis, 954 S.W.2d 374 (Mo. App. 1997)).

Although there is no bright line rule on when a confidential and fiduciary relationship is established, "[a] confidential relationship exists when one thus relies upon and trusts another in regard to handling property and business affairs, thereby creating some fiduciary obligation." *Estate of Gross*, 840 S.W.2d 253, 257 (Mo. App. E. Dist. 1992). In *Gross,* the jury found a confidential and fiduciary relationship between a father and son. The father trusted and relied on his son to make financial decisions, who arranged many major financial purchases, including a new car and tractor, and sale of house.

An important consideration when finding undue influence is whether the disposition of property was unnatural. A testator has the right to dispose of her property by will to a natural object of her bounty, even to the exclusion of another heir. In *Ruestman*, property was transferred to the testator's wife to the exclusion of the testator's son. *Ruestman v. Ruestman*, 111 S.W.3d 464, 481-482 (MO Court of App. 2003).

One action that can signal undue influence in a transaction is "a changed course of action." *In re Est. of Hock*, 322 S.W.3d 574, 583 (Mo. App. S. Dist. 2010).

Cases Finding No Undue Influence

In *Dickinson v. Dickinson*, an aunt executed a will in 1977 that divided her estate evenly among her nephews and niece. In the 1980's the aunt gave equal gifts to each of her nephews and niece. In the 1990's, the aunt changed her will so that her nephew that spent the most time with her was given the majority of the estate. This was not seen as a changed course of action. The court said that there was "no evidence that [her previous] intent continued into the 1990's." Because there was no such evidence, the court could not assume that the change in the will was a changed course of action. It was consistent to prefer the nephew later in her life when he helped care for her. 87 S.W.3d 438, 441 (Mo. App. W. Dist. 2002).

In *Allee v. Ruby Scott Sigears Est.*, 182 S.W.3d 772 (Mo. App. W. Dist. 2006), pairs of siblings, 2 brothers and 2 sisters, argued over the validity of a will and deeds executed prior to the death of their mother, Ruby, who in the latter stage of her life progressively suffered from mental deterioration. Upon signing the will, three years prior to her death, Ruby expressly included a clause removing her daughters from any right to inheritance, and remarked to her attorney that her reasoning included her displeasure at the poor treatment she received from them in her elderly years. Approximately 6 months later, Ruby's condition deteriorated so severely that she was adjudicatively deemed incapacitated. The sisters argued the close relationship between their mother Ruby and their surviving brothers was evidence of undue influence and sought to have the will invalidated, with a previous various version of Ruby's will to be alternatively enforced.

The surviving sister Mary and her niece and nephew, as plaintiffs, alleged that the close relationship brothers Jim and Bill had with Ruby in stark contrast to the hostile nature of the relationship between that of her mother and the sisters was a substantial factor in their omission, and several conversations about plans to omit the sisters from the will constituted undue influence. Contrastingly, the brothers contended such conversations never included direction on how to dispose of her estate. Furthermore, Ruby's attorney testified that it was Ruby who directed him to omit her daughters, not a direction or suggestion by counsel. The court ultimately held that there was no evidence of undue influence, remarking that "to set aside a deed [or will] on the basis of undue influence, there must be clear, cogent and convincing evidence of such influence." *Allee v. Ruby Scott Sigears Est.*, 182 S.W.3d 772, 780-81 (Mo. App. W. Dist. 2006) (quoting *Estate of Stanley,* 655 S.W.2d 88, 91 (Mo.App. W.D. 1983)).

"The most that can be said of the evidence is that Inga sought the marriage with Marvin Morse because of his money. Her power and opportunity to unduly influence the testator was not enough to submit the issue to the jury, absent its active exercise by Inga to that end. State ex rel. Smith v. Hughes, 200 S.W.2d at 363[3, 4]. A wife who urges and solicits her husband to make a will in her favor does not, by that fact, exercise an undue influence over its execution. Nor, to prove the issue, is it enough that the beneficiary of the will [there, also the second wife] dominated other aspects of the testator's life in ways adverse to the contestant [there the children of the first marriage]. Nor even does the fact that the wife "procured the scrivener and was present when the will was executed ... support an inference of undue influence." Hammonds v. Hammonds, 297 S.W.2d 391, 396[7, 8] (Mo.1957); Jones v. Jones, 260 S.W. 793, 797[1–3] (Mo.App.1924). Also, "the fact that a husband bequeaths all of his property to his wife to the exclusion of his children by a former marriage is not an unnatural disposition," and does not support the inference of undue influence. Id. at 394[2–6]." *Morse v. Volz*, 808 S.W.2d 424, 433 (Mo. App. W.D. 1991).

Cases Finding Undue Influence

Another factor in considering evidence of undue influence is the grantor's physical and mental health in order to show that the grantor was susceptible to the "persuasion of undue influence." *In re Est. of Hock*, 322 S.W.3d 574, 581 (Mo. App. S. Dist. 2010) (quoting *Landers v. Sgouros*, 224 S.W.3d 651, 661 (Mo. App. S. Dist. 2007)). The grantor in *Hock* had declining health for several years. Near the time when he changed his will, the grantor was dependent on alcohol, he had become "nasty and argumentative" and he began to forget things he did or said. The grantor's change in attitude and behavior caused several people he had been very close with to reduce or cut off contact. The court found there was substantial evidence that the grantor would be vulnerable to undue influence given his weakened mental condition.

In *Vancil v. Carpenter*, the Missouri Court of Appeals for the Western District of Missouri affirmed the trial court's finding that the testator's will was the result of undue influence. *Vancil*, 935 S.W.2d 42 at 49. The decedent, Wicks, was an elderly woman with no children, but several nieces and nephews. Wicks initially executed a will naming her niece Vancil as her sole beneficiary. About two years later, Wicks suffered a stroke, and her niece Carpenter and nephew Kirk began spending significantly more time with Wicks than they had in the past. Wicks subsequently executed a new will, dividing her estate equally between Vancil, Carpenter, and Kirk. The Court held that the facts gave rise to a presumption of undue influence. In finding a fiduciary relationship between Wicks and Carpenter and Kirk, the Court noted that Carpenter helped Wicks with physical activities and that Carpenter and Kirk escorted Wicks to her attorney so that she could execute the new will. In finding that Carpenter and Kirk were active in procuring the execution of the new will, the Court noted that Carpenter and Kirk increased their contact with Wicks around the time the will was executed. Furthermore, Carpenter and Kirk discouraged Vancil's efforts to communicate with Wicks. Finally, the Court noted that Carpenter and Kirk need not be present during the execution of the will to be active in its procurement; it was sufficient that they waited in the waiting room.