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## UNDUE INFLUENCE AND CONFIDENTIAL RELATIONSHIPS

The Supreme Court of Virginia recently decided a case involving the sufficiency of evidence to support a finding of a confidential relationship between parties to a deed, resulting in a presumption of undue influence.

In *Bailey v. Turnbow* (Record No. 060713, January 12, 2007), the plaintiff was the nephew of a decedent. The decedent, Annerbell Brewer, had no children, but she had twelve nieces and nephews. In her last will and testament, Ms. Brewer left her estate to her husband (who predeceased her), and then to her nieces and nephews equally. One of the nieces, the defendant, Linda Turnbow, was named as successor executrix. One of Ms. Brewer's nieces, Mary Crawford, handled Ms. Brewer's financial affairs from 1993 until Mrs. Brewer's death in 1997. Ms. Crawford not only made sure that Mrs. Brewer's bills were paid and her checkbook balanced, but also arranged for caregivers for her. Mrs. Brewer also lived with this niece and her husband while recovering from several illnesses.

Ms. Brewer also was close to one of her nephews, the plaintiff, Gilbert Bailey. Mr. Bailey was a builder and developer. Ms. Brewer and her husband had bought a house from Mr. Bailey's parents. They later exchanged this house for a piece of land that Mr. Bailey owned, and on which he built a house for the Brewers in 1963, and that Ms. Brewer owned at her death. Mr. Bailey made the repairs on this house, and he provided transportation for her in her later years. There was no evidence that he provided any assistance with her financial affairs, or that he provided her any financial advice. Ms. Brewer primarily resided with the Baileys during the last month of her life, while the niece continued to manage Mrs. Brewer's financial affairs.

In mid-1997, Ms. Brewer and Mr. Bailey went to the Department of Motor Vehicles, and Mrs. Brewer transferred the title of her vehicle into joint ownership of Mr. Bailey and her. She also told Mr. Bailey that she wanted to

transfer the title of her house to him. Ms. Bailey said that she wanted the house to remain in the family, and that she wanted Mr. Bailey ultimately to pass it to his grandson.

Mr. Bailey's attorney prepared a deed of gift transferring the real property from Ms. Brewer to Mr. Bailey, while reserving a life estate for Ms. Brewer. Ms. Brewer asked Mr. Bailey if he had the deed, and he showed it to her and read it to her. She said it was "exactly what she wanted," and she signed it in front of a notary public who was employed by Mr. Bailey and his wife.

Ms. Turnbow, the executrix, filed suit against Mr. Bailey, asking that the deed be set aside, alleging among other things, undue influence, fraud, unjust enrichment, and the decedent's lack of mental capacity. The chancellor dismissed all claims except undue influence. The chancellor held that the executrix carried her burden of proving a confidential relationship between Mr. Bailey and Ms. Brewer resulting in the presumption of undue influence, and that Mr. Bailey failed to rebut that presumption. The chancellor set aside and canceled the deed.

The Supreme Court of Virginia discussed two situations (requiring clear and convincing evidence) in which the presumption of undue influence can be established. One situation involves the mental state of the contracting party and the consideration provided in the transaction. The chancellor determined that there was no evidence to support a finding of Ms. Brewer's weakness of mind. The Court said that the chancellor's holding must rest on the second situation, which is the existence of a confidential relationship between the parties to the deed. The Court stated that Virginia law is clear that "a close family relationship, even the relationship of parent and child, will not, alone, give rise to a confidential relationship creating a presumption of undue influence." The party asserting the presumption must establish, by clear and convincing evidence, an agency relationship between the parties, an attorney-client relationship between the parties, or "when one family member provides financial advice or handles the finances of another family member." The Court then determined that the evidence in this case was insufficient to support the chancellor's finding, because none of the three cited circumstances existed. The niece, not Mr. Bailey, handled Ms. Brewer's finances, and the chancellor expressly found that the transfer of the vehicle to Mr. Bailey was free of undue influence. The Court stated that there was no evidence that the 1963 business transaction was anything other than an arms-length transaction. "A mere commercial relationship, even where the parties like and trust each other, is insufficient to establish a confidential relationship." The Court held that because there was insufficient evidence to establish a confidential relationship, no presumption of undue influence was created, and the Court reversed the chancellor's decree setting aside the deed.

This case provides a valuable lesson for the elder law attorney who is often asked to meet with a client and the client's family members. It is important for the attorney to be clear regarding who the client is. The elder law attorney must fully explore not only the family relationships, but also the existence of any agency or financial advice and assistance relationships. The attorneys at Oast & Hook are experienced with these situations and proceed cautiously to ensure that the client's wishes are carried out.

### Oast & Hook

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