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STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

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Undue Influence: Rebutting the Need for the Presumption

By Robert S. Zawideh

Introduction

You are defending a client in an undue influence case. The petitioner testified he has no information your client did anything to influence the testator to change his estate plan. Not a single person testified that they witnessed your client even attempt to do anything against the testator's will. No one testified that they witnessed any control or attempted control of any kind or nature over the decedent. The testator was never isolated, had frequent visitors, access to phones, and personally dealt with his financial advisor, and according to his doctors, nurses, and caregivers managed his own care and was described as "strong-willed" and "feisty." There was, in fact, absolutely no evidence of influence exerted on the decedent by anyone, let alone by your client.

This begs the question—how did this case even get to trial? The answer exists in four words—presumption of undue influence. Before trial, the petitioner convinced the trial court that your client—one of two beneficiaries remaining after petitioner was removed from the trust—had a fiduciary relationship with the decedent, benefited from the transaction, and had the opportunity to influence the decedent. Individually, none of these elements of the presumption are *per se* evidence that the accused influencer influenced the decedent to change his estate plan. But when all three prongs are established, they shield a contestant from motions for summary disposition, directed verdict, or even involuntary dismissal during a bench trial. In fact, if the respondent does not introduce substantial evidence to rebut the presumption, the contestant will prevail.

The time has come to retire this presumption. Undue influence requires evidence that the testator's will was supplanted with that of the influencer. The presumption, however, requires no evidence that a decedent was actually influenced. Each prong of the presumption is insufficient to prove undue influence. Together, however, the prongs create a presumption that the accused must rebut with substantial evidence. One would be hard pressed to find another instance where zero times three equals something other than zero. Moreover, if the presumption is rebutted, the law still leaves in place inferences for the trier of fact's consideration—*even in the face of uncontroverted affirmative evidence that there was no influence or control exercised over the testator*.

Compounding the problem, Michigan law currently only requires proof of undue influence by a preponderance of the evidence; the lowest evidentiary standard in law.[1] The combined effect of the presumption and the lower evidentiary standard undermines the guiding polar star of probate and trust law, which is to give effect to the intent of the testator. The purpose of this article is to generate discussion within the probate bench and bar regarding the continued viability of the presumption of undue influence. Hopefully, this discussion will lead to better ensuring that a decedent's carefully laid plans are honored while simultaneously allowing legitimate claims of undue influence to proceed.

The Guiding Polar Star

The governing principle of probate and trust law is that the intention of the testator or settlor controls. Over 175 years ago, the United States Supreme Court stated "[t]he first and great rule in the exposition of wills, to which all rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."[2] Over 125 years later, the Michigan Supreme Court echoed these sentiments, stating "[i]t is a cardinal canon, a predominating rule in the construction of wills,

that the intent of the testator must govern, unless it contravenes fixed rules of law… . The intent of the testator was fittingly styled by Lord Coke 'the polar star to guide judges in their determination."[3] The Michigan Supreme Court even subordinated the Michigan Rules of Professional Conduct to a decedent's intent. In that case, the court held that the ethical bar to attorneys drafting estate plans that benefit themselves yields to this guiding polar star, refusing to create a *per se* rule invalidating such plans.[4]

In 2000, the Michigan Legislature codified the primacy of the decedent's intentions within the Estate and Protected Individuals Code ("EPIC"). According to the Legislature, EPIC "shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following: (b) To discover and make effective a decedent's intent in distribution of the decedent's property."[5] Ten years later, the Legislature enacted the Michigan Trust Code, which must be construed and applied to promote "certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust."[6] "As with other legal documents, the "intent" is to be gleaned from the will itself unless an ambiguity is present. The law is loath to supplement the language of such documents with extrinsic information. This is especially so in the case of testamentary documents because the maker is not available to provide additional facts or insight."[7] "Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust."[8]

Undue Influence—What Is It, and How Much Influence Is Undue?

The movie *The Godfather* contains the most famous description of undue influence in popular culture. Michael Corleone explained to his then girlfriend Kay how his father, Vito, helped his godson's career:

> Michael: Well, when Johnny was first starting out, he was signed to this contract with a big-band leader. And as his career got better and better he wanted to get out of it. Now, Johnny is my father's godson. My father went to see the bandleader, and offered him $10,000 to let Johnny go, but the bandleader said no. So the next day, my father went to see the bandleader again, only this time with Luca Brasi. Within an hour, the bandleader signed the release, with a certified check of $1,000.
>
> Kay: How did he do that?
>
> Michael: My father made him an offer he couldn't refuse.
>
> Kay: What was that?
>
> Michael: Luca Brasi held a gun to his head, and my father assured him that either his brains or his signature would be on the contract.

Rarely outside of Hollywood is undue influence so clear. Off-screen, each case of undue influence is usually a case-specific factual analysis relying heavily on circumstantial evidence.[9] Undue influence almost always involves fact patterns spanning years. Although similar patterns develop between cases, the facts of each case require careful examination because "[m]en's minds are so differently constituted and operated on, that what will influence the action of one will frequently have no influence on another."[10] Thus, the same conduct that constitutes undue influence in one case may not rise to that level in another. Ultimately, influence becomes undue when the testator is too weak to resist it. "A will may not be set aside on the ground of undue influence *unless such influence amounted* to *a degree* of constraint such as *the testator was too weak to resist* and such as deprived him of his free agency and prevented him from doing as he pleased with his property."[11] The weaker the testator, the less influence it takes to become undue. There can be no "undue influence without a person incapable of protecting himself, as well as a wrong-doer to be resisted."[12] To that point, a finding that a decedent was stubborn and had a strong will is sufficient to defeat a claim of undue influence.[13]

In order "[t]o establish undue influence it must

be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient."[14] "[T]here must be more than mere opportunity, unequal distribution of property, or previous statement by the testator as to intended disposition of his estate from which the will departs, to constitute undue influence.[15] "'Undue influence' exercised upon one who executes a will may become the basis for finding the will invalid *if that influence took from the testator his right to freely exercise his discretion* in disposing of his property. This is because undue influence is something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator."[16] A party alleging undue influence bears the burdens of both proof and persuasion.[17]

The forgoing describes the law of undue influence. This is not to be confused with the law of the *presumption* of undue influence. In order to establish the presumption, it is *not* necessary to show that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. On the other hand opportunity, and ability to control—via a confidential or fiduciary relationship *are* sufficient to prove a presumption of the very fact they are insufficient to prove directly, provided those two elements are accompanied by an unequal distribution of property in favor of the accused. In other words, those things incapable of making a case of undue influence are sufficient to create a presumption of undue influence, which may allow a contestant to make a case of undue influence.

How and Why Does the Presumption Arise?

Presumptions have been fittingly described by Dean McCormick as "the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'"[18] "A rebuttable presumption is a legal fiction that allows the finder of fact to determine 'the existence of one fact (the presumed fact), for which there may be no direct evidence, upon presentation of proof of other facts (the basic facts). Once the basic facts supporting the rebuttable presumption are established, the existence of the presumed fact will be assumed until the opposing party meets a specific burden to challenge the existence of the presumed fact.'"[19] In a jury trial involving a presumption, jury instructions "should be phrased entirely in terms of underlying facts and burden of proof. That is, if the jury finds a basic fact, they must also find the presumed fact *unless persuaded by the evidence that its nonexistence is more probable than its existence*."[20]

Reasons for presumptions are numerous. Generally, it has been said that "the most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it … . Usually, for example, a presumption is based not only upon the judicial estimate of the probabilities but also upon the difficulties inherent in proving that the more probable event in fact occurred."[21]

In 1886, the Michigan Supreme Court ruled "[t]he law presumes undue influence where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, a person in favor of his priest or religious adviser, or where other close confidential relationship exists; and are viewed with great suspicion by the law, and some proof besides the factum of the will is required."[22] Four months

later, the Supreme Court tempered that decision, stating that "[t]he influence, to vitiate the will, must have been such as to amount to force and coercion, destroying her free agency, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, *which cannot be presumed*, but must be proved, and in connection with the will and not with other things."[23]

Today, a rebuttable presumption of undue influence arises when the evidence establishes "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction."[24] Although the presumption is rebuttable, the quantum of proof necessary to rebut the presumption has been a moving target for decades. In 1965, Justice Souris wrote that once a presumption was established, *the burden of proof essentially shifted to the Defendant*: "We have held with respect to statutory presumptions that in the absence of *clear, positive, and credible presumption-rebutting evidence* that would justify elimination of the presumption by the trial court as a matter of law, the jury should be instructed to apply the presumption unless it found from the evidence that the presumption had been rebutted."[25] "[I]n every case in which evidence has been offered to rebut presumed fact C, the jury should be instructed that in the event it cannot decide upon which side the evidence preponderates, then as a matter of law fact C must be presumed."[26] Eleven years later, the Supreme Court in *Kar* rejected Justice Souris's opinion in *Wood's Estate*, stating "[i]f the trier of fact finds the evidence by the defendant as *rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed*. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence."[27]

In a recent case, the Michigan Court of Appeals reversed the probate court's finding that insufficient evidence rebutting the presumption was presented to survive summary disposition. In that case, the trust proponent presented deposition testimony and attorney correspondence that tended to show that the settlor "acted under her own volition when she executed the trust. Deposition testimony indicated that [the settlor] provided petitioners with copies of the trust despite [proponent's] advice to her that she keep the terms of the trust a secret. Deposition testimony also established that several petitioners attempted to discuss the terms of the trust with [settlor] in an effort to persuade her to revoke [proponent's] life estate, but [settlor] rebuffed their requests to modify the terms of the trust on multiple occasions. Petitioners eventually stopped discussing the matter with her because they were unable to persuade her to change her mind and the terms of the trust. [Proponent] also presented evidence that [settlor's] first attorney … drafted several versions of [settlor's] 1990 will that reflected [settlor's] intent to convey a life estate to [proponent]. Evidence established that [the attorney] omitted the life estate provision from [settlor's] will only after [settlor's] son … directed [the attorney] to do so. [settlor's] second attorney … drafted her trust to include the life estate to [proponent]. [proponent] submitted for the probate court's consideration [settlor's] son Carl's deposition testimony in which he opined that [settlor] intended to convey a life estate to [proponent] upon her death."[28]

"The establishment of this presumption creates a 'mandatory inference' of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence."[29] On one hand, when "the pre-

sumption arises, the ultimate burden of proving undue influence remains on the party alleging that it occurred."[30] On the other hand, this presumption will satisfy the burden of persuasion, "if a party opposing the allegation of undue influence fails to offer *sufficient* rebuttal evidence," in which case, despite the absence of direct or circumstantial evidence of control of the decedent, "the party alleging undue influence will have met its burden of persuasion."[31]

Kar, however, was issued two years before MRE 301 became effective. MRE 301 governs presumptions and states "[i]n all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." "If the defending party *fails to present evidence* to rebut the presumption, the proponent has satisfied the burden of persuasion."[32] A presumption "is dissipated when substantial evidence is submitted by the opponents to the presumption."[33] However, while "substantial evidence consists of more than a mere scintilla of evidence," it may nonetheless amount to substantially less than a preponderance."[34] "Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact."[35] Put another way, a jury can be asked to decide (1) if a presumption has been established, (2) whether respondent has presented sufficient evidence to rebut the presumption, and (3) if the presumption has been rebutted, whether the inference that remains after the presumption has been rebutted, satisfies a contestant's burden of proving undue influence by a preponderance of the evidence.

Given that none of the three prongs establishing the inference are *per se* evidence of actual influence, the question is why this exercise is even necessary. Why should courts presume undue influence based on facts that otherwise are insufficient to prove undue influence? Ultimately, the trier of fact should only weigh direct or circumstantial evidence relating to whether the testator was unduly influenced into executing the challenged documents. Asking a jury to analyze competing proofs under a complex framework of shifting burdens, rebuttable presumptions and mandatory inferences that extend beyond the central question unnecessarily complicates an already difficult task.

Prong # 1: A Confidential or Fiduciary Relationship Between the Grantor and a Fiduciary

A confidential or fiduciary relationship is one "founded on trust or confidence reposed by one person in the integrity and fidelity of another. The term is a very broad one, * * * the rule embraces both technical and fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another."[36] "While the existence of a relationship of trust is not an *element* of undue influence, its existence, among other things, is relevant in determining whether a presumption of undue influence arises."[37] Examples recognized by the Michigan courts "include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser … . In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue."[38]

While no *presumption* of undue influence arises by the fact of marriage, that will not preclude a finding that undue influence may be exerted over a weakened or vulnerable spouse.[39] Allegations of a testator's inexperience and reliance on another are insufficient to claim a fiduciary relationship.[40] On the other hand, a confidential relationship exists when a person enfeebled by poor health relies on another to conduct banking or other financial transactions.[41] "[A]n attorney in fact acting under the authority of a general power of attorney is in a fiduciary relationship with

the principal to be generally accepted without question."[42] A presumption of undue influence may not be applied retroactively to times before the creation of a fiduciary relationship, including documents created before that time.[43] In sum, a confidential or fiduciary relationship arises when trust or confidence is reposed by one person in the integrity and fidelity of another. Simply showing inexperience and reliance is insufficient to establish such a relationship, nor does marriage standing alone, but such a relationship can nonetheless arise in a marriage. In 2018, the Michigan Court of Appeals cited *Susser Estate* for the proposition that "[t]he existence of a power of attorney reflects a fiduciary relationship even if the power of attorney was not used by the agent."[44] In other words, it was sufficient to show evidence of *ability* to control as opposed to evidence of *actual* control.

Just this year, however, the Court of Appeals reversed course by favoring *actual* control over ability to control. "Here, however, while there was testimony that Boyk had executed a power of attorney naming appellee as his attorney-in-fact with regard to finances, *appellants presented no evidence regarding the duration and nature of that power of attorney*, nor did they present evidence as to whether it was operative immediately or only upon the satisfaction of some condition, such as Boyk's disability. *Moreover, the probate court accepted appellee's testimony that she had never actually acted as Boyk attorney-in-fact, and we will not disturb the probate court's credibility determination*. In addition, although appellee admitted that she had been appointed as Boyk's patient advocate under a "medical power of attorney," *there is no evidence indicating that she was acting in that capacity when Boyk executed the disputed instruments*."[45] This is a significant shift from *Susser's Estate*. While *Boyk* is unpublished, this may signal a move by the courts to require evidence of actual control over a testator as a requirement to presuming the existence of actual control over a testator.

Prong #2: Benefit from the Transaction

In order for there to be a benefit sufficient to create a presumption of undue influence, such a benefit must be "substantial," and whether it is or is not substantial *is a question for the trier of fact*.[46] However, fiduciary and legal fees "are insufficient as a matter of law to raise the presumption of undue influence."[47] A financial planner who "collected money for his services is not sufficient to constitute a benefit."[48] "[T]he mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, would not alone establish the kind of benefit necessary to raise the presumption [of undue influence]. The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned."[49]

While there is little caselaw discussing this prong, there are principles to gleaned. A "benefit" for purposes of determining whether a presumption exists must be more than simply the earning of fees or compensation for services rendered. Further, being appointed a fiduciary as a result of the challenged transaction will not constitute a benefit for this purpose. Last, the benefit must arise directly from the challenged transaction.[50]

Prong #3: Opportunity to Influence the Grantor's Decision in that Transaction

The third prong needed to establish the presumption is the existence of the opportunity to influence the grantor's decision in that transaction.[51] "'Opportunity' is commonly defined as "a situation or condition favorable for attainment of a goal."[52] "When, because of a fiduciary relation, the presumption of invalidity of the transaction arises, doubtless such presumption is strengthened by proof of opportunity to exercise undue influence."[53] Opportunity may be found to exist when the accused influencer is present at the signing of the contested instrument.[54] Even though opportunity is one of the three prongs required to establish a presumption of undue influence, like the other two prongs, opportunity

"does not constitute affirmative evidence of undue influence sufficient to preclude summary disposition."[55]

The "opportunity" needed to raise the presumption should be sufficiently tied to an opportunity to directly influence the transaction. "[D]efendants had the opportunity to influence plaintiff›s decision in the transaction. They were present nearly every day in plaintiff›s life and they met with attorney Tomlinson, outside the presence of plaintiff, to discuss the deed. They were also in the room when attorney Tomlinson explained the deed to plaintiff and asked her whether the deed represented her intentions."[56] In other words, in order to find that an "opportunity" existed to influence the transaction, that opportunity should be meaningful. The question arises as to how broadly to construe opportunity to influence the challenged transaction. It is not uncommon for testators to be private about their estate planning desires during their lifetimes. Estate planning counsel are bound by attorney client privilege and are duty bound not to disclose those plans unless authorized to do so by their client, or by their death or incapacity, which would then trigger the need for disclosure. Is there still an opportunity to influence a transaction if there is uncontroverted affirmative evidence that the accused influencer had no knowledge of the transaction?

The Disappearing Jury Instruction

There exists a confusing back and forth between rebuttable presumptions, mandatory inferences, and clashing analyses between the presumption and the ultimate question of undue influence. The result is to give the weakest cases life that do not deserve it. Consider the following:

Facts Sufficient to Establish Presumption of Undue Influence

1. Existence of confidential/fiduciary relationship.
2. Benefited from transaction.
3. Opportunity to benefit from transaction.

Facts Insufficient to Show Undue Influence

1. Existence of confidential/fiduciary relationship is insufficient to establish undue influence because ability to control is not enough absent showing control was actually exercised.[57]
2. Showing benefit is insufficient to establish undue influence.[58]
3. Opportunity to benefit is insufficient.[59]

The conflicting nature of the proofs may explain why in late in 2014, a jury instruction regarding the presumption of undue influence disappeared, never to return. Prior to its deletion,[60] M Civ JI 170.45 provided as follows:

> To establish that the decedent made the will as a result of undue influence, the contestant has the burden of proving all three of the following propositions:
>
> That [name] had a fiduciary relationship with the decedent.
>
> That [name] (or a person or interest he represented) benefited from the will, and
>
> That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.
>
> Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.
>
> A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.

According to the *Notes on Use* that accompanied this instruction,

> [i]n cases involving the presumption of undue influence, this instruction *is applicable only where two conditions coexist*: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence,

and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280, 373 NW2d 538 (1985). Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 170.44 - Will Contests: Undue Influence - Burden of Proof.

Prior to October of 2014, a jury would only be instructed on the presumption if the putative fiduciary[61] failed to introduce substantial rebuttal evidence that undue influence did not cause the bequest. Clearly the deletion of this jury instruction and the committee's silence for over five years since then reflect the difficulty inherent in the conflict between undue influence on one hand and the presumption on the other.

Back to the Future: A Way Forward

What advice should estate planning counsel give to their clients, particularly those with children from prior marriages? Consider this common situation—a father or mother appoints one of several adult children as successor trustee, attorney-in-fact, and patient advocate. A parent may naturally trust and rely on one child over another for reasons too numerous to list here. There are countless situations where a parent wishes to provide one child with an inheritance that is larger than that of his or her siblings. Perhaps the child's spouse is someone the parent neither likes nor trusts. The parent-child relationship may have deteriorated. One child may have greater needs than their siblings. Right or wrong, there are countless reasons for favoring one heir or beneficiary over another that have nothing to do with undue influence.

Yet, a presumption may nonetheless arise that the dutiful child unduly influenced his or her parent. This can happen even in the absence of that child's knowledge of changes to the parent's estate plan. Moreover, that presumption often forces an innocent person to prove a negative. *Widmayer* states that if a jury finds a basic fact (the three prongs), they must also find the presumed fact (undue influence) unless persuaded by the evidence that its nonexistence is more probable than its existence. Further, the faith and trust that a testator reposes in the accused influencer will always be a shield and a sword. It may be an explanation for enhancing the testamentary gift. It can simultaneously be used to establish one of the three prongs necessary to create the presumption.

As the Michigan Supreme Court once said, "[f]raud and undue influence are never presumed."[62] What the law should require today is what it required over a hundred years ago—direct and/or circumstantial evidence that the will of the testator was substituted with the will of the accused influencer. There are those who argue that without the presumption, it will be difficult if not impossible to prove undue influence. The response is that in the absence of evidence that the accused influencer controlled the decedent, there is no undue influence to prove.

Invalidating a will or a trust based on undue influence is a daunting task. It should be. Contesting testamentary documents should be undertaken based on evidence, not legal fictions. Wills and trusts are the last expressions of a decedent's testamentary intentions before they leave this Earth. The dead can no longer speak for themselves. When they were alive, many had the foresight to leave written instructions. More often than not, this was done with all solemnity and at substantial expense and careful thought, detailing the wishes they expected to be carried out after they shuffle off this mortal coil. Convincing a trier of fact to ignore those written documents must require proofs leaving little room for doubt. Requiring less does little to foster "certainty in the law" and offers unnecessary complications in the bench and bar's efforts to follow the polar star of probate and trust law.

Rather than challenging the doctrine of *stare decisis*, the best way to eliminate the presumption is to do so legislatively. The relevant jury in-

structions on undue influence could be codified within EPIC and the Michigan Trust Code, with the added provision that undue influence is not to be presumed. In fact, it appears as though the Legislature has already moved in that direction. In his companion article, *Undue Influence: What Rules Apply to this Species of Fraud?* the author cites MCL 700.2507 for the proposition that the Legislature requires clear and convincing evidence to invalidate or supplement a testator's subsequent will, even in cases of undue influence. That statute provides, in pertinent part, as follows:

> (1) A will or a part of a will is revoked by either of the following acts:
>
> (a) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.
>
> . . .
>
> (2) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.
>
> (3) *The testator is presumed to have intended* a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked, and only the subsequent will is operative on the testator's death.
>
> (4) *The testator is presumed to have intended* a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will, and each will is fully operative on the testator's death to the extent they are not inconsistent.

Under common law, if a contestant establishes a confidential or fiduciary relationship, benefit, and opportunity to influence the transaction, undue influence is presumed. Under MCL 700.2507(3), however, *the subsequent will is presumed to reflect intent of the testator and no one else*. If both presumptions are allowed to stand, the existence of the testator's subsequent will simultaneously raises the presumption of two diametrically opposed facts—*that the will both does and does not reflect the intent of the testator.* It would be an absurd result to presume the existence of two facts that cancel each other out. "Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results."[63] The only reasonable construction in the face of this irreconcilable conflict is that "the unambiguous language of the statute must control."[64] MCL 700.2507 controls in the case of a will contestant challenging a subsequent will that replaces or supplements a previous will. There is no exception in the statute for theories of undue influence being the basis of such a claim. An argument can be made that MCL 700.2507(3) applies not just to wills, but also to trusts. EPIC provides that "[a] rule of construction or *presumption* provided *in this act*[65] applies to a *governing instrument* executed before that date[66] unless there is a clear indication of a contrary intent."[67] "Contrary intent" refers to the intent of the decedent.[68] EPIC also applies to a "*governing instrument* executed by a decedent dying after" the effective date of EPIC.[69] "Governing instrument" is a defined term that includes trusts.[70] MCL 700.2507 contains rules of presumptions provided under EPIC and, pursuant to MCL 700.8101(2) and MCL 700.1104(m), applies to trusts signed before EPIC was enacted and also applies to a trust executed by a decedent dying after the effective date of EPIC.

Alternatively, if the presumption of undue influence is to be retained, it should be modified. Once rebutted, it should stay rebutted without leaving in place a "mandatory inference." In a case where there exists uncontroverted evidence of lack of control over the testator, should

a court determine that the presumption has been rebutted, such a case should be summarily disposed before trial for lack of a genuine issue of material fact on the issue of control. Legal fictions should not thwart uncontroverted facts.

Instead of wasting time, money, and judicial resources proving the existence of a presumption that does not bear on control, the courts should direct litigants to instead focus their efforts on proving or disproving (1) that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion ("the Influence"); (2) that the influence was sufficient to and actually did overpower the decedent's volition and did destroy free agency; and (3) by such influence, the defendant/respondent impelled the grantor to act against his inclination and free will. Eliminating the presumption of undue influence altogether and requiring clear and convincing evidence to overturn a testator's final written expression of his or her intentions will avoid having courts and parties lose their way chasing rebuttable presumptions, and it will narrow the focus where it should—on proving facts rather than legal fictions.

Notes

1. The author argues that the burden should be raised to clear and convincing evidence in a companion article entitled *Undue Influence: What Rules Apply to This Species of Fraud?*

2. *Smith v Bell*, 31 US 68, 74 (1832).

3. As quoted in *Johnson v Atchinson*, 362 Mich 296, 299–300, 106 NW2d 748 (1961) (citing *In re Blodgett's Estate*, 197 Mich 455, 461-462, 163 NW 907 (1917)); and in *In re Mardigian Estate*, 502 Mich 154, 179, 917 NW2d 325 (2018) (Markman, CJ).

4. *Mardigian*, *supra*.

5. MCL 700.1201(b).

6. MCL 700.8201(2)(c) (emphasis added).

7. *Matter of Maloney Tr*, 423 Mich 632, 639, 377 NW2d 791 (1985).

8. *In re Gerald L Pollack Tr*, 309 Mich App 125, 160–61, 867 NW2d 884 (2015) [citing *In re Stillwell Trust,* 299 Mich App 289, 294, 829 NW2d 353 (2013)].

9. "An analysis of the cases discloses that in contesting a will on account of undue influence the burden of proof is always upon the contestant. The case must be determined generally upon circumstantial evidence. This is necessarily so by reason of the secret and insidious means by which such influence is usually exercised." *In re Loree's Estate*, 158 Mich 372, 378–79, 122 NW 623 (1909).

10. *White v Bailey*, 10 Mich 155, 158 (1862).

11. *In re Johnson's Estate*, 326 Mich 310, 319, 40 NW2d 163 (1949) (emphasis added).

12. *Latham v Udell*, 38 Mich 238, 242 (1878).

13. Presumption of undue influence was rebutted where the decedent "was a strong-willed individual who was mentally competent and capable of handling her own business affairs." *Kar v Hogan*, 399 Mich 529, 542, 251 NW2d 77 (1976) *holding limited in part on other grounds* by *In re Estate of Karmey*, 468 Mich 68, 74, 658 NW2d 796 (2003); *see also In re Mikeska*, 140 Mich App 116, 362 NW2d 906 (1985), (probate court's rejection of appellant's will contest affirmed since the decedent "was not susceptible to undue influence because of his stubborn nature" and strong-will.)

14. *Estate of Karmey*, 468 Mich at 74; *Bill & Dena Brown Tr v Garcia*, 312 Mich App 684, 699, 880 NW2d 269 (2015).

15. *In re Bulthuis' Estate*, 232 Mich 129, 136, 205 NW 191 (1925); *see also* M Civ JI 170.44 and M Civ JI 179.10.

16. *In re Mardigian Estate*, 502 Mich 154, 160, 917 NW2d 325, *reh'g denied*, 503 Mich 854 (2018) (emphasis added, internal citations and quotation marks omitted).

17. *Kar v Hogan*, 399 Mich at 539 (1976). Burden of proof "encompasses two distinct concepts: the burden of persuasion and the burden of producing evidence … . The party with the 'burden of production' on a disputed fact must introduce evidence sufficient to allow a finder of fact to find in that party's favor. If the trial court decides that the party has failed to produce such evidence, the court will direct a verdict against that party on the disputed fact. The 'burden of persuasion' refers to a party's obligation to introduce evidence that persuades the fact-finder, to a requisite degree of belief, that a particular proposition is in fact true." Curt A. Benson, *Michigan Rule of Evidence 301: I Presume*, Michigan Bar Journal (August 2008).

18. *Lappin v Lucurell*, 13 Wash App 277, 281, 534 P2d 1038 (1975), citing *McCormick On Evidence* § 342, at 802 (2d ed. Cleary 1972).

19. Joel S. Hjelmaas, Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences, 42 Drake L Rev 427, 430–31 (1993).

20. *Widmayer v Leonard*, 422 Mich 280, 289, 373 NW2d 538 (1985) (internal footnotes omitted, emphasis added). *Widmayer* went on to say "[w]e so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the

opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, *the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced.* But always it is the inference and not the presumption that must be weighed against the rebutting evidence." (Emphasis added).

21. "Reasons for the creation of presumptions: Illustrative presumptions," 2 *McCormick On Evidence* § 343 (8th ed.)

22. In re Disbrow's Estate, 58 Mich 96, 24 NW 624 (1885).

23. Bradford v Vinton, 59 Mich 139, 153, 26 NW 401 (1886) (emphasis added). *See also Prentis v Bates*, 93 Mich 234, 249, 53 NW 153 (1892) ("Fraud and undue influence are never presumed."); but see *Donovan v Bromley*, 113 Mich 53, 55, 71 NW 523 (1897) ("It is also true that the presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely, and under circumstances which rebut the inference of undue influence; and, where the proof of execution is such as to convince the jury that the testator was not at that time under the control of the legatee, it is certainly not error to at least permit the jury to draw the inference in favor of the validity of the will from the circumstances.")

24. In re Mardigian Estate, at 161.

25. In re Wood's Estate, 374 Mich 278, 132 NW2d 35 (1965) (emphasis added, internal quotation marks omitted).

26. Id., at 295.

27. Kar, 399 Mich at 542 (emphasis added).

28. In re Norma A Bolster Living Tr, No 346814, 2020 WL 815783 at *3 (Mich Ct App Feb 18, 2020). At the risk of editorializing, it is stunning that the probate court overlooked or disregarded as insufficient the breadth of this evidence that unquestionably rebutted the presumption in this case.

29. Matter of Estate of Mikeska, 140 Mich App 116, 121, 362 NW2d 906 (1985) (emphasis added).

30. Id., at 701 (citation omitted).

31. Id. (citation and quotation marks omitted).

32. Matter of Estate of Mikeska, 140 Mich App 116, 120–21, 362 NW2d 906 (1985) (emphasis added); *Mikeska* was cited with approval in *In re Mardigian Estate,* 312 Mich App 553, 566-567, 879 NW2d 313 (2015), affirmed by an equally divided court *In re Mardigian Estate*, 502 Mich 154, 917 NW2d 325, *reh'g denied*, 915 NW2d 887 (2018).

33. *Widmayer v Leonard,* 422 Mich 280, 286, 373 NW2d 538 (1985).

34. Jozwiak v Northern Michigan Hosps, Inc, 231 Mich App 230, 238, 586 NW2d 90 (1998). *See also In re Solomon's Estate*, 334 Mich 17, 25, 53 NW2d 597 (1952) ("No substantial evidence was adduced to rebut the presumption that at the time of making the will she was in full possession of her mental faculties."); *Hanson v McNamara,* No 293012, 2011 WL 255145 at *7 (Mich Ct App Jan 27, 2011) ("We conclude that petitioner presented substantial evidence that was sufficient to rebut the presumption of undue influence."). *Hanson* is particularly instructive because it details the proofs that in that case, rebutted the presumption of undue influence.

35. In re Peterson Estate, 193 Mich App 257, 261, 483 NW2d 624 (1991); *Peterson Estate*, however, predates by 23 years the elimination of M Civ JI 170.45 (jury instruction regarding the presumption of undue influence). Michigan Bar Journal, December 2014, pp. 70-71. According to the Committee on Model Jury Instructions, "it is continuing to review the issue of the presumption of undue influence and how the jury is to be instructed, *if at all, when that presumption has not been rebutted*." *Id*. (emphasis added). Despite the fact that the Committee has not replaced or commented on instructing the jury on the rebuttal of the presumption, some courts still hold that whether or not the presumption has been rebutted is a question for the jury. *In re Norma A Bolster Living Tr*, No 346814, 2020 WL 815783 at *2 (Mich Ct App Feb 18, 2020); *In re Estate of Weir*, No 291796, 2010 WL 4671018 at *5 (Mich Ct App Nov 18, 2010); *Bill & Dena Brown Tr v Garcia*, 312 Mich App 684, 701, 880 NW2d 269 (2015).

36. Van't Hof v Jemison, 291 Mich 385, 393, 289 NW 186 (1939).

37. Mikeska, at 116 (emphasis in original).

38. In re Estate of Karmey, 468 Mich 68, 75 fn. 3, 658 NW2d 796 (2003).

39. Id., at fn 4.

40. Ulrich v Federal Land Bank of St. Paul, 192 Mich App 194, 196, 480 NW2d 910 (1991).

41. In re Estate of Swantek, 172 Mich App 509, 514, 432 NW2d 307 (1988); *but see In re Estate of Ostrowski*, No 292941, 2010 WL 5373828 at *5 (Mich Ct App Dec 28, 2010) (the court rejected *Swantek*'s holding that the mere assistance in the handling of financial matters of someone who is suffering from health problems is sufficient to establish a fiduciary or confidential relationship.

42. In re Susser Estate, 254 Mich App 232, 235, 657 NW2d 147 (2002).

43. Bill & Dena Brown Tr v Garcia, 312 Mich. App at 702. However, "the conduct of the chief beneficiary of a will before or after the will's execution may be relevant to whether undue influence, was exerted in procuring the making of the will." *Id*.

44. "Accordingly, the trial court erred by determining that the 2002 power of attorney did not demonstrate a fiduciary relationship because DeBroske did not use it." *In re Estate of Krum*, No 340382, 2018 WL 6185294 at *4 (Mich Ct App Nov 27, 2018) (unpublished), citing *Susser*, at 234-235.

45. In re Estate of Boyk, No 345915, 2020 WL 972623 at *8 (Mich Ct App Feb 27, 2020) (unpublished) (emphasis added).

46. Vollbrecht's Estate v Pace, 26 Mich App 430, 437, 182 NW2d 609, 613 (1970) (emphasis added). However, *Vollbrecht's Estate* predates the elimination of the jury instruction regarding the presumption.

47. In re Estate of Forfa, No 234609, 2002 WL 31938879 at *4 (Mich Ct App Nov 22, 2002).

48. In re Estate of Berg, No 268584, 2006 WL 2482895 at *4 (Mich Ct App Aug 29, 2006).

49. In re Gerald L Pollack Tr, 309 Mich App 125, 149, 867 NW2d 884 (2015); (internal citations and quotations marks omitted, citing *Vollbrecht's Estate.)*

50. In re Estate of Berg, supra; Matter of Estate of Mikeska, 140 Mich App 116, 121, 362 NW2d 906 (1985).

51. In re Mardigian Estate, at 161.

52. In re Estate of Lawler, No 263238, 2005 WL 3536417 at *2 (Mich Ct App Dec 27, 2005).

53. Thon v Stiles, 259 Mich 145, 149, 242 NW 869 (1932).

54. Lawler, supra.

55. In re Wilfred Joseph Benedetti Estate & Tr, No 323573, 2015 WL 7370530 at *6 (Mich Ct App Nov 19, 2015).

56. Schnitzler v Donato, No 259370, 2006 WL 1752165 at *2 (Mich Ct App June 27, 2006).

57. Estate of Karmey, 468 Mich at 74.

58. In re McKeand, 185 Mich 97, 117–18, 151 NW 731 (1915) ("The fact that Jones and his wife were made beneficiaries under the will is not alone sufficient nor is contestant aided by the fact that it is shown that testator and Jones and his wife were intimate friends for many years. The latter consideration serves rather to show why Jones and his wife became objects of the testator's bounty.")

59. Estate of Karmey, supra.

60. Michigan Bar Journal, December 2014, pp. 70-72.

61. Why this instruction was limited to a "putative fiduciary" is unclear. Certainly, persons other than putative fiduciaries may unduly influence a testator. Ultimately, the benefit to the wrongdoer must be substantial, not simply being the putative fiduciary. *Vollbrecht's Estate, supra.*

62. Prentis v Bates, 93 Mich 234, 249, 53 NW 153 (1892).

63. Rogers v Wcisel, 312 Mich App 79, 87, 877 NW2d 169 (2015).

64. We presume that the Legislature is aware of the common law that legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control." *Lewis v LeGrow*, 258 Mich App 175, 183–84, 670 NW2d 675 (2003).

65. "This act" refers to EPIC. MCL 700.1101.

66. This refers to EPIC's effective date of April 1, 2000. MCL 700.8101(1).

67. MCL 700.8101(2)(e)(emphasis added).

68. See In re Estate of Mayfield, No 228624, 2002 WL 31188765 at *2 (Mich Ct App Oct. 1, 2002) ("Petitioner's self-serving testimony on the issue does not establish a clear indication of a contrary intent under M.C.L. § 700.8101(2)(e) so as to make the EPIC inapplicable. Because the will is unambiguous, we will not look beyond its four corners to establish decedent's intent."); *see also In re Estate of Fink*, No 278266, 2008 WL 2861662 at *4 (Mich Ct App July 24, 2008) ("Nothing in MCL 700.8101 prevents a trial court from considering extrinsic evidence to determine whether a testator who executed his will before EPIC was implemented had an intent contrary to the presumption contained in EPIC.")

69. MCL 700.8101(2)(a).

70. MCL 700.1104(m).

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