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Undue Influence: What Rules Apply to This Species of Fraud?

By Robert S. Zawideh

Undue influence is a species of fraud. As such, logic dictates that the rules of fraud apply to undue influence cases. Yet, despite its long-acknowledged membership in this species, the State of Michigan does not subject undue influence to the same rules as other species of fraud. In a related article,[1] this author advocates abolishing the presumption of undue influence because it undermines the "guiding polar star" of probate and trust law: the will of the testator controls the disposition of their property.[2] The problem with the presumption is threefold. First, undue influence will be presumed when three facts that are insufficient to prove undue influence are established. Second, even if rebutted by substantial evidence, an inference of undue influence remains for the trier of fact. Third, instead of clear and convincing evidence, this presumption, as well as the underlying fraud, may be proved with only a preponderance of the evidence. Currently, if a contestant can prove opportunity, benefit, and ability to control[3] then not only does the contestant go to trial, but undue influence can legally be found based on the lowest of evidentiary standards.

Michigan's failure to treat undue influence as though it is a species of fraud, despite its lip service to the contrary, is wrong for two critical reasons. First, accusations of fraud must be taken seriously. There are reasons why fraud must be pled with particularity, never presumed, and for requiring clear and convincing evidence to prove it. Second, imposing a lower burden of proof in will and trust contests conflicts with Michigan policy. Both the Estate and Protected Individuals Code (EPIC) and the Michigan Trust Code (MTC) require clear and convincing evidence to divine the intent of a testator or a settlor. The time has arrived for the bench and the bar to revisit not only the presumption, but the quantum of proof required to prove undue influence.

A "Species of Fraud" and "the Rules of Fraud"

In eighteen different cases since 1886, Michigan courts described undue influence as a "species of fraud," mostly without significant analysis.[4] Of those, three decisions state with little analysis that the rules of fraud apply to this particular species of fraud. As recently as 2018, in a dissenting opinion, Justice McCormack repeated that "'[u]ndue influence is a species of fraud,' and the rules of fraud therefore apply to questions of undue influence."[5] But what is it about undue influence that merits its inclusion in that genus?

Black's Law Dictionary defines "species" as "[i]n the civil law, form; figure; fashion or shape."[6] Precisely defining "fraud" however, is more challenging. "Although 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely."[7] Unlike its definition of "species," Black's defines "fraud" far more expansively, describing it as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."[8] Black's also defines it as "a generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated."[9]

Thus, a "species of fraud" is any conceivable form of deceit or trickery in which one person cheats another. "Misrepresentation is considered a species of fraud."[10] Using silence to mislead where the defendant knew the facts to be otherwise constitutes a species of fraud.[11] Concealment of information material to the transaction where such a fiduciary relationship exists constitutes a species of fraud.[12] The conduct of

depositing checks with unauthorized or forged endorsements has been found to be a species of fraud justifying application of the discovery rule to avoid the running of the statute of limitations.[13] "'Fraud upon the court' is a "species of fraud which constitutes an attempt to defile the court itself."[14] A prosecutor's threats to prosecute third persons absent probable cause to believe that the third person has committed a crime, while offering "concessions" as to him or her constitutes a species of fraud.[15] "Where a defendant makes a promise touching a substantive part of the consideration moving to the plaintiff, in bad faith and without intent to perform the promise, it constitutes a species of fraud."[16] "Duress is a species of fraud."[17] "[T]rademark infringement, false description, and deceptive trade practices constitute . . . species of fraud."[18] "[A]n insurance company's 'massive failure' to carry out its identified duties constitutes a 'suggestion of dishonesty' or 'a species of fraud,' within the meaning of 'bad faith.'"[19] "[I]nsider trading is a variation of the species of fraud known as embezzlement."[20]

In the case of *Scholten's Estate*,[21] the Michigan Supreme Court affirmed the trial court's instruction to the jury on undue influence. In so doing, the court shed light on why undue influence is a member of the "species of fraud":

> "'Undue influence is not exercised openly. It is a species of fraud, *and, being a species of fraud, works secretly in order to accomplish its improper purpose*. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence and the opportunity possessed by the beneficiary for the exercise of such control.
>
> 'If you find that *a scheme was made and carried out* by Catherine Scholten and Anthony Witte, or either of them, at the instance of Catherine, whereby the deceased was *induced to sign this instrument* at a time when she was weak in mind and body, stupefied by disease, and under conditions such that she was *unable to hear or appreciate or understand* what she was doing or what the instrument provided, and if such a scheme was carried out and this instrument was executed under those circumstances, then this instrument is not her last will and testament.'"[22]

That is the essence of undue influence and illuminates why undue influence is a species of fraud.[23] *Scholten's Estate*'s description of undue influence is the embodiment of fraudulent conduct. It involved a secret scheme designed to mislead another to take action. The result of the scheme was an act the victim never would have done were they fully informed and acting of their free will. Machinations were secretly put into play by the bad actor which were deceptive in nature. By definition, fraudulent conduct is intended to trick another into doing something that they would not ordinarily do, in order to benefit the bad actor. That is undue influence, and that is why it is a species of fraud.

The First Rule of Fraud: Fraud Must Be Pled with Particularity

Claims based on fraud are subject to a "heightened pleading standard."[24] "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity."[25] "In alleging fraud, it is well settled, both in law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient; that, whether fraud be alleged in a declaration, complaint, or bill, or set up by way of defense in the plea, answer, or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer. The reason is that fraud is a conclusion of law from facts stated, and facts, and not legal conclusions, are required to be pleaded. Mere general averments of fraud or the fraudulent conduct of a party, without the facts, do not constitute a statement upon which the court can pronounce judgment."[26] "[U]ndue influence is a species of fraud and as such the facts should be alleged with particularity."[27]

Applying this rule to undue influence, a contestant must therefore plead with particularity

those facts and circumstances (1) which constitute threats, misrepresentation, undue flattery, fraud, or physical or moral coercion to which the decedent was subjected; (2) the specific actions which overpowered or destroyed the decedent's volition and free agency; (3) the facts showing the decedent's previous inclination; and (4) that the accused influencer caused the decedent to act against their inclination and free will.[28] Simply alleging the challenged documents were procured by fraud, duress or undue influence does not satisfy the pleading requirement of setting forth facts and circumstances with particularity. Additionally, a contestant asserting the presumption must likewise plead the underlying facts with particularity. Just asserting the existence of a confidential or fiduciary relationship is insufficient. Rather, the facts supporting that conclusion must be pled, as well as identifying with particularity the benefit the alleged influencer obtained, as well as the supporting facts of how the accused had the opportunity to influence the testator.

Given that undue influence usually happens in secret, and the decedent is unavailable to testify, pleading causation with particularity can be difficult. *But it is still required*.[29] Evidence of undue influence is almost always circumstantial.[30] "We do not lose sight of the fact that undue influence need not be proven by direct evidence, but can be established by indirect and circumstantial evidence … . But we are of opinion that the contestant must introduce evidence from which *inferences may fairly be drawn that such influence was exercised."*[31] Although "circumstantial evidence may be relied on by contestants to show undue influence … such circumstantial evidence must … do more than raise a mere suspicion."[32] "To be adequate, a plaintiff's circumstantial proof must facilitate *reasonable inferences of causation*, not mere speculation."[33] "We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation … . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."[34]

Circumstantial evidence of undue influence "must be of considerable probative force"[35] and have "probative force beyond mere suspicion."[36] "[F]act finders, be they jury or court, may not indulge in conjecture. They are constrained to draw reasonable inferences from established facts. Reasoning '*post hoc ergo propter hoc*'[37] does not meet this test."[38] Accordingly, those facts must be set forth in the initial pleading.[39]

The Second and Third Rules of Fraud: Fraud Must Be Proved by Clear and Convincing Evidence and Fraud Is Never Presumed

This is where substantive Michigan law on undue influence conflicts with its status as a "species of fraud." On the one hand, caselaw makes it clear that undue influence is to be proved by a preponderance of the evidence.[40] "[T]o satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true."[41] Fraud, on the other hand, "must be established by clear and convincing evidence and must never be presumed."[42] This means that the party asserting fraud "must do more than merely persuade you that the proposition is probably true. To be clear and convincing, the evidence must be strong enough to cause you to have a clear and firm belief that the proposition *is* true."[43] Unlike undue influence, "[f]raud is not presumed but must be proven by clear, satisfactory, and convincing proof."[44]

Historically, "[w]here dishonesty, or fraud, is at issue, the courts have typically required a higher standard of proof. In view of the scienter requirement of an 'intent to deceive' imposed in the § 17a(2) exception, the reasoning behind the traditional requirement of a higher standard of proof for fraud or dishonesty is equally applicable here. This higher standard is based

> on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime. 37 C.J.S. Fraud s 94, p. 398 et seq.[45]

Claims of fraud will not be presumed due to the serious nature of the allegation. "While the stern principles by which courts of equity are guided, will be applied in all their strictness to cases of fraudulent conveyances, where the fraud is clearly established, yet we cannot *presume* that fraud actually exists upon slight circumstances. The proof should be so clear and conclusive as to leave no rational doubt upon the mind as to its existence."[46]

Standards Imposed by Other States

Requiring proof of undue influence by clear and convincing evidence is nothing new. As stated by the Kansas Supreme Court, "[t]here is another reason for the clear and convincing standard of proof. Undue influence is a species of fraud, and the terms in our decisions are used almost interchangeably … . It is hardly necessary to list the citations of authority on the long-standing rule in this state that one who asserts fraud must prove it by a preponderance of the evidence; that such evidence should be clear, convincing and satisfactory, and that it does not devolve upon the party charged with committing the fraud to prove the transaction was honest and bona fide. Fraud is never presumed; it must be proved. Mere suspicion is not sufficient."[47] Other states have imposed the higher burden of proof in such cases. See *Doolittle v Exchange Bank*, 241 Cal App 4th 529, 545, 193 Cal Rptr 3d 818, 830 (2015), as modified on denial of reh'g (Nov. 4, 2015) ("the party contesting a testamentary disposition bears the burden of proving undue influence" and "[u]ndue influence must be proven by clear and convincing evidence"); *In re Estate of Schumacher*, 2016 PA Super 17, 133 A3d 45, 52 (2016) ("A party claiming undue influence must establish, by clear and convincing evidence, that: (1) when the will was executed the testator was of weakened intellect and (2) that a person in a confidential relationship with the testator (3) receives a substantial benefit under the will … . Once this prima facie case has been established, the burden shifts to the proponent to refute the charge of undue influence"); *Parson v Miller*, 296 Va 509, 527, 822 SE2d 169, 179 (2018) ("[t]he contestant of a will always retains the burden of persuasion, and in order to prevail on a claim of undue influence, the contestant of a will must prove undue influence by clear and convincing evidence.")[48]

Iowa has taken a unique approach to applying the appropriate burden of proof in undue influence cases, focusing *on the sufficiency of evidence needed to prove causation*. While finding that the appropriate burden of proof for *most* of the elements was a preponderance of the evidence, the Court held that a contestant needed to prove *causation* by clear and convincing evidence:

> A heightened causation element in undue influence cases makes sense. In cases involving challenges to wills based upon undue influence, the central issue is whether the acts of the testator were a product of free will or coercion. The testator, however, is not available to testify and, as a result, a speculative element is necessarily introduced into the claim. As colorfully noted in the commentary, will contests necessarily apply a "worst evidence" rule … . Further, it is not always easy to distinguish ordinary permissible influences on a testator from improper coercion. *The injection of the word "clearly" into the fourth element of undue influence is designed to add a measure of protection to the free will of a testator, filter out claims that are unduly speculative, and to prevent the doctrine from expanding beyond its limited scope*. All of the other elements of undue influence might be present—susceptibility, opportunity, and disposition—and, still, the

will provisions might be the result of the testator's free will. *The heightened causation requirement of "clearly" ensures the other factors really mattered to the end result.*[49]

The Law of Fraud in Michigan

In Michigan, the relevant model jury instructions concerning fraud are M Civ JI 128.01 (Fraud Based on False Representation), 128.02 (Silent Fraud), and 128.03 (Bad Faith Promise). Each of these categories of fraud generally require the plaintiff to prove by clear and convincing evidence each of the following:

- Defendant intentionally committed a bad act (misrepresentation, omission of material fact, or bad faith promise);
- Defendant intended that Plaintiff rely on the bad act;
- Plaintiff actually relied on the bad act, and
- Plaintiff was damaged by that reliance.

Unlike fraud, however, undue influence can be both presumed and satisfied with a lesser evidentiary burden, based on facts that by definition are insufficient to show that control over the decedent was ever exercised. No justifiable reason exists, either in policy or in law for the disparate treatment of these two members of the same species. Assume fraud is treated the same as undue influence, and that a plaintiff could prove fraud with the assistance of a legal presumption. Currently, in order to prove fraudulent misrepresentation, a plaintiff must establish (1) a representation by defendant that was false, (2) that defendant knew it was false or made the representation with reckless disregard of the truth of that statement, and (3) that the defendant made the representation with intent that it be relied on, (4) that it was relied on and (5) plaintiff was damaged. Instead, imagine that all plaintiff had to establish was 1, 4 and 5, and by doing so, the law would presume the existence of (2) and (3). Further, the existence of the presumption would then shift to the defendant the burden of producing substantial evidence to rebut the presumption of fraud. Add to that the lower evidentiary standard of preponderance of the evidence. The end result is that a trier of fact could enter a judgement for plaintiff based on a presumption that defendant more likely than not committed fraud. Such an arrangement would be incredibly unjust for many reasons. First, fraud is of such a serious nature that it would never be presumed. Second, it would foist on the defendant the obligation to prove a negative. Yet that is exactly what Michigan prescribes for undue influence.

Scienter is one reason for imposing a higher burden of proof. Compare Michigan's Model Jury Instructions for fraud with the instruction for innocent misrepresentation. Both involve a misrepresentation, but unlike fraud, innocent misrepresentation only requires proof by a preponderance of the evidence.[50] The disparity in levels of proof required to establish fraud and innocent misrepresentation underscores why undue influence is included as a "species of fraud." There is nothing innocent about undue influence. Like fraud, undue influence is an intentional act conducted in secret, using deceit, and made with knowledge that the challenged document does not reflect the will of the person who is the target of the wrongful conduct, but rather the will of the undue influencer.

Fraud is an affront to society and to our legal system. There is a reason why the bench and bar have universally agreed that due to the gravity of the allegation, fraud should not be presumed and should be proven by clear and convincing evidence. The reason likely lies in the permanent stain such a finding leaves on a party. "What a man does fraudulently, he does in vain; and as to him, once a fraud, always a fraud."[51] Undue influence is of the same species as fraud and the allegation is just as serious. Perhaps even more so as it generally involves victimizing the vulnerable and the elderly. Since undue influence is as deceitful as fraud, it should be treated as such, and should only be proven by clear and convincing evidence. Fortunately, it appears that the trend in Michigan law is moving in that direction.

The Trend Toward Proving the Testator's Intent by Clear and Convincing Evidence

On October 16, 2014, Michigan's Committee on Model Civil Jury Instructions amended M Civ JI 170.44 (Wills) and its counterpart for trusts, M Civ JI 179.10.[52] At the time that it did, the relevant jury instructions expressly set forth that in both will and trust contests based on undue influence, the contestant's burden of proof was preponderance of the evidence. *That is no longer the case*. Effective January of 2020, both M Civ JI 170.44 and M Civ JI 179.10 were amended to say only that the contestant has the burden of proving undue influence, *with no reference to "preponderance of the evidence."*[53] The notes to both instructions state each instruction should be accompanied by M Civ JI 8.01, (Definition of Burden of Proof). That jury instruction, however, simply provides the definitions for both preponderance of the evidence and clear and convincing evidence.

The elimination of "preponderance of the evidence" from M Civ JI 170.44 and M Civ JI 179.10—and the silence over the correct burden of proof—is significant. First, after the amendments in 2014 were approved by the Committee, the dissent in *Mardigian* cited long-standing case-law that undue influence is a species of fraud, and that rules of fraud apply.[54] Second, the Committee retained the express language "preponderance of the evidence" in M Civ JI 170.41 and 179.04 (contest based on lack of capacity). This strongly suggests that the deletion of "preponderance of the evidence" from 170.44 and 179.10 was intentional.[55] Last, the model civil instructions may only be given in a case if "they accurately state the applicable law."[56] That begs the question: was the deletion of "preponderance of the evidence" required to accurately state the applicable law regarding a contestant's burden of proof? The answer to that question may be found within the trust code and the estate and protected individuals code.

The Statutory Emphasis on the Clear and Convincing Evidence Standard

While scienter is one reason for an increased burden of proof for undue influence, it is not the only reason. There exists another reason, one which is separate and distinct from undue influence being included as a species of fraud. *The reason is this" both EPIC and the Michigan Trust Code require clear and convincing evidence whenever courts are required to determine a decedent's testamentary intent.*

Clear and convincing evidence is required when a proponent of a document claims that such a document is a decedent's will. "Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section *if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended* the document or writing to constitute any of the following: (a) The decedent's will; (b) A partial or complete revocation of the decedent's will; (c) An addition to or an alteration of the decedent's will; (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will."[57] Likewise, the existence of an oral trust may only be established by clear and convincing evidence.[58] Moreover, a "court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention *if it is proved by clear and convincing evidence* that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."[59]

Two Standards, One Document

Clear and convincing evidence is required even when a settlor seeks to revoke or amend his or her *own* revocable trust. According to MCL 700.7602(3), that can be accomplished in any of the following ways:

(a) By substantially complying with a method provided in the terms of the trust.

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, in either of the following ways:

(i) If the trust is created pursuant to a writing, by another writing manifesting *clear and convincing evidence* of the settlor's intent to revoke or amend the trust.

(ii) If the trust is an oral trust, by any method manifesting *clear and convincing evidence* of the settlor's intent." (Emphasis added).

In the case of *In re Bisbikis Trust*, the Court of Appeals rejected petitioner's argument that a letter from her late husband constituted an amendment to his trust.[60] The Court found that in the writing, the decedent made a two-columned list outlining the distribution of some assets, however, the list did not specify whether the assets were held in the trust or outside of the trust, nor did it refer to the trust agreement in conjunction with the list. The letter did make a reference to the trust agreement when Bisbikis was relating his history to petitioner. *However, there was no dispute that the letter in question was written by the decedent, was written of his own free will, that he was competent to write it, that it was written subsequent to the trust, or that it reflected what he wanted to do with his own assets and his trust assets.* Nonetheless, although there was an inconsistency in the distribution of assets, the Court concluded "the single inconsistency between the list in the letter and the distribution of assets mandated by the amended trust agreement does not amount to substantial compliance with the trust provision allowing amendment of the trust agreement."[61]

Fortunately, the *Bisbikis Trust* case is unpublished. Nonetheless, it demonstrates that courts may not be swayed to deviate from the language of a trust document *even in the face of a subsequent written directive from a competent and freely acting trust settlor that contradicts that trust*. It appears then, *absent a settlor's manifestation of clear and convincing evidence of their own intent specifically relating to his or her Trust or Will, a settlor would be unable to amend or revoke their own trust*.

On the other hand, Michigan law imposes a lower evidentiary standard on a trust or will contestant seeking to revoke, on the basis of undue influence, a written manifestation of the settlor's intent on the basis of undue influence. Put another way, under Michigan law, a settlor must work harder to amend or revoke his or her own trust than a third party seeking to revoke all or part of that document on the basis of undue influence. Two standards. One document. On its face this seems absurd, particularly since the contestant (1) was likely not present for the execution of the challenged documents, and (2) must frequently overcome the testimony of the scrivener, a notary, and other eyewitnesses to the signing. This begs the question: How does the imposition of a lower evidentiary standard on a stranger to the transaction promote expressed purpose and policy set forth in the Michigan Trust Code: namely, the fostering of 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*?[62]

Conflicting Presumptions, Competing Burdens and a Hypothetical

Assume the following: John Doe privately meets with his lawyer to sign a new will and to revoke his old will. Under the new will, John disinherits his son, Junior, and leaves everything to his daughter, Jane, who has consistently cared for him, taken him to his doctor appointments, paid his bills, balanced his check books, and who has previously acted as his attorney-in-fact and patient advocate. John Doe decides to disinherit Junior, in part because Junior stopped visiting his father, and John wants to reward Jane for all her sacrifice, loyalty and hard work. In the first sentence of John's new will, it states "I, JOHN DOE, of Any County, Michigan, declare this as my Last Will and Testament. I hereby revoke all prior Wills and Codicils." John's revoked will left everything equally to his two children, Junior and Jane.

After John's death, Junior files a petition con-

testing the subsequent will, alleging undue influence. One significant problem for Junior's case is that everyone who knew John thought he was a "stubborn, strong-willed, SOB, who knew his own mind and couldn't be made to do anything he didn't want to do." But even though Junior has no evidence that his sister made John do anything to get her father to change his will, Junior will likely establish—by a preponderance of the evidence—the three prongs that make up the presumption of undue influence: (1) fiduciary relationship (by virtue of the power of attorney), (2) benefit, and (3) opportunity to influence the testator. The establishment of the presumption shifts the burden of producing substantial evidence to rebut the presumption on to Jane.

This common law presumption of undue influence, however, directly conflicts with a statutory presumption that it was John's intent to replace his prior will with the subsequent one. This is, in fact, the most powerful indication that clear and convincing evidence is the correct burden of proof in an undue influence contest, particularly involving a will. MCL 700.2507 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 evidenc***e**, 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.

In the above hypothetical, the existence of undue influence is presumed, i.e., that the subsequent will reflects Jane's intent, and not John's. But under MCL 700.2507(3), the subsequent will is presumed to reflect intent of John and no one else. Further, under the common law, Jane must rebut the presumption that she unduly influenced with substantial evidence.[63] Junior, on the other hand, must rebut the statutory presumption that the subsequent will reflects his father's intent *by clear and convincing evidence.*

If both presumptions are allowed to stand, the existence of John's subsequent will presumes the simultaneous existence two diametrically opposed facts: *that the will both does and does not reflect the intent of John Doe.* It would be an absurd result to presume the existence of two facts which cancel each other out. "Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results."[64] The only reasonable construction in the face of this irreconcilable conflict is that "the unambiguous language of the statute must control."[65]

MCL 700.2507 controls in the case of a will contestant challenging a subsequent will 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. Since that is the case, not only is there NO presumption of undue influence in such a contest, but there is no question that a will contestant must prove undue influence—which would be the basis for the challenge under the statute—by clear and convincing evidence.

This leaves open the question of whether

MCL 700.2507 applies to a trust contest based on undue influence. Although the express language of MCL 700.2507 applies to wills, an argument can be made that its provisions will also apply to trusts. First, "under Michigan law, courts apply the same rules of interpretation to trusts and wills … ."[66] Second, EPIC provides that "[a] rule of construction or *presumption* provided *in this act*[67] applies to a *governing instrument* executed before that date[68] unless there is a clear indication of a contrary intent."[69] "Contrary intent" refers to the intent of the decedent.[70] EPIC also applies to a "*governing instrument* executed by a decedent dying after" the effective date of EPIC.[71] "Governing instrument" is a defined term that includes trusts.[72] 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. Last, the Trust Code arguably already has its own corresponding provision in the form of MCL 700.7602, *supra*.

This conclusion makes sense. Assume all of the facts contained in the hypothetical above, but instead of a will leaving everything to Jane, assume John signed a pour-over will leaving everything to his revocable trust, which he amended by leaving his entire residue to Jane. There would be no meaningful reason to instruct a jury regarding the pour-over will based on MCL 700.2507, while instructing the same jury on the current state of the common law on undue influence regarding the trust. Such a hodgepodge of conflicting instructions would do little "to simplify and clarify the law concerning the affairs of decedents."[73]

Conclusion

The Legislature demands that EPIC be liberally construed and applied to discover and make effective a decedent's intent in the distribution of their property.[74] Ten years later, it enacted the Michigan Trust Code "[t]o foster 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."[75] Treating undue influence as a species of fraud will further these goals. Specifically, it cannot be presumed, it must be pled with particularity, and it must be proven by clear and convincing evidence.

The Michigan Legislature has made it clear where it stands on the quantum of proof needed to prove a testator's intent. EPIC and the Michigan Trust Code state that when proving a decedent's testamentary intent, the proofs must be clear and convincing. Documents proposed to be wills without the statutory formalities must be proven by clear and convincing evidence. Likewise, rebutting a presumption that a testator intended a subsequent will to replace or supplement a previous will or trust must be by clear and convincing evidence. Establishing an oral trust or reforming a written trust require clear and convincing evidence. A settlor may only revoke or amend his or her own revocable trust with clear and convincing evidence. Further, it is presumed that a testator's subsequent document revokes a prior will or codicil, and such a presumption will only be rebutted by clear and convincing evidence.

Absent the Michigan Supreme Court reversing over a hundred years of caselaw, change must come from the Michigan Legislature. Currently, MCL 700.3407(c) provides that "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." The statute could be amended by adding a sentence that reads "[U]ndue influence, fraud, duress, mistake, or revocation shall never be presumed and must be proven by clear and convincing evidence." Similarly, this sentence could be added to MCL 700.7406 which now states that "[a] trust is void to the extent its creation was induced by fraud, duress, or undue influence." To simplify the law regarding decedents' estates and foster certainty that a settlor's wishes will be carried out, the Legislature should enact within the Trust Code a statute that corresponds with MCL 700.2507, but which expressly references

trusts. These changes would also require corresponding revisions to the relevant jury instructions. Last, to avoid any confusion, the Michigan Supreme Court should amend MCR 2.112(B)(1) to read "[i]n allegations of fraud, *or any species thereof*, or mistake, the circumstances constituting fraud, *the specific species of fraud*, or mistake must be stated with particularity." Invalidating a will or a trust on the basis of undue influence is a difficult task. But nullifying a testator's last written directive should not be easy, and such litigation must not be undertaken absent clear and convincing evidence. That is because "the intention of the testator or settlor is paramount."[76] Pursuit of the guiding polar star of probate and trust law requires no less.

Notes

1. Undue Influence: Rethinking the Presumption, Robert S. Zawideh, Esq.

2. In re Mardigian Estate, 502 Mich at 179 (Markman, CJ).

3. In the context of a confidential or fiduciary relationship.

4. "What influence amounts to undue influence in the sense of the law cannot be defined with precision. It is a species of fraud, and, like fraud, must remain undefined by the courts." *Bradford v Vinton*, 59 Mich 139, 153, 26 NW 401, 408 (1886); *see also Coon v Dennis*, 111 Mich 450, 451–52, 69 NW 666 (1897); *In re Johnson's Estate*, 326 Mich 310, 319, 40 NW2d 163, 166 (1949); *In re Jennings' Estate*, 335 Mich 241, 247, 55 NW2d 812, 815 (1952); *In re Spillette's Estate*, 352 Mich 12, 17, 88 NW2d 300, 303 (1958); *In re Gotautas*, 373 Mich 513, 517, 129 NW2d 888, 890 (1964).

5. In re Mardigian Estate, 502 Mich 154, 187, 917 NW2d 325, 345, *reh'g denied*, 503 Mich 854, 915 NW2d 887 (2018).

6. Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979.

7. Husky Int'l Elecs, Inc v Ritz, ___ US ___, 136 S Ct. 1581, 1586–87, 194 L Ed 2d 655 (2016), citing 1 J. Story, *Commentaries on Equity Jurisprudence* § 189, p. 221 (6th ed. 1853) (Story) ("Fraud ... being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head")."

8. Id.

9. Id., citing *Johnson v McDonald*, 1934 OK 743, 170 Okla 117, 39 P2d 150.

10. Alternative Sys Concepts, Inc v Synopsys, Inc, 374 F3d 23, 29 (1st Cir 2004).

11. Creson v Carmody, 310 Ky 861, 863–64, 222 SW2d 935, 936 (1949).

12. Degner v Moncel, 6 Wis 2d 163, 166, 93 NW2d 857, 860 (1959).

13. Pena v First State Bank & Tr Co, 404 SW2d 56 (Tex Civ App 1966).

14. State v Carvajal, 147 Ariz 307, 309, 709 P2d 1366, 1369 (Ct App 1985).

15. United States v Nuckols, 606 F2d 566, 569 (5th Cir 1979); *Harman v Mohn*, 683 F2d 834, 837 (4th Cir 1982).

16. Martin v Lawrence, 156 Cal 191, 194, 103 P 913, 914 (1909).

17. Hochman v Zigler's Inc, 139 NJ Eq 139, 143, 50 A2d 97, 100 (Ch 1946).

18. Tunlaw Corp v EF MacDonald Co, No 68 C 2288, 1969 WL 9548, at *9 (ND Ill May 28, 1969).

19. Roehl Transp, Inc v Liberty Mut Ins Co, 2010 WI 49, 325 Wis 2d 56, 104, 784 NW2d 542, 566.

20. United States v Pinto-Thomaz, 352 F Supp 3d 287, 295–96 (SDNY 2018), *reconsideration denied*, No S2 18-CR-579 (JSR), 2019 WL 1460216 (SDNY Jan 10, 2019).

21. In re Scholten's Estate, 233 Mich 117, 125–26, 206 NW 559, 561–62 (1925).

22. Id., (emphasis added).

23. "Undue influence is the overpowering of the volition of the testator by another person whereby what purports to be the testator's will is in reality the will of the other person. While there need be no violence or threat of physical force, there must be unreasonable pressure upon the mind of the testator, amounting to psychological or moral coercion, compulsion, or constraint, so great that his free agency is destroyed and the volition of the person applying the pressure is substituted. To be actionable, the unreasonable and improper pressure must result in a will which the testator would not otherwise have made. Such a testament does not represent the testator's true will at all, but, in reality, represents the will of the person who influenced him." *In re Willey's Estate*, 9 Mich App 245, 254–55, 156 NW2d 631, 637 (1967).

24. State ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 63, 852 NW2d 103, 112 (2014).

25. MCR 2.112(B)(1) and MCR 5.001(A).

26. Scofield v Clarke, 179 Mich 681, 706, 146 NW 377, 385–86 (1914).

27. Taylor v Klahm, 8 Mich App 516, 517–18, 154 NW2d 529, 530 (1967).

28. See Guntzviller v Gitre, 195 Mich 695, 698, 162 NW 290, 291 (1917) (emphasis added) ("[I]t will be sufficient to say that they allege that [decedent] had been feebleminded from childhood, was mentally incompetent to, and did not, transact any business; was not mentally

competent to execute the deeds in question, and that if she executed them, they were procured by fraud, duress, and undue influence.")

29. A party alleging undue influence bears the burdens of both proof and persuasion. *Kar v Hogan, supra*.

30. E.g., In re Jackson's Estate, 220 Mich 565, 579, 190 NW 762 (1922).

31. In re McKeand, 185 Mich 97, 117 (1915) (emphasis added). The Supreme Court went on to say "[t]he 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. Opportunity alone cannot give rise to a valid inference that undue influence has been exercised." *Id*. at 117-118 (citations omitted).

32. Willey's Estate, at 257.

33. Skinner v Square D Co, 445 Mich 153, 164-165 (1994).

34. Id., (emphasis added).

35. In re Willey's Estate, 9 Mich App at 245.

36. In re Langlois' Estate, 361 Mich 646, 652, 106 NW2d 132 (1960).

37. Definition of *post hoc*, *ergo propter hoc*: after this, therefore because of this : because an event occurred first, it must have caused this later event—used to describe a fallacious argument. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/post%20hoc%2C%20ergo%20propter%20hoc.

38. Genesee Merchants Bank & Trust Co v Payne, 381 Mich 234, 248, 161 NW2d 17 (1968) (citation omitted).

39. "The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that: (a) he or she has read the document; (b) to the best of his or her knowledge, information, and belief formed *after reasonable inquiry*, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 1.109(E)(5) (emphasis added).

40. Sullivan v Foley, supra; *Bush v Delano*, 113 Mich 321, 71 NW 628 (1897); ("[u]ndue influence in the procurement of a will need be established by a preponderance of the evidence only"); *In re Kramer's Estate*, 324 Mich 626, 37 NW2d 564 (1949); *Taylor v Klahm*, 40 Mich App 255, 198 NW2d 715 (1972); *In re Estate of Haynes*, No 235232, 2003 WL 22715781, at *1 (Mich Ct App Nov 18, 2003) ("[t] he petitioner must still prove the existence of undue influence based on the preponderance of the evidence", citing *Kar* at 538.)

41. M Civ JI 8.01(a).

42. Foodland Distribs v Al-Naimi, 220 Mich App 453, 457, 559 NW2d 379, 381 (1996); *see also* M Civ JI 128.01, 128.02, and 128.03.

43. M Civ JI 8.01(b).

44. Youngs v Tuttle Hill Corp, 373 Mich 145, 147, 128 NW2d 472, 473 (1964); *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414, 751 NW2d 443, 451 (2008).

45. In re Huff, 1 BR 354, 357 (Bankr D Utah 1979). Further, if undue influence requires a lower burden of proof, it raises a question about the dischargeability of such a claim in bankruptcy. *See In re Mbunda*, 604 F App'x 552, 554 (9th Cir 2015) (even if undue influence proven, bankruptcy court did not err in dismissing claim with prejudice); *but see In re Scott*, 227 BR 918 (Bankr SD Fla 1998) (debtor's obligation on state court judgment would be excepted from discharge, as one for debtor's "willful and malicious injury" to property of another, given evidence that debtor deliberately used her position to procure the wealth of sick, old man, cleaned out his safe deposit box on date of his death, and promptly cashed in joint certificates of deposit.)

46. Buck v Sherman, 2 Doug 176, 182 (1845) (emphasis in original).

47. Matter of Estate of Bennett, 19 Kan App 2d 154, 164, 865 P2d 1062, 1069 (1993).

48. A number of other states, however, have treated undue influence in a significantly different manner. Many states hold that once a presumption of undue influence is established, the burden shifts to the party receiving the benefit to prove by clear and convincing evidence that the will or the trust was *not* the product of undue influence.

49. Burkhalter v Burkhalter, 841 NW2d 93, 105-106 (Iowa 2013) (internal citations omitted, emphasis added).

50. M Civ JI 128.04; compare with M Civ JI 128.01, 128.02 and 128.03 each of which expressly set forth the burden of proof as being "clear and convincing evidence."

51. Botsford Lumber Co v State, 188 Minn 247, 250, 246 NW 902, 903 (1933); *see also Merrill v Meachum*, 5 Day 341, 352 (Conn 1812).

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

53. https://courts.michigan.gov/courts/michigansupremecourt/mcji/pages/home.aspx.

54. "Undue influence is a species of fraud," and the rules of fraud therefore apply to questions of undue influence. *In re Mardigian Estate*, 502 Mich 154, 187, 917 NW2d 325, 345, *reh'g denied*, 503 Mich 854, 915 NW2d 887 (2018) [citing *Adams v. Adams (On Reconsideration)*, 276 Mich App 704, 710 n. 1, 742 NW2d 399 (2007).]

55. While the model jury instructions do not carry the force of a court rule, the exclusion of that language in one section of the chapter while retaining it in another section of the same chapter, or similar chapter, calls to mind the statutory construction doctrine of "*expressio unis est exclusio alterius*," which provides that an express mention of

one thing generally implies the exclusion of other similar things that were not mentioned.

56. MCR 2.512(D)(2)(b).

57. MCL 700.2503 (emphasis added).

58. MCL 700.7407.

59. MCL 700.7415 (emphasis added).

60. In re Bisbikis Tr, No 317588, 2014 WL 6602701, at *3 (Mich Ct App Nov 20, 2014).

61. Id. With all respect to the Court of Appeals, this appears to be a victory of form over substance, with the loser being the intent of the decedent.

62. MCL 700.8201(2)(c).

63. "Substantial evidence" is more than a scintilla, and less than a preponderance of the evidence. *Jozwiak v N Michigan Hosps, Inc*, 231 Mich App 230, 238 (1998).

64. Rogers v Wcisel, 312 Mich App 79, 87, 877 NW2d 169, 173 (2015).

65. We presume that the Legislature is aware of the common law that *184 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, 683 (2003).

66. In re Mardigian Estate, 312 Mich App 553, 563, 879 NW2d 313, 319 (2015), (internal citations and quotation marks omitted), affirmed by an equally divided court, *In re Mardigian Estate*, 502 Mich 154, 917 NW2d 325, reh'g denied, 503 Mich 854, 915 NW2d 887 (2018); *but see In re Mary E. Griffin Revocable Grantor Tr*, 483 Mich 1031, 1031, 765 NW2d 613 (2009) (reversing the Court of Appeals' application to a trust of the probable cause statute governing wills).

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

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

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

70. 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.")

71. MCL 700.8101(2)(a).

72. MCL 700.1104(m).

73. MCL 700.1201(a).

74. See MCL 700.1201(b).

75. MCL 700.8201(2)(c).

76. Matter of Estate of Sykes, 131 Mich App 49, 53–54, 345 NW2d 642, 643 (1983).

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