MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, February 13, 2026

Regular Meeting Agenda

I. Commencement (Nathan Piwowarski)

A. Call to Order and Welcome

B. Attendance:

1. Zoom Roll Call

2. Excused Absences: Susan L. Chalgian, Melisa M. W. Mysliwiec, and Nicholas A. Reister

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates)

B. Minutes of Prior Council Meetings (Melisa Mysliwiec) – **Attachment 1**

C. Chair's Report (Nathan Piwowarski)

D. Treasurer's Report (Angela Hentkowski)

III. Committee Reports

A. Committee on Special Projects (Dan Hilker)

B. Amicus Curiae (Andy Mayoras) – **Attachment 2**

C. Annual Meeting (Nathan Piwowarski)

D. Awards (Katie Lynwood)

E. Budget (Melisa Mysliwiec)

F. Bylaws (David Lucas)

G. Charitable and Exempt Organizations (Rebecca Wrock)

H. Citizens Outreach (Kathleen Goetsch)

I. Court Rules, Forms, and Proceedings (Patricia Davis and Georgette David)

J. Electronic Communications (Susie Chalgian)

K. Ethics and Unauthorized Practice of Law (Alex Mallory)

L. Guardianship, Conservatorship, and End of Life (Sandy Glazier)

M. Legislation Development and Drafting (Rob Tiplady and Rick Mills)

N. Legislation Monitoring and Analysis (Mike Shelton)

O. Legislative Testimony (Dan Hilker)

P. Membership (Ernscie Augustin)

Q. Nominating (Mark Kellogg)

R. Planning (Nathan Piwowarski)

S. Probate Institute (Chris Savage)

T. Real Estate (Angela Hentkowski)

U. State Bar and Section Journals (Melisa Mysliwiec)

V. Tax (J.V. Anderton) – **Attachment 3**

W. Assisted Reproductive Technology (Nancy Welber)

X. Electronic Wills (Kathleen Martone)

Y. Fiduciary Exception to the Attorney-Client Privilege (Warren Krueger)

Z. Nonbanking Entity Trust Powers (Jim Spica and Rob Tiplady)

AA. Premarital Agreements (Chris Savage)

BB. Trust Accounts (Elizabeth Luckenbach)

CC. Uniform Community Property Disposition at Death Act (Jim Spica)

DD. Uniform Guardian, Conservatorship, and Protective Arrangements Act (Nathan Piwowarski and Kathleen Martone)

EE. Undue Influence (Ken Silver)

FF. Uniform Fiduciary Income and Principal Act (Jim Spica)

GG. Various Issues Involving Death and Divorce (Dan Borst and Sean Blume)

IV. Good of the Order

V. Adjournment of Regular Meeting

Roundtable (Time Permitting)

BARRON, ROSENBERG,
MAYORAS & MAYORAS, P.C.

MEMORANDUM

To: Probate Council
From: Andrew W. Mayoras, Chair of Amicus Committee
Subject: Amicus Invitation
Date: January 29, 2026

Overview/Basic Facts

The Supreme Court invited the PEPS to submit an amicus brief in this appeal involving one of the elements of the presumption of undue influence. On January 14, 2026, the Supreme Court granted oral arguments and directed supplemental briefing on the application for leave to appeal, inviting amicus briefs in the same order. The Amicus Committee recommends filing an amicus brief consistent with the Section's standard practice to submit briefs when invited to do so.

In the probate court, after a bench trial, the court found that the presumption of undue influence applied and ruled in favor of the petitioner, who sought to overturn the decedent's act of naming his brother as beneficiary on a bank account. The petitioner was decedent's daughter.

Apparently, in the midst of having medical complications and episodic memory loss, decedent became convinced that his daughter mismanaged his money and failed to take care of him. There was no evidence to support the accusation. Nevertheless, the decedent believed it and turned to his brother, from whom he had been distant, for help. Decedent even filed a police report against the daughter.

The brother drove decedent to his credit union, where he met with the branch manager to remove daughter's name from the account. The brother was present for the meeting, but remained silent. The manager recommended a new account, which decedent created, and named his brother as beneficiary.

The decedent told his brother he was the only person he could trust. He drove his brother for errands and the decedent had his bank statements mailed to his brother's house. Decedent was admitted to the hospital four days after the account change, and the doctor opined he had cognitive issued caused by lack of oxygen to the brain. When oxygen was administered, his confusion dissipated.

The decedent died less than three months after naming his brother as the beneficiary.

The probate court held a bench trial, found the presumption of undue influence applied, and

ruled in favor of the daughter. The Court noted that the rebuttal evidence was much weaker than the evidence offered to support the presumption.

Court of Appeals Ruling

The Court of Appeals reversed the probate court and found that the presumption of undue influence was improperly applied. It further ruled that without the presumption, there was insufficient evidence of undue influence and petitioner never argued that she presented sufficient evidence of undue influence without the presumption. The Court noted that the outcome "strikes us an unfair" but that this unfairness does not justify court intervention.

The key analysis turned on whether a presumption of undue influence applied on the second element, existence of a confidential or fiduciary relationship. The other two elements (benefit and opportunity) clearly existed. The Court of Appeals ruled that "trust alone is not enough" and that "there needed to be evidence that decedent demonstrated his trust in [his brother] by placing reliance on [the brother's] judgment or advice." Finding no such evidence, the Court of Appeals reversed.

The Supreme Court asks for supplemental briefs on the issue of "what constitutes sufficient evidence of a fiduciary or confidential relationship." The PEPS and Elder Law Section were both invited to file amicus briefs.

Analysis

The amicus committee recommends that Council authorize filing an amicus brief to advocate that the Court of Appeals applied the wrong standard. While the Committee had mixed views on whether the outcome of reversal was proper, the Committee agreed that the seminal Supreme Court case on this issue, *In re Estate of Karmey*, 468 Mich 68 (2003), was not properly applied on this issue.

In *Karmey*, the Supreme Court found that a marriage alone does not justify a finding of a confidential or fiduciary relationship for purposes of the presumption. Rather, it set forth the following principles for when such a relationship exists in this context:

> Black's Law Dictionary (7th ed) defines the term as
>
> [a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client-require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and

> responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.
>
> Although a broad term, "confidential or fiduciary relationship" has a focused view toward relationships of inequality. This Court recognized in *In re Wood's Estate*, 374 Mich 278, 287, 132 NW2d 35 (1965), that the concept had its English origins in situations in which dominion may be exercised by one person over another. Quoting 3 Pomeroy, Equity Jurisprudence (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when "`there is confidence reposed on one side, and the resulting superiority and influence on the other.'" 374 Mich at 283,132 N.W.2d 35.
>
> Common examples this Court has recognized 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. 374 Mich at 285-286, 132 NW2d 35. 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.

468 Mich 68 at fn 2, 3 (emphasis added).

The Committee believes that, as the highlighted definition demonstrates, evidence of reliance on the judgment or advice of another is too narrow in light of the analysis set forth in *Karmey*. Rather, in the absence of a formal relationship (such as an attorney-in-fact), *Karmey* suggests two examples (which are not exclusive): (1) the existence of trust and a relationship of inequality, such as one gaining superiority or influence over another, and (2) when one person assumes control and responsibility over another. A test that requires evidence of reliance on judgment or advice is not consistent with *Karmey* and in fact could be applied in some cases to find a fiduciary relationship when none exists, or at other times, find that no such relationship existed when such a relationship did exist.

As such, the Committee recommends submitting an amicus brief advocating for remand and application of the proper test under *Karmey*. The Committee was split on whether the Court of Appeals' decision to reverse the trial court was proper, if the appropriate analysis under *Karmey* had been applied. The Committee also did not reach a consensus as to whether this case with difficult facts should be used as an opportunity by the Section to advocate for a broader examination of the undue influence test.

The Committee suggests that the author of the brief be selected by Council. If no other author is selected, then Andrew Mayoras is willing to author the brief. The brief is due on April 1, 2026.

January 14, 2026

168598

In re SHERROD ESTATE.

_____

DEDRA ELAN McBURROWS-SHERROD, as Personal Representative of the ESTATE OF CLYDE LAMONT SHERROD,
Appellant,

v

SC: 168598
COA: 369863
Oakland PC: 2022-410006-DE

MICHAEL SHERROD,
Appellee.

_____/

On order of the Court, the application for leave to appeal the March 18, 2025 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(I)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing what constitutes sufficient evidence of a fiduciary or confidential relationship. See, e.g., *In re Wood Estate*, 374 Mich 278, 282-283 (1965), overruled in part on other grounds by *Widmayer v Leonard*, 422 Mich 280, 288-289 (1985); *In re Jennings' Estate*, 335 Mich 241, 244 (1952).

The Probate and Estate Planning and Elder Law & Disability Rights Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case who are not exempt from the motion requirement under MCR 7.312(H) may move the Court for permission to file briefs amicus curiae.

STATE OF MICHIGAN

COURT OF APPEALS

In re SHERROD ESTATE.

DEDRA ELAN MCBURROWS-SHERROD, as Personal Representative,

Appellee,

v

MICHAEL SHERROD,

Appellant.

UNPUBLISHED
March 18, 2025
10:30 AM

No. 369863
Oakland Probate Court
LC No. 2022-410006-DE

Before: YOUNG, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

This action concerns title to funds in a Diversified Members Credit Union (DMCU) account that belonged to decedent, Clyde Lamont Sherrod. The funds were originally to go to decedent's daughter, Dedra McBurrows-Sherrod, but in July 2022, decedent transferred the money to a new account and made the beneficiary of that new account his brother, appellant Michael Sherrod. Shortly after decedent passed away in October 2022, McBurrows-Sherrod, as personal representative of Clyde Lamont Sherrod's Estate, challenged Michael's title to the funds in the DMCU account on grounds of undue influence. Following a bench trial, the trial court found that (1) McBurrows-Sherrod had presented sufficient evidence to establish a presumption of undue influence, and (2) despite Michael's rebuttal evidence, McBurrows-Sherrod had established by a preponderance of the evidence that Michael unduly influenced decedent to name Michael the beneficiary of the DMCU account. Michael appeals that ruling as of right. We conclude that McBurrows-Sherrod failed to present sufficient evidence to establish a fiduciary or confidential relationship between Michael and decedent, which means that McBurrows-Sherrod failed to establish a presumption of undue influence. Without that presumption, McBurrows-Sherrod's undue-influence claim fails. For these reasons, as explained more fully in this opinion, we reverse.

I. BACKGROUND

On March 28, 2022, decedent was admitted to the hospital with signs of heart failure, and a few days later on April 1, he underwent quadruple-bypass surgery. Decedent was discharged on April 13, 2022, but was readmitted to the emergency room on April 18, which resulted in another surgery being performed on April 30, 2022, to remove a portion of decedent's colon. Decedent was discharged on May 5, 2022, only to be readmitted to the emergency room the on May 7. During decedent's ensuing hospital stay, it was noted that decedent had become depressed due to his repeated hospitalizations and had lost significant weight since March 2022. Decedent was discharged to rehab on May 14, 2022, where he remained until June 2, 2022.

A short time after being discharged home, however, decedent was readmitted to the hospital, where he was diagnosed with episodic memory loss and dangerously-low blood pressure. The record is not a model of clarity, but it appears that, at some point shortly after this visit, decedent was discharged to a nursing home, where he remained until July 7, 2022.

It was during decedent's stay at the nursing home that Michael first visited decedent on July 2. Michael did not visit decedent at any point before July 2, despite knowing that decedent was in and out of the hospital. Michael justified his absence by explaining that he visited decedent when decedent called him, which was in July. Despite his absence, Michael testified that he had a close relationship with decedent. Others, however, testified that the two generally disliked each other. Regardless, Michael testified that, when decedent called him in July, Michael went to visit him, and after decedent was discharged, Michael would occasionally pick up decedent from his home to go out to lunch.

On July 11, 2022, Michael drove decedent to the police station, where decedent filed a report alleging that his daughter, McBurrows-Sherrod, was mismanaging his money and failed to take care of him. There was and still is no evidence to support this accusation. Nevertheless, decedent believed it, and due to his continuing concern about McBurrows-Sherrod's handling of his money, decedent asked Michael to take decedent to DMCU on July 13, 2022, so that decedent could remove McBurrows-Sherrod's access to decedent's account there. Michael agreed.

When the two arrived at DMCU on July 13, Michael pushed decedent's wheelchair to the office of the branch manager, Leah Lindsay. Michael stayed in Lindsay's office with decedent and Lindsay while decedent conducted his business, but Michael stayed mostly silent. Decedent asked Lindsay to remove McBurrows-Sherrod's power of attorney for decedent and to revoke her access to decedent's accounts, voicing his ongoing concern about McBurrows-Sherrod's handling of decedent's finances. Lindsay suggested that decedent resolve his concern by simply opening a new account, and decedent agreed. Decedent named Michael as the beneficiary for this new account. After the new account was created, the funds from decedent's old account were transferred to his new account. Michael did not tell McBurrows-Sherrod or anyone else in the family about either this trip to DMCU or the trip to the police station. He explained that he felt that he needed to keep the trips a secret because decedent told Michael that he was the only person that decedent could trust. Michael later took decedent to DMCU a second time because, when decedent created his new account, decedent's driver's license was expired, and he needed to provide a valid one. On this second trip to DMCU, Michael did not go into the bank with decedent.

On July 17, 2022—four days after creating the new DMCU account—decedent was readmitted to the hospital, and his records from that visit noted that decedent's memory was impaired. Dr. Anthony Martin, decedent's treating physician, opined that decedent's cognitive issue was likely caused by a lack of oxygen to decedent's brain. Dr. Martin explained that, when decedent was discharged in early July, he was given at-home treatment instructions to ensure proper blood flow (like wrapping his legs), but if decedent did not comply with his treatment plan, the result was a lack of oxygen to decedent's brain, affecting his cognitive abilities. In subsequent visits decedent had with Dr. Martin, Dr. Martin noted continuing issues with decedent's cognitive functions. When decedent was placed on oxygen during those visits, his confusion dissipated.

Decedent passed away on October 3, 2022. Lindsay testified that Michael called her on October 4 to inform her of decedent's death, and to start the process of closing decedent's DMCU account and sending the funds to Michael as the beneficiary.

Shortly thereafter, McBurrows-Sherrod filed an emergency ex parte motion seeking to enjoin Michael from withdrawing any funds from the DMCU account, which the trial court granted. This litigation seeking to settle ownership of the DMCU account ensued. Eventually, the lower court held a bench trial to determine whether Michael unduly influenced decedent to name him the beneficiary of the DMCU account. At the close of the trial, the court held that McBurrows-Sherrod established a presumption of undue influence and that Michael's rebuttal evidence was "much weaker evidence than the evidence offered to support the presumption of undue influence," so the court found by a preponderance of the evidence that Michael unduly influenced decedent to name Michael the beneficiary of decedent's DMCU account.

This appeal followed.

II. PRESUMPTION OF UNDUE INFLUENCE

Michael argues the trial court erred by finding that McBurrows-Sherrod established a presumption of undue influence. We agree.

A. STANDARD OF REVIEW

A probate court's findings following a bench trial are reviewed for clear error. *In re Estate of Bennett*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. This Court gives deference to trial courts on matters of credibility. *In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

B. ANALYSIS

Establishing that a will or contract was the result of undue influence vitiates the instrument because it establishes that the instrument was not the result of the testator's or contracting party's free will. See *In re McKeand*, 185 Mich 97, 120; 151 NW 731 (1915). "To 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." *In re Estate of Karmey*, 468

Mich 68, 75; 658 NW2d 796 (2003) (quotation marks and citation omitted). Certain circumstances are so suggestive of undue influence that, if those circumstances are established, it will give rise to a *presumption* of undue influence:

> The presumption of undue influence is brought to life upon the introduction of evidence which would establish (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. [*Id*. (quotation marks and citation omitted).]

The burden of proving undue influence rests "with the party asserting it." *In re Mardigian Estate*, 502 Mich 154, 160; 917 NW2d 325 (2018) (opinion of MARKMAN, J.).

The trial court here held that McBurrows-Sherrod presented evidence sufficient to establish a presumption of undue influence. On appeal, Michael takes issue with the court's finding that McBurrows-Sherrod established the first element of the presumption—the existence of a confidential or fiduciary relationship between Michael and decedent. Clearly, Michael and decedent did not have a traditional fiduciary relationship like attorney-client or physician-patient, see *In re Estate of Karmey*, 468 Mich at 74 n 3, but that is not necessarily fatal. A confidential or fiduciary relationship is a "broad" term, encompassing any relationship "in which there is confidence reposed on one side, and the resulting superiority and influence on the other." *In re Wood's Estate*, 374 Mich 278, 282-283; 132 NW2d 35 (1965). In this way, the term "has a focused view toward relationships of inequality." *In re Estate of Karmey*, 468 Mich at 74 n 3.

Trust alone is not sufficient to establish a confidential or fiduciary relationship. See *Knight v Behringer*, 329 Mich 24, 28; 44 NW2d 852 (1950). Rather, a confidential or fiduciary relationship requires "a reposing of faith, confidence and trust *and* the placing of reliance by one upon the judgment and advice of another." *In re Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952) (emphasis added). See also *In re Wood's Estate*, 374 Mich at 282 (stating that a confidential relationship embraces "those informal relations which exist whenever one man trusts in *and relies upon* another") (quotation marks and citation omitted; emphasis added). So, for instance, a confidential or fiduciary relationship exists when one trusts another and relies on that person "in handling the bank accounts for her," with the other person acting "solely as her agent in these transactions." *Van't Hof v Jemison*, 291 Mich 385, 393; 289 NW 186 (1939). See also *In re Estate of Swantek*, 172 Mich App 509, 514; 432 NW2d 307 (1988) ("A confidential relationship exists when a person enfeebled by poor health relies on another to conduct banking or other financial transactions."). Conversely, while people generally trust those they live with, living with another does not necessarily create a confidential or fiduciary relationship. See *In re Carlson's Estate*, 218 Mich 262, 265; 187 NW 284 (1922) ("We have not overlooked the fact that at the time the will was made the testatrix was living in the home of the proponent, and had been there several weeks . . . . The relation so established was not a fiduciary one, militating against the bequest to proponent."). See also *Knight*, 329 Mich at 29. Likewise, while people generally only allow those they trust to assist in their business affairs, assisting someone with their business affairs does not necessarily create a confidential or fiduciary relationship. See *In re Cottrell's Estate*, 235 Mich 627, 630; 209 NW 842 (1926) ("Before the burden can be cast on proponent, it must be shown that the fiduciary relations exist, and the fact that she was living with testator when the will was made

did not establish such relations, nor does the fact that she assisted him in his business affairs establish such relation.") (citations omitted). See also *Knight*, 329 Mich at 29; *Blackman v Andrews*, 150 Mich 322, 323-325; 114 NW 218 (1907) (holding that the contestants failed to establish undue influence despite showing that the proponent's husband drove the testatrix to the bank to change her will and had previously given her advice "respecting her business affairs").

Turning back to this case, the trial court found that, when decedent changed the beneficiary of the DMCU account to Michael, a confidential or fiduciary relationship existed between them. Despite finding that Michael generally lacked credibility, the court opined that "a lot of what Michael testified about supports the theory about a fiduciary relationship regarding this particular transaction and banking transaction." Specifically, the court opined that its finding of a confidential or fiduciary relationship between decedent and Michael was supported by Michael's testimony that (1) decedent "needed Michael Sherrod to help him" by driving him to the bank after he became "very suspicious of" McBurrows-Sherrod, (2) decedent told Michael "you're the only person I can trust," and (3) decedent "redirected all his mail to—to Michael's house with regard to financial issues."

This evidence was not sufficient to support a finding of a confidential or fiduciary relationship. That decedent trusted Michael is necessary for finding that a confidential or fiduciary relationship existed between them, but trust alone is not enough. See *Knight*, 329 Mich at 28. Rather, to establish that a confidential or fiduciary relationship existed between decedent and Michael, there needed to be evidence that decedent demonstrated his trust in Michael by placing reliance on Michael's judgment or advice, see *In re Jennings' Estate*, 335 Mich at 244, and there is no such evidence in the record. For instance, despite decedent's redirecting his financial statements to Michael's house, nothing in the record suggests that decedent gave Michael any control over decedent's finances such that decedent would have to trust Michael's judgment. Indeed, decedent did not even give Michael access to the funds in his DMCU account while decedent was alive—decedent only made Michael the beneficiary on his DMCU account. And while Michael drove decedent to DMCU in a trip that resulted in decedent naming Michael the beneficiary of decedent's account, this supports only that Michael had the opportunity to influence decedent; it does not support that a confidential or fiduciary relationship existed between them. See *Blackman*, 150 Mich at 323-325; *In re Brady's Estate*, 295 Mich 472, 474-476; 295 NW 230 (1940) (holding that "[n]o confidential relationship existed between either Mr. or Mrs. Knorpp and testator" despite evidence that the testator changed his will in front of the Knorpps, and the next day the Knorpps drove the testator to have his will executed and went into the office with the testator to do so).

We acknowledge that the trial court credited Dr. Martin's testimony that decedent may have been confused around the time of the transaction due to his ongoing medical issues, but we do not believe that this finding warrants a different result. That is, even if decedent was confused around the time of the transaction, it would not establish that a confidential or fiduciary relationship existed between Michael and decedent.[1] Again, a confidential or fiduciary relationship is

[1] It bears noting that decedent's confusion mostly manifested itself in his distrusting McBurrows-Sherrod. That distrust caused decedent to ask Michael to drive him to DMCU to remove

established when one places reliance on another's judgment or advice, see *In re Jennings' Estate*, 335 Mich at 244, and there is no evidence that decedent relied on Michael's judgment or advice.

For these reasons, we conclude that the trial court's finding that a confidential or fiduciary relationship existed between Michael and decedent was clearly erroneous. Without that finding, McBurrows-Sherrod cannot establish a presumption of undue influence. McBurrows-Sherrod has never argued that she presented sufficient evidence to establish undue influence absent a presumption, so our conclusion that McBurrows-Sherrod failed to establish the presumption of undue influence resolves this case.[2]

Reversed.

/s/ Adrienne N. Young
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle

McBurrows-Sherrod's access to his account, but it was Lindsay who suggested that decedent open a new account. When the new account was created, decedent named Michael the beneficiary.

[2] While it strikes us as unfair that decedent left his DMCU account to his brother (with whom he was estranged until recently) instead of his daughter (who faithfully remained by his side), this perceived unfairness does not justify court intervention:

> This court has often said that the mere fact that decedent so disposed of his property as to do an apparent injustice to one or more of his relatives would not nullify the transaction. Courts are not permitted to make equitable distribution of estates, but are concerned only in giving effect to the legal acts of decedents. [*In re Fay's Estate*, 197 Mich 675, 687; 164 NW 523 (1917) (quotation marks and citation omitted).]

In re Estate of Karmey

Decision Date: 08 April 2003

Docket Number: Docket No. 121082.

Citation: In re Estate of Karmey, 468 Mich. 68, 658 N.W.2d 796 (Mich. 2003)

Parties: In re ESTATE OF Abraham KARMEY, Deceased. Marianne Karmey-Kupka, George Karmey, and Irene Karmey, Petitioners-Appellees, v. Margaret Karmey, Respondent-Appellant.

Court: Michigan Supreme Court

658 N.W.2d 796

468 Mich. 68

In re ESTATE OF Abraham KARMEY, Deceased.

Marianne Karmey-Kupka, George Karmey, and Irene Karmey, Petitioners-Appellees, v. Margaret Karmey, Respondent-Appellant.

Docket No. 121082.

Supreme Court of Michigan.

April 8, 2003.

Weideman & Weideman, P.C., (by Carl M. Weideman, III), Grosse Pointe Woods, MI, for the petitioners.

Musilli, Baumgardner & Parnell P.C., (by John R. Parnell and Dennis M. Fuller), St. Clair Shores, MI, for the respondent.

Opinion

PER CURIAM.

In their petition to set aside a will, the children of the decedent claimed that the beneficiary of the will, decedent's second wife, had exercised undue influence over the decedent when he made her the sole beneficiary of his estate. The probate judge ruled that petitioners had failed to present sufficient evidence for a jury to find that decedent's wife unduly influenced her husband, and the judge therefore granted respondent's motion for a directed verdict. The Court of Appeals reversed and remanded the case for trial, holding that there was a question for the jury whether decedent and his wife had a confidential or fiduciary relationship, which would create a rebuttable presumption of undue influence.

The Court of Appeals reluctantly based its holding on this Court's decision in *Kar v. Hogan,* 399 **Mich**. 529, 251 N.W.2d 77 (1976), which the Court viewed as encompassing most marriages within the test for applying the presumption. We conclude *797 that marriage does not give rise to a presumption of N.W.2d 797 undue influence. We reverse that portion of the Court of Appeals decision necessitating a remand and reinstate the probate court's grant of a directed verdict.

I

Abraham Karmey died in 1997, leaving his entire estate to his wife of twenty years, Margaret Karmey. Margaret was Abraham's second wife. The three children of his first marriage, petitioners in this case, sought to have their father's will set aside, alleging that Margaret had exerted undue influence over their father when he drafted the will. They based their contention in large measure on statements he had allegedly made a year before drafting the will in which he expressed his intent to give each of them $25,000, as well as a business to operate. The inventory prepared by Margaret Karmey as the personal representative of her husband's estate showed a worth of only $57,000 at the time of his death.

The case proceeded to a jury trial in 1999, with the petitioners presenting testimony that Abraham feared Margaret and that she had control of the family finances, especially after he became ill in his last years. Margaret's position was that she had a typical marriage in which she shared confidences with her husband. At the close of petitioners' proofs, Margaret moved for a directed verdict. The probate judge granted the motion, noting that for influence to be undue, it must have overpowered the decedent's own free will. The judge said, "[T]he decedent may be influenced in the disposition of his property by specific or direct influences without such influences being undue." It is not improper, said the judge, for a spouse to use her powers of persuasion to shape the crafting of a will.

The judge rejected petitioners' argument that Abraham and Margaret were in a fiduciary relationship, so as to give rise to a presumption of undue influence:

> The Contestant—that's you—has the burden of proving that there was undue influence exerted on the decedent in making the Will.
>
> And part of your argument is the spousal relationship becomes that of a fiduciary relationship. I'm going to say that that is not the law and that's not the way I'm going to rule. She admitted that there was a confidential relationship but there should be a confidential relationship between all spouses.
>
> She also indicated that she didn't handle his finances and he paid the bills. So other than that one statement the court does not believe that there's sufficient factual basis that I can find a confidential relationship, therefore, the presumption doesn't come into play.

Petitioners appealed to the Court of Appeals, arguing that the judge's conduct in admonishing witnesses denied them a fair trial and that the proofs of a trusting marital relationship between Abraham and Margaret Karmey established a mandatory presumption of undue influence that had not been rebutted, making the directed verdict inappropriate. The Court rejected the first argument, but on a two-to-one vote agreed with the latter. Unpublished opinion per curiam, 2002 WL 207572, issued February 8, 2002 (Docket No. 223270).

The Court majority noted that Margaret Karmey's own trial testimony had indicated that a trusting relationship existed with her husband. Her relationship with Abraham, she agreed, was a "typical marriage" in which they were "very close" and he was her "closest friend," sharing things with her that he would not share with other people. *Id.* at 8. The Court determined *798 that N.W.2d 798 Abraham, at least on occasion, relied upon Margaret, and that she had an opportunity to influence him "because they were married and because he was allegedly afraid of her." *Id.* Because there was evidence that Abraham and Margaret had a "loving and trusting relationship," it was appropriate, said the Court, for a jury to resolve the undue influence issue, including the question whether a fiduciary relationship existed. *Id.*

The Court of Appeals majority recognized that under its holding, a presumption of undue influence could attach to all wills where one spouse leaves property exclusively to the remaining spouse, especially when to the exclusion of other family members. The majority admitted that it was "not particularly enamored of the possibility of such a result."[1] *Id.* at 9. However, it felt compelled to reach its conclusion on the basis of this Court's decision in *Kar*.

II

Kar concerned an action to set aside a property deed between a wife and husband on the ground that it was procured through undue influence. The action was brought by the stepchildren of the deceased, Julia Merkiel, who had married their father in 1914. The father died in 1951, and Julia married Edward Merkiel in 1953. In 1969, property owned by Julia was deeded to her and Edward as tenants by "their entireties," thereby precluding the children from gaining an interest in the property upon her death.

After completion of the proofs, the trial judge found that Julia and Edward met the test for a confidential or fiduciary relationship and, as a result, applied a presumption of undue influence to the case. He further found that defendant had rebutted the presumption, and he therefore ruled in defendant's favor.

The judge's utilization of the presumption of undue influence was based on a widely applied three-factor test, which this Court detailed in *Kar* as follows:

> The presumption of undue influence is brought to life upon the introduction of evidence which would establish (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. [399 **Mich**. at 537, 251 N.W.2d 77.]

Although *Kar* accepted the trial judge's utilization of the presumption of undue influence, that was not the focus of *Kar*. Instead, the critical issue for discussion concerned the burden of proof and the shifting evidentiary obligations of the parties when the presumption of undue influence has been found. *Kar* did not discuss what type of proofs were necessary to meet the three-part test. It simply operated on the premise that the marriage at issue was subject to the presumption. *799 The Court of Appeals majority in this case, N.W.2d 799 recognizing that the Court in *Kar* had accepted the trial judge's finding that the three-part test was met, concluded that *Kar* had established a rule that all spousal relationships of trust and confidence meet the three-part test, thereby bringing forth the presumption of undue influence. We reject this implication in *Kar*.

III

"Fiduciary relationship" is a legal term of art,[2] as is the phrase "confidential or fiduciary relationship."[3] Marriage, however, is a unique relationship, treated in law differently from other relationships, for a host of obvious reasons.

In the context of this case and the analysis provided in *Kar,* it can be said that marriage is not a relationship that has traditionally been recognized as involving fiduciary duties. It is a unique relationship based on mutual trust and

commitment. We do not believe the presumption of undue influence is applicable to such a relationship.

One should not lose sight of the basic principles underlying the concept of *undue* influence. As this Court said in *Kar:*

> To 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. [399 **Mich**. at 537, 251 N.W.2d 77.]

The influence of a husband or a wife over that person's spouse could be great— at times almost overwhelming—without being "undue." Although we agree with the standard for application of the presumption of undue influence established in *800 *Kar,* we hold that this presumption is not applicable to marriage.[4] *N.W.2d 800*

IV

In this case, the probate judge found that the proofs presented by the petitioners did not raise a question of fact about whether the relationship between Abraham and Margaret Karmey was a confidential or fiduciary relationship. The record supports this finding. Further, the marriage relationship between Abraham and Margaret Karmey was not shown by any factual allegations to be a relationship of undue influence.

Because the presumption of undue influence is not applicable to marriage, that portion of the Court of Appeals decision remanding this case for trial is reversed, and the probate court's grant of a directed verdict is affirmed. MCR 7.302(F)(1).

CORRIGAN, C.J., and MICHAEL F. CAVANAGH, WEAVER, MARILYN J. KELLY, TAYLOR, YOUNG, and MARKMAN, JJ., concurred.

[1.] This concern was echoed by the dissent, which warned:

Were we to apply the three-part test to a will contest where a spouse leaves everything to a surviving spouse, then a factual finding of a good marriage would automatically mean that a rebuttable presumption of undue influence would arise. This surely cannot nor should it be the law. More should be shown to raise a presumption of undue influence between spouses than a good confidential relationship where each understandably looked to the other for advice and took the advice of the other. To hold as the majority does and as the majority interprets *Kar* to have ruled, simply serves to penalize a good marriage by requiring a will contest trial if a third party objects to one spouse leaving virtually the entire estate to the surviving spouse.

[2.] Black's Law Dictionary (7th ed) defines the term as

[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client-require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

[3.] Although a broad term, "confidential or fiduciary relationship" has a focused view toward relationships of inequality. This Court recognized in *In re Wood's Estate,* 374 **Mich**. 278, 287, 132 N.W.2d 35 (1965), that the concept had its English origins in situations in which dominion may be exercised by one person over another. Quoting 3 Pomeroy, *Equity Jurisprudence* (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when "`there is confidence reposed on one side, and the resulting superiority and influence on the other.'" 374 **Mich**. at 283,132 N.W.2d 35.

Common examples this Court has recognized 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. 374 **Mich**. at 285-286, 132 N.W.2d 35. 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.

[4.] To be clear, we hold that no *presumption* of undue influence arises by the fact of marriage. We do not exclude the possibility that, under facts other than those presented in this particular case, a person might exercise undue influence over a

weakened or vulnerable spouse.

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, January 16, 2026
Held remotely via Zoom
(DRAFT) Minutes

I. Commencement (Nathan R. Piwowarski)

A. Call to Order and Welcome

Chairperson **Nathan R. Piwowarski** called the regular meeting of the Council to order at 11:06 a.m. and welcomed those attending via Zoom. He noted that the meeting was being recorded via Zoom solely for the purpose of preparing the minutes and that the recording would be deleted after the minutes were approved.

B. Attendance

Melisa M. W. Mysliwiec conducted a roll call of Zoom participants.

The following officers and members of the Council were present remotely via Zoom:

1. Nathan R. Piwowarski, Chairperson
2. Richard C. Mills, Chairperson-Elect
3. Christine M. Savage, Vice Chairperson
4. Melisa M. W. Mysliwiec, Secretary
5. Angela M. Hentkowski, Treasurer
6. J.V. Anderton
7. Ernscie Augustin
8. Daniel W. Borst
9. Susan L. Chalgian
10. Georgette E. David
11. Patricia E. Davis
12. Daniel S. Hilker
13. Kathleen A. Martone
14. Alexander S. Mallory
15. Nicholas A. Reister
16. Michael D. Shelton
17. Joseph J. Viviano
18. David Sprague
19. Rebecca K. Wrock

Others present remotely via Zoom:

1. Becky Bechler (Public Affairs Associates)
2. Jonathan Beer
3. Theresa Castle (Administrative Assistant)
4. Dustin S. Foster
5. Brianne M. Gidcumb
6. Trent Harris
7. J. David Kerr
8. Amanda Filizetti Knaffla
9. Robert B. Labe
10. Peter Langley (Public Affairs Associates)
11. David W. Lentz
12. Marguerite Munson Lentz (Ex Officio)
13. Michael Lichterman
14. David P. Lucas (Ex Officio)
15. Katie Lynwood (Ex Officio)
16. Andrew W. Mayoras
17. Austin McKee
18. Hon. David M. Murkowski
19. Rachael M. Sedlacek (ICLE)
20. Elizabeth M. Seifker
21. Mitchell Sickon
22. Kenneth F. Silver
23. James P. Spica (Ex Officio)
24. James B. Stewart (Ex Officio)

C. Excused Absences

The following were noted as excused:

1. Sandra D. Glazier
2. Warren H. Krueger
3. Elizabeth Luckenbach
4. Hon. Sara A. Schimke

D. Approval of Agenda

The Chair reviewed the agenda included in the meeting materials. No additions or changes were requested, and the agenda was accepted as presented.

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates)

Becky Beckler and Pete Langley of Public Affairs Associates reported that the Legislature has returned to session with a light calendar expected to focus primarily on budget matters. They summarized ongoing budget activity, related litigation, and upcoming key dates for the Revenue Estimating Conference, the Governor's budget address, and the State of the State.

They also discussed draft legislation under consideration by Representative Leitner related to the Uniform Adult Guardianship and Protective Proceedings Act and requested preliminary feedback from the Section prior to introduction. Legislative challenges in advancing bills between the House and Senate were noted.

B. Minutes of Prior Council Meetings (Melisa Mysliwiec)

Secretary Mysliwiec directed Council to the draft minutes included as **Attachment 1**. A correction was noted to the spelling of Brien Heckman's name (B-R-I-E-N). Upon motion duly made and seconded, the December 12, 2025, minutes were approved as corrected.

C. Chair's Report (Nathan Piwowarski)

Chair Piwowarski reported that most updates had been delegated to committee reports. He noted receipt of a communication from the State Bar of Michigan regarding the Legal Services Corporation's scope of acceptable pro bono services in probate matters. After brief discussion, Council expressed no objection to continuation of the existing scope.

D. Treasurer's Report (Angela Hentkowski)

Treasurer Hentkowski reported that current financial statements were included in the meeting materials and were self-explanatory. She also noted that an updated Section Expense Reimbursement Form reflecting the increased IRS mileage rate for 2026 is now in effect. No formal action was required.

III. Committee Reports

A. Committee on Special Projects (Dan Hilker)

Mr. Hilker reported that the Committee continues its review of draft statutes currently under consideration.

B. Amicus Curiae (Andy Mayoras)

Mr. Mayoras summarized the Committee's report regarding a request for an amicus brief in Duchene v Spicer. He reviewed the factual background, the Court of Appeals' unpublished decision, and the Committee's recommendation against authorizing an amicus brief at this stage due to the case's fact-specific nature and limited anticipated impact.

Council discussion followed regarding the scope and application of MCL 700.1205(3), including whether the EPIC fraud discovery rule applies to undue influence claims. Mr. Spica made a motion, seconded by Mr. Piwowarski, to authorize submission of an amicus curiae brief supporting the application for leave to appeal with the position that MCL 700.1205(3) applies to allegations of undue influence, and as such, the statute of limitations that should have been applied is that set forth in the statute, i.e. two years from the discovery of the undue influence. Discussion included timing and procedural considerations. This vote was taken as a public policy position. 17 voted in support, 1 opposed, 0 abstentions, and 5 did not vote. The motion prevailed and the public policy position was adopted. Mr. Mayoras then made a motion that the brief be co-authored by Elizabeth M. Siefker and James P. Spica. The motion prevailed by voice vote in support.

Mr. Mayoras also circulated the Michigan Supreme Court's Order as well as the Michigan Court of Appeals opinion in *In re Sherrod Estate*, requesting submission of an amicus brief by the Section.

C. Annual Meeting (Nathan Piwowarski)

No report.

D. Awards (Katie Lynwood)

No Report.

E. Budget (Melisa Mysliwiec)

No Report.

F. Bylaws (David Lucas)

No Report. Matters referred to committee by the chair. Committee hopes to get something to the chair by nest week.

G. Charitable and Exempt Organizations (Rick Mills for Rebecca Wrock)

No Report. Next meeting is Thursday the 29th at 10:00

H. Citizens Outreach (Kathleen Goetsch)

No Report.

I. Court Rules, Forms, and Proceedings (Patricia Davis & Georgette David)

Committee requested electronic vote, regarding proposed amendments MCR 2.106. Vote conducted 19 supporting, 0 opposing, 4 non-voting. No further report.

J. Electronic Communications (Susan Chalgian)

No report.

K. Ethics and Unauthorized Practice of Law (Alex Mallory)

Next meeting Friday at 8:30. No further report.

L. Guardianship, Conservatorship, and End of Life (Sandra Glazier)

Council discussed proposed guardianship jurisdiction legislation, including prior Section review of similar proposals and the need to ensure consistency with historical analysis and previously adopted positions before providing feedback to legislative sponsors. No action was taken.

M. Legislation Development and Drafting (Rob Tiplady & Rick Mills)

No report.

N. Legislation Monitoring and Analysis (Mike Shelton)

No report.

O. Legislative Testimony (Dan Hilker)

No report.

P. Membership (Ernscie Augustin)

No report.

Q. Nominating (Mark Kellogg)

Mr. Spica noted that the committee would like to see some data regarding attendance. No further report.

R. Planning (Nathan Piwowarski)

No Report. Mr. Piwowarski noted no meeting on Monday. Committee will reschedule next meeting.

S. Probate Institute (Chris Savage)

The schedule is final and available on the Section website. Registration is open and currently exceeds last year's pace; additional attendance is encouraged, including an optional add-on seminar on partnership taxation. No Further Report.

T. Real Estate (Angela Hentkowski)

Ms. Hentkowski reported on House Bills 5152 and 5153. The Real Estate Committee recommended and Ms. Hentkowski moved that Council adopt a public policy position opposing both bills due to concerns regarding restrictions on the assignability of redemption rights and surplus proceeds, overbreadth, and limited effectiveness. The motion was supported by Mr. Stewart. 14 voted in support, 0 opposed, 0 abstentions, and 9 did not vote. Council adopted a public policy position opposing House Bills 5152 and 5153.

U. State Bar and Section Journals (Melisa Mysliwiec)

A draft PDF was received from ICLE and is under review. Council members can expect to receive it in the coming week. No Further Report.

V. Tax (J. V. Anderton)

No Report.

W. Assisted Reproductive Technology (Nancy Welber)

No report.

X. Electronic Wills (Kathleen Martone)

No report.

Y. Fiduciary Exception to the Attorney-Client Privilege (Warren Krueger)

No report.

AA. Premarital Agreements (Chris Savage)

No report.

BB. Trust Accounts (Elizabeth Luckenbach)

A recent meeting was held with Representative Wozniak's office and representatives of the Michigan Bankers Association. The discussion was productive, and a redline proposal is expected to be circulated to the committee in February. Participants noted that the parties appear close to agreement.

CC. Uniform Community Property Disposition at Death Act (James Spica)

No report.

DD. Uniform Guardian, Conservatorship, and Protective Arrangements Act

The committee has met twice and begun a comprehensive review of the statute, identifying issues for later section-by-section analysis. Meetings will generally be held on the first and third Thursdays of each month beginning at noon, with the next meeting scheduled for February 5. Additional participation is welcomed.

EE. Undue Influence (Ken Silver)

No Report beyond what was discussed at CSP. Ms. Glazier provided an Article from Trusts & Estates Magazine on the topic (**Attachment 1**) as well as a UI Law Review article on the New Undue Influence (**Attachment 2**).

FF. Uniform Fiduciary Income and Principal Act (James Spica)

It was reported that the Unitrust bill has passed the House but remains in committee in the Senate. If Senate floor activity resumes, the bill is expected to be released for a vote. No Further report.

GG. Various Issues Involving Death and Divorce (Dan Borst & Sean Blume)

No report.

IV. Good of the Order

There was no additional business.

V. Adjournment

There being no further business, Mr. Piwowarski adjourned the regular Council meeting at 12:32 p.m.

Respectfully submitted,

Melisa M. W. Mysliwiec, Secretary
Probate & Estate Planning Section Council
State Bar of Michigan

reforms, including permitting charities to have flexibility to modify donor limits after a period of years, expanding the scope of modifications by courts and allowing charities' fiduciaries to make some decisions. The author highlights the use of gift acceptance policies as one way charities can strengthen their position against donor limits. Some tax reform options include treating donor limits as partial interests or retained rights that would reduce the charitable deduction, reducing the value of the contributed assets, imposing additional requirements on private foundations, delaying donors' charitable deductions until monies are distributed from DAFs, requiring that distributions from DAFs be unrestricted and allowing a non-itemizer charitable deduction only for unrestricted gifts.

The author concludes that unrestricted, fully completed gifts to charity allow charities to determine how best to use their assets and is consistent with the original intent of the charitable deduction "to supply charities with resources they need to advance the public good."

REVIEW BY: **Sandra D. Glazier**, equity shareholder at Lipson Neilson P.C. in Bloomfield Hills, Mich.

AUTHORS: **David Horton**, the Martin Luther King, Jr. professor of law at the University of California, Davis, School of Law in Davis, Calif. and **Reid Kress Weisbord**, distinguished professor of law at Rutgers Law School in Newark, N.J. and the Judge Norma L. Shapiro Scholar

ARTICLE: "**The New Undue Influence**," *Utah Law Review* (Spring 2023)

In "The New Undue Influence," professors Horton and Weisbord examine common law and statutory approaches to undue influence as a means of invalidating bequests as well as whether these approaches adequately meet the public policy reasons behind them. The article addresses the common law approach to undue influence as "the problem child of inheritance law,"[1] which represents "a hazy combination of fraud and duress [which] supposedly invalidates bequests that a beneficiary obtained by overriding the volition of a vulnerable testator or settlor."[2] As a member of the Undue Influence Committee of the Michigan Probate Council that's exploring the potential introduction of a statutory presumption of undue influence in Michigan, I found the article an interesting and informative read.

In exploring the historical common law approach to undue influence, the authors conclude that the complexities of relationships and vagaries of the level of influence needed for influence to be considered undue often results in the protection of "a decedent's family at the expense of non-relatives and unmarried partners."[3] While the common law approach to undue influence has been around for centuries, some view the concept as bothersome and argue that it's been exploited to overturn dispositions based on the factfinder's "own views of morality and propriety."[4] This article analyzes a number of cases in which the common law approach led some scholars to propose a weakening or abandonment of the concept as a means for invalidating bequests.

Recently, shifts in policy that correspond to a rising concern about financial elder abuse have resulted in the enactment in a number of jurisdictions of statutory presumptions that may turn the concern regarding the common law approach to undue influence on its head. The authors call such statutory approaches the "New Undue Influence" and contend these statutes merit a scholarly review given their increased prevalence. The article explores what the authors characterize as the "conventional view" that traditional undue influence approaches may actually "thwart a decedent's wishes."[5] In exploring the economics and burdens imposed under a common law approach, they contend the conventional view actually has it backwards. The real problem with the common law approach is "not that it is too powerful; rather, it is that it is not powerful enough."[6] After exploring the procedural pitfalls of a common law approach, the authors conclude "there's a plausible argument that the traditional undue influence rule does not discourage pernicious wrongdoing"[7] and that "special presumption laws reveal growing

anxiety that the common law of undue influence is inadequate to discourage wrongdoing."[8]

The article engages in a statistically based analysis of whether: (1) a statutory presumption of undue influence might create new incentives for litigating undue influence that can act as a potential deterrent against exploitive behavior; and (2) a statutory approach favors family members over other relationships. It also reviews whether civil actions for elder abuse, which permit a prevailing contestant to receive exemplary damages and attorney's fees when undue influence is proved to have been committed in bad faith, increase the potential cost of litigation and damages awarded.

Because California took a legislative lead in the area of undue influence, the authors analyzed 6,817 probate and trust cases brought in that state post-enactment in arriving at their conclusions. Even though only 175 of those cases went to trial (and only nine of those matters were tried to completion), access to settlement information regarding 81 contests in California helped in the analysis of case outcomes in determining what the authors quantified as the "success rate." In analyzing those contests, the authors found that even though the number of cases brought under California's undue influence statute didn't appear to be higher than before legislation was enacted, the success rate achieved in cases brought under the statute appeared statistically higher, and factfinders no longer manipulated the doctrine to protect a decedent's family. They also found that of the nine matters that proceeded to verdict, in the eight that were the result of a bench trial, the alleged wrongdoer still prevailed.

In addition to exploring the policy and potential implications of a statutory approach to undue influence, the article addresses the tort of intentional interference with an inheritance and whether a tort approach might function as a better deterrent against exploitive behavior, because it creates the potential for an award of both compensatory and punitive damages. The authors indicate the availability of this approach appears to be on the wane and has been the subject of much debate.

The article also discusses statutory elder abuse claims premised on undue influence and the potential limitations in who might seek such relief. In some jurisdictions, parties who might qualify to file a probate contest may not seek redress under a civil claim of elder abuse. In other jurisdictions where statutory civil claims for elder abuse (emanating from undue influence) are plausible, such claims might result in duplicative litigation with cases in civil and probate court being litigated, in tandem, over the same dispositive transaction. When this occurs, it may result in increased costs of litigation and a strain on judicial resources. It may also result in forum shopping in jurisdictions that permit a jury trial for tort claims but not for traditional undue influence claims brought in probate court. When duplicative avenues of litigation are available, the authors offer practical solutions and considerations, such as limiting civil claims of elder abuse based on undue influence to the probate arena, as well as the possibility for statutory approaches that provide for fee shifting or double damage awards that might operate to reimburse the cost of such litigation.

The article concludes that the statutory presumption of undue influence has the potential to make claims more valuable and achieve a higher success rate than common law undue influence cases. Based on the analysis of almost 7,000 cases, the authors found that despite such successes that were statistically found to have occurred in California following enactment of such legislation, challenges to wills remain relatively rare (because they only occurred in about 1% to 3% of estates).[9] Nonetheless, the article concludes that the statutory approach no longer favors family members over others and that litigants relied on a statutory presumption of undue influence less frequently than had been predicted with none of the contestants receiving amplified remedies that might be available under the statute. The article proffers the position that with the increased concern over elder financial abuse, a statutory approach to the presumption of undue influence "has the potential to encourage parties to pursue cases without subjecting alleged undue influencers to excessive liability."[10]

Endnotes

1. David Horton and Reid Kress Weisbord, "The New Undue Influence," *Utah Law Review*, at p. 1.

2. *Ibid.*
3. *Ibid.*, at p. 40.
4. *Ibid.*, at p. 3.
5. *Ibid.*, at p. 15.
6. *Ibid.*
7. *Ibid.*, at p. 22.
8. *Ibid.*, at p. 24.
9. The data available for this analysis was reported to generally be skewed toward single decedents, and those cases often pitted children of the decedent against other children of the decedent.
10. *Supra* note 1, at p. 48.

REVIEW BY: **Louis S. Harrison**, partner at Harrison LLP in Chicago

AUTHOR: **Lawrence M. Friedman**, professor of law, Stanford Law School, Stanford, Calif.

ARTICLE: "**Immortal Longings: Perpetuity in Context**," *Buffalo Law Review* (2023)

In "**Immortal Longings:** Perpetuity in Context," Professor Lawrence M. Friedman has created a masterful exploration of what I would refer to as "perpetual testamentary structures" or what planners regard as "dynasty trusts" in addition to private charitable foundations.

He intertwines an exploration of grantor psychology in creating these perpetual vehicles with historical and current laws on accumulations and perpetuities and analyzes this in the context of the evolution of thought, realities, changes in law and the like in the perpetual trust context. The result is a 73-page fascinating and unique dive into this area. And an important one.

Why do planners and clients want to create perpetual charitable or private trusts that last from generation to generation to generation? The author provides one interesting answer early on in the treatise: to create "vicarious immortality." This phrase is interesting and not typically used when discussing the area with clients; it has a certain reality when one thinks deeply about it.

Almost all of our clients won't know their great-grandchildren because those folks will not likely be born during our clients' lives. And yet, a perpetual trust will benefit them. Clients are wise to the concept today that too much wealth can destroy purpose and productivity. Accordingly, providing great wealth to future descendants (not yet born) certainly is an anathema to many of our clients. And yet they (and we as their planners) do it all the time.

And we use different nutshell explanations to justify perpetual trusts: "Set up perpetual trusts so that all health care and educational needs of your family are provided for generations to come."[1]

As estate planners know, the reality is quite different. We may be lobbying for perpetual trusts because we know that clients desire "vicarious immortality," and there's both an emotional and tax appeal to having these trusts.

Not without controversy, the author emphasizes that perpetual trusts provide big business to trust companies and planners. Maybe; maybe not.

But, there are variables that are critical to ensure the value of a perpetual trust. You need trustees that exercise the correct judgment over discretionary distributions from the trust to enhance, and not diminish, the client's beneficiaries' lives. The correct trustee selection is an important decision, which can't be overstated.[2]

Interestingly, later in the article, the author explains that taxes and business opportunities (initially for states that abolished the rule against perpetuities (RAP)) or perhaps business opportunities for planners, were motivating forces behind what's now essentially the elimination of the RAP in most (all?) states.[3] However, there's a slightly different reality.

The RAP was likely eliminated as an archaic common law complication to estate planning that no longer served any real purpose. In a strange way, estate taxes have replaced the need to have a RAP.

The author does an outstanding job illustrating the absurdity of long-lasting trusts for charitable or private purposes; essentially, can original intent really be fulfilled 100 years later, so to speak? He references, among others, Stephen Girard, who died in 1831. Stephen set up a trust to benefit "poor white male orphans between the ages of six and ten." Query

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The New Undue Influence

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THE NEW UNDUE INFLUENCE

David Horton* & Reid Kress Weisbord**

Abstract

The doctrine of undue influence has long been the problem child of inheritance law. Undue influence, a hazy combination of fraud and duress, supposedly invalidates bequests that a beneficiary obtained by overriding the volition of a vulnerable testator or settlor. But because relationships are complex, concepts like free will are slippery, and challenges to donative transfers are litigated after the owner dies, courts struggle to apply the rule. Making matters worse, factfinders exploit the principle's vagueness to protect a decedent's family at the expense of non-traditional relationships. As a result, scholars have criticized undue influence for decades, with some even calling for its abolition.

Yet this Article examines a little-noticed trend that is cutting in the opposite direction. Responding to the epidemic of elder abuse, several jurisdictions have started to experiment with a supercharged version of the undue influence doctrine. These states have realized that because the cost of pursuing undue influence allegations often dwarfs the contestant's potential recovery, the traditional rule does not do enough to deter pernicious misconduct. Thus, as Congress often creates bounties to encourage plaintiffs to enforce statutes, these lawmakers have incentivized "probate attorneys general" to file undue influence claims. They have done so by recognizing novel presumptions of undue influence, a civil claim for undue influence as a form of elder abuse, and enhanced remedies for undue influence committed in bad faith. We call these updates of the ancient rule the "new undue influence."

The Article then offers a ground-level assessment of this phenomenon by analyzing a dataset of nearly 7,000 recent probate and trust cases from California, which has been a pioneer in the new undue influence movement. The Article reaches three main conclusions. First, policymakers have successfully changed the economics of undue influence litigation. Indeed, the Article finds that heirs and beneficiaries who invoke the new undue influence achieve a higher "success rate"—the amount of damages or settlement proceeds divided by the maximum possible recovery—than those who only seek relief under traditional law. Second, contrary to scholars' assumptions, judges and juries no longer seem to manipulate the undue influence doctrine to protect a decedent's family. In fact, there appears to be no meaningful link between case results and the parties' relationship to the testator or settlor. Third, permitting

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 Distinguished Professor of Law and Judge Norma L. Shapiro Scholar, Rutgers Law School.

contestants to repackage probate cases as civil claims for elder abuse creates anomalies. Challengers often file probate petitions and civil complaints, opening the door for duplicative litigation, doctrinal inconsistency, and procedural gamesmanship. The Article therefore suggests ways for courts and policymakers to harness the benefits of the new undue influence while minimizing these costs.

INTRODUCTION

Perhaps no trusts and estates opinion is more infamous than *Estate of Kaufmann*.[1] Robert Kaufmann, an heir to the Kay Jewelry Store dynasty, executed a series of wills in the 1950s leaving most of his fortune to his lover, Walter Weiss.[2] Anticipating that his brothers would challenge the validity of his estate plan, Robert wrote them a letter explaining how Walter had transformed his life:

> Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to [p]eace of [m]ind—and what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult.[3]

However, a New York appellate court dismissed the missive as "at odds with reality."[4] The court then invalidated the wills, calling them the "result of an unnatural, insidious influence operating on a weak-willed, trusting, inexperienced Robert."[5]

Kaufmann is inheritance law's anticanonical case—its *Dred Scott* or *Koramatsu*—and the doctrine of undue influence is at its rotten core.[6] Undue

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[1] *In re* Kaufmann's Will, 247 N.Y.S.2d 664 (1964), *aff'd sub nom.* Matter of Kaufmann's Will, 205 N.E.2d 864 (N.Y. 1965).

[2] *See id.* at 687 (Witmer, J., dissenting).

[3] *Id.* at 671 (majority opinion).

[4] *Id.* at 684.

[5] *Id.* The decision "is now widely criticized and discredited." ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 4 (2006); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 592 n.132 (1999) (citing *Kaufmann* as an example of a "case[] that seem[s] to reflect pure prejudice"); Emily S. Taylor Poppe, *Choice Building*, 63 ARIZ. L. REV. 103, 119 n.120 (2021) (referring to *Kaufmann* as "infamous"); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 245 (1981) (calling *Kaufmann* a "clear example of judicial homophobia").

[6] *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (explaining that opinions like *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and *Korematsu v. United States*, 323 U.S. 214 (1944) are anticanonical in the sense that they "embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute").

influence, which emerged in the seventeenth century, voids transfers that a wrongdoer obtains by overriding the owner's free will.[7] The principle is part mental incapacity, part fraud, and part duress.[8] Supposedly, the rule applies if "the testator's mind, when he made the will, was such that, had he expressed it, he would have said: '[t]his is not my wish, but I must do it.'"[9]

For three related reasons, undue influence has earned a reputation as "one of the most bothersome concepts in all of law."[10] First, it is hopelessly vague. After all, any will or trust is "the result of influence,"[11] and efforts to explain why some kinds of dominion are improper "degenerate[] into nothing more than platitudes."[12] Second, as *Kaufmann* reveals, factfinders have frequently exploited undue influence's elasticity to invalidate wills and trusts that violate their "own views of morality and propriety."[13] Third, because of the common belief that people should support their families, judges and juries are especially likely to invalidate bequests to friends, lovers, and caregivers.[14] Thus, scholars have uniformly proposed weakening or abandoning the doctrine.[15]

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[7] *See* Boone v. Hoskins, 613 S.W.3d 45, 53 (Ky. Ct. App. 2020).

[8] *See infra* text accompanying notes 41–43.

[9] *In re* Estate of Weeks, 103 A.2d 43, 48 (N.J. Super. Ct. App. Div. 1954) (quoting Wingrove v. Wingrove, 11 P.D. 81 (High Court 1885)); Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920) ("undue influence . . . destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire"); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (AM. L. INST. 2003) (explaining that the principle applies when a "wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer the donor would not otherwise have made").

[10] *In re* Estate of Herbert, 979 P.2d 39, 52 (Haw. 1999) (quoting JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 160 (1995)).

[11] Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997).

[12] Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMPAR. & INT'L L. 41, 43 (2008).

[13] ELIAS CLARK, LOUIS LUSKY, ARTHUR W. MURPHY, MARK L. ASCHER & GRAYSON M.P. MCCOUCH, GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION 231 (5th ed. 2007); Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 201 (1989) (asserting that undue influence "often functions instead as a barometer of society's mores").

[14] *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C.L. REV. 199, 210 (2001) (describing how judges and juries use undue influence to further a "family paradigm"); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 237 (1996) (arguing that undue influence "frustrate[s] the testator's intent and distribute[s] estate assets to family members"); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 276 (1999) (contending that undue influence cases are "bias[ed] in favor of the testator's legal spouse and close blood relations").

[15] *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 245–46 (2010) (collecting criticism of the rule and claiming that it "must be abandoned").

However, this Article reveals that a quiet trend is cutting in the opposite direction. Responding to rising concern about elder abuse, several state legislatures have created muscular versions of the undue influence doctrine.[16] The logic behind these laws flips the conventional wisdom about undue influence on its head. Although commentators see the principle as a runaway train that imperils testamentary intent,[17] the new statutes take the position that the traditional rule does not do enough to deter misconduct.[18] For example, proving undue influence can be difficult because of the "worst evidence" problem: the claim hinges on the mental state of a person who is usually dead at the time of trial and thus cannot testify "to authenticate or clarify [their] declarations, which may have been made years, even decades past."[19] In addition, the remedies for undue influence are limited. Courts do not award compensatory or punitive damages; rather, they merely refuse to enforce the tainted instrument or impose a constructive trust on the ill-gotten assets.[20] As a result, a contestant's costs can dwarf the recovery.[21] Thus, as Congress creates incentives for private attorneys general to enforce important statutes, jurisdictions are sweetening the pot for "probate attorneys general" to pursue undue influence allegations.[22] These measures include creating novel presumptions of undue influence, recognizing a civil cause of action for undue influence as a form of elder abuse, and allowing contestants who show that a beneficiary committed undue

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[16] *See infra* Part II.B.

[17] *See, e.g.*, Foster, *supra* note 14, at 240 (arguing that because doctrines like undue influence are too potent, "the wrong people can and do inherit"); Leslie, *supra* note 14, at 236 (citing outcomes in undue influence cases as evidence that "many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent"); Spitko, *supra* note 14, at 280 ("the very standards aimed at ensuring testamentary freedom risk the testamentary freedom of a nontraditional testator who willingly executes an estate plan that fails to conform to societal norms").

[18] *See, e.g.*, CAL. COMM. REP., A.B. 381 (June 5, 2013) ("persons acting wrongfully and/or in bad faith should not benefit from their behavior because it is too costly for the wronged party to seek redress").

[19] John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344 (2013) (quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975)).

[20] *See* Youngblut v. Youngblut, 945 N.W.2d 25, 42 (Iowa 2020) (reasoning that contests merely try to carry out the decedent's intent and thus do not result in damage awards). A constructive trust is "a flexible device—originating in equity, but in widespread current usage—by which a court directs that property to which B holds legal title be transferred to A." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 com. b (AM. L. INST. 2011).

[21] *See, e.g.,* Daniel L. Madow, Comment, *Why Many Meritorious Elder Abuse Cases in California Are Not Litigated*, 47 U. S.F. L. REV. 619, 638–41 (2013) (surveying "the practical and legal challenges" of pursuing financial elder abuse claims against wrongdoers who target elders).

[22] *See* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (explaining how private attorneys general "vindicat[e] a policy that Congress considered of the highest priority").

influence in bad faith to recover exemplary damages and attorneys' fees.[23] We call this experiment the "new undue influence."

Whether this movement is good policy is difficult to assess using traditional legal research methods. To be sure, one can log on to Lexis or Westlaw and discover that contestants with new undue influence claims are beginning to win enormous verdicts.[24] However, reading reported appellate decisions cannot answer the crucial question of how parties are responding to the new incentives for litigating undue influence cases. Just a slender fraction of claims proceeds to a trial, gets appealed, and culminates in a published opinion. Instead, "most cases settle and most settlements are confidential."[25] This black box prevents us from knowing the outcome of the vast majority of disputes that involve the new undue influence.[26]

This Article overcomes this barrier by analyzing a hand-collected dataset of 6,817 probate and trust matters from California. The Golden State is an ideal jurisdiction to study for two reasons. For one, it has been a trailblazer in passing new undue influence legislation.[27] Also, it requires courts to approve most settlements in litigation involving decedents, thus placing these agreements in the judicial record.[28] Our research reveals 175 trial-level undue influence cases, including 100 that involve a claim under a new undue influence statute. In addition, our access to settlements allows us to calculate a nuanced measure of case outcomes. By dividing the amount of money or property a contestant received by the sum they would have obtained if they had prevailed on the merits, we determine their "success rate."[29]

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[23] *See, e.g.*, NEV. REV. STAT. § 155.097(2) (creating a unique presumption that a gift to a drafting attorney or caregiver is void); CAL. PROB. CODE § 859 (providing that anyone who "has taken . . . property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse . . . shall be liable for twice the value of the property recovered").

[24] *See, e.g.*, Keading v. Keading, 275 Cal. Rptr. 3d 338, 340 (Cal. Ct. App. 2021) (affirming trial court's award of $1.5 million damage penalty); Sulley-Black v. Johnson, No. G058565, 2021 WL 1526760, at *1 (Cal. Ct. App. Apr. 19, 2021) (upholding trial court's order forcing wrongdoer to surrender title to real estate, reimburse $431,097 in expenses, and pay an extra $431,097 penalty).

[25] David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 926 (2010).

[26] In addition, disputes that appear on mainstream databases suffer from selection bias: since they did not settle, something about them made the parties act differently than almost all other litigants. One hypothesis is that fully litigated cases tend to be extremely close calls, which prevents the parties from seeing eye-to-eye on who is likely to win. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–15 (1984).

[27] *See infra* Part II.B.

[28] *See* CAL. PROB. CODE §§ 9832(a)(1), 9833 (requiring court authorization for settlements that affect title to real property or the transfer of more than $25,000 from an estate).

[29] As we discuss, because determining the success rate often requires access to many variables, including real property values, the decedent's net worth, and the settlement terms,

We reach three main conclusions. First, lawmakers seem to have achieved their goal of altering the economics of undue influence litigation. Parties who pursue a new undue influence claim achieve a higher success rate by a statistically significant margin than those who merely file a common law cause of action. This divergence holds even when we control for factors like the parties' relationship to the decedent.[30] Thus, the new undue influence has the potential to create a class of probate attorneys general by increasing the expected value of contests.

Second, contrary to the received wisdom, we find no indication that factfinders distort the undue influence doctrine to protect the testator or settlor's family. For one, there is no connection between the parties' ties to the decedent and the success rate. Moreover, we uncover anecdotal evidence that—at least in liberal California—cultural minorities fare as well on the merits as other litigants.[31]

But third, on a less positive note, the new undue influence creates procedural headaches. Contestants routinely file duplicative lawsuits, such as a challenge to the validity of the will or trust in probate and a claim for elder abuse by undue influence in civil court.[32] These cases proceed in tandem, consuming the resources of the parties and the judges. We thus suggest reforms that could help policymakers harness the benefits of the new undue influence without these costs.

Before we start, two clarifications may be helpful. First, for the sake of simplicity, we will use the vocabulary of inheritance law even though the undue influence doctrine can apply to *inter vivos* dispositions of property. For example, some of the cases under our microscope involve transfers executed during the donor's life, such as gifts and deeds, but we will generally call attempts to void instruments "contests" and property owners "decedents," "testators," and "settlors." Of course, we will be more specific when distinctions between these categories matter.

Second, readers may wonder about the relationship between new undue influence and the tort of intentional interference with an inheritance. About half of the states have adopted the inheritance tort, which allows plaintiffs to pursue a civil lawsuit for wrongdoing committed during the estate planning process.[33] Because the tort can lead to awards of compensatory and punitive damages, its supporters argue that it discourages exploitation better than probate law.[34] As we will discuss, new

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we were not able to calculate the success rate for every undue influence claim in our data. *See infra* Part III.B.1.

[30] *See infra* Part III.B.1.

[31] *See infra* Part III.B.2.

[32] *See infra* Part III.B.3.

[33] *See* Goldberg & Sitkoff, *supra* note 19, at 361 (collecting authority); RESTATEMENT (SECOND) OF TORTS § 774B (AM. L. INST. 1979) (recognizing the expectancy tort).

[34] *See* Diane J. Klein, *A Disappointed Yankee in Connecticut (Or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235, 239 (2004) (arguing that probate's remedies fail to "deter certain . . . defendants"); Rebecca M. Murphy & Samantha M. Clarke, *A New Hope: Tortious Interference with an Expected Inheritance in Rhode Island,* 22 ROGER WILLIAMS U. L. REV. 531, 532 (2017) (claiming that

undue influence statutes also transcend probate's conventional focus on honoring the decedent's intent to "punish and deter specific misconduct."[35] But the concepts diverge in three ways. For one, unlike the inheritance tort, which has sparked vigorous debate,[36] new undue influence has flown under the scholarly radar.[37] Also, while a growing number of states are rejecting or limiting the inheritance tort,[38] new undue influence laws are becoming more common.[39] And finally, the inheritance tort is on the wane because courts have realized that it is deeply problematic: it is a common law doctrine that allows plaintiffs to circumvent the unique rules that state lawmakers have enacted for probate cases.[40] Conversely, the new undue influence movement is a *product* of state legislatures and thus stands on firmer footing.

The Article contains three Parts. Part I surveys the orthodox undue influence rule. It reveals that the doctrine's elusive, shape-shifting quality has long bedeviled courts. It also explains that legions of scholars have accused the rule of allowing factfinders to second-guess a decedent's unconventional estate planning decisions. However, Part II demonstrates that state legislatures are increasingly ignoring this criticism by passing new undue influence statutes. These laws carve out novel presumptions of undue influence and authorize enhanced damages to encourage probate attorneys general to push back against elder abuse. Part III presents our

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the expectancy tort "creat[es] a deterrent for wrongful conduct and, consequently, provid[es] greater protections to vulnerable [people]"); *see also infra* text accompanying notes 118–119.

[35] *In re* Estate of Ashlock, 259 Cal. Rptr. 3d 322, 330 (Cal. Ct. App. 2020).

[36] *Compare* Goldberg & Sitkoff, *supra* note 19, at 396 (arguing that courts should disavow the expectancy tort) *with* Gina M. Geary, Note, *The Light at the End of the Tunnel: Why the Timing Is Right for Connecticut to Consider Tortious Interference with Inheritance as a Valid Cause of Action*, 32 QUINNIPIAC PROB. L.J. 169, 182 (2019) (asserting that "tortious interference with inheritance fills the gap where the probate court and other causes of action are unable to offer a remedy.") *and* Diane J. Klein, *"Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—a Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209, 213 (2009) (discussing situations in which traditional probate remedies "will not remedy the harm" of interference with an inheritance); *see also infra* notes 117–123.

[37] There is a burgeoning literature on various aspects of elder abuse. *See* Ben Chen, *Elder Financial Abuse: Capacity Law and Economics*, 106 CORNELL L. REV. 1457, 1462 (2021) (proposing that courts reform their approach to determining whether seniors have the mental capacity to contract); David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 584–600 (2021) (discussing the trend of criminalizing financial exploitation of elders). However, the only articles of which we are aware that have addressed new undue influence appear in practitioner's journals. *See also* Sam Brannan, *Trends in Elder Abuse Law*, 20 PIABA BAR J. 365, 370 (2013) (mentioning in passing that some states that have created a private right of action for elder abuse); Julia L. Birkel, John M. Byrne & Susan I. Bernatz, *Litigating Financial Elder Abuse Claims*, L.A. LAW., Oct. 2007, at 19–20 (discussing some of California's novel undue influence rules).

[38] *See* Brief of Appellees at 40–41, *In re* Estate of Osguthorpe, No. 20180686-CA, 2020 WL 10759066 (Utah June 29, 2020) (explaining that "[o]f the ten states that have rejected the [expectancy] tort, all except one [of the cases] . . . were decided after 2000").

[39] *See infra* Part II.B.

[40] *See infra* text accompanying notes 121–123.

empirical study of the new undue influence. It concludes that these statutes are promising but imperfect attempts to cure the deficiencies of the common law doctrine.

I. TRADITIONAL UNDUE INFLUENCE

This Part provides background by describing the common law of undue influence. It explains why the rule is notorious for its amorphousness, its delegation of power to courts and juries, and its impact on gifts to non-relatives.

The undue influence doctrine emerged in seventeenth century England. Previously, courts had annulled wills only if the testator lacked mental capacity or had been the victim of duress or fraud.[41] However, some cases fell into a no man's land between these rules, such as when an impaired but competent testator executed an unjust-seeming instrument and there was no direct evidence of coercion or trickery.[42] Undue influence filled this gap.[43] For example, in *Herbert v. Lowns*, which the Court of Chancery decided in 1628, the testator, Peter Bland, was "a very weak [m]an" who was "apt to be circumvented."[44] Bland signed a will and several deeds leaving property to Laurence Lowns, whom he had hired to manage his finances, instead of his children.[45] The court imposed a constructive trust on the ill-gotten assets, reasoning that although Bland possessed testamentary capacity, the will and deeds were "drawn from him by [p]ractice and . . . ought to be void."[46]

Herbert embodies two themes that run through these early undue influence cases. First, the wrongdoer frequently enjoyed formal authority over the testator or settlor.[47] As Henry Swinburne's treatise noted, the rule invariably applied "when the [t]e[s]tator is under the [g]overnment of the [p]er[su]ader," such as a bequest left by a sick person to their doctor.[48] Second, undue influence almost seemed like a family protection rule, akin to principles that entitle some omitted spouses and children to

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[41] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *496–97 (explaining that "madmen" cannot execute valid wills); MOSES DROPSIE, ROMAN LAW OF TESTAMENTS, CODICILS, AND GIFTS IN THE EVENT OF DEATH 44-45 (1892) (explaining that, under Roman law, "entreaty or flattery if not connected with fraudulent or deceitful persuasions[ ] do not invalidate a testament").

[42] *See, e.g.*, Herbert v. Lowns, (1628) 21 Eng. Rep. 495, 496 (Ch) (featuring a testator who was not "a [m]an of non sane [m]emory" and yet abruptly disinherited his children).

[43] The first decision to describe this doctrine as "undue influence" was *Kerrich v. Bransby*, (1727) 3 Eng. Rep. 284, 284 (HL). The rule was "a twin" of the equitable principles that compelled chancery courts "to protect those, who, thought they had technical legal capacity, had mental or physical impairments which left them vulnerable to exploitative, though valid, bargains." Spivack, *supra* note 15, at 251.

[44] *Herbert*, 21 Eng. Rep. at 496.

[45] *See id.* at 495–96.

[46] *Id.* at 496.

[47] *See* John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 262 (1947) (observing that undue influence overlapped with "other protective doctrines of equity, particularly those evolved for 'confidential' and 'fiduciary' relationships").

[48] HENRY SWINBURNE, A BRIEFE TREATISE OF TESTAMENTS AND LAST WILLS 478 (1611).

a share of the estate.[49] Indeed, in a pattern that scholars would later condemn, courts were especially dubious of decedents who "prefer[red] [s]trangers before [n]ame and [b]lood."[50]

In the early nineteenth century, the rule migrated to America and began to evolve. In one of the most important developments, courts adopted a unique burden-shifting regime that continues to dominate the mechanics of undue influence litigation today.[51] Because hard evidence of misconduct rarely exists, judges allow contestants to raise a presumption of undue influence through circumstantial proof.[52] For lifetime transfers, like gifts and contracts, this presumption arises if a transaction favors a person who is in a confidential relationship with the victim, such as their lawyer, agent, or priest.[53] For wills and trusts, the objector must take the additional step of showing one or more "suspicious circumstances," like the decedent's mental frailty, the beneficiary's active involvement in the creation of the writing, or the existence of an "unnatural" bequest.[54] If the presumption is triggered, the case

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[49] *See* Johnston v. Johnston, (1817) 161 Eng. Rep. 1039, 1056 (holding that the birth of children can provide a basis to revoke a testator's will); Mary Ellen Kazimer, *The Problem of the "Un-Omitted" Spouse Under Section 2-301 of the Uniform Probate Code*, 52 U. CHI. L. REV. 481, 483 (1985) (describing the common law origins of modern pretermitted spouse statutes).

[50] Maundy v. Maundy, (1639) 21 Eng. Rep. 526, 526 (Ch.); *see also* Roberts v. Wynn, (1664) 21 Eng. Rep. 560, 560 (Ch.) (describing the "great [i]njury and [i]njustice" of a will that "disinherit[ed] an [h]eir and only [c]hild" and benefitted "[s]trangers"); Aynsworth v. Pollard (1636) 21 Eng. Rep. 519, 519 (Ch.) (admitting that the court "much dislik[ed] that the [e]state of the [testator] . . . should be given away from his own [c]hild"); *see also infra* notes 78–83.

[51] *See* Lake v. Ranney, 1860 WL 7575 (N.Y. Sup. Ct. 1860) (discussing the presumption of undue influence); *In re* Hartlerode's Will, 148 N.W. 774, 777 (Mich. 1914) (same); RESTATEMENT (THIRD) OF PROP.: (WILLS & DONATIVE TRANSFERS.) § 8.3 cmt. F (AM. L. INST. 2003) (summarizing modern law on the subject).

[52] *See* Lee v. Pearce, 68 N.C. 76, 88 (1873) (explaining how "a link in a chain of circumstantial evidence" can "rais[e] a presumption of fraud or undue influence"). Modern courts still follow this logic. *See In re* Estate of Barger, 931 N.W.2d 660, 674 (Neb. 2019) ("Because undue influence is often difficult to prove by a will contestant with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor: his or her life, character, and mental condition.").

[53] *See* Garvin's Adm'r v. Williams, 44 Mo. 465, 476 (1869) (explaining that a presumption of undue influence for *inter vivos* transactions "where a trust or confidence exists between the parties[] is well established"); Gilmore v. Lee, 86 N.E. 568, 570 (Ill. 1908) ("The relation of priest or spiritual adviser and parishioner is one of confidence.").

[54] *See* Crispell v. Dubois, 1848 WL 5096 (N.Y. Sup. Ct. 1848) ("if a party writes, or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court"); Starrett v. Douglass, 2 Yeates 46, 48 (Pa. 1796) ("[a] degree of suspicion arose from a devise of the bulk of the property to one, who was seven months before a mere stranger, and the instrument being drawn by that stranger himself, and not read to the testator at the time of execution"). Admittedly, courts did not always see eye-to-eye on whether the presumption of undue influence applied to wills in the absence of suspicious circumstances. *Compare* Hutcheson v. Bibb, 38 So. 754, 754 (Ala. 1904) ("[i]n

changes dramatically. The challenger no longer needs to demonstrate undue influence;[55] rather, the accused wrongdoer must establish that the arrangement was voluntary.[56]

In addition, the definition of "undue" influence grew until its boundaries blurred. During the Enlightenment, with its lofty ideas about self-determination, "the 'wrong' in undue influence, it was said, was the interference with another's will, which should ideally be free."[57] Viewing the rule as an anti-mind control device expanded its scope. Although judges had once required relatively egregious conduct,[58] now they discovered undue influence if an instrument had merely been "obtained either by flattery . . . or in any other way by which one person acquires a

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transactions testamentary in character, the mere existence of confidential relations between the testator and the beneficiary under the will are not, in and of themselves alone, sufficient to raise the presumption of undue influence") *with In re* Hartlerode's Will, 148 N.W. 774, 777 (Mich. 1914) ("T]here are certain cases in which the law indulges in the presumption that undue influence has been used, as 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.").

[55] States disagree about whether a contestant who does not raise the presumption must prove undue influence by clear and convincing evidence or a mere preponderance. For jurisdictions in the former camp, see *In re* Pundt's Estate, 157 N.W.2d 839, 841 (Minn. 1968); *In re* Estate of Fassett, No. A-3310-10T3, 2012 WL 670973, at *2 (N.J. Super. Ct. A. D. Mar. 2, 2012); Chapman v. Varela, 213 P.3d 1109, 1114 (N.M. 2009); Young v. Kaufman, 101 N.E.3d 655, 672 (Ohio Ct. App. 2017); *In re* Estate of Smaling, 80 A.3d 485, 497 (Pa. Super. Ct. 2013); Mueller v. Wells, 367 P.3d 580, 584 (Wash. 2016); Parson v. Miller, 822 S.E.2d 169, 179 (Va. 2018). For states in the latter, see *In re* Estate of Wiltfong, 148 P.3d 465, 467 (Colo. App. 2006); *In re* Estate of W., 522 A.2d 1256, 1264 (Del. 1987); Howe v. Palmer, 956 N.E.2d 249, 254 (Mass. App. Ct. 2011); *In re* Estate of Price, 388 N.W.2d 72, 77 (Neb. 1986); *In re* Estate of Bethurem, 313 P.3d 237, 242 (Nev. 2013); *In re* Will of Elmore, 346 N.Y.S.2d 182, 185 (N.Y. App. Div. 1973).

[56] Jurisdictions also differ over the standard by which the accused wrongdoer must rebut the presumption. *Compare* Great Am. Life Ins. Co. v. Tanner, 5 F.4th 601, 609 (5th Cir. 2021) (showing clear and convincing evidence is the standard) (applying Mississippi law); Sellards v. Kirby, 108 P. 73, 74 (Kan. 1910) (same); *In re* Estate of Davis, No. E2015-00826-COA-R3-CV, 2016 WL 944143, at *22 (Tenn. Ct. App. Mar. 14, 2016) (same), *and* Turner v. Hinchman, 79 S.E. 18, 22 (W. Va. 1912) (same), *with In re* Matter of Estate of Smith, 597 S.W.3d 65, 77 (Ark. Ct. App. 2020) (showing preponderance of evidence is the standard), *and* Kuehn v. Ritter, 233 S.W. 5, 6 (Mo. 1921) (same); Rusnak v. Fleming, 879 N.E.2d 865, 868 (Ohio Ct. Comm. Pls. 2007) (same).

[57] Dawson, *supra* note 47, at 263; *see also* Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 960, 964 (2006) (demonstrating how litigation over testamentary capacity "raised fundamental questions about the bounds of human freedom, the meaning of mental health, and the very constitution of the self.").

[58] *See* THOMAS JARMAN, ESQ., TREATISE ON WILLS 37 (1849) ("it is not unlawful for a person, by honest intercession and persuasion, to procure a will in favor of himself or another person; neither is it to induce the testator by fair and flattering speeches").

dominion over the will of another."[59] In turn, this broad understanding forced courts to admit that "undue influence cannot be precisely defined."[60]

As the decades passed, this slipperiness caused problems. For instance, factfinders—especially juries—seemed overeager to find undue influence. Two early analyses suggested that juries routinely nullified bequests that they should have upheld.[61] One from Minnesota in the early twentieth century determined that juries in undue influence trials were reversed on appeal a staggering six times more often than judges.[62] Another discovered that the California Supreme Court overturned more than half of the verdicts in favor of contestants between 1892 and 1953 for insufficient evidence.[63] These statistics eventually prompted California lawmakers to abolish the right to a jury trial in contests.[64]

In addition, starting in the 1990s, scholars like Frances Foster, Melanie Leslie, Ray Madoff, Gary Spitko, and Carla Spivack identified two related flaws with the

[59] O'Neall v. Farr, 30 S.C.L. 80, 84 (S.C. Ct. App. L. 1844); *see also* JAMES SCHOULER, LLB., LAW OF WILLS AND ADMINISTRATION 107 (1910) ("Undue influence is defined as that which compels the testator to do what is against his own wishes or will, from fear, the desire of peace, or some feeling which he is unable to resist.").

[60] Prescott v. Johnson, 97 N.W. 891, 892 (Minn. 1904); *see also* Emery v. Emery, 111 N.E. 287, 287 (Mass. 1916) (conceding that undue influence "cannot be ascertained with the accuracy of mathematical demonstration."); *In re* Will of Walther, 159 N.E.2d 665, 668 (N.Y. 1959) (explaining that "[t]he concept of undue influence does not readily lend itself to precise definition or description" and referring to it as "a silent resistless power"). This indeterminacy continues today. *See* Smith v. Smith, 623 S.W.3d 662, 672–73 (Mo. Ct. App. 2021) ("It is often impossible to set forth a rigid formula of what facts must be established to make a submissible case of undue influence by circumstantial evidence."); Anton v. Anton, 862 S.E.2d 374, 380 (N.C. Ct. App. 2021) ("the very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty"); *In re* Staico, 143 A.3d 983, 990 (Pa. Super. Ct. 2016) ("undue influence is a subtle, intangible and illusive [sic] thing"). Likewise, courts continue to describe the wrong in undue influence as a kind of mental hijacking. *See, e.g.*, Cresto v. Cresto, 358 P.3d 831, 840–41 (Kan. 2015) (explaining that a testator subjected to undue influence "becomes the tutored instrument of a dominating mind, which dictates to him what he shall do, compels him to adopt its will instead of exercising his own").

[61] *See* Edward S. Bade, *Jury Trial in Will Cases in Minnesota*, 22 MINN. L. REV. 513, 516–17 (1938); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 91–92 (1953).

[62] *See* Bade, *supra* note 61, at 517.

[63] This statistic includes findings of both incapacity and undue influence. *See Will Contests on Trial*, *supra* note 61, at 92 n.4.

[64] *See Recommendation Relating to Opening Estate Administration*, 19 CAL. L. REVISION COMM'N REP. 787, 794 & n.14 (1988); CAL. PROB. CODE § 825. Likewise, courts in other states have determined that because "probate matters are generally equitable in nature, no right to a jury trial ordinarily exists in a probate case." Riddell v. Edwards, 32 P.3d 4, 7 (Alaska 2001); *In re* Estate of Johnson, 820 A.2d 535, 538 (D.C. 2003); Foster v. Gilliam, 268 P.3d 945, 952 (Wash. Ct. App. 2011); *see also* Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 530 (1990) (arguing that "no form of jury trial should be permitted in will contests").

doctrine.[65] First, they claimed that juries and judges can manipulate the rule's loose joints to annul transfers that violate their worldviews.[66] They supported this assertion by citing a series of disturbing opinions from the middle of the twentieth century in which decision-makers had filled the principle's empty shell with sexism and bigotry.[67] One example is *Estate of Moses*.[68] Fannie Moses was fifty-four years old when she executed her final will.[69] She drank too much, but had survived three husbands and capably ran a business.[70] She became involved with her lawyer, Clarence Holland, who was in his late thirties.[71] When a cancer diagnosis forced Fannie to have a mastectomy, Clarence cared for her.[72] Shortly afterwards, Fannie consulted with a different attorney to draw up and execute a will leaving her entire estate to Clarence.[73] According to this lawyer, Fannie was "alert, intelligent and rational, and knew exactly what she was doing."[74] However, the Mississippi Supreme Court affirmed a trial court's finding of undue influence.[75] The court belittled Fannie's relationship with Clarence, observing that "she entertained the pathetic hope that he might marry her."[76] To commentators, opinions like *Moses* reveal that undue influence disputes pivot not on "whether the document represented the testator's intent, but whether the testator's intentions offended the courts' sense of justice or morality."[77]

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[65] *See* Foster, *supra* note 14; Leslie, *supra* note 14; Madoff, *supra* note 11; Spitko, *supra* note 14; Spivack, *supra* note 15.

[66] *See* Leslie, *supra* note 14, at 246 (explaining that triers of fact are "less concerned with effectuating testamentary intent than in forcing the testator to distribute her or his estate in accordance with prevailing notions of morality"); deFuria, *supra* note 13, at 201. Some courts share this assessment. *See In re* Estate of Fritschi, 384 P.2d 656, 659 (Cal. 1963) (observing that juries "invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties"); Burkhalter v. Burkhalter, 841 N.W.2d 93, 105 (Iowa 2013) ("because of its spongy character, . . . undue influence may undermine testamentary freedom in order to promote social goals thought to be desirable.").

[67] *See* Spivack, *supra* note 15, at 280–81 ("The history of undue influence cases contains many examples . . . of what most today would call serious miscarriages of justice.").

[68] *In re* Will of Moses, 227 So. 2d 829 (Miss. 1969).

[69] *See id.* at 839 (Robertson, J., dissenting).

[70] *See id.* at 839–40.

[71] *See id.* at 832 (majority opinion).

[72] *See id.* at 831–32.

[73] *See id.* at 831–34.

[74] *Id.* at 841 (Robertson, J., dissenting).

[75] *See id.* at 838 (majority opinion).

[76] *See id.* at 833. For a similar opinion from the same era, see *In re* Kaufmann's Will, 247 N.Y.S.2d 664 (1964), which we discuss *supra* text accompanying notes 1–6.

[77] Leslie, *supra* note 14, at 246; *See also* Brian Alan Ross, *Undue Influence and Gender Inequity*, 19 WOMEN'S RTS. L. REP. 97, 99 (1997) (arguing that some undue influence cases display "ill-formed and oppressive conceptions about women") (citation omitted).

Second, commentators argued that the undue influence doctrine serves "to keep inheritance within families."[78] For starters, because of the common belief that people should support their relatives,[79] triers of fact apply the principle in a way that penalizes "the 'abhorrent' testator [or settlor]" who leaves their possessions to "a non-mainstream religion, a radical political organization, or a same-sex romantic partner."[80] Moreover, critics continue, this preference for kin is woven deep into the rule's fabric. Recall that one of the red flags that raises the presumption of undue influence is the existence of an "unnatural bequest."[81] In some states, a gift is "unnatural" just because it passes to a beneficiary "who is not related [to the decedent] by blood or marriage."[82] Arguably, then, a case like *Moses* is not merely the product of boorish judges with too much discretion; rather, it reflects "the correct application of the established doctrinal standards."[83] We will call this the "family protection theory."

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[78] Foster, *supra* note 14, at 210–11 ("Bequests to individuals other than 'natural objects of the decedent's bounty'—essentially family members—raise judicial red flags, even when the beneficiary was the decedent's dependent or primary caregiver."); Leslie, *supra* note 14, at 243 (arguing that "the tendency toward family protection . . . is clearly evident in undue influence doctrine"); Madoff, *supra* note 11, at 577 (contending that undue influence does not "protect the intent of the testator, but rather to protect the testator's biological family from disinheritance").

[79] Madoff, *supra* note 11, at 576.

[80] Spitko, *supra* note 14, at 282; *see also* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 267 (1981) ("some evidence . . . suggest[s] that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned . . . .").

[81] *See, e.g.*, *In re* Estate of Maheras, 897 P.2d 268, 272 (Okla. 1995) (asking "[w]hether the person charged with undue influence was not a natural object of the maker's bounty") (citation omitted).

[82] *See In re* Trust of Ingersoll, 950 A.2d 672, 698 (D.C. 2008) (citation omitted); *see also* Sutton v. Combs, 419 S.W.2d 775, 776 (Ky. 1967) ("[i]t is natural that a person recognizes his relatives as the objects of his bounty . . . ."); *In re* Estate of Hock, 322 S.W.3d 574, 583 (Mo. Ct. App. 2010) ("an 'unnatural disposition of property' may be based on evidence of a transfer of property without apparent reason, to non-blood heirs . . . ."); *In re* Estate of Strozzi, 903 P.2d 852, 857 (N.M. Ct. App. 1995) ("[t]he natural objects of [the decedent's] bounty are ordinarily those persons designated to inherit from him in the absence of a will."). *But see* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.1 cmt. c (AM. L. INST. 2003) (stating that "natural" recipients of a decedent's assets can include close family members, stepchildren, and unmarried partners); Estate of Sarabia, 270 Cal. Rptr. 560, 564 (Cal. Ct. App. 1990) (holding that the "unnatural bequest" element requires an inquiry into "the respective relative standings of the beneficiary and the contestant").

[83] Madoff, *supra* note 11, at 601 (emphasis removed); Leslie, *supra* note 14, at 245 (noting that judges "often emphasize the beneficiary's inability to explain the 'unnatural' nature of the bequest"); *cf. In re* Will of Moses, 227 So. 2d 829, 834 (Miss. 1969) (reasoning that a will was the product of undue influence because it favored "a nonrelative to the exclusion of . . . blood relatives"); Snyder v. Erwin, 79 A. 124, 124–25 (Pa. 1911) (holding that the testator's "exclusion of an only daughter . . . was evidence of an undue influence exerted by the proponent affecting the dispositions of the will, and sufficient in itself to carry the case to the jury").

To conclude, undue influence is regarded as a Rorschach test that gives factfinders too much freedom to rewrite idiosyncratic estate plans. However, as we discuss next, there is a way of understanding the doctrine that flips this received wisdom on its head. In addition, this alternative vision is driving state legislatures to pass statutes that arm contestants with formidable new weapons to litigate undue influence claims.

II. THE NEW UNDUE INFLUENCE

This Part describes the flurry of legislation that is transforming undue influence. It first articulates the counterintuitive logic behind these statutes. Instead of serving the customary aim of inheritance law—facilitating testamentary intent—these laws try to inspire probate attorneys general to bring claims and hold wrongdoers accountable. This Part then examines each of these rules in turn: special presumptions of undue influence, civil causes of action for undue influence as a form of elder abuse, and large damage awards for undue influence committed in bad faith.

A. The Limits of Traditional Undue Influence

The conventional view is that undue influence often thwarts a decedent's wishes. Yet there is a plausible argument that this account is exactly backwards. Seen through this prism, the problem with the doctrine is not that it is too powerful; rather, it is that it is not powerful enough. This Section explores this counterintuition. It also shows that similar questions about the deterrent effect of inheritance rules have surfaced in the adjacent debate over the tort of intentional interference with an inheritance.

Upon close inspection, undue influence contestants face several major obstacles. First, due to the need to distribute a decedent's assets quickly, contests can be subject to very short statutes of limitation. For example, some jurisdictions require parties to challenge the validity of a will within three to six months of its admission to probate.[84] Likewise, Uniform Trust Code § 604, which has been widely adopted, allows trustees to serve beneficiaries with a notice that accelerates the deadline for challenging a revocable trust to 120 days after the settlor's death.[85] Contestants routinely fail to act before one of these clocks expires.[86]

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[84] *See* OHIO REV. CODE § 2107.76 (three months); WASH. REV. CODE § 11.24.010 (four months); MO. REV. STAT. § 473.083 (six months); 755 ILL. COMP. STAT. § 5/8-1(a) (same).

[85] *See* UNIF. TR. CODE § 604(a)(2) (UNIF. L. COMM'N 2000); CAL. PROB. CODE § 16061.8; COLO. REV. STAT. § 15-5-604(a)(II); MINN. STAT. § 501C.0605(a)(2); MISS. CODE. ANN. § 91-8-604(a)(2); TENN. CODE ANN. § 35-15-604(a)(2); *cf.* D.C. CODE § 19-1306.04(a)(2) (shortening this period even more to 90 days); HAW. REV. STAT. § 554D-604(a)(2) (same); *In re* Estate of Reugh, No. 37255-3-III, 2021 WL 5897510, at *6 (Wash. Ct. App. Dec. 14, 2021) (applying the state's four-month statute of limitations for will contests to a trust contest).

[86] *See* Neyama v. Sugishita, No. H048190, 2022 WL 4230917, at *7 (Cal. Ct. App. Sept. 14, 2022) (holding that trust contest was untimely even when party claimed that she

Second, contestants must litigate in the shadow of the worst evidence problem. Suspicious lifetime transfers generally remain undetected until the donor's death, when probate administration allows survivors to access the donor's financial statements and account information. Likewise, estate plans procured by undue influence often remain camouflaged until either the will is offered for probate or trust administration begins. Accordingly, in many (if not most) undue influence contests, the litigation occurs posthumously, and the pivotal witness cannot testify.[87]

Third, many states insist on clear and convincing evidence of undue influence.[88] Admittedly, the presumption of undue influence eases this load. Yet the predicate for burden-shifting under this regime—a confidential relationship between the donor and the alleged wrongdoer—does not always exist. Unless the parties had consummated a formal fiduciary relationship, such as lawyer/client or principal/agent, the contestant must show that the testator or settlor relied on or was subservient to the beneficiary.[89] This can be difficult in the evidentiary vacuum left by the victim's death.[90] Indeed, our extensive review of recently published undue influence cases shows that non-fiduciary confidential relationships are hard to prove, especially in the common situation where a beneficiary is closely related to the decedent, such as a surviving child or spouse.[91]

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was not aware of the wrongdoing until "long after the 120-day period expired"); *In re* Phyllis V. McDill Revocable Tr., 506 P.3d 753, 763 (Wyo. 2022) (finding a trust contest to be time-barred).

[87] The decedent is often the only witness to the undue influence. *See* Burkhalter v. Burkhalter, 841 N.W.2d 93, 105 (Iowa 2013) (noting that, in undue influence litigation, the testator "is not available to testify and, as a result, a speculative element is necessarily introduced into the claim"); Chapman v. Varela, 213 P.3d 1109, 1114 (N.M. 2009) ("[I]t would be a rare case where the details of conversation or conduct could be shown indicating undue persuasion and influence. Such arts would be exercised only in the absence of witnesses, or, at most, in the presence of those whose interest and inclination would impel to their denial.").

[88] *See In re* Estate of Pundt., 157 N.W.2d 839, 841 (Minn. 1968).

[89] *See, e.g., In re* Estate of Hogan, No. 11-20-00170-CV, 2022 WL 2070331, at *7 (Tex. App. June 9, 2022) (describing "an informal or confidential fiduciary relationship" as one "arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another"); Johnson-Murray v. Burns, 525 S.W.3d 625, 635 (Tenn. Ct. App. 2017) (quoting *In re* Estate of Brevard, 213 S.W. 3d 298, 303 (Tenn. Ct. App. 2006)) (requiring "proof of dominion and control"); *cf.* Massey v. Rushing, No. 1210092, 2022 WL 2286419, at *5 (Ala. June 24, 2022) (quoting Rash v. Bogart, 146 So. 814, 816 (Ala. 1933)) ("[T]he relation of husband and wife is per se a confidential relation.").

[90] *See, e.g.*, Haas v. Haas, No. A-5550-18T1, 2020 WL 3443255, at *3 (N.J. Super. Ct. App. Div. June 24, 2020) (finding that the contestant failed to prove confidential relationship between decedent and decedent's child because "[i]t is not enough to demonstrate that a beneficiary who stood to benefit from the will had a close relationship with the decedent"); Foelsch v. Farson, 153 N.E.3d 601, 608 (Ohio Ct. App. 2020) (finding that the contestant "failed to present evidence the relationship between [trust settlor and her daughter] extended beyond parent-child caregiving to the level of a confidential relationship").

[91] *See, e.g.*, Wis. Province of Soc'y of Jesus v. Cassem, 486 F. Supp. 3d 527, 549–50 (D. Conn. 2020); Davis v. Scott, No. 21A-PL-424, 2021 WL 4127203, at *4 (Ind. Ct. App.

Fourth, the economics of undue influence dissuade parties from pursuing claims. For one, the common law remedies—invalidation and restitution—are relatively weak. Consistent with probate's objective of implementing the decedent's wishes, courts do not award damages; rather, they merely effectuate what the decedent would have done without the wrongdoer's intervention.[92] If a court finds that a donative transfer was procured by undue influence, the judge will strike down the tainted instrument before it takes effect.[93] For example, if a party objects to the probate of a will and wins, the court will set aside the document and allow the party to inherit under an earlier will or through intestacy.[94] Alternatively, if the property has already transferred, a judge will impose a constructive trust on it, forcing the undue influencer to surrender the fruits of their misconduct.[95] Crucially, contestants are not entitled to compensation for their financial or emotional harm, punitive

Sept. 10, 2021); *In re* Estate of Beaird, No. 351968, 2020 WL 6939638, at *3 (Mich. Ct. App. Nov. 24, 2020); Haas v. Haas, No. A-5550-18T1, 2020 WL 3443255, at *3 (N.J. Super. Ct. App. Div. June 24, 2020); *In re* Kotsones, 128 N.Y.S.3d 714, 717 (N.Y. Super. Ct. App. Div. 2020); Foelsch v. Farson, 153 N.E.3d 601, 608 (Ohio Ct. App. 2020); Estate of Landis, 237 A.3d 1077, 2020 WL 3432712 at *6 (Pa. Super. Ct. 2020); *In re* Estate of Jordan, No. 80155-4-I, 2020 WL 5117965 at *7 (Wash. Ct. App. Aug. 31, 2020). Moreover, even when a contestant raises the presumption of undue influence, courts find the alleged wrongdoer to have rebutted it with surprising frequency. *See, e.g.*, *In re* Estate of Haverstick, 635 S.W.3d 482, 486 (Ark. 2021); McElwee v. Williams, No. No. 13-C-17-112945, 2020 WL 6748799, at *5–6 (Md. Ct. Spec. App. Nov. 17, 2020); Anton v. Anton, 862 S.E.2d 374, 381 (N.C. Ct. App. 2022); Filo v. Filo, Nos. CA2020-01-003, CA2020-03-009, 2021 WL 568453, at *3 (Ohio Ct. App. Feb. 16, 2021); *In re* Klionsky, No. 65 WDA 2021, 2021 WL 5293939, at *7 (Pa. Super. Ct. 2021); *In re* Estate of Hogan, No. 11-20-00170-CV, 2022 WL 2070331, at *8 (Tex. App. June 9, 2022).

[92] *See* Kinsel v. Lindsey, 526 S.W.3d 411, 422 n.3 (Tex. 2017).

[93] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.3 cmt. d (2003).

[94] *See, e.g.*, *In re* Estate of Luongo, 823 A.2d 942, 954 (Pa. Super. Ct. 2003) ("[W]here there is no prior will, . . . the estate would pass by the laws of intestacy if the challenged will were declared invalid.").

[95] *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. L. INST. 2011).

damages,[96] or their attorneys' fees.[97] Making matters worse, contests are expensive,[98] and because the accused wrongdoer is defending the validity of the will or trust, they are usually entitled to dip into the decedent's property to pay their lawyers.[99] Thus, with each passing day of litigation, there may be less for contestants to recover.

In fact, starting in the late twentieth century, these inadequacies drove litigants away from undue influence and towards a budding theory called tortious interference with an expected inheritance. The inheritance tort—an extension of more established doctrines like intentional interference with prospective economic advantage[100]—rose to prominence in 1979, when the *Restatement (Second) of Torts* abruptly announced that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or

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[96] *See, e.g.*, *In re* Estate of Folcher, 135 A.3d 128, 136 (N.J. 2016) ("[P]unitive damages [are] available in the probate part in the rare case."); McClure v. Finfrock, No. C-980323, 1999 WL 147937, at *1 (Ohio Ct. App. Mar. 19, 1999) (affirming lower court's "sound reasoning process in concluding that the probate division's limited jurisdiction . . . does not include adjudicating tort claims for punitive damages"). To be clear, courts may award punitive damages for the tort of intentional breach of a fiduciary duty, which sometimes partially overlaps with allegations of undue influence. *See, e.g.*, *In re* Estate of Hoellen, 854 N.E.2d 774, 787 (Ill. App. Ct. 2006) (affirming probate court's award of $50,000 in punitive damages when the defendant "used his position as a Chicago police officer to gain [the victim's] trust and confidence, exert undue influence over him, and then flagrantly and intentionally breach the fiduciary duty he owed him").

[97] *See, e.g.*, Dias v. Estate of Ciccone, No. CAL 17-17024, 2021 WL 6052585, at *22 (Md. Ct. Spec. App. Dec. 21, 2021) (holding that prevailing contestant could not recover attorney's fees from undue influencers under the American rule); Gonzales v. Lopez, 52 P.3d 418, 426 (N.M. Ct. App. 2002) (reversing attorney's fee award to prevailing contestant). As one might imagine, losing contestants also cannot recover their attorneys' fees. *See In re* Jolly's Estate, 101 P.2d 995, 1000 (Wash. 1940) ("[T]o award costs to unsuccessful contestants would be to encourage contests on weak and frivolous grounds.").

[98] *Cf.* David Horton & Reid K. Weisbord, *Probate Litigation*, 2022 ILL. L. REV. 1149, 1189 tbl.9 (2022) (finding that estate fiduciaries spent between $17,000 and $35,000 in extraordinary attorney's fees on undue influence litigation).

[99] *See* UNIF. PROB. CODE § 3-720 (amended 2010); *see generally* Jaime LaMere, *The Effects of Undue Influence on the Awarding of Attorneys' Fees*, 15 QUINNIPIAC PROB. L.J. 173 (2000) (discussing issues of undue influence and bad faith in awarding attorney's fees). Some courts even allow parties who are found to have committed undue influence to recover their attorneys' fees. *See* Harkins v. Crews, 907 S.W.2d 51, 62 (Tex. App. 1995) (granting fee award to proponent of will set aside for undue influence); Estate of Settle v. Holmes, 422 N.E.2d 1008, 1009–10 (Ill. App. Ct. 1981). *But see In re* Estate of Hand, 475 So. 2d 1337, 1339 (Fla. Dist. Ct. App. 1985) ("Because it is apodictic that one who is guilty of procuring a will by undue influence cannot act in good faith in offering the will for probate, there can be no recovery of fees and costs . . . .").

[100] *See, e,g.*, Wellin v. Wellin, 135 F. Supp. 3d 502, 515–17 (D.S.C. 2015) (linking the two torts).

gift . . . is subject to liability . . . . "[101] The elements of the tort are (1) the existence of an inheritance, (2) the defendant's intentional interference with it (3) through conduct that is tortious, and (4) damages.[102] A prevailing plaintiff receives an *in personam* judgment against the defendant rather than an *in rem* order setting aside a transfer or imposing a constructive trust.[103]

As the years passed, two doctrinal missteps helped the inheritance tort spread.[104] First, the rule is supposed to be restricted "to cases in which the actor has interfered with the inheritance or gift by means that are independently tortious in character."[105] That is, "the underlying conduct must be wrong for some reason other than the fact of the interference[,]"[106] such as kidnapping someone to stop them from making a will.[107] But paradoxically, many courts determined that undue influence, which is not a tort, can serve as the predicate wrongdoing for tortious interference.[108] These holdings dramatically expanded the number of scenarios that qualified for an

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[101] RESTATEMENT (SECOND) OF TORTS § 774B (AM. L. INST. 1979). Previous authority supporting the existence of the expectancy tort was sparse. *See* Bohannon v. Wachovia Bank & Tr. Co., 188 S.E. 390, 394 (N.C. 1936) ("If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."); RESTATEMENT (FIRST) OF TORTS §§ 870 & illus. 3, 912 cmt. f (AM. L. INST. 1939) (illustrating the general principle that a "person who does any tortious act for the purpose of causing harm to another . . . is liable to the other" with examples of tortfeasors who thwarted a plaintiff's anticipated inheritance).

[102] *See* Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993).

[103] *See* Sacks v. Dissinger, 178 N.E.3d 388, 395 (Mass. 2021); *see also* O'Hara v. Pittston Co., 42 S.E.2d 269, 275 (Va. 1947) (noting *in personam* actions "are directed against specific persons and seek personal judgments," whereas *in rem* proceedings "are directed against . . . property" (citation omitted)).

[104] Other factors also helped the expectancy tort gain momentum. For example, the rule received an unlikely endorsement in 2006, when the U.S. Supreme Court called it "widely recognized." Marshall v. Marshall, 547 U.S. 293, 312 (2006) (holding that the probate exception to federal subject matter jurisdiction did not apply to an expectancy tort claim).

[105] RESTATEMENT (SECOND) OF TORTS §774B cmt. c (AM. L. INST. 1979).

[106] Gomez v. Smith, 268 Cal. Rptr. 3d 812, 822 (Cal. Ct. App. 2020).

[107] *Cf.* Allen v. Hall, 139 F.3d 716, 716 (9th Cir. 1998) (involving allegations that the defendants forced a testator "into a medical facility and then l[ied] in order to cut off his life support systems so that he would die forthwith and not change his will"). *See also* O'Sullivan v. Haught, No. HHD-CV-20-6121602-S, 2022 WL 16757407, at *3 (Conn. Super. Ct. Oct. 31, 2022) ("[T]he plaintiff must prove that the defendant engaged in tortious conduct in addition to evidence that would satisfy the established elements of a claim of undue influence.").

[108] *See, e.g.*, Schilling v. Herrera, 952 So. 2d 1231, 1235 (Fla. Dist. Ct. App. 2007); Doughty v. Morris, 871 P.2d 380, 387 (N.M. Ct. App. 1994); Fell v. Rambo, 36 S.W.3d 837, 849 n.18 (Tenn. Ct. App. 2000); *see also* cases cited *infra* note 116. Admittedly, the law is not crystal clear on undue influence's status. *See* Umsted v. Umsted, No. 03-CV-219-S, 2004 WL 5308782, at *8–9 (D.R.I. Nov. 30, 2004), *report and recommendation adopted*, No. 03-CV-219-S, 2005 WL 5438379 (D.R.I. Feb. 18, 2005), *aff'd*, 446 F.3d 17 (1st Cir. 2006) (mentioning cases that opine that undue influence can be a tort but finding them unpersuasive).

inheritance tort claim. Rather than having to allege truly reprehensible behavior, now a plaintiff merely needed to plead facts that would give rise to a garden variety contest.

Second, judges permitted tort actions to proceed even when the aggrieved heir or beneficiary could have obtained relief in probate. The inheritance tort is meant to be a fallback for plaintiffs who have no adequate probate remedy.[109] Suppose testator T intends to sign a will leaving their estate one-half to child A and one-quarter each to children B and C. Wrongdoer W tortiously prevents T from signing the instrument. The probate court may lack the tools necessary to recreate this distributional scheme: it can neither validate the unexecuted document nor transmit assets in lopsided shares to the children through intestacy.[110] Arguably, in these unusual circumstances, only a tort claim against W can carry out T's intent and make A, the preferred child, whole.[111] Yet appellate courts in several states misunderstood this "adequacy of probate" rule. Some failed to realize that tort claims are usually superfluous because probate judges can mold a constructive trust to fit the equities of almost any scenario.[112] Others held that plaintiffs lacked sufficient recourse in probate because its legal infrastructure is less favorable to them than the tort system—a view of the "adequacy of probate" rule that would *never* find probate to be adequate due to its inherently less favorable rules for contestants.[113] These errors led about half of the states to endorse the inheritance tort, creating a "rival legal regime"[114] that lets contestants repackage contests as civil claims and thus avoid

[109] *See* DeWitt v. Duce, 408 So. 2d 216, 218 (Fla. 1981) ("The rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued.").

[110] *See* Neumann v. Wordock, 873 So. 2d 502, 505 (Fla. Dist. Ct. App. 2004) (holding that there was no adequate probate remedy when "the pre-interference intended distribution of the assets alleged by the [plaintiffs] appears to be significantly different than the distribution that would be provided by intestacy").

[111] *See id.* at 504–05. We say "arguably" because the probate court might be able to impose a constructive trust on the portion of B and C's assets necessary to effectuate T's wishes to disproportionately benefit A. *See* Goldberg & Sitkoff, *supra* note 19, at 352 n.107 (discussing "liability in restitution of an innocent third party").

[112] *See* Goldberg & Sitkoff, *supra* note 19, at 368–79 (collecting authority and remarking that "[i]n virtually every case in which the tort has been recognized in the absence of relief in probate, the plaintiff could have brought an action in restitution for constructive trust").

[113] *See, e.g.*, Huffey v. Lea, 491 N.W.2d 518, 521 (Iowa 1992) (holding that a plaintiff had no adequate probate remedy because "the recovery demanded in the will contest and in this action for intentional interference is not the same"), *overruled by* Youngblut v. Youngblut, 945 N.W.2d 25 (Iowa 2020).

[114] Goldberg & Sitkoff, *supra* note 19, at 338, 361 (collecting authority).

probate's short limitation statutes,[115] receive a jury trial,[116] and win compensatory and punitive damages.[117]

Despite these flaws, the inheritance tort was warmly received in the legal academy, at least initially. Many commentators praised the doctrine as a necessary response to overreaching during the estate planning process.[118] In their eyes, the rule is "a powerful deterrent" that "fill[s] the vacuum left [by] inadequate probate procedures."[119]

Nevertheless, over the past decade, the bloom seems to have come off the rose. State supreme courts in Idaho, Nebraska, South Dakota, and Texas have refused to

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[115] *See In re* Estate of Ellis, 923 N.E.2d 237, 243 (Ill. 2009) (holding that six-month statute of limitations for contests does not apply to tortious interference with an inheritance claim where the beneficiary was not aware of the will until two years after the decedent's death); Sacks v. Dissinger, 178 N.E.3d 388, 394–95 (Mass. 2021) (refusing to apply one-year deadline for trust contests to cause of action for intentional interference with an expectancy); UNIF. TR. CODE § 604, § 604(a)(2) cmt. (UNIF. L. COMM'N 2010) (setting forth the statute of limitations for attempts to invalidate a trust but then declaring that "[a]n action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section").

[116] *See, e.g.*, Mulvey v. Stephens, 250 So. 3d 106, 108 (Fla. Dist. Ct. App. 2018) (featuring a tortious interference with an expectancy claim that "proceeded to a jury trial").

[117] For cases in which a plaintiff parlayed an undue influence allegation into a damage recovery under a tortious interference theory, *see In re* Estate of Boman, No. 16-0110, 2017 WL 512493, at *12, *17 (Iowa Ct. App. Feb. 8, 2017) (affirming verdict allowing plaintiffs to recover nearly $180,000 in punitive damages); McPeak v. McPeak, 577 N.W.2d 670, 671–73 (Mich. 1998) (per curiam) (affirming exemplary damages of $1 million where defendant unduly influenced decedent's execution of life insurance beneficiary forms); Prokos v. Hines, Nos. 10CA51, 10CA57, 2014 WL 1339676, at *6, *29 (Ohio Ct. App. Mar. 28, 2014) (affirming jury verdict including $200,000 in compensatory damages and $500,000 in punitive damages); Biesele v. Mattena, 449 P.3d 1, 4, 9 (Utah 2019) (affirming jury's award of roughly $200,000 in compensatory damages and $300,000 in punitive damages assessed against each undue influencer); Smith v. Smith, No. 17-0107, 2018 WL 300991, at *2, *5 (W. Va. Jan. 5, 2018) (affirming jury award of $169,000 in compensatory and $150,000 in punitive damages).

[118] *See, e.g.*, Klein, *supra* note 34, at 239–40; Murphy & Clarke, *supra* note 34, at 532–33.

[119] *See* Murphy & Clarke, *supra* note 34, at 535; Eike G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, 47 U. MICH. J.L. REFORM 419, 423 (2014) ("One reason for recognizing this tort is that antisocial conduct, like undue influence, should be deterred more effectively."); Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift—Suggestions for Resort to the Tort*, 39 U. TOL. L. REV. 769, 774 (2008) ("[T]he possibility in tort of being assessed not only compensatory damages, but also attorneys' fees and, in appropriate cases, punitive damages, might deter potential tortfeasors."); Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—a Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 90 (2003) (discussing examples in which "[t]he probate system . . . offers no deterrent at all" to wrongdoers).

recognize the inheritance tort.[120] Even in jurisdictions that previously adopted the rule, judges are deciding with growing frequency that probate remedies are satisfactory.[121] This hostility to the tort stems from the awareness that it "undermine[s] the legislative intent in enacting the Probate Code."[122] Indeed, as John Goldberg and Rob Sitkoff put it, the doctrine "amount[s] to ad hoc reform of inheritance law" that invites litigants to override the "specialized rules and procedures that reflect principled (if contestable) policy judgments" simply by filing a civil complaint instead of a contest in probate.[123] They conclude that the inheritance tort "should be repudiated."[124]

To wrap up, there is a plausible argument that the traditional undue influence rule does not discourage pernicious wrongdoing. Although the invention of the inheritance tort once seemed as if it might solve this problem, the doctrine is rapidly falling from grace. But as the next Section demonstrates, there is another way in which some states have conscripted the undue influence doctrine into the fight against the exploitation of vulnerable persons.

B. The Dawn of the New Undue Influence

This Section describes the new undue influence trend. Led by California, several states have created novel presumptions of undue influence, recognized a civil

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[120] *See* Nelsen v. Nelsen, 508 P.3d 301, 332 (Idaho 2022); Manon v. Orr, 856 N.W.2d 106, 108, 111 (Neb. 2014); *In re* Certification of Question of L. from U.S. Dist. Ct., Dist. of S.D., S. Div., 931 N.W.2d 510, 517–18 (S.D. 2019); Archer v. Anderson, 556 S.W. 3d 228, 229 (Tex. 2018); *see also* Youngblut v. Youngblut, 945 N.W.2d 25, 34 (Iowa 2020) ("[E]nthusiasm for the tort appears to be waning in the most recent decisions from other jurisdictions[.]"); Dickson v. Shook, No. 2017-CA-00002 and No. 2017-CA-001115, 2019 WL 1412497, at *6 (Ky. Ct. App. Mar. 29, 2019) ("We expressly hold that Kentucky does not recognize the cause of action known as tortious interference with inheritance or gift[.]"). *But cf. In re* Estate of Osguthorpe, 491 P.3d 894, 919–20 (Utah 2021) (holding that trial court erred by dismissing expectancy tort claim when it was unclear whether plaintiffs had an adequate remedy in probate).

[121] *See, e.g.*, McDonald v. Copperthwaite, Civil Action No. CIV.A. 13-555, 2015 WL 519290, at *5 (D.N.J. Feb. 9, 2015) (rejecting the argument "that the remedies in probate are inadequate because . . . punitive damages and a trial by jury are unavailable"); Habal v. Habal, 303 So. 3d 960, 962 (Fla. Dist. Ct. App. 2020) (holding that a litigant's "exceptional circumstances argument for the tortious interference claim was without merit"); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 19, Reporter's Note cmt. c (AM. L. INST. 2020) ("[C]laims in tort are foreclosed by the *availability* of probate, not by the 'adequacy' of probate." (emphasis added)); *cf.* Solon v. Slater, 287 A.3d 574, 592 n.12 (Conn. 2023) (declining to "decide whether a cause of action for tortious interference with the right of inheritance is available to a plaintiff who failed to seek a remedy for the same claim in the Probate Court").

[122] Peralta v. Peralta, 131 P.3d 81, 83 (N.M. Ct. App. 2005).

[123] Goldberg & Sitkoff, *supra* note 19, at 365, 396.

[124] *Id.* at 337. Goldberg and Sitkoff also critique the doctrine on other grounds, such as its inconsistency with the bedrock tort principle "that a tort claim vindicates the plaintiff's own right not to be mistreated rather than the rights of others." *Id.* at 339.

cause of action for undue influence as a form of elder abuse, and allowed prevailing contestants to receive exemplary damages and attorneys' fees when they prove undue influence committed in bad faith. These rules have transformed the undue influence doctrine's purpose from effectuating the decedent's intent to deterring financial predators.

1. Special Presumptions of Undue Influence

As noted above, the common law recognizes a presumption of undue influence for certain beneficiaries who were in a confidential relationship with the decedent.[125] This subsection explains that some states have imported this rule into fresh settings.

California began to experiment with a special presumption of undue influence in the mid-1990s. The catalyst was an article published by the *Los Angeles Times* about an Orange County lawyer named James Gunderson, who had made himself the primary beneficiary of many of his clients' estate plans.[126] Gunderson pocketed $3.5 million from a will he had drafted for a ninety-eight-year-old blind and deaf man on his deathbed and $225,000 from a woman whom a judge had previously found to lack mental capacity.[127] The story provoked outrage,[128] and the legislature responded by creating a statute that instructs courts to assume that gifts to "disqualified person[s]"—drafting attorneys, their family members, and their law partners—are the product of undue influence.[129] Eventually, policymakers also became worried that caregivers "might find it too easy to take advantage of . . . demented elder[s]"[130] and expanded the class of "disqualified person[s]" to include "[a] care custodian of a transferor who is a dependent adult."[131] Finally the statute

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[125] *See supra* text accompanying notes 51–56.

[126] *See* Davan Maharaj, *Lawyer Inherited Millions in Stock, Cash from Clients: Ethics: Questions of Impropriety Are Raised. Leisure World Attorney Acknowledges Gifts but Denies Wrongdoing.*, L.A. TIMES (Nov. 22, 1992), https://www.latimes.com/archives/la-xpm-1992-11-22-mn-2328-story.html# [https://perma.cc/82C2-2LJ2].

[127] *See id.*

[128] *See* Editorial, *Taking Advantage of the Aged: Laws Must Be Toughened to Protect the Elderly from Exploitation*, L.A. TIMES (Nov. 25, 1992), https://www.latimes.com/archives/la-xpm-1992-11-25-me-731-story.html [https://perma.cc/5AT8-FBEZ].

[129] The statute originally appeared in CAL. PROB. CODE § 21350 (2004) (repealed 2014). *See In re* Estate of Shinkle, 119 Cal. Rptr. 2d 42, 44 (Cal. Ct. App. 2002). In 2014, the legislature renumbered it as CAL. PROB. CODE § 21380. *See* Grogan v. DeBarr, No. A152698, 2019 WL 1748681, at *8 n.4 (Cal. Ct. App. Apr. 19, 2019). The law also creates a presumption that the suspicious transfer was procured by fraud. *See* CAL. PROB. CODE § 21380(a).

[130] CALIFORNIA LAW REVISION COMMISSION, STUDY L-622, MEMORANDUM 2008-13 at 2 (2008), http://www.clrc.ca.gov/pub/2008/MM08-13.pdf [https://perma.cc/7KYF-T8BS].

[131] CAL. PROB. CODE § 21380. *See also* CAL. PROB. CODE § 21362 (defining a "care custodian" as someone "who provides health or social services to a dependent adult[,]" services that include "the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances."). CAL. PROB. CODE § 21366 (defining ~~a~~ "dependent adult" as a person who either

makes it hard for "disqualified person[s]" to rebut the presumption. Although California common law requires accused undue influencers to demonstrate that the transfer was voluntary by a preponderance of the evidence,[132] the statute raises this threshold to clear and convincing proof[133] and allows contestants to recover their attorneys' fees and costs if they litigate this issue and win.[134]

This deviation from traditional undue influence soon proved to be controversial. In *Bernard v. Foley*, the California Supreme Court held that two people who had tended to a cancer-ridden neighbor and friend were "care custodians" of a "dependent adult."[135] Reading the statute literally, the four justices in the majority refused either to limit its ambit to paid caregivers or create a safe harbor for "preexisting personal friends[.]"[136] But as three dissenting justices pointed out, this interpretation penalized "those who help the infirm out of the kindness of their hearts."[137] The seemingly perverse result in *Bernard* forced the legislature to amend the law again to exclude the decedent's longtime friends who provide services for free[138] and transfers made either before or after the caregiving occurs.[139]

Despite these difficulties, California's special presumption statute has served as a model for other states. For instance, in 2011, Nevada passed a virtually identical law.[140] Four years later, Illinois also added a provision to its probate code stating that "there is a rebuttable presumption . . . that [a] transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds

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cannot take care of "his or her personal needs for physical health, food, clothing, or shelter" or has "difficulty managing his or her own financial resources or resisting fraud or undue influence.").

[132] *See In re* Marriage of Balcof, 47 Cal. Rptr. 3d 183, 190–192 (Cal. Ct. App. 2006); Estate of Gelonese, 111 Cal. Rptr. 833, 838 (Cal. Ct. App. 1974).

[133] *See* CAL. PROB. CODE § 21380(b).

[134] *See id.* § 21380(d). The statute also contains several exceptions, including for gifts to close relatives or cohabitants, *see id.* § 21382(a), and where an attorney executes a certificate of independent review that the transfer is voluntary, *see id.* § 21384. On the flip side, the law also now declares that the presumption cannot be rebutted when the accused is a drafting attorney or one of their family members or associates. *See id.* § 21380(c).

[135] *See* Bernard v. Foley, 139 P.3d 1196, 1197 (Cal. 2006).

[136] *Id.* at 1204–05.

[137] *Id.* at 1215 (Corrigan, J., dissenting).

[138] *See* CAL. PROB. CODE § 21362.

[139] *See id.* § 21380(a)(3) (providing that the presumption of invalidity only governs "if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period").

[140] Nevada's legislation presumes undue influence, fraud, and duress for gifts to drafters, people who paid for or helped with the drafting, and paid caregivers of dependent adults. *See* NEV. REV. STAT. § 155.097(2)(a)–(c); Dish Network Corp. on behalf of Dish Network Corp. 401(k) Plan v. Pompa, No. 2:17-CV-1601-KJD-CWH, 2020 WL 2513671, at *4 (D. Nev. May 15, 2020). The presumption can be rebutted by clear and convincing evidence. *See* NEV. REV. STAT.§ 155.097(3). In addition, Nevada saddles *all* beneficiaries who are found liable for undue influence with paying the other side's attorneys' fees and costs. *See id.* § 155.097(1).

$20,000."[141] Finally, in 2018, the Michigan Supreme Court came within a hair's breadth of adopting a bright line rule that bequests to the drafting attorney stem from undue influence.[142] The decedent's will and trust left his $16,000,000 estate to his lawyer and his lawyer's children, thus disinheriting his girlfriend, brother, nieces, and nephews.[143] Despite the fact that the attorney was a "close friend of the decedent," the court deadlocked 3-3 on whether he should be allowed to try to rebut the presumption of undue influence.[144] The justices who voted in favor of recognizing undue influence *per se* opined that the traditional rule "is no longer sufficient to protect the public."[145]

In sum, special presumption laws reveal growing anxiety that the common law of undue influence is inadequate to discourage wrongdoing. As we discuss next, the same concern animates the recent wave of legislation creating a civil cause of action for elder abuse through undue influence.

2. Civil Actions for Undue Influence as Elder Abuse

For four decades, the area of elder law has been a hive of state legislative activity. This subsection explains how some of these statutes create a robust civil cause of action for undue influence as a form of elder abuse.

In the 1980s, state lawmakers began to crack down on the scourge of elder abuse. The catalyst was an investigation by a subcommittee of the House of Representatives that found that mistreatment of seniors was a pervasive and underreported problem.[146] However, because there was no federal regulation on the topic, states took the lead.[147] They founded public protective agencies, made

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[141] 755 ILL. COMP. STAT. § 5/4a-10(a); *see also* Durham v. Durham, No. 5-20-0140, 2021 WL 1227740, at *13 (Ill. Ct. App. Mar. 31, 2021) (voiding the deed to a caretaker under the statute). Similar laws also appear to be spreading abroad. *See* Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2002 (2018) (describing a draft Israeli law that singles out bequests to caregivers for scrutiny).

[142] *See In re* Mardigian Estate, 917 N.W.2d 325, 354 (Mich. 2018) (McCormack, J., dissenting).

[143] *See id.* at 329–30 (majority opinion); Respondents/Appellants' Brief on Appeal at *1, *In re* Mardigian Estate, 917 N.W.2d 325, 354 (Mich. 2018) (No. 152655).

[144] Mardigian Estate, 917 N.W.2d at 329.

[145] *Id.* at 342 (McCormack, J., dissenting).

[146] *See* SELECT COMM. ON AGING U.S. HOUSE OF REPRESENTATIVES, COMM. PUB. NO. 97-277, ELDER ABUSE (AN EXAMINATION OF A HIDDEN PROBLEM) XIV (1981) (concluding that about four percent of seniors experience moderate to severe mistreatment).

[147] Until Congress passed the Elder Justice Act in 2010, exploited elders "constituted the only ground of major crime victims to receive no direct federal support." *See* Brian W. Lindberg, Charles P. Sabatino & Robert B. Blancato, *Bringing National Action to a National Disgrace: The History of the Elder Justice Act*, 7 NAELA J., Spring 2011, at 105, 114–15.

reporting abuse mandatory, and criminalized mistreatment of people above a certain age (often sixty-five).[148]

But a decade later, some jurisdictions attacked the problem from a different angle. Amid signs that the epidemic was getting worse,[149] their "focus shifted to private, civil enforcement of laws against elder abuse and neglect."[150] Roughly twenty states passed legislation authorizing a civil claim for the "financial abuse" or "financial exploitation" of a senior.[151] Most importantly for our purposes, these laws define "financial abuse" and "financial exploitation" to include acquiring assets through "undue influence."[152]

This cause of action has the potential to reshape litigation over donative transfers. Unlike the common law undue influence doctrine, which places hurdles in the path of contestants,[153] legislators have paved the way for parties to file claims of

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[148] *See, e.g.*, ALA. CODE § 38-9D-2; ARIZ. REV. STAT. § 46-451; COLO. REV. STAT. § 26-3.1-101; IOWA CODE § 235B.2; KAN. § 39-1430; MASS. GEN. LAWS ch. 19A, § 14; MINN. STAT. § 609.232; N.Y. SOC. SERV. LAW § 473; N.C. GEN. STAT. § 108A-101; TEX. HUM. RES. CODE § 48.002; UTAH CODE § 62A-3-301; VA. CODE § 63.2-1605.

[149] *See Elder Abuse: A Decade of Shame and Inaction, Hearing Before the Subcomm. on Health and Long Term Care of the House Select Comm. on Aging*, 101st Cong., 2d Sess. 3 (1990) (statement of Hon. Edward R. Roybal) (estimating that 1,500,000 elders suffered abuse, but only one in eight reported it).

[150] Delaney v. Baker, 971 P.2d 987, 992 (Cal. 1999).

[151] *See, e.g.*, CAL. WELF. & INST. CODE § 15610.30(a); CONN. GEN. STAT. § 17b-462(a) (creating a claim on behalf of "[a]n elderly person who has been the victim of . . . exploitation"); FLA. STAT. § 415.1111; 755 ILL. COMP. STAT. 5/2-6.2(e); IOWA CODE § 235F.6(2); MD. CODE, EST. & TRUSTS § 13-604; MINN. STAT. § 626.557(20); MISS. CODE § 11-7-165(1); N.D. CENT. CODE § 50-25.2-11.1(1); NEV. REV. STAT. § 41.1395(1); OR. REV. STAT. § 124.100(2); S.D. CODIFIED LAWS § 22-46-13; TENN. CODE § 71-6-120(a); UTAH CODE § 62A-3-314(1); VT. STAT. 33, § 6952; WASH. REV. CODE § 74.34.200(1); W. VA. CODE § 55-7J-1(a); *cf.* ARIZ. REV. STAT. § 46-456 (subjecting a party who abuses a "position of trust and confidence" by misusing a senior's assets to liability).

[152] *See, e.g.*, CAL. WELF. & INST. CODE §§ 15610.30(a)(3), 15610.70 (defining "undue influence" as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity" and articulating specific factors for courts to consider that mirror the common law test); *see also* 755 ILL. COMP. STAT. 5 / 2-6.2(a); IOWA CODE § 235F.1(8); *See* MINN. STAT. § 626.557(9)(a)(3)); MISS. CODE § 11-7-165(1); NEV. REV. STAT § 41.1395(b)(1); VT. STAT. 33, § 6951(3)(B); WASH. REV. CODE § 74.34.020(7)(a); W. VA. CODE § 55-7J-1(b)(3)). Other statutes do not use the phrase "undue influence," but define "financial abuse" or "financial exploitation" broadly enough to encompass the concept. *See* CONN. GEN. STAT. § 17b-450(7) ("[t]he term 'exploitation' refers to the act or process of taking advantage of an elderly person by another person or caregiver whether for monetary, personal or other benefit, gain or profit."); MD. COD., EST. & TRUSTS § 13-601(e)(1)(ii) (forbidding the use of "excessive persuasion"); Church v. Woods, 77 P.3d 1150, 1153 (Or. Ct. App. 2003) (interpreting "improper means" in a financial exploitation statute to encompass undue influence).

[153] *See supra* Part II.A.

elder abuse. For one, to "'help[] victims engage lawyers to take their cases,'"[154] they allow prevailing claimants to recover treble, punitive, or exemplary damages and their attorneys' fees.[155] Likewise, because elder abuse is a civil complaint, it can give rise to a jury trial[156] and is covered by a statute of limitations that is significantly longer than that for contests.[157] Finally, a handful of states bar anyone who is found to have committed elder abuse from receiving assets from their victim's estate plan.[158] This "abuser doctrine" extends the ancient slayer rule, which bars killers

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[154] *See* Nina Santo, Comment, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 822 (2000) (quoting CAL. WELF. & INST. CODE § 15600(j) (West Sup. 2000)); CAL. SEN. JUD. COM., ANALYSIS OF SEN. BILL NO. 558 at 5–6 (Apr. 26, 2011) (explaining that enhanced remedies are necessary due to "the death of the victim and the difficulty in finding an attorney to handle an abuse case where attorney[s'] fees may not be awarded").

[155] *See, e.g.*, ARIZ. REV. STAT. § 46-456(B) (up to double damages and attorneys' fees); CAL. WELF. & INST. CODE § 15657.5(a), (d) (punitive damages and attorneys' fees); CONN. GEN. STAT. ANN. § 17b-462(a) (punitive damages and attorneys' fees); FLA. STAT. § 415.1111 (punitive damages and attorneys' fees); 720 ILL. COMP. STAT. 5 / 17-56(g) (treble damages and attorneys' fees); MD. CODE, EST. & TRUSTS § 13-606(b), (d) (treble damages and attorneys' fees); MINN. STAT. § 626.557(20) (triple the damages or up to $10,000 and attorneys' fees); MISS. CODE ANN. § 11-7-165(1) (treble damages); N.D. CENT. CODE § 50-25.2-11.1(2)–(3) (exemplary damages and attorneys' fees); NEV. REV. STAT. § 41.1395(1)–(2) (double damages and attorneys' fees); OR. REV. STAT. § 124.100(2)(b)–(c) (treble damages and attorneys' fees); S.D. CODIFIED LAWS § 22-46-13 (punitive damages and attorneys' fees); TENN. CODE ANN. § 71-6-120(d)-(e) (punitive damages and attorneys' fees); UTAH CODE § 26B-6-213(3) (attorneys' fees); VT. STAT. tit. 33, § 6952(b)(1)–(2) (treble damages and attorneys' fees); WASH. REV. CODE § 74.34.200(3) (attorneys' fees); W. VA. CODE § 55-7J(B)(2) (treble damages).

[156] Admittedly, elder abuse statutes do not expressly confer the right to a jury trial. However, because they create civil causes of action, they allow plaintiffs to sue in courts of general jurisdiction and thus escape the special rules that make bench trials mandatory in probate. *See supra* text accompanying note 64; *see also* Arace v. Medico Invs., LLC, 262 Cal. Rptr. 3d 341, 342 (Cal. Ct. App. 2020) (involving a jury trial of a financial abuse claim).

[157] *See, e.g.*, CAL. WELF. & INST. CODE § 15657.7 (prescribing a four-year statute of limitations for civil elder abuse claims); MD. COD, EST. & TRUSTS § 13-607(a) (five years); OR. REV. STAT. § 124.130 ("within seven years after discovery").

[158] These laws vary widely between jurisdictions. Some are categorical bars on the abuser inheriting from the victim. *See, e.g.*, ARIZ. REV. STAT.§ 46-456(C) (declaring that an abuser "forfeit[s] all or a portion of the person's . . . [i]nterest" in the victim's estate); 755 ILL. COMP. STAT.5 / 2-6.2 (stating that any person who is found "civilly liable for financial exploitation shall not receive any property, benefit, or other interest by reason of the death of that elderly person"); WASH. REV. CODE § 11.84.020 ("[n]o . . . abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent."). As such, they provide a way to invalidate a bequest to the abuser without filing a contest. *See In re* Estate of Jonnas, No. 1 CA-CV 12-0801, 2014 WL 50793, at *2 (Ariz. Ct. App. Jan. 7, 2014) (evidence of financial exploitation with respect to inter vivos transactions sufficient to invalidate trust amendments even without proof that trust amendments were procured by undue influence or exploitation). Alternatively, other states' abuser rules merely stop abusers from receiving funds the victim or their estate wins in an elder abuse case, which closes the

from inheriting from their victims.[159] In these ways, an allegation of elder abuse through undue influence is far more powerful than a run-of-the-mill undue influence contest.

Admittedly, some financial exploitation statutes are subject to an important limit. Probate Codes typically confer standing to file a contest upon "interested person[s]":[160] those who will receive property if the court strikes down the challenged will or trust.[161] In turn, this opens the probate courthouse door to a wide array of people, such as the decedent's intestate heirs or beneficiaries of prior estate plans.[162] Conversely, in many states, only the victim themself (during their life) or their personal representative (after their death) may seek relief for elder abuse.[163] Accordingly, many of the parties who *can* file contests *cannot* pursue assertions of elder abuse by undue influence.[164]

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potential loophole of wrongdoers effectively paying damages to themselves. *See* CAL. PROB. CODE § 259(c) ("[a]ny person found liable [for elder abuse] . . . shall not . . . receive any property, damages, or costs that are awarded to the decedent's estate . . . .").

[159] *See* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (recognizing the slayer principle); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. c (AM. L. INST. 2011) comm. ("The transparent purpose of the slayer rule is to prevent unjust enrichment by homicide.").

[160] *See, e.g.*, CAL. PROB. CODE § 1043(a); 755 ILL. COMP. STAT. 5/8-1(a); OR. REV. STAT. § 113.075(1).

[161] *See, e.g.*, Matter of the Estate of Phillips, 795 S.E.2d 273, 279 (N.C. Ct. App. 2016) (explaining that "interested person[s]" include "anyone who has a direct pecuniary interest in the estate") (quoting *In re Ashley*, 23 N.C. App. 176, 180 (N.C. Ct. App. 1974). *Compare* Spicer v. Estate of Spicer, 935 S.W.2d 576, 577 (Ark. Ct. App. 1996) (holding that contestant had standing to challenge codicil because it reduced his share of the estate) *with* Cranberg v. Wilson, No. 03-03-00389-CV, 2004 WL 101794, at *2 (Tex. App. Jan. 23, 2004) (finding that contestant lacked standing to try to invalidate will when he "testified that he would not receive any monetary benefit from the estate under the will or under the rules of descent and distribution were the will to be held invalid").

[162] Matter of Kosmo Fam. Tr., No. 2018-235, 2018 WL 6332886, at *2 (N.Y. Sur. Ct. Dec. 3, 2018) (noting that "[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent" enjoy standing) (quoting CAL. PROB. CODE § 48).

[163] *See, e.g.*, CONN. GEN. STAT. § 17b-462 (conferring standing on "the elderly person, or the elderly person's guardian or conservator, . . . or the elderly person's guardian or conservator, or by the personal representative of the estate of a deceased elderly victim"); MINN. STAT. § 626.557(3)(a)(1); N.D. CENT. CODE § 50-25.2-11.1; OR. REV. STAT. § 124.100(3)(a); S.D. CODIFIED LAWS § 22-46-13; W. VA. CODE § 55-7J-1. Limiting standing to pursue an elder abuse claim to the decedent's personal representative creates a huge loophole. Often, the personal representative is *also* the accused wrongdoer. This ensures that the estate will not assert an elder abuse claim—after all, who would sue themselves? The only path forward for claimants is to try to petition for the personal representative's removal, obtain appointment as the personal representative, and then file a complaint for elder abuse.

[164] *See*, *e.g.*, Pasquale v. Loving, 82 So. 3d 1205, 1208 (Fla. Dist. Ct. App. 2012) (affirming dismissal of financial exploitation claims for lack of standing by will contestants who were not appointed personal representative of the victim's estate); Kittrell v. Fowler,

But increasingly, lawmakers are expanding the class of people who can pursue claims of elder abuse by undue influence. Again, California has been at the vanguard. It essentially allows any litigant to sue on the decedent's behalf if they would inherit some of the damages from a successful elder abuse claim.[165] In turn, this means that heirs and beneficiaries often have standing to sue for elder abuse by

870 S.E.2d 210, 210 (Va. 2022) (holding that trust beneficiaries lack standing to contest inter vivos transfers by deceased settlor on grounds of undue influence because such claims belong to the decedent's estate and therefore must be pursued by the personal representative). Likewise, other states have resisted the new undue influence push by refusing to authorize a private right of action under their elder abuse statutes. *See* Park v. Haw. Med. Serv. Ass'n, 582 F. Supp. 3d 760, 765 (D. Haw. 2022); Buchanan v. United States, No. 3:19-CV-572-CHB, 2022 WL 889966, at *4 (W.D. Ky. Mar. 25, 2022); Adkins v. Sogliuzzo, No. Civ.Action. 09-1123 SDW, 2013 WL 5468970, at *17 (D.N.J. Sept. 30, 2013); Hymes v. DeRamus, 222 P.3d 874, 889 (Alaska 2010).

[165] *See* CAL. WELF. & INST. CODE § 15657.3(d). The statute provides that the decedent's personal representative has the first crack at suing for elder abuse. *See id.* § 15657.3(d)(1). However, if there is no personal representative, the personal representative refuses to sue, or if the personal representative is the alleged abuser, the claim passes to "[a]n interested person," which includes an heir or beneficiary who has "a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding." *Id.* § 15657.3(d)(1)-(2); CAL. PROB. CODE § 48(a)(1).

undue influence.[166] Illinois,[167] Maryland,[168] and Tennessee[169] recently passed similar laws.[170]

In these jurisdictions, undue influence is leading a double life. It is both the basis for challenging the validity of a donative transfer and the foundation for a civil claim.[171] Contestants are still working out how to use this to their advantage. Some

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[166] *See, e.g.*, Keading v. Keading, 275 Cal. Rptr. 3d 338, 341, 344 (Cal. Ct. App. 2021) (holding that beneficiary had standing to pursue claim of elder abuse by undue influence when her share of the trust was depleted by her brother's wrongdoing); *cf.* Estate of Lowrie, 12 Cal. Rptr. 3d 828, 835 (Cal. Ct. App. 2004) (reasoning that courts should construe the standing provisions of elder abuse statutes "in a manner that induces interested persons to report elder abuse and to file lawsuits against elder abuse and neglect"). *Contra* Lickter v. Lickter, 118 Cal. Rptr. 3d 123, 127 (Cal. Ct. App. 2010) (holding that the decedent's grandchildren, who were only entitled to a $10,000 payment under the trust, were not "interested person[s]" and thus lacked standing to pursue an elder abuse claim). The court reasoned that because the grandchildren received a lump sum—not a fractional share—they were not entitled to any damages that the estate would receive from the lawsuit. *See id.* at 136. Accordingly, they did not have "an interest of some sort that could impaired, defeated, or benefited by the [elder abuse] proceeding." *Id.* at 135.

[167] *See* 755 ILL. COMP. STAT. § 5 / 2-6.2(e) (allowing "interested person[s]" to sue for elder abuse "after the death of the victim"); *see also id.* § 5/1-2.11 (defining "interested person" as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved").

[168] In 2021, Maryland enacted the Financial Exploitation of Susceptible Adults and Older Adults (SAFE) Act, which confers standing to sue for elder abuse upon a broad category of people, including the victim's spouse, parents, descendants, "presumptive heir[s]," and anyone "named as a beneficiary to receive any property, benefit, or contractual right on the [victim's] death, including a person who would be a beneficiary but for the financial exploitation." MD. CODE, EST. & TRUSTS § 13-605(a)(3)–(5).

[169] *See* TENN. CODE ANN. § 71-6-120 (providing that elder abuse claims are transmitted to the decedent's loved ones in the same way as wrongful death claims); *see also id.* § 20-5-107(a) (providing that wrongful death claims "may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin").

[170] In other states, it is not clear whether heirs and beneficiaries can sue for elder abuse by undue influence after the victim's death. For example, Utah's elder abuse statute specifies that "[u]pon the death of a vulnerable adult, any cause of action under this section shall constitute an asset of the estate of the vulnerable adult." UTAH CODE § 26B-6-213(2). Although the general rule is that only a decedent's personal representative can pursue claims that belong to the estate, there are also exceptions that might open the courthouse door to third parties with a financial stake in the outcome. *See, e.g.*, Dickman v. Generis, 845 A.2d 488, 491 (Conn. Super. Ct. 2004) (discussing situations in which the personal representative's refusal to sue entitles heirs and beneficiaries to do so); *cf.* Complaint and Jury Demand at ¶ 51, Zegura v. Ledesma, No. 17041106, 2017 WL 3389446 (Utah Dist. Ct. Jul. 31, 2017) (alleging that Utah's elder abuse statute confers standing on the decedent's children).

[171] Statutory remedies for elder abuse supplement, rather than displace, traditional forms of relief for undue influence. *See*, *e.g.*, ARIZ. REV. STAT. § 46-456 (authorizing

apparently insert elder abuse allegations within their probate contests and others initiate two lawsuits: a contest in probate and an elder abuse claim in a court of general jurisdiction.[172] Either way, the contest tries to expand their *share* of the estate (by voiding a transfer to the wrongdoer) and the elder abuse allegations seek to enlarge the *size* of the estate (by obtaining enhanced damages on behalf of the decedent).

In sum, claims for elder abuse through undue influence are revolutionizing wills and trusts litigation. And as we explain next, California has also implemented a bounty for contestants who prove that a wrongdoer committed undue influence in bad faith.

3. Damages for Undue Influence Committed in Bad Faith

The final component of the new undue influence may also be the most audacious. This subsection describes how California allows virtually every undue influence contestant to request a penalty of twice the amount of assets that are in dispute.

In 1850, the California legislature passed what eventually became Probate Code § 859.[173] The statute allowed a decedent's executor or administrator to sue a party who had "embezzle[d] or alienate[d]" assets from the estate and collect a penalty of "double the value of the [misappropriated] property."[174] For example, if defendant stole $1,000 from a decedent, the personal representative could recoup $3,000: the original $1,000 and the statutory penalty of $2,000.[175]

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damages in addition to invalidation of the contested transfer); CAL. WELF. & INST. CODE § 15657.5 (authorizing attorney's fees and punitive damages "in addition to compensatory damages and all other remedies otherwise provided by law"); FLA. STAT. § 415.1111 ("The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult."); MD. CODE , EST. & TRUSTS § 13-606 ("The damages awarded under this section are in addition to and cumulative with other lawful and administrative damages available to a party."); MISS. CODE § 11-7-165(4) ("Civil remedies provided under this section shall be supplemental and cumulative, and not exclusive of other remedies afforded under any other law."); WASH. REV. CODE § 74.34.200(1).

[172] *Cf.* Petition for Review, In the Matter of the Estate of Crane, No. CV-05-0376-PR, 2005 WL 6060685, at *7 (Ariz. Oct. 28, 2005) ("[e]xploitation claims have become common-place [sic] in any contested probate matter."); *infra* Part III.B.3 (discussing the practice of filing both probate contests and civil claims based on the same allegations of undue influence).

[173] *See* Estate of Young v. Parker, 72 Cal. Rptr. 3d 520, 538 (Cal. Ct. App. 2008).

[174] *Id.* (quoting § 117, Stats. 1850, 1st Sess., ch. 129, ch. IV, p. 386). A few other states have similar provisions. *See* KAN. STAT. § 59-1704 ("If any person embezzles or converts to his or her own use any of the personal property of a decedent or conservatee, such person shall be liable for double the value of the property so embezzled or converted."); *cf.* WASH. REV. CODE § 11.48.060 (setting forth a similar rule but not permitting double damages).

[175] *See* Estate of Ashlock, 259 Cal. Rptr. 3d 322, 327–28 (Cal. Ct. App. 2020) (illustrating the calculation of damages under § 859 with a similar example).

Then, in the 2010s, the California legislature made three major changes to Section 859. First, it expanded the class of litigants who can invoke the statute beyond executors and administrators to include "any interested person."[176] This allows a decedent's heirs and beneficiaries to seek double damages.[177] Second, lawmakers gave courts discretion to award successful contestants their attorneys' fees and costs.[178] The sponsor of this amendment explained that discretionary fee-shifting was necessary because "even with double damages, there are instances in which the attorney[s'] fees incurred exceed the damages recovered."[179] Third, and most significantly, the legislature declared that an individual violates Section 859 if they acquire a decedent's possessions "by the use of undue influence in bad faith."[180] This language is curious because the idea of undue influence committed in bad faith seems redundant. Indeed, undue influence is practically synonymous with bad faith.[181] Thus, Section 859 seems to open the door for *every* undue influence contestant to demand double damages and their litigation expenses.

Not surprisingly, Section 859 has begun to appear often in California appellate decisions. These cases have affirmed trial court rulings awarding contestants double

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[176] CAL. PROB. CODE § 850(2). Technically, Section 859 is a component of California Probate Code § 850, which allows a petitioner to seek relief "[w]here the decedent died having a claim to real or personal property, title to or possession of which is held by another." *Id.* § 850(2)(D). Thus, Section 859's standing provision is located within Section 850.

[177] *See supra* text accompanying notes 159–160.

[178] CAL. PROB. CODE § 859 (2023) (stating that the wrongdoer "may, in the court's discretion, be liable for reasonable attorney's fees and costs").

[179] 2013 A.B. No. 381 (Cal. 2013-14 Reg. Sess.).

[180] CAL. PROB. CODE § 859. The statute contains an unfortunate ambiguity. It states that the double damages and fee-shifting remedies apply to someone who "has in bad faith wrongfully taken . . . property belonging to . . . the estate of a decedent[ ] or has taken . . . the property by the use of undue influence in bad faith or through the commission of elder . . . financial abuse." *Id.* Thus, in one breath, the statute suggests that only a finding of "undue influence in bad faith" triggers the enhanced remedies. Yet in the next breath, the text provides that elder abuse also suffices. As we discussed *supra* Part II.B.2, traditional undue influence—not undue influence in bad faith—can give rise to elder abuse. Thus, it is unclear whether Section 859 requires a contestant to prove bad faith in an undue influence case with an elder decedent. *Compare* Levin v. Winston-Levin, 252 Cal. Rptr. 3d 518, 527–28 (Cal. Ct. App. 2019) (insisting on evidence of bad faith), *with* Keading v. Keading, 275 Cal. Rptr. 3d 338, 347–49 (Cal. Ct. App. 2021) (reaching the opposite conclusion), *and* Kerley v. Weber, 238 Cal. Rptr. 3d 781, 789 (Cal. Ct. App. 2018) (same), *and* Hill v. Superior Ct., 198 Cal. Rptr. 3d 831, 835 (Cal. Ct. App. 2016) (same).

[181] For example, statutes in many states allow an executor to use estate funds to "prosecute[] any proceeding in good faith." *See, e.g.*, IND. CODE § 29-1-10-14(b); TEX. EST. CODE § 352.052(a). But a long line of cases holds that any executor who is found to have obtained the will by undue influence automatically has "not acted in good faith." *In re* Estate of Herbert, 979 P.2d 1133, 1136 (Haw. 1999) (quoting Wilson v. Veazey, 30 F.2d 310, 311 (D.C. Cir. 1929)); *see also* Respondents' Brief at *34, Estate of Burlin, 2019 WL 2265581, (Cal. Ct. App. May 28, 2019) No. A153321, 2019 WL 928440 ("Logically, it is hard to conceive of how a person could exert undue influence in good faith.").

damages[182] and reimbursing them for their litigation expenses.[183] For example, in *Estate of Burlin v. Felix*, Robert Burlin wanted to leave his house to his close friends, Richard James and Tom Hoover.[184] However, two weeks before Burlin died, a handyman named Endi Noel Felix had Burlin fill out an online deed template transferring his home to Felix.[185] In addition, Felix helped Burlin execute a codicil "in which he 'clarifie[d] his intent to bequeath the home . . . to Felix.'"[186] A trial court held that Felix had violated Section 859 and ordered him to pay twice the value of the house.[187] Felix challenged this ruling on appeal on the grounds that the judge had not specifically found that he had acted in bad faith.[188] The court of appeals disagreed, reasoning that the trial judge's conclusion that Felix had exerted undue influence was tantamount to a determination that he had attempted "to mislead or deceive another" and thus cleared Section 859's low threshold.[189]

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Several states have given the controversial doctrine of undue influence a punitive makeover. However, we know almost nothing about how these laws are functioning. Are their rewards generous enough to lure probate attorneys general off the sidelines? Or, as the Trusts and Estates Section of the California Bar stated in opposition to the recent amendments to Section 859, are they "especially problematic" because they will make already "fraught cases even more difficult to settle and further burden the courts"?[190] The next Part uses a painstakingly assembled dataset to offer preliminary answers to these questions.

III. EMPIRICAL STUDY

This Part offers a glimpse of how the new undue influence operates in practice. It begins by outlining our research methodology. It then discusses three main findings. First, new undue influence statutes seem to make contestants' claims more

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[182] *See, e.g.*, Froning v. Davis, No. D078621, 2022 WL 10311008, at *8 (Cal. Ct. App. Oct. 18, 2022); *Keading*, 275 Cal. Rptr. at 340, 348; Sulley-Black v. Johnson, No. G058565, 2021 WL 1526760 (Cal. Ct. App. Apr. 19, 2021); Green v. Cohen, No. B289909, 2021 WL 568325 (Cal. Ct. App. Feb. 11, 2021); Storey-Gross v. Knighton, No. G055774, 2019 WL 1770336, at *1 (Cal. Ct. App. Apr. 23, 2019).

[183] *See, e.g.*, Sanchez v. Sanchez, No. B293128, 2019 WL 6168441, at *3 (Cal. Ct. App. Nov. 20, 2019); Estate of Antos v. Antos, No. G054116, 2017 WL 5185178, at *10–12 (Cal. Ct. App. Nov. 9, 2017).

[184] *See* Estate of Burlin v. Felix, No. A153321, 2019 WL 2265581, at *1 (Cal. Ct. App. May 28, 2019).

[185] *See id.* at *3.

[186] *Id.* at *1.

[187] *See id.*

[188] *See id.* at *9.

[189] *See id.* at *9–10 (quoting People v. Superior Ct. (Sokolich), 204 Cal. Rptr. 3d 526, 535 (Cal. Ct. App. 2016)).

[190] CAL. STATE ASSEMB. OFFICE OF THE CHIEF CLERK, ASSEMBLY FLOOR ANALYSIS OF CAL. A.B. NO. 381 BEFORE THE SEN. JUD. COMM. (July 1, 2013).

valuable. Litigants who invoke either California's special presumption of undue influence, elder abuse through undue influence legislation, or Section 859 achieve a higher success rate than their peers who allege only traditional undue influence. Second, our data reveal little support for the family protection theory. Indeed, the relationship between the parties and the decedent appears to have no effect on settlements or verdicts. Third, as with tortious interference with an inheritance, the recognition of a cause of action for undue influence via elder abuse creates tension between the civil justice system and probate. Although elder abuse laws are not as troubling as the inheritance tort, we nevertheless propose ways for policymakers to harmonize them with probate principles.

A. Methodology

To assess the new undue influence, we gathered nearly 7,000 recent probate and trust matters from two California counties. This Section surveys our research goals, methods, and limitations.

One factor that hinders any attempt to empirically study the new undue influence is that contests are relatively rare. Empirical work on probate finds challenges to the validity of a will in 1% to 3% of estates.[191] This does not mean that these disputes are inconsequential; indeed, "[b]ecause . . . there are millions of probates per year, one-in-a-hundred litigation patterns are very serious."[192] But it does require researchers to cast a wide net in their initial data collection.

To meet this need, we amassed information from several different sources. First, we started with probate files that one or both of us had collected for other projects. This consisted of 2,100 cases that were heard in Alameda County, California between 2007 and 2010[193] and 1,349 matters from San Francisco County, California that came on calendar in 2014, 2015, and 2016.[194] We had compiled this data by accessing each court's online interface: Domainweb (for Alameda County)[195] and sfsuperiorcourt.org (for San Francisco County),[196] going through

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[191] *See, e.g.*, MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH WITH LODOSKA K. CLAUSEN, THE FAMILY AND INHERITANCE 184 (1970) (finding contests in 1.3% of wills from Cuyahoga County, Ohio); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 415–16 (1950) (discovering that, during five nonconsecutive years, a total of 3.5% of estates from Dane County, Wisconsin degenerated into contests).

[192] John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994).

[193] *See* David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447, 2476–77 (2018).

[194] This is the dataset we used to write David Horton & Reid K. Weisbord, *Heir Hunting*, 169 U. PA. L. REV. 383 (2021) and David Horton & Reid Kress Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149 [hereinafter Horton & Weisbord, *Probate Litigation*].

[195] *DomainWeb & Portals*, SUPER. CT. OF CAL.: CNTY. OF ALAMEDA, https://www.alameda.courts.ca.gov/online-services/domainweb [https://perma.cc/96KX-C9EK] (last visited Aug. 11, 2023).

[196] *Superior Court of California, County of S.F.* SUPER. CT. OF CAL.: CNTY. OF SAN FRANCISCO, https://www.sfsuperiorcourt.org/ [https://perma.cc/7XKH-8DDX] (last visited Aug. 11, 2023).

each day's docket, and extracting about fifty variables from the petitions, objections, orders, and other filings.[197]

Second, using the same approach, we added the 1,995 estates that passed through San Francisco County between January 1, 2017, and December 31, 2020. This brought the number of probate matters to 5,444.

Third, because probate files only feature wills, we tried to locate trust contests. This proved difficult: trusts are administered privately and thus do not surface in court records unless they spark litigation.[198] However, we discovered that San Francisco County assigns trust disputes case numbers that begin with "PTR." Thus, we searched for all such files beginning on January 1, 2014, and ending with December 31, 2020. This yielded 1,373 hits and left us with a grand total of 6,817 matters.[199]

In turn, this dataset generated 175 cases with any kind of undue influence claim.[200] We admit that this makes our universe of undue influence disputes relatively small. But because we were able to extract so much detail from each matter—including, as we discuss, both settlement value and the maximum amount a contestant could have recovered—our research still illuminates the impact of the California legislature's new rules far better than published decisions.

Finally, we should address the pros and cons of studying two California counties. On the one hand, as we have emphasized, the Golden State is the leader of the new undue influence pack.[201] Since it has adopted the full rainbow of new undue influence laws, it is the perfect jurisdiction for our inquiry. But on the other hand, as

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[197] For a more detailed description of this technique, see David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 626 (2015).

[198] *See* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 563–66 (2008).

[199] We acknowledge two potential gaps in our research coverage. First, California recognizes a narrow version of the inheritance tort. *See* Munn v. Briggs, 110 Cal. Rptr. 3d 783, 789 (Cal. Ct. App. 2010) (refusing to allow plaintiff to predicate the tort on undue influence when he could have brought a contest in probate); Beckwith v. Dahl, 141 Cal. Rptr. 3d 142, 153 (Cal. Ct. App. 2012) (recognizing the tort but limiting it to situations in which no adequate probate remedy exists). Second, plaintiffs can file undue influence through elder abuse claims in either probate or civil court. *See* CAL. WELF. & INST. CODE § 15657.3. Thus, it is possible than some individuals with undue influence claims relied on one of these theories instead of filing a contest, remained in the civil justice system, and eluded our research dragnet.

[200] Fifty-four undue influence contests appeared in probate administrations, which translates into a litigation rate of roughly 1%. This figure is slightly lower than other studies because our dataset includes both testate estates (where a decedent made a will) and intestacies (which do not involve a will). *Cf.* Horton & Weisbord, *Probate Litigation*, *supra* note 194, at 1180 (finding fourteen undue influence contests in 443 testacies). We could not calculate the litigation rate for trusts: because non-litigated trusts never enter the judicial system, we only know the numerator (the number of contested trusts) and not the denominator (the total number of trusts). For whatever it is worth, 121 of our 1,373 trust disputes (9%) involved an allegation of undue influence. Thus, undue influence claims were common when compared to other forms of trust-related conflict.

[201] *See supra* Part II.B.

with any study of a single state, its idiosyncrasies may limit the generalizability of our findings. For example, because California uses a community property system, it allows surviving husbands and wives to collect their share of a deceased spouse's possessions by filing a special petition that bypasses probate.[202] In turn, since the first spouse to die generally does not appear in the probate records, our data is skewed towards single decedents. Similarly, Northern California—home to Alameda and San Francisco Counties—is famously wealthy and liberal,[203] which could distort anything from the demographics of the parties in our sample to the way factfinders view "non-traditional" estate plans. Thus, further research in other geographical areas would be helpful.

B. Results and Implications

1. Probate Attorneys General

New undue influence laws must encourage claims without exposing wrongdoers to disproportionate liability. This Section explains why California's statutes manage to walk this tightrope.

At first blush, our data suggest that the new undue influence's impact is more modest than one might expect. For starters, fewer contestants capitalized on these statutes than we were expecting. Only 100 of the 175 undue influence objections (57%) attempted to invoke either the special presumption of undue influence, elder abuse via undue influence, or Section 859.[204] This paucity of claims was surprising given that Section 859 authorizes undue influence contestants to supersize their prayer for relief simply by reciting the words "in bad faith."[205] Likewise, 142 of the 148 (95%) decedents whose age appeared in the record was sixty-five or older and thus could have been victimized by elder abuse by undue influence.[206] These findings suggest that new undue influence legislation may apply more broadly on paper than in the real world.

In addition, no contestant in our data recovered any of the new undue influence's amplified remedies. Table 1 displays the results of the 175 cases under our microscope. It reports that only nine matters (5%) proceeded to a verdict. Eight

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[202] *See* CAL. PROB. CODE §§ 13500, 13502.5.

[203] *See* Eric McGhee, *California's Political Geography 2020*, PUB. POL'Y INST. OF CAL. (Feb. 2020), https://www.ppic.org/publication/californias-political-geography/ [https://perma.cc/T3EE-9JHB] (describing the left-leaning ideology of San Francisco and the East Bay).

[204] This included 33 attempts to raise a special presumption of undue influence, 68 allegations of elder abuse via undue influence, and 56 requests for double damages, attorneys' fees, and costs under Section 859. In addition, recall that California has adopted a narrow abuser rule that prevents elder abusers from inheriting any assets that the estate recovers in an elder abuse lawsuit. *See supra* text accompanying note 157. Thirty-nine contestants with elder abuse claims argued that this doctrine applied.

[205] *See supra* text accompanying notes 175–176.

[206] *See supra* Part II.B.2.

such disputes ended in a bench trial, and the alleged wrongdoer won every time.[207] The lone contestant victory came in a jury trial on an elder abuse via undue influence claim.[208] But rather than litigating over punitive damages, the parties then stipulated to a judgment for the value of the misappropriated assets.[209] As a result, wrongdoers were not saddled with the kind of crushing liability that appears in the reported appellate cases.

Table 1: Outcome of Cases With Undue Influence Claims

Result	N	Percent
Proponent Won at Trial	8	4.6%
Contestant Won at Trial	1	< 1.0%
Contest Voluntarily Dismissed	9	5.1%
Will or Trust Withdrawn	6	3.4%
Settled	121	69.1%
Dismissed for Procedural Issue	14	8.0%
Pending	12	6.9%

[207] *See, e.g.*, Statement of Decision at 19, Estate of Dieberger, No. RP-10-545167 (Cal. Super. Ct. Dec. 15, 2014).

[208] *See* Jury Verdict at 1–2, *In re* Palma, No. PTR-16-300126 (Cal. Super. Ct. Apr. 25, 2018).

[209] *See* Stipulation for Entry of Judgment, *In re* Palma, No. PTR-16-300126 (Cal. Super. Ct. May 2, 2018).

Unclear	4	2.3%
Total	175	100%

However, when we dug deeper, we found evidence of the new undue influence's impact on case outcomes. One hundred and twenty-one disputes (69%) settled. Since settlements are usually private, they often serve as brick walls to a research trail. But California requires parties to obtain judicial approval of settlements that either require a conveyance of more than $25,000 of a decedent's assets[210] or involve real property.[211] Accordingly, we were able to access the terms of many settlements in our data. We used this information to calculate the "success rate" of 81 contestants, including 57 who settled.[212] For settled matters, we divided the settlement amount by the challenger's claim value (the sum that they would have received if they had won at trial).[213] As Table 2 elucidates, the mean success rate in contests with a new undue influence claim was 51.9%, but the figure for cases that featured conventional undue influence allegations was 31.5%, which is a statistically significant difference ($p = 0.017$).

[210] *See* CAL. PROB. CODE § 9833.

[211] *See id.* § 9832(a)(1).

[212] We coded contestant victories at trial or cases in which the proponent withdrew the challenged instrument as 1. On the flip side, we assigned proponent wins at trial and disputes in which the contestant withdrew the objection the value 0. Finally, we did not assign a success rate for matters that were dismissed for procedural issues.

[213] Suppose an unmarried Settlor had three children: Son1, Son2, and Daughter. Settlor executed a trust worth $100,000 leaving everything to Son1 and Daughter. Settlor has no other estate planning instruments. Son2 files a contest and settles for $15,000. If Son2 had won at trial, Son2 would have taken one-third of the estate, or $33,333, in intestacy. Accordingly, Son2's success rate is $15,000/$33,333, which equals 45%. In several cases, we used Zillow and Redfin to estimate real property prices. In addition, when calculating the value of a new undue influence claim, we used the actual worth of the decedent's assets and did not factor in the possibility of the contestant recovering enhanced damages or attorneys' fees. For instance, in the hypo above, we treated Son2's claim value as $33,333 even if Son2 invoked Section 859 and thus would have inherited a portion of the double damage award if he had won at trial. We did this, in part, because punitive damage and attorneys' fees awards are impossible to predict.

Table 2: Success Rate by Claim Type		
Type of Claim	N	Mean Success Rate[†]
Traditional Undue Influence	33	31.5%
New Undue Influence	48	51.9%[*] (p = 0.017)
Total	81	43.6%
Notes: (1) [†] T-tests compare disputes that feature traditional allegations of undue influence with those that have at least one new undue influence claim. (2) We were unable to calculate the success rate in forty settled cases. [*] $p < 0.05$, [**] $p < 0.01$, [***] $p < 0.001$		

Table 3 displays the results of a linear probability regression analysis with success rate as the dependent variable. It allows us to see how the fact that a contestant invokes a new undue influence statute impacts the average success rate, while controlling for factors such as the relationships involved, whether the challenged instrument was a will or a trust, and whether the parties hired lawyers or represented themselves. It indicates that cases with new undue influence allegations are correlated with higher mean success rates relative to disputes with no such claims. This difference is statistically significant (p = 0.019).[214]

Table 3: Success Rate Regression Analysis Linear Probability Model (Robust Standard Errors in Parenthesis)	
Case Type *(Reference Category is Cases With Only Traditional Undue Influence Claims)*	
New Undue Influence	0.251[*] (0.104)
Contestant Identity *(Reference Category is Spouse)*	
Child or Grandchild	-0.102

[214] The fact that an alleged wrongdoer does not have counsel is also associated with a higher and statistically significant success rate (p = 0.000). Conversely, trust disputes are linked to lower success rates relative to will contests in a fashion that is on the margin of statistical significance (p = 0.057).

	(0.214)
Parent, Sibling, or Niece/Nephew	-0.222 (0.228)
Other Relative	-0.214 (0.295)
Non-Relative	-0.077 (0.268)
Alleged Wrongdoer Identity *(Reference Category is Spouse)*	
Partner	-0.051 (0.365)
Child or Grandchild	0.075 (0.127)
Parent, Sibling, or Niece/Nephew	0.059 (0.168)
Other Relative	-0.025 (0.165)
Non-Relative	-0.036 (0.126)
Other Controls	
Trust Dispute	-0.176 (0.091)
Pro Se Contestant	-0.130 (0.203)
Pro Se Alleged Wrongdoer	0.608*** (0.910)
Constant	0.497* (0.222)
N	81
adj. R^2	0.032
Notes: (1) The regression sample is smaller than the overall dataset because some cases are missing information. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$	

Thus, California's new undue influence statutes appear to achieve their goals. On the one hand, they do not burden alleged undue influencers with devastating liability. Indeed, our review of a decade's worth of probate matters and seven years of trust litigation did not uncover a single award of enhanced remedies. But on the

other hand, the laws increase the expected payoff from contests.[215] In turn, this should encourage probate attorneys general to file cases and deter wrongdoing.[216]

2. The Family Protection Theory

As mentioned, scholars have shown that undue influence can privilege a decedent's family at the expense of non-relatives and unmarried partners.[217] This dark reputation hangs over the new undue influence movement like a thundercloud. But as this subsection explains, we did not find support for the family protection theory.

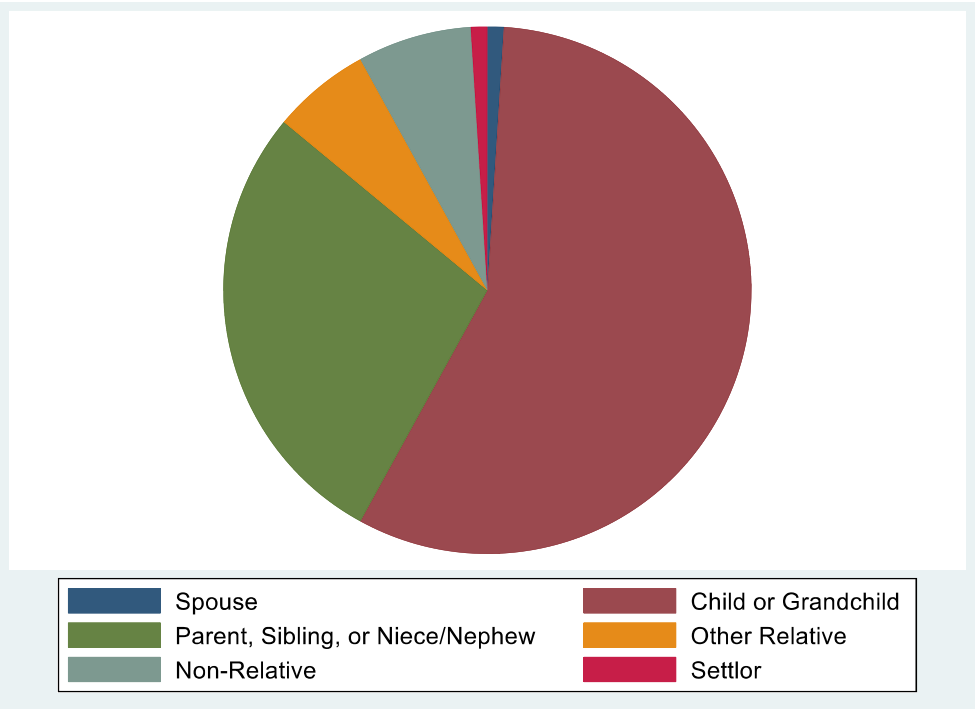
[215] Contestants were aware of the danger that an alleged undue influencer who was also a trustee or executor would try to use the decedent's property to pay their attorneys. California requires fiduciaries to bear their own litigation costs when they are defending their own interests rather than the validity of the underlying will or trust. *See* Terry v. Conlan, 33 Cal. Rptr. 3d 603, 616–17 (Cal. Ct. App. 2005); Whittlesey v. Aiello, 128 Cal. Rptr. 2d 742, 746–47 (Cal. Ct. App. 2002). Again and again, contestants included a passage in their opening pleadings invoking this rule and asking the court to enjoin the respondent from funding their defense with the estate. *See, e.g.*, Petition: (1) To Determine Validity of Purported Trust and Will and Impose Constructive Trust; (2) To Set Aside Donative Transfers Based on Undue Influence; (3) To Recover for Financial Abuse of a Dependent Adult; (4) For Recovery of Twice the Value of Property Wrongfully Taken; (5) For an Accounting; (6) Surcharging Trustee; (7) Instructing Respondents Not to Use Trust Funds for Defense at 20–21, *In re* Day, No. PTR-17-301077 (Cal. Super. Ct. Jul 21, 2007).

[216] We acknowledge that there are two other plausible explanations for the higher success rate in cases with new undue influence allegations. The first is that this finding stems from the quality of legal representation rather than the underlying law. Recall that not every challenger who could have invoked a new undue influence statute did so. *See supra* text accompanying notes 204–206. Some of these contestants seemed to have hired lower-tier attorneys who were unaware of the new legislation. In turn, this kind of half-hearted advocacy may have depressed the success rate in the pool of cases that only feature conventional undue influence claims. Second, contestants routinely joined both new and old undue influence assertions with other grounds to invalidate the will or trust. Indeed, only thirty-seven contestants pled some form of undue influence exclusively. The rest brought multiple claims, including incapacity (which appeared 100 times), fraud (37 times), improper execution or lack of intent (29 times), mistake (17 times), duress (7 times), and forgery (6 times). The success rate may also reflect the strength or weakness of these ancillary allegations.

[217] *See supra* text accompanying notes 78–83.

Overall, the parties' relationships to the victim varied with their role in the case.[218] Consistent with the family protection theory, contestants tended to be the decedent's relatives. Figure 1 reveals that 97 of these challengers were the decedent's children or grandchildren (56%), 46 were parents, siblings, or nieces/nephews (27%), 11 were non-relatives (6%), 10 were other relatives or step-relatives (6%), 7 were spouses (4%), and 2 were the property owners themselves (1%).[219]

Figure 1: Identity of Contestant



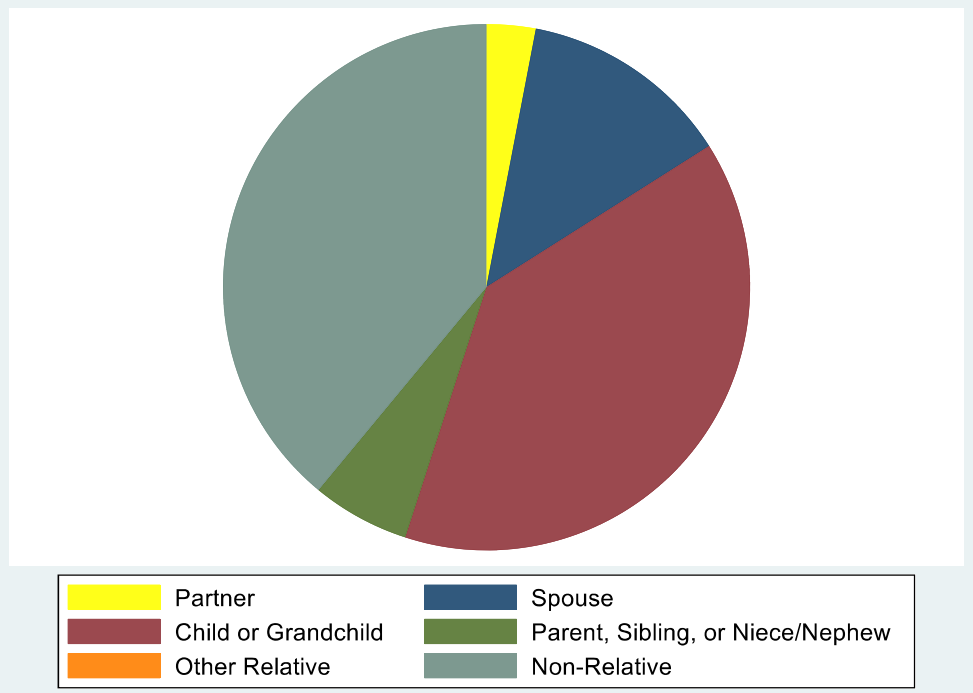
However, the alleged wrongdoers were more diverse. As Figure 2 demonstrates, 63 were the decedent's children or grandchildren (36%), 58 were non-relatives (33%), 23 were spouses (13%), 20 were parents, siblings, or

[218] We could not determine the relationship of two contestants and one wrongdoer.

[219] The fact that two contestants were the alleged victims themselves stems from the fact that California allows a claim for elder abuse involving a wrongfully procured gift, deed, and trust while the owner is still alive. *See* CAL. WELF. & INST. CODE § 15610.30(c) (applying "when an elder or dependent adult is deprived of any property right"). Notably, the statute extends to "testamentary bequest[s]" and thus also seems to cover the execution of a will. *Id.*; Bounds v. Superior Ct., 177 Cal. Rptr. 3d 320, 330 (Cal. Ct. App. 2014) (opining in *dicta* that the law governs "a testamentary bequest [that] has been made but the testator has not died"). This brings the elder abuse law into tension with the adage that "a will is ambulatory, so long as the testator lives, and only becomes effective at his death." *In re* Gaffken's Will, 197 A.D. 257, 259 (N.Y. App. Div. 1921), *aff'd*, 135 N.E. 971 (N.Y. 1922).

nieces/nephews (12%), 6 were unmarried romantic partners (4%), and 4 were other relatives or step-relatives (2%). In fact, the most common dynamic—which appeared in 40 contests (23%)—pitted children against children. Thus, although some accused undue influencers happened to be the testator or settlor's friends or relatives, many more were kin.

Figure 2: Identity of Alleged Wrongdoer



Similarly, as noted above, our regression analysis did not uncover a statistically significant link between the parties' ties to the decedent and the mean success rate.[220] Of course, such a correlation might emerge if we fed more cases into the equation. Likewise, the Bay Area's leftward slant might make its norms surrounding relationships unrepresentative.[221] Yet it is modestly encouraging that litigants who were members of the testator or settlor's family did not fare better than those who were not.

We also uncovered a surprising reason why family status may matter less than it once did. In four cases, a contestant not only accused a spouse of undue influence but asserted that the marriage was a sham. Two of these "weddings" occurred in

[220] *See supra* Part III.B.1.
[221] *See supra* text accompanying note 199.

secret,[222] one took place less than a week before the owner died,[223] and another happened two days before Adult Protective Services found that the settlor lacked mental capacity.[224] In these matters, the fact that the wrongdoer had formalized their relationship to the decedent fanned the flames of suspicion rather than insulated them from scrutiny.[225]

Finally, we uncovered anecdotal evidence that judicial attitudes have changed. Consider one of the most bitterly fought disputes in our dataset, *Estate of Narurkar*.[226] Vic Narurkar, a wealthy dermatologist, was close to his parents, Arvind and Leela.[227] But Vic was gay, and Arvind and Leela—who were "conservative"—did not approve of his longtime partner, Mike Hirner.[228] Five days before he died, Vic signed a will and a trust leaving his entire estate to Mike.[229] Arvind and Leela filed a will contest, a trust contest, and a civil claim for elder abuse through undue influence.[230] The matters were consolidated into a seventeen-day bench trial in

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[222] *See* Petition to Set Aside Trust, for Relief from Financial Elder Abuse, and for Declaratory Relief at 2, 6, 15, *In re* Matranga, No. PTR-19-302900 (Cal. Super. Ct. June 3, 2019); Petition for Return of Trust Property on the Bases of Financial Elder Abuse and Undue Influence; Constructive Fraud; Breach of Fiduciary Duty; Conversion; Physical Abuse at 2, *In re* Wakefield, No. PTR-20-303769 (July 22, 2020).

[223] *See* Petition: 1. To Determine Validity of Purported Trust and to Impose Constructive Trust; For Disqualification of Prohibited Transferee; 3. For Fraud; 4. For Mistake; 5. To Invalidate Marriage License at 2, *In re* Boyd, No. PCN-18-301763 (Cal. Super. Ct. Mar. 29, 2018) (alleging that the 25-year-old undue influencer procured a marriage license at a time when the 62-year-old victim "was physically unable to appear in person before the clerk").

[224] *See* Amended Petition to Invalidate Trust Amendment and Remove Trustee at 4, *In re* Webb, No. PTR-19-303084 (Cal. Super. Ct. Oct. 21, 2019).

[225] Recall that California's special presumption statute exempts the decedent's family. *See supra* text accompanying note 131. Concern that wrongdoers would try to use inauthentic marriages to fit within this safe harbor prompted the legislature to amend the law in 2019. *See* 2019 Cal. Legis. Serv. Ch. 10 (A.B. 328) (extending the presumption to some "care custodian[s] who commenced a marriage . . . with a transferor who is a dependent adult while providing services to that dependent adult . . . ."); *see also* CAL. PROB. CODE § 21380(a)(4). The number of allegedly sketchy marriages in our data suggests that this was a sensible change.

[226] *See generally* Proposed Statement of Decision, Estate of Narurkar, No. PES-19-302717 (Cal. Super. Ct. May 6, 2022) [hereinafter Narurkar Order].

[227] *See id.* at 5–7.

[228] Verified Response and Objection by Michael F. Hirner to First Amended Petition for Removal of Successor Trustee, Appointment of Successor Trustee, Compel Surrender of Trust Property, Order Award Attorneys' Fees and Costs, Compel Trustee Accounting, Violation of CAL WELF. & INST. CODE §§ et. seq.; Invalidate Trust for Undue Influence, and Invalidate Trust for Fraud at 8, *In re* Narurkar Trust, No. PTR-19-302798 (Cal. Super. Ct. Jul. 18, 2019); *see also* Narurkar Order, *supra* note 226, at 6–8.

[229] *See* Narurkar Order, *supra* note 226, at 5–6.

[230] *See* Will Contest and Grounds of Opposition to Probate of Purported Will, Estate of Narurkar, No. PES-19-302717 (Cal. Super. Ct. Apr. 29, 2019); First Amended Petition Re (1) Removal of Successor Trustee Michael F. Hirner; (2) Appointment Successor Trustee;

which thirty witnesses testified.[231] In an exhaustive opinion, the probate judge held that Arvind and Leela had failed to establish a presumption of undue influence and therefore entered judgment for Mike:

> [Mike] did not 'unduly' benefit. [Vic] chose to leave his assets to his partner of more than seventeen years. The evidence demonstrates that [Vic] and [Mike] were in a long-term, committed, and loving relationship. They called each other husband, jointly invested in a vacation home, and were a highly visible couple. There is nothing 'undue' about [Vic] leaving his estate to [Mike] . . . .[232]

Thus, although the facts resembled those of anti-canonical undue influence decisions such as *Estate of Kaufman*[233] and *Estate of Moses*,[234] the outcome was starkly different.

3. Jurisdictional Rivalry

Finally, our research also highlights one of the costs of the new undue influence. The same facts can give rise to a contest in probate and a civil claim for elder abuse, making cases unwieldy and subjecting litigants to dueling rules. We also explain why lawmakers and courts should resolve these conflicts by privileging probate's norms.

A comparison between the inheritance tort and a claim for elder abuse by undue influence can help frame this discussion. As noted above, the inheritance tort allows a plaintiff to cloak an undue influence contest in the guise of a civil cause of action and thus opt out of probate's restrictive procedural, evidentiary, and remedial traditions.[235] On a superficial level, elder abuse statutes are similar. Like the inheritance tort, alleging elder abuse through undue influence gives plaintiffs access to mechanisms that probate disallows, such as jury trials, punitive damages, and fee-shifting for prevailing parties.[236] However, on closer inspection, the jurisdictional rivalry created by elder abuse statutes poses a more intractable problem. There is a

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(3) Compel Surrender of Trust Property to Successor Trustee; (4) order Award Attorneys' Fees a[n]d Costs to Petitioner; (5) Surcharge Michael F. Hirner for Professional Fees and Costs; (6) Compel Trustee Accounting; (7) Violation of CAL WELF. & INST. CODE §§ et seq.; In Addition to Or in the Alternative to: (8) Invalidate Trust in its Entirety Based on Undue Influence; and (9) Invalidate Trust in its Entirety Based on Fraud, *In re* Narurkar Trust, No. PTR-19-302798 (Cal. Super. Ct. June 19, 2019); Plaintiffs' Complaint For: 1. Breach of Fiduciary Duty; 2. Violation of California Welfare & Institutions Code Section 15610.30 (Financial Elder Abuse); 3. Intentional Infliction of Emotional Distress; and 4. Negligence, Narurkar v. Hirner, No. CGC-19-575576 (Cal. Super. Ct. Apr. 29, 2019).

[231] *See* Narurkar Order, *supra* note 226, at 5.

[232] *Id.* at 21.

[233] *See supra* text accompanying notes 1–6.

[234] *See supra* text accompanying notes 68–76.

[235] *See supra* text accompanying notes 121–122.

[236] *See supra* Part II.B.

simple solution to the inheritance tort's end run around the probate system—a loophole that must be closed.[237] And indeed, many states now disavow the tort because it violates lawmakers' intent that inheritance disputes must be resolved under the Probate Code.[238] Yet in sharp contrast to the inheritance tort—a common law rule that thwarts the desires of the legislature—elder abuse by undue influence is a *creation* of the legislature. Thus, the claim and its tension with probate law are here to stay.

Two aspects of this clash appear to be especially problematic. The first is the lack of clarity about where contestants should file. In many states, including California, the division of power between probate judges and other courts has long been confusing.[239] Probate courts were once specialized tribunals that could only resolve contests and administer a decedent's assets.[240] Since then, some jurisdictions have overhauled their judicial systems by giving all trial courts the same designation (for instance, "superior courts") but assigning every wills, trusts, and estates-related matter to a specific judge (who sits in the "probate department").[241] Likewise, lawmakers have tried to minimize distinctions between courts by empowering probate judges to resolve issues that "are normally raised in a civil action" but are "related factually" to a pleading in probate.[242] Nevertheless, even after these reforms, there is no authoritative guidance on whether probate judges can hear a complaint

[237] *See supra* text accompanying notes 119–120.

[238] *See supra* text accompanying notes 119–120.

[239] States once varied tremendously in the powers they conferred upon probate judges. *See, e.g.*, Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 980 (1944) (observing that at one time "there was no general agreement as to the form of tribunal for the administration of estates").

[240] *See, e.g.*, Guess v. Going, 966 S.W.2d 930, 933 (Ark. Ct. App. 1998) ("A probate court lacks jurisdiction to determine contests over property rights and titles between the personal representative and third parties or strangers to the estate."); *In re* Bissinger's Estate, 388 P.2d 682, 687 (Cal. 1964) (quoting McPike v. Superior Ct. of San Francisco Cnty., 30 P.2d 17, 18 (Cal. 1934) (explaining that a probate "court has no other powers than those given by statute")); *cf.* Estate of Post, 234 Cal. Rptr. 3d 661, 667 (Cal. Ct. App. 2018) (holding that probate court lacked subject matter jurisdiction to decide dispute over life insurance policy in which the estate had no interest) (*depublished by* order of the Court).

[241] *See, e.g.*, Estate of Bowles, 87 Cal. Rptr. 3d 122, 129 (Cal. Ct. App. 2008) ("The superior court is divided into departments, including the probate department"); Ronald R. Volkmer, *Right to Jury Trial in Trust Cases*, 25 EST. PLAN. 429, 430 (1988) (noting that states have tried to merge "specialized probate courts . . . into the structure of the general jurisdiction trial courts").

[242] CAL. PROB. CODE § 855 (2001) (effective January 1, 2002); *In re* Baglione's Estate, 417 P.2d 683, 687 (Cal. 1966) (stating "a superior court sitting in probate that his jurisdiction over one aspect of a claim to certain property can determine all aspects of the claim"); State *ex rel.* Chester Twp. v. Grendell, 66 N.E.3d 683, 688 (Ohio 2016) ("A probate court's jurisdiction is broad, so as to enable it to order relief that may be required to fully adjudicate a matter.").

for elder abuse through undue influence.[243] And on the flip side, it remains to be seen whether courts of general jurisdiction can hear challenges to the validity of a will or a trust that accompany an elder abuse complaint.[244]

Against this hazy background, the contestants in our dataset did not take chances. They usually covered their bases by bringing a contest in probate that included an elder abuse allegation and filing a nearly identical complaint in civil court for elder abuse.[245] The matters then marched down parallel tracks, wasting resources. For example, after the probate judge in one case scheduled a crucial hearing, her civil counterpart asked the parties to file supplemental briefs explaining "what issues [will] remain for decision, if any, after the ruling."[246] Similarly, litigants often battled over whether to consolidate or stay the actions, halting the proceedings and compounding their cost.[247]

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[243] A recent unpublished and non-precedential California appellate court strongly implied that a probate judge can adjudicate a claim for elder abuse through undue influence. *See* Rey v. Rey, No. D073506, 2019 WL 1196734, at *5 (Cal. Ct. App. Mar. 14, 2019). The plaintiff had filed and then voluntarily dismissed with a probate action alleging that his sister unduly influenced their mom to amend her trust and will. *See id.* at *1. He had then tried to bring a civil complaint against his sister for elder abuse via undue influence. *See id.* at *2. The trial court dismissed the civil claims on the grounds of res judicata. *See id.* The court of appeals affirmed, reasoning that the plaintiff could have sought relief for elder abuse in the initial probate matter. *See id.* at *4–5. In addition, the court rejected the plaintiff's argument that he could not have pursued his elder abuse claim earlier because the probate court lacked jurisdiction to hear it. *Id* at *5. As the court explained, probate judges can resolve civil allegations that are "'factually related to the subject matter of [the probate] petition,'" and the plaintiff's "claim for financial elder abuse was intimately tied to his contentions in the original probate petition." *Id.* at *5–6 (quoting CAL. PROB. CODE § 855).

[244] *Compare* Harnedy v. Whitty, 2 Cal. Rptr. 3d 798, 807 (Cal. Ct. App. 2003) ("[E]ven in a county having a formal probate department, a nonprobate department *does not* lack fundamental jurisdiction over a probate matter."), *with* Saks v. Damon Raike & Co., 8 Cal. Rptr. 2d 869, 876 (Cal. Ct. App. 1992) (holding that trust beneficiaries improperly sued third parties in civil court because "the probate department . . . has exclusive subject matter jurisdiction over the [t]rust and proceedings concerning its internal affairs").

[245] *Compare* Complaint for Elder Abuse, Constructive Fraud, Conversion, Constructive Trust, Breach of Fiduciary Duty and Fraud Concealment, Gughemetti v. Cullen, No. CGC-16-552796 (Cal. Super. Ct. June 30, 2016), *with* Petition (1) to Invalidate Fourth Trust Amendment to Robert William Simpson 2004 Revocable Trust: Improper Donative Transfers to Successor Trustee and Care Custodian Due to Undue Influence; (2) Petition for Recovery of Trust Property and Accounting; (3) Constructive Trust; (4) Breach of Fiduciary Duty by Trustee and (5) Petition for Removal of Trustee, Accounting, and Appointment of Successor Trustee, *In re* Robert William Simpson 2004 Revocable Trust, No. PTR-16-299948 (Cal. Super. Ct. June 30, 2016).

[246] Docket Entry, Sleight v. Backer, No. CGC-19-579848 (Cal. Super. Ct. Sept. 30, 2020) (capitalization removed).

[247] *See* Notice of Motion to Consolidate at 2, Planel v. Silverman, No. CGC-16-554617 (Cal. Super. Ct. July 17, 2017) (arguing that merging the matters into a single probate case would "eliminate the expense of a second trial involving the same parties and facts and avoid the possibility that the two cases will yield inconsistent results"); Fifth Supplemental Brief

The second dilemma arising from the fact that undue influence can now be both grounds for a contest and a civil claim is determining the applicable limitations period. As noted, the timeline for challenging a will or trust can be as short as a few months, but the deadline for suing for elder abuse is several years.[248] Courts are already struggling with these irreconcilable deadlines, particularly in the relatively common situation where a plaintiff tries to file an elder abuse by undue influence claim after the statute of limitations for bringing a contest has expired.[249]

One solution would be to further the objectives of the new undue influence laws by promoting punishment and deterrence. Policymakers and courts could clarify that plaintiffs enjoy a choice of filing conjoined contests and elder abuse complaints either in the probate division or a court of general jurisdiction. In turn, this might expand the class of lawyers willing to represent contestants: wills and trusts practitioners may be more comfortable in probate court and civil litigators might prefer traditional trial courts. Similarly, judges could allow the longer statute of limitations in elder abuse legislation to govern for the purposes of a civil complaint even when a contestant is time-barred in probate. These approaches would tilt the scales towards probate attorneys general.

Nevertheless, it would be better to mandate a unitary procedure for litigating both types of claims in the probate division and under probate's rules and procedures. The brute truth is that complaints for elder abuse by undue influence are

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at 2, Sleight v. Backer, No. CGC-19-579848 (Cal. Super. Ct. Oct. 16, 2020) (asserting that the civil case should proceed). The probate court often stayed the civil matter. *See* Order Staying Action Pending Determination in Action No. PTR-18-302352, Scanlon v. Barboni, No. CGC-18-570472 (Cal. Super. Ct. Aug. 16, 2019); Order Re Motion to Stay Complaint for Court: (1) Order Invalidating Purported Amendment to Trust Based on Lack of Capacity, Undue Influence, and Fraud; (2) Financial Elder Abuse; (3) Conversion; (4) Unjust Enrichment; (5) Recovery of Personal Property; (6) Declaratory Relief and Constructive Trust; and (7) Cancellation of Instrument Pursuant to Stipulation, Gutierrez v. Lavell, No. CGC-18-572007 (Cal. Super. Ct. Aug. 21, 2019).

[248] *Compare* CAL. PROB. CODE § 8270, *with* CAL. WELF. & INST. CODE § 15657.7.

[249] Two unpublished and non-precedential California appellate cases have addressed the topic but point in opposite directions. *Compare In re* Estate of Kahanabetian, No. B225321, 2011 WL 989241, at *1 (Cal. Ct. App. Mar. 22, 2011) (holding that an heir's elder abuse through undue influence claim was untimely when he filed it "more than 120 days after the will was admitted to probate"), *with* Neyama v. Sugishita, No. H048190, 2022 WL 4230917, at *6 (Cal. Ct. App. Sept. 14, 2022) (opining in *dicta* that the four-year elder abuse statute of limitations governs a request for damages based on undue influence). In other states, where elder abuse laws are not yet fully developed, questions about which limitations period apply remain matters of first impression. In Tennessee, for example, the state legislature did not include a limitations period in its private right of action for elder financial exploitation. *See In re* Estate of Wair, No. M2014-00164-COA-R3-CV, 2014 WL 3697562, at *3–4 (Tenn. Ct. App. July 23, 2014). That omission led one court to hold, wrongly in our view, that the one-year limitations period applicable to personal torts runs from the time of the alleged undue influence, not the victim's death. *See id.* Because elders who are being unduly influenced are unlikely to be aware of the wrongdoing, the statute of limitations will likely expire before anyone sues. A better approach might toll the limitations period until the victim's death.

glorified contests. Indeed, unlike other forms of wrongdoing that can give rise to a complaint for elder abuse, like theft or neglect, undue influence is "a well-developed probate concept."[250] In turn, when an elder abuse claim sounds solely in undue influence, it should be heard in a forum that specializes in resolving such disputes.[251] This would funnel claims away from civil judges, who have little experience with contests, and towards probate judges, who regularly "distinguish between legitimate persuasion and 'undue influence' . . . in the context of nuanced family dynamics."[252] Moreover, giving probate courts exclusive jurisdiction over claims for elder abuse through undue influence would stop parties from filing redundant pleadings as they did in our data.[253]

Likewise, despite the plain language of elder abuse statutes of limitations, courts should use probate's shorter fuse for civil complaints that are, at bottom, contests. Lawmakers require contestants to act quickly for good reason: "probate is meant to provide a prompt, efficient, centralized way of resolving issues relating to a decedent's estate and getting the estate distributed."[254] It would make little sense to allow an elder abuse plaintiff to emerge from the woodwork years after the property has changed hands and call the underlying estate plan into question. For these reasons, states that recognize elder abuse via undue influence should require claimants to file in probate court within the period that governs challenges to the validity of the will or trust.

CONCLUSION

Some state legislatures have quietly repurposed the much-maligned doctrine of undue influence into a weapon to combat the plague of elder financial exploitation. These reforms, which we call the "new undue influence," pave the way for probate attorneys general to pursue undue influence allegations by creating new presumptions of undue influence, allowing undue influence to serve as the grounds for a civil claim for elder abuse, and forcing wrongdoers to pay enhanced damages and litigation costs. This Article is the first to catalogue these developments. It then

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[250] Youngblut v. Youngblut, 945 N.W.2d 25, 36 (Iowa 2020).

[251] Arguably, the same should be true for other elder abuse allegations that are also grounds for contesting a will or trust, such as fraud or duress. Anytime a plaintiff's elder abuse claim is nothing more than a beefed-up contest, it should be decided in probate under that system's doctrines and procedures.

[252] Goldberg & Sitkoff, *supra* note 19, at 338 (arguing against recognition of the inheritance tort because the civil litigation system "is ill-suited to posthumous reconstruction of the true intent of a decedent").

[253] *See supra* note 239 and accompanying text. Likewise, as mentioned above, some states only allow personal representatives to sue for elder abuse by undue influence; thus, if the personal representative also happens to be the alleged under influencer, a plaintiff must first win a petition to remove the personal representative before suing them for elder abuse. *See supra* notes 162–163 and accompanying text. Our proposal would allow the removal petition and the undue influence claims to be brought within the same forum.

[254] *Youngblut*, 945 N.W.2d at 35.

uses data from nearly 7,000 California court files to make three points. First, the new undue influence model has the potential to encourage parties to pursue cases without subjecting alleged undue influencers to excessive liability. Second, gloomy theories about the undue influence rule's disparate impact on non-relatives may be overbroad. And third, the new undue influence movement also has a dark side: it exacerbates jurisdictional rivalry between the probate and civil litigation systems for adjudicating certain claims.

TAX NUGGET
QTIP ELECTION QUAGMIRE, THE ESTATE OF MARTIN W. GRIFFIN, DECEASED T.C. MEMO 2025-47 (May 19, 2025)

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A QTIP trust is a type of marital deduction trust. QTIP is property in which the donee spouse is given a "qualifying income interest for life." To constitute such a qualifying income interest, the donee spouse must be entitled to all of the income from the property for life, payable annually or at more frequent intervals, or has a usufruct interest for life in the property. Furthermore, no person, including the surviving spouse, has the power to appoint any part of the property to anyone but the surviving spouse. Other requirements that must be met to have a valid QTIP trust are:

(a) The property must pass from the decedent; and

(b) The personal representative must elect QTIP treatment.

The QTIP election is irrevocable. You may file a supplemental estate tax return to elect QTIP treatment so long as the supplemental estate tax return is filed on or before the due date for filing the original estate tax return. If an estate tax return is not filed on or before the due date for filing the original estate tax return you are not barred from filing a QTIP election on a late estate tax return. The intentional late filing of an estate tax return and the making of a QTIP election is at times used as a strategy by tax advisors.

The primary reason that QTIP Trusts are popular is that the first spouse to die can direct the disposition of the remaining property of the QTIP Trust upon the death of the surviving spouse, and the surviving spouse will not have the power or control over the remaining QTIP trust property upon the survivor's death. A marital deduction is allowed for the qualified terminable interest property.

If there is no probate estate, the QTIP election is made by the person in actual or constructive possession of the QTIP property. The QTIP election is made on the federal estate tax return (Form 706 current version August 2025) by listing the QTIP property on Schedule M line 4 and including its value which reads "Enter QTIP property interest included in the gross estate that passes from the decedent to the surviving spouse and for which a marital deduction is claimed." Line 8 of Schedule M reads "Enter all other property passing to the surviving spouse not listed on line 4."

The relevant issue for purposes of this tax nugget in the Estate of Martin Griffin, Deceased was the failure to make a proper QTIP election on the estate's federal estate tax return. As a result, the decedent's testamentary specific bequest of two million dollars to an irrevocable trust did not qualify for QTIP treatment.

The Estate of Martin W. Griffin timely filed a Form 706, United States Estate (and Generation Skipping Transfer) tax return. The Tax Court in its opinion noted Schedule M. Bequests, etc., to Surviving Spouse, attached to the Form 706 version August 2019 "did not list any property from the estate as Qualified Terminal Interest Property (QTIP). The Schedule M, in the section for All other property (i.e., all non-QTIP), listed a specific bequest" to the [spouse] which in the version of the 706 that was filed was Part B instead of correctly listing it on Part A QTIP property. The Tax Court concluded the estate did not make a valid QTIP election on the Form 706 and thus the two million dollar bequest was not QTIP. The inability to claim a marital deduction for the two million dollar bequest caused a significant additional estate tax.