



PROBATE & ESTATE PLANNING SECTION

Attachments for

Friday, December 15, 2023

Committee on Special Projects

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

**Probate & Estate Planning Section of the
State Bar of Michigan**

You are invited to the December meetings of the Committee on Special Projects (CSP) and
the Council of the Probate & Estate Planning Section:

Friday, December 15, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.

When: Dec 15, 2023, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/join/register/tZMkcu6srDotEt3iRjMFy3rA7mFjic0Mgm_7

After registering, you will receive a confirmation email containing information about joining the meeting.

*If you are calling in by phone, email your name and phone number to Angela Hentkowski
ahentkowski@stewardsheridan.com, we will put your name in a zoom user list that
will identify you by name when you call in.*

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in person and remote meetings of the Council of the Probate & Estate Planning
Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects
(CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting
will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate
Planning Section page of the SBM website. Once those things are posted, you should be able to download
them from: <http://connect.michbar.org/probate/events/schedule>.

Richard C. Mills
Section Secretary

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**Officers of the Council
for 2023-2024 Term**

Office	Officer
Chairperson	James P. Spica
Chairperson Elect	Katie Lynwood
Vice Chairperson	Nathan R. Piwowarski
Secretary	Richard C. Mills
Treasurer	Christine M. Savage

**Council Members
for 2023-2024 Term**

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Glazier, Sandra D.	2021 (1 st term)	2024	Yes
Hentkowski, Angela M.	2021 (2 nd term)	2024	No
Mysliwiec, Melisa M. W.	2021 (2 nd term)	2024	No
Nusholtz, Neal	2021 (2 nd term)	2024	No
Sprague, David	2021 (1 st term)	2024	Yes
Wrock, Rebecca K.	2021 (1 st term)	2024	Yes
Mayoras, Andrew W.	2022 (2 nd term)	2025	No
Silver, Kenneth	2022 (2 nd term)	2025	No
Dunnings, Hon. Shauna L.	2022 (1 st term)	2025	Yes
Chalgian, Susan L.	2022 (1 st term)	2025	Yes
Shelton, Michael D.	2022 (1 st term)	2025	Yes
Borst, Daniel W.	2022 (1 st term)	2025	Yes
Augustin, Ernsacie	2023 (1 st term)	2026	Yes
Mallory, Alexander S.	2023 (1 st term)	2026	Yes
Anderton V, James F.	2023 (2 nd term)	2026	No
David, Georgette E.	2023 (2 nd term)	2026	No
Hilker, Daniel	2023 (2 nd term)	2026	No
Krueger III, Warren H.	2023 (2 nd term)	2026	No

Ex Officio Members of the Council

Christopher Ballard; Robert D. Brower, Jr.; Douglas G. Chalgian; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Shaheen I. Imami; Robert B. Joslyn; Mark E. Kellogg; Kenneth E. Konop; Marguerite Munson Lentz; Nancy L. Little; James H. LoPrete; Richard C. Lowe; David P. Lucas; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; David L.J.M. Skidmore; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Marlaine C. Teahan; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Standing Committees

Standing Committee	Mission	Chairperson	Members
Amicus Curiae	Review litigants’ applications and Courts’ requests for the Section to sponsor amicus curiae briefs in pending appeals cases relating to probate, and estate and trust planning, and oversee the work of legal counsel retained to prepare and file amicus briefs	Andrew W. Mayoras	Ryan P. Bourjaily Patricia Davis Angela Hentkowski Scott Kraemer Neil J. Marchand Kurt A. Olson David L.J.M. Skidmore Trevor J. Weston Timothy White
Annual meeting	Plan the Section’s Annual Meeting	James P. Spica [as Chair]	[Chair only]
Awards	Periodically make recommendations regarding recipients of the Michael Irish Award, and consult with ICLE regarding periodic induction of members in the George A. Cooney Society	Mark E. Kellogg [as immediate past Chair]	David L.J.M. Skidmore David Lucas [as 2nd and 3rd most recent past Chairs]
Budget	Develop the Section’s annual budget	Richard C. Mills [as immediate past Treasurer]	Christine M. Savage Nathan R. Piwowarski [as incoming Treasurer and immediate past Secretary]
Bylaws	Review the Section’s Bylaws, to ensure compliance with State Bar requirements, to include best practices for State Bar Sections, and to assure conformity to current practices and procedures of the Section and the Council, and make recommendations to the Council regarding such matters	David Lucas	Christopher A. Ballard John Roy Castillo Nancy H. Welber
Charitable and Exempt Organizations	Consider federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations, and make recommendations to the Council regarding such matters	Rebecca K. Wrock	Celeste E. Arduino Robin Ferriby Brian Heckman Richard C. Mills John McFarland Kate L. Ringler Matt Wiebe
Citizens Outreach	Provide opportunities for education of the public on matters relating to probate, and estate and trust planning	Kathleen M. Goetsch	Ernschie Augustin Kathleen Cieslik David Lucas Hon. Michael J. McClory Neal Nusholtz

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Committee on Special Projects	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Melisa M.W. Mysliwicz	[Committee of the whole]
Court Rules, Forms, & Proceedings	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Georgette E. David	JV Anderton Susan L. Chalgian Hon. Michael L. Jaconette Andrew W. Mayoras Hon. Michael J. McClory Dawn Santamarina Marlaine C. Teahan
Electronic Communications	Oversee all matters relating to electronic and virtual communication matters, and make recommendations to the Council regarding such matters	Angela Hentkowski	Michael G. Lichterman Richard C. Mills [as Secretary]
Ethics & Unauthorized Practice of Law	Consider matters relating to ethics and the unauthorized practice of law with respect to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Alex Mallory	William J. Ard Raymond A. Harris J. David Kerr Neil J. Marchand Robert M. Taylor Amy Rombyer Tripp
Guardianship, Conservatorship, & End of Life Committee	Consider matters relating to Guardianships and Conservatorships, and make recommendations to the Council regarding such matters	Sandra Glazier	William J. Ard Michael W. Bartnik Kimberly Browning Kathleen A. Cieslik Georgette E. David Kathleen M. Goetsch Elizabeth Sue Graziano Raymond A. Harris Hon. Michael L. Jaconette Hon. Michael J. McClory Hon. David M. Murkowski Kurt A. Olson Nathan R. Piwowarski Katie Lynn Ringler Hon. Avery Rose Dawn Santamarina David L.J.M. Skidmore James B. Steward Paul S. Vaidya Karen S. Willard

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Legislation Development and Drafting	Consider matters with respect to statutes relating to probate, and estate and trust legislation, consider the provisions of introduced legislation and legislation anticipated to be introduced with respect to probate, and estate and trust planning, draft proposals for legislation relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Robert P. Tiplady and Richard C. Mills	Aaron A. Bartell Howard H. Collens Georgette David Stephen Dunn Kathleen M. Goetsch Daniel S. Hilker Michael G. Lichterman David P. Lucas Katie Lynwood Alex Mallory Nathan Piwowarski Christine M. Savage James P. Spica David Sprague
Legislation Monitoring & Analysis	Monitor the status of introduced legislation, and legislation anticipated to be introduced, regarding probate, and estate and trust planning, and communicate with the Council and the Legislation Development and Drafting Committee regarding such matters	Michael D. Shelton	Stephen Dunn Brian K. Elder Elizabeth Graziano Daniel S. Hilker Katie Lynwood David Sprague
Legislative Testimony	As requested and as available, the Members of the Section will give testimony to the Legislature regarding legislation relating to probate, and estate and trust planning	Melisa M.W. Mysliwiec [as CSP Chair]	[Various Section Members]
Membership	Strengthen relations with Section members, encourage new membership, and promote awareness of, and participation in, Section activities	Angela Hentkowski	Ernschie Augustin Susan L. Chalgian Kate L. Ringler
Nominating	Nominate candidates to stand for election as the officers of the Section and the members of the Council	David P. Lucas [as most senior immediate past Chair]	David L.J.M Skidmore Mark E. Kellogg [as 1st and 2nd most recent past Chairs]
Planning	Periodically review and update the Section’s Plan of Work	James P. Spica [as Chair]	Katie Lynwood Nathan Piwowarski Richard C. Mills Christine M. Savage Mark E. Kellogg [as Officers and immediate past Chair]

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Probate Institute	Work with ICLE to plan the ICLE Probate and Estate Planning Institute	Nathan Piwowski [as Vice Chair]	[Chair only]
Real Estate	Consider real estate matters relating to probate, and estates and trusts, and make recommendations to the Council regarding such matters	Angela Hentkowski	Carlos Alvarado-Jorquera Jeffrey S. Ammon JV Anderton William J. Ard Leslie A. Butler Patricia Davis J. David Kerr Angela Hentkowski Michael G. Lichterman Melisa M.W. Mysliwec Michael D. Shelton David Sprague James B. Steward
State Bar & Section Journals	Oversee the publication of the Section’s Journal, and assist in the preparation of periodic theme issues of the State Bar Journal that are dedicated to probate, and estates and trusts	Melisa M.W. Mysliwec, Managing Editor	Diane Kuhn Huff Nancy L. Little Neil J. Marchand Richard C. Mills Kurt A. Olson Molly P. Petitjean Rebecca K. Wrock
Tax	Consider matters relating to taxation as taxation relates to probate, and estates and trusts, and make recommendations to the Council regarding such matters	JV Anderton	Daniel Borst Jonathan Beer Mark DeLuca Stephen Dunn Robert Labe John McFarland Neal Nusholtz Christine M. Savage

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Standing Committee.

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Ad Hoc Committees

Ad Hoc Committee	Mission	Chairperson	Members
Assisted Reproductive Technology	Review the 2008 Uniform Probate Code Amendment for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction, and make recommendations to the Council regarding such matters	Nancy H. Welber	Christopher A. Ballard Edward Goldman Nazneen Hasan Christina Lejowski James P. Spica Lawrence W. Waggoner
Electronic Wills	Review proposals for electronic wills, including the Uniform Law Commission’s draft of a Uniform Law, and make recommendations to the Council regarding such matters	Kathleen Cieslik	Kimberly Browning Georgette David Sandra Glazier Douglas A. Mielock Neal Nusholtz Christine M. Savage James P. Spica
Fiduciary Exception to the Attorney-Client Privilege	Consider whether there should be some exception to the rule that beneficiaries of an estate or trust are entitled to production of documents regarding the advice given by an attorney to the fiduciary, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	Aaron A. Bartell Ryan P. Bourjaily
Nonbanking Entity Trust Powers	Consider whether there should be legislation granting trust powers to nonbanking entities, and make recommendations to the Council regarding such matters	James P. Spica and Robert P. Tiplady	JV Anderton Laura L. Brownfield Kathleen Cieslik Elise J. McGee Mark K. Harder Richard C. Mills Carol A. Sewell Joe Viviano
Premarital Agreements	Consider whether there should be legislation regarding marital property agreements, and	Christine M. Savage	Daniel W. Borst Georgette David Stephen Dunn Sandra Glazier Angela Hentkowski David Sprague
Uniform Community Property Disposition at Death Act	Consider the Uniform Community Property Disposition at Death Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Kathleen Cieslik Richard C. Mills Christine M. Savage David Sprague Rebecca Wrock

Undue Influence	Consider the definition of undue influence and attendant evidentiary presumptions, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Sandra Glazier Hon. Michael L. Jaconette Warren H. Krueger, III John Mabley Andrew W. Mayoras Hon. David Murkowski Kurt A. Olson David L.J.M. Skidmore
Uniform Fiduciary Income & Principal Act	Consider the Uniform Fiduciary Income and Principal Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	James P. Spica	Anthony Belloli Kathleen Cieslik Marguerite Munson Lentz Richard C. Mills Robert P. Tiplady Joe Viviano
Uniform Partition of Heirs Property Act	Consider the Uniform Partition of Heirs Property Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Marguerite Munson Lentz Alex Mallory Elizabeth McLachlan Christine Savage David Sprague Rebecca Wrock
Various Issues Involving Death and Divorce	Should EPIC be changed so that a pending divorce affects priority to serve in a fiduciary position; Should Council explore whether EPIC should be changed so that a pending divorce affects intestacy, elective share, exemptions and allowances, etc. Should "affinity" be defined to prevent elimination of stepchildren's gifts by operation of law after divorce or, instead, should there be an exception allowing gifts to stepchildren on a showing of, Perhaps, clear and convincing evidence demonstrating that the Settlor would not have intended the omission of the stepchild?	Daniel Borst Sean Blume	Georgette David Hon. Shauna Dunnings Katie Lynwood Andy Mayoras Elizabeth Siefker

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Ad Hoc Committee.

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Liaisons

Association	Liaison
Alternative Dispute Resolution Section	John Hohman
Business Law Section	Mark E. Kellogg
Elder Law and Disability Right Section	Angela Hentkowski
Family Law Section	Anthea E. Papista
Institute of Continuing Legal Education	Lindsey DiCesare and Rachael Sedlacek
Law Schools	Savina Mucci
Michigan Bankers Association	David Sprague
Michigan Legal Help/Michigan Bar Foundation	Kathleen Goetsch
Michigan Probate Judges Association	Hon. Shauna Dunnings
Probate Registers	Ryan J. Buck
Real Property Law Section	Kenneth Silver
Supreme Court Administrative Office	Georgette E. David
State Bar	Jennifer Hatter
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

The mission of each Liaison is to develop and maintain bilateral communication between his or her association and the Probate and Estate Planning Section of the State Bar of Michigan on matters of mutual interest and concern.

CSP Materials

**MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE
COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN**

**The Committee on Special Projects, or CSP, is our Section's
"committee of the whole." The CSP flexibly studies, in depth, a
limited number of topics and makes recommendations to Council.
All Section members are welcome to participate and are able to vote.**

AGENDA

Friday, December 15, 2023

9:00 – 10:00 AM

In person meeting at the University Club of Michigan State University
3435 Forest Road, Lansing, MI 48910

Remote participation by Zoom is available. Register in advance at:
https://us02web.zoom.us/meeting/register/tZMkcu6srDotEt3iRjMFy3rA7mFjic0Mgm_7

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, please email your name and phone number to Angela Hentkowski at ahentkowski@stewardsheridan.com. We will put your name in a Zoom user list that will identify you by name when you call in.

Ken Silver – Undue Influence Ad Hoc Committee – 1 hour

Re: Presumption of Undue Influence

The Committee prepared a White Paper, attached as Ex 1, which sets forth a summary of the law on undue influence in Michigan and application of the presumption of undue influence, a discussion of the Restatement of Property definition of undue influence, a summary of how other states are addressing these issues, a summary of the science of undue influence, a summary of the pros and cons of the Committee's suggested statutory approach, and the Committee's proposed statutes defining undue influence and clarifying how the presumption of undue influence would be established and applied.

The Committee requests an in-depth discussion related to the presumption of undue influence in Michigan, or what it should be if a statutory framework is pursued legislatively. At conclusion of the discussion, the Committee requests that CSP provide its recommendation to the Committee as to how it desires the presumption of undue influence be applied in Michigan so that the Committee can continue its work.

EXHIBIT 1

Undue Influence Ad Hoc Committee

Committee's White Paper

Ad Hoc Committee on Undue Influence¹

Undue Influence and the Presumption of Undue Influence

Introduction

Over the course of the past few years, the Ad Hoc committee on Undue Influence was directed to work on drafting and recommending proposed legislation with respect to the definition of undue influence and the application of the presumption of undue influence in certain circumstances. After numerous Committee meetings, including meetings with probate judges and feedback received from the Section, our Committee prepared a proposed draft of statutes defining undue influence and clarifying how the presumption of undue influence would be established and applied. The feedback obtained from Council and the Probate Section in general indicates that reaching a consensus on these two issues may be difficult.

Despite the controversy, the Committee believes that work is still needed. The oft-cited definition for undue influence in Michigan from *Kar v Hogan*, in turn incorporates a definition, which dates back to the 1912 case, *Nelson v Wiggins*². Studies have identified a concern that historical cases have fallen behind the science of persuasion often identified in cases where undue influence is found to have occurred.³ Elder financial abuse has been called “the crime of the 21st century”⁴. Yet, in Michigan courts, judges and practitioners are finding greater confusion in the case law of undue influence, particularly as to the application of the presumption of undue influence. This led to the removal of the standard civil jury instruction on the presumption of undue influence in 2014, which to date has not been replaced.

Given the Committee’s perception that Council will have a difficult time reaching an agreement with regard to the proposed statutes, our Committee determined we could add value to the discussion by providing the Section with this White Paper explaining the state of the law and science with respect to undue influence as well as an outline of the pros and cons of our proposed statutory approach. If nothing else, we felt that the rest of the Probate Section could benefit from our work and that we could provide a worthwhile resource for those who practice in the area. Towards that end, this White Paper covers the following topics:

¹ Committee members who helped draft this white paper are Kenneth Silver, Sandra Glazier, Warren Krueger, John Mabley, and Andy Mayoras. Kurt Olson also participated. Significant portions of this paper represent excerpts from Glazier, Dixon and Sweeney, *Undue Influence and Vulnerable Adults*, ABA Book Publishing 2020, or additional legal research by Sandra D. Glazier in surveying statutes, cases and scientific studies and papers published in the area of undue influence and the presumption.

² *Kar v. Hogan*, 172 Mich 191; 137 NW 623 (1912)

³ See Dominic J. Campisi, Evan D. Winet, & Jack Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTED L.J. 371-380 (2018) (citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

⁴ Kristen M. Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, 28 Prob. & Prop. (2014).

- A. A brief summary of the state of the law on undue influence in Michigan and the application of the presumption.
- B. A brief discussion of the Restatement of Property definition of undue influence.
- C. A summary of how other states are addressing these issues.
- D. A summary of the science of undue influence
- E. A summary of the Pros and Cons of the Committee’s suggested statutory approach.
- F. The proposed Statutes

The members of the Committee seek instruction as to whether, upon submission of this White Paper, the work of our Committee should be deemed concluded.

A. Summary of the Law in Michigan

1. Definition of Undue Influence

For purposes of review, in Michigan and in many other states, there is no statutory definition of undue influence. The trend appears to be moving towards defining undue influence by statute. In the probate and estate planning context undue influence is commonly defined as influence upon the testator or settlor (hereafter “settlor”) of such a degree that it overpowered the individual’s free choice and caused the individual to act against his/her free will and to instead act in accordance with the will of the influencer. It often results from the abuse of a confidential or special relationship.

In Michigan, to establish undue influence, it must be shown that the settlor was subject 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. *Kar v Hogan* 399 Mich 529, 537 (1976). This definition, including a very brief explanation of what is *not* undue influence, is set forth in Michigan Model Civil Jury Instructions 170.44 pertaining to will contests and instruction 179.10 pertaining to Trusts. These two instructions were provided as part of the CSP materials on June 5, 2020. But undue influence is not limited to wills and trusts, and the definition set forth in these two jury instructions should be updated. Undue Influence can apply to any donative transfer. There is a large body of case law applying the doctrine in many different circumstances. A recitation of these cases is beyond the scope of this paper.⁵

A review of Michigan cases (published and unpublished) reflects that many other actions beyond threats, misrepresentations, undue flattery, fraud or physical or moral

⁵ For an excellent discussion of the definition of undue influence, development of the science concerning vulnerable adults and the presumption of undue influence see *Undue Influence and Vulnerable Adults* by Sandra Glazier, Thomas Dixon and Thomas Sweeney, published by the Real Property, Trust and Estate Law Section of the ABA, 2020. Sandra Glazier was a participant in our committee.

coercion have been recognized as resulting in persuasive tactics that have been found to be undue. It has been recognized that undue influence is generally a process pursuant to which the wrongdoer is able to exert influence which is so great that it overpowers the settlor's free will and results in the settlor disposing of his assets in a fashion contrary to what would truly represent his intentions had the influence not occurred. *In re Spillette Estate*, 352 Mich 12, 17-18 (1958). It is a course of conduct that essentially supplants the will of the influencer for that of the settlor. *Kar v Hogan*, 399 Mich 529, fn 9; 251 NW 2d 77 (1976). Fraud need not be an element. *In re Estate of Karmey*, 468 Mich 68, 73; 659 NW 2d 796 (1976). Undue Influence can be manifest through a variety of different forms of conduct. Examples include, but are by no means limited to, situations whereby a caregiver takes advantage⁶ or one family member poisons a grantor's relationship against other members of the family⁷. Further, undue Influence can apply to any donative transfer. Since there is a large body of case law applying the doctrine and in many different circumstances, a recitation of these cases is beyond the scope of this paper.⁸ Nevertheless, it is the opinion of the Committee that it is time to update the definition using this large body of case law and advances in the science as discussed further below.

2. Presumption of Undue Influence

Under Michigan law a presumption of undue influence exists when a) there is a confidential or fiduciary relationship between the alleged influencer and the alleged victim of influence, b) the alleged influencer benefits from a change in a donative document and c) the alleged influencer had an opportunity to influence the alleged victim. *Kar v Hogan* 399 Mich 529 (1976). In *In re Bailey Estate*, 186 Mich 677, 691 (Mich 1915) the court recognized that "where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence". The presumption is evidentiary in nature and not statutory. Rule 301 of the Michigan Rules of Evidence provides;

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Juries, judges (and practitioners) have difficulty distinguishing the shifting burden of production from the burden of persuasion that remains, under Michigan law, with the person contesting the transaction or instrument.

The Michigan Court of Appeals *In re Estate of Mortimore*, unpublished opinion of the Michigan Court of Appeals issued May 17, 2011 (Docket No. 297280), 2011

⁶ *In re Rosa's Estate*, 210 Mich 628, (1920); *In re Leone Estate*, 168 Mich App 321 (1988).

⁷ *In re Hillman's Estate*, 217 Mich 142 (1921).

⁸ For an excellent discussion of the definition of undue influence, development of the science concerning vulnerable adults and the presumption of undue influence see *Undue Influence and Vulnerable Adults* by Sandra Glazier, Thomas Dixon and Thomas Sweeney, published by the Real Property, Trust and Estate Law Section of the ABA, 2020. Sandra Glazier was a participant in our committee.

WL 1879737, leave denied, 491 Mich 925 (2012) determined that a preponderance of the evidence was necessary to rebut the presumption once established. This decision seems to be contrary to MRE 301 which requires that the burden of proof not shift once a presumption is established.⁹

Justice Young in his dissent of the Supreme Court's decision denying leave to appeal in *Mortimore* stated that "a will's proponent need only come forth with "substantial evidence" in rebuttal" once the presumption is established. *Id.* What constitutes "substantial evidence" was not addressed nor defined by Justice Young. Generally, the impact of the presumption and what level of evidence is necessary to rebut the presumption is an issue often litigated in Michigan and is the source of substantial confusion among litigants, counsel, judges and especially juries. It was the intent of our Committee to try to find a way to alleviate this confusion.

Six years ago, Council attempted to address the confusion with a recommendation to the Supreme Court's Committee on Model Jury Instructions that the standard jury instructions for will and trust contests concerning undue influence be modified to incorporate an instruction in the event the contestant sought to establish a presumption of undue influence. The proposed revisions were never adopted. No effort was made to update or adjust the definition of undue influence. To this day the confusion with respect to how to apply the presumption continues.

Proposed MCL 700.2725 (Exhibit A) clarifies that without a finding of undue influence a document is presumed to be valid. It is up to the contestant of the document or gift to demonstrate that the transaction was the result of undue influence by a preponderance of the evidence. The statute, as proposed, codifies how the presumption is established, consistent with Michigan law as it presently exists, but states that once established the burden shifts to the proponent to prove, by a preponderance of the evidence, that the transaction was NOT the result of undue influence. We also attempted to codify what constitutes a confidential or fiduciary relationship, also consistent with a large body of case law on point.

Application of the Presumption and flipping the burden of proof onto the proponent of the document, rather than the party objecting to the document (or transaction) may be a departure from current Michigan law, but it is also likely consistent with what actually occurs at the trial level given the difficulty judges, practitioners and juries may have in separating the burden of production from the burden of persuasion. We believe that the distinction between the burden of production and the burden of persuasion is too subtle to be consistently applied in practice. The proposed statute has the distinct advantage of clarity. Other states approach the issue from a variety of different

⁹ As noted by Justice Young in his *Mortimore* dissent from the decision of the Supreme Court denying leave to appeal, once the presumption is established, requiring the proponent of a document to prove by a preponderance of the evidence that undue influence does not exist, improperly shifts the burden of proof. He also noted that the *Mortimore* decision appears contrary to the Supreme Court's decision in *Widmayer v Leonard*, 422 Mich 280 (1985) holding that "once a presumption is created that presumption is a procedural device which regulates the burden of going forward with the evidence and is dissipated when substantial evidence is submitted by the opponents to the presumption." *Id.* @ 286.

viewpoints. Some states, like Florida and California¹⁰ flip the burden of proof, as we are suggesting. States such as Oklahoma suggest that once established, the presumption may be overcome if the individual obtained independent advice with respect to the transaction at issue.¹¹ California takes this approach as well, requiring a certificate of independent advice to avoid the presumption.

B. Restatement of Property Definition of Undue Influence

To help place the discussion of undue influence, as well as the presumption in proper historical context, we thought a review of how the Restatement of Property views the issue would be helpful.

1. Undue Influence, Generally

The Restatement (Third) of Property (Wills and Donative Transfers) § 8.3 (the “Restatement”) provides a definition for undue influence and a framework for litigating an undue influence claim. The Restatement provides:

(a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.

(b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.

Under the Restatement, the party contesting the donative transfer (the “contestant”) has the burden of establishing undue influence.¹² The Restatement acknowledges that the contestant must usually rely on circumstantial evidence to establish the exertion of undue influence because direct evidence of a wrongdoer's conduct and the donor's subservience is rarely available.¹³ Circumstantial evidence is sufficient to raise an inference of undue influence under the Restatement if the contestant proves that: (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.¹⁴

Although the Restatement recognizes four elements, it primarily focuses on susceptibility. The other three factors: opportunity to exert undue influence, the alleged wrongdoer's disposition to exert undue influence, and a result appearing to be the effect of undue influence, are not addressed in detail by the Restatement.

¹⁰ Florida Statute §733.107; Cal. Prob. Code §21380 et. seq.

¹¹ *White v Palmer*, 1971 OK 149. In California, the statutory presumption may not apply when a certificate of independent review is provided. Cal. Prob. Code §21384.

¹² Restatement, comment b.

¹³ Restatement, comment e.

¹⁴ Restatement, comment e.

Susceptibility focuses on the donor's physical and mental condition, specifically the donor's age, inexperience, dependence, physical or mental weakness, or any other factor that would make the donor susceptible to undue influence.¹⁵

2. The Presumption of Undue Influence

The presumption of undue influence, in some form, has been found to exist in all states, in recognition that in certain situations there is a strong likelihood that wrongdoing has occurred, such that when those circumstances are demonstrated to exist, a presumption will be triggered which will shift the onus (at least to some extent) to show that no wrongdoing occurred.¹⁶

a. Under the Restatement

The Restatement recognizes a presumption of undue influence. The presumption arises if: (1) a confidential relationship existed between the alleged wrongdoer and the donor, and (2) there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.

i. Confidential Relationship¹⁷

The term "confidential relationship" encapsulates three different types of relationships: (1) fiduciary, (2) reliant, or (3) dominant subservient. In some cases, a relationship may fall into more than one of those three categories.

ii. A fiduciary relationship is one in which the confidential relationship arises from a settled category of fiduciary obligation.¹⁸ Examples include attorney-client, agent under power of attorney and principal, or guardian and ward.

iii. A reliant relationship is one based on special trust and confidence.¹⁹ One example is a relationship in which the donor was accustomed to being guided by the judgment or advice of the alleged wrongdoer or was justified in placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor.²⁰

¹⁵ Restatement comment e.

¹⁶ See, *Undue Influence California Report* 2010, supra, at p. 101-102, citing Meyers, 2005

¹⁷ Michigan has defined a fiduciary relationship 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 relationship – 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. *In re Karmey Estate* 468 Mich 68, 75 (2003).

But has also recognized that confidential relationships can embrace both technical fiduciary relationships as well as more informal relationship that can exist whenever one man trusts in and relies upon another. *Vant Hof v Jemison*, 291 Mich 385, 393 (1939).

¹⁸ Restatement, comment g.

¹⁹ Restatement, comment g.

²⁰ Restatement, comment g.

A relationship between a financial adviser and client or a doctor and patient would fall within this category of confidential relationship.

iv. Finally, a dominant-subservient relationship exists where a donor is subservient to the alleged wrongdoer's dominant influence. Examples include a caregiver and an ill or feeble donor or an adult child and an ill or feeble parent.²¹

b. Suspicious Circumstances

The Restatement requires that suspicious circumstances accompany a confidential relationship to give rise to the presumption of undue influence. Such circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor.²²

The following factors may be considered in determining whether suspicious circumstances exist:

- (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence;
- (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute;
- (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute;
- (4) whether the will or will substitute was prepared in secrecy or in haste;
- (5) whether the donor's attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer;
- (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor;
- (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her property; and
- (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.²³

²¹ Restatement, comment g.

²² Restatement, comment h.

²³ Restatement, comment h.

3. Rebutting the Presumption under the Restatement

If a contestant establishes the elements of the presumption of undue influence, the burden of going forward with the evidence shifts to the proponent of the donative transfer (the “proponent”).²⁴ The burden of persuasion, however, always remains with the contestant. If the proponent does not present evidence to rebut the presumption, judgment as a matter of law in favor of the contestant is appropriate. The Restatement is silent on the evidentiary burden that a proponent must satisfy to rebut the presumption.

C. How Other Jurisdictions Address the Issues

Mississippi does not have a statutory presumption of undue influence. Nonetheless, in *Stover v. Davis*,²⁵ Mississippi’s Supreme Court held that once a presumption of undue influence arising out of a confidential relationship coupled with suspicious circumstances is established, the proponent of the instrument must rebut the presumption by clear and convincing evidence.

New Jersey may apply two different standards, depending upon the circumstances presented in order to rebut the presumption of undue influence.

Ordinarily, the burden of proving undue influence falls on the will contestant. Nevertheless, we have long held that if the will benefits one who stood in a confidential relationship to the testator and if there are additional circumstances, the burden shifts to the party who stood in that relationship to the testator. Suspicious circumstances, for purposes of this burden shifting, need only be slight. When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption. Although that burden of proof is usually discharged in accordance with the preponderance of the evidence standard, if the presumption arises from “a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney,” the presumption must instead be rebutted by clear and convincing evidence.²⁶

But it appears, in New Jersey, that when the suspicious circumstances are more than “slight” it may become incumbent upon the proponent of the transaction to rebut the presumption by clear and convincing evidence under some circumstances. The resulting legislation required the establishment of further study of predatory alienation. That bill defined predatory alienation as

extreme undue influence on, or coercive persuasion or psychologically damaging manipulation of another person that results in physical or emotional harm or the loss of financial assets, disrupts a parent-child

²⁴ Restatement, comment f.

²⁵ *Stover v. Davis*, 268 So. 3d 559 (Miss. 2019).

²⁶ *In re Estate of Stockdale*, 196 N.J. 275, 953 A.2d 454 (2008).

relationship, leads to deceptive or exploitative relationship, or isolates the person from family and friends.²⁷

And defined undue influence as

persuasion that overpowers a person's will, or that otherwise exerts control over a person, so as to prevent the person from acting intelligently, voluntarily, and with understanding, and which effectively destroys the person's willpower and constrains the person to act in a manner that they would not have done in the absence of such persuasion.

Arkansas. In Arkansas, the appellate court found a potentially higher standard of "beyond a reasonable doubt", generally reserved for criminal cases, might apply in certain circumstances. In *Lenderman v. Martin*²⁸ the court held that:

[W]hen the burden shifts from the contestants of the testamentary document to the proponents of it, such as where there is a presumption of undue influence, the proponent can show by clear preponderance of the evidence that she took no advantage of her influence and that the testamentary gift was a result of the testator's own volition. However, where a beneficiary of a testamentary instrument actually drafts or procures it or there is a confidential relationship so dominating or so overpowering as to overcome the testatrix's free will, the proponent of the instrument must

²⁷ PL 2017, Chapter 64 <https://legiscan.com/NJ/text/S2562/2016>. An amendatory act was introduced in 2020, following the study. It reflects that:

- a. Predatory alienation occurs whenever a person or group uses predatory behaviors, such as entrapment, coercion, and undue influence, to establish a relationship with a victim and isolate the victim from existing relationships and support systems, including family and friends, with the goal of gaining and retaining sweeping control over the victim's actions and decisions.
- b. Predatory alienation tactics and other forms of undue influence are commonly used by cults, religious sects, gangs, extremist groups, human traffickers, sexual predators, domestic abusers, and other similar persons and groups, as a means to recruit members, carry out crimes, spread their belief systems, advocate their political agendas, or simply impose their will on, and exert power, control, and supremacy over, victims.
- c. There is currently a lack of adequate legal or other protection for individuals in the State who are victims of predatory alienation or other undue influence.
- d. The protection of individuals from predatory alienation and undue influence requires a delicate balancing of interests, particularly in the case of vulnerable or victimized adults. Specifically, while the State and the family members or friends of an individual may have an interest in protecting the individual from the physical and mental abuse, domestic violence, manipulation, and control that is associated with predatory alienation and other undue influence, this paternal interest must be balanced against the individual's interest in maintaining personal autonomy and the ability to make independent life decisions.
- e. Compulsive third party influence and control are difficult to establish that an individual has fallen victim to coercive or compulsive tactics, even in cases where other forms of abuse have contributed to, or have facilitated, the victimization.
- f. The American Civil Liberties Union has concluded that, unless physical coercion or threats are used, there is no legal justification for those who have reached the age of maturity to be subjected to mental incompetency hearings, conservatorships, or temporary guardianships on the basis that they have become unwitting victims of predatory alienation or other undue influence.
- g. By establishing a system that counters the effectiveness of predatory alienation and other types of undue influence through the use of front-line prevention and consensual response efforts, such as extensive public education, proactive screening practices, the provision of therapeutic consultation to the families and friends of victims, and the provision of consensual counseling and treatment to the victims themselves, the State can properly balance the interests at stake in this area, thereby ensuring that its citizens will be better protected from predatory alienation and undue influence while continuing to exercise personal autonomy in their own lives.

²⁸ *Lenderman v. Martin*, 1999 WL 407519 (Ark. Ct. App. 1999)

prove beyond a reasonable doubt that the decedent had both the mental capacity and freedom of will to make the will legally valid.²⁹

Vermont also relies on case law to shift the burden of persuasion to a proponent of a transaction once a presumption of undue influence has been established.³⁰

In **Ohio**, a clear and convincing standard is required to rebut a presumption of undue influence, once established. In *Modie v. Andrews*,³¹ the Ohio appellate court analyzed the shifting burdens of proof in undue influence cases as follows:

A valid inter vivos gift requires that the donor (1) intends to make a gift of the property immediately, (2) effects a delivery of the property, and (3) relinquishes all control and dominion over the property. "The burden of showing that an inter vivos gift was made is on the donee by clear and convincing evidence."

... The elements of undue influence include the following: (1) a susceptible party; (2) another's opportunity to exert influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such improper influence." "In determining whether a particular influence brought to bear upon a [donor] was 'undue,' the focus is whether the influence was reasonable, given all the prevailing facts and circumstances."

"Where a fiduciary or confidential relationship exists between the donor and the donee, the transfer is regarded with suspicion that the donee may have brought undue influence to bear upon the donor." In such a case, a presumption of undue influence arises, and the donee bears the burden going forward and showing, by a preponderance of the evidence, that the gift was free from undue influence. Once the donee makes such a showing, the burden of ultimately demonstrating undue influence, by clear and convincing evidence, must be met by the party challenging the gift.³²

In **Pennsylvania**, once the presumption of undue influence has been established, it appears that the proponent can prove the validity of the challenged disposition by clear and convincing evidence that it was not the result of undue influence.³³

In **Oklahoma**, once the presumption of undue influence has been established, the burden of proof shifts to the party seeking to take advantage of the contested disposition and requires that they "rebut the presumption by showing that the confidential relationship

²⁹ Id. internal citations omitted.

³⁰ *Carvalho v. Estate of Carvalho*, 2009 VT 60, 186 Vt. 112, 978 A.2d 455.

³¹ *Modie v. Andrews*, C.A. NO. 19543, 2000 Ohio App. LEXIS 3333 (Ct. App. July 26, 2000).

³² Id.

³³ *In re Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215 (1984); *Estate of Reichel*, 484 Pa. 610, 400 A.2d 1268 (1979); *In re Clark's Estate*, 461 Pa. 52, 334 A.2d 628 (1975); *In re Quein's Estate*, 361 Pa. 133, 62 A.2d 909 (1949); *Burns v. Kabboul*, 407 Pa. Super. 289, 595 A.2d 1153 (1991); *In re Estate of Simpson*, 407 Pa. Super. 1, 595 A.2d 94 (1991); *In re Mampe*, 2007 Pa. Super. 269, 932 A.2d 954 (2007); *In re Estate of Stout*, 2000 Pa. Super. 37, 746 A.2d 645 (2000).

had been severed or that the party making the disposition had competent and independent legal advice in the preparation of the will.³⁴

In **Tennessee**, in order to rebut the presumption, the proponent needs to establish the fairness of the transaction by clear and convincing evidence. One way of showing that, where demonstrating fairness would be otherwise difficult, is by showing that the testator had the benefit of independent advice.³⁵

In the **US Virgin Islands**, once the presumption of undue influence has been established it must be rebutted by clear and convincing evidence that “the transaction is free of undue influence and that the donor’s decision to give the gift was the product of his free will”.³⁶

California defines undue influence as follows:

(a) “Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.

(2) The influencer’s apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.³⁷

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

³⁴ *Gautier v. Gonzales-Latiner*, 25 V.I. 26 (1990),

³⁵ *Matter of Estate of Depriest*, 733 S.W.2d 74 (Tenn. Ct. App. 1986); *Richmond v. Christian*, 555 S.W.2d 105 (Tenn. 1977).

³⁶ *Gautier v. Gonzales-Latiner*, 25 V.I. 26 (1990).

³⁷ To provide a greater understanding of the intent behind this provision, comments regarding the legislative intent, reflect:

Assembly Bill 140 lists family members as among those with ‘apparent authority’. The intent is to describe those who occupy positions of trust and who thus might more easily unduly influence an elder. The intent is not to address who might be the natural object of an elder’s bounty or to draw any particular negative inference from a family member’s receipt of something (whether testamentary or inter vivos) from an elder. Assem. Daily J., 2013-14 Reg. Sess., Sept. 12, 2013, p. 3368.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.³⁸³⁹

California also codified the operation and effect of the Presumption of Undue Influence.⁴⁰ As of January 1, 2020, California's statute provides that:

(a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

(1) The person who drafted the instrument.

(2) A person who transcribed the instrument or caused it to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only 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.

(4) A care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than six months after the marriage, cohabitation, or domestic partnership commenced.

³⁸ Cal. Welfare and Institutions Code §15610.70

³⁹ In understanding the issue of "inequity" the author of the bill that resulted in California's enactment of this statute wrote:

"Legislative Intent – Assembly Bill No. 140": My Assembly Bill 140 would codify the definition of undue influence to mean excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. However, an inequitable result, without more, would not be sufficient to prove undue influence, as the intent of the elder would remain paramount. Thus, a person remains free to dispose of his property, both by testamentary device and donative transfer, even if the disposition appears unfair in the eyes of others so long as the disposition results from an exercise of that person's free will. Unfairness is therefore to be determined from the standpoint of the elder.

Assem. Daily J., 2013-14 Reg. Sess., Sept. 12, 2013, p. 3368.

⁴⁰ Cal. Probate Code §21380.

(5) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

(6) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive.

(7) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.

(b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence.

(c) Notwithstanding subdivision (b), with respect to a donative transfer to the person who drafted the donative instrument, or to a person who is related to, or associated with, the drafter as described in paragraph (5), (6), or (7) of subdivision (a), the presumption created by this section is conclusive.

(d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.⁴¹

Exceptions to application of California's statutorily created presumption of undue influence exist. They include, but are not limited to, transfers to charities,⁴² transfers of property valued of less than \$5,000⁴³, instruments executed outside of California by a person who was not a resident of California at the time of execution,⁴⁴ at death transfers to spouses⁴⁵, and transfers reviewed by an independent attorney who

counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate ...⁴⁶

which substantially comports with a form of certificate provided in the statute.⁴⁷

Nevada, like California, has enacted a statutory presumption, which appears to be applicable to a broad array of transactions.⁴⁸ The legislature was careful to define the terms utilized (e.g. caregiver, dependent adult, independent attorney, transfer instrument,

⁴¹ Id.

⁴² Cal. Probate Code §21382(d).

⁴³ Cal. Probate Code §21382(e).

⁴⁴ Cal. Probate Code §21382(f).

⁴⁵ Cal. Probate Code §21385.

⁴⁶ Cal. Probate Code §21384(a).

⁴⁷ Id.

⁴⁸ NRS 155.097(2).

transfer, etc.)⁴⁹ NRS 155.97 not only sets forth the circumstances under which a transfer will be presumed to be void and shifts the burden once the presumption of undue influence has been established to the proponent, unless certain statutory exceptions are met. NRS 155.97, but also creates an exception to the American Rule as it relates to attorney fees incurred when a transfer is determined to be void as a result of fraud, duress or undue influence. Nevada, like Mississippi, requires a high burden to rebut the presumption once established, unless certain exceptions apply. NRS 155.97 provides that:

1. Regardless of when a transfer instrument is made, to the extent the court finds that a transfer was the product of fraud, duress or undue influence, the transfer is void and each transferee who is found responsible for the fraud, duress or undue influence shall bear the costs of the proceedings, including, without limitation, reasonable attorney's fees.
2. Except as otherwise provided in subsection 4 and NRS 155.0975, a transfer is presumed to be void if the transfer is to a transferee who is:
 - (a) The person who drafted the transfer instrument;
 - (b) A caregiver of the transferor who is a dependent adult;
 - (c) A person who materially participated in formulating the dispositive provisions of the transfer instrument or paid for the drafting of the transfer instrument; or
 - (d) A person who is related to, affiliated with or subordinate to any person described in paragraph (a), (b) or (c).
3. The presumption created by this section is a presumption concerning the burden of proof and may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud, duress or undue influence.
4. The provisions of subsection 2 do not apply to a transfer instrument that is intended to effectuate a transfer:
 - (a) After the transferor's death, unless the transfer instrument is made on or after October 1, 2011; or
 - (b) During the transferor's lifetime, unless the transfer instrument is made on or after October 1, 2015.

With regard to the exceptions statutorily recognized to application of the presumption, NRS 155.0975 provides that [t]he presumption established by NRS 155.097 does not apply:

⁴⁹ NRS 15.093, et seq.

5. To a transferee that is:
 - (a) A federal, state or local public entity; or
 - (b) An entity that is recognized as exempt under section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) or 501(c)(19), or a trust holding an interest for such an entity but only to the extent of the interest of the entity or the interest of the trustee of the trust.
6. To a transfer of property if the fair market value of the property does not exceed \$3,000. The exclusion provided by this subsection does not apply more than once in each calendar year to transfers made during the transferor's lifetime. For the purposes of this subsection, regardless of the number of transfer instruments involved, the value of property transferred to a transferee pursuant to a transfer that is triggered by the transferor's death must include the value of all property transferred to that transferee or for such transferee's benefit after the transferor's death.⁵⁰

These statutory applications are not intended to abrogate or limit common law rules or principals, unless those rules and principals are inconsistent with the NRS 155.097 and 155.0975.⁵¹

Arizona has also established a statutory presumption of undue influence.⁵² Pursuant to AZ Rev Stat §14-2712(E), a

governing instrument is presumed to be the product of undue influence if either:

1. A person who had a confidential relationship to the creator of the governing instrument was active in procuring its creation and execution and is a principal beneficiary of the governing instrument.
2. The preparer of the governing instrument or the preparer's spouse or parents or the issue of the preparer's spouse or parents is a principal beneficiary of the governing instrument. This paragraph does not apply if the governing instrument was prepared for a person who is a grandparent of the preparer, the issue of a grandparent of the preparer or the respective spouses or former spouses of persons related to the preparer.

AZ Rev Stat §14-2712(F) establishes that preponderance of the evidence is required to be presented by the proponent of the instrument in order to overcome the presumption.

In **Florida**, Fla. Stat. Ann. § 733.107 provides that

⁵⁰ NRS 155.0975

⁵¹ NRS 155.098.

⁵² AZ Rev Stat Section 14-2712 (2014). However, excluded from the act are proceedings relating to the validity of a power of attorney executed pursuant to §14-5506 and the ownership of multi-party accounts established under §14-6211.

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

In another statute, **Florida** addressed the issue of spousal rights procured by fraud, duress or undue influence. In Fla. Stat. Ann. § 732.805, the legislature provided that a variety of rights would be lost unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratified the marriage.⁵³ In such situations a contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence and if ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.⁵⁴

While **Montana** has not codified its presumption of undue influence, it has codified a definition of what constitutes undue influence, which defines undue influence to consist of:

- (1) the use by one in whom a confidence is reposed by another person or who holds a real or apparent authority over the other person of the confidence or authority for the purpose of obtaining an unfair advantage over the other person;
- (2) taking an unfair advantage of another person's weakness of mind;
or
- (3) taking a grossly oppressive and unfair advantage of another person's necessities or distress.⁵⁵

Maine also has not statutorily addressed the presumption of undue influence with regard to all transactions, it has addressed it in relation to transfer of real estate or major transfer of personal property or money for less than full consideration or execution of a guaranty by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship.⁵⁶ The Maine statute

⁵³ Fla. Stat. Ann. § 732.805(1).

⁵⁴ Fla. Stat. Ann. § 732.805(4).

⁵⁵ Mont. Code Ann. § 28-2-407.

⁵⁶ Main Title 33: Chapter 20, Section 1022.

provides examples of relationships can qualify as being confidential or fiduciary in nature, including:

- A. A family relationship between the elderly dependent person and the transferee or person who benefits from the execution of a guaranty, including relationships by marriage and adoption;
- B. A fiduciary relationship between the elderly dependent person and the transferee or person who benefits from the execution of a guaranty, such as with a guardian, conservator, trustee, accountant, broker or financial advisor;
- C. A relationship between an elderly dependent person and a physician, nurse or other medical or health care provider;
- D. A relationship between the elderly dependent person and a psychologist, social worker or counselor;
- E. A relationship between the elderly dependent person and an attorney;
- F. A relationship between the elderly dependent person and a priest, minister, rabbi or spiritual advisor;
- G. A relationship between the elderly dependent person and a person who provides care or services to that person whether or not care or services are paid for by the elderly person;
- H. A relationship between an elderly dependent person and a friend or neighbor; or
- I. A relationship between an elderly dependent person and a person sharing the same living quarters. [and]

When any of these relationships exist and when a transfer or execution is made to a corporation or organization primarily on account of the membership, ownership or employment interest or for the benefit of the fiduciary or confidante, a fiduciary or confidential relationship with the corporation or organization is deemed to exist.⁵⁷

Georgia has statutorily addressed the issue of undue influence with regard to inter vivos gifts. Ga. Code Ann. § 44-5-86 provides that

A gift by a person who is just over the age of majority or who is particularly susceptible to be unduly influenced by his parent, guardian, trustee, attorney, or other person standing in a similar confidential relationship to one of such persons shall be closely scrutinized. Upon the slightest evidence of persuasion or influence, such gift shall be declared void at the

⁵⁷ *Id.*, §1022 (2).

instance of the donor or his legal representative and at any time within five years after the making of such gift.

Georgia courts had previously found that “[i]t is for the common security of mankind that gifts procured by agents, and purchases made by the agents, from their principal, should be scrutinized with a close and vigilant suspicion.”⁵⁸

Missouri has enacted a rebuttable presumption when transfers to in-home health care providers is involved, except for those related to reasonable compensation for services rendered and transfers for less than five percent of the assets of the grantor.⁵⁹

North Dakota has legislatively created a rebuttable presumption when a trustee benefits from a transaction between the trustee and a trust beneficiary.⁶⁰ That statute provides that

A transaction between a trustee and the trust’s beneficiary during the existence of the trust or while the influence acquired by the trustee remains by which the trustee obtains any advantage from the trust’s beneficiary is presumed to be entered by the trust’s beneficiary without sufficient consideration and under undue influence. This presumption is a rebuttable presumption.⁶¹

In **North Dakota**, N.D.R. Ev. Rule 301 generally provides that, in civil cases, unless a statute or the North Dakota Rules of Evidence otherwise provides that unless a statute provides to the contrary, the “party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence”.⁶²

In 2015, **Illinois** created a statutory rebuttable presumption of “void transfer” when a transfer is made for the benefit of a “caregiver” and the fair market value of that transfer exceeds \$20,000⁶³, otherwise leaving in place its common law approach to undue influence in other circumstances. For purposes of the Illinois statutory presumption, the term “caregiver” includes anyone who voluntarily or in exchange for compensation assumes responsibility for all or a portion of a person’s activities of daily living. This statutory presumption may be rebutted if the transferee proves, either:

- (1) by a preponderance of the evidence that the transferee’s share is not greater than what he or she would have received under an instrument in effect before he or she became a caregiver, or
- (2) by clear and convincing evidence that the transfer was not the result of fraud, duress or undue influence.⁶⁴

⁵⁸ *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

⁵⁹ Mo. Rev. Stat. § 197.480 .

⁶⁰ N.D. Cent. Code, § 59-18-01.1.

⁶¹ *Id.*

⁶² N.D.R. Ev. Rule 301(b).

⁶³ 755 ILCS 5, Sec. 4a-5.

⁶⁴ 755 ILCS 5/4a-15.

In addition to its statutory approach relating to transfers to caregivers, Illinois has addressed undue influence in other scenarios. In *In re Estate of Burren*,⁶⁵ the Illinois appellate court found that:

[t]o overcome a presumption of undue influence in a will contest, a fiduciary who benefits from a will must present clear and convincing evidence that in the will, the testator freely expressed his own wishes and not the wishes of the fiduciary. Courts have considered such factors as whether the fiduciary “made a full and frank disclosure of all relevant information; * * * [whether] adequate consideration was given; and [whether the testator] had independent advice before completing the transaction.”⁶⁶

Virginia. Recently, Virginia’s Senate passed SB 1123, entitled “Will Contest; presumption of undue influence. That bill provides that “In any case contesting the validity of a decedent's will where a presumption of undue influence arises, the burden of producing evidence and the burden of persuasion as to the factual issue that undue influence was exerted over the testator shall be on the party against whom the presumption operates.”⁶⁷

The presumption of undue influence, in some form, has been found to exist in all states, in recognition that in certain situations there is a strong likelihood that wrongdoing has occurred, such that when those circumstances are demonstrated to exist, a presumption will be triggered which will shift the onus (at least to some extent) to show that no wrongdoing occurred.⁶⁸

D. The Science⁶⁹ With Respect to Undue Influence

To understand undue influence, one needs to understand that undue influence is “not a one-time act; it involves a pattern of manipulative behaviors to get a victim to do what the exploiter wants, even when the victim’s actions appear to be voluntary or are contrary to his or her previous beliefs, wishes, and actions.”⁷⁰ Undue influence “occurs as the result of a process, not a one-time event.”⁷¹ These types of cases are generally very fact-dependent. At times, the tactics used to exert influence may be “similar to brainwashing techniques used by cults and hostage takers. There are also parallels to domestic violence, stalking, and grooming behaviors used by some sexual predators.”⁷² Consequently, a thorough understanding of the facts leading up to (and sometimes after)

⁶⁵ *In re Estate of Burren*, 2013 IL App. (1st) 120996, 374 Ill. Dec. 85, 994 N.E.2d 1022 (App. Ct. 1st Dist. 2013), *appeal denied*, 377 Ill. Dec. 764, 2 N.E. 1045 (Ill 2013).

⁶⁶ *Id.* (internal citations omitted; emphasis added).

⁶⁷ Virginia SB 1123, <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1123>. This Senate Bill passed the Senate on 1/21/21 and has been referred to the Committee for Courts of Justice in the Virginia House of Representatives on 2/2/21.

⁶⁸ See, *Undue Influence California Report 2010*, supra, at p. 101-102, citing Meyers, 2005,

⁶⁹ Much of this section represents excerpts from *Undue Influence and Vulnerable Adults*, supra.

⁷⁰ Bonnie Brandle, Candice J. Heisler, & Lori A. Stiegel, *The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault*, 17 J. Elder Abuse Negl. 37 (2005).

⁷¹ *Id.* at 39.

⁷² *Id.*

the execution of an instrument at issue and the relationship between the individual and the influencer is needed.⁷³ As a general rule:

[u]ndue influence is not exercised openly, but, like crime, seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition, as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control.⁷⁴

Moreover, “[f]inancial exploitation is the most common form of elder abuse”⁷⁵. Importantly, it has been recognized that

[f]or some, victimization can be the “tipping point” that pushes the victim into poorer health. The victim’s quality of life “can be jeopardized [by] declining functional abilities, progressive dependency, a sense of helplessness, social isolation, and a cycle of worsening stress and psychological decline.”⁷⁶

Having been recognized as a form of financial abuse, it is important to recognize that undue influence “may be insidious and not in front of witnesses, but fair inferences can be drawn from the facts.”⁷⁷

In 2008 the ABA Commission on Law and Aging published the results of an extensive analysis of issues relating to capacity and undue influence.⁷⁸ This publication (and models and studies cited therein) are often relied upon by professionals in assessing issues related to these areas. Following a statutory change relating to the presumption of undue influence in British Columbia, a Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, published by the British Columbia Law Institute⁷⁹, in defining undue influence, now cites to some of the very same models and studies identified in the ABA’s Handbook (including the Thaler Singer, Blum IDEAL, SCAM, and Brandl/Heisler/Stengel Models.⁸⁰

In 2008, the Psychogeriatric Association’s subcommittee of an international task force undertook an extensive review of the types of factors that might be identified from a “clinical” perspective to alert an expert to the risk of undue influence⁸¹:

⁷³ *Id.*

⁷⁴ *Walts v. Walts*, 127 Mich. 607, 611, 86 N.W. 1030, 1031 (1901).

⁷⁵ AEquitas, *The Prosecutors’ Resource; Elder Abuse*, April 2017, at p. 6.

⁷⁶ *Id.*, at p. 10.

⁷⁷ *In re Paquin’s Estate*, 328 Mich. 293, 303, 43 N.W.2d 858, 862 (1950). See also *In re Persons Estate*, 346 Mich. 517, 532, 78 N.W.2d 235, 243 (1956).

⁷⁸ ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008).

⁷⁹ *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, Prepared for the British Columbia Law Institute by the Members of the Project Committee on Potential Undue Influence: Recommended Practices for Wills Practitioners*, BCLI Report no. 61, October 2011.

⁸⁰ *Id.* at p. 15.

⁸¹ Carmelle Peisah, Sanford I. Finkel, Kenneth Shulman, Pamela S. Melding, Jay S. Luxenberg, Jeremia Heinik, Robin J. Jacoby, Barry Reisberg, Gabriela Stoppe, A. Barker, Helen Cristina Torrano Firmino & Hayley I. Bennett, *The Wills*

(i) [S]ocial or environmental risk factors such as dependency, isolation, family conflict and recent bereavement; (ii) psychological and physical risk factors such as physical disability, deathbed wills, sexual bargaining, personality disorders, substance abuse and mental disorders including dementia, delirium, mood and paranoid disorders; and (iii) legal risk factors such as unnatural provisions in a will, or a provision not in keeping with previous wishes of the person making the will, and the instigation or procurement of a will by a beneficiary.⁸²

The subcommittee found that undue influence was more likely to occur:

(i) [w]here there is a special relationship in which the testator invests significant trust or confidence in another; (ii) where there is relative isolation (whether due to physical factors or communication difficulties) which limit free flow of information and allows subtle distortion of the truth: and, (iii) where there is vulnerability to influence through impaired mental capacity or emotional circumstances (such as withholding of affection, or persuasion on grounds of social, cultural or religious convention or obligation).⁸³

In 2010, the Borchard Foundation Center on Law & Aging published a study⁸⁴ that essentially adopted the SODR model which formed the premise (at least in part) for the enactment of California's statutory definition of undue influence when it was found that:

. . . [d]espite wide variations in the context and circumstances in which [undue influence] and coercive persuasion in general have been explored, the elements of [undue influence] are remarkably similar in each and can be reduced to four salient factors: susceptibility (of the victim), opportunity (of the influencer), disposition (of the influencer), and result.⁸⁵

Undue Influence and Vulnerable Adults,⁸⁶ addressed a recent study on the psychology of persuasion. That study identified several (additional) categories of tactics that persuaders may employ to effect undue influence for financial gain.⁸⁷ Among the tactics identified, generally applicable to estate planning situations, are "reciprocity," "commitment and consistency," "authority," and the creation of or taking advantage of "false memories":

Reciprocity: The "reciprocity" principal entails creating a debt of gratitude. While courts are reticent to apply this principle in family dynamics, it has been found that "[i]f kindness and affection result in overcoming the

of Older People: Risk Factors for Undue Influence, for International Psychogeriatric Association Task Force on Wills and Undue Influence, 21 Int. Psychogeriatric., at 7-15, 10, 11 (2009).

⁸² *Id.* at 7.

⁸³ *Id.* at 10.

⁸⁴ Mary Joy Quinn, Lisa Nerenberg, et al., *Undue Influence: Definitions and Applications*, report for The Borchard Foundation Center on Law & Aging (March 2010).

⁸⁵ Daniel A. Plotkin, James E. Spar, & Howard L. Horwitz, *Assessing Undue Influence*, 44 J. Am. Acad. Psychiatry Law 344-351 (September 2016), <http://jaapl.org/content/44/3/344>.

⁸⁶ *Undue Influence and Vulnerable Adults*, *supra* at p.67.

⁸⁷ *Id.* at 67, citing *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, *supra* at 371-380 (further citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

testator's free agency and leave the will that of the beneficiary rather than the testator, then such constitutes undue influence."⁸⁸

Commitment and consistency: When the "commitment and consistency" process is used, persuaders exploit the internal and interpersonal pressures often felt by individuals to justify and stand by decisions once made. Here, the persuader makes it easy for the victim to make a commitment. This tactic can be successful even with persons described as "strong-willed" or "stubborn." Once such individuals make a commitment, they tend to stick to it. Therefore, after the commitment that benefits the persuader is made, the victim is encouraged to follow through. In addition, by using this process, a "stubborn" individual may be persuaded to adopt negative perceptions of others and the belief that others are undeserving of an inheritance. Once the victim incorporates such beliefs as "facts," the "commitment and consistency" principle can make it difficult to overcome such perceptions and convince the victim that the contrary may be true.⁸⁹

Authority: Most people have a respect for authority and a disinclination to defy authority. When the "authority" process is used, the persuader attempts to clothe himself with the trappings of authority or to recruit others, including professionals, to aid and abet the persuader, whose authority (on its own or by such affiliation) benefits the persuader's efforts for financial gain. This process abuses the perception of authority, whether that perception is created by title, education, or attire. In the context of estate planner, the persuader "will often take steps to place himself in control of the testator's finances or estate plan and then represent to the testator that he must sign off on modification or transactions because they are necessary"⁹⁰ This process abuses the trust that the victim has placed in others.

False memories: Without being ageist, studies have indicated that the elderly may be more vulnerable than capable adults to the creation of false memories, which can be induced by repetitive efforts of a predator to reframe the elder's relationship with family members or other previously favored individuals or institutions.⁹¹

Recently, studies have identified that a mere reliance on historical cases may not have caught up with the science of persuasion often identified and utilized in cases where undue influence is found to have occurred.⁹² These studies, in part, formed the underpinnings of California's enactment of a statutory approach to undue influence and the presumptions arising out of the potential abuse of a confidential relationship in its effort to protect its vulnerable population.⁹³ Mary Joy Quinn, a nurse and gerontologist who was employed as a conservatorship investigator for the probate court system in

⁸⁸ *Kelley v. First State Bank of Princeton*, 81 Ill. App. 3rd 402, 414 (Ill. App. Ct. 1980), 401 N.E.2d 247, 256 (1980).

⁸⁹ Campisi, *Undue Influence*, *supra* note 37, at 373, 374.

⁹⁰ *Id.* at 377, 378.

⁹¹ *Id.* at 367, 368.

⁹² See Dominic J. Campisi, Evan D. Winet, & Jake Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L. J. 371-380 (2018) (citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

⁹³ See California Welfare and Institutions Code Section 15610.70,

California, and ultimately became the director of California's Probate Department, was at the forefront of studies conducted with the benefit of grant money in California to address the seemingly ever increasing issue of undue influence.⁹⁴ Her research team undertook an extensive review of literature relating to coercion and persuasion as well as a broad range of laws, focus groups and case reviews (from California and other states). Their extensive analysis, coupled with discussions with various disciplines, helped them to arrive at a framework for evaluating undue influence, including situations where the victim did or did not suffer from cognitive impairments.

Ultimately, they developed an overall definition of undue influence that recognized two related concepts. The first was they classified as "undue influence", with a second related concept being one of "predatory alienation".⁹⁵ They defined these concepts as follows:

"Undue Influence" is when individuals who are stronger or more powerful get weaker people to do things they would not have done otherwise, using various techniques or manipulations over time. They may isolate the weaker person, promote dependency, or induce fear and distrust of others. The abuser tries to convince the vulnerable person that friends, family members, or caregivers have malevolent motives and cannot be trusted. The related concept of "predatory alienation" is purposefully disrupting existing relationships, often through deception, to isolate people from those they trust in order to exploit, control, or take advantage of them.⁹⁶

E. The Committee's Suggested Statutory Approach: Pros and Cons

1. Pros:

a. The proposal would establish clarity in the law for litigants, judges and juries. Many states have found it advantageous to adopt a statutory definition to clarify the law and assure more consistent case decisions. Although a determination of undue influence is in fact intensive analysis, the law developed over many years can be viewed as inconsistent. When the elements of undue influence are clearly defined, judges and juries will have a roadmap to evaluate facts and achieve greater consistency.

b. The current proposal clearly applies the doctrine of undue influence to transactions beyond the execution of wills and trust documents to identify additional documents and transactions that may involve the exercise of undue influence, such as durable powers of attorney, designations of patient advocate, creation of joint bank accounts and TOD accounts, nominations of guardians and conservatories for physically infirm individuals, deeds and real estate transactions. Having a statutory definition will also help adult protective service and prosecutors identify factors which they might look for and consider during an analysis of whether a vulnerable adult may have been

⁹⁴ Unpacking Undue Influence, <https://www.elderjusticecal.org/blog-elder-justice-viewpoints/unpacking-undue-influence>

⁹⁵ <https://www.elderjusticecal.org/undue-influence.html>

⁹⁶ Id.

subjected to financial exploitation (which may be the result of undue influence). This will serve to expand the protection provided to vulnerable adults in Michigan.

c. The proposed definition of undue influence is aligned with scientific analysis and includes a list of factors derived from studies that discussed how undue influence occurs. While the list is not exhaustive, it does provide guidance to a decision-maker where the described element or elements are found to exist. As recent studies have developed, it is becoming clear that there are a number of areas of influence that have not been recognized in the past and have a direct bearing on the decision-making process of individuals. Inclusion of tactics which may support a finding of undue influence will again provide additional guidance to, and support of, decision-makers engaged in the process of determining whether or not undue influence is to be found under the evidence presented.

d. The proposal creates clarity as to when and under what circumstances the presumption of undue influence applies, and the impact of establishing the presumption. Rather than rely on the very nuanced concept of distinguishing the burden of production and the burden of proof, the proposed statute clearly establishes who has the burden of proof, and under what circumstances. This also has the benefit of removing the analysis from a discussion of MRE 301 altogether. This will address the inconsistency that has been observed in the case law in applying MRE 301 in an undue influence case.

2. CONS:

a. The proposal to change the burden of proof to the proponent rather than the contestant, once a presumption of undue influence is triggered, is not consistent with the current Michigan case law on the subject, or the application of MR E301. An argument is made that a proponent of a document would be placed in the difficult position of proving a negative; that undue influence did not occur. Some argue that the attempt in the proposal to codify a definition of undue influence, and the departure from the direction provided in MRE 301 regarding the effect of presumptions, and Michigan case law, by modifying the effect of establishing a presumption of undue influence to impose the burden of proof going forward on the proponent of the document or transaction involved will potentially create more litigation and uncertainty than it solves.

b. The terms “equity of result” and “suspicious circumstances” as used in the proposal may interject decisions made upon personal attitudes by judges and jurors and may create inconsistent results in cases with similar fact patterns. Undue influence is not susceptible to direct proof, because of the fact that the dealings between the individuals involved are often private and secret. These described elements are intended to focus the attention of the trier of fact on the overall nature of the transaction involved, and the facts surrounding the generation of the document or action which is alleged to have been the result of undue influence.

c. The factors currently included in the proposal defining undue influence leave out factors that have been cited in decided Michigan cases, potentially

creating confusion. The list of factors contained in the proposed definition are not intended to be exhaustive or exclusive, but are intended to provide expanded guidance to the trier of fact by calling out the most common elements that seem to be involved in undue influence situations.

d. Some argue that simply adopting the definition of undue influence contained in section 8.3 of the Restatement of Property may be a better approach than the definition included in the proposal, and would address one of the major issues created in *Kar v. Hogan* relative to focusing on whether free will was overcome rather than how it was overcome. In addition, the argument is made that the proposed definition would bring the concept of “mind poisoning” into the deliberation process. The definition of undue influence contained in section 8.3 states: “a donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor’s free will and cause the donor to make a donative transfer that the donor would not otherwise have made.” The effect of the definition in section 8.3 is to invalidate donative transfers procured by undue influence, duress or fraud. In each case the test is whether the alleged action of the alleged wrongdoer caused the donor to make a donative transfer that he or she would not otherwise have made, based on the facts proved at trial. While the provision regarding undue influence is simple, the concept of the level of influence to be proved, and whether the influence overcame the ability to exercise free will independently, create a real possibility of findings by the trier of fact based on the individual’s experiences and opinions regarding influence and free will, rather than the facts presented at trial.

F. Conclusions of the Committee

Hopefully the information provided will prove useful to practitioners involved in this area of practice. It is perhaps a fantasy to expect that a large contingency of lawyers and legislators will reach a consensus on this issue. However, there is a benefit to clarity. Certainly, the fog surrounding how to apply the presumption of undue influence, where applicable, needs to be lifted. This fog will not dissipate on its own and neither will the uncertainty concerning the definition of undue influence. An effort was undertaken some years ago to update the model civil jury instructions on point, but that effort failed as well.

Our committee has done a substantial amount of work in this area, and we have come to the conclusion that a legislative fix is certainly better than none. Hopefully, we can continue to move towards an identifiable resolution on these issues. Please become educated and use the information provided in your own practices.

EXHIBIT A

MCL 700.2524 Definition of Undue Influence:

- (A) A donative transfer is procured by undue influence if the alleged influencer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made. The amount of persuasion necessary to overcome a donor's free will may be less when a donor has vulnerabilities that could impair the donor's ability to withstand another's influence. In determining whether a result was produced by undue influence, the following factors are among those that may be considered:
- (1) The vulnerability of the donor. Evidence of vulnerability may include, but is not limited to incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, recent loss of a spouse, estrangement from children, fear of change in living situation, or whether the alleged influencer knew or should have known of the donor's vulnerability.
 - (2) The alleged influencer's apparent authority. Evidence of the alleged influencer's apparent authority may include, but is not limited to, status as a fiduciary, confidante, close family member, care provider, health-care professional, legal professional, financial professional, spiritual adviser, or the donor's perception of the alleged influencer's expertise.
 - (3) The actions or tactics used by the alleged influencer. Evidence of actions or tactics used may include, but is not limited to:
 - (a) Controlling necessities of life, medication, the donor's interactions with others, access to information, or sleep.

- (b) Use of force, threat, undue flattery, intimidation, coercion, fraud or misrepresentation.
 - (c) Initiation of changes in an estate plan or personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, or claims of expertise in effecting changes.
 - (d) Efforts to negatively influence the donor's perception of family members, advisors or otherwise interfere with family, business or professional relationships; or,
 - (e) The existence of other suspicious circumstances.
- (B) For purposes of this section and MCL 700.2725, as it relates to any instrument, gift, or other transaction alleged to be the product of undue influence, the term "donor" shall mean a testator, grantor, settlor, transferor or principal. The term "instrument" shall mean any instrument, whether written, governing or otherwise.

MCL 700.2521 Burden of Proof in Undue Influence Contests; Presumption Of Undue Influence.

- (a) A presumption of undue influence, whether as to an instrument, gift or transaction, is established when all of the following elements are proven to exist by a preponderance of evidence:
 - (1) A confidential relationship exists between the donor and the alleged influencer;
 - (2) The alleged influencer, or an interest represented by an alleged influencer, benefits from a transaction; and,
 - (3) The alleged influencer had an opportunity to influence the donor’s decision in the transaction.
- (b) Whether a presumption of undue influence has been established is a question for the court.
- (c) If a presumption of undue influence is found to exist, and notwithstanding Section 3407, then the proponent of an instrument, recipient of a gift, or other party to a transaction, has the burden of proving, by a preponderance of evidence, that the instrument, gift, or transaction is not the product of undue influence.
- (d) “Confidential relationship,” for purposes of this section, means a fiduciary, reliant, or dominant-subservient relationship.
 - (1) A fiduciary relationship is one in which the relationship arises from a legally recognized fiduciary obligation. Examples of legally recognized fiduciary relationships include, but are not limited to the following: lawyer/client, stockbroker/investor, principal/agent, guardian/ward, trustee/beneficiary, physician/patient, accountant/client, and financial advisor/client.

- (2) A reliant relationship is one where there is a relationship between the donor and alleged influencer based on special trust and confidence and may include circumstances where the donor was guided by the judgment or advice of the alleged influencer or placed confidence in the belief that the alleged influencer would act in the interest of the donor. Examples of reliant relationships include, but are not limited to, the following:
- (A) The donor relies on the alleged influencer to conduct banking or other financial transactions;
 - (B) Where trust is placed by the donor in the alleged influencer who, as a result, gains superiority or influence over the donor;
 - (C) When the alleged influencer assumes control over, and responsibility for, the donor, or is placed in an express or implied position of authority to represent or act on behalf of the donor;
 - (D) When the donor is reliant upon the alleged influencer for care; or,
 - (E) When a clergy/penitent relationship exists between the donor and the alleged influencer.
- (3) A dominant-subservient relationship is one where the donor is prepared to unquestioningly comply with the direction of the alleged influencer. Examples of dominant-subservient relationships include, but are not limited to, relationships between a hired caregiver and client, or relative and an ill or feeble donor, when the donor is dependent upon the alleged influencer for activities of daily living or instrumental activities of daily living.

- (e) Being the donor's spouse or child, without more, is not sufficient to establish a presumption of undue influence.
- (f) The definitions of "donor" and "instrument" set forth in MCL 700.2724, shall also apply to this section.

Council Materials

**MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN**

Friday, December 15, 2023

Regular Meeting Agenda

- I. Commencement (Jim Spica)
 - A. Call to Order and Welcome
 - B. Zoom Roll Call
 - C. Confirmation of In-Person Attendees
 - D. Excused Absences

- II. Monthly Reports
 - A. Lobbyist's Report (Public Affairs Associates)
 - B. Minutes of Prior Council Meetings – November (Rick Mills) – **Attachment 1**
 - C. Chair's Report (Jim Spica)
 - D. Chair-Elect's Report (Katie Lynwood)
 - E. Treasurer's Report (Christine Savage)

- III. Committee Reports
 - A. Committee on Special Projects (Mysliwicz)
 - B. Amicus Curiae (Mayoras)
 - C. Annual Meeting (Spica)
 - D. Awards (Kellogg)
 - E. Budget (Mills)
 - F. Bylaws (Lucas)
 - G. Charitable and Exempt Organizations (Wrock)
 - H. Citizens Outreach (Goetsch)
 - I. Court Rules, Forms, and Proceedings (David)
 - J. Electronic Communications (Hentkowski)
 - K. Ethics and Unauthorized Practice of Law (Mallory)
 - L. Guardianship, Conservatorship, and End of Life (Glazier)

- M. Legislation Development and Drafting (Tiplady and Mills)
- N. Legislation Monitoring and Analysis (Shelton)
- O. Legislative Testimony (Mysliwicz)
- P. Membership (Hentkowski)
- Q. Nominating (Lucas)
- R. Planning (Spica)
- S. Probate Institute (Piwowarski)
- T. Real Estate (Hentkowski)
- U. State Bar and Section Journals (Mysliwicz)
- V. Tax (Anderton) – (Tax Nugget by J.V Anderton – **Attachment 2**)
- W. Assisted Reproductive Technology (Welber)
- X. Electronic Wills (Cieslik)
- Y. Fiduciary Exception to the Attorney-Client Privilege (Krueger)
- Z. Nonbanking Entity Trust Powers (Spica and Tiplady)
- AA. Premarital Agreements (Savage)
- BB. Uniform Community Property Disposition at Death Act (Spica)
- CC. Undue Influence (Silver)
- DD. Uniform Fiduciary Income and Principal Act (Spica)
- EE. Uniform Partition of Heirs Property Act (Spica)
- GG. Various Issues Involving Death and Divorce (Borst and Blume)
- IV. Good of the Order
- V. Adjournment of Regular Meeting

Departments (Time Permitting)

- I. Legal Literature (Jim Spica)

Roundtable (Time Permitting)

Reminder: The next Probate & Estate Planning Council meeting will be Friday, January 19, 2024 at the **University Club of Michigan State University, 3435 Forest Road, Lansing, Michigan 48910**. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM.

ATTACHMENT 1

**MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN**

Friday, November 10, 2023

Minutes

I. Commencement (James P. Spica)

A. Call to Order and Welcome

Chairperson Spica called the meeting to order at 10:30 AM noting that the meeting was being recorded and that the resulting recording is to be deleted once the minutes of the meeting have been submitted by the Secretary and accepted by the Council.

B. Zoom Roll Call

Kenneth Silver, Michael Shelton, Kathleen Cieslik, Elizabeth Siefker, Rebecca Wrock, Christine Savage, David P. Lucas, Michael Lichterman, Melisa M.W. Mysliwicz, Angela Hentkowski, Hon. Milton Mack, Nancy Webler, Neal Nusholtz, Nick Reister, Patrica Davis, Rachael, Sedlacek (ICLE), Alexander S. Mallory, Sandra Glazier, Robert Labe, Rebecca Bechler (Public Affairs Associates), Mark E. Kellogg, Andrew Mayoras, David Sprague, Georgette David, James Steward, Jim Ryan, Jeff Kirkey (ICLE), and Andrea Neighbors administrative assistant

C. Confirmation of In-Person Attendees

Nathan Piwowarski, Katie Lynwood, James P. Spica, Richard C. Mills, Daniel Hilker, Susan L. Chalgian, Daniel W. Borst, Ernschie Augustin, Warren H. Krueger, III

D. Excused Absences

Hon. Shauna Dunning, James F. Anderton, V

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates)

- i. The Uniform Power of Attorney package was completed and signed by the Governor. See 2023 Public Acts 187-189.

- ii. The EPIC Omnibus package is in the Senate Committee on Judiciary Civil Rights and Public Safety. Ms. Bechler is hopeful that it will get out of committee in late January or early February.
 - iii. The Powers of Appointment Act/USRAP technical amendment bills are on the House floor.
 - iv. The Unitrust act, HB 5110, has been introduced. It has been referred to the House Judiciary Committee.
 - v. The ART package has not yet been introduced.
 - vi. The Guardianship reform package is in the Senate. We have requested a meeting with Senator Chang.
 - vii. There is a surrogacy package, HB 5207 through 5215, that passed the House and is in the Senate, which may have some implication on the ART package.
- B. Minutes of Prior Council Meetings –
- i. September (Nathan Piwowarski) – **Attachment 1**. David Sprague motioned, and Jim Spica supported accepting the September minutes with the revisions submitted by Mr. Spica. Motion carried.
 - ii. October (Rick Mills) – **Attachment 2**. Nathan Piwowarski motioned, and Dan Borst supported accepting the October minutes. Motion carried.
- C. Chair's Report (Jim Spica) – Mr. Spica thanked Greenleaf Trust for their sponsorship of the cocktail reception that preceded the Chair's dinner in October at the Interlochen Arts Academy on the campus of the Interlochen Center for the Arts. He also thanked the chairs of committees for regularly inviting Katie Lynwood and him to committee meetings as ex-officio members. Mr. Spica also encouraged committee chairs to review the current committee lists for accuracy. There will be a holiday luncheon at the University Club following the December 15 council meeting for those who indicate a wish to attend to Katie or Jim by the close of business on Monday, November 20.

D. Chair Elect Report (Katie Lynwood) – Ms. Lynwood reported that Rebecca Wrock has been added to the Uniform Partitions of Heirs Property Committee and the Uniform Community Property Disposition at Death Act, Patricia Davis has been added to the Real Estate Committee and Amicus Committee, James Anderton has been added to the Real Estate Committee, and Angela Hentkowski is now the chair of the Real Estate committee. Ms. Hentkowski is also now the Council’s liaison to the Real Estate Section.

E. Treasurer’s Report (Christine Savage)

If you would like to donate to the Hearts and Flowers account, please send a check to Christine Savage, payable to the Lowe Law Firm, PC. Please write on the memo line of the check “Hearts and Flowers”. A suggested donation is \$35.00.

III Committee Reports

A. Committee on Special Projects

CSP participated in a lengthy discussion related to the substantive law of undue influence in Michigan. While there was some dissent to the proposed statutory language, there was a consensus that the committee should continue its work toward a statutory framework to guide judicial deliberations on the subject. No official straw-poll or vote was taken. Next month, the committee will conduct in-depth discussion on the presumption of undue influence based on confidential relationships.

B. Amicus Curiae (Mayoras): Two of the Council’s amicus submissions are subject to oral arguments in the Supreme court on December 7 and 8.

C. Annual Meeting (Spica): No report.

D. Awards (Kellogg): No report.

E. Budget (Mills): No report.

F. Bylaws (Lucas): No report.

G. Charitable and Exempt Organizations (Wrock): Rebecca Wrock reported that the next committee meeting is on December 8. The committee will be discussing the proposal for legislation on which they are working.

H. Citizens Outreach (Goetsch): No report.

- I. Court Rules, Forms, and Proceedings (Hentkowski): Angela Hentkowski is the new chair of the committee. The committee has not met yet with Ms. Hentkowski as chair.
- J. Electronic Communications (Hentkowski): No report.
- K. Ethics and Unauthorized Practice of Law (Mallory): No report.
- L. Guardianship, Conservatorship, and End of Life (Glazier): The guardianship bills were passed out of the House in addition to a new bill that would create the Office of State Guardianship.
- M. Legislation Development and Drafting (Mills/Tiplady): Rick Mills reported that the committee has met yet since he joined Rob Tiplady as co-chair.
- N. Legislation Monitoring and Analysis (Shelton). Mike Shelton reported that SB 175 was referred out by the Committee on Tax Policy favorably with an amendment that limits the penalty for failing to file for non-principal residence properties to \$4,000.00.
- O. Legislative Testimony (Mysliwicz): No report.
- P. Membership (Hentkowski): Angela Hentkowski has proposed providing webinars to the section. Dan Hilker motioned to authorize Ms. Hentkowski to upgrade the Zoom account to include webinars to the extent she deems appropriate not to exceed \$1,000.00. Nathan Piwowarski seconded the motion. The motion carried.
- Q. Nominating (Lucas): Mr. Lucas reported that the Nominating Committee will take up its work later in the year. Part of the Nominating Committee's consideration is participation in meetings and committees of the Council.
- R. Planning (Spica). Mr. Spica reminded those in attendance who may have comments on questions about the Council's proceedings that the Executive Committee is meeting regularly in each month in which there is a Council meeting on the Monday following the month's Council meeting.
- S. Probate Institute (Piwowarski): Nathan Piwowarski reported that the agenda for the 2024 Probate and Estate Planning Institute is attachment 3 of the November 2023 meeting materials, page 66.

- T. Real Estate (Hentkowski): On behalf of the committee, Ms. Hentkowski motioned that the council oppose SB 175. The secretary recorded a vote of 21 Council members in favor and 2 not voting. The Chair declared the motion passed.
- U. State Bar and Section Journals (Mysliwiec): Ms. Mysliwiec encouraged members to submit an article for publication in the journal.
- V. Tax (Anderton): The report is the supplemental attachment to the November meeting materials.
- W. Assisted Reproductive Technology (Welber): The Council's ART legislation did not get introduced although there is a package that did get introduced and passed the House dealing with parentage. Issues still need to be addressed regarding the confluence of these pieces of legislation. Ms. Welber has an upcoming meeting with Rep. Kelly Breen to discuss the relevant issues.
- III. Electronic Wills (Cieslik): The Committee will be meeting on November 13, 2023. If anyone would like to attend the meeting, please contact Ms. Cieslik.
- IV. Fiduciary Exception to the Attorney-Client Privilege (Krueger): No report.
- V. Nonbanking Entity Trust Powers (Spica): Mr. Viviano and Mr. Spica plan to meet with the Director of the Michigan Office of Banking to seek guidance on the next phase of the committee's work, which is to create a set of amendments to the Banking Code of 1999 to accommodate the committee's proposed Private Trust Company Act.
- VI. Premarital Agreements (Savage): The Family Law Section is planning to prepare a version of the Uniform Premarital Agreement Act. The committee is looking to possibly work with the Family Law Section. Ms. Savage will update the Council in December.
- VII. Uniform Community Property Disposition at Death Act (Spica): The committee Chair is still working on an enactment-in-Michigan draft of the uniform act that incorporates the committee's considered suggestions.
- VIII. Undue Influence (Silver): No report apart from what was discussed in the CSP meeting.

- IX. Uniform Fiduciary Income and Principal Act (Spica): The Unitrust Act, HB 5110, has been assigned to the House Judiciary committee.
- X. Uniform Partition of Heirs Property Act (Spica): The legislative proposal for the adoption of this act in Michigan will go over into the next term.
- XI. Uniform Power of Attorney Act (Savage). Christine Savage expressed gratitude to the committee members for their work. Since with the enactment of 2023 Public Acts 187-189, the committee's work is completed, Ms. Savage asked Mr. Spica to disband the committee. That request was promptly granted.
- XII. Various Issues Involving Death and Divorce (Borst/Blume): No report.
- XIII. Good of the Order
Nathan Piwowarski reported that a new sponsor has been found to reintroduce the remote notarizing and witnessing legislation in favor of which the Council has already adopted a public policy position.
- XIV. The regular meeting was adjourned at 11:51 p.m.

Respectfully Submitted,

Richard C. Mills, Secretary

The next Council meeting will be held on Friday, December 15, 2023.

ATTACHMENT 2

Tax Nugget

To: Probate and Estate Planning Council

From: J.V. Anderton on behalf of the Tax Committee

RE: December 2023 Tax Nugget

This month's Tax Nugget is a few key numbers and planning ideas to remember heading into 2024.

Rev. Proc. 2023-34 announced the new exemptions amounts as adjusted for inflation as follows: (1) Unified Credit Against Estate Tax moves to \$13,610,000 under IRC 2010; (2) Annual Exclusion for Gifts moves to \$18,000 under IRC 2503; (3) Gift to non-US citizen spouse moves to \$185,000 which is not included in taxable gifts under IRC 2503 and 2523(i)(2).

Rev. Rul. 2023-21 announced the AFRs for various terms and compounding periods. The short term AFR compounded annually is 5.26%, the mid-term AFR compounded annually is 4.82%, and the long-term AFR compounded annually is 5.03%. For comparison purposes, these rates in December of 2022 were 4.55% (short-term), 4.27% (mid-term), and 4.34% (long-term). As a reminder, the short-term applies to debts with less than a 3-year term, mid-term applies to debts with a 3-9 year term, and the long-term applies to debts with more than 9 years for the term.

For those with higher net-worth clients, it is worth remembering that higher interest rates will result in a lower present value of a gift of a remainder interest, which can make strategies such as a qualified personal residence trust (QPRT) or a charitable remainder annuity trust (CRAT) more effective.

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