Supplementary Materials
for
January 18, 2014, Probate & Estate Planning Section Council Meeting

Committee Report of January 6, 2014
Ad hoc Committee for review of proposed revisions to Michigan Model Civil Jury Instructions
MEMORANDUM

TO: Thomas F. Sweeney, Chair, Probate & Estate Planning Council
FROM: David L.J.M. Skidmore, Chair, Ad Hoc Committee on Undue Influence Jury Instructions
DATE: January 6, 2014
RE: Proposed Revisions to Michigan Model Civil Jury Instructions Regarding Undue Influence

INTRODUCTION

The Committee on Model Jury Instructions (the “MJI Committee”) has published proposed revisions to the Michigan Model Civil Jury Instructions related to undue influence claims, soliciting comment on the proposed revisions. The Probate & Estate Planning Council (the “Council”) has formed an ad hoc committee to advise the Council regarding comment on the proposed revisions (the “Ad Hoc Committee”). The Ad Hoc Committee recommends that the Council should formally comment on the proposed revisions as outlined in this memorandum.

MICHIGAN LAW REGARDING PRESUMPTION OF UNDUE INFLUENCE

By way of background, undue influence in will and trust contests can be difficult to establish because direct evidence rarely exists. Accordingly, the “English rule that undue influence was never presumed was softened to allow circumstantial evidence, such as the existence of a fiduciary relationship[,] to raise the presumption of undue influence.” Scalise, Jr., Undue Influence and the Law of Wills: A Comparative Analysis, 19 Duke J Comp & Int’l L 41, 53 (2008).

As the Michigan Supreme Court explained in In re Hartlerode’s Will, “there are certain cases in which the law indulges in the presumption that undue influence has been used, as where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser.” 183 Mich 51, 60; 148 NW 774 (1914). In those circumstances, “experience has taught that if certain evidentiary facts can be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed.” Id.

Therefore, under Michigan law, “[t]he presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to
influence the grantor's decision in that transaction.” *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

A presumption has a dual nature. On the one hand, there is an evidentiary aspect to a presumption, because a presumption is an “assumed fact created by operation of law.” Benson, *Michigan Rule of Evidence 301, I Presume*, 87 Mich B J 34, 35 (2008). On the other hand, there is a procedural aspect to a presumption, such that the presumption of undue influence has been described as a “procedural mechanism” that “regulates the burden of proceeding with the evidence.” *Id.*

The contestant (the party contesting the validity of the will/trust) may seek to establish the presumption of undue influence in order to invalidate the instrument. In that case, the proponent (the party propounding the validity of the will/trust) will seek to defeat the presumption of undue influence in order to uphold the validity of the instrument.

The contestant who is alleging undue influence has the burden of proof in the sense of the burden of persuasion. “The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout trial.” *Kar*, 399 Mich at 538 (rejecting argument “that, once established, the presumption shifts the burden of proof to the defendant to show an absence of undue influence.”). “[A] presumption . . . does not shift to [the party against whom it is directed] the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” MRE 301.

The burden of persuasion is one aspect of the burden of proof. “Generally the burden of persuasion is allocated between the parties on the basis of the pleadings. The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation. A plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case.” *Kar*, 399 Mich at 539. “This burden never shifts during trial. Therefore, plaintiffs, who alleged the existence of undue influence, bore the ultimate burden of persuading the trier of fact that undue influence was used to procure the deed.” *Id.*

The burden of production is another aspect of the burden of proof; it determines which party has the current duty to go forward with production of evidence in order to avoid a directed verdict. “[T]he burden of production always rests with the party in danger of losing a motion for a directed verdict.” Benson, 87 Mich B J 34. This burden can shift during trial. “Initially, the burden of going forward with evidence (the risk of nonproduction) is upon the party charged with the burden of persuasion. However, the burden of going forward may be shifted to the opposing party.” *Kar*, 399 Mich at 540.

If the contestant offers proof of the underlying elements required to establish the presumption of undue influence, then the contestant will avoid entry of an unfavorable directed verdict. “It [i.e., the presumption] is a procedural device which allows a person relying on the presumption to avoid a directed verdict[.]” *Widmayer*, 422 Mich at 289.

MRE 301 provides that the establishment of the presumption by the contestant imposes a burden on the proponent of producing evidence to rebut or meet the presumption: “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[]." Accord Widmayer, 422 Mich at 289 ("[T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device...").

The trial court decides whether the contestant’s proofs are sufficient to establish the presumption of undue influence, for purposes of regulating the burden of production. “Under Thayer/MRE 301, the judge makes all determinations as to the existence, or nonexistence, of the presumption.” Widmayer, 422 Mich at 288. The Court need not, and should not, discuss its procedural determination regarding the presumption with the finder of fact, in order to avoid influencing its verdict.

After the burden of production shifts, the opposing party must introduce evidence that rebuts the presumption of undue influence. “[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption...” MRE 301. “At a minimum, a presumption shifts to the opponent of the presumed fact the burden of going forward with evidence to rebut the fact presumed.” Benson, 87 Mich B J 34. “The immediate legal effect of a presumption is procedural[;] it shifts the burden of going forward with the evidence relating to the presumed fact. Once there is a presumption that fact C is true, the opposing party must produce evidence tending to disprove either facts A and B or presumed fact C[].” Kar, 399 Mich at 540-41, quoting In re Wood Estate, 374 Mich 278, 288-289; 132 NW2d 35 (1965).

How much proof must the opposing party offer in order to rebut the presumption? “[I]t is clear that, under the ‘Thayer bursting bubble’ theory of presumptions, which theory is embodied in MRE 301, substantial evidence is required [to meet the burden of producing evidence sufficient to rebut a presumption]. ... Michigan courts have repeatedly held that substantial evidence consists of more than a mere scintilla of evidence but may amount to substantially less than a preponderance.” Jozwiak v N Michigan Hosps, Inc, 231 Mich App 230, 238; 586 NW2d 90 (1998), citing Widmayer, 422 Mich at 286.

If the proponent offers sufficient rebuttal evidence, then the case goes to the jury. “[I]f the plaintiff has produced so much evidence that the burden of production has shifted to the defendant, and if the defendant has met that burden with enough evidence to rebut the plaintiff’s evidence, the trial court will simply submit the issue to the jury. In other words, the burden of persuasion comes into play only after the proofs at trial are closed and the case is presented to the jury.” Benson, 87 Mich B J 34.

If the opposing party fails to produce evidence rebutting the presumption, then the court should grant a directed verdict to the contestant. “[I]f [the presumption] permits that person [relying on the presumption] a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.” Widmayer, 422 Mich at 289. Accord Kar, 399 Mich at 542 (“[T]he plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.”).
If and when the case goes to the jury, the jury instructions should not discuss the presumption. “[I]nsofar as Wood appears to hold that the trier of fact must be instructed as to the existence of the presumption . . . it is no longer controlling precedent. We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof.” Widmayer, 422 Mich at 288-89.

Where the contestant has invoked the presumption, the jury will make factual findings as to the existence of each of the underlying elements. If the jury finds that the elements of the presumption are established, then it must also find that the presumed fact (will/trust as product of undue influence) is also established, unless the evidence shows that the nonexistence of the presumed fact (undue influence) is more probable than the existence of the presumed fact. “That is, if the jury finds a basic fact, they must also find the presumed fact, unless persuaded by the evidence that its nonexistence is more probable than its existence.” Widmayer, 422 Mich at 290-291. “Again, even though the presumptions were overcome, permissible inferences remained. These inferences might have been sufficient to satisfy the trier of fact even in the face of the rebutting evidence.” Id.

The finder of fact weighs the contestant’s evidence (including the potential inference of undue influence, arising from the presumption elements) against the proponent’s evidence. “Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.” Widmayer, 422 Mich at 289.

DESCRIPTION OF PROPOSED REVISIONS

The MJI Committee has proposed revisions to the following Michigan Model Civil Jury Instructions relating to undue influence claims: M Civ JI 170.44, 170.45, 179.10 and 179.25. The proposed revisions to the instructions at issue are attached as Exhibit A.

A. M Civ JI 170.44 (“Will Contests: Undue Influence”)

The MJI Committee has proposed making seven revisions to M Civ JI 170.44. First, the title of the instruction would be changed to: “Will Contests: Undue Influence and Confidential or Fiduciary Relationship.” Second, in the sentence where the current instruction provides that the contestant has the burden of proof, the “by a preponderance of the evidence” standard would be inserted. Third, the following provision would be added to the instruction: “Undue influence may be proven by indirect or circumstantial evidence.”

Fourth, the following provision would be added to the instruction, only to be used where the contestant seeks to establish a presumption of undue influence (the “Proposed Presumption Provision”):
If you find:

a. That [name] had a confidential or fiduciary relationship with the decedent; and

b. That [name] (or a person or interest he represented) benefited from the will; and

c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

Fifth, the following definition would be added to the instruction, only to be used in conjunction with the Proposed Presumption Provision:

A ‘confidential or fiduciary relationship’ is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person’s affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person’s affairs. The relationship may be formal, informal, professional and/or personal.

(This definition is actually part of the Proposed Presumption Provision, but the definition has been separated for purposes of the discussion below.)

Sixth, the following note on use, corresponding to the new Proposed Presumption Provision, would be added:

Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the three elements of the presumption into evidence. Whether the contestant has introduced evidence of the three elements of the presumption is a procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the
presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer,* 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *id.*

Seventh, several additional cases would be cited in the comment to this instruction.

B.  M Civ JI 170.45 ("Will Contests: Existence of Presumption of Undue Influence – Burden of Proof")

The MJI Committee has proposed deleting M Civ JI 170.45, for the reason that "the proposed amendment to M Civ JI 170.44" would make "M Civ JI 170.45 no longer necessary."

C.  M Civ JI 179.10 ("Trust Contests: Undue Influence")

The MJI Committee has proposed making seven revisions to M Civ JI 179.10, which are identical to the proposed revisions to M Civ JI 170.44.

D.  M Civ JI 179.25 ("Trust Contests: Existence of Presumption of Undue Influence – Burden of Proof")

The MJI Committee has proposed deleting M Civ JI 179.25, for the reason that "the proposed amendment to M Civ JI 179.10" would make "M Civ JI 179.25 no longer necessary."

**COMMENT ON PROPOSED REVISIONS**

The Ad Hoc Committee believes that the Proposed Presumption Provision in M Civ JI 170.44 and 179.10 is inconsistent with, and contrary to, Michigan law and should not be adopted. Otherwise, the Ad Hoc Committee approves of the proposed revisions. (One typographical error was noted: the omission of an asterisk at the beginning of subparagraph b, following the clause that begins "It is not improper...")

Under M Civ JI 170.44 and 179.10, the Proposed Presumption Provision would be used in will or trust contests where (1) the contestant meets its burden of production by introducing evidence of three factors that give rise to the presumption of undue influence; (2) the proponent meets its burden of production by introducing evidence that rebuts the presumption of undue influence; and (3) the trial court sends the case to the jury as finder of fact. Under that scenario, the Proposed Presumption Provision would instruct the jury that, if it finds the existence of the three undue influence presumption factors (i.e., relationship, opportunity and benefit), then it "should consider such circumstances, along with all the evidence, in determining..."
whether the contestant has proven undue influence.” Such an instruction would be inconsistent with, and contrary to, Michigan law.

The Michigan Supreme Court has ruled that, under such circumstances, the trial court should instruct the jury that, if it finds the facts that establish the presumed fact (without mentioning the presumption), then it must find the presumed fact, unless it finds – based on all the evidence – that the nonexistence of the presumed fact is more likely than the existence of the presumed fact. “We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof. That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.” *Widmayer*, 422 Mich at 288-89. The Proposed Presumption Provision, by merely instructing the jury that it “should consider” the basic facts, fails to comport with *Widmayer*.

Professor Benson employs virtually identical wording in his discussion of the relevance of the presumption to the jury’s findings. “When a presumption applies, if a jury accepts as true the basic facts, it is instructed that it must, by law, accept the presumed facts unless the presumed facts have been rebutted by contrary evidence.” Benson, 87 Mich B J 34.

It should be emphasized that, in the scenarios under consideration by both the Michigan Supreme Court and Professor Benson, the undue influence case has gone to the jury, meaning that the contestant offered sufficient evidence to establish a presumption of undue influence, the burden of production passed to the opposing party, and the opposing party met its burden of producing evidence to rebut the presumption. Despite the fact that the presumption of undue influence has been “rebutted” in this scenario, both the Michigan Supreme Court and Professor Benson agree that the jury is to be instructed that it must find undue influence if it finds the underlying three factors, unless it is persuaded by all the evidence that the nonexistence of undue influence is more likely than the existence of undue influence.

Hence, the term “rebuttal” in the presumption of undue influence arena appears to be given two slightly different meanings. During the trial, the presumption of undue influence may be rebutted by the proponent/defendant meeting its burden of producing evidence sufficient to avoid a directed verdict. “[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption...” MRE 301 (emphasis added). This type of rebuttal might be thought of as rebuttal for purposes of evaluating whether the trial court should enter a directed verdict.

After the close of the proofs, when the case is sent to the jury, the presumption of undue influence may be “rebutted” by the jury finding that the nonexistence of the presumed fact is more likely than the existence of the presumed fact, based on all the evidence. “[I]f a jury accepts as true the basic facts, ... it must, by law, accept the presumed facts unless the presumed facts have been rebutted by contrary evidence.” Benson, 87 Mich B J 34. This type of rebuttal might be thought of as rebuttal for purposes of a jury verdict.

Moreover, the Proposed Presumption Provision does not fit into any recognized inference format. Again, evidence of the three foundational factors (relationship, opportunity, benefit) supports an inference of undue influence. An inference may be mandatory (“If you find
A, B and C, then you must find D”), conditionally mandatory (“If you find A, B and C, then you must find D, unless you find that all the evidence makes it more likely that D did not exist”), or permissive (“If you find A, B and C, then you may find D”).

The template of the Proposed Presumption Provision is: “If you find A, B and C, then you should consider A, B and C, and all other evidence, in determining whether D existed.” This language reflects that the jury is to draw no type of inference whatsoever from the underlying factors. The proposed language thereby fails to impress upon the jury that there is a significant link between the existence of A, B and C, and the likelihood that D occurred. “Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed.” In re Wood’s Estate, 374 Mich at 289.

The Proposed Presumption Provision essentially says: “You can consider all the evidence, including A, B and C, in determining whether D existed.” That seems to be little more than the basic charge to the jury: “Decide the case based on the evidence you’ve heard.” In contrast, both Widmayer and Professor Benson require that the jury instructions employ a conditional mandatory inference under these circumstances (i.e., “If you find A, B and C, then you must find D, unless you find that all the evidence makes it more likely that D did not exist”).

The Ad Hoc Committee believes that, as presently worded, the Proposed Presumption Provision would serve to vitiate the operation of the undue influence presumption in every case that goes to the jury. The Ad Hoc Committee strongly recommends that the Proposed Presumption Provision be revised to read as follows:

If you find:

a. That [name] had a confidential or fiduciary relationship with the decedent;

b. That [name] (or a person or interest he represented) benefited from the will; and

c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you must find that the [will/trust] is the product of undue influence, unless you are persuaded by all of the evidence that the nonexistence of undue influence is more probable than the existence of undue influence.

This alternative language would instruct the jury on the inferential relationship between A, B and C, on the one hand, and undue influence, on the other hand, and direct the jury to weigh that important relationship against all of the countervailing evidence.
EXHIBIT A
FROM THE COMMITTEE ON
MODEL CIVIL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by April 1, 2014. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee is considering the adoption of amended instructions for use in cases where a will or trust is being contested and the deletion of two instructions previously used in those cases.

[AMENDED] M CIV JI 170.44
M CIV JI 170.44 WILL CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the decedent in the making of the will.

Undue influence is influence which is so great that it overpowers the decedent's free will and prevents [ him / her ] from doing as [ he / she ] pleases with [ his / her ] property.

To be "undue," the influence exerted upon the decedent must be of such a degree that it overpowered the decedent's free choice and caused [ him / her ] to act against [ his / her ] own free will and to act in accordance with the will of the [ person / persons ] who influenced [ him / her ].

The influence exerted may be by [ force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / ( other ) ]. A will which results from undue influence is a will which the decedent would not otherwise have made. It disposes of the decedent's property in a manner different from the disposition the decedent would have made had [ he / she ] been free of such influence.

The word "undue" must be emphasized, because the decedent may be influenced in the disposition of [ his / her ] property by specific and direct influences without such influences becoming undue. This is true even though the will would not have been made but for such influence. It is not improper for a [ spouse / child / parent / relative / friend / housekeeper / (other) ] to—
a. *(advise / persuade / argue / flatter / solicit / entreat / implore ),
b. (appeal to the decedent's [ hopes / fears / prejudices / sense of justice / sense of
duty / sense of gratitude / sense of pity ],)
c. *(appeal to ties of [ friendship / affection / kinship ],)
d. *(( other ),)

provided the decedent's power to resist such influence is not overcome and [ his / her ]
capacity to finally act in accordance with [ his / her ] own free will is not overpowered. A
will which results must be the free will and purpose of the decedent and not that of
[ another person / other persons ].

Mere existence of the opportunity, motive or even the ability to control the free will of the
decedent is not sufficient to establish that the decedent's will is the result of undue
influence.

Undue influence may be proven by indirect or circumstantial evidence.

**If you find:
a. That [ name ] had a confidential or fiduciary relationship with the decedent; and
b. That [ name ] (or a person or interest he represented) benefited from the will; and
c. That [ name ] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in
determining whether the contestant has proven undue influence.

A "confidential or fiduciary relationship" is a relationship where one person places
confidence, reliance and trust in another person, such that the second person has
authority or power over some aspect of the first person's affairs, and the first person
expects that the second person will act with integrity and fidelity towards the first
person's affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use
*The Court should choose among subsections a-d those which are applicable to the
case.

This instruction should be accompanied by MCivJI 8.01, Meaning of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the
contestant seeks to establish a presumption of undue influence and has offered
evidence of each of the three elements of the presumption into evidence. Whether the
contestant has introduced evidence of the three elements of the presumption is a
procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *id*.

Comment

*In re Estate of Karmey*, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 170.44 was added January 1984.
Amended December 8, 2003.

[DELETED] M CIV JI 170.45

M CIV JI 170.45 WILL CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

To establish that the decedent made the will as a result of undue influence, the contestant has the burden of proving all three of the following propositions:

a. That [name] had a fiduciary relationship with the decedent.
b. That [name] (or a person or interest he represented) benefited from the will, and
c. That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.

Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.
A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.

Note on Use

The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ JI 170.44, making M Civ JI 170.45 no longer necessary.

In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; Widmayer v Leonard, 422 Mich 280; 373 NW2d 538 (1985).

Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M-Civ JI 170.44—Will Contests: Undue Influence—Burden of Proof.

A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; Widmayer, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; Widmayer, supra.

Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, In re Kanable Estate, 47 Mich App 289; 200 NW2d 452 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, In re Estate of Karmey, 468 Mich 68,74 fn 2,3; 658 NW2d 796 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. In re Estate of Karmey.

The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or
fiduciary relationship" have identical meanings. See, In re Estate of Karmey.

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof.

Comment
In re Estate of Karmey; Widmayer, Kar v Hogan, 399 Mich 529; 251 NW2d 77 (1976).
See also In re Cox Estate, 383 Mich 108; 174 NW2d 558 (1970) (fiduciary relationship
of attorney and clergyman); In re Vollbrecht Estate, 26 Mich App 430; 182 NW2d 609
(1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney
and her accountant were also trustees of foundation); In re Spillette Estate, 352 Mich
12; 88 NW2d 300 (1958); In re Haskell's Estate, 283 Mich 513; 278 NW 668 (1938) (will
in favor of attorney upheld where testatrix obtained independent advice; presumption of
undue influence rebutted); In re Eldred's Estate, 234 Mich 131; 203 NW 870 (1926)
(doctor); In re Hartlrodeo's Estate, 183 Mich 51; 148 NW 774 (1914) (clergyman).

History
M Civ JI 170.45 was added January 1984.

[AMENDED] M CIV JI 179.10
M CIV JI 179.10 TRUST CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR
FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there
was undue influence exerted on the settlor in the [ creation / amendment / revocation ]
of the trust.

Undue influence is influence that is so great that it overpowers the settlor's free will and
prevents [ him / her ] from doing as [ he / she ] pleases with [ his / her ] property.

To be "undue," the influence exerted upon the settlor must be of such a degree that it
overpowered the settlor's free choice and caused [ him / her ] to act against [ his / her ]
own free will and to act in accordance with the will of the [ person / persons ] who
influenced [ him / her ].

The influence exerted may be by [ force / threats / flattery / persuasion / fraud /
misrepresentation / physical coercion / moral coercion / other ]. Action that results from
undue influence is action that the settlor would not otherwise have taken. It disposes of
the trust property in a manner different from the disposition the settlor would have made
had [ he / she ] been free of such influence.

The word "undue" must be emphasized, because the settlor may be influenced in the
disposition of the trust property by specific and direct influences without such influences
becoming undue. This is true even though the trust would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / other] to—

a. *[advise / persuade / argue / flatter / solicit / entreat / implore],
b. *(appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],
c. *(appeal to ties of [friendship / affection / kinship],
d. *(other],

provided the settlor's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A trust that results must be the free will and purpose of the settlor and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the settlor is not sufficient to establish that [creation / amendment / revocation] of the trust is the result of undue influence.

**Undue influence may be proven by indirect or circumstantial evidence.**

**If you find:**
a. That [name] had a confidential or fiduciary relationship with the decedent; and
b. That [name] (or a person or interest he represented) benefited from the will; and
c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

A "confidential or fiduciary relationship" is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person's affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person's affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use
*The Court should choose among subsections a-d those which are applicable to the case.
This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the 3 elements of the presumption into evidence. Whether the
contestant has introduced evidence of the 3 elements of the presumption is a procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts.  

*Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant.  

*MRE 301*. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant.  

*Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *Id*.

Comment

This instruction is virtually identical to M Civ JI 170.44

*In re Estate of Karmey*, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1945); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History  

M Civ JI 179.10 was added June 2011.

[DELETED] M CIV JI 179.25  

M CIV JI 179.25 TRUST CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

To establish that the settlor [*created / amended / revoked*] the trust as a result of undue influence, the contestant has the burden of proving all three of the following propositions:

1. that [*name*] had a fiduciary relationship with the settlor;
2. that [*name*] (or a person or interest he represented) benefited from the [*creation / amendment / revocation*] of the trust, and
3. that by reason of the fiduciary relationship [*name*] had an opportunity to influence the settlor in giving that benefit.

If you find that all three propositions have been proven, then the settlor’s action is
invalid as a result of undue influence. Otherwise, the settlor’s action is not invalid as a result of undue influence.

A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.

Note on Use
The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ Jl 179.10, making M Civ Jl 179.25 no longer necessary.

In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn’t introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; Widmayer v Leonard, 422 Mich 280 (1985).

Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ Jl 179.10 Trust Contests: Undue Influence—Definition.

A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; Widmayer, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict—MRE 301; Widmayer, supra.

Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, In re Kanable Estate, 47 Mich App 299 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, In re Estate of Karmey, 468 Mich 68,74 fn 2,3 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. In re Estate of Karmey.
The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or fiduciary relationship" have identical meanings. See, In re Estate of Karmey.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

Comment
This instruction is substantially similar to M Civ JI 170.45.
In re Estate of Karmey; Widmayer; Kar v Hogan; 399 Mich 529 (1976). See also In re Cox Estate, 383 Mich 108 (1970) (fiduciary relationship of attorney and clergyman); In re Vollbrecht Estate, 26 Mich App 430 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); In re Spillette Estate, 352 Mich 12 (1958); In re Haskell’s Estate, 283 Mich 513 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); In re Eldred’s Estate, 234 Mich 131 (1926) (doctor); In re Hartlerode’s Estate, 183 Mich 51 (1914) (clergyman).

History
M Civ JI 179.25 was added June 2011.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Alfred M. Butzbaugh
Reporter: Timothy J. Raubinger