proof of that approval or certification is provided to the secretary and department, unless the use of the electronic notarization system is affirmatively disallowed by the secretary.


**55.286b Remote electronic notarization platforms; requirements; approval; review standards; recording limitations; journal; requirements; custodian.**

Sec. 26b. (1) By March 30, 2019, the secretary and the department of technology, management, and budget shall review and may approve remote electronic notarization platforms for the performance of notarial acts in this state. A notary public shall not use a remote electronic notarization platform that is not approved under this section.

(2) Subject to subsection (3), in developing criteria for the approval of any remote electronic notarization platform for use in this state, the secretary of state and the department of technology, management, and budget shall consider, at a minimum, all of the following:

(a) The need to ensure that any change to or tampering with an electronic record containing the information required under this act is evident.

(b) The need to ensure integrity in the creation, transmission, storage, or authentication of remote electronic notarizations, records, or signatures.

(c) The need to prevent fraud or mistake in the performance of remote electronic notarizations.

(d) The ability to adequately investigate and authenticate a notarial act performed remotely with that remote electronic notarization platform.

(e) The most recent standards regarding remote electronic notarization promulgated by national bodies, including, but not limited to, the National Association of Secretaries of State.

(f) The standards, practices, and customs of other jurisdictions that allow remote electronic notarial acts.

(3) If a remote electronic notarization platform for the performance of remote electronic notarizations is approved or certified by a government-sponsored enterprise, as that term is defined in 2 USC 622(8), the secretary of state and the department of technology, management, and budget shall approve the platform for use in this state if verifiable proof of that approval or certification is provided to the secretary and department, unless use of the remote electronic notarization platform is affirmatively disallowed by the secretary.

(4) The secretary and the department of technology, management, and budget shall review their standards for approving remote electronic notarization platforms for use in this state, and whether the number of approved remote electronic notarization platforms are sufficient, at least every 4 years.

(5) A notary public may perform a notarial act using a remote electronic notarization platform if either of the following is met:

(a) The notary public makes all applicable determinations under section 25 according to personal knowledge or satisfactory evidence, performance of the notarial act complies with section 27, and the notary public does not violate section 31 in the performance of the notarial act.

(b) The notary public, through use of the remote electronic notarization platform, personal knowledge, or satisfactory evidence, is able to identify the record before the notary public as the same record presented by the individual for notarization.

(6) The notary public shall not record by audio or visual means a notarial act performed using a remote electronic notarization platform, unless the notary public discloses to the person that requested the notarial act that an audio or visual recording is being made and how the recording will be preserved, and the person consents or has previously consented to the recording. A notary public may refuse to conduct a notarial act using a remote electronic notarization platform if the person that requested the notarial act objects to an audio or visual recording of the notarial act.

(7) If a notary public performs notarial acts using a remote electronic notarization platform, the notary public shall maintain a journal that records, at a minimum, each of those notarial acts. A notary public shall maintain only 1 journal for the recording of notarial acts and must keep the journal either as a tangible, permanent bound register or in a tamper-evident, permanent electronic format. A notary public shall retain the journal for at least 10 years after the performance of the last notarial act recorded in it. If a notary public is not reappointed, or his or her commission is revoked, the former notary public shall inform the secretary of state where the journal is kept or, if directed by the secretary, shall forward the journal to the secretary or a repository designated by the secretary.

(8) A notary public shall make an entry in a journal maintained under subsection (7) contemporaneously with performance of the notarial act, and the entry must include, at a minimum, all of the following:

(a) The date, time, and nature of the notarial act.

(b) A description of the record, if any.

(c) The full name and address of each individual for whom the notarial act is performed.

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"Remote Notarization and Witnessing Workgroup (Appendix B: Existing Law)"
(d) If the identity of the individual for whom the notarial act is performed is based on personal knowledge, a statement to that effect. If the identity of the individual for whom the notarial act is performed is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance and expiration for the credential.

(e) The fee charged, if any, by the notary public.

(9) An entry made in a journal maintained by a notary public under subsection (7) must also reference, but shall not itself contain, any audio or visual recording of a notarial act performed using a remote electronic notarization platform. Subject to subsection (1), a notary public must retain an audio or visual recording of a notarial act for at least 10 years after the performance of the notarial act.

(10) A notary public may designate a custodian to do any of the following:
(a) Maintain the journal required under subsection (7) on his or her behalf.
(b) Retain an audio or visual recording of a notarial act under subsection (9) on his or her behalf. If an audio or visual recording of a notarial act is transferred to a custodian to hold on behalf of the notary public, the journal entry must identify the custodian with sufficient information to locate and contact that custodian.

(11) A notarial act performed using a remote electronic notarization platform under this section that otherwise satisfies the requirements of this act is presumed to satisfy any requirement under this act that a notarial act be performed in the presence of a notary public.


55.287 Signature of notary public; statements; stamp, seal, or electronic process; effect of illegible statement.

Sec. 27. (1) A notary public shall place his or her signature on every record upon which he or she performs a notarial act. The notary public shall sign his or her name exactly as his or her name appears on his or her application for commission as a notary public.

(2) On each record that a notary public performs a notarial act and immediately near the notary public's signature, as is practical, the notary public shall print, type, stamp, or otherwise imprint mechanically or electronically sufficiently clear and legible to be read by the secretary and in a manner capable of photographic reproduction all of the following in this format or in a similar format that conveys all of the same information:
(a) The name of the notary public exactly as it appears on his or her application for commission as a notary public.
(b) The statement: "Notary public, State of Michigan, County of _______.
(c) The statement: "My commission expires _______."
(d) If performing a notarial act in a county other than the county of commission, the statement: "Acting in the County of _______."
(e) The date the notarial act was performed.

(3) A notary public may use a stamp, seal, or electronic process that contains all of the information required under subsection (2). However, the notary public shall not use the stamp, seal, or electronic process in a manner that renders anything illegible on the record being notarized. A notary public shall not use an embosser alone or use any other method that cannot be reproduced.

(4) The illegibility of the statements required under subsection (2) does not affect the validity of the transaction or record that was notarized.


Compiler's note: The repealed section pertained to use of notary form.

55.291 Notary public; prohibited conduct.

Sec. 31. (1) A notary public shall not certify or notarize that a record is either of the following:
(a) An original.
(b) A true copy of another record.
(2) A notary public shall not do any of the following:
(a) Perform a notarial act upon any record executed by himself or herself.
(b) Notarize his or her own signature.
(c) Take his or her own deposition or affidavit.
(3) A notary public shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

(4) A notary public shall not, in any document, advertisement, stationery, letterhead, business card, or other comparable written material describing the role of the notary public, literally translate from English into another language terms or titles including, but not limited to, notary public, notary, licensed, attorney, lawyer, or any other term that implies the person is an attorney.

(5) A notary public who is not a licensed attorney and who advertises notarial services in a language other than English shall include in the document, advertisement, stationery, letterhead, business card, or other comparable written material the following, prominently displayed in the same language:

(a) The statement: "I am not an attorney and have no authority to give advice on immigration or other legal matters".

(b) The fees for notarial acts as specified by statute.

(6) A notary public may not use the term "notario publico" or any equivalent non-English term in any business card, advertisement, notice, or sign.

(7) A notary public shall not perform any notarial act in connection with a transaction if the notary public has a conflict of interest. As used in this subsection, "conflict of interest" means either or both of the following:

(a) The notary public has a direct financial or beneficial interest, other than the notary public fee, in the transaction.

(b) The notary public is named, individually, as a grantor, grantee, mortgagee, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee or as a party in some other capacity to the transaction.

(8) A notary public shall not perform a notarial act for a spouse, lineal ancestor, lineal descendant, or sibling including in-laws, steps, or half-relatives.

(9) A notary public who is a stockholder, director, officer, or employee of a bank or other corporation may take the acknowledgment of a party to a record executed to or by the corporation, or to administer an oath to any other stockholder, director, officer, employee, or agent of the corporation. A notary public shall not take the acknowledgment of a record by or to a bank or other corporation of which he or she is a stockholder, director, officer, or employee, under circumstances where the notary public is named as a party to the record, either individually or as a representative of the bank or other corporation and the notary public is individually a party to the record.

(10) For purposes of subsection (7), a notary public has no direct financial or beneficial interest in a transaction where the notary public acts in the capacity of an agent, employee, insurer, attorney, escrow, or lender for a person having a direct financial or beneficial interest in the transaction.


55.293 Person with physical limitations; signature by notary public.
Sec. 33. A notary public may sign the name of a person whose physical characteristics limit his or her capacity to sign or make a mark on a record presented for notarization under all of the following conditions:

(a) The notary public is orally, verbally, physically, or through electronic or mechanical means provided by the person and directed by that person to sign that person's name.

(b) The person is in the physical presence of the notary public.

(c) The notary public inscribes beneath the signature:

"Signature affixed pursuant to section 33 of the Michigan notary public act."


55.295 Request by secretary of state; failure to respond.
Sec. 35. (1) Upon receiving a written or electronic request from the secretary, a notary public shall do all of the following as applicable:

(a) Furnish the secretary with a copy of the notary public's records that relate to the request.

(b) Within 15 days after receiving the request, respond to the secretary with information that relates to the official acts performed by the notary public.

(c) Permit the secretary to inspect his or her notary public records, contracts, or other information that pertains to the official acts of a notary public if those records, contracts, or other information is maintained by the notary public.

(2) Upon presentation to the secretary of satisfactory evidence that a notary public has failed to respond within 15 days or another time period designated under this act to a request of the secretary under subsection (1), the secretary may notify the notary public that his or her notary public commission is suspended indefinitely until he or she provides a satisfactory response to the request.
55.297 Misconduct; civil liability; conditions.

Sec. 37. (1) For the official misconduct of a notary public, the notary public and the sureties on the notary public’s surety bond are liable in a civil action for the damages sustained by the persons injured. The employer of a notary public is also liable if both of the following conditions apply:

(a) The notary public was acting within the actual or apparent scope of his or her employment.
(b) The employer had knowledge of and consented to or permitted the official misconduct.

(2) A notary public and the notary public’s sureties are not liable for the truth, form, or correctness of the contents of a record upon which the notary public performs a notarial act.


55.299 Violations of notary public laws.

Sec. 39. The secretary may investigate, or cause to be investigated by local authorities, the administration of notary public laws and shall report violations of the notary public laws and rules to the attorney general or prosecuting attorney, or both, for prosecution.


55.300 Investigation by secretary of state; complaint.

Sec. 40. (1) The secretary may, on his or her own initiative or in response to a complaint, make a reasonable and necessary investigation within or outside of this state and gather evidence concerning a person who violated, allegedly violated, or is about to violate this act, a rule promulgated under this act, or an order issued under this act or concerning whether a notary public is in compliance with this act, a rule promulgated under this act, or an order issued under this act.

(2) A person may file a complaint against a notary public with the secretary. A complaint shall be made in a format prescribed by the secretary and contain all of the following:

(a) The complainant’s name, address, and telephone number.
(b) The complainant’s signature and the date the complaint was signed.
(c) A complete statement describing the basis for the complaint.
(d) The actual record that is the basis for the complaint or a copy, photocopy, or other replica of the record.

(3) The secretary may investigate compliance with this act, the rules promulgated under it, or an order issued under it by examination of a notary public’s records, contracts, and other pertinent records or information that relate to the official acts of the notary public.


55.300a Penalties; evidence; notice and hearing; revocation of commission; fine.

Sec. 40a. (1) An applicant for an appointment or a commissioned notary public who has engaged in conduct prohibited by this act, a rule promulgated under this act, or an order issued under this act is subject to one or more of the following penalties, in addition to any criminal penalties otherwise imposed:

(a) Suspension or revocation of his or her certificate of appointment.
(b) Denial of an application for appointment.
(c) A civil fine paid to the department in an amount not to exceed $1,000.00.
(d) A requirement to take the affirmative action determined necessary by the secretary, including payment of restitution to an injured person.
(e) A letter of censure.
(f) A requirement to reimburse the secretary for the costs of the investigation.

(2) The secretary may impose 1 or more of the penalties listed in subsection (1) upon presentation to the secretary of satisfactory evidence that the applicant for an appointment or a commissioned notary public has done 1 or more of the following:

(a) Violated this act, a rule promulgated under this act, or an order issued under this act or assisted others in the violation of this act, a rule promulgated under this act, or an order issued under this act.
(b) Committed an act of official misconduct, dishonesty, fraud, deceit, or of any cause substantially relating to the duties or responsibilities of a notary public or the character or public trust necessary to be a notary public.
(c) Failed to perform his or her notary public duties in accordance with this act, a rule promulgated under this act, or an order issued under this act.
(d) Failed to fully and faithfully discharge a duty or responsibility required of a notary public.
(e) Been found liable in a court of competent jurisdiction for damages in an action grounded in fraud, misrepresentation, or violation of this act.

(f) Represented, implied, or used false or misleading advertising that he or she has duties, rights, or privileges that he or she does not possess by law.

(g) Charged a fee for a notarial act that was more than is allowed under this act.

(h) Failed to complete the notary public's acknowledgment at the time the notary public signed or affixed his or her signature or seal to a record.

(i) Failed to administer an oath or affirmation as required by law.

(j) Engaged in the unauthorized practice of law as determined by a court of competent jurisdiction.

(k) Ceased to maintain his or her residence or principal place of business in this state.

(l) Lacks adequate ability to read and write English.

(m) Hindered or refused a request by the secretary for notary public records or papers.

(n) Engaged in a method, act, or practice that is unfair or deceptive including the making of an untrue statement of a material fact relating to a duty or responsibility of a notary public.

(o) Violated a condition of probation imposed under subsection (1).

(p) Permitted an unlawful use of a notary public's seal.

(q) Failed to maintain good moral character as defined and determined under 1974 PA 381, MCL 338.41 to 338.47.

(3) Before the secretary takes any action under subsection (2), the person affected shall be given notice and an opportunity for a hearing.

(4) If a person holding office as a notary public is sentenced to a term of imprisonment in a state correctional facility or jail in this or any other state or in a federal correctional facility, that person's commission as a notary public is revoked automatically on the day on which the person begins serving the sentence in the jail or correctional facility. If a person's commission as a notary public is revoked because the person begins serving a term of imprisonment and that person performs or attempts to perform a notarial act while imprisoned, that person is not eligible to receive a commission as a notary public for at least 10 years after the person completes his or her term of imprisonment.

(5) Cancellation of a commission is without prejudice to reapplication at any time. A person whose commission is revoked is ineligible for the issuance of a new commission for at least 5 years.

(6) A fine imposed under this act that remains unpaid for more than 180 days may be referred to the department of treasury for collection. The department of treasury may collect the fine by deducting the amount owed from a payroll or tax refund warrant. The secretary may bring an action in a court of competent jurisdiction to recover the amount of a civil fine.


55.301 Automatic revocation; violation as felony; notification of conviction.

Sec. 41. (1) If an individual commissioned as a notary public in this state is convicted of a felony or of a substantially corresponding violation of another state, the secretary shall automatically revoke the notary public commission of that individual on the date that the individual's felony conviction is entered.

(2) If an individual commissioned as a notary public in this state is convicted of 2 or more specified misdemeanors within a 12-month period while commissioned, or of 3 or more specified misdemeanors within a 5-year period regardless of being commissioned, the secretary shall automatically revoke the notary public commission of that individual on the date that the secretary determines the misdemeanor of which the individual was convicted is a specified misdemeanor. As used in this subsection, "specified misdemeanor" means a misdemeanor that the secretary determines involves any of the following:

(a) A violation of this act.

(b) A violation of the public trust.

(c) An act of official misconduct, dishonesty, fraud, or deceit.

(d) An act substantially related to the duties or responsibilities of a notary public.

(3) If an individual commissioned as a notary public in this state is sentenced to a term of imprisonment in a state correctional facility or jail in this or any other state or in a federal correctional facility, his or her commission as a notary public is revoked automatically on the day on which he or she begins serving the sentence in the jail or correctional facility. If an individual's commission as a notary public is revoked because he or she begins serving a term of imprisonment and he or she performs or attempts to perform a notarial act while imprisoned, he or she is not eligible to receive a commission as a notary public for at least 10 years after he or she completes his or her term of imprisonment.

(4) An individual found guilty of performing a notarial act after his or her commission as a notary public is revoked under this section is guilty of a felony punishable by a fine of not more than $3,000.00 or by imprisonment for not more than 5 years, or both.

(5) An individual, regardless of whether he or she has ever been commissioned as a notary public, who is...
convicted of a felony is disqualified from being commissioned as a notary public for not less than 10 years after he or she completes his or her sentence for that crime, including any term of imprisonment, parole, or probation, and pays all fines, costs, and assessments. As used in this section, a "felony" means a violation of a penal law of this state, another state, or the United States for which the offender, if convicted, may be punished by death or imprisonment for more than 1 year or an offense expressly designated by law as a felony.

(6) If an individual is convicted of a violation described in subsection (5), the court shall make a determination of whether he or she is a notary. If the individual is a notary, the court shall inform the secretary of the conviction.

(7) If an individual commissioned as a notary public in this state is convicted of any felony or misdemeanor in any court, he or she shall notify the secretary in writing of the conviction within 10 days after the date of that conviction.


55.303 Reapplication after revocation; unpaid fine.
Sec. 43. (1) Cancellation of a commission is without prejudice to reapplication at any time. Except as otherwise provided for in section 41(3), a person whose commission is revoked is ineligible for the issuance of a new commission for at least 5 years.

(2) A fine imposed under this act that remains unpaid for more than 180 days may be referred to the department of treasury for collection. The department of treasury may collect the fine by deducting the amount owed from a payoff or tax refund warrant. The secretary may bring an action in a court of competent jurisdiction to recover the amount of a civil fine.


55.305 Injunction or restraining order.
Sec. 45. (1) Whenever it appears to the secretary that a person has engaged in or is about to engage in an act of practice that constitutes or will constitute a violation of this act, a rule promulgated under this act, or an order issued under this act, the attorney general may petition a circuit court for injunctive relief. Upon a proper showing, a circuit court may issue a permanent or temporary injunction or restraining order to enforce the provisions of this act. A party to the action has the right to appeal within 60 days from the date the order or judgment of the court was issued.

(2) The court may order a person subject to an injunction or restraining order provided for in this section to reimburse the secretary for the actual expenses incurred in the investigation related to the petition. The secretary shall refund any amount received as reimbursement should the injunction or restraining order later be dissolved by an appellate court.


55.307 Presumption.
Sec. 47. (1) Subject to subsection (2) and in the courts of this state, the certificate of a notary public of official acts performed in the capacity of a notary public, under the seal of office, is presumptive evidence of the facts contained in the certificate except that the certificate is not evidence of a notice of nonacceptance or nonpayment in any case in which a defendant attaches to his or her pleadings an affidavit denying the fact of having received that notice of nonacceptance or nonpayment.

(2) Notwithstanding subsection (1), the court may invalidate any notarial act not performed in compliance with this act.


55.309 Violation as misdemeanor or felony; jurisdiction; penalties and remedies as cumulative.
Sec. 49. (1) Except as otherwise provided for in section 41(4) or as provided by law, a person who violates this act is guilty of 1 of the following:

(a) Except as provided in subdivision (b), a misdemeanor punishable by a fine of not more than $5,000.00 or by imprisonment for not more than 1 year, or both.

(b) If the person knowingly violates this act when notarizing any document relating to an interest in real property or a mortgage transaction, a felony punishable by a fine of not more than $5,000.00 or by imprisonment for not more than 4 years, or both.

(2) An action concerning a fee charged for a notarial act shall be filed in the district court in the place where the notarial act occurred.
The penalties and remedies under this act are cumulative. The bringing of an action or prosecution under this act does not bar an action or prosecution under any other applicable law.


55.311 Notary fees fund.

Sec. 51. (1) The notary fees fund is created in the state treasury. Except as otherwise provided in sections 15(2) and 21(4), an application processing fee, duplicate notary public certificate of appointment processing fee, certification processing fee, copying processing fee, reimbursement costs, or administrative fine collected under this act by the secretary shall be deposited by the state treasurer in the notary fees fund and is appropriated to defray the costs incurred by the secretary in administering this act.

(2) A processing or filing fee paid to the secretary or county clerk under this act is not refundable.


55.313 Maintenance of records.

Sec. 53. A person, or the personal representative of a person who is deceased, who both performed a notarial act and created a record of the act performed while commissioned as a notary public under this act shall maintain all the records of that notarial act for at least 5 years after the date of the notarial act.


55.314 Application of act.

Sec. 54. This act modifies, limits, and supersedes the electronic signatures in global and national commerce act, 15 USC 7001 to 7031, but does not modify, limit, or supersede section 101(c) of that act, 15 USC 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 USC 7003(b).


55.315 Rules.

Sec. 55. The secretary may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to implement this act.

Memo

To: Probate Council, Committee on Special Projects

From: Kenneth F. Silver, Chair, Ad Hoc Committee on Undue Influence

Date: May 29, 2020

At the April 2020 Council meeting an Ad Hoc committee with respect to undue influence was created for the purpose of investigating and recommending a legislative fix with respect to undue influence. There is some disagreement among the committee members concerning the scope of our task. Some members of the committee believe that we should simultaneously tackle the confusion in the law concerning the proper application of the presumption of undue influence and create a statutory legal definition of undue influence, while others believe we should focus solely on the presumption. Because we were unable to reach consensus on the direction of the committee, we resolved to seek additional guidance from the larger group. Below is a brief summary of the state of the law with respect to the current definition of undue influence, the presumption of undue influence and past efforts of the Section in this area.

Definition of Undue Influence

There is no statutory definition of undue influence in Michigan. Undue influence has been defined as influence upon the testator or settlor of such a degree that it overpowered the individual's free choice and caused the individual to act against his own free will and in accordance with the will of the influencer. To establish undue influence, it must be shown that the grantor 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. 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. A copy of each jury instruction is attached as Exhibit 1. But undue influence is not limited to wills and trusts. It can apply to any donative transfer. There is a large body of case law applying this doctrine and in many different circumstances. A recitation of these cases is beyond the scope of this memo.
MEMO
To: Probate Council, Committee on Special Projects
From: Kenneth F. Silver, Chair, Ad Hoc Committee on Undue Influence
Date: May 29, 2020
Page: 2

The concept of "undue influence" is commonly linked to six factors. (Singer, Undue Influence and Written Documents: Psychological Aspects, 10 Cultic Studs. J. 19 (1993). These six factors include:

1. Isolation: the manipulator controls communications to and from the victim.
2. Siege Mentality: the manipulator sets up others as being sinister and threats to the victim.
3. Dependency: the manipulator emphasizes the victim's need for the manipulator and suggests that only the manipulator can be trusted.
4. Powerlessness: the manipulator emphasizes the victim's lack of power to combat the sinister enemies.
5. Fear and Vulnerability: the manipulator suggests that the victim's life, property, or money are in jeopardy.
6. Unaware: the manipulator constructs a false reality for the victim.

Many cases in Michigan have also incorporate some or all of these concepts.

To the committee's knowledge the only state that has attempted to incorporate these concepts into a statutory definition of undue influence is California. The California statute is attached as Exhibit 2. Our committee seeks guidance as to whether we should embark on our own effort to draft a similar statute.

Presumption of Undue Influence

Under Michigan law a presumption of undue 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 benefits from the change. Kar v Hogan 399 Mich 529 (1976). The presumption is evidentiary in nature and not statutory. Rule 301 of the Michigan Rules of Evidence provides:

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

evidence was necessary to rebut the presumption once established. This decision seems to be contrary to MRE 301 which requires that the burden not shift once a presumption is established. As noted by Justice Young in his Mortimore dissent, 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. What constitutes “substantial evidence” is also an issue often litigated. I can attest from personal experience that application of the presumption and its impact upon a trial is a struggle for many courts and litigants.

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. A copy of David Skidmore’s memo explaining the proposed revisions in detail is attached as Exhibit 3.

Conclusion

There is universal agreement within our committee that the confusion with respect to the application of the presumption requires a statutory fix. There is disagreement as to whether we should also attempt to define undue influence in a manner similar to California. In favor are those who believe a defining statute is necessary to provide clarity, especially as the population ages and the use of electronic documents and signatures becomes more and prevalent, and that the current case-law definition is too hard to satisfy, thereby encouraging undue influence. Opposed are those who believe years of jurisprudence has provided ample guidance on this issue and that given the difficulty in reaching consensus on any statute, a statutory definition is simply not necessary. Some are also concerned that there simply isn’t a legislative appetite for this fix and we should limit our efforts accordingly.
M Civ JI 170.44 Will Contests: Undue Influence—Definition; Burden of Proof

The contestant has the burden of proving 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) *(of (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.

If you find that [name] exerted undue influence, then your verdict will be against the will. If you find that [name] did not exert undue influence, then your verdict will be in favor of the will.

Note on Use

* The Court should choose among subsections (a)-(d) those which are applicable to the case.
Chapter 170: Will Contests

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

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 Jl 170.44 was added January 1984. Amended December 2003; October 2014.
January 2020.
M Civ JI 179.10 Trust Contests: Undue Influence—Definition—Burden of Proof

The contestant has the burden of proving 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—

(1) *([ advise / persuade / argue / flatter / solicit / entreat / implore ])

(2) *(appeal to the decedent’s hopes / fears / prejudices / sense of duty / sense of gratitude / sense of pity ,)

(3) *(appeal to ties of friendship / affection / kinship ,)

(4) *( [ 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.

If you find that [ name ] exerted undue influence, then your verdict will be against the trust. If you find that [ name ] did not exert undue influence, then your verdict will be in favor of the trust.

Note on Use

*The Court should choose among subsections (1)–(4) those which are applicable to the case.
Chapter 179: Trust Contests

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

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); Kur 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 179.10 was added June 2011. Amended October 2014, January 2020.
EXHIBIT 2
15610.70. (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.

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.

   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.

(Added by Stats. 2013, Ch. 668, Sec. 3. (AB 140) Effective January 1, 2014.)
EXHIBIT 3
MEMORANDUM

TO: Thomas F. Sweeley, Chair, Probate & Estate Planning Council
FROM: David L.J.M. Skidmore, Chair, Ad Hoc Committee on Undue Influence Jury Instructions
DATE: February 14, 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. 1 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. “[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: “If
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[.]" Kur, 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 burning 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 Hosp, Inc, 231 Mich App 230, 238; 586 NW2d 90 (1998), citing Widmayer, 422 Mich at 288.

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 Kur, 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. "[T]husfar 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) must be a 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." Id.

DESCRIPTION OF PROPOSED REVISIONS

The MJJ 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 Contest: Undue Influence")

The MJJ Committee has proposed making seven revisions to M Civ JI 170.44. First, the title of the instruction would be changed to: "Will Contest: 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 finding 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.

D. 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. (Two typographical errors were noted: in M Civ JI 170.44, the omission of an asterisk at the beginning of subparagraph b, following the clause that begins "It is not improper..."); and in M Civ JI 179.10, "trust" should replace "will" in the sentence that reads "If you find ... That [name] ... benefited from the will...")

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 are established, there is such a strong practical likelihood that another stated fact will be true that the 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 Kldmayer 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/trust]; 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 existence of undue influence is less probable than the nonexistence 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. It would also clarify that the burden of proof rests with the contestant and not the proponent, by replacing "the nonexistence of undue influence is more probable than the existence of undue influence" with "the existence of undue influence is less probable than the nonexistence of undue influence."

DIJMS