

UNDUE INFLUENCE: THE LITIGATION PERSPECTIVE

By: Sandra D. Glazier, Esq., Thomas M. Dixon, Esq., and Thomas F. Sweeney, Esq.

I. What is Undue Influence?

Undue influence is a process, not an event. It is very fact dependent and often occurs in secret. Undue influence presupposes that the individual had capacity. One must be competent to be subject to undue influence. While capacity must exist for undue influence to occur, it often occurs when there is diminished capacity. This may be because vulnerability, isolation and dependency are factors routinely present in undue influence cases. While reduced cognition may be a factor in certain undue influence cases, it's not a necessary element.

Depending upon what type of instrument or activity is involved, the definition of what is required for capacity to exist can also vary. Examples of where such variances of definition may occur, include but are not limited to:

- a. Wills and revocable trusts
- b. Powers of attorney
- c. Medical or advanced directives
- d. Gifts
- e. Irrevocable trusts
- f. Deeds
- g. Informed consent for medical procedures
- h. Marriage
- i. Contracts
- j. Designations of beneficiary
- k. Creation of joint accounts
- l. Driving a vehicle

Courts will generally presume that the requisite level of capacity exists. As a result, the challenger has the burden of proving the testator or grantor lacked capacity.

For a definition of undue influence, see M Civ JI 170.44 Will Contests: Undue Influence – Definition; Burden of Proof (Amended October, 2014), M Civ JI 179.10 Trust contests: Undue Influence-definition; Burden of Proof (Amended October, 2014). These instructions make clear that not all influence is undue and it may not be improper, per se, to obtain a bequest even where the beneficiary has implored the decedent to confer such benefit.

According to *Kar v Hogan*, 399 Mich 529 (1976), undue influence is persuasion that abuses a relationship. It may be exerted by improper threat, but more generally takes the form of unfair persuasion in the context of a relationship which is thereby abused. Influence thus becomes undue as a function of the relationship.

Some cases indicate that to establish undue influence it must be shown that the individual was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. (*In re Peterson*, 193 Mich App 257, 259-260 (1991)). But it is important to understand that undue influence, at its core is influence that destroys free agency and supplants the will of an individual for that of another.

Not all influence is “undue.” “Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient”. Undue influence can’t be simply inferred from acts of kindness. The jury instructions emphasize that an individual may leave his estate to whomever he wants and that the fact finder should normally not substitute his judgment for that of the testator, even if it appears the testator did an apparent injustice to those who would be considered the natural objects of his bounty.

Undue influence can be found to apply to almost any type of transaction. This could include, but not be limited to transactions relating to:

1. Life insurance
2. Annuities
3. POD accounts
4. Deeds of conveyance
5. Designations of beneficiaries
6. Gifts
7. Transfers of interests into joint tenancy
8. Contracts

Undue influence affect transactions intended to take effect during life as well as upon death.

II. The Presumption of Undue Influence

The law recognizes the difficulties of establishing undue influence because the same usually occurs in isolation and secrecy. As a result, the presumption, in Michigan, is an evidentiary mechanism intended to level the playing field. The presumption may be established by demonstrating the:

1. Existence of a confidential or fiduciary relationship with the individual
2. Fiduciary had an opportunity to influence the individual’s decision in the transaction
3. Fiduciary or an interest he/she represents benefited from the transaction

The benefit of obtaining a determination that the presumption applies may be that it generally provides an opportunity to present the case to a fact-finder. An additional benefit of the presumption is that it may provide probable cause for a challenge sufficient to neutralize a no contest cause. Historically, establishment of the presumption provided an

inference of undue influence even if sufficient evidence was brought forth by the proponent to rebut the presumption. However, this area is in a state of flux following *In re Mortimore* and the revocation of the jury instructions on the implications of the presumption in undue influence cases. It may be important to note that the failure of the proponent to provide sufficient evidence to rebut the presumption can result in summary disposition in favor of the challenger or a directed verdict. When applicable, an early determination that the presumption does or does not apply may create offensive and/or defensive advantages.

In the absence of a finding the presumption exists and applies, duly executed instruments are generally presumed to be valid.

Michigan recognizes that fiduciary and confidential relationships may include both technical fiduciary relationships as well as informal relationships which can exist when one individual trusts in and relies upon another.

Relationships that might qualify as fiduciary or confidential in nature as a matter of law include those of:

1. Principal-agent
2. Guardian-ward
3. Trustee-beneficiary
4. Lawyer-client
5. Physician-patient
6. Clergy-penitent
7. Accountant-client
8. Stockbroker-customer

Other relationships may constitute a fiduciary or confidential relationship satisfying the “relationship” prong under Michigan law, including those when:

1. One person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first;
2. One person assumes control and responsibility over another;
3. One person has a duty to act for or give advice to another person on matters falling within the scope of the relationship.

Additional relationships that might meet the requirements of a “confidential relationship” for purposes of the imposition of the presumption include “[a]ny type of relationship between two human beings in which the parties do not keep each other at arm’s length may be deemed confidential if one of the parties shows any type of trust or confidence in the other.” When the claim is based upon a “confidential relationship” that is not recognized as a matter of law to establish a “fiduciary relationship”, then a factual analysis will generally be required and a sufficient record created to support a finding that the requisite repose of confidence exists.

While a marital relationship, by its nature, constitutes a “confidential relationship”, the imposition of the presumption as between spouses generally requires the imposition of a higher standard or the finding of a relationship beyond merely that of husband/wife before the presumption will arise as between them in undue influence cases. It’s not impossible for undue influence to be found to exist between spouses, although the presumption will generally be based on a relationship in addition to that of husband and wife or the existence of other factors. Undue influence cases involving spouses most often appear in the context of blended families.

Often the benefit bestowed will be self-evident. At other times, it may constitute a question of fact. Generally, the appointment of a scrivener as Trustee, in and of itself, won’t be deemed sufficient to meet the benefit prong of the presumption. However, there may be times, depending upon the facts and circumstances, when the appointment of the scrivener as Trustee does satisfy this prong of the presumption. When such an appointment is deemed to satisfy the benefit prong it is often as a result of the discretionary powers bestowed upon the scrivener, the size of the estate, and the potential for additional benefits that may be derived as a result thereof.

With regard to proof of opportunity, again as with the element of “benefit”, in some cases “opportunity” will be self-evident, while in other cases it will represent a factual determination.

It is possible for undue influence to occur in the absence of a fiduciary or confidential relationship. However, under such circumstances the presumption may not apply and resort to credible proofs will be required. Since it will be the rare case where the proponent fails to bring forth evidence intended to rebut the presumption, a challenger should plan on presenting credible evidence that undue influence has occurred.

Rebutting the Presumption. In *In re Mortimore*, the Michigan Court of Appeals analyzed the effect of the “mandatory” presumption, holding that:

The trial court recognized that there was evidence presented that would support a conclusion that [the decedent] was unduly influenced. At the same time, the trial court recognized that there was evidence presented that would result in a conclusion that [the decedent] was not unduly influenced. In the end, the trial court ruled that ‘it was just a decision that the Court had to come down on.’ The trial court’s statements recognize that [the proponent] presented evidence to rebut the presumption of undue influence but when weighed against opposing evidence in favor of the presumption, the trial court essentially found the evidence equally convincing. As such [the proponent] did not overcome her duty to rebut the presumption. Therefore, the mandatory presumption of undue influence remained unscathed...

But what is the impact of the Michigan Supreme Court’s denial of application for leave to appeal? The dissent noted that by vacating the order granting leave to appeal, the

majority “left in place a decision of the Court of Appeals that erroneously concluded that there was a ‘mandatory presumption’ of undue influence and that the proponent of the will bore the burden of overcoming it.”

Other sources might provide guidance in the shadow of *Mortimore*. Michigan Supreme Court decisions (pre-*Mortimore*) indicated that the finding of a presumption did not shift the burden of persuasion to the proponent, it merely shifted the burden of going forward with the presentation of substantial evidence.

In re Wood Estate modified the “*Thayer*” approach to presumptions in undue influence cases such that once rebutted, the presumption in such cases remained a permissible inference. Under the *Thayer* busting bubble theory, a presumption is merely 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”. After *In re Wood Estate*, the court in *Widmayer v. Leonard*, indicated that once a presumption had been established, it was “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.” While *Widmayer* found that almost all presumptions represent “permissible inferences” and it is the inference and not the presumption that must be weighed against the rebutting evidence, the practical impact of such inferences became unclear. In *Widmayer* the court recognized that there are two aspects of the “burden of proof”:

1. The burden of persuasion (which would remain with the [Challenger], and
2. The burden of going forward with evidence (and this particular burden may shift several times during a trial).

Following *Mortimore* and the revocation of the jury instructions on the presumption, whether an inference of undue influence remains after the presumption has been rebutted now appears unclear.

While *In re Mortimore* may have originally been viewed by many attorneys as an outlier case, *dicta* in *Reed v Breton*, may reflect otherwise. *Reed v Breton* may also be important when analyzing the quantum of evidence necessary to rebut statutory presumptions attendant to joint accounts or jointly named beneficiaries (by way of example and without limitation MCL 490.54, 490.56, 490.57).

In rebutting the presumption, the proponent may attack any one of all three of the elements of the presumption. If any one element fails, no presumption will be found to exist. In order to rebut the presumption it will be important to introduce credible evidence that the document represented the intent of the decedent and that such intent was not supplanted with the intent of another.

III. Suspicious Circumstances

Circumstances are deemed “suspicious” based upon a review of the totality of the facts and not any one fact in isolation of others. It is possible that, in some circumstances, the existence of even a single credible mitigating factor may negate the potential impact of the existence of a multitude of suspicious circumstances.

In undue influence cases a challenger often relies upon suspicious circumstances to prove their case due given the nature of undue influence. In these cases, the challenger often has no control or access to direct evidence and transactions generally occur in secret.

The Restatement (Third) of Property (Wills & Don. Trans) Section 8.3 cmt. h, provides that: “[i]n evaluating whether suspicious circumstances are present, all relevant factors may be considered, including: (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence; (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute; (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute; (4) whether the will or will substitute was prepared in secrecy or in haste; (5) whether the donor’s attitude toward others had changed by reason of his or her relationship with the wrongdoer; (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor; (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her property; and (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.”

No exhaustive or all-inclusive list of “suspicious circumstances” exists. Moreover, the existence of such indicia may not, necessarily be determinative of the outcome.

There are some generally recognized circumstances that are viewed as suspicious. It’s important to understand that even though an individual’s vulnerabilities to undue influence generally appear throughout these lists, the existence of such vulnerabilities will not necessarily be determinative that undue influence occurred.

Some sources one might look to in gleaning circumstances that may be deemed suspicious are:

1. Psychogeriatric Association’s International Task Force report
2. Restatement of Property 3rd
3. Handbook for Psychologist generated by the ABA/APA Interdisciplinary Task Force
4. Psychogeriatric experts

Other marketed sources exist. They include:

1. IDEAL
2. Cult model
3. SCAM
4. SODR
5. Undue Influence Wheel

It may be important to understand and be able to identify certain key concepts when reviewing circumstantial evidence of suspicious circumstances. These concepts include, but are not limited to the following:

1. "Vulnerability" – age, impaired mental and/or physical condition - dementia, depression, anxiety, delirium, mood, substance abuse
2. Dependency
3. "Isolation" – imposed by another or the natural result of technological or other challenges or other conditions. Such isolation may result merely from limitations in movement and locale to withholding mail; limiting telephone access; limiting visitation or limiting privacy when victim is with others ("chaperoning");
4. "Lack of Independent Advice or Counsel" – which can be the result of, among other things, who contacted, arranged for, communicated with the lawyer, and/or whether counsel breached a duty of loyalty to the individual, and even whether such "counsel" took sufficient steps to assure the capacity of the individual and the independence of the plan generated.
5. "Conduct of the beneficiary" – which can relate to patterns of behavior and/or actions of the beneficiary, before, during as well as after the execution of the instrument.
6. Other selected suspicious circumstances may include the existence of:
 - A) confidential relationship between the perpetrator and victim
 - B) mental inequality between victim and perpetrator
 - C) financial dependence
 - D) advanced age (typically over 75)
 - E) shift of power equation
 - F) highly "medicalized" or acute care settings
 - G) substance abuse
 - H) sleep deprivation
 - I) living with or dependence upon an abusive individual
 - J) active involvement procuring the instrument (active procurement), including:
 - (1) obtaining a lawyer for the victim
 - (2) securing the witnesses
 - (3) beneficiary knows contents of the will before execution
 - (4) beneficiary gives lawyer instructions on preparation of the will
 - (5) presence of the beneficiary at the execution of the will
 - K) secrecy concerning transactions or legal changes

- L) events occurring in haste or at abnormal times or in an abnormal place
- M) changes in the identified victim's attitude toward others
- N) change in values
- O) family conflict
- P) recent bereavement
- Q) sexual bargaining
- R) food enticements for person unable to swallow or on a track
- S) fear of abandonment or changed living situations
- T) implied promise by perpetrator to care for the person
- U) "unnatural" terms new legal instrument (new will, new trust, etc.)
- V) anonymous criticism of other potential beneficiaries
- W) suggestion, without proof, that other beneficiaries threatened harm;
- X) use of multiple persuaders;
- Y) using victim's assets - such as property, money, credit cards and/or access to accounts
- Z) becoming fiduciary (conservator, trustee, executor) or named on Power of Attorney forms;

It's important to remember that undue influence cases are extremely fact specific. The existence of various red flags or indicia of undue influence may be undercut by a single mitigating or countervailing factor in some circumstances. Moreover, it's generally the quality of the evidence not quantity of the evidence when weighting mitigating factors against existing suspicious circumstances.

IV. Evidentiary Considerations

Michigan case law recognizes that undue influence cases are largely circumstantial in nature. The challenger often has no control or access to direct evidence that undue influence has occurred. As a result, the case law recognizes that discovery and relevancy standards are relaxed in undue influence cases. In such cases, the court may have an enhanced role as gate-keeper, and the exercise of this role can have a profound impact on the outcome of the case. Consequently, the resolution of discovery and relevancy issues may be critical. Additionally, one may wish to consider the use of motions *in limine*.

What types of evidence will generally be deemed relevant in an undue influence case?

1. In general, all evidence, both direct and circumstantial, bearing upon the question of undue influence will be deemed relevant and admissible.
2. Even evidence regarding acts of undue influence post-execution is relevant.
3. Evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence is deemed relevant.
4. Courts have also recognized that indirect proof of undue influence should be allowed due to the difficulty of developing direct proof in such claims.

A challenger may prove undue influence by establishing the existence of certain indicators which might be considered circumstantial evidence that a confidential relationship may have been abused and the decedent's decision-making process corrupted.

Generally, all relevant evidence is admissible unless excluded by the US or state constitution, or another applicable statute or rule of evidence. There are two types of relevant evidence:

1. Material evidence—evidence that is offered to prove a matter that is properly an issue in the case according to the substantive law applicable to a claim or defense.
2. Probative evidence—evidence that tends to prove or disprove any fact at issue in the lawsuit.

Pursuant to MRE 404, evidence of other crimes, wrongs, or acts may be deemed admissible as proof of “motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.”

In general, all evidence, both direct and circumstantial, bearing upon the question of undue influence will be deemed admissible. “[A]ll evidence which tends to prove or disprove the main contention that this will was procured by ... undue influence ... should be admitted.” The Restatement (Third) of Property (Wills & Don. Trans.) Section 8.3 cmt. e. explains the use of circumstantial evidence in undue influence cases: “In the absence of direct evidence of undue influence, circumstantial evidence is sufficient to raise an inference of undue influence if the [challenger] proves that (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had the disposition to exert undue influence, and (4) there was a result appearing to be the effect of undue influence.”

Scrivener testimony is important too. The attorney-client privilege does not apply to communications between the attorney and testator during preparation of an estate planning instrument, where the contest is between parties who are not strangers to the estate. Additional issues relating to acting as scrivener includes: 1) serving as a material witness in challenge proceedings; and 2) the potential disqualification or other limitations and implications relating to representation during post-death proceedings.

It's important to remember that capacity can exist despite significant cognitive or other impairments. An understanding of the potential inter-relationships between vulnerabilities and the parties' relationship(s) is essential. As a result, a thorough understanding of the medical evidence may be important to the development and defense of an undue influence challenge. It is also important to recognize that assessments performed by medical care providers in obtaining informed consent or in making neurological assessments may not translate directly into competency assessments relating to

testamentary capacity, even though such results may have some bearing on an individual's vulnerability to undue influence.

V. Pretrial and Trial Preparation

Procedurally, it is important to pay attention to time requirements for filing a contest. For a will you may need to take action before an order admitting the will for probate is entered, but in any event, you will need to take action no later than the earlier of one year after the entry of the order sought to be vacated under MCL 700.3412; before an order approving distribution is entered; or, within six months of the filing of a closing statement (if the estate is closed by the filing of such a statement).

For a revocable trust, file within 6 months of notice provided under MCL 700.7604(1)(b); and if no such notice, then within 2 years from date of grantor's death.

Preparing and presenting the undue influence case is usually complex, fact intensive and challenging. For the proponent, often a straight forward, simple, believable and thematic approach will be most effective. For a challenger the issues (especially in the absence of the presumption or following the rebuttal of the presumption) can be much more difficult due to the need for the challenger to piece together suspicious circumstances and apply them to the known facts in order to portray a mosaic explanation of the "backstory" to the creation of the challenged instrument.

The challenger's view point may include a longitudinal presentation of circumstantial facts over time emphasizing:

1. Decedent's vulnerabilities
2. Devolution from a long held plan and stated intentions
3. Evolving isolation of decedent
4. Secretive actions of the proponent
5. Decedent's growing dependency
6. The existence of any number of "red flag" indicia of undue influence

The proponent's view point may instead seek to emphasize an acute view of the evidence focusing on discrete moments in time such as execution of estate planning documents when third parties are available to offer corroborating evidence of sufficient capacity to engage in the transaction and statements made as well as personal observations regarding the voluntary nature of the decedent's actions.

A working knowledge of the facts is necessary to:

1. Understand the potential interplay and impact of cognitive difficulties, the medical issues and records relating to same
2. Understand the complexities of the family dynamics
3. Development of a trial theme and strategy

Experts can be used effectively in the preparation and analysis of the case as a whole, during pre-trial motions, discovery, and at trial. Consider the use of an expert when such

persons can, by virtue of knowledge, skill, experience, training or education, assist the trier of fact in understanding scientific, technical, or other specialized evidence. The extent and types of experts needed may vary from case to case. Potential categories of expert witnesses include:

1. Forensic or other geriatric psychiatrist or psychologist
2. Neuropsychologist or neuropsychiatrist
3. Other physicians with specialties pertinent to the case
4. Non-physician health care professionals in specialties relating to cognitive functioning (such as speech and language pathologists)
5. Expert in pharmacology
6. Standard of care experts where concern might exist that a lawyer's or health care provider's action or inaction made the decedent more vulnerable to undue influence
7. Legal expert relating to the independence of counsel
8. Nurse or other medical professional who might assist with organizing, synthesizing, interpreting and understanding medical records

Potential roles/purposes for a psychological/psychiatric expert include:

1. Portrayal of a comprehensive perspective of a person's vulnerabilities and risk factors
2. If living – IME regarding competency and vulnerabilities
3. Assessment of physical and psychological dependency and the implications thereof
4. Assistance with developing and understanding the import of discovery and medical evidence
5. Assist in assessment of strengths and weaknesses of the case
6. Motion practice
7. Post-mortem forensic assessment

As you conduct discovery and prepare for trial it will be helpful to create a detailed chronology. In large document cases, you may also wish to consider converting PDF documents to an OCR or other searchable format. Document management systems can help organize volumes of information. It's also wise to develop a discovery plan.

Finally, know your “burden” and determine how you intend to meet it. Anticipate and plan for potential evidentiary issues in advance of trial and consider use of summaries under MRE 1006, particularly as it relates to extensive medical or financial records.

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Appendix A - Source Materials

Cases:

In re Allen's Estate, 230 Mich. 584 (1925)
Estate of Auen, 30 Cal. App. 4th 300 (1993)] [cited by California Supreme Court in support in *Rice v. Clark*, 28 Cal. 4th 89 (2002)
Balk's Estate, 289 Mich. 703 (1939)
Brown v Blesch, 270 Mich. 576 (1935)
In re Brown Estate, 312 Mich. App. 684 (2015)
In re Cosgrove Estate, 290 Mich. 258 (1939)
In re Cummins' Estate, 271 Mich. 215 (1935)
Eicholtz v. Grunewald, 313 Mich. 666 (1946)
In re Estate of Erickson, 202 Mich. App. 329 (1993)
In re Fay's Estate, 197 Mich. 675 (1917)
In re Hallitt's Estate, 324 Mich. 654 (1949)
In re Hannan's Estate, 315 Mich. 102 (1946)
In re Will of Jones, 362 N.C. 569 (2008)
Kar v Hogan, 399 Mich. 529 (1976)
In re Estate of Karmey, 468 Mich. 68 (2003)
In re Kramer's Estate, 324 Mich. 626 (1949)
In re Langlois' Estate, 361 Mich. 646 (1960)
Latham v. Udell, 38 Mich. 238 (1878)
Leffingwell v. Bettinghouse, 151 Mich. 513 (1908)
In re Livingston's Estate, 295 Mich. 637 (1940)
In re Loree's Estate, 158 Mich. 372 (1909)
In re Paquin's Estate, 328 Mich. 293 (1950)
In re Paul's Estate, 289 Mich. 452 (1939)
People v McKinney, 410 Mich. 413 (1981)
McPeak v McPeak, 233 Mich. App. 483 (1999), appeal denied 461 Mich. 926 (1999)
In re Merritt's Estate, 286 Mich. 83 (1938)
In re Estate of Mikeska, 140 Mich. App. 116 (1985)
In re Estate of Mortimore, No. 297280, 2011 Mich. App. LEXIS 905 (Mich. App. May 17, 2011; *Hanneman v. Fiser (In re Estate of Mortimore)*, 813 N.W.2d 288, 289 (Mich. 2012)
Nederlander v Nederlander, 205 Mich. App. 125 (1993), appeal denied 442 Mich. 854 (1993)
In re Nickel's Estate, 321 Mich. 519 (1948)
Papazian v. Goldberg (In re Mardigian Estate), 312 Mich. App. 553 (2015)
Peacock v. Dubois, 105 So. 321, 322 (Fla. 1925)
Persinger v. Holtz, 248 Mich. App. 499 (2001)
In re Persons' Estate, 346 Mich. 517 (1956)
In re Peterson, 193 Mich. App. 257 (1991)
In re Pollack Trust, 309 Mich. App. 125 (2015)
In re Powers Estate, 375 Mich. 150 (1965)
Reed v. Breton, 475 Mich. 531 (2006)
Richardson v. Ball, 300 Mich. 424, 429-430 (1942)
Simko v. Blake, 448 Mich. 648 (1995)
In re Spillette Estate, 352 Mich. 12, 17-18 (1958)

Spratt v Spratt, 76 Mich. 384 (1889)
In re Sprenger's Estate, 337 Mich. 514 (1953)
In re Susser Estate, 254 Mich. App. 232 (2002)
In re Estate of Swantek, 172 Mich. App. 509 (1988)
Taylor v. Khlam, 40 Mich. App. 225 (1972)
In re Vallender's Estate, 310 Mich. 359 (1945)
Van't Hof v. Jemison, 291 Mich. 385 (1939)
In re Vhay's Estate, 225 Mich. 107 (1923)
In re Vollbrecht Estate, 26 Mich. App. 430 (1970)
Walts v. Walts, 127 Mich. 607 (1901)
Widmayer v. Leonard, 422 Mich. 280 (1985)
In re Willey's Estate, 9 Mich. App. 245 (1967)
Wingrove v. Wingrove (1885) LR11PD 81 at 82-83
In re Estate of Wood, 2008 Mich. App. Lexis at *12

Court Rules:

MCR 5.131
MCR 5.132 (A)

Rules of Evidence:

FRE 401
MRE 301
MRE 401
MRE 404(b)(1)
MRE 702

Rules of Professional Responsibility:

MRPC 1.14

Statutes:

MCL 600.2152
MCL 700.2501
MCL 700.7401.
MCL 700.7402
MCL 700.5508 (1)
MCL 700.7601

Jury Instructions:

M Civ JI 170.04 Will Contests: Cautionary Instruction as to Decedent's Right to Leave Property by a Will

Civ JI 170.41 Will Contests: Mental Capacity—Definition

M Civ JI 170.42 Will Contests: Mental Capacity

M Civ JI 170.44 Will Contests: Undue Influence – Definition; Burden of Proof (Amended October, 2014)

M Civ JI 170.51 Will Contests: Burden of Proof

M Civ JI 179.03 Trust Contests: Creation of a Trust

M Civ JI 179.04 Trust Contests: Sufficient Mental Capacity—Definition

M Civ JI 179.05 Trust Contests: Intention to create a trust

M Civ JI 179.07 Trust Contests: Cautionary Instruction as to Settlor's Right to Leave Property by a Trust

M Civ JI 179.10 Trust contests: Undue Influence-definition; Burden of Proof (Amended October, 2014)

M Civ JI 179.20 Trust Contests: Burden of Proof

It should also be noted that the following jury instructions relating to the burden of proof when a presumption of undue influence has been established have been deleted, while the committee continues to review the issue and how the jury is to be instructed when such circumstances exist. See prior jury instructions: M Civ JI 170.45 Will Contests: Existence of Presumption of Undue Influence-Burden of Proof (Deleted October, 2014); and, M Civ JI 179.25 Trust Contests, Existence of Presumption of Undue Influence-Burden of Proof. Changes to M Civ JI 170.44 and 179.10 coupled with the elimination of an instruction on the presumption in undue influence cases, may affect the evidentiary import and impact of the presumption in undue influence cases. The Court's "gate keeper" role when a presumption of undue influence is found to exist also appears to be in a state of flux. As a result, the potential benefits of the presumption (especially in a jury trial setting) are currently uncertain.

Articles and Publications:

Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists, American Bar Association/American Psychological Association (c) 2008

Bennett Blum, Ph.D., Website

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Sanford I. Finkel, MD, *Ten Pitfalls in Litigating a Contested Will*, A Publication of The American Association of Justice, Vol 16, No.2, Winter 2009.

Robert B. Fleming, *Dealing with the Aging Client*, 53rd Annual Probate and Estate Planning Institute, Institute of Continuing Legal Education, 2013

Gregory W. MacKenzie and Bennett Blum, MD and Rez Swanda, Ph.D , *Representing Estate and Trust Beneficiaries and Fiduciaries*, § 7:5. ALI-ABA COURSE OF STUDY MATERIALS, July 2011

C. Peisah, S. Finkel, K. Shulman, P. Melding, J. Luxenberg, J. Heinik, R. Jacoby, B. Reisberg, G. Stoppe, A. Barker, H. Firmino & H. Bennett *The wills of older people: risk factors for undue influence*, for the International Psychogeriatric Association Task Force on Wills and Undue Influence, *International Psychogeriatrics* (2009) 12:1, 7-15.at p 10, Printed in the United Kingdom

Restatement Property 3rd, §8.1

Restatement Property 3rd, §8.3 cmt. e

Restatement Property 3rd, § 8.3 cmt. h

Restatement Trusts 3rd, §69

Restatement Trusts 2nd, §341

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