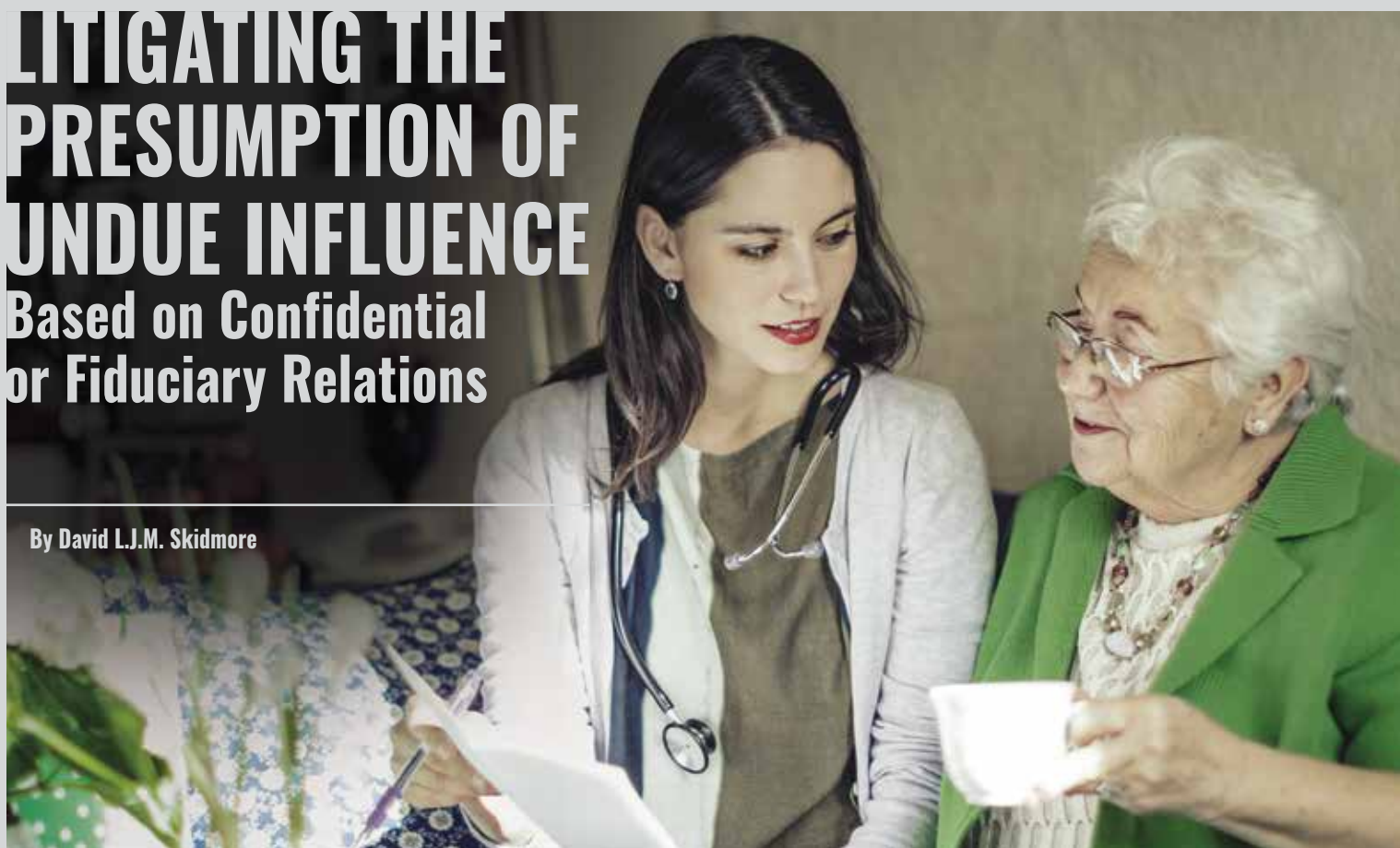


LITIGATING THE PRESUMPTION OF UNDUE INFLUENCE

Based on Confidential or Fiduciary Relations

By David L.J.M. Skidmore



Generally speaking, undue influence is wrongful conduct by which one person (the influencer) overpowers the free will of another person (the victim) and causes the victim to execute a legal document or engage in a legal transaction which reflects the desires of the influencer rather than the victim. Undue influence tends to occur behind closed doors without witnesses present, and it can be difficult to prove in will and trust contests because direct evidence (e.g., eyewitness testimony) rarely exists. This article considers when a litigant is entitled to a presumption of undue influence and the legal significance of the presumption once established.

Initially, the parties to an undue influence case are called the contestant and the proponent. The contestant seeks to invalidate the challenged instrument or transaction based on undue influence, while the proponent defends the validity of the instrument or transaction.

Historical background

Since 1897, Michigan law has recognized that the contestant may be entitled to a presumption of undue influence in

certain situations.¹ 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.”² 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 [i.e., the occurrence of undue influence] will be true that that fact may be presumed.”³

Factors giving rise to presumption

The existence of three evidentiary facts gives rise to a presumption of undue influence:

The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction.⁴

AT A GLANCE

- The presumption of undue influence arises from a confidential or fiduciary relationship, opportunity to influence, and benefit to the alleged influencer.
- Establishing the presumption requires the alleged influencer to produce evidence to rebut the presumption.

“Although a broad term, ‘confidential or fiduciary relationship’ has a focused view toward relationships of inequality. [T]he concept had its English origins in situations in which dominion may be exercised by one person over another.”⁵ The term includes recognized fiduciary relationships, such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client, and other relationships where “there is confidence reposed on one side, and the resulting superiority and influence on the other.”⁶ However, the marital relationship is not a confidential relationship for purposes of the presumption.⁷

Relationship between presumption and burden of proof

Establishment of the presumption affects the burden of production but does not affect the burden of persuasion.

Burden of persuasion

The contestant alleging undue influence has the burden of proof in the sense of the burden of persuasion—i.e., persuading the finder of fact of all elements of the contestant’s case. The contestant’s burden of persuasion is not affected by establishing the presumption 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.”⁸ “The ultimate burden of proof [i.e., burden of persuasion] in undue influence cases does not shift; it remains with the plaintiff throughout trial.”⁹ “A contestant of a will has the burden of establishing . . . undue influence, [and a] party has the ultimate burden of persuasion as to a matter

with respect to which the party has the initial burden of proof.”¹⁰

Burden of production

However, establishment of the presumption of undue influence does affect another aspect of the burden of proof: the burden of production. The burden of production determines which party has the current duty to go forward with producing evidence to avoid summary disposition or a directed verdict.¹¹ This burden can shift during pretrial dispositive motion practice or 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.”¹² If the contestant fails to establish the presumption, then the burden of production does not shift to the proponent.¹³

For purposes of regulating the burden of production, the trial court decides whether the contestant’s proofs are sufficient to establish the presumption of undue influence. “[T]he judge makes all determinations as to the existence, or non-existence, of the presumption.”¹⁴

Rebutting the presumption

Burden of producing rebuttal evidence

MRE 301 provides that the contestant’s establishment of the presumption imposes a burden on the proponent of producing evidence to rebut or meet the presumption. “In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption[.]” MRE 301 reflects the “Thayer’ bursting bubble theory of presumptions,” holding “that a 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.”¹⁵

If the burden of production shifts from the contestant to the proponent, the proponent must introduce evidence that rebuts the presumption of undue influence. “The immediate legal effect of a presumption is procedural[;] it shifts the burden of going forward with the evidence relating to the presumed fact [i.e., undue influence].”¹⁶ The proponent may meet its burden by offering evidence disproving either the existence of undue influence or the existence of the facts giving rise to the presumption (confidential or fiduciary relationship, opportunity, benefit).¹⁷

Required weight of rebuttal evidence

How much proof must the proponent offer to rebut the presumption? Historically, caselaw imposed a duty of producing substantial evidence for purposes of rebuttal.

[I]t is clear that, under the “Thayer bursting bubble” theory of presumptions, which theory is embodied in MRE 301, substantial evidence is required [to meet the burden of producing evidence sufficient to rebut a presumption]. Michigan courts have repeatedly held that substantial evidence consists of more than a mere scintilla of evidence but may amount to substantially less than a preponderance.¹⁸

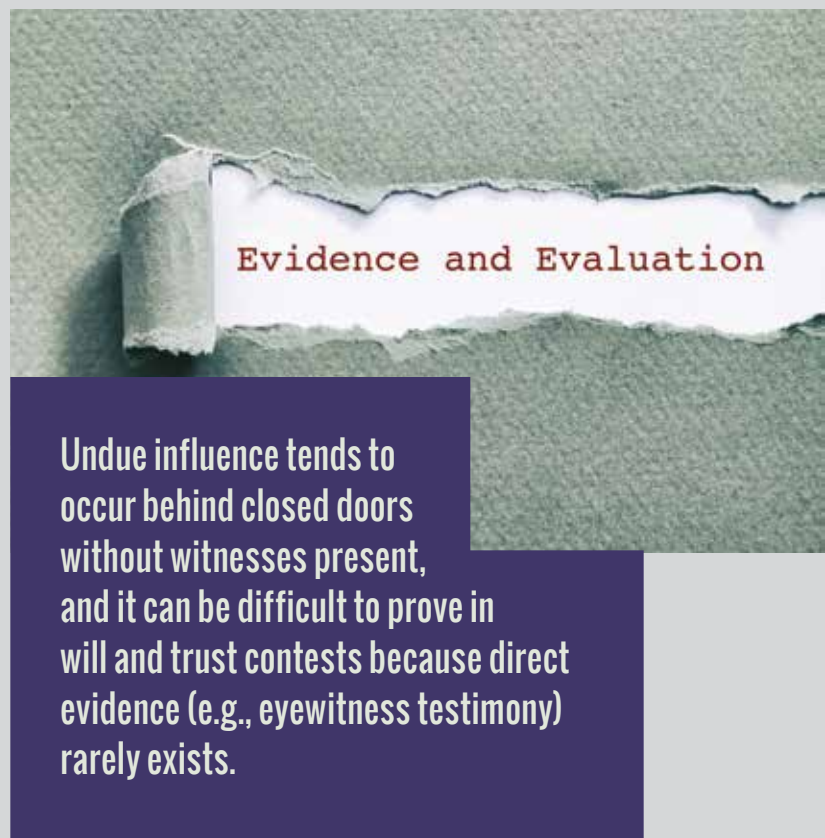
However, in *In re Estate of Mortimore*, the Michigan Supreme Court let stand the lower decision of the Court of Appeals, which held that the proponent failed to rebut the presumption by offering evidence equal in force to the contestant’s evidence.¹⁹ The Court of Appeals had held: “If the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the ‘mandatory inference’ remains unscathed.”²⁰ In dissent, Justice Young posited that “the proponent need only introduce substantial evidence sufficient to create a question of fact regarding undue influence, at which point the trier of fact weighs the totality of the evidence and all permissible inferences therefrom to determine whether the will was a product of undue influence.”²¹

Application of presumption to dispositive motions

In the context of a pretrial summary disposition motion, if the proponent offers substantial evidence that rebuts the presumption, then there is a genuine issue of material fact regarding whether undue influence occurred, and summary disposition is improper. “Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact.”²² In contrast, if the proponent fails to offer evidence rebutting the presumption, then the contestant is entitled to summary disposition on the grounds of no genuine issue as to any material fact. The contestant’s burden of persuasion may be satisfied by the proponent’s failure to meet its burden of production.

Application of presumption at trial

In the context of a trial, if the contestant offers proof of the three elements establishing the presumption of undue influence, then the contestant will avoid entry of a directed verdict.²³ “[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.”²⁴ Alternately, if the proponent fails to offer evidence rebutting the presumption, then the court should grant a directed verdict to the contestant. “[The presumption] permits that person [relying on the presumption] a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.”²⁵

Jury instructions

In 2014, the Committee on Model Civil Jury Instructions considered revisions to the standard jury instructions regarding undue influence in will and trust contests. Ultimately, the committee deleted the instructions regarding the significance of the three factual elements giving rise to the presumption and regarding the definition of a fiduciary relationship (M Civ JI 170.45, 179.25) without adopting replacement instructions. Counsel must therefore prepare proposed jury instructions.

If and when the case goes to the jury, the court should make no reference to the presumption in the jury instructions. “[I]nstructions should be phrased entirely in terms of underlying facts and burden of proof.”²⁶ However, there is an evidentiary aspect of the presumption, in that the jury may draw an inference regarding undue influence from the existence of the facts that give rise to the presumption.

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.²⁷

“If rebuttal evidence is introduced, the presumption dissolves, but the underlying inferences remain to be considered by the jury.”²⁸

If the jury draws an inference of undue influence from the contestant's evidence, then the jury must weigh that inference against the proponent's evidence that undue influence did not occur.²⁹ In *Estate of Swantek*, the Court of Appeals found no error in the probate court's jury instructions in an undue influence case.

The trial court here did not instruct the jury that a mandatory presumption of undue influence arose from evidence of the existence of a confidential relationship. The trial court told the jury that, if it found that a confidential relationship existed, then it “might” presume undue influence. The trial court then instructed the jury that it must also consider the evidence tending to show that respondent did not unduly influence the decedent.³⁰

Rather than mentioning the presumption (prohibited under *Widmayer*), the probate court should have instructed the jury that it might draw an inference of undue influence based on the existence of a confidential relationship.

Opportunity to commit undue influence is one of the factors giving rise to the presumption. While *Widmayer* speaks of the jury's ability to infer “presumed facts” (i.e., undue influence) from the underlying “basic facts” (i.e., the factors giving rise to the presumption of undue influence),³¹ there is a line of Michigan caselaw holding that undue influence may not be inferred from evidence of opportunity alone. “It is well settled that mere opportunity to influence, and the fact that a will makes an unequal distribution of property, is not sufficient to go to a jury on the question of undue influence.”³²

The factors giving rise to the presumption are not the only types of circumstantial evidence that may be used to support an inference of undue influence. Michigan caselaw has repeatedly held that undue influence may be proven by types of circumstantial evidence other than the factors giving rise to the presumption.³³

Conclusion

The presumption of undue influence is an important yet complicated legal doctrine that will continue to play a central role in many undue influence cases. ■



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ENDNOTES

1. *Donovan v Bromley*, 113 Mich 53; 71 NW 523 (1897).
2. *In re Hartlerode's Will*, 183 Mich 51, 60; 148 NW 774 (1914).
3. *In re Wood Estate*, 374 Mich 278, 288-289; 132 NW2d 35 (1965).
4. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).
5. *In re Karmey*, 468 Mich 68, 75 n 3; 658 NW2d 796 (2003).
6. *Wood*, 374 Mich at 283.
7. *Karmey*, 468 Mich at 75.
8. MRE 301.
9. *Kar*, 399 Mich at 538.
10. MCL 700.3407(1)(c) and (d).
11. See, e.g., *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 179; 405 NW2d 88 (1987), quoting McCormick, *Evidence* (3rd ed), § 336, p 947 (“The burden of producing evidence on an issue means the liability to an adverse ruling [generally a finding or directed verdict] if evidence on the issue has not been produced.”).
12. *Kar*, 399 Mich at 540.
13. *Bill and Dena Brown Trust v Garcia*, 312 Mich App 684, 703; 880 NW2d 269 (2015).
14. *Widmayer v Leonard*, 422 Mich 280, 288; 373 NW2d 538 (1985).
15. *Id.* at 286.
16. *Kar*, 399 Mich at 540-541, quoting *In re Wood Estate*, 374 Mich at 288-289.
17. *Id.*
18. *Jozwiak v Northern Mich Hosps*, 231 Mich App 230, 238; 586 NW2d 90 (1998), citing *Widmayer*, 422 Mich at 286.
19. *In re Mortimore*, 491 Mich 925; 813 NW2d 288 (2012).
20. *In re Mortimore*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2011 (Docket No 297280) (quoting *Kar*, 399 Mich at 542).
21. *Mortimore*, 491 Mich at 925-926 (YOUNG, C.J., dissenting).
22. *In re Peterson*, 193 Mich App 257, 261; 483 NW2d 624 (1991), cited by *In re Weir*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2010 (Docket No 291796), p 6 (“Because petitioners in this case provided sufficient facts to invoke the presumption of undue influence, the trial court erred in granting summary disposition on this issue.”). *In re Mayes*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2006 (Docket No. 260799), p 4 (“By presenting evidence to rebut the presumption of undue influence, respondent raised a genuine issue of material fact regarding whether the presumption of undue influence was rebutted, and summary disposition under MCR 2.116(C)(10) was not appropriate.”).
23. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985).
24. Benson, *Michigan Rule of Evidence 301, I Presume*, 87 Mich B.J. 34 (August 2008) <<https://www.michbar.org/file/barjournal/article/documents/pdf4article1396.pdf>> (accessed October 10, 2018).
25. *Widmayer*, 422 Mich at 289 and *Kar*, 399 Mich at 542 (“[T]he plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.”).
26. *Widmayer*, 422 Mich at 288-289.
27. *Id.* at 289.
28. *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005).
29. *In re Estate of Swantek*, 172 Mich App 509, 516; 432 NW2d 307 (1988).
30. *Id.*
31. *Widmayer*, 422 Mich at 289.
32. *In re Reedy's Estate*, 237 Mich 691, 695; 213 NW 64 (1927).
33. See, e.g., *In re Willey's Estate*, 9 Mich App 245, 257; 156 NW2d 631 (1967).