

The Committee has adopted the following new model civil jury instruction effective October 16, 2014.

ADOPTED

M CIV JI CHAPTER 119 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

M CIV JI 119.01 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS— BURDEN OF PROOF

Plaintiff claims that defendant is responsible for the intentional infliction of emotional distress. For this claim, plaintiff has the burden of proving each of the following:

- a. that defendant's conduct was extreme and outrageous,
- b. that defendant's conduct was intentional or reckless,
- c. that defendant's conduct caused plaintiff severe emotional distress, and
- d. that defendant's conduct caused plaintiff damages.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Lewis v LeGrow, 258 Mich App 175; 670 NW2d 675 (2003); *Dalley v Dykema Gossett*, 287 Mich App 296; 788 NW2d 679 (2010).

History

M Civ JI 119.01 was added October 2014.

The Committee has adopted the following amended model civil jury instruction effective October 16, 2014.

ADOPTED

[AMENDED] M CIV JI 170.44 WILL CONTESTS: UNDUE INFLUENCE— DEFINITION; BURDEN OF PROOF

The contestant has the burden of proving by a preponderance of the evidence

that there was undue influence exerted on the decedent in the making of the will.

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

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

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

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

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

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

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

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.

This instruction should be accompanied by M Civ JI 8.01, Definition 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 JI 170.44 was added January 1984. Amended December 2003; October 2014.

The Committee has deleted the following model civil jury instruction effective October 16, 2014.

DELETION

WILL CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

The Committee deleted M Civ JI 170.45, but it is continuing to review the issue of the presumption of undue influence and how the jury is to be instructed, if at all, when that presumption has not been rebutted.

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

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

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

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

That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.

Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.

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

Note on Use

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

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

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

exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301, *Widmayer, supra*.

Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299, 209 NW2d 452 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See *In re Estate of Karmey*, 468 Mich 68, 74 fn 2, 3, 658 NW2d 796 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.

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

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

Comment

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

Hartlerode’s Estate, 183 Mich 51, 148 NW 774 (1914) (clergyman).

History

M Civ JI 170.45 was added January 1984. Amended March 1990, December 8, 2003. Deleted October 2014.

The Committee has adopted the following amended model civil jury instruction effective October 16, 2014.

ADOPTED

[AMENDED] M CIV JI 179.10 TRUST CONTESTS: UNDUE INFLUENCE—DEFINITION; BURDEN OF PROOF

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

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

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

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

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

1. *(advise/persuade/argue/flatter/solicit/entreat/implore,)

2. *(appeal to the decedent's [hopes/fears/prejudices/sense of justice/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.

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); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303;

298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 179.10 was added June 2011. Amended October 2014.

The Committee has deleted the following model civil jury instruction effective October 16, 2014.

DELETION

TRUST CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

The Committee deleted M Civ JI 179.25, but it is continuing to review the issue of the



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presumption of undue influence and how the jury is to be instructed, if at all, when that presumption has not been rebutted.

**[DELETED] M CIV JI 179.25
TRUST CONTESTS: EXISTENCE
OF PRESUMPTION OF UNDU
INFLUENCE—BURDEN OF PROOF**

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

that [name] had a fiduciary relationship with the settlor;

that [name] (or a person or interest he represented) benefited from the [creation/amendment/revocation] of the trust; and

that by reason of the fiduciary relationship [name] had an opportunity to influence the settlor in giving that benefit.

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

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

Note on Use

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

Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence

instruction is M Civ JI 179.10 Trust Contests: Undue Influence—Definition.

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

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

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

This instruction should be accompanied by M Civ JI 8:01, Definition of Burden of Proof.

Comment

This instruction is substantially similar to M Civ JI 170.45.

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

History

M Civ JI 179.25 was added June 2011. Deleted October 2014.

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

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

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