

## Proving Undue Influence

**Take-Away:** Proving undue influence can be difficult due, in part, to the lack of direct evidence and the possible use of a presumption of undue influence in some situations.

**Background:** Proving undue influence with estate planning documents is always a challenge. Claims of undue influence most often arise when the testator or settlor is old and infirm, but direct evidence of undue influence is difficult to identify. That challenge in identifying its evidence of undue influence is assisted, however, when certain legal presumptions apply.

**Undue Influence:** To establish undue influence, it must be shown that the testator or settlor was subjected to threats, misrepresentations, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the testator or settlor to act against his/her inclination and free will. Motive, opportunity or even an ability to control, in the absence of affirmative evidence that it was exercised, are however *not sufficient*. Circumstantial evidence may be used to demonstrate undue influence so long as it is evidence of a 'probative force beyond mere suspicion.'

**Presumption of Undue Influence:** The presumption of undue influence results from the introduction of evidence which establishes: (i) the existence of a confidential or fiduciary relationship between the testator/settlor and a fiduciary; (ii) the fiduciary, or an interest which he/she represents, benefits from a transaction; and (iii) the fiduciary had an opportunity to influence the testator/settlor's decision in that transaction.

However, even when the evidentiary presumption of undue influence arises, the ultimate burden of proving undue influence remains on the party who alleges that it occurred. *Bill and Dena Brown Trust v. Garcia*, 312 Mich App 684 (2015.) "*But the presumption satisfies the burden of persuasion, so if a party opposing the allegation of undue influence fails to offer sufficient rebuttal evidence, then the party alleging undue influence will have met its burden of persuasion, i.e., its burden of showing the occurrence of undue influence.*"

**Confidential or Fiduciary Relationship:** The definition of these terms focuses on a *relationship of inequality*. A fiduciary relationship exists as a fact when "there is confidence reposed on one side, and the superiority and influence on the other." Examples of a *relationship of inequality* include: (i) a patient makes a will in favor of her physician; (ii) a client in favor of his lawyer; or (iii) an individual in favor of his/her priest or spiritual advisor. *"In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power or moral authority to control the subject matter at issue."* *In re Estate of Karmey*, 468 Mich. 68 (2003.) A recent Michigan Court of Appeal decision found such a confidential relationship to exist between a mother and her son, who was her live-in caregiver.

***In re Jones Estate, Michigan Court of Appeals, No. 2019-853230-DE***

**Facts:** In 1984 Helen executed her Will. Her Will provided that her estate was to be divided equally among her five children. One son, Henry, moved into her home after the death of Helen's husband in 2016. Henry apparently had a history of violence and abuse against his mother, e.g., he was formally banned from her home for many years by Helen's husband. Henry became Helen's primary caregiver, managing her home, health, and daily life. In 2018, two years after Helen's husband's death, Henry took Helen to an attorney to change her Will. While Helen's 2018 Will did not disinherit her other children, her 2018 Will left her home solely to Henry.

**Dispute:** After Helen's death her other children claimed that her 2018 Will was invalid due to Henry's undue influence.

**Probate Court:** The probate court agreed that the 2018 Will was invalid due to Henry's undue influence, which effectively resurrected Helen's 1984 Will to dispose of her estate. The probate court found that Henry had failed to rebut the presumption of undue influence. The probate judge found that Henry had a profound role in Helen's life, as her caretaker, house manager, driver, monitor of her medications and holder of her bank card. Henry was *"unquestionably in a trusted and confidential of fiduciary relationship with Helen until she died."*

**Court of Appeals:** The Court sustained the probate court's finding that Helen's 2018 Will was a product of undue influence, using Henry's own testimony in the probate court to reach this conclusion that his relationship with Helen, his mother, was one of inequality.

**Presumptions of Undue Influence:** The Court noted that the probate judge was correct when he found a presumption of undue influence:

- *"He [Henry] cooked her meals, washed her clothes, washed her feet, shopped for groceries, occasionally took her to medical appointments and picked up her prescriptions, monitored her medications, and had access to her debit card to use if they 'needed something' like groceries. Additionally, [Henry] testified he had spent his own money buying furniture for the house after moving in with Helen, and stated he was responsible for maintaining the house 'from top to bottom.' By [Henry's] own testimony, it is clear that he served as, and understood himself to be, Helen's caregiver. Indeed, it was [Henry] who drove Helen to the meeting with the attorney to change her Will."*

**Failure to Rebut the Presumption:** Henry argued that his mother was competent and he relied on the testimony of the attorney who drafted Helen's 2018 Will to rebut the presumption of undue influence. However, the Court found that the drafting attorney 'did not delve deeply into Helen's situation.'

- The Court noted, however, that the drafting attorney only spent a short amount of time with Helen and Henry, and she lacked information about Helen's mental diagnoses, i.e., mental health issues including severe anxiety, depression, narcotics addition, hypertension, diabetes, and edema *"all of which made her a vulnerable adult."*

The Court also noted that the drafting attorney did not know of Helen's 1984 Will, and that she was unaware that Henry had a felony conviction, and he had only recently come to live with his mother.

Accordingly, the Court found that the attorney's testimony that Helen had executed her Will 'freely, willingly, and knowingly' did not sufficiently rebut the evidence presented that Henry had anger management issues and that he was pushing Helen, who was afraid of him, to change her Will. Apparently, there was even testimony that Helen was forced to leave her own home out of fear of Henry, and that she expressed regret after executing her 2018 Will.

*"While the attorney's testimony may have been able to rebut a small fraction of the evidence against him, it was insufficient in the face of extensive evidence provided by [Helen's other children.]"*

**Conclusion:** It is not readily apparent from the facts that were reported by the Court of Appeals whether all caregivers should be viewed to be in a confidential relationship with the elder they serve, or if Henry's 'bad history' with his mother colored the Court's opinion of his motives, e.g., are 'anger management issues' sufficient to presume undue influence? Nor is it all that clear what type of evidence will be necessary to negate the presumption of undue influence. In the *Jones Estate* case the testimony of the drafting attorney that her client signed her Will freely, knowingly, and willingly was not enough because she apparently did not 'delve deeply enough' into her client's history.

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