

## What is a Confidential Relationship

**Quick-Take:** A *confidential relationship* is treated as a *fiduciary* relationship when it comes to the presumption of undue influence in Michigan legal proceedings. Unlike formal titles or roles of a customary *fiduciary*, a *confidential relationship* can arise from informal relationships, e.g., caregiver-elderly person, or unique facts and circumstances where there is reliance in a trusted relationship which results in control by another.

**Background:** We are always concerned when there might be undue influence when a governing instrument, e.g., a Will, a trust, a deed, a beneficiary designation is executed by an individual who is aged, or who suffers from a disability or growing dementia. Undue influence arises when an individual's *free agency* is either destroyed or when the will of another individual is substituted. [*Kar v. Hogan*, 399 Mich. 529 (1976).]

**Fiduciary:** The presumption of undue influence arises when one has a *fiduciary* duty to another individual, e.g., a lawyer, conservator, guardian, trustee, priest or pastor, or an agent who holds a durable power of attorney. EPIC defines a *fiduciary* as “including, but is not limited to, a personal representative, funeral representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary. [MCL700.1104(e).] EPIC goes on to require that a *fiduciary* must discharge his or her duties and obligations of a *confidential* and fiduciary relationship, including the duties of undivided loyalty, impartiality between heirs, devisees, and beneficiaries, care, and prudence in actions. [MCL 700.1212(1).] Consequently, a *fiduciary* is a person who stands in a position of confidence and trust with another person. A *fiduciary* relationship also has been defined by courts as a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship, or when faith, confidence and trust and the reliance on of one upon the judgment and advice of another. [*In re Monier Khalil Living Trust*, 328 Mich. App. 151 (2019).]

There are four ways in which a *fiduciary relationship* can be created according to Michigan courts:

- (i) A person places trust in the faithful integrity of another person, who as a result gains superiority or influence over the first.

- (ii) One person assumes control over and responsibility for another person.
- (iii) One person has a duty to act for or give advice to another person on matters that fall within the scope of the relationship.
- (iv) There is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

[*Estate of Karmey*, 468 Mich.68 (2003).]

However, a *fiduciary relationship* can also arise when a person is in a *confidential relationship* with the testator or settlor. The challenge is that a *confidential relationship* is based on facts and circumstances rather than an official fiduciary role or title that is recognized at law.

**Presumption of Undue Influence:** Michigan law engages in legal presumptions, and inferences, when claims of undue influence arise. Sometimes in a Will or trust contest, a presumption of undue influence can arise when a *confidential relationship* is coupled with suspicious circumstances like: (i) Vulnerability of the victim due age, illness, mental impairment, dependence on the influencer, or isolation, all of which can make a person susceptible to undue influence; (ii) Active involvement of the influencer, by the influencer's participation in procuring the Will or trust, like arranging the attorney meeting, or controlling the testator/settlor's access to information; or (iii) Unnatural or unjust disposition of assets, where the Will or trust significantly departs from the testator/settlor's previous intentions or favors the influencer disproportionately.

Thus, one of the 'red flags' of undue influence is when a person in a *fiduciary or a confidential relationship* with the testator or the settlor either benefits from the Will or trust, or someone on their behalf benefits under the Will or trust. As a broad generalization, most presumptions of undue influence will rely on the element of an existing *confidential* or fiduciary relationship, yet undue influence can still occur even when a *confidential* or fiduciary relationship is missing. This is when suspicious circumstances, or 'red flags,' are presented to show that undue influence was exerted.

**Burden of Production of Evidence:** A presumption of undue influence can lead to a *prima facie* case of undue influence if all its elements are established. Once those elements are established, it results in a shift in the burdens of (i) production of evidence, and (ii) the ultimate persuasion of the trier of fact. If the elements of the presumption are not met, i.e., no presumption of undue influence arises, then the executed Will or trust is presumed to be valid.

There is a lot of discussion (dare I say confusion) these days in Michigan regarding the presumption of undue influence and the shifting burdens of evidence, or burdens of going forward to produce evidence, and inferences that can be drawn from facts presented in the court. This may be why the Michigan Probate and Estate Planning Council has created a committee to take a serious look at creating a more standardized approach to describe and prove undue influence.

**Confidential Relationship:** Unlike a *fiduciary* relationship that is established as a matter of law, a *confidential relationship* is almost always established by the unique facts of the testator or settlor's situation. A *confidential relationship* might exist if an individual is feeble due to poor health who is forced to rely on another to deal with banking or other financial transactions. An individual's reliance, trust, or dependency can also lead to a *confidential relationship*. Courts have repeatedly noted that a *confidential relationship* is not confined to any specific association of persons but arises any time there appears on one side an *overmastering influence* on the other person, or weakness, dependence, or trust justifiably reposed. An example of just how far-reaching a finding of a *confidential relationship* is the Minnesota court decision *State v Campbell*, 756 N.W.2d 263 (Minn. App. 2008) where a joint or multi-party bank account was found to create a *confidential relationship*. That Court noted:

*"..fiduciary obligations may be but are not necessarily a part of joint account arrangements. We recognize that the joint account is a starting point for analysis; it establishes a financial relationship. When each party is able to make unlimited withdrawals, there are clearly opportunities for abuse. To enter into the relationship, some level of trust exists between or among the parties to the account. The relationship and the trust may be nominal or far reaching. The important point is that in addition to the joint account, other factors must be weighed in determining whether a fiduciary relationship exists. These factors include the following: (1) the legal, familial, or personal relationship*

*between the parties; (2) the capacity or sophistication of the parties; (3) who contributed the funds to joint accounts and in what ratio; and (4) the parties' understanding of their respective roles and responsibilities within the relationship. We do not suggest that this is an exhaustive list."*

In this Minnesota case evidence of the joint nature of banking accounts, that the contributions were solely made by the decedent, and that the co-owner used the joint account funds for his own personal benefit were found to provide sufficient evidence of a breach of a 'fiduciary' relationship, which supported a conviction for financial exploitation of a vulnerable adult under Minnesota statutes.

**Conclusion:** When it comes to proving undue influence, in the absence of a recognized and formal *fiduciary* relationship with the testator or settlor, the existence of a *confidential relationship* requires demonstrating a record of the 'red flags' indicia and/or suspicious circumstances that exist to meet the presumption of undue influence. This determination in court often turns not so much on the quantity of 'red flags' as much on the quality of the evidence offered to the probate judge. It is still a highly vague and confusing process to show undue influence, which is why an effort is currently being undertaken to create a better definition of undue influence and how it is proved in the courtroom.

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