

## **WHAT EVERY ESTATE PLANNER SHOULD KNOW ABOUT UNDUE INFLUENCE: RECOGNIZING IT, INSULATING/PLANNING AGAINST IT... AND LITIGATING IT.**

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A brilliant and accomplished man suffers injuries in an accident. He is being cared for by a woman who is a former nurse. This woman worships, adores and admires him. She attends to all his needs. While he lacks mobility and is unable to attend to even his most basic needs (such as food preparation, toileting, transfers) and he requires significant assistance, his mind is crisp and clear. His sense of humor remains intact. His ability to formulate a plan of action and engage in conduct with the expressed goal of implementing it is evident. Anyone observing him would have no doubt that he has his wits about him and is fully competent. He suffers no cognitive limitations or impairments. His female “help mate,” at times, reminds him that he better hope that nothing ever happens to her (and anyone looking at his face knows that he believes her when she says it). It’s obvious that he has full knowledge of just how isolated and dependent he truly is. She coos such things to him as “[s]ush, darling, trust me, it’s for the best, G-d I love you.” She tells him “[y]ou’ve got a lot of recovering to do. There’s nothing to worry about. You’ll be just fine.” She tells him “I’m your number one fan” and how brilliant he is. She assures him that she’s contacted the appropriate healthcare providers and obtained the best medical advice possible. She makes special food just for him. She says things like: “you poor dear thing”; “let me help you”; “comfy?”; “it breaks my heart to see you like this”; and, “I have faith in you my darling”. She knows everything about him. Her admiration of him is long standing and apparent. One might even say her concern over him is obsessive. She keeps a picture of him in a prominent location in her home. She intones how she has

saved his life and is working to nurse him back to health. There are, at times, interchanges of dialogue between them, which contain words of respect, caring and concern.

Is he competent? Absolutely. There's no doubt that he knows and understands his situation. One could easily surmise that he knows the objects of his bounty, extent of his estate and is of sound mind. Were he to do so, there would be no question that he has sufficient capacity to execute an estate planning instrument.

However, despite these apparently loving and respectful interchanges of dialogue, those privy to the backstory are fully cognizant that this relationship is one based upon fear, vulnerability and dependency. But without access to, or the utilization of, an independent individual who might meet with the man in private and instill confidence sufficient for him to trust that what he communicates will not be disclosed back to the woman, an outsider might only see a loving caring woman who attends to the man's every need. To the outside world the impact of the man's vulnerabilities, dependency and fear, as well as the true story behind the situation, might not be apparent.

Does this scenario sound familiar? It comes from the 1990 movie, *Misery*, based upon the novel by Stephen King. As a viewer, one is privy to the nuances of the relationship and able to make independent observations. But, in the typical undue influence case, such nuances are conducted outside the purview of others – in privacy and in secret. If the character, Paul Sheldon, were to die, discovery of the true circumstances of the relationship might be lost. To the viewer, there is no doubt that Paul Sheldon's burning of the sole copy of his newest manuscript and writing of a new one that suits the demands of his caregiver, Annie, are the direct result of undue influence. We

see it. We understand it. We know it to be the undeniable truth because through the director's eyes we have a front row seat. But if you didn't see it, hadn't experienced it, if it had been more subtle and nuanced, and if Paul Sheldon had died and never escaped Annie's clutches, how would you be able to identify it?

To assist the reader in understanding, identifying, addressing and litigating issues relating to undue influence, vulnerabilities and diminished capacity, this paper will primarily focus on undue influence from three primary perspectives: (1) The Legal Perspective, (2) The Litigation Perspective, and, (3) The Estate Planner's Perspective.

## UNDUE INFLUENCE – THE LEGAL PERSPECTIVE

### *Undue Influence is a Process*

To understand undue influence one need understand that it "is a process, not an event."<sup>1</sup> These types of cases are very fact dependent. Consequently, a thorough understanding of the facts leading up to (and sometimes after) the execution of an instrument at issue and the relationship between the individual and the influencer is needed.<sup>2</sup> As a general rule,

"[u]ndue influence is not exercised openly, but, like crime, seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition, as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control."<sup>3</sup>

"Undue influence may be insidious and not in front of witnesses, but fair inferences can be drawn from the facts."<sup>4</sup>

From a "clinical" vs "legal" perspective, it has been found that the more risk factors or "red flag" indicia of undue influence that are found to exist, the more likely it is that

undue influence is occurring or has occurred.<sup>5</sup> These “indicia” will be addressed in greater length elsewhere in this paper.

### Capacity vs. Undue Influence

Each state has its own set of definition(s) for capacity. Depending upon what type of instrument is involved, the definition of what is required for capacity to exist can also vary. 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.<sup>6</sup>

Examples of where the definition of capacity may differ include, but may not be limited to, the capacity to execute or make a: (i) will; (ii) revocable trust; (iii) power of attorney; (iv) medical or advanced directive; (v) gift; (vi) irrevocable trust; (v) deed; (vi) provide informed consent for a medical procedure; (v) marry, (viii) contract; (ix) designate a beneficiary; (x) create a joint account, or even (x) drive.<sup>7</sup> “The law regarding capacity is full of fine distinctions: capacity to marry is one thing,<sup>8</sup> the capacity to enter into a contractual relation is another, and the capacity to execute a will still another.”<sup>9</sup> “...[I]t is never wise to think that categories that were developed by doctors to aid in the treatment of patients can with ease be transferred to legal contexts.”<sup>10</sup>

Regardless of the applicable standard for capacity, for undue influence to occur, the person influenced must have the capacity to engage in the transaction, or the transaction would generally be considered void *ab initio*. Consequently, competency and undue influence are mutually exclusive. Every victim of undue influence was, by definition, competent (even though lack of capacity and undue influence may be plead in the alternative as a basis for invalidating an instrument and experts are often asked to opine

on both testamentary capacity and the vulnerability to undue influence). While reduced cognition may be a factor in many undue influence cases (due to the existence of fertile ground for susceptibility and vulnerability to influence that it can create), it's not a necessary element.

So, what is undue influence? It isn't "undue" to persuade, suggest, ask, recommend or even attempt to guilt a person into taking action, as long as such conduct doesn't abuse the relationship or otherwise supplant the will of the individual. In the most general sense, influence is "undue" if that persuasion abuses the relationship.<sup>11</sup> Undue influence 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.<sup>12</sup>

It is often said 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.<sup>13</sup> While a claim of undue influence may involve elements of fraud, duress and/or misrepresentation, each of these elements need not be present and such elements, in and of themselves, may be separate causes of action, with differing burdens and proofs from those associated with an undue influence claim.

Undue Influence consists of persuasion carried to the point of overpowering the will, or such a control over the person in question as prevents him from acting intelligently, understandingly, and voluntarily, and in effect destroys his free agency and constrains him to do that which he would not have done if such control had not been exercised.<sup>14</sup>

Moreover, not all influence is undue.

[I]nfluences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution, although such will would not have been made but for such influence, so long as the testator's choice is his own ....<sup>15</sup>

To constitute undue influence, a person's "mind must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purpose of another."<sup>16</sup>

Therefore, what becomes important in an undue influence case is to establish that the free agency of the person influenced was taken from him (or her) or destroyed, and in its place the will of another person substituted.<sup>17</sup> "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient."<sup>18</sup> Further, undue influence cannot be inferred merely from acts of kindness.<sup>19</sup>

So how does one provide such affirmative evidence, when the crux of such conduct tends to be veiled in secrecy? Often the proponent of the instrument had or has control of the environment. They know and may have control over all of the pertinent facts and evidence. The challenger to the instrument may now be on the outside. If the challenger has been isolated from the individual, the challenger may lack knowledge of what has transpired.<sup>20</sup> While the challenger may have more than just a feeling that something is wrong and that the instrument doesn't reflect the individual's prior expressions of intent, proving that their gut feeling is right may be difficult and costly. If

the proponent is now the fiduciary of the estate governed by the instrument, the proponent may control the purse strings and have the ability to utilize the assets of the estate to fund the defense. Moreover, the challenger may face the potential consequences of a “no contest” or *in terrorem* clause. While some states, such as Michigan, permit the challenger to proceed without loss of benefit if probable cause to the challenge exists, this “safe haven” does not exist in every state.

In a state where this probable cause “safe haven” doesn’t exist, it might be possible for the parties to find themselves in a “winner take all” scenario. This result could occur because (1) the challenger loses the benefit of his bequest due to the application of the *no contest* clause, or (2) if the proponent of the instrument knew or had reason to know that the instrument the proponent propounded was not valid and such conduct, itself, results in the triggering of an *in terrorem* clause (in a previously executed version of the instrument which is ultimately determined to be valid) costing the proponent his or her benefit under a prior iteration of the instrument.<sup>21</sup>

In a state where the probable cause “safe haven” exists, the practitioner should be cautious to know whether a beneficiary petition seeking a determination of probable cause, in and of itself, constitutes a challenge that could trigger the *in terrorem* clause. If so, the threat of forfeiture under an *in terrorem* clause may be avoided when an independent (non-beneficiary) fiduciary brings the challenge.

#### *Probable Cause Can Provide a “Safe Haven”*

No contest clauses have a checkered history, in part, because they can affect a forfeiture of an estate interest and, in part, because their enforceability has varied among

those states whose courts or legislatures have considered them. Where no contest clauses are allowed by law, it is to permit the post-death enforcement of an estate plan by punishing an unsuccessful challenger of that estate plan, and in some cases, the administration of that plan. Some states, by legislation or court ruling, have created an exception to the enforcement of no contest clauses where there is sufficient evidence to create probable cause for the challenge whether or not the challenge is successful. In these states, the courts, in effect, apply a balancing test between an individual's right to have an estate plan implemented after death and protecting against wrongful creation of an estate plan based on one or more of several factors including undue influence, duress, misrepresentation or fraud. While the existence of a no contest clause, by itself, is not an indicia of undue influence where such clauses are legal; it is possible that the inclusion of such a clause may, itself, be an additional indicia of undue influence if substantial other indicia of undue influence are also present, such as a long standing intention to provide for family members without a no contest clause.

Although the scope of a non-contest clause may be broader than attempting to dissuade a challenge to a document, most are always intended to punish a challenger to the dispositive terms of the document. This leads, in those states where there is a probable cause exception, to an inquiry regarding the meaning of the term "probable cause." There is general acceptance that meeting the 'probable cause' test does not require the challenger to prevail in the challenge itself. However, it may require the challenger to demonstrate a reasonable belief, at the time the challenge is officially asserted, that there were substantial facts and circumstances in existence to support an allegation of lack of capacity or undue influence. A reasonable belief is that of a



hypothetical, reasonable person, exercising ordinary prudence in evaluating the facts and circumstances then present. This is sometimes described as a requirement that the challenger act in good faith. While the opinion of legal counsel, sought in good faith, and after disclosure of the facts and circumstances, can be supportive, the existence of such an opinion will not necessarily avoid a forfeiture. Some states require that the facts and circumstances indicate a substantial likelihood of success - while other states require that the facts and circumstances indicate that there is a reasonable likelihood of success.<sup>22</sup> To date, no state has required that the challenger establish probable cause by a preponderance of the evidence standard. A reasonable reconciliation of these different standards suggests that it may be the quality of the evidence regarding the circumstances under which an instrument was created as opposed to the amount of evidence presented may impact a determination of whether probable cause exists to challenge an estate planning document subject to an *in terrorem* clause. Establishing that a presumption of undue influence exists, may in itself, be sufficient to establish probable cause for a contest under many circumstances.

### Presumptions.

In the absence of a finding that a “presumption of undue influence” applies, duly executed instruments are generally presumed to be valid.<sup>23</sup> Because of the very nature of undue influence cases, most states have imposed a mechanism to create a “presumption of undue influence” (the “Presumption”) when certain circumstances are met. These mechanisms vary from state to state, but being able to satisfy the requirements for imposition of the Presumption may have a significant impact on the outcome of the case. The purpose of the Presumption is to level the playing field. A

finding that the Presumption has been established can negate the grant of a summary disposition of the challenge. It may even provide an adequate basis, if not sufficiently rebutted, to prove that undue influence occurred, without further factual support. In Michigan, *In re Estate of Erickson Estate*<sup>24</sup>, established that the Presumption arises when the challenger can show:

- (1) That a confidential or fiduciary relationship existed between the grantor and a fiduciary,
- (2) That the fiduciary or an interest he represented benefited from the transaction, and
- (3) That the fiduciary had an opportunity to influence the grantor's decision in that transaction.<sup>25</sup>

In Michigan, the effect of the Presumption is not to shift the burden of persuasion, but rather, to shift the burden of production from the person claiming undue influence to the proponent of the instrument.<sup>26</sup> "The [challenger] may satisfy the burden of persuasion with the presumption of undue influence, which remains as substantive evidence, and the [challenger] will always satisfy the burden of persuasion, when the [proponent] fails to offer sufficient evidence to rebut the presumption."<sup>27</sup>

"Presumptions in the law are almost invariably crystallized inferences of fact. Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed."<sup>28</sup>

In other states, establishing the Presumption serves to shift the burden of proof to the proponent. As of July 14, 2014, Florida (by way of example) amended section 733.107 of the Florida statutes by enacting the following:

- (2) In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of

fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

In California, following earlier appellate decisions that the establishment of the Presumption shifted the burden of proof to the proponent<sup>29</sup>, the California legislature amended its Probate Code in 1995 to establish a series of complex rules, inter alia, governing the application of the Presumption and when it shifts the burden of proof to the proponent in a variety of factual situations.<sup>30</sup> Like California<sup>31</sup>, Florida<sup>32</sup>, and other states (such as Michigan), impose the Presumption largely as a result of the circumstances surrounding a confidential or fiduciary relationship.

While, a survey of the various Presumption statutes and standards applicable in each state is beyond the scope of this paper, the existence of such distinctions is noted so that the reader can be advised of the importance of determining what the appropriate standard entails, as well as its potential impact.

#### *What Types of Confidential or Fiduciary Relationships Will Satisfy this Component of the Presumption?*

The existence of a confidential or fiduciary relationship is sometimes a question of fact.<sup>33</sup> The term is a very broad one, embracing both technical fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another.<sup>34</sup> A confidential relationship can be found to exist when a person enfeebled by poor health relies on another to conduct banking or other financial transactions.<sup>35</sup>

A fiduciary is a person who stands in a position of confidence and trust vis-à-vis another person.<sup>36</sup> A fiduciary relationship has also been defined as a “relationship in which one person is under a clear duty to act for the benefit of the other on matters within

the scope of the relationship."<sup>37</sup> Michigan courts have held that there are four typical ways in which a fiduciary relationship can arise:

- a. When one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first;
- b. When one person assumes control and responsibility over another;
- c. When one person has a duty to act for or give advice to another person on matters falling within the scope of the relationship; or
- d. When there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stock broker and a customer.<sup>38</sup>

There are a number of relationships which are fiduciary as a matter of law, such as, principal-agent, guardian-ward, trustee-beneficiary, lawyer-client, physician-patient, clergy-penitent, accountant-client, and stockbroker-customer.<sup>39</sup> Michigan Courts have recognized that a fiduciary relationship exists as a matter of law from the grant of a power of attorney.<sup>40</sup> In Michigan, unless there is a dispute whether the named relationship exists, it will be deemed a fiduciary relationship as a matter of law.<sup>41</sup>

There are other relationships that might satisfy the requirement of a confidential or fiduciary relationship (in addition to those relationships listed above) for purposes of imposing the Presumption.<sup>42</sup> It has been observed that "[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."<sup>43</sup>

It has been said that trust is an essential component of a good marital relationship. That may well be the reason that many states recognize a spousal privilege in acknowledgment that an open and honest dialogue is an extension of communications exchanged between a husband and wife and confidence reposed. A natural extension of

this may be the requirement for litigants alleging undue influence by a spouse to demonstrate how the spouse abused the relationship to attain the interest received, or may even result in 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. That being said, it's not impossible for undue influence to be found to exist between spouses, although generally it must be based on a relationship in addition to that of husband and wife.<sup>44</sup>

In one case, the court said:

We do not know of any rule of law or morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit or for that of others, unless she acts fraudulently, or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent.<sup>45</sup>

It may, however, be important to note that in the above referenced case, the court went on to find that the husband

...was entirely able to control his own actions, and was not weak enough to be a mere instrument in any one's hands. There can be no fatally undue influence without a person incapable of protecting himself, as well as a wrong-doer to be resisted. Neither is found here.<sup>46</sup>

It appears that undue influence cases involving spouses, one of whom is deceased, most often appear in the context of blended families, where the ultimate beneficiaries of one spouse's largess may be others than those who would have been the natural objects of the other spouse's estate.<sup>47</sup> Consequently, nationwide, there are numerous situations where undue influence by a spouse has been found to occur.

### Rebutting the Presumption.

The requirements for rebutting the Presumption, vary from state to state.

In Michigan, because the Presumption is evidentiary in nature (as opposed to statutory) the question arises as to when “sufficient” evidence has been presented so as to convert the Presumption into a mere “inference”.

Recently 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 and we conclude that appellants established that [the proponent] unduly influenced [the decedent].<sup>48</sup>

Thereafter, the Michigan Supreme Court denied proponent’s application for leave to appeal as the Court was “no longer persuaded that the question presented should be reviewed by this Court.”<sup>49</sup> The dissent, however, 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.”<sup>50</sup> Therefore, while it may be unclear until revisited by the Michigan Supreme Court, the law in Michigan may require that the proponent of a will or trust prove the absence of undue influence, once the Presumption has been established.

Because of the confusion created by *In Re Mortimore*,<sup>51</sup> we look to other sources to provide guidance on the burdens imposed once the Presumption has been found to exist.

Until 1965, Michigan (like other states) had historically relied upon a *Thayer*<sup>52</sup> approach to such evidentiary issues.<sup>53</sup> Under *Thayer*, a bursting bubble theory of presumptions was applied. This theory held, in substance, that a presumption was 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.”<sup>54</sup> In the 1965 issuance of its decision in *In re Wood Estate*,<sup>55</sup> the Michigan Supreme Court modified the prior application of the *Thayer* theory with respect to what happens when a presumption is rebutted. While previously the presumption disappeared when it was rebutted, after *Wood*, the presumption became a permissible inference. In later decisions, the Michigan Supreme Court clarified that the finding of a presumption did not shift the burden of proof to the proponent, and instead only shifted the burden of going forward with the evidence.<sup>56</sup> Consequently, an analysis akin to that required above relating to “probable cause,” might be required in order to analyze what would constitute “substantial evidence” sufficient to rebut the Presumption once it has been established.

*Widmayer v. Leonard*,<sup>57</sup> indicates that with regard to cases where a presumption had been established:

We are 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.

We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption

to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting 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.<sup>58</sup>

*Widmayer* went on to distinguish the difference between the “burden of persuasion” and the “burden of going forward with the evidence.” It indicated:

The problem in the case at bar results from the imprecise use of the phrase “burden of proof.” There are two aspects of the “burden of proof”—the “burden of persuasion” and the “burden of going forward with the evidence.” The latter burden may shift several times during the trial, whereas the burden of persuasion generally remains with the plaintiff.<sup>59</sup>

The *Widmayer* court also acknowledged the potential risks of a simplified *Thayer* approach indicating that:

It is important to acknowledge that while this theory has the advantage of simplicity and ease of application, it does not give weight to probability and social policy and thus is subject to this criticism. Some courts, therefore, have varied the formula, \*\*\* by providing that not only must substantial evidence be introduced before the presumption vanished, but it must be evidence which the jury believes.<sup>60</sup>

It has been generally accepted that:

[t]he question of credibility is always one for the jury who may not accept all or any part of testimony that they believe untrue. Credibility is a very important factor where facts are in conflict and witnesses have an interest in upholding or defeating a will.<sup>61</sup>

This is because, “...testimony on the question of ... undue influence does not control the result.”<sup>62</sup>



While the importance of “credibility” cannot be overstated, it will be further addressed later in this paper.

Regardless, it appears, that with Michigan’s implementation of newly minted jury instructions, the issue of the quantum of evidence required to rebut the Presumption will endure further scrutiny.<sup>63</sup>

*The Need to Rely Upon Circumstantial Evidence.*

If the Presumption has not been established, then it must be determined, whether the party asserting undue influence has established its occurrence.<sup>64</sup> Because a relationship of trust is not an element, *per se*, of undue influence, it is possible for undue influence to exist regardless of whether the elements of the Presumption have been met.<sup>65</sup> Furthermore, because “sufficient” evidence may be presented by the proponent to rebut the Presumption, prudence dictates that the challenger not plan on merely relying upon the Presumption to prevail.

In general, all evidence, both direct and circumstantial, bearing upon the question of undue influence should be admitted.<sup>66</sup> A party may use circumstantial evidence to show undue influence, but the evidence must do more than raise a mere suspicion.<sup>67</sup> Because (as further discussed below) undue influence cases tend to require a longitudinal analysis of the evidence, in such cases, “[e]vidence showing acts of undue influence at a date subsequent to the execution of the will is competent, in connection with other facts and circumstances, in support of the charge of undue influence exerted at the earlier date.”<sup>68</sup>

But what is relevant? "Relevant evidence" has been defined to be evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>69</sup> The term "any" indicates that the merest tendency will suffice, which represents a low threshold. This evidentiary rule encourages the admission of arguable relevant evidence proffered and indicates that if reasonable minds could differ about the relevance of a particular item of evidence, it should be considered relevant. Evidence may be relevant because it is direct evidence of the event sought to be proved ("Direct Evidence"). Alternatively, evidence may be relevant because it is of a quality that leads to an inference that a probable event did or did not occur ("Circumstantial Evidence"). Generally, all relevant evidence is admissible unless it is excluded by the U.S. or pertinent state Constitution, or another applicable statute or rule of evidence.

Because of the very nature of undue influence cases, it is recognized that the evidence in such cases is largely circumstantial in nature.

Undoubtedly, circumstantial evidence may be relied on by [challengers] to show undue influence. ... However, to carry the question to the jury, such circumstantial evidence must be of considerable probative force and, quite clearly, must do more than raise a mere suspicion.<sup>70</sup>

To establish undue influence it must be shown that the person 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.<sup>71</sup>

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.”<sup>72</sup>

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.<sup>73</sup>

Courts have also recognized that indirect proof of undue influence should be allowed due to the difficulty of developing direct proof in such claims. Both Direct Evidence and Circumstantial Evidence of undue influence are admissible, although Direct Evidence is less common than Circumstantial Evidence because of the secretive nature of undue influence. Therefore, in undue influence cases, “[t]he case must be determined generally upon circumstantial evidence. This is necessarily so by reason of the secret and insidious means by which such influence is usually exercised.”<sup>74</sup>

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. Circumstances are deemed “suspicious” based upon a review of the totality of the facts and not any one fact in isolation of others.

The Restatement (Third) of Property (Wills & Don.Trans) Section 8.3 cmt. h, provides that:

In 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.<sup>75</sup>

As previously stated, because undue influence is, indeed, a process, and not a single event, a longitudinal view and approach to the evidence is often warranted. Therefore, evidence both before and after the execution of the instrument in question will be deemed relevant. In this regard, even evidence of undue influence which occurred after the date on which the testator made his or her will is relevant and admissible as tending to show a continuance of undue influence.<sup>76</sup>

### UNDUE INFLUENCE – THE LITIGATION PERSPECTIVE

Due to their very nature, undue influence cases tend to be complex, fact intensive and challenging. For the proponent of an instrument, often a straight forward, simple, believable and thematic approach is the most effective. For the challenger, however, the presentation of proofs (especially in the absence of the Presumption or following the rebuttal of the Presumption) can be much more difficult. The challenger must often 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.

Unlike the influence portrayed in the movie “*Misery*,” in most cases the action tends to be much more subtle than “hobbling” and we seldom have the benefit of the “director’s lens” with which to view the conduct (although “smoking guns” may be found during the course of discovery).

These cases require not only a knowledge of the law, but also a working knowledge of the facts, an understanding of the potential interplay and impact of dependency and vulnerabilities, including cognitive difficulties, and a great deal of strategy. Moreover, the use of experts in a variety of different fields can have a significant impact in the preparation and analysis, pre-trial motion, discovery and trial stages of a case. In these cases an understanding of the complexities of family dynamics, cognitive and other medical and mental health issues and records, as well as the legal issues presented may necessitate outside assistance and a holistic approach to the case.

In many other respects litigating undue influence cases involve the same kind of planning, strategies and litigation skills and techniques required in other forms of civil litigation. Hence, the focus here will be on selected topics and other considerations that distinguish undue influence cases from most other forms of litigation.

*It’s About the Money: But Rarely Is It Only about the Money*

Like any commercial dispute, allocation (or re-allocation) of money is generally the core issue in undue influence challenges. What distinguishes these cases is that it is rarely *only* about the money. By their very nature, will and trust challenges generally involve longstanding and often complicated family relationships that bring with them all the emotions and motivations associated with those longstanding relationships. For

example, such motivations can commonly include sibling rivalry, jealousy, competition for the perceived affection of a deceased relative, vindictiveness, anger, and, of course, outright hatred. The list goes on and on. These motivations are sometimes not obvious because people are often guarded, deliberately or otherwise, against showing their true feelings and intentions. Such concerns are augmented by the fact that the aging baby boomer generation often leave children and spouses (thus potential beneficiaries) from multiple marriages, which often results in more complex relationships. Whether representing the proponent or challenger, it is important for litigators to assess the motivations of clients and opposing parties (and sometimes scores of influential relatives) to weigh the impact such motivations can have on important considerations such as case strategy, the testimony of witnesses and settlement negotiations.<sup>77</sup> In particular, these volatilities often make settlement more complicated than mere rational assessment of financial risk. It is folly for counsel to ignore such profound influences in a case. It is also important in properly counseling clients through the course of the litigation to openly discuss these issues, which in turn may improve client satisfaction with the outcome of the litigation. As a litigator, recognition and management of these considerations can be every bit as important as the skill of establishing an effective record during depositions or cross examination at trial.

#### *Litigating the Circumstantial Case.*

As referenced above, due to their very nature, undue influence cases are almost always based on circumstantial evidence. More often than not, the challenger had limited access or contact with the decedent and, therefore, likely was not a witness to many of the alleged events giving rise to the contest. Isolation can even be present when the

decedent had contact with third parties who have little or no past knowledge of the functioning and intentions of the decedent or the nature of the relationship between the decedent and the alleged perpetrator. The key point is that challengers rarely have direct proof of the elements of the claim and, therefore, the discovery, assessment and presentation of circumstantial proofs becomes essential.

Also, as discussed above, the law has recognized the difficulty of alleging and proving circumstantial cases caused by isolation and secrecy. To level the playing field, the law allows a challenger to establish a “presumption of undue influence” based on a relatively modest burden of proof of (1) the existence of a confidential or fiduciary relationship, (2) the fiduciary benefited, and (3) the fiduciary had an opportunity to influence the grantor. From a litigation perspective, a key benefit of establishing the presumption (in jurisdictions such as Michigan) is that the challenger may be immune from a dispositive motion and is thus guaranteed the opportunity to present the case to a factfinder. (As stated above, other benefits of establishing the Presumption may include a probable cause determination to void the operation of an *in terrorem* clause and ultimate victory if the proponent is unable to produce substantial evidence rebutting the Presumption.) When applicable, an early determination that the Presumption does or does not exist may create offensive and/or defensive advantages. As one might glean from the distinction between Michigan and Florida or California law relating to the evidentiary and persuasive weight of the Presumption, as a litigator it is important to understand the elements necessary to establish and rebut the Presumption. This knowledge can assist not only in litigating such issues but also prove helpful in the estate planning stage.

The law additionally levels the playing field in these circumstantial cases by relaxing discovery and evidentiary (relevancy) standards relating to admission of evidence.<sup>78</sup> Importantly, counsel for both proponents and challengers must bear in mind the strategic considerations of the court's role as "gate keeper" for both the scope of discovery as well as admission of proofs at trial. Judges who take a narrow view of the scope of relevancy and, therefore, discovery and admissibility, may make a challenge exceedingly more difficult and/or outright impossible. For these reasons, disputes regarding the scope of discovery and admissibility of evidence are both common and critical to the outcome of undue influence cases.

*Case Perspective: Longitudinal vs. Acute*

Because undue influence challenges are often based on circumstantial evidence, the parties will often present their case from two entirely different perspectives.

A challenger will likely view the case longitudinally, and thereby present a collection of circumstantial facts over time tending to establish such things as vulnerabilities of the decedent, the changes in estate planning intentions of the decedent, evolving isolation of the decedent, secretive actions of a proponent, growing dependency and any number of the "red flag" indicia of undue influence. The challenger will need to determine if a chronological, thematic or combined approach best portrays the longitudinal story to be presented. It is against this backdrop that other elements which tend to demonstrate the existence of influence which is "undue" will be superimposed. Absent a finding of the Presumption, the challenger often bears a heavy burden to establish that the grantor's estate planning desires were actually supplanted by the will of another. Therefore, it is important that the challenger develop a rational and credible



theme which demonstrates how and why the grantor's will was supplanted for that of another.

In contrast, proponents of an instrument may likely emphasize an "acute view" focused on discreet moments of time, such as, for example, the execution of amendments to an estate plan when third parties are available to allegedly corroborate testamentary capacity based on statements made by and in the presence of the decedent and his or her apparent knowing and voluntary execution of the instrument. These discreet events, if viewed in isolation and stripped of any proofs relating to pre and post execution, make challenges extraordinarily difficult. Because it is generally presumed that documents are valid, absent a showing of fraud, duress or undue influence, in the absence of an established Presumption, the proponent's story is generally an easier one to present. This may be further buttressed, in part, because the trier of fact isn't charged with changing the outcome simply because a different disposition may be deemed more appropriate or reasonable.<sup>79</sup>

Nonetheless, whether one represents the proponent or the challenger, it may still be important to establish the nature of the relationship and why the decedent desired the provisions of the instrument.

### Scrivener Testimony

There is a natural tendency for a drafting lawyer of challenged estate planning documents to assert the attorney-client privilege. There is clear law in Michigan (and elsewhere) that "...communications between attorney and testator during preparation of a will are not privileged" where the contest is between parties not strangers to the estate.<sup>80</sup>

The importance of the scrivener's files and testimony cannot be overstated and scriveners should anticipate that their actions (and inactions) will be subject to thorough discovery. Such evidence may be pivotal to either making or rebuffing a challenge.

### *Scrivener as the Trial Advocate*

As with any case when the validity of the estate planning documents are contested, in undue influence cases there is often the possibility and/or likelihood that the scrivener will be asked (or compelled) to testify at trial. The Model Rules of Professional Conduct preclude the scrivener from serving as a trial advocate when that lawyer is also likely to be a necessary witness in a contested proceeding.<sup>81</sup> As a result, scriveners should avoid taking on the role of the trial advocate in such circumstances. The more challenging tactical question is whether a law partner of the scrivener should serve as the trial advocate. The Model Rules of Professional Conduct allow such representation unless the role results in a conflict of interest under Rule 1.7 or 1.9.<sup>82</sup> Certainly in cases where the actions (or inactions) of the scrivener are directly implicated in the alleged undue influence, the trial advocate may be placed in the untenable position of defending, directly or indirectly, the conduct of his or her own partner. In some cases there may be malpractice implications involving the scrivener which would make the advocacy role of the partner even more tenuous or even outright prohibited where the advocate's own interest (by virtue of his partner's and his law firm's potential exposure) could materially limit the representation of the client.<sup>83</sup> In practice, the considerations as to whether a scrivener or a lawyer in the scrivener's firm should serve as the trial advocate in undue influences cases vary dramatically depending upon the facts and circumstances of the

case in question. Each case must be considered on its own merits so that the trial advocacy is conducted in a manner that promotes the client's best interests.

### Use of Experts

As with any case, use of experts in an undue influence case should be considered 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.<sup>84</sup> Also, like any other types of cases, the extent and types of experts needed will vary from case to case. The considerations are many, and will almost always include whether the case is a bench or jury trial and, if a bench trial, the judge's level of knowledge and past experience in presiding over undue influences cases.

When litigating challenges that can justify the expense, counsel for both sides should give strong consideration to retaining a seasoned forensic expert, such as a geriatric psychiatrist or psychologist. The primary role of such an expert is to opine, from a comprehensive perspective, on a person's vulnerability to undue influence and to assess the risk factors supporting that opinion.<sup>85</sup> Apart from offering such opinions, a qualified expert can play an expansive role in the litigation and early retention of such an expert is often critical for one or more of the following reasons:

- (1) If the alleged victim is still living, counsel for both sides should give strong consideration to whether an "independent" medical exam could be helpful to the client's case. These examinations are principally focused on the individual's testamentary capacity and, if competent, the person's vulnerability to undue influence. These assessments usually include a psycho-social profile, and assessments of both physical and emotional dependency;
- (2) The expert can provide counsel with an early and accurate assessment of the case. Qualified experts will likely see things that will not yet be obvious to counsel. Such expertise is particularly helpful when the person allegedly

influenced possibly suffered from mental health disorders such as depression, anxiety disorder, delirium or other cognitive impairment due to psychiatric and/or significant medical issues;

- (3) The expert can help develop a more targeted discovery plan, particularly because of their knowledge of the patterns associated with such cases;
- (4) The expert can assist in preparing for depositions of treating physicians and other health care professionals, particularly because treating health care providers are often less focused on mental health issues and more focused on immediate medical issues necessary to keep the patient alive and stable. A fuller understanding of the medical conditions and their possible impact on vulnerability may help counsel elicit useful testimony from treating physicians as both fact and/or expert witnesses;
- (5) The expert can be helpful in preliminary motion practice such as motions regarding the scope of discovery, motions seeking to establish the Presumption and/or early motions for summary disposition. The expert's involvement with motion practice may include reports of a medical evaluation or a preliminary report regarding vulnerability to undue influence based on the evidence available at that time; and
- (6) An expert can help wade through large volumes of medical records, testimony and other discovery information to help better synthesize evidence for the effective presentation of proofs at trial.

Since contests are often initiated post-death, it is common that the retained forensic expert will not have the opportunity to conduct his or her own examination of the decedent. However, regardless of whether an examination is conducted, qualified forensic experts can perform valuable post-death assessments based on medical records, witness testimony and other discovery sources.<sup>86</sup> While such "records-only" evaluations lack some of the advantages of a hands-on assessment, they are usually based on broader sources of information over a greater period of time and, therefore, may well offer a more comprehensive perspective of the decedent. It is for this very reason that treating physicians are not necessarily in a better position to testify to issues of

capacity and vulnerability. Moreover, treating physicians and other health care professionals often lack qualifications to fully assess the mental status of a patient and are often focused on other aspects of a patient's care at the time of treatment.

In addition to the forensic expert, counsel should give consideration to additional testifying experts, including:

- Physician(s) with appropriate specialties who can interpret the medical record, and explain medical conditions and how those conditions may impact competency and/or vulnerability and dependency;
- Non-physician health care professionals in specialties that relate to important issues such as cognitive functioning (e.g. speech and language pathologists);
- An expert in pharmacology to understand and explain the potential impact of medications and polypharmacy;
- 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; and/or,
- A legal expert on issues relating to the independence of counsel.

In addition to testimonial experts, in cases involving substantial volumes of medical records, a nurse or other medical professional may prove invaluable as a medical records consultant. Among other things, the consultant can organize and interpret medical records, help prepare a comprehensive and accurate medical record chronology, and assist counsel in preparing for depositions and trial testimony of medical-related witnesses.

It can also be helpful to research possible experts as well as those named by the opposing party. Having an understanding of the expert's philosophic bent, and prior

opinions and/or writings, may prove invaluable in the selection of an expert as well as in the cross examination of the opposing party's expert.

*Indicia of Undue Influence.*

While we know of no all-inclusive or exhaustive list of indicia of undue influence, there are some generally recognized indicia. Further, while issues reflecting upon an individual's vulnerabilities to undue influence generally appear in these lists of considerations, the existence of such vulnerabilities will not necessarily be determinative that undue influence occurred.

In 2008, the Psychogeriatric Association's subcommittee of an International Task Force (the "Subcommittee") identified, from a "clinical" perspective, some common "red flags" which might alert an expert to the risk of undue influence.<sup>87</sup> These included:

(i) social or environmental risk factors such as dependency, isolation, family conflict and recent bereavement; (ii) psychological and physical risk factors such as physical disability, deathbed wills, sexual bargaining, personality disorders, substance abuse and mental disorders including dementia, delirium, mood and paranoid disorders; and (iii) legal risk factors such as unnatural provisions in a will, or a provision not in keeping with previous wishes of the person making the will, and the instigation or procurement of a will by a beneficiary.<sup>88</sup>

The Subcommittee found that undue influence, was more likely to occur:

(i) where there is a special relationship in which the testator invests significant trust or confidence in another; (ii) where there is relative isolation (whether due to physical factors or communication difficulties) which limit free flow of information and allows subtle distortion of the truth: and, (iii) where there is vulnerability to influence through impaired mental capacity or emotional circumstances (such as withholding of affection, or persuasion on grounds of social, cultural or religious convention or obligation).<sup>89</sup>

In regards to the "special relationship," an elderly cognitively impaired person might be adversely influenced by a person who was: (1) a cohabiting family member such as an adult child; (2) a non-resident child; (3) a helpful neighbor or friend; (4) a formal or

informal care provider; (5) a more distant family member; (6) a “suitor” who may, or may not, become a de facto partner or spouse, who is generally significantly younger and cognitively intact; or, (7) professional such as attorneys, clergy, doctors, accountants, or policemen.<sup>90</sup> They noted that it is even possible for several people to be involved in the “influence” process.<sup>91</sup>

Where an individual is cognitively or emotionally vulnerable, less “coercive” influence might be determined to be “undue.”<sup>92</sup> By way of example, “...a person in the last days or hours of life may have become so weak and feeble that very little influence be sufficient to bring about the desired result.”<sup>93</sup>

Some social circumstances might actually enhance the possibility of undue influence. These include: (1) sequestration and isolation of the impaired person such that outside contact is inhibited; (2) previously trusted individuals are no longer favored or trusted by the cognitively impaired decedent; (3) family conflict; and/or (4) physical and/or psychological dependency on a person rendering care.<sup>94</sup>

Psychological factors that might enhance the possibility of adverse influences include: (1) loneliness; (2) sexual bargaining; (3) emotional vulnerability to the influence of others; (4) highly “*medicalized*” or acute care settings; (5) family dynamics that feed on a sense of guilt, martyrdom, anxiety or fear of abandonment; (6) mourning and grief associated with the loss of a powerful relationship; (7) persons who are excessively dependent; (8) chemical dependency; (9) a myriad of mental disorders, such as delirium, dementia, chronic schizophrenia, paranoia or depression; and/or (10) other cognitive impairments.<sup>95</sup>

It may be important to note that while certain cognitive impairments that create fertile ground for suspicious or paranoid ideation may make an individual more amenable to undue influence, it may also protect them from such influence.<sup>96</sup> Consequently, a person's suspicions (founded or otherwise) that people are trying to take advantage of him might, in certain circumstances, counter-act attempts to unduly influence that individual.

Some key terms to consider when reviewing materials on "risk factors" are:

- "Vulnerability" – which can relate to the individual's age, mental and/or physical condition.
- "Isolation" – which need not be imposed by another, but may be the natural result of technological or other challenges or other conditions.
- "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.
- "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.

The American Bar Association (ABA) Commission on Law and Aging and the American Psychological Association (APA) interdisciplinary Task Force recognized that there are some factors that can create a predisposition for financial exploitation. Per the Handbook for Psychologist generated by the ABA/APA Interdisciplinary Task Force <sup>97</sup> (the "Psychologist Handbook"), these may include such factors as:

- Advanced age (over 75);
- Unmarried/widowed/divorce;
- Organic brain damage;



- Cognitive impairment;
- Physical, mental or emotional dysfunction (especially depression);
- Recent loss of a spouse or divorce;
- Living with or dependence on an abuser;
- Living alone;
- Social isolation;
- Estrangement from children;
- Financial independence with no designated financial caretaker;
- Middle or upper income bracket individuals;
- Persons taking multiple medications;
- Frailty;
- Fear of change of living situations;
- Implied promise by perpetrator to care for elderly person if funds or material goods are transferred;
- Elderly person subject to deception (misrepresentation/concealment of information for selfish gain); and/or,
- Elderly person subject to intimidation (perpetrator induces dependency with fear of rejection if demands not met, or creates fear by threat of physical or emotional harm or abandonment).

The Psychologist Handbook also points to certain characteristics of persons who might exploit the elderly, and these characteristic may include, but not be limited to any number of the following:

- Caregiving relationship to the elderly person;
- Installation of a sense of helplessness and dependency;

- Isolation of the elderly person from family members and other social contacts;
- Presentation of self as a protector of the elderly victim while isolating them from others;
- Enhancement of inadequacies and diminished self-worth in victim, making him or her more vulnerable;
- There is often a history of multiple unstable relationships;
- Falsified credentials or embellishment of personal power, role or position;
- Opportunistic;
- Psychologically dysfunctional;
- Predatory;
- Antisocial with little regard for rights of others;
- Methodically identifies victims and establishes power and total control over them; and/or,
- Gains control of assets through deceit, intimidations and psychological abuse.

The Psychologist Handbook also describes certain sign and symptoms suggestive of undue influence, which might include:

- Elderly person's actions inconsistent with past longstanding values/beliefs;
- Older person making sudden changes in financial management that enriches one individual;
- Elderly persons changing their will or disposition of assets, belongings, property, and direct assets toward one who is not natural "object of their bounty";
- Caretaker dismisses previous professionals and directs older person to new ones (e.g. bankers stockbrokers, lawyers, physicians, realtors);

- Elderly person isolated from family, friends, community, and other stable relationships;
- Non-family caretaker has moved into the home or taken control of daily schedule;
- Older person directs income flow to caretaker;
- Wills, living wills, trusts altered with new caretaker or friend as beneficiary/executor;
- Elderly person develops mistrust of family members, particularly about financial affairs, with this view supported by new friend, acquaintance or caretaker;
- Older person finds new caretaker guaranteeing lifelong care if he or she gives the caretaker his or her assets;
- Elderly person in relationship characterized by power imbalance between parties, with caretaker assuming restrictive control and dominance;
- Caretaker or friend accompanies elder to most important transactions, not leaving him or her alone to speak for himself or herself;
- Older person increasingly helpless, frightened, despondent, feeling that only the caretaker can prevent his or her further decline;
- Elderly person sees acquaintance or caretaker as exalted, with unusual powers or influence; and/or,
- Legal risk factors such as unnatural provisions in a will or provisions not in keeping with previous wishes of the person making the will and the instigation or procurement of a will by a beneficiary (commonly referred to as “active procurement”).

Various recognized models have also been established to assist in understanding, analyzing and developing the requisite factual basis pertinent to undue influence cases. A working knowledge of these models may assist the litigator in the development of themes and strategies in the case. These models include, but are limited to:

- IDEAL;
- Cult model;

- SCAM;
- SODR; and,
- The Undue Influence Wheel.

The IDEAL model promoted by Dr. Bennett Blum is just one of the prominently developed and marketed models with regard to the “indicia” or “red flags” of undue influence. Dr. Blum identifies and explains his acronym “IDEAL” as standing for:

**Isolation**- Refers to isolation from pertinent information, friends, relatives, or usual advisors. Causes can include medical disorders, a history of poor relationships with others, perpetrator interference, geographic changes (e.g. travel) and technological isolation (e.g. loss of telephone service or ability to communicate in that fashion).

**Dependency**- Refers to dependence upon the perpetrator, such as for physical support, emotional factors, or information.

**Emotional Manipulation or Exploitation of a weakness** – This is often manifested as a combination of promises and threats regarding either issues of safety and security, or companionship and friendship. Perpetrators sometimes make use of a victim’s weakness or vulnerabilities. It is not unusual to encounter cases in which, for example, a perpetrator provides alcohol to an alcoholic, or has him execute documents despite knowing that the victim is mentally impaired due to acute or long term effects of alcohol; having a vision impaired person sign a legal document or misrepresenting documents and their consequences to the cognitively impaired individual.

**Acquiescence** – refers to the victim’s apparent consent or submission. The act is not truly voluntary, but is instead the product of inaccurate, misleading or deceptive information that is believed due to the victim’s impairments and/or relationship with the perpetrator.

**Loss** – refers to damages, such as inter-vivos financial loss.

According to leading forensic psychiatric experts, Dr. Sanford Finkel and Dr. Bennett Blum, the more “red flag indicia”<sup>98</sup> or “suspicious circumstances”<sup>99</sup> of undue influence, the more likely undue influence might be found to have occurred. This might

be akin to the analogy that “where there is smoke there is fire” or the proverb that “if it walks like a duck, quacks like a duck, and looks like a duck, it must be a duck.”

The existence of a significant number of these “circumstances” or “indicia” may well be persuasive that “probable cause” for a contest exists, as well as indicative that influence has been exerted. Nonetheless, it is equally important to remember that undue influence cases are extremely fact specific and the existence of a single countervailing factor may significantly impact the outcome of the case. Therefore, the mere existence of such “red flags” or “indicia” is not necessarily determinative that the influence was “undue” such that the will of an individual has been supplanted by another. Moreover, a single mitigating or countervailing fact may be sufficient to establish the independence of the plan created.

In the development of one’s pre-trial, discovery and trial strategies, a thorough understanding the indicia and potential impact of cognitive deficits, dependency and impairments on the facts and circumstances of your case is tantamount. Again, because cognitive impairments may not result in a lack of capacity, the tedious effort of understanding such impairments (to the extent they exist) in a particular case can be extremely important.

#### *The Importance of a Detailed Chronology and Development of a Discovery Plan*

As indicated, undue influence cases lend themselves to a longitudinal view of the evidence before, during and after execution of the instrument. As a consequence, from the outset of representation, the development of a detailed chronology can be crucial. In preparing the chronology, it may be helpful to use consistent references and terminology

(to the extent possible) as doing so will facilitate the use of word search capabilities should the chronology become lengthy. The use of a chronology that identifies sources and individuals involved in a noted transaction may assist in identifying witnesses and preparing for depositions and trial testimony. Additionally, because undue influence cases tend to be extremely fact sensitive, careful identification of citations to the source of the information contained in the chronology (such as identification of date stamped document pages) can prove invaluable. Counsel should consider developing a chronology that is over-inclusive because in circumstantial cases seemingly innocuous evidence may take on greater importance as additional facts are discovered.

In cases involving a considerable volume of documents, conversion of pdf documents into an OCR or other text searchable format can also be extremely helpful. Further, the use of document management systems that enhance the ability to search depositions, documents and other materials easily, can prove extremely beneficial during discovery and at trial.

Court imposed timelines and other factors might constrain the time period available for discovery. Therefore, it is important to develop a discovery plan early and revisit it throughout preparation of the case, as factual patterns, theories, themes or initial assumptions are impacted.

### *Understanding the Medical Evidence*

Because the “capacity” to make a will or trust often represents a very low level of understanding, such that it can exist despite significant cognitive or other impairments, understanding the interaction and inter-relationship of such conditions in the context of

the overall relationship of the parties and the potential inter-play of vulnerabilities may be key to the successful challenge or defense of a proposed instrument.

Where significant health conditions exist, it may prove beneficial to retain the services of appropriate health care providers who can provide a better understanding of the medical issues and their potential impact on vulnerabilities of the individual. Understanding the “medicine” can truly assist in how one approaches discovery and the presentation of proofs at trial. It may also help in the selection of experts who may present testimony and/or demonstrative evidence at the time of trial.

### *The Role of “Informed Consent” in Contest Cases*

Litigation over lack of testamentary capacity or undue influence frequently involves medical evidence and the testimony of treating healthcare professionals. Healthcare professionals are required by law to obtain “informed consent” from patients before conducting certain medical procedures. Although debatable, the concepts of informed consent and testamentary capacity are similar (but not necessarily identical). As a consequence, the facts and circumstances relating to how health care personnel handled informed consent with the subject person can become important as both substantive evidence and in knowing how it will likely influence the testimony of healthcare professionals.

Informed consent is generally defined as the ability to understand the following: (1) the condition that needs treatment, (2) the treatment options (including no treatment), and (3) the possible benefits and drawbacks for each treatment option in order to be in a position to make an informed choice. The treating physician must determine, after

examination of the patient, whether or not the patient is able to “participate in medical treatment, or as applicable, mental health treatment decisions.”<sup>100</sup> A recent article, intended to provide a practical framework to guide psychiatrists through solving problems of capacity and informed consent, reflected that the assessment of informed consent might occur along a “sliding scale” known as “Drane’s sliding scale.” This psychiatric article reflected that:

Drane’s “sliding scale” model, modulates the threshold to determine the patient’s decisional capacity based on risk to benefit ratio of the decision, to help with the analysis. For example, the greater the risk associated with the patient’s treatment refusal, the lower the threshold for deeming the patient as not having decisional capacity.<sup>101</sup>

Healthcare professionals should and generally do look to the patient for informed consent unless the patient formally delegates the decision making to someone else or when the patient is otherwise incapable of providing informed consent due to severe medical problems, dementia or other forms of cognitive impairment. In litigating undue influence cases, whether as proponent or challenger, counsel should expect that the testimony of healthcare professionals will be impacted by the manner in which informed consent was handled (and documented) at the time of treatment. So, for example, where there is no clear indication in the medical record that informed consent was obtained from another individual, attorneys should well expect that the healthcare provider responsible for informed consent will testify that the patient was capable of giving informed consent and in fact did so. In reality, we know it is often questionable whether or not a patient is genuinely capable of giving informed consent and that healthcare providers understandably may also rely on the informal consent of a caring spouse or other family member. Regardless of the reality of the situation at the time of treatment, the healthcare



professional may be reluctant to acknowledge that it was even questionable whether the patient was capable of giving informed consent. In contrast, where a healthcare professional required informed consent from a legal representative of the patient, this fact can be extremely important to demonstrating lack of testamentary capacity and/or diminished capacity and vulnerability. Further, although healthcare professionals may testify that they believe the patient validly gave informed consent, if pressed the providers may often concede that there was no specific assessment performed for informed consent and that the professional is not really trained to perform such an assessment. Also when pressed, healthcare professionals may acknowledge that although the patient was able to give informed consent, they ultimately looked to family members or others to make medical decisions. As a challenger, such testimony can neutralize the testimony of biased healthcare providers that they obtained informed consent.

*Alert and Oriented x 3 doesn't End the Capacity Inquiry*

In cases involving questions of testamentary capacity or diminished capacity due to medical and/or mental health issues, there is understandably much attention paid to whether healthcare professionals assessed orientation of the subject, particularly during time periods when key estate planning related events took place. Although the topic of orientation could itself be the subject of a lengthy and detailed article, suffice it to say that a healthcare provider's assessment of "alert and oriented x 3" should rarely be the final word as it relates to an assessment of testamentary capacity and/or diminished capacity. Generally speaking, the term "alert" in the medical context means simply that the patient is awake (not asleep and not unconscious). Also, an assessment of "oriented

x 3” is subject to much variation in terms of both interpretation and the method of assessment used by the healthcare professional. Moreover, keep in mind that a four year old child is generally capable of being “alert and oriented x 3.” Further, just because an individual is only “alert and oriented x 2” doesn’t necessarily mean they lack capacity, but it may be demonstrative of vulnerability.

### UNDUE INFLUENCE – FROM THE ESTATE PLANNER’S PERSPECTIVE

While estate planning for those clients who are clearly competent and fully functioning adults rarely requires significant or further inquiry as to the competency or vulnerability to exploitation of the client, estate planning for the disabled, elderly or infirmed individuals (“Vulnerable Adults”), may require additional care and an initial screening by the lawyer. In some instances, where potential vulnerability factors exist, a more extensive inquiry and even psychological and/or neurological evaluation may be merited.

As the population in the United States ages, there will be an increased need for estate planning attorneys to pay careful attention to the needs and potential vulnerabilities of this client base. According to a recent report by the Alzheimer Association, by 2030 20% of the US population will be over 65, and this segment of the population is at the greatest risk of suffering from the type of cognitive impairments which might be classified as falling along the dementia spectrum.<sup>102</sup>

#### Standard of Care

The standard of care for Michigan lawyers has been described by the Michigan Supreme Court as follows:

If there is an attorney-client relationship, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law.<sup>103</sup>

Further, defining the responsibility of the lawyer for a client who appears to have diminished cognition is described under MRPC 1.14 and in the first paragraph of the accompanying Comments. This rule and the related comments should be equally applicable to proper legal representation of a Vulnerable Adult in the context of estate planning.

MRPC 1.14 is entitled “Client under a Disability.” It provides that:

- (a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client lawyer relationship with the client.
- (b) The lawyer may seek the appointment of a guardian *or take other protective action with respect to a client only when the lawyer reasonably believes the client cannot adequately act in the client’s own interest* (emphasis added)

The comments to MRPC 1.14 provide that:

The normal client lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of

advanced age can be quite capable of handling routine financial matters while needing special legal protections concerning major transactions.

### *Identifying Issues for Vulnerable Adults*

The preparation of an estate plan normally involves several documents which may include, but not be limited to, a will, revocable trust, power of attorney (usually durable), and health care authorization (usually referred to as patient advocate designation, advance directive, and/or durable power of attorney for health care). Also part of the estate plan may be beneficiary designations for life insurance contracts, annuity contracts, retirement plans or retirement accounts, as well as, deeds of conveyance and assignments of personal property. In addition, more sophisticated estate plans may include one or more irrevocable trusts and the creation of closely held business entities such as partnerships, limited liability companies and corporations.

The lawyer meeting with client who is a Vulnerable Adult needs to be alert to determine the potential existence of any issues involving diminished cognition or client vulnerabilities, even though in many cases there may be no overt evidence of either. Particularly, in an initial meeting with a Vulnerable Adult, attention should be given to an informal screening of the cognition and vulnerability to exploitation based on a more extensive dialogue with the client. Once vulnerabilities are identified, heightened concern may be merited. This might include clients whose environment alone justifies greater inquiry and documentation (i.e. a client who has evidence of physical dependency or where the meeting takes place in a nursing home, foster care or hospital like setting).

If there are any initial concerns identified by the lawyer, it may be for the lawyer to reflect such concerns and any additional inquiry made by the lawyer in his/her notes. Even in those cases where the lawyer previously represented the Vulnerable Adult and

that client was previously determined to have sufficient capacity and did not appear otherwise vulnerable, the lawyer should assess whether there have been changes in the client's condition, or evidence of any diminished cognition or increased vulnerability since the prior engagement. If such changes become apparent during the interview process, further inquiry might then be merited. In screening a Vulnerable Adult for diminished cognition, the lawyer should have an understanding of the indicia of dementia (which may be viewed as an important vulnerability factor) as well as an understanding that dementia has a spectrum which may start with forgetfulness or memory loss which might appear long before lack of capacity becomes an issue.

### *The Dementia Spectrum*

The dementia spectrum is sometimes described as consisting of five levels:<sup>104</sup>

- a. Mild cognitive impairment. The person may experience memory problems, but is able to live independently. This person should have sufficient capacity to execute the customary estate planning documents.
- b. Mild dementia. The person may experience impaired memory and thinking skills. The person may no longer be able to live completely independently and may require assistance with some Instrumental Activities of Daily Living (IADLs)<sup>105</sup> and Activities of Daily Living (ADLs),<sup>106</sup> and may become confused when in public. This person will usually have sufficient capacity to execute the customary estate planning documents.
- c. Moderate dementia. The person may experience severe memory loss and difficulty in communicating. The person cannot live alone and needs help with most IADLs and ADLs. The person needs assistance if out in the public. The capacity of such a person to execute the customary estate planning documents will likely be slipping away and will be lost by the time severe dementia occurs.
- d. Severe dementia. The person may experience severe problems with communication, incontinence, require constant care and need hands on assistance with all ADL's, and is unable to perform any IADLs. This person will likely lack sufficient capacity to execute any estate planning documents.

e. Profound dementia. This person is usually bedridden and has insufficient capacity to execute any estate planning document.

Dealing with the Aging Client, 2013  
Probate and Estate Planning Institute, ICLE<sup>107</sup>

At various stages along the dementia spectrum, senses of taste and hearing may be retained as well as the ability to respond to emotion.

Because no two patients experience precisely the same process, it is also important to remember that each patient's ability to handle tasks will be unique, and a diagnosis of dementia need not prevent the patient from developing a lawyer-client relationship nor completing estate, health care and/or Medicaid planning in individual cases.<sup>108</sup>

Although Alzheimer's Disease is but one form of dementia, in order to put the prevalence of dementia into perspective, a 2014 report indicated that in 2010, 1 in 9 people aged 65 or older suffered from Alzheimer's Disease (or 11% of this population) and 1/3rd of all people aged 85 or older (or 32% of this population), had Alzheimer's.<sup>109</sup> Further, as of 2014 it was estimated that 5.2 million of persons of all ages had Alzheimer's.<sup>110</sup>

### Assessing Capacity

In assessing a client who is a Vulnerable Adult's level of cognition for purposes of determining capacity, the lawyer should recognize that there are different levels of capacity required for different documents. While "testamentary capacity" as defined by applicable statute or case law is the standard for wills and often for revocable trusts, the requisite standard for powers of attorney, health care powers, irrevocable trusts, beneficiary designations, deeds of conveyance, and other contractual undertakings will likely require satisfaction of a somewhat higher standard.

In Michigan, testamentary capacity is the standard for both wills and revocable trusts.<sup>111</sup> In making business contracts and settlement agreements, opening bank accounts and changing insurance policy beneficiaries, persons must:

...generally possess 'sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged....'<sup>112</sup>

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To execute a deed of conveyance, a person must have "sufficient mental capacity to understand the business in which he is engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in mind long enough to plan and effect the conveyances in question without prompting and interference from others."<sup>113</sup>

The designation of a patient advocate under MCL 700.5506 "for purposes of medical treatment, custody and care decisions, specifically requires the patient to be of sound mind at the time the designation is made."<sup>114</sup> With respect to a power of attorney, the principles governing the law of agency are applicable to such documents and as a result powers of attorney executed with regard to financial transactions can only be executed by persons who are mentally competent. As such, these instruments require that

...the principal be mentally competent to consent to, render a degree of control over, and appreciate the significance and consequences of the resulting agency relationship is consonant with the purpose of a power of attorney.<sup>115</sup>

Because of the potentially significant ramifications of a power of attorney, at least one court recognized that:

...requiring the principal of a power of attorney to be mentally competent at the time of its execution advances important public policy concerns. We are hard pressed to conceive of a more effective and efficient means by which to devastate and destroy the estate of a vulnerable person than through a durable general power of attorney. Sanctioning the execution of a power of attorney by a mentally incompetent principal would give license to those who have the power or inclination

to coerce, cajole, or dupe such a person into effectively relinquishing rights to their property, finances, and other assets with minimal effort. Considering the nature, breadth, and consequences of a power of attorney, public policy interests are served by the requirement that the principal have the ability to engage in thoughtful deliberation and use reasonable judgment with regard to its formation.<sup>116</sup>

As previously noted, the standard of capacity applied by medical personnel for making a medical decision while potentially analogous may not be identical to that required for estate planning documents. Further, a determination that the individual can make their needs known, remain involved in discussions relating to their own care or be sufficiently oriented (i.e. alert (awake), and oriented to the extent of knowing his name, location and time) also does not satisfy the standard of “testamentary capacity,” much less the somewhat different standards for certain other estate planning documents. Consequently, when a client is a Vulnerable Adult, the lawyer should satisfy himself that the applicable standards of capacity have been met based upon the lawyer’s screening. If after the lawyer’s initial assessment, he has concerns regarding the client’s capacity, those concerns should be documented in the lawyer’s notes. In addition, the lawyer (as part of his undertaking to protect the client), should consider the extent to which appropriate additional steps might be required to confirm that the client has sufficient capacity to execute the contemplated estate planning documents. In some cases, where cognition issues are transient such as those resulting from a temporary illness, accident or medical procedure, such concern might dissipate with the client’s recovery over the mere passage of time.

*Observation of Risk Factors:*

While lawyers are not omniscient, the careful documentation of observations can be an important defense mechanism to the preservation of the client’s estate plan. The



documentation of the lawyer's screening process and analysis, when dealing with an estate planning client who is a Vulnerable Adult, may prove crucial to establishing the "independence" of counsel as opposed to merely being tasked with being a "scrivener" who fails to exercise independent judgment.

If after analysis the lawyer has concerns that indicia of exploitation are present (such as where the client has testamentary capacity, but appears to be vulnerable due to possible diminished cognition, physical infirmity or dependency on others for many activities of daily living), then lawyer should assess and document whether there are other circumstances which satisfied the lawyer's concern. The lawyer should take note of the facts which he believes supports the conclusion that the plan was generated by and represented the unfettered will of the client, and document those circumstances which he believe supports such conclusions.

In evaluating whether there are potential indicia of undue influence, Peisah, Finkel, *et al* note numerous risk factors that may predispose an individual to undue influence.<sup>117</sup> Blum lists over thirty such circumstances, which he identifies as "red flags."<sup>118</sup> The ability of the estate planning lawyer to identify and be cognizant of such indicia such that they might then conduct an enhanced screening of the client's vulnerabilities, potential susceptibility to exploitation, and ability to generate an independently created plan may prove important. As a result, there are several circumstances that should be initially considered.

- a. Is the client vulnerable to influence based on diminished cognition, physical condition, emotional state, financial circumstances, isolation from pertinent information, relatives and friends, and dependence on others?

- b. Are persons other than the client involved in the estate planning process, particularly, if they are not the client's natural objects of his or her bounty? These include a cohabitating adult family member, a caregiver, a more distant family member such as a nephew or niece, a friend or neighbor, a suitor, or a professional such as an attorney, accountant, clergy, doctor, or investment advisor. Did such persons arrange for the appointment with the lawyer?
- c. Is there a confidential or fiduciary relationship between the client and another person involved in the estate planning process?
- d. Do the client's estate planning goals reflect a significant departure from the pattern in prior estate planning documents?
- e. Is there a formerly trusted family member who is no longer trusted? Is there a significant change in the client's attitude towards former beneficiaries?
- f. Is there family conflict present between siblings or a spouse and the client's descendants?
- g. Have you been retained after dismissal of prior longstanding estate planning attorney who is still actively practicing?<sup>119</sup>

#### Guidelines when Capacity May Be an Issue

If any concerns regarding vulnerability to exploitation remain, these should be documented in the lawyer's notes. In addition, the lawyer as part of undertaking to protect the client, should then consider what appropriate additional steps might be undertaken to protect the client or the intended plan.

If concerns that exist relate to capacity, what should a lawyer do, if based on the initial screening, the lawyer has doubts whether the client has sufficient capacity to validly execute any of the proposed estate planning documents? The following suggestions to a lawyer in this situation may fall within the purview of MRPC 1.14 which authorizes a lawyer to "...take other protective action with respect to a client when the lawyer reasonably believes the client cannot adequately act in the client's own interest."<sup>120</sup>

- First, if the level of apparent cognitive impairment appears substantial to the lawyer, based on the spectrum of dementia, some professional medical review might be suggested to the client. In some cases the administration of the so called mini-mental exam (MME) administered by the client's physician as part of a routine examination, might be sufficient to resolve the concern.<sup>121</sup>
- Second, if the MME is not satisfactorily passed, then a referral to a qualified health care provider might be appropriate for a more complete clinical examination. This could involve the submission of the individual to examination by a psychiatrist, geriatric psychiatrist, neurologist or speech pathologist who is trained to assess cognitive functioning. Such an examination should include the "...usual features of medical and psychiatric history, mental status and cognitive examination, as well as the specific issues relevant to testamentary capacity..."<sup>122</sup>
- Third, if the lawyer's assessment (and any subsequent examination(s) deemed appropriate) confirm that the client has sufficient capacity to execute the estate planning instruments, it is a good practice to make sure that the documents are provided to the client in advance of the appointment when they are to be executed. Providing the documents to the client, in advance, provides the client with adequate time to digest and process the contents of the instruments, as well as to formulate and ask any questions the client might have regarding the impact of the instruments or meaning of language which might be otherwise unclear to the client. If the client has vision issues, it may be important to ascertain that an independent individual (or the lawyer) read the document to the client paced in a manner intended to facilitate comprehension and understanding.
- Fourth, it may be advisable to have the estate planning instruments executed in the presence of independent (and to the extent possible - professional) witnesses. As part of the witnessing and execution process, it is recommended that the lawyer review pertinent provisions of the document orally with the client, preferably with the witnesses present, and have a dialogue with the client to elicit factual support evidencing the elements of testamentary or other capacity required for the particular estate planning documents. When a client is a Vulnerable Adult, it may be important for both the lawyer and witnesses to create and retain notes regarding the execution.
- Fifth, if after proceeding through one or more of the foregoing steps, the lawyer is still concerned that the client lacks sufficient capacity to execute one or more of the estate planning documents, the lawyer should so advise the client of his concerns and decline to participate in the execution of any document where the lawyer isn't satisfied that sufficient capacity is present. If the client has capacity to execute some of the estate planning documents which will operate independently of the documents where the level of capacity is insufficient, the lawyer could, however, proceed with the execution of those documents where evidence of sufficient capacity does exist in the manner described in the preceding steps and

elect not to proceed with regard to those documents where capacity remains questionable.

### Guidelines When Vulnerability May Be an Issue

But what about the client who has sufficient capacity, but appears vulnerable to exploitation? With respect to such clients, what should the lawyer do when faced with a client who is vulnerable and now wishes a change that is clearly contrary to previously stated estate planning desires? The following quotation in a recent Michigan Bar Journal article sheds some light upon the challenge faced by a lawyer in responding to this question. It identifies that the lawyer

...should pay careful attention to the possibility of exploitation or undue influence by the proposed agent. Dementia can add a layer of misunderstanding or confusion that either disguises exploitation or misinterprets innocent behavior as wrongdoing.<sup>123</sup>

As in the case of determining capacity, the following suggestions are believed to also fall within in the gambit of steps permitted under the auspices of MRPC 1.14 which direct that a lawyer "...take other protective action with respect to a client when the lawyer reasonably believes the client cannot adequately act in the client's own interest."<sup>124</sup>

- First, the lawyer's responsibility is to the client, and the lawyer's efforts should be directed to ascertaining the client's actual estate planning goals free of any possible undue influence (or fraud, duress, or misrepresentation). It may be that despite the existence of certain vulnerabilities or other indicia, and the lawyer's initial concerns, there is in fact no undue influence.
- Second, the lawyer should insist on meeting with the client in the absence of any other person who may benefit from any particular disposition of property during lifetime or at death. It may also be important to exclude any agent or representative of a person who might benefit from the instrument or plan. Multiple meetings may provide additional guidance and confirmation of the client's estate planning goals. It is advisable for the lawyer to create and preserve notes of all discussions with the client.

- Third, inclusion in a meeting with the client of the client's disinterested third party professional advisors may be helpful in providing additional insights and confirmation regarding the client's estate planning intentions. Again, it is advisable that the lawyer create and retain notes of these meetings.
- Fourth, if isolation from information and/or family and friends becomes apparent, with the client's permission, the lawyer might engage in actions intended to breach the isolation. This might include obtaining authorization for provision of key financial documents to the client from advisors and financial institutions or accommodations intended to provide important contact with the client and/or lawyer. It's advisable for the lawyer to confirm the client's perspective with regard to such information during the estate planning process. Again, it is recommended that the lawyer create and retain notes of any discussions involving family, friends and/or the client's independent advisors as well as with regard to any subsequent communications engaged in with the client during the planning process after receipt of such information.
- Fifth, a medical examination by a qualified psychiatrist, geriatric psychiatrist, psychologist or other relevant health care provider may be useful if concerns remain after one or more of the prior steps have been taken.
- Sixth, if estate planning documents are to be executed, as indicated above (in the section relating to "capacity"), the instruments should be provided to the client in advance either for him to read and review or to be read to him by the lawyer or another independent person.
- Seventh, once the lawyer is satisfied that the estate planning documents reflect the client's intent, it is advisable to have the estate planning instruments executed in the presence of independent (and to the extent possible - professional) witnesses. As part of the witnessing and execution process, it is recommended that the lawyer review pertinent provisions of the document orally with the client, preferably with the witnesses present, and have a dialogue with the client to elicit factual support evidencing the elements of testamentary or other capacity required for the particular estate planning documents. When a client is a vulnerable adult, it is recommended that both the lawyer and witnesses create and retain notes regarding the execution.
- Eighth, no beneficiary should be present in the room during the execution and witnessing of the instruments.
- Ninth, if after proceeding through one or more of the preceding steps, the lawyer still has concerns that the proposed plan may be the product of undue influence, it is recommended that the lawyer advise the client of his concerns and decline to take further action to assist in the execution of the

suspect estate planning documents. It is further recommended that the lawyer create and retain notes regarding the lawyer's concerns and the foregoing actions which emanated as a result.

Because lawyers are engaged in a "service" profession, they often attempt to accommodate a client's desires and may placate a client's expressions that the lawyer take short cuts or otherwise give short shrift to concerns which the lawyer has raised. It remains important for estate planning lawyers to remember that they are engaged to not only document a client's estate planning desires but also to engage in conduct and to craft documents under practice parameters gaged to enhance the enforceability of the instruments created for the client's benefit. At times, having blunt and frank discussions with the client about why additional steps and safeguards are being recommended, may convince the client of the merit of such efforts because they increase the likelihood that the client's estate planning objectives are met.

Evidence that the lawyer exercised independent judgment and provided independent advice, as opposed to merely acting as a "scrivener" may, under certain circumstances, become the single most important body of evidence that the instrument was duly executed, while the individual possessed the requisite capacity and that such instrument represented the individual's intent (as opposed to the supplanted intent of another). Consequently, evidence of true independence of counsel coupled with documentation of the efforts engaged in by the estate planning lawyer to assess the client's capacity and unfettered intent, may well be the most effective and best defense to a subsequent attack premised upon lack of capacity or a claim of undue influence on the enforceability of the estate planning documents.

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<sup>1</sup> Bonnie Brandle, Candice Heisler, Lori Stiegel, *Undue Influence: The Criminal Justice Response*, 11 (2006)

<sup>2</sup> *Id.*

<sup>3</sup> *Walts v. Walts*, 127 Mich. 607, 611 (1901)

<sup>4</sup> *In re Paquin's Estate*, 328 Mich. 293, 303 (1950); see also *In re Persons' Estate*, 346 Mich. 517, 532 (1956)

<sup>5</sup> 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

<sup>6</sup> *In re Powers Estate*, 375 Mich 150, 158 (1965); *In re Sprenger's Estate*, 337 Mich. 514, 521 (1953); *In re Vollbrecht Estate*, 26 Mich. App. 430, 434 (1970)

<sup>7</sup> *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, American Bar Association/American Psychological Association (c) 2008, p 52-102

<sup>8</sup> See discussion regarding the law compared to reality in the courtroom, Steven L. Elkins, *Exploitive Marriages in Michigan: To Love and to Honor until Death does Its Part*. Michigan Probate & Estate Planning Journal, Winter 2014

<sup>9</sup> R. Fleming, *Dealing with the Aging Client*, 53rd Annual Probate and Estate Planning Institute, Institute of Continuing Legal Education, 2013, p.24-6

<sup>10</sup> *Id.* at p. 24-7

<sup>11</sup> See, *Kar v. Hogan*, 399 Mich 529, 537 (1976)

<sup>12</sup> *Walts v. Walts*, 127 Mich at 611

<sup>13</sup> *In re Peterson*, 193 Mich App 257, 259-260 (1991)

<sup>14</sup> *Kar*, 399 Mich at 554, n 9 (LEVIN dissenting) quoting from 2 Black, Rescission & Cancellation (2d ed), § 237, pp 676-677

<sup>15</sup> *In re Spillette Estate*, 352 Mich 12, 17-18 (1958)

<sup>16</sup> *Peacock v. Dubois*, 105 So. 321, 322 (Fla. 1925)

<sup>17</sup> *Kar*, 399 Mich at 554 (LEVIN dissenting)

<sup>18</sup> *In re Estate of Erickson*, 202 Mich App 329, 331 (1993)

<sup>19</sup> *In re Langlois' Estate*, 361 Mich 646, 650 (1960)

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<sup>20</sup> *McPeak v McPeak*, 233 Mich App 483, 446 (1999), appeal denied 461 Mich 926 (1999)

<sup>21</sup> See *In re Estate of Kirkholder*, 171 A.D. 153, 154 (N.Y. App. Div. Jan. 22, 1916); *In re Estate of Bergland*, 180 Cal. 629, 634, 635-636 (1919); *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 1306, 1303 (2002); See also Claudia G. Catalano, J.D., Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R. 5th 590

<sup>22</sup> See discussion regarding meaning of probable cause: as an exception to enforcement of no contest clauses. T. Sweeney, T. Dixon and T. Fabbri, *Probable Cause Exceptions to Enforcement of Will and Trust In Terrorum Clauses: Determining the Factors in applying the Exception and Considering Opportunities for an Early Determination of Whether the Exception has Been Satisfied*, Michigan Probate & Estate Planning Journal, Winter, 2013

<sup>23</sup> *In re Cosgrove Estate*, 290 Mich 258, 264 (1939)

<sup>24</sup> *In re Estate of Erickson*, 202 Mich App 329

<sup>25</sup> *In re Estate of Erickson*, 202 Mich App at 331

<sup>26</sup> *Kar*, 399 Mich at 541-542. But see, *In re Estate of Mortimore*, No. 297280, 2011 Mich. App. LEXIS 905 (Mich. App. May 17, 2011)

<sup>27</sup> *Kar*, 399 Mich at 541-542

<sup>28</sup> *Kar*. 399 Mich at 540. See also MRE 301; *Widmayer v. Leonard*, 422 Mich 280 (1985)

<sup>29</sup> *Estate of Auen*, 30 Cal. App. 4th, 300, 313 (1994) (cited by California Supreme Court in support in *Rice v. Clark*, 28 Cal 4th 89 (2002))

<sup>30</sup> See California Probate Code §21350 *et. seq.*

<sup>31</sup> *Estate of Auen*, 30 Cal App 4<sup>th</sup> at 309

<sup>32</sup> *Langford v. McCormick*, 552 So.2d 964, 967 (Fla. 1st DCA 1989), review denied, 562 So.2d 346 (Fla.1990); *Jordan v. Noll*, 423 So.2d 368, 369 (Fla. 1st DCA 1983), review denied, 430 So.2d 451 (Fla.1983); *Jacobs v. Vaillancourt*, 634 So.2d 667, 671 (1994)

<sup>33</sup> *Taylor v. Khlam*, 40 Mich App 225, 264-265 (1972)

<sup>34</sup> *Van't Hof v. Jemison*, 291 Mich 385, 283-284 (1939) (citing Black's Law Dictionary (3d ed), Fiduciary or Confidential Relations, p. 775)

<sup>35</sup> *In re Estate of Swantek*, 172 Mich App 509, 514 (1988)

<sup>36</sup> *In re Estate of Wood*, 2008 Mich App Lexis at \*12

<sup>37</sup> *In re Estate of Karmey*, 468 Mich 68, 75 (2003)

<sup>38</sup> *Id.* at 75



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<sup>39</sup> *Id.* at 74 n 2, 3

<sup>40</sup> *In re Susser Estate*, 254 Mich App 232, 236 (2002)

<sup>41</sup> *Id.* at 236

<sup>42</sup> G. MacKenzie, B. Blum, MD and R. Swanda, Ph.D., *Representing Estate and Trust Beneficiaries and Fiduciaries*, § 7:5 ALI-ABA COURSE OF STUDY MATERIALS, July 2011, at p. 9

<sup>43</sup> *Id.* § 7:5 at p. 9

<sup>44</sup> *In re Will of Jones*, 362 NC 569, 578-580 (2008)

<sup>45</sup> *Latham v. Udell*, 38 Mich 238, 241-242 (1878). Also *Kar*, 399 Mich at 555-556 (LEVIN dissenting) and *Nederlander v Nederlander*, 205 Mich App 125, 227 (1993), appeal denied 442 Mich 854 (1993)

<sup>46</sup> *Lathem*, 38 Mich at 241

<sup>47</sup> See, *In re Estate of Mortimore*, No. 297280, 2011 Mich App. LEXIS 905 12-15 (Mich App May 17, 2011) (internal citations omitted). Also see, *In re Estate of Karmey*, 468 Mich at 75

<sup>48</sup> *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 NW2d 288, 289 (Mich 2012)

<sup>49</sup> *Hanneman*, 813 NW2d at 289

<sup>50</sup> *Id.*

<sup>51</sup> *In re Estate of Mortimore*, No. 297280, 2011 Mich App. LEXIS 905 12-15

<sup>52</sup> Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 313, 336-337 (1898)

<sup>53</sup> *Widmayer*, 422 Mich at 286

<sup>54</sup> *Id.*

<sup>55</sup> *In re Wood Estate*, 374 Mich 278 (1965)

<sup>56</sup> See MRE 301. Also see *Kar*, 399 Mich 529 (1976)

<sup>57</sup> *Widmeyer*, 422 Mich 280

<sup>58</sup> *Id.* at 288-289

<sup>59</sup> *Id.* at 290

<sup>60</sup> *Id.* at 288, n 10

<sup>61</sup> *In re Paquin's Estate*, 328 Mich at 303

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<sup>62</sup> *Richardson v. Ball*, 300 Mich 424, 429-430 (1942)

<sup>63</sup> 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). 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. Clearly, the landscape of undue influence cases in Michigan is changing. Presently the impact of *In Re Mortimore, supra*, remains uncertain. However, *In Re Mortimore*, could have a significant impact on the level of proof required to rebut a presumption of undue influence. Further, 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 influences 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.

<sup>64</sup> *In re Estate of Mikeska*, 140 Mich App 116, 121 (1985)

<sup>65</sup> See, *In re Estate of Mikeska, Id.*

<sup>66</sup> *In re Loree’s Estate*, 158 Mich 372, 376 (1909)

<sup>67</sup> *In re Willey’s Estate*, 9 Mich App 245, 257 (1967)

<sup>68</sup> *Leffingwell v. Bettinghouse*, 151 Mich 513, 518 (1908)

<sup>69</sup> MRE 401. Also see FRE 401.

<sup>70</sup> *In re Willey’s Estate*, 9 Mich App at 257

<sup>71</sup> *In re Estate of Karmey*, 468 Mich at 75

<sup>72</sup> *In re Loree’s Estate*, 158 Mich at 376

<sup>73</sup> Restatement (Third) of Property (Wills & Don. Trans) § 8.3 cmt. e

<sup>74</sup> *In re Loree’s Estate*, 158 Mich at 378

<sup>75</sup> Restatement (Third) of Property (Wills & Don. Trans) § 8.3 cmt. h

<sup>76</sup> See *Walts v. Walts*, 127 Mich at 610. Also see *Leffingwell, supra* and *In re Vhay’s Estate, supra*.

<sup>77</sup> These non-financial motivations have been recognized by clinicians with expertise in assessing vulnerability to undue influence. S. Finkel, MD, *Ten Pitfalls in Litigating a Contested Will*, A Publication of The American Association of Justice, Vol 16, No.2, Winter 2009.

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<sup>78</sup> In general, all evidence, both direct and circumstantial, bearing upon the question of undue influence should be admitted. All evidence which tends to prove or disprove that an instrument was procured by undue influence should be admitted. *In re Loree's Estate*, 158 Mich at 379. Evidence of undue influence after the date on which the testator made his or her will is relevant and admissible as tending to show a continuance of undue influence. *Walts*, 127 Mich at 610; *Leffingwell*, 151 Mich at 518. And see, *In re Vhay's Estate*, 225 Mich at 108. The remoteness in time of the evidence only impacts the weight such evidence should be given, not whether or not such evidence is admissible. *Balk's Estate*, 289 Mich 703, 706 (1939); see also *McPeak v. McPeak*, 233 Mich App at 496. There should be no arbitrary time limit placed upon what might prove relevant, and all material evidence should be produced. *In re Loree's Estate*, 158 Mich at 376-377.

<sup>79</sup> M Civ JI 170.04; M Civ JI 179.07. The comments to M Civ JI 170.04 is instructive. It provides that :

This instruction contains cautions as to the rights of a person in the making of his will. These cautions are believed necessary to prevent the often mistaken belief of most jurors that the decedent cannot disinherit heirs and other relatives by his or her will and to prevent the jurors from improperly trying to substitute their judgment for the judgment of the maker of the will. See *In re Allen's Estate*, 230 Mich 584 (1925).

The testator has a right to dispose of his property as he sees fit. *In re Kramer's Estate*, 324 Mich 626 (1949). The law does not require property to be disposed among the testator's heirs. *In re Fay's Estate*, 197 Mich 675 (1917). It concerns no one what a person's reasons were in his distribution by will. *Brown v Blesch*, 270 Mich 576 (1935). The jury has no right to substitute its judgment for the judgment of the testator. *In re Hannan's Estate*, 315 Mich 102 (1946). The jury has no right to consider that the testator did an apparent injustice in his will. *In re Livingston's Estate*, 295 Mich 637 (1940). While the testator's blood relations are the natural objects of his bounty, such bounty is not limited by blood relationship, and his blood relations have no natural or inherent right to his property. *Spratt v Spratt*, 76 Mich 384 (1889).

<sup>80</sup> *In re Loree's Estate*, 158 Mich at 377; *Eicholtz v. Grunewald*, 313 Mich 666, 670-671 (1946)

<sup>81</sup> Model Rules of Professional Conduct, Rule 3.7: (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

<sup>82</sup> *Id.*

<sup>83</sup> Model Rules of Professional Conduct, Rule 1.7: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

<sup>84</sup> See MRE 702

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<sup>85</sup> In some jurisdictions the expert may be permitted to opine on the ultimate issue of whether undue influence was exerted. See MRE 704.

<sup>86</sup> *The wills of older people: risk factors for undue influence, supra* at p 13

<sup>87</sup> *The wills of older people: risk factors for undue influence: supra*

<sup>88</sup> *Id.* at p 7

<sup>89</sup> *Id.* at p 10

<sup>90</sup> *Id.* at p 10

<sup>91</sup> *Id.* at p 10

<sup>92</sup> *Id.* at p 8

<sup>93</sup> *Id.* at p 8, citing *Wingrove v. Wingrove* (1885) LR11PD 81 at 82-83

<sup>94</sup> *The wills of older people: risk factors for undue influence, supra* at p 10

<sup>95</sup> *Id.* at p 11-12

<sup>96</sup> *Id.* at p 13

<sup>97</sup> *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (c) American Bar Association Commission on Law and Aging – American Psychological Association, 2008

<sup>98</sup> *The wills of older people: risk factors for undue influence, supra.*

<sup>99</sup> Bennett Blum, MD has identified on his website 32 “suspicious circumstances.” They included: (1)the identified victim's susceptibility or vulnerability to influence (including among other things issues related to age, physical or mental deterioration, emotional state, education, finances, etc.); (2)a confidential relationship between the supposed perpetrator and identified victim; (3) beneficiary's active involvement or participation in procuring the legal instrument in question; (3) secrecy concerning the existence of the transaction or legal changes, or the events occurring in haste; (4) lack of independent advice related to that transaction or new legal document; (5) changes in the identified victim's attitude toward others; (6) discrepancies between the identified victim's behavior and previously expressed intentions; (7) the unjust or unnatural nature of the terms of the transaction or new legal instrument (new will, new trust, etc.); (8) anonymous criticism of other potential beneficiaries made to the identified victim; (9)suggestion, without proof, to the identified victim that other potential beneficiaries had attempted to physically harm him or her; (10) withholding mail; (11)limiting telephone access; (12) limiting visitation; (12) limiting privacy when victim is with others (which conduct is generally known as “chaperoning”); (13) discussion of transaction at an unusual or inappropriate time; (14) consummation of the transaction at an unusual place; (15) use of multiple persuaders against a single vulnerable person; (16) demand the business be finished at once; (17) extreme emphasis on the consequences of delay; (18) obtaining a lawyer for the victim; (19) using victim's assets - such as property, money, credit cards, etc.; (20) becoming conservator, trustee, beneficiary, executor, etc.; (21) obtaining access to bank accounts; (22) obtaining access to safety deposit boxes; (23) having the victim name the perpetrator on Power of Attorney forms; (24) isolating the

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testator and disparaging family members; (25) mental inequality between the decedent and the beneficiary; (26) reasonableness of the will or trust provision; (27) presence of the beneficiary at the execution of the will; (28) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (29) recommendation by the beneficiary of a lawyer to draw the will; (30) knowledge of the contents of the will by the beneficiary prior to execution; (31) giving of instructions on preparation of the will by the beneficiary to the lawyer drawing the will; and, (32) securing of witnesses to the will by the beneficiary.

<sup>100</sup> See MCL 700.5508 (1)

<sup>101</sup> Y. Sher, MD and S. Lolak, MD, *The Ethical Issues: The Patient's Capacity to Make Medical Decisions*, Psychiatric Times, November 28, 2014, at p. 1

<sup>102</sup> See, K. Fargo, Ph.D., and L. Bleiler, *Report 2014 Alzheimer's disease facts and figures*, Alzheimer's Association, 2014, at pg. e57

<sup>103</sup> *Simko v. Blake*, 448 Mich 648, 655-656 (1995)

<sup>104</sup> *Dealing with the Aging Client*, *supra* at pp. 24-3 and 4

<sup>105</sup> IADLs include managing finances, handling personal transportation, shopping, preparing meals, using telephone and communication devices, and performing housework. L. Kernisan, MD and P.S. Scott, Caring.com

<sup>106</sup> ADLs include feeding, toileting, selecting proper attire, grooming, maintaining continence, dressing, bathing, walking and transferring. L. Kernisan, MD and P.S. Scott, Caring.com

<sup>107</sup> *Dealing with the Aging Client*, *supra* at pp. 24-3 and 4

<sup>108</sup> *Id.* at pp. 24-3 and 4

<sup>109</sup> *Report 2014 Alzheimer's disease facts and figures*, *supra* at p. e54

<sup>110</sup> *Id.* at p. e54

<sup>111</sup> MCL 700.2501, 700.7601

<sup>112</sup> *Persinger v. Holtz*, 248 Mich App 499, 503 (2001), citing *In re Erickson* 202 Mich App at 332

<sup>113</sup> *Persinger*, 248 Mich App at 503-504.

<sup>114</sup> *Id.* at 506

<sup>115</sup> *Id.* at 505

<sup>116</sup> *Id.* at 506-507

<sup>117</sup> *The Wills of Older People, Risk Factors for Undue Influence*, *supra* at 21:1, pp. 10-11

<sup>118</sup> Blum, *supra*

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<sup>119</sup> C Peisah, S. I. Finkel, et al, *The Wills of Older People, Risk Factors for Undue Influence*. International Psycho-geriatrics, (2009) 21:1, pp. 10-11; Blum, *supra*

<sup>120</sup> MRPC 1.14

<sup>121</sup> Examples of both a Standardized Mini Mental State Examination (SMMSE) and separate Global Deterioration Scale (GDS) provided by the Alzheimer Drug Therapy Initiative for physician use can be viewed at <http://www.health.gov.bc.ca/pharmacare/adti/clinician/pdf/ADTI%20SMMSE-GDS%20Reference%Card.pdf>

<sup>122</sup> K. I. Shulman, C. Peisah, R. Jacoby, J. Heinik, and S. Finkel, *Contemporaneous Assessment of Testamentary Capacity*, International Psycho-geriatrics (2009) 00-0, p. 5

<sup>123</sup> B. A. Swagman and C.M. Dellenbusch, *An Overview of Dementia and Competency*, Michigan Bar Journal, November, 2014, p. 29.

<sup>124</sup> MRPC 1.14

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Much thanks goes to our colleague, Thomas E.F. Fabbri, Esq., of Clark Hill PLC, for his research efforts on other matters that provided source material cited in this paper.



## **Sandra D. Glazier, Esq.**

Shareholder -Lipson, Neilson, Cole, Seltzer & Garin, P.C., Bloomfield Hills, MI

Sandra D. Glazier is a principal with Lipson, Neilson, Cole, Seltzer & Garin, P.C., in its Bloomfield Hills, Michigan office. Sandy concentrates her practice in the areas of probate litigation; estate planning; probate and trust administration; and, family law. An experienced litigator and estate planner, Sandy has represented contestants and proponents of estate planning documents, as well as fiduciaries, in significant trust litigation proceedings. She has served as a mediator for the Oakland County Circuit and Probate Courts, and been appointed as a mediator, arbitrator and guardian ad litem in family court cases. In addition to her probate and estate planning practice, she has handled a multitude of complex divorce matters, involving a myriad of issues, including, but not limited to: valuation of closely held business interests, the impact of pre-marital, gifted and inherited property, custody and parenting time, child support, spousal support, equitable division of the marital estate and obligations, pre-and postnuptial agreements, division of retirement benefits, and tax implications.

Sandy is an active member of the Oakland County Bar Association (OCBA), which is the largest voluntary bar association in Michigan. She serves on the Probate, Estates & Trusts and Family Law committees and is the current vice-chair of the Probate, Estates and Trusts Committee. In the past she has served as vice chair and chairperson of the Family Court Committee, subcommittee chair and representative for the Family Court Division for the bench/bar retreats, liaison to the Legislative Committee, as a member of the OCBA's nominating committee and its Public Advisory Committee on Judicial Candidates. Sandy has been a representative to the 2nd Invitational Michigan Bench/Bar Conference, and sat on the State of Michigan Second Bench/Bar Conference Committee for the 3rd Invitational Conference. She is also a fellow of the Adams Pratt-Oakland County Bar Foundation.

Sandy has taught Valuation for Federal, Estate and Gift Tax Purposes in the Masters of Tax program at Walsh College. She has been an author and presenter on issues of undue influence for the OCBA's Probate Estates and Trusts Committee and the Michigan Institute for Continuing Legal Education. Additionally, she has presented at various seminars for the OCBA, ICLE and the Family Law Section of Michigan's State Bar on the issues of: valuation and tax, separate versus marital property, and the intersection of probate and family law. In addition, Sandy has written numerous articles pertaining to probate, estate planning and family law.

Sandy is a Phi Beta Kappa. She was the recipient of the OCBA's Distinguished Service Award in 2003 and has received Certificates of Appreciation from the Oakland County Circuit Court in 1997 and 1999. She has been designated an "AV®" Rated Preeminent attorney by Martindale-Hubbell and was named a "Top Lawyer" for 2010 by DBusiness in the areas of probate, estate planning and family law.

Sandy, a resident of West Bloomfield, is also active in her community. She has served on the local Jewish National Fund board, and Detroit board of the Jewish Theological Seminary and currently serves on the board of trustees for Congregation Beth Ahm.



## **Thomas F. Sweeney, Esq.**

### **Of counsel to Clark Hill PLC, in its Birmingham, MI office**

Thomas F. Sweeney has been a trust and estate attorney for over forty years. Formerly a member of Michigan based Clark Hill, PLC for 18 years, Tom now serves as of counsel to that firm and focuses on estate planning, trust administration and trust dispute resolution. He has extensive experience with Federal and state income and transfer taxation (gift, estate, generation-skipping and inheritance) affecting trusts, estates and individuals. He is actively involved in the design and implementation of estate plans including tax, probate avoidance and investment strategy planning and is experienced in the use of total return trusts for purposes of allocating a trust's receipt of different forms of investment return in an equitable manner. He also has substantial experience in trust and estate dispute resolution involving the issues of testamentary capacity, undue influence, valuation of assets, trustee responsibilities and other related matters.

Tom has served as an expert witness regarding trust law questions involving the creation and administration of trusts and wills and has been a presenter at over sixteen Institute of Continuing Education programs on trust, transfer tax, fiduciary income tax, and trust protector subjects. He has also authored several articles for the Michigan Probate and Estate Planning Journal including articles on estate tax apportionment, total return trusts, and the probable cause exception to enforcement of *in terrorem* clauses in wills and trusts, among others.

Tom has lectured at the University of Michigan Law School on estate tax apportionment and was faculty member at Wayne State Law School for six years teaching estate, gift and generation skipping taxation and mentoring LLM students in the preparation of their theses. He was a member of the Council of the Probate and Estate Planning Section of the Michigan State Bar for ten years serving as its chair in 2013-14. In that role he has testified before committees of the Michigan Legislature in support of several amendments to the Michigan Trust Code.

Tom has been recognized by Best Lawyers in America since 2003, by Super Lawyers since 2006, and more recently by dBusiness Best Lawyers in the area of trusts and estates. He also has been peer reviewed by Martindale Hubbell with a pre-eminent ranking and has been identified by Five Star Professionals as a highly qualified estate planning attorney. He received his undergraduate degree from the University of Michigan and his Juris Doctor degree from the University of Michigan Law School. As an undergraduate athlete, Tom received the Fielding Yost Honor Award for academic and athletic performance.

Tom has been active in civic, educational and community organizations for many years. He served on the City of Birmingham Charter Review Commission, chaired two Birmingham School Board citizen committees, was an elected member of the Birmingham's Baldwin Public Library for 27 years including serving four years as President. He also was a board member of the Community House and Birmingham Rotary Club Endowment Fund including serving as President of both organizations. He has also been as a board member on numerous other civic and charitable organizations, often in leadership roles. For these contributions, he was honored in 1995 as the First Citizen for the communities of Birmingham, Bloomfield Hills, Beverly Hills, Bingham Farms and Bloomfield Township, Michigan.





## **Thomas M. Dixon, Esq.**

Member, Clark Hill PLC, in its Detroit, MI office

Thomas M. Dixon is an experienced trial lawyer and heads Clark Hill's Litigation Practice Group firm-wide. Tom specializes in will, trust, estate and probate litigation and complex commercial litigation. Tom has been continually recognized by his peers as a Michigan Super Lawyer, in Best Lawyers in America, "Top Lawyer" by Crain's Detroit Business and as a "Top Lawyer" by DBusiness. Tom has also received an "AV®" Preeminent Rating by his peers through Martindale-Hubbell.

During his 28 years of practice, Tom has litigated cases involving wills, trusts, and probate estates, including cases involving claims of undue influence, lack of testamentary capacity, fraud, and duress. Tom has represented banks and other institutional fiduciaries, individual fiduciaries, families, and other trustees and personal representatives, in fraud, negligence, and breach of fiduciary duty claims. He has litigated trust cases involving some of the largest private estates in Michigan. Tom has also litigated guardianship and conservatorship proceedings and claims of financial abuse of elderly persons. In the areas of trust and estate litigation and financial elder abuse, Tom has been a public speaker and his publications include "Probable Cause Exception to the Enforcement of Will and Trust in *Terrorem* Clauses", published Winter 2013. Michigan Probate & Estate Planning Journal, Vol 33, No.1.

Tom's areas of emphasis and experience include:

- will contests
- will construction and interpretation
- probate litigation
- trust contests
- trust reformation, construction and interpretation
- undue influence, lack of testamentary capacity and diminished mental capacity
- breach of fiduciary duty claims
- fiduciary litigation, including challenges to remove and surcharge fiduciaries
- fiduciary and attorney fee disputes
- prudent investor rule claims
- guardianship and conservatorship litigation
- financial abuse of the elderly
- determination of, and challenges to, heirship
- actions to recover assets

Tom is a leader of Clark Hill's Digital Risk Management and E-Discovery team which oversees a suite of services and products, ranging from document review and protection, e-discovery services and policy development and protocol in social media.

Tom is a graduate of University of Michigan (1984) and the University of Notre Dame Law School (1988). Tom was awarded the William T. Kirby Award for excellence in legal writing and served as editor of the Journal of College and University Law. He is also a long-time member of the Federation of Defense and Corporate Counsel (FDCC), and has served on numerous committees of that prestigious nation-wide organization of trial lawyers.