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## Probate Litigation Report

By David L. J. M. Skimore

### A Response to Robert S. Zawideh's Article on the Evidentiary Standard Applicable to Undue Influence Claims

By David L. J. M. Skidmore

I am writing in response to Robert S. Zawideh's recent article on the evidentiary standard applicable to an undue influence claim.<sup>1</sup> In his scholarly and thought-provoking article, Mr. Zawideh takes the position that a litigant alleging undue influence should be required to prove that undue influence occurred by clear and convincing evidence, the highest evidentiary standard applied in civil litigation. I disagree based on public policy grounds.

Financial exploitation of the elderly and vulnerable is a real problem in our society. The state has an obvious interest in preventing and remedying this problem. The criminal justice system handles some cases of elder financial exploitation, but that system does not take up many other cases where exploitation is alleged. Where the criminal justice system does not provide relief, private citizens may seek relief through civil litigation before the Probate Courts. Civil litigation that identifies and remedies elder financial exploitation serves not only the prevailing litigants' self-interests but also the public interest in prohibiting such exploitation.

This financial exploitation often takes the form of undue influence. The word "undue" is key, because it is not unlawful to attempt to persuade another person to do, or not do, something. Influence only becomes improper when it is "undue"—when the influence becomes so overwhelming that the subject of the influence cannot resist it and is compelled to take action that reflects not the subject's intentions but the influencer's intentions.

In order for a civil litigant to prove undue influence, "it must be shown that the grantor 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>2</sup> It is extremely difficult for a litigant to make this showing because undue influence is always done in secret. "Undue influence is not exercised openly. It is a species of fraud, and, being a species of fraud, works secretly in order to accomplish its improper purpose."<sup>3</sup>

Typically, when undue influence occurs, the only parties present are the influencer and the victim. By the time the circumstances come to light, the victim is usually deceased, leaving only the influencer available to testify about what happened behind closed doors. The influencer cannot be expected to admit that he or she committed undue influence. As a result, it is virtually impossible for a litigant to prove undue influence by direct evidence (e.g., eyewitness testimony). Instead, undue influence must typically be proven by circumstantial evidence. And it is extremely challenging to prove that one person overcame another person's free will with non-direct, circumstantial evidence.

True, a litigant may establish a presumption of undue influence by showing (1) the existence of a confidential or fiduciary relationship between the decedent and the alleged influencer; (2) the alleged influencer had the opportunity to influence the decedent; and (3) the alleged influencer received a benefit from something the decedent did.<sup>4</sup> The presumption (which is in my view an attempt to level an uneven playing field that favors the influencer) provides some benefit to the person alleging undue influence; the case will go to trial where the petitioner establishes the presumption and the respondent offers evidence to rebut the presumption, creating a disputed issue of fact. However, at trial, the contestant will still have to prove that the influencer overcame the victim's free will, using only non-direct circumstantial evidence. (I have written about the procedural and evidentiary aspects of the presumption elsewhere.<sup>5</sup>)

What evidentiary standard applies to the contestant's undue influence claim? Under Michigan caselaw, undue influence must be proven by the preponderance of the evidence standard, and nothing in the Estates and Protected Individuals Code or the Michigan Trust Code changes that rule. However, Mr. Zawideh takes the position that a claim of undue influence should be subject to the heightened clear and convincing evidence standard. In other words, in order to prevail, a party seeking to prove undue influence would have to offer a greater quantum of evidence than is required under the status quo (i.e., preponderance of the evidence). Mr. Zawideh believes that undue influence should be subject to this heightened evidentiary standard because it applies to fraud claims and undue influence is often said to be a type of fraud.

I disagree with this proposed approach. In my opinion, there is a valid public policy reason for applying a different evidentiary standard to undue influence claims than to fraud claims. With a fraud claim, there was some type of interaction between the plaintiff and the defendant; the plaintiff should be able to specifically describe and prove what the defendant did to defraud the plaintiff. In contrast, with an undue influence claim, the contestant was not part of the challenged transaction involving the respondent. Instead, the transaction involved only the respondent and the decedent; the contestant was excluded from the transaction; and the only party still living is the respondent who is accused of having unduly influenced the decedent behind closed doors. Based on the unique nature of undue influence, the contestant cannot be held to the heightened evidentiary standard required for fraud claims.

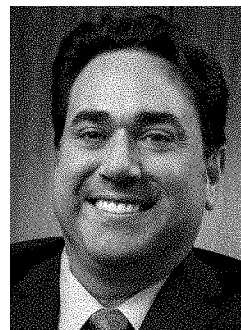
Undue influence is an actual phenomenon; it is something that occurs in the real world. It may not have occurred in every case where it is alleged, but it definitely occurred in some of those cases. One unintended consequence of adopting Mr. Zawideh's proposal would make it more likely that exploiters, who actually committed un-

due influence, would get away with it. If undue influencers banded together and hired a lobbyist, they would seek the legislative change proposed in the article under consideration.

Financial exploitation of the elderly and the vulnerable will continue to be a challenging public policy issue. Under the status quo, an undue influence claim is already extremely difficult to prove. Making it more difficult to prove undue influence may not drive undue influence extinct, but it would put it on the endangered species list. The Legislature should avoid legislation that would make it more difficult to identify and remedy such exploitation, or easier to commit and get away with such exploitation. In my view, subjecting undue influence claims to the heightened clear and convincing evidence standard would be bad public policy.

#### Notes

1. Robert S. Zawideh, *Undue Influence: What Rules Apply to This Species of Fraud?* Michigan Prob & Est Plan J, Winter 2020, at 11.
2. *Kar v Hogan*, 399 Mich 529, 537, 251 NW2d 77, 78 (1976).
3. *In re Scholten's Estate*, 233 Mich 117, 125-126, 206 NW 559 (1925).
4. *Kar*, *supra*, 399 Mich at 537.
5. David L.J.M. Skidmore, *Litigating the Presumption of Undue Influence Based on Confidential or Fiduciary Relations*, 97 Mich B J 11, 34 (Nov 2018).



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