Balancing Discretion to Give and Undue Influence Concerns

Although courts have eased the task of challenging transfers to those with a confidential relationship, the burden of proof imposed on the recipients of those gifts is not insurmountable.

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Charges of undue influence, fraud, and lack of capacity have increased in the past several decades in situations where the elderly transfer their assets through inter vivos or testamentary probate or nonprobate transfers. This trend has occurred in part because individuals are living longer, and their older age makes them more susceptible to debilitating (but not fatal) diseases such as Alzheimer's and macular degeneration. These individuals, thus, are more likely to be dependent on assistance and care in later years and susceptible to conduct justifying such charges. The breakdown of family relationships—the result of the geographic dispersal of siblings—also has contributed to the increase in contested probate proceedings. Finally, the statutory trend encouraging and expediting the use of nonprobate transfers and durable powers of attorney has increased opportunities for abuse.

The law relating to will contests has long been established, but there recently has been an increase in challenges to nonprobate transfers and lifetime gifts seeking the remedy of imposition of a constructive trust.[1] These types of transfers have been challenged more frequently for abuse, in part because more assets are transferred by nonprobate means—e.g., 401(k) and individual retirement account (IRA) beneficiary designations—with attorneys less likely to be involved in these transfers. Proving or disproving, as well as avoiding, undue influence can be more difficult when an attorney was not involved in the transfer process.

The individuals most vulnerable to charges of undue influence are often those closest to the donor. There is a natural inclination to make gifts to those who are closest and most helpful to the elderly during their later years, including longtime friends and family members. The law might discourage volunteerism if such individuals were subject to lawsuits without a reasonable basis for challenging inter vivos and testamentary gifts. Thus, these two competing interests must be recognized and balanced in such circumstances:

1. Allowing a donor to make gifts of property to those closest to him or her and facilitating the economies involved in the use of nonprobate transfers and powers of attorney.
2. Protecting the elderly who are susceptible to undue influence, fraud, and incapacity.

The law balances these interests when it imposes a presumption of undue influence on transfers to someone with whom the benefactor has a confidential or fiduciary relationship.[2] The law regarding

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the presumption of undue influence/unfairness, however, has developed in a parallel and sometimes inconsistent fashion with regard to will contests versus challenges to lifetime and testamentary nonprobate transfers.[3]

States differ in how they apply the presumption of undue influence based on a confidential or fiduciary relationship. From state to state, and even internally within some states, laws conflict regarding whether the presumption does the following:

1. Disappears from the case once rebutted (the "bursting bubble").[4]
2. Remains in the case even after rebuttal.[5]
3. Permanently shifts the burden of proof.[6]
4. Merely gives rise to an evidentiary inference rather than a legal presumption.[7]

By settling on a consistent operation of the presumption of undue influence in the context of both probate and nonprobate transfers, the courts can create a more level playing field while avoiding a flood of litigation by disgruntled heirs in situations lacking any evidence or legitimate reason, other than speculation, to conclude that undue influence in fact occurred.

Undue influence litigation

Undue influence has been recognized as "one of the most bothersome concepts in all the law."[8] To prove undue influence, the person seeking to set aside the transfer must show that the undue influence was enough to "overpower the will of the grantor to the extent that he [was] prevented from voluntary action and [was] deprived of free agency."[9] Undue influence generally is defined as an outside force overcoming the will of the donor.[10] However, "influence is not necessarily 'undue' even if gained through persuasion or kindness" and even if the influence results in "unequal or unjust disposition" in favor of a donee who has cared for the donor at the end of the donor's life.[11] The key issue is whether the donor voluntarily made the gift. Often the elements of undue influence and confidential relationship are interwoven.[12]

Consequently, undue influence can be hard to prove. Normally, undue influence "is not done so overtly that it can be proven with direct evidence;"[13] it often is exerted subtly and in private. For this reason, an undue influence claim "is often built on circumstantial evidence from which undue influence can be inferred."[14]

Typical circumstances providing an evidentiary basis for a finding of undue influence in the will contest context include the following.[15]

- A confidential relationship.[16]
- A fiduciary relationship.[17]
- Undue influence present at will execution.[18]
- A relationship between the attorney drafting the will and the influencer.[19]
- Knowledge of the contents of the will by the influencer.[20]
- An influencer instructing the preparation of a will, making first contact with the attorney, or meeting alone with the attorney drafting the will.[21]
- An influencer paying the drafting attorney.[22]
- An influencer securing witnesses to the will.[23]
- An influencer keeping the will after execution.[24]
- The execution of the will being kept a secret from potential challengers.[25]
- Old age of the donor.[26]
- An opportunity and motive for the exercise of undue influence.[27]
- Weak physical and mental health of the donor.[28]

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1 Kirch, "Constructive Trusts," 146 Tr. & Est. 50 (July 2007).

2 In re Estate of Niemi, 2009 WL 1176897 (Ohio Ct. App., 2009), citing Ament v. Reassure Am. Life Ins., 905 N.E.2d 1246 (Ohio Ct. App., 2009); Krueger v. Ary, 205 P.3d 1150 (Colo., 2009). But see Street v. Street, 211 P.3d 495 (Wyo., 2009), quoting Krafczik v. Morris, 206 P.3d 372 (Wyo., 2009) (holding that once a confidential relationship is established, the burden of proof shifts to the proponent of the will to prove that the transaction was fair).

3 Surprisingly, the courts have given no attention to distinguishing between probate and nonprobate transfers and there has been a parallel but independent development of the law in these areas relating to undue influence. See Monroe v. Marsden, 207 P.3d 320 (Mont., 2009) (nonprobate transfers); Lipscomb v. Young, 672 S.E.2d 649 (Ga., 2009) (probate transfers).

4 Krueger v. Ary, 220 P.3d 923 (Colo. App., 2007), *aff'd* 205 P.3d 1150 (Colo., 2009).

5 In re Wood, 132 N.W.2d 35 (Mich., 1965).

6 Street, *supra* note 2.

7 Theriault v. Burnham, 2 A.3d 324 (Me., 2010).

8 Dukeminier, Sitkoff, and Lindgren, *Wills, Trusts, and Estates* (Aspen, 8th ed., 2009), page 180.

9 Krueger, *supra* note 4, quoting Anderson v. Lindgren, 157 P.2d 687 (Colo., 1945). See also In re Will of Jones, 669 S.E.2d 572 (N.Car., 2008), citing In re Will of Turnage, 179 S.E. 332 (N.Car., 1935).

10 Eads v. Dearing, 874 P.2d 474 (Colo. App., 1994).

11 Jones, *supra* note 9, quoting In re Will of Craven, 86 S.E. 587 (N.Car., 1915). See also In re Rentfro's Estate, 79 P.2d 1042 (Colo., 1938) (mere kindness of treatment, or reasonable solicitation or persuasion not sufficient to invalidate a will).

12 Theriault, *supra* note 7.

13 American College of Trust and Estate Counsel Fiduciary Litigation Committee, "Evidentiary Issues Involving Pre-Execution Practice and Drafting," 27 ACTEC J. 246 (2001).

14 *Id.*

15 *Id.*

16 In re Estate of Carpenter, 253 So.2d 697 (Fla., 1971); Estate of Herbert, 979 P.2d 39 (Haw., 1999); Estate of Edel, 700 N.Y.S.2d 664 (N.Y. Surr. Ct., 1999); Estate of Stout, 746 A.2d 645 (Pa. Super. Ct., 2000).

17 Jordan v. Growney, 416 So.2d 24 (Fla. Dist. Ct. App., 1982).

18 Carpenter, supra note 16.

19 *Id.*; Herman v. Kogan, 487 So.2d 48 (Fla. Dist. Ct. App., 1986).

20 Carpenter, *supra* note 16.

21 *Id.*; Elson v. Vargas, 520 So.2d 76 (Fla. Dist. Ct. App., 1988); Estate of Van Aken, 281 So. 2d 917 (Fla. Dist. Ct. App., 1973).

22 Carpenter, *supra* note 16.

23 *Id.*

24 *Id.*

25 In re Estate of Burton, 45 So.2d 873 (Fla., 1950).

26 *Id.*

27 *Id.*

28 In re Estate of Reid, 138 So.2d 342 (Fla. Dist. Ct. App., 1962).

- A beneficiary caring for the donor during the end of the donor's life.[29]
- A beneficiary treating a new will execution as an urgent matter.[30]
- A dramatic change in the testamentary disposition of assets.[31]

Some courts have identified specific factors that support a finding of undue influence. For example, in North Carolina, courts rely on seven factors when determining whether undue influence occurred in a will contest:[32]

1. Old age.
2. Physical and mental weakness.
3. The person signing the paper is in the home of the beneficiary and subject to his or her constant association and supervision.
4. Others have little or no opportunity to see the person executing the instrument.
5. The will is different from and revokes a prior will.
6. The will is made in favor of one having no blood ties.
7. The will disinherits the natural objects of the drafter's bounty.
8. The beneficiary has procured the will's execution.

In many states, the same principles for the operation of the presumption of undue influence apply to nonprobate and probate transfers.[33]

A comparison of two cases involving undue influence claims based on a confidential relationship with respect to nonprobate transfers is instructive on the factual distinctions on which a finding of undue influence in the nonprobate context may hinge. In one case, the court found undue influence where the donee completely controlled all aspects of the donor's financial affairs and the donor was seriously ill during the time of this control.[34] Also, the court noted that the disposition of the assets during this time was "completely inconsistent with the way [the donor] lived her entire life." In contrast, another court found that undue influence did not occur based on evidence that the donor was strong-willed and naturally wished to make the gift.[35]

In another case involving a nonprobate transfer, the court held that the presumption of undue influence may be rebutted by showing either of the following:

1. The confidential relationship had been severed before the critical events took place.
2. The person executing the instrument received independent and critical advice.[36]

Recently, in *In re Estate of Hall*,[37] the presumption arising from a confidential relationship in both the will and inter vivos gift context was overcome by evidence of the fairness of the transaction. The donee used a power of attorney to place funds in an account as to which he was a joint tenant with right of survivorship. The devisee/donee was a long-time friend who was shown to have an honest character, and the testator/donor was shown to have full knowledge of his actions and their consequences.

Defining the presumption of undue influence

The presumption of undue influence specifically based on the existence of a confidential or fiduciary relationship can be a powerful tool to challenge probate and nonprobate transfers. However, it has been an area of the law lacking in analytical precision and clear guidance as to the factual elements sufficient to prove undue influence.

Confidential or fiduciary relationship. The threshold issue of the existence of a confidential relationship is a question of fact.[38] A common fact pattern involves a donor living with or relying on a caretaker, often a family member or close friend, especially as the donor's health and cognitive functions begin to decline.[39] A confidential relationship can exist, however, "whenever one person, by acting or pretending to act for the benefit or in the interest of another, gains the trust and confidence of the other person (and, as a result, is put in a position to exercise influence and control over the other)."[40]

Not every close relationship, of course, is a confidential relationship. "Friendly relations or even intimacy of relationship present an entirely different question from what is understood as a confidential relation in law."[41]

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29 Elson, *supra* note 21.

30 Carpenter, *supra* note 16, at 702.

31 Newman v. Smith, 82 So. 236 (Fla., 1919).

32 Jones, *supra* note 9, quoting In re Will of Andrews, 261 S.E.2d 198 (N.Car., 1980).

33 Dodkin, "Howard v. Nasser: The Relative Burdens for Wills Contested on the Basis of Confidential Relationships and Undue Influence," 57 S.C. L. Rev. 531 (2006); Restatement (Third) of Property: Wills and Donative Transfers, § 8.3.

34 Monroe, *supra* note 3.

35 Krueger, *supra* note 4.

36 Edwards v. Urice, 220 P.3d 1145 (Okla. App., 2008).

37 32 So.3d 506 (Miss. App., 2009).

38 Columbia Sav. & Loan Ass'n v. Carpenter, 521 P.2d 1299 (Colo. App., 1974), *rev'd on other grounds sub. nom.* Judkins v. Carpenter, 537 P.2d 737 (Colo., 1975).

39 See, e.g., *id.* (deeming evidence sufficient to support the finding of a confidential relationship between decedent and her granddaughter when the evidence showed that the 84-year-old decedent was living with her granddaughter, was in ill health, and was "somewhat confused regarding her business and personal matters," requiring her to rely on her granddaughter for advice and help in arranging her affairs).

40 Wade, *Wade/Parks Colorado Law of Wills, Trusts, and Fiduciary Administration*, § 4.20, (CLE in Colo., Inc., 5th ed. 2005), *quoting* CJI-Civ. 34:15 (CLE ed. 2005).

41 Hancock v. Anderson, 168 S.E. 458 (Va., 1933).

Categories of confidential relationships. In an effort to add more analytical precision to the concept, the Restatement (Third) of Property divides confidential relationships into three categories:

1. Fiduciary.
2. Reliant.
3. Dominant-subservient.[42]

In this fashion, the Restatement (Third) attempts to provide a framework for the types of relationships under which a confidential relationship might arise. These categories, however, are rarely clear-cut and tend to overlap. Furthermore, the Restatement (Second) of Property, which does not make such distinctions,[43] still may be the law in some states.

The first category—a fiduciary relationship—is based on "a settled category of fiduciary obligations."[44] This relationship can range from the professional relationship between an attorney and client to a family member who acts as an agent under a power of attorney of a disabled principal, even if he or she receives no fee.

The second type of confidential relationship under the Restatement (Third) is a reliant one. A reliant relationship is based on "special trust and confidence."[45] It exists where "the donor [is] accustomed to being guided by the judgment or advice of the alleged wrongdoer or [is] justified in placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor."[46]

The third type of confidential relationship recognized in the Restatement (Third) is a dominant-subservient relationship. As its name suggests, this type of relationship occurs when the transferor is subservient to the transferee's dominant influence. In other words, the transferor feels that he or she cannot say no to the transferee.[47] An example of such a relationship would be a donor dependent on the donee for medical assistance, the denial of which would be life threatening.

Relationships rarely fit into the Restatement (Third)'s neatly defined categories. For example, a niece acting as an agent under a power of attorney could give rise to a fiduciary relationship. At the same time, she may also be acting as a caregiver, which could give rise to either a dominant-subservient relationship or a reliant relationship. Many courts recognize that the three relationships from the Restatement (Third) are confidential relationships; however, they rarely distinguish among these three categories.[48] Instead, courts often simply find that a confidential or fiduciary relationship existed, based on various circumstances, using these two terms interchangeably.[49]

A confidential relationship is not enough. In most states, the mere presence of a confidential relationship is not enough to prove undue influence.[50] "Evidence showing only an opportunity to influence and a substantial benefit under the will does not show the exercise of undue influence."[51] Accordingly, it has been recognized that evidence that highlights a confidential relationship "resulting from [the donee's] role in attending to [the donor's] daily needs ... is of scant probative value on the issue of undue influence."[52]

Thus, caution must be exercised in applying the presumption of undue influence based solely on the existence of a fiduciary or confidential relationship, as well as in finding the existence of a confidential relationship giving rise to the presumption in the first instance. Some states do not allow a trier of fact to presume "that a person used undue influence on another person solely because they were in a fiduciary or confidential relationship."[53]

The mere existence of motive and opportunity does not give rise to an inference that undue influence was exercised in fact. The natural influence that the donee gains "by reason of love, affection, or kindness" is not undue influence.[54] Therefore, the challenger must show more than just a close relationship.[55] He or she must show that a confidential relationship existed in fact, which includes circumstances making the donor susceptible to influence. If a party shows that the donor remained

42 Restatement (Third), *supra* note 33, § 8.3 cmt. g.

43 Restatement (Second) of Property: Donative Transfers, § 34.7 (1992).

44 Restatement (Third), *supra* note 33, § 8.3 cmt. g.

45 *Id.*

46 *Id.*

47 *Id.* (an ill or feeble donor is in a subservient relationship with a hired caregiver where the donor feels that he or she "must do what [the caregiver] says").

48 See, e.g., Arnold v. Abernethy, 307 P.2d 1106 (Colo., 1957) (using the terms "fiduciary" and "dominant-subservient" interchangeably). See also In re Bednarz Trust, 2009 WL 1693482 (Mich. Ct. App., 2009).

49 *Id.*

50 In re Peterson, 483 N.W.2d 624 (Mich. App., 1991) (requiring evidence that the fiduciary had an opportunity to influence the donor in that transaction). See also Equitex, Inc. v. Ungar, 60 P.3d 746 (Colo. App., 2002).

51 Lipscomb, *supra* note 3.

52 *Id.*

53 See, e.g., Furrow v. Helton, 13 So.3d 350 (Ala., 2008) (requiring a will contestant to show (1) a confidential relationship, (2) influence that was dominant and controlling, and (3) undue activity by the dominant party in procuring execution of the will).

54 Wade, *supra* note 40, § 4.20. See also Bock v. Brody, 870 P.2d 530 (Colo. App., 1993), *aff'd in part and rev'd in part on other grounds* 897 P.2d 769 (Colo., 1995) (recognizing that a confidential relationship based on a relationship "akin to that of father and son" was "insufficient to establish a fiduciary relationship"); Rentfro's Estate, *supra* note 11 (mere kindness of treatment, or reasonable solicitation or persuasion not sufficient to invalidate a will).

55 See, e.g., Furrow, *supra* note 48 (confidential relationship is only one of three requirements to find undue influence); Jones, *supra* note 9 (undue influence requires "more than mere influence or persuasion" and is akin to coercion).

strong-willed or that the donor's mental facilities were not impaired at the time of the transfer, neither the presumption nor even an evidentiary "permissible inference" of undue influence possibly arising from the relationship likely will be sufficient to set aside the transfer.[56] There must be some element of domination to the relationship.[57]

Further, the transaction must be within the scope of the relationship.[58] For example, in *Equitex v. Ungar* [59] the court held that even though the parties had a confidential relationship, that relationship did not create a duty for the defendant to protect the plaintiff's interests in settlement negotiations, because the negotiations fell outside the scope of their relationship. Without such a nexus between the relationship and the challenged transfer, the presumption logically does not arise, despite the existence of a confidential relationship.

In a recent case from the Indiana Court of Appeals, the claim of undue influence arose in the context of a father entering into a contract to sell land to his son and his son's wife.[60] The father entered into this contract while in the hospital a month before he died. The father previously had designated his son as the holder of a general power of attorney. The court interpreted the language of a 2005 amendment to the Indiana Power of Attorney Act as freeing the benefitting designated agent from the presumption of undue influence so long as the power of attorney is "unused" in the questioned transaction. Thus, a fiduciary relationship is generally, by itself, not sufficient.

Undue influence and unfairness. It is uncertain whether the presumptions of undue influence and unfairness are the same presumption, alternative presumptions, or cumulative presumptions. The courts sometimes do this:

> conflate[ ] the two presumptions by holding that where parties to a transaction maintain a fiduciary relationship, the fiduciary bears the burden of proving the transaction was "in fact fair, just and reasonable" to overcome the presumption that the transaction was "obtained by undue influence or fraud."[61]

At least one court has reasoned that the presumption of undue influence and unfairness is a single, interchangeable presumption.[62]

Undue influence is influence that overcomes the will of the grantor, preventing the grantor from exercising free agency when the grantor himself or herself makes the transfer.[63] In contrast, unfairness occurs when the transferee takes advantage of his or her trust position and engages in self-dealing in a fiduciary capacity to transfer or use property for his or her benefit in a transaction that is not fair, just, or reasonable.[64]

In either case, evidence of fairness in the making of the transfer will likely refute both the presumption of undue influence and unfairness, depending on the applicable context. Also, in the case of either an inter vivos transfer by a donor or a testamentary transfer by either a will or nonprobate disposition (e.g., joint tenancy or a beneficiary designation), where evidence rebuts the presumption of undue influence resulting from the existence of a confidential or fiduciary relationship, a separate presumption as to the fairness or reasonableness of the transaction is inappropriate. Further, courts should be reluctant to substitute their own judgment of fairness for that of competent transferees.

Operation of the presumption

Courts have long struggled with the burden of proof applicable to rebut the presumption of undue influence. Generally, the ultimate burden of proof, the "risk of nonpersuasion," never shifts during a case.[65] Once the presumption has arisen, to remove the legal operation of the presumption from the case entirely, in most states, the defendant has the burden of going forward with some evidence that the transaction was fair or not the result of undue influence.[66]

Courts going as far back as the early 1900s, however, initially held that once the presumption of undue influence arises, the ultimate burden of proof is on the proponent of the will to show that no undue influence occurred.[67] Some states continue to treat the presumption as permanently shifting the ultimate burden of proof, not merely shifting the burden of going forward with the evidence.[68] In that case, if the defendant comes forward with no evidence to rebut this presumption, the challenge should prevail because the plaintiff, as a matter of law, has shifted the burden of proof.

56 Krueger, *supra* note 2. See also Bednarz, *supra* note 48 (donor "was strong-willed, stubborn, and would not be easily influenced"); Hall, *supra* note 37.

57 Theriault, *supra* note 7.

58 Peterson, *supra* note 50. See also Equitex, *supra* note 50.

59 Note 50, *supra*.

60 In re Estate of Compton, 919 N.E.2d 1181 (Ind. App., 2010).

61 Krueger, *supra* note 4.

62 See, e.g., Krueger, *supra* note 2 ("The court of appeals analyzed the presumptions of undue influence and unfairness, and concluded they are interchangeable and indistinguishable. For the purposes of this opinion, we agree." (internal citations omitted)).

63 Eads v. Dearing, 874 P.2d 474 (Colo. App., 1994); Lipscomb, *supra* note 3.

64 In re Estate of Heyn, 47 P.3d 724 (Colo. App., 2002).

65 Case Note, "Wills-Undue Influence-Burden of Proof where Confidential Relation Existed," 38 Yale L. J. 831 (1929).

66 *Id.*; Niemi, *supra* note 2, citing Ament, *supra* note 2.

67 *Id.*

68 See, e.g., Street, *supra* note 2. See also Theriault, *supra* note 7.

For example, the Supreme Judicial Court of Maine recently held in a will contest that a confidential relationship merely gave rise to an inference of undue influence, rather than a legal presumption, while in a tortious interference case, the finding of undue influence shifted the burden of proof to the proponent of the will.[69] In its concluding footnotes, the court discussed the nuances of the claim of tortious interference with inheritance compared to a will contest. The court reasoned that a more stringent application of the presumption (making it easier to challenge the transfer) is appropriate for tortious interference claims requesting monetary damages, rather than an action to set aside a will. This logic seems to be a distinction without a difference. Interestingly, the case involved a claim of tortious interference in a will contest matter. The court noted that in many states, the tortious interference with inheritance claim is available only if a will contest is not available or would not provide adequate relief, recognizing its application to nonprobate transfers.

Most courts have since "altered their position or clarified [these] former statements" by holding that only the burden of going forward with the evidence shifts to the proponent of the will, not the ultimate burden of proof.[70] In some situations, the evidence establishing the confidential relationship still may operate as evidence from which the trier of fact could infer undue influence. On the other hand, the evidence rebutting the presumption may negate any logical or reasonable inference from the confidential relationship.[71]

Pre-mortem probate and undue influence

A decision of the Illinois Court of Appeals dealt with undue influence and the potential remedy that exists while the person who was unduly influenced is alive but not competent.[72] The court used its statutory power to change a will to remove a caregiver guilty of undue influence as a devisee. Although there would be a second bite at the apple after death, the decision effectively shifted the burden of proof to the person accused of engaging in undue influence.

Restatement (Third) approach

As additional protection against frivolous litigation in this area, states could adopt the approach of the Restatement (Third)'s requirement that "suspicious circumstances" also must be present, in addition to a confidential or fiduciary relationship, before the presumption is raised.[73] This notion appears to have operated as a de facto consideration in many court decisions.[74]

The Restatement (Third) provides factors to consider when determining whether suspicious circumstances are present, including:

1. Whether the donor was in a weakened condition, physically or mentally.
2. The extent to which the beneficiary participated in the preparation or procurement of the gift.
3. Whether the donor received advice from an independent third party.
4. Whether the gift was prepared in secret or in haste.
5. Whether the donor's attitude towards others had changed because of his or her relationship with the beneficiary rather than due to factors such as reduced contact and involvement in the donor's life.
6. The discrepancy between the gift or will and previously expressed intent.
7. "[W]hether the disposition of property is such that a reasonable person would regard it as unnatural, unjust, or unfair" under the circumstances.[75]

This standard would require challengers of a transfer to come forward with more than just the existence of a confidential or fiduciary relationship and speculation to justify their lawsuit. A thorough investigation of the circumstances involved in the transfer would be required, including interviews of the donor's physician, caregivers, friends, bankers, accountants, family members, and those persons knowledgeable as to both the existence of a confidential relationship and the actual occurrence of undue influence.

Conclusion

As courts try to balance the protection of elderly donors with their right to dispose of property as donors see fit, they have reached a compromise. Courts have made it easier to challenge transfers within a confidential relationship, but still allow transferees the opportunity to defend themselves while not having to bear an insurmountable burden of proof and without having to incur the expense of litigation based merely on unjustified suspicions. It is still unsettled whether more than a confidential relationship is required to support the presumption of undue influence; what differences, if any, exist between the probate and nonprobate arenas; and how the presumption operates relative to the burden of proof. ■

69 Theriault, *supra* note 7.

70 *Id.*

71 Hall, *supra* note 37.

72 In re Estate of Henry, 919 N.E.2d 33 (Ill. App. Ct., 2009).

73 Restatement (Third), *supra* note 33, § 8.3 cmt. h.

74 See, e.g., Krueger, *supra* note 2.

75 *Id.*