

A Donor's Rights to Disposition of Assets Versus Undue Influence Protection

by David W. Kirch

The law of undue influence continues to evolve in Colorado. This article provides an overview of the Krueger opinion and other court decisions, as well as recent changes to the Colorado Jury Instructions.

Charges of undue influence, fraud, and lack of capacity have increased in the past several decades 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 and, thus, are more likely to need assistance and care in later years. 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 more frequently challenged for abuse, in part because more assets are transferred by nonprobate means—for example, 401(k) and individual retirement account (IRA) beneficiary designations—with attorneys less likely to be involved in these transfers. Proving and disproving, as well as avoiding, undue influence can be difficult as to transfers where an attorney was not involved in the 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, two competing interests in such circumstances must be recognized and balanced: (1) allowing a donor to gift or transfer property to those closest to the donor and facilitating the economies involved in the use of nonprobate transfers and powers of attorney, and (2) protecting the elderly who are susceptible to undue influence, fraud, and incapacity.² The law balances these interests when it imposes a rebuttable presumption of undue influence on transfers to someone with whom the benefactor has a confidential or fiduciary relationship.³ This presumption is sometimes called a “bursting bubble” presumption.⁴

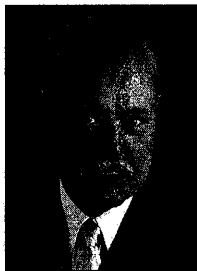
The law regarding the presumption of undue influence and unfairness has developed in a parallel and sometimes inconsistent fashion with regard to will contests versus challenges to lifetime and testamentary nonprobate transfers.⁵ Attention to reconciling the law in these two areas has been infrequent.⁶

In the past, courts in Colorado inconsistently applied the presumption of undue influence, creating considerable uncertainty in the state of the law. Colorado case law and jury instructions conflicted on whether the presumption: (1) disappeared from the case once rebutted (the bursting bubble);⁷ (2) remained in the case even after rebuttal;⁸ or (3) shifted the burden of proof.⁹ The Colorado Supreme Court, in the recent case of *Krueger v. Ary*,¹⁰ partially resolved this uncertainty in the context of nonprobate transfers, holding that the presumption disappears from the case once rebutted.¹¹

Consistent with *Krueger* in the nonprobate context, in *In re Estate of Schlagel*,¹² the Colorado Court of Appeals previously held that, in the probate context, a confidential relationship raised only a rebuttable presumption of undue influence. In that case, the court concluded that an intimate, adulterous relationship alone was not

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enough to prove undue influence when the parties rebutted the presumption.¹³

Finally, the Colorado Jury Instructions (CJI-Civ.) were substantially revised in the last year with respect to *inter vivos* gifts and wills to conform to the *Krueger* decision.¹⁴ As discussed below, these instructions mostly provide some helpful clarification to the law, but they also raise additional questions.

This article provides an overview of undue influence, including the presumption of undue influence. It examines the operation of this presumption and discusses the evidence necessary to rebut the presumption and the rebuttal's effect on the burden of proof. It also discusses the *Krueger* decision and its implications for undue influence litigation in Colorado, as well as pre-mortem probate in the context of undue influence.

Undue Influence Litigation

Undue influence has been recognized as "one of the most bothersome concepts in all the law."¹⁵ 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."¹⁶ Undue influence generally is defined as an outside force overcoming the will of the donor.¹⁷ 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.¹⁸ The key issue is whether the donor voluntarily made the gift.¹⁹

Consequently, undue influence can be hard to prove. Normally, undue influence "is not done so overtly that it can be proven with direct evidence;"²⁰ 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."²¹

Typical circumstances providing an evidentiary basis for a finding of undue influence in the will contest context include the following:²²

- a confidential relationship
- a fiduciary relationship
- undue influence present at will execution
- a relationship between attorney drafting will and influencer
- knowledge of the contents of will by influencer
- an influencer instructing the preparation of a will, making first contact with the attorney or meeting alone with attorney drafting the will
- an influencer paying the drafting attorney
- an influencer securing witnesses to the will
- an influencer keeping the will after execution
- the execution of the will is kept a secret from potential challengers
- old age of the donor
- an opportunity and motive for the exercise of undue influence
- weak physical and mental health of the donor
- a beneficiary caring for the donor during the end of donor's life
- a beneficiary treating new will execution as an urgent matter
- dramatic change in the testamentary disposition of assets.

Many of these factors also may apply to nonprobate transfers.²³ The circumstances of nonprobate transfers may differ from making a will.

A comparison of two cases involving undue influence claims regarding 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.²⁴ 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."²⁵ In contrast, the court in *Krueger* found that undue influence did not occur based on evidence that the donor was strong-willed and naturally wished to make the gift.²⁶

In another case, the court held that the presumption of undue influence may be rebutted by showing that either: (1) the confidential relationship had been severed before the critical events took place; or (2) the person executing the instrument received independent and critical advice.²⁷

Most recent, in *In re Estate of Hall*,²⁸ the presumption arising from a confidential relationship in both the will and *inter vivos* gift context was overcome by evidence of the transaction. 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. 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.²⁹

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:³⁰

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- 1) old age and physical and mental weakness;
- 2) the person signing the paper is in the home of the beneficiary and subject to his or her constant association and supervision;
- 3) others have little or no opportunity to see the person executing the instrument;
- 4) the will is different from and revokes a prior will;
- 5) the will is made in favor of one with whom there are no blood ties;
- 6) the will disinherits the natural objects of the drafter's bounty; and
- 7) the beneficiary has procured the will's execution.

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.³¹ 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.³² However, a confidential relationship can exist 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).³³

Not every close relationship, however, is a confidential relationship.³⁴

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; and (3) dominant-subservient.³⁵ In this fashion, the *Restatement (Third)* attempts to provide a framework for the types of relationships under which a confidential relationship might arise. However, these categories are rarely clear-cut and tend to overlap. Furthermore, the *Restatement (Second) of Property*, which does not make such distinctions,³⁶ still may be the law in Colorado.³⁷

The first category—a fiduciary relationship—is based on “a settled category of fiduciary obligations.”³⁸ 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.³⁹ Colorado recognized in *Woodhams v. Amy*⁴⁰ that a fiduciary relationship can be a confidential relationship.

The second type of confidential relationship under the *Restatement (Third)* is a reliant one. A reliant relationship is based on “special trust and confidence.”⁴¹ 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.⁴²

The circumstances surrounding the reliance are such that the donor is shown to a significant extent to be vulnerable to undue in-

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fluence.⁴³ For example, *Columbia Sav. & Loan Ass'n v. Carpenter*⁴⁴ involved a reliant relationship. The donor was an 84-year-old woman in ill health, was "somewhat confused" about her finances and personal affairs, and lived with her granddaughter. Because the donor relied on her granddaughter for advice and help in arranging her affairs, the court found that she was reliant and, thus, in a confidential relationship.⁴⁵

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.⁴⁶ The Colorado Supreme Court has treated a dominant-subservient relationship as a confidential relationship.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.⁴⁸ At the same time, she also may be acting as a caregiver, which could give rise to either a dominant-subservient relationship or a reliant relationship. Colorado courts recognize that the three relationships from the *Restatement (Third)* are confidential relationships; however, they rarely distinguish among these three categories. Instead, courts often find that a confidential or fiduciary relationship existed, using these two terms interchangeably.⁴⁹

Exercise of undue influence. In most states, the mere presence of a confidential relationship is not enough to prove undue influ-

ence.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 [donee's] role in attending to [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 of the existence of a confidential relationship giving rise to the presumption in the first instance. In the will contest context, CJI-Civ. 34:16 notes: "You may not presume, however, that a person exercised undue influence over another person solely because they were in a (confidential) (and) (or) (fiduciary) relationship."⁵³ In the gift context, it also is necessary to show that "the defendant was the dominant member of that relationship" and that "[t]he transaction was [] unfair, unjust, or unreasonable. . . ."⁵⁴

Further, "the mere existence of motive and opportunity does not give rise to an inference that undue influence was exercised in fact. . . ."⁵⁵ The natural influence that the donee gains "by reason of love, affection, or kindness" is not undue influence.⁵⁶ Therefore, the challenger must show more than just a close relationship.⁵⁷ He or she must show that a confidential relationship existed in fact, which includes circumstances making the donor susceptible to influence, as the court in *Krueger* recognized. If a party shows that the donor remained strong-willed or that the donor's mental faculties were not impaired at the time of the transfer, neither the presumption nor even an evidentiary "permissible inference"⁵⁸ of

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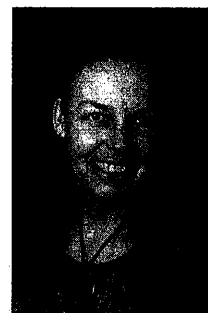
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undue influence possibly arising from the relationship likely will be sufficient to set aside the transfer.⁵⁹ Notes on Use 2 to CJI-Civ. 34:16 recognize this in stating that sufficient rebutting evidence “may include the circumstances of the relationship and the transaction, such as evidence of love and trust between the parties, evidence the transaction was not unreasonable, and evidence of independent action by the testator.” Finally, the transaction must be within the scope of the relationship.⁶⁰ In *Equitex v. Ungar*,⁶¹ the Colorado Court of Appeals held that even though the parties had a fiduciary or confidential relationship, that relationship did not give rise to 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 fiduciary or 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.⁶² The father entered into the 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 effecting the following change: The benefitting designated agent is freed from the presumption of undue influence as long as the power of attorney is “unused” in the questioned transaction.⁶³ Under CRS § 15-14-606, the result would be the same.

Undue Influence and Unfairness

Colorado court decisions evidence some uncertainty regarding whether the presumption of undue influence and the presumption of unfairness are a single presumption, alternative presumptions, or cumulative presumptions.⁶⁴ The differing Colorado Jury Instructions on the presumptions with respect to lifetime transfers and will contests compound this uncertainty.⁶⁵

The Colorado Court of Appeals noted in *Krueger* that the Colorado Supreme Court previously had

conflated 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.”⁶⁶

In a footnote in *Krueger*, the Colorado Supreme Court treated the presumptions of undue influence and unfairness as a single, interchangeable presumption.⁶⁷ Other states likewise have treated the presumption of undue influence and the requirement of fairness as a single, although sometimes conflated, concept.⁶⁸

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.⁶⁹ 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.⁷⁰ In either case, evidence of fairness in the making of the transfer likely will 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—for example, joint tenancy or a beneficiary designation—

where there is otherwise evidence to rebut 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.

Operation of the Presumption

Krueger states that the presumption of undue influence and/or unfairness creates a *prima facie* case.⁷¹ If the defendant comes forward with no evidence to rebut this presumption, the *Krueger* opinion implies that the plaintiff, as a matter of law, has shifted the burden of proof simply by showing a confidential relationship and a transfer of property within the scope of the relationship.⁷²

Once the presumption has arisen, to entirely remove the legal operation of the presumption from the case, in most states (including Colorado), the defendant has the burden of going forward with some evidence that the transaction was fair or otherwise not the result of undue influence.⁷³ Colorado thus has separated itself from those states that treat the presumption as permanently shifting the ultimate burden of proof, not merely shifting the burden of going forward with evidence.⁷⁴

Krueger v. Ary and Changes to the Colorado Jury Instructions

The *Krueger* decision and complying Colorado Civil Jury Instructions are only a partial answer to some of the questions regarding the operation of the presumption of undue influence.

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However, their discussion of a potential remaining inference of undue influence raises additional questions.

The Krueger Decision

In *Krueger*, the defendant Marlyn Ary started working for Mary and Iver Villa as a housekeeper in the mid-1970s. After Mary Villa's death in 1989, Marlyn remained as the housekeeper for Iver, and the two became friends. Iver's health began to decline and Marlyn began acting as a paid caregiver, assisting him with his finances and transporting him to appointments. In 2001, Iver began construction on a new house and decided to leave it to Marlyn instead of to his children. In 2003, he executed a deed for joint tenancy on the property and the house, worth \$350,000, with Marlyn.

On Iver's death in 2005, his daughter, Mary Krueger, became personal representative and brought suit against Marlyn, claiming that the transfer was the result of undue influence.⁷⁵ During the trial, Mary raised the presumption of undue influence; however, the trial court held that Marlyn rebutted the presumption and the court refused to instruct the jury on the presumption.

The Court quickly dispensed with Mary's argument that the Colorado Civil Jury Instructions controlled the outcome. It held that "the pattern instructions are not law, not authoritative, and not binding on this court."⁷⁶ Thus, case law controls where it conflicts with pattern jury instructions.

Next, the Court analyzed the case law and determined that the presumption of undue influence shifts the burden of going forward to the party against whom it is raised. If the defendant meets the

burden, the presumption does not continue in the case. The Court expressly overruled contrary case law.⁷⁷

Although "a permissible inference of the presumed facts" may remain in the case, based on the logical conclusions that might be reached from the evidence that gave rise to the presumption in the first place, a jury instruction on this inference was found unnecessary under the circumstances of *Krueger*.⁷⁸ Thus, the *Krueger* Court recognized that the factual circumstances giving rise to a confidential relationship could, in some cases, also provide an evidentiary basis (as could many other particular circumstances and facts) for the trier of fact likewise to infer that undue influence had occurred. However, not all factual circumstances involving a confidential and/or fiduciary relationship would provide such an evidentiary basis for a finding of undue influence.⁷⁹ An example of circumstances obviously giving rise to a logical inference surviving rebuttal evidence of the absence of undue influence is a transfer for the benefit of a short-term, unrelated, compensated professional caregiver during the last days of the life of a donor who clearly is susceptible to undue influence.

The discussion of a permissible inference of undue influence in the *Krueger* decision originated in the oral arguments of counsel before the Colorado Supreme Court. Rather than appearing to create a new rule of law, the opinion seems to rely on the logical assumption that the factual basis for a finding of a confidential relationship may independently evidence undue influence, not create a new legal principle that such an inference would exist in every confidential or fiduciary relationship. The evidence rebutting the presumption also can serve to refute the permissible inference.⁸⁰

The operation of the inference depends entirely on the circumstances.⁸¹ For example, the inference likely does not operate in the situation of a joint tenancy account, where the issue is whether the account was created as a matter of convenience and where the statutory evidentiary standard may be clear and convincing evidence,⁸² with the appropriate remedy of imposition of a resulting trust. The inference may not survive in the situation of a long-time, close relationship based on love and affection,⁸³ as opposed to a recently established relationship of dominance created as the result of involuntary dependence due to health (where there had been no previous family relationship or friendship with the caregiver making that individual a natural object of the bounty of the donor), with the appropriate remedy in such a situation, absent the introduction of evidence, which by a preponderance of the evidence dis-



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proves undue influence, being the imposition of a constructive trust.⁸⁴

Instructing the Jury on the Permissible Inference

Under *Krueger*, whether to instruct the jury on the permissible inference of undue influence is within the discretion of the trial court. In determining whether to instruct the jury, the court must determine whether the instructions "are justified by strong underlying policy considerations."⁸⁵ This requirement further reflects a facts-and-circumstances test as to the operation of the inference. The Court in *Krueger* acknowledged that the law generally disfavors instructions emphasizing specific evidence.⁸⁶ Thus, although there may be justification in limited circumstances for tendering such an instruction, a court generally is not required to do so. Accordingly, when both parties focus their arguments on the allegation of undue influence, failing to instruct the jury to consider the inference does not substantially prejudice either party.⁸⁷ This reflects on the permissible inference as a logical, not legal, evidentiary concept.⁸⁸

Krueger leaves open the question of what constitutes substantial prejudice.⁸⁹ If both sides adequately argue the evidence supporting the claim of undue influence, there likely is not substantial prejudice when the court refuses to instruct the jury on the permissible inference.⁹⁰ Circumstances that would create substantial prejudice are unclear but appear to be very narrow.

Some aspects of the conforming changes to the Colorado Civil Jury Instructions deserve attention. CJI-Civ. 30:17, 30:18, and 30:19 apply to *inter vivos* gifts, and 34:16 and 34:17 apply to wills. The Comments to both reference *Krueger*, leaving open the question of which should be applied to nonprobate testamentary transfers. This is significant because the two sets of instructions differ as to the question of whether the transaction was "unfair, unjust, or unreasonable,"⁹¹ as well as where the presumption can be based solely on the existence of "a (confidential) (and)(or) (fiduciary) relationship. . . ."⁹² This may be a distinction without a difference, but it is not clear why the two areas receive different treatment. Finally, Note on Use 3 to CJI-Civ. 34:17 implies the inference in-

struction logically will be given if "the case involves an elderly person making a significant conveyance to a caregiver." However, this was the situation in *Krueger*, where the court held the instruction did not need to be given.⁹³

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.⁹⁴ 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.⁹⁵ In Colorado, CRS § 15-14-411(g) could be used for the same purpose.

Considering the Restatement (Third) Approach

Although it has not been adopted in Colorado, the *Restatement (Third)* requires that suspicious circumstances be present before the presumption is raised.⁹⁶ This notion appears to have operated as a *de facto* consideration in many court decisions.⁹⁷ The suspicious circumstances giving rise to a confidential relationship also may give rise to the permissible inference discussed in *Krueger*. Such circumstances might involve more than mere speculation and may be refuted by the same evidence refuting the presumption of undue influence in the first instance.

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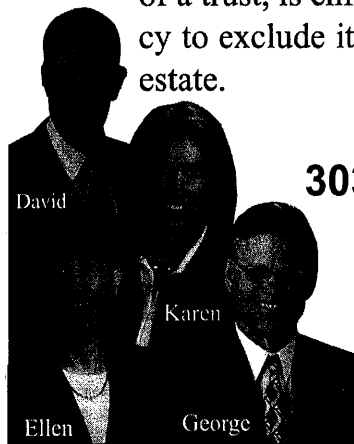
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11 U.S.C. § 541(C)(2)

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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 and mentally;
- 2) the extent to which the beneficiary actively participated in the preparation or procurement of the gift or will;
- 3) whether the donor acted on the basis of advice from an independent third party;
- 4) whether the gift was prepared in secret or in haste;
- 5) whether the donor's attitude toward 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; and
- 7) "whether the disposition of property is such that a reasonable person would regard it as unnatural, unjust, or unfair" under the circumstances.⁹⁸

This conceptualized standard would require challengers of a transfer to come forward with more than just the existence of a confidential relationship and speculation to justify their lawsuit, as seems to be required by both the Colorado Civil Jury Instructions⁹⁹ and prior Colorado case law¹⁰⁰ dealing with will contests. A thorough investigation of the circumstances involved in the transfer would include 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.

A Conceptual Framework of Undue Influence Law in Colorado

Taken together, *Krueger* and *Schlagel* support the assumption that the same principles for the operation of the presumption of undue influence generally apply to both nonprobate and probate transfers.¹⁰¹ Ultimately, the presumption of undue influence can be useful when the plaintiff believes that a transfer occurred because of undue influence as the result of a confidential relationship, but does not have access to the facts relating to the transfer.

The presumption of unfairness and the presumption of undue influence are logically a single presumption (based on mutually exclusive grounds), not two independent presumptions. Once the presumption is established, the defendant can rebut it by presenting some evidence indicating the absence of undue influence. This may include the testimony of the donee as to the actual circumstances surrounding the transfer, if the testimony is not barred by the Dead Man's Statute. Self-serving statements of the recipient are not enough.¹⁰² Also, in many states, the same principles for the operation of the presumption of undue influence apply to nonprobate and probate transfers.¹⁰³

The burden of proof never shifts to the defendant; it remains on the plaintiff throughout the entire case. Therefore, once the defendant presents enough evidence to burst the bubble, the presumption disappears from the case and the plaintiff must prove undue influence and unfairness without the benefit of the presumption. 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.¹⁰⁴

Conclusion

As courts try to balance the protection of elderly donors with the 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 also to allow transferees the



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Notes

1. Kirch, "Constructive Trusts," *Trusts & Estates* 50, 51 (July 2007).
2. *Krueger v. Ary*, 220 P.3d 923, 924-926 (Colo.App. Dec. 13, 2007), *aff'd*, 205 P.3d 1150 (Colo. 2009).
3. *Krueger v. Ary*, 205 P.3d 1150, 1152 (Colo. 2009); Walker, "The Protective Doctrine of Undue Influence," 38 *The Colorado Lawyer* 75, 75-76 (June 2009).
4. Wade, *Wade/Parks Colorado Law of Wills, Trusts, and Fiduciary Administration* § 4.20 (5th ed. 2004).
5. *Compare In re Estate of Schlagel*, 89 P.3d 419, 422 (Colo.App. 2003) (dealing with probate transfers and holding that an intimate and adulterous relationship was not enough to prove undue influence where the presumption had been rebutted), *with Krueger, supra* note 3 at 1156 (dealing with nonprobate transfers and holding that a permissible inference still could exist after the presumption has been rebutted). Courts have not distinguished between probate and nonprobate transfers, and there has been a parallel but independent development of case law in these areas relating to undue influence. *See Monroe v. Marsden*, 207 P.3d 320, 323-24 (Mont. 2009) (nonprobate transfers); *Lipscomb v. Young*, 672 S.E.2d 649, 649-50 (Ga. 2009) (probate transfers).
6. *See, e.g., CJI-Civ.* 30:15, 30:16, 34:16 (CLE ed. 2005); 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, 540-44 (2006).
7. *Lesser v. Lesser*, 250 P.2d 130, 134 (Colo. 1952).
8. Notes on Use to CJI-Civ., *supra* note 6 at 30:15.
9. *Hilliard v. Shellabarger*, 210 P.2d 441, 447-48 (Colo. 1949).
10. *Krueger, supra* note 3.
11. *Id.* at 1152.
12. *Schlagel, supra* note 5.
13. *Id.* at 422. *See also Hancock v. Anderson*, 168 S.E. 458, 464 (Va. 1933) ("Friendly relations or even intimacy of relationship present an entirely different question from what is understood as a confidential relation in law.").
14. CJI-Civ., *supra* note 6 at 3:5, 3:8, 30:17, 30:18, 30:19, 34:16, 34:17.
15. Dukeminier *et al.*, *Wills, Trusts, and Estates* 180 (8th ed., Aspen Pub., 2009).

16. *Krueger, supra* note 2, *quoting Anderson v. Lindgren*, 157 P.2d 687, 689 (Colo. 1945). *See also In re Will of Jones*, 669 S.E.2d 572, 575 (N.C. 2008), *citing In re Will of Turnage*, 179 S.E. 332, 333 (1935).
17. *Eads v. Dearing*, 874 P.2d 474, 477 (Colo.App. 1994).
18. *Jones, supra* note 16 at 575, *quoting In re Will of Craven*, 86 S.E. 587, 592 (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); CJI-Civ., *supra* note 6 at 34:15.
19. *Id.*
20. American College of Trust and Estate Counsel Fiduciary Litigation Committee, "Evidentiary Issues Involving Pre-Execution Practice and Drafting," 27 *ACTECJ.* 246, 246 (2001).
21. *Id.*
22. *Id.*
23. *Monroe, supra* note 5 at 323-24.
24. *Id.*
25. *Id.*
26. *Krueger, supra* note 2.
27. *Edwards v. Urice*, 220 P.3d 1145 (Okla.App. 2008).
28. *In re Estate of Hall*, 32 So.3d 506 (Miss.App. 2009).
29. *Id.*
30. *Jones, supra* note 16 at 575, *quoting In re Will of Andrews*, 261 S.E.2d 198, 200 (1980).
31. *Columbia Sav. & Loan Ass'n v. Carpenter*, 521 P.2d 1299, 1301 (Colo.App. 1974), *revid on other grounds sub. nom. Judkins v. Carpenter*, 537 P.2d 737 (Colo. 1975).
32. *See, e.g., id.* (deeming evidence sufficient to support the finding of a confidential relationship between decedent and her granddaughter where 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).
33. Wade, *supra* note 4, *quoting CJI-Civ., supra* note 6 at 34:15.
34. *Lipscomb, supra* note 5 at 650; *Hancock, supra* note 13 at 464 ("Friendly relations or even intimacy of relationship present an entirely different question from what is understood as a confidential relation in law.").
35. *Restatement (Third) of Property: Wills and Donative Transfers* § 8.3 cmt. g (2003).
36. *Restatement (Second) of Property: Donative Transfers* § 34.7 (1992).

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37. See, e.g., Stewart, "Citing the *Restatement (Third) of Trusts*," 27 *Colorado Bar Association Trust and Estate Section Council Notes* 22-23 (Fall 2008).

38. *Restatement (Third)*, supra note 35 at § 8.3 cmt. g.

39. *Id.*; CRS § 15-14-606.

40. *Woodhams v. Amy*, 365 P.2d 696, 697 (Colo. 1961). Although this case stands for the proposition that a fiduciary is in a confidential relationship with the beneficiary, its second conclusion—that the presumption of undue influence shifts the burden of proof to the defendant—subsequently was overturned in Colorado. *Columbia Sav. & Loan*, supra note 31 at 1302. For a detailed discussion on the bursting bubble presumption that currently exists in Colorado law, see the discussion of *Krueger v. Ary*, infra.

41. *Restatement (Third)*, supra note 35.

42. *Id.*

43. *Lipscomb*, supra note 5 at 650.

44. *Id.* at 1301.

45. *Id.*

46. *Restatement (Third)*, supra note 35 (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").

47. *Arnold v. Abernethy*, 307 P.2d 1106, 1107 (Colo. 1957) (where one person is in the dominant position of "taking care" of another, a confidential and fiduciary relationship exists that requires a gift to the dominant person to be fair and reasonable).

48. CRS § 15-14-606.

49. See, e.g., *Arnold*, supra note 47 at 1107 (using the terms "fiduciary" and "dominant-subservient" interchangeably); *In re Bednarz Trust*, No. 283699, 2009 WL 1693482 at *5 (Mich.App. June 16, 2009).

50. *In re Peterson*, 483 N.W.2d at 625 (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, 752 (Colo.App. 2002).

51. *Lipscomb*, supra note 35 at 650.

52. *Id.*

53. CJI-Civ., supra note 6 at 34:16.

54. *Id.* at 30:17.

55. *Wade*, supra note 4 at § 4.20.

56. *Id.* See also *Bock v. Brody*, 870 P.2d 530, 533 (Colo.App. 1993), *aff'd in part and rev'd in part on other grounds*, 867 P.2d 769 (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 18 (mere kindness of treatment, or reasonable solicitation or persuasion not sufficient to invalidate a will); CJI-Civ., supra note 6 at 34:15.

57. See, e.g., *Furrow v. Helton*, 13 So.3d 350, 355-56 (Ala. 2008) (confidential relationship is only one of three requirements to find undue influence); *In re Will of Jones*, 669 S.E.2d 572, 577 (N.C. 2008) (undue influence requires "more than mere influence or persuasion" and is akin to coercion).

58. See *infra* discussion of *Krueger v. Ary* and "Changes to the Colorado Jury Instructions: Instructing the Jury on the Permissible Inference" in text for discussion of the permissible inference under Colorado law.

59. *Krueger*, supra note 3 at 1153. See also *Bednarz Trust*, supra note 49 at *5 (donor "was strong-willed, stubborn, and would not be easily influenced"). See also *Hall*, supra note 28 at 506.

60. *Peterson*, supra note 50 (requiring evidence that the fiduciary had an opportunity to influence the donor in that transaction). See also *Equitex*, supra note 50 at 752.

61. *Equitex*, supra note 50 at 752.

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

63. *Id.*

64. *Krueger*, supra note 2 at *2-3, quoting *Anderson v. Lindgren*, 157 P.2d 687, 689 (Colo. 1945).

65. See, e.g., CJI-Civ., supra note 6 at 30:15, 30:16, 34:15, 34:16, 34:17 (containing instructions and presumptions with different requirements).

66. *Krueger*, supra note 2 at *5, quoting *Arnold*, supra note 47 at 1108.

67. *Krueger*, supra note 3 at 1153 ("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)).

68. See, e.g., *Street v. Street*, 211 P.3d 495, 501 (Wyo. 2009), quoting *Kraficzik v. Morris*, 206 P.3d 372, 377 (Wyo. 2009).

69. *Eads v. Dearing*, 874 P.2d 474, 477 (Colo.App.1994); *Lipscomb*, supra note 5 at 650.

70. *In re Estate of Heyn*, 47 P.3d 724, 726 (Colo.App. 2002); *Wade*, supra note 4 at § 20.4.

71. *Krueger*, supra note 3 at 1152.

72. *Id.*

73. *Id.*; *In re Estate of Niemi*, 2009 WL 1176897 at *5 (Ohio App. May 1, 2009), citing *Ament v. Reassure Am. Life Ins.*, 905 N.E.2d 1246, 1254 (Ohio App. 2009).

74. *Street*, supra note 68 at *5.

75. *Krueger*, supra note 3 at 1153.

76. *Id.*

77. *Id.* at 1155.

78. *Id.* at 1154.

79. *In re Wood*, 132 N.W.2d 35, 44 (Mich. 1965). See also *Furrow*, supra note 57 at *5 (only reasonable inferences are considered at summary judgment).

80. *Wood*, supra note 79 at 44.

81. See Wanless, "Rethinking Oregon's Law of Undue Influence in Will Contests," 76 *Or. L.Rev.* 1027, 1044-45 (1997) (arguing for a fact-intensive inquiry in undue influence cases).

82. CRS § 15-15-212(5).

83. *Wade*, supra note 4 at § 4.20. See also *In re Jones*, 669 S.E.2d at 574, 577, citing *In re Will of Craven*, 86 S.E. 587, 591-92 (N.C.1915); *Hall*, supra note 28 at 506.

84. *Monroe*, supra note 5.

85. *Krueger*, supra note 3 at 1157.

86. *Id.* at 1157-58.

87. *Id.* at 1158.

88. *Wood*, supra note 79 at 44 n.7 (when the presumption is rebutted, the effect of the remaining inference is "logical rather than legal").

89. *Krueger*, supra note 3 at 1158.

90. *Id.*

91. CJI-Civ., supra note 6 at 30:17.

92. *Id.* at 34:16.

93. *Krueger*, supra note 3 at 1157.

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

95. *Id.*

96. *Restatement (Third)*, supra note 35 at § 8.3 cmt. h.

97. See, e.g., *Krueger*, supra note 3 at 1157; *Hall*, supra note 28 at 506.

98. *Restatement (Third)*, supra note 35 at § 8.3 cmt. h.

99. CJI-Civ., supra note 6 at 34:15, 34:16.

100. *Schlagel*, supra note 5. See also *Rentfro's Estate*, supra note 18 (mere kindness of treatment, or reasonable solicitation or persuasion not sufficient to invalidate a will).

101. *Dodkin*, supra note 6 at 543-44; *Restatement (Third)*, supra note 35 at § 8.3.

102. *Hall*, supra note 28.

103. *Dodkin*, supra note 6 at 543-44; *Restatement (Third)*, supra note 35 at § 8.3.

104. *Hall*, supra note 28 at 506. ■

