ELECTRONICALLY FILED FEB 13, 2017 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT

NO. 15-2126

DENNIS WORKMAN,

Plaintiff/Appellant,

vs.

GARY WORKMAN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARGARET E. WORKMAN, and LAVERNE WORKMAN, CYNTHIA NOGGLE, RANDY NOGGLE, MINDY (NOGGLE) SHERWOOD, CHRISTINE (WORKMAN) THOMPSON AND JEFFREY WORKMAN.

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE JOHN D. TELLEEN
SCOTT COUNTY PROBATE NUMBER ESPR074050

PLAINTIFF/APPELLANT'S APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR REVIEW

SHOULD IOWA LAW CHANGE TO CREATE A BURDEN SHIFTING ANALYSIS OF CONFIDENTIAL RELATIONSHIPS AND UNDUE INFLUENCE IN THE CONTEXT OF TESTAMENTARY DISPOSITIONS OF PROPERTY?

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STATEMENT SUPPORTING FURTHER REVIEW

This case warrants further review because the Iowa Court of Appeals decided a case where there is an important question of changing legal principles. I.R.A.P. 6.1103(b)(3). The District Court and Court of Appeals determined that the burden of proof does not shift to an individual in a confidential relationship with the testator. Iowa law currently holds that the burden of proof transfers in the case of inter vivos gifts, but the burden does not shift in testamentary transfers. The trend in decisions in other jurisdictions and the legal scholarship has been to abolish this particular distinction.

BRIEF

The District Court ruled in its motion for summary judgment on the relationship between a confidential relationship and undue influence. (Order on Motion for Summary Judgment pp. 6-8, App. 803-805). In particular the District Court quoted the Iowa Supreme Court as stating:

> A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another, and so it has been said that all the variety of relations in which dominion may be exercised by one person fall within the general term "confidential relationship." *Matter of Herm's Estate*, 284 N.W.2d 191, 199 (Iowa 1979) (quoting *Dibel v. Meredith*, 10 N.W.2d 28, 30 (Iowa 1943).

> "Where such confidential relationship exists, a transaction by which the one having the advantage profits at the expense of the other will be held presumptively fraudulent and voidable." Id. (citations removed). Further, the Court explained that when such confident relationship exits, "[t]he burden of proceeding with the evidence then shifts to the claimant to establish by clear and convincing proof that the advantage was procured without undue influence." Id. (citations removed). However, it appears as if this analysis is only considered when inter vivos transfers are involved. See In the Matter of Estate of Todd, 585 N.W.2d 273, 277 (Iowa 1998) (the more stringent inter vivos transfer standard overruled in Jackson v. Schrader, 676 N.W.2d 599 (Iowa 2003)). The court further noted that "a suspicion of overreaching may arise where the dominate party has participated in the actual preparation or execution of the will." Id. (citing In re Estate of Bayer, 574 N.W.2d 667, 675 (Iowa 1998)). Here, we only have testamentary transfers at issue and thus the burden shifting does not appear to apply. It remains for the Plaintiff to establish at trial the Defendant unduly influenced Mrs. Workman and there is a fact question precluding summary judgment on that issue.
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> (Order on Motion for Summary Judgment, App. 803-805)

The issue presented on this appeal is whether this should continue to be the standard for cases involving a confidential relationship and undue influence in the State of Iowa.

The Restatement (Third) of Property rejects a formulation of confidential relationships and undue influence that turns on whether the transaction was inter vivos or testamentary. The Restatement sets out the basic rule explaining: "A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud." Restatement (Third) of

Property: Wills & Donative Transfers § 8.3(a). The first part of the commentary to this section explains "This section applies to all donative transfers, whether inter vivos or testamentary." Restatement (Third) of Property: Wills & Donative Transfers § 8.3 comment a. Comment b explains that: "The burden of establishing undue influence, duress, or fraud (referred herein as the "wrong") is on the party contesting the validity of a donative transfer. In some circumstances the contestant's case may be aided by a presumption of invalidity. See Comment f." Restatement (Third) of Property: Wills & Donative Transfers § 8.3 comment a.

In Comment F to Restatement (Third) of Property: Wills & Donative Transfers § 8.3[1] the treatise explains undue influence:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption. See Comment *g* for what constitutes a confidential relationship, and see Comment *h* for what constitutes suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.

[1] The Restatement (Third) of Property: Wills & Trusts presents a new approach to the undue influence question. *See* Walker, James. *The Protective Doctrine of Undue Influence*, Colorado Lawyer (June 2009).

> Restatement (Third) of Property: Wills & Donative Transfers § 8.3, comment f.

The commentary also explains:

> The existence of a confidential relationship is not sufficient to raise a presumption of undue influence. There must also be suspicious circumstances surrounding the preparation, execution, or formulation of the donative transfer. Suspicious circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor.
>
> 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 alleged 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.
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> Restatement (Third) of Property § 8.3, comment h.

This standard requires the District Court to make a determination as to whether the presumption of undue influence arises. The District Court

found that the presumption could not apply in the case of a testamentary transfer and thus made no findings on the issue. (Order on Motion for Summary Judgment p. 8, App. 805). Instead, the District Court determined that the burden of going forward with the evidence remained with the contestant. (Order on Motion for Summary Judgment p. 8, App. 805).

Other jurisdictions have rejected drawing a distinction between inter vivos and testamentary transfers when it comes to undue influence. The Kansas Court of Appeals considered this issue and discussed the difference between inter vivos transfers and testamentary transfers. The Court explained:

> The guiding principles applicable to a claim of undue influence contesting contracts, inter vivos gifts, and wills are nearly identical. All share certain rules applicable to this action whether the POD accounts are considered "will substitutes," contracts, or a gift.
>
> ...
>
> The existence of a confidential or fiduciary relationship would have the same effect irrespective of whether the POD accounts are considered "will substitutes" or contracts.
>
> "A presumption of undue influence is not raised and the burden of proof shifted by the mere fact that the beneficiary of a will occupied a confidential or fiduciary relationship with the testator or testatrix. Such a presumption is raised and the burden of proof shifted, however, when, in addition to the confidential relationship, there exists suspicious circumstances." *Bennett,* 19 Kan.App.2d 154, Syl. ¶ 4, 865 P.2d 1062.
> See *In re Adoption of Irons,* 235 Kan. 540, Syl. ¶ 4, 684 P.2d

332; *In re Estate of Brown,* 230 Kan. 726, 732, 640 P.2d 1250 (1982).

Heck v. Archer, 927 F.2d 495, 499-500 (Kansas App. 1996).

In Nevada the Supreme Court reviewed a recommendation to invalidate a will and held:

> We have held that "[a] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction." *In re Jane Tiffany Living Trust 2001,* 124 Nev. 74, 78, 177 P.3d 1060, 1062 (2008) (addressing undue influence in the context of an attorney receiving an inter vivos transfer from a client). Once raised, a beneficiary may rebut such a presumption by clear and convincing evidence. *Id.* at 79, 177 P.3d at 1063. Undue influence may also be shown in the absence of a presumption. *See generally In re Estate of Hegarty,* 46 Nev. at 327, 212 P. at 1042.

In re Estate of Bethurem, 313 P.3d 237 (Nev. 2013).

The Kansas Supreme Court discussed the reasoning behind such a rule:

> But the very nature of a person exerting undue influence in a confidential relationship makes proving that situation with direct evidence a rarity; it is more commonly proved by circumstantial evidence. *Brennan v. Dennis,* 143 Kan. 919, 954, 57 P.2d 431 (1936); *Ginter,* 79 Kan. at 741, 101 P. 634 (" '[t]he evidence of undue influence will generally be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved.' ") (quoting *Nelson's Will,* 39 Minn. 204, 206, 39 N.W. 143 [1888]; see also *Mendenhall v. Judy,* 671 N.W.2d 452, 454 (Iowa 2003)) ("[U]ndue influence may be and usually is proven by circumstantial evidence."); *Blumer v. Manes,* 234 S.W.3d 591, 594 (Mo.App.2007) (case-by-case analysis required in undue

influence cases because they are often proved by circumstantial evidence); *Knowlton v. Schultz,* 179 Ohio App.3d 497, 508, 902 N.E.2d 548 (2008) (undue influence usually proved by circumstantial evidence); *In re Estate of Johnson,* 340 S.W.3d 769, 777 (Tex.App.2011) (exertion of undue influence is subtle and usually involves extended course of dealings and circumstances; usually established by circumstantial evidence).

That necessity of establishing undue influence through circumstantial evidence gave rise to the "suspicious circumstances doctrine" in a common-law claim of undue influence. See Feeney and Carmichael, *Will Contests in Kansas,* 64 J.K.B.A. 22, 27 (September 1995); see also *In re Estate of Maddox,* 60 S.W.3d 84, 88 (Tenn.App.2001) (recognizing that in most cases, proving undue influence must be done circumstantially through the existence of suspicious circumstances).

...

As noted above, after the proponent has proffered a prima facie case for validity, the burden has shifted to the contestant to show the requisite relationship and suspicious circumstances to create the presumption of undue influence. But then, upon the successful creation of the presumption of undue influence, the burden shifts back to the proponent of the testamentary document to rebut the presumption. See *Farr,* 274 Kan. at 71, 49 P.3d 415; *Haneberg,* 270 Kan. at 375, 14 P.3d 1088; *Brown,* 230 Kan. at 732, 640 P.2d 1250.

Cresto v. Cresto, 358 P.3d 831, 833-834 (Kansas 2015)

In New Jersey the law explains:

Ordinarily, the burden of proving undue influence falls on the will contestant. Nevertheless, we have long held that if the will benefits one who stood in a confidential relationship to the testator and if there are additional "suspicious" circumstances, the burden shifts to the party who stood in that relationship to the testator. *In re Rittenhouse's Will,* 19 *N.J.* 376, 378–79, 117

> *A.*2d 401 (1955); *see In re Blake's Will,* 21 *N.J.* 50, 55–56, 120 *A.*2d 745 (1956); *In re Davis's Will,* 14 *N.J.* 166, 170, 101 *A.*2d 521 (1953). In general, there is a confidential relationship if the testator, "by reason of ... weakness or dependence," reposes trust in the particular beneficiary, or if the parties occupied a "relation[ship] in which reliance [was] naturally inspired or in fact exist[ed]." *In re Hopper,* 9 *N.J.* 280, 282, 88 *A.*2d 193 (1952). Suspicious circumstances, for purposes of this burden shifting, need only be slight. *Rittenhouse's Will, supra,* 19 *N.J.* at 379, 117 *A.*2d 401.
>
> When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption.
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> *In re Estate of Stockdale*, 953 A.2d 454, 470 (N.J. 2008).

Likewise, other jurisdictions hold that a confidential relationship plus suspicious circumstances shifts the burden to the proponent to overcome the presumption of undue influence in a will contest. *See Kelley v. Johns*, 96 S.W.2d 189 (Tenn. App. 2002); *In re Moses' Will*, 227 So.2d 829 (Miss. 1969); *In re Fechter's Estate*, 277 N.W.2d 143 (Wis. 1979); *In the Will of Faulks*, 17 N.W.2d 423, 440 (Wis. 1945); *Matter of Estate of Gersbach*, 960 P.2d 811 (New Mexico 1998); *In re Estate of Holcomb*, 63 P.3d 9 (Okla. 2002); *In re Estate of Novak*, 458 N.W.2d 221 (Neb. 1990); *In re Aldrich's Estate*, 3 So.2d 856 (Florida 1941); *In re Estate Luongo*, 823 A.2d 942 (Penn. 2003); *In re Lobb's Will*, 145 P.2d 808 (Oregon 1944); *Eckstein v. Estate of Dunn*, 816 A.2d 494 (Ver. 2002); *Howard v. Nasser*, 613 S.E.2d 64

(S.C. 2005); *Ayers v. Shaffer*, 748 S.E.2d 83 (Vir. 2013); *In re Last Will and Testament of Melson*, 711 A.2d 783 (Del. Sup. 1998).

By way of contrast, the Iowa law on the subject does not allow for burden shifting in an undue influence case based on a confidential relationship and suspicious circumstances when testamentary transfers are at issue. The current state of Iowa law is as follows:

> Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefitted parties to prove—by clear, satisfactory, and convincing evidence—their freedom from undue influence. No such presumption of undue influence exists in the case of a will contest, even where the testator and beneficiary stand in a confidential relationship. *Bayer*, 574 N.W.2d at 675. But a suspicion of overreaching may arise where the dominant party has participated in the actual preparation or execution of the will. *Id.*
>
> *Matter of Estate of Todd*, 585 N.W.2d 273, 277 (Iowa 1998).

In *Matter of Estate of Bayer*, 574 N.W.2d 667 (Iowa 1998) the Supreme Court cited 79 Am.Jur.2d *Wills* § 428 for the proposition that "mere existence of a confidential relations between testator and beneficiary under will does not raise presumption that beneficiary exercised undue influence over testator." *Bayer* at 675. However, the current version of the 79 Am.Jur.2d Wills § 394 (2016) makes it clear that a presumption of undue influence can be raised and shift the burden to a proponent in a will contest. 79 Am.Jur.2d Wills § 394 (2016).

In *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 100 (Iowa 2013) this Court explained it believed the current state of Iowa law was: "[w]e reaffirmed, however, that if a confidential relationship existed between the testator and the putative beneficiary, the burden shifted 'to the recipient 'to establish by clear and convincing proof that the advantage was procured without undue influence.'" *Burkhalter* at 100. (citing *In re Estate of Todd*, 585 N.W.2d 273, 276 (Iowa 1998) and *In re Estate of Herm*, 284 N.W.2d 191, 200 (Iowa 1979)). However, the *In re Estate of Todd* case stands for the opposite proposition. *In re Estate of Todd* at 276. (holding "[n]o such presumption of undue influence exists in the case of a will contest, even where the testator and beneficiary stand in a confidential relationship."). As a result Iowa law is now unclear on this subject.

In *Burkhalter* this Court struggled with the appropriate standards to apply in a will contest based on a confidential relationship and undue influence. *Burkhalter* at 97. (stating "[s]o, courts have struggled with the concept of undue influence. Today, it is our turn."). The undoubted source of this struggle is the concept that jurors or judges are often presented with incomplete facts or circumstantial evidence. The source of these incomplete facts and circumstantial evidence are will contestants that were not present when the beneficiary in a confidential relationship exercised influence.

Undoubtedly not all influence is inappropriate. However, in these sorts of cases jurors or judges rarely hear the evidence about the content of the confidential conversations. When the contestant bears the burden of proof at all stages, then the proponent beneficiary has no incentive to provide evidence of their conversations with candor. If the law shifted the burden to the proponent after an appropriate showing of a confidential relationship and suspicious circumstances, then the law would create the incentive for proponents to bring these matters into the light.

This Court should adopt as Iowa law the "suspicious circumstances doctrine" as set forth in the Restatement (Third) of Property: Wills and Trusts § 8.3 and shift the burden to the proponent in those circumstances where a confidential relationship exists and there are suspicious circumstances concerning the execution of the will. The best reason for adopting this rule is that the person in the confidential relationship enjoys a serious advantage when it comes to the evidence of their dealings with the testator or testatrix. The beneficiary that can unduly influence a testator or testatrix can easily chose the time and place they exercise their influence. A reasonably careful person could influence the testator or testatrix outside the present of witnesses, family members and attorneys. As a result the beneficiary can victimize both the donor and the other beneficiaries without

much fear that legal action will be successful against them. When the improper beneficiary has no obligation to come forward with evidence rebutting the presumption they can simply sit back and watch a will contestant flounder based on a lack of evidence.

Obviously, the law should not shift the burden in every will contest where a confidential relationship exists. If that were the case then every person that is close to the testator or testatrix would have the burden of proving a lack of undue influence. However, this does not mean that Iowa law should hold that the presumption never arises. The jurisdictions and the Restatement (Third) of Property described above have set forth standards for fairly evaluating these issues. In particular the Restatement (Third) standard is designed to require more than just a confidential relationship and provides significant guidance on what constitutes "suspicious circumstances." This Court should adopt those standards and provide adequate protection to unduly influenced donors and the impacted beneficiaries.

This standard would resolve a great deal of the issues that this Court struggled with in *Burkhalter*. The issue in *Burkhalter* was that the undue influence doctrine "ostensibly safeguards testamentary freedom" but that the decision are more often "...dependent on the courts' normative views of the relationships between the testator, beneficiary and contestant than by the

actual presence or absence of factors often deemed indicative of undue influence." *Burkhalter* at 104-105. This Court explained that this "underlying critique" of undue influence law is the result of "any standard of clarity, fairness or predictability" in the legal standard. *Id.* at 104. However, this analysis overlooks the concept that the legal standard may seem lacking because the unique circumstances of a will contest provide one party a serious evidentiary disadvantage. It seems likely that jurors and judges are left judging the character of will proponent or applying social norms because the will proponent has no incentive to provide information about their interactions with the testator. A will proponent can simply state "I did not do it" and then point to the contestant's lack of direct evidence. In the absence of this sort of testimony the fact finder is left bereft of vital information. A change in the standard would alter this dynamic.

The different standard would significantly impact this case. The evidence demonstrates that Dennis Workman was kept from returning to work on the farm on numerous occasions. Gary testified about regular interactions with his mother but offered no substantive testimony about the nature of those interactions. (Trial Transcript pp. 183-185, App. 427-429). Instead he simply stated that he had not coerced his mother into writing these Wills. (Trial Transcript pp. 183-185, App. 427-429). In a situation of

such disparity of information the correct standard is to require a contestant to make a showing of a confidential relationship and suspicious circumstances and then shift the burden to the proponent to demonstrate a lack of undue influence. If Gary had the burden of coming forward with evidence to refute or rebut a presumption of undue influence then he would have every incentive to testify as fully as possible on the subject.

Instead of a jury making a decision against Dennis based on a failure to meet the burden of proof there is a significant likelihood that a jury would find a failure in Gary's evidence to rebut the presumption. For instance, Gary testified and presented evidence about his conversations with Margaret about Dennis's financial troubles. Gary offered the evidence clearly for the purpose of offering a competing theory as to his mother's state of mind. Gary's presentation of this evidence is much more detailed than the evidence concerning their discussions about estate planning. Dennis was at a significant disadvantage because he was not present for those conversations. He was simply unable to develop or present evidence on the effect of those conversations that occurred outside his presence, but in the presence of Gary. A jury, faced with applying the burden of proof to Dennis's case, most likely would hesitate to rule in his favor in such a situation. The lack of evidence can be fatal when a party bears the burden of proof. Conversely, if

Gary had to rebut the presumption then his reticence about his involvement with estate planning would be a serious strike against him.

It is important to remember how impactful the burden of proof is on jurors in a jury trial. Anyone that has spent a significant period of time listening to closing arguments knows that the burden of proof is often the defendant's best friend. In general, defendant's counsel spend significant portions of their closing argument emphasizing the word "prove" as if the plaintiff were required to scientifically or mathematically prove a theorem. This leads many jurors to conclude that if they are not 100% convinced of the plaintiff's position that they must rule in favor of the defendant's position. In particular the burden of proof requires that the jury find against a plaintiff if they are unable to determine where the truth lies. Presumptions are designed to assist a jury in those circumstances.

This Court should adopt the formulation of undue influence and confidential relationships set forth in Restatement (Third) of Property: Wills and Trusts § 8.3.

CONCLUSION

The Court should reverse the District Court Ruling on Summary Judgment and remand for a jury trial on the merits on all legal theories presented by the Plaintiff.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 3,811 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

By: /s/ Eric M. Updegraff .

CERTIFICATE OF SERVICE

I, Eric M. Updegraff, a member of the Bar of Iowa, hereby certify that on the 13th day of February, 2017, I served the above Appellant's Application for Further Review by electronic filing thereof to the following:

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I, Eric M. Updegraff, a member of the Bar of Iowa, hereby certify that on the 13th day of February, 2017, I served the above Appellant's Application for Further Review by ordinary mailing thereof to the following:

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CERTIFICATE OF FILING

I, Eric M. Updegraff hereby certify that I, or a person acting on my direction, did file the attached Appellants' Application for Further Review by electronic filing thereof to the Clerk of the Iowa Supreme Court at 1111 East Court Avenue, Des Moines, Iowa 50319 on this 13th day of February, 2017.

By: /s/ Eric M. Updegraff .