Howard v. Nasser: The Relative Burdens for Wills Contested on the Basis of Confidential Relationships and Undue Influence

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I. INTRODUCTION

In *Howard v. Nasser*, the South Carolina Court of Appeals made a new declaration regarding presumptions and the burden of proof for wills challenged on the basis of undue influence. Though the result in *Howard* appears unremarkable given that the court ultimately applied the general rule followed in South Carolina—the existence of a confidential relationship giving rise to a presumption in will cases shifts only the burden of producing evidence, not the burden of persuasion—the court’s direct reliance on *Dixon v. Dixon* distorts the clarity of its decision and creates uncertainty in South Carolina’s undue influence jurisprudence. The court seemed to rely on *Dixon* to state the presumption of invalidity arising from a confidential relationship in deed cases, which shifts the entire burden of proof to the proponent, also applies in will cases. The confusion arises because, before *Howard*, South Carolina courts consistently held that the presumption of undue influence operates differently in will cases than in deed cases.

A court’s most important goal in will contest cases is protecting “testamentary freedom” by ensuring the deceased’s estate is distributed according to the deceased’s wishes. The goal of “testamentary freedom furthers important social policies” throughout the United States. By honoring the will of the testator, “[t]estamentary freedom provides an incentive for property owners to remain economically engaged, to make their capital productive and to preserve, rather than consume, their assets.” Protecting testamentary freedom also serves as an incentive for family members or loved ones to care for each other, in hopes of becoming beneficiaries.

To ensure the testator’s wishes are carried out, the law requires the testator to possess testamentary capacity as well as be free from fraud or undue influence at the time the testator executes the will. A donative transfer is the product of undue influence “if the wrongdoer exerted such influence over the donor that it overcame

2. Id. at 287, 613 S.E.2d at 68.
5. See E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 276–78 (1999) (“Freedom of testamentation encompasses the right to pass one’s property at death to the persons or institutions of one’s choosing.”).
6. Id. at 278.
7. Id.
8. Id.

531
the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made. ¹⁰ The contestant of the donative transfer has the burden of proving undue influence, but presumptions affecting the burdens of proof may arise in the contestant’s favor.¹¹

This Note focuses on the clarification of the relative burdens of proof in South Carolina will contest cases. Part II provides an overview of Howard v. Nasser and attempts to ascertain Dixon’s role in the court’s analysis. Part III attempts to clarify the parties’ relative burdens of proof in both will and deed cases. Part III also analyzes the nature of confidential relationships, their role in giving rise to a presumption, the nature of presumptions in general, and the effect presumptions have on the burden of proof. Finally, Part III explores the reasons for applying different presumption rules in deed and will cases versus the reasons for applying a uniform rule. Part IV concludes by examining South Carolina’s position in light of the uncertainty created by Howard v. Nasser and the steps the state can take in the future to reduce confusion. While there is some justification behind applying a uniform rule in both deed and will cases, maintaining separate rules is the most effective way to serve the interests of the parties while ensuring the contestant does not have a distinct advantage.

II. THE HOWARD V. NASSER DECISION ON UNDUE INFLUENCE: UNCERTAINTY CREATED BY RELIANCE ON DIXON V. DIXON, THE RESTATEMENT, AND SOUTH CAROLINA CODE SECTION 62-3-407

A. Facts and Procedural History

The testator Nasser’s disinherited nephews filed a will contest alleging JoAnn, Nasser’s widow, procured the will through undue influence.¹² Nasser’s prior will, signed after his first wife died, left his estate to his nephews.¹³ While in the hospital recovering from a fall, Nasser met JoAnn, who worked at the hospital.¹⁴ The two married in May 1999, approximately nine months after meeting.¹⁵ After his marriage to JoAnn, Nasser gave her a power of attorney, thus revoking the power of attorney he previously gave to one of his nephews.¹⁶ He also executed a new will on April 10, 2000, which left nothing to his nephews but instead left $10,000 to each of his great-nieces and the remainder to JoAnn.¹⁷ Nasser died on May 19, 2000, as a result of pancreatic cancer and cirrhosis.¹⁸ Since Nasser’s will was

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11. Id. § 8.3 cmt. b.
13. Id. at 282, 613 S.E.2d at 65.
14. Id. at 282, 613 S.E.2d at 65.
15. See id. at 282–83, 613 S.E.2d at 65.
16. Id. at 282, 613 S.E.2d at 65.
17. Id. at 282, 613 S.E.2d at 65.
properly executed, his family entered it into probate, and the court appointed JoAnn as personal representative of the estate.19

The nephews "filed a petition in probate court, alleging causes of action for undue influence, lack of mental capacity, fraud, and tortious interference with an expectancy to inherit."20 Subsequently, "[p]ursuant to section 62-1-302 of the South Carolina Code of Laws, the parties consented to remove the action from probate court to circuit court."21 After hearing arguments, the circuit court granted summary judgment in favor of JoAnn, ruling that the "burden of proving undue influence could not be shifted to [JoAnn]" and that the nephews "continued to bear the burden of proof even if a confidential/fiduciary relationship existed between [JoAnn] and Nasser."22 The nephews appealed the circuit court order, but only as to the undue influence cause of action.23

B. Holding and Reasoning

The issue before the South Carolina Court of Appeals was "whether [the] presumption [of undue influence], which affects the burden of proof, is applicable in the context of a contested will."24 In contested deed cases, a presumption of invalidity arises if the contestant presents evidence that a confidential relationship existed between the grantor and grantee.25 Once the presumption of undue influence arises, the burden then shifts to the proponent to "affirmatively show the absence of undue influence."26 While no relevant case law exists on this issue in the context of will cases, the Howard court looked to Dixon v. Dixon, a similar case regarding a deed contest, for guidance.27 The court of appeals believed the supreme court in Dixon "implicitly recognize[d] that the presumption of invalidity in deed cases applies to will cases."28 However, while the court of appeals suggested that Dixon creates an implicit connection between the presumptions in deed and will cases, the connection is more limited than it may appear at first glance.

1. Dixon v. Dixon

In Dixon, an elderly mother conveyed property to her son, in exchange for the son’s simultaneously signing a Lifetime Agreement to take care of his mother and

19. Id. at 282, 613 S.E.2d at 65.
20. Id. at 283, 613 S.E.2d at 65.
21. Id. at 283 n.1, 613 S.E.2d at 65 n.1 (citing S.C. CODE ANN. § 62-1-302(c) (Supp. 2004)).
22. Id. at 284, 613 S.E.2d at 66.
23. Id. at 284, 613 S.E.2d at 66.
27. See Howard, 364 S.C. at 287, 613 S.E.2d at 68.
28. Id. at 287, 613 S.E.2d at 68 (citing Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)).
maintain her residence. The mother testified "she knew what she was doing when she signed the deed" and the Lifetime Agreement. Prior to executing the deed, mother and son opened a joint checking account and mother granted son a limited power of attorney. After a confrontation three years later, "Mother asked Son to leave her home" and re-convey the title to her home. The son refused and his mother brought suit.

The master-in-equity determined that the son was the owner of the property, finding that his mother failed to establish that the deed was the result of undue influence. Mother appealed and raised several issues—the pertinent issue being whether "the master err[ed] in refusing to set aside the deed for undue influence." The South Carolina Supreme Court agreed that the mother and son shared a confidential relationship, which exists when the grantor presents sufficient evidence that she placed her "trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." The court stated that "[o]nce a contestant has proven a confidential relationship existed at the time of conveyance, the burden shifts to the grantee to prove that the contestant's conveyance was not the product of undue influence." In determining whether the son satisfied this burden, the court noted that principles of undue influence in will cases were applicable to deed cases and stated that the nature of "the influence must be the kind... which destroys the free agency of the creator and constrains him to do things... he would not have done if he had been left to his own judgment and volition." In a footnote, the court made the following statement: "Most of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed...; nonetheless, we find no reason why this discrepancy should change our analysis." Based on this reasoning, the court held the son met his burden of proving the absence of undue influence.

The court's analysis in Dixon did not focus on the burden-shifting device of a confidential relationship. The court instead referred to the degree of pressure or coercion required to find undue influence—the type of influence the contestant must disprove once the burden has already shifted. Also, the two cases supporting

30. Id. at 394, 608 S.E.2d at 851–52.
31. Id. at 393, 608 S.E.2d at 851.
32. Id. at 394, 608 S.E.2d at 852.
33. Id. at 394, 608 S.E.2d at 852.
35. Id. at 395, 608 S.E.2d at 852.
36. Id. at 397, 608 S.E.2d at 853 (quoting Brooks v. Kay, 339 S.C. 479, 488, 530 S.E.2d 120, 125 (2000)).
37. Id. at 398, 608 S.E.2d at 853 (citing Brooks, 339 S.C. at 489, 530 S.E.2d at 125).
38. See id. at 398 n.7, 608 S.E.2d at 854 n.7.
41. Id. at 399, 608 S.E.2d at 854.
42. See id. at 398, 608 S.E.2d at 854.
43. See id. at 398, 608 S.E.2d at 854.
the supreme court's proposition in *Dixon*, that the process of proving undue influence in the execution of a deed is the same for that of a will, may not be persuasive on the issues of presumptions and burden shifting.\(^{44}\) Therefore, it is unlikely that the *Dixon* court intended its reasoning—"we find no reason why this discrepancy [between a deed and a will] should change our analysis"\(^{45}\)—to apply to the procedural issue of shifting the burden of disproving the existence of undue influence to the proponent.

In *Howard*, it is unclear why the court of appeals did not rely on *Mordecai v. Canty*,\(^{46}\) which seems to relate directly to the issue of the procedural aspects of burden shifting. Although the *Mordecai* decision is almost one-hundred years old, the South Carolina Court of Appeals cited *Mordecai* as recently as 1999.\(^{47}\) In *Mordecai*, the supreme court was asked whether, on facts and circumstances giving rise to a presumption of invalidity, "the burden shifted to the proponent of the will to prove affirmatively testamentary capacity" and, thus, the absence of undue influence.\(^{48}\) The *Mordecai* court placed "the burden ... on the contestant to prove fraud, undue influence, incapacity, or other ground of objection to the will, and this burden remains upon them to the end."\(^{49}\) Similar holdings followed *Mordecai*,\(^{50}\) and in 1986 the legislature enacted the South Carolina Probate Code to consolidate and revise aspects of the law pertaining to general probate definitions, intestate succession, administration of a decedent's estate, protection of disabled persons,

\(^{44}\) The *Dixon* court references a Wisconsin Supreme Court case in the footnote analyzing this issue. *See id.* at 398 n.7, 608 S.E.2d at 854 n.7. At first glance, the Wisconsin decision seems helpful because it states that "[u]ndue influence in the execution of an inter vivos conveyance is proved in the same way that undue influence is proved in the execution of a will." First Nat'l Bank of Appleton v. Nennig, 285 N.W.2d 614, 623 (Wis. 1979) (citing *In re Estate of Taylor*, 260 N.W.2d 803 (Wis. 1978)). However, that statement was made in the context of substantively proving the existence of undue influence, while the *Dixon* court considered it in terms of "whether Son satisfied his burden to prove that he did not unduly influence Mother to convey him the property." *See Dixon*, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7.

*Dixon* also references a Massachusetts case which holds wills and deeds can be analyzed in the same manner for purposes of undue influence. *See id.* at 398 n.7, 608 S.E.2d at 854 n.7. In *Lyons v. Elston*, 98 N.E. 93 (Mass. 1912), the Massachusetts Supreme Court stated that "the means for executing [the grantor's] purpose," whether it be a will or a deed, "is not a primary but a wholly incidental consideration, which does not modify the main finding of the exercise of undue influence." *Id.* at 94. Again, the Massachusetts opinion did not discuss the parties' burdens or the possibility of a presumption. *See id.*


\(^{46}\) 86 S.C. 470, 68 S.E. 1049 (1910).


\(^{48}\) *See Mordecai*, 86 S.C. at 477, 68 S.E. at 1052.

\(^{49}\) *Id.* at 477, 68 S.E. at 1052.

\(^{50}\) *See, e.g.*, Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) (stating that "[t]he contestants continue to bear the burden of [proving undue influence] throughout the will contest"); Smith v. Whetstone, 209 S.C. 78, 83-84, 39 S.E.2d 127, 129 (1946) ("The burden of proof rests upon the contestants to establish the existence of undue influence ... and this burden remains on him to the end.") (citing Goethe v. Browning, 146 S.C. 7, 14, 143 S.E. 362, 365 (1928)); *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 393 (Ct. App. 1999) (stating that "[c]ontestants of a will have the burden of establishing undue influence" (citing S.C. CODE ANN. § 62-3-407 (Supp. 1997))).
and other related topics. 51 Section 62-3-407 directly addresses the burdens in contested will cases. 52

2. Restatement (Third) of Property and South Carolina Code Section 62-3-407

In Howard, the court of appeals also relied on the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement) and South Carolina Code section 62-3-407 to support the application of a presumption to contested will cases. 53 However, this presumption is not exactly the same presumption that was outlined in the deed cases. The Restatement provides:

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. 54

The Howard court interpreted this Restatement comment and section 62-3-407 together "to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal," but "they do not have to affirmatively disprove the existence of undue influence." 55 The court also applied the well-recognized rule in South Carolina that "the contestants of the will still retain the ultimate burden of proof to invalidate the will." 56 After hearing the evidence presented by both parties, the Howard court reversed and remanded the case, concluding that a genuine issue of material fact existed and that the circuit court improperly granted summary judgment to JoAnn. 57

54. RESTATEMENT, supra note 10, § 8.3 cmt. f.
56. Id. at 288, 613 S.E.2d at 69; see also supra notes 47–49 and accompanying text (discussing South Carolina case law supporting the proposition).
57. Howard, 364 S.C. at 291, 613 S.E.2d at 70. The parties agreed a confidential relationship existed between Nasser and JoAnn, based in part on the power of attorney given to her. Id. at 290, 613 S.E.2d at 69. The nephews offered additional evidence in support of a finding of undue influence: Nasser was physically infirm prior to the execution of the will, the final will was dramatically different.
The effect of the presumption explained in the Restatement is quite different than that in Dixon. It is possible that the court of appeals relied on Dixon to find that the existence of a confidential relationship is relevant in will contests, but Dixon placed greater significance on such a relationship in deed cases. While the court of appeals in Howard seemed to rely directly on Dixon, the effect of a presumption of undue influence in will cases will likely remain unchanged. The Howard court reinforced earlier South Carolina case law by affirmatively holding that “the burden of proof as to undue influence remains on [the contestants] throughout the will contest.”

III. CLARIFICATION AND ANALYSIS: THE CONFIDENTIAL RELATIONSHIP, PRESUMPTIONS, AND BURDEN OF PROOF—PIECES OF THE UNDUE INFLUENCE PUZZLE AND HOW THEY FIT INTO WILL AND DEED CONTEST CASES

A. The Nature of Confidential Relationships

Generally, jurisdictions broadly interpret the meaning of confidential relationships: “[A] confidential relationship giving rise to fiduciary obligation may include any business, social, or purely personal relationship in which one party justifiably places trust and confidence in another to care for his or her welfare and interests.” Common confidential relations include: guardian[,] power of attorney[,] partner[,] business agent[,] business associate[,] legal counsel[,] medical advisor[,] physician[,] nurse[,] and spiritual adviser.] Most courts state that confidential relationships are not limited to formal fiduciary relationships, but “may also arise informally from moral, social, domestic, or purely personal relationships.”

from the first two wills executed, JoAnn was present at meetings with attorneys to discuss the new will, Nasser’s relationship with the nephews became strained after the marriage to JoAnn, a family member believed that someone was monitoring Nasser’s phone calls, and a previous attorney refused to draft the will because he believed it troubled Nasser. Id. at 290, 613 S.E.2d at 69–70. The court stated this evidence was enough to raise a presumption of undue influence, requiring JoAnn to present evidence in rebuttal. Id. at 290, 613 S.E.2d at 70. JoAnn then offered evidence that physicians did not discern mental infirmity; the attorney preparing the new will believed the testator had the requisite capacity to dispose of his estate; a stockbroker testified that Nasser did not want the nephews to have his money; and JoAnn denied using the power of attorney, restricting visits, or monitoring phone calls. Id. at 290–91, 613 S.E.2d at 70.

At the core of a confidential relationship is a fiduciary duty—"the highest order of duty imposed by law." The beneficiary of a confidential relationship owes to the principal the "utmost good faith and candor" and "must not profit from the relationship without the knowledge and permission of the principal." The nature of the relationship gives rise to the potential for abuse. The elements of trust and dependence the principal places in the fiduciary leaves the principal vulnerable to the wishes of and coercion by the fiduciary. Because of this vulnerability, courts often presume undue influence in a transfer of property between principal and beneficiary.

However, South Carolina accepts the Restatement's explanation that a presumption of undue influence arises where the testator and beneficiary were in a confidential relationship and there were suspicious circumstances surrounding the transfer. In determining whether suspicious circumstances are present, courts look to a variety of factors including the following: whether the beneficiary actively participated in the preparation and execution of the will, whether the beneficiary received an undue benefit, the testator's mental capacity, the testator's lack of independent counsel, an unexplained change in attitude toward those to which the testator previously showed affection, and change in a previous testamentary plan. This rule is contrary to a historical, but lasting, rule in South Carolina that a confidential relationship alone may raise the presumption of undue influence for inter vivos transfers. The reason courts require the will contestant to show more

relationships encompass "informal relationship[s] . . . whether the relation is a moral, social, domestic, or merely personal one").

63. Id.
66. Mignogna, supra note 60, at 126.
67. In the context of challenging a trust, the South Carolina Supreme Court stated: [T]he relations of these parties to [the grantor]—that is to say, her husband and her stepson, who had accepted the position as trustee—were such as to raise the presumption that constructive fraud was committed and undue influence was used to bring about this [trust] for the purpose of transferring the property from [the grantor's] control to the control of [her husband] and his children, and to practically deprive her of the same. The law then placed the burden upon the parties interested to show that there was no such constructive fraud or undue influence . . . .

Where a party challenged the assignment of an insurance policy, the supreme court examined the link between a confidential relationship and undue influence, stating:

"While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the
than a confidential relationship is likely because wills enjoy a presumption of validity, and courts strive to be particularly cautious when contradicting the supposed wishes of the testator.

B. The Nature of the Presumption and Its Effect on the Burden of Proof

The general rule is the contestant of a will has the burden to prove undue influence. A burden of proof includes two elements: the burden of producing evidence and the burden of persuasion. The following excerpt describes and distinguishes the two elements:

The "burden of persuasion" means the "obligation of a party to produce a particular conviction in the mind of the trier of fact as to the existence or nonexistence of a fact." By contrast, the "burden of production" means "the liability to an adverse ruling if the further evidence on the issue is not produced."

When a presumption applies, if a party proves certain facts at trial, the factfinder must accept a second fact—the "presumed fact"—as proven, unless the adverse party introduces sufficient evidence that is likely to rebut the presumed fact. "The underlying purpose and impact of a presumption is to affect the burden of going forward." Several factors may affect the presumption, and the presumption "may shift the burden of production as to the presumed fact, or [it] may shift both the burden of production and the burden of persuasion." Presumptions shifting only the burden of production are those which assist in the

presumption."

Way v. Union Cent. Life Ins. Co., 61 S.C. 501, 505, 39 S.E. 742, 743 (1901) (quoting 2 POM. EQ. JUR. § 956 (2d ed. 1901)).

Finally, in an action to set aside a deed, where parties had established a confidential relationship, the supreme court stated that, "without reference to the infirmity of one of the parties, the other party who has received a benefit by the transaction must prove that the transaction was fair." Huguenin v. Adams, 110 S.C. 407, 412, 96 S.E. 918, 919 (1918) (citing Way, 61 S.C. at 505, 39 S.E. at 743). The burden of persuasion thus shifts along with the burden of production for each of these inter vivos transfers.

69. Id.
70. 29 AM. JUR. 2D Evidence § 155 (1994).
71. Kurt Wanless, Comment, Rethinking Oregon's Law of Undue Influence in Will Contests, 76 OR. L. REV. 1027, 1043 (1997) (quoting LAIRD C. KIRKPATRICK, OREGON EVIDENCE 63, 69 (3d ed., Michie 1996)). Oregon's rule is similar to South Carolina's rule: the existence of a confidential relationship plus other suspicious circumstances gives rise to a presumption of undue influence, causing the burden of production to shift to the proponent of the will. See id. at 1029–30. Wanless's Comment criticizes Oregon's burden-shifting procedure, but offers a detailed discussion on the justifications behind such procedure. See id. at 1027–42.
72. 29 AM. JUR. 2D Evidence § 181 (1994).
73. Id.
74. Id.
determination of a claim, while presumptions shifting the burden of persuasion along with the burden of production are those which implement public policy. The presumption of undue influence in South Carolina shifts the burden of producing evidence to the proponent of the will. The purpose of creating this presumption of undue influence upon a showing of a confidential relationship and suspicious circumstances is "to bring more evidence into the court's decision-making process." Undue influence in procuring a will generally takes place behind closed doors. Thus, the contestant is often able to provide only circumstantial evidence, and circumstantial evidence is insufficient to carry the burden of proving undue influence. To ease this burden, the contestant may invoke the presumption of undue influence upon a showing of a confidential relationship accompanied by "suspicious circumstances." If the proponent of the will fails to come forth with any evidence to rebut this presumption, the court may infer that undue influence occurred in procuring the will and that the evidentiary standard of "preponderance of the evidence" has been satisfied.

C. Application of Different Presumption Rules in the Context of Testamentary and Inter Vivos Transfers

1. Reasons for Applying Different Rules

Several possible explanations exist for applying different rules regarding the presumption of undue influence based on the existence of a confidential relationship. First, if the entire burden of proof shifted to the proponent of the will, the proponent would face a nearly "impossible evidentiary burden." Wills are unilateral transactions, and the beneficiaries often possess no knowledge of the gift prior to the testator's death, unlike most grantees of an inter vivos gift. Requiring the beneficiary to provide evidence establishing the absence of undue influence when he has "no personal knowledge of the circumstances of the will, may be unreasonable." Recipients of inter vivos gifts generally have knowledge of the transaction and therefore will be able to produce evidence to satisfy their burden of persuasion. In addition, even if the beneficiary was aware of the circumstances at

77. See Wanless, supra note 71, at 1032.
79. Wanless, supra note 71, at 1033.
80. Id.
81. See Pauline Ridge, Equitable Undue Influence and Wills, 120 L.Q. Rev. 617, 629 (2004). Although the Law Quarterly Review is a British publication, the points it raises in the context of wills and undue influence are applicable to South Carolina law.
82. See id. at 630.
83. See id.
the time of procurement, it is unlikely the beneficiary will confess to any wrongdoing. Another evidentiary concern is that the testator will not be able to testify as to his intent or state of mind at the time he executed the will.\textsuperscript{84} This, however, may not be a material factor because survivors may challenge deeds after the grantor’s death, and the same evidentiary issue would be present.\textsuperscript{85}

A second reason for applying the presumption of undue influence differently in inter vivos as opposed to will cases involves the ultimate effect on the grantor or testator. An inter vivos transfer of assets leaves the grantor in some ways “impoverished.”\textsuperscript{86} The testator does not feel this impact because he has no further use of his assets after death.\textsuperscript{87} Therefore, courts can reasonably require the proponent of a deed to sustain a higher burden of proof to prevent the danger of leaving a grantor destitute. Beneficiaries of a will not procured by undue influence may also experience the harmful effects of undue influence. This group includes the residuary legatees of intestacy or people to whom the testator may have left assets absent undue influence.\textsuperscript{88} Identifying this second group of beneficiaries may not be possible.\textsuperscript{89} The difficulty in proving the existence of such “victims”\textsuperscript{90} of testamentary undue influence supports the rule calling for a shift only in the burden of going forward with the evidence and not the ultimate burden of persuasion.

A third factor to consider is one that is inherent in all will contest cases—the protection of testamentary freedom.\textsuperscript{91} Because wills are presumed to be a valid expression of the testator’s intent, courts are hesitant to rewrite wills. Thus, the burden of persuasion regarding the invalidity of a will should remain with the contestant. The court should not find the will invalid unless the proponent does nothing to show that the will was valid, or the contestant of the will has sufficiently met the burden of proving undue influence “unmistakenly and convincingly.”\textsuperscript{92} This notion prevents the judge from canceling a truly valid will solely on the basis of a lack of evidence demonstrating validity. Again, in terms of evidentiary concerns, it is more likely the grantor, if alive, can convince the court of his intent because he will be available for testimony.

Finally, the possibility of an increase in will contests supports a rule that the ultimate burden of proof should remain with the contestant throughout the case.\textsuperscript{93} As mentioned before, courts strive to uphold the policy that wills are presumptively

\textsuperscript{84} Id. at 629.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 627.
\textsuperscript{87} Ridge, supra note 81, at 627.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} See Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); see also Wanless, supra note 71, at 1027 (“The law of undue influence is intended to protect testamentary freedom by invalidating wills which are not true representations of the testator’s free volition, but rather, are products of coercion, trickery, or duress.”).
\textsuperscript{93} See Wanless, supra note 71, at 1027.
valid. If a potential contestant knows the burden is merely to show the existence of a confidential relationship and suspicious circumstances surrounding the making of the will, the would-be contestant will be more likely to file suit, even if there is little or no solid basis for an undue influence claim. More and more "disgruntled beneficiaries and non-beneficiaries [will] frivolously contest wills in an effort to get their perceived 'fair share' of the estate." Disgruntled non-grantees of inter vivos gifts are unlikely to bring claims during the grantor's lifetime because the grantor can easily testify as to his intentions. Moreover, although disgruntled parties may bring claims after a grantor dies, there will likely be more evidence of the grantor's intentions than with a testamentary devise.

2. States Applying the Different Rules

South Carolina has applied different presumptions to inter vivos and testamentary transfers in the past and, despite the confusion after Howard, these rules remain in effect. Some jurisdictions shift the burden of persuasion to the proponent, while other jurisdictions, like South Carolina, merely shift the burden of going forward with the evidence. The following are jurisdictions that apply different rules to testamentary transfers than to inter vivos transfers.

The North Carolina Court of Appeals, for example, noted that "caveators in a will caveat proceeding continue to bear the burden of proof on the issue of undue influence despite any presumptions that may arise in their favor." However, in the context of a deed, the North Carolina Court of Appeals held that "when a transferee of property stands in a confidential or fiduciary relation to the transferor, the transferee has the burden of showing that in getting the property he acted fairly and in good faith."

Virginia supports these theories, stating, in the context of wills as opposed to deeds, "once the presumption of undue influence arises, the burden of producing evidence tending to rebut the presumption shifts to the opposing party." The South Dakota Supreme Court agreed, stating the following: "[I]f will contestants can establish the existence of a confidential relationship between the testatrix and the beneficiary under the contested will, the burden of going forward with the evidence shifts to the beneficiary to show that he took no unfair advantage of his dominant position.

95. Wanless, supra note 71, at 1027.
99. In re Estate of Elliot, 537 N.W.2d 660, 663 (S.D. 1995) (citing In re Estate of Till, 458 N.W.2d 521, 523 (S.D. 1990)).
In Kronebusch v. Lettenmaier, the North Dakota Supreme Court stated once the grantee establishes a confidential relationship with the grantor, the grantee under the deed "'bears the burden of showing ... [t]hat the deed was freely and voluntarily made; that ... [the grantor] knew what he was doing when he executed the deed; and that no such fraud or undue influence exists to warrant its cancellation.'" Other states supporting this theory include Arkansas, Illinois, New York, Oregon, and Washington.

D. Uniform Application of Shifting the Entire Burden of Proof in Inter Vivos and Will Cases

1. Reasons for Applying the Same Rule

Protecting testamentary freedom supports the argument for shifting only the burden of producing evidence, but may also lend support to the argument for shifting the entire burden of proof to the proponent of a will after the contestant shows the existence of a confidential relationship. One commentator has argued similar public policy issues in "postdeath challenges regardless of whether the disputed gift is testamentary or inter vivos" necessitate uniformity among rules regarding presumptions and burdens of proof. In a confidential relationship, whether in the context of a deed or a will, substantial room exists for the exertion of undue influence and overreaching. Because the opportunity to exert undue influence is so great within confidential relationships, some states presume undue influence has occurred, regardless of whether it occurs in the context of testamentary or inter vivos transfers. A person in a confidential relationship who claims a gift under such circumstances should anticipate a higher burden of proof.

100. 311 N.W.2d 32 (N.D. 1981).
101. Id. at 34 (quoting Mehus v. Thompson, 266 N.W.2d 920, 926 (N.D. 1978)).
102. See, e.g., Hiler v. Cude, 455 S.W.2d 891, 901 (Ark. 1970) (stating while the burden of proving undue influence never shifts from the will contestant, "the burden of going forward with the evidence may shift at various times during the trial" (quoting 29 A.M.JUR.2D Evidence § 125)); Franciscan Sisters Health Care Corp. v. Dean, 448 N.E.2d 872, 876 (Ill. 1983) ("The burden of proof [in a contested will case] thus does not shift but remains with the party who initially had the benefit of the presumption."); In re Wharton's Will, 62 N.Y.S.2d 169, 172 (App. Div. 1946) ("Undue influence is an affirmative assault on the validity of a will and the burden of proof on that issue does not shift but remains on the party who asserts its existence."); In re Southman's Estate, 168 P.2d 572, 581 (Or. 1946) ("The existence of a confidential relationship, such as that of guardian and ward, when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof ... ."); White v. White, 655 P.2d 1173, 1176 (Wash. Ct. App. 1982) ("In a will contest, the initial burden is placed upon the contestant to prove the existence of undue influence by clear and convincing evidence; if so proved, only then does the burden shift to the proponent of the will to come forward with sufficient evidence to rebut this presumption." (citing In re Estate of Reilly, 479 P.2d 1, 24 (Wash. 1970)); In re Estate of Smith, 411 P.2d 879, 884 (Wash. 1966))).
103. See supra notes 91–92 and accompanying text.
In addition, the fiduciary obligation, which is "the essence of a confidential relationship" and "the highest order of duty imposed by law," mandates "the fiduciary must . . . disclose all relevant information, and must not profit from the relationship without the knowledge and permission of the principal."\(^{106}\) For these reasons, courts should hold those who have allegedly breached fiduciary duties to a higher standard than simply producing evidence. As previously mentioned, the stronger presumption, which shifts the burden of production and persuasion, enhances public policy.\(^ {107}\) Protection of a vulnerable relationship—no matter the transaction at issue—seems to be an important public policy to state courts, as almost all states recognize some kind of presumption of invalidity after a showing of a confidential relationship. If the courts and the legislature deem this an important policy to implement, then the presumption should be uniform to all transactions, shifting the entire burden of proof.

A second justification for increasing the burden placed on proponents of wills to match the higher burden placed on proponents of deeds is the protection of relatives.\(^ {108}\) Because the "norm favoring family furthers donative freedom on the whole in that it appropriately reflects the wishes of the average testator,"\(^ {109}\) courts favor disposition to spouses first, then to blood relatives, and then to institutions and friends.\(^ {110}\) The Arkansas Court of Appeals held that a testator has a moral duty to provide for relatives, stating:

Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.\(^ {111}\)

To further the goal of protecting the family and ensuring family support, courts should allow the presumption of undue influence within a confidential relationship to shift the entire burden of proof to the proponent. When deciding whether the proponent has met the burden of proof, courts should take into consideration whether the proponent is or is not a family member. If the proponent is not a family member but merely a nontraditional beneficiary, the beneficiary may have a significantly lower chance of overcoming an undue influence challenge.

In an 1859 South Carolina Court of Appeals case, the court stated a testator was "under a higher moral obligation to provide for his own children," and he "provided

\(^{106}\) Anderson, supra note 59, at 317.

\(^{107}\) See Nilsson, supra note 75, at 23.

\(^{108}\) See Spiiko, supra note 5, at 279.

\(^{109}\) Id.

\(^{110}\) Id. (citing Mary Louise Fellows, In Search of Donative Intent, 73 IOWA L. REV. 611, 621–22 (1988)).

for them as natural affection and moral duty demanded."\textsuperscript{112} This statement suggests South Carolina might support some aspect of the rule favoring familial beneficiaries, even though similar language has not appeared in any subsequent undue influence will contest case. In addition, the rule favoring distribution to family members is result-oriented rather than policy-oriented.

\textbf{2. States That Apply the Same Rule}

Several states have concluded that the presumption of undue influence shifts the ultimate burden of persuasion to the proponent of the will, just as in deed cases. Reacting to the confusion over which burden shifted in response to the presumption of undue influence, the Florida legislature amended its law to provide that "\textquote{the presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof.}\textquote{113} Subsection (2) of the Florida statute does not differentiate between wills and deeds.\textsuperscript{114} A recent case presented significant discussion on the amended statute:

The effect of the amended statute is "\textquote{to make clear that the presumption of undue influence by an actively involved substantial beneficiary who is in a fiduciary or confidential relationship with the testator is a policy-based shifting of the burden of proof. This ensures that the presumption does not} \textquote{vanish} \textquote{upon production of rebuttal evidence by the proponent of the will.}\textquote{115}

In Delaware, if the contestant proves the existence of a confidential relationship, "\textquote{the burden shifts to the proponent of the will to prove by a preponderance of the evidence that the testator or testatrix possessed the requisite testamentary capacity and to show the absence of undue influence.}\textquote{116} Delaware courts follow the same rule in deed cases, stating that "\textquote{once the fiduciary relationship is found to exist \ldots the burden of showing the fairness of a transfer to the one in the dominant position of confidence is placed upon the person seeking to sustain the transfer.}\textquote{117}

\begin{itemize}
\item \textsuperscript{112} McKnight v. Wright, 46 S.C.L. (12 Rich.) 232, 243 (1859).
\item \textsuperscript{113} FLA. STAT. ANN. § 733.107(2) (2005).
\item \textsuperscript{114} See \textit{id}.
\item \textsuperscript{116} \textit{In re} Last Will and Testament of Melson, 711 A.2d 783, 788 (Del. 1998).
\item \textsuperscript{117} White v. Lamborn, No. 4471, 1977 WL 9612, at *4 (Del. Ch. Mar. 15, 1977) (citing Swain v. Moore, 71 A.2d 264 (Del. Ch. 1930)).
\end{itemize}
A Pennsylvania court made a similar pronouncement in terms of a will:

[G]enerally speaking, the burden of proving lack of testamentary capacity or undue influence or confidential relationship rests upon the person asserting the same . . . . But a more difficult question arises in those cases in which a person in a confidential relationship receives the bulk of the donor’s or testator’s property. If the donor or testator was of weakened intellect, the burden is upon the person occupying the confidential relation to prove that the act or gift or bequest was the free, voluntary and clearly understood act of the other party and that the entire transaction, gift or bequest was unaffected by undue influence or imposition or deception or fraud. If, however, the confidential relationship is not coupled with weakened intellect the burden of proof in will cases is upon those asserting undue influence.\(^{118}\)

In 2005, the Arizona Court of Appeals ruled "that the presumption of undue influence, once it arises, shifts the burden of persuasion to the proponent of a will," similar to that of a deed.\(^{119}\) This decision in Mullin changed state law and aligned Arizona’s jurisprudence on the presumption and burden in will and deed cases with Delaware and Pennsylvania.

**IV. Conclusion**

In Howard, the South Carolina Court of Appeals ultimately upheld the state’s general rule that the contestant of a will continues to bear the burden of proof throughout the entire will contest.\(^{120}\) Although this decision may seem unexceptional, the court’s reliance on Dixon creates uncertainty in undue influence jurisprudence and forces the legal community to analyze the different presumption and burden of proof rules established for deeds and wills and the justifications behind each. There are strong arguments in support of maintaining separate rules for challenges to inter vivos and testamentary gifts, as the court did in Howard. However, there is also support for applying the stronger presumption to both deeds and wills.

If Howard goes to the South Carolina Supreme Court, it will be interesting to see whether the court will make a definitive statement distinguishing the burdens

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118. Williams v. McCarroll, 97 A.2d 14, 21 (Pa. 1953) (citations omitted). Although Pennsylvania requires certain circumstances to exist in addition to a confidential relationship. The entire burden shifts to the proponent once these circumstances are coupled with the confidential relationship. *Id.*

119. Mullin v. Brown, 115 P.3d 139, 144 (Ariz. Ct. App. 2005) (interpreting In re Estate of Shumway, 9 P.3d 1062, 1068 (Ariz. 2000)). After making determining the Arizona Supreme Court’s case mandated this change in state law, the Arizona Court of Appeals stated: “If the court did not mean for the language in Shumway to apply to other will-contest cases such as this, or to implicitly overrule . . . prior cases, it obviously can clarify its intent.” *Id.* (citations omitted).

of proof that may shift in response to a showing of confidential relations. As unlikely as it may seem, South Carolina could join the ranks of those states having a single rule for inter vivos and testamentary transfers.\textsuperscript{121} A ruling of this type would promote uniformity and uphold the public policy against abuse of confidential relationships.\textsuperscript{122} The South Carolina legislature could potentially address the confusion created by \textit{Howard} by amending the state statute dealing with presumptions and burdens. The legislature could create new law in South Carolina stating that the burden of persuasion shifts to the proponent for all such contested transfers in which a presumption of invalidity arises once a confidential relationship is shown. More realistically, the legislature could supersede the ruling by codifying the language in the \textit{Restatement},\textsuperscript{123} which specifically maintains separate rules for inter vivos and testamentary conveyances. The important policy considerations behind maintaining separate rules, especially the protection of testamentary freedom and avoidance of creating unrealistic evidentiary burdens, outweigh the arguments in support of modification of the rule. As it stands, the rule serves to promote social policy, while not giving an unfair advantage to the contestant of the will.

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\textsuperscript{121} See \textit{supra} notes 113–19 and accompanying text.


\textsuperscript{123} See \textit{RESTATEMENT}, \textit{supra} note 10 and accompanying text.