

2009 HOUSE JUDICIARY

HB 1458

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1458

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/3/09

Recorder Job Number: 8496

Committee Clerk Signature

*A. Penrose*

Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1458.

**Rep. Larry Klemin:** Sponsor, support, explained the bill. In the 2007 legislative session, we passed a long bill called the Uniform Trust Code. Prior to that bill being introduced, we had an interim study on that bill which included some members of the legislature, including myself and also a task force organized by the State Bar Association that went through the Uniform Trust Code line by line and compared it to what other states had done and made some recommendations, all of which were then adopted in the bill, and became law in 2007. Since 2007, we've had a little more experience with the Uniform Trust Code and a couple of areas needed some clarification or amplification. The task force that had been created was resurrected and came up with some additional changes which are in HB 1458. There isn't a definition of "irrevocable" in the code now, so that was put in Section 1. Section 2 deals with the duty to inform and report and this is a revamping of that section that further clarifies it. There has been some criticism of how this duty is working in the area of trust law. On page 1 there is some new language that there is a duty to inform and report, the duty that is owed to by the trustee. The second part of this on the top of page 2 is what existing #1 was. The rest of page 2 relates to the duty of a trustee to notify the qualified beneficiary for certain matters

relating to the trust. Going on to section 3, on page 3, the amendment is striking out references to a certain section of the law and the reason is because it was maybe too restrictive. The strategy that would be permitted would be any strategy under that chapter, being 59-17. Then section 4 on page 4, creates a new presumption against the trustee for being unduly influenced and defined how it is used.

**Rep. Dahl:** On section 4, can you clarify a little further, exactly what that scenario is addressing and maybe elaborate a little bit what it means by "any advantage".

**Rep. Klemin:** This deals with a presumption against a trustee. Well it refers to certain kinds of insider dealing between the trustee and certain persons and if there's not sufficient consideration for that kind of transaction that's deemed to be under undue influence; if it contributes to that particular beneficiary becoming vulnerable.

**Rep. Delmore:** What does Title 50 refer to?

**Rep. Klemin:** I can't tell you what Title 50 is.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Marilyn Foss, ND Bankers Association:** Support. I was on the task force as well.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Julie Leer, Director, Legal Advisory Unit, DHS:** Support (attachment).

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition.

**David Boeck, Protection & Advocacy Project:** Opposed (attachment and proposed amendments).

**Chairman DeKrey:** Thank you. We will close the hearing.

# 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1458

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8690

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will take a look at HB 1458.

**Rep. Klemin:** I had introduced this bill at the request of Bill Guy and the task force for the Bar Association. I wasn't a participant in that task force because I was up here at the legislature.

**Rep. Dahl:** I move a Do Pass.

**Rep. Delmore:** Second.

13 YES 0 NO 0 ABSENT

DO PASS

CARRIER: Rep. Klemin

Date: 2/4/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1458

**HOUSE JUDICIARY COMMITTEE**

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep Dahl Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 0

Floor Carrier: Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1458: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS**  
(13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1458 was placed on the  
Eleventh order on the calendar.

2009 SENATE JUDICIARY

HB 1458

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1458

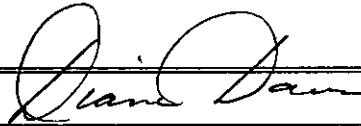
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/10/09

Recorder Job Number: 10576

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

**Relating to the definition of irrevocable in reference to a trust and a presumption against eligibility for assistance programs for certain transactions.**

**Representative Larry Klemin** – Introduces the bill – He gives a background on the bill from the 2005 and 2007 session. In 2007 session the Legislature passed the Uniform Trust Code. There has been seen an additional need for tweaking. That is why we are here now.

**Malcom Brown** – Hands out written testimony for William Guy. He explains the bill by sections.

**Senator Nething** – Asks him to explain the amended section in layman's terms.

**Brown** – Responds, with regard to revocable trust, it narrows who is entitled to be notified of the existence of the trust. The theory being that a revocable trust is just that. Under existing law the trustee is required to give everybody a copy of the trust and all the information to a qualified beneficiary even though the trust could be revoked. This means you're giving notice to someone about something that could be changed at anytime. This could create false expectations.

**Senator Nething** – Asks who it would be narrowed to.

**Brown** – States who would have to be notified and who is a qualified beneficiary. Settlor is the person who creates the trust. He continues to discuss section 4, which is a new section.

**Senator Fiebiger** – Asks what spurred section four?

**Brown** – Replies a similar section was omitted and it needed to be put back in.

**Senator Nething** – Asks about the deletions on Section 3.

**Brown** – Says those sections were part of the old law and the reference is no longer needed.

**Julie Leer** – Director of Legal Advisory Unit for the Dept. of Human Services – See written testimony.

**Senator Nething** – Asks her if the reason she wants the resumption section is for the vulnerable population.

**Leer** – Replies, yes, it is meant for the elderly population.

**David Boeck** – Lawyer for the Protection and Advocacy Project – See written testimony.

Close the hearing on 1458

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1458

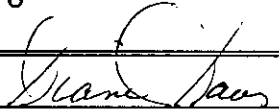
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/10/09

Recorder Job Number: 10578

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

**Committee work on HB1458**

Senator Nelson moves the amendment

Senator Schneider seconds

Verbal vote – all yes

Committee decides to wait one day to vote on the bill.

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1458

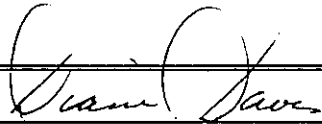
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/18/09

Recorder Job Number: 11191

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work

Chair entertains the motion to reconsider the action on amending HB1458

**Senator Fiebiger** moves


**Senator Schneider** seconds

Verbal vote – all yes

**Senator Fiebiger** said he visited with attorneys that have worked cases with Human Services surrounding this issue. They thought the old statute 5901-16 which was repealed by the Uniform Trust code was sufficient. The thought now is that anyone who would want to help someone gratuitously is under undue influence. The thought was that the current language was sufficient and with the language with the amendment we are taking out the trustee's spouse, parent, descendant, or sibling. He said he was concerned about including all the other individuals.

**Senator Olafson** – Asks if rebuttable is still in the language or do we not need that in there anymore.

Committee discusses that rebuttable still needs to be in there.

 **Senator Nething** – Asks Senator Fiebiger to meet with Rep. Klemin and see if he is in agreement.

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1458

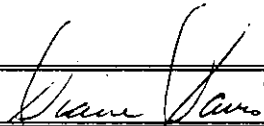
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/23/09

Recorder Job Number: 11368

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work

Senator talks of his amendments and putting in rebuttable presumption. He reads how the new language would read.

Senator Fiebiger moves the amendment

Senator Schneider seconds

Verbal vote all yes

Senator Fiebiger moves do pass as amended

Senator Nelson seconds

Vote – 6-0

Senator Fiebiger will carry



Date: 3/18  
Roll Call Vote #: 2  
1458

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

*Reconsider  
Amendment*

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Fiebiger Seconded By Sen Schneider

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething – Chairman			Sen. Tom Fiebiger		
Sen. Curtis Olafson – V. Chair.			Sen. Carolyn Nelson		
Sen. Stanley W. Lyson			Sen. Mac Schneider		

Total (Yes) \_\_\_\_\_ (N) \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Verbal yes

*Fiebigler  
Amend.*

90660.0301  
Title.

Prepared by the Legislative Council staff for  
Senator Fiebigler

March 11, 2009

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1458

Page 4, line 3, remove "or the trustee's spouse, parent, descendant, or sibling, or their"

Page 4, line 4, remove "spouses"

Page 4, line 5, remove "if the transaction"

Page 4, remove line 6

Page 4, line 7, remove "assistance under title 50"

Renumber accordingly



Date: 3/23  
 Roll Call Vote #: 4  
1458

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen. Fiebiger Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Fiebiger	X	
Sen. Curtis Olafson - V. Chair.	X		Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson	X		Sen. Mac Schneider	X	

Total (Yes) 6 (N) 0

Absent \_\_\_\_\_

Floor Assignment Sen. Fiebiger

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1458: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1458 was placed on the Sixth order on the calendar.

Page 4, line 3, remove "or the trustee's spouse, parent, descendant, or sibling, or their"

Page 4, line 4, remove "spouses"

Page 4, line 5, replace "if the transaction" with ". This presumption is a rebuttable presumption."

Page 4, remove lines 6 and 7

Renumber accordingly

2009 TESTIMONY

HB 1458

**Testimony**  
**House Bill 1458 – Department Of Human Services**  
**House Judiciary Committee**  
**Representative Duane DeKrey, Chairman**  
**February 3, 2009**

*Same to  
given to  
Senate.*

Chairman DeKrey, members of the House Judiciary Committee, I am Julie Leer, Director of the Legal Advisory Unit for the Department of Human Services. I am here today to offer testimony in support of House Bill No. 1458; specifically, changes being proposed under sections 2 and 4 of the bill.

The Department of Human Services requested the language in subdivision c of subsection 1 of section 59-16-13, set forth in section 2 of the bill at the bottom of page 1. This language would require a trustee to inform a person who has been identified as a qualified beneficiary of a revocable trust of what the trust may provide to that beneficiary if the qualified beneficiary is required to provide that information so that eligibility for benefits under title 50 may be determined. Title 50 is the title of the Century Code under which medical assistance, temporary assistance for needy families, supplemental nutrition assistance (formerly known as "food stamps"), home and community based services, and service payments for the elderly and disabled are administered. Any of these programs may require an applicant, in proving eligibility for benefits, to provide information about benefits the applicant may be able to receive under a trust. Without the specific permission provided under the new subdivision c to subsection 1, a trustee of a revocable trust would be prohibited from providing that information to the qualified beneficiary. If that were to happen, it would impact a program's ability to determine benefits because they would be unable to gather all required information.

The second change the Department requested in this bill is the reinstatement of the presumption against a trustee that the trustee has acted without sufficient consideration and with undue influence in certain circumstances. Similar language existed in North Dakota Trust Law since 1877 until it was repealed in 2007. The Department considers this language to be important to the protection of the vulnerable populations it serves. The language proposed in section 4 of the bill has been narrowed so the presumption only applies if the transaction in question contributes to the trust's beneficiary becoming ineligible for support under a program of assistance under title 50.

Thank you. I would be happy to try to answer any questions you might have.

House Judiciary Committee  
Sixty-First Legislative Assembly of North Dakota  
House Bill No. 1458  
February 4, 2008

Chairman DeKrey and Members of the House Standing Committee on the Judiciary: I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project is an independent state agency that acts to protect people with disabilities from abuse, neglect, and exploitation, and advocates for the disability-related rights of people with disabilities.

This is a summary of the unscripted testimony I provided Tuesday, February 3, 2009, on HB 1458, along with proposed amendments.

I support HB 1458 but believe it would benefit from some minor amendments.

**1.** Lines 22-24, page 1, includes a provision that is unnecessarily narrow. As written, it would require a trustee of a revocable trust to "inform and report" to a beneficiary only if the beneficiary is receiving or applying to receive benefits under title 50 of the North Dakota Century Code. Title 50 covers public benefits programs, e.g., Medicaid.

If a trustee has a duty to "inform and report" to a beneficiary, it should not matter that the beneficiary is applying for or receiving assistance or that the trust is revocable or irrevocable. I recommend the omission of these criteria.

In a separate provision of HB 1458, a trustee would have a duty to inform and report to all beneficiaries of an irrevocable trust. This provision runs from line 1, page 2, through line 17, page 3. If a trustee has a duty to “inform and report” to a beneficiary, it should not matter that the trust is revocable or irrevocable.

In order to satisfy the revocable trust provisions of HB 1458, the trustee needs to know whether the beneficiary is receiving or applying to receive benefits under title 50. This is an unrealistic expectation and this actually puts a burden on the trustee. In the ordinary course, a trustee might have considerable difficulty getting to know and keep up-to-date on this information. In some instances, it would be impossible.

This amendment would be consistent with (but broader than) the goal presented for this provision by Julie Leer, testifying for the Department of Human Services.

2. Moving to page 2 of HB 1458, sixty days is a long time to delay informing a person who receives Medicaid benefits that the person has become beneficiary of a trust. It seems reasonable that, in ordinary circumstances, a trustee could contact a beneficiary within 30 days. This is very significant for a newly designated beneficiary who applies for or receives Medicaid coverage. A beneficiary might plan health care differently than a Medicaid recipient/applicant.

The Medicaid program would treat a Medicaid recipient as a trust beneficiary the moment the moment the person gains beneficiary status. Before the Medicaid recipient learns of the trust, the Medicaid program may have expended funds for medical care for which the newly designated beneficiary might no longer be eligible.

At this point, the beneficiary might not understand when or how much the trust might affect income. This creates a problem for the Medicaid program, which now might try to collect the recently expended Medicaid funds from the newly designated beneficiary. Litigation may follow.

This is also a problem for the Medicaid recipient. Some trusts prohibit trustees from paying old medical bills, for which public benefits may be available. This may lead to a dispute over eligibility for Medicaid benefits and over availability of trust funds. Resolution of the dispute may require an administrative hearing and may lead to court action.

It is worthwhile to avoid these disputes. I am recommending an amendment to address this issue.

3. I testified in favor of an amendment to page 3, line 14. I misread the bill and now withdraw that recommendation.

4. Julie Leer testified for the Department of Human Services in favor of Section 4 of the bill, the substance of Section 4 appears in HB 1458 on page 5, lines 1 to 7. I also support this section of the bill.

Ms. Leer explained that a similar provision was part of state law from 1877 to 2007. She said the Department of Human Services considers this provision important to the protection of vulnerable North Dakotans. The Protection & Advocacy Project concurs.

This provision is important not only to beneficiaries who apply for or receive assistance under title 50 of the Century Code. The provision is important to any beneficiary but particularly to those who are especially vulnerable. The Protection & Advocacy Project recommends the provision be broadened from the proposal to cover all beneficiaries who might fall prey to an unscrupulous trustee.

I also recommend the addition of a sentence at the end of section 4, "This presumption is a rebuttable presumption," so there still can be transactions when appropriate between a trustee and a beneficiary.

I welcome any questions from Committee Members by email ([dboeck@nd.gov](mailto:dboeck@nd.gov)), phone call (328-2950), or invitation to attend when the Committee works on HB 1458.

Thank you for allowing me to present testimony on HB 1458. Attached are the proposed amendments discussed above.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1458

Page 1, line 22, add a period after the first occurrence of "beneficiary" and delete the remainder of line 22, and delete lines 23 and 24;

Page 2, line 1-2, delete lines 1-2

Page 2, line 26, delete "irrevocable"

Page 2, line 13, replace "sixty" with "thirty"

Page 2, line 24, replace "sixty" with "thirty"

Page 4, lines 5 to 7, delete the remainder of line 5 after "influence" and delete all of lines 6 and 7

Page 4, line 7, add a new sentence after the period, stating "This presumption is a rebuttable presumption."

Renumber accordingly

TESTIMONY OF WILLIAM L. GUY III, CHAIR  
NORTH DAKOTA UTC DRAFTING TASK FORCE  
IN SUPPORT OF  
HOUSE BILL NO. 1458

Mr. Chairman and members of the Committee, my name is William L. Guy III. I live in Fargo and work as an estate planning and business succession attorney in the Moorhead office of the Vogel Law Firm. I am sorry that, due to prior commitments that could not be altered, I am unable to present this testimony in person.

In 2006 I was appointed chair of the SBAND task force that reviewed the Uniform Trust Code prior to its enactment in 2007 as NDCC Chapters 59-09 through 59-19. Since its enactment, Section 59-16-13, which pertains to a trustee's duty to inform and report, has caused a great deal of concern among professional trustees and estate planning attorneys.

As currently enacted, this section requires that a trustee provide a copy of the trust instrument and all of the information outlined in Subsections 1 through 9 to the "Qualified Beneficiaries" (i.e. those beneficiaries who would currently be recipients of income and principal together with the next tier of beneficiaries who would receive income and principal upon the death of the current recipient). For example, if I was a single person who had established a revocable trust for myself that would eventually pass to my children, both my children and I would be "qualified beneficiaries".

Unfortunately, as currently, enacted Section 50-16-13 does not distinguish between revocable trusts and irrevocable trusts.

A revocable trust is often a "will substitute". The trust is typically established by the settlor of the trust (who is often the initial trustee), who may use the trust to provide for management of assets prior to his/her death. Upon the death of the settlor the trust assets are then either continued in trust or distributed to the next level of beneficiaries (in the example above it would be my children). As this section is currently enacted, the trustee of a revocable trust (even if that trustee is also the settlor) is required to provide

a copy of the trust and the information that is detailed in Sub-sections 1 through 9 to the Qualified Beneficiaries. Since a revocable trust is "revocable" the settlor may change the trust entirely during his/her lifetime and may, prior to his/her death totally exclude any individual or organization who would currently be a Qualified Beneficiary. Nonetheless whether the trust is revocable or irrevocable, the section as currently enacted requires the trustee to distribute a copy of the trust and a great deal of other trust information to Qualified Beneficiaries of upon their request. Distribution of a revocable trust, upon the demand of the Qualified Beneficiaries, prior to the death of the settlor, would be the equivalent an individual being able to demand a copy of the settlor's will prior to that settlor's death.

The provisions in sub-sections 1 through 9 of the section as currently enacted are quite appropriate for an irrevocable trust. At that point, even if the settlor is still living, the terms of the trust cannot be changed.

Accordingly, our Task Force prepared a new Sub-section 1 which pertains to revocable trusts only and which provides that the trustee's duty to inform and report is owed exclusively:

- To the settlor, while the trust is revocable;
- To the hold of a power of withdrawal to the extent the property is subject to the power during the period in which the power may be executed; and,
- To a Qualified Beneficiary when the Qualified Beneficiary is required by law or regulation to provide that information to determine eligibility for benefits or to verify continued eligibility for benefits under Title 50.

The third bullet point above was prepared in conjunction with the North Dakota Department of Human Services. The members of the Task Force and the Department believe that it will enable the Department to obtain the information that it needs from an applicant for benefits under Title 50 while still protecting the privacy of the settlor.

Sub-sections 1 through 7 and sub-section 9, as currently enacted, have been transformed into sub-divisions a. through h. of new sub-section 2 and pertain only to irrevocable trusts. Old sub-section 8 is effectively incorporated into new sub-section 1

and is no longer necessary.

I was initially concerned about the amendments that had been proposed after the hearing before the House Judiciary Committee by the Director of the Protection & Advocacy Project., Mr. David Boeck. However, in a telephone conference yesterday afternoon Mr. Boeck agreed to withdraw all of his proposed amendments to pages 1 and 2 and I agreed to support his proposed amendments to page 4, which would:

- Delete the remainder of line 5 after "influence" and delete all of line 6 and 7; and,
- Add a new sentence after period stating "This presumption is a rebuttable presumption".

The proposed section on page 4 (with the deletions on lines 5, 6, and 7 recommended by Mr. Boeck) had previously been set forth in section 59-01-16 prior to the 2007 enactment of the UTC. The inclusion by Mr. Boeck of the sentence that makes clear the presumption set forth in this section is a rebuttable presumption provides an appropriate balance that was previously lacking.

On behalf of the Task Force, I strongly recommend passage of House Bill 1458 with the above amendment to page4 of the Bill.

Respectfully submitted,  
William L. Guy III

750096.1

Senate Judiciary Committee  
Sixty-First Legislative Assembly of North Dakota  
House Bill No. 1458  
March 10, 2009

Good morning Chairman Nething and Members of the Senate Standing Committee on the Judiciary. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project is an independent state agency that acts to protect people with disabilities from abuse, neglect, and exploitation, and advocates for the disability-related rights of people with disabilities.

I support HB 1458 but believe it would benefit from an amendment to Section 4, which appears on page 5, lines 1 to 7. Having worked with William L. Guy III of the Vogel Law Firm on this, I understand the State Bar Association's task force on the Uniform Trust Code is agreeable to this amendment.

This provision and its amendment are important to protect financially unsophisticated and vulnerable North Dakotans.

The proposed amendment would create a rebuttable presumption to help a beneficiary who has to deal with an unscrupulous trustee, whether a family member trustee, nonprofessional trustee, or corporate trustee. There still could be transactions when appropriate between a trustee and a beneficiary.

Thank you for allowing me to present testimony on HB 1458. Attached is the proposed amendment.

PROPOSED AMENDMENT TO HOUSE BILL NO. 1458

Page 4, lines 5 to 7, delete the remainder of line 5 after "influence" and delete all of lines 6 and 7

Page 4, line 7, add a new sentence after the period, stating "This presumption is rebuttable."

Renumber accordingly