YOUR LEGAL ADVISORS

Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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DT: May 9, 2012

RE: In the Matter of DOMAN ESTATE
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL COMMENTARY:

"Josh Hamilton"

How about that Josh Hamilton? Four homers in one game! Only the 16th time in MLB history. Who didn't achieve this feat? Bonds didn't, Aaron didn't, Ruth didn't, Rodriquez didn't, Griffey, Jr. didn't, Sosa didn't, Thome didn't, Frank Robinson didn't and Mark McGuire didn't. These are nine of the top 10 homerun hitters, lifetime. The only one of the top 10 players to accomplish the feat is Willie Mays. Also, although it is Mays, he is ahead in all Triple Crown categories. Josh – stay sober and keep going.

REVIEW OF CASE:

Reference Files: Joint bank accounts – proper party Plaintiff and how to set aside transfer
Mental capacity setting aside bank account
Mental capacity setting aside Deed
Mental capacity setting aside Will
Fraud
Conversion
Raising objections to judgment not supported by fact
Raising objections to jury instruction
Medical over lay and lawyer's testimony
Basis of going to trier of fact
Undue influence – diminished capacity – "Johnson Curve"

The instant case is replete with many issues with which a probate attorney deals, they are listed above.

The facts are classic and simple. Decedent had one object of bounty – Plaintiffs, and changed over his bank account, land and Will to another, Defendant. Overlaid is a claim of mental incapacity, diminished mental capacity, undue influence, fraud and conversion. Decedent had a minor stroke, and had later driven his car into a tree. Medical records support reduced cognitive function. Expert testimony shows inability to handle affairs to the extent that the slightest influence is undue influence. Juxtaposed was lay testimony of bankers and lawyers to the contrary. Plaintiff won by jury verdict in the Lower Court. Defendant did not move for judgment notwithstanding verdict.

LESSON LEARNED: Convincing Plaintiff medical is sufficient to support reasonable basis for jury verdict involving cognitive issues.

REVERSION: When Decedent switches from one joint holder to another, it is the previous owner who is the proper party Plaintiff. As with a Will, the beneficiary of an antecedent's Will has standing to attack the subsequent Will.

Query: Is this theoretically possible? Consider the following – lack of mental capacity renders nugatory two actions; the dissolution of the first joint account relationship and establishment of the second.

In order to render the first nugatory, need not the estate be a party Plaintiff or Defendant in an action for rescission? The reader is alerted to another unpublished Court of Appeals' case of *In re Daniel Manners* – 10/21/11, reviewed by me 1/9/12.

STANDARD OF PROOF: We know the new Trust Code places the same competency standard on Trusts as Wills, ***but*** nothing else changes regarding the standard of competency on contracts. The Court of Appeals, clearly lays out three standards for bank accounts, Deeds and Wills; citing published cases.

> "The test of whether a person has the mental capacity to open a joint bank account is if he has '"sufficient mind to understand in a reasonable manner the nature and effect of the act in which [he] is engaged." *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001) (quotation omitted). To execute a deed of conveyance, a person must have "sufficient mental capacity to understand the

> business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others." *Id.* at 503-504, quoting *Barrett v Swisher*, 324 Mich 638, 641; 37 NW2d 655(1949). To execute a will, a person must have testamentary capacity: he must "be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make." *Persinger*, 248 Mich App at 504, quoting *Estate of Vollbrecht* v Pace, 26 Mich App 430, 434, 182 NW2d 609 (1970)."

JOHNSON CURVE: Michigan has long held that success in proving undue influence is a moving target. The greater the diminished capacity the less influence is required to prove "undue" influence. *In re Johnson*, 326 Mich 310 (1949).

The instant appeal and Dr. Shiner's testimony are the best example of applying the Johnson Curve:

> "Along, these behavioral changes and actions would not be sufficient to indicate undue influence. However, plaintiffs' expert, Dr. Gerald Shiner, testified that Doman's mental condition at the time he changed his will, deed and bank accounts was "so comprised that he would be vulnerable to any sort of influence[,] and any sort of influence…would have been undue because he was very stubborn, he exercised poor judgment, and then [in] other instances he was very easily redirected and, so, anyone who influenced him or told him what to do would be able to influence him quite easily." Doman was described in his medical records as "pleasantly confused," which Shiener stated meant he was not argumentative and was, therefore, very vulnerable to influence because his capacity to resist any influence was low. Although several witnesses, including Whitton's expert physician, the bank employee who helped Doman change his accounts and execute his deed, and the lawyer who drafted Doman's will testified that Doman did not appear to have been unduly influenced, when viewing the evidence in the light most favorable to plaintiffs, reasonable minds could differ on whether Whitton exercised an undue influence over Doman. Accordingly, the trial court did not err in refusing to grant directed verdict on this claim"

MENTAL CAPACITY: There have been decisions of the Court of Appeals of late favoring lawyers' testimony over that of doctors. The following discussion favors strong medical testimony:

> "However, plaintiffs' and Whitton's experts agreed that Doman was suffering from cerebral atrophy and vascular dementia when he made the changes to his assets and estate. There were also medical records from March 2008, which was just before he made the changes at issue, that show that Doman was confused. Shiener opined that by March 26, 2008 the day Doman changed his bank accounts, he had such significant impairments in cognitive function that his ability to understand the nature and extent of his possessions and who would receive them, his judgment in deciding how to distribute his possessions, and his ability to be free from undue influence were impaired. Doman's medical records indicate that on that same date, Doman suffered from "moderate/severely impaired

> decision-making ability." Shiener believes that on April 10, 2008, when Doman executed a quitclaim deed, he was significantly impaired in his ability to remember, understand, make judgments, and appreciate the consequences of his actions. Doman executed his will 13 days after that."

PRESENTATION OF ISSUES: If you want to argue that facts do not support the verdict you must have filed for directed verdict or judgment not withstanding verdict!!!

To raise an improper jury charge you must object to it at the trial court. Likewise, witness(es) not included on pre-trial order may be called if there is no objection at trial to their names not being included.

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Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DOMAN ESTATE.

ELEANOR DZIEWIT, ELIZABETH DZIEWIT and ROBERT DZIEWIT,

Plaintiffs-Appellees,

v

KATHLEEN WHITTON, Individually and as Personal Representative of the Estate of LEONARD JOHN DOMAN,

Defendant-Appellant.

UNPUBLISHED
April 19, 2012

No. 301260
Macomb Probate Court
LC No. 2010-199243-CZ

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

In this dispute concerning decedent Leonard John Doman's estate, defendant Kathleen Whitton appeals by right the judgment entered after a jury verdict in favor of plaintiffs Eleanor Dziewit, Doman's stepdaughter, and Eleanor Dziewit's children: Elizabeth and Robert Dziewit. The jury found that Doman did not have the mental capacity to transfer his bank accounts and the deed to his home to Whitton, or to change his will to make Whitton the beneficiary. It also found that Whitton's actions in procuring these changes amounted to fraud and undue influence and that she converted Doman's bank funds for her own use. For the reason more fully explained below, we affirm in part and reverse in part.

Doman was born in June 1909 and died in November 2009. Whitton first met Doman in 1997, which is when she began working across the street from his home. Over the next 10 years, the two remained friends; Whitton would stop by to visit with Doman several times a week.

Three years before his death, in May 2006, Doman executed a will in which he bequeathed his vehicles and the property in his garage to Robert Dziewit, $1,000 to his biological son, Alfred Domanski, whose whereabouts were unknown at the time, and his personal property and the remainder of his estate to Eleanor Dziewit or, if she did not survive him, to Elizabeth Dziewit. He also named Eleanor Dziewit or, as an alternate, Elizabeth Dziewit, to be his personal representative.

In 2003 Doman suffered a mild stroke and, in April 2007, Doman drove his car into a tree in his front yard. He was hospitalized for eight days after the accident, and then stayed in a rehabilitation center before returning home. While he was in the facility, he asked Elizabeth Dziewit to find some money and other valuables in his home and hold them for him, and she did so. In November 2007, Elizabeth Dziewit visited with Doman and reminded him of what she had taken. Doman thought she had stolen from him, and the two had a falling out. Shortly afterward, Whitton took over caring for Doman.

In March 2008, Doman went to his bank with Whitton and closed the accounts that he held jointly with Eleanor Dziewit; he then opened new accounts jointly with Whitton. In the next month, April 2008, Doman executed a quitclaim deed transferring his home to Whitton and executed a new will, which revoked his prior will. In the new will he bequeathed a vehicle to Whitton, left the $1,000 bequest to Domanski in place, and changed the recipient of his personal property and the remainder of his estate from Eleanor Dziewit to Whitton. He also made Whitton his personal representative.

I. JURY INSTRUCTIONS

Whitton first argues that the trial court improperly instructed the jury on several matters and that these improper instructions deprived her of a fair trial. "To preserve an instructional issue for appeal, a party must request the instruction before instructions are given and must object on the record before the jury retires to deliberate." *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009); MCR 2.512(C). "The failure to timely and specifically object precludes appellate review absent manifest injustice." *Heaton*, 286 Mich App at 537. "Manifest injustice results where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Joba Constr Co v Burns & Roe, Inc*, 121 Mich App 615, 639; 329 NW2d 760 (1982).

Here, the lawyers for the parties discussed the proposed jury instructions with the trial court on the record. Whitton's lawyer did not address any of the issues Whitton now claims were error and did not object to the instructions as given. Whitton does not assert that she requested a conversion instruction, and there is no indication in the record that she did so. Additionally, Whitton's lawyer explicitly stated, when asked by the trial court whether he had any concerns with the jury instructions, that he had none. Therefore, Whitton has waived this claim of error. See *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 224; 755 NW2d 686 (2008) (stating that a trial lawyer's expression of satisfaction with jury instructions constitutes a waiver and extinguishes any error on appeal).

II. CONVERSION

Whitton next asserts that the facts of this case did not support plaintiffs' claim of conversion. Generally, an issue must be raised, addressed, and decided by a trial court in order to be preserved for appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). "Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a 'failure to timely raise an issue waives review of that issue on appeal.'" *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008), quoting *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987).

Here, Whitton's lawyer did not move for a directed verdict or judgment notwithstanding the verdict with regard to the conversion claim. Therefore, this claim was not preserved for our review. *Napier*, 429 Mich at 230. Moreover, after examining the record, we decline to exercise our discretion to review this unpreserved claim. *Walters*, 481 Mich at 387.

III. SCOPE OF PRETRIAL ORDER

Whitton next argues on appeal that the issues of fraud and conversion should not have been presented at trial because they were outside the scope of the pretrial order. Whitton's lawyer did not object to the trial of the conversion claim on this basis. Accordingly, with regard to the conversion claim, this issue is unpreserved. And, on this record, we decline to exercise our discretion to review it. *Id.*

Whitton also argues that the trial court denied her a fair trial by allowing plaintiffs' fraud claim to be tried without giving her a chance to present an adequate defense. This Court reviews a trial court's decision to modify a pretrial order for an abuse of discretion. See *Hanlon v Firestone Tire & Rubber Co*, 391 Mich 558, 564; 218 NW2d 5 (1974) (applying the abuse of discretion standard to the modification of pretrial orders under prior GCR 1963, 301.3). A party may be entitled to a new trial if his or her substantial rights were affected by an "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion [] denied the moving party a fair trial." MCR 2.611(A)(1)(a).

Here, plaintiffs alleged four counts in their complaint: breach of fiduciary duty, conversion, fraud, and unjust enrichment. The pretrial order listed the issues to be tried as: (1) the validity of Doman's April 2008 will, which included whether there was undue influence and whether he had the mental capacity to execute the will, and (2) the validity of Doman's quitclaim deed and the changes to his bank accounts, which included whether there was undue influence and whether he had the mental capacity to execute the deed and make the changes. "To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, *fraud*, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *In re Estate of Karmey*, 468 Mich 68, 75; 658 NW2d 796 (2003) (emphasis added, quotation omitted). In other words, undue influence may proceed on an underlying theory of fraud, although undue influence requires proof of additional elements. *Id.*

There is no indication in the pretrial order, or elsewhere, that any particular counts were expressly stricken or voluntarily dropped before trial. Because fraud is a potential underlying theory of undue influence, and undue influence was included in the pretrial order as an issue to be tried, Whitton had sufficient notice to prepare her defense against the claim of fraud. Accordingly, the trial court did not abuse its discretion by allowing plaintiffs to try the issue of fraud.

IV. DIRECTED VERDICT

This Court reviews de novo a claim that the trial court should have granted a motion for directed verdict. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). In reviewing such a claim, this Court "'review[s] the evidence and all legitimate inferences in the light most favorable to the nonmoving party.'" *Id.* (quotation marks and citation omitted). A court should grant a motion for directed verdict only when the evidence, viewed in this light, fails as a matter of law to establish a claim. *Id.* "If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008) (quotation marks and citation omitted).

A. FRAUD

Fraud must be pleaded with particularity. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008); MCR 2.112(B)(1). To plead fraud with particularity, "the plaintiff must allege (1) 'the time, place, and content of the alleged misrepresentation,' (2) 'the fraudulent scheme,' (3) the defendant's fraudulent intent, and (4) the resulting injury." *Chesbrough, MD v VPA, PC*, 655 F3d 461, 467 (CA 6, 2011) (interpreting Federal Rule of Civil Procedure 9(b), the federal corollary to MCR 2.112(B)(1)) (citation omitted). Fraud should not be presumed, and must be proved by clear and convincing evidence. *Cooper*, 481 Mich at 414.

In order to establish a claim for fraud, plaintiffs had to prove that Whitton made a material representation to Doman, that it was false, that when she made it she knew it was false, or made it recklessly without any knowledge of its truth, that she made it with the intention that Doman should act upon it, that Doman actually acted in reliance upon it, and that he thereby suffered injury. *Lawrence M Clarke, Inc v Richco Constr Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011). "[D]irect proof of fraud is not required, and fraud may be proven by inference from facts and circumstances." *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005).

Plaintiffs pleaded that Whitton "systematically isolated" and "alienated" Doman from his family, that she "made intentional false statements to [d]ecedent which ultimately fed into his paranoid delusions" about Elizabeth Dziewit, that Doman "relied upon" the false statements and was, thereby, "deprived . . . of his testamentary wishes and intent for his funds and property." Plaintiffs also alleged that Whitton "made material and false misrepresentation concerning" Elizabeth and Eleanor Dziewit's intentions, which caused Doman to be alienated from his "long-standing family unit," and which Whitton "knew . . . were false when made, in order that they should be acted upon by the [d]ecedent." We conclude that these allegations were not sufficiently pleaded as required by MCR 2.112(B)(1).

Plaintiffs also failed to produce any evidence at trial to establish the elements of fraud. There was no evidence that Whitton made any false statement to Doman. Plaintiffs apparently proceeded under the theory that Doman's falling out with Elizabeth Dziewit was caused by Whitton falsely accusing Elizabeth of stealing from Doman. Whitton did testify that Elizabeth Dziewit took money from Doman's home, but Elizabeth confirmed that she did that and plaintiffs did not present any evidence that Whitton ever misrepresented the incident to Doman. Plaintiffs also claim on appeal that Whitton lied to Doman's doctors, telling them that someone

was trying to put Doman in a nursing home, and asked them to declare him competent to avoid this, implying that, in reality, she wanted a competency judgment to support her case. Even if this were true, it is not a misrepresentation made to and relied upon by *Doman*; it is merely a misrepresentation to a third party. Even when we view this evidence in the light most favorable to plaintiffs, we find reasonable minds could not differ on the issue of whether Whitton perpetrated a fraud on Doman. Accordingly, the trial court should have granted a directed verdict in Whitton's favor on this claim.

B. UNDUE INFLUENCE

"To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *In re Estate of Karmey*, 468 Mich at 75 (quotation marks and citation omitted). "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993). Undue influence also cannot be inferred merely from acts of kindness. *In re Langlois' Estate*, 361 Mich 646, 650; 106 NW2d 132 (1960). A party may use circumstantial evidence to show undue influence, but the evidence must do more than raise a mere suspicion. *In re Willey's Estate*, 9 Mich App 245, 257; 156 NW2d 631 (1967).

Here, the evidence showed Whitton took over caring for Doman in November of 2007, after he had had a falling out with his family and about six months after he was injured in a car accident. Soon thereafter, Doman paid off Whitton's car and credit card balances despite many witnesses testifying he was extremely frugal and this was out of character for him. Whitton admitted she made the withdrawal for the car loan balance herself. She also drove Doman to the bank when he changed his accounts and when he executed the quitclaim deed, and to Doman's lawyer's office to execute the new will. There was also evidence that Doman began attending a unity church with Whitton, which seemed very out of character for him because he had been a Catholic his entire life.

Alone, these behavioral changes and actions would not be sufficient to indicate undue influence. However, plaintiffs' expert, Dr. Gerald Shiener, testified that Doman's mental condition at the time he changed his will, deed, and bank accounts was "so comprised that he would be vulnerable to any sort of influence[,] and any sort of influence . . . would have been undue because he was very stubborn, he exercised poor judgment, and then [in] other instances he was very easily redirected and, so, anyone who influenced him or told him what to do would be able to influence him quite easily." Doman was described in his medical records as "pleasantly confused," which Shiener stated meant he was not argumentative and was, therefore, very vulnerable to influence because his capacity to resist any influence was low. Although several witnesses, including Whitton's expert physician, the bank employee who helped Doman change his accounts and execute his deed, and the lawyer who drafted Doman's new will, testified that Doman did not appear to have been unduly influenced, when viewing the evidence in the light most favorable to plaintiffs, reasonable minds could differ on whether Whitton exercised an undue influence over Doman. Accordingly, the trial court did not err in refusing to grant a directed verdict on this claim.

C. MENTAL CAPACITY

The test of whether a person has the mental capacity to open a joint bank account is if he has "sufficient mind to understand in a reasonable manner the nature and effect of the act in which [he] is engaged.'" *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001) (quotation omitted). To execute a deed of conveyance, a person must have "'sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others.'" *Id.* at 503-504, quoting *Barrett v Swisher*, 324 Mich 638, 641; 37 NW2d 655 (1949). To execute a will, a person must have testamentary capacity: he must "be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make." *Persinger*, 248 Mich App at 504, quoting *Estate of Vollbrecht v Pace*, 26 Mich App 430, 434; 182 NW2d 609 (1970).

Here, Doman's banker, Cynthia Hanson, testified that Doman appeared to be competent to change his bank accounts and to execute his quitclaim deed. She had been trained to evaluate whether elderly persons should be allowed to make such changes, and said Doman knew what he had in his accounts and that, if anything happened to him, Whitton would get all of the money in the accounts. Doman's lawyer, Charles Busse, similarly testified that he spoke to Doman about his intentions regarding his new will and explained to him that changing his will would cause a stir. Busse stated that Doman nevertheless still wanted to make the new will.

However, plaintiffs' and Whitton's experts agreed that Doman was suffering from cerebral atrophy and vascular dementia when he made the changes to his assets and estate. There were also medical records from March 2008, which was just before he made the changes at issue, that show that Doman was confused. Shiener opined that by March 26, 2008, the day Doman changed his bank accounts, he had such significant impairments in cognitive function that his ability to understand the nature and extent of his possessions and who would receive them, his judgment in deciding how to distribute his possessions, and his ability to be free from undue influence were impaired. Doman's medical records indicate that on that same date, Doman suffered from "moderate/severely impaired decision-making ability." Shiener believes that on April 10, 2008, when Doman executed a quitclaim deed, he was significantly impaired in his ability to remember, understand, make judgments, and appreciate the consequences of his actions. Doman executed his will 13 days after that.

In April 2007, nearly a year before the incidents in question, Doman drove his car into a tree in his front yard, and afterward was confused and did not know what happened. Whitton herself testified that Doman acted "different" after March 2008, when he was hospitalized for pneumonia. Several other friends and family members testified that Doman was often confused and did not recognize them or know what was going on around him.

Although there was also substantial evidence that Doman was competent to make the decisions at issue, when this evidence is viewed in the light most favorable to plaintiffs, we conclude that reasonable minds could differ on the issue of whether Doman possessed the necessary mental capacity to change his bank accounts, deed, and will. Therefore, the trial court did not err in failing to grant a directed verdict in favor on this claim.

For these reasons, we affirm the jury verdicts on the claims for conversion, undue influence, and mental capacity, but reverse the verdict on the claim for fraud. We further remand this matter to the trial court to enter an amended judgment consistent with this opinion. We do not retain jurisdiction. Because none of the parties prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio