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 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation 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: February 28, 2011

RE: David Hanson, Personal Representative for the Estate of Edward E. Lerg
STATE OF MICHIGAN COURT OF APPEALS

ALL STAR BASEBALL STATS:

Okay fans, how about a team composed of players who had more than 20 years with one franchise who merit the name All Star?

Brooks Robinson played for the Orioles for 23 years and would be my third baseman.

Carl Yastrzemski played for the Red Sox for 23 years and checks in at first base.

Cal Ripken played shortstop for Baltimore for 21 years and qualifies as the shortstop.

Harmon Killebrew was known as a third baseman. I had to shoehorn him in, and since he played 11 games at second base and spent 21 years with the Twins this qualifies him for that position.

My outfield is composed of Al Kaline, 22 years with the Tigers; Stan Musial, 22 years with the Cardinals and Ty Cobb, 22 years with the Tigers.

Walter Johnson is my pitcher with 21 years with the Senators and Cap Anson did catch a little, and spent 22 years with the White Sox.

Since the Probate article deals with time, I thought the above baseball article was timely. What do you think?

REVIEW OF CASE:

Reference Files: Wills
Mental Capacity
Undue Influence
Time of Execution

Appellee was a co-guardian of his Ward. The other co-guardian was obstreperous in preventing the Ward, his relative, from living in an unstructured setting. Appellee was a non blood relative, but tried to assist the Ward in moving to an unstructured setting. Ward retained an Elder Law Firm, drew a Will, disinherited his children and the Appellee and gave everything to the co-guardian, non relative.

The Probate Court found incapacity and undue influence.

The Lower Court laid emphasis in finding undue influence on what it believed to be the unrebutted presumption of undue influence emanating from Appellant's fiduciary capacity.

Regarding incapacity, the Lower Court found the following to be probative facts:

1. Testator had a guardian.
2. There was a diagnosis of Alzheimer's disease.
3. There was testimony by a physician that the disease was progressively degenerative.
4. There was testimony that the Testator was irritable, shortsighted and had poor insight as well as judgment.
5. Testator was suspicious of people.

The Court of Appeals said it was not reviewing the matter de novo. The Court of Appeals used the standard of clearly erroneous AND reversed the Lower Court's findings. The Court of Appeals found that none of the above facts recited by the Lower Court were probative. The Court of Appeals said that because there was very little access and opportunity on behalf of the co-guardian to Testator, and much independent testimony by the lawyer who drew the Will of competency and free will, that the presumption was, therefore, overcome.

The Court of Appeals gave, in my opinion, the strongest utilization of factum temprus I have ever seen. Despite all the evidence proffered, the Court of Appeals found the Lower Court clearly erroneous in light of the testimony of the lawyer. The court used the very liberal interpretation, found in EPIC, of mental capacity.

The court correctly defined clearly erroneous as:

> "A finding is clearly erroneous when a review in court is left with a definite and firm conviction and a mistake has been even if there is evidence to support the finding."

The court found clear error by the Lower Court by declaring all the contestant's evidence not to be of probative value because it did not apply to the date of execution.

Since the definition of clearly erroneous has the words "even if there is evidence to support the finding" the decision of the Court of Appeals is not contrary to prevailing law. The Court of Appeals appropriately says that deference is given to the Lower Court because of its unique vantage point. However, not a lot of deference was given in this case because of the way, I suspect, the Lower Court approached the matter. The Court of Appeals noted that no consideration was given as to the unrebutted evidence of what happened at the time of execution. It is conceivable that the Lower Court did take this into consideration, but it must have been absent from its opinion. The result might have been different if the Lower Court had weighed the testimony of the lawyer as against the testimony of the physician.

The lessons to be learned from the case are that lawyers write Wills; doctors don't, and if you are going to use medical testimony to upset a document do the best you can to tie it into the date of execution either by actuality or by direct inference of the nature of the disorder.

AAM:jv:682099v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

DAVID HANSON, Personal Representative for the Estate of EDWARD E. LERG,

Petitioner-Appellant,

v

THOMAS MCNAMARA, MICHAEL MCNAMARA, and JOAN KLOTZ,

Respondents-Appellees.

UNPUBLISHED
January 27, 2011

No. 293012
Clinton Probate Court
LC No. 08-026722-DE

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Petitioner appeals as of right from a judgment denying admission of Edward Lerg's April 19, 2006 will, based on findings that Lerg lacked testamentary capacity to execute the will and was subject to the undue influence of petitioner in making the will. We reverse and remand.

On June 19, 2000, Lerg, as Settlor, executed a "Declaration of Trust," naming his trust the "Edward E. Lerg Trust," and designating himself as Trustee and Joan Klotz as Successor Trustee. The Lerg Trust provided that it was "the Settlor's intent that, should he become physically or mentally disabled, the Successor Trustee shall dispose of any and all Trust estate assets for his benefit, with a view towards keeping the Settlor in his own personal residence so long as medically advisable." And the Lerg Trust included the following provision: "The Settlor reserves the right to amend, modify, or revoke this Trust, in whole or in part." Lerg's primary asset was a 40-acre parcel of land where he lived in Clinton County and, on February 7, 2002, Lerg executed a quit claim deed conveying this property from himself, as a single man, to himself as Trustee of the "Edward E. Lerg Trust, a revocable living Trust . . . ."

In 2003, while in the hospital after having fallen, Lerg was diagnosed with Alzheimer's dementia. Shortly thereafter, Klotz was appointed as Lerg's guardian and Klotz had Lerg admitted into a nursing home. Although Lerg was moved to several different nursing homes, it was undisputed that Lerg hated living in any nursing home and compared it repeatedly to living in a prison. It was also undisputed that Lerg repeatedly attempted to return to living on his own property through efforts that included seeking to have his trust revised and the guardianship terminated. The Sixty Plus Elder Law Clinic, a non-profit clinic sponsored by The Thomas M. Cooley Law School, represented Lerg at various guardianship-related proceedings. Although an

order entered on May 12, 2004, following Lerg's petition for termination of the guardianship, provided that Lerg was to be placed in "the least restrictive environment" possible, Lerg remained in a nursing home. That is, all of Lerg's efforts to return home were unsuccessful. In 2005, Lerg's long-time friend, and petitioner in this case, David Hanson, was appointed as Lerg's co-guardian. Petitioner's efforts to return Lerg to his own property, after arranging to have a modular home placed, were thwarted by Klotz and, thus, were unsuccessful.

The Sixty Plus Elder Law Clinic continued to assist Lerg who was dissatisfied with his predicament. At Lerg's request, the Sixty Plus Elder Law Clinic drafted a will for Lerg which purported to "revoke any previous Will, Codicil, and Trust of mine." The will also provided: "I created the 'Edward E. Lerg Trust' in June of 2000, but have revoked that Trust and this Will should control how my estate should be distributed." Petitioner was named the beneficiary under the will, and Klotz as well as her children were specifically disinherited. The will was signed on April 19, 2006. Lerg died on March 10, 2008.

Following Lerg's death, petitioner sought to have Lerg's will probated. Klotz, as well as Thomas McNamara and Michael McNamara, beneficiaries under the Edward E. Lerg Trust, objected to the admission of the will, arguing that Lerg lacked testamentary capacity to execute the will and was induced to do so by the undue influence of petitioner. Following a hearing on the petition, the probate court rendered its opinion and order denying admission of Lerg's will. The court held that Lerg lacked the requisite level of testamentary capacity to execute the will on April 19, 2006, and was subjected to undue influence exerted upon him by his co-guardian, petitioner. This appeal followed.

Petitioner first argues that respondents failed to rebut the presumption that Lerg possessed the requisite testamentary capacity to execute his will; therefore, the probate court's decision to deny admission of Lerg's will on this ground was clearly erroneous and must be reversed. We agree.

Pursuant to MCL 600.866(1), "[a]ll appeals from the probate court shall be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. An appeal shall not be tried de novo." "The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* This Court defers to the probate court on matters of credibility and gives broad deference to its findings because of its unique vantage point. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

MCL 700.2501 provides as follows:

> (1) An individual 18 years of age or older who has sufficient mental capacity may make a will.
>
> (2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:

(a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.

(b) The individual has the ability to know the nature and extent of his or her property.

(c) The individual knows the natural objects of his or her bounty.

(d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

The right to contest a will is statutory and a "contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." MCL 700.3407(1)(c). That is, the testator's capacity to make a will is presumed. See, also, *In re Skoog's Estate*, 373 Mich 27, 30; 127 NW2d 888 (1964). And whether a testator had the requisite testamentary capacity "is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution." *In re Powers' Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965).

The requirements of testamentary capacity were explained in *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953), as follows:

> To have testamentary capacity, an individual 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. The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn.
>
> Illiteracy or lack of education has little, if any, bearing upon mental capacity to make a will and the appointment of a guardian to protect the property of a person does not constitute probative evidence of mental incompetency. Nor should the lack of wisdom in the disposition of the property nor the fairness of the provisions of the will influence the court in a determination of mental competency. Weakness of mind and forgetfulness are likewise insufficient of themselves to invalidate a will. [Citations omitted.]

Here, the probate court set forth its findings of fact in support of its decision to deny admission of Lerg's will. The probate court noted that Lerg had a guardian. The court also noted that Lerg was diagnosed with Alzheimer's disease and that, according to the testimony of Dr. William Beecroft, such disease is progressively degenerative. The court indicated that Dr. Beecroft, respondents' witness and an expert in psychiatry, testified that he evaluated Lerg one time in May of 2005 and found that Lerg was irritable, short tempered, did not want to talk, and showed poor insight as well as judgment. Dr. Beecroft concluded that Lerg was modestly to severely demented and was suspicious of people. The court further noted that Dr. Beecroft again evaluated Lerg in 2007 and Lerg's mental condition had further declined.

We conclude that these findings of fact have very little probative value and do not support a conclusion that Lerg lacked testamentary capacity at the time he executed his will.

That Lerg had a guardian "does not constitute probative evidence of mental incompetency." *In re Sprenger's Estate*, 337 Mich at 521. A diagnosis of Alzheimer's disease, alone, is not dispositive of testamentary capacity. And Dr. Beecroft evaluated Lerg on one occasion, May 4, 2005, about a year before Lerg executed his will. His findings after this one visit—that Lerg was irritable, short tempered, did not want to talk, showed poor insight and judgment, and was suspicious of people—does not lead to the conclusion that Lerg lacked testamentary capacity, as set forth in MCL 700.2501, at the time he executed his will on April 19, 2006.

The probate court's decision also referenced the testimony of respondent Thomas McNamara, who testified that Lerg was very angry at Klotz, blamed her for being in the nursing home, and believed that she had all of his money. These findings of fact have very little, if any, probative value and do not support a conclusion that Lerg lacked testamentary capacity at the time he executed his will. Neither "the lack of wisdom in the disposition of the property nor the fairness of the provisions of the will" should influence the court in a determination of mental competency. *In re Sprenger's Estate*, 337 Mich at 521. However, this testimony does explain why Lerg would choose to specifically disinherit Klotz in his will. It appears that Lerg believed that Klotz took advantage of the fact that she was named his successor trustee and then did not act in accordance with the desires he expressed in his trust.

In support of its conclusion that Lerg lacked testamentary capacity, the probate court also relied on the testimony of respondent Klotz who testified that, on occasion, when Klotz visited Lerg in the nursing home, Lerg would ask for or about relatives who had passed away years earlier. On other occasions, Klotz testified, Lerg did not recognize her or other people. However, we have reviewed the testimony of Klotz and Klotz did not testify with any specificity as to *when* precisely these alleged events of confusion occurred. Lerg was in a nursing home from 2003 until his death in 2008. There is no way to determine from Klotz's testimony as to whether Lerg was confused with regard to his property or the natural objects of his bounty in April of 2006 when he executed his will. For example, Klotz was asked by her attorney whether she recalled "one visit when you – when you arrived to see Mr. Lerg that he was upset, he was crying?" Klotz responded in the affirmative and testified that Lerg wanted to see his mother who was dead. However, there was no time reference other than "one visit." That visit could have been any time, including in 2007 or 2008. There was also no time reference with regard to Lerg purportedly asking Klotz about his brothers and his father, who also had passed away. Again, the questions posed to Klotz were whether she recalled conversations she had with Lerg at *any* time. However, at the time he made his will, Lerg did not name any of these deceased relatives as his beneficiaries; therefore, it appears that he knew they were deceased at *that* time. Accordingly, the probate court's findings with regard to Klotz's testimony were of little probative value and did not support a conclusion that Lerg lacked testamentary capacity at the time he executed his will.

In reaching its decision, the probate court also considered the testimony offered by petitioner's witnesses. However, respondents had the burden of establishing lack of testamentary capacity. See MCL 700.3407(1)(c). In that regard, respondents offered the witness testimony of Dr. Beecroft, Thomas McNamara, and Klotz. For the reasons set forth above, their testimony provided very little, if any, evidentiary support for respondents' claim that on April 19, 2006, when Lerg signed his will, he did not meet the requirements of MCL 700.2501(2). Respondents failed to carry their burden and failed to rebut the presumption of capacity; thus, review of

petitioner's evidence was unnecessary. See MCL 700.3407(1)(c); *In re Shattuck's Estate*, 324 Mich 568, 573; 37 NW2d 555 (1949). Accordingly, the probate court clearly erred when it denied admission of Lerg's will on the ground that he lacked testamentary capacity because the holding was not supported by the evidence.[1]

Next, petitioner argues that respondents failed to establish that Lerg's will was the product of undue influence exerted by petitioner. After review of the probate court's findings under a clear error standard of review as set forth above, we agree. See *In re Bennett Estate*, 255 Mich App at 549.

> 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. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. [*In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

However, a presumption of undue influence arises when: (1) there exists a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. *In re Karmey Estate*, 468 Mich at 73, quoting *Kar*, 399 Mich at 537.

In this case, petitioner was Lerg's co-guardian thus a fiduciary relationship between petitioner and Lerg existed. See MCL 700.1104(e). Petitioner, if he survived Lerg, was also the sole beneficiary of Lerg's will. Petitioner, however, argues that he did not have the opportunity to influence Lerg's decisions regarding the will because he did not know Lerg was creating a will. But the evidence of record indicates that petitioner initially contacted the Sixty Plus Elder Law Clinic on Lerg's behalf, participated in many of the Clinic's meetings, and drove Lerg to the Clinic's office the day Lerg executed his will. Thus, we agree with the probate court's conclusion that a presumption of undue influence existed and petitioner was required to present sufficient evidence to rebut the presumption. However, the burden of persuasion remained with respondents. *In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1991), quoting *Kar*, 399 Mich at 541-542.

After concluding that there was a presumption of undue influence, the probate court then turned to the question whether petitioner rebutted the presumption with substantial evidence. In this regard the probate court held:

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[1] We note the probate court's concern that Lerg did not have the mental capacity to create a different trust but such capacity is not dispositive on the issue whether he possessed the mental capacity to make a will. MCL 700.2501. And, according to the "Edward E. Lerg Trust," Lerg—the Settlor—retained the unqualified power and right to revoke his trust. See MCL 700.7103(h).

> I know Mr. Hanson has testified he did not believe he exerted any undue influence, that he only helped facilitate contact with the attorneys and assist Mr. Lerg at those meetings because he was hard of hearing; however, he -- he did participate in the meetings -- some of the meetings revoking the trust and creating the Will which disinherited Klotz and named him sole beneficiary. He clearly had a dislike or has a dislike for Ms. Klotz himself, during his testimony there were several references but the one that sticks out most in my mind is when he -- one of the first times he acknowledges Ms. Klotz he referred to her as Mr. Lerg's so-called niece. He was working with attorneys who did not like Ms. Klotz, he knew Lerg was angry at Klotz for not letting him go back and live on his property and told Lerg he would do whatever he wanted him to do. He appealed to his anger and fears which is exactly what undue influence involves. He did overcome -- or that influence did overcome, I believe, Mr. Lerg's volition because the doctor indicated he was suspicious and susceptible and vulnerable. He was in a poor mental state which even Mr. Hanson acknowledged, he had memory impairment, he was dependent on others, he was basing his actions on information that was not accurate and no -- Mr. Hanson did not correct that.
>
> So based on the foregoing I feel that the presumption of undue influence was not rebutted, that there was evidence of undue influence and so the admission of the Will dated April 19, 2006 is denied.

Thus the probate court based its holding on the following purported findings of fact: (1) petitioner participated in meetings involving the trust and will, (2) petitioner disliked Klotz, (3) petitioner "was working with attorneys who did not like Ms. Klotz," (4) petitioner knew Lerg was angry at Klotz "for not letting him go back and live on his property and told Lerg he would do whatever he wanted him to do," and (5) Lerg was basing his actions on information that was not accurate and petitioner "did not correct that." It is clearly apparent from the probate court's holding that it wholly failed to consider the evidence actually presented by petitioner to rebut the presumption of undue influence.

In brief, petitioner's witness, Gary Bauer, testified that, when Lerg signed his will, no one other than people from the Sixty Plus Elder Law Clinic were in the room. Bauer also testified that he "had absolutely no impression that [Lerg] was there doing anything that he didn't want to do . . . ." Petitioner's witness Tiffany Ruttkofsky, who was involved in drafting Lerg's will, testified that she met with Lerg several times at the nursing home and Lerg always knew who she was, was always able to speak to her, and was not confused. Lerg spoke repeatedly about his property and how "he just wanted to go home." Lerg spoke to Ruttkofsky about Klotz and was very upset with Klotz. Lerg "was very very very adamant that he wanted the property not to go to Ms. Klotz or any of her children." Ruttkofsky testified that she would meet with Lerg on many occasions unannounced and outside of petitioner's presence to make sure Lerg was not being coached or being told what to tell her and to make sure "he wasn't changing his story." Ruttkofsky further testified that "every time we met him that's all he wanted to talk about is make sure my property is protected, you know, what can you do to make sure that, you know, my property goes where I want it to -- where I want it to go, sorry, that was his focus. . . . that's all he really wanted to talk about." Petitioner's witness Chris Yokey, who witnessed Lerg sign the will, testified that he was confident that Lerg was not under an undue influence with regard to

the will. This uncontroverted evidence, which was not considered by the probate court, clearly rebutted the presumption of undue influence.

And the probate court's findings of fact do not tend to establish that petitioner exerted undue influence on Lerg with regard to the making of his will. That is, none of the findings by the probate court demonstrate that Lerg was subjected to "threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel" Lerg to act against his inclination and free will in favor of petitioner. See *In re Karmey Estate*, 468 Mich at 75. More particularly, even if petitioner did participate in meetings involving the trust and will, opportunity alone without other affirmative evidence is not sufficient to establish undue influence. See *id.* Further, that petitioner and Lerg's attorneys liked or disliked Klotz is of no probative value on the issue whether petitioner exerted undue influence on Lerg. Moreover petitioner's awareness of Lerg's feelings toward Klotz and purported offer to "do whatever [Lerg] wanted him to do" do not tend to establish a claim of undue influence with regard to Lerg creating his will. And finally, that petitioner did not "correct" Lerg's alleged inaccurate knowledge of whatever sort is of no probative value on the issue of undue influence.

We conclude that petitioner presented substantial evidence that was sufficient to rebut the presumption of undue influence. Further, respondents failed to carry their burden of proving their claim of undue influence. See *In re Peterson Estate*, 193 Mich App at 260. There was no evidence, direct or circumstantial, that Lerg was subjected to any threats, misrepresentation, undue flattery, fraud, or coercion. Because the holding was not supported by the evidence, the probate court clearly erred when it denied admission of Lerg's will on the ground that it was the product of undue influence exerted by petitioner. In light of our resolution of these issues we need not consider petitioner's evidentiary issue on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher