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.

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DT: January 4, 2011

RE: Estate of Avis Laverne Weir
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

How about an all rookie team? Baseball has not always had the Rookie of The Year Award. So too, that person might not have been the best at his position. I have tried to review available records to come up with my own all rookie team, by position, choosing players from throughout the years.

Here is my outfield:

- Fred Lynn – batted .331, 103 runs
- Ted Williams – batted .327, 145 RBI, 31 HR
- Joe Dimaggio – batted .323, 125 RBI, 29 HR

Some might point to Ichiro Suzuki who batted .350 with 242 hits in his first year. Since Ichiro spent so many years in Japanese baseball he was hardly rookie.

First base:

- Albert Pujois – 37 HR, 112 RBI, batted .329

Second base:

- Nap Lajoie – batted .361, 569 slugging percentage, 197 hits

Shortstop:

- Nomar Garciaparra – batted .306, 209 hits, 30 HR

Third base:

- Al Rosen – Led the league with 37 HR, 116 RBI, batted .287

Catcher:

- Mike Piazza – batted .318, 174 hits, 35

Pitchers:

- Ed Summers – 24 & 12
- Al Spalding – 47 & 12
- Grover Alexander – 28 & 13, with a 2.57 ERA
- Fernando Valenzuela – 13 & 7, with a 2.48 ERA

How do you feel?

REVIEW OF CASE:

Reference Files: Will Contests
Testamentary Capacity
Undue Influence
Fraud
Misrepresentation
Standard of Review
Insane Delusion

Although I do not agree with all reasoning of the Court of Appeals, some of their theories have value to the probate litigator.

I want to draw to the reader's attention a change in the Michigan Court Rules. Specifically, MCR 508 (B) (2) which still contains the words "on the record," but as of June 1, 2010 no longer contains the language "and not de novo." Hence, to make sense of the instant Court of Appeals ruling that a summary disposition motion from the Court of Appeals is de novo they must mean "de novo on the record."

In this matter the Probate Court granted summary disposition on the issue of testamentary capacity because of the strong witness of two attorneys. The only other evidence proffered against the document was a letter from a doctor who never saw the decedent. There was some evidence of mental confusion and early Alzheimer, per medical records, and the decedent did

suffer a stroke a week after the execution of the Will. She was also forgetful as to who her relatives were. There was also lay testimony that she persistently experienced confusion.

There is a statement as to estoppel that was not dealt with by the Court of Appeals, to show that one of the petitioners received personal property under the Will and, therefore, could not challenge it. This is what we call a 'Beglinger' issue and the Court of Appeals did not address it.

The Court of Appeals makes an interesting observation that 'before you can find somebody possessed of sound mind' you must first address the issue of testamentary capacity. The Court of Appeals said that the Probate Court was free to allow petitioners to plead lucid interval if they wish. The fact that the stroke was after the Will was still probative on summary disposition and the denial of summary disposition. The Court goes on here to say that there was evidence of lack of testamentary capacity and that there were fact questions to be resolved by a finder of fact. Nowhere does the Court of Appeals use the words *genuine* issues of material fact. They merely state that in light of the doctor's opinion, the confusion, the fact that there was stroke a week after the Will; that although it might be fine in a bench trial to make a determination against the petitioners a Court should not do so in a motion for summary disposition, where the facts must be construed most favorably to the petitioners claiming undue influence.

Regarding undue influence, the Court of Appeals, basically, says that if you have a presumption of undue influence that basically gets you over a motion for summary disposition. It might have been different had there been sufficient evidence other than these two attorneys, but the statement "whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact" is rather strong.

Relative to insane delusions there is a correct quote that says:

> "An insane delusion exists where a person persistently believes supposed facts which have no real existence and so believes such supposed facts against all evidence and probabilities and without any foundation and reason for the belief and conducts himself as if such facts actually occurred".

The Court of Appeals cites the published case of *In re Solomon's Estate*, 334 Mich 17 (1952).

It is my recall of the law that the insane delusion must not only meet the definition above but there must be some underlining psychopathology, because the above could relate to general forgetfulness.

Regarding the failure to list a known sister on a Petition for Commencement of Proceedings was made short shrift of by the Court of Appeals because they said no injury came to the petitioners. It is my recall that notice is jurisdictional and can be raised on appeal. I think, rather than going off on whether there was injury or not; since they were reversing the case anyway, I think that they should have made a determination that notice is jurisdictional.

AAM:jv:doc#678550v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of AVIS LAVERNE WEIR.

CYNTHIA GILBERTSON, KATIE DICKSON, and TIMOTHY KING,

Petitioners-Appellants,

v

CRAIG L. GILBERTSON,

Respondent-Appellee.

UNPUBLISHED
November 18, 2010

No. 291796
Oakland Probate Court
LC No. 2006-305605-DE

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

In this will contest amount family members of decedent Avis Laverne Weir, petitioners, Cynthia Gilbertson, Katie Dickson, and Timothy King, appeal as of right an order granting a motion for summary disposition filed by respondent Craig L. Gilbertson, the decedent's nephew and the personal representative of her estate. We affirm in part, reverse in part, and remand for additional proceedings.

I. BACKGROUND

Gilbertson and respondent[1] are brother and sister and, as the children of one of decedent's sisters, are the niece and nephew of the decedent. Dickson and King are Gilbertson's children. The decedent died on June 10, 2006, with her husband having predeceased her on January 10, 2004, leaving no children. On March 23, 2006, decedent executed a will. The March 2006 will left everything to respondent with no mention of any of the petitioners, and the alternate

[1] Given that there are multiple petitioners, we shall refer to each petitioner by last name. Because petitioner Cynthia Gilbertson and respondent Craig Gilbertson share a last name, we shall refer to respondent only by party designation, such that all references simply to "Gilbertson" shall refer to petitioner Gilbertson.

beneficiary being one Mary Ann Delisle, decedent's husband's niece. Although decedent apparently had a prior will, it has not surfaced, and the March 2006 will expressly revoked "all my prior wills." On August 8, 2006, respondent filed a petition requesting that the probate court appoint him as the personal representative of the decedent's estate and that the court probate decedent's estate according to the March 2006 will. The documents filed by respondent do not mention petitioners as interested persons in the estate; they mention only decedent's other sister, Winona Gilbertson.[2]

On October 27, 2006, petitioners objected to the admission of the will to probate and requested both supervised probate administration and that respondent be required to post a bond. The objections asserted included (1) that respondent committed fraud upon the court by falsely and intentionally failing to disclose his sister's existence and (2) that the March 2006 will was invalid because decedent did not have the proper physical and mental capacity to execute it, as she was operating under respondent's undue influence, as well as suffering from "insane delusions."

In December 2007, respondent filed a motion for summary disposition of petitioner's objections on the ground that petitioners had failed to show any evidence of a lack of testamentary intent, undue influence, insane delusions, fraud, or duress. Petitioners filed a response opposing respondent's motion, urging that multiple fact questions existed based on the record evidence which required the claims to proceed to trial.

The probate court declined to have oral argument on the motion, requiring the parties to file briefs on their positions. On November 7, 2008, the probate court issued its opinion and order granting respondent's motion for summary disposition. It held that whether the Will was executed was a matter of law and concluded that the attorneys who witnessed the will signing concluded that the decedent was of sound mind and that the other evidence did not dispute their testimony and concluded that the will was properly executed.

The probate court again relied on the testimony of the two attorney witnesses to conclude that the decedent had the proper testamentary capacity at the time of the execution. It disregarded the medical testimony to the contrary because it was "written by a doctor that never saw the Decedent." Without that evidence, there was nothing to suggest the decedent did not have testamentary capacity, and so it granted summary disposition on the issue. The probate court also granted summary disposition as to undue influence because, "[w]hile the contestants may be able to provide motive, opportunity and even the ability to control, they fail to provide any affirmative evidence that it was exercised."

The probate court concluded that there was no evidence of duress because none of the petitioners had any knowledge that duress occurred. The probate court tossed out the insane delusions claim because, although it recognized one of the petitioners provided testimony regarding behaviors that "at first glance . . . might seem like an insane delusion," it concluded

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[2] Her interests are not at issue in this appeal.

that petitioners failed to show that she "persistently had this confusion," that she acted as if such facts actually existed, or that there was any connection between these actions and the construction or execution of the will. Finally, the probate court granted summary disposition as to petitioners' fraud claim by summarily finding that none of the elements were pled or shown by the evidence. The probate court also concluded that Dickson was estopped from challenging the will unless she gave up the personal property she received under the will, but found no estoppel as to the claims of Gilbertson or King.

Petitioners requested a rehearing or reconsideration. After the motion was filed and scheduled, but before it was heard, the probate judge retired. The motions were ultimately heard by the newly elected probate judge on March 18, 2009. The probate court entered an order denying the motion on April 9, 2009. Petitioners now appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because both parties in their briefs relied on evidence outside the pleadings, such as documents and an affidavit, we review the record as a motion for summary disposition brought under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 458; 750 NW2d 615 (2008). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." We view all of the evidence in the light most favorable to the nonmoving party. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).

B. TESTAMENTARY CAPACITY

The probate court concluded both that the will was properly executed as required by law and that testamentary capacity existed. Oddly, it concluded that the decedent was of "sound mind" in its determination that the will was properly executed, before it considered whether the decedent had testamentary capacity. Because the determination of whether the decedent was of sound mind is the same test as that of testamentary capacity, we are uncertain why the probate court addressed these as separate claims. Accordingly, we address them together as testamentary capacity.

> To have testamentary capacity, an individual must be able to comprehend the nature and estate 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. [*In re Sprenger Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953).]

Based on the evidence, we believe that the probate court erred in granting summary disposition on this issue because there was an outstanding factual question as to whether the decedent had testamentary capacity at the time she executed the will.

The probate court relied exclusively on the testimony of the two attorneys who witnessed the will execution to the exclusion of all else. Not only was this an improper fact finding by weighing the evidence, which is impermissible at the summary disposition stage, *In re Peterson Estate*, 193 Mich App 257, 261; 483 NW2d 652 (1992), it was improper consideration of the evidence in the light most favorable to respondent, instead of petitioners who were the nonmoving party.

Petitioners provided evidence in the form of a medical opinion from Dr. Ron Samarian. Dr. Samarian summarized various medical documents and then concluded:

> Although I had never had the opportunity to evaluate Mrs. Wier in person, it is my opinion, based on the review of her records, that it would be highly unlikely that she would be able to comprehend the full depth and meaning of the concept of her estate as well as sustain and fully appreciate the concept of her heirs.

The probate court disregarded Dr. Samarian's opinion because he had never seen the decedent in person. Respondent relies on an unpublished case from a panel of this Court to support the probate court's actions. However, not only is that case not precedential, MCR 7.215(C)(1), but there are several facts about that case that makes it inapplicable. The most important fact is that the instant case was decided on summary disposition, whereas the unpublished case was decided after a bench trial, at which witnesses testified. Thus, the probate court in that case could properly conclude that the attorney's testimony outweighed that of the physician because it was in a position to make factual findings. That was not true in the instant case because it was being decided on summary disposition. They very fact that the doctor's testimony disputed that of the attorneys created a factual question that precluded summary disposition.

Furthermore, the psychiatrist in the unpublished case explicitly "stated that it would be better to defer to [the attorney]'s judgment" on the issue of legal capacity. The doctor made no such concession in this case. Finally, it is important to note that, even though Dr. Samarian never personally evaluated the decedent, he was simply forming an opinion based on the medical records created by physicians who *had* personally evaluated her. Those records, which were also provided to the probate court, included records from September 1998, diagnosing the decedent with "[a]dvanced dementia most likely multi-infarct process"; from March 1999, where the physician explicitly stated that he felt "this patient does have a dementia of Alzheimer's type"; from January 2006, that diagnosed her with history of stroke and dementia; from April 2006, only a few weeks after the will was executed, which indicated she had problems with problem-solving, sequencing, immediate, short-term and long-term memory; from May 2006, diagnosing her with dementia with delirium, depression, and delusions; also from May 2006, finding that she was only oriented to herself, and not to place or time; from June 2006, in which she was found to have "inability to focus and answer interview questions" and indicated that she had "no other living family" besides respondent; and, also from June 2006, concluding she had a "memory deficit, short and long term with inability to make safe decisions or to make needs known effectively." Thus, even without Dr. Samarian's summary, the medical evidence before the probate court raised a factual question as to whether the decedent had testamentary capacity.

In addition to the medical records, Dickson provided testimony that created factual questions as to the decedent's mental abilities. Dickson went to visit the decedent about every month. According to Dickson the decedent got "generally confused" as to who Dickson and her children were and called Dickson by different names. This got worse as the decedent got older. The decedent "got more and more forgetful as time went by." Dickson would call the decedent and, even though they had recently spoken, the decedent would say "I haven't talked to you in a couple of weeks. Where have you been?" She also heard the decedent speak about "people who were dead as if they were alive." The decedent would ask Dickson if she had talked to her grandmother, or how her grandfather was doing, although both of them were deceased. Thus, there exists factual questions as to the decedent's testamentary capacity, because it is not clear that she knew who people were or what relatives she had.

Dickson also testified that she tried to help the decedent by offering help with her checking account or taking her to doctor's appointments, but the decedent always refused, saying that respondent was doing it. When coupled with the attorneys' statements that the decedent indicated that "she had no children and that as far as anybody else concerned in her life, no, [respondent] was the person in her life that had taken care of her and had done things for her," there is some question as to whether the decedent remembered Dickson at all. Neither attorney indicates that they ever inquired as to whether there were, in fact, other relatives that the decedent knew of and was omitting. Rather, they seem to have taken at face value that respondent was the only relative—a fact further supported by the fact that the attorneys failed to initially name any of the petitioners as relatives or people of interest in the estate in the initial probate filings. A factfinder could interpret the decedent's statement as a failure to remember that she had any other relatives at all, let alone ones that offered to help her. Alternatively, the factfinder could conclude that she was simply stating a preference. Either way, it's a factual question that must be left to the factfinder to resolve.

Although respondent is free to argue at trial that the decedent was having a lucid moment during the will execution, the fact that she had memory issues and problems knowing who her relatives were and who was alive *prior* and *after* the execution certainly is sufficient to raise the specter of whether she was cognizant at the time the will was executed. Accordingly, taking the evidence in the light most favorable to petitioners, summary disposition as to the issue of testamentary capacity was improper.

C. UNDUE INFLUENCE

As to petitioners' claims of undue influence and breach of fiduciary duty, we hold that the probate court erred in granting summary disposition because petitioners established the presumption of undue influence. The presumption of undue influence arises in transactions where the evidence establishes "'(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction.'" *In re Karmey Estate*, 468 Mich 68, 73; 658 NW2d 796 (2003)), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). Additionally, claims of undue influence and the presumption do not apply solely to wills, but also apply when assets are changed to be jointly titled in order to bypass probate. See *Habersack v Rabaut*, 93 Mich App 300, 305; 387 NW2d 213 (1979) (applying the presumption of undue influence to the

creation of joint checking accounts). Thus, if petitioners establish the presumption of undue influence, it applies to both the execution of the will, as well as the transfers to joint checking accounts and joint ownership of property that occurred prior to the execution of the will.

The undisputed evidence established that respondent had been given a general power of attorney over the decedent's affairs, which establishes the fiduciary relationship as a matter of law. See *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). As for the transfers that occurred prior to the execution of the general power of attorney, respondent has not disputed that he was responsible for helping the decedent with her financial affairs after her husband died, and he even testified that he was the one who drafted the quit claim deed that transferred the decedent's property to him. Thus, there was sufficient evidence in the record that, even prior to the execution of the formal power of attorney, respondent and the decedent shared a confidential or informal fiduciary relationship. See *Boden v Renihan*, 299 Mich 226, 239; 300 NW 53 (1941) (holding that a fiduciary relationship can be founded, in general, on intimate personal or business relations in which trust or confidence is accepted).

The evidence also showed that respondent had the opportunity to influence the decedent's decisions, as there was evidence that he wrote checks, he testified that he drafted the quit claim deed that transferred the decedent's property to him and that he had taken her to the banks when she had changed over various accounts to include his name. Finally, respondent's receipt of numerous assets based on the addition of his name to the decedent's accounts and deeds meets the third requirement that he benefit from the transaction. Accordingly, petitioners provided evidence sufficient to create the presumption of undue influence.

The trial court concluded that even though petitioners had met the elements for the presumption, their failure to show it was exercised was sufficient to permit summary disposition. This was clear error. The probate court erroneously relied on *In re Erickson Estate*, 202 Mich App 329; 508 NW2d 181 (1993), as it involved factual findings made at a bench trial, as opposed to summary disposition. Furthermore, *In re Peterson Estate*, 193 Mich App 257, which the probate court also referenced, stands for precisely the opposite proposition for which it was cited. In *Peterson,* this Court *reversed* the probate court's grant of summary disposition because the petitioner had developed the facts to invoke the presumption and noted that, "It is well settled that a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact." *Id.* at 261 (citations omitted). Because the presumption existed, even if respondent provided rebuttal evidence, there was a factual question that could only be resolved at trial. Thus, it was inappropriate for the probate court to grant summary disposition.

Because petitioners in this case provided sufficient facts to invoke the presumption of undue influence, the trial court erred in granting summary disposition on this issue. *Id.*

D. DURESS

Duress requires a showing that the person was a victim of a wrongdoing or unlawful act or thread and that the act or threat deprived the victim of her unfettered will. See *Barnett v Int'l Tennis Corp*, 80 Mich App 396, 406; 263 NW2d 908 (1978). We find no evidence in the record of an act or threat made against the decedent that deprived her of her will and petitioners do not point us to any. Accordingly, we find that the probate court properly granted summary disposition as to the allegation of duress.

E. INSANE DELUSIONS

"An insane delusion exists when a person persistently believes supposed facts which have no real existence, and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed." *In re Solomon's Estate*, 334 Mich 17, 27; 53 NW2d 597 (1952) (internal quotation marks and citation omitted).

Here, we agree with the probate court that Dickson's testimony certainly raises the question of whether the decedent was operating under insane delusions, as it indicates that the decedent sometimes believed that certain of her relatives who were deceased were still living. However, even assuming that the decedent was suffering from these delusions at the time the will was executed, it would not change her disposition to respondent. Unlike the question of testamentary capacity, where we are left to wonder whether the decedent knew what relatives she had at the time of the execution, the question here was whether the decedent was conducting herself as if such facts existed—i.e. the decedent believed that certain relatives who were deceased were in fact alive. If decedent believed those relatives were alive, then her will simply disinherited more relatives. Had the decedent believed that petitioners were deceased when, in fact, they were not, there would be a claim. However, the fact that the decedent may have believed she had *more* living relatives at the time of her execution of the will would not make any difference in this case. Accordingly, the trial court properly granted summary disposition as to the claim regarding insane delusions.[3]

F. FRAUD

> The elements of fraud are: (1) that the charged party made a material representations; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it;

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[3] However, this conclusion does not preclude petitioners from presenting the evidence of these alleged delusions in their case regarding whether the decedent had the proper testamentary capacity.

and (6) that the other party thereby suffered injury. [*City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005).]

We agree with the probate court that petitioners have not satisfied these elements. Although there is evidence that respondent made false representations to the probate court and potentially his attorneys regarding the lack of any other persons of interest in the estate, these representations were not made to petitioners. Additionally, there is no evidence that petitioners have suffered injury from this misrepresentation. Petitioners were ultimately listed as interested persons and are litigating whether the will was properly executed. Thus, they have suffered no injury from respondent's initial failure to include them. We can discern no other fraud claims from petitioners' pleadings and they have not argued any in their appellate brief. Accordingly, the trial court properly dismissed petitioners' fraud claim.

G. REMAINING CLAIMS

Because the probate court erroneously granted summary disposition, we need not address petitioners' alternative arguments regarding whether the successor probate judge erred in denying their motion for reconsideration. Additionally, because petitioners have not addressed the probate court's estoppel ruling on appeal, it stands.

III. CONCLUSION

The probate court improperly granted summary disposition on whether the will was properly executed, whether the decedent had the proper testamentary capacity, and whether there was undue influence. Accordingly, we reverse the probate court's grant of summary disposition as to those issues, affirm in all other respects, and remand for additional proceedings consistent with this opinion. No costs, neither party having prevailed in full. MCR 7.219(A). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro