



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.

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DT: November 6, 2014

RE: John V. Newton and Barry Newton, Plaintiffs-Appellants v. Reba Silvio, Gaspare Silvo, Wendy Nienhaus, and Janice Blackledge, Defendants-Appellees
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL LORE:

The explosive season of Jose Abreu as a 2014 rookie is billed as one of the best. Jose batted .317, hit 36 homeruns, 107 RBI’s and scored 80 runs. He did this for a mediocre Chicago White Sox team.

Although this is certainly good by any standards, let alone a rookie, I do not think it is one of the best.

I will not go into Ichiro Suzuki because he played so many years in Japan. But I do not think anyone will top batting .350 leading the league, having 242 hits leading the league, and having 69 RBI’s.

I do want to mention two people who I really think had better rookie seasons. The first is Fred Lynn for the Red Sox. Fred batted .331, lead the league with a slugging percentage of .566, had 175 hits, 21 homeruns and 105 runs. He also won the MVP award as a rookie. Another Red Sox did just as well, and that was Ted Williams in 1939. Ted batted .327, had a slugging percentage of .609, 185 hits, 31 homeruns and led the league in RBI's with 145.

Also, he was only 20 years of age.

Let's see what happens with a sophomore jinx.

REVIEW OF CASE:

Reference Files: Setting Aside Case Evaluations
 Undue Influence – Presumption
 Sanctions
 Hearsay – Party Deceased

Mom, while alive, gave daughter, Reba, a power of attorney and directed Reba to transfer mom's bank accounts to the joint names of Reba and mom with right of survivorship. Mom had given "Janice" money in joint names with rights of survivorship. Mom directed Reba to get that money back. Janice refused and mom sued. Mom gave a deposition. At her deposition it showed that she was of sound mind and knowingly directed Reba to get the money back and that she realized that Reba was now her sole heir. That former deposition of mom formed a basis of dismissal of other heirs claims of undue influence in the instant matter.

Judge Mack in the lower court set a judgment aside which was the product of facilitation. He did it on the basis of factors found on page 3 and page 4 of the attached Opinion, for those who are interested. I have not reviewed that issue as it does not specifically concern probate. The same applies to the issue of contempt. The factors are listed at page 6 by the Court of Appeals as to what should be evaluated in the finding of contempt and what remedy to apply. It is worthy of noting that even if you have a bum case, Judge Mack wouldn't sanction you if the prevailing party delayed, thus giving the party with a bad case the opinion that they had a good case. This is a great observation and ruling.

The Lower Court allowed the deposition transcript of mom, while she was alive, into evidence in the deceased case under 804(a)(4), declarant not available, 803(3), state of mind and the catch all of 804(b)(7).

The Court of Appeals made the following observations regarding undue influence:

1. The Kar vs. Hogan factors.
2. The party alleging undue influence carries the burden of proof despite the presumption.
3. That the influence must be "undue."

The lower court found that in light of the clarity of the deposition testimony, there was no fiduciary relationship and if there was a fiduciary relationship, the deposition testimony overcame the presumption created by the power of attorney.¹

¹ The mental capacity was supported by the testimony of an attorney and actually Appellant himself. The attorney also testified that he "didn't see anything that would prevent her (Decedent) from making her own decisions."

The Lower Court also found that this clarity was sufficient grounds for granting summary disposition in the Court of Appeals sustained.

This case is the best example of the so-called “Johnson Curve.”² The stronger mentally that you are, the more evidence is necessary to show that the influence was undue influence. Some might say that this case goes even further. If you are competent and there is good evidence of that, one alleging undue influence cannot win.

What do you think?

AAM:kjd
Attachment
783142v1

² In Re: Johnson, 326 Mich 310.

STATE OF MICHIGAN
COURT OF APPEALS

JOHN V. NEWTON and BARRY NEWTON,

UNPUBLISHED
September 23, 2014

Plaintiffs-Appellants,

v

No. 315556
Macomb Probate Court
LC No. 2011-203001

REBA SILVIO, GASPARE SILVIO, WENDY
NIENHAUS, and JANICE BLACKLEDGE,

Defendants-Appellees.

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

This appeal arises from a family dispute over the assets of a deceased mother/grandmother. Before her death, Mary Brackner (Mary) ordered her daughter, Reba Silvio (Reba), to dissolve a certificate of deposit (CD), on which her grandson, John Newton, was named as a co-owner. Mary subsequently signed a revised will, disinheriting John and his brother Barry (the Newtons). The Newtons sought to set aside these transactions, claiming undue influence and conversion, mainly on the part of their aunt, Reba. The evidence establishes that Mary knowingly undertook these transactions and that Reba followed Mary's instructions. Accordingly, we affirm the probate court's summary dismissal of the Newtons' complaint.

I. BACKGROUND

Mary and Monroe Brackner originally planned to leave their estate in equal shares to their three daughters: Gloria, Janice, and Reba. After Gloria's premature death, her sons, John and Barry Newton, became heirs under their grandparents' wills. In addition to their wills, Mary and Monroe created three CDs to hold the majority of their wealth. These accounts were established in Alabama, where the couple then lived. Each CD contained \$100,000, and was held in Mary's and Monroe's names. They named Janice as a co-owner on one CD, Reba on the second, and John Newton on the third. In 2006, Monroe became severely ill. He and Mary signed a power of attorney and instructed Reba to dissolve the CDs and transfer the funds to Michigan accounts. Reba did so, but did not maintain the original co-owners on the accounts.

Once Monroe passed away, Mary moved from Alabama to Michigan with the plan of living alternating months with her remaining daughters. Mary ordered Reba to move her funds into an account in Mary's name with Reba as the listed co-owner. After a dispute with her daughter Janice, Mary also met with an attorney to write a new will, naming Reba as her sole

heir.¹ Reba had previously placed \$100,000 of Mary's money in an account in Janice's name to assist with Mary's care. As Mary decided to remain full-time in Reba's home, she requested the return of her funds from Janice. Janice refused and Mary filed suit. During that suit, Mary submitted to a deposition, describing her intent to place all her assets in her own name with Reba as the sole co-owner. After case evaluation, Janice and Mary accepted an award under which Janice was required to return two-thirds of the funds to her mother.

In 2009, Mary passed away. Mary's assets were all held in accounts with Reba as the named co-owner, so they passed to Reba outside of probate. When the Newtons realized they had been disinherited, they filed suit accusing Reba and Gaspare (the Silvios) of unduly influencing the elderly Mary and converting Mary's assets to their own use. The Newtons also sought to set aside the will and the 2006 transfer of assets from the Alabama CDs to Michigan accounts, and therefore named Janice and Wendy as defendants as well.

The litigation between the Newtons and their relatives took an inordinate amount of time because defendants delayed in providing complete discovery regarding the trail of Mary's funds.² Further, the matter did not proceed easily in the Macomb Probate Court, being heard at important junctures by substitute judges. The matter was sent to case evaluation in March 2012, and an award of "\$50,000 Total" against Reba, Gaspare, and Wendy (together "defendants") was issued in the Newtons' favor, with no damages awarded against Janice. The Newtons accepted the award as to Wendy and Janice, but rejected it as to the Silvios. Defendants entered one acceptance and mistakenly indicated that their acceptance was based only on the Newtons' acceptance, rather than on the Newtons' acceptance as to each codefendant.

Following case evaluation but before the parties filed their acceptance/rejection of the award, defendants sought summary dismissal of the Newtons' claims, arguing that the Newtons presented no evidence of undue influence over Mary. Macomb Probate Judge Pamela G. O'Sullivan discerned remaining factual issues and denied the motion. The Newtons then sought entry of a judgment against Wendy based on the parties' acceptance of the case evaluation award. Judge Dennis Miller heard the matter in Judge O'Sullivan's stead. Defendants explained that they believed the description of the award as "total" meant that the Newtons' acceptance as to one defendant negated their remaining claims against the others. Despite that defendants and the Newtons did not agree on the meaning of the case evaluation award and the effect of their acceptance/rejection, the court entered a judgment against Wendy and allowed the matter to proceed against the Silvios. Defendants sought reconsideration, which was denied, and then filed an appeal application in the Macomb Circuit Court, which was rejected.

¹ Reba's husband Gaspare took the estate in the event Reba predeceased Mary, and Reba's daughter Wendy was named as the contingent beneficiary.

² Preparing this appeal took an inordinate amount of time as well. The Macomb Probate Court initially provided only half the appellate record, and later review revealed further missing documents. We remind the lower court of its duty under MCR 7.210(G) to provide a complete record on appeal and to review the record before certifying that all documents are present and accounted for.

Thereafter, the entirety of the Macomb Probate Court bench disqualified itself from this case. The Supreme Court Administrative Office reassigned the matter to Wayne Probate Judge Milton Mack. Judge Mack quickly realized the error in entering the judgment on the case evaluation award. He set it aside as on a motion for relief from judgment pursuant to MCR 2.612. The parties filed competing motions for summary disposition, which he entertained. When Reba provided full discovery describing the trail of Mary's assets from the Alabama CDs and the sale of her house, it became clear that all the funds (except those wrongfully kept by Janice) were transferred into accounts bearing Mary's name. And Mary's deposition in her lawsuit against Janice revealed that Mary was of sound mind and knowingly made Reba her sole heir. The court therefore dismissed the Newtons' complaint.

II. SETTING ASIDE THE CASE EVALUATION ACCEPTANCE AND JUDGMENT

The Newtons contend that Wayne Probate Judge Mack should not have set aside defendants' acceptance of the case evaluation award and the judgment effectuating that award. A court has the authority to set aside a case evaluation award, even when both sides accepted that award. See *Goch Props, LLC v Van Boxell Transp, Inc*, 477 Mich 871; 721 NW2d 581 (2006). We review the lower court's decision in this regard for an abuse of discretion. *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 510; 448 NW2d 493 (1989).

Case evaluations are governed by MCR 2.403. Relevant to this appeal, MCR 2.403(K) requires case evaluators to "include a separate award as to each plaintiff's claim against each defendant . . . that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim." The confusion in this case began because the case evaluation panel did not follow this requirement and instead awarded a lump sum against defendants.

The confusion continued with the parties' acceptance/rejection forms. MCR 2.403(L) governs the acceptance/rejection of case evaluation awards:

(1) Each party shall file a written acceptance or rejection of the panel's evaluation. . . . Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. . . .

* * *

(3) In case evaluations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if

(i) all opposing parties accept, and/or

(ii) the opposing parties accept as to specified coparties.

Defendants should have indicated that their acceptance was conditioned on the Newtons' acceptance as to the other defendants, rather than on the Newtons' general acceptance. It was clear at the hearing before Judge Miller that defendants believed their acceptance was based on the Newtons being entitled to a single \$50,000 judgment. This was based on their interpretation of the award being total against all three defendants. Judge Miller at that point should have declined to enter a judgment and allowed defendants to withdraw their acceptance.

Thereafter, defendants never specifically sought an order to set aside the judgment under MCR 2.612 (motions for relief from judgment). A reading of their pleadings, however, shows this is the very relief they sought. Defendants immediately requested that the Macomb Probate Court reconsider its order and then sought an appeal to the Macomb Circuit Court. Once the case was transferred to the Wayne Probate Court, defendants sought summary disposition, including in their argument the lack of evidence against Wendy. At every step, defendants pleaded that the Newtons could not sever their acceptance of the total case evaluation award.

When the issue finally reached Judge Mack, he relied upon MCR 2.612 to set aside the case evaluation acceptance and the judgment. This action was based on a rational reading of defendants' various motions. To grant relief on defendants' motion for reconsideration, application for leave in the circuit court, or subsequent motion for summary disposition, the court would be required to set aside (grant relief from) the judgment. As a general rule, courts are "not bound by [a party's] choice of labels for [his or] her action because this would exalt form over substance." *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). That principle is equally true under these circumstances.

The court rule provides for relief from a judgment based on "[m]istake, inadvertence, surprise, or excusable neglect," MCR 2.612(C)(1)(a), such as that present in this case. The case evaluation panel caused confusion by failing to follow MCR 2.403(K)(2)'s award format. As a result, defendants mistakenly accepted the case evaluation award on the wrong condition. They quickly brought this mistake to the Macomb Probate Court's attention, but it turned a deaf ear. Judge Mack remedied that mistake to avoid substantial injustice. See *Great American Ins Co*, 180 Mich App at 510 ("An acceptance should be set aside only where necessary to prevent substantial injustice."). This result was not an abuse of discretion.

III. DISCOVERY SANCTIONS

In the Macomb Probate Court, the Newtons complained regarding defendants' interrogatory answers. They contended that a notary falsely attested that the answers were signed in her presence and that defendants' answers conflicted with the Silvios' deposition testimony. The Newtons sought contempt proceedings against defendants. Defendants responded by refiling their interrogatory answers after having them properly notarized. The matter was not resolved in the Wayne Probate Court and Judge Mack refused the Newtons' renewed request to conduct an evidentiary hearing on the matter.

Before Judge Mack considered the parties' motions for summary disposition, the Newtons also filed a motion for a default judgment against defendants based on their failure to

provide complete discovery of requested financial documents. Judge Mack never actually addressed the motion, instead ordering Reba to compile a complete trail documenting the movement of Mary's funds. Reba did so and the motion fell by the wayside.

The Newtons now complain that contempt proceedings should have been allowed to proceed and that the court should have entered a default judgment given the lengthy delay in production of documents. We review for an abuse of discretion a lower court's decision on a motion for sanctions following a discovery violation. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

MCR 2.114 "applies to all pleadings, motions, affidavits, and other papers provided for by these rules." MCR 2.114(A). No rule requires notarization of interrogatory answers. Rather, MCR 2.309(B)(3) only requires that "the person making" the answers sign the document. By signing the interrogatory answers, the party certifies that "he or she has read the document" and "to the best of his or her knowledge, information, and belief" the answers are true. MCR 2.114(D). The court "shall impose . . . an appropriate sanction" for the violation of these rules. *Id.*

The power to hold a party in contempt is granted by MCL 600.1701. This statute permits a court "to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct," including when officials such as notaries and attorneys neglect or violate the duties of their offices. MCL 600.1701(c). Judge Mack correctly determined that contempt proceedings were not appropriate in this case. In relation to the notarization of the interrogatory answers, such signature was not required by the court rules. There is no indication that defendants had any knowledge regarding the purpose or effect of notarization or understood that they had to sign the document in front of the notary. When defense counsel was made aware of the problem, he remedied it by having defendants re-sign their answers in the presence of the notary. And the notary's violation of duty has already been handled by the Office of the Great Seal. Contempt proceedings in relation to the notarization issue would have been a waste of judicial resources.

Moreover, the Newtons never entered the entirety of the interrogatory answers into the record so the court could assess the pervasiveness of any perceived falsities. While defendants' interrogatory answers were cursory and filed to provide examples of Mary's expression of intent as requested by the Newtons, they were not inconsistent with the parties' deposition answers. Gaspare testified that Mary often travelled to the bank with Reba to conduct her own business. He claimed that Mary "had all her wits" and "knew what was going on." He also stated his belief that the Newtons rarely visited Mary and showed little concern for her. Mary told him and Reba that she decided to exclude the Newtons from her will, Gaspare asserted. Reba testified about following Mary's instructions in making various financial transactions. Reba further asserted that Mary told her "she didn't feel comfortable" about giving the Newtons any money because she was afraid they would "waste it." These answers were not so divergent from the interrogatories as to render them false.

We also find no ground to upset Judge Mack's denial by implication of a default judgment against defendants based on their late production of financial records. "Default is a punitive measure, appropriate in defined circumstances, the threat of which encourages the

cooperation of parties to a suit. Our court rules governing the entry of defaults and default judgments are narrowly designed to sanction an uncooperative party.” *Rogers v JB Hunt Transp*, 466 Mich 645, 653; 649 NW2d 23 (2002). Disposition of the issues on the merits is preferred, however, and “defaults and default judgments are not favored in the law.” *Id.* at 654. Before employing such “a drastic sanction,” “[t]he trial court should carefully consider the circumstances of the case.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). “The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Id.* Relevant factors include:

“(1) Whether the violation was wilful or accidental; (2) the party’s history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party’s] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court’s order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.” [*Id.* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Judge Mack made absolutely no record consideration of any factors until the post-dismissal hearing on defendants’ request for attorney fees as case evaluation sanctions. At that time, the court denied this request because defendants’ own delay “led plaintiffs to believe they had a good case. In fact, they did not.”

Defendants did not completely ignore the Newtons’ requests for documents or court orders to compel discovery. We cannot discern from the record what documents were produced when. However, the Newtons had some information from which they could have subpoenaed certain banks for more detailed records earlier in the proceedings. At some point, Reba neatly handwrote a consolidated ledger of all activity involving Mary’s money from April 21, 2006, through December 15, 2009. Moreover, defendants’ hesitation in producing documents was justified in part. The Newtons wanted not only information on Mary’s accounts, but also on the Silvios’ personal finances, allegedly to determine if they were “stealing” Mary’s social security checks. Whether the Silvios had possession of those social security checks is irrelevant. These personal accounts were only relevant to the extent they might contain some proceeds of the CD on which John Newton had been a co-owner. Once enough records were produced, it was positively established that Reba transferred those funds into an account controlled by Mary, completely disproving the Newtons’ conversion claims. Ultimately, considering all the circumstances, Judge Mack did not abuse his discretion in choosing a less drastic sanction over a default judgment.

IV. SUMMARY DISPOSITION

The Newtons assert that the Wayne Probate Court erred in suddenly reversing the course of the proceedings and summarily dismissing their undue influence and conversion claims. We

review de novo a circuit court's resolution of a summary disposition motion. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh*, 263 Mich App at 621]. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

Whether the court properly granted summary disposition hinges on the admissibility of Mary's 2007 deposition testimony in her lawsuit against Janice, a highly debated issue in this case. This evidence was certainly relevant. Mary testified regarding her financial plan and how she wanted her money handled, a major question underlying the current lawsuit. Mary's 2007 testimony therefore had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Yet, Mary's 2007 deposition testimony was hearsay, as it was a statement made by the declarant outside testimony provided in the current action and defendants sought its admission to prove the truth of the matter asserted. See MRE 801(c). And Mary's 2009 death made her unavailable in the current proceeding. See MRE 804(a)(4).

Mary's deposition could be admissible under MRE 803(3), then existing mental, emotional, or physical condition. That provision allows for admission of:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Mary testified as to her intent, plan, motive, and design for her finances and her current negative state of mind against Janice. She also testified regarding the 2006 will revision.

And as noted by Judge Mack, MRE 804(b)(7) permits admission in this case. That rule is a catch-all and provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other

evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Mary's deposition testimony was offered as evidence of a material fact—Mary's plan for her finances and estate. It was the most probative evidence that could be produced on this point—Mary herself testified that she wanted all her money in her own name with only Reba as the co-owner. And the interests of justice were best served by admitting this evidence because it was the most reliable way to prove Mary's intent.

Based on various pieces of evidence, including Mary's 2007 deposition testimony, Judge Mack correctly summarily dismissed the Newtons' undue influence claim under MCR 2.116(C)(10). Our Supreme Court has outlined the method of proving undue influence in a will contest as follows:

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. However, in some transactions the law presumes undue influence. The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976) (citation omitted).]

The existence of a presumption does not shift the burden of proof, however, "it remains with the plaintiff throughout trial." *Id.* at 539. The opposing party simply acquires a burden to come forward with evidence to rebut the presumption. *Id.* at 540-542.

As further recognized by our Supreme Court, not all influence is "undue" such that it destroys testamentary intent. To be "undue," the influence must destroy the testator's free will and make him or her an agent representing the desires of another. See *In re Spillette Estate*, 352 Mich 12, 17-18; 88 NW2d 300 (1958). And "[m]ere suspicion" is not enough; speculation of undue influence cannot form a case. *Id.* at 17.

A confidential or fiduciary relationship sufficient to create a presumption of undue influence claim has been defined as:

"extend[ing] to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal. If a relation of trust and confidence exists between the parties -- that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been

acquired and abused -- that is sufficient as a predicate for relief. The origin of the confidence is immaterial." [*In re Estate of Wood*, 374 Mich 278, 282-283; 132 NW2d 35 (1965), quoting 3 Pomeroy, *Equity Jurisprudence* (5th ed, 1941), § 956a, overruled in part on other grounds *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985).]

Quoting Black's Law Dictionary (7th ed), the Supreme Court has also defined a fiduciary relationship as:

"[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. . . . Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." [*In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003).]

The evidence reveals that the Silvios did not have a fiduciary relationship with Mary and therefore there was no presumption of undue influence. On its face, the Silvios' relationship with Mary appears to be fiduciary in nature. In 2006, Mary gave Reba (as well as Janice) a power of attorney to handle financial affairs. However, the Silvios never had control over Mary and they acted according to her instructions, not their own instincts. Even if the Silvios stood in a fiduciary relationship with Mary, the evidence would have overcome the presumption and proved that no undue influence occurred.

Mary's 2007 deposition testimony showed that she was mentally competent and accurately understood her own finances. Mary was aware of and ordered the financial transactions Reba took on her behalf. Mary specifically testified that her "grandkids" had been made co-owner on a CD in lieu of her deceased daughter. Mary also asserted that she "signed for [Reba] to close them [the CDs]" because she intended those funds to be transferred to accounts in a Michigan bank. Mary specifically testified that Reba "had my permission to handle the money."

Thomas Barr, the attorney who prepared Mary's 2006 will, testified in his deposition in the current matter that he met with Mary alone while the Silvios waited in the lobby. Mary told Barr that her daughter Gloria had predeceased her and that Gloria had two children, but made no gift to those grandchildren. Mary instructed Barr that she wanted her entire estate to pass to Reba. Barr testified that Mary was alert, competent, and "aware of what she was doing."

Barry admitted at his deposition that Mary "was fine mentally" and was not "mentally incapacitated" when she reworked her estate plan. Barry conceded that he "didn't personally see anything where [Mary] couldn't make her own decisions." John, on the other hand, felt that Mary was mentally feeble simply because his grandmother sometimes called him by his brother's name. Yet, John testified that he was "sure" Mary was able to make her own decisions.

The Newtons could prove no undue influence given their admissions that Mary was mentally competent and could make her own decisions and Mary's own testimony showed that she orchestrated the handling of her accounts. Barr, a neutral third party, also assessed Mary legally competent to handle her affairs. The Newtons disproved their own case.

The court also correctly dismissed the Newtons' conversion claim. Statutory conversion is governed by MCL 600.2919a, which provides for treble damages when one person converts the property of another for his or her own use. "Common law conversion . . . consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

The first step to proving any conversion claim is to prove that the subject property belonged to the plaintiff. The \$100,000 in the Alabama CD over which John was named as a co-owner did not belong to the Newtons, however, under either Michigan or Alabama law. In a factually similar case, our Supreme Court held that a grandmother "reserved the right to withdraw" from an account on which she named her granddaughter as a co-owner and could close the account at any time because the joint account was not a gift in life to the other, but a testamentary tool that could be revoked at any time. See *Esling v City Nat'l Bank & Trust Co of Battle Creek*, 278 Mich 571; 270 NW 791 (1936). And under Ala Code 5-24-11, in an account held as joint owners with rights of survivorship, during the lifetime of all parties, each owns the funds within only in proportion to his or her contribution to the account.

Mary was alive when Reba closed the Alabama CD on which John was named as a co-owner. At that time, Mary (and Monroe) alone owned the funds in the CD because the funds contributed to the account came from Mary (and Monroe). John had no ownership interest at that time. And Mary instructed Reba to close the CD and bring the funds to Michigan as proven by her own deposition testimony. Accordingly, the Newtons cannot support a claim that Reba converted their funds—they did not own them, Mary had every right to close the account and change the disposition, and Reba had every right to act on Mary's instructions in this regard.³

V. PRELIMINARY INJUNCTION

Throughout the lower court proceedings, the court continued a preliminary injunction to prevent the dissipation of Mary's assets. The Newtons challenge Judge Mack's refusal to continue the injunction after dismissing the Newtons' action. We review for an abuse of discretion a lower court's decision on a request for a preliminary injunction. *State v McQueen*, 493 Mich 135, 146; 828 NW2d 644 (2013).

³ As the Newtons could not establish any wrongdoing on defendants' part, the court properly denied their motion to amend their complaint to add an exemplary damages count. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

“Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008), quoting *Kernen v Homestead Development Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). The party seeking the injunction must “make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” *Mich Coalition of State Employee Unions v Michigan Civil Svc Comm*, 465 Mich 212, 225; 634 NW2d 692 (2001). And the proponent must demonstrate that it “is likely to prevail on the merits.” *Mich State Employees Ass’n v Dep’t of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1985).

Once defendants provided full discovery, it became clear that Mary’s money had transferred exactly as she instructed and that the Silvios had converted no assets. At that point, the Newtons’ claims lost all merit. Judge Mack therefore acted appropriately in denying the Newtons’ request to continue the preliminary injunction.

VI. JUDICIAL DISQUALIFICATION

Finally, the Newtons contend that Judge Mack should have disqualified himself from this proceeding based on personal bias. MCR 2.003(C)(1)(a) requires disqualification when “[t]he judge is biased or prejudiced for or against a party or attorney.” To warrant judicial disqualification, the bias must be “extrajudicial,” i.e. “have its origin in events or sources of information gleaned outside the judicial proceeding.” *Cain v Dep’t of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). “[A] favorable or unfavorable predisposition that springs from facts or events occurring in the current proceeding may deserve to be characterized as ‘bias’ or ‘prejudice.’ However, these opinions will not constitute a basis for disqualification ‘unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’” *Id.* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). The proponent “must overcome a heavy presumption of judicial impartiality.” *Cain*, 451 Mich at 497.

Judge Mack did not abuse his discretion in this case. The Newtons made no allegation of bias beyond Judge Mack’s rulings in these proceedings. Nothing in those rulings reflects “a deep-seated favoritism or antagonism” rendering Judge Mack’s rulings invalid. As discussed in the earlier issues, Judge Mack’s decisions were appropriate. Accordingly, Judge Mack acted within his discretion in denying the Newtons’ motion to disqualify him.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause