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# 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 2007-2014 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

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

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**DT**: October 19, 2015

**RE: In Re Mardigian Estate**
STATE OF MICHIGAN COURT OF APPEALS

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**"Alan, you cannot write about baseball all your life"**
- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

**BASEBALL LORE:**

DAN CARMICHAEL – AND OTHER HEROES

You would have to be a real devotee of baseball to know the name Dan Carmichael, so let me tell you part of this baseball lore.

The first televised baseball game happened on May 17, 1939; Columbia University played Princeton University. The game took place at Columbia's Baker Field. Two notable people who participated in this endeavor were Bill Stern, the famous broadcaster who broadcast this game and Sid Luckman, the All-American football player and future pro quarterback for the Chicago Bears. Sid played shortstop for Columbia.

The pitcher for Princeton was a gentleman by the name of Dan Carmichael. He was credited with Princeton's 2 to 1 victory. Also, when the score was tied 1 to 1, he led off the final inning with a single and ultimately scored the winning run himself (he was driven in by Princeton's Stan Pearson, Jr.).

He went on to have quite a legacy. He joined the Navy and shot down 13 enemy aircraft. Carmichael flew a Hellcat fighter plane and survived a crash. He received a Silver Star for this heroism. He became a champion amateur golfer, winning the Ohio Amateur golf championship. He was also a champion formula one racer.

The opposing pitcher that day was a gentleman by the name of Hector Dowd, who also served in World War II and went on to be a practicing lawyer.

The game also saw a homerun by Columbia's Ken Pill, who served honorably in combat in World War II. Pill was a sergeant.

Stan Pearson, Jr. entered World War II and served as a major in the Airforce. Pearson was a U.S. Squash Singles Champion.

Another member of the Princeton nine was Bill Malloy, who gave his life in World War II.

**REVIEW OF CASE:**

Referenced Files: Violation of Public Policy - Effect
Michigan Rules of Professional Responsibility – As Public Policy
Void Documents

This published 2 to 1 decision by the Michigan Court of Appeals should be appealed to the Michigan Supreme Court and decided by the Michigan Supreme Court.

Appellant was the lawyer for appellees' deceased. Appellant presented a will to appellees' deceased to sign which appellant prepared wherein appellant and his family benefited. Appellees' deceased passed away.

Appellees contested the instrument on the basis of incompetency and undue influence. The Charlevoix County Probate Court dismissed the contested will on the legal basis that it violated public policy and therefore was void.

In a 2 to 1 decision, the Court of Appeals reversed, giving appellant attorney a chance to prove that he could overcome the presumption of undue influence arising because of his fiduciary status. The Court of Appeals stressed the applicability of the *Powers* case, 375 Mich 150, which it said "held that a will, devising the bulk of the estate to a member of the family of the attorney who drafted the will, and also naming the attorney as an additional beneficiary, was not necessarily invalid."

The dissent went at least as far as to recognize that the *Powers* decision said it "stood for the proposition," rather than "held," which is somewhat closer to the point.

In point of fact, this reviewer does not believe either the majority or the dissent were correct in their interpretation of the *Powers* decision for the following reasons:

1. It is true that a lawyer benefitted from the will in *Powers* and it is true that the *Powers* court said it was not necessarily invalid. However, there was no holding to this effect. The holding in *Powers* was that the matter should be reversed for a new trial because inadmissible evidence was admitted, admissible evidence was not admitted and the charges to the jury were improper. Thus, there is only dicta on the issue of enforceability of a document against public policy.

2. Further, no one raised the issue of invalidity of the document as a matter of law in *Powers*.

Next, as the dissent points out, MRPC 1.8(c) did not exist at the time *Powers* was decided. Although the majority makes reference in determining what is and what is not public policy, by looking at whether the language in the rules in question are precatory or mandatory, the majority opinion failed to take note that MRPC 1.8(c) used mandatory language. "A lawyer shall not prepare an instrument . . ." Also, the dissent clearly points out that MCL 700.7410(1) was also not in existence at the time of *Powers*, which said:

> "In addition to the methods of termination prescribed by sections 7411 to 7414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful *or contrary to public policy*."

Neither the majority nor the dissent have cited MCL 700.7105(2)(c) holding that the terms of the trust prevail over any provision of the code, except as follows "that the trust has a purpose that is lawful, not contrary to public policy, and possible to achieve." Thus, there is two references in the trust code relative to public policy.

In this reviewers opinion, the discourse about the difference between wills, trusts and contracts raise distinctions rather than differences and are not germane to the discussion.

It may very well be that the Supreme Court would ultimately extend *Powers* to vitiate the effect of the rules of professional responsibility or the two cited sections of the trust code relative to public policy, but it should be the Supreme Court that does it.

Whichever way the Supreme Court decides, it would be instructive to the scrivener. If the Supreme Court rules that such documents are void, the attorney knows that it is not only good practice, but that it becomes mandatory to send the client to another attorney if the intent of the testator is really to benefit the lawyer. Although the Court of Appeals is correct that we must look to the intent of the settlor, the intent of the settlor can always be carried out if another non-involved lawyers becomes the scrivener. Collateral issues could also be addressed as to whether an instrument is void where the scrivener is an indirect beneficiary, such as a director or officer of a charitable beneficiary or distributee.

AAM:kjd
Attachment
815315

# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* MARDIGIAN Estate.

MARK S. PAPAZIAN, Executor for the Estate of ROBERT DOUGLAS MARDIGIAN,

Appellant,

v

MELISSA GOLDBERG, SUSAN V. LUCKEN, NANCY VARBEDIAN, EDWARD MARDIGIAN, GRANT MARDIGIAN, MATTHEW MARDIGIAN, and JP MORGAN CHASE BANK, NA,

Appellees.

FOR PUBLICATION
October 8, 2015
9:05 a.m.

No. 319023
Charlevoix Probate Court
LC No. 12-011738-DE;
12-011765-TV

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

WILDER, P.J.

In this action originating in the Charelvoix County Probate Court, appellees contested the August 13, 2010 trust and the June 8, 2011 will of decedent Robert D. Mardigian (decedent). Appellees challenged the trust and will on the basis that appellant, the proponent of the documents and the recipient, together with his children, of the majority of decedent's estate, also was the drafter of the documents in violation of the Michigan Rules of Professional Conduct (MRPC). In a motion for summary disposition filed in the probate court pursuant to MCR 2.116(C)(10), appellees contended that the devises were void as against public policy, and therefore, unenforceable. The probate court granted the motion for summary disposition, and this appeal ensued. For the reasons articulated herein, we reverse.

## I. STATEMENT OF FACTS

On August 13, 2010, decedent executed an amended trust prepared by appellant,[1] decedent's long-time friend and an attorney, which left the bulk of decedent's estate to appellant and his children, Todd Papazian and Tyler Papazian. Decedent also executed a will prepared by appellant on June 8, 2011 that contained similar provisions. Decedent died on January 12, 2012.

After decedent's death, appellant sought to introduce the documents he had prepared for probate, along with a petition to be appointed personal representative pursuant to the language in the document. Appellees Edward Mardigian, Grant Mardigian, and Matthew Mardigian, decedent's brother and nephews, respectively, challenged the introduction of these documents into probate, as did two of decedent's nieces, appellees Susan Lucken and Nancy Varbedian, and decedent's girlfriend, appellee Melissa Goldberg. At the same time, various appellees, primarily appellees Edward, Grant, and Matthew Mardigian, contended that subsequent writings by decedent, namely a letter with what appellant termed "dubious" handwritten notes should be submitted instead, as writings intended to be a will, and as an amendment to decedent's trust.

Following discovery, appellees Edward, Grant, and Matthew Mardigian moved for partial summary disposition and asked the probate court to void all gifts contained in both the trust and the will to appellant and his children, as a matter of law. Edward, Grant, and Matthew Mardigian argued that the gifts were against public policy, as evidenced by the MRPC, specifically MRPC 1.8(c), which provides: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." The probate court initially denied the motion.[2] However, after Edward, Grant, and Matthew Mardigian verbally renewed their motion during the hearing on November 6, 2013, the probate court then granted the motion on the ground that, as a matter of public policy, it could not enforce the documents.

After the probate court granted the motion for summary disposition, the matter proceeded toward a scheduled jury trial. On the date of the scheduled trial, the probate court denied appellant's motion for a stay under MCL 600.867(1); however, the probate court and other parties agreed that appellant could continue to participate in the subsequent proceedings. For reasons not clear in the record, appellant decided not to continue to participate in the proceedings. Thereafter, the other parties reached a settlement concerning the distribution of funds and the jury was excused. This Court subsequently denied appellant's motion for a stay, and denied reconsideration.

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[1] Although appellees discuss appellant's initial denial of this fact in their briefs on appeal, appellant's counsel admitted that appellant prepared the documents at the motion hearing below.

[2] The probate court also denied appellant's motion for partial summary disposition regarding all claims of undue influence.

## II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Dillard v Schlussel*, 308 Mich App 429, 444; 865 NW2d 648 (2014).

> When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. "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." A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." When entertaining a summary disposition motion under subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. [*Id*. at 444-445 (citations omitted).]

We also review de novo the proper interpretation of trusts and wills, as well as the interpretation of statutes. *In re Estate of Stan*, 301 Mich App 435, 442; 839 NW2d 498 (2013).

## III. ANALYSIS

### A. BINDING SUPREME COURT PRECEDENT

In *In re Powers Estate*, 375 Mich 150, 156, 176, 179; 134 NW2d 148 (1965), our Supreme Court held that a will, devising the bulk of the estate to a member of the family of the attorney who drafted the will, and also naming the attorney as an additional beneficiary, was not necessarily invalid. Rather, in such circumstances, a question of undue influence exists, such that undue influence arising from the relationship is presumed to have been exerted as the means to secure the testamentary gift. *Id*. at 179. In remanding for further proceedings, the *Powers* Court stated:

> This will contest is on no different legal and factual basis than any other in our past jurisprudence and we caution court and counsel if the case is retried to confine the testimony to the issues:
>
> (1) The well-defined, well-recognized test of the testatrix' competency to execute the testamentary instrument at the time she executed it;
>
> (2) The equally well-defined and well-recognized issue of the exercise of fraud or undue influence in the execution thereof, including any presumption created by the fact that proponent was deceased's attorney and the fact that he drew the instrument here involved as such. [*Id*.]

In his concurrence, Justice Souris further noted that:

> Indeed, this Court almost 60 years ago bluntly warned the profession against such conduct, in [*Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907)]:

> "By statute, a bequest to a subscribing witness, necessary for proving the will, is declared absolutely void (CL 1897, § 9268), and this, though the subscribing witness may be and generally is ignorant of the contents of the will. Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion. [*Dudley v Gates*, 124 Mich 440; 83 NW 97 (1900).]" [*Powers*, 375 Mich at 181 (SOURIS, J., concurring in reversal and remand).]

*Powers* is directly on point to the facts presented in the instant case, and as such is binding on this Court.[3] Under *Powers*, we are required to remand for further proceedings, where appellant would be required to overcome the presumption of undue influence arising from the attorney-client relationship in order to receive the devises left to him and his family.

## B. *KARABATIAN'S ESTATE v HNOT* IMPROPERLY FAILED TO FOLLOW *POWERS* AND, REGARDLESS, IS NOT BINDING ON THIS COURT

Although we remand for further proceedings, we further address the significant policy questions presented by this case. First, appellees note that in *Karabatian's Estate v Hnot*, 17 Mich App 541, 546-547; 170 NW 2d 166 (1969), this Court held a will to be void as against public policy under similar facts. But, we find that the *Karabatian* Court erred in failing to follow *Powers* as binding precedent, and, as a pre-1990 decision, we are not bound by *Karabatian*. Administrative Order No. 1990-6. In addition, even if *Karabatian* may have correctly foretold the outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here, we lack the authority to overrule *Powers*:

> Although the Court of Appeals panel in this case correctly anticipated our holding, we disapprove of the manner in which the panel indicated its disagreement with [*People v Goff*, 401 Mich 412; 258 NW2d 57 (1977)]. An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts. [*People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) (citation omitted).]

## C. TRUSTS AND WILLS IMPLICATE DIFFERENT PUBLIC POLICY CONSIDERATIONS THAN CONTRACTS AND THEREFORE MAY WARRANT DIFFERENT TREATMENT IN THE APPLICATION OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

Second, appellees rightly recognize that MRPC 1.8(c) expressly prohibits the conduct at issue here. Based principally on the enactment of this provision, the fact that our Supreme Court

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[3] Because "[t]he rules of construction applicable to wills also apply to the interpretation of trust documents[,]" *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005), we conclude that *Powers* applies to both the trust and the will at issue in this case.

has ruled that "public rules of professional conduct may also constitute definitive indicators of public policy," *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002), the fact that contracts entered into in violation of the MRPC have been found unenforceable, *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189; 650 NW2d 364 (2002), and the enactment by the Legislature of MCL 700.7410(1) and MCL 700.2705, appellees argue, separate and apart from the *Karabatian* decision, that the devises to appellant and his children were void as against public policy. If appellees were correct that MCL 700.7410(1) and MCL 700.2705, together with MRPC 1.8(c), make it clear that the public policy of this state prohibits an attorney or specified relative from receiving a devise from an instrument prepared by the attorney for a client, this case might be distinguishable from *Powers*. However, we conclude that appellees' argument is unavailing.

*Terrien* established only that "public rules of professional conduct *may* also constitute definitive indicators of public policy." *Terrien*, 467 Mich at 67 n 11 (emphasis added). Accordingly, while the violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy. Moreover, as noted in the commentary to MRPC 1.0:

> The Rules of Professional Conduct are rules of reason. . . . Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. . . .
>
> * * *
>
> . . . [A] violation of a rule does not . . . create any presumption that a legal duty has been breached. . . . The fact that a rule is a just basis . . . for sanctioning a lawyer under the administration of a disciplinary authority[] does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.

These limitations noted in the commentary to MRPC 1.0 and in *Terrien* (that a violation of the MRPC *may* constitute a definitive indicator of public policy) are important considerations in the instant case, because contracts, the legal instrument at issue in *Lizza*, are distinctly different from trusts and wills, which are at issue in this case.

A will is generally *not* a contract. 1 Williston, Contracts (4th ed), § 1.7, p 48. The nature of wills and contracts are essentially different, most notably in that they derive their binding force from differing sources. Finburg, *Wills—As Distinguished from Common Law Contracts*, 16 BU L Rev 269, 272 (1936). Whereas a contract is "an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties," 95 CJS, Wills, § 188, p 185, a will is "a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his or her last expressed purpose, and a will, although absolute and unconditional, cannot be termed a contract." *Id*. It is this difference that gives rise to the separate and distinct rules applied to interpreting the meaning of wills and contracts. 5 Corbin, Contracts (rev ed), § 24.1, p 6. Whereas, with most contracts, at least two participants play a role in the formation and performance, each party choosing some of the symbols of expression, and each giving those symbols a meaning that may differ materially from the meaning given to them by the other party

to the contract, a will, made for the purpose of affecting the disposition of property by stating the desire of the testator, requires courts to give legal operation to the meaning of the symbols of expression of only one person—the testator. *Id*. Thus, while a court must interpret contracts in light of the intent of all of the contracting parties, in the making of a will, the testator requires no other person's understanding or assent. *Id.* ("No one is asked to make a return promise, to render an executed consideration, or to do any other act in reliance. . . . [T]hese factors enter largely into the making and performance of a contract. The result is that the court must determine, in accordance with applicable contract law, which party's meaning is to prevail, a determination far less simple than in the case of a will.").

While trusts and wills "are not the same, and different legal rules govern each," 90 CJS, Trusts, § 1, p 130, under Michigan law, courts apply the same rules of interpretation to trusts and wills, *Reisman*, 266 Mich App at 526. The primary goal of interpreting wills is to give effect to the testator's intent as long as it is lawful. See *Wanstead v Fisher*, 278 Mich 68, 73; 270 NW 218 (1936) ("It is elementary that the cardinal principle in the interpretation of wills is to carry out the intention of the testator if it is lawful and can be discovered; and that the whole will is to be taken together and is to be so construed as to give effect if it be possible to the whole."); *Sondheim v Fechenbach*, 137 Mich 384, 387-388; 100 NW 586 (1904) ("The general rule for the interpretation of wills is that it is the duty of courts to give full and complete effect to the testator's intention, and carry out such intention if it be lawful." (citation and quotation marks omitted)). Similarly, in interpreting trusts, "the probate court's objective is to ascertain and give effect to the intent of the settlor." *In re Estate of Stan*, 301 Mich App 435, 442; 839 NW2d 498 (2013). The devises to the appellant and his children are not, on their face, unlawful devises. Thus, they can only be invalidated as unlawful *if* they are definitively against public policy. No statute, including MCL 700.7410(1) and MCL 700.2705, renders these devises as definitively contrary to public policy. The decedent's purported intent, to transfer assets to appellant and appellant's children, is not per se unlawful, as demonstrated by the fact that, had an independent attorney drafted the documents rather than appellant, there was nothing illegal about the devises. Rather than the purpose of the devises being illegal, it is the fact that the person drafting the documents did so contrary to the letter and spirit of the rules of professional conduct that raises suspicion of the validity of the devises.[4]

In sum, there are valid policy reasons why our Supreme Court could reembrace the rule enunciated in *Powers* and conclude that it is appropriate to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, where a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual

[4] Even this Court's opinion in *Karabatian's Estate v Hnot*, 17 Mich App 541, 546-547; 170 NW2d 166 (1969), which did not follow *Powers* in concluding that the bequest to the scrivener was void as contrary to public policy, nevertheless, acknowledged that there was no statute to invalidate a bequest to a scrivener.

and sincere desires of the grantor. Thus, as noted in *Powers*, the proper remedy for the rule violation may be to follow the normal procedures intended to effectuate the grantor's intent, but to also view the devises to the drafting attorney and his family with suspicion, by application of the presumption of undue influence, rather than to declare the devises void on their face. *Powers*, 375 Mich at 179; *id*. at 180-181 (SOURIS, J., concurring in reversal and remand). As explained below, if appellant can rebut the presumption of undue influence with competent evidence, then the devises should be enforced.

## D. APPLICABLE LAW SUGGESTS THAT A PRESUMPTION OF UNDUE INFLUENCE MUST BE REBUTTED TO AVOID THE INVALIDATION OF A DEVISE DRAFTED UNDER THE FACTS OF THIS CASE

Finally, the statutory scheme provided by the Legislature suggests that the contestant of a trust or will must establish, *inter alia*, undue influence in order to invalidate the trust or will. 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." *Powers*, 375 Mich at 158. Similarly, "[a] trust is created only if . . . [t]he settlor has capacity to create a trust" and "[t]he settlor indicates an intention to create the trust." MCL 700.7402(1)(a)-(b). "A trust is void to the extent its creation was induced by fraud, duress, or undue influence." MCL 700.7406.

"To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *In re Estate of Karmey*, 468 Mich 68, 75; 658 NW2d 796 (2003) (citation and quotation marks

omitted). Motive, opportunity, or the ability to control, without proof that it was exercised, is insufficient to establish undue influence. *Id*. (citation omitted). However, as previously discussed, in certain circumstances, undue influence is presumed:

> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993) (citation omitted).]

As this Court has further explained:

> The establishment of this presumption creates a "mandatory inference" of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. [*In re Estate of Mikeska*, 140 Mich App 116, 121; 362 NW2d 906 (1985) (citation omitted).]

The framework adopted by our Legislature attempts both to honor the actual intent of the grantor while also protecting against abuse. Because appellant was the decedent's fiduciary, he benefited from the transaction with decedent, and, as the drafter of the documents, he had an opportunity to influence the decedent's decision in that transaction, it is presumed he exerted undue influence in securing the devises at issue. However, case law and existing statutes afford appellant the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside, and that in fact the devises represent the unfettered and uninfluenced intent of the decedent.

## IV. CONCLUSION

Based on the binding precedent of our Supreme Court in *Powers*, and for the above-stated reasons, we reverse and remand to the Charlevoix County Probate Court for proceedings consistent with this opinion. As the prevailing party, appellant may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

# STATE OF MICHIGAN

# COURT OF APPEALS

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*In re* MARDIGIAN Estate.

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MARK S. PAPAZIAN, Executor for the Estate of ROBERT DOUGLAS MARDIGIAN,

Appellant,

v

MELISSA GOLDBERG, SUSAN V. LUCKEN, NANCY VARBEDIAN, EDWARD MARDIGIAN, GRANT MARDIGIAN, MATTHEW MARDIGIAN, and JP MORGAN CHASE BANK, NA,

Appellees.

FOR PUBLICATION
October 8, 2015

No. 319023
Charlevoix Probate Court
LC No. 12-011738-DE;
12-011765-TV

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Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

Servitto, J. (*dissenting*).

I respectfully dissent. The majority is correct that *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965) stands for the proposition that instruments drafted by an attorney that propose to give a gift or devise to the attorney or his family members may be appropriate so long as such gift does not result from undue influence.

However, *Powers* was decided long before the 1988 enactment of the MRPC, or even its predecessor, the Code of Professional Conduct, which was adopted in 1971. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194; 650 NW2d 364 (2002). MRPC 1.8(c) now specifically prohibits this conduct. Moreover, this Court has held, in the context of a referral fee contract sought to be upheld by the attorney, a contract is unethical when it violates the MRPC, and "unethical contracts violate our public policy and therefore are unenforceable." *Id*. at 189.

The *Lizza* Court agreed with our Supreme Court's findings that "[i]t would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement." *Lizza*, 251 Mich App at 196 (internal quotation marks and citations omitted). While the majority correctly notes that a will is not a contract, it would nonetheless be equally

absurd to allow appellant to benefit from his actions in the instant case where he would be also subject to such discipline for them. And, given the discussion in *Lizza*, including its reliance on *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997), as well as the enactment of the subsequent rules governing attorney conduct, this Court could conclude that the specific holding in *Powers* relied upon so heavily by appellant has now been superseded by subsequent Supreme Court actions.

With respect to public policy issues, our Supreme Court has stated:

> . . . the proper exercise of the judicial power is to determine from objective legal sources what public policy *is,* and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.
>
> ***
>
> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. [*Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002)].

The *Terrien* Court also stated, "[w]e note that, besides constitutions, statutes, and the common law, administrative rules and regulations, and *public rules of professional conduct* may also constitute definitive indicators of public policy." *Id*. at 67, n 11 (emphasis added). In fact, our Supreme Court is charged with promulgating the rules regarding the ethical conduct of attorneys in Michigan. MCL 600.904 provides:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

It also has "the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct." *Speicher v Columbia Tp Bd of Election Com'rs*, 299 Mich App 86, 91; 832 NW2d 392 (2012). Because "the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904 . . . conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy." *Id*. at 92.

I would also note that while the majority cites to the ability to rebut a presumption of undue influence with respect to trusts and wills as a protection, the majority makes no mention of MCL 700.7410(1), governing trusts, which provides:

> In addition to the methods of termination prescribed by sections 7411 to 7414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have

> become impossible to achieve or are found by a court to be unlawful *or contrary to public policy.* (emphasis added)

MCL 700.2705 similarly provides:

> The meaning and legal effect of a governing instrument other than a trust are determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in part 2 of this article, the provisions relating to exempt property and allowances described in part 4 of this article, or another public policy of this state otherwise applicable to the disposition.

Thus, once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent. Given the above statutory provisions, longstanding caselaw, and the language of MRPC 1.8(c), I disagree with the majority's conclusion that *Powers*, supra, requires remand for further proceedings where appellant would be required to overcome the presumption of undue influence. I would instead find that the trial court did not err when it found that the devises to appellant and his children in the June 8, 2011, will and the August 13, 2010, trust were void as against public policy and I would affirm.

/s/ Deborah A. Servitto