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

PROBATE LAW CASE SUMMARY

BY: Alan A. May

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

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

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

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DT: November 12, 2010

RE: Estate of Helen Bandemer
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

We all know of good and bad trades, Babe Ruth being the best ever and thus the worst ever for the trading team.

Let's examine the Tigers.

Miguel Cabrera may be on his way to being the best ever, but four trades standout to me as the two best and two worst.

George Kell for Barney McCoskey – the Tigers acquired Kell, who went on to have seven plus .300 seasons and a batting championship. McCoskey – two plus .300 years, then obscurity. Pretty good trade.

Norm Cash for Steve Demeter – Cash had one super year batting .361 in 1961 and won the batting title. He incurred the largest drop to .243 in 1962, but finished his career with a lifetime .271 and 377 homeruns. Demeter had five at bats in 1960; got no hits and then dropped out of baseball. Pretty good trade.

Now, two stinkers:

Dale Alexander and Roy Johnson to Boston for Earl Webb. Alexander went on to lead the league with a .367, then a .281 and then retired. Johnson went on to have three plus .300 seasons. Webb? He played one-half of one year, and a mediocre one at that, and dropped out of baseball.

Billy Pierce for Aaron Robinson – this could rank near Ruth. Billy left the Tigers to go on to a 211-169 record. Led the league in wins in 1957, in ERA in 1955 at .197 and strike outs in 1953. He had 38 shut outs. Robinson? He caught for the Bengals for two years, batting .269 and .226; then was traded. He cost us the 1950 pennant with a bonehead play against Cleveland. Most startling in 1951 when he batted .226, Billy batted .260.

Which trades do you think about?

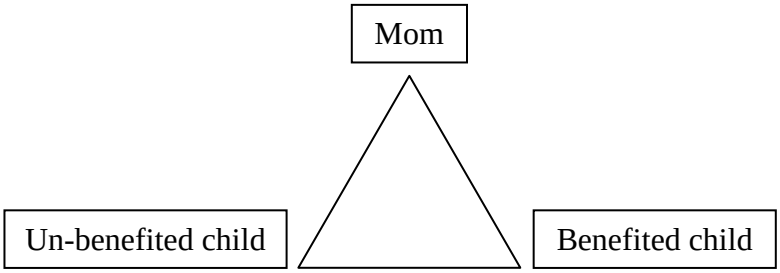
REVIEW OF CASE:

Reference Files: Tortious Interference with Prospective Advantage and Unjust Enrichment
Tortious Interference with a Trust
Intentional and Negligent Infliction of Emotional Distress
Conversion
Fiduciary Relationship

Decedent had four children, two are the Appellants and two are the Appellees. Each believed the other got more than they should have, under a variety of theories.

Although I was not involved in this appeal and did not represent either side. I was the fiduciary and I will, therefore, truncate my commentary.

To analyze this decision is helpful to draw a triangle.



Tortious Interference with Perspective Advantage and Unjust Enrichment

The un-benefited child had no business relationship with either the mom or the benefited child and, therefore, they could not allege tortious interference with perspective advantage in a Trust, because the benefited child didn't receive the benefit from the un-benefited child but from his mother. Neither theory, therefore, applies.

Tortious Interference with Trust

The court did not say that it recognized the tort of interference with the right of inheritance, but said that "if it did it did not lie here." The court did not use the triangle theory but said there was a failure to allege that the benefited party engaged in tortious conduct to induce the mother to fund the Trust the way that the mother funded the Trust.

Intentional and Negligent Infliction of Emotional Distress

The court said that for the first tort to occur there must be extreme and outrageous behavior, which was not present here and for the latter to occur it took the witnessing of a tortious event which did not occur here.

Conversion

Here we look at a similar triangle. The Trust gave money to a benefited child. Since the benefited child did not take money from the un-benefited child there was no conversion. Title was acquired properly and you cannot convert your own property.

Fiduciary Relationship

Trusting in someone's integrity does not a fiduciary relationship make.

AAM:jv:#675044
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of HELEN BANDEMER.

GEORGE BANDEMER and MARVIN BANDEMER,

Appellants,

v

MARTIN BANDEMER and NORMAN BANDEMER,

Appellees.

UNPUBLISHED
October 12, 2010

No. 293033
Wayne Probate Court
LC No. 2006-700767-CZ

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Appellants George Bandemer and Marvin Bandemer appeal as of right from a probate court order granting summary disposition in favor of their brothers, appellees Martin Bandemer and Norman Bandemer, and thereby dismissing all 12 counts in appellants' complaint. We affirm.

This case involves a dispute over the disposition of property formerly belonging to the parties' parents, Marvin Sr. and Helen. Before their deaths, the parties' parents had either given certain assets to one or more of their sons or identified one or more of their sons as a joint owner of certain assets. Marvin Sr. died in 1984. In May 2002, Helen created a will that basically provided that all of her assets were to be divided equally among the four brothers. Helen intended that any assets she held jointly with her sons would also pass under her will and was advised "that that would require retitling assets and disjoining assets," but she declined to take such action. Helen told her lawyer that she wanted her sons to get along, and "trust[ed] them to do the right thing to make sure my desires are carried out." In June 2002, Helen sent Martin a letter asking him to either place certain assets in her name alone or to jointly title certain assets in his and his brothers' names. He apparently did not do so. After the probate court declined to recognize Helen's letter as an amendment to her will, appellants filed a 12-count complaint against appellees seeking damages and imposition of a constructive trust over those assets held

by appellees. The trial court dismissed all 12 counts under MCR 2.116(C)(8) or (10). For the reasons stated below, we conclude that counts II, III, V, VI, IX, and X were all properly dismissed under MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted[1] and that counts I, IV, VII, VIII, XI, and XII were all properly dismissed under MCR 2.116(C)(10) for failure to establish a genuine issue of material fact.

I. STANDARD OF REVIEW

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer,* 277 Mich App 333, 344; 745 NW2d 137 (2007). Summary disposition is appropriate under MCR 2.116(C)(8) when a party fails to state a claim upon which relief may be granted. "When reviewing a motion decided under MCR 2.116(C)(8), this Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery." *Stott v Wayne Co,* 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd 459 Mich 999 (1999) (citations omitted).

"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). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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.

II. TORTIOUS INTERFERENCE WITH A PROSPECTIVE ADVANTAGE

Not just any prospective advantage is actionable; the cause of action is based on tortious interference with a prospective economic advantage or business relationship. See, e.g., *Health Call of Detroit v Atrium Home & Health Care Servs, Inc,* 268 Mich App 83, 90; 706 NW2d 843 (2005) (tortious interference with a business relationship or expectancy requires proof of a valid business relationship or expectancy); *Blazer Foods, Inc v Restaurant Props, Inc,* 259 Mich App 241, 254; 673 NW2d 805 (2003) (tortious interference with a prospective economic advantage requires proof of a valid business relationship or the expectation of such a relationship); *Pryor v Sloan Valve Co,* 194 Mich App 556, 560; 487 NW2d 846 (1992) (tortious interference with economic advantage or business relations requires proof of a valid business relationship or expectancy). "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a

[1] Although the trial court only dismissed counts V and VI under subrule (C)(8), this Court will not reverse where the trial court reaches the right result for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

business relation with another or by preventing a third person from continuing a business relation with another." *Northern Plumbing & Heating, Inc v Henderson Bros, Inc,* 83 Mich App 84, 93; 268 NW2d 296 (1978), quoting 45 Am Jur 2d, Interference, § 50, p 322. The elements of such a claim are (1) the existence of a valid business relationship or expectancy between the plaintiff and a third party, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) intentional interference by the defendant causing a breach or termination of the business relationship or expectancy, and (4) causing damages to the plaintiff. *Health Call of Detroit,* 268 Mich App at 83; *Blazer Foods,* 259 Mich App at 241.

Appellants alleged that before her death, Helen jointly titled certain assets in both her name and that of appellees with instructions that appellees were to divide those assets equally with their brothers upon Helen's death, which amounted to the creation of an express oral trust, that appellees have possession of those assets, and that appellees had not given appellants their fair share.[2] They further alleged that appellees engaged in deliberate and intentional acts, representations, and misrepresentations, as well as deliberate volitional acts and omissions that divested appellants of the economic benefits they would have realized from their share of Helen's assets. Appellants did not allege that they had a valid business relationship or expectancy of such a relationship with Helen, that appellees were aware of that relationship or expectancy, and that as a result of appellees' interference, that relationship or expectancy was terminated or thwarted. Therefore, appellants failed to state a claim for tortious interference with prospective economic advantage and count II was properly dismissed.

III. TORTIOUS INTERFERENCE WITH A TRUST

Appellants rely on *In re Green,* unpublished opinion per curiam of the Court of Appeals, issued August 16, 1996 (Docket No. 173335), in which this Court recognized a cause of action for tortious interference with an expected inheritance or gift and identified the elements of such a claim as "(1) the existence of an expectancy; (2) intentional interference with that expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) a reasonable certainty that the devise to the plaintiff would have been received had the defendants not interfered; and (5) damages." *Id.,* slip op at 2. Assuming without deciding that a cause of action exists for tortious interference with an expected inheritance or gift,[3] the decision in *In re Green* makes clear that the defendant must use fraud, duress, or undue influence to persuade the testator or donor not to leave the expected inheritance or gift to the plaintiff or to remove the item from the testator's or donor's estate, e.g., using a forged deed to sell property of the testator or donor that otherwise would have gone to the plaintiff. *Id.,* slip op at 3-4.

In addition to the operable facts, appellants further alleged that upon Helen's death, they had a vested interest in the assets that had become part of the express oral trust and that appellees engaged in "deliberate volitional acts and omissions" by not giving appellants their share of the assets. Even if *In re Green* is applicable by analogy to trusts, appellants clearly did not allege the

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[2] These are the "operable facts" common to every claim alleged by appellants.

[3] Unpublished decisions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

necessary elements for their claim. Specifically, they did not allege that appellees engaged in any tortious conduct that either induced Helen not to place assets in trust for appellants or prevented anticipated trust assets from becoming part of the trust. Therefore, appellants failed to state a claim for tortious interference with a trust and count III was properly dismissed.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). The threshold for showing extreme and outrageous conduct is high. As explained in *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995):

> Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. It has been said that the case is generally one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" [Citations omitted.]

Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery is a question of law for the court. If reasonable minds could differ on the subject, the issue becomes a question of fact for the jury. *Id.* at 92; *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003).

In addition to the operable facts, appellants further alleged that appellees acted both intentionally and negligently; that their conduct was extreme, outrageous, and intolerable; that appellees acted with an ulterior motive or purpose; and that appellants suffered emotional distress. Allegations that appellees failed to comply with their mother's wishes by sharing her assets with their brothers indicate that appellees are selfish and inconsiderate, but being selfish, and inconsiderate is not so extreme and outrageous as to warrant the imposition of liability. Because appellees' alleged conduct is not extreme and outrageous, appellants failed to state a claim for intentional infliction of emotional distress and the trial court properly dismissed count V.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A claim for negligent infliction of emotional distress is not predicated simply upon some negligent action that causes the plaintiff to suffer severe emotional distress. Rather, it is predicated upon the plaintiff's witnessing negligent injury to an immediately family member and suffering severe mental distress resulting in actual physical harm.[4] *Duran v Detroit News, Inc*,

[4] *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970), does not create liability for any (continued...)

200 Mich App 622, 629; 504 NW2d 715 (1993); *Wargelin v Sisters of Mercy Health Corp,* 149 Mich App 75, 81; 385 NW2d 732 (1986). The elements of this claim are (1) a serious injury is threatened or inflicted on a third person, (2) the nature of the injury is such as to cause severe mental disturbance to the plaintiff, (3) the shock results in actual physical harm, (4) the plaintiff is a member of the third person's immediate family, and (5) the plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with that injury. *Taylor v Kurapati,* 236 Mich App 315, 360; 600 NW2d 670 (1999).

In addition to the operable facts, appellants further alleged that appellees acted negligently; that their conduct was extreme, outrageous, and intolerable; that appellees acted with an ulterior motive or purpose; and that appellants suffered emotional distress. Because appellants did not allege that they witnessed appellees inflict injury on a member of appellants' immediate family that caused appellants to suffer severe mental distress resulting in actual physical harm, they failed to state a claim for negligent infliction of emotional distress and the trial court properly dismissed count VI.

VI. FRAUD

The elements of traditional common-law fraud are (1) the defendant made a material representation to the plaintiff, (2) the representation was false, (3) the defendant knew the representation was false or made it recklessly as a positive assertion without knowledge of its truth, (4) the defendant intended that the plaintiff rely on the representation, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff was injured as a result of such reliance. *Hord v Environmental Research Inst of Mich (After Remand),* 463 Mich 399, 404; 617 NW2d 543 (2000). The misrepresentation must be based on a statement of past or existing fact. *Michaels v Amway Corp,* 206 Mich App 644, 652; 522 NW2d 703 (1994). A fraud claim may be based on a promise made in bad faith without intention of performance, *Phinney v Perlmutter,* 222 Mich App 513, 525; 564 NW2d 532 (1997), but only if it is shown that at the time the defendant made the promise, he did not intend to keep it, *Derderian v Genesys Health Care Sys,* 263 Mich App 364, 379; 689 NW2d 145 (2004), because a broken promise is itself neither fraud nor evidence of fraud. *Michaels,* 206 Mich at 652.

In addition to the operable facts, appellants alleged that appellees falsely assured Helen that after her death they would divide her assets according to her instructions, which somehow became a false representation to appellants regarding appellees' future intent, that appellees intended that appellants should rely on their representation, that appellants did rely on the representation, and that appellants thereby sustained economic losses. The claim is clearly based on a broken promise, but appellants failed to allege that appellees made the promise in bad faith or that they intended to break the promise at the time they made it. Further, there is a disconnect between the person to whom the alleged representation was made (Helen) and the persons who relied on the representation (appellants). Appellants appear to be pursuing a fraud claim on behalf of themselves as opposed to Helen's estate, but they have not alleged that appellees made

(...continued)

negligently inflicted emotional distress. Rather, it allows a plaintiff who has suffered emotional, as opposed to physical, injuries as a result of a defendant's negligent conduct to recover damages.

any false representations to them. "An allegation of fraud based on misrepresentations to a third party does not constitute a valid fraud claim." *Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty,* 214 Mich App 437, 447; 543 NW2d 25 (1995). Therefore, appellants failed to state a claim for fraud and count IX was properly dismissed.

VII. UNJUST ENRICHMENT

Unjust enrichment is the process of imposing a contract in law. *Hollowell v Career Decisions, Inc,* 100 Mich App 561, 570; 298 NW2d 915 (1980). "In order to sustain a claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 478; 666 NW2d 271 (2003). When such elements exist, "the law operates to imply a contract in order to prevent unjust enrichment." *Barber v SMH (US), Inc,* 202 Mich App 366, 375; 509 NW2d 791 (1993).

In addition to the operable facts, appellants alleged that appellees improperly benefited from the receipt of the assets to the detriment of Helen, Helen's estate, and appellants, and that appellees would be unjustly enriched at the expense of Helen, Helen's estate, and appellants. Appellants did not allege that appellees actually received a benefit from appellants themselves, which benefit would be inequitable for appellees to retain, but instead alleged that appellees received a benefit from Helen, which benefit was detrimental to appellants. Therefore, appellants failed to state a claim for unjust enrichment and count X was properly dismissed.

VIII. CREATION OF AN EXPRESS ORAL TRUST

A transfer may be a gift or a creation of a trust, depending on the donor's intent. *Osius v Dingell,* 375 Mich 605, 611-612; 134 NW2d 657 (1965). A valid inter vivos gift requires an absolute transfer of the property from the donor to the donee that takes effect immediately. *Geisel v Burg,* 283 Mich 73, 80; 276 NW 904 (1937). A trust in personalty may be created by parol, *Harmon v Harmon,* 303 Mich 513, 519; 6 NW2d 762 (1942), but a trust in realty cannot be established by parol evidence. *Howe v Webert,* 332 Mich 84, 93-94; 50 NW2d 725 (1952). "[A] trust is created only if the settlor manifests an intention to create a trust, and it is essential that there be an explicit declaration of trust accompanied by a transfer of property to one for the benefit of another." *Osius,* 375 Mich at 613. "To establish a trust of personalty, parol evidence must be clear and satisfactory and find some support in the surrounding circumstances and conduct of the parties." *Id.* "Voluntary parol trusts will not be created by the courts, but will only be enforced." *Martin v Martin,* 37 Mich App 208, 211; 194 NW2d 552 (1971).

The disputed assets are identified as "[a]ll of the lots on St. Clair, the house in Cadillac, the farm in Pennsylvania, money in all bank accounts, proceeds from Treasury Bills, the remainder of Helen's money that was in Martin's credit union, all of Helen's monies used by Martin and Norman for their own personal expenses, repayment of loans to Martin, Norman, and Bill, all of the stocks held jointly with Helen's and all of Helen's personal property both on St. Clair and in Cadillac." There is very little evidence showing when Martin or Norman acquired these assets. The evidence shows that Marvin Sr. and Helen transferred the Cadillac property to Marvin Sr. and Martin in August 1980. Although Helen no longer held an interest in the property, she and Martin were both named insureds on a homeowners policy issued for the 1994-1995 policy period. Appellants and their wives have stated that at some unspecified time, a

claim was made under the policy and the proceeds paid to Helen. Between 1980 and 1993, Martin purchased property on St. Clair Street from third parties, apparently with money lent to him by Helen. Between 1989 and 1991, Helen and Martin were the joint holders of one or more treasury securities. At unspecified times, Martin and Norman had borrowed money from Helen. Together, they had borrowed $160,000 and had not repaid it.

Appellants and their wives all submitted virtually identical affidavits averring that Marvin Sr. and Helen had always said that following their deaths, the four brothers were to share equally in their assets. They also claimed that when Marvin Sr. and Helen placed the name of one or more children on their assets, they only did so to avoid probate, not to create a gift, and that the assets were still to be divided equally among the four brothers. This shows that Marvin Sr. and Helen wanted the four brothers to equally share their assets once they died, not that at the time they placed the assets in any son's name, they intended that son to hold the assets in trust for himself and his brothers. In *Osius,* for example, the plaintiff-stock owner testified that before she delivered the stock certificate to the defendants, she told the husband that it was for his son after her death and it would be hers until then. When she delivered the stock certificate to the defendants, she iterated that the stock was to continue to belong to her during her lifetime and was to be used for their son's education after she died. *Osius,* 375 Mich at 609. In *Martin,* on the other hand, the evidence showed only that the plaintiff's late husband had named his father as the beneficiary of his life insurance policy "so that he would be reimbursed for expenses incurred on decedent's behalf in the event that something happened to decedent-insured." There was conflicting evidence whether the father promised to place the proceeds in trust for his grandchildren. *Martin,* 37 Mich App at 210. Thus, this Court affirmed the trial court's determination that the plaintiff had failed to prove that the deceased had intended to create a trust. *Id.* at 211. Here, even Helen's June 2002 letter does not advance appellants' cause. Helen told Martin that she wanted all assets to be divided equally and that his brothers' rights should be protected by having the assets titled either in her name or in the names of all four brothers, not that Martin was to hold the property in trust for the benefit of his brothers. Therefore, aside from the fact that an oral trust cannot be created in realty, the evidence does not provide any basis for concluding that at the time any assets were given to, or titled in the name of, appellees, either parent intended that son to hold the assets in trust for his brothers and thus the trial court properly dismissed count I.

IX. CONVERSION

In order to maintain an action for conversion, the plaintiff must have an enforceable interest in the property at issue. See *Thomas v Watt,* 104 Mich 201, 207; 62 NW 345 (1895) (the plaintiff must prove "[p]roperty in herself, and a right of possession at the time of the conversion"); *Hance v Tittabawassee Boom Co,* 70 Mich 227, 231; 38 NW 228 (1888) ("the plaintiff must prove his ownership, absolute or qualified, of the property"). If the defendant's right to possession is greater than that of the plaintiff, a claim for conversion will not lie because a person cannot convert his own property. *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 391; 486 NW2d 600 (1992); *Rohe Scientific Corp v Nat'l Bank of Detroit,* 133 Mich App 462, 468; 350 NW2d 280 (1984), rev'd in part on other grounds 135 Mich App 777 (1984).

There is a common-law tort of conversion and a statutory tort of conversion. *Lawsuit Fin, LLC v Curry,* 261 Mich App 579, 591-592; 683 NW2d 233 (2004). The common-law tort "is defined as any distinct act of domain wrongfully exerted over another's personal property in

denial of or inconsistent with the rights therein." *Foremost Ins Co*, 439 Mich at 391. Statutory conversion consists of (1) another person steals or embezzles property or converts property to his own use or (2) another person buys, receives, possesses, conceals or aids in the concealment of stolen, embezzled, or converted property knowing that the property had been stolen, embezzled, or converted. MCL 600.2919a.

As alleged in the complaint, both conversion claims are predicated on the existence of a trust having been created by Helen as alleged in count I, the trust presumably giving appellants an interest in what would otherwise be appellees' property. Because there is no evidence that Helen intended to create a trust at the time she transferred her assets to, or placed Martin's or Norman's names on her assets, appellants' conversion claims necessarily fail and thus the trial court properly dismissed counts VII and VIII.

X. CONSTRUCTIVE TRUST, UNDUE INFLUENCE, AND BREACH OF FIDUCIARY DUTY

A constructive trust is not really a trust and thus does not require proof of an intent to create a trust. *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976). It is instead a judicial remedy that may be imposed where necessary to achieve equity or to prevent unjust enrichment. *Id.*; *Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 188; 504 NW2d 635 (1993). A constructive trust "makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest." *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978). A constructive trust may be based on fraud, misrepresentation, breach of a fiduciary duty or confidential relationship, concealment, mistake, undue influence, duress, "taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property[.]" *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931); *Grasman*, 70 Mich App at 752.

In addition to the operable facts, appellants alleged that Martin and Norman, as the trustees of the express oral trust, were entrusted with the duty to disburse the trust assets for the benefit of the beneficiaries and that at Helen's death, an express, implied, or constructive trust was created for the benefit of appellants. The claim as pleaded is logically flawed. Appellants seem to contend that a constructive trust should be imposed because an express oral trust was created. That aside, appellants have offered no evidence that appellees engaged in wrongful conduct in any dealings with Helen or appellants such that it would be unconscionable for them to retain any assets titled in their names. It appears that appellants seek imposition of a constructive trust based on their claims of undue influence and breach of fiduciary duty as alleged in counts XI and XII.

Appellants alleged in Count XI that appellees managed Helen's affairs at "a time where she lacked the capacity and or was of diminished capacity" and so "exert[ed] their will on [Helen] to as to cause [her] assets to be titled jointly with themselves" and that at the time, Helen lacked the ability "to fully understand the consequences of her actions and the effect it would have upon her estate plan." Appellants presented no evidence to indicate that Helen ever lacked the mental capacity to make a reasoned, independent decision regarding the disposition of her assets or that appellees used any threats, coercion, fraud, etc., to compel her to do anything against her will and appellants do not argue otherwise on appeal. They argue only that the circumstances of the case are such that undue influence should be presumed.

Undue influence will be presumed where it is shown that (1) a confidential or fiduciary relationship exists between the grantor and another person, (2) that person or an interest he represents benefits from a transaction, and (3) that person had an opportunity to influence the grantor's decision in that transaction. *Kar*, 399 Mich at 537. The term "fiduciary relationship" is a legal term of art. *In re Karmey Estate*, 468 Mich 68, 74; 658 NW2d 796 (2003). A fiduciary relationship usually arises 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. [*Id.* at 74 n 2, quoting Black's Law Dictionary (7th ed).]

Appellants alleged in count XII that appellees stood in a fiduciary relationship with Helen because they handled her personal affairs. However, appellants did not present any evidence that either appellee was ever responsible for handling any of Helen's affairs. They argue on appeal that a fiduciary relationship was created when their parents entrusted appellees to eventually divide their assets equally among the brothers. However, the only evidence offered is the hearsay testimony of appellants and their wives.[5] While it is evident from Helen's June 2002 letter that she placed her trust in Martin's integrity to do right by his brothers, there is nothing to suggest that Martin gained superiority or influence over Helen as a result of that trust. Absent evidence of a fiduciary relationship between appellees and their mother, a presumption of undue influence cannot arise and thus the trial court properly dismissed counts IV, XI, and XII.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

[5] Appellants contend that any hearsay is admissible under MRE 803(3) and MRE 804(b)(7), but they do not address the merits of either exception or otherwise explain the basis for their assertion. Therefore, this contention is deemed abandoned. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel*, 255 Mich App 235, 244; 661 NW2d 243 (2003).