



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



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DT: June 21, 2011

RE: Estate of Arnold E. Mortimore
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE COMMENTARY:

The Intentional Walk

Watching the White Sox give Miguel Cabrera an intentional pass to load the bases to allow Ryan Raburn to hit a grand slam; prompted this commentary.

Before 1920, a catcher could step outside of the catcher's box to receive a pitcher's intentional ball. In lieu of changing the rule to make the intentional pass ("I.P.") a balk, a compromise was reached forcing the catcher to remain in the catcher's box until the ball was pitched. I seem to remember in the 50's, after an apparent relaxing of the rule, the league told ump's to clamp down on catchers leaving the box early.

In the spring issue of SABR’s Baseball Journal, Bill Deane reports on the eleven instances when a batter swung and managed to put the ball in play. All but one occurred after the eighth inning. The one that didn’t was Ty Cobb, tripling in two runs in 1907, before the catcher was forced to remain in the catcher’s box.

As I did with “No Hitters” vs “The Cycle,” I want to compare this occurrence to others to test its rarity. Fifteen players have hit four homeruns in a game, and like the I.P. ball in play; none twice. This compares favorably to the eleven I.P. balls put in play. Four homer games and I.P. balls in play have happened twice in the same year, only once. With each phenomenon, they occurred in the month of May.

REVIEW OF CASE:

Reference Files: Undue Influence
Spouse

Appellee was a recent second wife of an old weakened bereaved husband. She managed his affairs, apparently both before and after the alleged marriage and was found to have stood in a fiduciary relationship to her husband. The Lower Court (says Shiawassee Circuit Court) decided that the testimony, as to the issue of undue influence was equally divided and, therefore, the Appellee sustained her burden of overcoming the presumption of undue influence and, therefore, there was no undue influence. The marriage was also dubious in that the clergyman (if he existed) provided a non-existent address and could not be located.

I believe that the proper result was reached in this matter, but I would have liked a tad more discussion.

There are three answers to questions of fact that I would like to know:

1. What was the date of Will?
2. When did the Appellee’s fiduciary relationship begin?
3. Who filed the marriage license?

One question of fact I would like to have answered, but don’t need to have answered, is why was this matter appealed from a Circuit Court or is this just an error?

Please recall that the Appellee, whom the court looked at as a spouse, found that the spouse was burdened with the presumption of undue influence because of a fiduciary relationship. The Court of Appeals correctly cites *Karmey*, 468 Mich 68 (2003) but leaves a good deal of *Karmey*’s pertinence out of its decision. *Karmey* says:

“The influence of a husband or a wife over that person’s spouse could be great – at times almost overwhelming – without being “undue.” Although we agree with the standard for application of the presumption of undue influence established in *Kar*, we hold that this presumption is not applicable to marriage. ¹

¹ To be clear, we hold that no presumption of undue influence arises by the fact of marriage. We do not exclude the possibility that, under facts other than those presented in this particular case, a person might exercise undue influence over a weakened or vulnerable spouse.

In this case, the probate judge found that the proofs presented by the petitioners did not raise a question of fact about whether the relationship between Abraham and Margaret Karmey was a confidential or fiduciary relationship. The record supports this finding. Further, the marriage relationship between Abraham and Margaret Karmey was not shown by any factual allegations to be a relationship of undue influence.

Because the presumption of undue influence is not applicable to marriage, that portion of the Court of Appeals decision remanding this case for trial is reversed, and the probate court's grant of a directed verdict is affirmed. MCR"

What the Court of Appeals has done (without saying so) is seize upon the *Karmey* footnote and breath life and strength into it. I believe we can infer this, but it is with respect that I say that they should have said so. Without such a discussion, one might think that there is a conflict with *Karmey* instead of a refinement and factual extension of *Karmey*.

If we knew the date of the Will, we could make an assessment as to whether the undue influence predated the marriage. Hence, *Karmey* might not even apply. Even better, if the undue influence existed before the marriage, could we then not have a distinction to *Karmey* as to something that transcends the actual fact of marriage if it existed both before and after the marriage? Also, what if the undue influence was the cause of the marriage? Then the Appellee would lose allowances, as well as the beneficiary status. Although the license was recorded within 10 days, the doubtful nature of the clergyman and his being missing might have violated MCL 551.104 which says, in pertinent part:

“Duty of person officiating at marriage with respect to completion of certificate; return of original license; record.

Sec. 4 It shall be the duty of the clergyman or magistrate officiating at a marriage, to fill in the spaces of the certificate left blank for the attorney of the time and place of marriage, the names and residences of 2 witnesses, and his own signature in certification that the marriage has been performed by him and any and all information required to be filled in the space left blank in the certificate shall be typewritten or legibly printed. He shall separate the duplicate license and certificate, and deliver the half part designated duplicate to 1 of the parties, so joined in marriage, and within 10 days return the original to the county clerk issuing the same. It shall be the duty of such clergyman or magistrate to keep an accurate record of all marriages solemnized in a book used expressly for that purpose.”

The Court of Appeals shows that the presumption of undue influence should be looked at separate from the burden of proving undue influence. If the evidence proffered by the Appellant was equal to that of the Appellee, who had the presumption of undue influence against her, then the court is saying as a matter of law the Appellee could not have overcome her presumption. The Lower Court had mixed the concepts.

I hope the Appellant lawyer goes into all the above at retrial.

I spoke with Doug Chalgian (prevailing counsel) after I wrote my draft; he answered two of my three questions. He told me that the Will predated the marriage and the Appellee's fiduciary relationship began before the marriage. Both of these being true, I now have an understanding as to why the Court of Appeals did not mention the lack of the spousal presumption of *Karmey*; all

the operative facts creating the presumption of undue influence preceded the marriage. This isn't clear from the rendition of the facts and I hope my article helps clear the matter up for anyone reading Mortimore in conjunction with *Karmey*. Doug also said this matter was appealed from the Probate Court, not the Circuit Court.

AAM:jv:691169v2
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ARNOLD E. MORTIMORE,
Deceased.

RENEE HANNEMAN and DEAN
MORTIMORE,

Appellants,

v

HELEN M. FISER,

Appellee.

UNPUBLISHED
May 17, 2011

No. 297280
Shiawassee Circuit Court
LC No. 09-034102-DA

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Appellants, Renee Hanneman and Dean Mortimore, appeal as of right the trial court's order declaring that the will of their deceased father, Arnold Mortimore, valid and not the product of undue influence. Because the trial court's conclusion that appellants did not establish that appellee, Helen M. Fiser, unduly influenced Arnold was clearly erroneous, there was a mandatory presumption of undue influence in this case, and the trial court erred when it failed to recognize that presumption, we reverse.

Arnold and Joann Mortimore were married for 53 years. They lived in Morrice, Michigan. Arnold and Joann had three children: appellant Renee Hanneman, appellant Dean Mortimore, and Robert (Rob) Mortimore.¹ Hanneman testified that the whole family was "very, very close." Joann died on April 5, 2007. Arnold was 72 or 73 years old at that time. Helen lived less than one mile from Arnold and Joann. Helen's husband, Richard Fiser, died on November 12, 2006, approximately five months before Joann died. When Hanneman went to

¹ Rob died on December 8, 2008.

Arnold's house after Joann died, Helen was present. That was the first time that Hanneman met Helen. Hanneman never heard Helen's name before that time. Dean testified that after he heard that Joann passed away, he, his son, his wife, and Rob all immediately flew to Michigan. When they arrived at Arnold's house at one o'clock in the morning a couple days after Joann died, Helen was there standing next to Arnold. Dean testified that the first words Helen said to Dean was that she and Joann were "best buds." Dean testified that he never previously heard Helen's name mentioned. Helen helped out with the funeral arrangements, which included picking out flowers, clothes for Joann to wear, and music to play, as well as creating a photograph album with pictures of Joann. In addition, Helen drove to Adrianne, Michigan and purchased an inexpensive "casket for cremation," which was what Helen did when Richard died. By all accounts, after Joann's death, Helen became intimately involved in all aspects of Arnold's life.

On October 10, 2008, Arnold and Helen allegedly got married. The record is riddled with testimony that some people were told that Arnold and Helen were married and others were specifically told that they were not married. Hanneman and Dean did not know that Arnold and Helen got married. The wedding ceremony was allegedly at Arnold's home. Helen testified that the minister who married them was in his 90's and related to her. However, there was also testimony that the address that the minister provided did not exist and that the minister cannot be located.

Arnold died on June 12, 2009. The day after Arnold died, Hanneman received a telephone call that things were being moved out of Arnold's house and that Arnold and Helen were married. Hanneman was told on that day that there was a new will in which Helen was named Arnold's sole beneficiary. Dean also found out about the will after Arnold died. Curt Watkins, who owned a funeral home, testified that Helen appeared at his funeral home after Arnold's death and that she was "very quick to have Arnold cremated immediately." When asked about Arnold's children, Helen indicated that his two children lived in Arizona. On June 18, 2009, Helen and Arnold's marriage certificate was filed.

On June 19, 2009, Hanneman filed a petition for appointment of special personal representative. The petition provided that there was a dispute whether Arnold was legally married, it was not known whether there was a valid will, and Helen was disposing of Arnold's property. Thus, Hanneman requested that she be appointed special personal representative to secure and preserve assets.

On July 1, 2009, Helen filed a response to petition for appointment of personal representative and a petition for appointment of personal representative. Helen essentially requested that the will be declared valid and that she be appointed personal representative of Arnold's estate. At the beginning of trial, the parties agreed that whether Arnold's will was forged was no longer an issue. The only issue that remained was whether the will was the product of undue influence. The court heard extensive testimony and at the conclusion of trial indicated that this case:

probably has less overlap and less consistency than any case I've ever heard. It's basically a black/white, day/night, one side's one way and one side's the other way and there's very little cross-over. And so a huge amount of my pending decision is gonna be based on the credibility of the witnesses, what was said.

* * *

Unfortunately, the Court has to make a decision on the credibility of what was presented. The Court has to look at undue influence because the issue of validity of the Will was withdrawn prior to the proceeding and the Will was determined to be valid by all parties at the time that we started the proceeding. So the only issue left was undue influence.

* * *

So what the Court is left with is the issue, first off, of undue influence To establish undue influence it must be shown that grantor was subjected to threats, misrepresentation, undue flattery, fraud or physical or moral coercion sufficient to overpower as volition as destroy its free agency, and impel the grantor to act against his inclination and free will. The Court listened to two and a half to three days of testimony and basically I look back and the doctor of 25 years felt that Arnold was able to make a decision of his own free will. We had witnesses on both sides that said he was influenced by Helen and witnesses on the other side say he was able to do what he wants and you couldn't change his free will. And it was just a decision that the Court had to come down on. The Court finds that the . . . Petitioners did not prove undue influence. That there is not sufficient grounds to find undue influence under any of the conditions and standards of the case law. So the Court's going to . . . make the Will valid. The Court will appoint Helen Fiser as the Personal Representative and she can proceed to process the probate.

And as far as the marriage, I don't have to determine that. Again, it's something that's [moot] now and again I had multiple stories.

On March 12, 2010, the trial court entered a final order providing that petitioners did not prove undue influence. Thus, the trial court deemed the will valid and Helen could process the probate of the will as Arnold's personal representative. The order also incorporated and adopted the trial court's opinion from the bench. It is from this order that appellants now appeal as of right.

Appellants argue that the trial court failed to recognize that the facts of the case created a presumption of undue influence that was not rebutted. Appellants continue that even if the presumption of undue influence was rebutted, there was sufficient evidence to demonstrate that Fiser unduly influenced Arnold. Undue influence is an equitable matter. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). Michigan appellate courts review dispositional rulings on equitable matters de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). However, the standard of review of findings of fact made by a probate court sitting without a jury is whether those findings are clearly erroneous. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The reviewing court will defer to the probate court on matters of credibility,

and will give broad deference to findings of fact made by the probate court because the probate court's unique vantage point regarding witnesses, their testimony, and other influencing factors not readily ascertainable to the reviewing court. *Id.*; MCR 2.613(C).

Our Supreme Court in *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), set forth the basic principles underlying the concept of undue influence. The Court indicated that:

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. [*Id.* (quotation omitted).]

Further, the Court articulated the widely applied three-factor test relating to the presumption of 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. [*Id.* at 73 (quotation omitted).]

The term "fiduciary relationship" is a legal term of art and is defined 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—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. 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. [Black's Law Dictionary (8th ed); . *In re Karmey Estate*, 468 Mich at 75.]

In this case, a fiduciary relationship existed between Arnold and Helen, who became involved with each other at virtually the same time that Arnold's wife died. *In re Karmey Estate*, 468 Mich at 73-75. The testimony before the trial court reflected that Helen managed Arnold's finances, which included paying all of his bills. In addition, Helen testified that she was also paying the bills for Arnold's business, ordering supplies, typing up invoices on the computer, billing customers, and preparing a monthly report. Evidence showed that Helen was involved with every financial aspect of Arnold's life. After Arnold's wife's death, Helen purchased a less expensive casket for Arnold's wife's remains. In addition, Jimmy Mortimore, Arnold's grandson, heard Helen offer to help Arnold with the drafting of his will. Arnold indicated that Helen wanted him to put her name on his property and vice versa. Helen made comments about

how she did not believe in trusts, wills, and prenuptial agreements and conveyed those thoughts to Arnold. The record also reflects that Helen injected herself in a decision of whether Arnold should sell his property or a portion of his property to Dean by herself calling Dean and indicating that "they" did not want to sell the property. Helen tried to get Hanneman to deposit money from her daughters' savings accounts into certificates of deposit having both Arnold and Helen as the legal names on the accounts. In addition, Helen took Arnold's wife's wedding ring from Arnold's granddaughter stating she wanted to have it melted and have something else created from it.

Not only was Helen involved in every aspect of Arnold's finances, several witnesses testified that she appeared to be involved in every aspect of his life. Friends, family, and others could not have a private telephone conversation with Arnold without Helen interjecting and coaching Arnold on what to say. There was evidence that Helen drafted, typed, and sent emails on Arnold's behalf. Even Helen testified that when Arnold was allegedly indicating that he wanted to change his will and revoke his trust, Helen, not Arnold, contacted Kurt Ryal, a notary, to set up a meeting. Further, Helen admitted that she was present during Arnold's meeting with Ryal when they discussed revoking the trust.

In sum, the record overwhelmingly supports that Helen was involved in every financial aspect of Arnold's life and that Arnold trusted Helen to act for his benefit with respect to financial and all other matters. The testimony at trial provided that Arnold thought that Helen was "a very trustworthy person." Consequently, it cannot reasonably be disputed on this record that Helen had a fiduciary or confidential relationship with Arnold at the time of the will's execution. Arnold placed trust in the faithful integrity of Helen, who as a result gained superiority or influence over Arnold with regard to his financial matters. *In re Karmey Estate*, 468 Mich at 73-75. Helen clearly benefitted from Arnold executing the will at issue because she was named Arnold's sole beneficiary. The record clearly supports that Helen had the opportunity to influence Arnold's decision to make her his sole beneficiary. *Id.* Because appellants introduced evidence on each of the factors necessary for the presumption of undue influence, a mandatory presumption of undue influence was brought to life in this case. *Id.* The trial court's failure to recognize that a presumption of undue influence existed was error. *Id.*

Because there was a presumption of undue influence in this case, that presumption remained unscathed unless appellee presented evidence to rebut that presumption. *Kar v Hogan*, 399 Mich 529, 542; 251 NW2d 77 (1976). Our review of the record reveals that appellee failed to offer sufficient evidence to rebut the presumption of undue influence. *Id.* Although we generally defer to the trial court on issues of credibility, the record reflects that Helen's testimony at trial was simply insufficient to rebut the presumption. *In re Miller*, 433 Mich at 337. In fact, the trial court's findings clearly support that the presumption, had it been properly applied by the trial court, would not have been rebutted by the evidence. The witnesses to the will and the notary testified that Arnold appeared to be executing the will of his own free will. These impressions, however, did not consider that in the many months leading up to the signing of the will, Helen had the opportunity to and did manipulate and influence Arnold into executing such a will. Although several witnesses testified that they did not witness Helen trying to control Arnold and that Arnold was strong-minded, appellants presented strong contrary testimony on those issues. Several witnesses provided specific testimony about how Helen tried to control Arnold and inserted herself into all aspects of his life. Helen required that all telephone calls go

through her, coached Arnold while he spoke on the telephone even to his own children, and potentially sent emails purporting to be from Arnold. There was testimony that Arnold was extremely depressed after his wife's death to the point where he indicated that he was considering suicide. Arnold had been completely dependent on his wife. After his wife died, he "was scared" because he was not the type of man to be on his own. Arnold was not even capable of cooking for himself. Significantly, Arnold also suffered a variety of medical problems in the months leading to the execution of his will, which included his gallbladder surgery, inability to use one of his arms, and bowel and stomach problems. Arnold "couldn't do anything for himself anymore" and any independence he previously enjoyed, no longer existed.

The trial court recognized that there was evidence presented that would support a conclusion that Arnold was unduly influenced. At the same time, the trial court recognized that there was evidence presented that would result in a conclusion that Arnold was not unduly influenced. In the end, the trial court ruled that "it was just a decision that the Court had to come down on." The trial court's statements recognize that Helen presented evidence to rebut the presumption of undue influence but when weighed against opposing evidence in favor of the presumption, the trial court essentially found the evidence equally convincing. As such Helen did not overcome her duty to rebut the presumption. *Kar*, 399 Mich at 542 ("If the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed.") Therefore, the mandatory presumption of undue influence remained unscathed and we conclude that appellants established that Helen unduly influenced Arnold. *Id.*

Reversed. We do not retain jurisdiction. Appellants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering