



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 2007-2017, 2019 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*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine’s list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: <http://kkue.com/resources/probate-law-case-summaries/>.

He is the published author of “Article XII: A Political Thriller” and “Sons of Adam,” an International Terror Mystery.

DT: March 10, 2020

RE: *In re Bolster Living Trust*

STATE OF MICHIGAN COURT OF APPEALS

“Alan, you cannot write about baseball all your life”

- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

BASEBALL – STATISTICS

I did a father and son article and for obvious reasons, I can't do a mother/daughter article, but in my excellent research I have found another obvious. Baseball players like beautiful woman. Consider *Baseball Almanac's* findings.

Bo Belinsky was married to a Playboy Playmate of the Year, Jo Collins.

Johnny Bench was married to Vickie Chesser, a model.

Kris Benson is married to a model, Anna Benson.

Aaron Boone is married to Playboy Playmate, Laura Cover.

Clay Buchholz is married to model, Lindsay Clubine.

Jose Canseco was married to model, Jessica Canseco.

Chuck Connors had two ex-wives who were actresses, as did Joe DiMaggio.

Leo Durocher was married to Laraine Day and Curt Flood is married to Judy Pace. Derrick Jeter to is married to an actress, Hanna Jetter.

David Justice was married to Halle Berry.

Another Palyboy Playmate, Jamie Edmondson is married to Evan Longoria. More Playmates; Alicia Rickter and Lisa Podsednik are married to Mike Piazza and Scott Podsednik respectively. Even more, Julia Shultz to Brett Tomko.

Then of course there is Kate U. and Justin V.

Six degrees of separation. Actress Meredith MacRae, daughter of Gordon MacRae is the ex-daughter-in-law of MLB player Greg Mulleavy. Meredith once dated Dale Rands who attended the 1971 All-Star with Alan May.

**Caveat: MCR 2.119, MCR 7.212 and
7.215 take effect May 1, 2016 on
propriety of citing unpublished cases**

REVIEW OF CASE:

RE: *In re Bolster Living Trust*

- Undue Influence
- Undue Influence Presumption
- Undue Influence Rebuttal

Appellee challenged a trust which benefitted Appellant claiming undue influence. Because of the relationship with the deceased, Appellee was able to establish a confidential relationship, and hence, a presumption of undue influence. The lower Court found the Appellant had not rebutted the presumption of undue influence, and therefore, it set the trust aside and removed the Appellant as trustee.

The Court of Appeals reversed and said that no Summary Judgment could be granted if a genuine issue of material fact existed as to either respondent offering evidence as to the existence of undue influence or the existence of facts which created the presumption.

The Court cited all the evidence Appellant introduced and said “at the very least,” Appellant established a genuine issue of material fact as to whether he rebutted the presumption of undue influence, especially if you involve the rule that the trier of fact has to look at the evidence in a light most favorable to the non-moving party.

Since the removal of the trustee was predicated on the existence of the trust, and the trust is now by reversal in existence, the removal should fail. The Court needn’t have gone through the grounds for removal not being met and no need to find abuse of discretion. To me, it is axiomatic, if there is no trust, there shouldn’t be a trustee, and if there is a trust, there should be a trustee.

What is of importance, is that the Court of Appeals mandated looking at the date of the document to ask if the influence existed at that time. Some courts seem to ignore this mandate.

Also, of importance, the Court of Appeals cited *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684 (2015) to the effect that motive, opportunity or even the ability to control the

STATE OF MICHIGAN COURT OF APPEALS Case
–continued–

grantor is insufficient to establish undue influence in the absence of affirmative proof that it was exercised.

**STATE OF MICHIGAN
COURT OF APPEALS**

In re NORMA A. BOLSTER LIVING TRUST.

RONALD BOLSTER,

Appellant,

v

LAWRENCE BOLSTER, JOHN BOLSTER,
ELAINE IONESCU, CARL BOLSTER, EVELYN
WEATHERHOLT, JESSICA BUFORD, and
JULIE BUFORD,

Appellees.

UNPUBLISHED
February 18, 2020

No. 346814
Monroe Probate Court
LC No. 2017-000445-TV

Before: REDFORD, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

In this trust dispute, Ronald Bolster appeals as of right the probate court's order granting petitioners'¹ motion for summary disposition under MCR 2.116(C)(10), regarding their petition to invalidate his mother, Norma Bolster's trust as the product of undue influence. On appeal, Ronald contends that the probate court erred by granting petitioners' motion and removing Ronald as trustee because a genuine issue of material fact existed whether Ronald rebutted the presumption of undue influence, and the probate court failed to make any findings of fact or conclusions of law to support its decision to remove Ronald as trustee. We agree and therefore reverse the decision of the trial court and remand the matter for further proceedings.

¹ Appellees will be referred to collectively as petitioners as they filed the petition to invalidate the trust.

I. FACTUAL BACKGROUND

Norma executed a will in 1990 in which she bequeathed her home and farmland to each of her children in equal shares. In 2012, Norma executed a revocable living trust. The trust provided that Ronald would retain a life estate in Norma's home and farmland upon Norma's death. The trust also provided that the property taxes, homeowner's insurance, and maintenance of the property would be funded by the revenue generated from a farmland lease that Norma executed in 2012. Petitioners were each devised a portion of the residue and remainder of the trust assets.

Norma died in April 2017. In September 2017, petitioners filed a petition for supervision of the trust, for entry of an order determining the invalidity of the trust, and for the removal of Ronald as trustee. Petitioners alleged that Norma's trust was invalid as the product of Ronald's undue influence. Ronald denied that Norma's trust was the product of undue influence. After the close of discovery, petitioners moved for summary disposition under MCR 2.116(C)(10). Petitioners relied on deposition testimony, medical records, and attorney correspondence to support their assertion that Norma's trust was the product of undue influence. Ronald asserted that a question of fact existed whether Norma's trust was the product of undue influence and relied on deposition testimony and attorney correspondence to show that Norma acted under her own volition when she executed the trust. Ultimately, the probate court granted petitioners' motion because petitioners' evidence gave rise to the presumption of undue influence and it ruled that Ronald failed to rebut that presumption. The probate court ordered Norma's trust invalidated and removed Ronald as trustee.

II. STANDARD OF REVIEW

"This court reviews de novo a trial court's decision on a motion for summary disposition." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A summary disposition motion filed under MCR 2.116(C)(10) "tests the factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence." *Id.* "Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 408; 864 NW2d 591 (2014) (quotation marks and citation omitted). "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." *Gorman*, 302 Mich App at 116 (quotation marks and citation omitted).

III. ANALYSIS

A. UNDUE INFLUENCE

Ronald argues that the probate court erred by granting petitioners' motion for summary disposition because he established the existence of a genuine issue of material fact whether he rebutted the presumption of undue influence. We agree.

"A trust is void to the extent its creation was induced by fraud, duress, or undue influence." MCL 700.7406. To establish undue influence, evidence must be presented 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 [her] inclination and free will.” *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 699; 880 NW2d 269 (2015) (citation and quotation marks omitted). “Proof of motive, opportunity, or even the ability to control the grantor is not sufficient to establish undue influence in the absence of affirmative proof that it was exercised.” *Id.* (citations omitted).

A rebuttable presumption of undue influence arises when the evidence establishes “(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.” *In re Mardigian Estate*, 502 Mich 154, 161; 917 NW2d 325 (2018). “Even when the presumption arises, the ultimate burden of proving undue influence remains on the party alleging that it occurred.” *Bill & Dena Brown Trust*, 312 Mich App at 701 (citation omitted). Nonetheless, “the presumption satisfies the burden of persuasion, so if a party opposing the allegation of undue influence fails to offer sufficient rebuttal evidence, then the party alleging undue influence will have met its burden of persuasion.” *Id.* (citation and quotation marks omitted).

The presumption of undue influence, however, may be rebutted by evidence refuting either the existence of undue influence or the existence of facts giving rise to the presumption of undue influence. See *Kar v Hogan*, 399 Mich 529, 542-544; 251 NW2d 77 (1976), overruled in part on other grounds by *In re Estate of Karmey*, 468 Mich 68, 69; 658 NW2d 796 (2003). When the presumption is established, the party seeking to enforce the trust must offer other evidence to rebut the presumption. *Kar*, 399 Mich at 542. “Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact.” *In re Peterson Estate*, 193 Mich App 257, 261; 483 NW2d 624 (1991).

The record reflects that petitioners established the presumption of undue influence. Petitioners presented evidence that a confidential or fiduciary relationship existed between Norma and Ronald. A confidential or fiduciary relationship “arises from a reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another.” *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Petitioners presented evidence that Norma placed her faith, confidence, and trust in Ronald by presenting deposition testimony that Norma depended on Ronald for daily care and transportation, Ronald managed Norma’s finances, and Ronald set up meetings with Norma’s doctors and attorneys. Deposition testimony and attorney correspondence showed that Ronald benefited from the creation of the trust. Norma’s 1990 will did not bequeath a life estate to him but Norma’s trust did. Evidence also established that Ronald had the opportunity to influence Norma’s decisions. Deposition testimony showed that Ronald lived alone with Norma, controlled Norma’s finances, and controlled Norma’s communications with her attorneys. The evidence presented to the probate court sufficed to establish the presumption of undue influence. Therefore, the burden shifted to Ronald to provide evidence to rebut the presumption or avoid summary disposition by establishing the existence of a genuine issue of material fact in that regard.

A probate court may not make findings of fact or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

The trier of fact must resolve whether the presumption of undue influence is rebutted. *In re Peterson Estate*, 193 Mich App at 261.

The record reflects that Ronald responded to petitioners' motion by presenting evidence that he did not subject Norma to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion to overpower her volition, destroy her free agency, or compel her to act against her inclination and free will. Considering that the presumption of undue influence may be rebutted by evidence disproving either the existence of undue influence or the existence of facts giving rise to the presumption of undue influence, the record reflects that Ronald established the existence of a question of fact whether he rebutted the presumption of undue influence. Ronald presented deposition testimony and attorney correspondence that tended to show that Norma acted under her own volition when she executed the trust. Deposition testimony indicated that Norma provided petitioners with copies of the trust despite Ronald's advice to her that she keep the terms of the trust a secret. Deposition testimony also established that several petitioners attempted to discuss the terms of the trust with Norma in an effort to persuade her to revoke Ronald's life estate, but Norma rebuffed their requests to modify the terms of the trust on multiple occasions. Petitioners eventually stopped discussing the matter with her because they were unable to persuade her to change her mind and the terms of the trust.

Ronald also presented evidence that Norma's first attorney, Christian Horkey, drafted several versions of Norma's 1990 will that reflected Norma's intent to convey a life estate to Ronald. Evidence established that Horkey omitted the life estate provision from Norma's will only after Norma's son John directed Horkey to do so. Norma's second attorney, Steven Hyder, drafted her trust to include the life estate to Ronald. Ronald submitted for the probate court's consideration Norma's son Carl's deposition testimony in which he opined that Norma intended to convey a life estate to Ronald upon her death.

The record reflects that Ronald submitted evidence that, at the very least, established the existence of a genuine issue of material fact whether he rebutted the presumption of undue influence. The evidence he presented, when considered in the light most favorable to the nonmoving party, as is required when a trial court is considering a motion brought pursuant to MCR 2.116(C)(10), tended to show that Norma acted under her own volition when she executed the trust. See *Kar*, 399 Mich at 542-544. Likewise, the evidence established a factual dispute existed whether Ronald controlled Norma in 2012 and exercised undue influence over her. Norma's second attorney, Hyder, testified that Norma acted under her own volition when she executed the trust. Horkey testified to the contrary. Therefore, a genuine issue of material fact existed for the trier of fact to determine whether Ronald unduly influenced Norma when she executed the trust. *In re Peterson Estate*, 193 Mich App at 261. Therefore, the probate court erred by granting petitioners' motion for summary disposition.

B. REMOVAL AS TRUSTEE

We review for an abuse of discretion a probate court's decision whether to remove a trustee. *In re Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007) (citation omitted). We review for clear error underlying factual findings made by the court. *Id.* A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Id.* at 397.

Under MCL 700.7706(2):

The court may remove a trustee if 1 or more of the following occur:

- (a) The trustee commits a serious breach of trust.
- (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.
- (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.
- (d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

The probate court's decision to remove Ronald as trustee required that petitioners establish one or more grounds for his removal under MCL 700.7706(2). The record reflects that the probate court removed Ronald as trustee because it invalidated the trust. Because the probate court's removal decision rested upon its erroneous grant of petitioners' motion for summary disposition and invalidation of the trust, the probate court abused its discretion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ James Robert Redford

/s/ Mark J. Cavanagh

/s/ Deborah A. Servitto