STATE OF MICHIGAN
IN THE SUPREME COURT

In the Matter of Estate of Robert D. Mardigian, Deceased (a.k.a. Robert Douglas Mardigian, (deceased)	Case No. 152655 COA Case No. 319023
Mark S. Papazian, Petitioner-Appellee, v	Charlevoix County Probate Ct. Case No. 12-011738-DC Case No. 112-011765-TV Hon. Frederick R. Mulhauser (P28895)
Melissa Goldberg Ryburn, Susan V. Lucken, Nancy Varbedian, Edward Mardigian, Grant Mardigian, and Matthew Mardigian Respondents-Appellants.	

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Brief of Amicus Attorney Grievance Commission

Table of Contents

Index of Authorities

Court of Appeal Cases **Page**

Statutes

Other Authorities

Argument

I

A rebuttable presumption of undue influence is not a workable rule that sufficiently protects the testator when the testator's attorney violates MRPC 1.8(c).

A client should be able to expect that the attorney who drafts the client's will does so with undivided fidelity. When that does not happen – when the attorney writes himself into his client's will – the legal profession should do more than simply apply a rebuttable presumption of undue influence in the ensuing will contest. However necessary the use of that procedural device may be in other types of cases involving allegations of undue influence, it is not a workable rule for protecting the testator when the testator's attorney violates MRPC 1.8(c).

To "protect" means "to cover in front, to defend." *Webster's Third New International Dictionary* (1986). The time for the legal profession to protect the testator is before the will is drafted, not at some indeterminate future date when the testator's lips are sealed by death and litigation is underway in probate court.

The testator's intention is, without question, a probate court's "first and great object of inquiry." *Johnson v Atchinson*, 362 Mich 296, 300; 106 NW 2d 748 (1961). That intention is the "polar star" by which judges are guided in their determination. *Id.* As the Court of Appeals herein observed, courts have a duty to discover and carry out the intention of the testator.

Discovering that intent, and determining whether undue influence was exerted upon the testator, is complicated by the reality that the factfinder frequently has to make that determination on the basis of indirect and circumstantial evidence. *Shepard v*

Shepard, 161 Mich 441; 126 NW 640 (1910). Weighing evidence to determine whether there is proof of undue influence is a process that will not be facilitated by the use of a rebuttable presumption. The hypothetical handicap posed by such a presumption would be easily overcome as a practical matter by the testator's attorney because of the change in the law of presumptions.

In 1965, when *Powers* was decided, the effect of a presumption varied according to the nature of the evidentiary conflict in the case. *In re Wood's Estate*, 374 Mich 278; 132 NW 2d 35 (1965). Back then, under certain circumstances, the presumption itself could be weighed as evidence by the factfinder as a "conditional mandatory inference." *Id.* at 294. This so-called "Morgan" approach to presumptions which was embraced by the Court in *Woods* resulted in a host of "confusing" and "often conflicting" decisions by the Court of Appeals. 1 Mich Ct Rules Practice, Evid § 301.2 (3d ed).

With the adoption of MRE 301 in 1978, the law of presumptions in Michigan took the "Thayer" or "bursting bubble" approach. Today, the presumption itself has no evidentiary force whatsoever; it simply allows the person who has the benefit of the presumption to avoid a directed verdict, and it permits that person to obtain a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. *Widmayer v Leonard*, 422 Mich 280; 373 NW 2d 538 (1985).

Under MRE 301, the duty to come forward with evidence to rebut the presumption does not shift the burden of persuasion. All that the testator's attorney needs to do is come forward with "sufficient" rebuttal evidence to dissipate the presumption. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 701; 880 NW 2d 269 (2015); 1 Mich Ct Rules

Practice, Evid §301.1 (3d ed). The testator's attorney does not need to prove the nonexistence of undue influence.

Whether the presumption has been rebutted is generally treated as a question of fact, *Bill & Dena Brown Trust, supra,* so there is little risk of a summary disposition or a directed verdict being entered against the testator's attorney. See, e.g., *In re Estate of Peterson*, 193 Mich App 257; 488 NW 2d 624 (1991). Moreover, once the presumption has "burst" and become merely a permissible inference, the testator's attorney can look forward during the will contest to several substantive and procedural advantages.

First, the will is considered to be the best evidence of the testator's intent. 10 Thompson on Real Property, p 274. The testator is assumed to have "carefully expressed" his wishes in the will. *In re Jameson's Estate*, 374 Mich 231, 246; 132 NW 2d 1 (1965). Thus, the most important item of evidence in the will contest is a document which was personally created by the testator's attorney.

Second, as already discussed, the presumption does not shift the ultimate burden of persuasion as to the issue of undue influence; the burden of persuasion remains on the contestant throughout the proceeding. MCL 700.3407. And, because of the change in the law of presumptions, the contestant is no longer able to benefit by having the presumption itself weighed as evidence.

Third, the burden of persuasion involves an inherently ambiguous area of substantive law. Undue influence, according to numerous appellate decisions, "is a species of fraud and, like fraud, must remain undefined by the courts. All that can be done is to lay down certain principles." *In re McIntyre's Estate*, 355 Mich 238, 249; 94 NW 2d 208 (1959). "Undue influence," according to the Model Civil Jury Instructions, "is influence

which is so great that it overpowers the decedent's free will and prevents him from doing as he pleases with his property." M Civ JI 170.44. Moreover, the contestant must prove that "force" and "coercion" destroyed the free agency of the testator, and to further prove that the will was obtained by the coercion. *In re Kramer's Estate*, 342 Mich 626, 635; 70 NW 2d 819 (1949).

Further ambiguity is encountered by a contestant regarding the use of circumstantial evidence to prove undue influence. On the one hand, "it must be of considerable probative force and, quite clearly, must do more than raise a suspicion." *In re Willey's Estate*, 9 Mich App 245, 257; 156 NW 2d 631 (1967). On the other hand, as the Court of Appeals in *Willey* confessed, "the line between evidence which merely raises a suspicion and evidence which would support a fair inference is not an easy one to draw." *Id.*

Adding further to the contestant's already uncertain burden of persuasion is the long-standing doctrine that evidence of fraud must be "clear, satisfactory and convincing." *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW 2d 813 (1976). Before evidence can be considered clear and convincing, it must be strong enough to induce in the factfinder "a clear and firm belief that the proposition is true." M Civ JI 8.01(b). The standard of clear and convincing evidence is the most demanding standard applied in civil cases. *Hunter v Hunter*, 484 Mich 247; 771 NW 2d 694 (2009).

Finally, as pointed out in *Widmayer*, jurors may struggle to follow complex instructions about the law of civil presumptions. 422 Mich at 292, fn 10. The legal profession apparently is also struggling. Three years ago, the Model Civil Jury Instruction (M Civ JI 170.45) that addressed the subject of the presumption of undue influence was

deleted, and the Committee is continuing to review the issue of how the jury is to be instructed, if at all, when that presumption has not been rebutted.

A will contest is an inefficient and costly method for discovering the testator's intent and determining whether the will is a product of undue influence. Consider the judicial resources consumed by the will contest which was reversed by *Powers*: an eight-week jury trial involving 63 witnesses and more than 150 exhibits. There is a more efficient and workable solution for protecting the testator if the testator's attorney is tempted to violate MRPC 1.8(c), and it begins with overruling *In re Powers Estate*, 375 Mich 150; 134 NW 2d 148 (1965).

II

The Court's adoption of MRPC 1.8(c) warrants overruling *Powers*.

A. *Powers* is not binding precedent.

The Court of Appeals herein deemed *Powers* to be binding precedent because it is "directly on point with the facts presented in the instant case." *In re Mardigian Estate*, 312 Mich App 553, 559; 879 NW 2d 313 (2015). However, the doctrine of *stare decisis* contemplates more than just the existence of similar facts. The doctrine applies to principles or points of law, not to the facts of a case. *In re Sprenger's Estate*, 337 Mich 514; 60 NW 2d 436 (1953).

The will that was contested in *Powers* had been drafted by the testatrix's attorney, Alexis Rogowski. The will left the bulk of the estate to Mr. Rogowski's wife. Objections to the will were filed in the probate court, and the will contest was certified to circuit court. After a jury trial in circuit court, the jury found against the will and returned a general verdict in favor of the contestants. Mr. Rogowski appealed directly to the Court.

The appellate focus of the Court in *Powers* was on the fairness of the trial, and in particular on the circuit court judge's handling of evidentiary issues and jury instructions. Mr. Rogowski prevailed on appeal because the Court concluded that he had been "lethally" prejudiced by the erroneous admission of expert witness testimony regarding the definition of testamentary capacity. 375 Mich at 171.

Powers did not "hold" that the will drafted by Mr. Rogowski might be valid. A "holding" is a court's determination of a matter of law pivotal to its decision. *Black's Law Dictionary* (10th ed). *Powers* explicitly states that Mr. Rogowski's "dismal professional judgment…is not…the issue here," 375 Mich at 157. The subject of legal ethics was not pivotal to the decision. A close reading of *Powers* shows that the reason the case was remanded had nothing to do with the interplay between legal ethics and the validity of wills.

After *Powers* determined that the case would be remanded because of the improper expert witness testimony, the Court felt obliged to then look ahead by commenting "we mention, in addition, other error which might be expected to occur in the event of a retrial." *Id.* at 173. This is the context in which *Powers* refers, in a single sentence, to the presumption of undue influence created by Mr. Rogowski's relationship with the testatrix.

This reference in *Powers* to a presumption of undue influence does not constitute a holding; it was a passing remark by the Court borne out of their frustration with having to reverse the results of a will contest which already had been the subject of two[1] previous

[1]*Rogowski v Streeter*, 364 Mich 115; 110 NW 2d 617 (1961); and, *In re Powers Estate*, 362 Mich 222; 106 NW 2d 833 (1961).

appeals. "No appellate duty," said *Powers*, "is more distasteful as to set aside the ultimate conclusion of 8-weeks trial, an infinity of time in legal research and briefing, a prodigal amount of money, and the expenditure of sorely needed judicial time." *Id.* at 176.

Justice O'Hara, writing for the Court, pointedly criticized the circuit court's handling of the will contest. At the outset of his opinion, he noted that the case "is no stranger to our bench," and then "wonders, whether, as Tennyson's 'Brook,' the case is destined to go on forever." *Id.* at 155. The jury trial in circuit court is described in *Powers* as "overemotionalized and underdisciplined," *Id.* at 175.

In the final few paragraphs of the *Powers* opinion – in the portion that discusses the "other error" which might be expected to occur in the event of a retrial -- Justice O'Hara cautions the circuit court judge and counsel that the testimony should be confined to the issue of the testatrix's competence, and the issue of undue influence. *Id.* at 163. That mention of a presumption was unnecessary to the Court's decision to remand. It was only a heads up to the circuit court for the proceedings following remand. *Powers* is, at best, an incomplete analysis because the Court did not deliberately examine and decide the presumption issue. See, e.g., *City of Coldwater v Consumers Energy Co*, ___ Mich ___ ; 895 NW 2d 154 (2017) (Docket Nos. 151051, 151053).

Of course, there was a good reason why the Court did not "deliberately examine or decide" whether Mr. Rogowski's ethical violation might be an independent basis on which to invalidate the will. The reason is that the contestants of the will never argued the point at trial or on appeal. In fact, it was Mr. Rogowski himself in the will contest who first broached the issue of legal ethics by eliciting expert testimony to the effect that the "signing and witnessing" of the will had been "conducted in accordance with the usual

and customary standard of lawyers." (Appendix for Proponent and Appellant, Vol I, p 41a.) The issue of whether Mr. Rogowski complied with those alleged usual and customary standards was taken for granted by all counsel and by the circuit court to be simply an aspect of the issue of undue influence.

The circuit court in *Powers* instructed the jury on this issue as follows:

> I instruct you that it is not within your province to pass upon what Mr. Rogowski did was (sic) or was not a breach of lawyer's ethics. This is not a trial concerning his ethical conduct. The testimony concerning this matter, is to be considered and weighed by you only insofar as you may find that it relates to the issue of undue influence. You may take into account this evidence, if you find it to be below the general standard of conduct of attorneys in this community as bearing upon whether what Mr. Rogowski did amounted to undue influence. (Appendix for Proponent and Appellant, Vol III, p 1271a.)

Powers is not binding precedent, and it long ago lost any persuasive value.

B. *Powers* is no longer persuasive.

Powers assumed that Mr. Rogowski's status as a member of the Michigan bar "adds not one centimeter, nor subtracts one from his position as a party litigant," 375 Mich at 176, and further assumed that "the forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure." *Id.* at 178. However defensible that position may have appeared to the Court in 1965, those assumptions that *Powers* made, when reexamined, show why the decision has no contemporary persuasive force. The conventional wisdom displayed in *Powers* about professional misconduct is a reflection of the premodern era of attorney discipline.

During the two decades following the *Powers* decision, the Court transformed the system for self-regulation of Michigan's legal profession. Ethical standards were substantially revised and the Court assumed control over the discipline system's enforcement mechanism. *Powers* is a vestige from a time when ethical standards for attorneys amounted to little more than gentlemanly admonitions.

In 1965, the ethical standards governing Michigan attorneys were the Canons of Ethics adopted by the American Bar Association in 1908. There was a growing consensus, many years in advance of *Powers,* that the ABA Canons needed substantial revision because they failed to distinguish between the inspirational and the proscriptive. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark L Rev 1 (1970). The ABA Canons were superseded in Michigan, first by the Code of Professional Responsibility (1971) and then by the current Rules of Professional Conduct (1988). Compared to the older standards of conduct, the primary distinguishing characteristic of the modern standards is their added detail and precision. *Id.*

When Mr. Rogowski drafted the will that came before the Court in *Powers*, the ABA Canon applicable to his conduct was Canon 6 ("Adverse Influences and Conflicting Interests"). Canon 6, in its entirety, provided as follows:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his elations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Given the language of Canon 6, it is unsurprising that the Court in *Powers* was indifferent to the possibility that Mr. Rogowski's "dismal professional judgment" might be a *per se* basis for invalidating the will. However, with the adoption of the clear and proscriptive ethical standard set forth in MRPC 1.8(c), there is no longer any justification for ignoring the issue. This is especially true when one considers the Court's fundamental restructuring of the attorney discipline system since 1965.

From the early days of Michigan's statehood, the Court has claimed the constitutional authority to discipline attorneys. *In re Mills*, 1 Mich 392 (1850). However, the Court's control over the enforcement mechanism is a relatively recent development.

Disbarment proceedings originally were prosecuted as criminal matters by a prosecuting attorney. By the end of the 19th century, the attorney general was responsible for pursuing charges of professional misconduct, and the proceedings were defined by the legislature to be civil in nature. Executive branch control of the enforcement mechanism continued until an integrated state bar was created for Michigan attorneys in 1935, and control then shifted to the legislative branch.

When the legislature created the State Bar of Michigan in 1935, the bar association assumed responsibility for conducting disciplinary proceedings. The State Bar's record for enforcement of attorney discipline between 1935 and 1970 has been described as "lax" and "virtually nonexistent." Dubin & Schwartz, *Michigan Rules of Professional Conduct and Disciplinary Procedure* (Ann Arbor: *ICLE*, 1997), p. 11-1. This soft approach

to enforcement was exacerbated by an atmosphere of secrecy. For example, disciplinary proceedings before a three-judge panel in circuit court were conducted with the pleadings under seal. Notices of discipline published in the Michigan Bar Journal disclosed only that the attorney had resigned, or had been suspended or disbarred; the notice did not even identify the nature of the attorney's misconduct. The rationale of "only a few bad apples" permeated the legal profession in 1965, and may help to explain the Court's insistence in *Powers* that Mr. Rogowski's "dismal professional judgment" was irrelevant to their review.

In late 1968, a public scandal erupted involving allegations of judicial corruption against more than a dozen attorneys in Livingston County. The State Bar grievance committee investigating the allegations was accused of "foot dragging and whitewashing the charges. A bill was introduced in the Michigan House of Representatives (HB3622) to repeal the integrated bar. "McWhirter, *Lavan May Face Disbarment*," Detroit Free Press (February 19, 1969), p. A3.

The pressure generated by that scandal prompted the Court to streamline the attorney discipline system. Enforcement responsibility was transferred to the newly-created State Bar Grievance Board, effective March 1, 1970. "Lane, *Rules to Discipline Lawyers Set Up*," Detroit Free Press (January 9, 1970), p. A3. The State Bar Grievance Board lasted until October 1978, when the Court bifurcated the attorney discipline system by creating the Attorney Grievance Commission and the Attorney Discipline Board. It was only at that point, thirteen years after *Powers*, that the enforcement authority for attorney discipline was finally located wholly within the judicial branch.

The merger of constitutional and administrative authority in the Court, as well as the eventual displacement of Canon 6 by MRPC 1.8(c), means that the Court is in a

position to do what the Court in *Powers* assumed it could not, i.e., address whether the testator's attorney should be allowed an opportunity to benefit from a will that he drafted in violation of his ethical duty.

III

A violation of MRPC 1.8(c) should invalidate the gift provided to the testator's attorney under the will.

The public policy argument for invalidating the gift provided to the testator's attorney under a will drafted in violation of MRPC 1.8(c) has been comprehensively briefed by Appellants and need not be repeated here. Amicus Attorney Grievance Commission supports that argument, and further notes that the same view was expressed sixty-four years ago by attorney Henry S. Drinker, who served as chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association: "In states where the Codes have been adopted by statute or by rules of the highest court, they may of course be given the full force of law. "Drinker, *Legal Ethics* (New York: Columbia University Press, 1953), p. 27, fn. 25.

In deciding whether to give MRPC 1.8(c) the force of law as an expression of public policy, the Court should bear in mind that the taproot of conflict rules such as MRPC 1.8(c) and Canon 6 is the common law of agency. Principles of agency law generally govern the attorney-client relationship. *Friedman v Dozorc*, 412 Mich 1; 312 NW 2d 585 (1981).

As the agent of his client, an attorney has a duty of loyalty to act for the client's benefit in all matters connected with the agency relationship. Restatement (Third) of Agency, §8.01 (2006). An attorney's duty of loyalty is "unswerving," *Atlanta Int'l Co v Bell*, 438 Mich 512, 519; 475 NW 2d 294 (1991), and perhaps the "most basic." *People v Smith*, 456 Mich 543, 557; 581 NW 2d 654 (1998). An attorney who knowingly drafts a

will that, by definition, is going to be "looked on with suspicion," *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907), cannot be said to have acted with loyalty or undivided fidelity.

Alternatively, if the Court is unwilling to invalidate the gift to the testator's attorney on public policy grounds, equitable principles support the same relief.

Undue influence is an equitable matter. *Adams v Adams*, 276 Mich App 704; 742 NW 2d 399 (2007). Probate courts have legal and equitable jurisdiction. MCL 700.1302; MCL 700.1303. The testator's lawyer, by virtue of the violation of MRPC 1.8(c), comes before the probate court with unclean hands and the probate court should refuse to entertain the case.

Although the clean hands doctrine is usually seen as a defense which is raised by a party seeking to block specific performance, it may also be invoked by a court to protect the court's integrity. *Stachnik v Winkel*, 394 Mich 375; 230 NW 2d 529 (1975). To invoke the clean hands doctrine, the misconduct need not necessarily be punishable as a crime. "Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the doctrine." *Id.* at 386 (citation omitted).

Conclusion

Canon 6, from which MRPC 1.8 is derived, was "a frank recognition that, human nature being what it is, a dual relationship, involving adverse or conflicting interests, constitutes an enormous temptation to take advantage of one or both parties to such relationship." Opinion 132 (January 1950), State Bar of Michigan Committee on Professional and Judicial Ethics. The purpose of Canon 6, and by extension MRPC

1.8(c), "is to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results which may flow therefrom." *Id.*

By applying a presumption of undue influence, the legal system is "merely scrutinizing" the results which may flow from the violation of MRPC 1.8(c) by the testator's attorney. A prophylactic rule from the Court regarding this type of professional misconduct is a better method for protecting the testator.

Dated: October 27, 2017

/s/ Robert E. Edick

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