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
Court of Appeals Case No. 319023

MARK S. PAPAZIAN,

Petitioner/Appellee,

vs

Charlevoix County Probate Court
Case No. 12-011738-DE
Case No. 12-011765-TV

MELISSA GOLDBERG RYBURN, SUSAN V. LUCKEN, NANCY VARBEDIAN, EDWARD MARDIGIAN, GRANT MARDIGIAN, and MATTHEW MARDIGIAN,

Respondents/Appellants.
_____/

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BRIEF OF *AMICUS CURIAE* PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

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PROBATE & ESTATE PLANNING SECTION
Public Policy Position
In re Mardigian Estate

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,362 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 9, 2017, the Section adopted its position after discussion and vote at a scheduled meeting. 11 members voted in favor of the Section's position on *In re Mardigian Estate*, 0 members voted against this position, 0 members abstained, 11 members did not vote.

The Probate Council authorized the filing of an amicus brief in the case *In re Mardigian Estate*, currently pending before the Michigan Supreme Court (COA case number 152655).

Explanation:
The Michigan Supreme Court has invited the Probate Section to file an amicus brief weighing in on the following three questions:

(1) whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c);

(2) whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*; and

(3) if *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument; and if so, how?

Contact Person: Christopher Ballard

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Position Adopted: September 9, 2017

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BASIS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.303(B)(1) and this Court's Order of July 7, 2017, granting Respondents/Appellants' Application for Leave to Appeal. Appellants appeal from an Opinion of the Michigan Court of Appeals dated October 8, 2015.

STATEMENT OF RELIEF SOUGHT

The State Bar of Michigan's Probate and Estate Planning Section (the "Probate Section") files this *amicus* brief pursuant to the Court's invitation in the July 7, 2017 Order granting the Application for Leave to Appeal. The Probate Section respectfully requests that this Court determine that *In re Powers Estate* does not adequately address the issue of an attorney-scrivener who is also a beneficiary, that MRPC 1.8(c) should bear on the issue, and adopt a specific rule of law that applies, unless and until a legislative fix is adopted.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c)?

The Trial Court answered: No.

The Court of Appeals answered: Yes.

The Appellants answer: No.

The Appellee answers: Yes.

The Probate and Estate Planning Section answers: No.

2. Whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*?

The Trial Court answered: The Trial Court did not answer this question.

The Court of Appeals answered: No.

The Appellants answer: Yes.

The Appellee answers: No.

The Probate and Estate Planning Section answers: No.

3. If *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument, and if so, how?

The Trial Court answered: Yes and determined that the gift should be void.

The Court of Appeals answered: The Court of Appeals did not answer this question.

The Appellants answer: Yes and that it should be determined to be void.

The Appellee answers: No.

The Probate and Estate Planning Section answers: Yes and presents three options as to how this Court should determine that a violation should bear on the validity of the gift.

STATEMENT OF FACTS AND PROCEEDINGS

Pursuant to MCR 7.212(D)(3)(b), the Probate and Estate Planning Section accepts the Statements of Facts presented by the Appellants and Appellee. The Probate Section is not aware of any additional facts that it believes are relevant to this appeal. Further, while the Probate Section believes that some of the facts discussed in the parties' Statements of Facts are not relevant to the issues before this Court, the Probate Section is not aware that any of the presented facts are either inaccurate or deficient.

STANDARD OF REVIEW

This Court reviews a grant of summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, this Court's review of statutory interpretation is de novo. *Graves v American Acceptance Mort Corp*, 467 Mich 308; 652 NW2d 221, 222-223 (2002) (citing *Smith*).

ARGUMENT

INTRODUCTION

The issue of how a probate court should address the validity of a testamentary instrument drafted by a lawyer who is also the beneficiary, or a close relative of a beneficiary, involving a substantial gift is complex. At first blush, the issue appears squarely addressed by MRPC 1.8(c). But Rules of Professional Conduct do not give rise to a cause of action for enforcement of the rule or for damages caused by the failure to comply with the rule. MRPC 1.0(b). Michigan probate law has long favored discovering and enforcing a decedent's intent as to the distribution of property. MCL 700.1201(b).

The problem is this: How do courts determine what the decedent's true intent was when there is an allegation of undue influence involving someone in a fiduciary or confidential capacity? Undue influence typically occurs behind closed doors, without any direct evidence. Since at least 1866, Michigan courts have utilized some form of a presumption to more closely scrutinize instruments benefitting someone who occupied a confidential or fiduciary relationship. *Seely v Price*, 14 Mich 541, 546-47 (1866) (reasoning that courts had a duty to refrain from sanctioning a legal instrument until fully satisfied of the fairness of the transaction where the instrument benefitted someone standing in a confidential relationship). The resulting presumption of undue influence was used in varying forms over the years until it was clarified through this Court's landmark decision, *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976).

Yet, as *Kar* made clear, the presumption only applies partial relief. The ultimate burden of persuasion remains on the contestant. *Id* at 542. That burden is high. The contestant must

show, "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." *Id* at 537. Further, "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient." *Id*.

To complicate the matter, some courts -- including the court of appeals in a recent published decision -- have held that even when the presumption applies, if the opponent of the instrument does not have other evidence of undue influence, summary disposition against the opponent is warranted. *Bill and Dena Brown Trust v Garcia*, 312 Mich App 684, 703; 880 NW2d 269 (2015). And the question of what level of proof that must be submitted to overcome the presumption is subject to some debate. See *In re Estate of Mortimore* (Young, J., dissenting), 491 Mich 925; 813 NW2d 288 (2012).

Typically, the best witness to help guard against the exercise of undue influence is the estate planning attorney who prepares the instrument and usually witnesses the execution. When the attorney whose role is to help protect against undue influence is the one accused of undue influence, a special set of concerns arise. This is particularly true considering that attorneys typically meet with their clients alone. If any undue influence occurs, and no one else is present during the conversations, how is a subsequent challenger of the instrument able to provide evidence of that influence? It would be almost impossible.

Yet, that does not mean that a client cannot have an earnest desire to make a substantial gift to his or her estate planning lawyer. The easy response is that in that instance, the lawyer should always refer the client to another lawyer to prepare that specific instrument. In fact,

MRPC 1.8(c) requires it. But does that failure alone, if the client's desire is earnest, automatically render the instrument void as against public policy? Again, the answer is not easy.

Public perception should also factor into the equation. Clients who visit lawyers to prepare wills, trusts, and similar instruments must have the utmost confidence and trust in them. They are required to discuss many intimate, private details, such as the nature of their relationships with their children, spouses, and other family members, their assets and lifetime of savings, and concerns about their own long-term care needs. If clients fear that lawyers have ulterior motives, then clients may resist meeting lawyers, try to prepare their own wills and trusts, or even avoid doing estate planning altogether. People find enough reasons to procrastinate doing their estate planning. Adding in the fear of a lawyer with an ulterior motive only magnifies this problem.

The Probate Section agrees with the Supreme Court's decision to grant leave to appeal to definitively address this issue. The Court has never previously done so, even in the *In re Powers Estate* opinion. There, the Court was primarily focused on whether sufficient evidentiary and other abuses occurred during trial to warrant a new trial. The Court was not focused on, and did not even discuss in the lead opinion, the policy issues and concerns surrounding a will or trust that substantially benefits the lawyer who prepared it. The Rule of Professional Conduct at issue did not exist then. The Estates and Protected Individuals Code ("EPIC") and the Michigan Trust Code ("MTC") also did not exist. It is time for this issue to be squarely addressed so that future lawyers are not encouraged to violate MRPC and so public confidence in estate planning lawyers is not eroded.

In doing so, it is important to balance the competing policies of enforcing decedents' true intentions versus the prohibition against lawyers preparing instruments that create substantial gifts to the lawyers or their relatives, along with the concern of public perception of the legal community. The Probate Section proposes that this Court consider three options as to how this should be addressed. First, the Court can follow the traditional undue influence analysis that was addressed in *Kar* v *Hogan* and defer to the Legislature to adopt a more specific law. Second, the Court can adopt a modified version of the traditional undue influence approach and require the lawyer to overcome the presumption through clear and convincing evidence that the gift was not the product of undue influence. Third, the Court can void the gift outright under public policy considerations, as primarily defined by MRPC 1.8(c).

The Probate Section believes that the Legislature is an appropriate forum to address this issue. The Appellee points to Probate Section meeting minutes indicating that the Section has formed a special drafting committee to attempt to pursue legislation, if necessary, to address the issue raised in this case. However, there is no guarantee that the Legislature will address the issue, or if it does, that it will pass corrective legislation. The Probate Section's special drafting committee intends to await the outcome of this Court's opinion before deciding whether to pursue a legislative fix. In the meantime, especially considering that the conduct in this case involves a licensed attorney and the public perception impact that this case could have, the Probate Section believes the Supreme Court should address the issue.

I. THE REBUTTABLE PRESUMPTION OF UNDUE INFLUENCE IS NOT A WORKABLE RULE TO SUFFICIENTLY PROTECT THE TESTATOR WHEN A LAWYER IS BOTH THE DRAFTING ATTORNEY AND A SUBSTANTIAL BENEFICIARY.

A. THE RULING SET FORTH IN *IN RE POWERS ESTATE* DOES NOT SUFFICIENTLY ADDRESS THE ISSUE OR PROVIDE A WORKABLE RULE.

1. *Powers* Did Not Focus On What Rule Should Be Applied.

The Court in *In re Powers Estate*, 375 Mich 150, 134 NW2d 148 (1965), focused its discussion on whether there were sufficient errors committed during trial of the will contest, including evidentiary and jury-charging errors, to deny the appellants the basic guaranty of a fair trial. *Id* at 155. In doing so, the *Powers* Court expressed its displeasure with the drafting attorney/will proponent: "If any prizes were to be awarded for dismal professional judgment, the proponent here would be in a fair way to be signally recognized." *Id* at 157. That was, of course, prior to the adoption of MRPC 1.8(c), as this Court already noted in its July 7, 2017 Order. That statement in *Powers* rings doubly true for lawyers who draft instruments naming themselves or their close family members as beneficiaries after the passage of the MRPC 1.8(c).

Yet the *Powers'* Court did not discuss whether an attorney's unethical behavior constituted a sufficient public policy reason to invalidate the will or otherwise remove the case from the normal undue-influence analysis. It simply concluded, without explaining why, that the professional responsibility issue was not relevant:

> Whether proponent used questionable professional judgment in drawing the instrument involved need not be retried; it is irrelevant. Proponent's status as a member of the bar of Michigan adds not one centimeter, nor subtracts one from his position as a party litigant, and this question should take no time in trial.

Id at 176.

The Court provided this direction in the context of analyzing whether evidentiary admissions, lines of questions for witnesses, and attorney arguments to the jury were improper. In doing so, the Court chose to provide guidance as to what topics should, or should not, be discussed. For example, the Court noted, "The trial of this case was overemotionalized and underdisciplined. This was reflected in the briefing as well as in argument before us. We do not take kindly to the statements in contestant's brief: ..." *Id* at 175. Additionally, "The following questions, answers, objections and rulings of the court are exemplary of such irrelevant matter: ..." *Id* at 176. The Court concluded its Opinion by cautioning the trial court and counsel to limit the issues during retrial to whether the testator had sufficient capacity to execute the instrument and whether any fraud or undue influence occurred. *Id* at 179. The Court did not discuss if public policy considerations may support a finding that a will or trust was void, as a matter of law, without the necessity of a trial.

Indeed, just a few years after *Powers*, the Court of Appeals addressed the precise issue of whether public policy impacts a will contest involving a beneficiary who was also the drafting attorney. In *In re Karabatian Estate*, the Court of Appeals ruled, "If an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state. The bequest to contestant being void, he has no standing to contest the later will." 17 Mich App 541, 546-47; 170 NW2d 166 (1969). The *Karabatian* Opinion briefly mentioned *Powers* as providing a warning to lawyers not to engage in this behavior, but otherwise did not discuss or rely on *Powers* in any way. Clearly, at least that panel of the Court of Appeals felt that *Powers* did not directly address the issue.

Because *Powers* did not discuss whether public policy impacted the validity of the gift in the instrument, this Court should not feel bound to follow *Powers*.

2. *Powers* Pre-dated the Pertinent Rule of Professional Conduct and Statutes.

When *Powers* was decided in 1965, the Court did not have the benefit of a Rule of Professional Conduct on point. Even without an explicit rule, courts in Michigan have noted the general premise that lawyers should not engage in this behavior. "[I]t is generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions in his favor ..." *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907). But being against the spirit of the code is not the same as an express prohibition, which only came about in 1988: "A lawyer shall not prepare an instrument giving the lawyer ... any substantial gift from a client ...". MRPC 1.8(c).

While the Probate Section believes that the Rule of Professional Conduct, alone, should not invalidate an instrument or justify overruling *Powers* (if the case needs to be overruled), the Rule is important in light of the statutes adopted through the MTC and EPIC. These statutes were created well after *Powers* was decided[1]. The MTC includes direct statutes that permit courts to invalidate trusts when the purposes of the trust become "contrary to public policy." MCL 700.7410(1). A trust may only be created in Michigan, "to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." MCL 700.7404. There is no direct, parallel provision in EPIC governing wills that are contrary to public policy, although there is support for a court's ability to invalidate a will under public policy considerations under

[1] The MTC's effective date was April 1, 2010 (MCL 700.8204) and EPIC's effective date was April 1, 2000 (MCL 700.8101(1)).

MCL 700.2705.

This of course raises the question of what is public policy on this point? As the dissenting opinion in *Mardigian* noted, among other sources including common law, "rules of professional conduct may also constitute definitive indicators of public policy." *In re Mardigian Estate*, 312 Mich App 553, 569; 879 NW2d 313 (2015) (Servitto, J., dissenting) (citing *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW 2d 602 (2002)). As also pointed out by the dissent, this Court has "the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct." *Id*, citing *Speicher v Columbia Twp Bd of Election Com'rs*, 299 Mich App 86, 91; 832 NW2d 392 (2012).

As such, Rule 1.8(c) cannot be ignored simply because this case began as a probate proceeding rather than a disciplinary proceeding. It is certainly relevant in the Court's determination of what public policy is and whether that policy justifies treating the trust and will in this case as contrary of public policy. Now that the issue has been presented to this Supreme Court again, this time with the benefit of MRPC 1.8(c), the MTC, and EPIC, this issue should be fully addressed.

3. The Rule Discussed In *Powers* Is Not Workable To Protect Testators Because Drafting Attorneys Occupy A Unique Position, Unlike Other Fiduciaries.

In Michigan, wills and trusts are void if induced by undue influence or fraud. MCL 700.3407 and 700.7406. Similarly, if the decedent lacked sufficient capacity when the instrument was executed, the instrument also fails. MCL 700.2501 and 700.7402. The attorney who prepares the document occupies a critical role to determine if the client has sufficient mental capacity and if the instrument comports with his or her intention, free of undue influence of

another. Michigan case law has many examples where the drafting attorney is an important, and often deciding, witness on these issues. See, for example, *Kar v Hogan*, 399 Mich 529, 543-44; 251 NW2d 77 (1976) (finding that the defendant met the burden of rebutting the presumption of undue influence because the decedent, "sought out and retained independent counsel and that she supplied the impetus behind the procurement of the deed."); *In re Mikeska Estate*, 140 Mich App 116, 122-23; 362 NW2d 906 (1985) (relying primarily on the testimony of the drafting attorney to support a trial court's finding that no undue influence occurred); and *Bill and Dean Brown Trust v Garcia*, 312 Mich App 684, 692; 880 NW2d 269 (2015) (affirming summary disposition in favor of will proponent for which trial court relied primarily on testimony of the drafting attorney and a bank employee).

When the beneficiary seeking to defend a challenged will or trust is that drafting attorney, the attorney's actions and the validity of the document warrant extra scrutiny. The Court in *Powers* recognized this reality but did not provide a rule that addressed it. Specifically, the majority opinion noted:

> The issue of the relationship of the attorney and his client, and the attorney and his wife as beneficiaries, is an additional element in the broader concept of undue influence.
>
> Essentially if [sic] goes to degree of proof necessary to establish prima facie the opportunity for the exercise of undue influence and the ultimate consideration of that question by the trier of the facts–in this case the jury.

375 Mich at 157-58 (emphasis added). The concurring opinion addressed the issue as well:

> When the fiduciary so benefitted directly or indirectly, happens to be a lawyer-scrivener of the challenged testament, the burden of overcoming the presumption quite obviously is substantially greater than had an independent and disinterested person prepared the testamentary instruments.

375 Mich at 181 (Souris, J., concurring) (emphasis added).

The open question is how should the degree of proof and evidentiary burden facing the lawyer-scrivener change compared to other beneficiaries who occupied a position of trust and confidence? The rule discussed in *Powers* does not take this into consideration and instead treats the drafting lawyer the same as other fiduciaries. This is inconsistent with Michigan law, which has long recognized that instruments benefitting the preparing lawyer should be more closely scrutinized. *See, for example, Abrey v Duffield*, 149 Mich 248, 259 (1907); *Habersack v Rabaut*, 93 Mich App 300, 306 n2 (1979); and *In re Estate of Barnhart*, 127 Mich App 381, 388-89 (1983). Indeed, the *Karabatian* opinion, discussed above, determined that this scrutiny was so compelling as to render the instrument void as a matter of public policy. 17 Mich App at 546-47.

If drafting attorneys take advantage of their position to exercise undue influence or take advantage of a client with insufficient mental capacity, there is no one else in the process who can intercede and stop the wrongdoing. As such, reliance on the traditional undue influence presumption process is likely insufficient. As discussed in the Introduction, above, that process presently requires the challenging party to meet the burden of persuasion, even when the presumption applies, and supply affirmative evidence of undue influence. *Kar v Hogan*. That burden is high and requires a showing that the grantor was impelled to act against his or her inclination and free will. 399 Mich at 537. Even with the presumption, the contestant must present some affirmative evidence that undue influence occurred or risk losing during the summary disposition phase, without a finder-of-fact reviewing the testimony. *Bill and Dena Brown Trust*, 312 Mich App at 703.

Drafting attorneys are likely to know the difficulty that an opponent has to overcome to

successfully challenge a will or trust under this standard. Unethical attorneys would also be able to draft documents favoring them, and then use undue influence, fraud, or take advantage of a deficient mental condition, to benefit themselves (or their family members) with no one else part of the process to testify against them. In particular, clients who are unmarried and have no, or distant, children would not have anyone in a position to contradict the attorney that undue influence or fraud did not occur. Indeed, an attorney could simply sneak a hidden term into a lengthy trust document and feel confident that most clients would not even discover it.

This is not to suggest that the Appellee in this case engaged in this level of wrongdoing. Nor does the Probate Section advocate that all wills and trusts drafted by attorneys who are also beneficiaries should be automatically void. But they should certainly be subject to close scrutiny. And the attorneys should have to explain why they violated MRPC 1.8(c). The *Powers* test provides just the opposite - that an attorney's violation of professional ethics is completely irrelevant. 375 Mich at 176. If this rule is enforced even now, after the adoption of 1.8(c) and the MTC and EPIC, then future attorneys who are unscrupulous would be encouraged to engage in these types of behaviors. Further, even the vast majority of attorneys who do not do so could be suspected of doing so in the minds of the public at large.

The *Powers* rule is not workable to protect testators, much less testators who may be subject to abuse by an unsavory drafting attorney.

B. THE UNDUE INFLUENCE PRESUMPTION FRAMEWORK HAS OPEN AND UNRESOLVED ISSUES THAT RENDER IT UNRELIABLE.

The workability of a rule that reviews an instrument that favors the drafting attorney under the traditional undue influence presumption is complicated by the fact that there are open and unresolved issues surrounding how the presumption operates. Specifically, the level of proof needed to overcome the presumption and when summary disposition is appropriate after the presumption is established are both open to debate. An unethical drafting attorney, more so than anyone else, would be in a position to take advantage of this uncertainty.

The *Powers* decision does not discuss how the presumption operates in terms of production of evidence and the burdens of persuasion and production. Rather, the landmark *Kar v Hogan* decision does so. 399 Mich 529, 251 NW2d 77 (1976). In *Kar*, the Court described the operation of the presumption as follows:

> 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. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.

399 Mich at 542.

Since that opinion was issued, MRE 301 was adopted and the Supreme Court further revisited the issue of presumptions and inferences in *Widmayer v Leonard*, 422 Mich 280, 373 NW2d 538 (1985). Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposed on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does

> not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In *Widmayer*, this Court clarified the impact of presumptions and inferences by ruling:

> That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.
>
> We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
>
> Almost all presumptions are made up on permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.

422 Mich at 289.

Reading these cases together, courts are still confused as to how this works with the presumption of undue influence in practice. Specifically, what level of proof is needed to overcome the presumption once applied?

Justice Young addressed this very issue at length in a dissenting opinion in the case of *In re Estate of Mortimore*, 491 Mich 925; 813 NW2d 288 (2012) (Young, J., dissenting). Specifically, in that case, following a bench trial, the probate court found that the evidence for and against undue influence was relatively even. As such, it ruled against the contestant because she carried the ultimately burden of persuasion. The Court of Appeals then reversed because of the mandatory inference created by the presumption under *Kar*. The Supreme Court initially granted leave to appeal, then after oral argument, vacated that decision. Justice Young, joined by

Justice Markman and Justice Mary Beth Kelly, dissented and explained as follows:

> The Court of Appeals held that, once established, there was a "mandatory presumption" of undue influence that the *proponent* of the will bore the burden of overcoming. The Court reasoned that because the probate court, sitting as fact-finder, found that the evidence for and against undue influence was essentially evenly split, the will's *proponent* had not met *her* burden to disprove the presumption of undue influence.
>
> By instituting a "mandatory presumption" of undue influence, the Court of Appeals, *in effect*, shifted the ultimate burden of persuasion to Helen Fisher – the *proponent* of the will. It is erroneous and illogical to state that the burden of proof always remains with the *contestant* of a will, but then require the *proponent* of a will to rebut a presumption of undue influence by a preponderance of the evidence. *The preponderance standard is the very same level of evidence that satisfies the ultimate burden of proof in a civil case*. I therefore cannot agree with the statement in *Kar*, upon which the Court of Appeals primarily relied for its ultimate conclusion, that
>
> > [i]f 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. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, *and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.*
>
> Key to the analysis of this issue is that the burden of proof of undue influence *always* rests on the *contestant* of the will. Because *Kar* states that the *proponent* of the will must *disprove* the claim of undue influence by a preponderance of the evidence at the rebuttal stage, how can it be said that this scheme has not shifted the burden of persuasion onto the proponent? Although *Kar* disclaimed this conclusion – stating that "[t]his does not mean that the ultimate burden of proof has shifted from plaintiff to defendant" – I am unable to read *Kar* in any other way. This is particularly true where, as *Kar* provides, the failure to rebut the presumption means that the contestant receives a mandatory inference of undue influence that will "*always satisfy*" the burden of persuasion.
>
> I believe that requiring evidence that equals the ultimate burden of proof at the initial rebuttal stage sets too high of a bar for rebutting the presumption. To the

> extent that *Kar* is internally inconsistent and should be clarified. Moreover, *Kar* was decided before the enactment of MRE 301 and MCL 700.3407, and its statements regarding the quantum of proof necessary to rebut a presumption of undue influence are inherently inconsistent with MRE 301 and MCL 700.3407, as well as caselaw of this Court. At the very least, this Court ought to address the problem created by *Kar* because, as this case illustrates, *Kar* is distorting the burden of proof in this important area of the law.
>
> Instead, consistently with our caselaw, I would hold that where a presumption of undue influence arises, a will's proponent need only come forth with "substantial evidence" in rebuttal. Ultimately, this standard requires that a *proponent of the will come forward with some objective evidence supporting the position that no undue influence existed, but does not require that the proponent "prove" by a preponderance that no undue influence existed.*

491 Mich at 928-930 (italics in original, internal citations omitted) (Young, J., dissenting).

Accordingly, three of the seven Supreme Court Justices believed that the presumption of undue influence framework of *Kar v Hogan* warranted revisiting and clarifying by this Court. This Court has not had the opportunity to do so since the *Mortimore* case.

The undue influence presumption is further complicated by the unresolved issue of how the presumption, once triggered, effects summary disposition. As discussed above, in *Widmayer*, the Court ruled that once a presumption is applied, that has the effect of avoiding a directed verdict against the party in whose favor the presumption operates. 422 Mich at 289. Yet, a recent published Court of Appeals case appears to have contradicted this.

In *Bill and Dena Brown Trust*, *supra*, the Court of Appeals determined that the presumption did not apply in that case. It then went further and discussed how, even if the presumption had applied, the resulting mandatory inference was not enough to create a genuine issue of material fact:

> Even if we were to assume that a presumption of undue influence arising from the creation of the power of attorney could be applied retroactively,

> we recognize that the presumption creates only a permissible inference that may be rebutted by the introduction of evidence to the contrary. The ultimate burden of proof regarding undue influence remains with the party who alleges that it occurred. In the present case, no evidence was presented of undue influence and, in fact, the evidence showed that Bill Brown's actions were the result of his own free will. So, even if a presumption of undue influence applied retroactively stemming from the creation of a power of attorney in defendant, the presumption was rebutted such that a reasonable trier of fact could only conclude that the questioned documents were not the product of undue influence. They were the result of Bill Brown's free will.

312 Mich App at 702 (citations omitted; emphasis added). The Court affirmed summary disposition against the non-moving party even if the presumption of undue influence applied to that party's benefit. This appears contrary to *Widmayer*'s holding that a presumption, when triggered, avoided a directed verdict even in the absence of other evidence.

These unresolved distinctions in the undue influence presumption framework make the rule discussed in *Powers* even more unworkable, particularly because an unethical attorney in a position to draft a will or trust for an unsuspecting client would be in a position to know and take advantage of these difficulties. In short, the presumption of undue influence is an imperfect doctrine needing clarification, despite its long history of use in Michigan. By itself, the rule does not do enough to protect testators against attorneys who violate MRPC 1.8(c).

II. THIS COURT'S ADOPTION OF MRPC 1.8(C) DOES NOT WARRANT OVERRULING *IN RE POWERS ESTATE* BECAUSE THE APPLICABLE STATEMENTS SHOULD BE TREATED AS DICTA.

As discussed above in Section 1.A., *Powers* did not directly address the issue of whether public policy requires a will or trust to be held invalid when the drafting attorney is also the beneficiary. Instead, the *Powers* Court framed the issues on appeal as follows:

> Motions for directed verdict non-obstante veredicto and for a new trial were made. It is from a denial of these motions that appeal is taken. Eighteen additional assignments of error are made, one of which reiterates on a specific ground, error in denial of a new trial. The others challenge refusals of requests to charge, admissions of and refusals to admit evidentiary matter.
>
> Abiding all this, our scope of review is essentially limited. Were issues of fact created by conflicting admissible evidence? If so, the jury's finding thereon is controlling. If error was committed in admissions or exclusions of evidence, were they prejudicially reversible? Was there reversible error in the charge including refusals of specific requests – and, of course, that rather difficult to define question submitted in most jury cases – was the verdict against the great weight of the evidence? It would be rare, if not unique in 8 weeks of bitterly contested litigation were no error committed. In this case there was. Some was harmless. The question must be confined to such error as would have denied to appellants the basic guaranty of a fair trial.

In re Powers Estate, 375 Mich at 155 (emphasis added).

As part of its ruling that a new trial was warranted, the Court provided guidance to the parties and lower court that the fact that the defending beneficiary was also the drafting attorney was not relevant. The *Mardigian* Court of Appeals decided to reverse the Probate Court's ruling because of statements to this effect. *In re Mardigian Estate*, 312 Mich App at 558-59, citing to *Powers*, 375 Mich at 179 and 181. These statements in *Powers* should be treated as dicta.

In *Auto-Owners Inc Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13; 857 NW2d 520 (2014), this Court stated, "Obiter dicta are not binding precedent. Instead, they are

statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication." *Id* at 21, n 15 (citing *People v Peltola*, 489 Mich 174, 190 n32; 830 NW2d 140 (2011)). Applying this distinction, statements that are unnecessary to determine the case at hand are not binding precedent.

In *Powers*, the Court limited its review to whether or not a will contest resulted in a fair trial due to evidentiary and charging errors. Its statements about how the parties and trial court should address, on remand, the fact that the defending beneficiary was also the drafting attorney were not necessary for this determination. Certainly, the limited discussion of this topic should not be considered binding precedent on the issue of whether public policy, as defined in part by MRPC 1.8(c), should render a testamentary instrument void when the drafting attorney was also a substantial beneficiary. Rather, this Court should address this issue squarely and not feel bound by the *Powers* discussion.

This precise analysis played out in this Court's decision in *In re Karmey Estate*, 468 Mich 68; 458 NW2d 798 (2003). In that case, the issue before this Court was whether a marriage created a confidential or fiduciary relationship sufficient to satisfy the first prong of the test for the presumption of undue influence, which had been clarified in *Kar v. Hogan*. 468 Mich at 72. The Court of Appeals felt compelled to follow *Kar* because *Kar* applied the three-prong test in a case that involved a husband and wife. *Id*. The Supreme Court recognized that this issue was not the focus of *Kar*, and as such, this aspect of the *Kar* decision was not binding. Specifically,

> Although *Kar* accepted the trial judge's utilization of the presumption of undue influence, that was not the focus of *Kar*. Instead, the critical issue for discussion concerned the burden of proof and the shifting evidence obligations of the parties

> when the presumption of undue influence has been found. *Kar* did not discuss what type of proofs were necessary to meet the three-prong test. It simply operated on the premise that the marriage at issue was subject to the presumption.

Id at 73-74. As such, this Court in *Karmey* rejected the implication in *Kar* that a husband-wife relationship automatically met the first prong of the test, but it did not overrule *Kar*. *Id* at 74.

Similarly in this case, the *Powers* implication that an instrument drafted by an attorney who is also a beneficiary is treated like any other will or trust instrument in dispute should be rejected. This does not mean that *Powers* need be overruled. Rather, the primary focus of *Powers* should still be treated as good law, just as was done with *Kar v Hogan*.

While this may seem to be a fine distinction, it is an important one nonetheless, especially in light of the purposes of the Rules of Professional Conduct. "The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule." MRPC 1.0(b). These purposes are further defined in the Preamble to MRPC 1.0:

> Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

MRPC 1.0 Comment, Preamble: A Lawyer's Responsibility.

The Probate Section believes that it would be inappropriate to overrule any published appellate decision, especially a Supreme Court decision, by virtue of a Rule of Professional Conduct alone. That does not mean, however, that the rule should be not considered as the legal

principal is addressed by the Court[2].

III. A VIOLATION OF MRPC 1.8(C) SHOULD BEAR ON THE VALIDITY OF THE GIFT. THE PROBATE SECTION PRESENTS THREE OPTIONS FOR HOW IT SHOULD DO SO.

While the Rules of Professional Conduct should not directly invalidate a gift in a testamentary instrument, they certainly should not be ignored either. As noted in the dissent to the *Mardigian* Court of Appeals opinion, both the MTC and, to a lesser extent, EPIC permit courts to invalidate a will or trust on the basis of public policy. 312 MichApp at 570 (Servitto, J., dissenting). Specifically, "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." MCL 700.7404. Further, "a trust terminates to the extent … the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy." MCL 700.7410. As to wills, "The meaning and legal effect of a governing instrument other than a trust are determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to … another public policy of this state otherwise applicable to the disposition." MCL 700.2705.

Because a probate court clearly has the right to invalidate a will or trust on public policy grounds, the question then becomes what defines public policy. Again, the dissent in *Mardigian* accurately summarized how this question should be answered in this case, which contains the important aspect of regulating the conduct of attorneys licensed in Michigan:

[2] Indeed, the same Preamble also stresses the importance of acting in the public interest. "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interest concerns of the bar. … Neglect of these responsibilities compromises the independence of the profession and the public interest

> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. *Terrien v Zwit*, 467 Mich. 56, 66-67; 648 N.W.2d 602 (2002).
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> The *Terrien* Court also stated, "We note that, besides constitutions, statutes, and the common law, administrative rules and regulations, and *public rules of professional conduct* may also constitute definitive indicators of public policy." *Id.* at 67 n 11 (emphasis added). In fact, our Supreme Court is charged with promulgating the rules regarding the ethical conduct of attorneys in Michigan. MCL 600.904 provides:
>
> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.
>
> It also has "the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct . . ." *Speicher v Columbia Twp. Bd. Of Election Comm'rs*, 299 Mich. App. 86, 91; 832 N.W. 2d 392 (2012). Because "the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904 . . ., conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy." *Id.* at 92.

Mardigian, 312 Mich App at 569 (Servitto, J., dissenting).

Many other courts have followed the approach that Rules of Professional Conduct help define public policy. See, for example, *Abram v Susan Feldstein PC*, 456 Mich 867; 569 NW2d 160 (1997); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002); and *Morris and Doherty PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2004). Unless and until the Legislature addresses the issue, the Supreme Court is in the best position to address what public policy of the State of Michigan is and how it should apply in this situation.

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which it serves." *Id.*

The issue of how this Court should ultimately apply public policy to the instrument in question in this case is a complex one. The Probate Section believes there are three different alternatives to be considered:

(1) apply the rebuttable presumption approach established by *Kar* v *Hogan*, 399 Mich 529 (1976), treating the drafting lawyer the same as any other fiduciary, and defer the issue to the Legislature to change existing law;

(2) create and apply a modified version of the rebuttable presumption approach established in *Kar* v *Hogan*, such that the presumption can only be overcome if the drafting lawyer establishes by clear and convincing evidence that the gift was not procured because of undue influence, with this determination being a question of fact; or

(3) rule that any substantial gift, including a testamentary gift, is void, as a matter of law, as against public policy pursuant to MCL 700.2705, 700.7404, and 700.7410, where the gift was made from a client to a drafting lawyer or the lawyer's parent, child, sibling, or spouse, unless the lawyer is related to the client.

The Probate Section does not condone the actions of the drafting attorney in this case and believes that all attorneys should strictly comply with MRPC 1.8(c). Attorneys presented with this situation in the future should be cautioned to refer the client to an independent attorney to draft the requested instrument. Despite that simple premise, resolution of this issue is complex because of the competing principles involved. As discussed above in the Introduction, this issue necessitates balancing the rights of a decedent to bequeath property as he or she wants against

the danger involved in a drafting attorney using his or her unique position of confidence and trust to bring about a self-interested gift. The Section is very mindful of the public perception of the integrity of attorneys, particularly in the estate planning field where it is essential that clients have complete faith and trust in their attorneys. Otherwise, many individuals may forgo retaining attorneys for estate planning or may do no planning at all. The Section requests that the Court consider, discuss and apply these considerations in determining what rule of law should apply.

Of the three options, the first is advocated by the Appellee and the third is advocated by the Appellant. The Probate Section suggests that the Supreme Court should also consider a new alternative, presented above as the second option. This approach would blend the competing interests at play; i.e., respecting a testator's final wishes versus the prohibition on attorneys drafting instruments through which they receive a substantial gift. Under this option, the burden would be on the drafting attorney to establish, by clear and convincing evidence, that the gift was not the product of undue influence. The question of whether the lawyer has met this burden should be a question of fact.

This approach would be consistent with existing law. Many Michigan courts have suggested that higher scrutiny should be applied when the attorney who prepared the instrument is also a beneficiary. *See, for example, Abrey* v *Duffield*, 149 Mich 248, 259 (1907); *Habersack* v *Rabaut*, 93 Mich App 300, 306 n2 (1979); and *In re Estate of Barnhart*, 127 Mich App 381, 388-89 (1983). The clear and convincing standard is already employed in other areas of Michigan probate law, such as whether or not: (i) an oral trust was created (MCL 700.7407), (ii) the terms of a trust should be reformed due to mistake (MCL 700.7415), (iii) a writing can be

considered to be a will when not executed in compliance with the formalities required by statute (MCL 700.2503); (iv) a subsequent will was intended to supplement rather than replace a previous will (MCL 700.2507), and (v) someone survived the death of another for 120 hours (MCL 700.2702).

The Section does not advocate for this second option in particular. The first and third options have already been thoroughly addressed in well-written briefs by the respective parties to this appeal. Both positions have merit. Indeed, in the multiple discussions that the Section and its governing council have had regarding this issue, a significant number of section members favored each position. The Probate Section did not reach consensus to advocate for one particular option of the three.

The Probate Section believes that a solution should be crafted by the Legislature. However, there is no guarantee that the Legislature will do so, or when it may happen. Due to the importance of the issue, this Court's traditional role governing the actions of lawyers, and the need for estate planning clients to have complete confidence and trust in their drafting attorneys, the Court should take this opportunity to adopt and apply a rule of law that directly addresses this issue.

Importantly, the Probate Section also respectfully requests that this Court warn other attorneys not to engage in behavior contrary to MRPC 1.8(c). If an attorney believes that a client has an earnest desire to name him or her, or a family member of the attorney, as a beneficiary of a substantial gift, then the attorney should either decline the gift or refer the client to an independent attorney to discuss the matter with the client and prepare the instrument.

CONCLUSION

This case has the potential to impact many more attorneys and the public at large than just the parties to this appeal. The Probate Section respectfully requests that this Court determine that *In re Powers Estate* did not sufficiently address the issue, although overruling of that decision by virtue of MRPC 1.8(c) is neither necessary nor warranted. Instead, this Court should carefully weigh the competing interests and apply a rule of law to provide guidance to members of the State Bar and ensure that public confidence in estate planning attorneys is not adversely affected.

Respectfully submitted,

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