State Of Michigan
In the Supreme Court

Appeal from the Charlevoix County Probate Court
Hon. Frederick R. Mulhauser

In the matter of:

Estate of Robert D. Mardigian, Deceased
(a.k.a. Robert Douglas Mardigian, deceased)

MSC Docket No. 152655

Mark S. Papazian,
Petitioner-Appellee,
v.

Melissa Goldberg,
Respondent-Appellant, and

Susan V. Lucken and Nancy Varbedian,
Respondent-Appellants, and

Edward Mardigian, Grant Mardigian and Matthew Mardigian,

Respondent-Appellants.

COA Case No. 319023

Charlevoix County Probate Ct
Case No: 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

YOUNG & ASSOCIATES, P.C.
Rodger D. Young (P22652)
J. David Garcia (P60194)
Counsel for Petitioner-Appellee
27725 Stansbury Blvd., Suite 125
Farmington Hills, MI 48334
248.353.8620
efiling@youngpc.com

Date: October 5, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

The Court has jurisdiction to hear the appeal of the Court of Appeals' judgment entered on October 8, 2015 under MCR 7.303(B)(1). On July 7, 2017, this Court issued an Order granting Appellants' application for leave to appeal the Court of Appeals' October 8, 2015 decision (*In re Mardigian Estate*, 312 Mich App 553 (2015)) which reversed the Charlevoix County Probate Court's November 11, 2013 grant of summary disposition to Appellants.

STANDARD OF REVIEW

Appellants did not address a standard of review in their brief.

The question of whether a testamentary gift to an attorney who participated in the drafting of a Will and Trust should be deemed void and unenforceable as against public policy is a question of law. This Court reviews questions of law de novo. *Hoste v. Shanty Creek Management, Inc*., 459 Mich 561, 569; 592 NW2d 360, 363 (1999). This Court also reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *West v Gen Motors Corp,* 469 Mich 177, 182-183; 665 NW2d 468 (2003).

COUNTER STATEMENT OF QUESTIONS INVOLVED

Appellee Mark Papazian, a divorce attorney, participated in drafting a Will and Trust for his best friend of 30 years. The resulting documents contained substantial gifts to Mr. Papazian and his children, and no gifts to Appellants. The question in this case is whether the gifts to Mr. Papazian should automatically be rendered void as against public policy because he participated in the drafting of the Will and Trust?

Appellee Papazian says: NO
Appellants say: YES
Probate Court said: YES
Court of Appeals said: NO

In its Order granting leave to appeal, the Court directed the parties to include among the issues to be briefed:

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).

Appellee says: YES
Appellants say: NO
The Probate Court did not directly address this issue.
The Court of Appeals did not directly address this issue.

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

Appellee says: NO
Appellants say: YES
The Probate Court did not directly address this issue.
The Court of Appeals did not directly address this issue.

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?

Appellee says:	NO, "a violation of MRPC 1.8(c)" should not "bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument."
Appellants say:	YES, "a violation of MRPC 1.8(c)" automatically invalidates the gift to the lawyer.

The Probate Court did not directly address this issue.
The Court of Appeals did not directly address this issue.

I. INTRODUCTION

At its heart, this case comes down to balancing the law-creating authority of the Legislature and the adjudicative role of the Judiciary. Appellants ask this Court to venture outside of its constitutionally created realm of authority, usurp the role of the Legislature, and create substantive law that would void a testamentary gift to an attorney-scrivener. Appellants attempt to convince the Court not only that it can void a testamentary gift to an attorney-scrivener merely by relying on Michigan Rule of Professional Conduct ("MRPC") 1.8(c), but also that the Court's promulgation of MRPC 1.8(c), an ethical canon, overruled 100 years of common law and statutory law to the contrary. They are wrong on both counts.

In *In re Powers Estate*, 375 Mich 150 (1965), this Court held that when an attorney drafts an estate document in which she receives a testamentary gift, the gift is not necessarily invalidated by the attorney's conduct in drafting the document. What is relevant to the validity of estate documents, however, is whether an attorney *unduly influenced* her client to make such a gift. *Powers* reaffirmed over 60 years of case law finding a rebuttable presumption of undue influence when a fiduciary receives a gift by way of an estate document she drafted.[1] The presumption then shifts the burden of proof to the fiduciary to show that she did not unduly influence the testator to make such a gift. The Michigan Legislature enacted a similar rule: "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, *undue influence*, fraud, duress,

[1] See, e g, *Donovan v Bromley,* 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raised presumption of undue influence); *In re Hartlerode's Estate,* 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where client makes a will in favor of his lawyer).

mistake, or revocation." MCL 700.3407(c), emphasis added.

Powers provides a workable rule that sufficiently protects the testator by: 1) honoring their intent, the "guiding polar star" of probate law, and 2) protecting against potential exploitation by requiring an attorney-scrivener who benefits from the testamentary instrument they drafted to overcome the presumption of undue influence. The rule suggested by Appellants, namely that legal instruments drawn in violation of the MRPCs are void, is by contrast, unworkable. Adopting Appellants' argument would eviscerate the intent of a testator merely because of how the instrument was created. A second step in the analysis must be taken. The court should ask if the intent of the testator was thwarted by some malfeasance worked by the attorney. This is exactly the process that *Powers* provides.

Appellants urge this Court to overrule *Powers*, contending that it is no longer controlling law due to the Court's adoption of MRPC 1.8(c) and the Legislature's enactment of the Estates and Protected Individuals Code ("EPIC"). Contrary to Appellants' contentions, the Court's adoption of MRPC 1.8(c) and the Legislature's enactment of the EPIC have not rendered *Powers* dead letter law. First, MRPC 1.8(c) is an ethical canon; it does not rise to the level of substantive law. Second, the MRPCs provide for possible disciplinary actions, not substantive legal remedies. MRPC 1.0(b) (noting that failure to comply with a Rule is a basis for invoking the disciplinary process, not a basis for a cause of action or for damages). EPIC provides that wills and trusts whose *purposes* are contrary to public policy are void. The *purpose* of this will is not contrary to public policy. Appellants admitted this before the Court at oral argument in January 2017. Appellants take issue not with the purpose of the will, but with who drafted it. There are no provisions in EPIC that void a will or trust that a judge believes was *created* in a manner contrary

to public policy. Thus, MRPC 1.8(c) and EPIC did not overrule *Powers*. *Powers* is still good law.

When asked to consider overruling precedent, the question of whether changes in the law no longer justify its holding is only one part of the Court's analysis. *Stare decisis* is the preferred course, particularly "where past decisions establish 'rules of property' that induce extensive reliance." *2000 Baum Family Trust v. Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), quoting *Bott v. Natural Resources Comm*, 415 Mich 45, 77- 78; 327 NW2d 838 (1982). When considering whether to overrule precedent, the Court also asks 1) was the decision at issue wrongly decided, 2) does the decision at issue defy "practical workability," and 3) would the reliance interests reflected in the decision work an undue hardship. *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). All of these factors, as further briefed below, find against overruling *Powers*.

We do not disagree with Appellants that the Supreme Court has the authority to regulate the practice of law and the conduct of members of the Bar. However, what Appellants refuse to admit is that MRPC 1.8(c) *does not void a testamentary gift to attorney- scrivener*. The Rule states "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." The Rule does not provide that such a gift is void. Thus, in order for this Court to void such a gift, it would need to create positive law providing for such a result. While this Court has plenary authority over "practice and procedure" in all courts of this State, it does not have the power to enact substantive law. *McDougall v. Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). That is the Legislature's role, and infringing upon it would be a direct violation of the Constitution's separation of powers.

In sum, Appellants attempt to elevate MRPC 1.8(c), a rule of professional responsibility, above all other conflicting common and statutory law. This goes against not only the stated

purpose of the MRPC, but also usurps the right of the Legislature to create positive law.

II. SUMMARY OF ARGUMENT

Appellee is hereby providing a summary of his responses to the three questions posed by the Court, with greater detail to follow in Sections IV) A, B, and C, below.

A. 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)"

Appellants claim that the rebuttable presumption of undue influence set forth in *Powers* is a "toothless protection." Appellants minimize or ignore completely over 100 years of case law and this Court's ability to apply it. Michigan courts have applied the rule delineated in *Powers* for over a century, in a well- reasoned and careful manner. See, e.g., *Donovan v. Bromley*, 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raises presumption of undue influence); *In re Hartlerode's Estate*, 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where a client makes a will in favor of his lawyer). If the rule were indeed "toothless," then courts would consistently find a lack of undue influence on behalf of an attorney who benefits from a will they drafted. A quick review of case law proves that this argument is without merit. See e.g. *In re Estate of Haynes*, 2003 WL 22715781 at *5 (Mich App 2003) [Appellee's Appendix ("App") 001b, Ex. 1]; *Johnson v. Johnson*, 2013 WL 6182654 at *2- 3 (Mich App 2013) [App 006b, Ex. 2]; *In re Estate of Lawler*, 2005 WL 3536417 at *2 (Mich App 2005) [App 009b, Ex. 3] (all finding sufficient evidence of undue influence).

The rebuttable presumption of undue influence set forth in *Powers* is a workable rule

because it carefully balances multiple promulgations of Michigan law and policy. The rule takes into account (1) a testator's right to leave his property to whomever he chooses (absent undue influence) ("A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible.")[2], (2) the right of the Legislature to enact or modify statutes affecting the validity of estate documents (Michigan probate statutes "set[] forth certain definite requirements which must be complied with for a will to be valid. By setting forth these requirements, and by providing for revocation by law only under certain circumstances, our Legislature sought to achieve a certain stability in the probate area of the law.")[3], and (3) the rights of Michigan attorneys to have grievances handled through established procedures. The rule proposed by Appellants', the automatic invalidation of a testamentary gift to an attorney- scrivener, in contrast, *only takes into account the public policy pronounced in MRPC 1.8(c) and nothing else.* Importantly, Michigan public policy is not solely outlined in the MRPC. The *Powers'* rule is workable because it inherently recognizes this, and incorporates multiple public policy considerations surrounding the issue of testamentary gifts.

Lastly, the rebuttable presumption of undue influence set forth in *Powers* sufficiently protects the testator. In Appellants' world, the only protection a testator needs is the assurance that no gift will result to the attorney that drafts their estate document. This fails to take into account the fundamental premise of probate law, namely, testator intent. A testator's intent *must* be protected by this Court. The *Powers'* rule sufficiently protects the testator because it protects their right to leave their estate to whomever they wish, while also guarding against the potential for manipulation by an attorney hired to draft their estate documents by requiring that attorney to

---

[2] *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

[3] See *In re Blanchard's Estate*, 391 Mich 644, 664-65; 218 NW2d 37 (1974) (concurrence)

overcome the presumption of undue influence.

B. This Court's Adoption of MRPC 1.8(c) Does Not Warrant Overruling *In re Powers Estate*

Appellants contend that this Court's adoption of MRPC 1.8(c) alone warrants overruling *Powers*. There is far more to the analysis than Appellants care to admit. First of all, when this Court is asked to consider overruling precedent, it must begin with a presumption against doing so: "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *2000 Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), quoting *Payne v Tenn*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed2d 720 (1991). When asked to consider overruling precedent, this Court examines: 1) whether the decision at issue was wrongly decided, 2) whether the decision defies "practical workability," 3) whether the "reliance interests" reflected in the decision would work an undue hardship, and 4) whether changes in the law or facts since the decisions' issuance no longer justify its holding. *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

Powers was correctly decided because it is consistent with *more than one hundred years* of Michigan case law analyzing the validity of a will resulting in a gift to an attorney-scrivener. See, e g, *In re Hartlerode's Estate*, 183 Mich 51, 60; 148 NW 774 (1914) (presumption that undue influence has been used where a client makes a will in favor of his lawyer and burden rests with the proponent of the instrument to overcome this presumption).

As further briefed above in section A, *Powers* represents a practical and workable solution because it inherently recognizes (1) the well- established policy of the State of Michigan that a testator's intent is paramount, (2) the Legislature's plenary power to enact law regarding the

validity of estate documents, and (3) the rights of Michigan attorneys to have their grievances heard through established procedures.

Overruling *Powers* would disrupt the real world reliance interests of (1) testators who wish that their final directives be respected, (2) Legislators who understand that their constitutionally created power to enact law cannot be usurped by the Judiciary, and (3) attorneys who have come to rely upon the established grievance procedures in the MRPC.

Lastly, there has been no change in substantive law since the issuance of the *Powers* decision that would require overruling *Powers*. Appellants contend that *Powers* is dead letter law due to the adoption of MRPC 1.8(c), and provisions in EPIC rendering a trust invalid where its purpose violates public policy. They are wrong. The adoption of MRPC 1.8(c) was not the seminal change in law that Appellants insist it was. At the time *Powers* was decided, Michigan courts already recognized that it was "contrary to the spirit of [the profession's] code of ethics" for an attorney to draft a testamentary instrument making a devise in favor of the attorney.[4] *Powers* was decided in despite of this fact. Moreover, MRPC 1.8(c) did not supersede *Powers* because it *does not void a testamentary gift to an attorney- scrivener*. The rule merely states that an attorney shall not draft such a document. *The rule itself does not invalidate the resulting gift*.

Additionally, MRPC 1.8(c) did not supersede *Powers* because MRPC 1.8(c) is an ethical canon, it is not intended to supplant substantive law. MRPC 1.0(b) ("[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The

[4] See, e.g. *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907) ("I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion."). See also *Powers*, 375 Mich at 181 (SOURIS, concurrence) (same).

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.").[5] Similarly, the Legislature's enactment of EPIC did not supersede *Powers*. MCL 700.7404 and 700.7410(1) bar the creation and enforcement of trusts whose *purposes* are "contrary to public policy." *The purpose of Mr. Mardigian's will was to leave money to his best friend. This is not against public policy*. Appellants take issue with the fact that Mr. Papazian *drafted* the documents, not with the *purpose* of the bequests.

Lastly, the Court's adoption of MRPC 1.8(c) does not warrant overruling *Powers* because the Court should not elevate one pronouncement of public policy above all others. Doing so would ignore other sources of Michigan public policy, namely (1) the right of a decedent to leave property to whomever she pleases, and (2) the court's obligation to enforce the statutes of Michigan.

C. If *In re Powers Estate* is Overruled, "a Violation of MRPC 1.8(c)" Should Not "Bear on the Validity of the Gift Provided to the Testator's Lawyer Under the Testamentary Instrument"

Even if this Court were to overrule *Powers*, MRPC 1.8(c) *still does not bear on the ultimate validity of a gift provided to a testator's lawyer*. MRPC 1.8(c) does not invalidate a testamentary gift to an attorney-scrivener. It simply states that an attorney "shall not prepare" such an instrument. In order for this Court to hold that such gifts are invalid, the Court would need to create substantive law to that effect, an action that is outside its constitutionally granted authority.

---

[5] See also *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000) ("though failure to comply with the requirements of MRPC 1.8(h) may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule.")

Moreover, such a law would contradict 100 years of existing common law and statutory law to the contrary.[6]

Appellees agree with Appellants' that this Court has the right to enforce the MRPC 1.8(c). What Appellants' fail to grasp, however, is that such enforcement is effected through a disciplinary process, not through the wholesale invalidation of an innocent third parties' testamentary provision merely because of how the instrument was created.

III. COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Underlying Facts

Robert Douglas Mardigian ("Bobby") died on January 12, 2012 at age 59, following a short fight with aggressive lung cancer. Petitioner-Appellee Mark Papazian and Bobby first met when they were 18 and 24.[7] Sharing a common Armenian heritage, Mr. Papazian considered Bobby "like family" and Bobby often referred to Mr. Papazian as his "cousin,"[8] although there was no blood relationship between the men. Even Bobby's brother, Edward, admitted that Mr. Papazian and Bobby were close friends "for many decades."[9]

Bobby created, and changed, his estate plan several times. In his early estate plans (drafted

---

[6] See, e.g., *Donovan v. Bromley*, 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raises presumption of undue influence); MCL 700.3407(c), emphasis added ("[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, *undue influence*, fraud, duress, mistake, or revocation.").

[7] App 013b, Ex. 4, Papazian Dep, 102:7-9.

[8] App 013b, Ex. 4, Papazian Dep, 51:21-22; 48:4-10. See also App 027b, Ex. 5, Bonventre Dep, 35:7-17; 66:1-5.

[9] App 041b, Ex. 6, E. Mardigan Dep, 44:19-21.

in the early 1990's) Bobby included testamentary gifts to his family members. However, as rifts between him and his family grew, Bobby disinherited his family members. In fact, none of Bobby's estate plan documents drafted after 1995 included gifts to his brother Edward, or to Bobby's nieces.[10]

In 2003, Bobby's estate plan left the bulk of his estate to a friend (Dr. Raft) and to Raft's daughter.[11] In 2004, Bobby's estate plan contained provisions leaving $5 million each to two children of a different friend (Mr. Pertnoy), with the balance of Bobby's estate at that time going to Mr. Pertnoy.[12]

In 2007, Bobby contacted his good friend Mr. Papazian (a Troy, Michigan divorce lawyer) to update his estate documents; Mr. Papazian told Bobby to go back to a previous estate lawyer.[13] Bobby refused, claiming that Mr. Papazian was his lawyer and his "best friend."[14] Mr. Papazian eventually made the changes that Bobby wanted, and under the terms of the 2007 estate documents, Mr. Papazian's two children (instead of Mr. Pertnoy's two children) became the beneficiaries, and Mr. Papazian (instead of Mr. Pertnoy) became the residual beneficiary of Bobby's estate.[15]

In 2010, Bobby again wanted to make changes to his estate plan by: (1) adding his

---

[10] App 046b, Ex. 7; App 058b, Ex. 8; App 065b, Ex. 9; App 078b, Ex. 10; App 094b, Ex. 11 (selected portions)

[11] App 046b, Ex. 7, Declaration and Agreement of Trust for the Robert Douglas Mardigian Revocable Trust, dated Oct. 29, 2003, pp 6-8; App 013b, Ex. 4, Papazian Dep, 136:20-22.

[12] App 065b, Ex. 9, Amendment and Restatement of the Robert Douglas Mardigian Revocable Trust, dated November 27, 2004, pp 5-10; App 013b, Ex. 4, Papazian Dep, 136:22-25.

[13] App 013b, Ex. 4, Papazian Dep, 123:8–124:19.

[14] App 013b, Ex. 4, Papazian Dep, 124:15-19.

[15] App 013b, Ex. 4, Papazian Dep, 134:8-21; 148:3-10.

girlfriend as a beneficiary, (2) modifying his canine trust, and (3) deleting some charitable bequests.[16] Mr. Papazian made these modifications and Bobby signed the amendments to his Trust on August 13, 2010.[17]

In early 2011, Bobby again pressed Mr. Papazian to make changes—this time to his Will. On May 26, 2011, Mr. Papazian sent the following e-mail message to Bobby:

> You need to tell me WHO gets all of your tangible personal property, household furniture and furnishings, appliances, automobiles boats, books, picture, jewelry, art objects, hobby equipment, and collections, wearing apparel, country club memberships and any other articles of household personal use. NOTE: YOU CAN DECIDE WHO GETS WHAT.[18]

An hour later, Mr. Papazian received a responsive e-mail from Bobby reiterating that he wanted Mr. Papazian to act as his personal representative, and for his personal property to go to Mr. Papazian.[19] After making the changes requested, on June 8, 2011, Bobby executed the Will, which devised the residue of his estate to the Trust in effect on the date of his death.[20]

The estate documents at issue here are Bobby's June 8, 2011 Will[21] and his August 13,

[16] App 013b, Ex. 4, Papazian Dep, 162:2-14; 166:14-19.

[17] App 013b, Ex. 4, Papazian Dep, 160:13-17.

[18] App 110b, Ex. 12, email.

[19] App 110b, Ex. 12, email.

[20] App 013b, Ex. 4, Papazian Dep, 203:12-20; 211:23—212:7.

[21] App 112b, Ex. 13, Last Will and Testament of Robert Mardigian dated June 8, 2011.

2010 Trust;[22] Mr. Papazian drafted portions of each of them.

B. Other Independent Professionals Assisted Bobby with his Estate Planning After Mr. Papazian Participated in Drafting Bobby's Estate Documents

Within weeks after Mr. Papazian completed work on Bobby's Will in June, 2011, Bobby contacted another attorney (Joseph Bonventre, of Clark Hill) and sent him copies of his Will and Trust for review.[23] Mr. Bonventre testified in deposition that, early in his conversations with Bobby, Bobby discussed the possibility of reducing the amount of his gifts to Mr. Papazian and his children.[24] Later, when Mr. Bonventre learned that Bobby's friend Mr. Papazian had been involved in drafting the estate documents, Mr. Bonventre raised with Bobby the possibility of a conflict of interest, but Bobby did not want Mr. Bonventre to spend time researching or pursuing that issue.[25] Bobby also was adamant that he did not want Mr. Bonventre contacting Mr. Papazian directly to discuss updating any of the estate documents.[26]

Mr. Bonventre testified about a voicemail message that Bobby left for him on December 1, 2011:

> [Bobby] was basically saying that if he didn't do anything the way things are written now is fine, and to me that meant his current documents that he had already signed were fine, that's the way I took it, because that's why I continued to harp in those last days in December and January, things -- you know, do you want these distributions to be made that were set forth in your current documents? If not, you

[22] App 094b, Ex. 11 (selected portions).

[23] App 027b, Ex. 5, Bonventre Dep, 18:1-9; 21:13-15; 22:1-10.

[24] App 027b, Ex. 5, Bonventre Dep, 29:2–30:7.

[25] App 027b, Ex. 5, Bonventre Dep, 31:2-18; 129:25-130:11; 131:12-132:1.

[26] App 027b, Ex. 5, Bonventre Dep, 57:3-19.

better change them now because you could die soon.[27]

Despite the fact that Bobby retained Mr. Bonventre to examine his estate documents, Bobby never signed any new estate documents altering either the Will or Trust previously drafted by Mr. Papazian and executed by Bobby.

Comerica Bank managed Bobby's finances for several years prior to his death.[28] Four months *after* Mr. Papazian completed work on Bobby's estate documents, during the time that Bobby was discussing his estate plan with Mr. Bonventre, Bobby also met with two Comerica employees: (1) a Trust and Estate Advisor (an attorney); and (2) a Wealth Planner to discuss his estate plan.

On October 17, 2011, these two Comerica employees emailed a 76-page "wealth plan" for Bobby to Mr. Bonventre.[29] This "wealth plan" contained detailed discussion and a diagram showing that, if Bobby died in 2011, Mr. Papazian would receive in excess of seven million dollars, and that both of Mr. Papazian's children would receive net bequests of $5 million.[30] No changes to the estate documents resulted from Bobby's review of this Wealth Plan.

On January 9, 2012 (more than six months after Mr. Papazian completed any involvement with Bobby's estate documents), Mr. Bonventre sent an email to the Comerica Trust and Estate Advisor stating that "based on my last call with Bob, he did not want to change anything until he

---

[27] App 027b, Ex. 5, Bonventre Dep, 91:2-11; 92:15–93:1.

[28] App 119b, Ex. 14, [Comerica Trust and Estate advisor and attorney] K. Christ Dep, 143:2-13

[29] App 123b, Ex. 15, Comerica October 17, 2011 "wealth plan" prepared for Bobby Mardigian (excerpts).

[30] App 123b, Ex. 15, Wealth Plan at p. 52.

thought about the issues further."[31]

Bobby died three days later, on January 12, 2012. Bobby had decided not to sign any of the documents that Mr. Bonventre prepared which would have amended Bobby's estate documents.[32]

C. Probate Court Proceedings

Almost immediately after Mr. Papazian filed Bobby's June 8, 2011 Will and Bobby's Trust for probate in the Charlevoix County Probate Court, Bobby's estranged family members (and one of Bobby's girlfriends) filed objections challenging both: (1) the estate documents, and (2) Mr. Papazian serving as personal representative. Each Respondent alleged that Bobby's estate documents were the product of undue influence exercised by Mr. Papazian over Bobby.[33]

On August 19, 2013, following discovery, the Mardigian Appellants moved for MCR 2.116(C)(10) summary disposition, asking the Probate Court to "void any claim" by Mr. Papazian and his children under the Will and Trust,[34] because they claimed Papazian violated MRPC 1.8(c),

---

[31] App 027b, Ex. 5, Bonventre Dep, 108:3-7.

[32] App 027b, Ex. 5, Bonventre Dep, 109:1-7.

[33] The three Mardigian Appellants filed Objections, asserting that: "The Alleged Last Will was the result of the fraud and *undue influence of Robert's attorney, Mark S. Papazian*." [Mardigian Mar. 5, 2012 Petition for Appointment of Special Fiduciary, p 6]. The Appellant nieces claimed that: "Papazian as drafting attorney, naming himself and his wife as a fiduciary of the estate, and naming himself as a beneficiary under the Previously Executed Will, compromises his honesty and integrity and creates the presumption of *undue influence and overreaching by Papazian*. . . ." (Emphasis added). [Nieces' March 26, 2012 "Amended Petition to Admit", p 10.] Appellant Melissa Goldberg [Ryburn], also filed objections.

[34] The Appellants did not ask the probate court to declare the estate documents ***void ab initio***—they asked only that ***portions*** of the documents benefitting Mr. Papazian and his children be stricken, thereby allowing the Appellants to take under a residuary clause. This relief is inconsistent with the holdings of the cases on which they relied. See, e g, *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003) ("We find that public policy voids the contract ab initio").

and because enforcing the resultant estate documents would allegedly violate Michigan's public policy.

On September 11, 2013, Mr. Papazian filed a cross-motion for partial summary disposition on his claim that he had *not* unduly influenced Bobby, relying on admissions made by the Appellants. For example, Bobby's brother Edward candidly admitted at deposition that he had no evidence to support his claim that Mr. Papazian unduly influenced Bobby:

> Q. Did your brother ever tell you that he felt he was being influenced or dominated by Mark Papazian in terms of anything?
>
> A. No.
>
> …
>
> Q. You understand Mr. Papazian has been a close friend of your brother's for many decades, correct?
>
> A. Yes.
>
> Q. *Ultimately, sir, do you believe or do you know whether Mr. Papazian advised your brother about any aspect of his estate planning?*
>
> A. *I don't know.*
>
> Q. *Do you know at any time whether Mr. Papazian ever asked your brother to leave him any asset or any amount of money?*
>
> A. *I don't know that.*[35]

Mr. Papazian also relied on the fact that Bobby had consulted both an independent attorney and two independent financial advisors after Mr. Papazian participated in drafting the documents, and still Bobby made no changes to his estate documents. Mr. Papazian thus argued that public

---

[35] App 041b, Ex. 6, E. Mardigian Dep, 44:3-45:4.

policy was insufficient to support voiding Bobby's Will and Trust where the bequests in them reflected Bobby's testamentary intent, and where the MRPCs, Michigan case law, and Michigan statutes contain no bar to enforcing estate documents that result from an alleged violation of MRPC 1.8(c).

The Appellants put forth no evidence of undue influence, claiming instead that the provisions in the Will and Trust benefitting Mr. Papazian and his children were automatically invalid.

The probate court conducted no examination of Mr. Papazian's evidence, and it declined to permit a jury to do so. Instead, on November 6, 2013, the court ruled from the bench that it would refuse to:

> accept the Will and Trust prepared by the attorney that benefits himself and his family for the purposes of probate and eventual enforcement. * * * The court . . . makes that decision based on that being not permitted under the Rules of Professional Responsibility. And the Court would be disinclined to enforce such a document in the court of this state.[36]

D. Mr. Papazian Appeals and The Mardigians File An Attorney Grievance

On November 11, 2013, the same day that the Probate Court's Order was entered [Appellants' Appendix 1a, Ex. A to Appellants' Brief], Mr. Papazian filed a claim of appeal as of right in the Michigan Court of Appeals on behalf of himself and his children. On December 16, 2013, the Mardigians filed an attorney grievance against Mr. Papazian. That matter remains

[36] App 130b, Ex. 16, Nov 6, 2013 TR, 43:6-16. That same day, the Appellants reached a contingent settlement among themselves (which did not include Mr. Papazian or his children). That settlement is "contingent" on this appeal being unsuccessful.

pending as of this date.

E. The Court of Appeals' Reversal

On October 8, 2015, the Court of Appeals issued an Opinion reversing the probate court's grant of summary disposition against Mr. Papazian. That Court held that Mr. Papazian should be permitted to present his evidence to a jury so that it could determine whether his actions constituted undue influence over Bobby. The Court of Appeal's Opinion contains four essential points:

(a) *In re Powers Estate*, 375 Mich 150, 156, 176, 179 (1965) expressly holds that a will devising the bulk of the estate to an unrelated attorney and his family is not thereby rendered invalid.[37]

(b) Several cases decided after 1965 that refused to enforce *contracts* entered into by an attorney in violation of the MRPC are inapplicable to this dispute, because a *contract* is fundamentally different than a *will*, and different policy considerations apply to enforcement of a will.[38]

(c) Michigan's statutory scheme dictates what a contestant must establish to invalidate a will or trust on the basis of undue influence.[39]

(d) "The framework adopted by the legislature attempts both to honor the actual intent of the grantor while also protecting against abuse."[40] "[C]ase law and existing statutes afford [Mr. Papazian] the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside." *Id.*

F. Proceedings In This Court

On November 12, 2015 all Respondents-Appellants filed a joint Application in this Court for leave to appeal. Mr. Papazian filed his Answer to the Application on December 9, 2015, asking

---

[37] Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, pp 3-4.

[38] Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, pp 4-7.

[39] Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, pp 7-8.

[40] Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, p 8.

this Court to deny leave.

On June 29, 2016, this Court issued an Order requesting MOAA Supplemental Briefs "addressing among other issues, whether this Court should overrule *In re Powers Estate*, 375 Mich 150 (1965)." The Order also directed the Clerk to schedule oral argument. On August 10, 2016, Mr. Papazian filed his Supplemental MOAA Brief, requesting that the Court affirm *Powers*. On January 10, 2017, the parties appeared before this Court for oral argument on the application for leave to appeal the October 8, 2015 judgment of the Court of Appeals. On July 7, 2017, this Court issued an Order granting the application for leave to appeal, and ordered the parties to submit further briefing on issues including (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?

IV. ARGUMENT

A. 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)"

1. *Powers* Creates a Rebuttable Presumption of Undue Influence and Requires that Courts Carefully Scrutinize any Testamentary Document Drafted by and Benefitting an Attorney

Appellants argue that the presumption of undue influence set forth in *In re Powers Estate*

is a "toothless protection." This is not only an affront to the Court's balanced and workable rule and its ability to apply it, it is a mischaracterization of the law and its historical application by numerous Michigan courts.

For over 100 years, Michigan courts have looked upon testamentary instruments drafted by an attorney- beneficiary with suspicion, and have reviewed such instruments under careful scrutiny.[41] Michigan courts have consistently held that when an attorney- scrivener benefits from a will or trust, the proper inquiry is whether there was undue influence by the attorney, not whether the attorney used "questionable professional judgment" in drafting the document. See, e.g., *Donovan v. Bromley*, 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raises presumption of undue influence); *In re Hartlerode's Estate*, 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where a client makes a will in favor of his lawyer); *In re Powers*, 375 Mich 150, 176; 134 NW2d 148 (1965) (whether an attorney who drew estate document "used questionable professional judgment" is irrelevant to enforceability of will; and dissent, noting the burden of overcoming a presumption of undue influence where the beneficiary is the lawyer-scrivener). The Michigan Legislature codified the same inquiry in MCL 700.3407(c): "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."

The court's evaluation of the presence of undue influence is a careful and methodological

[41] See *Matter of Estate of Barnhart*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983) ("an instrument drafted by an attorney in his own favor is looked upon with suspicion") citing *Creller v Baer*, 354 Mich 408; 93 NW2d 259 (1958). See also *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907) (because it has been recognized as contrary to the legal code of ethics for a lawyer to draft a will making dispositions of property in his favor, such dispositions are looked upon with suspicion).

analysis. "The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *In re Estate of Karmey*, 468 Mich 68, 73; 658 NW2d 796 (2003), internal citations omitted. Once a challenger satisfies these three prongs, the burden of proof shifts to the attorney-fiduciary to attempt to rebut this presumption. *In re Barnhart Estate*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983) (attorney who created account with his client in which attorney retained right of survivorship, had burden of showing that he did not unduly influence his client); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 273; 289 NW2d 898 (1980) ("presumption of undue influence [by fiduciary] was rebutted by a preponderance of the evidence."); *Vollbrecht's Estate v Pace*, 26 Mich App 430, 437; 182 NW2d 609 (1970) ("once the jury finds substantial benefit to the fiduciaries, or their interest, a presumption of undue influence will arise. Whether or not this presumption is rebutted, thereby becoming merely a permissible inference, is another question.").

Contrary to Appellants' assertions, the test employed by Michigan courts when determining whether or not there has been undue influence is not a rubber stamp. If that were true, then all cases applying the test would result in the victory of the attorney-scrivener. A survey of the case law shows that this is not the case. See e.g. *In re Estate of Haynes*, 2003 WL 22715781 at *5 (Mich App 2003) (holding that the trial court did not err in finding the existence of undue influence) [App 001b, Ex. 1]; *Johnson v. Johnson*, 2013 WL 6182654 at *2- 3 (Mich App 2013) (affirming the trial court's finding of undue influence in the case of a life estate deed because, among other things, "defendant placed continuous pressure on plaintiff to use the land for his benefit…plaintiff was intimidated by pressure from defendant, and…plaintiff appeared submissive

and often confused.") [App 006b, Ex. 2]; *In re Estate of Lawler*, 2005 WL 3536417 at *2 (Mich App 2005) (remanding the case for further proceedings on the issue of undue influence because "the evidence presented below was sufficient to meet the requirements for establishing a presumption of undue influence in the execution of the contested will, against which petitioner offered no contrary evidence.") [App 009b, Ex. 3].[42] Instead, these cases reflect careful consideration of numerous facts and circumstances by the fact- finder. This is precisely the inquiry required by *Powers*.

2. The Rebuttable Presumption of Undue Influence Set Forth in *In re Powers* Remains a Workable Rule

The rebuttable presumption of undue influence set forth in *In re Powers* is a workable rule because it takes into account multiple sources of law and policy without obviating any one area. The *Powers* rule is workable because it preserves (1) a testator's right to leave his property to whomever he chooses (in the absence of undue influence), (2) the right of the Legislature to enact or modify statutes affecting the validity of estate documents, and (3) the rights of Michigan attorneys to have grievances handled through established procedures.

Michigan courts are bound to follow the public policy pronouncements set forth in statutes adopted by the Legislature. See, e.g., *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 131; 596 NW2d 208 (1999) ("Unquestionably, public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court."); *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000) (same). Here, the Estates and Protected Individuals Code, MCL 700.1101 et seq., reflects the Legislature's resolve to honor testator intent. MCL 700.2501

[42] The fact that all of these cases are unpublished shows that the finding of undue influence by an attorney scrivener is not particularly novel or atypical.

(granting individuals the right to prepare a will), MCL 700.1201(b) (requiring the Code to be applied "to promote its underlying purposes and policies, which include . . . to discover and make effective a decedent's intent in the distribution of the decedent's property."). The importance of testator intent is also reflected in the Michigan Trust Code, a purpose of which is to "foster certainty in the law so that settlers or trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c).

It is therefore the public policy of Michigan, as recognized by the Legislature, to effectuate a testator's intent. See generally *In re Jauw*, 2012 WL 4039277, *3 (Mich App 2012), [App 134b, Ex. 17] quoting *In re Estate of Raymond*, 483 Mich 48, 58; 764 NW2d 1 (2009) ("Because a testator is free to dispose of his property as he sees fit, *the intent of the testator is the 'guiding polar star*.'") (Emphasis added). "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). "It is incumbent upon a probate court to execute the intent of the testator regarding the distribution of the estate, especially where the intent has been expressed in the lawful provisions of a will." *Jauw*, 2012 WL 4039277 at *3 [App 134b, Ex.17], quoting *In re Howlett's Estate*, 275 Mich 596, 600–601; 267 NW 743 (1936). The *Powers* rule is workable because it respects the Legislature's pronouncement that protecting testator intent is paramount.

Powers is also workable because it inherently recognizes that *it is the Legislature's role to enact substantive law* regarding the validity of testamentary documents, not the judiciary's. See *In re Blanchard's Estate*, 391 Mich 644, 664-65; 218 NW2d 37 (1974) (concurrence) (Michigan probate statutes "set[] forth certain definite requirements which must be complied with for a will to be valid. By setting forth these requirements, and by providing for revocation by law only under

certain circumstances, our Legislature sought to achieve a certain stability in the probate area of the law.") See also *Matter of Estate of Jurek*, 170 Mich App 778, 784; 428 NW2d 774 (1988), citing *Labine v Vincent*, 401 US 532; 91 SCt 1017; 28 LEd2d 288 (1971). When *Powers* was decided, the Michigan Legislature had not enacted a statute voiding testamentary gifts to an attorney- scrivener. See *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907) (noting absence of any statute invalidating a bequest made to a scrivener of a will). However, the Michigan Legislature *has* enacted a statute whereby an individual can challenge the validity of a will: "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." MCL 700.3407(c). Some state legislatures have enacted statutes that void testamentary gifts to a non-family attorney- scrivener. See, e.g., Vernon's Texas Estates Code Ann, § 254.003(a) ("A devise of property in a will is void if the devise is made to: (1) an attorney who prepares or supervises the preparation of the will [containing an exception in § 254.003(b) where the attorney is related to the testator); Kan Stat Ann § 59-605 (a testamentary provision "written or prepared for another person, that gives the writer or preparer or the writer's or preparer's parent, children, issue, sibling or spouse any devise or bequest is invalid" unless the preparer is related to the testator, or the testator knew the contents of the provision and had independent legal advice regarding the same). Since *Powers* was decided, the Michigan Legislature *still* has not enacted such a statute. This is significant. *Powers* preserves the right of the Michigan Legislature to enact statutes governing the validity of wills and trusts, and respects the fact that the Legislature has not promulgated a statute voiding a testamentary gift to an attorney- scrivener, despite the fact that Powers was decided *52 years ago*.

Lastly, the rule delineated in *Powers* is workable because it preserves the rights of Michigan attorneys to have grievances handled through procedures established by this Court. The

procedures outlined in the MRPC provide important rights to attorneys against whom allegations of ethical misconduct are lodged. See e.g. MCR 9.101 et seq. and MCR 9.126 (addressing confidential aspects of investigations and hearings). Maintaining this current system would preserve the rights of Michigan attorneys to have such allegations addressed and resolved pursuant to established procedures and not on an ad hoc basis by trial judges. The process ensures that any discipline actually imposed will be proportionate to: (1) the severity of the infraction, and (2) the discipline imposed on other attorneys who committed similar infraction(s).

In contrast, Appellants' solution is *not* workable. At the parties' oral argument in January 2017, Justice Joan Larsen brought up an important hypothetical that illustrates the absurd results that would come to pass if this Court were to accept Appellants' argument that ethical violations equate to binding substantive law. [App 140b, Ex. 18, Unofficial Transcript of Oral Argument, pp. 12- 17.][43] In that hypothetical, Justice Larsen posited: what if an attorney is suspended, and during his suspension, he drafts an otherwise valid contract on behalf of his client and another individual. The contract provides for the sale of a company of which the attorney happens to own a small piece. Justice Larsen asked, is that contract now void or is the attorney subject to discipline? Appellants argued to this Court that the *entire contract would be void* because the sale in some way benefits the attorney. Appellants then suggested that the parties would be forced to lodge a malpractice action to recoup their losses from this now invalidated, but perfectly legal, transaction.

This result is untenable. It would eviscerate an entire contract, and the intent of the parties to the contract to effectuate a sale of the company, merely because their attorney drafted it while

[43] Appellees requested an official transcript of the oral argument in January 2017 but were told that such a transcript did not exist. Appellees hired a third party court reporter to transcribe the proceedings and attach the transcript here as Exhibit 18 pursuant to MCR 7.312(D)(2).

he was suspended from the practice of law. The court should employ a further step to the analysis, namely an investigation into whether the attorney exerted some influence over the parties that affected the contract in a way that resulted in the attorney benefitting, contrary to the parties' intent. This is *exactly* what the rule in *Powers* provides. Rather than voiding an entire will based on the manner in which the attorney drafted it, *Powers* directs the Court to examine if undue influence was exerted by the attorney. *That* is a workable process, not the wholesale decimation of an otherwise valid legal instrument reflecting the intent of innocent third parties merely because of the manner in which it was created.

3. The Rebuttable Presumption of Undue Influence Set Forth in *In re Powers* "Sufficiently Protects the Testator When the Testator's Lawyer Violates MRPC 1.8(c)"

Appellants would have this Court believe that the only protection a testator requires is the assurance that an attorney does not draft and benefit from their testamentary instrument. This ignores the most fundamental principle of probate law.

The *Powers* rule sufficiently protects the testator because it respects the testator's intent and statutory right to leave their assets to whomever they wish, while at the same time safeguarding against exploitation by providing for a presumption of undue influence. Bobby Mardigian's intent was to leave assets to his life- long friend, Mark Papazian. Using MRPC 1.8(c) as a weapon to eviscerate Mardigan's expression of his intent is not only a violation of the fundamental principle of probate law, namely that testator intent is the 'guiding polar star,' it stands in direct contrast to the purpose of MRPC 1.8(c) as reflected in the preamble comments to MRPC 1.0. (stating that Michigan's ethical rules are designed "to provide a structure for regulating conduct through disciplinary agencies" not to "*augment any substantive legal duty of lawyers or the*

extradisciplinary consequences of violating such a duty.") (emphasis added).

The *Powers* rule sufficiently protects the testator because it imposes a heavy burden on the attorney-scrivener to rebut the presumption of undue influence, but it does not preclude the possibility that an attorney could draft estate documents in his own favor in accordance with the testator's intent.

4. *In re Powers* does not incentivize misconduct

Appellants argue that *Powers* is unworkable because it creates an incentive for lawyers to violate MRPC 1.8(c). Appellants' Brief on Appeal, pp. 32- 34. This is simply untrue. What Appellants fail to understand is that when an attorney-beneficiary drafts a will, the document is looked upon with heightened suspicion and the *presumption is that undue influence has occurred.*[44] The burden of proof falls on the attorney- scrivener to rebut that presumption. Second, a violation of MRPC 1.8(c) is a basis for invoking the disciplinary process. MRPC 1.0(b). An attorney in violation of a Rule of Professional Conduct can be *disbarred*. See e.g. *In re Disciplinary Proceeding Against Miller*, 149 Wash 2d 262, 288; 66 P3d 1069 (2003). An attorney is not incentivized to violate MRPC 1.8(c) because *Powers* and MRPC 1.8(c) sufficiently protect against that kind of behavior. The attorney will be subject to an in depth analysis from the probate court, and will face disciplinary consequences.

Appellants bring up an example on page 33 of their Brief involving an undue influence waiver. In essence, the hypothetical involves an elderly woman who wants to leave the totality of

---

[44] See *Kar v. Hogan*, 399 Mich. 529, 537; 251 NW 77 (1976) overruled on other grounds by *In re Estate of Karmey*, 468 Mich. 68 (2014) (undue influence is presumed in cases with evidence of "(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").

her estate to a charity, but her lawyer tricks her into leaving half of the estate to him and half to the charity. In an effort to avoid losing the testamentary gift on the basis of undue influence, the lawyer somehow "gets the client to sign an 'undue influence waiver,' slipped in amongst piles of other estate documents to sign." (Appellants' Brief on Appeal, p. 33). Not surprisingly, Appellants do not cite a single case where this has actually occurred. Moreover, earlier in their Brief, Appellants argue that MRPC 1.8(c) is *not waivable*, and "[e]ven if the client executed a waiver stating expressly that there was no undue influence or that the client waived any presumption of undue influence, this would not be enforceable." (Appellants' Brief on Appeal, p. 12.) Thus, Appellants have already stated that the waiver in their hypothetical is not enforceable and that such a hypothetical is impossible. Additionally, the hypothetical posed ignores at least two protections against this kind of behavior that are in place in the current system: (1) in the instance of an attorney scrivener who benefits from a testamentary gift, undue influence is *presumed*, and the burden is on the attorney to overcome this presumption, and (2) two witnesses must attest to the signing of the Will or Trust. Thus, the hypothetical posed by Appellants is not only impossible, according to them, it also ignores at least two protections in place that guard against such behavior.

B. This Court's adoption of MRPC 1.8(c) does not warrant overruling *In re Powers Estate*

1. This Court should not overrule *Powers* because it was correctly decided, it represents a practical and workable solution, undue hardship would result if it was overturned, and there have been no changes in law or facts that would justify its nullification

When considering whether to overrule a case, this Court must begin with a presumption against doing so. Overruling precedent is not a matter that should be taken lightly; "stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual

and perceived integrity of the judicial process." *2000 Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), quoting *Payne v Tenn*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed2d 720 (1991). When the Court is examining a precedential case that affects property rights, "the values served by stare decisis—stability, predictability, and continuity" should be given even more weight. *Baum Trust*, 488 Mich at 172. "[S]tare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Id*, quoting *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

This Court considers four questions when deciding whether or not to overrule precedent. First, the Court looks to whether the decision at issue was wrongly decided. *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). The Court should then examine: (2) whether the decision defies "practical workability," (3) whether the "reliance interests" reflected in that decision would work an undue hardship if it were overruled, and (4) whether changes in the law or facts since issuance of the decision no longer justify its holding. See *People v McKinley*, 496 Mich 410, 422; 852 NW2d 770 (2014), citing *Robinson*, 462 Mich 439, 464; 613 NW2d 307 (2000). Appellants devote a mere *five sentences* to analyzing and quickly dismissing these factors. The analysis under *Robinson* deserves far more consideration than that.

a) *Powers* was Correctly Decided

In re Powers Estate, 375 Mich 150; 134 NW 2d 148 (1965) was correctly decided. In *Powers*, an attorney drew a will for a close friend of his wife. *Powers*, 375 Mich at 156. The will left much of the testator's estate to the attorney and his wife, while specifically omitting any relatives, "most of whom [the testator] saw little or nothing of in her lifetime." *Id*. at 156. A trial resulted over the will's validity, and the jury returned a general verdict against the will. This Court

reversed and remanded for new trial.

Despite Appellants' contentions, the policy behind MRPC 1.8(c) was in place and well understood to be true when *Powers* was litigated. At the time *Powers* was decided, it was well recognized under Michigan law that it was "contrary to the spirit of [the profession's] code of ethics" for an attorney to benefit from a testamentary instrument he drafted. See, e.g. *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907) ("I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion."). See also *Powers*, 375 Mich at 181 (SOURIS, concurrence) (same).

This Court made clear, despite the evidence offered by the *Powers* appellees' regarding the impropriety of the attorney's actions, that the appropriate issue to be examined when determining the validity of a will was whether the attorney had unduly influenced the decedent, not whether the attorney had engaged in poor "professional judgment" in drafting the document. *Powers*, 375 Mich at 157-158. The Court directed that:

> The forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure. The forum in which not to test it is a jury trial determining testamentary capacity and undue influence. The purity of motive of the advocates representing those found to be proper parties in interest is not to be the subject of consideration. It is not in issue. [*Powers*, 375 Mich at 178]

This Court remanded the case for further proceedings in order to determine whether the attorney unduly influenced the testator.[45]

Powers was correctly decided because it is consistent with the approach Michigan courts have taken for *more than one hundred years* when examining the validity of a will. Michigan

[45] Obviously, if the *Powers* Court did not believe that there were any circumstances under which such a will could be valid, remand would not have been necessary.

courts have consistently held that, when litigating the validity of a will, the proper question to ask is whether there was undue influence exercised by the attorney- beneficiary, not whether the attorney acted "contrary to the spirit of [the profession's] code of ethics." See, e g, *Donovan v Bromley*, 113 Mich 53, 55; 71 NW 523 (1897) ("It is also true that the presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely, and under circumstances which rebut the inference of undue influence..."); *In re Hartlerode's Estate*, 183 Mich 51, 60; 148 NW 774 (1914) (presumption that undue influence has been used where a client makes a will in favor of his lawyer and burden rests with the proponent of the instrument to overcome this presumption); *In re Powers*, 375 Mich 150, 176, 181; 134 NW2d 148 (1965) (whether attorney who drew estate document "used questionable judgment" is irrelevant to validity of will; and concurrence, noting the burden of overcoming a presumption of undue influence where beneficiary is lawyer-scrivener); See also *Habersack v Rabaut*, 93 Mich App 300, 306; 287 NW2d 213 (1979) (although the Court "look[ed] with disfavor upon the type of transactions engaged in by the defendant attorney," evidence of: (1) previous wills showing that decedent intended to disinherit her son, and (2) longstanding friendship between the lawyer and the decedent, was sufficient to rebut the presumption of undue influence).

b) *Powers* Represents a Practical and Workable Rule

As further briefed above in section IV) A) 2, *Powers* represents a practical and workable solution because it inherently recognizes (1) the well- established policy of the State of Michigan that a testator's intent should effectuated by the courts, (2) the Legislature's authority to enact law regarding the validity of estate documents, and (3) the rights of Michigan attorneys to have their

grievances heard through established procedures.

c) The Reliance Interests Here Would Work an Undue Hardship

The third question examined by the Court when considering whether to overrule precedent is whether doing so would have a negative effect on the "reliance interests" of those who rely on *Po*wers, and the law set forth therein. "The Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations, that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). In other words, the question is, would overruling *Powers* disrupt "any real-world reliance interests?" See *Hamed v Wayne County*, 490 Mich 1, 27; 803 NW2d 237 (2011).[46] The answer is yes.

Overruling *Powers* would disrupt the reliance interests of 1) Michigan testators who want to know with certainty before their death that their intent reflected in their testamentary documents will be upheld, 2) Michigan legislators who are tasked with updating or amending the Estates and Protected Individuals Code ("EPIC"), and 3) Michigan attorneys who rely on the procedures created by this Court when it comes to having their grievances adjudicated, rather than the will of ad hoc judges.

Knowing that one's intent will be honored by the court system is of paramount importance to a testator. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983) ("[a] fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried

[46] Reliance interests are deeply embedded when it comes to precedent regarding the disposition of property. "Judicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *Bott v Natural Resources Comm*, 415 Mich 45, 78; 327 NW2d 838 (1982).

out as nearly as possible."); *In re Howlett's Estate*, 275 Mich 596, 600–601; 267 NW 743 (1936). ("It is the duty of the courts to carry out as nearly as possible the intent of a testator or testatrix as to the distribution of an estate in so far as such intent has been expressed in the lawful provisions of a will."). If this Court were to overrule *Powers* and judicially create a law voiding a gift to an attorney-scrivener, it would destroy the reliance that testators have on courts to ensure that their intent is carried out after their death.

The reliance interests of Michigan Legislators will be disrupted should this Court overrule *Powers* and create a law voiding all gifts to attorney- scriveners. The Michigan Legislature has the constitutional authority to amend or enact statutes regarding the validity of wills. See *In re Blanchard's Estate*, 391 Mich 644, 664-65, *supra*. In fact, this process is in motion right now, and the Court's overruling of *Powers* would unquestionably disrupt it. In December 2015, the Chairperson of Michigan's Probate & Estate Planning Section of the State Bar requested that the Section's committee on legislation begin drafting "a legislative proposal for a statutory forfeiture of a gift in an estate planning document to the drafting attorney."[47] Since that time, the Probate & Estate Planning Section formed a four member ad hoc drafting committee and tasked them with drafting a "proposal for forfeiture of gifts to lawyer who drafted the instrument."[48] While it is unknown whether the Michigan Legislature will consider or adopt any proposed legislation drafted by the Section committee in this instance, it is clear that if this Court were to overrule *Powers*, the Legislature would be precluded from considering any such legislation, and the stability of the

[47] App 184b, Ex. 19, December 19, 2015 Minutes of the Meeting of the Council of the Probate & Estate Planning Section of the State Bar of Michigan, p 4.

[48] See App 192b, Ex. 20, State Bar of Michigan Probate and Estate Planning Section, Committee List, dated June 4, 2016, p 6. Note that these six pages are excerpts from a much larger document, which was located in its entirety at http://connect.michbar.org/probate/events/schedule.

overall statutory scheme concerning how statutes set forth in EPIC are amended or rescinded would be destroyed.

Lastly, attorneys have reliance interests at play here as well. Michigan attorneys have relied upon procedures created by this Court to adjudicate allegations of ethical misconduct for decades. See e.g. MCR 9.101 et seq. and MCR 9.126. Such a procedure ensures consistency in the application of the MRPCs and in any discipline resulting from alleged violations. Overruling *Powers* would disrupt these reliance interests and would result in trial judges adjudicating allegations of ethical violations on an ad hoc basis. This would lead to inconsistency and unpredictability.

d) Intervening Changes in the Law Do Not Require Overruling *Powers*

The final prong for examination is "whether intermediate changes in the law or facts no longer justify" the previous decision. *People v Breidenbach*, 489 Mich 1, 17; 798 NW2d 738 (2011). Appellants argue that the Court's enactment of MRPC 1.8(c) "sweeps the field before it," knocking out over 100 years of common law and statute to the contrary. Appellants ask this Court to create a rule barring any attorney from receiving a gift under a will drafted by the attorney (unless the attorney is related to the decedent), even where the attorney can prove that there was no undue influence. This argument is untenable and must be rejected for the reasons outlined below.

2. *In re Powers* has Not Been Superseded by the Court's Adoption of MRPC 1.8(c) Because the Rule is an Ethical Canon; it Does Not Rise to the Level of Substantive Law

Appellants attempt to convince this Court that *In re Powers* was superseded by the promulgation of MRPC 1.8(c), an ethical rule, because the Rule allegedly "has super- statutory

force… [and] trumps an earlier court decision, just as a statute would." Appellants' Brief on Appeal, p. 36. Not surprisingly, Appellants have *no case law support for this argument*.

The promulgation of MRPC 1.8(c) did not supersede *Powers*. First of all, Appellants attempt to convince this Court that the promulgation of MRPC 1.8(c) was a watershed moment whereby the actions of an attorney- beneficiary in drafting a will were first deemed unethical. Appellants claim that this change in public policy renders *Powers* dead letter law. This is not so. As briefed above, at the time *Powers* was decided, Michigan courts already recognized that it was "contrary to the spirit of the [profession's] code of ethics" for a lawyer to benefit from a will he drafted.[49]

Second, MRPC 1.8(c) does not prohibit an attorney from *taking* under an instrument that the attorney drafted, it prohibits *drafting* the instrument. The Appellants assume that the difference is of no consequence, but they are wrong. MRPC 1.8(c) does not contain any provision striking or voiding any instrument or any testamentary gift. The Rule simply states that an attorney "shall not" prepare an instrument for a non-relative that gives the lawyer a substantial gift. It does not address the *validity* of a document resulting from an attorney's conduct in drafting the document. The rules of statutory construction apply to the provisions of the MRPC,[50] and when interpreting statutes, courts are to assume that an omission in a text was intentional. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003).

Lastly, in their brief, Appellants attempt to elevate the Michigan Rules of Professional

---

[49] See, e.g. *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907) ("I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion."). See also *Powers*, 375 Mich at 181 (SOURIS, concurrence) (same).

[50] *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44-45; 672 NW2d 884 (2003).

Conduct to a level far exceeding its reach. Appellants argue this Court should raise a rule of professional conduct to a level on par with laws promulgated by Michigan's democratically elected Legislature. The Michigan Rules of Professional Conduct were not intended to constitute building blocks for litigation. The Rules were intended to guide the ethical behavior of attorneys. MRPC 1.0(b) (providing that failure to comply with a Rule is a basis for invoking the disciplinary process, but does not give rise to a cause of action or damages).[51]

The Preamble comments to Rule 1.0 lay the foundation for the purpose of the MRPC, providing that "nothing in the rules should be deemed to augment . . . the extradisciplinary consequences of violating such a duty.") See also *Johnson v QFD, Inc*, 292 Mich App 359, 365; 807 NW2d 719 (2011) (while "as a general matter . . . contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void…it does not necessarily follow that every statutory or regulatory violation by one of the contracting parties renders the parties' contract void and unenforceable.").

Appellants' attempt to equate the Michigan Rules of Professional Conduct with substantive law is not only incorrect, but it would lead to an unworkable and impractical results. The MRPCs actually enumerate 54 different things that attorneys "shall not" do.[52] If the Appellants' argument that the public policy supporting Rule 1.8(c)'s "shall not" prohibitions authorized judges to punish

---

[51] See also *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000) ("though failure to comply with the requirements of MRPC 1.8(h) may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule.")

[52] See MRPC 1.1; 1.2(c); 1.5(a); 1.5(d); 1.6(b); 1.7(a); 1.7(b); 1.8(a); 1.8(c); 1.8(d); 1.8(e); 1.8(f); 1.8(g); 1.8(h); 1.8(i); 1.8(j); 1.9(a); 1.9(b); 1.9(c); 1.10(a); 1.11(a); 1.11(c); 1.12(a); 1.12(b); 1.16(a); 2.2(c); 3.1; 3.3(a); 3.4; 3.5; 3.6(a); 3.7(a); 3.8(c); 4.1; 4.2; 4.3; 4.4; 5.4(a); 5.4(b); 5.4(c); 5.4(d); 5.5(a); 5.5(b); 5.6; 6.2; 6.3(a); 7.2(c); 7.3(a); 7.3(b); 7.5(a); 7.5(c); 8.1(a); 8.2(a).

counsel appearing before them for alleged Rule violations, then courts could also make summary determinations about the other 53 MRPC prohibitions.[53] If this Court were to accept Appellants' argument, it would not only be ignoring the Court's statements in the Rule preamble and Rule 1.0(b), it would also be creating an incentive for litigants to use the MRPCs in litigation, in precisely the fashion forbidden in the Rules themselves. Litigants would approach the Court claiming that any one of these ethical rules overruled case law to the contrary. Adopting Appellants' argument would authorize Michigan's trial courts to summarily enforce all MRPC prohibitions, for example, dismissing a lawsuit because of a frivolous discovery request. This would result in the enforcement of ethical provisions without the procedural safeguards established by this Court in MCR 9.101 et seq. It would inevitably lead to challenges from disciplined attorneys complaining that their "discipline" was disproportionate to that received by other attorneys for similar conduct.[54] In sum, adopting Appellants' argument would be an enforcement

---

[53] See e g, Rule 1.1 ("lawyer shall not handle a legal matter without preparation adequate in the circumstances"); Rule 3.3(a)(1) ("lawyer shall not knowingly make a false statement of material fact or law to a tribunal"); Rule 3.4(d) ("lawyer shall not in pretrial procedure, make a frivolous discovery request"); Rule 3.5(d) ("lawyer shall not engage in undignified or discourteous conduct toward the tribunal"); Rule 4.4: ("lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person [in representing a client]").

[54] Cases in other jurisdictions reveal that the same discipline is not appropriate in each situation. Compare, e.g. *Attorney Grievance Comm'n of Maryland v Lanocha*, 392 Md 234, 246; 896 A2d 996 (2006) (where attorney drafted will in violation of Rule 1.8(c) leaving substantial bequest to his adult daughter, and where there was no evidence of duress or improper influence, appropriate disciplinary sanction for scrivener attorney was reprimand) with *In re Disciplinary Proceeding Against Miller*, 149 Wash 2d 262, 288; 66 P3d 1069 (2003) (where attorney befriended elderly female client, added his name to her large CD, falsified a loan application based on the CD, cashed the CD, told his legal assistant to prepare a will for the client leaving the lawyer a substantial gift, filed probate proceedings less than 12 hours after client's death, and immediately upon receiving letters testamentary transferred money in her bank accounts to his own name, disbarment was appropriate).

nightmare for trial courts.

In contrast to the dearth of case law cited by Appellants on this point, whether or not Rule 1.8(c) can render common law and statute dead letter law has been examined by other states, each of which has rejected the argument.

In *Agee v Brown*, 73 So3d 882, 884 (Fla App 2011), the trial court (like the probate court here) found that a testamentary gift to a lawyer was void as contrary to public policy based on Florida's version of Rule 1.8(c) because the decedent's lawyer drafted a will that left a substantial bequest to the lawyer and his wife. The appellate court squarely rejected this argument, noting that the Florida Probate Code does not provide for an automatic exclusion of the bequest. *Agee*, 73 So3d at 885. "It is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." *Id,* internal citation omitted. The Court further reasoned that the "best way to protect the public" from wills drafted in violation of Rule 1.8(c) "is entirely within the province of the Florida Legislature." *Agee*, 73 So3d at 886.

In *Sandford v Metcalfe*, 110 Conn App 162; 954 A2d 188 (2008), cert denied, 289 Conn 931 (2008), the Connecticut Court of Appeals rejected the same "public policy based on Rule 1.8(c)" argument. On appeal the issue was "whether there should be a forfeiture of the bequest to Sandford, the attorney who drafted the will, on the basis of public policy." *Sandford*, 110 Conn App at 167. The court found that forfeiture was not authorized, holding that "[t]he law governing descent and distribution emanates from the legislature and is purely statutory. . . . [and there is] . . . no statute barring an attorney who drafted a testamentary instrument from inheriting by the instrument she drafted." *Sandford*, 110 Conn App at 168-169.

After finding no statutory basis to impose a forfeiture of the gift, the Court examined

whether it could fashion an equitable remedy to reach the result urged by the heirs:

> Because there is no statute barring a distribution to Sanford, the heirs at law ask us to use our equitable powers to prevent such a distribution. We cannot do so. Even if the omission of such a statute were the result of legislative oversight or neglect, we have no power to supply the omission or to remedy the effect of the neglect…The statutes cannot be changed by the court to make them conform to the court's conception of right and justice in a particular case. To avoid trenching on legislative ground, the court must take the view that if the legislature had intended such an exception from the statutes as is sought in this case, it would have said so. Although we agree that it is ill-advised, as a matter of public policy, for an attorney to draft a will in which she is to receive a bequest, in the absence of statutory provisions to the contrary, there is no bar against the right of Sandford to inherit from the decedent's estate under the statutes governing descent and distribution. If the law is to be changed to make provision for the situation at hand, it is for the legislature to make the change, not the court.

[*Sandford*, 110 Conn App at 169-170 (Citations and ellipses omitted)]. The court thus squarely declined the invitation to fill the legislative hole perceived by the will contestants.

Finally, Pennsylvania's intermediate appellate court reached a similar result in *In re Bloch*, 425 Pa Super 300; 625 A2d 57, 63 (1993). There, the lawyer who drafted the will included substantial bequests to the lawyer's father (also a lawyer) and to the father's girlfriend. The contestants challenged the will on numerous grounds, including undue influence and the contestant's view that the will was drawn in violation of Rule 1.8(c) because it contained a substantial bequest to the scrivener's father. The Court spent little time addressing the ethical allegation, dismissing it in a footnote: "To the extent that the scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, Rule 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct." *In re Bloch*, 425 Pa Super

at 310 n 8.

Admittedly, these three cases are not binding on this Court. However, each of them examined the same issue presented here, and concluded that the validity of wills and trusts is governed by statute, that any forfeiture of a bequest to the lawyer-scrivener must come from the Legislature, and therefore that any forfeiture imposed by the court based on a Rule 1.8(c) violation would be inconsistent with the statutory pronouncements in each state. For the same reasons elucidated in *Agee*, *Sandford*, and *Bloch*, this Court should not overrule *Powers* and preempt EPIC's statutory scheme in Michigan by judicially creating a forfeiture provision based on Rule 1.8(c) or the public policy which supports it.

3. While the Legislature in EPIC Has Provided that Trusts and Wills Whose *Purposes* are Contrary to Public Policy are Void, the Statute Did Not Overrule *Powers* and is Inapplicable Here because the *Purpose* of This Will and Trust is Not Contrary to Public Policy

Appellants argue that *Powers* has been superseded by MCL 700.7404 and 700.7410(1), which bar the creation and enforcement of trusts whose *purposes* are "contrary to public policy." Appellants claim that because MRPC 1.8(c) is indicative of Michigan's public policy, a violation of MRPC 1.8(c) is automatically "contrary to public policy." Not so. MCL 700.7404 permits a trust to be created where its *purposes* are not contrary to public policy. MCL 700.7410(1) voids a trust where the *purpose* of the trust is contrary to public policy. There are no provisions in EPIC that void a will or trust that a judge believes was *created* in a manner contrary to public policy. Appellants overlook the important difference between the two.

There is nothing unlawful about the purpose of Mr. Mardigian's will, which is to leave the majority of his assets to his best friend and to disinherit his family. Appellants take issue with the fact that the best friend at issue *drafted* the will, not with the *purpose* of the will. Appellants

admitted this at oral argument:

> JUSTICE YOUNG: This -- this Will, had it not been prepared by a lawyer who was a beneficiary, would not be void, correct?
>
> MR. HUDSON (Counsel for Appellants): That is correct.
>
> ...
>
> JUSTICE YOUNG: The purpose of this Will is not illegal. It is not void otherwise, but for the involvement of the lawyer who was a beneficiary.
>
> MR. HUDSON (Counsel for Appellants): That is correct.

App 140b, Ex. 18, Transcript of Oral Argument, 5:25- 6:3; 9:7- 9:11.

The purpose of Mr. Mardigian's will, to leave his assets to his best friend, is not contrary to public policy like creating a "playground for white children" (*purpose* at issue in *La Fond v City of Detroit,* 357 Mich 362, 366; 98 NW2d 530 (1948)), or attempting to perpetuate individuals in office to the detriment of minority shareholders (*purpose* at issue in *Billings v Marshall Furnace Co*, 210 Mich 1, 5; 177 NW 22 (1920)). The provisions of EPIC have not *superseded Powers* because they contain no provision voiding a will or trust that a judge believes was *created* in a manner that violates public policy. EPIC voids a trust where its *purposes* are contrary to public policy. The purpose of a will is intrinsic to the document and is not affected by who drafts it. Appellants admitted as much at oral argument and thus this argument fails.

In their Brief, Appellants attempt to draw a parallel between this case and other Court of Appeals cases involving contracts that were not enforced because they were determined to be against public policy.[55] As the Court of Appeals in this case explained, a will is generally not a

[55] See *Evans & Luptak, PC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002) (refusing to enforce agreement for referral fee from replacement counsel, after plaintiffs-attorneys withdrew due to

contract. [Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, p. 5]; 1 Williston, Contracts (4th ed), § 1.7, P 48. There are valid reasons why a court would choose not to enforce a contract "drafted in violation of the MRPC," but would not automatically take the same route in regards to a will. The public policy considerations in the two scenarios are markedly different. "Whereas a contract is 'an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties,' a will is 'a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his or her last expressed purpose, and a will, although absolute and unconditional, cannot be termed a contract." [Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, p 5 (citations omitted)].

Therefore, as the Court of Appeals correctly noted:

> . . . there are valid policy reasons why our Supreme Court could reembrace the rule enunciated in *Powers* and conclude that it is appropriate to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, where a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual and sincere desires of the grantor. [Appellants' Appendix 4a, Ex. B to Appellants' Brief, COA Opinion, pp 6-7].

The obligation to honor a testator's intent when considering estate document drastically changes the public policy landscape from simple contract interpretation. Where, as here, there is no evidence of undue influence, the testator's intention to benefit the attorney-scrivener must be

---

conflict of interest); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38; 672 NW2d 884 (2003) (refusing to enforce referral fee contract between lawyer and inactive member of Bar); *Speicher v Columbia Twp Bd of Election Commissioners*, 299 Mich App 86, 92- 93; 832 NW2d 392 (2012) (refusing to enforce contract for attorney fees that were grossly excessive).

recognized and upheld.[56] Otherwise, refusing to enforce a will that reflects the testator's intent would grant a windfall either to persons whom the testator did not intend to benefit or to the State by escheat. (In the instant case, it would actually cause a windfall that the decedent specifically intended to prohibit.)

4. This Court's adoption of MRPC 1.8(c) Does Not Warrant Overruling *Powers* Because the Doing So Would Ignore All Other Sources of Public Policy

In Appellants' world, MRPC 1.8(c) sets forth *the only public policy* that the Court need concern itself with. This is simply not the case. While MRPC 1.8(c) is indicative of public policy, Michigan's constitution, statutes, its common law and its administrative rules and regulations also constitute Michigan's public policy. *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002).

As further briefed above in Section IV) A) 2, Michigan Courts are bound to follow public policy promulgated by the Legislature. It is the public policy of Michigan, as recognized by the Legislature in the Estates and Protected Individuals Code, MCL 700.1101 et seq., to effectuate a testator's intent.[57] Appellants give little or no weight to this critical policy interest.

Thus, there are independent countervailing public policies that must be balanced against the public policy reflected in MRPC 1.8(c): (1) the right of a decedent to leave property to

---

[56] Obviously, in cases where there is evidence of undue influence by the attorney-scrivener, the testator's intent may be unclear, and accordingly this factor may have less significance.

[57] See MCL 700.2501 (granting individuals the right to prepare a will), MCL 700.1201(b) (requiring the Code to be applied "to promote its underlying purposes and policies, which include . . . to discover and make effective a decedent's intent in the distribution of the decedent's property"); see e.g. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983) ("A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible").

whomever she pleases, and (2) the court's obligation to enforce the statutes of Michigan.

In the event of conflicting sources of public policy, this Court should defer to the Michigan Legislature:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's."

Terrien v Zwit, 467 Mich 56, 67; 648 NW2d 602 (2002), internal citation omitted.

As this Court stated in *Robertson v. DaimlerChrysler Corp.,* 465 Mich. 732, 748, 641 N.W.2d 567 (2002), "[t]he Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." It is not the judiciary's role to apply public policy in direct contravention of statutory text. See *Buzzitta v Larizza Industries, Inc*, 465 Mich 975; 641 NW2d 593 (Mich 2002) Mem (Corrigan, Concurrence) (internal citation omitted, emphasis added) ("This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text ***e****ven where we view the result as "absurd" or "unjust.*") See also *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 758; 641 NW2d 567 (2002) ("constitutional duty" of Michigan Courts "*not* to substitute our own policy preferences in order to make the law less 'illogical'") (emphasis in original); *Terrien v Zwit*, 467 Mich 56, 66 n 9; 648 NW2d 602 (2002) (internal citation omitted) ("The principle that contracts in contravention of public policy are not enforceable should be *applied with caution*.") It would be inappropriate for this Court to overrule *Powers* based on the public policy set forth in Rule 1.8(c). In doing so, the Court would necessarily be elevating the MRPC above the public policy set forth by the Legislature.

C. If *In re Powers Estate* is Overruled, "a Violation of MRPC 1.8(c)" Should Not "Bear on the Validity of the Gift Provided to the Testator's Lawyer under the Testamentary Instrument"

1. MRPC 1.8(c) does Not Authorize Striking a Gift to an Attorney-Beneficiary

Appellants argue that "a violation of MRPC 1.8(c) automatically invalidates the gift to the lawyer, every time." Appellants are conspicuously adding language to MRPC 1.8(c) that does not exist. MRPC 1.8(c) states, "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." *Nowhere in that text does it state that such a gift is void.* Appellants want this Court to take a leap from MRPC 1.8(c) by adding language that is not there.

Thus, relying on MRPC 1.8(c) does not provide a court with authority to void a testamentary gift. This Court would need to affirmatively create a new rule of substantive law that void such gifts. That action would fall outside of the Court's authority and would impinge on the Legislature's constitutional power to make substantive law.

2. The Supreme Court has Plenary Power to Regulate the Practice of Law and the Conduct, Activities, and Discipline of the Members of the State Bar, but Does Not have the Power to Create Substantive Law

Appellees agree that the Supreme Court has plenary authority over "practice and procedure" in all courts of this State. Const 1963, art 6, § 5; *McDougall v. Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999) ("[i]t is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court."). Appellees have no objection to Appellants' assertion that this Court has "the duty and responsibility to regulate and discipline the members of

the bar of this state." *Grievance Adm'r v. Fieger*, 476 Mich 231, 240; 719 NW2d 123, 131 (2006). Appellants take this one step further, however, and attempt to argue that rules of "practice" encompass substantive areas. Presumably Appellants do this in an effort to counter Appellee's argument that the Supreme Court cannot enact a substantive law that voids a testamentary gift to an attorney- scrivener. Appellants misunderstand the separation of powers between the Judiciary and Legislature.

The Court's lawful exercise of its power to regulate the practice of attorneys through the enforcement of the MRPCs cannot be equated with the Legislature's ability to enact substantive law. The "Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *McDougall v. Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). It is incorrect to equate the voiding of a testamentary instrument drawn by an attorney- beneficiary with an exercise of the Court's authority to regulate practice and procedure. Despite Appellants' contestations to the contrary, this Court's enforcement of the MRPCs is not substantive, it is an enforcement of rules of *practice*. Should this Court choose to adopt Appellants' argument and enact a rule voiding a substantive testamentary gift to an attorney scrivener, the Court would be usurping the Legislature's authority to "establish, abrogate, or modify the substantive law." See *Id.* Such an enactment would be a matter of substantive law, not a matter of practice and procedure.

The *McDougall* Court examined the difference between substantive law and practice and procedure in the context of a statute that provided requirements for the admission of expert testimony in medical malpractice cases. The Court concluded that a statutory rule of evidence enacted by the Legislature infringes upon the Court's power to regulate practice and procedure "when 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified…'" *McDougall*, 461 Mich 15 at 30, quoting *Kirby v. Larson*, 400 Mich 585,

598; 256 NW 2d 400 (1977). The *McDougall* Court went on to explain that "'[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration…the [court] rule should yield [to the statute].'" *Id*. at 30- 31, internal citation omitted. This Court concluded that the statute in question was an enactment of substantive law: "[i]t reflects wide- ranging and substantial policy considerations relating to medical malpractice actions…the statute does not involve the mere dispatch of judicial business." *Id*. at 35. *McDougall*'s reasoning should be applied here.

The enactment of a Court rule voiding testamentary gifts to an attorney scrivener is unquestionably substantive in nature. Such a rule does not concern the dispatch of judicial business. See *McDougall*, 461 Mich 15 at 35. The rule would have far reaching and substantial policy considerations relating to testator intent, and the fundamental right of a testator to dispose of her assets in the manner she wishes. See *id*. Such a rule would "contravene[] a legislatively declared principle of public policy, having as its basis something other than court administration." *Id.* at 30. As further briefed above in Section IV) A) 2, EPIC, MCL 700.1101 et seq., reflects Legislative intent to grant Michiganders the right to leave their assets to whomever they choose. See MCL 700.2501, MCL 700.1201(b). It is the public policy of Michigan, as recognized by the Legislature, to effectuate a decedent's intent. See generally *In re Estate of Raymond*, 483 Mich 48, 58; 764 NW2d 1 (2009) (the "guiding polar star" is that the intent of the testator must govern).

The enactment of a rule voiding testamentary gifts to attorney scriveners would contravene the aforementioned public policies, which clearly do not involve court administration. Thus, under *McDougall*, the rule proposed by Appellants is substantive and its enactment falls outside the

Court's authority to regulate practice and procedure.

3. The Supreme Court's Constitutional Power to Regulate the Practice of Law Encompasses the Authority to Enforce MRPC 1.8(c) *Through a Disciplinary Process*

Appellees agree that the Supreme Court has the power to enforce MRPC 1.8(c) through its constitutional authority to regulate the practice of law. What Appellants' fail to grasp however, is that *the enforcement of MRPC 1.8(c) is accomplished through a disciplinary process*. The MRPC itself makes this clear. MRPC 1.0(b).

Appellants attempt to convince the Court that punishing the attorney- scrivener of a testamentary instrument is equivalent to voiding a testamentary provision through which they benefit. *These two actions are not nearly the same*. First of all, a court cannot void a testamentary provision simply based upon the language of MRPC 1.8(c). That ethical Rule does not state that a testamentary gift benefitting an attorney scrivener is void, it states that an attorney "shall not" draft such an instrument. The two actions precipitate very different consequences to those involved. Even if the Court were to determine that it could void a testamentary provision based upon MRPC 1.8(c), which Appellees submit is not possible, the Court would not only be punishing the attorney; the testator, whose intent is supposed to govern these proceedings, would be punished as well. The result accomplished through the enforcement of MRPC 1.8(c) should the punishment of an attorney. The result accomplished through the voiding of a testamentary gift is *the punishment of the testator whose intent is completely eviscerated*.

4. If this Court Overrules *Powers*, its Ruling Should be Given Prospective Rather than Retroactive Application

Lastly, even if this Court chooses to overrule *Powers*, which, for the reasons detailed herein, Appellees submit would be inappropriate, the decision to do so should be given prospective

application only. While this Court's rulings are generally given retroactive effect, prospective application is appropriate where the holding overrules settled precedent. *Pohutski v. City of Allen Park*, 465 Mich, 675, 696; 641 NW2d 219 (2002); *Lindsey v. Harper Hosp.*, 455 Mich. 56, 68, 564 N.W.2d 861 (1997) (holding that a more flexible approach than retroactive application is warranted where injustice might otherwise result). Prospective application is warranted when overruling settled precedent or deciding cases of first impression whose result was not "clearly foreshadowed." *Jahner v. Department of Corrections*, 197 Mich. App. 111, 114 (1992) citing *People v. Phillips*, 416 Mich. 63, 68, 330 N.W.2d 366 (1982).

There is no question that overruling *Powers* would constitute overruling settled precedent for the many reasons discussed in this Brief. The question of whether to overrule *Powers* would not be before this Court if that were not the case. If this Court chooses to overrule the well settled rule of law laid out in *Powers*, such a ruling should be given prospective application only in accordance with *Pohutski* and *Lindsey*.

V. CONCLUSION AND RELIEF REQUESTED

This Court should decline to overrule *In re Powers*, 375 Mich. 150 (1965) and should affirm the decision of the Court of Appeals. The presumption of undue influence set forth in *Powers* appropriately respects a testator's intent by declining to automatically invalidate a gift to an attorney who drafted their estate document. *Powers* correctly applies a second step to the analysis, namely whether the attorney unduly influenced the testator in order to receive such a gift.

Overruling *Powers* would disrupt the uniformity, predictability, and consistency essential in the probate arena. There have been no intervening changes in Michigan law since the issuance of the *Powers* decision that would justify its nullification. The MRPCs do not address the validity

of estate documents, and EPIC contains no provision invalidating a will or trust based on the manner in which it was drafted.

Adopting Appellants' argument would lead to unworkable results, and would 1) ignore the testator's intent, the upholding of which is a fundamental premise of probate law; 2) encroach the role of the Legislature in modifying EPIC; 3) create new and unanticipated holes in EPIC; 4) create a de facto bypass of the attorney disciplinary system with no due process guarantees; and 5) encourage litigants to assert ethical improprieties by opposing counsel for strategic advantage.

This Court should decline to create a new rule barring an attorney scrivener from receiving a testamentary gift from a non-family member. Such an action would subvert the Legislature and usurp their constitutionally created plenary authority to create the law.

/s/ Rodger D. Young
Young & Associates
Rodger D. Young (P22652)
J. David Garcia (P60194)
Counsel for Petitioner-Appellee
27725 Stansbury Blvd., Suite 125
Farmington Hills, MI 48334
248.353.8620

Date: October 5, 2017