STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of ABRAHAM KARMEY, Deceased.

MARIANNE KARMEY-KUPKA, GEORGE KARMEY AND IRENE KARMEY,

Petitioners-Appellants,

v

MARGARET KARMEY,

Respondent-Appellee.

UNPUBLISHED
February 8, 2002

No. 223270
Wayne Probate Court
LC No. 97-585430-IE

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Marianne Karmey-Kupka, George Karmey, and Irene Karmey (contestants) appeal as of right from the probate court order denying their petition to set aside the will of decedent Abraham Karmey. We reverse.

I. Basic Facts And Procedural History

Abraham and Margaret Karmey were husband and wife; this was a second marriage for Abraham Karmey. Abraham Karmey executed a will in late September 1994 in which he left all his property to his wife, named her his estate's independent personal representative, and deliberately excluded his children from his first marriage, contestants, from inheriting his property. Essentially, Abraham Karmey left all his property to his wife. According to contestants, this was contrary to statements he allegedly made a year before drafting the will in which he expressed that he intended to give each of his children $25,000 and give them a business to operate.

After Abraham Karmey died in November 1997, Margaret Karmey submitted his will to probate. Contestants moved to set aside the will, alleging that Margaret Karmey, the will proponent, had exerted undue influence over their father when he drafted the will. Therefore, they claimed, the will was invalid. After the matter went to trial, Margaret Karmey moved for a directed verdict. The probate court granted the motion, ruling that contestants had failed to

present sufficient evidence for a reasonable jury to find that Margaret Karmey unduly influenced Abraham Karmey when he created his will.

II. Directed Verdict

A. Standard Of Review

Contestants argue that the probate court erred in granting Margaret Karmey's motion for a directed verdict because they presented the trial court with sufficient evidence for the jury to find a presumption of undue influence. This Court reviews de novo the trial court's order granting or denying a motion for directed verdict.[1]

B. Legal Standards

"A party may move for a directed verdict at the close of the evidence offered by an opponent."[2] "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ."[3] "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor."[4] "When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury."[5]

C. Undue Influence

Within certain limits set by the law, individuals are entitled to designate how to dispose of their property after death in any manner they see as fit.[6] However, a will is not valid when it reflects the intent of someone other than the testator.[7] As this Court explained in *In re Erickson Estate*:[8]

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Motive, opportunity,

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[1] *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

[2] MCR 2.515.

[3] *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 524; 529 NW2d 318 (1995).

[4] *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

[5] *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996).

[6] See *In re Anderson Estate*, 353 Mich 169, 172-173; 91 NW2d 356 (1958).

[7] *Id*.

[8] *In re Erickson Estate*, 202 Mich App 329; 508 NW2d 181 (1993).

> or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.[9]

Indeed, the opportunity to influence others short of overwhelming their free will is a natural part of human interaction. This principle has long been acknowledged in the case law, especially with regard to the influence one spouse may exercise over the other. As the Michigan Supreme Court said more than a century ago:

> [W]e do not know of any rule of laws or morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit or for that of others, unless she acts fraudulently, or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent. A faithful wife ought to have very great influence over her husband, and it is one of the necessary results of proper marriage relations. It would be monstrous to deny to a woman who is generally an important agent in building up domestic prosperity, the right to express her wishes concerning its disposal. And there is no legal presumption against the validity of any provision which a husband may make in his wife's favor. . . .[10]

Furthermore:

> A wife has a right, she owes the duty to herself, to advise, to persuade, to entreat, and to importune her husband to make proper provision for her support and maintenance after his death, either by deed or by will. . . . It must further appear by proof or by fair inference to be drawn from facts established that the influence exercised by her destroyed the free agency of the testator at the time the will was executed; that it expresses her mind and intent and not his. Mere suspicion is not sufficient.[11]

The core legal principle that there must be proof of actual undue influence, which cannot be presumed merely from a marital relationship, evolved over time, resulting in a widely-applied, three-factor test governing a presumption of undue influence.

> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction.[12]

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[9] *Id*. at 331 (citations omitted).

[10] *Latham v Udell*, 38 Mich 238, 241 (1978).

[11] *In re Jackson Estate*, 220 Mich 565, 571-572; 190 NW 762 (1922).

[12] *Erickson*, *supra* at 331 (citations omitted).

Once there is evidence of each of these elements, a "'mandatory inference' of undue influence " arises, which shifts "the burden of going forward with contrary evidence onto the person contesting the claim of undue influence."[13] Despite the will proponent's obligation to provide evidence that overcomes the inference of undue influence, the will contestant retains the ultimate obligation of persuading the factfinder that the testator's will was the product of undue influence.[14]

Contestants and Margaret Karmey all rely on the same authority, *Kar v Hogan*,[15] in this appeal.[16] Contestants contend that *Kar* stands for the proposition that a marital relationship between the testator and a beneficiary is sufficient to create the fiduciary or confidential relationship required under the three-part test for the presumption of undue influence. In contrast, Margaret Karmey evidently suggests that although one spouse *may* have a confidential or fiduciary relationship with the other, this special relationship does not automatically arise from a marriage. Additionally, on the facts of this case, she argues that there was no confidential or fiduciary relationship between Abraham and Margaret Karmey.

The facts of *Kar* are somewhat complex. In 1914, Julia Kar married John Kar, a widower with two small children, Irene and Edward.[17] Julia Kar raised the children "as if they were her own."[18] In 1951, John Kar died and Julia Kar inherited the farm that they had shared.[19] Julia Kar married Edward Merkiel in 1953.[20] Sixteen years later, Julia Kar arranged to have the farm property deeded to herself and Merkiel as tenants by the entireties.[21] When she died in 1970, Merkiel became the sole owner of the farm.[22] This disposition left Edward Kar and Irene Kar Altshuler without any share in the farm that their father and Julia Kar, the woman they had considered their mother, had purchased and cultivated for thirty-four years of their marriage, and which Julia Kar had continued to own for the nineteen years she survived her first husband. Had Julia Kar and Merkiel not arranged to become tenants by the entireties, Edward Kar and Altshuler would have inherited approximately two-thirds of the property under Julia Kar's will,

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[13] *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985) (citations omitted).

[14] *Id*.

[15] *Kar v Hogan*, 399 Mich 529; 150 NW2d 77 (1976.)

[16] Interestingly, at oral arguments, the attorney for the contestants and the proponent's attorney contended that there was no case law applying the three-factor analysis relevant to the presumption of undue influence when a wife is alleged to have exerted undue influence over her husband. However, as our discussion makes clear, that is not true. *Kar* involved just those circumstances.

[17] *Kar*, *supra* at 536.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

with the remainder going to Merkiel.[23] Thus, the two children, now grown, attempted to void the deed by demonstrating that Julia Kar had given up her sole interest in the farm in order to share it as a tenant by the entireties with her new husband because he had exerted undue influence over her at the time the new deed was conveyed.[24]

Because Merkiel died not long after Julia Kar, the children substituted Fred Hogan, the executor of Merkiel's estate, for Merkiel as the defendant in the action.[25] The case was tried in front of an advisory jury, which found in favor of the children.[26] However, the trial court rejected the jury's findings, indicating that it was not persuaded that Merkiel had overcome Julia Kar's free will in the property conveyance, but that if the case were to be decided by a jury, the marital relationship between Julia Kar and Merkiel would allow the jury to consider the issue of undue influence.[27]

In affirming the trial court in *Kar*, the Michigan Supreme Court explained that the trial court had presumed that undue influence existed, but found that Hogan had rebutted that presumption with evidence that Julia Kar was "strong-willed," "mentally competent," and "capable of handling her own business affairs" even in the years leading up to her death.[28] The primary focus of the majority opinion in *Kar* was not the facts supporting or contradicting either the presumption of undue influence or its rebuttal. Rather, aside from a number of minor issues, the majority opinion was primarily dedicated to explaining the shifting burdens of production and persuasion involved in applying a presumption.[29] Chief Justice Kavanagh concurred, agreeing with the majority's conclusion that the children had failed to rebut the presumption of undue influence.[30]

With Justice Ryan not participating in the decision, Justice Levin was the lone dissenter.[31] In his dissent, he gave significant attention to the evidence and how, in his view, it did not support the trial court's conclusion that Hogan had rebutted the presumption of undue influence.[32] For instance, Justice Levin concluded that the record demonstrated that though Julia Kar was competent, "she was susceptible to improper persuasion"; Merkiel had an opportunity to influence her, the conveyance deprived Julia Kar's estate of its primary asset and was contrary to intent that the children should inherit part of the property as expressed in her will and statements

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[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 537.

[27] *Id*. at 544.

[28] *Id*. at 542.

[29] *Id*. at 538-542.

[30] *Id*. at 546.

[31] *Id*. at 546.

[32] *Id*. at 547-551, 556-562.

to neighbors; the conveyance also was kept secret and occurred suspiciously close to a time when she thought her death was imminent.[33] Critically, the children had also produced a letter that Merkiel had written to them in which he said, "I admit that if she [Julia Kar] hadn't come to my terms I would have bowed out of the picture."[34] This evidence strongly implied that Merkiel used the opportunity to marry as a way to persuade Julia Kar to grant him an interest in the property, regardless of the delay leading to this transaction and irrespective of her desire to give the property to the children one day. Thus, Justice Levin concluded that Merkiel "took the initiative" and actually exerted undue influence over Julia Kar.[35]

The common thread linking the majority, concurrence, and dissent in *Kar* is that the facts make the case when it comes to undue influence. Of the four justices who participated in the majority decision, along with the concurring chief justice, not one disagreed with the essential legal principle that the three-factor undue influence test applies irrespective of a marital relationship.[36] Clearly, the majority-endorsed test requires evidence of a fiduciary or confidential relationship even if the majority did not spend much time explaining a basis in the record for concluding that such a relationship existed between Julia Kar and Merkiel.[37] Only dissenting Justice Levin appears to have preferred a different test for familial transactions that are claimed to have been the product of undue influence. He would have asked not whether there was a fiduciary or confidential relationship at issue, but whether

> the challenged arrangement is attended by circumstances which call for an explanation. Among the circumstances often present when such a presumption is said to arise are: the person apparently assenting was susceptible to improper persuasion, there was opportunity to exert such pressure, the person benefitted indicated an inclination to take the initiative, the arrangement was unusual, it was clothed in secrecy, and the timing or other circumstances raise suspicion.[38]

Though not a mirror image of the second and third elements of the test the majority used, Justice Levin's analysis does bear a striking resemblance to them, only omitting the fiduciary or confidential relationship element. Justice Levin's test does take into consideration a number of highly practical considerations for circumstances involving family members, especially spouses, which the Michigan Supreme Court may wish to reconsider in the future. In the end analysis, however, we can find no binding authority overruling *Kar*. Therefore, we take away from *Kar* a basic understanding that the party claiming that a legal transaction is void because of undue influence bears the burden of proving each of these elements, including the existence of a fiduciary or confidential relationship, even when the transaction involves spouses. In short, we

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[33] *Id*. at 549, 557-558.

[34] *Id*. at 550.

[35] *Id*. at 558.

[36] *Id*. at 537.

[37] *Id*.

[38] *Id*. at 557 (footnotes omitted).

can find no support for contestants' proposition that such a relationship should be presumed when the individuals at issue are married.

D. Fiduciary Or Confidential Relationship

Having resolved that the contestants had an obligation to prove a fiduciary or confidential relationship between their father and Margaret Karmey in order to benefit ultimately from the presumption of undue influence, we briefly examine this legal concept further before turning to any relevant evidence.[39] The term "fiduciary or confidential relationship" is wide ranging in its in scope, covering a large number of personal and professional relationships.[40] Historically, the Michigan Supreme Court has relied on the definition of "fiduciary relationship" provided by Black's Law Dictionary in cases disputing such a relationship.[41] Black's Law Dictionary (6th ed) continues to reflect this encompassing definition of a "fiduciary or confidential relationship," stating that it is a

> very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another. One founded upon trust or confidence reposed by one person in the integrity and fidelity of another. Such relationship arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic or merely personal.[42]

A fiduciary has a duty to act for the benefit of the other person in the relationship with regard to matters within the scope of the fiduciary relationship,[43] which explains why a transaction that benefits the fiduciary or trusted individual because of influence is void.[44] However, whether a fiduciary or confidential relationship exists is fact-specific.[45] As the dictionary definition suggests, the key to determining whether such a relationship does exist depends on whether the parties have a relationship of "faith, confidence, and trust" in which one party relies "upon the judgment and advice of the other party."[46]

Here, the trial court evaluated the trial testimony independently, concluding that no confidential or fiduciary relationship existed between Margaret Karmey and Abraham Karmey:

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[39] See *In re Swantek Estate*, 172 Mich App 509, 513-514; 432 NW2d 307 (1988) (confidential or fiduciary relationship is a question of fact).

[40] See *Van't Hof v Jemison*, 291 Mich 385, 393; 289 NW 186 (1939).

[41] See *id*.

[42] Black's Law Dictionary (6th ed), p 626 (citations omitted).

[43] *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999).

[44] *Erickson*, *supra* at 331.

[45] *Swantek*, *supra* at 513-514.

[46] *Nederlander v Nederlander*, 205 Mich App 123, 127; 517 NW2d 768 (1994).

> The Contestant – that's you – has the burden of proving that there was undue influence exerted on the decedent in making the Will. And part of your argument is the spousal relationship becomes that of a fiduciary relationship. I'm going to say that that is not the law and that's not the way I'm going to rule. She admitted that there was a confidential relationship but there should be a confidential relationship between all spouses. She also indicated that she didn't handle his finances and he paid the bills. So other than that one statement the court does not believe that there's sufficient factual basis that I can find a confidential relationship, therefore, the presumption doesn't come into play.

However, Margaret Karmey's own trial testimony indicates that a trusting relationship existed between her and Abraham Karmey:

> *Q.* [*Contestants' Counsel*]. How close were you with the decedent?
>
> *A.* [*Margaret Karmey*]. Very close.
>
> *Q.* Would you describe your marriage as a typical marriage?
>
> *A.* Typical.
>
> *Q.* Did you view Mr. Karmey as your closest friend?
>
> *A.* Yes, I did.
>
> *Q.* Did he share things with you that he wouldn't share with other people?
>
> *A.* Absolutely.

Though the trial court apparently relied on Margaret Karmey's testimony that she did not handle the couple's financial affairs, a "fiduciary or confidential relationship" is not limited to relationships with a financial duty involved; rather, as previously noted, the relationship may be "legal, social, domestic or merely personal" in nature.[47] Therefore, even if Abraham Karmey handled all family finances, this fact would not prevent a fiduciary or confidential relationship from existing between Abraham and Margaret Karmey. What we can discern from the record is that there was a genuine dispute about the nature of their relationship. Without going into the many sordid details revealed at trial, there is debate about the extent to which Abraham Karmey relied on his wife, even if not for financial matters. Further, Margaret Karmey clearly benefited from her husband's will, contrary to his alleged statements that he would provide for his children. She also had an opportunity to influence her husband because they were married and because he was allegedly afraid of her. We can surmise that the animosity between Margaret Karmey and her stepchildren, contestants, would give her reason to put the opportunity to influence her husband to use. Over all, this evidence, especially when viewed in light of the conflicting evidence that Abraham and Margaret Karmey had a loving and trusting relationship, made the

[47] Black's Law Dictionary, *supra*, p 626 (1990).

jury the appropriate body to resolve the undue influence issue, including the question whether a fiduciary relationship existed, when we consider the legal standards for a directed verdict.[48] This conclusion is warranted especially in light of the requirement that we give contestants, who did *not* move for a directed verdict, the benefit of all reasonable doubts.[49]

Margaret Karmey asserts that, if this Court reverses the trial court on this issue, a presumption of undue influence will attach to all wills in which one spouse leaves his or her property exclusively to the remaining spouse, especially to the exclusion of other family members who might otherwise be naturally selected as heirs. We must admit that we are not particularly enamored of the possibility of such a result. Justice Levin, in his dissent in *Kar*, outlined the problem succinctly:

> On the premise that the family relationships of husband-wife and parent-child are based similarly on trust and confidence, such a presumption has also been said to arise where intra-family transactions or dispositions are challenged. Intra-family transactions and dispositions are, however, so commonplace, prompted generally by affection, kindness and other proper considerations, that unattended by other circumstances they call for no explanation. It would be disproportionate to cast the burden of producing countervailing evidence on the person benefited in often prosaic family transactions without regard to the occasion or the proportion or amount involved or to other circumstances.[50]

As we have already intimated, Justice Levin's observations are eminently sensible and we urge the Michigan Supreme Court to examine them. In fact, there may be no particularly good reason to apply the three-factor analysis of undue influence to events and transactions involving members of the same family, especially a husband and wife. However, this Court's duty is to correct errors by following precedent.[51] We are not at liberty, and do not seek the authority, to set new precedent in this area of law, given the Michigan Supreme Court's definitive statement in *Kar*. Under the standards for a directed verdict, we believe that the contestants provided the minimum amount of evidence necessary to create a dispute regarding the nature of Abraham and Margaret Karmey's relationship and the effects of that relationship to require the jury to determine whether the will should be set aside because of undue influence.

III. Fair Trial

A. Standard Of Review

Contestants assert that the trial court denied them a fair trial by treating witnesses abusively. Contestants failed to preserve this issue for appeal by objecting at trial.[52] Generally,

[48] See *Lamson*, *supra* at 455.

[49] See *Locke*, *supra* at 223.

[50] *Kar*, *supra* at 556; see also *Jackson*, *supra*; *Udell*, *supra*.

[51] See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

[52] *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988).

this Court does not review unpreserved allegations of error.[53] "However, since appellate courts cannot condone manifest injustice, this Court can react, even in the absence of timely objection, to error which resulted in a denial of a fair trial."[54] This review is particularly fitting when "any objection had to be made to the trial judge himself concerning his own conduct."[55]

B. Trial Court Conduct

A trial court has wide discretion when conducting a trial.[56] However, a trial court's discretion is not unlimited.[57] If the trial court pierces the veil of judicial impartiality by its conduct or comments in a manner that unduly influences the jury, it may wrongfully deprive the parties of a fair, impartial trial.[58] Even in a case such as this, which the trial court decided without jury input, improper judicial conduct may nevertheless deny the parties a fair trial, such as when the improper conduct reveals bias.[59]

With respect to a trial court's decision to question witnesses, this Court has held:

> The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986); *People v Pawelczak*, 125 Mich App 231, 236; 336 NW2d 453 (1983). However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Sterling*, *supra*; *People v Cole*, 349 Mich 175, 84 NW2d 711 (1957); *People v Jackson*, 97 Mich App 660, 662; 296 NW2d 135 (1980). The test is whether the "judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, . . . and whether partiality '*quite possibly could* have influenced the jury to the detriment of defendant's case.'" *Sterling*, *supra*, quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976), citing *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975) (emphasis in original).[60]

In this case, however, the record does not indicate that the trial court was argumentative, prejudicial, unfair, or partial to the witnesses. On several occasions, the trial court was forced to remind witnesses of the need to answer the question posed rather than speaking

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

[57] *Id.*

[58] *Id.*

[59] See, generally, *In re Forfeiture of $1,159,420*, 194 Mich App 124, 152-153; 486 NW2d 326 (1992).

[60] *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992).

extemporaneously. Further, the trial court properly admonished the testifying witnesses not to communicate with contestants through hand signals. On the two occasions when the trial court believed it necessary to deliver more than routine instructions on these topics, it excused the jury from the court room. We can discern no evidence that the trial court acted improperly in any respect, thereby denying contestants a fair trial. We conclude that contestants' argument on this point fails.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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SAAD, P.J. (*dissenting).*

I respectfully dissent.

I do not read *Kar* to have squarely faced, much less decided, the issue of whether the three-part test for triggering a rebuttable presumption of undue influence applies to a "marital" will. Moreover, I do not believe that our Supreme Court would so rule if it had directly addressed this issue.

Were we to apply the three-part test to a will contest where a spouse leaves everything to a surviving spouse, then a factual finding of a good marriage would automatically mean that a rebuttable presumption of undue influence would arise. This surely cannot nor should it be the law. More should be shown to raise a presumption of undue influence between spouses than a good confidential relationship where each understandably looked to the other for advice and took the advice of the other. To hold as the majority does and as the majority interprets *Kar* to have ruled, simply serves to penalize a good marriage by requiring a will contest trial if a third party objects to one spouse leaving virtually the entire estate to the surviving spouse.

/s/ Henry William Saad