2012 WL 566161 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

In re Estate of Arnold D. MORTIMORE, Deceased.
Helen M. FISER, Respondent/Appellant,
v.
Renee HANNEMAN and Dean Mortimore, Petitioners/Appellees.

No. 143307.
January 25, 2012.

Court of Appeals No. 297280
Shiawassee Probate Court Trial Court No. 09-034102-DA
Oral Agrument Request
January 25, 2012

Brief on Appeal - Appellees

Douglas G. Chalgian (P54757), Phillip E. Harter (P24309), Chalgian & Tripp Law Offices, PLLC, Attorneys for Petitioner/Appellees, 1019 Trowbridge Rd., East Lansing, MI 48823, Telephone: (517) 332-3800.

Douglas A. Mielock (P42924), Foster, Swift, Collins & Smith, PC, Attorneys for Respondent/Appellant, 313 S. Washington Ave., Lansing MI 48933-2193, Telephone: (517) 371-8100.

***ii** TABLE OF CONTENTS

***iii** INDEX OF AUTHORITIES

*iv BASIS OF JURISDICTION AND RELIEF REQUESTED

As accurately stated in the Appellant's Brief, jurisdiction was granted by Order of this Court dated October 26, 2011, which Order also defines the scope of the issue on appeal. Specifically, the Court directed the parties address: “what standards should apply and what factors a court should consider in determining whether a transaction was the product of undue influence where there is a fiduciary relationship between the parties.”

Petitioners-Appellees, Dean Mortimore and Renee Hanneman, ask this Court to affirm the Court of Appeals, which correctly determined that Helen Fiser failed to offer sufficient evidence to rebut the presumption of undue influence and consequently correctly reversed the trial court's decision that Petitioners-Appellees did not prove that the Will of Arnold E. Mortimore was the product of undue influence. More specifically, Petitioner-Appellees ask this Court to rule that the Court of Appeals correctly determined that a “preponderance of evidence” is necessary to rebut an established presumption of undue influence rather than the lesser quantum of “substantial evidence.”

*v COUNTER-STATEMENT OF QUESTIONS INVOLVED

When a presumption of undue influence has been established by the contestant, whether the correct quantum of evidence necessary to rebut the presumption of undue influence is a preponderance of evidence rather than substantial evidence (more than a scintilla but less than a preponderance)?

The Court of Appeals answered: Yes.

The trial court did not address this question having failed to recognize the presumption of undue influence.

Respondent-Appellant answers: No.

Petitioner-Appellee's answer: Yes.

*1 INTRODUCTION AND COUNTER-STATEMENT OF FACTS

This is a case about the **exploitation** of a vulnerable adult. How this Court decides this case will dramatically impact the ability of Michigan Court's to protect vulnerable adults in the future.

Technically, this case concerns the validity of a will purportedly created by Arnold E. Mortimore (“Arnold”) who died June 12, 2009. The dispute is between Appellant, Helen Fiser (“Helen”) and Arnold's two surviving children, the Appellees.

In some respects the facts of this case are typical of these types of cases: At the age of 72, Arnold loses wife of more than 53 years. Helen quickly entangles herself in Arnold's affairs, appearing seemingly out of nowhere even before Arnold's first wife is buried. Over time Helen follows the usual scenario of isolating and alienating Arnold from his family. Following Arnold's death, Helen claims Arnold revoked his Trust and created a will leaving everything to her. (Will of Arnold Mortimore-Appellant's Appendix 33a).

In other respects the facts of this case are bizarre:

Helen says she doesn't know who drew up Arnold's will, but she admits she did draw up his power of attorney for **finances**, his power of attorney for health care, and two deeds. All of these documents were purportedly signed around the same time, and all witnessed by Helen's friends and family members. (6b and 15b).

***2** The will states that Arnold had two living children: Renee and Dean. Curious since on the date the will was purportedly signed, Arnold had three children. More amazing is that the one not named, Robert, subsequently died of a condition that was not known at the time the will was purportedly created. (Will of Arnold E. Mortimore - Appellant's Appendix 33a and 12b).

The will misspells the names of several of Arnold's family members, with whom he had a very close relationship but accurately spells the unusual names of Helen's family members, with whom he had little or no relationship. (Will of Arnold E. Mortimore-Appellant's Appendix 33a and 11b and 12b).

After Arnold's death, Helen told the funeral director that "I am and I am not" Arnold's wife. The funeral director inquired, because in previous discussions with Helen, she represented herself as Arnold's niece. The validity of the marriage isn't an issue that controls the outcome of the case, because the will doesn't assert that Arnold and Helen were married when it was purportedly signed. (02/26/2010 Bench Opinion, p. 3 -Appellant's Appendix 10a)

The Trial Court premised its opinion with the following:

I'm gonna premise this with, most cases that are in controversy, there's some blend of overlap and this case, I've been on the bench 24 years, probably has less overlap and less consistency than any case I've ever heard. It's basically a black/white, day/night, one side' one way and one side's the other way and there's very little cross-over. (02/26/2010 Bench Opinion, p. 3 - Appellant's Appendix 10a)

Understandably, Appellant's "Statement of Facts" portrays Helen in a much more sympathetic light. Appellee disputes that characterization and ***3** suggests that the record clearly demonstrates that the conduct of Helen was much more calculated and nefarious.

But this case is no longer about the facts, and no longer about the validity of a will. Rather this case is about how Michigan trial courts will apply the presumption of undue influence - a legal tool that is a central element in the majority of cases involving **exploitation** of vulnerable adults, a societal problem of epidemic proportions.

*4 ARGUMENTS

Appellees accept the scholarly presentation of the historical development of the presumption of undue influence presented by Appellant. However, Appellees strongly disagree with the argument propounded by Appellant that the presumption somehow conquers a donor's freedom to make transfers of property to a person and in amounts of the donor's choosing. The vast majority of gifts and testamentary dispositions go uncontested. The few that do end in a contest almost always occur after the donor's death or after the donor has become so cognitively impaired that s/he can no longer offer meaningful testimony. This, of course, is the very reason for the historical development of the presumption of undue influence. The donor is no longer able to give evidence as to his or her intent. The individual who has asserted the influence is the only one who can testify to the actual act which is unlikely. Therefore, Michigan case law has developed the presumption. When certain observable facts exist, it may be presumed the undue influence has taken place. This presumption is vital in the area of probate law since undue influence is a defense against those who prey on others when they can no longer defend themselves. While there may exist controversy surrounding the presumption of undue influence, Michigan's law which has been developed over decades is clear.

This brief will first address the issue of whether the Court of Appeals in using "preponderance of evidence" used the correct quantum of evidence necessary to overcome the presumption of undue influence as was established by this Court in *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976). Contrary to Appellant's ***5** arguments, this standard was not changed by *Widmayer v. Leonard*, 422 Mich 280; 373 NW2d 538 (1985). Second, we will address the importance of this presumption in the area of probate law and whether the quantum of evidence to overcome the presumption should be "preponderance" or "substantial" evidence.Finally, we will argue that the presumption of undue influence should be allowed to stand under any theory.

I. THE QUANTUM OF EVIDENCE NECESSARY TO REBUT A PRESUMPTION OF UNDUE INFLUNECE IS "PREPONDERANCE OF EVIDENCE."

This Court *In re Karmey Estate,* 468 Mich 68, 75; 658 NW2d 796 (2003) set forth the basic principles underlying the concept of undue influence. The Court indicated:

One should not lose sight of the basic principles underlying the concept of *undue* influence. As this Court said in *Kar*.

> 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 his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. *(399 Mich 537.)*

This Court also articulated the widely applied three-factor test relating to the presumption of undue influence when it stated: The Judge's utilization of the presumption of undue influence was based on a widely applied three-factor test, which this Court detailed in Kar as follows:

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 ***6** benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. (*399 Mich 537.*)

The presumption certainly was clearly established in the present case. Helen Fiser was/is in a confidential and fiduciary relationship with decedent. She controlled his **finances**, his contacts, drafted legal documents for him and generally controlled his life. Helen Fiser certainly benefitted by receiving his entire estate. Helen Fiser had the opportunity and she lived with decedent in his home. Therefore, it has not been disputed that the presumption existed and was missed by the trial court. The Court of Appeals corrected this error, and decided the case based upon whether there was enough evidence to rebut the presumption. They used the standard of preponderance of the evidence which was announced by this Court as the correct standard in *Kar v Hogan,* 399 Mich 529; 251 NW2d 77 (1976). That is stated in *Kar,* 399 Mich at 542, as follows:

> If the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.

This standard for rebutting the presumption remains unchanged by this Court and is the correct standard.

What Appellant really wants is for the Court to change the law, and to reduce the level of evidence required to rebut the presumption. This brings us to the battle between the Thayer view of presumptions and the Morgan view, and ***7** how those views may affect the issue of quantum of evidence necessary to defeat a presumption. Curt A. Benson, *Michigan Rule of Evidence* 301, I Presume, 87-AUG Michigan Bar Journal 34 (2008) (20b-24b) gives us the history as follows:
A little history is in order. There are two basic approaches to presumptions in civil cases. One approach was first articulated by Thayer. Thayer saw presumptions as a procedural device that regulated only the burden of going forward with the evidence and nothing more. Describing what later became known as the "bursting-bubble theory," Thayer believed that once the opponent of the presumption introduces evidence rebutting the presumed fact, the presumption disappears from the case. In the face of

contrary evidence, the jury hears nothing of the presumption. So viewed, presumptions are not very significant at all. They are like "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

Thayer's view carried the day until another Harvard law professor came along a generation later. Professor Edmund M. Morgan rejected Thayer's view as giving presumptions too little weight. Presumptions, Morgan argued, are created for a reason. Oftentimes they exist to promote public policy. They sometimes promote procedural fairness. Often they are created for the convenient and efficient administration of the law. Morgan thought it unwise to casually discard the presumption in the face of sometimes flimsy rebuttal evidence. Accordingly, Morgan advocated pushing both the burden of production and the burden of persuasion over to the opponent of the presumption. Under the Morgan formula, when the party enjoying the presumption establishes "basic fact" A, the court instructs the jury that it must find fact B unless the opponent persuades the jury that the nonexistence of fact B is more probably true than not." (22b).

Appellant bases its whole argument on the assumption that *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985) changes everything. This is an incorrect assumption which is supported by a quote, taken out of context, and a misunderstanding of the Thayer theory of presumptions. First, it must be noted that a careful reading of *Widmayer* and Michigan Rule of Evidence 301 will reveal that neither the case nor the rule say anything about the quantum of evidence ***8** necessary to rebut the presumption of undue influence. Both the case and the rule are only designed to address the procedure difficulty of instructing a jury as to the effect of presumption and only in that way did Michigan shift to the Thayer camp. This Court did not overrule *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976) nor mention it. Unlike the Appellant, Appellees presume that our appellate courts are aware of major cases even when not cited. The quote cited by Appellant from *Widmayer*, 422 Mich at 286 is only a historical reference and not a proclamation of a new standard. Again to quote Appellant's source, Professor Curt A. Benson states: "**As for the quantum of evidence necessary to meet a burden, Widmayer did not say.**" * (emphasis added) (22b)

Secondly, Appellant argues that by implication going back to how Thayer handles presumptions procedurally, we must also adopt the most extreme case of the "bursting bubble" theory which would hold that any evidence destroys the presumption. This is incorrect. Again, to quote from a source first cited by Appellant, Neil S. Hecht and William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. Rev 527, 550 (1978) states:
A difference of both quality and quantity exists between this and the previous Thayerian dogmatic rule. In applying this standard, jurisdictions ask judges to rule on presumptions much in the same way that they ask judges to rule on directed verdicts. In both situations the judge has to determine whether a prima facie case, or defense, has been made out by the presentation of the quantum of evidence sufficient to meet the jurisdiction's standard. Within this view of presumptions there are many ways of expressing the standard the judge is to apply in determining whether sufficient, i.e., prima facie, rebuttal evidence has been introduced. Confusion has arisen because courts have mistakenly thought that this method was truly different from the pure Thayer view, rather than being merely a different standard of rebuttal within the same theoretical construct. Once the basic approach is recognized and accepted, then it is the judge's function to decide whether the appropriate quantum of rebuttal ***9** evidence has been introduced in accord with the particular variation of the standard that jurisdiction has adopted. This approach could be called a Thayer rule with a reasonable rebuttal standard. (Appellant's Appendix 75a)

The second approach answers the four basic questions in the following way:

(1) The question, as in the pure Thayer approach, remains one for the judge.

(2) Since this standard is really a reasonable Thayer rule, it has no effect whatsoever upon the burden of persuasion.

(3) The amount of evidence required to rebut the presumption is some amount between the strict "bursting bubble" and beyond a reasonable doubt. Each jurisdiction must select the exact quantum of rebuttal evidence that it desires to be required. In general terms, the standard could be described as sufficiently credible rebuttal evidence, in contrast to any rebuttal evidence presented in opposition, as was the case in the strict Thayer approach.

(4) Once the judge determines that sufficient rebuttal evidence has been introduced, the presumption disappears and any underlying logical inference remains. (Appellant's Appendix 76a)

Therefore, *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976) alone gives us the standard for rebutting the presumption of undue influence. It has not been overruled and need not be altered by the return procedural to the Thayer camp. The procedural shift simply takes presumptions away from the jury and lets them rest with the judge. It does not change the quantum of evidence standard announced by *Kar*.

***10 II. THE KAR (PREPONDERANCE) STANDARD SHOULD REMAIN FOR THE REASONS THAT (A) IT IS A STANDARD THAT TRIAL COURTS CAN MORE RELIABLY AND COMFORTABLY APPLY; AND (B) IT IS A STANDARD THAT BETTER EFFECTUATES THE STATE'S INTEREST IN PROTECTING VULNERABLE ADULTS.**

A. Appellant offered this Court a quote from a 1941 statement of Judge Learned Hand commenting on the law of presumption in their Reply Brief supporting their Application for Leave to Appeal. Judge Hand was quoted as saying:
"(j)udges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't much care what it is." 18 ALI Proceedings 217-218 (1941).

Appellees would agree with this statement as would, we believe, the great majority of trial judges. Trial judges like clear standards and rules. Appellant, however, propounds a standard that would be hard to understand and which would be unworkable if any importance is given to the presumption of undue influence. The standard which they ask the Court to adopt as the necessary quantum of evidence to destroy the presumption of undue influence is substantial evidence. Appellants define substantial evidence as "more than a mere scintilla of evidence but may amount to substantially less evidence than a preponderance." This is not a clear standard but a range. How will judges interpret this standard? How will it be reviewed on Appeal? More than anything, trial courts need and desire something clear and definite. Such a standard could quickly become any evidence may be sufficient to destroy the presumption. The presumption would therefore become meaningless. Judges regularly apply and ***11** comfortably understand preponderance of evidence. Preponderance of the evidence should be and should remain the standard for rebutting the presumption of undue influence.

B. The presumption of undue influence is an extremely important presumption especially in the area of probate law. The two major protections against predatory individuals who get **elderly** individual or individuals weakened by disease to sign away their property or to sign testamentary documents are lack of capacity and undue influence. These are usually pled in most will contests and in proceedings for the return of property to an estate. Lack of capacity is difficult to hide and may be observed whenever an individual with dementia or other mental problems interact with others. The physician for such an individual can discover it in a routine examination or family and friends can observe the symptoms in the community. On the other hand, undue influence can remain out of sight. The predator through their influence tries to keep it secret and often isolates the individual from family and friends. A person may appear normal during brief contacts and be otherwise competent while under the undue influence of a predator. Therefore, undue influence is extremely difficult to prove. Actual acts of undue influence would rarely be observable. In short, the predator has all the evidence and is not likely to reveal it. The contestant is left with only circumstantial evidence in trying to reach an already high threshold. Thus, the importance of the presumption and why it has developed. To minimize this presumption's effect by lowering the standard necessary to overcome it would ***12** have profound effects in the probate area and in protecting our citizens (usually the **elderly**).

Appellant asks this Court to adopt a standard of "substantial evidence" which they define as "more than a mere scintilla of evidence but may amount to substantially less than a preponderance". Once this level is reached, the presumption goes away under the Thayer theory. Under this approach, so little evidence as the statements of the predator would seem to be sufficient

to destroy the presumption. Appellant asks this Court to adopt the most restrictive version of Thayer theory where almost any evidence destroys the presumption. There is not logical reason for doing so. Michigan should keep its present standard of preponderance of the evidence as the quantum of evidence necessary to destroy the presumption of undue influence. As was discussed above, this would give Michigan Thayer with a reasonable rebuttal standard.

III. THE PRESUMPTION OF UNDUE INFLUENCE WOULD NOT BE REBUTTED UNDER THEORIES PROPOUNDED BY APPELLANT.

As has been stated, the Probate Court Judge was flummoxed by the three days of testimony and twenty-eight witnesses giving contradictory evidence. The Judge did not make findings as to the credibility of each witness but seemed to indicate he did not know which side to believe.

The Court of Appeals, engaged in an extensive review of the evidence and correctly concluded that the Probate Court had failed to recognize the presumption of undue influence and that there was overwhelming evidence to support the presumption:
***13** Not only was Helen involved in every aspect of Arnold's **finances**, several witnesses testified that she appeared to be involved in every aspect of his life. Friends, family, and others could not have a private telephone conversation with Arnold without Helen interjecting and coaching Arnold on what to say. There was evidence that Helen drafted, typed, and sent emails on Arnold's behalf. Even Helen testified that when Arnold was allegedly indicating that he wanted to change his will and revoke his trust, Helen, not Arnold, contacted Kurt Ryal, a notary, to set up a meeting. Further, Helen admitted that she was present during Arnold's meeting with Ryal when they discussed revoking the trust.

In sum, the record overwhelmingly supports that Helen was involved in every **financial** aspect of Arnold's life and that Arnold trusted Helen to act for his benefit with respect to **financial** and all other matters. The testimony at trial provided that Arnold thought that Helen was "a trustworthy person." Consequently, it cannot reasonably be disputed on this record that Helen had a fiduciary or confidential relationship with Arnold at the time of the will's execution. Arnold placed trust in the faithful integrity of Helen, who as a result gained superiority or influence over Arnold with regard to his **financial** matters. *In re Karmey Estate*, 468 Mich at 73-75. Helen clearly benefitted from Arnold executing the will at issue because she was named Arnold's sole beneficiary. The record clearly supports that Helen had the opportunity to influence Arnold's decision to make her his sole beneficiary. *Id.* The trail court's failure to recognize that a presumption of undue influence existed was error. *Id.* (Appellant's Appendix 18a)

Ultimately, the Court of Appeals held after using a clearly erroneous standard of review and deferring to the Probate Court on matters of credibility that the decision of the Probate Court was clearly erroneous.

While the Court of Appeals correctly reversed the Probate Court because there was not a preponderance of evidence to rebut the presumption, they could also have reversed on the grounds that there was clear error on the part of the Probate Court since its finding was against the great weight of the evidence. The same overwhelming evidence, which established the presumption of undue influence, which was overlooked by the Probate Court would also constitute circumstantial evidence of undue influence even if there were no presumption. ***14** The Probate Court simply had no reason to pull out its decision coin and flip, which appears to be what was done.

Appellant also argues that it is too easy to establish the presumption of undue influence under Michigan law. Appellees would note that even if the standard they cite under Restatement of Property, under the facts of this case both a "confidential relationship" and "suspicious circumstance" were clearly established. Helen Fiser isolated the decedent, completely took over his **finances**, drafted legal documents for him to sign and as the Court of Appeals concludes, "appeared to be involved in every aspect of his life." (See above quote from Court of Appeals Opinion). The mysterious will, as well as other behavior of which decedent engaged which was unlike him, would clearly constitute "suspicious circumstances." While Appellees do not believe

the grounds for establishing the presumption of undue influence should be changed because of the difficulty of obtaining the evidence necessary to prove undue influence, even if that would have been the law, it would have been no help to Appellant.

*15 CONCLUSION

The quantum of evidence necessary to overcome the presumption of undue influence is preponderance of the evidence. This was established by the case of *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976). The case of *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985), and Michigan Rule of Evidence 301 changed only the procedure by which presumptions are handled. Specifically, presumptions were taken out of the hands of a jury and placed with the judge. This was consistent with how presumptions are handled under the Thayer theory of presumption. However, the Widmayer case and Michigan Rule of Evidence did not mention or change the quantum of evidence necessary to overcome the presumption of undue influence which was announced in *Kar*.

Preponderance of the evidence is the proper standard to use. Unlike the standard propounded by Appellant, it recognizes the importance of the presumption and it is a clear and definitive standard which is familiar to judges. The standard propounded by Appellant is vague and would lead to a situation where the presumption of undue influence would almost always become unavailable as a defense to the predatory practices of individuals who prey on our **elderly** or infirmed.

While the Court of Appeals correctly decided this case on the basis that a presumption of undue influence was established and not rebutted, the case could have been decided by the Court of Appeals on the basis that the Probate Court's decision was against the great weight of the evidence. Also, even if no ***16** presumption existed, Appellees should have prevailed since undue influence should have been established based upon the evidence presented.

Appellees, accordingly, for all of the reasons given, ask that this Court affirm the Court of Appeals.

End of Document