

**Court of Appeals, State of Michigan**

**ORDER**

In re Violet S. Sigmund Trust  
In re William A. Sigmund Trust

Docket No. 266396; 266400

LC No. 04-006709 TV; 04-006710 TV

Helene N. White  
Presiding Judge

E. Thomas Fitzgerald

Michael J. Talbot  
Judges

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On the Court's own motion, the July 25, 2006, unpublished per curiam opinion is AMENDED to correct a clerical error – Jackson Probate Court No. 04-006709 TV was inadvertently omitted from the opinion caption.

The opinion disposed of both Jackson Probate Court No. 04-006709 ~~TV~~ and No. 04-006710 TV.

In all other respects, the July 25, 2006, opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 07 2006

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ARTHUR W. SIGMUND, JR., JUNE S.  
THOMPSON, MARY P. STAITE,  
DOROTHEANNA S. SIGMUND, ARTHUR W.  
SIGMUND, III, and STEPHEN L. SIGMUND,

Petitioners-Appellants,

v

CHARLES C. MCCLAFFERTY, RALPH L.  
BODMAN, KENNETH A. DILLON, and BILL  
AND VI SIGMUND FOUNDATION,

Respondents-Appellees.

UNPUBLISHED  
July 25, 2006

No. 266396  
Jackson Probate Court  
LC No. 04-006710-TV

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No. 266400  
Jackson Probate Court  
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Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Petitioners appeal as of right the probate court's dismissal pursuant to MCR 2.116(C)(10) of their claims that Violet Sigmund lacked testamentary capacity and that William Sigmund was subject to the undue influence of petitioners such that the Sigmunds' last wills and trusts should be set aside. We reverse.

I

William and Violet Sigmund married in 1940 and remained married until Violet Sigmund's death at age 85 on July 11, 2002. Violet had been hospitalized in April 2002, after multiple falls and increasing weakness and loss of appetite, and at that time was diagnosed with stomach cancer. William (Bill) Sigmund died on March 18, 2003. The Sigmunds had no children.

Petitioners are June S. Thompson, Violet's sister, Mary P. Staite, Violet's sister-in-law; Dorotheanna S. Sigmund, wife and successor of Arthur W. Sigmund, Jr. (the Sigmunds' nephew, now deceased); and Arthur W. Sigmund, III, and Stephen L. Sigmund, sons of Arthur Jr., and Dorotheanna Sigmund. Respondents are Charles C. McClafferty, the Sigmunds' former attorney; Kenneth Dillon, the Sigmunds' investment advisor; and Ralph Bodman, a successor owner of three of the Sigmunds' McDonald's restaurants.

The Sigmunds' estate approximated \$10.5 million dollars. During their lifetimes, the Sigmunds had given petitioners substantial sums of money. The Sigmunds updated their wills and trusts in 1981, 1983, 1992, 1996, 1999 and, for the last time, in 2002. Before 2002, the couple signed identical wills and trusts that provided that when one of them died, all property would go to the other, and that when the second spouse died, the bulk of their estate would pass to petitioners.

The wills and trusts the Sigmunds signed on February 7, 2002 were their last. Under these documents, the bulk of their estate was directed to the Bill and Vi Sigmund Foundation, and a total of approximately \$700,000 was left to petitioners. The Foundation was funded with an initial \$1,000,000 in January 2002, just after it was established. The additional funding would come after both the Sigmunds' deaths. The wills and trusts the Sigmunds signed on February 7, 2002 provided that on either of their deaths, their tangible personal property would pass to the surviving spouse, named Respondent McClafferty as the personal representative, and the residuary estate was bequeathed to, and would be administered by, their "successor co-trustees (Respondents Bodman, Dillon and McClafferty) under the trust. The wills and trusts established a separate marital trust for the surviving spouse, and provided that the trustee after paying the necessary expenses of the trust, shall pay the surviving spouse/Grantor such amounts of principal as the Grantor may from time to time request.

Petitioners filed identical petitions regarding the William A. Sigmund Trust and the Violet S. Sigmund Trust. The petitions alleged that Violet lacked testamentary capacity and that respondents exercised undue influence on William.<sup>1</sup> The probate court granted summary disposition in respondents' favor. This appeal ensued.

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<sup>1</sup> Petitioners' claims of fraud and tortious interference are not at issue in this appeal.

## II

This Court reviews de novo the probate court's dismissal under MCR 2.116(C)(10) of petitioners' claims of lack of testamentary capacity and undue influence. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party has the burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence, and the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The Estates and Protected Individuals Code (EPIC) provides that "[a]n individual 18 years of age or older who is of sound mind may make a will." MCL 700.2501. A person executing a will must have testamentary capacity, *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001), and there is a presumption that a testator has such capacity.<sup>2</sup> *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). To have testamentary capacity, an individual must "be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make." *Persinger, supra* at 504, quoting *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970). "The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn." *Id.* quoting *In Re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953). "Weakness of mind and forgetfulness are insufficient to invalidate a will if it appears that the mind of the testator was capable of attention and exertion when aroused." *In re Paquin's Estate*, 328 Mich 293, 302; 43 NW2d 858 (1950). "A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected thereby." *In re Ferguson's Estate*, 239 Mich 616, 627; 215 NW 51 (1927).

Testamentary capacity is judged as of the time of the execution of the instrument, particularly when there is evidence of the testator's competence on the day the documents were signed. See *In re Vollbrecht Estate, supra* at 434; *In re Powers Estate, supra* at 179; *Burmeister v Russell*, 362 Mich 287, 289-290; 106 NW2d 752 (1961).

## A

Petitioners first assert that the probate court erred in refusing to consider the pre-litigation medical records and diagnosis of the Sigmunds' treating physician, Dr. Imdad Butt, when deciding the issue of Violet Sigmund's lack of testamentary capacity. Under the circumstances presented here, we disagree.

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<sup>2</sup> MCL 600.2152 provides:

In proceedings for the probate of wills, it shall not be necessary for the proponent in the first instance to introduce any proof to show the competency of the decedent to make a will, but the like presumption of mental competency shall obtain in all other cases.

After deposing Dr. Butt, respondents moved to strike Dr. Butt's diagnosis of dementia and Alzheimer's disease as unreliable and prejudicial, asserting that the diagnoses were made based solely on a report from William Sigmund that Violet was having memory problems, without any testing or clinical examination of Violet. The probate court barred petitioners from using Dr. Butt's diagnosis and any reference in Violet's medical records to Alzheimer's and dementia that did not have its own basis beyond repeating Dr. Butt's diagnosis.

Respondents supported their motion to strike with Dr. Butt's deposition and the affidavit of Dr. Alan Mellow, a geriatric psychiatrist, who stated that Dr. Butt's diagnosis was without basis in clinical practice. Dr. Butt's deposition testimony is clear that he arrived at the diagnosis of dementia/Alzheimer's of Violet based solely on a conversation with William on October 18, 2001, when William and Violet came to Dr. Butt's office. Dr. Butt testified that on that date, William told Dr. Butt that he was concerned about Violet's memory loss. Dr. Butt testified that he asked William whether it was short term or long term memory loss, and that William responded that it was short-term. Dr. Butt testified that he did not perform any testing. Dr. Butt also testified that now, he does test patients before making a diagnosis of Alzheimer's or dementia.

The affidavit of respondents' medical expert, Dr. Mellow, a geriatric psychiatrist, stated:

3. In Violet Sigmund's office visit with Dr. Butt on October 18, 2001, where his records indicate "Alzheimer's disease" as a diagnosis, Dr. Butt did not conduct any clinical examination, perform any cognitive screening tests, or apply any diagnostic criteria to support that diagnosis.

4. In a subsequent visit by Mrs. Sigmund, on January 17, 2002, Dr. Butt again listed "Alzheimer's disease" as a diagnosis with no examination or application of any criteria.

5. Consequently, Dr. Butt's diagnosis of "Alzheimer's disease" on either of those days is entirely unsupported, without any basis in clinical practice.

Respondents also submitted diagnostic criteria developed in the geriatric psychiatry field, entitled "Diagnostic Criteria for Alzheimer's Disease," which listed as criteria for such a diagnosis a clinical examination, documented by a standard test of cognitive function and confirmed by neuropsychological tests.

Petitioners submitted various witnesses' deposition testimony that, as early as 1999, Violet was forgetful, at times disoriented and, at her brother's funeral in 2001 exhibited odd or socially inappropriate behavior.<sup>3</sup> Dr. Butt admitted in his deposition that the first time his

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<sup>3</sup> The depositions petitioners submitted below regarded Violet's behavior before October 18, 2001 (at which time Dr. Butt diagnosed Violet with dementia and Alzheimer's).

records indicate Violet had any cognition problems was October 18, 2001, and that his diagnosis was based on William's report alone.

We conclude that the probate court properly granted the motion to preclude consideration of Dr. Butt's diagnosis.

## B

Petitioners also assert that the probate court erred in relying only on the testimony of the three individuals present (respondent McClafferty, the son of respondent Dillon, and McClafferty's secretary) on the date Violet signed her last will and trust, February 7, 2002, to determine Violet's testamentary capacity. We agree.

In response to respondents' motion, petitioners asserted that for several years before her death, those around Violet noticed her mental decline, and in the last year of her life, her severe mental deterioration. Petitioners submitted medical records from Foote Hospital, where Violet was admitted to the emergency department in September 1999 and hospitalized several times thereafter. The September 1999 hospital records state "pt not acting as normal per family. . . . pt acting as if she was intoxicated." A CT scan of Violet's head was performed and showed "mild generalized cerebral atrophy." (Emphasis added.) In October 2001 Violet underwent another CT scan of the head at Foote Hospital, records of which stated: "There is evidence of *moderate* generalized cerebral atrophy. Mild white matter ischemic changes are identified involving the cerebral hemisphere bilaterally." [Emphasis added.]

Petitioners also submitted excerpts of deposition testimony of petitioner Mary Staite, Elizabeth Male (Violet's niece), and a friend of the Sigmunds, Michael Brown. Petitioner Mary Staite testified that as far back as 1997, when she called Violet on the phone and asked her how she was and what she had been doing, Violet would respond that she would "let Bill" tell Mary how they were doing and gave the phone to Bill. Staite testified that she and her husband went on a cruise with the Sigmunds in 1999, and that Violet could not remember her cabin number or which way to go when getting off the ship's elevator. Staite testified that while on the cruise, Violet did not remember other trips they had taken that William brought up. Staite testified that when William and Violet came to Staite's husband's funeral (Violet's brother's funeral) in 2001, Violet never asked how her brother died, and had "a strange grin on her face" during the funeral service.

Violet's niece, Elizabeth Male, testified on deposition that when Bill and Violet arrived at Violet's brother's funeral, Violet did not seem to recognize her, and at the funeral sat there "like a little child." Michael Brown, a friend of the Sigmunds, testified that around 1999, William told him that Violet was getting a little forgetful, for example, about what time her hair appointments were, and that Violet herself joked at times that she was getting a bit forgetful.

At the hearing on respondents' motion, petitioners' counsel summarized the deposition testimony of petitioners' medical expert, Dr. Stephen Read, a board-certified psychiatrist with specialties in geriatric and forensic psychiatry:

Dr. Reed [sic] has opined unequivocally that in his opinion there is substantial evidence of a cognitive deficit in Violet Sigmund, beginning in 1999, and



progressing, based upon not only what he sees in the medical records, but his review of the testimony in depositions; and not merely the testimony as Respondents would assert, of people, the Petitioners, who were seeking money, of the statements and testimony attributing a loss of cognitive function to Mr. Sigmund, of evidence of depression, of the medical evidence of loss of cerebral brain matter, cognitive functioning.

Additionally he's basing it on the medical records themselves, and the testimony of such people as Michael Brown, who is an uninterested party, and Mr. McClafferty himself.

Respondents' counsel objected, arguing that petitioners should not be allowed to offer Dr. Read's opinion at this late date and should have obtained an affidavit from Dr. Read earlier. Petitioners' counsel responded:

MR. LaBELLA: They took the deposition on Friday, the 7<sup>th</sup>. We only got the transcript beyond that date and could not formally submit it. If the Court wishes, I would be happy to take—if the Court wishes to take this motion under advisement, I'll be happy to submit a supplemental brief and attach selective portions of Dr. Reed's [sic] testimony.

I'm representing, as an officer of the Court, and they represented—they took the deposition, as to what Dr. Reed [sic] had to say, and I'll be happy to read some specific portions of the testimony at this point.

But, what Dr. Reed said, and what Respondent's [sic] argument overlooks is that this is a continuum of events, and at any time that you're dealing with circumstantial evidence, you have to look at a continuum of events, and the mental and medical progression of significant disease in Violet Sigmund.

The probate court granted respondents' summary disposition motion, noting:

There certainly is testimony, probably in about every deposition that the court read, that Violet was ill, at least in 2001 and 2002, up to her death. She apparently had shingles at one point and then was diagnosed with cancer. There is much testimony about her being weak, a big concern about her loss of weight, her lack of appetite. I think there was some concerns [sic] about some projectile vomiting at some point, and there was also testimony about her forgetfulness, the fact that she was not as talkative as she had been previously.

The Court – none of the Petitioners, according to their depositions, or witness depositions, saw Violet between October 21<sup>st</sup>, when Dr. Butt had indicated was the first time he had noticed cognitive problems with her, and the time she signed the trust documents on February 7<sup>th</sup> of '02.

The people that were there, Mr. McMclafferty, Barb Barton, and Jeff Dillon, all indicated that other than her being weak, they didn't see any problems with her. She carried on normal conversations, a fairly extensive one with Mr. McClafferty

while the others went on a tour. Jeff Dillon indicated that she carried on a normal conversation with him after she came out of the hospital in '02 at one point. Mr. Bodman indicated that he was there frequently in '01, and '02, and was able to carry on normal conversations, I think until – I think he testified the day before her death, that he did not.

The Court has previously stricken Dr. Butt's diagnosis for the reasons the Court stated at that time.

The Court doesn't have the benefit of an affidavit or deposition testimony of Dr. Reed [sic]. It's my understanding that he did not examine her and based his opinion on reviewing reports and some records, and depositions, testimony of some of the folks here that the Court has read.

The issue really comes down to whether on the day she signed the documents, which was February 7, of '2, whether she understood the properties she possessed, who the natural objects of her bounty were, and what disposition she was making of her property. The Petitioners need to prove [sic] that. There is, in the Court's estimation, no evidence that she was not able to do that. There is evidence from the people that were there that she was acting normally. There was evidence that—of discussions that took place up to that point in terms of this is what she wanted to do with her property.

The Court would, therefore, grant summary disposition in favor of the Respondents as to the issue on the lack of testamentary capacity or mental capacity.

Petitioners moved for reconsideration, supporting that motion with the deposition transcript of Dr. Read. The probate court denied the motion.

We conclude that summary disposition was improperly granted in respondents' favor. Dr. Read testified on deposition:

Violet Sigmund shows evidence of deficits in multiple mental functions which are manifest beginning in 1997, probably before. They're severe certainly by July of 2001. They worsen continuously from that point up to the point of her death approximately a year after that.

In my opinion, Violet Sigmund meets criteria for a diagnosis of dementia. As the cause of her dementia, it was not possible to determine accurately; in all likelihood, has multiple causes. As a consequence of her dementia, it's my opinion that by July of 2001, that she would have failed to have capacity for testamentary purposes, and by extension, failed to have capacity for more complex legal/financial contracting; and that that incapacity would be continuous and in fact worsen from July 2001 on; that her incapacity likely extended before that time, but that's a date of point that we have a lot of information about.

\* \* \*



In addition to her dementia, Violet Sigmund possibly had a depressive syndrome, but that's a complex diagnostic matter. To the extent that she had a depressive syndrome, it would be a further challenge to her ability to make decisions and execute and carry out actions in her own interest.

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. . . I've already stated that her illness began probably in the late 1990s. In terms of meeting criteria for a diagnosis of dementia in terms of her functional loss of capacity, there are suggestions in the record that that diagnosis could have been made as early as 1999, but the first time I can firmly make a diagnosis based on the material that I reviewed would be July 2001. . . .

Regarding what happened in July 2001 that led to his dementia diagnosis, Dr. Read testified:

Multiple observations related because of the death of her younger brother, Jack, and the funeral which brought family together. And the observations around that time solidify and crystalize observations about multiple mental functions which underlie the – the diagnosis.

\* \* \*

The reason for my focusing precisely on July of 2001 are the multiple and, in my opinion, very credible descriptions of her family members that she failed to recognize them and even that she – it was unclear that she recognized her brother, Jack, who is the – who had died and, you know, was in an open casket in front of her. And it's that failure to have in mind her family members, which I believe is the incontrovertible evidence that she lacked testamentary capacity as of that date.

We conclude that the medical CT scan records showing that Violet Sigmund's generalized cerebral atrophy went from mild in 1999 to moderate in 2001, Dr. Read's deposition testimony, and deposition testimony of various family members raise a genuine issue of fact whether Violet lacked testamentary capacity in February 2002. We thus reverse the probate court's grant of summary disposition to respondents of the claim that Violet Sigmund lacked testamentary capacity.

### III

Petitioners next contend that the probate court erred in dismissing their undue influence claim, where petitioners established a presumption of undue influence and raised a question of fact for the jury. Petitioners assert that the probate court properly found a mandatory inference of undue influence, but erred by holding that the presumption had been rebutted. Petitioners argue that the court impermissibly engaged in fact finding and independently assessed the strength of Violet and William's character and the evidence presented, when the question whether the presumption of undue influence is rebutted is a question for the jury. We agree.

A

The probate court dismissed the claim of undue influence of William, stating:

I think when there is a claim for undue influence, you look at whether there is a presumption. As a starting point, there is an allegation here, at least to Mr. McClafferty, and perhaps not to the others, as to the presumption of undue influence, but I think it's clear that Mr. McClafferty was in a fiduciary relationship with the Sigmunds as their attorney. I think it's also clear that Mr. Dillon was, as their investment advisor. I think Mr. Bodman probably was too as the business associate and close friend as he's depicted in the deposition and documents. So the Court would find that all 3 of them were actually fiduciary [sic] confidential relationship as to the Sigmunds.

The benefit I think is probably the real key issue. They do take trustee fees. There was testimony about that. The case cited by both as to that issue talks about being the scribner of the trust not making a benefit. There were issues in terms of the control of the trustee fees. The Court finds—I don't think, it appears to the Court, that there is a great benefit to the 3, but I think there is some benefit that I think could be looked at in terms of the presumption of undue influence.

Then, the last issue is whether there is opportunity. They were all friends in a confidential relationship with the Sigmunds so they would have had an opportunity.

The Court next looks at whether that presumption has been rebutted. Mr. McClafferty, in his extensive testimony, talked of the Sigmund's [sic] desire to set up the foundation in the early '70s. It re-emerged in the late '90s, I think he thought '98 or '99, and also in his testimony indicated when there was an actual discussion about the allocation in the trust between the foundation and the relatives, he indicated he had suggested to the Sigmunds that they give more of the inheritance to the relatives.

There is testimony also in the deposition from Carolyn Pratt, who testified that she was involved with the Sigmunds. They had a donor advice fund (ph) at the Jackson Community Foundation. She was –worked there from '90 to 2000, and apparently they had a fund with the Jackson Foundation at that time. She testified about a luncheon in 2000, that she had with the Sigmunds and the director of the Community College Foundation, and they indicated to her at that time that they were going to establish a foundation of their own.

There is also testimony that the Sigmunds told Jeff Dillon the reasons that they were giving the relatives less in the estate documents, that they had given them a lot through the years, which is evidenced by the accounts that Mr. Sigmund kept extensive accounts of the monies that had been given to the various relatives over the years. There was a concern about some of the relatives about not being thankful, and expecting these gifts. There was testimony from Ken Dillon that in the '80s the Sigmunds had talked to him about their own foundation.

The Court would find, based on all of that, that the Respondents have presented evidence rebutting a presumption. The Court finds that the presumption being rebutted, there is no evidence presented that any of the Respondents, any of the 3 Respondents exercised undue influence on the Sigmunds, or actually any kind of influence at all on the Sigmunds, to make the 2002 changes to their trusts and wills.

The Court would grant a summary disposition in favor of the Respondents as to that issue of undue influence.

## B

We agree with the probate court that a presumption of undue influence was raised as to all three respondents. We conclude, however, that the grant of summary disposition was error.

Generally, “[t]o 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.” *In re Peterson Estate*, 193 Mich App 257, 259-260; 483 NW2d 624 (1992), quoting *In re Mikeska Estate*, 140 Mich App 116, 120-121; 362 NW2d 906 (1985), citing *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

However, there is a presumption of undue influence which attaches to a transaction where the evidence establishes 1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, 2) that the fiduciary (or an interest which he represents) benefits from the transaction, and 3) that the fiduciary had an opportunity to influence the grantor’s decision in that transaction. [*Kar, supra* at 537.] The establishment of this presumption creates a “mandatory inference” of undue influence, shifting the burden of going forward with contrary evidence to the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. *Id.*, pp 541-542.

“Appointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence.” *In re Vollbrecht Estate*, 26 Mich App at 436. “The mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, would not alone establish the kind of benefit to raise the presumption [of undue influence].” *Id.* Neither trustee fees nor fees generated by the estate to the executor for additional legal work are considered sufficient to raise a presumption of undue influence. See *id.*

In the instant case, the personal benefit to respondents is much more than mere trustee fees. Respondents, along with several other persons serving as trustees, control the allocation of the millions of dollars in the Sigmund trusts. Respondents’ standing and power in the community is undoubtedly greatly enhanced by virtue of being trustees. Under the circumstances here, as in *In re Vollbrecht Estate, supra* at 436, the question of substantial benefit should have been left to the finder of fact. “The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned.” *Id.*

We conclude that the probate court also erred in independently assessing whether respondents rebutted the presumption of undue influence. “Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact.” *In re Peterson Estate, supra* at 261. The probate court in the instant case improperly made findings of fact and weighed credibility in holding that respondents had rebutted the presumption of undue influence, when that question is for the fact-finder. Accordingly, we reverse the dismissal of petitioners’ claim of undue influence.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot