

NO. A05-1429

State of Minnesota
In Court of Appeals

In Re: Estate of

Mary Victorine Carpentier Torgerson
a/k/a Mary V. Torgerson

BRIEF AND APPENDIX OF
PERSONAL REPRESENTATIVE DAVID P. GROVES

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STATEMENT OF LEGAL ISSUES

1. Did the district court err in affirming the referee's findings of fact that decedent was not unduly influenced at the time she executed her November 2002 will, where there is ample evidence to support the referee's findings and the district court must accept the referee's findings of fact unless clearly erroneous?

Apposite authority:

In re Reay's Estate, 249 Minn. 123, 81 N.W.2d 277 (1957)

In re Congdon's Estate, 309 N.W.2d 261 (Minn. 1981)

2. Did the district court err in affirming the referee's findings of fact that decedent had testamentary capacity when she executed her November 2002 will, where there is ample evidence to support the referee's findings and the district court must accept the referee's findings of fact unless clearly erroneous?

Apposite authority:

In re Reay's Estate, 249 Minn. 123, 81 N.W.2d 277 (1957)

In re Estate of Anderson, 384 N.W.2d 518 (Minn. App. 1986).

3. Did the district court abuse its discretion by denying appellant-objector's request for attorney fees where appellant-objector was not nominated as personal representative under the will, and only a person nominated under a will as the personal representative can recover fees?

Apposite authority:

Brookdale Pontiac-GMC v. Federated Ins., 630 N.W.2d 5 (Minn. App. 2001),
review denied (Minn. Aug. 22, 2001)

Minn. Stat. § 524.3-720.

STATEMENT OF THE CASE

This appeal arises out of a probate dispute over whether the decedent had testamentary capacity and was unduly influenced when she executed her will. After decedent Mary Torgersen died in 2003, one of her sons-in-law, respondent-petitioner David Groves, offered for probate her November 20, 2002 will, which nominated him as

personal representative. Another son-in-law, appellant Ned Masbaum, objected, claiming that this will was invalid because of undue influence and lack of testamentary capacity. Instead, appellant-objector Masbaum petitioned for probate of an earlier will, dated August 8, 1978, nominating him as personal representative.

The matter was tried without a jury before Hennepin County District Court Referee Bruce Kruger on May 10 through May 14, and June 28, 2004. Both sides presented witness testimony and documentary evidence. On October 14, 2004, the referee issued findings of fact and conclusions of law that decedent was not subject to undue influence and had testamentary capacity at the time she executed her November 20, 2002 will. The referee ordered this will probated and respondent-petitioner Groves appointed personal representative, pursuant to the terms of the will. The referee's order was countersigned by a judge of district court.

In April 2005, Masbaum filed a motion in district court to review the referee's order. Masbaum also requested that the district court grant him attorney fees under Minn. Stat. § 524.3-720. On May 31, 2005, the Hennepin County District Court, the Honorable H. Peter Albrecht presiding, issued an order affirming the referee's October 14, 2004 findings and order. On July 1, 2005, the district court, the Honorable H. Peter Albrecht again presiding, issued an order denying Masbaum attorney fees.

Masbaum now appeals the district court's order affirming the referee's October 14, 2004 findings and order probating the November 2002 will and appointing respondent-petitioner Groves as personal representative. Masbaum also appeals the order denying his request for attorney fees.

STATEMENT OF FACTS

A. Background of decedent Mary Torgersen.

Decedent Mary Torgersen was born May 26, 1909 in Aurora, Illinois. (T. 5).¹ She died April 5, 2003 in St. Louis Park. (T. 5). In 1930, Mary married Henry Torgersen. (T. 5). The Torgersens had four daughters: Josephine Dennison, Arlene Torgersen, EmCele Masbaum, and Andrea Groves. Mary's third daughter, EmCele, is married to appellant-objector, Ned Masbaum. Mary's youngest daughter, Andrea, is married to respondent David Groves — the personal representative of Mary's estate.

After Henry Torgersen died in 1971 (T. 259), Mary lived on her own in Louisville, Kentucky, Aurora, Illinois, Carmel, Indiana, and Indianapolis, Indiana. (T. 854). At all four of these locations, Mary lived in close proximity to her daughter EmCele Masbaum and EmCele's husband, Ned Masbaum. (T. 258). Over the years, EmCele helped her mother manage her finances. (T. 260-65). Ned Masbaum, a psychiatrist, also assisted Mary by arranging for her medical care and eventually assuming the role as her primary physician in the mid 1990s. (T. 263-65). In the years following her husband's death, Mary's physical condition gradually declined and she had limited mobility. (T. 66, 772, 866-67). Mentally, however, she remained sharp and competent. (T. 66).

Although Mary lived geographically closer to daughter EmCele while in Indiana, Mary maintained close ties with her youngest daughter, Andrea Groves, who lived with her husband, David, in Minnesota. (T. 853-56). Mary and Andrea had a good

¹ "T. #" refers to the transcript of the bench trial held May 10-14, and June 28, 2004, before the referee.

relationship, and the two visited frequently over the years. (T. 574, 853, 856). For example, Andrea would visit her mother approximately every other month while Mary lived in Kentucky, Illinois, and Indiana, and in later years Andrea visited every six weeks. (T. 12, 146, 763, 854). And every year, Mary would spend a month, usually in the summer, at the Groves' home in Minnesota. (T. 792-93).

B. With no notice to Mary or Andrea Groves, Ned and EmCele Masbaum abruptly send Mary to Minnesota to live with Andrea and David.

In spring 2001, EmCele allegedly experienced an incident of high blood pressure that Ned Masbaum characterized as a "near stroke." (T. 280-81, 580-81). Purportedly, this left EmCele in a weakened condition, which prevented EmCele from providing any further assistance to her mother. (T. 281, 581). Therefore, the Masbaums unilaterally decided that Mary was to live with Andrea and David Groves in Minnesota. (T. 176, 288-89, 585). The Masbaums made this decision without consulting Mary or the Groves or giving them any advance notice. (*Id.*).

When Andrea arrived in Indiana on April 30, 2001 for her regular visit with her mother, she found the Masbaums waiting for her at Mary's apartment. (T. 861). This was unusual because even though the Masbaums lived nearby, they would not visit with Andrea or Mary during Andrea's visits, and Andrea had seen Ned Masbaum only a few times in years. (T. 861). To Andrea and Mary's shock and surprise, the Masbaums announced that Mary was moving to Minnesota to live with Andrea, and that Mary would be leaving the next day. (T. 576-77, 861-66). In fact, the Masbaums had purchased a pair of one-way tickets for Mary and Andrea for the following day. (T. 862, 870). This

was the first time either Mary or Andrea learned of these plans. (T. 591, 862, 864). This sudden revelation surprised and upset Mary, who was 92 years old. (T. 864-66).

Andrea and Mary worked late into the night packing before flying to Minnesota the next day. (T. 866-70). A few weeks later, on May 27, 2001, the Masbaums drove a truck to Minneapolis and dropped off Mary's remaining belongings at the Groves' home. (T. 22, 290, 601, 874, 885). This was the last time that Ned Masbaum saw Mary. (T. 219, 294, 601, 887). EmCele saw her mother in person one last time in September 2001, when she visited Mary while Andrea and David were on vacation. (T. 667, 219, 301, 601-602, 887-88). EmCele described this visit as "beautiful," and EmCele stated that Mary's "thinking is so good." (*Id.*; R.A. 1).² Until her death in 2003, Mary insisted that the Masbaums had ordered her out of her Indiana apartment in the middle of the night, a not unreasonable characterization. (T. 932-33, 866, 869, 873).

C. After sending Mary to live with the Groves in Minnesota, the Masbaums' conduct causes the relationship between the Masbaums and Mary to further sour, eventually becoming bitter and acrimonious.

After Mary moved in with Andrea and David Groves in Minnesota, the Groves arranged for Mary to have their master bedroom and bath, and they also constructed a ramp to accommodate Mary's limited mobility and use of a wheelchair. (T. 16). The Groves also arranged Mary's medical and dental care, as well as introducing her to their friends. Initially, however, EmCele continued to handle Mary's finances and she would send money from Mary's account in Indiana to Minnesota to cover some or all of Mary's

² "R.A. #" refers to respondent's attached appendix.

expenses. (T. 24-25, 882). Not long after the Masbaums abruptly sent Mary to Minnesota, seven events caused the relationship between Mary and the Masbaums to further sour and eventually become acrimonious.

First, Mary needed a new pair of dentures, but EmCele refused to send money from Mary's account for the dentures, concluding that because Mary would be dying soon, the cost was not justified. (T. 70, 156, 159, 788, 912, 910). Although EmCele ultimately sent the money for the new dentures, her initial refusal upset Mary. (T. 70-74, 788, 806-807).

Second, when the Masbaums brought Mary's things to Minnesota from Indiana, they left behind many of her personal belongings and keepsakes — and the Masbaums kept them in Indiana even after Mary asked for them. (T. 565, 649, 679, 788, 887). These included Mary's family Bible and prayer book, which she wanted buried with her (very important to Mary, a devout Catholic), some stock certificates, USAA account papers, two insurance policies, and Mary's birth and marriage certificates. (*Id.*; T. 60, 129; *see* A-70).³ And without her birth and marriage certificates, Mary had a difficult time obtaining her voter registration and Minnesota state identification card. (T. 166, 787, 887). Ultimately, the Groves resolved these problems for Mary by helping her independently obtain the identification documents that she needed — but Mary never did get many of the intensely personal belongings that she believed the Masbaums had failed to send her. (T. 270, 788).

³ "A-#" refers to appellant Masbaum's appendix.

Third, EmCele would not transfer Mary's financial affairs to Minnesota. This forced Mary, with the Groves' assistance, to open a Minnesota bank account and arrange for direct deposit of her social-security and pension checks into this new account. (T. 24-25, 679, 781, 882). Eventually, all of her finances, except for the life-insurance policies and the USAA account, were administered in Minnesota with help from the Groves. (T. 24-25, 882). A thread running through Masbaum's brief is his belief that the Groves' motive for helping Mary transfer her assets to Minnesota was to benefit themselves. (Br. 5-8).⁴ Actually, the Groves received very little money from Mary or EmCele for Mary's care, and they were more than willing to pay for things for Mary if EmCele refused to send money. (T. 31, 777, 853, 880). And Andrea made nearly \$70,000 a year as a nurse, enabling them to fully support themselves and Mary. (T. 853). Additionally, the Groves refinanced their home, taking out approximately \$100,000 to have on hand. (T. 922). In fact, EmCele's reluctance to send money for Mary's dentures caused the Groves to suspect that the Masbaums sent Mary to live in Minnesota because they had depleted most of Mary's funds, or that the Masbaums wanted to retain what remained. (T. 72-73).

Fourth, the evidence shows that beginning in late 2001 or early 2002, EmCele began calling Mary many times each day and often in the middle of the night on Mary's private phone at the Groves' — to the point that Mary felt she was being harassed. (T. 19-20, 798, 890). EmCele's constant calls bothered Mary so much that she asked Andrea to disable the ringer on her phone. (T. 161, 797, 891). Testimony at trial showed that

⁴ "Br. #" denotes the page of appellant Masbaum's brief.

Mary knew how to turn the ringer on and off. (T. 797). When Mary's elderly sister became ill in April 2002, her family, unable to reach Mary on her phone because the ringer was off, called the Masbaums, who chose not to give them the Groves' home number. (T. 305-306, 809, 34, 53, 683-84). Despite Mary's sister's critical condition, Ned Masbaum testified that he chose not to give them the number because Mary did not want him to, due to the Groves' allegedly "abrupt" phone message that simply said "Leave a number." (T. 305-306, 684). The Masbaums testified that they instead faxed and mailed a note to the Groves (although Ned did not know whether the note was in fact faxed), notifying them of Mary's sister's condition. But Andrea testified that she only received the letter — and by then it was too late. (T. 306, 486, 915-920). Testimony at trial showed that this upset and angered Mary because the Masbaums' conduct deprived her of an opportunity to talk with her sister one last time before she died. (T. 34, 53-54).⁵

Fifth, Mary's relationship with the Masbaums went even further downhill after Ned Masbaum berated Mary in a letter dated March 15, 2002. (T. 900-902; R.A. 3). In his three-page letter — a letter that Masbaum conceded was "not a nice letter" (T. 608) — Masbaum berated Mary for her alleged ingratitude toward EmCele, among other things. Masbaum's letter to Mary included the following remarks:

⁵ Masbaum testified that he was told that Mary's sister could not speak on the phone because of her condition (Br. 12 (citing T. 384)), implying it was irrelevant whether Mary knew before her sister died. But the Masbaum letter made no mention of this, indicating only that Mary's sister had pneumonia and was on oxygen and that she (Mary's sister) wanted Mary to know of her condition. (R.A. 11). Nor does this indicate that Mary could not have spoken with her sister had she received notice in time.

Your telephone conversation with me suggested you are in a disturbed state.

* * *

If you want to talk about garbage, your untruthful statements were the garbage, and you know it.

* * *

She saw to it that you got your groceries and provided all transportation since you never learned to drive. Even people with one eye can get a driver's license if they want one. [Referring to the fact that Mary was not blind in one eye.]

She provided you with her friends since you made no effort to make your own friends.

* * *

You know that she did even more than all this with loving care and cheerfully in spite of your well-known complaining and negative attitude.

* * *

You must stop maligning EmCele with those people you live with and tell them the truth.

* * *

You and Andrea must stop this calumny of EmCele immediately!

You and Andrea also need to quit being so self-absorbed with your shared and imagined victim-hood like Oprah show guests. * * * Try positive thinking and work at seeing the good in people. If you can't say something nice, shut up! * * * Sadly, it had to come to this after the outrageous, distorted and untruthful raving that is coming from you * * * . My gracious, a real live Oprah show victim!

(R.A. 3 to R.A.5).

Masbaum's letter greatly upset Mary, and she hired attorney David Porter to help her regain control over her USAA account. (T. 268, 899-903). The Masbaums still exercised control over Mary's USAA account pursuant to EmCele's power of attorney, initially granted by Mary in 1988. (T. 268, 899-903). Central to Masbaum's theory of

the case that the Groves were orchestrating Mary's actions, Masbaum claims that "[i]t should be noted that Mary did not ask for a lawyer," speculating instead that the Groves' daughter "hand-picked" Porter. (Br. 24, 15). Actually, Mary wanted an attorney, especially after Masbaum's letter. (T. 899, 902). And although the Groves' daughter, also an attorney, gave Porter's phone number to the Groves to give to Mary, she also gave them other numbers — and Porter had never previously done any work for the Groves or the Groves' daughter. (T. 37, 360, 385, 801, 899). Masbaum also misstates the facts when he asserts that the Groves hired and paid Porter (Br. 16); it was Mary — not the Groves — who paid Porter to represent her. (T. 391-94).

When Porter came out to the Groves' home to meet with Mary in March 2002, he met with Mary alone — neither Andrea nor David Groves were present. (T. 360-64, 906). Mary explained that she wanted to revoke the power of attorney that she had previously granted EmCele and grant a new power of attorney in favor of David Groves. (T. 360, 899-900). Porter testified that he recognized the family conflict in revoking EmCele's power of attorney and granting power of attorney to David. (T. 360-64). Porter did not prepare anything at their first meeting, but he returned with a revocation of power-of-attorney form and a new power-of-attorney form and gave them to Mary. (T. 360-64, 899-900; A-57). After Mary signed the documents, they were forwarded to USAA and EmCele. (A-57).

Sixth, Mary's relationship with the Masbaums further deteriorated when Masbaum wrote a letter to USAA on April 1, 2002 (a copy of which was sent to Mary) declaring that she was "of unsound mind, suffering from delusions and incompetent." (R.A. 6; T.

492, 709-710, 900). Masbaum further claimed that there was “a related issue of undue influence by those surrounding her in her current living situation.” (R.A. 6). Masbaum wrote this letter to stop USAA from honoring Mary’s revocation of EmCele’s power of attorney, thus blocking Mary from gaining control over her USAA account. (T. 660). Although Masbaum had been one of Mary’s physicians before sending her to Minnesota, he never saw her again after May 2001 — nearly a year before he sent this letter “diagnosing” her as not competent. (T. 219, 509, 601, 660). And Masbaum’s long-distance “diagnosis” was contrary to that of Mary’s primary physician, Thomas Kiefer, M.D., who wrote a letter dated April 3, 2002, stating that Mary Torgersen was competent. (T. 453-55; R.A. 7). Dr. Kiefer has been a family practitioner for some 31 years, and he deals with mental-health issues on a daily basis, including Alzheimer’s disease patients. (T. 439-42). In fact, he has personal knowledge of such aging issues because his mother died of Alzheimer’s disease about two years ago. (T. 442). Dr. Kiefer became Mary’s primary physician beginning in June 2001 when he treated Mary for arthritis in her knees, and he met with Mary about a dozen times before her death in April 2003. (T. 41, 108, 442-44, 455-56). On April 15, 2002, Masbaum contacted Dr. Kiefer to inform him that it was his (Masbaum’s) opinion that Mary was incompetent. (T. 457, 896). But Dr. Kiefer did not agree with Masbaum’s opinion, and Dr. Kiefer opined that Mary was competent. (T. 457-58).⁶

⁶ Following these incidents, Mary filed complaints against Masbaum with the Indiana and Minnesota medical boards, and she filed a lawsuit against Masbaum in Minnesota. (T. 41-42, 504). Although David Groves drafted these documents, he did so

Finally during this same period — spring 2002 — EmCele and Mary were talking on the phone, and during the conversation, EmCele disavowed Mary as her mother, screaming into the phone at Mary, “I have no mother. See you in Court!” (T. 185, 804). So by the late spring of 2002, Mary was extremely upset and angry with EmCele and Ned Masbaum.

D. Because of the falling out between the Masbaums and Mary, Mary disinherits EmCele in 2002.

In June 2002, Mary again contacted her attorney, David Porter, this time about drafting a new will. (T. 365-67). Porter met with Mary alone to discuss drafting a new will. (T. 367). In Mary’s original will, dated August 8, 1978, she left her estate equally to her four daughters. (T. 10). When Mary asked Porter to draft a new will in June 2002, she intended to disinherit EmCele because she was very disappointed in EmCele and Ned for what she felt was their meddling with her financial affairs. She wanted EmCele out of her will and Ned out of her life. (T. 365-67). Porter stated that under the circumstances, Mary’s decision seemed rational. (T. 395). Porter testified that Mary was competent, and he sensed no undue influence over Mary by either David or Andrea. (T. 368-69). Indeed, Porter described Mary as “alert and aware as anyone [he’d] ever

at Mary’s direction, and it was Mary’s idea to initiate these actions. (T. 41-42). In keeping with Masbaum’s theory of the case, Masbaum implies that David was the motivator behind these actions because Mary was not a litigious person and would not have filed these complaints and the lawsuit on her own. (Br. 25; T. 273). But the evidence showed that Mary had previously wanted to initiate lawsuits for incidents in Indiana, including a time when her medical-help “Lifeline” button malfunctioned and another time when she fell in her apartment building. The Masbaums had discouraged her from making these suits. (T. 63, 909).

known,” and “a joy to meet and to talk with.” (T. 367). Porter testified that he was vigilant as to Mary’s competency for a number of reasons, including the fact that Mary planned to disinherit EmCele. (T. 368-69, 394-95, 404). Porter testified that she was completely competent as he understood the standard for legal competency in Minnesota. (*Id.*). He was also vigilant for any undue influence — but that there was “[n]one whatsoever.” (T. 368-69, 394-95, 404). So on June 27, 2002, Mary executed a new will in which she disinherited EmCele. (T. 371). Porter testified that he went through the terms of the June 27 will with Mary, and that Mary was both competent and not under any undue influence at the time she signed this will. (T. 369, 371-72).

Mary subsequently decided to change her will again in August 2002 to also exclude her other daughters Josephine and Arlene. (T. 49, 241-42, 378-81). Mary made this decision after returning from a visit with Josephine and Arlene in Florida. (T. 77, 809-810). Mary learned that both Josephine and Arlene received public assistance, and any inheritance that they received from Mary would disqualify them for this assistance. (T. 241-42, 378-80). So Mary had Porter remove them from her will. (*Id.*). In his brief, Masbaum states that “Porter did no independent investigation to see if Arlene and Josephine concurred in being disinherited, as it was claimed.” (Br. 16 (citing T. 379)). But Porter did not claim that he checked with Arlene or Josephine (T. 379), nor was he obligated to do so. Porter testified that he met with Mary alone, discussed disinheriting her daughters Josephine and Arlene, drafted the will, and returned to meet with Mary, again alone, and explained it to her. (T. 78-82). The new will was executed and witnessed

on August 27, 2002. (T. 378-82). He also stated that Mary was competent and not under any undue influence. (T. 380-81).

Finally, Mary amended her will on November 20, 2002. (T. 382, 810). This November 2002 will did not change anything with respect to her daughters, but merely added Mary's USAA account as a probate asset, as advised by Porter. (T. 49, 382-84, 810). Porter advised this because USAA was at an impasse; because of Ned Masbaum's claim that Mary was incompetent, USAA would not recognize either the revocation of the power of attorney or the new power of attorney, waiting instead for the matter to resolve in court. (T. 383-84, 389). Porter contacted Mary and explained that in order to protect the USAA account, she should add it to the will as a probate asset. (T. 381-84). Porter stated that Mary completely understood everything he was explaining, and that she was competent and not under any undue influence. (T. 383-87, 369).⁷

Masbaum's theory of the case is that Mary lacked testamentary capacity, and he speculates that because Mary "wrote her initials 'MVC' instead of her initials 'MVT'" on

⁷ Masbaum impugns Porter's integrity because he was suspended from practicing law from 1990 to 1995 for falsifying a will. (Br. 15, 24; *see* T. 358-60). Porter explained at trial that he was suffering from manic depression and bipolar psychiatric disorder in the late 1980s, and it was during a manic episode that he had his secretary sign as a second witness to a will, knowing that the will would be contested for that reason. (T. 358-60). Porter then came forward and filed a petition with the Lawyers Professional Responsibility Board and went through the disciplinary process. (T. 359). Since 1989, Porter has received psychiatric therapy and medication, and has had no other problems. (T. 359-60).

On appeal, Masbaum improperly raises for the first time that during this same phase in Porter's life, he also failed to maintain proper account books for client money he held in trust. (Br. 15). Masbaum did not raise this before the referee, and therefore this court may ignore it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate courts will not consider matters not raised in district court).

her November 2002 will, this is somehow evidence of “confusion about her name,” which points to “much broader confusion.” (Br. 14-15; *see* A-25). Actually, Mary’s full name, as it appears on the first page of her will, is Mary Victorine Carpentier Torgersen, so her first three initials would be MVC. (A-24). And notwithstanding that she wrote “MVC” instead of “MVT,” as discussed below, those actually present on November 22, 2002, testified that Mary was competent when signing her will.

E. Except for the Masbaums, who had not even seen Mary since 2001, all the witnesses testified at trial that Mary was competent and not under undue influence when she executed her 2002 wills.

Porter testified that on every occasion he met with Mary, she was competent and not under the influence of anyone, including David and Andrea Groves. (T. 368-69, 371-72, 380-81, 386-87). Porter prepared the various wills for Mary only after meeting with her alone. (T. 366-67, 378, 383). Porter testified that Mary unmistakably intended to disinherit EmCele, and that he had no concern that Mary was incompetent or under any undue influence. (T. 366-69). Similarly, Porter testified that it was Mary’s intent to exclude her other daughters, Arlene and Josephine, from her will so they would continue to be eligible for public assistance. (T. 378-81). It was clear to Porter that Mary completely understood the impact of her decision to disinherit three of her four daughters, and that she was competent and not under any undue influence. (T. 368-69, 380). He also testified that after he drafted each of the wills, he carefully went over them with Mary before she signed them. (T. 371, 384). Porter testified that Mary was competent and not under any undue influence on each occasion when she executed her June, August, and November 2002 wills. (T. 368-69, 371-72, 380-81, 386-87).

In addition, all of the witnesses who were present when Mary signed her wills testified that Mary appeared competent and not under the influence of the Groves or anyone else. (T. 320, 324, 328-32, 356). Jonathan Schramm and Pamela Griffith, neighbors of the Groves, witnessed the June 2002 will. (T. 317-19). Schramm testified that the Groves were not present during the will signing, and that in his opinion, Mary was competent and understood what was happening. (T. 319-20). He also stated that he did not believe Mary was under any undue influence by the Groves. (T. 320). And David Groves testified that he “had nothing to do with any of these wills.” (T. 52).

Elizabeth Damian, a psychiatric nurse who worked with Andrea and had spent time with Mary on numerous occasions, witnessed the November 2002 will along with her husband, Stephen Damian. (T. 340-46). Ms. Damian testified that she knew Mary was angry at the Masbaums. (T. 344, 348). She also stated that she never had any concern about Mary’s competency, either on the day that Mary signed her November 2002 will, or at any other time. (T. 344). She never sensed any undue influence by the Groves. (T. 346). As a psychiatric nurse at Hennepin County Medical Center, Ms. Damian testified that she deals frequently with patients who have competency issues. (T. 356). Ms. Damian testified that “I always believed [Mary] was very competent.” (T. 356). Stephen Damian stated that he had visited Mary more than five times, about once a month, and that he talked to her on an individual basis. (T. 327-29). On the day Mary signed her November 2002 will, Mr. Damian described her as “very coherent.” (T. 339). In sum, both Elizabeth and Stephen Damian testified that Mary was competent and not subject to any undue influence when she signed her November 2002 will. (T. 328-32,

339, 340-46, 356).

Mary's primary physician, Dr. Kiefer — who saw Mary numerous times from 2001 through her death in 2003 — testified to a reasonable degree of medical certainty that Mary was competent when she executed her wills on June 22, August 27, and November 20, 2002. (T. 465-66). Indeed, Dr. Kiefer described Mary as bright and alert. (T. 443, 449). Although she was depressed and stressed with family issues, she displayed good judgment. (T. 444-45, 449). She knew her medications and knew when she had last taken them. (T. 459). Also, Andrea Groves, a certified psychiatric nurse, testified that she believed her mother was competent. (T. 847, 903).

Indeed, Masbaum is really the only one in this case who believed that Mary lacked testamentary capacity or was under undue influence. (T. 491, 502, 522-24, 532, 537). Yet Masbaum neither spoke with nor met with Mary on any of the days when she executed the revocation of power of attorney, executed the new power of attorney, or any of the three 2002 wills; in fact, he never saw her after May 2001.

Masbaum, however, points to the fact that his attorney, Todd Haugan, testified that Mary appeared confused at the conservatorship hearing on December 2, 2002. (T. 311). Haugan, who was not present when Mary signed any of her 2002 wills, represented Masbaum in connection with Mary's voluntary petition for a conservatorship. (T. 309). Mary, through her attorney Porter, petitioned for conservatorship because USAA refused to acknowledge the revocation of the power of attorney and new power of attorney, and a conservator would have the authority to break the stalemate and demand the USAA funds. (T. 389-90). Porter testified that it was Mary's desire to petition for

conservatorship because “[s]he wanted control of her money.” (T. 390). When Porter saw Mary at the conservatorship hearing, he testified that Mary’s appearance that day was strikingly dissimilar to how she was on every other occasion he had seen her, including when she signed her 2002 wills. (T. 368-69, 387). Porter testified that Mary was competent on each occasion when she executed her June, August, and November 2002 wills. (T. 368-69, 371-72, 380-81, 386-87).

F. Even as Mary approaches her final days and begins to show signs of mental decline, she remains competent.

On January 24, 2003 — two months after Mary executed her November 2002 will — Mary was seen by Susan Czapiewski, M.D., a psychiatrist skilled in elderly mental-health issues. (T. 110, 448, 898; R.A. 10-11). Although Dr. Czapiewski found that Mary occasionally had illogical speech, loose associations, and severe depression, Mary scored 24 out of 30 on a mini-mental status exam, indicating only mild to moderate impairment. (T. 479; R.A. 10). Thus, two months after Mary signed her November 2002 will, Mary was not deemed incompetent by Dr. Czapiewski.

In April 2003 — just days before Mary died — psychologist Michael J. Fuhrman, Ph.D., performed a mental evaluation of Mary. (T. 109; A-77). Although Dr. Fuhrman acknowledged evidence of declining mental status and brain atrophy (a reduction in brain size), he determined that Mary “does not show the level of cognitive impairment that ordinarily militates for legal intervention” or finding of legal incompetence. (A-82; T. 463). Dr. Kiefer agreed with Dr. Fuhrman, noting that brain atrophy is common among people Mary’s age (T. 463, 471), but it did not equate with a lack of capacity.

ARGUMENT

Standard of Review

In his brief, Masbaum concedes that the “parties and the district court agree on the law [and] [t]he facts are not in dispute * * * .” (Br. 2). Rather, the “dispute lies in the application of the facts to the law.” (*Id.*). This court’s review is limited to whether the referee, as factfinder, clearly erred in finding that Mary had testamentary capacity and was not unduly influenced at the time she executed her November 2002 will:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court.

Minn. R. Civ. P. 52.01; *see* Minn. R. Civ. P. 53.05(b) (“In an action to be tried without a jury, the court shall accept the referee’s findings of fact unless clearly erroneous.”).

Findings of fact are clearly erroneous only where the reviewing court is “left with the definite and firm conviction that a mistake has been made.” *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987). Thus, if there is *any* reasonable evidence to support the findings of fact, a reviewing court must not disturb those findings. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999); *see First Trust Co. of St. Paul v. McLean*, 254 Minn. 75, 75, 93 N.W.2d 517, 518 (1958) (“Findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole[,] even though we might find the facts to be different if we had the factfinding function.”); *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 460 (Minn. App. 2001) (“An appellate court has limited review over findings of fact, and

those findings may only be overturned if manifestly contrary to the evidence.”), *review denied* (Minn. July 24, 2001).

Further, this court does not reweigh the evidence; rather, it determines whether the evidence as a whole sustains the findings. *In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988). And appellate courts show great deference to a factfinder’s determinations regarding the weight and credibility of witness testimony. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *see Caroga Realty Co. v. Tapper*, 274 Minn. 164, 169, 177, 143 N.W.2d 215, 220, 224 (1966) (stating appellate court defers to factfinder on credibility and weight, if any, to be given testimony). Where, as here, credibility determinations are crucial, a reviewing court will give deference to the primary observations and trustworthiness assessments made by the factfinder. *Engbretson v. Comm’r of Pub. Safety*, 395 N.W.2d 98, 100 (Minn. App. 1986) (affirming district court findings even though contrary to testimony of three witnesses). Moreover, “where evidence can support a finding either way, the trial court’s decision will not be reversed.” *In re Anderson*, 384 N.W.2d 518, 521 (Minn. App. 1986); *Appeal of Borstad*, 232 Minn. 365, 370, 45 N.W.2d 828, 831 (1951) (“Where the evidence as to testamentary capacity and undue influence is conflicting, findings of the trial court with respect to such questions are final on appeal * * * .”).

Here, the referee issued detailed and extensive findings of fact that are amply supported by testimony and documentary evidence, and therefore this court must affirm.

I. Ample evidence supports the referee's findings that Mary Torgersen was not subject to undue influence and that she had testamentary capacity when she executed her November 2002 will.

Instead of addressing his arguments to the standard of review, Masbaum primarily reargues the evidence in favor of his theory of the case. *See Lewis v. Lewis*, 572 N.W.2d 313, 316 (Minn. App. 1997) (stating in the comparable context of amended findings, “[w]hen it is claimed that the record does not support findings, the moving party should address the record evidence [and] explain why the record does not support the * * * findings * * * .”).⁸ But as discussed below, Masbaum cannot prevail on appeal because there is ample evidence to support the referee's findings that Mary had testamentary capacity and was not unduly influenced.

A. The evidence amply supports the referee's finding that Mary was not unduly influenced.

Undue influence is that which destroys the free agency of the testator to such a degree that the will is not the testator's will but that of another. *In re Reay's Estate*, 249 Minn. 123, 126, 81 N.W.2d 277, 280 (1957). In order to show undue influence in the preparation of a will, the evidence must go beyond suspicion and conjecture and show not only that influence was exerted, but that it so dominated and controlled the testator's mind that, in making the will, the testator ceased to act of her own free volition and became a mere puppet of the wielder of that influence. *In re Congdon's Estate*, 309 N.W.2d 261, 268 (Minn. 1981).

⁸ As the objector to the will, Masbaum bore the burden at trial of proving undue influence and lack of testamentary capacity by clear and convincing evidence. *In re Reay's Estate*, 249 Minn. 123, 126, 81 N.W.2d 277, 280 (1957); Minn. Stat. § 524.3-407.

Existence of influence is a question of fact. *In re Estate of Opsahl*, 448 N.W.2d 96, 100 (Minn. App. 1989). In determining whether a testator was subject to undue influence, a court may consider such factors as: the opportunity to exercise influence, active participation in the preparation of the will by the party exercising influence, the confidential relationship between the will-maker and the party exercising the influence, disinheritance of those whom the decedent probably would have remembered, the singularity of the will provisions, and the exercise of influence or persuasion to make the will in question. *Id.* The requisite proof is not established merely by showing motive, opportunity, or disposition to use undue influence, by showing a confidential relationship, or by showing inequality of the will. *Id.*

Here, the referee found that Mary Torgersen was not subject to undue influence when she executed her November 2002 will, and ample evidence supports the referee's findings and conclusions. For one thing, there was no evidence that the Groves played any part in Mary's June, August, or November wills. Mary's attorney, David Porter, testified that he met with Mary alone to discuss those wills. And Porter was not "hand-picked" by the Groves, contrary to Masbaum's assertion. (Br. 24). Rather, the Groves' daughter (also a lawyer) recommended Porter, but also provided a list of other names. Moreover, Porter represented Mary — not the Groves. And Porter was "hyper-alert" about influence because of the nature of what Mary was doing in her wills. (T. 395, 404). As an attorney who has practiced in this area for years, Porter opined that he did not believe Mary was subject to any undue influence. And neither did any of the witnesses to any of the wills. As to the November 2002 will specifically, one witness, Elizabeth

Damian, who was well acquainted with Mary, testified that she knew Mary was upset with the Masbaums, and that she did not believe Mary to be subject to any undue influence by the Groves when she executed her will.

Masbaum speculates that because “David Groves quit working a mere ten days after Mary came to live [in Minnesota],” “it can be inferred” that David Groves made it “his full time job” to exercise influence over Mary. (Br. 26, 6). Masbaum even uses the epithet “the unemployed David.” (Br. 21). But Groves, who worked for the Minnesota Department of Transportation, requested a leave of absence in February 2001 — three months before the Masbaums abruptly moved Mary to Minnesota — so he could return to school to train as an electrician. (T. 754). And the Minnesota Department of Transportation approved Groves’ request on May 7, 2001 (T. 755) — days after Mary arrived on May 1. Since then, he has been working as an apprentice electrician and building “sweat equity” in his son’s business here in Minnesota. (T. 754-57). As soon as Groves obtains his electrician’s license, he testified that he intends to take over the business from his son, who has moved to Florida to start a new company. (T. 756). So contrary to Masbaum’s speculation, nothing can be inferred from the fact that Mary began living with the Groves at about the time David Groves’ leave of absence to train as an electrician was granted. Moreover, the evidence shows that David Groves did not participate in drafting Mary’s wills, nor was he present when Mary met with her attorney to discuss and review those wills, or when they were executed. Masbaum offers only speculation that David exercised undue influence over Mary.

Further, while certainly David and Andrea Groves had a confidential relationship with Mary because she lived in their home, the testimony and evidence showed that Mary met alone with her attorney to discuss revoking her power of attorney and in drafting her June, August, and November 2002 wills. And despite the Masbaums' belief that Andrea was Mary's "captor," or that Mary wanted to leave Minnesota and return to Indiana (Br. 17, 21, 25, 28), evidence shows just the opposite. Both Elizabeth and Stephen Damian testified that they never got the impression that Mary was a captive in the Groves' home. (T. 332, 346). To the contrary, they testified that Mary was happy in Minnesota, that she enjoyed living with Andrea and David, and that she did not want to move back to Indiana. (T. 331, 346). Porter also testified that Mary did not appear to be a captive of the Groves, and he stated that Mary "absolutely did not want to go back to Indiana, she was quite happy where she was [with the Groves]." (T. 370, 384). And Dr. Kiefer testified that when the subject arose of the Masbaums wanting Mary to return to Indiana, Mary said she did not want to leave Minneapolis, and that she was happy living with the Groves. (T. 449-50).

Masbaum further argues that Mary never would have disinherited three of her four daughters unless she was being unduly influenced by the Groves. But there was sound and copious evidence supporting Mary's reasons for changing her will. The evidence established that Mary was extremely upset with her daughter, as well as EmCele's husband, Ned. Mary made her decision to disinherit EmCele after the following series of events: The Masbaums' sudden and unilateral decision to move Mary out of her Indiana apartment and send her to Minnesota with no notice; EmCele's initial refusal to send

money out of Mary's own funds for new dentures; the Masbaums' failure to send Mary's personal keepsakes and other items to her in Minnesota; their refusal to let her get her funds from her USAA account and attempts to close her account; Ned Masbaum's declaration that she was delusional and incompetent; Masbaum's March 2002 letter berating Mary; and the Masbaums' failure to give her sister's relatives the Groves' telephone number so that Mary could speak with her sister on her deathbed. Finally, EmCele disavowed Mary as her mother, screaming into the phone at Mary, "I have no mother. See you in Court!" Any one or the combination of these events could have led Mary to change her will to disinherit EmCele. These events were the result of the Masbaums' own conduct — not potential undue influence by the Groves.

As to Mary's other daughters, Josephine and Arlene, Mary removed them from her will because she learned that they would lose their public assistance if they inherited any money from Mary. Masbaum presented no evidence to the contrary.

In sum, all that the law requires is that *any* evidence supports the referee's findings that Mary was not unduly influenced when she changed her wills in 2002. Here, there is ample evidence to sustain the referee's findings. And because there is evidence that sustains the referee's findings, this court must affirm.

B. Ample evidence supports the referee's finding that Mary had testamentary capacity.

For a will to be valid, the testator must have had "testamentary capacity" at the time the will was executed. *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986). A testator has testamentary capacity to execute a will if

when making the will, [s]he understands the nature, situation, and extent of [her] property and the claims of others on his bounty or his remembrance, and [s]he is able to hold these things in [her] mind long enough to form a rational judgment concerning them.

Id. (quotation omitted). In determining whether a testator possessed testamentary capacity, the court considers: (1) reasonableness or naturalness of the property disposition; (2) testator's conduct within a reasonable time before and after execution of the disputed will; (3) prior adjudication involving testator's mental capacity; and (4) expert testimony pertaining to the mental and physical condition of the testator. *Id.* "It is well-settled that the evidence and the inferences must be viewed in the light most favorable to the trial court's decision." *Id.*

Here, ample evidence exists to support the referee's finding that Mary possessed testamentary capacity when she executed her November 2002 will. Mary's treating physician, Dr. Kiefer, testified that she had testamentary capacity to execute her wills (T. 465-66), as did Mr. Porter, her attorney. (T. 368-69, 371-72, 380-81, 386-87). And a close friend and witness of Mary's November 2002 will, psychiatric nurse Elizabeth Damian, testified that she had no doubt that Mary had testamentary capacity. (T. 356). Moreover, even shortly before Mary's death, psychiatrist Dr. Czapiewski, M.D., and psychologist Dr. Furhman found that Mary was competent. (R.A. 10; A-82; T. 463, 479, 898).

Applying the first *Estate of Anderson* factor, Masbaum, however, argues that only a will leaving Mary's estate equally to her four daughters would have been "normal," and thus Mary lacked testamentary capacity. (Br. 30). But reasonableness of the will

distribution is the inquiry, not what Masbaum considers “normal.” Here, the evidence amply supports the reasonableness of Mary’s distribution.

First, as set forth above, the evidence before the referee showed that Mary felt betrayed by and was extremely angry at EmCele and Ned for various reasons: In abruptly moving Mary to Minnesota, Mary felt that the Masbaums had evicted her from her Indiana apartment in the middle of the night. Mary was also upset with the EmCele because she initially refused to send Mary’s money for new dentures and to transfer her finances to Minnesota, as well as EmCele’s refusal to send Mary’s requested personal belongings and keepsakes, including Mary’s family Bible and prayer book, which Mary left behind in the sudden rush to move. Mary also felt that the Masbaums deprived her of speaking with her dying sister one last time by refusing to give her sister’s family the Groves’ phone number. Mary was also extremely upset by Masbaum’s mean-spirited March 2002 letter — a letter that even Masbaum admitted was “not nice.” “Not nice” is an understatement. In his letter, Masbaum berated Mary, calling her an “Oprah victim” and accusing her of making “distorted” and “untruthful statements [that] were the garbage.” And Mary was equally upset by his letter to USAA stating that she was incompetent so as to prevent her from revoking EmCele’s power of attorney and gaining back control over her USAA accounts. Finally, the conflict culminated in EmCele screaming at Mary over the phone, “I have no mother. See you in Court!” In light of EmCele’s statement, it is neither surprising nor unreasonable that Mary chose to cut EmCele out of her will.

Second, Mary further amended her will to exclude her two other daughters, Josephine and Arlene, after she learned that any inheritance she gave them would disqualify them from receiving the public assistance they depended on to live. This evidence shows the reasonableness of Mary's property distribution and amply sustains the referee's determination that Mary possessed testamentary capacity.

Turning to the second factor, Masbaum argues that because Mary appeared confused at the December 2, 2002 conservatorship hearing, this means she lacked testamentary capacity. (Br. 30). But Porter testified that when he saw Mary at the conservatorship hearing, her appearance that day was strikingly dissimilar to how she was on every other occasion he had seen her, including when discussing her 2002 wills. (T. 368-69, 386-87). Mary's change in appearance was not surprising, given the stress of the situation. Porter testified that in his experience, elderly clients "just get so overloaded with emotion and disruption and fear and unfamiliar environment [i.e., the courtroom for the conservatorship hearing] they just withdraw." (T. 388). Porter also testified that Mary was competent on each occasion when she executed her June, August, and November 2002 wills. (T. 368-69, 371-72, 380-81, 387-89). Moreover, the evidence showed that just three days after Mary signed her November 22, 2002 will, Mary's treating physician, Dr. Kiefer, wrote a letter to Porter describing Mary as competent and "bright, alert, and lucid * * * capable of making rational[] decisions" (R.A. 8; T. 455-57, 465-66). Masbaum even concedes this. (Br. 30). The fact that Dr. Kiefer noted that Mary suffered from depression and was not capable of handling her finances does not equate with lack of testamentary capacity; rather, Dr. Kiefer stated that this meant only

that she needed assistance with her finances, and that Mary was fully capable of identifying a person to assist her. (T. 455-57; R.A. 8). Moreover, Dr. Kiefer testified that the stress brought on by the conservatorship hearing would have caused her to appear confused, and that she was fully competent in November when she signed her will. (T. 464-66).

Masbaum also cites to Mary's October 30, 2002 CT scan, which showed only "moderate" cerebral cortical atrophy, as proof that she lacked testamentary capacity. (Br. 30; T. 716; R.A. 9). But Dr. Kiefer testified that virtually all elderly people show some brain atrophy (shrinkage of brain tissue), so Mary's CT scan results were very typical (T. 471), and moderate atrophy does not equal lack of testamentary capacity. Dr. Kiefer testified that his notes from October 21, 2002, nine days before the CT scan, also described Mary as "lucid." (R.A. 13; T. 452). Moreover, months later and days before Mary's death, in April 2003, psychologist Dr. Fuhrman acknowledged evidence of brain atrophy in Mary, but concluded that it did not reach the degree that militates toward a finding of legal incompetence. (A-82; T. 463). Masbaum did not even disagree with Dr. Kiefer's testimony that some brain shrinkage was normal in elderly persons, and he conceded that Mary's atrophy was categorized as only "moderate." (T. 714, 716). So notwithstanding Mary's CT scan, ample evidence supports the referee's finding that Mary was competent and did not lack testamentary capacity.

Addressing the final factor, Masbaum argues that the referee should have believed his "expert" testimony over that of Mary's treating physician, Dr. Kiefer. (Br. 31). It is important to note that Masbaum was not introduced as an expert witness at trial.

Masbaum submitted a copy of his curriculum vitae in connection with his motion to amend the referee's findings, and therefore Masbaum was not qualified to testify as an expert at trial, and his testimony should not be considered by this court. *See Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974) (stating that in considering a motion for amended findings, a court "may neither go outside the record, nor consider new evidence"). But regardless, the referee, as factfinder, was free to reject as much of Masbaum's expert testimony as he did not believe. *Knetz v. Johnson*, 113 N.W.2d 96, 98-99 (Minn. 1962); *In re Congdon's Estate*, 309 N.W.2d at 267 ("Expert opinion testimony is not conclusive, but is merely evidence to be weighed and considered by the trier of fact."). Here, the referee chose to believe the expert testimony of Dr. Kiefer, who had been Mary's treating physician from her 2001 arrival in Minnesota until her death in 2003, over Masbaum's self-interested expert testimony based on having not seen Mary since May 2001.

For example, Masbaum testified that Mary lacked testamentary capacity because she suffered from Alzheimer's disease. (Br. 33). But Dr. Kiefer testified that he regularly treated Alzheimer's patients and was very familiar with Alzheimer's disease and other elderly dementia both professionally and personally, as his mother suffered from Alzheimer's disease. (T. 442-44). And Dr. Kiefer testified that Mary was competent when she executed her wills on June 22, August 27, and November 20, 2002. (T. 465-66).

Masbaum further testified at trial that Mary lacked testamentary capacity because he "diagnosed" her as having "Stockholm Syndrome." (Br. 33). Stockholm syndrome is

the phenomenon where a captive identifies or sympathizes with her captors. *American Heritage Dictionary of the English Language* (3d ed. 1992). Even though Masbaum had not seen Mary since May 2001, he testified that Mary was fearful of the people she was living with, and that her whole existence depended upon the Groves. (T. 721). But contrary testimony showed that Mary was happy living with the Groves (T. 331, 346, 370, 384, 449-50), and that the Groves were providing for her and taking care of all her needs. (T. 378). Masbaum also could not explain how Mary's dependence on the Groves was any different from her dependence on the Masbaums while in Indiana. Moreover, Mary's attorney, Porter, explained that he was familiar with Stockholm syndrome, and he testified that he did not believe that she suffered from Stockholm syndrome at any time. (T. 370). Andrea, a psychiatric nurse, also testified that she disagreed with this Stockholm-syndrome diagnosis. (T. 916). Also, notwithstanding Masbaum's flagrant misstatement that Dr. Kiefer "did not opine that [Mary] had testamentary capacity" (Br. 32), Dr. Kiefer did indeed testify to a reasonable degree of medical certainty that Mary was competent when she executed her wills on June 22, August 27, and November 20, 2002. (T. 465-66).

In sum, the referee carefully reviewed and weighed all the evidence and testimony and made detailed findings that Mary was neither unduly influenced nor lacked testamentary capacity. Because there is ample record evidence supporting the referee's findings, this court must affirm.

II. The district court did not abuse its discretion in refusing to award Masbaum attorney fees.

Masbaum also appeals the district court's refusal to award him attorney fees. (Br. 34). This court reviews a district court's decision to award or deny attorney fees for abuse of discretion. *Brookdale Pontiac-GMC v. Federated Ins.*, 630 N.W.2d 5, 10 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Masbaum claims that he is entitled to attorney fees under Minn. Stat. § 524.3-720 (2004), which reads:

*Any personal representative or person nominated as a personal representative who defends or prosecutes any proceeding in good faith, whether successful or not, * * * is entitled to receive from the estate * * * reasonable attorney fees incurred.*

Minn. Stat. § 524.3-720 (emphasis added). Masbaum cites to the fact that he was nominated as personal representative by Mary's 1978 will. (Br. 34). But the 1978 will is moot and irrelevant because Mary's November 2002 will is the only valid will here. And it nominates David Groves as the personal representative — not Masbaum. (A-26).⁹ Although the core of this dispute is whether Mary's November 2002 will or her 1978 will was to be probated, the referee ordered that Mary's November 2002 will be probated, and this is supported by ample evidence, as already discussed. Masbaum is not entitled to attorney fees under Minn. Stat. § 524.3-720 when he is not the personal representative under the November 2002 will under probate.

Moreover, whether the Masbaums somehow helped Mary increase or maintain the value of her financial assets during her lifetime (Br. 34) is not an issue. The statute

⁹ Mary's 2002 wills consistently name David Groves as the personal representative.

contemplates an award of attorney fees only where proceedings benefit the *estate* by increasing its *value*:

When * * * a claim is made against the personal representative on behalf of the estate and any interested person shall then by a separate attorney prosecute or pursue *and recover such fund or asset for the benefit of the estate*, or when, and to the extent that, the services of an attorney for any interested person *contribute to the benefit of the estate*, as such, *as distinguished from the personal benefit of such person*, such attorney shall be paid such compensation from the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made or from such services.

Minn. Stat. § 524.3-720 (emphasis added). In other words, the statute contemplates an award of attorney fees only where a party undertakes proceedings that result in increasing or enhancing the value of the estate. Here, Masbaum's contest of the will for his personal gain has not increased Mary's estate. Nor has any work he or his wife undertook during her lifetime. In sum, the district court properly denied Masbaum attorney fees under Minn. Stat. § 524.3-720.

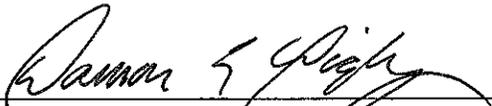
CONCLUSION

Masbaum's appeal is based on conspiracy theory and conjecture that the Groves manipulated Mary in order to get her money and poison Mary's unsound mind against the Masbaums. (Br. 5-8, 10, 21-22, 29). But the evidence that supports the referee's findings shows that the Masbaums' own conduct in alienating Mary and trying to prevent her from regaining control over her finances angered Mary to the point that she wrote the Masbaums out of her will — and evidence shows that she did this with sound mind and not under undue influence. Because ample evidence supports the referee's findings that

Mary neither lacked testamentary capacity nor was unduly influenced, they are not clearly erroneous and this court must affirm.

Respectfully submitted,

Dated: September 20, 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).