

NO. A05-1429

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State of Minnesota  
**In Court of Appeals**

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In Re: Estate of Mary Victorine Carpentier Torgerson,  
a/k/a Mary V. Torgerson,

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**APPELLANT'S BRIEF AND APPENDIX**

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Mr. Bruce W. Larson (#129227)  
Mr. Charles A. Beckjord (#186703)  
746 Mill Street  
Wayzata, MN 55391  
(952) 476-0923

*Attorneys for Appellant*  
*Dr. Ned P. Mausbaum*

Mr. Timothy W. Ridley (#130515)  
Ms. Livia E. Babcock (#299443)  
MEAGHER & GEER, P.L.L.P.  
33 South Sixth Street, #4200  
Minneapolis, MN 55402  
(612) 338-0661

*Attorneys for Respondent*  
*David P. Groves*

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## ISSUES

1. Whether the district court erred in finding that David and Mary Groves did not exercise undue influence upon the decedent?

The district court found that the Groves did not exercise undue influence upon the decedent.

*Norwest Bank Minnesota North v. Beckler*, 663 N.W.2d 571 (Minn. App. 2003).

2. Whether the district court erred in finding that the decedent, Mary Torgersen, had testamentary capacity?

The district court found that the decedent did have testamentary capacity.

*Norwest Bank Minnesota North v. Beckler*, 663 N.W.2d 571 (Minn. App. 2003).

3. Whether the district court abused its discretion in finding that Dr. Masbaum was not entitled to fees and expenses as a nominated personal representative?

The district court found that Dr. Masbaum is not entitled to his fees and expenses.

## STATEMENT OF THE CASE

This matter arose from competing Petitions to probate wills of the decedent, Mary Victorine Carpenter Torgersen, who died on April 25, 2003. A-7. David Groves sought to probate a will dated November 20, 2002, which nominated him as personal representative. A-6. Dr. Ned Masbaum sought to probate an August 8, 1978 will, which nominated him as personal representative. *Id.* The matter was tried before the Hon. Bruce Kruger, District Court Referee, on May 10-14, 2004 and June 28, 2004, in Hennepin County District Court. *Id.* The November 20, 2002 will omitted three daughters of the decedent and left everything to the fourth daughter and her husband. A-25. Ned Masbaum objected to the probate of this will as being the result of undue influence, and that the decedent lacked testamentary capacity. On October 14, 2004, Referee Kruger ordered that the November 20, 2002 will be probated, and denied the Petition of Dr. Masbaum. A-23.

Dr. Masbaum then timely sought a Judge's review of the Referee's Order Probating Will and Appointing Personal Representative.<sup>1</sup> A motion was heard on May 18, 2005 before the Hon. H. Peter Albrecht, Judge of District Court. A-2 On May 31, 2005, Judge Albrecht affirmed Referee Kruger's Findings and Order. A-3. On July 1, 2005 Judge Albrecht denied Dr. Masbaum's request for reasonable attorney's fees and

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<sup>1</sup> The transcripts in this matter approached 1,000 pages and took a some time to prepare, and this delay explains the gap in time between Referee Kruger's Order and the motion hearing.

costs. A, 4-5. In this ensuing appeal, Dr. Masbaum seeks review of both the May 31, 2005 and the July 1, 2005 Orders of the district court. A-1.

The parties and the district court agree on the law. The facts are not in dispute for the most part. The dispute lies in the application of the facts to the law. Appellant Masbaum and David Groves are brothers in law, having married sisters. EmCele Masbaum took care of her mother for a period of about thirty years, seeing to her personal needs, and managing and growing her financial assets. When EmCele had health problems, the decedent was moved to Minnesota to live with the Groves. In just over a year, the Groves succeeded in getting the 93 year-old decedent to give them everything she had, disinheriting not only EmCele, but two other daughters as well.

#### STATEMENT OF THE FACTS

The decedent, Mary Victorine Carpenter Torgersen (hereafter "Mary") was born May 26, 1909 at Aurora, IL, and died April 5, 2003 at St. Louis Park, MN. Transcript (hereafter "T"), at 5. She resided in the home of her daughter and son-in-law, Andrea and David Groves, at 10210 Portland Avenue South, Bloomington, MN from May 1, 2001, until her death—a period of less than two years. T., at 6, 10. She married Henry Torgersen on April 12, 1930. Mr. Torgersen initially worked in steel mills owned by International Harvester Company, but worked his way up into management, where he spent most of his career as Plant Manager for various International Harvester facilities. A-7. In early 1964, Henry suffered a stroke, forcing his retirement. *Id* Mary took care

of him for the rest of his life and remained a widow after Henry died in 1971. T, 259. She was survived by her four daughters, Josephine E. Dennison, Arlene R. Torgersen, EmCele Masbaum, and Andrea Groves. T, at 8.

EmCele was a devoted and very caring daughter to her mother. Since 1971 until some time after Mary had moved to Bloomington, MN, EmCele Masbaum managed Mary's finances. T, 261. She was able to invest Mary's relatively small amount of money that she received from her husband, as well as her monthly checks from Social Security and used it to provide Mary with an outstanding quality of life and exceptional living accommodations. Objector's Exh. 11 (hereafter "O."); T, 261-62. EmCele also devoted much time to Mary, in increasing amounts over the years. A-8. EmCele always made sure her mother lived near her and her husband. *Id.* EmCele helped her mother locate new apartments and move nine times, provided transportation to appointments and other events (since Mary did not drive), shopped for Mary's food, clothing, and other items, cleaned Mary's apartment, attended to her every need and laundry, and took Mary along on vacations. *Id.*; T, 265. Ned Masbaum testified that EmCele did not receive any monies or gifts at all from Mary as compensation for her services. A-8; T, 263.. David Groves admitted that EmCele had provided 22 years of care to her mother. T, at 12.

Similarly, from 1971 until sometime after Mary's move to Bloomington, Ned Masbaum managed Mary's health, by referring her to the appropriate physicians. A-8. Eventually, in the mid-1990's, he became her primary care physician as her other doctors

retired, relocated, returned to residency, or died. *Id.*, O Exh. 11 Dr. Masbaum never charged Mary for his services. T, 263-65. Dr. Masbaum made many house calls for Mary when she was sick. *Id.*

Mary's mental and emotional states were becoming increasingly impaired prior to her leaving Indiana. Dr. Masbaum, a Board Certified Psychiatrist and Forensic Psychiatrist, and Mary's primary physician for years, treated Mary for depression. T, 256, 272. Since the death of her husband in 1971 she became increasingly dependent, antisocial and negativistic. O. Exh. 11; T, 273.

EmCele suffered a sudden change in her physical health due to hypertension and cardiac irregularity. A-9. In the spring of 2001, she had an incident of extremely high blood pressure and had a "near stroke" *Id.* EmCele, who had been devoting two full days and more per week to Mary's care, and many times daily, was unable to assist Mary any longer to the degree Mary required. *Id.*, 9-10. By sudden and urgent necessity, the Masbaums decided that Mary should live with the Groves, since EmCele could no longer take care of her, and Mary did need care. This decision was made because the Groves, and David in particular, made harassing and badgering phone calls for Mary to come to live with them for years. T, 282, 288-89, 587-88.

Due to EmCele's rather abrupt decline in health, the decision to move Mary to live with the Groves was equally abrupt. A at 9, 10. ; T, 581-82. Thus, when Andrea came to visit, she was asked to take Mary with her back home. Andrea agreed to do this after

checking with her husband. A-10. The Masbaums drove to Minnesota a month later with a twenty-four foot truck load with Mary's personal items that were not initially taken with her. T, 290-91.

At the time the move took place, EmCele, Andrea, David and Mary all agreed that EmCele would continue managing Mary's finances. T, 22. It was established that Mary would not have a checking account in Minnesota. EmCele sent money—at least \$800 per month-- from Mary's account to help the Groves pay for her living expenses, and also paid Mary's charge accounts. T, 178-79. Mary was always afraid that the Groves would take her money. T, 592. She only moved there with the promise from the Groves that EmCele would continue to manage Mary's finances. *Id* Mary made stealth calls to the Masbaums when the Groves were not home, about the Groves and her wish to return to Indiana. T, 296-97.

There is evidence that the Groves had speculated for some time about the extent of Mary's financial holdings. David Groves thought that Mary had owned 10,000 shares of International Harvester stock. T, 13-15. Andrea Groves thought that her mother had \$300,000.00 invested at one time, and had further speculated that principle had grown T, at 152.

Dr. Masbaum is a successful and respected forensic psychiatrist practicing in Indiana. T, 255-57. He is engaged in private practice in psychiatry. He is on the medical staff of Clarion Methodist Hospital. He is a Court-Appointed Forensic Psychiatrist in

Marion County, and throughout Indiana. *Id.*

Andrea Groves is a part-time psychiatric nurse at Hennepin County Medical Center, who worked weekends in the last months of Mary's life. See Exh. 28, medical records dated January 24, 2003. David Groves used to work for the Minnesota Department of Transportation, but stopped working on May 11, 2001, just ten days after Mary came to live with the Groves. T, 13. Apparently, David Groves has not worked since.

Once the Groves had Mary in their clutches, they did not let go. They did not allow her to move back to Indiana. And once the Groves moved to take over Mary's finances, in the last year of her life, they did not stop until Mary had given or signed over to them everything they had. The Groves would do just about anything to get Mary's money, and they did. While not a doctor of medicine, Andrea is a psychiatric nurse. She apparently used her knowledge of Mary's mental condition to poison her relationship with the Masbaum's, feeding on the paranoia and anger that comes with senile dementia.<sup>2</sup> Specific ways the Groves, especially Andrea, poisoned the relationship with Mary and the Masbaums by convincing Mary that EmCele did not like her, had no desire to visit here, and had kept several items belonging to Mary. T-80.

EmCele visited Mary in September, 2001, while Andrea and David were in Las

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<sup>2</sup> One concrete example of this are the Doctor visits, when Mary would claim that the Masbaums had left her penniless. Andrea, present on such visits, took no action to dissuade either Dr. Keifer or Mary that this wasn't the case. T, 474-78. It can be inferred that Andrea and David Groves were actively trying to foster this idea in Mary's head.

Vegas. During her visit, which lasted several days, EmCele was not given the courtesy of having a moment alone with her mother. T, 301-302, 605-06. Various Groves' family members would drop by. *Id.* David Groves claims he was fearful EmCele would "kidnap" Mary. T, 130. The Masbaums and Mary were making plans to return her to Indiana when September 11, 2001 occurred. This event placed the move on hold. T, 302.

In the spring of 2002, EmCele found an appropriate living place for Mary near the Masbaums back in Indiana. T, 302-03, O. Exb. 24. A family member was going to take Mary back to Indiana. When Andrea Groves heard about this, she called the family member to cancel the plans. *Id.* New plans were made, including the purchase of airline tickets, which Andrea tried to return. Mary reported that Andrea threw a temper tantrum, claiming that she would have a heart attack if Mary left. T, 300.

The Groves admitted that they turned off Mary's telephone ringer. T, 18-19. Thus, when a person would call Mary, her phone would ring and ring, but remain unanswered, as the rings could not be heard. The Groves would also monitor her mail. In her final stealth call, Mary said she could not leave Minnesota because "they have no money," indicating the Groves had become dependent on her money. T, 297-98

It was at this time, as the Groves decided to take over Mary's finances, that the relationship between the Groves and the Masbaums ended, though it was never a warm relationship. As a result, the relationship between Mary and the Masbaums was poisoned by delusions implanted by the Groves as part of their scheme. Mary was 93 and in the

last year of her life. She had senile dementia and other problems relating to old age. O Exh. 19, 30.

One facet of senile dementia and Alzheimer's Disease is that the sufferer may become paranoid and experience changes in personality and mood. O, Exh. 24. Dr. Masbaum was obviously aware of these diseases and their symptoms. The Masbaums reasonably became alarmed in February 2002, when Mary started making bizarre accusations against them. T, 694.

The first blatant attempt by the Groves to take Mary's money came on March 25, 2002, when David Groves sent a revocation of EmCele's Power of Attorney to the Masbaums. O. Exh 10. The Groves helped Mary close the Indiana bank account and open a new one in Minnesota. T, 24. This came without any prior notice or reasonable discussion between Mary and EmCele. *Id.* As her treating physician for a number of years, and with Mary's abrupt personality change and delusional confusion, Dr. Masbaum credibly found that she was no longer competent, and he fought the Revocation of Power of Attorney to prevent the Groves from stealing Mary's money. The Groves' attempts to take over Mary's finances arose shortly after EmCele tried to get Mary back to Indiana.

The Groves claim that it was Mary who wanted the change of finances, and that she did this on her own. However, either David or Andrea Groves would place the call, and undoubtedly be right there as Mary made each request, as this happened with the

accountants. T. 697-698.

Appellant Dr. Masbaum claims that the only reason Mary would have transferred all of her assets to the Groves was her failing mental health and the overreaching and undue influence by the Groves. The Groves claim Mary transferred her assets because she was mad at the Masbaums. However, the Groves' claim is suspect, since the interests of Josephine and Arlene also ended up in the hands of the Groves.

The reasons Dr. Masbaum gave for finding that Mary was legally incompetent were listed in his letter to Dr. Keifer of April 15, 2002. O, Exh 19. Dr. Masbaum testified that Mary was legally incompetent to make decisions about her financial matters (T, 523-531) and that she was legally incompetent in regard to testamentary capacity T, 531-33. He noted she had not managed her finances for three decades. He noted that Mary had wanted to leave the Groves, and had a long list of complaints about living with the Groves. *Id.* When Mary breached the subject of leaving with Andrea, Andrea would throw hysterical fits of anger. At some point Mary developed a complete change of personality and outlook, and an irrational delusional anger that was directed at the Masbaums. When speaking with the Masbaums, she began to obsess that she had been "thrown out her home in the middle of the night" and that the Masbaums refused to let her take out the garbage. O, Ex. 15, R at 3 (Mary had difficulty with the garbage in her Indiana apartment and might have been injured by the garbage chute door).

The Groves saw Mary Torgersen as an asset and were only too happy to have her

move in with them. Once she was there, she was under their control and not unlike a spider pulling a valuable and vulnerable prey into its web. There, in their web, the Groves had ample time and opportunity to recover, locate and decipher her assets. No stone was left unturned.

When Dr. Masbaum and EmCele tried to fight the Groves attempts to take Mary's money, David Groves responded by filing professional complaints against Dr. Masbaum in both Indiana and Minnesota. O, Exh. 11, 12. Both complaints were dismissed. David Groves then caused to be filed a \$39 million lawsuit medical malpractice suit in federal court against Dr. Masbaum, which was also without merit and hence then voluntarily dismissed. T, 41-43. David Groves was actually hoping that Dr. Masbaum would be arrested. T, 42, 507. It is somewhat ironic that Groves wanted Dr. Masbaum arrested, given he and his wife ended up getting nearly the entire estate.

David Groves lashed out at anybody who resisted his attempts to take over the handling of Mary's money. He filed professional complaints against the accountants who did Mary's taxes, when they refused his request to give him all of Mary's financial information. T, 40. He also filed a securities complaint and a lawsuit against USAA, when they froze the principal of Mary's money to protect it from the Groves seizing it. T, 37-40. This is an indication that the Groves' animus against the Masbaums was in fact largely because the Masbaum's resisted their taking control of Mary's money, since he took similar actions against anyone who opposed his efforts to get control of her money.

The Referee distorted EmCele's initial payment for new dentures as a major reason for the deterioration of the relations between herself and the Masbaums. T, 70. EmCele did finally pay for the new dentures, but was reticent at first since 1) the last dentist Andrea Groves had taken Mary to pulled out all her teeth; 2) Mary had not wanted new dentures prior to going to Bloomington, Minnesota; and 3) it is very difficult to fit new dentures for very elderly persons, and the process requires numerous trips to the dentist. T, 670-673. The Groves used this incident to suspect that the Masbaums were stealing Mary's money, without any further evidence this was occurring. T-70,71.

It is more likely that the professional complaints and the malpractice lawsuit created an instant and great deterioration of relationship between the Groves and the Masbaums, than the incident with the dentures. Mary finally had an emotional capitulation to the Groves, who now clearly saw the Masbaums as enemies as they were preventing the Groves from getting Mary's money.

Another incident that marked the deterioration of the relationship between Mary Torgersen and the Masbaums appears to be the death of Mary's sister, Anna Carpentier, on or about April 22, 2002. Relatives of Anna had attempted to reach Mary, to inform her of her sister's final illness. T, 34-35. Unable to reach Mary on her line, one relative, Margine, called Dr Masbaum. Dr, Masbaum did not give want to give out the Groves's phone number, under directions from Mary. T, 684.<sup>3</sup> The Groves, and Mary, apparently

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<sup>3</sup> By this time, the Groves had, without prior discussion, attempted to change Mary's power of attorney. Certainly, this was an awkward situation for Dr. Masbaum.

blamed the Masbaums for preventing a final conversation between Mary and Anna. However, by the time Dr. Masbaum was contacted, Anna could no longer speak on the phone. *Id* And the primary reason Mary could not be contacted about Anna's impending death was, of course, the fact that the Groves' had turned off Mary's ringer! T, 34-35. EmCele did try to notify her mother of Anna's condition by sending a letter and a fax. T, 306. Andrea Groves could not recall whether or not she received a fax. T, 226. But the point is the Masbaums were bitterly blamed by the Groves, and Mary, for an incident that was the responsibility of the Groves. They had turned off Mary's ringer.

It appears that the Groves looked hard for or created reasons to explain Mary's disinheritance of EmCele. David Groves was asked at trial if there was anything Mary was mad at the Masbaums about before the move of May, 2001. He said she was mad she couldn't sue over being hit by an apartment door; that EmCele allegedly charged her \$50 to take her to the doctor, and David was unable to borrow a boat from Ned to take Henry out on the water. T, 63-65. This last reason seems more probably to be David Groves's problem, and not Mary's.

Between June, 2002 and November, 2002, the Groves had Mary execute no fewer than three wills. One such will, signed June 27, 2002, excluded EmCele Masbaum. O Exh, 6. The last will, and the one the Groves petitioned to probate, was dated November 20, 2002. O Exh.7. The August and November wills excluded the three other sisters and left everything to Andrea and David Groves. T, 373. These documents demonstrate the

Groves true intentions of getting their hands on Mary's entire estate.

There are independent indications that Mary was either susceptible to undue influence and/or lacked testamentary capacity at or near the signing of the November 20, 2002 will. One is the letter from Dr. Kiefer, dated November 25, 2002 in which he opined that Mary suffered from depression and is not capable of handling her finances. O Exh. 18. This letter was dated November 25, 2002, five days after the will was signed. He did find that she was lucid and capable of making rational decisions, but this finding is thrown into question by the CT scan finding of October 30, 2002, which notes that Mary suffered from moderate cerebral cortical atrophy. This scan was conducted approximately 20 days prior to the signing of the will. O, Exh. 28. Subjective signs of confusion and dizziness were noted. Also, Dr. Kiefer was surprised on the witness stand when he learned that Mary Torgersen wasn't penniless<sup>4</sup>, that her money wasn't all tied up and that she had a joint checking account with the Groves during the time period she was complaining to him that the Masbaums had stolen all of her money. T, 474-78 In other words, his opinion that she had testamentary capacity was based on largely inaccurate information—he did not understand the degree to which Mary was delusional. Dr. Kiefer admitted he never gave Mary any formal memory or psychological exam. T, 478-79. On March 11, 2003, Mary was seen by a psychologist, Michael J. Furman. He had incomplete information as well, as he was explicitly prevented by giving or receiving information with Dr. Masbaum. O, Exh. 30. He concluded she had dysfunction of the

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<sup>4</sup> As noted later, Mary died with \$25,000.00 in a Minneapolis account

frontal lobes, that she had "pseudodementia" and that she performed poorly on various psychiatric tests, including passive resistance. He stated she needed to be provided with external oversight, and that she should not act unilaterally in matters of complexity or consequence. *Id.* While he concluded that did not show the level of cognitive impairment that normally militates for legal intervention, he was not allowed to consult with Dr. Masbaum, who could have given him relevant information as her doctor for many years.

In addition, in December 2, 2002, a hearing was conducted on a proposed Conservatorship for Mary. During the hearing, both Todd Haugen, then counsel for the Masbaums, and David Porter, testified that Mary was confused and disoriented, and that attorney Porter had difficulties explaining matters to her. A-17, T, 310. She also made disruptive noises and comments in the courtroom. She recognized David Groves, but did not seem to understand the nature of the proceedings. Even her own attorney was shocked, describing her as "disoriented." T, 368. The conservatorship hearing was a mere two weeks after the last will was executed.

Mary Torgersen's Will of November 20, 2002 (exhibit 7) revealed her marked confusion by her incorrect initials. On page 2 of the Will of November 20, 2002 Mary Torgersen wrote her initials "MVC" instead of her initials "MVT". Her maiden name began with the letter C, for Carpentier. Ever since she married Henry Torgersen in 1930 she has used the initials "MVT" and always did so after Henry Torgersen's death in 1971. She never used the initials "MVC" after 1930. That she was confused about her name

points to much broader confusion as to other matters.

The August and November 20, 2002 wills omitted Josephine, Arlene, and EmCele, as "they have been already adequately provided for." However, the only money Josephine and Arlene received were proceeds from two relatively small \$2,000.00 life insurance policies Mary took out so all her daughters could afford to attend her funeral. EmCele was excluded by the Groves using Mary's signature. And the death benefits to Andrea, David, Josephine, Arlene were made while this probate matter was contested. The Referee did not mention this fact.

At the time of the August will, Mary had lived with the Groves for a year and one third. This was the period of time it took for them to convince Mary that they should have all her money, even though they were already receiving compensation for having Mary in their house.

It should be noted that Mary did not ask for a lawyer. The Groves chose and contacted David Porter for her. He testified that she had testamentary capacity, but it appears Mr. Porter has his own problems which came to light during the trial. He claimed he was suspended for five years because he had falsified documents in connection with the execution of a will. However, he also had trust account irregularities, which was not a matter he testified to. *In Re Disciplinary Action Against Porter*, 449 N.W.2d 713 (Minn. 1990). The Groves' choice of an attorney in this matter is particularly interesting. He was picked by David and Andrea's daughter, Lisa Bloomquist-Groves, herself an

attorney.<sup>5</sup> Porter did no independent investigation to see if Arlene and Josephine concurred in being disinherited, as it was claimed. T, at 379. Arlene (and possibly Josephine) had children. T, at 512- 513. If for some reason, Arlene could not receive monies for reasons relating to Medicaid, one would think she would ask that her share of the estate pass through her and go to her children. It is not likely she would have given her consent to have the Groves get all the money, as claimed.

David Groves was careful not to be present when the Wills were actually signed. However, it appears as though Andrea Groves was present when the Wills were signed, particularly the last one of November 20, 2002, which happens to be Andrea's birthday. In addition, there should have been certain "red flags" for Attorney Porter in this matter. For instance, he should have noticed that the Torgorsen's entire estate was going to the Groves-to the exclusion of all of the other relatives. This should have been particularly alarming to him since it was the Groves who had hired him to prepare these Wills and who presumably would be paying or authorizing payment of his bills. But Porter testified that no red flags came up for him. T, at 394.

Three witnesses to the wills testified that Mary seemed lucid. However, none of them realized or were told that Mary's other daughters were being disinherited. T, 322, 335, 347-48. They weren't given any information to question what was happening.

Andrea Groves, especially as a registered psychiatric nurse, knew or should have

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<sup>5</sup> Porter was likely to be sympathetic to the Grove's interests, since he had received a number of referrals from the Groves's daughter, also a lawyer. T, at 400.

known that her mother was someone who would have legally been classified as a vulnerable adult; that her mother was suffering from a number of delusions; and that her mother's mental health was deteriorating. However, instead of helping to rectify the situation, as one would expect she should have done, Andrea Groves fostered and perpetuated the situation by confirming her mother's delusional statements and assertions to Dr. Kiefer, Dr. Susan Czapiewski and others as being true and accurate.

Although the Groves testified that they didn't need the money, it certainly appears as though that was their motivation behind keeping Mary Torgersen captive in their home. Andrea Groves testified that after Mary Torgersen had come to live with them they remortgaged their house taking approximately \$100,000 worth of equity out of their home in cash with no apparent purchases on the horizon. T, 922. They continued to receive the USAA dividends throughout the course of this lawsuit. It appears as though Andrea and David Groves' only source of income is approximately \$70,000 per year from Andrea Groves' employment with the Hennepin County Medical Center. That's apparently not enough money to meet the Groves' expenses., The Groves argue that it was natural for Mary Torgersen to reward them for taking care of her during her last two years. However, even this care provided about at least an \$800.00 monthly benefit for the Groves. Meanwhile, EmCele Masbaum has received no financial benefit for the selfless care she gave her mother for the thirty years she managed her mother's finances. Dr. Masbaum received nothing for his management of Mary's health care for so many years.

The Groves further had Mary sign the necessary documents so that all funds (about \$5000.00) were withdrawn from her Indiana bank account and placed in a new account in Minnesota. A-12. This was done without notifying the Masbaums, either pre-fact or after the fact, causing EmCele to write a dishonored check (for Mary's prescriptions) *Id.* Not surprisingly, the funds went into a joint account with Mary and the Groves, with the Groves paying themselves approximately \$25,000.00 upon Mary's death. The additional monies in this account presumably came from a \$38,000.00 inheritance Mary received from the estate of her sister. T, 26-31.

The Groves' anger at the Masbaums for preventing them from getting at all of Mary's money led them to get Mary to sign documents that are truly beyond belief. A mere three months before her death, the Groves drafted a document, which they got Mary to sign, that demanded to have the Masbaums prosecuted criminally if they attended Mary's funeral or visited her grave. O, Exh. 3.

Dr. Masbaum testified that though EmCele had joint ownership of the USAA account, it was always her intention to share these funds with her sisters. T, 280.

When Mary died in April, 2003, the Masbaums were not notified by the Groves about Mary's terminal hospitalization, death, funeral or burial. The Masbaums learned of these from an anonymous source, some time after Mary's funeral. O, Exh. 16.

The Groves went farther yet. They had obituaries printed in several newspapers, including near where the Masbaums lived in Indiana, they maliciously stated that Mary

only had three daughters, intentionally omitting mention of EmCele as a child of Mary.  
This is further indication that the animus was between the Groves and the Masbaums, and  
that over time Mary took on the Groves's hatreds and prejudices.

## ARGUMENT

### I. STANDARD OF REVIEW

The district court's review of a referee's order is in the nature of a motion for amended findings or a new trial. *Kahn v. Tronnier*, 547 N.W.2d 425, 428 (Minn. App. 1996); Minn. Stat. § 53.05(b). A trial court's decision to grant a new trial will not be disturbed absent a clear abuse of discretion. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 915 (Minn. App. 2001). A verdict should be overturned only when manifestly and palpably contrary to the weight of the evidence considered in the light most favorable to the verdict. *Mrozka v. Archdiocese of St. Paul & Mpls*, 482 N.W.2d 806, 812 (Minn. App. 1992). The purpose of a motion for amended findings is to permit the trial court a review of its own exercise of discretion. *Lewis v Lewis*, 572 N.W.2d 313, 315 (Minn. App. 1979). A proper motion for amended findings must both identify the alleged defect in the challenged findings and explain why the challenged findings are defective. *Id.*

The issues of undue influence and testamentary capacity involve questions of fact. *In re Estate of Opshal*, 448 N.W.2d 96, 101 (Minn. App. 1989); *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986). The factual findings of a trial court sitting without a jury will not be set aside unless clearly erroneous. *Opshal*, 448 N.W.2d at 101. A finding will be held clearly erroneous when the reviewing court is left with the definite

and firm conviction that a mistake has been committed. *Id.*

In reviewing a referee's recommended order, the court must accept a referee's finding of fact unless clearly erroneous. Minn. R. Civ P. 53.05(b).

Undue influence and lack of testamentary capacity must be demonstrated by clear and convincing proof. *In re Reay's Estate*, 249 Minn. 123, 126-27, 81 N.W.2d 277, 280 (1957). In order to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal and uncontradicted, and intrinsically probable and credible. *Deli v University of Minnesota*, 511 N.W.2d 46, 52 (Minn. App. 1994).

## **II. APPELLANT DEMONSTRATED THAT UNDUE INFLUENCE OCCURRED**

The relevant facts in this matter are involved and convoluted, but in essence, this matter is not a complicated case. It became obvious to the Masbaums that the Groves intended to take all of Mary's money. The Masbaums attempted to intervene, to prevent this from happening. The Groves prevented Mary from returning to Indiana, and turned Mary against the Masbaums, even though EmCele had selflessly taken care of her mother for nearly 30 years. When Mary had lived for the Groves for nearly a year, the Groves, especially the unemployed David, undertook a massive campaign to get all of Mary's money. The Groves helped Mary to close her bank accounts in Indiana, not even telling EmCele either before or after the fact, in spite of her many years of taking care of Mary's money. They also drafted a revocation of EmCele's power of attorney without prior notice to EmCele. Professional complaints were made against Dr. Masbaum in both

Minnesota and Indiana. A thirty-nine million dollar medical malpractice lawsuit was filed against Dr. Masbaum in federal court. Other professional complaints and lawsuits were filed against Mary's accountants and USAA. The Groves had Mary sign a document that intended the Masbaums from attending Mary's funeral or ever visiting her gravesite. The Groves did not notify the Masbaum's of Mary's death. The Groves placed obituaries, in Indiana where the Masbaums live, that omitted mention of EmCele as a daughter.

Minnesota has noted that circumstantial evidence can be sufficient to show the existence of undue influence. *Opsahl*, 448 N.W.2d at 100. The Groves claim that 93 year-old Mary Torgersen dreamed up these actions, which the Groves merely drafted and wrote for her at her direction. It is more likely that the Groves decided at some point to take her money, and that Mary signed the numerous documents and wills at the direction of the Groves. The actions taken by the Groves are extreme, and are amply indicative that undue influence occurred.

The factors a court considers in determining if the evidence supports a finding of undue influence are: a) an opportunity to exercise influence; b) whether a confidential relationship existed between the testator and the person purportedly exercising undue influence; c) active participation in the preparation of the will by the person purportedly exercising undue influence; d) disinheritance of those who would have likely been named in the will; e) singularity of the will's provisions; and f) the use of influence or persuasion

to induce the testator to make the will in question. *Norwest Bank Minnesota North v Beckler*, 663 N.W.2d 571 (Minn. App. 2003). *In re Estate of Opsahl*, 448 N.W.2d 96, 100 (Minn. App. 1989) (citing *In re Estate of Wilson*, 223 Minn. 409, 413, 27 N.W.2d 429, 432 (1947)). Contestants of a will claiming undue influence have the burden of proving undue influence. *In Re Estate of Ristau*, 399 N.W.2d 101, (Minn. App. 1987). "A will is invalid if it is obtained through an influence which destroys the free agency of the testator and substitutes another's volition for his. Influence may be undue although it does not amount to physical coercion, but mere advice, persuasion or kindness does not constitute undue influence." *Matter of Estate of Olsen*, 357 N.W.2d 407, 411 (Minn. App. 1984). The evidence must show, not only that undue influence was exerted, but that it was so dominant and controlling of the testator's mind that in making the will, she ceased to act of her own free volition and become a mere puppet of the wielder of that influence. *In re Reay's Estate*, 249 Minn. 123, 126-27, 81 N.W.2d 277, 280 (1957). This matter represents a classic case of undue influence, as all of these factors and burdens have been met.<sup>6</sup>

A.. Whether the alleged influencer had the opportunity to exercise influence.

Andrea and David Groves and/or their family members controlled Mary Torgersen's every activity and movement 24 hours a day/7 days a week. Mary Torgersen wasn't allowed to

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<sup>6</sup> The Referee, in his report, stated that "There is little evidence of undue influence." It is difficult to see how the Referee could have arrived at this finding. The referee apparently found the Groves had a confidential relationship with decedent and that they had the opportunity to exercise influence, but did not specifically examine each factor A, at 22.

go any place or do anything without the Groves permission and consent. The Groves turned off her telephone ringer, censored her mail and decided whom she could and could not interact and socialize with. They controlled and changed her medications and took her to and from all of her doctor's appointments apparently even sitting in on those appointments for the apparent purpose of giving her doctors inaccurate information about Mary's finances. They then brought in their hand-picked Attorney, David Porter (who was previously suspended from the practice of law for 5 years over a false Will), to draft various legal and bank documents, in addition to the Wills, which they then had Mary Torgersen's signature affixed to. The purported reason for all this was the alleged worry the Masbaum's were stealing Mary's money. T, 368. However, it was the Groves who have succeeded, perhaps, in taking her money, to the detriment of all other heirs. There was no credible evidence that the Masbaums ever took any of Mary's money.

Porter testified that Mary wanted to omit EmCele since "Ned and EmCele cheated me out of just about everything I had." T, 368. This statement is false and clearly delusional. While the Masbaums took actions to protect the USAA principal, they did not take it. Mary and the Groves continued to collect the income (which the Groves received until the trial of this matter). This misstatement by Mary indicates the following possibilities: 1) a misunderstanding of the facts, indicating she was being misled by the Groves; 2) she understood what was happening but felt she had to please the Groves; or 3) she had lost her capacity to understand what was happening due to her age and advancing

dementia.

Particularly disturbing is the fact that the Groves took over Mary's bank account without any notification to the Masbaum's, either pre-fact or post-fact. Such actions, and those listed above, simply do not pass any reasonable "smell" test. The Groves did not go about acquiring Mary's money in any reasonable fashion. Mary did not call the Masbaums, the accountants, or USAA to inform them she wanted the Groves to control her finances. Rather, the Groves had her sign various documents and did things as secretly as possible, such as closing the Indiana accounts without notification to EmCele. And when anyone questioned David Groves's actions, he used harassing and intimidating tactics, such as the professional complaints and lawsuits noted above.

The lawsuit and complaint against Dr. Masbaum had a chilling effect on the Masbaums, as they risked submitting to Minnesota's jurisdiction by visiting Mary in the last year of her life. And without being here, the Masbaums could not easily have Mary seen by physicians of their own choice. Even when Mary was seen by a psychologist, Dr. Furman, that doctor was forbidden to discuss Mary's case with Dr. Masbaum.

B. Whether a confidential relationship existed between the testator and the alleged influencer.

A confidential relationship did exist, as Andrea Groves was not only Mary Torgersen's daughter but also her nurse, her caretaker and her captor. The Groves took Mary everywhere, they provided her social life. She was completely dependent on them

for everything.<sup>7</sup>

While not a doctor, Andrea Groves is a psychiatric nurse at HCMC. She would have some understanding of Mary's senile dementia. Most people, faced with a parent's dementia and accompanying paranoia, would try to reason with the parent to the extent possible, and correct their mistatements and misunderstandings. But through the myriad documents the Groves had Mary sign, it is clear that there was a clear strategy to foster and develop Mary's paranoia against the Masbaums, thus isolating Mary from her longterm caregiver.

C. Active participation in the preparation of the will by the person purportedly exercising undue influence.

While David Groves did not draft the wills, he did contact the witnesses to the wills, which indicates he knew when the wills were ready, as well as what was in each will. T, 322. And he drafted or had drafted a number of documents pertaining to this matter, such as the amended power of attorney, the professional complaint against Dr. Masbaum, the lawsuit against Dr. Masbaum, the professional complaint against the accountants, the securities complaint against USAA, the lawsuit against USAA, and finally the bizarre document forbidding the Masbaums to attend Mary's funeral or to visit her grave. It is quite interesting that David Groves quit working a mere ten days after Mary came to live there. He did not need to do this to take care of Mary, since his wife

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<sup>7</sup> While Mary was also largely dependent on EmCele, Mary did have her own space, and apparently had at least a few friends in her apartment she could visit.

worked weekends, and was therefore available to Mary during the work week. It can be inferred, from this timing and his other actions, that David Groves not only had the opportunity to exercise influence over Mary, but that it was his full time job.<sup>8</sup>

D. Disinheritance of those who would have likely been named in the will

The normal distribution of an estate would be that it would go to person's living children. It is not only abnormal, but highly unusual, that an individual would be disinheriting all of their children except for the child insisting that she make a new Will (in this case 3 new Wills). At first, only EmCele was excluded. But that was not enough for the Groves, and they made sure her last wills also disinherited Josephine and Arlene. This is not a decision Mary would have made had she been of sound mind and had not been unduely influenced by the Groves. Emcele was disinherited after having lived with the Groves for just over a year. The disinheritance of all other daughters occurred a mere two months later. The wills disinheriting the other daughters all came within on year of Mary's death.

E. Singularity of the will's provisions.

Henry Torgersen's 1965 Will, as expected, left his estate equally to all 4 of their daughters (if Mary had predeceased him). T, 271, Mary Torgersen's Will of August 28, 1978 did the same thing. Mary Torgersen's last four Wills were totally inconsistent with

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<sup>8</sup> At trial, Mr. Groves merely claimed to be Mary's typist. T, 45. Except for when he went to the law library to research federal court medical malpractice cases. T, 43. He further thought this \$39 million lawsuit was reasonable, inferring his interest in these documents was more than passive. T, 96.

that plan and the only trend seemed to be that the Groves would be more enriched (at the expense of Mary Torgersen's other 3 daughters) by each successive Will.

Further, the November 20, 2002 will indicated that the reason for omitting all daughters but Andrea was that the other daughters had otherwise been provided for. However, little was distributed to the excluded daughters outside the will. The only monies given to Arlene and Josephine were partial proceeds of very small life insurance policies, and EmCele did not get anything. And Mary told Attorney Porter that the reason for excluding Ned and EmCele was that they had cheated her out of everything, when in fact they had worked long and hard to preserve her assets, without any pecuniary reward in return. Thus, the terms of the will were neither consistent with each other nor with reality.

F. The use of influence or persuasion to induce the testator to make the will in question

Mary wanted to leave the Groves in early 2002. However, Andrea prevented this by having angry fits and threatening Mary with trying to break her heart. It was shortly after this time that Mary commenced her irrational accusations against the Masbaums, accusations that were fostered and encouraged by the Groves apparently to the point where Mary Torgersen was consumed by them. It is clear that David Groves spent numerous hours on the Internet and telephone tracking down and capturing Mary Torgersen's finances. The Groves orchestrated the need for a new Will (or Wills) and once that Will (or those Wills) had been signed they were filed with the Court and copies kept in the

Groves strong box so that they would be available for probate thereby making it almost impossible for Mary Torgersen to change or tear them up.

The Groves so dominated Mary that they got her to sign documents purporting to give authority to have the Masbaums arrested for trespass if they attended Mary's funeral or if they visited her grave. These are not documents Mary would have considered signing against anyone had she remained of sound mind and without influence.

The Referee stated that: "[Mary's] reasons for excluding her other daughters [Josephine and Arlene] are less pronounced, but she felt strongly that the Groves were the ones who had and were helping her." A. at 22. The Groves only seem capable of helping themselves, no matter what the cost to others.

Appellant brings this appeal due to the strong belief that the district court did make a mistake in not finding that undue influence had occurred. There is overwhelming evidence, both direct and circumstantial, that indicate the Groves used every weapon they could think of to get Mary's money. The Masbaum's realized this, and when they tried to prevent the theft of the estate, the Groves made sure to isolate Mary from them. This was not hard, given Mary's fragile mental state. If the district court is affirmed, it would appear that there is no real limit to what people can do in this state to steal their parent's money away from their other siblings. Therefore, appellant humbly asks that the Court review this matter carefully, and either reverse the district court or remand this matter for more appropriate findings. If this is not undue influence, it becomes hard to imagine

what does constitute undue influence.

### III. THE TESTATOR LACKED TESTAMENTARY CAPACITY

Factors considered in determining whether testamentary capacity exists include: 1) the reasonableness or naturalness of the property disposition; 2) the testator's conduct within a reasonable time before and after execution of the disputed will; 3) any prior adjudication involving testator's mental capacity; and 4) any expert testimony pertaining to the mental and physical condition of the testator. *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986).

1. The Property distribution was not normal.

A normal distribution would have left Mary's Estate equally among her daughters.

2. The Testator was confused before and after the will was signed.

Mary was very confused at the December 2, 2002 hearing for the conservatorship. About two and one-half months prior to the execution of the last will. Dr. Kiefer's letter, dated November 25, 2002 in which he opined that Mary suffered from depression and is not capable of handling her finances. While he did find her "lucid", he did not realize her complaints against the Masbaums were all delusional. This letter was dated November 25, 2002, five days after the will was signed. The CT scan finding of October 30, 2002 notes that Mary suffered from moderate cerebral cortical atrophy. This scan was conducted approximately 20 days prior to the signing of the will. About two months after the signing of the will, Mary signed documents requesting that the Masbaums be persecuted for

trespassing if they attended her funeral or visited her grave. About four months after the will signing, Michael J. Furman a psychologist, concluded she had dysfunction of the frontal lobes, that she had "pseudodementia" and that she performed poorly on various psychiatric tests, including passive resistance. He stated she needed to be provided with external oversight, and that she should not act unilaterally in matters of complexity or consequence.

3. Any prior Adjudications.

There are no prior adjudications as to Mary's capacity.

4. Any expert testimony pertaining to the mental and physical condition of the testator.

Two experts testified as to the mental and physical condition of Mary: Dr. Keifer and Dr. Masbaum. Dr. Kiefer is a family physician, for whom psychiatric training may have been optional. A family practitioner is not likely to have any training in testamentary capacity or giving courtroom testimony, although called upon after the fact as in this case. Families may ask a family practitioner to sign on to simple forms such as Power of Attorney when a signature is needed. Minimal if any formal education or training in medical-legal issues except some training in issues of medical malpractice would be required in medical school. On the other hand, a Forensic Psychiatrist has all the medical training of a family physician then years of specialty training in Psychiatry and experience and training in subspecialty training in Forensic Psychiatry. Specifically, a Forensic Psychiatrist is trained and experienced in formal evaluations of testamentary

capacity as well as competence in civil and criminal matters and is also trained and experienced in courtroom testimony in civil and criminal matters.

Dr. Masbaum testified that his full time private practice is Forensic Psychiatry. He usually testifies in court as an expert witness at least once a week or more. The bulk of his work is competency evaluations and testimony, mainly in criminal matters. Competency is basically the same evaluation in criminal and civil matters except for the differences in the statutes, parameters and issues that need to be addressed. He performs evaluations on individuals when appointed by the Court and upon the request of both Prosecuting and Defense Attorneys as well as Plaintiff and Defense Attorneys in civil and criminal matters.

In the instant case, Dr. Kiefer did not testify that he had expertise, training or experience in determining testamentary capacity or competence. He did not describe any formal examination that he performed on Mary to arrive at his determination. In fact his medical records show that he only saw Mary about four times before his determination. Each time he saw her he injected her arthritic knees. His testimony was little more than that of a fact witness rather than a skilled medical witness in the area of competency or testamentary capacity. In fact, he did not opine that she had testamentary capacity, but merely that she appeared "lucid". The referee, in failing to give the appropriate weight to Dr. Masbaum's opinion, never even mentioned that he is a forensic psychiatrist, or that determining competency is exactly what he does. The referee also discounted Dr. Masbaum's opinions as he last saw Mary in June 2001, despite the fact that Dr. Masbaum

had managed Mary's healthcare for thirty years, so that he would have been very familiar, not only with her personality, but her degenerative mental, emotional, and physical conditions, as he had tracked them for so long.

Dr Masbaum testified that Mary suffered from Alzheimer's Disease. The medical records confirmed this diagnoses. Dr. Masbaum further opined that Mary lacked testamentary capacity because she had memory impairment, confusion, delusions about the Masbaums and her financial condition, as well as irrational anger. She was not able to understand the effects of her will on her children.

Dr. Masbaum also diagnosed that Mary suffered from Stockholm Syndrome. O, Exh. 27. Stockholm Syndrome was first described in 1973 after a bank robbery in Stockholm where a number of persons were taken hostage. After the incident, the captive person had strange attitudes about their captors, including feelings of affection and emotional bonding, and not wishing for them to be prosecuted, defending them, and being angry at police. This syndrome has been noted since in other hostage situations, such as in the Patty Hearst and Elizabeth Smart cases. The issue is that the captive person is totally dependent on the captor for survival and they do everything the captor wants them to do, and an emotional bond is created. They try to please the captors. The Groves admitted that they were worried that the Masbaums would kidnap Mary from them, and that they would do things such as turning off her phone ringer. Dr. Masbaum made this diagnoses of Stockholm Syndrome from his knowledge of Mary, of forensic psychiatry, from the

phone conversations he had with Mary in which she demonstrated delusional and confused thinking, and that she needed to please the Groves. She did this by signing any document the Groves put before her.

It was easier for the Groves to exert undue influence upon Mary, due to her diminished capacity in the last year or so of her life. The Groves had her right in their midst, and they took every advantage they could of her.

#### IV. ATTORNEY'S FEES

The Referee made no Findings or Conclusions as to whether appellant Ned P. Masbaum, M.D. is entitled to reasonable attorney's fees. Minn. Stat. § 524.3-720 (2004) states that: "Any personal representative or person nominated as a personal representative who defends or prosecutes any proceeding in good faith, whether successful or not, or any interested person who successfully opposes the allowance of a will, is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney's fees incurred. Dr. Masbaum was nominated personal representative pursuant to the August 8, 1978 will, and has acted in this matter to prevent the Groves from keeping the entire estate, rather than dispersing it to all of four children of Mary Torgersen.

It cannot be said that the Masbaums did not add to the estate. It was only due to EmCele's longterm careful management of her mother's funds that there was any substantial estate at all. Appellant Masbaum tried to preserve the estate from the Groves, and EmCele is the reason there was an estate at all. See *In re Estate of Baumgartner*, 274

Minn. 337, \_\_\_, 144 N.W.2d 574, 579 (Minn. 1966).

### CONCLUSION

*Opshal* noted that "a finding will be held clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed." Appellant has reason to believe that such a mistake has been committed, and now looks to this Court to correct the errors of the district court. Appellant has shown that the Groves would and did almost anything to get control over Mary Torgersen's money. Nothing was beneath them. They took advantage of an elderly woman in the last year of her life. Appellant humbly seeks reversal, or a remand to the district court. If the current results stand, our elderly and their estates will be fair game, and seemingly no act would be off limit in the pursuit of theft.

DATED:

8-17-05

LAW OFFICE BRUCE W. LARSON



Bruce W. Larson, #129227  
Charles A. Beckjord, # 186703  
746 Mill Street  
Wayzata, MN 55391  
(952) 476-0923

Attorneys for Appellant  
Dr. Ned P. Masbaum

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**LAW OFFICE BRUCE W. LARSON**



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Bruce W. Larson, #129227  
Charles A. Beckjord, # 186703  
746 Mill Street  
Wayzata, MN 55391  
(952) 476-0923

Attorneys for Appellant  
Dr. Ned P. Masbaum

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).