

STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of:

Estate of Robert D. Mardigian,
Deceased
(a.k.a. Robert Douglas Mardigian,
deceased)

Case No. 152655
Court of Appeals Case No. 319023

Mark S. Papazian,
Petitioner-Appellee,
v.

Charlevoix County Probate Court
Case No. 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser
(P28895)

Melissa Goldberg Ryburn,
Respondent-Appellant, and

Susan V. Lucken and Nancy Varbedian,
Respondents-Appellants,
and

Edward Mardigian, Grant Mardigian
and Matthew Mardigian,
Respondents-Appellants.

Clifford W. Taylor (P21293)
Gerald J. Gleeson, II (P53568)
Paul D. Hudson (P69844)
Dawn M. Schluter (P43082)
Miller, Canfield, Paddock and Stone,
PLC
840 West Long Lake Road, Suite 150
Troy, MI 48098
(248) 879-2000
*Attorneys for Appellants Edward
Mardigian, Grant Mardigian, and
Matthew Mardigian*

Joseph A. Ahern (P38710)
Ahern & Kill, P.C.
Attorneys for Appellant Goldberg

Marc E. Thomas (P25628)
Bendure & Thomas
*Attorneys for Appellants Lucken and
Varbedian*

Kimberly J. Ruppel (P55138)
Attorney for J.P. Morgan Chase Bank

Rodger D. Young (P22652)
J. David Garcia (P60194)
Attorneys for Petitioner-Appellee

REPLY SUPPORTING
RESPONDENTS' APPLICATION FOR LEAVE TO APPEAL

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1. Introduction

The premise of appellee's position is that, even though he violated the ethics rules, the consequence of that violation remains an open question. He argues that this Court's hands are tied; the offending unethical documents are off-limits, and the Court must sit back, abide the ethical violation, and hope that someday the Attorney Grievance Commission does something to address it.

That cannot be the law in Michigan, and this Court should grant leave or peremptorily reverse to confirm that Michigan lawyers are not permitted to profit from their ethical violations. The consequence of a violation of MRPC 1.8(c) is not an open question: the consequence is that the offending gifts are void as a matter of law, each time, every time. Michigan courts do not have to look the other way when an unethical lawyer asks them to enforce an unethical provision that violates Michigan public policy; courts have the authority and obligation to void the provision to prevent the lawyer from profiting from unethical conduct. The dissent got it right: "once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent." (Dissent at 3.)

To the extent there is any lack of clarity regarding any of these issues, this is all the more reason for this Court to grant leave to appeal. Indeed, the Court of Appeals majority essentially invited this Court's review when it acknowledged that one of its other decisions voiding an unethical will "may have correctly foretold the

outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here[.]” (Slip Op. at 4.) Alternatively, because the Court of Appeals dissent got the analysis exactly right, this Court could adopt the dissent as its own and clarify Michigan law on these critical issues.

2. There is no genuine dispute: Mr. Papazian violated Rule 1.8(c).

Mr. Papazian argues that appellants are wrong to “*assume*” he violated Rule 1.8(c), and he instructs the Court to “note that there has been no admission of any violation.” (Appellee’s Br. at 2 n.3; emphasis was Papazian’s.) But there is no assumption necessary; Mr. Papazian *has* admitted a violation. Rule 1.8(c) says a lawyer “shall not” prepare a will giving the lawyer or his children any substantial gift from an unrelated client. And Mr. Papazian admitted, under oath, that he did just that: “Q: [Y]ou admit drafting . . . the Last Will? A: Yes, I do admit that.” (Ex. C, Papazian dep. at 368.) And then his lawyer admitted in open court that “there is no factual dispute” on this point. (Ex. D, Tr. Nov. 6, 2013 at 42.)

Indeed, after faulting appellants for “*assum[ing]*” a violation of Rule 1.8(c), Mr. Papazian then admits the violation again a few pages later in his brief. He admits that the decedent asked him to update his estate documents and “Mr. Papazian eventually agreed to do so.” (Br. at 7.) And he admits that “[t]he estate documents at issue here are Bobby’s June 8, 2011 Will [Ex 9] and his August 13, 2010 Trust [Ex 8],” and “Mr. Papazian drafted portions of each of them.” (*Id.*; see also *id.* at 2, admitting that he “participated in re-drafting estate documents” for the decedent.)

In short, there is no genuine dispute of fact that Mr. Papazian prepared a will and trust giving him and his children \$16 million in assets from an unrelated client. And there is no genuine dispute that this admitted conduct violated Rule 1.8(c).

3. When an attorney violates the MRPC in drafting an instrument, the offending provisions are void as a matter of law.

The consequence of Mr. Papazian's admitted violation of Rule 1.8(c) is that the offending gifts are void as a matter of law. This is because this Court's cases provide that (1) the MRPC are definitive indicators of Michigan public policy; (2) an attorney who violates the MRPC therefore violates Michigan public policy; and (3) Michigan courts may not and will not enforce provisions of a legal instrument that violate public policy. *See Terrien v Zwit*, 467 Mich 56, 67 n.11; 648 NW2d 602, 608 (2002); *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997); *La Fond v City of Detroit*, 357 Mich 362, 363; 98 NW2d 530 (1959).

Papazian responds that the "MRPCs are not the *only* source of Michigan public policy," and that MRPC 1.8(c) should not "trump" countervailing policies such as the goal to effectuate the testator's intent. (Br. at 5, 22-26.) Mr. Papazian argues that the proper course is to "balance" these competing policies through a trial in which the jury presumes undue influence but Papazian is able to try his hand at rebutting that presumption. (*See id.* at 26)

The fatal flaw in this argument is that there is no legally enforceable expression of the testator's intent here with respect to the gifts to Papazian and his children. When Papazian's pen hit the paper, so to speak, and he prepared these provisions in violation of Rule 1.8(c), the offending provisions were void ab initio as

against public policy. *See, e.g., Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 60; 672 NW2d 884 (2003) (because the attorney violated the MRPC, the offending instrument was “void ab initio” “as a matter of public policy”). Thus, there is no competing public policy to balance—the first step is determining whether the Court has before it a legally valid expression of the testator’s intent, and Papazian’s argument fails at this first step. As the dissent correctly noted, when Papazian violated the ethics rules, the legal effect of the violating provisions was a “foregone conclusion.” (Dissent at 3.)

Papazian argues that other Court of Appeals’ decisions holding that a legal instrument is void when it was prepared in violation of the MRPC are distinguishable because “there were no countervailing public policies” in any of those cases. (Br. at 26.) That is incorrect. In *Evans v Luptak* and *Morris & Doherty*, for example, there was a *strong* countervailing public policy of effectuating the contracting parties’ intent by enforcing the plain terms of their contracts. *Evans v Luptak*, 251 Mich App 187, 194-96; 650 NW2d 364 (2002); *Morris*, 259 Mich App at 60. But the court in those cases did not “balance” this policy against the policy of enforcing the MRPCs or throw it to a jury to sort out; the court in each case held that because the contract was prepared in violation of the MRPC, the contract was void ab initio, end of story. When a general policy (effectuating a testator’s or contracting party’s intent) is faced with a specific policy that covers the precise conduct at issue (don’t prepare a will or contract in violation of MRPC 1.8(c) or 5.4(a)), the specific policy controls. Indeed, as these cases recognize, it would be

“*absurd* if an attorney were allowed to enforce [a legal instrument prepared in violation of the MRPC] through court action[.]” *Evans*, 251 Mich App at 196 (emphasis added).¹

Indeed, this is the only workable rule. Mark Papazian affirmatively placed the will that he prepared in violation of Rule 1.8(c) before a Michigan court and affirmatively asked the court to declare it valid. That is the relief he seeks: “An order determining that [the will] is valid and admitted to probate.” (See Feb 17, 2012 Petition for Probate.) And that is the relief a Michigan court would have to grant him if he were to succeed in this action, *even if* the case were to proceed to a jury trial on the factual question of whether Mr. Papazian “unduly influenced” the decedent. The probate court, the Court of Appeals, and ultimately this Court would have to quite literally sign off on Mr. Papazian’s ethical violation by entering and affirming a judgment that declared to the Michigan public that a will prepared in violation of the ethics rules was nonetheless “valid” and enforceable. This is not a tenable view of Michigan law.

4. The probate code expressly provides that a will or trust fails if it is contrary to public policy.

Mr. Papazian argues that “the state legislature is vested with the power to enact statutes governing the validity of will and trusts,” and the “fact that the

¹ Papazian also cites the Court of Appeals’ majority’s long discussion of how a contract differs from a will. (Quoting Slip Op. at 6-7.) Nobody disputes that a contract is different from a will. But as the dissent correctly noted, “While the majority correctly notes that a will is not a contract, it would nonetheless be equally absurd to allow appellant to benefit from his actions in the instant case where he would be also subject to such discipline for them.” (Dissent at 2.)

Michigan legislature has chosen *not* to enact a statute barring gifts to a non-family member scrivener is pivotal here[.]” (Br. at 16-17.) “[T]his Court,” says Mr. Papazian, should not “usurp” the legislature’s role. (*Id.* at 19.)

But first, this Court reigns supreme in this area, and the Court’s clear and unequivocal prohibition of this precise conduct in MRPC 1.8(c) has the full force of statutory law. And second, there *is* a statute. MCL 700.7410(1) provides that a trust is invalid if its purposes are “*found by a court to be unlawful or contrary to public policy.*” *See also* MCL 700.7404; MCL 700.2705. Thus, the statute expressly empowers the *courts* to invalidate testamentary instruments when they are contrary to public policy. There’s no “usurping” here; the probate court correctly followed Rule 1.8(c), this Court’s precedent, and the probate code by voiding the gifts to Papazian and his children because they violate public policy.

5. Courts have the “authority and obligation” to enforce the MRPC by refusing to enforce unethical instruments.

Papazian argues that this Court must take a blind eye to his ethical violation because MRPC 1.0(b) provides that the MRPC “do not . . . give rise to a cause of action for enforcement of a rule or for damages caused by” violation of the MRPC. (Br. at 4, 20.) Thus, argues Papazian, parties may not use the MRPC “offensively,” and the only recourse for an ethical violation is to lodge a complaint with the Attorney Grievance Commission. (*See id.*)

The Court of Appeals has repeatedly rejected that argument, and for good reason. In *Evans*, for example, the court stated that “Plaintiff’s argument appears to be that judges have no ethical oversight regarding their court officers and that

the Attorney Grievance Commission is the exclusive authority regulating the ethical obligations of attorneys.” *Id.* “In this regard, plaintiff fails to understand the proper role of the court regarding the ethical conduct of its officers.” *Id.* The court noted that “Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers,” and the courts have long “taken affirmative action to enforce our ethical standards and rules regarding counsel.” *Id.* Simply put, “[t]he question of civil liability for an ethics violation is distinguishable from the present issue whether the courts of this state should enforce, and thereby sanction unethical contracts.” *Id.* at 195-96 (quoting *Abrams* dissent followed by this Court).

The same is true here. This is not a cause of action against Mark Papazian for his violation of MRPC 1.8(c), and the issue here is not whether someone can recover damages from him for his unethical conduct. The issue is whether the court “should enforce, and thereby sanction,” the unethical bequests in the estate documents that he prepared.

6. Other states

Papazian cites cases from Florida and Connecticut, “both of which declined to use the public policy of Rule 1.8(c) to trump the legislatively enacted probate statutes in their state.” (Br. at 18.) Those cases are easily distinguishable. In Michigan, the MRPC were adopted pursuant to constitutional and legislative grants of authority to establish rules of practice and procedure and regulate the conduct of members of the bar. Const 1963 art VI, § 5, MCL 600.904. In Michigan, in other words, the Supreme Court has supreme responsibility for enacting rules that regulate the conduct of lawyers. The Florida constitution, in contrast, expressly

subordinates the Florida Supreme Court's role to the legislature's, providing that the Supreme Court's adoption of rules for practice and procedure are subject to "repeal[]" by the legislature. Fla Const 1968, art V, § 2(a). And Connecticut's constitution contains no provision regarding the judiciary's authority to enact rules of professional conduct. See Conn Const 1965. The law from these states is therefore distinguishable and not persuasive authority here.²

7. Papazian raises irrelevant and immaterial factual points.

The dispositive fact in this case is that Mr. Papazian prepared a will and trust in violation of Rule 1.8(c). In his brief, Papazian raises a slew of additional, irrelevant factual points. He suggests, for example, that review of Mr. Mardigian's estate documents by other lawyers and professionals somehow scrubbed the stain of his violation of Rule 1.8(c). (See Br. at 7-8.) It did not. Rule 1.8(c) contains no exceptions. The rule provides that a lawyer "shall not" do what Mr. Papazian did; it does not say a lawyer "shall not" do it unless he "consults" with another lawyer or asks him to "review" the ethical violation.

Mr. Papazian also argues that he believes there is evidence the decedent really, truly intended to leave money to him and not to his family members and other friends. Again, this argument is immaterial and does not provide a ground for

² Moreover, other states have statutes and cases going the other way. A Texas statute, for example, expressly provides that "A devise of property in a will is void if the devise is made to . . . an attorney who prepares or supervises the preparation of the will." Tex Code 254.003(a)(1). And the Texas courts have held that even such bequests in wills prepared *before* the enactment of the statute were "void as a matter of public policy." See *Olson v Watson*, 52 SW3d 865 (Tex App 2001).

reversing summary judgment. But it is worth noting that the evidence of Mr. Papazian's undue influence is far more extensive and suspicious than Papazian lets on in his brief. In early versions of the decedent's will, for example—the versions Papazian did *not* prepare—the decedent made either no gifts or modest gifts to Papazian, and left the bulk of the estate to *another* friend, not Papazian. (See Ex. C to 4/5/12 Pet. for Partial Superv., Exs. D and M to 12/13/12 Mtn. for SD and Ex. D to 8/20/12 Motion for SD.) Then, in 2007, when Papazian became involved in the preparation of the will, lo and behold the other friend was phased out and Papazian and his children were subbed in. (See Ex. E to 4/5/12 Pet.) Papazian's stake thereafter grew with each iteration of the will he prepared. (See Ex. A to 3/5/12 Pet., Ex. YY to 8/20/13 Motion for SD, and Ex. F to 12/12/12 Pet.) Moreover, the record shows the decedent had second thoughts about leaving his estate to Papazian. On June 22, 2011, the decedent marked up a copy of the trust containing the gifts to Papazian, and wrote "ALL VOID – This Will not acceptable." (See Ex. D to 12/14/12 Motion for SD.)

On top of all that, Papazian then misrepresented to the probate court whether he prepared the will and trust, which suggests he knew he had something to hide. He represented to the court, for example, that he "played no role in drafting" the amendments to the will and "had no role in drafting the trust" and could "prove it." (Ex. 3 to Lucken Br.; Oct. 2, 2013 hg at 14.) The probate court was dumbfounded when Papazian later admitted he had in fact prepared the will and trust: "The Court did not [previously] grant summary disposition because

essentially, Mr. Young, you said that there would be facts developed at trial that would cause the trier of fact to conclude that Mr. Papazian hadn't really drafted this document[.]” (Nov 6, 2013 hg tr at 33-34.)

Finally, Papazian argues that the probate court should have considered whether Papazian and the decedent were “related” within the meaning of Rule 1.8(c) even though they're not actually related within that term's plain meaning. (Br. at 10-11.) Suffice it to say on this argument that Papazian provides no authority suggesting “related” in Rule 1.8(c) extends to “buddies who call each other ‘cousin.’” (*See id.* at 6.)

8. Conclusion

This was a problem of Mark Papazian's own making. If Bobby Mardigian truly wanted to leave his money to Mr. Papazian, it would have been *exceedingly* easy for Papazian to make that happen. He could have simply walked Mr. Mardigian down the stairs to another law firm to prepare the will. But having declined that easy option in favor of openly violating the ethics rules, Papazian cannot now wrap himself in the protection of Mr. Mardigian's “testamentary intent.” It is because of *Papazian* that the Court does not have before it a legally valid expression of Mr. Mardigian's testamentary intent. It is only Mr. Papazian to blame for this, and Mr. Papazian certainly cannot now *profit* from it. This Court should grant leave to appeal or peremptorily reverse to clarify these important issues.

Respectfully submitted,
MILLER, CANFIELD, PADDOCK AND STONE,
P.L.C.

By: /s Paul D. Hudson
Clifford W. Taylor (P21293)
Gerald J. Gleeson, II (P53568)
Paul D. Hudson (P69844)
Dawn M. Schluter (P43082)
Attorneys for Respondents-Appellants
Edward Mardigian, Grant Mardigian, and
Matthew Mardigian
840 West Long Lake Road, Suite 150
Troy, MI 48098
(248) 879-2000
gleeson@millercanfield.com
hudson@millercanfield.com

Dated: December 22, 2015

/s/ Joseph A. Ahern
Joseph A. Ahern P38710
Amanda A. Kill P68988
Ahern & Kill, P.C.
430 N. Old Woodward, Second Floor
Birmingham, MI 48009
(248) 723-6101
Attorneys for Melissa Goldberg Rayburn

/s/ Marc E. Thomas
Marc E. Thomas P25628
Bendure & Thomas
33 Bloomfield Hills Pkwy, Suite 220
Bloomfield Hills, MI 48304-2909
(248) 646-5255
Attorneys for Nancy Varbedian and Susan V.
Lucken

25670622.1\149299-00001