

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE KERSHAW COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

UNPUBLISHED OPINION NUMBER 2022-UP-243
(S.C.Ct. APP. FILED JUNE 8, 2022)

In the Matter of Almeter B. Robinson (Deceased)
Laverne Robinson, Petitioner,

v.

Willene Brooks, Mary
Green, Ronnie Robinson,
Almeter P. Harrison, Herbert
Robinson, James Robinson,
Leroy Robinson and Mary Aiken,

Defendants,

Of Whom, Mary Green, Ronnie
Robinson, Almeter P. Harrison,
Leroy Robinson and Mary Aiken are
Respondents,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 7, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Trial Court's imposition of the burden of proof on the proponent of the will on the issue of undue influence in violation of §62-3-407 S.C. Code Ann.?
2. Did the Court of Appeals err by overlooking the clear language in the Probate Judge's August 10, 2018, Order shifting the burden of proof from the contestant of the will to the proponent of the will?
3. Did the Court of Appeals err by citing numerous authorities for the proposition that the contestant of the will has the burden of proof throughout the trial, and then affirming the Probate Judge's August 10, 2018, Order that imposed the burden of proof on the proponent of the will?

STATEMENT OF THE CASE

This is an appeal from a Petition filed in the Probate Court for Kershaw County on August 14, 2017, seeking to admit a copy of a will executed by Almeter Robinson on February 3, 2015, and have the Appellant appointed as Personal Representative in accordance with the will. An Answer was filed on behalf of Respondents Mary Greene, Ronnie Robinson, Almeter P. Harrison, Leroy Robinson, and Martha Aiken asserting that the February 3, 2015, will had been revoked, that it was executed when the decedent lack

capacity or was under undue influence by the Appellant. The Answer was filed on September 15, 2017.

After the Answer was filed, but before the case was tried, the Appellant discovered and filed the original will. Also, after the Answer was filed but before the case was tried, the Respondent Martha Aiken relieved her attorney of record Moultrie B. Burns, Jr. and retained Leonard R. Jordan, Jr. to represent her in this matter.

Almeter B. Robinson died a resident of Kershaw County on February 25, 2017. At the time of her death, Almeter Robinson had no spouse, and the Appellant and the Respondents were her surviving children. Respondent Herbert Robinson died after the case was filed, but before the trial.

The case was tried before the Honorable Debra B. Branham on July 9, 2018. Her Order dated August 10, 2018, ruled that the February 3, 2015, will was properly executed according to §62-2-502; that insufficient evidence of lack of capacity by the testator to execute the will was presented; and that the February 3, 2015, will was invalid because of undue influence over the testator exerted by the Appellant. (R. p. 1-6)

The Appellant filed and served his Notice of Intent to Appeal to Circuit Court on August 17, 2018. The Appeal was heard by the Honorable Robert E. Hood on September 23, 2019. The Honorable Robert E. Hood issued his Order Affirming the Probate Court Order on October 3, 2019. The Appellant filed a Motion to Alter or Amend a Judgment under Rule 59(e) SCRCF on October 8, 2019. The Honorable Robert E. Hood issued his Amended Order Affirming Probate Court Order on January 2, 2020. The Appellant filed his Notice of Appeal on January 14, 2020. The Appellant timely ordered a transcript of

the September 23, 2019, appeal hearing which was delivered to Appellant's counsel on December 18, 2020. The Court of Appeals issued an Unpublished Opinion on June 8, 2022, affirming the Circuit Court Order dated January 2, 2020.

ARGUMENT

In law offices across South Carolina, lawyers prepare probate document packages which include a simple will in which each spouse makes the other spouse the beneficiary of the estate and names the other spouse as personal representative over the estate. The careful lawyer also prepares a durable power of attorney appointing the other spouse as agent to act for the signing spouse in case of incompetency. The lawyer has the couple execute the documents and assures them that they are now protected in the case of the death or incompetency of the other spouse.

If the lawyer has not read the unpublished opinion of the Court of Appeals in this case, he is blissfully unaware that he has just committed malpractice and misled his clients. Under the ruling in unpublished Opinion 2022-UP-243, when the client signed the durable power of attorney to his spouse, he created a "confidential relationship" with that spouse which gave rise to a presumption that the will he signed five (5) minutes earlier devising the estate to the spouse and naming her as his personal representative, and thus the proponent of his will after his death, was a product of undue influence and therefore invalid. Under the ruling of the Court of Appeals in 2022-UP-243, executing the power of attorney to the spouse gives rise to the presumption that the will devising property to the spouse is invalid. Such is the folly of the ruling by the Court of Appeals in this case. It creates the

presumption of invalidity of the will every time a spouse executes a durable power of attorney to his spouse who takes under his will and is named personal representative under his will. The unsuspecting lawyer in the above scenario, which happens every day in South Carolina, has committed malpractice by inducing his clients to sign a power of attorney that creates a presumption of invalidity as to the will that he just executed. He has charged the client a fee to prepare will that the lawyer himself has made presumptively invalid by allowing the client to sign a power of attorney to the future proponent of the will.

In the case at bar, Almeter B. Robinson, Petitioner's mother, executed a Durable Power of Attorney appointing Petitioner as her agent on August 22, 2014, and recorded the same in the ROD for Kershaw County on November 18, 2014. (R. p. 134-139) On February 3, 2015, Almeter B. Robinson executed a Last Will and Testament naming Petitioner as personal representative and distributing her property among her children including Petitioner. (R. p. 112-115) After the death of Almeter B. Robinson on February 25, 2017, Petitioner filed this action in the Kershaw County Probate Court as the proponent of the February 3, 2015, Last Will and Testament, seeking to have it admitted to probate. The Respondents filed an Answer asserting that the February 3, 2015, will was a product of undue influence by Petitioner, thus making the Respondents the contestants of the will under §62-3-407 S.C. Code of Laws Ann. which states,

“Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters which they have the initial burden of proof.”

The General Assembly did not carve out an exception, shifting the burden of proof to the proponent of the will where the proponent is the testator's agent under a

power of attorney, though it could have done so. Under the statutory law of South Carolina, the Respondents had the burden of proof as to the issue of undue influence.

The undue influence issue was tried before the Probate Judge for Kershaw County on July 9, 2018. She issued her Order on August 10, 2018, (R. p. 26-31) ruling that the February 3, 2015, will was the product of undue influence by Petitioner and therefore invalid. In reaching this result, the Probate Judge imposed the burden of proof on the Petitioner to rebut a presumption of undue influence as follows,

“If a Confidential or Fiduciary Relationship between the Testator and the Beneficiary exist, the burden of proof rebutting undue influence falls on the beneficiary. During the trial, testimony of the Plaintiff (Petitioner) beneficiary showed that a durable power of attorney existed.” (R. p.29) emphasis added

The trial court shifted the burden of proof from the contestants of the will to the proponent of the will in direct violation of §62-3-407 S.C. Code of Laws Ann. based on a fiduciary relationship between the Petitioner and the Testator created by a durable power of attorney. Her error of law was affirmed by the Court of Appeals in 2022-UP-243, creating appellate case law to the effect that the existence of a durable power of attorney between a testator and a beneficiary in a will contest creates the presumption that the will is invalid. This will create havoc in South Carolina probate law because most people grant powers of attorney to close and trusted relatives who are the same close and trusted relatives who are beneficiaries under the person’s will. The effect of Court of Appeals Opinion 2022 UP 243 is to invalidate the vast majority of wills executed in this state.

The burden shifting case law relied upon by the Court of Appeals originated in deed cases that are not controlled by §62-3-407 S.C. Code of Laws Ann. In *Middleton v. Suber*,

300 S.C. 402, 388 S.E.2d 639 (1990), the Circuit Court set aside two (2) deeds of Lake Murray lots for nominal consideration. The grantees were distant cousins of the eighty-three (83) year old grantor, and the deeds were contested after the death of the grantor by her granddaughters on the grounds of undue influence, The court in *Middleton* stated:

“A deed regular and valid on its face raises a presumption of validity....Generally, the party attacking the deed has the burden of proof.”

“Where, however, a confidential relationship exists between the grantor and grantee, the deed is presumed invalid and the burden is upon the grantee to establish absence of undue influence.”

Middleton v. Suber, supra.

The burden of proof as to deeds is shifted to the grantee by the showing of a “confidential relationship” which requires adequate evidence that the grantor placed her “trust and confidence in the grantee, and the grantee has exerted dominion over grantor.” *Brooks v. Kay*, 339 S.C. 479, 789, 530 S.E.2d 120, 125 (2000), *Middleton v. Middleton*, supra.

In the deed case of *Dixon v. Dixon* 362 S.C. 388, 608 S.E., 849 (2005) the Supreme Court found a “confidential relationship” between mother, grantor, and son, grantee, based in part on the existence of power of attorney given by mother to son. In *Dixon v. Dixon*, supra., the line between undue influence in deed cases and undue influence will cases began to blur when the court cited two (2) will cases, *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003) and *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982), as authority on general principals of undue influence law. Blurring the line between deed cases and will cases, comingling requirements of

evidence to establish undue influence between cases that challenge the validity of a deed and cases that challenge the validity of a will is harmless. However, the common law rule shifting the burden of proof from the party challenging the validity of a deed to the proponent of the deed because of a “confidential relationship” between the deed grantor and grantee set forth in *Middleton v. Middleton*, supra., cannot be exported from deed cases to will cases because the General Assembly has assigned the burden of proof in will cases on the issue of undue influence to the party challenging the validity of the will in §62-3-407 S.C. Code Ann., with no carve out exception for cases where testator and the proponent of the will have a “confidential relationship.” The statutory assignment of the burden of proof in will cases trumps the common law *Middleton* burden shifting rule.

The conflict between the statutory assignment of the burden of proof and the burden shifting common law rule began with the case of *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005). Leroy Nasser married Joann Nasser on May 24, 1999. In October, 1999 Leroy executed a durable power of attorney to his wife, Joann. On April 10, 2000, Leroy executed a Will leaving nothing to his nephews who contested the will, appointing his wife as personal representative and leaving the bulk of his estate to his wife. In other words, Leroy Nasser, who had no children executed a durable power of attorney to his wife and a simple will appointing his wife as personal representative and leaving her most of his estate. Leroy Nasser’s estate plan was identical to that recommended by competent South Carolina general practice attorneys across the state every day. However, according to Unpublished Opinion 2022-UP-243, that estate plan, the standard plan for small estates in South Carolina, is presumed to be invalid as a

product of undue influence.

The nephews who contested Leroy Nasser's will argued that the fiduciary relationship between Leroy Nasser and his wife created a presumption of undue influence shifting the burden of proof to the wife. *Howard v. Nasser*, supra. The circuit court judge ruled that the burden of proof could not be shifted to the proponent of the will and granted summary judgment against the nephew contestants of the will. The *Nasser* case went to the Court of Appeals as a challenge to the granting of summary judgment viewing all evidence in the light most favorable to the non-moving party.

The Court of Appeals in *Nasser* acknowledged that §62-3-407 S.C. Code Ann., places the burden of proof on the contestants of the will, and cited case law from *Calhoun v. Calhoun* 277 S.C. 527, 290 S.E.2d 415 (1982) interpreting the statute as follows:

When the formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity, or other basis of invalidation. The Contestants continue to bear the burden of proof throughout the will contest.

However, the court relied on a footnote in the deed case, *Dixon v. Dixon*, supra., footnote 7, to give it authority to ignore the clear language of §62-3-407 S.C. Code Ann. assigning the burden of proof to the contestants of the will throughout the will contest, and apply the burden shifting rule from deed cases and from cases decided in other jurisdictions not subject to §62-3-407 S.C. Code Ann. to South Carolina will cases.

“7. Most of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed, as does the case quoted above; nonetheless, we find no reason why this discrepancy should change our analysis. See *First Nat'l Bank of Appleton v. Nanning*, 92 Wis 2d 518, 285 N.W. 2d. 614, 623 (1979) (holding that “undue influence in the execution of an inter vivos conveyance is proved in the same way that

undue influence is proved in the execution of a will”); *Lyons v. Elston*, 211 Mass 478, 48 N.E. 93 (1912) (holding that the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the Plaintiff was unduly influenced is a will or a deed). *Dixon v. Dixon*, supra. Footnote 7

Dixon v. Dixon, supra, the Wisconsin case and the Massachusetts case cited in footnote 7 for the proposition that burden of proof rules in deed cases and will cases are interchangeable all have one thing in common, none of these cases are controlled by §62-3-407 S.C. Code Ann.

In order to resolve the conflict between its application of the burden shifting deed case rule and §62-3-407 S.C. Code Ann. which does not permit burden shifting, the *Nasser* court goes into a highly nuanced analysis by which the contestants of the will continue to bear the burden of proof after the “burden” has been shifted to the proponent of the will. The burden that is shifted under *Nasser* is the burden of going forward, not the burden of proof.

“The effect of the presumption is to shift to the proponent the burden of going forward with evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with any evidence to rebut the presumption.”

Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 at 68 (Ct. App. 2005)

In this regard, the *Nasser* opinion is consistent with Rule 301 S.C.R.E.:

“In all civil actions and proceedings not otherwise provided for by state or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of nonpersuasion, which remains throughout the trial upon the party on whom it is was originally cast.”

The assignment of the burden of proof was not an issue in the *Nasser* case because

it went up on an order granting summary judgment. Neither party had been required to offer proof of anything to a fact finder at that point. The court was looking for the scintilla of evidence necessary to defeat the motion for summary judgment that had been granted by the circuit court, and the shifting of the burden of going forward with evidence to the moving party was sufficient to defeat the grant of summary judgment.

The burden of proof and the burden of going forward are two (2) separate and distinct legal concepts. Unfortunately, that distinction flew right over the head of the Kershaw County Probate Court Judge, who is not a lawyer. More troubling is the fact that the difference between the burden of proof and the burden of going forward also illuded the Circuit Court and the Court of Appeals who affirmed the Probate Judge's assignment of the burden of proof as to undue influence to the proponent of the will, with both citing *Howard v. Nasser*, supra, as the controlling authority.

However, the last paragraph of *Howard v. Nasser*, supra., reads:

“Again, we emphasize that the burden of proof as to undue influence remains on Appellants [contestants of the will] throughout the will contest. In reversing the Circuit Court, we offer no opinion regarding Appellant's success on the merits. We merely find that Appellants offered sufficient evidence to survive summary judgment.”

In the Order dated August 10, 2018 (R. p. 26-31) the trial judge clearly ruled that burden of proof rebutting undue influence falls on the beneficiary based on the existence of a Durable Power of Attorney. (R. p. 29) This was an error of law because it violated §62-3-407 S.C. Code Ann. In Unpublished Opinion No 2022-UP-243, the Court of Appeals affirmed the trial courts without any coherent explanation. From reading 2022-UP-243, one cannot tell whether the Court of Appeals determined that the Petitioner is

mistaken and the trial court did not actually shift the burden of proof, or whether the Court of Appeals determined that the trial court did shift the burden of proof but refused to correct that error for some reason. As pointed out in the Petition for Rehearing, the Court of Appeals cited numerous authorities for the proposition that the contestants of the will bear the burden of proof in a will contest including §62-3-407 S.C. Code Ann; *Gunnells v. Harkness* 431 S.C. 116, 847 S.E. 2d.97 (Ct. App. 2020); *Calhoun v. Calhoun* 277 S.C. 527, 290 S.E.2d 415 (1982), and then without an explanation, affirmed the trial court that did the opposite.

CONCLUSION

The trial court in this case committed a serious error of law by assigning the burden of proof to the wrong party. When the trial court acts as the fact finder in a case without a jury, confusion about which party bears the burden of proof is fatal to the process of reaching a just verdict. The burden of proof matters.

The confusion over the burden of proof that infected this case was decades in the making. It began with the deed cases that shifted the burden of proof from the grantor to the grantee in undue influence cases based on a confidential relationships. The confusion progressed in *Dixon v. Dixon*, supra when the court began citing undue influence will cases in undue influence deed cases. In *Howard v. Nasser*, supra. the Court exported the burden shifting rules from deed cases into will cases. The court in *Howard v. Nasser* supra, failed to recognize the enormous difference between deeds and wills in everyday law practice. The vast majority of deeds are executed in arm's length transactions

between non-related parties. The real estate market is driven by money, not by “confidential relationships.” However, in regard to wills, the beneficiaries and the personal representatives are almost always limited to spouses, children and other special relatives, all of whom have confidential relationships with the testator. Testators do not appoint casual acquaintances as their personal representatives. They appoint their closest and most trusted relative as personal representative and that same person as agent under their durable power of attorney. We expect the personal representative and the beneficiaries in will contests to have a “confidential relationship” with the testator. That person is going to be the proponent of the will in any future will contest and creating a presumption that such a will is invalid makes no sense. With the exception of the wealthy testators who might appoint a bank trust department as personal representative, the case at bar creates the presumption of invalidity as to nearly all of the wills executed in South Carolina.

The Supreme Court has three (3) choices in this case. It can deny certiorari and leave in place the presumption that most wills executed by middle class South Carolinians are invalid products of undue influence. Or it can grant certiorari and reverse the Court of Appeals decision in 2022-UP-2432 and issue an opinion attempting to clarify that the burden shifting rule in undue influence deed cases under *Middleton v. Middleton* supra refers to the burden of proof while the burden shifting rule in undue influence will cases under *Howard v. Nasser* supra refers to the burden of going forward, and pointing out that those two (2) burdens are separate and distinct concepts. Or it can grant certiorari and overrule *Howard v. Nasser* supra., explain that burden

shifting in undue influence cases applies only to deeds, and that §62-3-407 S.C. Code Ann. controls the burden of proof in will cases, period. The third option would clear up the confusion once and for all and would remove the cloud of invalidity by undue influence from simple wills in South Carolina going forward. Option three (3) would recognize the difference between deeds that transfer real estate from one party to another in the marketplace, and wills that reward spouses and children for maintaining a close and “confidential relationship” with the testator during his lifetime with the bounty of his estate after his death. Rewarding those with a “confidential relationship” with the testator is the entire point of executing a will and imposing a punitive presumption on testators who reward their loved ones is contrary to the public good.

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