

The South Carolina Court Of Appeals
March 4, 2024
Case No. 2023-001852

I received the letter dated February 20, 2024 on Saturday the 24th of February. I have corrected the paperwork to the best I am able to understand. I pray it is correct. Thank you for your patience helping those of us that can not afford legal assistance.

Athena Irland
Appellant
186 Dolly Dimples Trl
Huger, SC 29450
843-697-3631

Athena Irland 3/4/2024

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SC Court of Appeals



The South Carolina Court of Appeals

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February 20, 2024

Athena L. Irland
186 Dolly Dimples Trail
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Re: Athena Irland v. Brandy Culp
Appellate Case No. 2023-001852

Dear Ms. Irland:

Upon reviewing your brief in support of motion for a rehearing, which this Court construes as your appellant's initial brief, the following deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter or this matter will be dismissed:

- The caption/title does not comply with Rule 267(a), SCACR. Specifically, the document must be titled "Initial Brief of Appellant".
- The document is not accompanied by the required certificate of counsel.
- The initial brief is not accompanied by a designation of matter to be included in the record on appeal. The designation of matter may only propose to include any material relevant to this appeal to be included in the Record on Appeal. Therefore, the designated material provided in the brief is being returned to you.
- The brief does not comply with Rule 208(b), SCACR. Specifically, the brief must contain the content in the following order: table of contents and cases, statement of issues on appeal, statement of the case, standard of review, argument, and conclusion.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal From Charleston County
Court Of Common Pleas

Bently Price Circuit Court Judge

Case No. 2023-001852

Athena Irland

Appellant

v.

Brandy S. Culp

Respondent

INITIAL BRIEF OF APPELLANT

RECEIVED

MAR 06 2024

SC Court of Appeals

Athena Irland
186 Dolly Dimples Trl
Huger, SC 29450
(843) 697-3631
Appellant

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In re Estate of Berg

783 N.W.2d 831 (S.D. 2010) • 2010 S.D. 48
Decided Jun 16, 2010

No. 25429.

Considered on Briefs April 26, 2010.

Decided June 16, 2010.

832 Appeal from the Circuit Court, Fourth Judicial Circuit, Meade County, Jerome A. Eckrich, III, J. *832

Stephen J. Wesolick of Wesolick Konenkamp Rounds, LLP, Rapid City, South Dakota, Jamison A. Rounds of Wesolick Konenkamp Rounds, LLP, Sioux Falls, South Dakota, Attorneys for appellant, Carol Berg Opdahl.

Gregory A. Eiesland, Aaron D. Eiesland, Johnson Eiesland Law Firm, PC, Rapid City, South Dakota, Attorneys for appellee, Helen Manns.

833 Robert Van Norman of Nooney, Solay Van Norman, LLP, Rapid City, South Dakota, *833 Attorneys for appellee, Great Western Bank.

GILBERTSON, Chief Justice.

[¶ 1.] In a probate proceeding, contestant Carol Opdahl (Opdahl) unsuccessfully objected to her uncle's will claiming lack of testamentary capacity and undue influence. We affirm.

FACTS

[¶ 2.] Fred L. Berg was born on July 27, 1919, and died on November 5, 2006, at the age of 87. He was the youngest of nine children. Fred grew up in North Dakota and served in the United States Army during World War II. He was discharged from the Army in 1943 and admitted to hospitals in Washington State and North Dakota due to service-connected schizophrenia.

[¶ 3.] Fred was eventually admitted to the Veteran Affairs (VA) Hospital in Fort Meade, South Dakota. His medical records from 1945 through 1950 indicate he suffered visual and auditory hallucinations. After several rounds of electro shock therapy, Fred experienced periods of remarkable improvement. However, he subsequently refused electro shock therapy due to unfounded fears that he had a severe back condition that could be worsened by further treatments. His medical records indicate several times that his doctors considered him to be incompetent.

[¶ 4.] In March 1950, Fred received a bilateral prefrontal lobotomy for unclassified schizophrenia.¹ His post-operative diagnoses were: (a) schizophrenic reaction, paranoid type, manifested by delusions and auditory hallucinations, peculiar hyperactive behavior, and confusion; and (b) convulsive disorder, grand mal type,

probably secondary to bilateral prefrontal lobotomy. Fred received psychotropic medications for the rest of his life including Stelazine for schizophrenia and Dilantin for the convulsive disorder. He gradually improved enough to engage in social and recreational activities, but preferred to be alone.

¹ The use of lobotomy on the mentally ill "reached the height of use just after World War II. . . . At that time, the procedure was viewed as a possible solution to the overcrowded and understaffed conditions in state-run mental hospitals and asylums." <http://www.healthline.com/galecontent/psychosurgery> (last visited June 8, 2010). The lobotomy was used frequently on shell-shocked returning World War II veterans. <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/lobotomistintroduction/> (last visited June 8, 2010). Eventually, the lobotomy was abandoned after long-term studies on the after effects began to emerge. *Id.* "For many patients the procedure resulted in a vegetative state, or reduced them to a childlike mental faculty." *Id.*

[¶ 5.] On July 6, 1950, Fred's parents brought Fred back to North Dakota to live with his sister Helen Manns and her husband on a trial basis.² He was, however, unable to function well outside of a care facility due to his tendency to set small fires while smoking. He returned to live at the VA Hospital at Fort Meade.

² Fred's records indicate he lived with Helen and her husband during high school due to some difficulty between Fred and his father.

[¶ 6.] In 1964, Fred was found to have sufficient "present contact with reality" to try a year of foster care in a private residence that provided housing for disabled veterans. His medical records indicated that he was no longer considered incompetent by his physicians. At the end of a year in foster care, Fred was found well
834 enough to relocate to Ox Yoke Ranch, a residential facility for disabled veterans in Nemo, South Dakota. *834

[¶ 7.] On February 1, 1967, the VA declared Fred incompetent under 38 C.F.R. § 3.353. That incompetency was "limited for purposes of insurance and disbursement of benefits." See 38 C.F.R. § 3.353(b)(1) (emphasis added).³ No determination was ever made by the VA as to Fred's testamentary capacity under 38 C.F.R. § 3.355.⁴

³ A declaration of incompetency under 38 C.F.R. § 3.353 is not binding on this Court on the issue of testamentary capacity. *In re Estate of Dokken*, 2000 SD 9, ¶ 21, 604 N.W.2d 487, 493.

⁴ "A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." 38 C.F.R. § 3.353(a). The determination is made by the rating agency, and is limited for purposes of insurance and disbursement of benefits. 38 C.F.R. § 3.353(b)(1).

Testamentary capacity for purposes of executing designations or changing of beneficiary is determined under 38 C.F.R. § 3.355. That section provides in relevant part:

(a) Testamentary capacity is that degree of mental capacity necessary to enable a person to perform a testamentary act. This, in general, requires that the testator reasonably comprehend the nature and significance of his act, that is, the subject and extent of his disposition, recognition of the object of his bounty, and appreciation of the consequence of his act, uninfluenced by any material delusion as to the property or persons involved.

....

(c) Lack of testamentary capacity should not be confused with insanity or mental incompetence. An insane person might have a lucid interval during which he would possess testamentary capacity. On the other hand, a sane person might suffer a temporary mental aberration during which he would not possess testamentary capacity. There is a general but rebuttable presumption that every testator possesses testamentary capacity. Therefore, reasonable doubts should be resolved in favor of testamentary capacity.

38 C.F.R. § 3.355.

[¶ 8.] After Fred was found incompetent under 38 C.F.R. § 3.353, the VA required the appointment of a guardian as a condition precedent to the receipt of future benefits. On February 28, 1967, a county court order appointed American National Bank Trust Company (nka U.S. Bank Trust National Association SD) ("U.S. Bank") as guardian. U.S. Bank served as guardian under SDC 1960 § 35.1907 until the relationship was changed to that of a conservatorship by the enactment of the South Dakota Guardianship and Conservatorship Act in 1993. *See* SDCL 29A-5-103. After the 1993 change in the code, a guardian was not appointed for Fred.

[¶ 9.] Fred remained at Ox Yoke Ranch until it closed in 1991. He was relocated to the nursing home care unit at the VA Hospital at Fort Meade until a proper nursing home placement could be found. A nursing care note in his VA Hospital records dated April 28, 1992, stated that Fred wanted to have his will drawn up. The nursing notes indicated that Fred was competent for purposes of making a will. Fred was referred to an attorney, but nothing in the nursing notes indicated that a meeting took place.

[¶ 10.] In 1992, Fred moved to the Good Samaritan Center (Good Samaritan) in New Underwood, South Dakota. He resided there until November 29, 1999, when his declining physical state required a higher level of care and he returned to the VA Hospital at Fort Meade. Fred's file indicated an increasing number of falls throughout his last three years at Good Samaritan and a progression from a cane to a walker. However, the use of these aids did not improve his gait or balance.

Relationship with Roger Berg

[¶ 11.] In 1991, Roger Berg (Roger), one of Fred's many nephews, and Roger's son visited Fred at the VA Hospital at *835 Fort Meade while in the Black Hills for a vacation. This was the first time Roger and Fred had seen each other since the two first met in 1961 when Roger was fifteen or sixteen and Fred was visiting his parents on their North Dakota farm. Fred remembered Roger and described for him their meeting in great detail. Fred described the farm layout including what crops were being grown in which fields. Fred also remembered that Roger had left before Fred that day and that Roger had his horse with him. Fred remembered the name of Roger's horse some thirty years later.

[¶ 12.] Roger and his son took Fred out to dinner that evening. While in Deadwood, they stopped at a casino because Fred wanted to play Blackjack. Roger observed that Fred was counting points as he played and was surprised that Fred was able to do so faster than Roger could. That evening a friendship began between the two men that lasted until Fred's death.

[¶ 13.] After Fred moved to Good Samaritan a few months later, Roger and Fred would see each other one to two times per year almost every year for the next sixteen years. Roger would take Fred out for a few days each time. The two traveled to the state of Washington to visit Fred's sister, Anne Hunt, and her family.⁵ Roger also brought Fred to North Dakota for a Berg family reunion where Fred spent time with his favorite sister, Helen. The two also took trips together in and around the Black Hills. Roger also regularly telephoned Fred at Good Samaritan.

⁵ It was at this time that Roger became aware that Fred had some money at U.S. Bank, as Roger was able to pay for Fred's airline ticket and then obtain reimbursement from the conservatorship account.

[¶ 14.] During the family reunion, Helen and Norma Miedema, one of Fred's nieces and sister to Opdahl and who was then serving as the family contact for Good Samaritan, asked Roger if he would be willing to serve as Fred's attorney-in-fact for health care as well as for financial and business purposes.⁶ Roger was honored to do so and on his next visit to see Fred at Good Samaritan, Roger discussed the matter with Fred who agreed it was a good idea. Roger also discussed the power of attorney with Diana Tines, Director of Social Services at Good Samaritan, who would later testify that it was a natural progression of the relationship between the two men as Roger was the only family member who routinely visited Fred.

⁶ Fred's father, Gilbert Berg, originally had served as the contact for medical providers until Gilbert was confined to a nursing home. A succession of brothers served until their deaths or disabilities, including Leonard Berg, the father of Opdahl, the will contestant in this matter.

[¶ 15.] In early December 1995, Roger made an appointment for Fred with attorney Tom Foye of the firm of Bangs, McCullen, Butler, Foye and Simmons LLP in Rapid City for the preparation and signing of the power of attorney. On December 21, 1995, during one of Roger's visits, he took Fred to Attorney Foye's office. Attorney Foye explained to Fred the purpose of a durable power of attorney and a power of attorney for health care purposes. Fred signed the power of attorney in Roger's presence. From that time on, Roger received numerous calls from Good Samaritan staff concerning Fred's health issues, medication changes, and other issues for which staff needed Roger's assistance or approval.

[¶ 16.] In the spring of 1996, Roger received a copy of an annual conservatorship report from U.S. Bank in his capacity as Fred's attorney-in-fact. He learned for the first time that Fred had a significant ⁸³⁶ amount of money. Up until that time, Roger and the entire Berg family had been under the impression that Fred was a pauper. During a family reunion, Fred had mentioned to Roger and another cousin, Kenny, that he had \$100,000 in the bank. Roger remembered he and Kenny chuckled about Fred's claim, which ultimately proved to be more than true. The conservatorship accounting indicated Fred had somewhere around \$500,000 in the bank.⁷ Roger decided against sharing the information about Fred's finances with the Berg family for two reasons: his position as a fiduciary for Fred and his concern that despite the few visits family were able to make over the past twenty years, some family members might begin visiting Fred in order to obtain access to the money or in an attempt to inherit.

⁷ The record does not indicate the source of this sum. All the record indicates is that Fred was receiving benefits from the Veteran's Administration and that his brothers deposited some funds from Gilbert Berg's estate into the account as a burial fund.

[¶ 17.] The revelations of Fred's financial condition in the spring of 1996 also prompted Roger to discuss with Fred the need for a will. Roger did not tell Fred the exact size of his bank account, but left the matter at Fred's estimation of \$100,000. Roger told Fred that in order to have a say in how his money would be distributed after death, Fred needed a will or the State of South Dakota would make that determination for him. Fred appeared to understand the purpose of a will based on his conversation with Roger and agreed to see an attorney.

[¶ 18.] Roger scheduled an appointment with Attorney Foye for December 8, 1997, for purposes of drafting Fred's will. Fred recalled Attorney Foye from the power of attorney signing in 1995. Roger took Fred to that appointment and waited in the lobby while Attorney Foye met with Fred.

[¶ 19.] Roger, a Vietnam veteran, admitted himself into a VA hospital in Kansas shortly after the December 8, 1997, appointment with Attorney Foye. He did not return to see Fred until the fall of 1998, several months after Fred signed the will. Roger continued visiting Fred until his death in 2006.

Attorney Tom Foye

[¶ 20.] Attorney Foye greeted Roger and Fred at the initial will drafting meeting on December 8, 1997. He then asked Roger to wait outside as it was Attorney Foye's practice to exclude caregivers, family members, and drivers from will meetings in order to ascertain whether there was undue influence being exerted. Attorney Foye met with Fred one-on-one for approximately twenty minutes. During that time, he asked Fred what his assets were. Fred replied he had bank accounts valued at \$100,000. When asked who his family members were, Fred answered that he had two living sisters, and somewhere around twenty nieces and nephews including Roger. Fred indicated that he wanted his will to benefit Roger and in the alternative Fred's two sisters, Anne Hunt of Washington and Helen Manns of North Dakota, if Roger predeceased Fred. Finally, Fred indicated that he wanted Roger to serve as his personal representative and U.S. Bank to serve if Roger was unable. After the meeting, Attorney Foye asked Roger to provide the full names and addresses of Fred's two sisters.

[¶ 21.] During that meeting, Fred also indicated that he had difficulty seeing well enough to read and asked that
837 Attorney Foye send him a draft copy typed in all capitals.⁸ Attorney Foye mailed a copy of *837 the draft will and a letter to Fred dated January 1, 1998. A follow-up telephone call was made by Attorney Foye in March 1998 to Tines at Good Samaritan asking Fred to return to the office and sign his will. On March 26, 1998, Alice Richter, Good Samaritan activities director, drove Fred to Attorney Foye's office. While Alice waited in the lobby, Fred signed his will, which was witnessed by Attorney Foye and his secretary Karen Fetzer (now Wenzlick). The three signatures were witnessed and notarized by Judy Schlangenhauer (now Probst). Fetzer, Schlangenhauer, and Attorney Foye all testified at trial that Fred understood who he was on the date he signed the will, knew that he was signing a copy of his last will and testament, and that there did not appear to be any improper influence exerted upon Fred in this matter.

⁸ Fred was eventually diagnosed with macular degeneration.

Good Samaritan Staff

[¶ 22.] During his eight years at Good Samaritan, Fred had regular contact with several staff members. Included among those were Tines, director of social services at Good Samaritan, who had a double major in sociology and psychology and an associate's degree in social work. She had almost daily contact with Fred. Wendy Bruns worked in the office during the time Fred was a resident and also saw him on almost a daily basis as did Richter, the activities director.

Diana Tines

[¶ 23.] According to Tines, between the time Roger took Fred to see Attorney Foye on December 8, 1997, and the time Fred signed his last will and testament on March 26, 1998, Roger did not have physical contact with Fred. The Good Samaritan staff made several telephone calls to Roger in Kansas during this time for various medical issues such as falls and routine appointments. Roger also spoke with Fred via the telephone sometime around Christmas to wish him a happy holiday. On February 2, 1997, over a month before Fred signed his will, Roger was contacted by Tines to update Fred's file and advanced health care directives. Roger told Tines that Fred did not want extraordinary measures taken including cardio pulmonary resuscitation (CPR). Tines noted this in Fred's file.

[¶ 24.] After Attorney Foye called Good Samaritan and spoke with Tines about Fred returning to sign his will, Tines became concerned that Fred might not have the legal capacity to sign his will. Her concerns were generated by a declaration of incompetency that Tines believed she had seen in Fred's VA records. However, when Tines consulted Fred's records at Good Samaritan she could find no such documentation. Tines asked Fred to sign a release of medical records form in order to obtain any relevant documentation from the VA. Despite a document request, no such forms or declaration were ever found. Tines also consulted with Jeff Denison, the trust officer at U.S. Bank, about her concerns. Denison told Tines that Attorney Foye would have asked questions to ascertain Fred's capacity to sign the will and that Attorney Foye was very experienced and well respected in the legal community. Tines documented all her inquiries in Fred's file and she considered the matter resolved. A few days after the meeting with Attorney Foye, Fred gave Tines his copy of the signed will for placement in his records.

[¶ 25.] Tines also testified that Fred declined physically in the last few years he lived at Good Samaritan progressing from the use of a cane to a walker. Tines eventually noted Fred used a wheel chair when she visited him at the VA Hospital at Fort Meade after he returned to that facility. She also noted that he had good days and
838 bad days, but more good than bad. Tines noted that Fred would "light up" *838 when Roger was expected for a visit and spoke about Roger's visits with great enthusiasm. Tines also testified that Fred would claim that the late actor Fred MacMurray⁹ was his father, but also could and did discuss his natural parents with her. She considered Fred to be an eloquent speaker; typically oriented to person, place, and time; and very intelligent. She testified that if she had been Fred she would have left everything to Roger based on their relationship and the fact that very few family members other than Roger visited Fred while he was at Good Samaritan.

⁹ Fred MacMurray, born August 30, 1908, died on November 5, 1991, after a career in theater, film, and television. His most memorable television role was as the father on "My Three Sons," from 1960 to 1972.
<http://www.imdb.com/name/nm0534045/bio> (last visited June 8, 2010).

Alice Richter

[¶ 26.] Richter was the activities director at Good Samaritan beginning in 1996 and had almost daily contact with Fred until he moved back to the VA Hospital at Fort Meade in 1999. She described him as oriented to person, place, and time, and able to participate in recreational activities. Richter noted Fred played cards, two-card bingo, watched television, and participated in social gatherings and day trips. She described him as able to participate in discussion groups on current topics as well as reminiscing groups, and he was able to discuss television programming he had recently viewed.

Wendy Bruns

[¶ 27.] Bruns worked in the office at Good Samaritan while Fred was a resident and was eventually promoted to assistant administrator. As part of her employment during Fred's time in residence, Bruns administered Mini-Mental Status Exams (MMSE) to residents to assess mental functioning and reasoning as part of care planning. Fred's MMSE results for December 29, 1997, a few weeks after his initial appointment with Attorney Foye, indicated a score of twenty-seven out of thirty.¹⁰ Fred's result on the MMSE administered by Bruns on March 27, 1998, the day after he signed his will was twenty-eight out of thirty. Bruns documented both times that Fred was "oriented times three," meaning oriented to time, place, and person. Bruns described Fred as being generally in good spirits and able to carry a conversation. Bruns also noted Fred would be excited whenever his nephew Roger was about to visit.

10 According to Dr. Stephen Manlove, an expert witness for Opdahl, a score of twenty-five or better on the MMSE indicated good cognitive function.

The Will Contest

[¶ 28.] After Fred passed away on November 5, 2006, Roger received a copy of Fred's will and learned that he was the sole heir, but that Fred's sisters, Anne, now deceased, and Helen, would have inherited in the event Roger predeceased Fred. Approximately two days later, Roger visited Helen and her daughter Virginia at Helen's home in North Dakota. Roger explained that he did not want any part of the inheritance and believed it should go to Helen. On March 10, 2007, Roger executed a disclaimer of any interest in Fred's will or estate, which he filed with the clerk of courts on March 30, 2007.

[¶ 29.] On April 10, 2007, Opdahl, Fred's niece and daughter of Leonard Berg, filed a petition for adjudication of intestacy, determination of heirs, and appointment of a personal representative. Opdahl alleged undue influence by Roger. She sought an equal distribution of Fred's estate among all eight branches of the Berg family. *839

[¶ 30.] Trial was held on the will contest on May 20, and July 8-9, 2009. Opdahl called Dr. Pablo Faustino, one of Fred's treating physicians at the VA Hospital at Fort Meade; Dr. Stephen Manlove, a psychiatrist and certified forensic psychiatrist; Jeff Denison, U.S. Bank trust officer; and Tines. She also offered her own testimony.

[¶ 31.] Dr. Manlove testified that he was asked to conduct a forensic psychiatric evaluation on the issue of Fred's testamentary capacity by counsel for the special representative. He was hired after Fred's death and never saw him personally. In rendering his opinion, Dr. Manlove read the deposition transcripts of Tines, Bruns, Richter, and Attorney Foye. He also interviewed Attorney Foye. In addition, he reviewed Fred's medical records. Dr. Manlove testified that it was his opinion that Fred was more susceptible to undue influence than the general public due to his schizophrenia. However, Dr. Manlove specifically stated that he was not testifying that Fred was influenced when he executed his will.

[¶ 32.] Dr. Manlove also opined that the record contained "evidence . . . [that] was much more overwhelming that [Fred] was probably thought disordered and psychotic on the day that the will was made." He further testified that it was significant that Fred's medical records indicated that in 1988 Fred claimed several relatives such as a non-existent sister Hattie, a non-existent niece Murtle Nash, a common-law-son Eugene Blackburn, and in 1992 a non-existent brother Charles. Dr. Manlove considered Fred's static delusion that Fred MacMurray¹¹ was his father a significant factor in rendering his opinion. He also testified that in his opinion, Attorney Foye's notes were too sparse on the issue of testamentary capacity and as such he considered Attorney Foye's statement that Fred possessed sufficient testamentary capacity on December 8, 1996, as not a credible statement. Finally, Dr. Manlove testified that he felt, after a review of the record, that he could not have defended the will signing under the South Dakota three-part test for testamentary capacity.

¹¹ Dr. Manlove noted in his testimony an exchange documented between Gilbert Berg, Fred's father, and a medical provider at the VA Hospital at Fort Meade in 1946. When asked by the doctor what Gilbert Berg's relationship was with the patient, he replied: "I'm not the father. I'm only Gilbert Berg." When asked to explain his remark, Gilbert Berg stated: "Well, that woman over there says I'm the father." Dr. Manlove opined that these types of remarks may have been the origin of Fred's confusion as to the identity of his father. It could have provided, according to Dr. Manlove, the impetus for Fred to declare Fred MacMurray was his father and on another occasion that a German doctor, who Fred claimed had taken his hand after the lobotomy and helped him off the operating table, was his father.

[¶ 33.] Dr. Faustino, who had worked in the psychiatry department at the VA Hospital at Fort Meade for twenty-seven years, but who was not board certified in psychiatry, testified Fred was not capable of independent living. He also opined that Fred's statements made at the age of seventy-seven that he wanted to go back to school, become a physician, and obtain life insurance, as well as the comments regarding Fred MacMurray, indicated unrealistic thought processes. These unrealistic thoughts, according to Dr. Faustino, were indicative of a benign psychosis. He also testified that one of the major side effects of the medication for schizophrenia, Stelazine, was Fred's loss of balance and propensity to fall. Dr. Faustino further testified that he thought it was surprising that Attorney Foye, Tines, or Denison, did not request that the VA document Fred's competency before the will signing given the VA was responsible for Fred's monies. *840 However, he also noted that there was no general policy requiring such a request and if one had been made that Fred would have been referred to a non-VA doctor for the evaluation.

[¶ 34.] Opdahl, the will contestant, testified that she first visited Fred in 1945 at a mental hospital in North Dakota when she was eleven years old while on a family trip. She next saw Fred in 1954 when Opdahl was twenty and she accompanied her father and grandfather to the VA Hospital at Fort Meade. At that time, Opdahl had just finished three months of psychiatric nursing course work, but had yet to receive a nursing degree. She testified she accompanied her father and uncle at the request of her father because Opdahl was the only family member at that time with any medical background. According to Opdahl, the VA doctors told them that after the lobotomy Fred could not think, could not reason, and could not reach valid conclusions. Opdahl last visited Fred in 1994 when she accompanied her brother Kenny on a visit. According to Opdahl's testimony, the Berg family made decisions regarding Fred as a group and that who ever was serving as the "family liaison" with the VA Hospital kept everyone informed. Opdahl expected that Roger would do the same after he was asked by Opdahl's sister, Norma, and Helen to take over in that capacity.

[¶ 35.] Opdahl became suspicious of Roger about five weeks after Fred's death when she learned the size of Fred's estate. Opdahl testified she filed the will contest because she had known since 1954 that Fred was of "unsound mind" and was "essentially a human robot" whose every activity had to be actively directed by someone else. Opdahl also testified that Helen's daughter, Virginia, and Roger's sisters were all in on a conspiracy to hide the size of Fred's estate from the rest of the family. She accused Roger of what she deemed to be two "felonies" including making a fraudulent will for his own benefit and creating the power of attorney.

[¶ 36.] After trial on the matter, the trial court entered findings of fact and conclusions of law. The trial court concluded that Fred's caretakers and companions over the last several years of his life knew Fred best and were more credible and persuasive than Opdahl's witnesses. It further concluded that Tines, Bruns, and Richter were the most knowledgeable and best able to testify to Fred's competency to execute his will. It also found Roger to be credible because of his frequent contact with Fred and the consistency of his testimony with that of Tines, Bruns, and Richter. With regard to Attorney Foye, the trial court found him credible and that his conversation with Fred was properly focused on the three-prong South Dakota test for competency to execute a will.

[¶ 37.] With regard to Dr. Manlove, the trial court gave consideration to his forensic opinion testimony. Ultimately, however, greater credence was given to the testimony of Tines, Bruns, and Richter due to their day-to-day contact with Fred over a period of several years. The trial court also gave due consideration to Dr. Faustino's testimony, but gave it less weight for the same reason as Dr. Manlove's. Finally, with regard to Opdahl, the trial court found her testimony was entitled to little credence as it was mainly hearsay-upon-hearsay, conjecture, and speculation.

[¶ 38.] The trial court concluded that Fred had testamentary capacity at the time the will was drafted and executed. It also found Fred was aware he had a sizeable estate, but because he did not spend a significant amount of money Fred had no reason to know or care about the exact amount. Further, the trial court found
841 Fred knew to whom he wanted his money *841 to go: his nephew Roger and Fred's sisters Anne and Helen.

[¶ 39.] With regard to the undue influence claim, the trial court concluded that there was a proper relationship between a loving and caring nephew and uncle. Next, it concluded that Roger did not take advantage of his relationship with Fred as a nephew or as Fred's attorney-in-fact. It also concluded there was no evidence that Roger unduly profited from Fred's will because Roger made a reasonable and credible decision to formally disclaim before the will contest was filed. The trial court also concluded there was no evidence that Roger contemplated or designed, or would benefit from, some conspiracy, subterfuge, fraud, or other machination to by-pass the legal effect of the formal disclaimer as contended by Opdahl.

[¶ 40.] Finally, the trial court concluded that Helen was the sole surviving heir and was entitled to the rest, residue, and remainder of Fred's estate under his last will and testament. Opdahl's will contest claim was dismissed on the merits and with prejudice as to her and all other heirs and heirs-at-law whether claiming by intestacy or otherwise. Opdahl appeals raising the following issues:

1. Whether the trial court erred in its application of the standard of testamentary capacity under South Dakota law.
2. Whether the trial court erred when it concluded that Fred had testamentary capacity to execute his will.
3. Whether the trial court erred when it concluded that Roger did not exert undue influence over Fred in the execution of the will.

We have combined Opdahl's issues one and two as they are essentially the same.

STANDARD OF REVIEW

[¶ 41.] A trial court's finding on the issue of a testator's testamentary capacity is reviewed by this Court under the clearly erroneous standard. *In re Estate of Dokken*, 2000 SD 9, ¶ 10, 604 N.W.2d 487, 490 (citing *In re Estate of Long*, 1998 SD 15, ¶ 9, 575 N.W.2d 254, 255). The existence of undue influence is a question of fact for the trial court and is also reviewed by this Court under the clearly erroneous standard. *Id.* (citing *In re Estate of Unke*, 1998 SD 94, ¶ 11, 583 N.W.2d 145, 147-48). Clear error is found when "after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.* (quoting *Unke*, 1998 SD 94, ¶ 11, 583 N.W.2d at 149). We resolve all conflicts in the evidence in favor of the trial court's determinations. *Id.* "The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the trial court and we give due regard to the trial court's opportunity to observe the witnesses and the evidence." *Id.* Documentary and deposition evidence are also reviewed under the clearly erroneous standard. SDCL § 15-6-52(a).

ANALYSIS AND DECISION

[¶ 42.] 1. Whether the trial court erred when it concluded that Fred had testamentary capacity to execute his will.

[¶ 43.] Opdahl argues that because Fred had a static delusion that Fred MacMurray was his father, Fred did not know the natural objects of his bounty within the meaning of our case law on testamentary capacity. Helen, as the proponent, and Great Western Bank, as the special administrator, argue that Fred's delusions did not touch his testamentary capacity because he never sought to name Fred MacMurray, or any other fictitious relatives, in his last will and testament.

⁸⁴² [¶ 44.] "An individual eighteen or more years of age who is of sound mind ^{*842} may make a will." SDCL 29A-2-501. We have defined sound mind, for purposes of testamentary capacity, as someone who "*without prompting, . . . is able 'to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty and the disposition that he desires to make of such property.'*" *Dokken*, 2000 SD 9, ¶ 13, 604 N.W.2d at 491-92 (quoting *Long*, 1998 SD 15, ¶ 21, 575 N.W.2d at 257-58 (quoting *In re Estate of Podgursky*, 271 N.W.2d 52, 55 (S.D. 1978))). For purposes of testamentary capacity, we do not require the soundness of mind enjoyed by those in perfect health, or that required to "make contracts and do business generally nor to engage in complex and intricate business matters." *Id.* (quoting *Long*, 1998 SD 15, ¶ 21, 575 N.W.2d at 257-58 (quoting *Petterson v. Imbsen*, 46 S.D. 540, 546, 194 N.W. 842, 844 (1923))). "Testamentary capacity is not determined by any single moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed." *Id.* ¶ 14, 604 N.W.2d at 491-92 (citing *Long*, 1998 SD 15, ¶ 23, 575 N.W.2d at 258).

[¶ 45.] This Court has never been asked to define the natural objects of a testator's bounty. Some courts have limited that designation to those who will inherit unless a will exists. *See Norris v. Bristow*, 358 Mo. 1177, 1187, 219 S.W.2d 367, 370 (1949) (noting nephews, nieces, brothers, sisters and other collateral heirs, are not natural or normal objects of a testator's bounty because of such relationships alone); *In re Caiman's Estate*, 179 Neb. 270, 273, 137 N.W.2d 822, 824 (1965). Other courts have noted that

collateral heirs, such as brothers and sisters, are not 'natural objects of bounty' as that term is used in the interpretation of wills, and therefore, in cases such as this, where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons, in order to establish that the instrument is unnatural, must show affirmatively that they had peculiar or superior claims to the decedent's bounty; and, if no such claim is adduced, the instrument cannot be held to be unnatural.

Stormon v. Weiss, 65 N.W.2d 475, 505 (N.D. 1954) (quoting *In re Easton's Estate*, 140 Cal.App. 367, 35 P.2d 614, 619 (1934)).

[¶ 46.] We need not settle the matter of who are the natural object's of a testator's bounty today other than to say that an imaginary father, or other fictitious relative, who is not named in the will qualifies under neither definition. Fred did not attempt to devise his estate to Fred MacMurray; his claimed German father; or the non-existent niece, brother, or common-law-son. Fred devised his estate to Roger, a nephew with whom he had a loving and long-term relationship in the last sixteen years of his life and, at the time he executed the will, his two living sisters Helen and Anne.

[¶ 47.] The trial court's finding also reconciles with our precedents in the area of testamentary capacity and insane delusions. *See In re Estate of Schnell*, 2004 SD 80, ¶ 17, 683 N.W.2d 415, 420. "The will of a testator found to suffer from an insane delusion will not be held invalid, however, unless it is shown that his delusion materially affected the terms and provisions of his will." *Id.* (citing *In re Estate of Breeden*, 992 P.2d 1167, 1171 (Colo. 2000)). *See also In re Walther's Estate*, 177 Or. 382, 398-99, 163 P.2d 285, 292 (1945).¹² The

⁸⁴³ authorities cited by Opdahl ^{*843} also support this proposition. *See In re Estate of Killen*, 188 Ariz. 562, 937

P.2d 1368, 1372 (Ariz.Ct.App. 1996) (holding to invalidate a will "the hallucinations or delusions must have influenced the creation and terms of the will such that the testator devised his property in a way that he would not have done except for the delusions.").

¹² Furthermore, there is an adequate explanation for why Fred may have developed the delusion regarding who his father was. *See supra* n. 9.

[¶ 48.] Opdahl next argues that because the trial court did not enter a specific ruling on the credibility of the contemporaneous medical records offered by Drs. Goff and Corsini, it erred. However, in the argument section of her brief, Opdahl does not indicate what portions or conclusions in those medical records she urges this Court to review other than to argue the records should be reviewed under the de novo standard when this Court is required to use the clearly erroneous standard under the provisions of SDCL § 15-6-52(a). Other than one specific reference in the fact section to Dr. Corsini of the VA Hospital at Fort Meade who indicated that Fred's psychosis was "stable," or unimproved, it is not possible to ascertain what weight Opdahl seeks to have this Court place on facts reviewed by its expert witness Dr. Manlove. The same treatment is given by Opdahl to Dr. Goff's record notes on March 25, 1998, the day before Fred signed his will. Dr. Goff indicated that Fred's "history was unreliable," complained of back pain, and was unable to stay on one subject due to disordered thoughts. Dr. Manlove used these records in order to arrive at his opinion that Fred was thought disordered and psychotic on the day he signed the will.

[¶ 49.] The trial court found the testimony of the live witnesses with whom Fred interacted on a daily basis in and around the time he executed his will to be of greatest significance. The trial court had the contemporaneous medical records of Drs. Goff and Corsini before it, which were reviewed in detail while Dr. Manlove was on the stand. The trial court found Dr. Manlove to be credible, but less so than those witnesses who knew and interacted with Fred during his years at Good Samaritan. Furthermore, Opdahl does not provide any authority to support her proposition that it was error not to make a specific finding as to the credibility of the contemporaneous medical records reviewed by Drs. Goff and Corsini. As such, that issue is waived. *See State v. Fool Bull*, 2009 SD 36, ¶ 46, 766 N.W.2d 159, 169 (citing *State v. Pellegrino*, 1998 SD 39, ¶ 22, 577 N.W.2d 590, 599). Regardless, the contemporaneous medical records were considered by the trial court and we can find no error in the manner in which it reviewed and weighed that evidence.

[¶ 50.] Opdahl next challenges the trial court's credibility determination regarding Attorney Foye and his clerical staff who witnessed Fred's signature on the will on March 26, 1998, Roger, and the Good Samaritan staff members who provided his care. We acknowledge there are some minor discrepancies in the testimony as indicated by Opdahl. We also note that there are some issues concerning the witnesses' abilities to recall details that occurred between sixteen and eleven years prior to the trial. We are not convinced, however, that the trial court was clearly erroneous when it found that Fred was competent to execute a will.

[¶ 51.] We can find no indication that the trial court erred when it found Attorney Foye to be credible. Attorney Foye's testimony was based on over fifty years of experience in assessing and determining the competency of testators and on his contemporaneous notes and billing records. Attorney Foye testified to events that happened some eleven years before the trial. His memory and testimony were not perfect, but were thoroughly cross-

844 examined *844 and remained consistent throughout.

[¶ 52.] With regard to Opdahl's challenge to Roger's testimony, we can give no credence to the suggestion that a fiduciary who keeps his principal's confidential information from other family members is not credible as a consequence. Whether Opdahl believed Roger's role was to share information with the family is not controlling in determining Roger's credibility. Opdahl conceded that other family members who served as the liaison

between Fred's caregivers and the family did not provide a steady stream of information, nor did she pursue those individuals when she did not receive any updates over a period of several years. We also decline to recognize that the extended members of the Berg family had a right to know anything about Fred's health issues, financial affairs, or his last will and testament. Again, Opdahl provides no authority for her proposition that she had a right to this information. *See id.*

[¶ 53.] Finally, Opdahl's argument that Tines' testimony is entitled to less credibility than the trial court gave it is without support in the record. It is true that Tines never testified that Fred got better, knew the nature and extent of his estate, or knew the natural objects of his bounty. However, she was never asked to do so. We can find no error by the trial court in its credibility determination regarding Tines, or any of the other witnesses whose testimony Opdahl was able to test at trial.

[¶ 54.] 2. Whether the trial court erred when it concluded that Roger did not exert undue influence over Fred in the execution of the will.

[¶ 55.] Opdahl argues that in the event that this Court finds Roger's testimony less than credible the door is open to a claim of undue influence. In order to advance this claim, this Court must accept that Roger and Virginia entered into an agreement whereby Roger would receive a portion of the inheritance despite having signed and filed a disclaimer. We would have to do so despite the trial court's finding that such an agreement was never made. Apart from Opdahl's claims, there is nothing for this Court to review under Issue 2 as there is no testimony or documentary evidence showing that Roger entered into such an agreement.

[¶ 56.] Affirmed.

[¶ 57.] ZINTER, MEIERHENRY and SEVERSON, Justices, and MILLER, Retired Justice, concur.

[¶ 58.] MILLER, Retired Justice, sitting for KONENKAMP, Justice, disqualified.

2

In re Estate of Cumbee

333 S.C. 664 (S.C. Ct. App. 1999) · 511 S.E.2d 390
Decided Jan 4, 1999

Opinion No. 2920.

Submitted December 8, 1998.

665 Decided January 4, 1999. *665

Appeal From Berkeley County, R. Markley
Dennis, Jr., Circuit Court Judge.

666 Affirmed. *666

Shirrese B. Brockington, of Charleston, for
Appellant.

Benjamin Goldberg, of Charleston, for
Respondent.

667 *667

ANDERSON, Judge:

This case involves a will contest between two sons of the late Lillian Cumbee. The probate judge rejected wills Mrs. Cumbee executed in 1991 and 1994, finding both were the product of undue influence. The judge admitted for probate a will Mrs. Cumbee executed in 1987, and included in her estate funds her son Calvin Cumbee held in his own name. The circuit court affirmed in result. Calvin appeals. We affirm.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTUAL/PROCEDURAL BACKGROUND

On February 6, 1987, Lillian Cumbee and her husband, Jasper L. Cumbee, Sr., executed a joint will in which each left the estate to the other. The

will provided that in the event of their simultaneous deaths or upon the death of the survivor, their estate (with the exception of a few specific devises) was to be distributed to their son, Calvin Cumbee, to be held in trust for the lifetime care of their disabled daughter, Garnetta Cumbee. Upon Garnetta's death or, if Garnetta predeceased the Cumbees, upon the death of the Cumbees, the remainder was to be divided equally among the 668 Cumbees' eight other children. *668

Mr. Cumbee passed away on July 26, 1988, leaving Mrs. Cumbee over \$140,000 in cash and property. Shortly after her husband's death, Mrs. Cumbee moved in with her son Calvin and his wife, Ruth. Mrs. Cumbee returned to her own home several times before finally taking up permanent residence with Calvin and Ruth in early 1989. Mrs. Cumbee was then in her early 80's, and Ruth was primarily responsible for taking care of Mrs. Cumbee's daily needs and administering her various medications. Mrs. Cumbee reportedly paid Calvin \$150 per week to live in his home; Calvin acknowledged receiving only \$100 per week. Within a year of his father's death, Calvin completely took over his mother's financial affairs.

On March 6, 1991, Mrs. Cumbee executed a second will, naming her son Melvin Cumbee as executor. The 1991 will expressly revoked all prior wills and the trust fund for Garnetta, and directed that her estate be distributed equally to all of her children who survived her. This will was made while Mrs. Cumbee was visiting with her son Melvin at his home in Hanahan.

Before her health started to fail, Mrs. Cumbee would occasionally spend the day with her sister-in-law, Myrtle Wright, or spend the week with one of her daughters, Maxine Nobles. However, after her health problems decreased her mobility, Mrs. Cumbee spent most of her time in her bedroom at Calvin's house. Although she was staying in his home, sometimes a week would pass where Mrs. Cumbee did not see Calvin.

On February 15, 1994, Mrs. Cumbee executed a third will which revoked all prior wills. Mrs. Cumbee named her son Calvin as her personal representative and left him her entire estate, with one dollar for each of the remaining children, including her disabled daughter Garnetta. In the event Calvin predeceased Mrs. Cumbee, Calvin's wife, Ruth, was to receive \$30,000, and the other children were to take the residue of the property per capita.

Mrs. Cumbee died in Berkeley County on September 23, 1994 at the age of 89. Calvin offered the 1994 will for probate. He listed a residence valued at \$35,900 as the only asset of 669 the *669 estate. Melvin offered the 1991 will for probate. A will contest ensued.

The probate judge found Mr. and Mrs. Cumbee contracted to make a joint will providing for the lifetime care of their incapacitated daughter Garnetta. The judge found the 1987 reciprocal will created a valid contract and Mrs. Cumbee must be held to the contractual obligations to her husband. As an additional sustaining ground, the judge found the 1991 and 1994 wills were invalid due to Mrs. Cumbee's diminished capacity² and the evidence of undue influence. Accordingly, the judge denied probate of the 1991 and 1994 wills and ordered that the terms of the 1987 joint will be carried out. The judge determined Mrs. Cumbee's estate consisted primarily of a home worth around \$35,000 and approximately \$107,000 in cash which was held mostly in certificates of deposit. The money was left to Mrs. Cumbee by her husband and was originally deposited in accounts

jointly held with her son Calvin. However, approximately one year after his father's death, Calvin transferred the money out of his mother's joint accounts and into accounts held solely in his own name. The probate judge found this money was an estate asset.

² The judge found Mrs. Cumbee was not mentally incompetent.

Calvin appealed to the circuit court, contending the probate judge erred in denying probate of the 1994 will on the ground of undue influence and in including the \$107,000 held in Calvin's name in Mrs. Cumbee's estate. The circuit court rejected the probate judge's finding the 1987 will created a contractual obligation, stating under the South Carolina Probate Code, the execution of a joint will does not create a presumption of a contract not to revoke the will. *See* S.C. Code Ann. § 62-2-701 (Supp. 1997). However, the court affirmed the probate judge's ruling the 1994 will was vitiated by undue influence and, since the will was void *ab initio*, the 1987 will was not revoked and remained valid at the time of Mrs. Cumbee's death.³ The 670 court affirmed in result the *670 probate judge's decision to probate the 1987 will. Finally, the court affirmed the probate judge's decision to include in Mrs. Cumbee's estate the \$107,000 held by Calvin in his own name. Calvin appeals.⁴

³ The circuit court noted both the 1991 and 1994 wills were the product of undue influence; thus, neither will effectively revoked the 1987 will. However, the court stated Calvin did not appeal the probate judge's ruling regarding the validity of the 1991 will; therefore, the 1991 will would not be considered by the court.

⁴ Neither party appealed the circuit court's ruling the 1987 will did not create a contract to will. This ruling and the probate court's unappealed rejection of the 1991 will are now the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255

S.C. 159, 177 S.E.2d 544 (1970) (an unchallenged ruling, "right or wrong," is the law of the case).

ISSUES

I. Did the circuit court err in finding the 1994 will was the product of undue influence?

II. Did the circuit court err in disregarding the fact Mrs. Cumbee had the opportunity to change her 1994 will after the alleged exercise of undue influence?

III. Did the circuit court err in finding S.C. Code Ann. § 62-2-508 (1987) addresses only revival of a former will in cases where a subsequent will has been revoked by a physical act?

IV. Did the circuit court err in finding the \$107,000 in Calvin's name should be included in Mrs. Cumbee's estate?

STANDARD OF REVIEW

An action to contest a will is an action at law. *Johnson v. Johnson*, 235 S.C. 542, 112 S.E.2d 647 (1960); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App. 1997); *Golini v. Bolton*, 326 S.C. 333, 482 S.E.2d 784 (Ct.App. 1997). If the proceeding in the probate court is in the nature of an action at law, the circuit court and this Court may not disturb the probate judge's findings of fact unless a review of the record discloses there is no evidence to support them. *See In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454.

Under the Probate Code, a circuit court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on
671 appeal. S.C. Code *671 Ann. § 62-1-308(d) (Supp. 1997); *In re Howard*, 315 S.C. 356, 434 S.E.2d 254.

LAW/ANALYSIS

I. EXISTENCE OF UNDUE INFLUENCE

Calvin first contends the circuit court erred in affirming the probate judge's finding the 1994 will was void on the ground of undue influence. We disagree.

"Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity." S.C. Code Ann. § 62-3-407 (Supp. 1997). *See also Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (the contestant has the burden of proof as to any alleged invalidity once due execution of the challenged will is proved).

In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice. *Todd v. Woodard*, 297 S.C. 264, 376 S.E.2d 276 (1989). "Undue influence, the influence necessary to void a will, 'must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; [further, there must be proof that the act was obtained by this coercion;] by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear.'" *Calhoun v. Calhoun*, 277 S.C. 527, 532, 290 S.E.2d 415, 418 (1982) (quoting *Floyd v. Floyd*, 3 Strob. 44, 34 S.C.L. 23 (1848)). A mere showing of opportunity or motive does not create an issue of fact regarding undue influence. *Todd*, 297 S.C. 264, 376 S.E.2d 276.

"In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing
672 fiduciary relationship at the time of or *672 before the will's execution." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct.App. 1993) (citing *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Our supreme court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." *Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983). However, the circumstantial evidence must point unmistakably and convincingly to the fact that the mind of the maker was subject to that of some other person so the will is that of the latter and not of the former.
Id.

Although Mrs. Cumbee had access to a telephone and visitors, Ruth and Calvin monitored her conversations with a baby monitor. Calvin admitted he told his wife to listen in on conversations his mother had with his brother Melvin and Melvin's wife, Maxine. Mrs. Cumbee felt uneasy talking around the monitor. To avoid Ruth hearing her conversations, Mrs. Cumbee developed hand signals to communicate with her visitors.

The record additionally contains evidence of threats and fear. Betty Cumbee, Calvin's daughter-in-law, testified Mrs. Cumbee did not like living with Calvin and Ruth but felt she had no choice. She was afraid of being placed in a nursing home. Betty recalled Mrs. Cumbee telling her, "If I don't do what they say they'll put me in a nursing home." Calvin admitted his mother had told him that "she was afraid of having to go to a nursing home."

Further, Calvin had a fiduciary relationship with his mother. "A confidential or fiduciary relationship exists when one imposes a special

confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Brown v. Pearson*, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct.App. 1997) (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct.App. 1987)). Calvin had his mother's power of attorney. He also managed all of her finances, including keeping her checkbook. Although Calvin wrote checks for his mother, he could not produce the check register at
673 trial. The circuit court found a fiduciary *673 relationship created a presumption of undue influence. See *Byrd*, 279 S.C. 425, 308 S.E.2d 788; *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948); *Hembree*, 311 S.C. 192, 428 S.E.2d 3.

The evidence also indicates Calvin utilized undue influence to compel Mrs. Cumbee to execute the 1994 will, and he controlled the execution of the will. Mrs. Cumbee gave her directions for the new will to her attorney's office by telephone. Because Mrs. Cumbee was confined to the house, Calvin picked up the will from the attorney's office for the execution. Calvin selected the witnesses for the execution of the will. Two of the witnesses, John and Barbara Bihlear, rented Mrs. Cumbee's house from Calvin. The witnesses testified Mrs. Cumbee was aware that she was executing a will. However, they stated the will was not read in their presence and Mrs. Cumbee did not discuss the contents of the will. Calvin did not give a copy of the will to his mother. Instead, he put the original in a safety deposit box.

When Mrs. Cumbee was in the hospital after executing the 1994 will, Ruth stayed with her constantly to prevent her from being alone with Mrs. Cumbee's son Melvin. According to Betty Cumbee, Ruth was afraid Melvin would ask Mrs. Cumbee about the will and she did not want Mrs. Cumbee to talk about the new will and its provisions with Melvin.

There is evidence which indicates the disposition of Mrs. Cumbee's estate in the 1994 will did not comport with her expressed intentions. Five months before she died, Mrs. Cumbee told Myrtle Wright, her sister-in-law and best friend, that she wanted her children to sell her belongings after she died and to divide the proceeds equally. Mrs. Cumbee stated she did not think it would be right to leave her property to one child when she had nine children. Mrs. Cumbee told Wright that Calvin had asked her to give him the home she owned, but she refused. Calvin then asked her to sell him the home, but she again refused. Mrs. Cumbee executed the 1994 will in February of 1994, approximately seven months before her death in September 1994 and, thus, two months before this conversation.

Calvin argues the circuit court erred in disregarding the testimony of the subscribing
674 witnesses to the will and the legal *674 secretary who spoke to Mrs. Cumbee two weeks before the will was executed. However, based on our limited standard of review, we hold the record presents sufficient evidence to support the lower court's finding of undue influence.

II. OPPORTUNITY TO CHANGE THE 1994 WILL

Calvin next argues the lower court erred in voiding the 1994 will on the ground of undue influence because Mrs. Cumbee had the unhampered opportunity to change her will after the alleged exercise of undue influence. He cites *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946) and *Hembree*, 311 S.C. 192, 428 S.E.2d 3, for the proposition that where the decedent had an unhampered opportunity to revoke the will, but made no change in it, the testimony of undue influence is generally destroyed.

This issue was neither raised to nor ruled on by the probate judge. Accordingly, it is not preserved for review by this Court. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997) (issue may not be raised for the first time on

appeal); *Collins v. Pilgrim Health Life Ins. Co.*, 201 S.C. 166, 21 S.E.2d 576 (1942) (issue should be raised in trial court and on appeal to be properly preserved for review).

III. REVIVAL OF 1987 WILL

Calvin alleges the circuit judge erred in holding S.C. Code Ann. § 62-2-508 (1987) of the Probate Code does not apply to the case *sub judice*. This statute deals with revival of a former will upon the revocation of a subsequent will. Under Calvin's reliance on the statute, the third (1994) will's revocation of the second (1991) will would be presumed not to "revive" the first (1987) will.⁵ We disagree.

⁵ The first (1987) will was expressly revoked by language contained in the second (1991) will; the second (1991) will was, in turn, expressly revoked by the third (1994) will.

Initially, it is questionable whether the issue was preserved for appeal. Calvin failed to challenge the probate judge's enforcement of the 1987 will on this basis with a Rule 59(e), SCRPC motion. See *In re Estate of Timmerman*, Op. No. 2831 (S.C.Ct.App. filed July 6, 1998) (Shealy Adv. Sh. No. 24 at 17) (when probate judge grants certain relief not previously contemplated, the aggrieved
675 party *675 must move, pursuant to Rule 59, SCRPC, to alter or amend the judgment in order to preserve the issue for appeal).

In any event, there was no reversible error. Under the Probate Code, the revocation of a subsequent will by either a physical act or a writing such as a third will is presumed not to revive a former will. S.C. Code Ann. § 62-2-508(a) (b) (1987). The circuit judge generally noted that section 62-2-508 applies only to revival of a former will in cases where a subsequent will has been revoked by a physical act. However, section 62-2-508 is divided into two sections, one dealing with revocation by a physical act *and* the other governing revocation of a subsequent will by a writing.⁶ Nevertheless, the case before us does not present the issue of

whether the 1987 will was revived by revocation of a subsequent will with a third will. Rather, the probate judge held the 1991 and 1994 wills were vitiated by undue influence and were therefore void *ab initio*; the judge did not find these wills were revoked by a subsequent writing. The circuit court affirmed these findings. Section 62-2-508 clearly is not applicable. Consequently, there was no error in refusing to apply the statute's presumption against revival.

⁶ Subsection (b) provides as follows: "The revocation by a third will . . . of a will made subsequent to a former will, where the subsequent will would have revoked the former will if the subsequent will had remained effective at the death of the testator, shall not revive or make effective any former will except to the extent it appears from the terms of the third will that the testator intended the former will to take effect." S.C. Code Ann. § 62-2-508(b) (1987).

IV. INCLUSION OF \$107,000 IN THE ESTATE

Calvin finally argues the court below erred by including in his mother's estate \$107,000 that was held in his individual account. We disagree.

Mrs. Cumbee received over \$100,000 when her husband passed away. Calvin originally placed some money from the estate into a joint money market account held in his and his mother's names; some of the money was in a certificate of deposit, which continued to earn interest. Around a year after his father died, Calvin changed the account to be in only his name. He reported the interest from the account on his tax returns. Calvin explained he transferred his mother's money from the joint account to his individual account to "hide" the money from Medicaid. Without equivocation, Calvin admitted the money he held in his individual account was his mother's money. Therefore, he cannot complain it was error to include the funds in his mother's estate when even he acknowledges the money belonged to his mother.

CONCLUSION

We hold the evidence supports the finding Mrs. Cumbee's 1994 will was voided by undue influence. The probate of the 1987 will of Mrs. Cumbee and the inclusion in her estate of the funds held by her son Calvin is

AFFIRMED.

HOWELL, C.J., and STILWELL, JJ., concur.

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Noblin v. Burgess

54 So. 3d 282 (Miss. Ct. App. 2011) • 2008 CA 1425
Decided Feb 17, 2011

No. 2008-CA-01425-COA.

June 8, 2010. Rehearing Denied November 16, 2010. Certiorari Denied February 17, 2011.

Appeal from the Circuit Court, Smith County,
283 Robert G. Evans, J. *283

David Garner, Lewis W. Bell, William F. Goodman, Jr., Jackson, Eugene Coursey Tullos, attorneys for appellants.

Mark K. Tullos, Raleigh, attorney for appellees.

Before MYERS, P.J., BARNES and MAXWELL, JJ.

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MAXWELL, J., for the Court:

¶ 1. Robert H. "Bob" Noblin executed his last will and testament only hours before his death. The proponents of the will and the sole beneficiaries under it, Sammy Burgess and Sheila McDill, initiated probate proceedings in Smith County. Noblin's numerous heirs at law contested the will, asserting it was the product of undue influence. The trial court granted the contestants' request for a jury trial, and the jury returned a verdict in favor of the proponents.

¶ 2. On appeal, the contestants contend that a confidential relationship existed between the testator and the proponents, raising a presumption of undue influence. They argue the proponents failed as a matter of law to overcome this presumption by clear and convincing evidence. In

the alternative, the contestants claim the trial court erred in peremptorily instructing the jury that the testator possessed testamentary capacity. They also argue the trial court erred in failing to grant their proposed peremptory instruction, which would have directed the jury to find the existence of a confidential relationship.

¶ 3. We find no reversible error and affirm.

FACTS

¶ 4. Noblin died in the early morning hours of October 3, 2003. He left behind no close "blood" relatives. Noblin's closest relatives by consanguinity appear to be an aunt and an uncle. His uncle is one of the contestants along with multiple first cousins.¹ The proponents, Burgess and McDill, are Noblin's stepchildren. Noblin's only wife, who passed away in 1994, was the natural mother of Burgess and McDill. But because Noblin never adopted Burgess or McDill, 286 they bear no *286 relationship to him under Mississippi's law of intestate succession.²

¹ The contestants comprise seven of Noblin's twenty-one or more heirs at law.

² See generally Robert A. Weems, *Wills and Administration of Estates in Mississippi* § 1:9 (3rd ed. 2003).

¶ 5. Although Noblin did not make a will until the final hours of his life, he had named Burgess and McDill as contingent beneficiaries (entitled to payment if his spouse predeceased him) on his individual retirement accounts (IRAs) and

certificates of deposit. In 1989, Noblin listed Burgess and McDill as his "son" and "daughter" on his IRA applications.

¶ 6. On September 23, 2003, Burgess took Noblin to see a doctor because Noblin had been having physical problems.³ Burgess later took Noblin to Lackey Memorial Hospital in Forest, Mississippi. While there, Noblin's doctors determined he had widespread liver and pancreatic cancer. Shortly after this diagnosis, Burgess drove Noblin to Baptist Hospital in Jackson, Mississippi. Soon after Noblin's arrival, his physicians determined he had no treatment options other than taking medication to control his pain. Noblin remained at Baptist Hospital from September 29 until he died on October 3. Burgess and McDill attended to Noblin during these five days and took turns spending the night with him.

³ At the time, Burgess was living with Noblin and had been for about two years. Burgess testified that he had moved in with his stepfather because Burgess had just gotten divorced.

¶ 7. On October 1, 2003, Burgess called Todd Sorey, an attorney back home in Smith County. The call was placed from Noblin's hospital room, where only Noblin and Burgess were present. According to Burgess, he contacted Sorey at Noblin's request. Burgess asked Sorey to draft Noblin's will, and Sorey agreed to do so. Both McDill and Burgess testified that it was Noblin's idea, and not their own, to make the will. Noblin never spoke with Sorey directly over the phone. Instead, Burgess talked to Sorey on the phone and relayed information back and forth between Sorey and Noblin. According to Burgess, McDill, and Sorey, Noblin had a severe hearing problem and was unable to personally speak to Sorey over the telephone.

¶ 8. Sorey testified he could hear Noblin responding to his questions. He also heard Noblin speaking about the information he wanted in his will. According to Sorey, he had known Noblin

most of his life and was familiar with his voice. Sorey claimed that he could hear Noblin's voice over the phone. He recognized the tone, vernacular, and accent as Noblin's. Sorey maintained he had no doubt that he was speaking to Noblin, albeit with Burgess as an intermediary.⁴ Sorey testified that he heard Noblin express his desire to leave all his property to Burgess and McDill.

⁴ Sorey readily conceded that he would have preferred to have met with Noblin personally, but explained that a personal meeting never took place because he was leaving town the afternoon of October 1, 2003.

¶ 9. After this phone conversation, Sorey drafted a will leaving Noblin's entire estate to Burgess and McDill. McDill picked up the will at Sorey's office on October 2 and brought it back to the hospital in Jackson. Burgess then asked Noblin's nurse, Lynn Thornton, to find hospital employees to witness the will. Thornton herself agreed to witness the will. She recruited Corley Callum, also a registered nurse, to fill the role of the other attesting witness.

¶ 10. Of the two attesting witnesses, only Callum testified at trial. According to Callum, immediately before witnessing the will, she had a conversation with Noblin. Though she could not remember the exact exchange, she satisfied herself that Noblin's will reflected his intent. Callum testified that through her conversations with Noblin at the time the will was executed, she was able to verify that "what was taking place was what he wanted to do."

¶ 11. Noblin executed his will on the afternoon of October 2 some time between 12:00 p.m. and 3:00 p.m. He died at 12:10 a.m. on October 3.

PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

¶ 12. Following Noblin's death, Burgess and McDill initiated probate proceedings in the Smith County Chancery Court. The contestants filed a will contest and requested a jury trial. The chancellor then transferred the case to Smith County Circuit Court, where a jury trial was held.⁵

⁵ We note that Mississippi's chancery courts have full jurisdiction over "matters testamentary and of administration." *In re Estate of Hathome v. Griffin*, 987 So.2d 486, 489 (¶ 13) (Miss. Ct.App. 2008) (quoting Miss. Const. art. 6, § 159). Although subject-matter jurisdiction was proper in the chancery court, neither party has taken issue with the circuit court's lack of jurisdiction. But even if either party complained on this ground, article 6, section 147 of the Mississippi Constitution prohibits reversal of a circuit or chancery judgment solely on the ground of either court's lack of subject-matter jurisdiction. See also *Tillotson v. Anders*, 551 So.2d 212, 215 (Miss. 1989). Therefore, absent some other error, we need not visit this issue.

¶ 13. The trial judge granted a directed verdict in favor of the proponents on the issue of testamentary capacity. The trial court later gave a peremptory instruction for the jury to find the testator possessed the requisite capacity to make a will. The court, however, submitted to the jury the issues of (1) whether a presumption of undue influence arose by virtue of a confidential relationship between the testator and the proponents, and (2) whether clear and convincing evidence existed to overcome the presumption of undue influence. The trial court denied the contestants' request for a peremptory instruction on issue (1).

¶ 14. Following a three-day trial, the jury found in favor of the proponents, and the trial court entered a judgment reflecting the jury's decision.

STANDARD OF REVIEW

¶ 15. In reviewing a jury verdict, we apply the following standard:

[An appellate court] resolves all conflicts of evidence in the appellee's favor and determines all reasonable inferences from testimony given towards the appellee's position. Reversal occurs only where the facts presented are so overwhelming in the appellant's position that reasonable jurors could not have found for the appellee. When an appellant challenges the sufficiency of evidence to support a jury's verdict, the appellate court's scope of review is limited. All evidence must be reviewed in the light most favorable to the appellee. An appellate court may only reverse a jury verdict when the facts considered in that light point so overwhelmingly to the appellant's position that reasonable men could not have arrived at a contrary verdict. In the event that evidence is conflicting, a jury is the sole judge of the credibility of witnesses and the weight of their testimony.

In re Estate of Dabney v. Hataway, 740 So.2d 915, 919 (¶ 11) (Miss. 1999) (internal citations and 288 quotation marks omitted). *288

DISCUSSION

I. Undue Influence

¶ 16. The contestants' first and main contention is that the proponents presented insufficient evidence to overcome the presumption of undue influence, which they allege arose by virtue of a confidential relationship. On this ground, they ask this Court to reverse and render the judgment of the trial court.

A. Presumption of Undue Influence

¶ 17. In *Croft v. Alder*, 237 Miss. 713, 115 So.2d 683 (1959), our supreme court crafted the confidential relationship doctrine applicable to wills contested on the basis of undue influence. Robert A. Weems, *Wills and Administration of*

Estates in Mississippi § 8: 18 (3rd ed. 2003). The *Croft* court held a presumption of undue influence arises where: (1) a confidential relationship existed between the testator and a beneficiary, and (2) the beneficiary in the confidential relationship was actively involved in some way with preparing or executing the will. *Croft*, 237 Miss. at 722-23, 115 So.2d at 686. A confidential relationship is present where "one person is in a position to exercise dominant influence upon the other because of the latter's dependency on the former arising either from weakness of mind or body, or through trust." *In re Estate of Laughter v. Williams*, 23 So.3d 1055, 1063 (¶ 31) (Miss. 2009) (citation omitted).

B. Overcoming the Presumption of Undue Influence

¶ 18. *Croft* also established that once the required showing is made to raise the presumption of undue influence, the burden shifts to the proponents to rebut the presumption by clear and convincing evidence. *Croft*, 237 Miss. at 723, 115 So.2d at 686.

¶ 19. In order to overcome the presumption of undue influence, the proponents must show by clear and convincing evidence: (1) the beneficiary acted in good faith; (2) the testator had "full knowledge and deliberation" in executing the will; and (3) the testator exhibited "independent consent and action." *In re Last Will and Testament and Estate of Smith v. Averill*, 722 So.2d 606, 612 (¶ 22) (Miss. 1998). Factors to be considered in assessing the beneficiary's good faith include:

- (1) who initiated the procurement of the will;
- (2) where the testator executed the will and who was present at the execution;
- (3) what consideration was paid and who paid it; and
- (4) whether the execution was done in secrecy or openly.

See id. Factors to be assessed in determining the testator's knowledge and deliberation in executing the will include:

- (1) whether the testator was aware of his total assets and their worth;
- (2) whether the testator understood who his "natural inheritors" were;
- (3) whether the testator understood how his action would legally affect prior wills;
- (4) whether the testator knew non-relative beneficiaries would be included; and
- (5) whether the testator knew who controlled his finances and the method used:
 - (a) how dependent the testator is on persons handling his finances; and
 - (b) how susceptible the testator is to be influenced by any such persons.

See id.

¶ 20. Regarding the testator's "independent consent and action," unlike the other two prongs, there is no express list of factors. The supreme court has in the past required a showing that the 289 testator *289 acted on "[a]dvice of . . . [a] competent person, . . . disconnected from the [beneficiary] and . . . devoted wholly to the . . . testator's interest." *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984). Though still a relevant consideration, this requirement has been absolved by more recent precedent, which has instead required "a showing of the grantor's 'independent consent and action' based on all of the surrounding facts and circumstances." *Vega v. Estate of Mullen*, 583 So.2d 1259, 1264 (Miss. 1991).

1. Good Faith

¶ 21. Other than inferences that might be drawn from circumstances surrounding the will's procurement, the contestants produced no evidence that Burgess or McDill influenced

Noblin's decision to make a will or suggested the terms of the will. In fact, the evidence points to the contrary. Burgess and McDill both testified that the idea of making a will originated with Noblin. Burgess testified Noblin wanted him to contact Sorey to draft a will. Sorey testified he could clearly identify Noblin's voice over the phone, and Noblin expressed his desire to leave all of his property to Burgess and McDill. Sorey explained he was satisfied the will embodied Noblin's wishes. And just prior to the will's execution, Galium had a conversation directly with Noblin. Through this conversation, she ascertained the will's provisions reflected his intent.

¶ 22. While we recognize much of this testimony is self-serving, our law is clear that witness credibility determinations are for the jury. *See, e.g., Solanki v. Ervin*, 21 So.3d 552, 568 (¶ 41) (Miss. 2009).⁶ Burgess, McDill, and Sorey, in particular, were all vigorously cross-examined about the circumstances surrounding the making of the will.

⁶ Though "the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence," *In re Estate of Holmes*, 961 So.2d 674, 681 (¶ 19) (Miss. 2007), we note that Callum had no interest in the will.

¶ 23. It is not disputed that Noblin executed his will in a hospital room. Noblin signed the will in the presence of Burgess and McDill, as well as the two subscribing witnesses, Callum and Thornton. Gail Young, a hospital employee, was present to notarize documents. As to the consideration paid, Sorey testified he would have sent the bill for Noblin to pay but was unable to do so. According to Sorey, no one ever told him they would pay his fee for drafting the will, and no one ever paid it. Finally, there is no indication the execution was done in secrecy. The issue here is not whether the heirs had knowledge of the will's execution, but whether the "the physical place the will was executed was in plain view of the witnesses."

Estate of Smith, 722 So.2d at 613 (¶ 23). Here, Callum testified she saw Noblin sign the will. The contestants offered no contrary evidence to show the execution was in any way concealed from the view of the attesting witnesses or done in a secretive manner.

2. Knowledge and Deliberation

¶ 24. Under this prong, the proponents offered a great deal of evidence that Noblin managed and controlled his own personal affairs and finances. At least eight witnesses testified in support of the fact that Noblin was an extraordinarily independent person. Several of the contestants even testified to this fact. For example, contestant Henry Clay Noblin described Noblin as an "independent[] loaner [sic], off to his self [sic] fellow, [who] did his own work." According to 290 contestant Diane Boykin, Noblin "made up his own mind about things," and "[i]t was his way or no way. So, if you asked him something and he answered, that was . . . law." Finally, contestant Ronnie Noblin described Noblin as "strong-willed."

¶ 25. Two non-relative acquaintances of Noblin's also echoed these sentiments. According to David Gainey, who had known Noblin since childhood, Noblin "pretty much stuck to himself as far as his business was concerned" and "made up his own mind." Joe Rigby, a friend of Burgess's, testified that Noblin "was [the] kind of person that stayed to himself and took care of Bob." As contestant Boykin put it, Noblin had garnered the nickname — "one way Bob."

¶ 26. According to McDill and Burgess, this independence extended to financial matters as well. Although we find no specific proof of what Noblin knew of his total assets, the testimony of Burgess and McDill supports that Noblin took care of his own finances. Both Burgess and McDill asserted they did not own a joint account with Noblin or assist Noblin in writing checks.

¶ 27. There is little or no proof to show Noblin either did or did not understand who his intestate heirs were. Also, no prior wills existed for the subject will to effect.

3. Independent Consent and Action

¶ 28. Again, other than inferences that might be drawn from the procurement of the will, especially from Burgess's telephone call to Sorey, the evidence points to the fact that Noblin exercised his own independent consent and action with regard to the making of the will and its terms. Callum's testimony, as a disinterested person, is of course very significant on this factor. Callum testified to the following:

Q: Okay. Once you walked into the room, did you have any conversations with Mr. Noblin?

A: I don't remember the exact words or exact conversation that I had with Mr. Noblin, but I did have a conversation with him, yes.

Q: Okay, what were your conversations about?

A: I'm sure the usual exchanges of, you know, hey, Mr. Noblin, how are you doing, that kind of thing took place originally; and then, you know, verifying that what was taking place was what he wanted to do.

Q: Okay. And did you satisfy yourself that that's what he wanted to do?

A: I did, through the questions that I asked him, yes.

Callum remained in the room for approximately thirty minutes during the execution of the will. During cross-examination, Callum added, "I'm not going to sign my name to any document that I feel is deceitful. I read the will[,] and I made my own judgment based on the questions that I asked Mr. Noblin." After reading the will, remaining in the

room for half an hour, and having a conversation with Noblin, Callum "satisfied [herself] knowing that [she] was doing what Mr. Noblin wanted done." She then observed Noblin sign his will.

¶ 29. Under these circumstances, we find a factual question on which reasonable minds could differ. The trial court did not err in refusing to hold the presumption of undue influence could not be overcome as a matter of law. The trial court properly submitted this issue to the jury.

II. Testamentary Capacity

¶ 30. The trial judge granted a directed verdict on testamentary capacity, finding Noblin possessed the requisite capacity to *291 make a will. The judge later granted a peremptory instruction to that effect. The contestants argue reasonable minds could differ over the question of whether the testator had capacity. They contend this issue should have been submitted to the jury.

¶ 31. We review de novo the trial court's grant or denial of motion for a directed verdict. *Solanki* 21 So.3d at 557 (¶ 10). The applicable standard of review is as follows:

In deciding whether a directed verdict should be granted, the trial judge is to look solely to the testimony on behalf of the party against whom a directed verdict is requested. He will take such testimony as true along with all reasonable inferences which can be drawn from that testimony which is favorable to that party, and, if it could support a verdict for that party, the directed verdict should not be given. If reasonable minds might differ as to this question, it becomes a jury issue.

Id. at 556 (¶ 8). The same standard applies to ruling on a peremptory instruction. *Id.* at 557 (¶ 10).

¶ 32. For a will to be valid, the testator must possess testamentary capacity. For testamentary capacity to be present, the testator must be of

"sound and disposing mind" at the time of the will's execution. Miss. Code Ann. § 91-5-1 (Rev. 2004); *In re Estate of Edwards v. Edwards*, 520 So.2d 1370, 1372 (Miss. 1988); Weems, at § 4:3.⁷ The requirement of a sound and disposing mind does not mean the testator's mind must be as good as it ever was. Weems, at § 4:3. Rather, the relevant test centers on the time the will is executed. At that time, the testator must: "understand and appreciate the nature and effect of his act [of making a will,] the natural objects or persons to receive his bounty and their relation to him, and [be] able to determine what disposition he desires to make of his property." *In re Estate of Mask v. Elrod*, 703 So.2d 852, 856 (¶ 17) (Miss. 1997).

⁷ The testator must also be of sufficient age to possess testamentary capacity. See Miss. Code Ann. § 91-5-1 (Rev. 2004).

¶ 33. Our supreme court has explained the burden of proof on the issue of testamentary capacity as follows:

The proponents of the will meet their burden of proof by the offering and receipt of the will into evidence and the record of probate. The proponents make a prima facie case solely on this proof. The burden then shifts to the contestants to overcome the prima facie case, but the burden of proof remains with the proponents to show by a preponderance of evidence that the testator had capacity.

Estate of Holmes, 961 So.2d at 679-80 (¶ 13) (internal citations omitted). Here, the proponents offered the will, subscribing witness affidavits, and the record of probate into evidence. Thus, a prima facie case of testamentary capacity arose, shifting the burden to the contestants.

¶ 34. To support their argument on this issue, contestants direct our attention to the notes of Dr. Grace Shoemaker, Noblin's oncologist. These notes indicate Noblin was "lethargic" and

"jaundiced" on October 2 — the date Noblin signed the will. They also point to testimony that Noblin had been given pain medicine off and on during his stay at Baptist Hospital and that he did not eat on October 1 or 2. The contestants also rely on nursing notes, taken in the two days before the will was signed, which indicate that Noblin
292 hallucinated *292 and heard voices after receiving medication.

¶ 35. Dr. Shoemaker testified "lethargic" means "sleepy, decreased level of consciousness." She testified her October 2 entry would have been made between 8 a.m. and 9 a.m. Nurse's notes taken on the morning of October 2 at 7:45 a.m. indicate Noblin was "[v]ery lethargic" but "[e]asily aroused." According to Dr. Shoemaker, "easily aroused" means "with any kind of stimulus, either talking to them or touching . . . them, they [would] wake up and . . . respond to you." Although Noblin was lethargic, Dr. Shoemaker explained, he would "wake up and talk" when stimulated. In addition, when asked whether a lethargic person can continue to conduct their own business, Dr. Shoemaker responded: "There are lots of degrees of lethargy, yes." When asked directly about whether Noblin was of sound mind when the will was made, Dr. Shoemaker did not make an assessment. The following exchange occurred:

Q: Okay. And as far as Bob Noblin's mental status between the hours of 12:00 noon and 2:00 in the afternoon, are you able to give an opinion based upon a reasonable degree of medical probability as to whether or not Mr. Noblin was mentally able to understand and appreciate what he was doing and signing?

A: I'm not sure what date you're talking about. But my memory of that, completely, I'd have to rely on what I've written in the record.

Q: Okay. And would you also rely on what a nurse, as far as the nurse's assessment of the patient?

A: I would rely on a nurse's ability to assess that, yes.

Q: Well, what about — you indicated you recall Ms. Corley Callum.

A: Vaguely.

Q: Okay. Would you rely on her assessment?

A: I assume I would, yes.

¶ 36. This Court addressed a similar factual scenario in *In re Estate of Pigg v. McClendon*, 877 So.2d 406 (Miss.Ct.App. 2003). In *Estate of Pigg*, this Court reversed a trial court's decision to submit the issue of testamentary capacity to the jury. *Id.* at 411 (¶ 23). The testatrix executed her will on April 10, 1997, leaving all her property to siblings and half-blood siblings but making no provision for one of the contestants, her brother. *Id.* at 408-09 (¶¶ 2-4). One witness testified by deposition that the testatrix had experienced hallucinations during the month of April, slightly over one week prior to executing the will. *Id.* at 410 (¶ 14). In addition, the testatrix's treating physician, who saw her both the day before (April 9) and the day after (April 11) she executed the will, testified that "someone who had that many multiple problems, certainly they felt bad, and I'm not sure that they would be thinking rationally. I'm thinking in general terms." *Id.* at (¶ 15). However, Judge Southwick writing for this Court pointed out her physician did not have any record of seeing her on April 10 — the date she executed the will — and offered no opinion on her mental status on that date. *Id.* at (¶ 16).

¶ 37. On the other hand, two witnesses — one being the attorney who drafted the will and the other being the attorney's wife who occasionally worked in her husband's law office — testified at trial that they witnessed the will's execution. Both

acknowledged the testatrix appeared to be in physical discomfort the morning she signed the will. *Id.* at 410-11 (¶ 20). But they further testified they went over the dispositive paragraphs of the will with her, *293 and she responded to questions appropriately. *Id.* at 411 (¶ 20).

¶ 38. The trial judge submitted the issue of testamentary capacity to the jury, which this Court found to be reversible error under these circumstances. *Id.* at (¶ 23). In reaching this decision, the Court noted: "At the close of their case, the contestants had produced no evidence that [the testatrix] failed to have sufficient mental capacity on the critical date of April 10, 1997." *Id.* at 410 (¶ 18). This Court emphasized the importance of testimony of the attesting witnesses regarding the testatrix's responsiveness on the date in question, and the fact that the testatrix made a natural disposition of her property. *Id.* at 411 (¶ 22).

¶ 39. In another instructive case, *Hayward v. Hayward*, 299 So.2d 207, 210-11 (Miss. 1974), our supreme court likewise reversed the trial court's decision to submit the issue of testamentary capacity to the jury. In *Hayward*, when the testator executed his will on May 15, 1970, he was elderly, almost totally deaf and blind, in poor physical condition, and suffering from arteriosclerosis. *Id.* at 207. The contestants alleged the testator lacked capacity to make a will. As support, they offered the testimony of two doctors and several lay witnesses. *Id.* at 208. One of the doctors, who had treated the testator in 1969, testified that he had seemed "lethargic" and had "no appetite." *Id.* The physician opined "it was unlikely that Hayward would have had 'testamentary capacity' on the date of the execution of the will[.]" *Id.* Based on the testator's arteriosclerosis, the physician explained he "wouldn't 'expect' [the testator] to have had 'testamentary capacity.'" *Id.* A second physician, who had been the testator's family physician for around twenty-five years, had seen the testator 4 or 5 times from 1968 to 1970. *Id.* This physician testified: "I have an opinion, but

this is not a fact. I do not think [the testator] was mentally competent" at the time he executed the will. *Id.* The basis for this assessment also focused on the testator's arteriosclerosis. *Id.* However, the family physician did not see the testator on the date of the will's execution. *Id.* Finally, several lay witnesses testified that, due to the testator's severe blindness and deafness, he often failed to recognize people unless they were very close to him, and he often had extreme difficulty communicating with people. *Id.*

¶ 40. To rebut the contestants' witnesses, the proponents offered several witnesses who claimed the testator was of sound mind when executing the will. *Id.* at 209. The attorney who drafted the will "testified unequivocally that the testator was fully aware of the natural objects of his bounty . . . and knew the nature and extent of the property owned by him." *Id.* The attorney also claimed "the provisions incorporated in the [will] were given to him by [the testator] who instructed him as to how he wished to leave his property." *Id.* The attorney testified that after he drafted the will, the testator read the will and expressed that it memorialized his wishes. *Id.*

¶ 41. The supreme court, quoting a previous decision favorably, emphasized the significance of "the crucial moment when evidence of testamentary capacity attains its maximum and controlling relevancy, that is, . . . the time of the will's execution." *Id.* at 209-10 (quoting *Ward v. Ward*, 203 Miss. 32, 37, 33 So.2d 294, 295 (1948)). The *Hayward* court held:

We have concluded . . . that the evidence offered as tending to establish a lack of testamentary capacity . . . amounts to no more than a scintilla and is wholly incapable of supporting the charge. It was error for the chancellor to submit to the jury the issue [of] testamentary capacity[,] and [the proponents'] request for a directed verdict on that issue . . . should have been granted.

Id. at 210-11.

¶ 42. In the present case, just as in *Estate of Pigg* and *Hayward*, only the proponents presented probative evidence of testamentary capacity at the precise time the will was executed. Callum's testimony is highly probative of the testator's mental capacity at this critical time. We have discussed Callum's testimony at length and do not repeat it here, except to add the following exchange:

Q: Now, [in] the affidavit . . . paragraph three claims that . . . Noblin was then and there of sound and disposing mind and memory. Were you satisfied with that statement before you signed the affidavit?

A: I was.

Q: And what did you base that upon?

A: Through conversations I had with Mr. Noblin that day.

Q: And you don't recall the specifics of the conversation?

A: I do not.

Q: As a nurse in the oncology department, is that something that you would regularly do, is to check the mental status of a patient?

A: I would say absolutely. Any time you encounter a patient, you assess their mental status.

Q: Okay. And you satisfied yourself that Mr. Noblin was of sound and disposing mind?

A: I was satisfied or I would not have signed my name.

¶ 43. We recognize the importance of the supreme court's instruction that: "[T]estimony of subscribing witnesses is entitled to greater weight than the testimony of witnesses who were not

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present at the time of the will's execution or did not see the testator on the day of the will's execution." *Estate of Edwards*, 520 So.2d at 1373. Further, "the subscribing witnesses to a will may testify as experts on the question of testamentary capacity." *Id.*

¶ 44. Here, Callum, the only subscribing witness who testified, maintained that Noblin had capacity at the critical time he executed the will. Her testimony is supported by other witnesses as well, including McDill, who testified that Noblin put on his glasses and read the will before signing it. We further note that Noblin's will reflected a natural disposition of his property to his stepson and stepdaughter, whom the record indicates he considered to be his own children, though he never adopted them.

¶ 45. The contestants claim the evidence of Noblin being lethargic, jaundiced, on medication, and allegedly hallucinating and hearing voices on days prior to signing the will created a jury question on the issue of testamentary capacity. Similar contentions were raised in *Estate of Pigg* and *Hayward*. And in both cases, the trial court committed reversible error by submitting the issue of testamentary capacity to the jury based upon unsubstantiated inference, where the attesting witnesses indicated the testator had capacity at the crucial and controlling moment of the will's execution. We find the contestants' proof insufficient to create a jury issue about the testator's capacity to make a will at the critical time of execution.⁸ *295 Therefore, the trial court properly granted a directed verdict and later a peremptory instruction in favor of the proponents on this issue.

⁸ The contestants also claim Noblin's signature on the will did not match a signature on a September 29 hospital record. However, the contestants have not made a sufficient showing that the signature on the hospital record was

Noblin's. We find this allegation insufficient to create a jury question as well.

III. Peremptory Instruction

¶ 46. At trial, counsel for the contestants submitted proposed jury instruction C-9 — a peremptory instruction directing the jury to find a confidential relationship existed between the testator and the proponents. The trial judge denied the peremptory instruction. The contestants argue the instructions given by the trial judge impermissibly permitted the jury to determine whether a confidential relationship existed, when, they contend, a confidential relationship was established as a matter of law. The proponents respond that the jury instructions taken as a whole fairly announced the law and created no injustice, and any error in the denial of the peremptory instruction is harmless.

¶ 47. We review de novo the trial court's grant or denial of a request for a peremptory instruction. *Solanki*, 21 So.3d at 557 (¶ 10). The following standard is the same for reviewing the trial court's ruling on a motion for a directed verdict:

The rule for determining whether a peremptory instruction is appropriate requires that all evidence favorable to the party against whom the peremptory instruction is requested must be accepted as true, all evidence in favor of the party requesting the peremptory instruction in conflict with that of the other party must be disregarded, and, if the evidence and the reasonable inferences to be drawn from same will support a verdict for the party against whom it is requested, then the peremptory instruction should be refused.

In re Last Will and Testament of Dickey v. Dickey, 542 So.2d 903, 904 (Miss. 1989).

¶ 48. Here, as the parties point out, the trial judge initially informed the attorneys, outside of the presence of the jury, that:

Clearly the active participation by the beneficiaries in the procurement, preparation and delivery of the will, to which the proponents testified themselves, fits squarely within the definition of a confidential relationship as defined in the jury instructions submitted by the proponents] and the contestants]. . . . Such actions seem to invite a will contest, but whether the actions of the proponents are sufficient to support a verdict of undue influence remains to be seen.

Nevertheless, it appears he later changed his mind and denied instruction C-9, which stated: "The Court instructs the jury that you shall find that a confidential relationship existed between the testator . . . and the proponents[.]"

¶ 49. The initial matter that we must consider is the fact that counsel for the proponents conceded, albeit with some hesitation, after questioning at oral argument before this Court that a confidential relationship existed. We are certainly wary of resting our decision on a concession made during appeal, which we ultimately determine is not supported by the record. Although matters stipulated at trial are procedurally barred from being appealed, *see State ex rel. Holmes v. Griffin*, 667 So.2d 1319, 1327 (Miss. 1995), this issue was not stipulated at trial. The fact remains that the trial judge considered conflicting evidence on the existence of a confidential relationship. The concession aside, we find the trial court ultimately arrived at the correct decision to submit the issue to the jury.

¶ 50. Our supreme court has described a confidential relationship as one where "a fiduciary relation exists as a fact, in which there is a
296 confidence reposed on one side *296 and the resulting superiority and influence on the other." *Davion v. Williams*, 352 So.2d 804, 807 (Miss. 1977) (quoting *Croft*, 237 Miss. at 725, 115 So.2d at 687); *see also Estate of Laughter*, 23 So.3d at 1063 (¶ 31) (A confidential relationship is present

where "one person is in a position to exercise dominant influence upon the other because of the latter's dependency on the former arising either from weakness of mind or body, or through trust."); *Taylor v. Welch*, 609 So.2d 1225, 1231-32 (Miss. 1992) ("In order for a litigant to prove a confidential or fiduciary relationship from which undue influence arises, the relationship must reflect 'a dominant, overmastering influence which controls over a dependent person or trust justifiably reposed.'"); *Norris v. Norris*, 498 So.2d 809, 812-13 (Miss. 1986) ("[A] confidential relationship is not confined to any specific association of persons but arises any time there appears on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed."). The supreme court has also held that "[t]he basis of this relationship need not be legal; it may be moral, domestic, or personal." *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss. 1982).

¶ 51. It is well settled that "the burden of establishing the existence of a confidential relationship lies with the party asserting it" — the contestants. *In re Will and Testament of Launius v. Warden*, 507 So.2d 27, 31 (Miss. 1987). The contestants must show that a confidential relationship existed at the time the will was executed by clear and convincing evidence. *In re Will and Testament of Boyles v. Tadlock*, 990 So.2d 230, 236 (¶ 22) (Miss.Ct.App. 2008). The following factors should be considered in assessing the existence of a confidential relationship:

(1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

Estate of Dabney, 740 So.2d at 919 (§ 12). If reasonable minds can differ over the existence of a confidential relationship, the question is one for the jury. *Davion*, 352 So.2d at 807-08.

¶ 52. In the context an inter vivos transfer, the supreme court has held that "a familial relationship is not intrinsically one of confidence." *Foster v. Ross*, 804 So.2d 1018, 1023 (§ 17) (Miss. 2002). In this same vein, we have stated: "[A] deed from a parent to a child alone and of itself raises no presumption of undue influence since, in the absence of evidence to the contrary, the parent is presumably the dominant party. This is true even though the parent is aged, or aged and infirm." *In re Estate of Summerlin v. Summerlin*, 989 So.2d 466, 477 (§ 37) (Miss.Ct.App. 2008). Here, we are guided by these principles, given that the relationship between Noblin and his stepchildren was in essence a parent/child relationship, as evidenced by his IRA applications completed in 1989 wherein he referenced them as his "son" and "daughter." Even the tombstone purchased by Noblin in 1994 had the word "father" inscribed above Noblin's name. Noblin had no natural children of his own and could only have been referencing his relationship with his stepchildren. Further, Sorey testified Noblin told him Burgess and McDill were his "son" and "daughter."

¶ 53. In *Davion*, the supreme court found reversible error in peremptorily instructing the jury to find the existence of a confidential relationship, where the question was one over which reasonable minds could differ. *Damon*, 352 So.2d at 807-08. There, the testatrix executed two wills purporting to be her last will and testament. *Id.* at 805-06. The first will left the testatrix's entire estate to her brother. *Id.* The second will left her entire estate to her neighbor. *Id.* at 806. The brother sought to probate the first will, which the neighbor contested on the ground that it had been revoked by the second will. *Id.* at 805. The brother answered, arguing the latter will was the product of undue influence. *Id.* After the close of the evidence, the trial court granted two instructions, peremptory in character, placing the burden of proof on the neighbor to show by clear and convincing evidence that the second will was not the product of undue influence. *Id.* at 806-07. The peremptory instructions assumed that a confidential relationship was present with regard to the second will. *Id.* The sole issue on appeal was whether the trial court committed reversible error in not submitting the issue of the existence of a confidential relationship between the testatrix and the neighbor to the jury.

¶ 54. The neighbor, who stood as the contestant of the first will but the proponent of the second, lived next door to the testatrix for many years and was a close personal friend to her. *Id.* at 806. The brother lived "a good distance away" in another state. *Id.* The neighbor went to the office of the lawyer who drafted the will and provided some of the details to put into the will. *Id.* Around six days after the second will was drafted, the testatrix placed the neighbor's family's names on her checking account so that they could attend to her business if anything happened to her, according to a bank official. *Id.* However, multiple witnesses testified to the testatrix's strong-willed nature. *Id.* Furthermore, the evidence was clear that "on the occasion of the execution of the second [w]ill, she was under no disability and no misapprehensions,

but that her mind was clear and that she had control of all of her faculties and knew exactly what she wanted to do concerning her property[.]" *Id.* Given the conflicting evidence, the supreme court found the trial court's failure to submit the issue of the existence of a confidential relationship to the jury was reversible error, reasoning:

In the present case, concerning a relationship between neighbors, given the testimony as to the strong[-]willed nature of [the testatrix], her independent execution of the [w]ill, and testimony at least indicating the beneficiary occupied a subservient role in the relationship; it must be held that a question arose particularly suitable for determination by a jury.

Id. at 808.

¶ 55. Here, we reiterate that the contestants were required to show by clear and convincing evidence the existence of a dominant, overmastering influence on the part of the beneficiaries over the testator. *Taylor*, 609 So.2d at 1231-32; *Will and Testament of Boyles*, 990 So.2d at 236 (¶ 22). If reasonable minds could differ over whether this showing has been made, the trial court must submit the issue to the jury. *Davion*, 352 So.2d at 807-08. While we certainly agree under the unusual fact of this case that there was evidence of such a dominant influence, we cannot ignore the evidence supporting the opposite proposition. No less than eight witnesses, including three of the contestants, testified to Noblin's independent nature. Much of this testimony centered on his insusceptibility to be influenced by others in his

decision making and his practice of tending to his own business and financial affairs. We also cannot ignore Callum's testimony *298 as a disinterested witness that Noblin's will reflected his wishes. Although doctor's and nurse's notes tended to show Noblin's mental weakness soon before the will's execution, Callum's testimony certainly supported the opposite at the critical time of the will's execution. And her testimony was uncontradicted on this point. Furthermore, the contestants presented no evidence that Noblin maintained any joint account with another person or that there existed any power of attorney between him and another person.

¶ 56. Under these facts, we conclude the contestants failed to establish the existence of a confidential relationship by clear and convincing evidence as a matter of law. Due to conflicting evidence on this issue, we find reasonable minds could differ over whether a confidential relationship existed between Noblin and Burgess and McDill. Therefore, we find no error in the trial court's submission of this issue to the jury.

¶ 57. Accordingly, we affirm the judgment of the trial court.

¶ 58. THE JUDGMENT OF THE SMITH COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

KING, C.J., LEE AND MYERS, P.JJ., GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR. IRVING AND CARLTON, JJ., NOT PARTICIPATING.

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Ellis v. Davidson

358 S.C. 509 (S.C. Ct. App. 2004) • 595 S.E.2d 817
Decided Mar 1, 2004

Opinion No. 3748.

Heard February 11, 2004.

Filed March 1, 2004. Rehearing Denied May 20, 2004.

Appeal From Charleston County, Jackson V.
510 Gregory, Circuit Court Judge. *510 **AFFIRMED**
IN PART, REVERSED IN PART AND
511 **REMANDED** *511

Cynthia B. Castengera, of Newland, NC and D.
Dusty Rhoades, of Charleston, for Appellant.

M. Dawes Cooke, Jr. and K. Michael Barfield,
both of Charleston, for Respondents.

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514 *514

ANDERSON, J.:

Mark W. Ellis, individually and on behalf of American Survey, Inc., appeals from the trial judge's grant of partial summary judgment to Respondents. We affirm in part, reverse in part, and remand

FACTS/PROCEDURAL **BACKGROUND**

In the spring of 1998, Ellis, a licensed surveyor, decided to start his own residential surveying company. Ellis contacted Rusty Bennett, a partner at the law firm of Davidson Bennett (the Firm)

because he needed an investor. Ellis had performed prior survey work for the Firm. According to Ellis, Bennett agreed to invest in the 515 company and stated: *515

That he would handle all of the legal paperwork and make sure that the company was set up properly and that [Ellis's] rights were protected. . . . [Bennett] said he would cover all legal advice involving [Ellis] and the company, for [Ellis] not to worry about anything other than producing surveys.

Ellis believed that, in having the Firm invest in the business, he would be able to perform work for the Firm and have the Firm set up the surveying company in such a way that he was protected from liability. After Bennett invested, the business ownership was: Bennett — 60%; Ellis — 40%; the 1000 shares of common stock would be divided proportionally, with no restrictions placed upon them; Bennett would "set up" the surveying company; and Ellis would be employed by the surveying company. Other than proposed business plans, no written contracts or documents memorialize the agreement between Ellis and Bennett. The parties created American Survey, Inc. (American). Bennett set up the company and arranged for American to lease space in a building he owned. At some point, Bennett's law partner in the Firm, Eric Davidson, became a shareholder in American. Ellis claimed that, in January of 1999, he "was told [the new percentage of ownership] was one-third, one-third, one-third." Bennett professed he "believe[d] . . . the agreement . . .

was that [he and Davidson] would hold 65 percent of the shares and [Ellis] would have 35 percent of the shares."¹

¹ While Ellis and Bennett disagree over the series of events leading to Davidson's participation in American, it is clear Davidson was involved early in American's formation.

Several months later, Bennett retired from the practice of law and sold his interest in the Firm and the Firm's businesses (including American) to his three partners: Davidson, Jarrell Wigger, and Mark Weeks (hereinafter, "the Firm"). After Bennett's retirement, the Firm instructed Ellis not to sign a new lease with Bennett. The Firm met with Ellis after discovering Bennett never filed American's corporate papers. In fact, Bennett never kept corporate minutes, records, or by-laws for American. Ellis testified the members of the Firm told him they were acting as attorneys for the corporation, and that he should sign the papers as

516 instructed. *516

Ellis and the Firm soon disagreed over the way Ellis operated American. At a meeting in March of 1999, Ellis told the Firm he wanted to buy out their interest in American. After offers and counteroffers were made and rejected, the parties came to a verbal agreement about the buyout. The agreement was put into writing, and Ellis and Davidson faxed revisions back and forth. While admitting the buyout negotiations were "a matter strictly of business," Ellis stated the Firm did not advise him to obtain separate counsel, and that he thought the Firm acted as attorneys on behalf of both American and himself. The agreement was not finalized, as Ellis wanted a written commitment from the Firm that American would still continue to be used as the Firm's chief surveying company. In order to force a decision, Ellis informed the Firm that he would close American's doors and terminate its employees if the Firm did not agree to his terms. The Firm then

decided to close American themselves. They arrived at American with deputy sheriffs, terminated the employees, and changed the locks.

At approximately the same time Ellis and the Firm were in the midst of buyout discussions, the Firm decided to form a new surveying company. Members of the Firm testified the new company, Absolute Survey Inc. (Absolute), would be run by Kelly Davis and would perform surveying for the Firm after Ellis bought their interests in American. Ellis declared that, while he was aware of Absolute's formation, he did not realize it would be a competing surveying company.

On behalf of American and in his individual capacity, Ellis filed an amended complaint against the Firm (including the lawyers in their individual capacities), American, Absolute, and Davis. Ellis alleged various causes of action, including breach of fiduciary duty, legal malpractice, conversion, and civil conspiracy. The Firm and the lawyers in their individual capacities answered, counterclaimed, and moved for summary judgment. Additionally, the Firm asked for summary judgment for Davis as to all claims against him.

The Circuit judge granted the Firm's summary judgment motion as to the causes of action for legal malpractice and breach of fiduciary duty. The judge denied the motion for summary judgment as to the remaining causes of action.

517 *517 Further, the judge granted summary judgment in Davis's favor as to all causes of action against him. The judge denied Ellis's subsequent motion for reconsideration.

ISSUES

I.

Did the trial judge err in classifying the relationship that existed between the parties?

II.

Did the trial judge err in "discounting" the expert witness affidavit?

III.

Did the trial judge err in dismissing Kelly Davis as a party?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998); see also Laurens Emergency Med. Specialists, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct.App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct.App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, 518 and admissions on file, *518 together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Regions Bank, 354 S.C. at

659, 582 S.E.2d at 438; Hedgepath v. American Tel. Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001); Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, Op. No. 3719 (S.C.Ct.App. filed December 22, 2003) (Shearouse Adv. Sh. No. 1 at 66); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Bayle, 344 S.C. at 120, 542 S.E.2d at 738. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath, 348 S.C. at 355, 559 S.E.2d at 336; Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere

allegations or denials contained in the pleadings. Regions Bank, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward
519 with specific facts *519 showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct.App. 1999); Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

I. Relationship Between the Parties

A. Fiduciary Duty

Ellis argues the trial judge erred in finding there was no evidence of a fiduciary duty between the Firm and Ellis and/or American. We agree.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003); Steele v. Victory Sav. Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct.App. 1988). A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); O'Shea v. Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992); SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93. A relationship must be more than casual to equal a fiduciary relationship. Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93.

As a general rule, a fiduciary relationship cannot be created by the unilateral action of one party. Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct.App. 1997). To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so
520 entrusted will act not in his own *520 behalf but in the interest of the party so reposing. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786 (1986). The evidence must show the entrusted party actually accepted or induced the confidence placed in him. Regions Bank, 354 S.C. at 671, 582 S.E.2d at 444; State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct.App. 2003); Brown, 326 S.C. at 423, 483 S.E.2d at 484.

We find there are genuine issues of material fact as to whether a fiduciary duty existed between the Firm and Ellis, in his individual and representative capacities. There is evidence that Ellis relied upon the Firm's legal expertise and reposed a "trust and confidence" in the Firm in their joint business dealings. The Firm had always tendered legal advice to Ellis, even after American was set up. For example, Davidson instructed Ellis to speak to Wigger about an American employee who was injured in the course of his employment.

We rule that genuine issues of material fact exist as to whether the Firm breached a fiduciary duty in its treatment of Ellis, both in his individual and representative capacities. We disagree with the judge's finding that any such duty ended with the formation of American. Bennett was integral to the process of structuring and incorporating American. When asked who "had the responsibility of handling all of the legal work with the formation of American," Bennett responded: "That would have been me or our firm." According to Ellis, even after American was set up and Bennett left the Firm, the remaining members of the Firm told Ellis they were acting as American's attorneys. When queried regarding whether he or the Firm gave

advice to Ellis personally or to American, Weeks answered: "American Survey." The Firm instructed Ellis about: (1) breaking American's lease in Bennett's building and (2) following their advice in signing papers to properly incorporate American. In fact, when the parties were engaged in buyout negotiations, Ellis testified he did not obtain separate counsel because he believed the Firm acted as attorneys for both himself and American.

We conclude genuine issues of material fact exist as to whether there was a fiduciary duty and, if so, whether such duty was breached. Accordingly, the trial judge erred in granting summary judgment on
521 this issue. *521 **B. Attorney-Client Relationship**

Ellis contends the trial judge erred in finding there was insufficient evidence of an attorney-client relationship between the Firm and Ellis and/or American. We agree.

Our courts have recognized the attorney-client relationship is, by its very nature, a fiduciary one. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct.App. 2000); see also Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991) (noting that attorney-client relationship is by nature a fiduciary one); De Pass v. Piedmont Interstate Fair Ass'n, 217 S.C. 38, 59 S.E.2d 495 (1950) (stating that a fiduciary relationship always exists between attorney and client). The relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith. Weatherford, 340 S.C. at 582, 532 S.E.2d at 315; 7 Am.Jur.2d Attorneys at Law § 137 (1997).

In the instant case, the Firm was intricately involved in American's business — from the time of its formation until the Firm's lockout of the company. Bennett drafted the initial incorporation papers for American and, after Bennett left the

Firm, the remaining Firm attorneys re-drafted and filed American's corporate papers. The following colloquy occurred during Ellis's deposition:

Q Can you think of any other personal legal advice that they have given you?

A Yes. At our second meeting at Davidson and Bennett, the missing corporate books showed up that were at the James Island office the whole time, and Eric stated that Jerry would be going over with me the corporate books and what needed to be taken care of.

Jerry opened up the books sitting there at the table across from me and said, none of this stuff ha[s] been done, all of the forms are blank. That I could get sued personally. Mark Weeks jumped up and said, we are one station wagon loaded full of kids with a soccer mom going through an intersection and having one of our vehicles hit her, and that I could be sued personally and they could take
522 everything that I own. *522

Jerry flipped open the book and said, you need to sign here and we get our ass off — you need to sign here, you need to sign here. I am sitting there going, shit, I had no idea, Rusty was supposed to be taking care of this.

At the same time they are going, this company is a "C" corp., Rusty put the screws to us, we should have been a "S" corp. Rusty made it a "C" corp. to protect his ass. That is the only reason Rusty did it. He didn't give a shit about you, Mark. He has this thing as a "C" corp.

Sign here, sign here, take care of this. I am thinking, the signatures I am putting on these blank sheets of paper, if you look, you will see they are not only blank, but they are not dated, was to protect me from getting sued. This is what they are telling me sitting in that office —

Q Who told you —

A — they are protecting my rights.

Q Who told you that?

A Mark Weeks, Jerry Wigger and Eric Davidson, sitting in there.

Q What did you sign?

A I signed every piece of paper they threw in front [of] me that they said would cause me to get sued by some soccer mom loaded up full of kids.

Q What were the papers that you signed?

A I signed a bunch of papers. I couldn't tell you the exact one. I tell you how quick it went, you need to sign here, flip, flip, you need to sign here, flip, flip, and sign here and sign here, and this is going to protect you, Mark, this is going to stop that soccer mom loaded full of kids from suing you personally.

Q You mean by making sure that the corporation was duly incorporated, is that what they were telling you?

A What they told me, what Jerry Wigger told me, in particular, as I was told from Eric, that he was a business attorney for the group, was that a corporation has to act as a corporation. It cannot act as just some little fly by night, oh, yeah, we filed some paperwork with the State, therefore, we have this corporate veil, we are impenetrable personally by it.

Jerry said that is what he did all day long is pierce the corporate veil in order to go after personal
523 assets, personal, *523 private assets, and that he was protecting me by me signing these documents.

After American was properly formed, the Firm advised Ellis on at least one Workers' Compensation matter and acted in American's interest in negotiating a new lease for American's

offices. In addition, the Firm did not advise Ellis to obtain outside counsel during the buyout negotiations.

We conclude there was ample evidence presented to overcome summary judgment on this matter. Concomitantly, the trial judge erred in finding there was insufficient evidence of an attorney-client relationship.

C. Legal Malpractice

Ellis maintains the trial judge erred in finding there was no evidence of legal malpractice. We agree.

In order to prevail in a legal malpractice action, the plaintiff must prove four elements:

- (1) the existence of an attorney-client relationship;
- (2) a breach of duty by the attorney;
- (3) damage to the client; and
- (4) proximate causation of the client's damages by the breach.

Smith v. Haynsworth, Marion, McKay Geurard, 322 S.C. 433, 472 S.E.2d 612 (1996); Sims v. Hall, Op. No. 3703 (S.C.Ct.App. filed December 8, 2003) (Shearouse Adv. Sh. No. 43 at 60); Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct.App. 2002); Henkel v. Winn, 346 S.C. 14, 550 S.E.2d 577 (Ct.App. 2001); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998).

Viewing the evidence in the light most favorable to Ellis and American, we find there was sufficient evidence presented on the issue of legal malpractice to survive the Firm's motion for summary judgment. Factual issues exist as to the (1) buyout negotiations; (2) subsequent lockout of the American offices; and (3) Firm's formation of a rival surveying company, Absolute, in the midst of these buyout negotiations. We disagree with the trial judge's finding that no evidence exists as to damages. The damages Ellis and American suffered in this case flowed from the improper

formation of American. The Firm did not perform several functions, including: issuing stock
 524 certificates, holding an organizational *524 meeting, writing by-laws, drafting an employment contract for Ellis, and preparing documentation that Ellis loaned personal equipment to American. If the Firm had drafted these documents, the rights and responsibilities of the parties could have been clearly laid out. For example, stock restrictions could have been implemented, corporate governance could have been set out, a right of first refusal in transferring company stock could have been included, and the procedure for valuing and selling American could have been devised and agreed upon by the parties. As a result of the Firm's poor drafting, Ellis was not apprised of the proper procedures and methods for governing American. He was later literally and figuratively shut out of American's operation. Further, as there was no documentation of equipment loaned to American, Ellis lost several pieces of personal property when the Firm effected a lockout of the company. Finally, genuine issues of material fact exist as to whether these damages were proximately caused by the Firm's improper formation of American.

II. Affidavit from Expert Witness

Ellis asserts the trial judge erred in "discounting" an affidavit from an expert witness. We agree.

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct.App. 2002); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct.App. 2001). A trial court's decision to admit or exclude expert testimony will not be disturbed on appeal absent an abuse of discretion. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct.App. 2003); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct.App. 2003); Burroughs, 352 S.C. at 390, 574 S.E.2d at 219. An abuse of

discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987); Fields, 354 S.C. at 451, 581 S.E.2d at 492; Hedgepath v. American Tel. Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001); see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) (stating that abuse of discretion occurs where trial court is controlled by
 525 error of law or *525 where trial court's order is based on factual conclusions without evidentiary support). A court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 354 S.C. at 451, 581 S.E.2d at 492; Grubbs, 353 S.C. at 379, 577 S.E.2d at 496; Means, 348 S.C. at 166, 558 S.E.2d at 924.

In order for this Court to reverse a judgment for an alleged error in the exclusion of evidence, the complaining party must prove both the error of the ruling and resulting prejudice. Fields, 354 S.C. at 451, 581 S.E.2d at 492; Means, 348 S.C. at 166, 558 S.E.2d at 924; see also Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995) (admission of expert testimony is within sound discretion of trial judge and will not be overruled absent finding of abuse of discretion and prejudice to complaining party); Stevens v. Allen, 336 S.C. 439, 448, 520 S.E.2d 625, 629 (Ct.App. 1999), aff'd, 342 S.C. 47, 536 S.E.2d 663 (2000) ("For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown."); Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct.App. 1988) ("Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of evidence, the appellant must show prejudice.").

Rule 702, SCRE, articulates guidelines for the admissibility of expert testimony. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact

to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Mizell, 351 S.C. at 406, 570 S.E.2d at 183; Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct.App. 2003); see also Fields, 354 S.C. at 452, 581 S.E.2d at 492 (to be competent as expert, witness must have acquired, by reason of study or experience, or both, such knowledge and skill in a business, profession, or science that he is better qualified than the fact finder to form an opinion).

526 *526

At the summary judgment hearing, Ellis presented an expert affidavit from Gregory Adams, a University of South Carolina law school professor and expert on legal ethics. Adams concluded the Firm "incompetently set up" American and failed to properly advise Ellis about several important matters while forming the company. Adams opined there was an attorney-client relationship between the parties, and that this relationship was subsequently breached by the Firm's actions. Adams noted the Firm engaged in transactions which conflicted with their responsibilities to Ellis and American. The trial judge ruled:

[Adams's] affidavit . . . cannot create the requisite factual issue because it is based on factual assumptions about advice provided to Plaintiff Ellis, which assumptions are not supported by the record in this case. . . . [A]s the record establishes that the only potential legal advice provided to Ellis was with regard to formation of the corporation and obtaining worker's compensation insurance, Dr. Adams' affidavit does not change this Court's conclusion that no attorney-client relationship existed between Ellis and the Defendants that resulted in any damages alleged in this action.

The record supports Adams's conclusions in the affidavit, and, when considered in conjunction with Ellis's testimony, presented a genuine issue of material fact about the questions of breach of fiduciary duty, the existence of an attorney-client relationship, and legal malpractice. As the affidavit was crucial to proving the Firm breached a fiduciary duty in their attorney-client relationship with Ellis and American, Ellis, in his individual and representative capacities, was prejudiced by the court's ruling. See Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (explaining the client in a legal malpractice action must generally establish the standard of care by expert testimony).

The trial judge abused his discretion in failing to give efficacy to the expert witness affidavit. Because this resulted in prejudice to Ellis and American, it was error.

III. Dismissal of Davis

Ellis argues the trial judge erred in dismissing
527 Kelly Davis from the lawsuit. We disagree. *527

In the complaint, Ellis and American included Kelly Davis, the surveyor for Absolute, as a party in this action on the grounds of civil conspiracy and conversion. The trial judge granted Davis's

motion for summary judgment as to all causes of action raised against him. We agree with the trial judge's ruling on this issue.

A. Civil Conspiracy

A civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes the plaintiff special damage. Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct.App. 2002); Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct.App. 1986). Ellis did not prove Davis engaged in a civil conspiracy with the Firm in order to purposely injure either Ellis or American. We find no genuine issue of material fact exists in the allegations levied against Davis. Ellis proved only that Davis was involved with the Firm in the formation of Absolute, not that he undertook this enterprise for the purpose of injuring either Ellis or American. Because Ellis could not establish the second element of civil conspiracy, the trial judge did not err in granting summary judgment in Davis's favor.

B. Conversion

Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003). Davis is not liable for Absolute's alleged conversion of American's property. Absolute is a corporation. Davis may use the disputed equipment but only in his capacity as a surveyor employed by Absolute. Ellis and American have not alleged that Davis

personally gained from the property in question. They aver only that Absolute has benefited from it. Even if Davis had believed the property belonged to Ellis or *528 American, he would have had no authority to dispose of it without the approval of the corporation. In the Appellants' brief, Ellis and American assert: "Davis is the responsible party at Absolute." However, Davis is a surveyor for Absolute. He is an employee of the corporation and a minority shareholder. This does not make him personally liable to Ellis and American for property that Absolute, as a corporation, has allegedly converted. The judge properly granted summary judgment to Davis.

CONCLUSION

Based upon the foregoing, the trial judge's order granting the Firm's motion for partial summary judgment² is

² On remand, the Circuit Court will evaluate all issues separately and distinctly in regard to Mark W. Ellis, individually, and American Survey, Inc.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. ³ HEARN, C.J., and GOOLSBY, J., concur.

³ Ellis alleges the trial judge erred in granting summary judgment while there were outstanding motions and discovery in this case. However, as we are reversing and remanding this case on several issues, we need not reach this one.

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In re Estate of Tank

SUPREME COURT OF THE STATE OF SOUTH DAKOTA Jan 22, 2020

938 N.W.2d 449 (S.D. 2020)

938 N.W.2d 449 · 2020 S.D. 2

#28955

01-22-2020

In the MATTER OF the ESTATE OF Russell O. TANK, Deceased.

DANIEL K. BRENDTRO, ROBERT D. TRZYNKA of Brendtro Law Firm, Prof. LLC, Sioux Falls, South Dakota, Attorneys for appellants Arlo Tank, Renald Tank, Sherri Castro, and Gina Ellingson. REED RASMUSSEN of Siegel, Barnett & Schutz, LLP, Aberdeen, South Dakota, Attorneys for appellee Jason Bender.

JENSEN, Justice

DANIEL K. BRENDTRO, ROBERT D. TRZYNKA of Brendtro Law Firm, Prof. LLC, Sioux Falls, South Dakota, Attorneys for appellants Arlo Tank, Renald Tank, Sherri Castro, and Gina Ellingson.

REED RASMUSSEN of Siegel, Barnett & Schutz, LLP, Aberdeen, South Dakota, Attorneys for appellee Jason Bender.

JENSEN, Justice

[¶1.] Russell Tank farmed in the Britton area most of his life and accumulated a sizeable estate. He died on May 25, 2016, at the age of 84. Russell's last will and testament, executed on December 19, 2012, was offered for probate on June 6, 2016. The will named Russell's neighbor and long-time farm tenant, Jason Bender, as his sole heir and specifically disinherited Russell's four adult children: Arlo Tank, Renald (Renny) Tank, Sherri Tank, and Regina (Gina) Ellingson (Children). Children filed a petition challenging the will on the grounds of lack of testamentary capacity, insane delusions, and undue influence. Following discovery, Bender filed a motion for summary judgment on Children's claims. The circuit court granted Bender's motion and entered an order dismissing the petition. Children appeal. We affirm in part and reverse in part.

Facts and Procedural History

[¶2.] After returning from serving in the U.S. Army in the 1950s, Russell married Harriet. Children were born during the marriage. Russell and Harriet separated in 1971 and divorced in 1974. Children were all under the age of ten at the time of the separation. Following the separation and divorce, Renny, Sherri, and Gina lived with Harriet, while Arlo lived with Russell. Children spent some time with Russell on the weekends. In his teen years, Renny began living with Russell and assisting on the farm.

[¶3.] Despite efforts to connect with their father while growing up, Children did not develop an emotional bond with him. Each of them explained that Russell never showed them love or affection and seemed disinterested in them and their activities. Children described how Russell stared off in the distance when they were around, never made eye contact with them, and rarely talked with them. They asserted Russell's only interests were working and restoring vintage vehicles.

[¶4.] Arlo farmed and lived with Russell until 1985, when Russell, for unknown reasons, abruptly told Arlo to leave. Arlo claimed he was forced to leave so quickly that he was unable to gather his possessions. He subsequently sued and was awarded a \$40,000 judgment against Russell. Arlo continued to live in the area, but the two hardly spoke after 1986.

[¶5.] Renny lived and farmed with his father until 2001, when Russell asked Renny to leave the farm. An acquaintance attempted to intervene, but Russell was unwilling to change his mind. Much like Arlo, Russell's reasons for asking Renny to leave are unknown. Renny moved a short distance from Russell, but the two saw each other only occasionally.

453 [¶6.] Gina and Sherri moved from the Britton area after high school. Both visited the area over the years, but rarely saw their father. They each sent Russell letters, cards, and invitations to special occasions, *453 but he never responded. Gina testified that she had little contact with Russell after 1979, and estimated that she had not spoken to her father since 1993. Sherri visited her father from time to time, but rarely saw Russell after 2005.

[¶7.] Bender first met Russell while growing up in the Britton area through his father's acquaintance with Russell. In the late 1990s, Russell, Bender, Boyd Hagenson, and others began regularly playing cards together. In 2002, Russell leased his farmland to Bender for a cash rent of \$50 per acre. Bender acknowledged the rental rate was significantly less than market rent, but claimed it was the amount Russell requested. Bender also explained that he expended extra time and money to address weed problems in the first few years of farming the land. At the time, Russell had not grown a crop on the land for an entire year. The rental rate never changed in the fifteen years before Russell's death. Bender testified he mentioned to Russell more than once that the rent was too low, but claimed Russell would say it was fine and say that Bender could help him out around the farm.

[¶8.] Bender assisted Russell more and more over the years. Bender took Russell to see Russell's army friend several times in Ohio and drove Russell to visit the gravesite after Russell's friend passed away. In 2009, Russell had attorney Tom Sannes draft a power of attorney, naming Bender as attorney-in-fact. Later, Russell added Bender as a signatory on his bank account and gave Bender a large sum of cash to hold for Russell's safekeeping. Russell had also buried cash at different locations around the farm. He later told Bender where this money was located, and Bender created a map showing the locations. In 2015, Bender arranged for Russell to be placed in a nursing home after Russell was unable to care for himself. At this time, Bender dug up the cash Russell had buried and testified that he placed the money in a safe at his home.¹

¹ At the time of Russell's death, Bender was holding \$149,000 of Russell's cash.

[¶9.] Russell prepared at least three wills during his lifetime. The first identified will was prepared by attorney Tom Sannes in 2001. Russell told Sannes he wanted to give nearly everything to his daughter Sherri and disinherit his other three children. Sannes asked a local physician to perform a competency exam before drafting the will. The physician examined Russell and sent a letter to Sannes concluding that Russell was mentally competent. The 2001 will executed by Russell gave all of Russell's property to his daughter Sherri, except for a few vintage vehicles given to Russell's friends. Sherri was also named as Russell's personal representative. The other three children were specifically disinherited.

[¶10.] Russell executed a second will in 2004. At this time, Russell told Sannes that he wanted to remove Sherri as a beneficiary and name Bender instead. Sannes had no impression that Bender encouraged or was involved in Russell's decision to change his will. Except for a few vehicles given to other friends, the 2004 will named Bender as Russell's beneficiary and personal representative. Sherri and the other three children were specifically disinherited in the 2004 will.

[¶11.] Sannes retained memos of each of his meetings with Russell showing that Russell expressed an understanding of his heirs, his property, and testamentary intentions. Sannes found Russell to be "decisive and able to clearly express his wishes" in each meeting. Sannes believed Russell was competent and "fully
454 understood" what he was doing when he executed the *454 2001 and 2004 wills and the power of attorney.

[¶12.] Russell made a third will in 2012, prepared by attorney Kari Bartling. Russell was 80 at the time. The will revoked all prior wills and named Bender as Russell's sole heir and personal representative. Children were again specifically disinherited in the 2012 will.

[¶13.] Bartling prepared a contemporaneous memorandum reflecting her discussions with Russell prior to drafting the 2012 will. Bartling's notes reflect that Russell described his assets and answered questions about his background, Children, and other family members. Russell told Bartling that he did not want to leave anything to Children because he had already helped them out and no longer had contact with any of them. Russell stated that he did not know where his two daughters lived and had hardly seen them since the divorce. He also said his two sons live close to him but described a lack of any contact with them. Russell also described some of the things Bender had done for him and told Bartling that he was very fond of Bender and could not think of a better person to receive his assets. Bartling concluded that "Russell was very well aware of what he owned," had a "good head on his shoulders as far as business," and "appeared to be very intelligent." Bartling asked Russell if Bender had talked to him about changing his will. Russell said "no" and stated that Bender did not know he was doing this.

[¶14.] After Russell's death, Bender commenced an informal probate of Russell's 2012 will. Arlo and Renny filed a petition challenging the will. Sherri and Gina joined in an amended petition shortly thereafter. The amended petition alleged Russell lacked testamentary capacity and that the 2012 will was a product of an insane delusion and undue influence.

[¶15.] Children retained Dr. Rodney Swenson, a psychologist, as an expert witness concerning Russell's competency and mental health. Dr. Swenson did not personally examine Russell, and his opinions were based on medical records, depositions, and statements from Children and others. Dr. Swenson concluded that Russell developed a chronic delusional disorder early in his life that affected his ability to form and maintain close relationships with Children and others. Dr. Swenson also concluded that Russell started developing vascular dementia in his later years. Dr. Swenson cited Russell's distrust of societal institutions, limited topics of conversation, obsession with keeping loaded guns hidden around him, burying large sums of money, and ignoring Children as examples of the delusional disorder affecting Russell's daily life activities. As to the 2012 will, Dr. Swenson opined that: (1) Russell lacked testamentary capacity to execute the will because he was unable to form, perceive, and understand his connection to Children; (2) the will was the product of an insane delusion concerning Russell's beliefs as to the nature of his relationship with Children; and (3) Russell was susceptible to undue influence.

[¶16.] Bender also retained a psychologist, Dr. Daniel Tranel, to address Russell's competency and mental state at the time he executed the 2012 will. Like Dr. Swenson, Dr. Tranel did not personally examine Russell and generally relied on the same information as Dr. Swenson. Dr. Tranel concluded that Russell did not demonstrate symptoms of a delusional disorder. Instead, Dr. Tranel opined that Russell's struggles with relationships and distrust of people and institutions would be more accurately placed on the autism spectrum or possibly a
455 personality disorder. Dr. Tranel also acknowledged that *455 Russell had begun developing dementia the last few years of his life.

[¶17.] On October 19, 2018, Bender filed a motion for summary judgment, or in the alternative, a motion to exclude the opinions of Dr. Swenson. Children resisted the motions and both parties presented extensive affidavit and deposition testimony. The circuit court heard arguments and orally granted Bender's motion for summary judgment on Children's petition. The court did not address Bender's motion to exclude the testimony of Dr. Swenson. The court concluded as a matter of law that Russell did not lack testamentary capacity when he executed the 2012 will. The court also determined that Russell did not suffer from an insane delusion concerning

his relationship with Children, concluding Russell's belief that he had an estranged relationship with Children was based on reality. Finally, the court granted summary judgment on the undue influence claim, determining there was no evidence showing Bender had an improper disposition to unduly influence Russell.

[¶18.] Children appeal the circuit court's order granting summary judgment, raising three issues:

1. Whether the circuit court erred in concluding there were no genuine issues of material fact showing Russell lacked testamentary capacity to execute the 2012 will.
2. Whether the circuit court erred in determining there were no genuine issues of material fact showing Russell suffered from an insane delusion affecting the terms of his 2012 will.
3. Whether the circuit court erred in determining there were no genuine issues of material fact showing Russell's 2012 will was tainted by undue influence.

Standard of Review

[¶19.] "We review a circuit court's entry of summary judgment under the de novo standard of review." *Harvieux v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 9, 915 N.W.2d 697, 700 (quoting *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174). "When conducting a de novo review, '[w]e give no deference to the circuit court's decision[.]'" *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486 (quoting *Oxton v. Rudland*, 2017 S.D. 35, ¶ 12, 897 N.W.2d 356). "On appeal from a grant of summary judgment, we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, 841 N.W.2d 250, 253. "We view the evidence in favor of the nonmoving party and reasonable doubts are resolved against the moving party, but the nonmoving party must have presented specific facts showing that a genuine, material issue for trial existed." *Id.*

Analysis and Decision

1. Whether the circuit court erred in concluding there were no genuine issues of material fact showing Russell lacked testamentary capacity to execute the 2012 will.

[¶20.] A testator has the privilege and right to dispose of his or her property within the limits of and in the manner fixed by our statutes. *Briggs v. Briggs*, 2019 S.D. 37, ¶ 23, 931 N.W.2d 510, 516. The minimum requirements for making a will under SDCL 29A-2-501 are that an individual must be at least eighteen years of age and of sound mind.

[¶21.] One has sound mind or testamentary capacity "if, without prompting, he is able to comprehend the nature
456 *456 and extent of his property, the persons who are the natural objects of his bounty and the disposition that he desires to make of such property." *In re Estate of Long*, 2014 S.D. 26, ¶ 18, 846 N.W.2d 782, 786. "Testamentary capacity is not determined by any single moment in time[.]" *In re Estate of Pringle*, 2008 S.D. 38, ¶ 20, 751 N.W.2d 277, 284. The state of the testator's mind must be considered for a reasonable length of time before and after the will is executed. *Id.* The party challenging the will has the burden of establishing lack of testamentary capacity. *In re Estate of Dokken*, 2000 S.D. 9, ¶ 25, 604 N.W.2d 487, 494 ; see also SDCL 29A-3-407.

[¶22.] Children do not dispute that Russell comprehended the nature and extent of his property when he executed the 2012 will, but claim that Russell was unable to comprehend the natural objects of his bounty or the disposition he intended to make of the property. Children argue that the comprehension of one's relatives requires more than a knowledge of their names and familial identities. They maintain that to comprehend means "to take in the meaning, nature, or importance of" these relationships, particularly with Children. Children cite language from *In re Anders Estate*, 88 S.D. 631, 636, 226 N.W.2d 170, 173 (1975), arguing that a testator must "recollect and apprehend the nature of the claims of those who are excluded from participating in his bounty." Children

contend that Russell's delusional disorder caused him to be emotionally detached from them and unable to comprehend the importance of a father/child relationship and the disposition he otherwise would have wanted to make to Children.

[¶23.] Children's arguments are contrary to our decisions on testamentary capacity. This Court has consistently held that testamentary capacity exists under the second and third elements of our test if the testator knows his or her heirs and the disposition he or she desires to make of the property. *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 26, 790 N.W.2d 52, 62 (written instrument signed by decedent provided evidence that he understood the intended disposition of his property); *Pringle*, 2008 S.D. 38, ¶ 28, 751 N.W.2d at 286 (finding of testamentary capacity sustained when evidence showed testator "was cognizant of her children" at the time); *In re Estate of Schnell*, 2004 S.D. 80, ¶ 18, 683 N.W.2d 415, 421 (evidence that testator "knew the natural objects of his bounty" supported a finding of capacity); *Dokken*, 2000 S.D. 9, ¶ 23, 604 N.W.2d at 494 (evidence that testator "knew who his relatives were" supporting the finding of testamentary capacity); *In re Estate of Linnell*, 388 N.W.2d 881, 884 (S.D. 1986) (evidence was sufficient to support a finding of capacity where the attorney testified that the testator knew "who his heirs were at that time" of making the will).

[¶24.] Attorney Bartling testified that Russell knew his Children at the time he executed the 2012 will and described the absence of a relationship with them. Bartling testified that Russell expressed a clear intention to disinherit Children and give his property to Bender. Children presented no facts disputing Bartling's testimony.

[¶25.] Children contend that Dr. Swenson's opinions concerning the impact Russell's delusion disorder had on his relationship with them created a question of fact concerning Russell's testamentary capacity. However, Dr. Swenson's conclusions misapply the standard for testamentary capacity, and conflate the separate doctrines of testamentary capacity and insane delusions. As Professor Thomas E. Simmons explains in his excellent discussion of testamentary incapacity, insane delusions, and undue influence:

457 *457

Testamentary capacity precedes an analysis of either undue influence or insane delusions; it considers whether the individual had the capacity to understand the nature and extent of his property, to know the natural objects of his bounty, and to form an intent regarding the disposition of his property at death....

Only after it has been determined that an individual has testamentary capacity will the doctrines of insane delusions and undue influence have any possibility of operating. An individual lacking capacity can never be subject to insane delusion or undue influence because those doctrines describe invalidating circumstances on all, or portions, of an otherwise valid will[.]

Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. Rev. 175, 179–181 (2015).

[¶26.] Evidence that Russell suffered from a delusional disorder and some degree of dementia is insufficient to create a fact question on testamentary capacity at the time he made the 2012 will. The evidence is undisputed that Russell had the ability to understand and recollect the nature and extent of his property, the natural objects of his bounty, and his intended disposition of his property. The inquiry for testamentary capacity at that point ends. Children have failed to present any facts supporting a claim that Russell lacked testamentary capacity at the time he made the 2012 will.

2. Whether the circuit court erred in determining there were no genuine issues of material fact showing Russell suffered from an insane delusion affecting the terms of his 2012 will.

[¶27.] A will or portion of a will may be invalidated by an insane delusion of the testator. *In re Estate of Berg*, 2010 S.D. 48, ¶ 47, 783 N.W.2d 831, 842–43; *Schnell*, 2004 S.D. 80, ¶¶ 14–18, 683 N.W.2d 415, 419–21; *Irwin v. Lattin*, 29 S.D. 1, 135 N.W. 759, 762 (1912). In *Schnell*, this Court described the doctrine of insane delusions as follows:

An insane delusion is insanity upon a single subject. An insane delusion renders the person afflicted incapable of reasoning upon that particular subject. He assumes to believe that to be true which has no reasonable foundation in fact on which to base his belief. A person persistently believing supposed facts which have no real existence against all evidence and probability, and conducting himself upon the assumption of their existence, is so far as such facts are concerned, under an insane delusion.

Schnell, 2004 S.D. 80, ¶ 15, 683 N.W.2d 415, 420 (quoting *In re Estate of Flaherty*, 446 N.W.2d 760, 763 (N.D. 1989)). "The will of a testator found to suffer from an insane delusion will not be held invalid, however, unless it is shown that his delusion materially affected the terms and provisions of his will." *Berg*, 2010 S.D. 48, ¶ 47, 783 N.W.2d at 842.

[¶28.] Children argue that questions of fact exist as to whether Russell was suffering from an insane delusion when he made the 2012 will. They cite to Dr. Swenson's opinions that Russell was paranoid and suffered from a delusional disorder his entire life. Children claim that Dr. Swenson presented evidence from which a jury could conclude his delusional disorder "made him incapable of understanding or recalling the contact that his children had with him; incapable of understanding or recalling their efforts to care for him; incapable of understanding his own role in causing and perpetuating the failed relationships." They contend that "an insane delusion may exist
458 even though *458 there was some evidence from which the person afflicted might have formed his belief of judgment." See *Schnell*, 2004 S.D. 80, ¶ 15, 683 N.W.2d at 420.

[¶29.] For summary judgment purposes, we accept Dr. Swenson's opinions that Russell's delusional disorder made him paranoid and unable to form normal relationships with people, including Children. However, this evidence is insufficient to create a question of fact as to whether Russell suffered from an insane delusion. There was no evidence he was delusional about a particular subject or topic that "*materially affected the terms and provisions of his will*." See *Berg*, 2010 S.D. 48, ¶ 47, 783 N.W.2d at 842 (emphasis added). "An insane delusion is insanity upon a single subject." *Schnell*, 2004 S.D. 80, ¶ 15, 683 N.W.2d at 420. Often referenced as "monomania"², an insane delusion "is not a general defect of the mind but rather is an insanity directed to something specific, that is, a particular person or thing...." 79 Am. Jur. 2d Wills § 76.

² Monomania is defined as: "Insanity about some particular subject or class of subjects, usu[ally] manifested by a single insane delusion." *Black's Law Dictionary* 1160 (10th ed. 2014). See also *Irwin*, 29 S.D. 1, 135 N.W. at 763 (using insane delusion and monomania interchangeably).

[¶30.] Our prior decisions discussing the doctrine of insane delusions recognize that an insane delusion involves a false belief concerning a particular subject. *Berg*, 2010 S.D. 48, ¶ 25, 783 N.W.2d at 838 (testator held onto a delusion that he had relatives that did not exist and that the actor Fred MacMurray was his father); *Schnell*, 2004 S.D. 80, ¶ 18, 683 N.W.2d at 420 (considered evidence of a belief by the testator that his sons were hiding in the hills with guns to hurt him); *Irwin*, 29 S.D. 1, 135 N.W. at 763 (considered evidence of testator's belief that she was able to communicate with "departed spirits who guided all her actions in the ordinary affairs of life").

[¶31.] Here, Dr. Swenson's opinions that Russell had a lifelong delusional disorder that affected his ability to form relationships with his children did not create a basis to invalidate Russell's will for an insane delusion.³ Dr. Swenson described relationship issues and odd behaviors exhibited by Russell that Dr. Swenson attributed to Russell's delusional disorder, but Dr. Swenson failed to identify a fixed, delusional belief that materially affected the terms of Russell's will. Dr. Swenson also pointed to inaccurate statements Russell made to his attorneys about his relationship with his children.⁴ Russell's recollections and perceptions of his interactions with Children may differ from Children's, and may have even been inaccurate, but they fail to create a question of fact showing that Russell was suffering from an insane delusion. Rather, Russell's statements reflect the unfortunate reality, which is undisputed in this record, that Russell had a poor relationship with Children. As the circuit court aptly
459 concluded, *459 "I accept Dr. Swenson's conclusion that part of Russell's psychological character interfered with his ability to form normal relationships with his Children. I do not accept his application of those psychological facts to South Dakota's law of insane delusions."

3 As noted by Professor Simmons, "Despite its name, which resonates with psychiatric trappings, an insane delusion is a legal concept rather than a scientific one." Simmons, *supra* ¶ 27, at 194. See also Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 Real Prop. Prob. & Tr. J. 67, 68 (2007) (noting that courts have fashioned the legal doctrine of insane delusions).

4 Dr. Swenson relied upon statements made by Russell to his attorneys in which he claimed he had no contact with his daughters since the divorce, that he did not know where they lived, that he was upset he had not seen his daughters at a local parade, that he lost contact with his sons years ago, that Renny did not contact him or wave to Russell when driving on the road, and that Russell believed his sons had been "terrible" to him.

[¶32.] Children have failed to present facts to show that Russell was suffering from an insane delusion that caused him to disinherit Children.

3. Whether the circuit court erred in determining there were no genuine issues of material fact showing Russell's 2012 will was tainted by undue influence.

[¶33.] A will contestant has the burden to prove undue influence by the greater weight of the evidence. *Pringle*, 2008 S.D. 38, ¶ 44, 751 N.W.2d at 291. "For influence to be undue it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator." *Id.* (quoting *Schnell*, 2004 S.D. 80, ¶ 21, 683 N.W.2d at 421).⁵ We have stated that claims of undue influence are generally questions of fact. *Pringle*, 2008 S.D. 38, ¶ 18, 751 N.W.2d at 284. A party seeking to prove undue influence must establish: "(1) the decedent's susceptibility to undue influence; (2) an opportunity to exert such influence and effect the wrongful purpose; (3) a disposition to do so for an improper purpose; and, (4) a result clearly showing the effects of undue influence." *Stockwell*, 2010 S.D. 79, ¶ 35, 790 N.W.2d at 64. Therefore, to successfully resist summary judgment, Children must "show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Foster-Naser v. Aurora Cty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508.

5 A presumption of undue influence arises when there is (1) a confidential relationship between the testator and a beneficiary, and (2) the beneficiary "participates in preparation and execution of the will and unduly profits therefrom." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 32, 721 N.W.2d 438, 446–47. Children concede that a presumption of undue influence did not arise in this case because Bender did not participate in the preparation of Russell's 2012 will.

[¶34.] Bender does not dispute that there are facts showing he had the opportunity to influence Russell. He does, however, dispute that Children presented genuine issues of fact on the other elements of undue influence upon which Children have the burden of proof.

[¶35.] As to Russell's susceptibility to undue influence, Children argue that the opinions of Dr. Swenson and testimony of other witnesses create disputed facts for trial. In particular, Children presented testimony of a bank employee who interacted and conducted bank business with Russell for more than twenty years. The bank employee stated that she became increasingly concerned about Russell's mental acuity in his later years and that he seemed less certain about what he wanted to do when he came into the bank. The bank employee also expressed concern about the amount of cash Russell began withdrawing, as well as Boyd Hagenson's involvement in Russell's banking business.⁶ She observed that Hagenson often brought Russell to the bank and seemed overly engaged in Russell's private banking business.

6 There is evidence that Hagenson spent time with both Russell and Bender. However, there are no facts showing Hagenson was involved in the preparation of the 2012 will or that Bender benefitted from any of Hagenson's actions.

460 [¶36.] The bank employee described one particular transaction in the fall of 2013 *460 when Russell, accompanied by Hagenson, sought to negotiate a \$28,000 check for cash. She instead convinced Russell to take \$8,000 cash and a cashier's check for the balance. She overheard Hagenson telling Russell to include Hagenson's name on the cashier's check. The bank employee reluctantly added Hagenson's name to the check after Russell told her to do so. Later, Russell came to the bank, this time accompanied by Bender, stating that the check and

cash could not be located and Hagenson's whereabouts were unknown.⁷ During this visit, Bender asked Russell if he wanted to add Bender's name to Russell's account. Russell then conferred with the bank about adding Bender's name to Russell's account, and later did so.

⁷ The cashier's check had not been negotiated. It is unclear what happened to the check or the cash.

[¶37.] Dr. Swenson opined that Russell was showing signs of vascular dementia by at least 2009, and that his dementia likely would have caused problems for Russell some time before it became apparent in 2009. Dr. Swenson suggested that Russell's delusional disorder and dementia would have made him more susceptible to manipulation and influence by others.

[¶38.] Bender disputes Dr. Swenson's opinions, and claims they are unsupported by evidence. Bender cites Children's own description of Russell as "domineering", "hardheaded", and "controlling".⁸ Bender submits that Russell was strong willed and distrustful of people, which "weighs against a finding that such a person is susceptible to undue influence." Although Bender believes Dr. Swenson's opinions are unfounded, they were not stricken by the circuit court and therefore remain a part of the summary judgment record. Moreover, Bender's invitation to "weigh" Dr. Swenson's opinions against other evidence is not appropriate on summary judgment. We conclude that disputed facts exist as to Russell's susceptibility to undue influence.

⁸ Importantly, these descriptions of Russell were from a time when Children interacted with Russell when he was younger. Renny testified that Russell mellowed as he grew older. The record also suggests that as Russell aged, he became more reliant on Bender for assistance.

[¶39.] On the question of Bender's disposition to influence Russell for an improper purpose, the circuit court concluded there were no facts supporting a finding that Bender had such a disposition. Children claim the circuit court failed to consider circumstantial evidence showing Bender's improper disposition to influence and take advantage of Russell. They cite *In re Metz Estate* to support their claim that direct proof of undue influence is rarely available and is not required to present a question of fact for undue influence:

There is no direct proof of undue influence in this case. There seldom is. Undue influence is not usually exercised in the open. "It is therefore usually solely through inferences drawn from surrounding facts and circumstances that a court arrives at the conclusion that a will is the product of undue influence working on the mind of the testator."

78 S.D. 212, 221, 100 N.W.2d 393, 397 (1960) (quoting *Johnson v. Shaver*, 41 S.D. 585, 172 N.W. 676, 678 (1919)).

[¶40.] Children initially argue that the farm rental arrangement between Russell and Bender provides circumstantial evidence of Bender's ability and disposition to exert undue influence over Russell. They cite *Neugebauer v. Neugebauer*, 2011 S.D. 64, 804 N.W.2d 450, where we affirmed a finding that a mother's
461 agreement to sell *461 land to her son at a price substantially below fair market value was the result of undue influence. Affirming the circuit court's finding that the son had a disposition to exert undue influence, the Court considered, among other evidence, that the son "historically took advantage of [mother] by paying her less than fair market rent under the oral lease." *Id.* ¶ 24, 804 N.W.2d at 456.

[¶41.] Here, Bender testified that Russell set the amount of rent and that the rent was never increased because Russell always rebuffed Bender's suggestions to do so. However, Bender acknowledged the rent was below market rate. Bender further acknowledged that rental rates for agricultural property in the area increased significantly after 2002. Despite these increases, the rental rate for Russell's farmland never changed, even after Bender became Russell's fiduciary in 2009.⁹

⁹ There is no evidence that Bender made use of the power of attorney to rent Russell's land. However, when Bender became aware he was Russell's attorney-in-fact, "a fiduciary relationship [was] created" and "the fiduciary [had] a duty to act primarily for the benefit of the other." See *Duebendorfer*, 2006 S.D. 79, ¶ 26, 721 N.W.2d at 445.

[¶42.] Evidence also shows that Russell gave Bender a large amount of cash to hold for him for "safekeeping" in 2009. After Russell was placed in the nursing home in 2015, Bender testified that he dug up the additional cash that Russell had buried around the farm and put it in his safe. Bender did not inventory or account for any of this cash until after Russell's death. Aside from a friend who assisted him with digging up some of the buried money, Bender did not disclose his receipt of this cash to anyone until after Russell's death. Children also presented testimony from a neighbor concerning a transaction with Bender in which Bender paid the neighbor cash to purchase a tractor. This transaction occurred after Bender had access to Russell's cash, and the witness claimed the money received from Bender smelled so moldy that she put it outside to air out. Bender admitted that some of the money he received from Russell smelled "slightly" moldy.

[¶43.] These circumstances, viewed most favorably to Children, raise material issues of fact concerning whether Bender took advantage of Russell in the rental arrangement and in handling the cash Russell gave him and whether such evidence supports a finding that Bender had a disposition to influence Russell for an improper purpose. On summary judgment, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *St. Onge Livestock Co., Ltd. v. Curtis*, 2002 S.D. 102, ¶ 10, 650 N.W.2d 537, 540–41.

[¶44.] Finally, we consider whether Children have presented a question of fact whether the disposition of Russell's 2012 will clearly shows the effects of undue influence. Bender argues that the evidence fails to show such a result because the 2012 will was consistent with the prior will Russell had made in 2004. He cites *In re Blake's Estate* which states, "The consistency and harmony of the two wills and the considerable lapse of time between their execution strongly negatives the presence of undue influence[.]" 81 S.D. 391, 400, 136 N.W.2d 242, 247 (1965). While the consistency between the 2004 and 2012 wills may be relevant, a fact finder could also consider the circumstances involving Russell's decision to give nearly all his property to Sherri in the 2001 will and then disinherit her completely in the 2004 will, just three years later.

462 [¶45.] After Sherri had already been named the primary beneficiary in the 2001 *462 will, Bender began renting farmland from Russell at a reduced rate and became more involved in Russell's affairs. Aside from Bender's increased involvement with Russell, there is nothing in the record to suggest that anything occurred in the relationship between Russell and Sherri from 2001 to 2004 that would have caused Russell to disinherit his daughter. A fact finder could consider these circumstances, and inferences drawn from them, in determining whether Russell's decision to disinherit Sherri in the 2012 will was clearly the result of any undue influence by Bender.

[¶46.] In contrast, the "causation" element concerning Russell's decision to disinherit Arlo, Renny, and Gina in the 2012 will is more problematic because Russell had already decided to disinherit them in the 2001 will. Children have made no claim that Bender engaged in any undue influence before Russell made the decision to disinherit Arlo, Renny, and Gina in the 2001 will.

[¶47.] Children argue that notwithstanding the prior wills, Russell made an unnatural disposition of his estate, which may support a finding that the will was clearly a result of undue influence. They claim that both the 2004 and 2012 wills resulted in an unnatural disposition to Bender because Children were "the natural objects of a [Russell's] bounty." *See Blake's Estate*, 81 S.D. at 400, 136 N.W.2d at 247. While Arlo, Renny, and Gina may have been Russell's heirs at law, there is no evidence to show that Russell had any testamentary disposition toward them, even in the absence of any alleged undue influence by Bender. The evidence shows that Russell's relationship with Arlo and Renny became more estranged after Russell kicked them off the farm. Further, Gina's relationship with her father, by her own testimony, was nearly non-existent after 1979. It is undisputed that Russell had already decided to disinherit Arlo, Renny, and Gina in 2001, before there was any claim of undue influence by Bender. Arlo, Renny, and Gina have failed to present any evidence showing "causation" between any alleged undue influence by Bender and Russell's decision to disinherit each one of them in the 2004 will and, more particularly, in the 2012 will. Therefore, the circuit court properly granted summary judgment as to any claim that undue influence caused Russell to disinherit Arlo, Renny, and Gina.

[¶48.] By their very nature, claims of undue influence are fact intensive inquiries. The "evidence and favorable inferences from that evidence" must be viewed "in a light most favorable to the nonmoving party" at the summary judgment stage. *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 6, 741 N.W.2d 767, 769. Doing so here, we conclude that material issues of fact exist on Sherri's claim that 2012 will was the product of undue influence, and summary judgment should not have been entered on her claim. Conversely, there is no evidence to support a claim that Russell's disinheritance of Arlo, Renny, and Gina in his 2012 will was clearly the result of undue influence.

[¶49.] We reverse the entry of summary judgment on Sherri's claim of undue influence. We affirm the entry of summary judgment on all the other claims in Children's petition challenging the 2012 will.

[¶50.] GILBERTSON, Chief Justice, and KERN, SALTER, and DEVANEY, Justices, concur.

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6

Hembree v. Estate of Hembree

311 S.C. 192 (S.C. Ct. App. 1993) • 428 S.E.2d 3
Decided Feb 11, 1993

Opinion No. 1954

Heard January 20, 1993

Decided February 11, 1993 Rehearing Denied
March 13, 1993

Appeal from Lexington County Julius H. Baggett,
193 Circuit Court Judge *193

Affirmed.

*Michael Ray Ellisor, Batesburg, for appellant. Jeff
M. Anderson, of Bouknight, Nicholson, Davis
Young, Lexington, for respondent.*

PER CURIAM:Page 194

Appellant Katherine A. Hembree (contestant) initiated this action in the probate court contesting the will of Willie A. Hembree (testator) on the grounds of undue influence and testator incapacity. The matter was removed to the Court of Common Pleas for Lexington County and proceeded to a jury trial. At the close of contestant's evidence, Respondent moved for and the trial judge directed a verdict in favor of the estate on both issues. The lower court then remanded the matter back to the probate court. Contestant appeals. We affirm.

The testator died on September 23, 1989. He left a will, executed September 30, 1988, devising his residuary estate to Andrea Bowers (Andrea), Carolyn Shumpert (Carolyn), and Janice Dunker, his three daughters by his first marriage, and leaving contestant, who was his second wife, an income interest in a trust comprised of one-third of

his probate estate. Before the execution of this will, testator had executed a will in 1979 which left contestant nothing.

Generally, when the formal execution of a will is admitted or proven, a *prima facie* case in favor of the will is made out. *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982). The burden is then on the contestant to prove testator incapacity or undue influence. *Id.* at 530, 290 S.E.2d at 417. However, in determining whether this burden has been met, we are required to view the evidence in the light most favorable to the contestant. *Id.*

During the summer before the will's execution, testator had been hospitalized for head surgery.¹ Following the surgery, he was physically weak. Moreover, he had problems conversing with others, often repeating or forgetting what he had said or not being able to maintain a conversation.

¹ The surgery was performed to lessen pressure on the brain because of blood clots.

During this hospital stay, Andrea went into his lockbox and removed its contents. Also at this time, Carolyn talked privately with him about his will. Initially, the testator wanted an attorney to come to the hospital and make a new will. However, Carolyn persuaded him instead to plan an appointment for after his release. He agreed and requested that she arrange a meeting at the law firm at which she worked. Before he met with an attorney and under the advice of an attorney
195 *195 with the firm, Carolyn obtained a medical opinion as to testator's capacity.

On August 23, 1988, testator met with an attorney at the firm at which Carolyn worked. Carolyn's husband had driven him to the appointment. When the testator arrived, Carolyn greeted her father. However, she did not sit in on the attorney-client conference nor did she discuss the testator's will with the attorney.

In early September, Carolyn delivered a letter dated September 6, 1988, from the attorney to the testator concerning the testator's wishes as to disposition of certain assets. In response to this letter, the testator directed Andrea to prepare two letters detailing his wishes concerning his estate. She did so but admits brushing up the grammar and sentence structure. On September 12, 1988, Carolyn picked up the testator from his house and drove him to a nearby filling station where he signed these letters.

On September 30, 1988, the decedent executed his will and a power of attorney in favor of Andrea at the law offices. Both Carolyn and Andrea were present but neither witnessed nor were in the attorney's office during the execution. At the testator's request, Carolyn was given the will for safekeeping. Contestant asserts this evidence is sufficient to present the issues of undue influence and testator capacity to a jury. We disagree.

First, the contestant argues that the testator did not understand his will and for this reason he lacked capacity. The test of capacity necessary to make a will is whether the testator knew his estate, the objects of his affections and to whom he wished to give his property. *Hellams v. Ross*, 268 S.C. 284, 233 S.E.2d 98 (1977). Moreover, the presumption arises upon proof of due execution of the will that the testator knew its contents and this is sufficient to establish testator knowledge thereof. *In re Estate of O'Neill*, 259 S.C. 55, 190 S.E.2d 754 (1972).

The contestant relies on the fact that the testator had undergone head surgery and was under medication to challenge his ability to understand the will. She never asserts he was mentally

incapacitated. Instead, she states he could not have understood the complex will and she is unsure if he understood the breadth of his estate. However, there was no ¹⁹⁶ evidence either from the drafting attorney or the subscribing witnesses concerning his condition at the time of the execution. Their testimony would have been quite illuminating as to his condition, but the contestant chose not to call them.

Moreover, the mere fact that the will was a complex document which required explanation from the drafting attorney does not convince us that the testator lacked the capacity to execute this document. On the contrary, the similarity of disposition in the 1979 will and the 1988 will establishes that the testator recognized who his loved ones were and to whom he wished the majority of the estate to go. In fact, the apparent reason the testator wanted the new will was because a change in South Carolina law could undermine his wishes as expressed in the 1979 will.² We find no sufficient evidence to establish testator incapacity at the execution of the will and therefore no error in directing a verdict on this issue.

² Under the common law prior to 1984, the contestant would only have had a dower interest in the testator's estate. *But see Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984) (holding that dower was unconstitutional). Under the South Carolina Probate Code, the contestant, if proceeding under the 1979 will, could claim one-third of the testator's probate estate outright. *See* S.C. CODE ANN. § 62-2-201 (Supp. 1992).

Furthermore, we find no error in the lower court's refusal to submit the issue of undue influence to the jury. The mere existence of influence is not enough to void a will as all influences are not unlawful. *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946). For influence to vitiate a will, it must destroy free agency and amount to force and coercion. *Todd v. Woodard*, 297 S.C. 264, 376

S.E.2d 276 (1989); *Calhoun*, 277 S.C. at 532, 290 S.E.2d at 418; *Smith*, 209 S.C. at 83, 39 S.E.2d at 129. Circumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator. *Calhoun*, 277 S.C. at 530, 290 S.E.2d at 417. In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution. See *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948); *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983).

However, even if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after
 197 the operation of undue *197 influence destroys this conclusion. *Calhoun*, 277 S.C. at 532, 290 S.E.2d at 419. The court's directing of a verdict in that instance is proper. *Id.*

The contestant asserts that Andrea and Carolyn unduly influenced the testator to leave the majority of the estate to them and their other sister. She bases this allegation on the facts we have set out above. However, there was no evidence that

Carolyn or Andrea coerced the testator by force or threat to sign the letters, set up the appointment, go to the law offices, or make the will. They were not in the room when the will was executed nor when the testator first met with the attorney. They had no way of knowing what he was signing until after the fact. At most, the evidence showed opportunity, which alone did not create an issue of fact. See *Todd*, 297 S.C. at 266, 376 S.E.2d at 278.

Moreover, the testator had plenty of time, unhampered by the presence and operation of the alleged influence, to change or revoke his will. His death was not until almost one year after the will's execution. During this time he remained active. He played golf, drove a car, and handled his business affairs. In addition, he lived with the contestant, not the persons allegedly practicing the undue influence. In fact, there was testimony that visits from the alleged influencers were rare. Testator's failure to void or alter the will during this period destroys any inference of undue influence that may have arisen from the other testimony. As a result, we find the granting of the directed verdict was proper.

Affirmed.

7

Church v. Trotter

278 S.C. 504 (S.C. 1983) • 299 S.E.2d 332
Decided Jan 5, 1983

21844

January 5, 1983.

E. Michael Carlton, Lexington, and *Sheila D. McMillan*, Columbia, for appellant-respondent.
505 *505 *C. Joseph Roof*, of Lumpkin Sherrill, Columbia, for respondent-appellant.

Jan. 5, 1983.

LEWIS, Chief Justice:

Appeal and cross-appeal are taken from a family court order determining a number of issues between these parties. Because of the interrelationship of these issues and an error of law committed by the trial judge in resolving the threshold question, we remand the case in its entirety for redetermination as directed below.

Respondent (Church) was adjudicated incompetent in 1969. Two years later he met and married appellant (Trotter). The marriage lasted three days. Three months after the couple parted, divorce proceedings were initiated by appellant. Divorce was granted by default, and alimony was awarded to appellant. For seven years thereafter, appellant collected monthly alimony from respondent's committee Bank. In 1979, respondent was adjudicated competent and began these proceedings in family court to recover the alimony paid. His position was that the prior adjudication of incompetency rendered the 1971 marriage a nullity under Section 20-1-10, Code of Laws, 1976, from which he reasoned the divorce had no legal effect and the alimony award constituted

unjust enrichment. Appellant contended that the respondent was in fact competent in 1971 which made the marriage contract binding, the divorce decree proper and the alimony just. Further, appellant argued that since respondent was in fact competent in 1971 and 1972, he was not entitled to personal service of process under 15-9-490, Code of Laws, 1976, which had also been a basis for respondent's attack upon the divorce decree.

Reviewing the order of the trial court, we find that the 1971 marriage was declared null and void solely on the basis of the 1969 adjudication. Although there was conflicting testimony presented at hearing which bore upon the respondent's actual mental condition during the relevant times, the family court order is completely silent with respect to this contested fact. It appears that the trial judge considered himself bound conclusively by the prior
506 adjudication. This was error of law. *506

It has long been the rule in this State that an adjudication of incompetency is but prima facie evidence of that fact. *Keys v. Norris*, 6 Rich Eq. 388; *Cathcart v. Matthews*, 105 S.C. 329, 343, 89 S.E. 1021. In a contract setting, particularly, this Court has looked specifically to the condition of a party at the time of a transaction. *Fielder Brown v. Jennings*, 131 S.C. 26, 126 S.E. 448. We have also provided guidance in ascertaining the existence of incompetency as a matter of fact. *Thompson v. Moore*, 227 S.C. 417, 88 S.E.2d 354.

Under the testimony in this record, it was the duty of the trial judge to make specific findings of fact with regard to respondent's competency at the time

of the 1971 marriage and indeed during the pendency of the divorce action. Our review cannot proceed to the remaining issues without some finding on this threshold question.

Judgment is accordingly reversed; and the case remanded for determination of the competency of respondent at the relevant times and for determination of all other issues as may be appropriate.

LITTLEJOHN, NESS, GREGORY and
HARWELL, JJ., concur.

8

Thompson v. Moore

227 S.C. 417 (S.C. 1955) • 88 S.E.2d 354
Decided Jul 14, 1955

17031

418 July 14, 1955. *418

*Charles Welborn, Esq., of Anderson, for Appellant, cites: As to error on part of trial Judge in revoking the appointment and dismissing the complaint, the order of appointment not being subject to collateral attack: 62 S.Ct. 438, 315 U.S. 94, 86 L.Ed. 711; 11 S.E. 188; 153 S.C. 78, 150 S.E. 473; 207 S.C. 478, 36 S.E.2d 742; 189 U.S. 426, 23 S.Ct. 513, 514, 47 L.Ed. 882; 37 Am. Jur. 502, Motions, Rules and Orders, Sec. 3; 1 Am. 419 Jur. 955, *419 Affidavits, Sec. 29; 202 S.C. 546, 27 S.E.2d 803. As to mental capacity, in instant case, being jury question: 131 S.C. 26, 126 S.E. 448; 105 S.C. 329, 89 S.E. 1021; 212 S.C. 502, 48 S.E.2d 445. As to general rule concerning legal rights of insane person who is not under guardianship: 199 S.C. 490, 20 S.E.2d 107. As to where prima facie case is made, burden of proof shifts to he who contests: 20 Am. Jur. 136, Evidence, Sec. 133.*

John C. Pracht, Esq., of Anderson, for Respondent, cites: As to Circuit Judge having power to revoke or modify his own order: 12 S.C.L. 474; 188 S.C. 181, 186, 198 S.E. 389. As to respondent's motion not constituting a collateral attack: 204 S.C. 26, 28 S.E.2d 441.

July 14, 1955.

J. WOODROW LEWIS, Acting Associate Justice.

This is an appeal from an order of Judge Pruitt of the Tenth Circuit vacating a previous order by him appointing appellant as guardian *ad litem* for appellant's father, William N. Thompson. Upon the verified petition of appellant an order was passed on August 21, 1954, appointing the appellant as guardian *ad litem* for his father for the purpose of bringing an action against the respondent for the recovery of money allegedly due by the respondent to the said William N. Thompson who, it was alleged, was incompetent by reason of his mental condition to bring the action. Upon the institution of the action by the appellant, the respondent moved before Judge Pruitt for an order vacating the previous order of appointment. After hearing the motion the circuit judge passed an order vacating the previous appointment of appellant as guardian *ad litem* and dismissed the action on the ground that "the proof of incompetency was insufficient to support the appointment."

The appellant first contends that the motion to vacate the order appointing him guardian *ad litem* constitutes a collateral attack upon the order of 420 appointment previously *420 made. The procedure adopted by the respondent is not a collateral attack upon the order of appointment but is a direct one in the same proceeding which resulted in the appointment. The procedure here adopted is approved in the case of *Barr v. One Ford 1935 V-8 Ford Truck*, 188 S.C. 181, 198 S.E. 389, 391.

It is next contended that the issue of the mental competency of the subject herein presented a question of fact to be determined by the jury upon

a trial of the case. The complaint contains no allegation that the subject was mentally incompetent at the time of the transaction alleged. Assuming, however, that the complaint did so allege, appellant confuses the issue of incompetency as it affects the right of the appellant to institute the present action and the right of recovery on the cause of action alleged in the complaint. The question before the circuit judge was not whether the subject was incompetent at the time of the transaction set forth in the complaint, but whether he was mentally incompetent at the time of the appointment of appellant as guardian *ad litem*.

The appearance of a mentally incompetent person as a party to litigation in this State is governed by statute. Section 10-236, 1952 Code of Laws, as amended by Act No. 836 of the 1952 Acts of the General Assembly, 47 St. at Large, p. 2066, provides that "a mentally incompetent person, whether hospitalized or not, shall appear by guardian *ad litem* in an action by or against him. * * * The application shall be made to, and the appointment made by, the court in which the action is prosecuted, or by the judge, or the clerk, or the master thereof, or by the probate judge of the county in which the incompetent person resides, or of the county in which the action is prosecuted."

The statutes do not provide for, nor contemplate, a jury trial on the question of mental competency upon application for the appointment of a guardian *ad litem* for an allegedly mental incompetent. In cases, as here, where there has been no previous
421 adjudication of mental incompetency *421 it is required that the fact of mental incompetency be made to appear to the Court or officer making such appointment by proof reasonably sufficient to establish the fact, either by affidavit or otherwise. The question of the mental condition of the subject is one of fact to be determined by the Court or officer to whom the application is made, here the circuit judge. See *Barr v. One 1935 V-8 Ford Truck, supra*.

As stated in the *Barr case, supra*: "'To justify such an appointment, which may have the effect to deprive a person of the control of litigation in which his interests may be largely involved, the fact of incompetency should be specifically alleged, and the court should be satisfied from the proofs that the status of incompetency actually exists at the time the appointment is made. A finding of incompetency should be made'."

The second position of the appellant cannot be sustained. The remaining exception charges error on the part of the circuit judge in holding that the proof of incompetency of the subject was insufficient to support the appointment of a guardian *ad litem*.

The only showing of incompetency before the circuit judge at the time of the appointment herein consisted of the allegations in the verified petition of appellant "that his father is an elderly man some seventy-nine (79) years of age and because of his said age he is incompetent to prosecute the action in his own name, and is not capable mentally of prosecuting or defending said action." The foregoing, unsupported by any other showing, is clearly insufficient ground upon which to base a finding of mental incompetency.

At the hearing of the motion to vacate the order of appointment the circuit judge had before him two affidavits offered by the appellant to sustain the previous order, one affidavit by the appellant and the other by his brother. The respondent offered no
422 affidavits or other factual showing, *422 relying upon the claimed insufficiency of the showing by the appellant. The substance of the mentioned affidavits, as they pertain to the issues here, is that the appellant's father is incompetent to look after his affairs "because of his age, his eyesight and his hearing," "because he allows anyone to come along and 'sweet talk' him out of any money that he has on his person at that time," and "for the past ten (10) years or more, he has not been capable of handling money or business transactions." It is

further stated that because of his incompetency their mother, prior to her death in 1951, handled all of his business affairs.

The term "mentally incompetent" is difficult of exact definition. Mental incompetency "in its ordinary meaning imports mental deficiency so great as to render one unable to comprehend or transact the ordinary affairs of life." *Edge v. Duncan Mills*, 202 S.C. 189, 24 S.E.2d 268, 271. It is not necessary that it be proved that the subject is a lunatic or that he has been previously adjudged insane. It must be shown, however, by credible evidence that the subject, because of mental impairment, has become incapable of managing his own affairs, whether from age, disease, or affliction. See 44 C.J.S., *Insane Person*, § 2, p. 39.

On the question of proof of incompetency it was stated in the case of *Barr v. One 1935 V-8 Ford Truck*, *supra*: "While we do not desire to lay down a hard and fast rule as to the sufficiency of evidence, where there has been no previous adjudication, we do not think it amiss to call attention by way of analogy to Section 6234, Code, 1932 [now Section 32-1001, 1952 Code], relating to the appointment of a committee for an insane person by the probate judge, which provides for the examination of the alleged insane

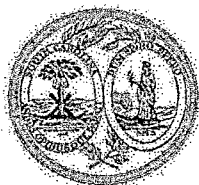
person, if practicable, and such other witnesses as may be deemed necessary, at least two of whom shall be practicing physicians."

The conclusion of the circuit judge that the showing of incompetency was insufficient constitutes a finding of fact, binding on this Court unless unsupported ⁴²³ by the evidence. The burden of proving mental incompetency of the subject is upon the appellant who seeks to establish it. The showing made by the appellant constitutes at the most generalities and opinions that fall short of that proof required to sustain a finding of mental incompetency. The circuit judge correctly held that the proof herein was insufficient and properly vacated his previous order appointing appellant as guardian *ad litem* for the subject in this case.

The conclusions herein are without prejudice to the institution of new proceedings for the appointment of a guardian *ad litem* for the subject herein.

Affirmed.

STUKES, TAYLOR, OXNER and LEGGE, JJ., concur.



Charleston Common Pleas

Case Caption: Athena L Irland , plaintiff, et al VS Isadore John Psaras , defendant, et al
Case Number: 2022CP1003304
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

4

CASE # 2022-CP-10-3304

Athena Irland,
Appellant

vs.

Brandy S Culp
Respondent

Reconsideration
of Dismissal
of Appeal From
Probate Court

In the Court of Common
Pleas Ninth Judicial
Circuit

FILED
2023 OCT 11 PM 3:26
JULIE J. ADAMS, CLERK OF COURT
JR

Case # 2022-CP-10-3304

The initial hearing before this Court on October 27, 2022 was based on three issues from opposing counsel.

1) Notification of service NOT given within 10 days to Isadore John Paras and Christina Culp

2) res judicata

3) "she hasn't taken any of the steps under the Statute for perfecting the Appeal."

No statement of issues, designation of matter, initial brief

While I filed to the Court my documents on July 22, 2023. I did not file the paperwork in the order according to Statute section 62-1-308. I know that now.

I filed on July 22, 2023:

Notice of Appeal Intent, I gave each individual a copy and had them or their personnel sign for the documents.

In the document of the Intent to Appeal was also the issues of the appeal, signatures of signees, the Order from the Probate Court.

As said it was not in procedural order, it is the basis for a case listed under, Issues of Appeal and

CASE# 2022-CP-10-3304

Designation of Matter which included
Signatures, Notice of Appeal, issues of
Appeal, order From the Probate Court
CASE# 2019-ES-10-1368

I am asking the Court to reconsider
dismissing the Appeal, (Oct. 2, 2023)
and consider substance over form,
while flawed in format, it still
communicated necessary information
and facts that led this Court to grant
my appeal on November 15, 2022.

A dismissal punishes me for
well-meaning imperfections despite
no prejudices to other parties; they
were fully aware of my appellate intent.

Dismissal on procedural grounds
which can be rectified, means these
important issues are not considered on
appeal. The appellate review is intended
to correct the potential errors by the
Lower Court. A procedural dismissal
prevents that. If the dismissal is
upheld a potentially invalid will
governs the estate of Dolly Coleman
over direct evidence that shows
the testamentary capacity was not
given and medical evidence proving
no Dementia in Dolly Coleman when
tested at MUSC.

CASE# 2022-CP-10-3304

Accusations of undue influence shown to be untrue with testimony.

The Supreme Court of Illinois held that prose complaints are to be held to less stringent standards than formal pleadings drafted by lawyers.

Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 595, 30 L.Ed. 2d 652 (1972)

Procedural Flaws pale in comparison to the substantive issues of the above.

I ask the Court to grant me reconsideration of dismissing my Appeal, To use its discretion to reopen the appeal in the interests of fully examining serious questions of the Will's validity and the Lower Court's errors concerning Dolly Coleman's capacity and medical records proving the same.

This case needs to be used to consider reforms like leniency for procedural errors by prose litigants in the interests of adjudicating merits.

Lastly Isadore John Psaras and Christina Culp are not parties to this action. Through mediation they sold their rights to Brandy Culp as was so ordered by Judge Lenna Kirchner

CASE # 2022-CP-10-3304

Accusation of undue influence shown to be untrue with testimony.

In reference to the 45 day rule under Section 62-1-308(b).

It states within 45 days after receipt of written notice of the order, sentence or decree of the Probate Court, the Appellant must file a Statement of Issues. I received the Filed Order by the Probate Court through the Clerk of Court in the mail which it was filed July 22, 2022. That is the date I used to have 45 days.

July 22ND to 31ST 9 days

August 1-31 31 days

Sept. 1-6 5 days 5 not included

September 5 was a holiday so it was filed on Sept. 6 equalling 45 days

I am asking The Court to find that my appeal is granted and remanded back to the Probate Court for a new trial.

Athena Claf
10-11-2023

5

I N D E X

DESCRIPTION	PAGE
Motions	4
Certificate of Transcriptionist	23

EXHIBITS PAGE

NO.

DESCRIPTION

ID EV

(No exhibits offered.)

1 P R O C E E D I N G S

2 (Proceedings begin on the 27th day of October 2022,
3 at 10:21 a.m.)

4 THE COURT: All right. So it is y'all's
5 motion to dismiss the appeal; is that correct?

6 MR. SANCHEZ: Yes, Your Honor.

7 THE COURT: All right. I'll be happy to hear
8 from you. I've read -- I've read the motion.

9 MR. SANCHEZ: Thank you, Your Honor. May it
10 please the Court.

11 THE COURT: Sure.

12 MR. SANCHEZ: My name is Jesse Sanchez. I
13 represent Respondent Brandi Culp who is here with
14 us today. Also in the courtroom is Christina Culp
15 who is a -- also a respondent, a named respondent
16 in this appeal.

17 Your Honor, as we set in our brief, we believe
18 there are three main reasons why this appeal should
19 be dismissed. But before we get into any of those
20 reasons, we think that there is a date that is
21 important for the Court to note, and that date is
22 October 28, 2014. And I'll come back to this date,
23 you'll see, over the course of this motion hearing.

24 The first reason why we believe the motion --
25 that the appeal should be dismissed is because res

1 judicata. The issues in this appeal have already
2 been tried twice and they've been unsuccessfully
3 appealed by Ms. Irland. In fact, the South
4 Carolina Court of Appeals dismissed the very
5 issues, the appeal that address the very issues
6 that are in this case today.

7 So I'd like to give you a little bit of a
8 background. There was a previous related case back
9 in 2016 when the decedent, Dolly Legare, was still
10 alive. There was a trial before Judge Kirchner.
11 And the main issue in that case was that Ms. Legare
12 had been suffering from dementia since 2010 and
13 Ms. Irland in -- on October 28, 2014, again, that
14 date, had caused her mom to transfer three
15 properties over to her by signing deed.

16 The Court ultimately found that the decedent
17 lacked the capacity to transfer the properties over
18 to Ms. Irland and that Ms. Irland had exercised
19 undue influence over her mother. That was the law
20 of that case.

21 Again, on October 28, 2014, there was a lack
22 of capacity and undue influence.

23 THE COURT: And when did Judge Kirchner make
24 that determination?

25 MR. SANCHEZ: Judge Kirchner issued that order

1 on June 29, 2017. And then, it was subsequently
2 appealed and dismissed by the Court of Appeals on
3 August 22, 2017.

4 THE COURT: All right. Hold on. Court of
5 Appeals when?

6 MR. SANCHEZ: August 22, 2017.

7 THE COURT: All right. Pardon my ignorance.
8 How did we get here?

9 MR. SANCHEZ: Well, fast forward to 2022 when
10 we're in front of Judge Kirchner again.

11 THE COURT: On a?

12 MR. SANCHEZ: On -- Ms. Irland wanted to --
13 Ms. Irland had argued that the decedent had revoked
14 her will on October 28, 2014. She had taken her
15 mother to have the will revoked, had it torn up.
16 Again, there was a finding by the Court that on
17 October 28, 2014, she lacked the capacity to revoke
18 a will. And then, October 28, 2014, she exercised
19 undue influence over her.

20 THE COURT: How did she get -- how did
21 Ms. Irland get to Judge Kirchner again? Like on a
22 motion? If it went to the Court of Appeals, that
23 would be it. I don't understand how probate court
24 would allow that to get back in in August of this
25 year.

1 MR. SANCHEZ: Well, one was a guardian case
2 while the decedent was alive.

3 THE COURT: Right.

4 MR. SANCHEZ: And one involved the existence
5 of this will.

6 THE COURT: All right.

7 MR. SANCHEZ: And so had we known about this
8 revocation of the will back in --

9 THE COURT: You would have adjudicated it back
10 them?

11 MR. SANCHEZ: Right. Exactly.

12 THE COURT: There's my confusion. All right.
13 Go ahead.

14 MR. SANCHEZ: So unfortunately, we were in
15 front of Judge Kirchner again. We had testimony
16 from the parties and different respondents. And at
17 the end, she determined that again, as with the
18 previous case that is the law of the land, she
19 lacked capacity on that date and that Ms. Irland
20 exercised undue influence. So that's the first --

21 THE COURT: I assume a pretty easy decision
22 now that she already found it once, there's no
23 reason to find it -- didn't have to necessarily
24 look at another piece of document -- or another
25 document.

1 MR. SANCHEZ: No, Your Honor. But they did go
2 into a very lengthy hearing. She didn't entirely
3 rely on the earlier discussion. She listened to
4 all the arguments again.

5 THE COURT: Fair enough.

6 MR. SANCHEZ: The second reason, Your Honor,
7 why the case -- why the motion should be dismissed
8 is on jurisdictional grounds. Under the statute,
9 the notice of intent to appeal must be served on
10 all parties within 10 days of notice of entry of
11 the order. Ms. Irland didn't do that.
12 Specifically, there are two respondents, Christina
13 Culp and John Isadore Psaras who were not served at
14 all with a notice of appeal. They are respondents
15 in the case. They were parties in the underlying
16 case. They were named respondents in the notice of
17 intent to appeal that was filed and they were never
18 served.

19 And I just call this Court's direct --
20 attention to *USAA Properties and Casualty Insurance*
21 *versus Clegg*, which says that, you know, the Court
22 lacks jurisdiction to rescue the delinquent party
23 by extending or ignoring the deadline for service
24 of the notice. So that is a jurisdictional issue,
25 Your Honor. It wasn't properly served on all the

1 parties according to the statute and under the
2 South Carolina law. That's fatal to her appeal.

3 THE COURT: Quick question. Has Ms. Irland
4 ever been represented by counsel or always been pro
5 se?

6 MR. SANCHEZ: Ms. Irland was at one point
7 represented by our now current Federal
8 Judge Dawson --

9 THE COURT: All right.

10 MR. SANCHEZ: -- during the first trial. And
11 candidly, Your Honor, and I think you'll -- you'll
12 see this when you review the -- the documents that
13 were filed by Ms. Irland, she seems to blame
14 everyone about the situation that she's in. She
15 blames Judge Dawson who was then her lawyer, her
16 lawyers in this case, Judge Kirchner.

17 But there's -- there's also a third reason,
18 Your Honor, why this appeal should be dismissed,
19 and that is, she hasn't taken any of the steps
20 under the statute for perfecting the appeal. She
21 has not filed or served a statement of the issues
22 on appeal, which she's required to do within 45
23 days of receiving the order. She hasn't filed or
24 served a designation of matter which is required to
25 do within 30 days of serving on issues on appeal.

1 She hasn't filed an initial brief in this case
2 which was due at the same time that the designation
3 of matter was due. So that's a third reason,
4 Your Honor, why this -- we respectfully submit this
5 appeal should be dismissed. The first one is res
6 judicata, the second one is the jurisdictional
7 issue, and the third one is she hasn't taken any
8 steps to actually proceed the appeal.

9 THE COURT: All right. Thank you very much.
10 Give me one second. I'm pulling it up. It just
11 takes a while. (Pause.)

12 What was the hearing that was held in front of
13 Judge Kirchner April of this year?

14 MR. SANCHEZ: Your Honor, that was the hearing
15 in this case in which Ms. Irland had attempted to
16 revoke the mother's will.

17 THE COURT: That's the hearing that generated
18 the second order.

19 MR. SANCHEZ: Correct.

20 THE COURT: Got it. Whatever -- what did
21 Judge Kirchner ever do with the three properties
22 that she found that Ms. Irland based defrauded the
23 -- what was -- what was the relationship? Her
24 mother?

25 MR. SANCHEZ: Her mother and other respondents

1 consist of her siblings and also Ms. Irland --
2 Ms. Legare's -- the decedent's granddaughter,
3 Brandi Culp, is my client.

4 THE COURT: And so whatever happened to the
5 properties back in 2017?

6 MR. SANCHEZ: They were ultimately -- those
7 deeds were rescinded by the Court.

8 THE COURT: And so ultimately, were they all
9 divided equally amongst the -- the heirs?

10 MS. IRLAND: No. It's not three properties;
11 it's two.

12 THE COURT: Well --

13 MR. SANCHEZ: They went -- they --

14 THE COURT: The two properties. Sorry.

15 MR. SANCHEZ: They went back to the estate,
16 Your Honor.

17 THE COURT: Okay. And has the estate been
18 closed?

19 UNIDENTIFIED MALE SPEAKER: What -- what
20 happened was the estate isn't closed because now
21 that -- she was alive at the time that that took
22 place --

23 THE COURT: Right.

24 UNIDENTIFIED MALE SPEAKER: And now, what
25 happened with the will is that -- is because they

1 attempted to revoke the will. And the Court
2 determined that the will wasn't revoked. And the
3 Court says we're going to exercise under that will.
4 So that will is where we stand today except for the
5 fact that there's been an appeal --

6 THE COURT: To that order.

7 UNIDENTIFIED MALE SPEAKER: -- which brings us
8 here.

9 THE COURT: I understand that.

10 UNIDENTIFIED MALE SPEAKER: Yes, sir.

11 THE COURT: All right. So the appeal that was
12 attempted to be revoked was denied. And so there
13 is a will and y'all are obviously going to abide by
14 whoever -- the executors are going to have to now
15 go through the entire process of -- what do they
16 call it? I can't remember what they call it.
17 Probate the will.

18 MR. SANCHEZ: Yes, sir.

19 MS. IRLAND: Yes, sir.

20 THE COURT: It's on the second floor. I've
21 been down there.

22 All right. Yes, ma'am.

23 MS. IRLAND: I'm not going to go through
24 everything that he said. I'm just going to focus
25 on -- on the -- I gave my notice of appeal --

1 THE COURT: Here's what I'd like you -- for
2 you to focus on, Ms. Ireland. I am only considering
3 -- I understand you're not an attorney that's why I
4 asked if you had been represented by counsel
5 previously or if you were always pro se. You
6 understand that as a pro se appellant that you are
7 held to the same requirements as an attorney.

8 MS. IRLAND: Correct.

9 THE COURT: But I understand that you have not
10 abided by the rules and regulations and the
11 statutory requirements of this case; however, I
12 want you to address the issue that they brought up
13 about res judicata, meaning Judge Kirchner's
14 already made all these decisions. Why did you
15 bring it here saying that she did something wrong?
16 That's what I want to hear about, please.

17 MS. IRLAND: Yes, sir. I'm appealing Judge
18 Kirchner's decision on why the will should not be
19 revoked because she did not consider -- and here's
20 my documentation -- any testamentary capacity of my
21 mother. When you said that, well, they did one, do
22 the other, that's not what the law says.

23 THE COURT: But he -- he acknowledged that.
24 He said no, she did not do that.

25 MS. IRLAND: Okay.

1 THE COURT: He said Judge Kirchner did not
2 rely on the laws of her original order, that she
3 went through an entirely separate hearing and her
4 testimony --

5 MS. IRLAND: We went through the hearing, but
6 she --

7 THE COURT: Ma'am, I'll do you a favor. I
8 won't interrupt you again if you don't interrupt
9 me. Okay?

10 MS. IRLAND: Okay.

11 THE COURT: All right. And so he indicated
12 that she had not done that, that she had rested on
13 the previous order, that she had had a completely
14 new hearing and decided the facts and issued an
15 order based on that hearing. So he had actually
16 agreed upon that.

17 MS. IRLAND: No. The first in '17 was the
18 deeds to the property. It was two pieces of
19 property that my mother deeded to me.

20 THE COURT: I understand.

21 MS. IRLAND: But before all this started --

22 THE COURT: The second portion, of course, was
23 the will.

24 MS. IRLAND: This is the -- the one on April 7
25 was the will. Testamentary capacity is different

1 doing a contract and a will, because a will can --
2 you can write a will seven days a week if you'd
3 like. It doesn't have the same legal standard.
4 And I gave cases and I provided information. She
5 didn't consider any of that. That is -- was my
6 basis for my appeal. I went through descendants.

7 They are appealing -- they sent a motion to
8 dismiss my appeal because I did not notify
9 Christina Culp or Johnny Psaras. This is a
10 settlement agreement that Johnny and Tina signed,
11 and it is in March 16 of 2020, that they assigned
12 all their interests over to Brandi Culp. So I did
13 not have to notify them.

14 Now, if I made a -- a lack in judgment by
15 putting their name still at the top, that does not
16 disenfranchise this settlement agreement that they
17 have. Not only was that settlement agreement in
18 our court case on April 7, Judge Kirchner and --

19 THE COURT: Was that provided to Judge
20 Kirchner at that April hearing?

21 MS. IRLAND: What?

22 THE COURT: That that you have in your hand,
23 that settlement agreement.

24 MS. IRLAND: Judge Kirchner didn't -- Judge
25 Kirchner made this back in 21. I think it was

1 March -- I have that here too. March 20, she
2 signed off on this.

3 THE COURT: Okay.

4 MS. IRLAND: They're saying that I did not
5 notify them and I had to notify them under the
6 rules.

7 THE COURT: That's about the appeal.

8 MS. IRLAND: Correct. That's why we're here.
9 They're doing a motion to stop my appeal of
10 revoking the will by Judge Kirchner. Okay. That's
11 what I want to have the circuit court look at. Do
12 you -- are you understanding me?

13 THE COURT: I'm coming with you. I'm
14 focusing.

15 MS. IRLAND: Okay. It doesn't have anything
16 to do with the rescinding of the deeds. It doesn't
17 have anything to do with the revoking of the will.
18 It is they filed a motion to stop my appeal because
19 I did not notify Christina Culp or Johnny Psaras.
20 I didn't notify them because they are not a party
21 of interest to this action.

22 THE COURT: Why are they not a party of
23 interest to this action?

24 MS. IRLAND: Because they sold their interest
25 to Brandi Culp. And also Judge Kirchner -- Judge

1 Kirchner signed an order to approve the settlement
2 of them assigning their interest over to Brandi
3 Culp on March 22 of '21 and that they didn't have a
4 hearing and the reason is because the courts were
5 closed and all because of COVID. So she -- and she
6 states that in here that she -- she just went ahead
7 and approved it. So they're not a party to my
8 appeal, which is to appeal Judge Kirchner's
9 decision, which has nothing to do with this today
10 appeal -- of the revocation of the will. It's --
11 they're trying to confuse the Court, and I don't
12 appreciate that.

13 Because yes, things were done. And I take
14 exception to him saying, Oh, she's trying to blame
15 everybody. I'm not trying to blame everybody.
16 Facts are facts. But that's not before this Court
17 today. But I don't need to defend myself. I
18 shouldn't need to defend myself from things he said
19 that's not true. Because he was just hired. He
20 has -- he can look at paperwork and he can listen
21 to what their clients say, but facts are -- are
22 facts. Okay.

23 So yes, I lost the deeds back in 2017 that
24 mother had signed before any of this started back
25 in magistrate's court in 2014. Okay. And yes, I

1 took my mother took a lawyer, was not present when
2 she tore up the will. Wasn't present. I took her
3 when she did the deeds. Wasn't present.

4 THE COURT: All right.

5 MS. IRLAND: She did it on her own, but I was
6 caused to say I had undue influence. That's fine.
7 We're done. That's over.

8 And I did file the appeal. I filed the notice
9 of appeal and I filed the appeal. But they're
10 trying to stop me from appealing Judge Kirchner's
11 ruling on the will. And I appealed it within the
12 45 days.

13 THE COURT: All right.

14 MS. IRLAND: But they're -- this is the reason
15 why we're here is I didn't serve them, and I don't
16 have to serve them because they're not a party.

17 THE COURT: All right. All right. Anything
18 further?

19 MR. SANCHEZ: Yes, Your Honor. So a couple of
20 points, Your Honor, quickly. If we look at Judge
21 Kirchner's order specifically on page 1 and page 4
22 of her order, most recent one, it identifies all
23 the respondents including Christina Culp and Johnny
24 Psaras.

25 And then on page 4, it identifies them as each

1 being a party to the underlying probate action as
2 well as intestate beneficiaries and listed devisees
3 under the subject wills. So they were at all times
4 during the hearing parties to that hearing.
5 There's never been an order dismissing them from
6 the case whatever.

7 There is, in fact, a private settlement
8 agreement between our client Brandi Culp and those
9 two respondents that were entered with the Court.
10 It specifically says it does not appeal to
11 Ms. Irland. They have not released any claims or
12 defenses or anything with regard to Ms. Irland's
13 claim. It's simply a settlement agreement as to
14 how they're going to divide things with our client,
15 Brandi Culp.

16 THE COURT: All right.

17 MS. IRLAND: Your Honor, that is not true.
18 Here it is right here.

19 THE COURT: You could -- get that piece of
20 paper real quick she keeps referencing.

21 MS. IRLAND: Here's the settlement agreement.

22 THE COURT: Ma'am, again, I promise that I
23 wouldn't interrupt you if you don't interrupt me.

24 MS. IRLAND: I --

25 THE COURT: I asked for the piece of paper and

1 they'll hand it to me.

2 MS. IRLAND: Okay. I was just telling you
3 which one it was, Your Honor. I'm sorry.

4 (Document is handed up to the Court.)

5 THE COURT: (Reviews document.)

6 MS. IRLAND: And Your Honor, if I could, he
7 was talking about page 4 of that hearing. Here is
8 page 5 and page 6 where the judge is discussing
9 with Mr. Michelle who was the attorney for the
10 state. And it also says here that they -- both
11 Johnny and Tina are out, if you'd like to see this.
12 This is page -- he said page 4. This is 5 and 6.

13 THE COURT: I have it right here.

14 MS. IRLAND: Okay.

15 MR. SANCHEZ: Your Honor, for the record, I
16 was referring to the order, not the transcript.

17 THE COURT: Judge Kirchner's order?

18 MR. SANCHEZ: Yes, sir.

19 MS. IRLAND: Well, this is the transcript that
20 she's confirming with Attorney Michelle.

21 THE COURT: (Reviews document.)

22 All right. All right. I took a look at the
23 order of Judge Kirchner. All right. Anything
24 further?

25 MS. IRLAND: Do you want to see this?

1 THE COURT: What is it?

2 MS. IRLAND: It's where the judge is talking
3 to the Attorney Michelle and the testimony which
4 also says that Christina Culp and Johnny Psaras
5 have settled and they are not a party.

6 THE COURT: I've seen it in the order.

7 MS. IRLAND: Okay.

8 THE COURT: All right. Anything further?

9 MR. SANCHEZ: Your Honor, may I just add a
10 couple of points? I just want to point out for the
11 Court that we actually moved for summary judgment
12 in front of Judge Kirchner. She denied it. Had a
13 full hearing on the issues, listened to everything,
14 and ultimately after considering all the issues,
15 determined that the same thing that had happened in
16 2017 happened again, which was on that specific
17 date the decedent lacked capacity and that
18 Ms. Irland had exercised undue influence.

19 And I would just also add, Your Honor, that we
20 provided three distinct reasons why this appeal
21 should be dismissed, whereas Ms. Irland has really
22 only addressed one -- one of those arguments.

23 THE COURT: I asked her that though.

24 MR. SANCHEZ: Thank you, Your Honor.

25 MS. IRLAND: Your Honor, his first issue of

1 the undue, that is not an issue for this. The
2 other thing, I -- I have followed the rules and
3 sent, like I said, my notice of appeal and the
4 appeal to the courts in the time frame that I was
5 supposed to.

6 THE COURT: All right. All right. I'll take
7 it under advisement. Y'all will have my answer by
8 the end of the day.

9 MS. IRLAND: Oh. Thank you very much.

10 (Proceedings conclude at 10:48 p.m.)
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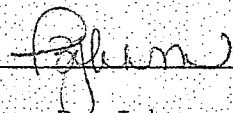
CERTIFICATE

23

I, the undersigned, Teresa B. Johnson, Official Court Reporter, do hereby certify that I transcribed the electronic recording of the remote hearing in this matter; and that the foregoing is a true transcript of said electronic recording.

I do further certify that I am not a relative, employee, attorney, or counsel of any of the parties connected with the action, nor am I financially interested in the action.

Dated: May 5, 2023

A handwritten signature in cursive script, appearing to read "T. Johnson", is written over a horizontal line.

Teresa B. Johnson, CVR-M-CM, RVR, RVR-M
Official Court Reporter

6

Exhibit 3

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Athena Ireland

Plaintiff(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2022 -CP- 10 - 3304

Isadore JOHN PEARAS
Christina D. Culp, Brandy S. Culp

Defendant(s)

Submitted By: Athena Ireland
Address: 186 DOLLY DIMPLES TRL
HUGER SC 29450

SC Bar #: _____
Telephone #: 843-3316-4834
Fax #: _____
Other: _____
E-mail: KARMA1234@myyahoo.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____ Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____ Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____-____-____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____ Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____ Pharmaceuticals (630) Unfair Trade Practices (640) Out-of State Depositions (650) Motion to Quash Subpoena in an Out-of-County Action (660) Pre-Suit Discovery (670)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☒ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____

Submitting Party Signature: Athena Ireland

Date: 6-7-22-2022

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

Exhibit 4

2022-CP-10-3304

STATE OF SOUTH CAROLINA)
)
COUNTY OF Charleston)
)
IN THE MATTER OF: Dolly L. Coleman)
)
(Decedent) Athena L. Irland)
)
Appellant(s),)
)
vs. Isadore John Psaras, Christina D Culp,)
)
Brandy S Culp)
Respondent(s).)

IN THE CIRCUIT COURT

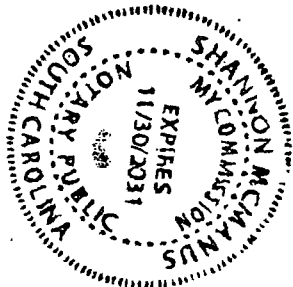
Appeal from Probate Court for Charleston County

CASE NUMBER: 2019-ES-10-1368

**NOTICE OF INTENT TO APPEAL TO
CIRCUIT COURT**

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her/its Notice of Appellant's Intent to Appeal the Order/Sentence/Decree of the Probate Court dated July 13, 20 22. Said Order/Sentence/Decree was received by the Appellant or Appellant's counsel on July 14, 20 22. A copy of said Final Order is attached.

SWORN to before me this 22
day of July, 20 22
Shannon McManus
Notary Public for: South Carolina
My Commission Expires: 11/30/2023



Respectfully submitted,

Signature: Athena L. Irland
Print Name: Athena L. Irland
Address: 186 Dolly Dimples Trail
Huger, SC 29450
(Home): 843-336-4834
(Cell):
Email: Karma1234@myyahoo.com
Relationship to Decedent/Estate: Daughter
Attorney: Self Representation
Address:
Telephone:
Email:

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt of written notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.
2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(I) and the South Carolina Appellate Court Rules, as applicable.

FILED
2022 JUL 22 PM 2:12
CLERK OF COURT

Pg 2

Case 2019-ES-10-1368
Estate of Dolly L Coleman
Order July 13, 2022
Received July 14, 2022

Notice has been served to:

1. John Sinclair III, in his capacity as Personal Representative for the Estate of Dolly L Coleman. Hand delivered
2. David Michel, Esq., Estate Attorney. Hand delivered.
3. Charleston County Probate Clerk of Court office, Presiding Judge Lenna S Kirchner. Hand delivered.
4. Circuit Court of Charleston County, Clerk of Court. Hand delivered.
5. David and Stephen Slotchiver, attorney for Brandy S Culp. Hand delivered.

Notice of Appeal on the findings and ruling of the probate court are as follows:

Pg. 2 (4)
Pg. 2 (5) cont. pg 3
Pg. 3 (6)
Pg. 3 (11)
Pg. 4 (18)
Pg. 5 (21)
Pg. 5 (22)
Pg. 5 (23)
Pg. 6 (7)
Pg. 6 (25)
Pg. 6 (26)
Pg. 6 (27)

The court erred in the undue influence by Athena Irland. The court erred in the legal standing of testamentary capacity, contractual testamentary vs. the testamentary capacity to execute, tear up or discard a will. All in accordance with South Carolina law and the precedence of the statute regarding testamentary capacity since 1807.

Therefore notice given that this matter is being appealed to the Circuit Court of Charleston County.

State of South Carolina
County of Charleston

In Probate Court
Case #
2019-ES-10-1368

Matter: Estate of Dolly
Legare Coleman

ORDER

John Sinclair III,
Personal Representative
for the Estate
Petitioner

✓

Athena Irland, John Pearas
Brandy S. Culp, Christina Culp
Respondents

Hearing date: April 7, 2022
Presiding Judge: Honorable Lenna S. Kirchner
Court Reporter: Ashley Manini

a staff worker from the nursing home took Mr. Berg to the lawyer's office to sign the will. 6

The director of the nursing home reported that Mr. Berg made claims of Fred MacMurray being his father. She also reported that Mr. Berg was very intelligent and typically oriented in all three spheres. Mr. Berg enjoyed bingo and participated in discussion groups on current topics.

After Mr. Berg signed his will in 1998, Mr. Berg was given a Mental State Examination to screen cognitive impairment. He scored 28 of a possible 30.

Mr. Berg died November 5, 2006. On April 10, 2007 Mr. Berg's brother's daughter, Carol Opdahl filed a petition asserting that Mr. Berg lacked the capacity to execute a will. She also alleged undue influence by Roger and sought equal distribution of Berg's estate. Ms. Opdahl testified that she had known that, since 1954, Mr. Berg had been of "unsound mind" and had been "essentially a human Robot". Ms. Opdahl had last visited Fred Berg in 1994, 12 years before his death.

Ruling and Reasoning:

The trial court concluded that Mr. Berg's caretakers and companions over the last several years of his life knew him best and were more credible and persuasive regarding Mr. Berg's

competency to execute his will than was Ms Opdahl's expert witness. The trial court gave little credence to Ms Opdahl's testimony, as it was considered "mainly hearsay - upon hearsay, conjecture and speculation" (Berg, pg 840)

The trial court concluded that Mr. Berg had testamentary capacity at the time his will was drafted and executed. It found that Mr Berg was aware that he had a "sizeable" estate, that he knew to whom he wanted his money to go, and there was no evidence of undue influence by Roger.

Ms Opdahl appealed the decision to the South Dakota Supreme Court asserting that the trial court erred in its conclusion that Mr Berg had testamentary capacity and that Roger did not exert undue influence.

The Court found that the existence of undue influence was a question of fact for the trial court that had already been answered. The Court concluded that Mr Berg's static delusion that Fred MacMurray was his father "DID NOT TOUCH" his testamentary capacity, Mr. MacMurray was not named in his bounty, and therefore the delusion did not materially affect the terms and provisions of the will. The court went on to say that "for purposes of testamentary capacity, we do not require the soundness of mind enjoyed by those in perfect health" (Berg, pg 842) and

"testamentary capacity is not determined by any single moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed" (Berg, p 842)

Testamentary capacity, for discussion, refers to an individual's capacity to make a will and the testator enjoys the the presumption of competence until proven by legal standard. To have testamentary capacity testators must know a reasonable approximation of the overall worth of their estate and which individuals are the "natural objects" of their bounty, usually blood relatives. In addition, the will must be executed in the absence of undue external influence. In a will that is contested, the burden of proof in most jurisdictions is "clear and convincing" and rests with the party alleging deficiency.

At issue in this case, as in all competencies, is whether the signs and symptoms of a mental disorder interfered with the abilities needed to competently perform a specific task or function, making a will or destroying a will. The criteria for possessing testamentary capacity are conceived of as a low level, perhaps the lowest level, of any legal demands on an individual

Accusations of undue influence by me, Athena Irland, in regards to the deeds of Berkeley County and the will of 2009 in testimony April 7, 2022. (2019-ES-10-1368, 20-24) pg. 77 (pg 12, 7-11) (pg 68, 2-6)

The confidential relationship of Mother, daughter, relative does not generally give rise to undue influence. The mere existence of a confidential relationship between the testator and another such as a beneficiary, relative does not by itself give rise to a presumption or fact of undue influence.

Direct testimony from attorney Lynn McCants. His knowledge of the relationship between he and Dolly Coleman. (pg 39, 4-15) His knowledge of the relationship between me, Athena Irland and Dolly Coleman in reference to his conducting transactions for Dolly Coleman. (pg. 39, 16-20) (pg 40, 18-23)

Lynn McCants knowledge asked and answered to a legal point of undue influence, on or about October 2014. (pg 46, 18-20) (pg 48, 25) (pg 49, 1-25) (pg 50, 1-2)

Longtime relationship between Attorney Lynn McCants and Dolly Coleman asked of his opinion on her testamentary capacity. Question to Mr. McCants by me, Athena Irland (pg 50, 18-20) answered by Mr. McCants

(pg 51, 23) Question by Athena Ireland
 (pg 51, 24-25) answered by Lynn McCants
 Question by Mr Michel and answered
 by Mr. Lynn McCants.

pg 54 (1-18)

The above testimony shows that on that day or about that day October, 2014 I, Athena Ireland took Dolly Coleman to Attorney Lynn McCants office and I did not attend and was not present during their conference in the transactions of the 2009 will. Undue influence is the taking advantage of another through a position of trust. Transporting Dolly Coleman to the office of Lynn McCants does not meet any standard of undue influence: taking advantage, pressuring, dominance.

The burden of Proof of lack of Testamentary capacity and undue influence lies on the contestors in every case, every state and every country.

Estate of Phelps: Terry et al. v Phelps, et al. Testamentary capacity in reference to a will upheld.

Estate of Phelps: Terry et al. v Phelps, et al. The Claim of undue influence did not present sufficient evidence to overcome the presumption of undue influence.

Opposing counsel Slotchiver wants this court to believe that the threshold for testamentary capacity is the same in regards to Contractual capacity.

This is false claim. Testamentary capacity, again, is when a person is of sound mind (pg 3 of order) in that one understands what documents are being drafted, torn up or revoked, assets owned and their disposal.

On the opposite side of the spectrum is Contractual capacity, which is a more rigorous standard to meet. Common law has long considered that the ability to contract requires a higher mental ability threshold than does the ability to make testamentary decisions. The statutes set a higher standard for determining contractual capacity and require more mental capacity the greater the complexity of the act.

Mr. Slotchiver, based on adjudicated testimony of the medical doctor that Dolly Coleman was medically incapacitated. (pg 8, 1-4) In fact Dr Rubano stated that Dolly Coleman's long term memory was intact (4-25-11, Exhibit 8 deposition) her (Dolly Coleman) short term memory due to a natural progression would be diminished.

Mr. Slotchiver wants this court

to accept testimony of Attorney Chandler, who had only had one encounter with Dolly Coleman October, 2014, where he stated, Mr. Slotchiver, that Mr. Chandler stated Dolly Coleman was unable to exercise her restraint (order pg 8, 1-3) (pg. 24, 14-18) but Mr. Slotchiver objected to Attorney McCants answering a question on Dolly Coleman's demeanor and whether or not I had undue influence on or about that day October, 2014.

Mr. Slotchiver wants to take notice that Dolly Coleman did not return to Lynn McCants office to write another will. She was unable to. She was physically removed from her home at 186 Dolly Dimples Trl. Huger, SC by Christina Culp at the direction of Brandy S Culp,

Based on testimony during the hearing and the legal Basis of Testamentary Capacity presented. Finding of the Court that Dolly Legare Coleman estate is that of intestate. Dolly Legare Coleman died intestacy.

Lenna S. Kirchner
Associate Judge of Probate
Charleston County

2022-CP-10-3304

NOTICE OF PROOF OF SERVICE July 22, 2022

David L. Michel, Esq.
Attorney for P.R.

David L. Michel

7/22/22

Hard Delivery

NOTICE OF APPEARANCE

JULIE J. MERRITT
CLERK OF COURT

2022 JUL 22 PM 2:12

FILED

Susan C. Mauldin 7/22/2022

Susan C. Mauldin for Daniel S. Slotchiver

Josh Gilman

7/22/2022

7

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF: THE ESTATE OF DOLLY
LEGARE COLEMAN

JOHN SINCLAIRE, III, in his capacity as Personal
Representative for the Estate of Dolly L. Coleman,

Petitioner,

vs.

ATHENA L. IRLAND, CHRISTINA D. CULP,
ISADORE JOHN PSARAS, and BRANDY S. CULP,

Respondents.

IN THE PROBATE COURT

CASE NO.: 2019-ES-10-1368

ORDER

Hearing Date:	April 7, 2022
Presiding Judge:	Lenna S. Kirchner
Petitioner:	John a/k/a "Jack" Sinclair, Esq.
Petitioner's Attorney:	David Michel, Esq.
Respondents:	Athena L. Irland Christina D. Culp Isadore John Psaras Brandy S. Culp
Respondents' Attorney:	Daniel S. Slotchiver, Esq. and Stephen M. Slotchiver, Esq. for Brandy S. Culp
Court Reporter:	Ashley Manini

THIS MATTER came before the court upon the filing of a Summons and Petition for a Declaratory Judgment filed by David Michel, Esq. on behalf of Personal Representative John, a/k/a "Jack" Sinclair, Esq, on September 8, 2021.

Present were John, a/k/a "Jack" Sinclair, Esq. as Personal Representative of the Estate, as well as his counsel, David Michel, Esq.; Athena Ireland, without legal counsel; Christina Culp,

without legal counsel; and Brandy Culp, represented by Daniel S. Slotchiver, Esq. and Stephen M. Slotchiver, Esq.

Prior to the presentation of testimony, Daniel Slotchiver, Esq., on behalf of Brandy S. Culp, moved for Summary Judgment on the issue of reinstating the Last Will and Testament drafted by John Lynn McCants based on the argument that this Court had previously determined and ruled in an Order dated June 29, 2017, from a hearing held on October 18, 2016, that 1) Athena Irland had exercised Undue Influence on the same day of the alleged destruction of her Last Will (October 28, 2014), in the presence of John Lynn McCants, 2) Athena Irland owed a fiduciary duty to the Decedent under a Confidential Relationship, which was breached, and that on that same date the Decedent was medically incapacitated prior to the tearing up of said Will, and as such would not have had the Capacity to destroy said Will, thus rendering said will her testamentary desire. This Motion was denied.

Upon review of the file and after hearing testimony of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter and venue is proper pursuant to S.C. Code Ann. §§62-1-302 and 62-3-201(a)(1).
2. This Court finds that proper notice was given to all parties with an interest in this matter pursuant to S.C. Code Ann. § 62-1-401.
3. Dolly Dimples Legare Coleman ("Decedent") died on March 21, 2019.
4. Decedent was adjudicated as incapacitated in Charleston County Probate Court Case No. 2014-GC-10-0210.
5. During a hearing in the Guardianship and Conservatorship case on October 18, 2016, the Court heard arguments regarding allegations of undue influence by Athena Irland

- on Decedent in regard to the execution of two deeds of conveyance on October 28, 2014. This Court takes judicial notice of the file and proceedings from the Guardianship and Conservatorship case (2014-GC-10-0210) of Decedent.
6. On June 29, 2017, the Court issued an Order from the October 18, 2016 hearing rescinding the subject deeds due to lack of requisite capacity by Decedent on the date of execution (October 28, 2014) and undue influence exercised by Respondent Athena Irland on Decedent. The Order included excerpts from extensive live testimony and/or testimony from depositions taken from several professionals, including Decedent's treating physician, Guardian, and Conservator.
 7. Respondent Athena Irland filed a Notice of Appeal in regard to the June 29, 2017 Order with the South Carolina Court of Appeals on July 27, 2017. The South Carolina Court of Appeals dismissed the matter on August 22, 2017 due to Appellant's failure to provide proof that the parties consented in writing or on the record to appeal directly to said court as set forth in S.C. Code Ann. §62-1-308(l). No additional appeals or Motions for Reconsideration regarding the June 29, 2017 Order have been filed.
 8. John, a/k/a "Jack" Sinclair, Esq. ("Petitioner"), previously served as Decedent's Guardian and was appointed as the Personal Representative of her Estate on August 8, 2019, with the consent of the Respondents.
 9. Petitioner filed a Summons and Petition seeking a Declaratory Judgment from the Court on September 8, 2021.
 10. Respondents are Decedent's children and grandchild.
 11. Decedent executed a Last Will and Testament on October 20, 2008 ("2008 Will"), and executed a subsequent Last Will and Testament on August 31, 2009 ("2009 Will").

12. Respondent Athena Irland is a daughter of Decedent, an intestate beneficiary, and a listed devisee under both the 2008 Will and the 2009 Will.
13. Respondent Christina D. Culp is a daughter of Decedent, an intestate beneficiary, and a listed devisee under both the 2008 Will and the 2009 Will.
14. Respondent Isadore John Psara is a son of Decedent, and intestate beneficiary, and a listed devisee under the both the 2008 Will and the 2009 Will.
15. Respondent Brandy S. Culp is a granddaughter of Decedent and a listed devisee under both the 2008 Will and the 2009 Will.
16. The 2008 Will was executed by Attorney Heyward Carter and the 2009 Will was executed by Attorney Lynn McCants.
17. The 2009 Will revokes all Wills and Codicils that Decedent had previously made.
18. It is undisputed by the parties that Decedent was taken to the office of Lynn McCants, Esq., by Respondent Athena Irland on October 28, 2014, stated that it was her intention to revoke the 2009 Will, and physically tore the 2009 Will in half in the presence of Mr. McCants.
19. Petitioner originally sought a ruling from the Court that Decedent died intestate due to the destruction of the 2009 Will, which had revoked the 2008 Will, and the lack of any subsequent Last Will and Testament. After learning of additional information to be presented by counsel for Respondent Brandy S. Culp at the hearing, Petitioner informed the Court that he was no longer taking a position as the validity of the 2009 Will and/or the possibility that Decedent died intestate and would instead allow the Court to hear the arguments of the Respondents on those issues.
20. During arguments presented by Respondent Brandy S. Culp, an original transcript wherein Andrew Chandler, an estate planning attorney in Charleston, South Carolina,

had previously testified at the October 18, 2016 hearing, was handed to the Court for its review and made a part of the Record as Exhibit 1. Mr. Chandler testified and that he had reviewed the transcript of his testimony from the last hearing regarding Decedent and confirmed that it was truthful and accurate.

21. John, a/k/a "Jack" Sinclair was then called to testify. He testified that in his investigation as to the facts surrounding the destruction of the 2009 Last Will and Testament, drafted by Lynn McCants, he was advised by attorney McCants that the destruction took place on October 28, 2014. This Court takes notice of the fact that this is the same day on which this Court previously determined the invalidity of a deed based on Undue Influence, breach of a Confidential Relationship, and lack of capacity of Decedent.

22. John Lynn McCants, a lawyer in Mount Pleasant, testified that he had drafted the 2009 Will of Decedent, that he witnessed the destruction of the Will, wherein both Decedent and Ms. Irland were present at his office, that he does not dispute the purported destruction date of October 28, 2014, that he was not aware of the Court rulings about other events that occurred on that date, but had he known of the same, he would have had concern about the ability and correctness of Decedent destroying her Will.

23. Mr. McCants presented the actual torn will, as well as a living will, healthcare power of attorney and a general durable power of attorney, all likewise destroyed on that same date. Mr. McCants also testified that Decedent told him "I'll get back with you, we'll do another Will...", but this act never took place.

24. When asked if it was customary for a client to create a new Will before destroying an old one, Mr. McCants testified that it was not.

25. Mr. McCants further testified that he did not have medical training to assist in determining capacity or undue influence and that with regard to Decedent, that he was "surprised" when he learned that Decedent had gone to another lawyer regarding an attempted deed transfer, an action later explained by Ms. Ireland when she testified that "...it was my decision to go to Jack Williams." This Court notes that Mr. Williams is the lawyer who drafted the vacated deed and notes the representation of "my decision" in the testimony provided as evidence that Ms. Ireland had exerted control over Decedent.

26. The Court finds that its ruling on June 29, 2017, that Decedent was unduly influenced by Respondent Ireland and that Decedent lacked capacity to execute deeds of conveyance on October 28, 2014, which has not been overturned or amended, would logically extend to the alleged revocation of the 2009 Will on that same day under similar circumstances. The case law and statutory law cited in the June 29, 2017 Order are equally applicable here.

27. The Court therefore finds that Decedent lacked the capacity to revoke the 2009 Last Will and Testament and that the 2009 Will represents the Decedent's testamentary desires.

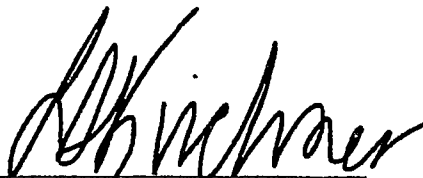
Based on the foregoing, it is hereby

ORDERED, ADJUDGED AND DECREED that the Last Will and Testament of the Decedent executed on August 31, 2009 was not effectively revoked due to lack of capacity of the Decedent and undue influence at the hands of Respondent Ireland. It is ordered that the Last Will and Testament of the Decedent executed on August 31, 2009 shall be re-assembled, copied, and admitted to the Court as an original Last Will and Testament of Dolly Legare Coleman; it is further

ORDERED, ADJUDGED AND DECREED that the Estate of Dolly Legare Coleman shall be administered as a testate estate in accordance with the South Carolina Probate Code; it is further

ORDERED, ADJUDGED, AND DECREED that this Order shall be subject to such further Orders of this Court as may become necessary.

IT IS SO ORDERED.



Lenna S. Kirchner
Associate Judge of Probate
Charleston County

This 13th day of July, 2022
Charleston, South Carolina.



8

✓
STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN RE: THE ESTATE OF

DOLLY LEGARE COLEMAN

) IN THE PROBATE COURT
)

) CASE NO: 2019-ES10-1368
)
)
)
)
)

HEARING BEFORE THE

HONORABLE LENNA S. KIRCHNER

APRIL 7, 2022

10:07 a.m.

McCarn Court Reporting, Inc.

P.O. Box 778

Folly Beach, SC 29439

A-P-P-E-A-R-A-N-C-E-S

For the Petitioner John "Jack" Sinclaire, III,
as personal representative:

Michel Law Firm, LLC
By: David L. Michel, Esq.
751 Johnnie Dodds Boulevard, Suite 200
Mt. Pleasant, SC 29464

For the Respondent Brandy S. Culp:

Slotchiver & Slotchiver.
By: Daniel S. Slotchiver
By: Stephen M. Slotchiver
751 Johnnie Dodds Boulevard, Suite 100
Mt Pleasant, SC 29464

Respondents Athena L. Ireland and
Christina D. Culp: Pro Se

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** (Exhibits retained by the Court.)

1 THE COURT: We are here this morning on the
2 Estate of Dolly Lagare Coleman, Charleston County
3 Probate Case No. 2019-ES10-1368. We are here on the
4 petition filed by Mr. David Michel on behalf of our
5 personal representative, Mr. John, also known as Jack,
6 Sinclaire for a petition for declaratory judgement.

7 We have representing the respondents -- hold
8 on one second. Brandy Culp is represented by Stephen
9 Slotchiver and Dan Slotchiver. And Ms. Athena
10 Ireland, Christina Culp, and Isadore Psaras are
11 unrepresented, appearing pro se. Is that correct?

12 MR. DAN SLOTCHIVER: That's correct, Your
13 Honor.

14 THE COURT: All right. Let me just, before
15 we get started, have everyone just identify for
16 purposes of being present, who you are and who you
17 represent or your relation to Ms. Dolly Coleman.
18 We'll start with -- all right. This is Mr. Michel's
19 petition, so we'll start with you, Mr. Michel.

20 MR. MICHEL: Good morning, Your Honor. May
21 it please the Court, David Michel, M-I-C-H-E-L. I
22 represent the personal representative John, goes by
23 Jack, Sinclaire, who's here seated next to me.

24 THE COURT: Thank you.

25 MR. SINCLAIRE: Sinclaire's got an E on the

1 end.

2 THE COURT: All right. Mr. Slotchiver?

3 MR. DAN SLOTCHIVER: Good morning, Judge.

4 Daniel Slotchiver and Stephen Slotchiver, we represent
5 Brandy Culp.

6 THE COURT: Okay. All right. And Ms.
7 Ireland, you're here?

8 MS. IRELAND: Athena Irland, yes.

9 THE COURT: And we have Christina Culp with
10 us?

11 MS. CHRISTINA CULP: (Raising her hand.)

12 THE COURT: Okay. Thank you. What about
13 Isadore Psaras?

14 MR. MICHEL: Your Honor?

15 THE COURT: Yes.

16 MR. MICHEL: As a matter of factual
17 background, we did have mediation where they reached a
18 partial agreement, which is on file with the court.
19 Isadore, who goes by Johnny, he has settled, as has
20 Christina, who's here today.

21 THE COURT: Say that again, please.

22 MR. MICHEL: So Isadore.

23 THE COURT: Yes.

24 MR. MICHEL: Who goes by Johnny, he has
25 settled the case.

1 THE COURT: Okay.

2 MR. MICHEL: Along with his sister, Tina
3 Culp, who's here today.

4 THE COURT: Okay.

5 MS. CHRISTINA: Christina.

6 MR. MICHEL: I mean, Christina, excuse me,
7 Christina.

8 MS. CHRISTINA: Christina Dolly.

9 MR. MICHEL: Christina Dolly.

10 THE COURT: Okay. Thank you. And the Court
11 has reviewed your mediation agreement, and I believe
12 we signed off an order accepting it.

13 MR. MICHEL: Yes, Your Honor.

14 THE COURT: All right. Are we ready to get
15 started? There's other people in the courtroom, but I
16 assume these are witnesses?

17 MR. MICHEL: Yes. Do you want them to
18 introduce themselves or not?

19 THE COURT: You can do it as you call them.

20 MR. MICHEL: Okay.

21 MR. DAN SLOTCHIVER: Your Honor, before we
22 begin, if I can -- or as we begin, if I can bring
23 something to the Court's attention that may have
24 bearing and may move this along or it may not, but I
25 wanted to talk to the Court about it, if I can.

1 THE COURT: Okay.

2 MR. DAN SLOCHIVER: And it's a motion for a
3 summary judgement, but I want to give the Court the
4 basis why. Judge, this is not the first time that
5 this matter or a matter dealing with this estate with
6 Ms. Coleman has come before you. And if I may
7 approach the Court?

8 THE COURT: Sure.

9 MR. DAN SLOCHIVER: This is a copy of an
10 order that was issued by this Court. And if I can go
11 through the pertinent parts and I'll be able to show
12 you why we believe this is a matter that -- for
13 summary judgement to reinstate or to have the last
14 will and testament, the one that was created and
15 destroyed as referenced in the motion.

16 And Judge, I'll suggest to you that in the
17 motion, it was filed in October, Paragraph 12 of the
18 motion, that on October 28, 2014, it was destroyed.
19 What's relevant about that date, Your Honor, is that
20 is the same date that this Court has already
21 adjudicated Ms. Irland having exercised undue
22 influence on Ms. Coleman. It's already adjudicated
23 that there was a confidential relationship which was
24 breached and damages were awarded against Ms. Irland
25 for what she did with her mother, Ms. Coleman.

1 It's already adjudicated based on testimony
2 of lawyers, Mr. Chandler, and testimony of the medical
3 doctor, that Ms. Coleman was unable to exercise -- her
4 restraint was medically incapacitated. What's
5 particularly interesting about this is it's the same
6 parties that are here before us today, Your Honor.
7 And on Page 2 of that order, on the very top line, and
8 I'll walk you through the part that most pertinent so
9 you can follow. I know it's been a handful of years,
10 but on Page 2 of the order it says, this order is
11 binding on all parties in the above-captioned matter.
12 And it has not been appealed, Your Honor. This is the
13 law of this case.

14 If you fast forward, Your Honor, what you'll
15 find is that on October the 28th, there's testimony
16 that a deed was created and the Court has determined
17 that the deed was not proper. There's testimony that
18 Ms. Irland went to the office of Mr. Chandler in an
19 attempt -- with Ms. Coleman in an attempt to retrieve
20 the last will and testament that had been drafted by
21 Mr. Chandler's office, I believe Mr. Carter drafted
22 it. And had gone there with the intent to destroy it
23 and Mr. Chandler refused to give it, based on concerns
24 that he had, based on the testimony.

25 If you fast forward, Your Honor, to Page 16,

1 which is the beginning of your conclusions of law,
2 paragraph 18 starts with, "Where a transaction is
3 challenged on the basis of mental incapacity, the
4 individual's competency on the date of that
5 transaction must be determined."

6 And I'll represent to you, Your Honor, that
7 the date of this purported destruction of the will, as
8 referenced in the motion before the Court today, is
9 the same date that the Court's already ruled upon,
10 where two things happened: Number one, the creation
11 of the deed that was discarded by the Court and found
12 to be improper. And also the date that Ms. Irland had
13 gone to Mr. Chandler's office.

14 THE COURT: Say that one more time, the date
15 of the destruction of the 2009 will?

16 MR. DAN SLOTCHIVER: On the date -- 2000 --
17 on the same date as the destruction of this will that
18 we're here before the Court -- so let me back up,
19 maybe it will make more sense. I'm assuming facts
20 that I haven't discussed.

21 The whole motion that's filed today is
22 because the special administrator has learned that the
23 last will and testament that had been created by Lynn
24 McCants was destroyed.

25 THE COURT: And what was the date of that

1 will?

2 MR. DAN SLOTCHIVER: The date of the will
3 was -- the date of the will itself, I'm sorry?

4 THE COURT: The 2009 will?

5 MR. DAN SLOTCHIVER: Yes, the 2009 will as
6 referenced in the petition. And on October 28, 2014,
7 which is the same date that the Court's already dealt
8 with, and the same date that Court has made findings
9 as a matter of law. And those findings are binding on
10 Ms. Irland and all the parties involved in this
11 action.

12 The Court had determined that there was both
13 undue influence, lack of capacity, breach of a
14 confidential relationship, breach of duty. And all of
15 those are set forth in the record in this court, that
16 was signed by this Court.

17 In reaching those decisions, Your Honor,
18 again, you've heard both -- you heard testimony from
19 the parties, you heard testimony from the lawyers, you
20 heard testimony from a medical doctor. You heard
21 testimony that contradicted what Ms. Irland stated
22 herself. So where on the one hand she would say my
23 mom was fine, and on the other hand, in the order it
24 says that she said, my mom is not fine. She had told
25 that to the doctors before. And this was your

1 conclusion.

2 So the idea now that we're going to go
3 forward and ask the Court to determine that the
4 revocation of a will done on a date where the Court's
5 already determined that there was undue influence,
6 lack of capacity, and a breach of a confidential
7 relationship is one that doesn't -- it doesn't meet
8 justice. And I believe it's already been determined
9 by the Court based on the case law that's been
10 presented.

11 And so based on that argument, I would ask
12 the Court to dismiss this action and to order that the
13 2009 will, which was drafted by Mr. McCants, who's in
14 the courtroom, is the last will and testament and that
15 it proceed as an estate with that will.

16 THE COURT: Okay. So it's your position -- I
17 believe, and correct me if I'm wrong, but my review of
18 the case, I believe that the -- was the 2009 will the
19 one that was torn in Mr. McCants' office?

20 MR. DAN SLOTCHIVER: It is.

21 THE COURT: Okay.

22 MR. DAN SLOTCHIVER: So in the last
23 hearing --

24 THE COURT: You're asking the Court to accept
25 that one?

1 MR. DAN SLOTCHIVER: -- I don't think the
2 Court was aware -- I'm sorry?

3 THE COURT: You're asking the Court to accept
4 that one that she tore?

5 MR. DAN SLOTCHIVER: Yes, we are.

6 THE COURT: Okay.

7 MR. DAN SLOTCHIVER: Because that will was
8 inappropriately -- it was destroyed at a time frame
9 when there was undue influence -- it was determined
10 < undue influence, lack of capacity, and a breach of a >
11 confidential relationship. *N Revocation of POA*
12 *7/24/2013*

13 THE COURT: I see that.

14 MR. DAN SLOTCHIVER: And that's an undisputed
15 fact now for -- on that day. So apparently, they went
16 three places on that day. Let's get a deed, let's *slander*
17 destroy both wills that exist.

18 And we weren't aware -- in fact, when the
19 order goes through, when we looked in order to
20 proceed, the Court wasn't aware, nor were we aware
21 that there had been another will that had been created
22 on that day. In fact, Mr. McCants would have been
23 called in, also. We weren't aware of that. That came
24 up much later in time. Certainly, Ms. Irland was
25 aware of that. She was in the courtroom. She had
gone on that same day with her mother to revoke that

1 will. And in fact, in the Court's order, it
2 references that the last will and testament is the
3 will and testament that was drafted by Mr. Carter's
4 office.

5 THE COURT: I understand now. Thank you.

6 MR. DAN SLOTCHIVER: So that's the concern
7 that we have. We certainly want to create justice.
8 We want to follow the intent of the testator, but
9 because nobody has appealed it -- and it's too late to
10 appeal it now -- that's the law of the land. And
11 although, Ms. Irland is not represented today, she was
12 represented at the time by --

13 THE COURT: Mr. Dawson.

14 MR. DAN SLOTCHIVER: Yes. That's correct.
15 Thank you, Your Honor.

16 THE COURT: Thank you. Mr. Michel, would you
17 like to respond?

18 MR. MICHEL: Your Honor, on behalf of the
19 personal representative, I would just respond that our
20 petition is based on information and belief. We have
21 not put Mr. McCants under oath. So that's why we're
22 here today. I would not bring something forward
23 unless I thought there was a potential dispute.
24 Again, I don't -- I'm not disputing what Mr.
25 Slotchiver says or what Ms. Irland says. I'm just

1 saying that based on our investigation -- or excuse
2 me, my client's investigation, he was informed by Mr.
3 McCants that the will was torn up. We believe it's
4 the same date, but again, that will need to come from
5 Mr. McCants.

6 THE COURT: Okay. And I --

7 MR. MICHEL: So that's why we're here.

8 THE COURT: I understand. Ms. Irland, do you
9 wish to make a statement. This is --

10 MS. IRLAND: Yes, I do.

11 THE COURT: Okay.

12 MS. IRLAND: But -- and you know I'm not an
13 attorney.

14 THE COURT: Yes.

15 MS. IRLAND: But I just want to correct a few
16 things, and, yes --

17 THE COURT: Let me just stop you first.
18 I just have to get this on the record: You understand
19 that you have the right to appear today with an
20 attorney, but you've chosen to appear and represent
21 yourself?

22 MS. IRLAND: That is correct.

23 THE COURT: Okay. You can proceed.

24 MS. IRLAND: That is correct.

25 THE COURT: All right.

1 MS. IRLAND: Unfortunately, my attorney, Jim
2 Dawson, made many, many mistakes. He appealed -- you
3 were talking about the appeal, he appealed in the
4 wrong court. So that made it where I could not
5 appeal. He also did not respond to an e-mail that was
6 sent to him for the deposition of the doctor, so he
7 missed that. And the Court allowed the doctor
8 deposition to be read without any response from my
9 attorney. There are other things that he did.

10 And the other thing he said was the fact
11 that -- he said, yes, she's this, or, yes, she's that.
12 My mom, in my opinion and with the doctors, did not
13 have dementia at that time. She knew --

14 THE COURT: At what time? Tell me at what
15 time.

16 MS. IRLAND: She knew what she was doing.
17 She knew in 2014 --

18 MR. DAN SLOTCHIVER: Your Honor, if I
19 could --

20 MS. IRLAND: I didn't interrupt you.

21 MR. DAN SLOTCHIVER: If I could put on the
22 record an objection. She can't testify to what her
23 mother knew. It's barred by the dead man's statute.

24 MS. IRLAND: I said I felt it. I knew it.
25 She lived with me. And I can explain that to you in

1 just a second.

2 THE COURT: Okay. Let me just explain this
3 though: For purposes of this initial motion, we're
4 not actually into the crux of the case yet.

5 MS. IRLAND: Right.

6 THE COURT: Try to just keep your comments in
7 response to his motion, whether or not there's
8 enough --

9 MS. IRLAND: That's what I'm doing. That's
10 what I'm going to try to do.

11 THE COURT: Okay.

12 MS. IRLAND: But when he said, he made the
13 statement that all three things were done on the same
14 day in 2014, that is absolutely not true. And, yes,
15 we did go Chandler's office, and Mr. Chandler got on
16 the stand and said that, according to the court
17 documents, that we just showed up. That's not true.

18 The secretary told us mom had to bring a
19 note, and then she could go to the bank and get her
20 will. And here's her note signed by her when he went
21 there. And they called -- because this is what Mr.
22 Chandler said, he called Brandy Culp, and they would
23 not give her the will, because of what she said.

24 At that time, my mother had not been to any
25 doctor to say that she had any problems. And that

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1 part of the will was that she would have to be
2 incapacitated by two doctors, and Brandy Culp and I
3 would be the person in charge of that. None of that
4 had happened, none of it.

5 The other thing that he talked about and my
6 lawyer didn't do something about again, was the fact
7 that on the other case, it said that I had a power of
8 attorney and I violated that. I did not have a power
9 of attorney. I just got this from downstairs, because
10 I lost my copy that I had gotten, and this is the
11 revocation of my power of attorney from 2011. And it
12 was done on July 24th of 2013, downstairs, because it
13 used to be on the first floor. And the original was
14 not recorded in Charleston County. And the counter
15 customer was Brandy Culp who had it mailed to her, so
16 no one else would know about it.

17 MR. DAN SLOTCHIVER: Your Honor, I would
18 object to the relevancy of this. None of this
19 conforms to the point.

20 MS. IRLAND: Because you --

21 MR. DAN SLOTCHIVER: The Court has already
22 issued an order. Whatever issues she has with Judge
23 Dawson, that's an issue between her and him. The
24 reason that we have time limits on filing an appeal is
25 so that we can in fact create justice and have a

POA
7

7

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1 system that works, that we can understand. This Court
2 has already issued an order on these very matters.

3 MS. IRLAND: You opened the door to this.
4 And I think I have the right to answer it. I don't
5 know, but you opened the door to it. You opened the
6 door to several things that I'm trying to correct.

7 MR. DAN SLOTCHIVER: Judge, the only thing
8 that I've addressed with the Court is that the Court
9 has already ruled on this matter.

10 MS. IRLAND: No, that's not all you said.

11 THE COURT: Okay. I understand, and I
12 sustain the motion.

13 So we -- for purposes of today's hearing, the
14 basis of Mr. Slotchiver's asking the Court to rule and
15 dismiss the case is because part of the -- in Mr.
16 Slotchiver's opinion, Mr. Slotchiver's opinion, these
17 matters have already been adjudicated through
18 guardianship and conservatorship court.

19 And that is true some. Some of that is true.
20 Now, the issue in my mind that's currently before this
21 Court is: Is this a testate estate or is this an
22 intestate estate? Is there a valid will that Mr.
23 Sinclair needs to follow for purposes of
24 distribution?

25 All Mr. Slotchiver is doing with his motion

1 to have this case dismissed is to say, these certain
2 matters have already been adjudicated. So his
3 objection to what you're responding to is essentially
4 that you've got -- you're pointing out some issues
5 that we had from the guardianship and conservatorship
6 court. That's already -- that's closed.

7 MS. IRLAND: I understand, but he --

8 THE COURT: And what we're left with is to
9 sort --

10 MS. IRLAND: -- he pointed it out in the --
11 in this, the paragraphs that he pointed to. So I was
12 responding to that.

13 THE COURT: Okay.

14 MS. IRLAND: That's all.

15 THE COURT: Okay. Is there anything
16 additional, anything further before we get into the
17 crux of why we're here? And you may have evidence to
18 produce or questions to ask that pertain to that, but
19 for purposes of this motion, this is just a pretrial
20 motion to determine whether or not we even need to get
21 into whether there is a valid will and which one --

22 MS. IRLAND: And I believe this should be
23 gotten into, because this is a -- this is different.
24 This is based on the deeds that -- I won't say my
25 opinion, but that's a different issue than the will.

1 THE COURT: Exactly. That is why we're here,
2 because this is a different issue.

3 MR. DAN SLOTCHIVER: And I would agree this
4 is a different issue. The reason why I brought it up
5 to Your Honor is because it's been determined that on
6 the same date that all this happened. There's
7 obviously -- based on the Court's paragraph at the
8 beginning, "You must look to the date to determine the
9 competency and a lack of capacity and undue
10 influence."

11 The Court's already determined that that
12 existed. We know that the will was a valid will. It
13 was drafted by Mr. McCants. The only issue is was it
14 destroyed. We know it was destroyed when Ms. Irland
15 went with her mother to Mr. McCants' office and
16 destroyed it. So if she didn't have the capacity or
17 she was under the influence as the Court's already
18 determined on that date, then that will is no longer
19 destroyed. And if it's no longer destroyed, then we
20 probate that will. And that's what we're asking the
21 Court. And whatever testimony we take today, I don't
22 know how it's going to change that. Whatever problems
23 she has with Judge Dawson, I don't know how that's
24 going to change it.

25 THE COURT: And that's correct. I understand

1 what the issues are, but I do think that I have to
2 deny the motion to dismiss, and let's get started,
3 because what I think what needs to happen is you need
4 to get your evidence in and call the witnesses you
5 need to establish your position and give Mr. Michel
6 and Ms. Irland an opportunity to respond. But I
7 understand what you're saying, there was an
8 adjudication. That adjudication can't be ignored.

9 MR. DAN SLOTCHIVER: Your Honor, I was going
10 to call, with your permission, Mr. Chandler first. I
11 will represent to the Court that his testimony -- he's
12 already testified, and I know he's got a personal
13 appointment, if the Court be willing to review his
14 deposition transcript? I've got it.

15 THE COURT: Yes.

16 MR. DAN SLOTCHIVER: Without having to put
17 him on the stand. I don't anticipate it being any
18 different. He's already testified before the Court,
19 but if the Court wants me to call him again, I can.

20 THE COURT: Unless there's something new or
21 if there's any -- if there's no objection to me
22 reading the transcript from the
23 guardianship-conservatorship court.

24 MR. DAN SLOTCHIVER: I don't believe so.

25 MS. IRLAND: Well, I have a question for him.

1 I mean, he can answer it back there, but I -- and it's
2 one of the things I brought to your attention and
3 would like to know his response.

4 THE COURT: Is it relevant to the validity of
5 either the 2008/2009 or 2009 will?

6 MS. IRLAND: Yes, ma'am. It has to do
7 with -- well, you tell me. It has to do with the fact
8 that he stated in that that we came to his office
9 unannounced. And like I said, I have this because the
10 secretary told Mom she had to bring this. And then,
11 also, he referred to the beginning of that saying that
12 he contacted her and that she had to -- she said, no,
13 she can't have it. I want to know what legal standing
14 that he had to do that, because she should have been
15 able to get her will, because there had been nothing
16 to stop her with this, her signed thing, to get that
17 2008 will from them.

18 THE COURT: Okay. Hold on one sec. Mr.
19 Michel?

20 MR. MICHEL: Your Honor, I don't know the
21 time restraints for Mr. Chandler, but he's here. He's
22 very busy. It might be easier for us just to take his
23 testimony. And since he's here, we'll have a clean
24 record. We have Mr. McCants here. And then that way,
25 that, upon appeal, the issue is out the door, since

1 everybody is here, if he has time.

2 MR. DAN SLOTCHIVER: Well, perhaps we can
3 hand up the deposition testimony, which will be used
4 for any purpose of the Court. And then she's welcome
5 to ask -- I don't know how those questions are
6 relevant to the issue of --

7 THE COURT: You may make those objections.

8 MR. DAN SLOTCHIVER: But to the extent that
9 you want to let her ask. Can I hand the transcript to
10 the Court?

11 THE COURT: Yes.

12 MR. DAN SLOTCHIVER: This is the original.

13 THE COURT: Yes, you may hand it up. And I
14 will just note for the record that the transcript was
15 made a part of the record in the GC file, but not an
16 original.

17 MR. DAN SLOTCHIVER: Thank you, Judge.

18 THE COURT: And you do want it marked?

19 MR. DAN SLOTCHIVER: Yes.

20 (Respondent's Exhibit No. 1 marked.)

21 THE COURT: All right. Mr. Chandler, would
22 you mind joining us up here in this box.

23 ANDREW W. CHANDLER,
24 having been duly sworn, testified as follows:

25 THE COURT: Thank you. Please have a seat

1 and once you're seated, give us your name and your
2 current occupation and for which firm you are
3 employed.

4 THE WITNESS: May it please the Court, my
5 name is Andrew Chandler. I'm an attorney. I
6 primarily practice in the area of estate planning,
7 probate, and tax. I've been with the firm of Evans
8 Carter Kunes & Bennett for 20 years.

9 THE COURT: Mr. Michel?

10 MR. MICHEL: On behalf of the personal
11 representative, I have no questions.

12 THE COURT: Thank you. Mr. Slotchiver?

13 CROSS-EXAMINATION

14 BY MR. DAN SLOTCHIVER:

15 Q Mr. Chandler, the testimony that you
16 presented at the last hearing is truthful and accurate
17 to the best of your recollection?

18 A It is.

19 Q You went on to testify to April Watson,
20 correct?

21 A Correct.

22 MR. DAN SLOTCHIVER: I have nothing further.
23 Thank you.

24 THE COURT: All right. Ms. Irland, any
25 questions for Mr. Chandler?

CROSS-EXAMINATION

BY MS. IRLAND:

Q Just a couple. Because my mom and I came with this note. Would you like to see it?

A I would like to.

THE COURT: Sure.

BY MS. IRLAND:

Q Because your secretary had told us the day before that we needed to have that, and we an appointment at 10 a.m. to go to the bank and get the will. And you said you had contacted Brandy Culp; is that correct?

A Well -- and I would note that this was of course many years ago in 2014, but as I recall, I contacted Brandy Culp after you and Dolly Dimples Coleman came to my firm, because, though I refused to hand the will over to (inaudible) and to you. I offered, because there was a durable power of attorney, and to my knowledge at that time, it was on file and valid that did name you, Ms. Irland, and Brandy Culp as the co-agents. And so I offered you an alternative -- your mother an alternative to obtain her will.

Q Let me stop you right there, if you don't mind. When you -- let's do the whole sentence,

1 because that durable power of attorney that was in
2 that will was only valid if my mother had been deemed
3 incompetent by two doctors?

4 A So the durable power was a separate document
5 from the will. They're separate documents. And so
6 that durable power of attorney was on record with the
7 Register of Deeds, back then called the RNC. And it
8 was not the same as the will. So the reason that you
9 were talking about the durable power of attorney was
10 simply that agents under a durable power of attorney
11 have certain powers.

12 And one of those powers that you and Brandy
13 Culp shared as the co-agents was to obtain her
14 documents, including her will. And so I simply had
15 offered you and Ms. Coleman, because she was there --
16 sweet lady -- I simply offered to call Brandy and if
17 she said, yes, as an agent, a co-agent, I agreed to
18 release the will. Then we would have gladly given the
19 will over.

20 Q And you said you did contact her and that she
21 said, no; did you not?

22 A I did contact her after I found her number,
23 and she did tell me, no. And because you and Ms. Culp
24 are co-agents, one doesn't sort of trump the other in
25 terms of taking care of the things that an agent, or

1 co-agents in this case, handle for a person who lacks
2 capacity or is unable to handle their affairs.

3 Q And so seeing this note, is this is what is
4 required to be able to get your will from the bank?

5 MR. DAN SLOTCHIVER: Your Honor, I would
6 object at this time. I'm trying to give latitude, I
7 know she isn't represented, but this isn't relevant to
8 what we're before the Court with today, and we're
9 getting far astray.

10 MS. IRLAND: That's my last question that I
11 have for him.

12 MR. DAN SLOTCHIVER: I would object to the
13 relevancy of the question.

14 MS. IRLAND: The relevancy is the fact that
15 he said that -- it goes to my head to what he said
16 that I wanted. They keep on saying that I want it
17 torn up. No, my mother wanted to see it. And it's
18 her choice whether or not she wanted to tear it up.
19 But when you say that we came there unannounced, and I
20 have this document stating that this what they said
21 she needed to do, and it's her signature, I just want
22 him to acknowledge the fact that is this exactly what
23 you need to bring.

24 Now, you know, someone else might put it on
25 here, they might have it typed, but this is what the

1 secretary told us we needed, and I just would like you
2 to verify that.

3 MR. DAN SLOTCHIVER: The factual background
4 as to Mr. Chandler's involvement as to communications
5 that took place on that day as to what occurred to
6 give him concern, those are all matters that were
7 addressed in the order, they were all matters that
8 were addressed by the Court. What she's trying to do
9 now is to readdress matters --

10 MS. IRLAND: No --

11 MR. DAN SLOTCHIVER: -- that have been found
12 by the Court, and it's inappropriate, and I don't
13 think it's relevant. I would ask that she not be able
14 to continue with it.

15 THE COURT: Sustained. I agree. I think
16 that that was already adjudicated in the
17 guardianship-conservatorship case.

18 MS. IRLAND: That's all I have.

19 THE COURT: Thank you. Anything further?
20 Any redirect?

21 MR. MICHEL: Nothing on behalf of the
22 personal representative, Your Honor.

23 THE COURT: Anything further, Mr. Slotchiver?

24 MR. DAN SLOTCHIVER: No, Your Honor. Thank
25 you.

1 THE COURT: Thank you for your time, and you
2 are free to leave. We appreciate you making time for
3 us today.

4 MR. DAN SLOTCHIVER: Your Honor, should we go
5 through Mr. Michel as far as calling witnesses, or can
6 we call the witness.

7 THE COURT: If he wants to, procedurally,
8 just call him.

9 MR. MICHEL: Your Honor, I have subpoenaed
10 Mr. McCants here and that would be the only witness
11 that I would call.

12 THE COURT: Okay.

13 MR. MICHEL: I wanted to make sure we took
14 Mr. Chandler out of turn. And so it may be easier to
15 take Mr. McCants next unless you want someone --

16 MR. DAN SLOTCHIVER: I was going to call Mr.
17 Sinclaire, it might make sense for the order of what
18 we're doing. It will take -- I have one question to
19 ask him and then call Mr. McCants afterwards if that
20 would be agreeable.

21 THE COURT: As long as you don't have an
22 objection.

23 MR. MICHEL: I don't have an objection.

24 THE COURT: All right. Mr. Sinclaire.

25 MR. MICHEL: And I just want to put something

1 on the record once he's sworn in, before any
2 questions.

3 THE COURT: Okay. No problem.

4 JOHN SINCLAIRE, III,
5 having been duly sworn, testified as follows:

6 THE COURT: Thank you. Please be seated give
7 us your name, occupation, and your current role in the
8 case.

9 THE WITNESS: Thank you. John Sinclair,
10 III. Everyone calls me Jack. I'm an attorney in
11 Charleston. Been an attorney in Charleston for close
12 to 37 years. I'm the court-appointed special
13 administrator/personal representative for the estate.

14 THE COURT: Thank you.

15 MR. MICHEL: Your Honor, very briefly, if I
16 could set a quick factual background for a clean
17 record later on.

18 DIRECT EXAMINATION

19 BY MR. MICHEL:

20 Q Mr. Sinclair, at some time prior to Ms.
21 Dolly Coleman's passing, you were appointed by this
22 Court, as we've already identified, as guardian; is
23 that correct?

24 A As guardian, yes.

25 Q Subsequent to her passing, you were nominated

1 and appointed as a personal representative of her
2 estate by all three siblings; is that correct?

3 A That's correct.

4 Q And I've represented you in that capacity?

5 A That's correct.

6 Q Okay. And based upon your investigation, you
7 initially filed this informal application for
8 appointment as PR and intestate, correct?

9 A That's correct.

10 Q At some point, did you discover there may
11 have been a will in 2009 that was torn up?

12 A At some point, yes.

13 Q And subsequent to that, there's been a
14 petition for declaratory judgment filed, as your role
15 as a personal representative?

16 A That's correct, sir, yes.

17 MR. MICHEL: Thank you, Your Honor.

18 THE COURT: Thank you. Mr. Slotchiver?

19 MR. DAN SLOTCHIVER: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. DAN SLOTCHIVER:

22 Q Mr. Sinclair, my understanding is that you
23 are petitioning the Court, because in your role, you
24 need to make sure that the Court is aware of the
25 dispute as to whether or not the estate -- whether

1 there's a will in existence or whether or not it's
2 intestate?

3 A That is correct, yes.

4 Q You're not an advocate for either side?

5 A That's correct.

6 Q Okay. And in making your determination to
7 file this, you undertook the investigation to learn
8 what you can about the estate, correct?

9 A Yes.

10 Q Okay. And you would have read the motion
11 that you filed that we're here before the Court today,
12 correct?

13 A Yes.

14 Q Do you have a copy in front of you?

15 A I do not.

16 Q Okay. Let me show you, if I may -- may I
17 approach?

18 THE COURT: Sure.

19 BY MR. DAN SLOTCHIVER:

20 Q Paragraph 13, if you could read that for the
21 Court.

22 A Yeah. "Based on information obtained from
23 Attorney McCants, petitioner believes that the
24 decedent physically tore the 2009 will in half in
25 Attorney McCants' presence on October 28, 2014."

1 Q Okay. So that's a discussion you would have
2 had with Mr. McCants?

3 A I believe so, yes.

4 Q Okay. He would have given you that
5 information?

6 A I would not have had any other source of
7 information.

8 MR. DAN SLOTCHIVER: Thank you. Thank you,
9 sir. I've got nothing further. Thank you.

10 THE COURT: All right. Any questions, Ms.
11 Irland?

12 MS. IRLAND: No, ma'am.

13 THE COURT: All right. You may step down.
14 Thank you.

15 THE WITNESS: Thank you, Your Honor.

16 MR. MICHEL: As petitioner, Your Honor.

17 THE COURT: Yes.

18 MR. MICHEL: I would call Lynn McCants next.

19 THE COURT: Mr. McCants, if you'll join us up
20 front.

21 JOHN LYNN McCANTS,

22 having been duly sworn, testified as follows:

23 THE COURT: Thank you. Please be seated and
24 give us your name and occupation.

25 THE WITNESS: My name is John Lynn McCants.

1 I'm an attorney practicing in Mount Pleasant. I've
2 been practicing for 37 years.

3 THE COURT: All right. You may proceed.

4 DIRECT EXAMINATION

5 BY MR. MICHEL:

6 Q Mr. McCants, you're here today because you
7 were subpoenaed to be here today?

8 A Correct.

9 Q And you were subpoenaed because based on
10 information, you believe you had a working
11 relationship with Ms. Coleman during her lifetime?

12 A I did.

13 Q And you prepared deeds, wills, and other
14 documents for her during her lifetime?

15 A I did.

16 Q And you knew her pretty well?

17 A As a neighbor and a good client, yes.

18 MR. MICHEL: Please answer any questions
19 these parties or their lawyers have. Thank you for
20 being here.

21 THE COURT: Mr. Slotchiver?

22 MR. DAN SLOTCHIVER: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. DAN SLOTCHIVER:

25 Q Mr. McCants, you and I had a chance to chat

1 today. We never met in person before, have we?

2 A Not that I recall.

3 Q Okay. And my understanding is that until
4 today, you were not aware of the Court's order that
5 was issued following a 2016 hearing between the same
6 parties today?

7 A That's correct, I was not aware.

8 Q Okay. Now, were you aware -- well, let's
9 back it up.

10 The will that we're -- that my client is
11 asserting should be the valid will, is that a will
12 drafted by you?

13 A The 2009 will?

14 Q Yes, sir.

15 A My office drafted.

16 Q Okay. And do you, as a general practice,
17 draft wills?

18 A I do.

19 Q Okay. And do you follow the regular
20 requirements set forth in drafting a will to make sure
21 that you've done everything technically correct to the
22 best of your ability?

23 A I do.

24 Q Are you aware of anything that you did with
25 reference to the 2009 will that would make it an

1 invalid will, based on the way that it was written?

2 A Nothing that I'm aware of.

3 Q Okay. Mr. Sinclair has testified that he
4 spoke to you and that based on his conversation with
5 you, he determined the date that you were approached
6 by Ms. Irland and Ms. Coleman to destroy the will,
7 correct?

8 A Well, I did speak to Mr. Sinclair, and I did
9 confirm that it was in October of 2014.

10 Q You've heard his testimony today that he
11 wrote October 28th. Is there any reason that you --
12 and that it was based on a conversation he had with
13 you, is there any reason you have to dispute that that
14 is the date that you told him.

15 A I would not dispute that date.

16 Q Okay, sir. And were you aware on the day
17 that you were approached by Ms. Coleman and Ms. Irland
18 that on that same date she had also gone to Mr.
19 Chandler's office to try to retrieve a will to destroy
20 it?

21 A I was not aware of that.

22 Q Were you aware that on that same date that
23 she had gone to a different lawyer who prepares deeds,
24 not yourself, to have a deed created conveying land
25 from Ms. Coleman to Ms. Irland?

1 A No, I was not aware of that.

2 Q Okay. And you were not aware that this Court
3 has found that there was lack of capacity and undue
4 influence and a breach of fiduciary duty that existed
5 on that same date, correct?

6 A Correct, I was not aware of that until today.

7 Q Had you been aware of those things, any of
8 those things, would that have given you some concern
9 about the ability and the correctness of destroying a
10 will in your presence on the date that they went to
11 your office?

12 A It would have, yes.

13 Q And the original will that was destroyed,
14 have you retained a copy of that?

15 A I do.

16 Q So if the Court were to determine that that
17 is the correct will and that should be probated, that
18 is something that you could hand over a copy of the
19 will to the Court for the purpose of probate, correct?

20 A I could, yes.

21 Q And you've actually retained a copy of the
22 destroyed will in your file, is that correct? Or you
23 actually retained the original destroyed will?

24 A I do have both halves of it.

25 Q Okay. So there's no argument that it's a

1 different will, because you actually have the halves
2 of the written will?

3 A Correct.

4 MR. DAN SLOTCHIVER: Okay, sir. Thank you
5 very much. I have nothing further.

6 THE COURT: All right. Ms. Irland?

7 CROSS-EXAMINATION

8 BY MS. IRLAND:

9 Q How many deeds or mortgages or things do you
10 think that you have done for Dolly Coleman?

11 MR. DAN SLOTCHIVER: Objection to relevance,
12 Your Honor. It's not a matter before the Court. The
13 matter before the Court today is the destruction of a
14 will and the circumstances on that day.

15 MS. IRLAND: If you let me continue, you will
16 see.

17 THE COURT: Hold on one second. Mr. Michel?

18 MR. MICHEL: Your Honor, I would just say
19 that I think he testified that he had a longtime
20 relationship with her. So that may -- that objection
21 may be moot. I am not disagreeing with Ms. Irland or
22 Mr. Slotchiver, I think when I asked him earlier, he
23 said he had a working relationship with her.

24 MR. DAN SLOTCHIVER: It doesn't make it
25 relevant to the matter at hand.

1 THE COURT: I'm going to allow it. You can
2 ask the question.

3 BY MS. IRLAND:

4 Q In your opinion, how many deeds and what
5 years did it start that you had done for Dolly
6 Coleman, how many things that you had done for her?

7 A Well, I met Dolly Coleman in 1983 when my
8 wife and I moved into the Old Village there in Mount
9 Pleasant. And of course, Dolly was our neighbor and a
10 business owner, and of course, we knew her.

11 And I did, I would have to say at least a
12 half dozen or a dozen real estate matters for her in
13 my 35 years. And the first will I did for her was
14 1992. So the 2009 will was not the first will I had
15 prepared for her.

16 Q Do you remember doing a hardware store and
17 like houses around?

18 A That's correct, I do, yes.

19 Q And did I help my mom with that? Was I
20 present during that?

21 MR. DAN SLOTCHIVER: Objection to relevancy,
22 Your Honor.

23 MS. IRLAND: I have been made to believe that
24 I violated my duty, and I'm just trying to -- because
25 Mr. McCants knows how long that he's been doing it and

1 things that I've helped, and I'm just trying that --
2 make the Court aware of the relationship that my
3 mother and I had with his knowledge.

4 THE COURT: Okay. And --

5 MR. DAN SLOTCHIVER: We will stipulate that
6 there was a relationship. The Court's already found
7 in its prior order that there was a confidential
8 relationship, one of trust, and that she took care of
9 her mother, that she with her mother, that she would
10 do things for her mother. That's already a part of
11 the record. And that's part of the finding of the
12 Court earlier was, with a confidential relationship,
13 the burden shifts. So we'll stipulate to the fact
14 that they had a very close relationship.

15 MS. IRLAND: I'm getting to my point.

16 THE COURT: Okay. Get there quickly. I'm
17 giving you some latitude.

18 BY MS. IRLAND:

19 Q Do you remember that, and was I present?

20 A I spoke with and met and talked to Dolly many
21 times just with her alone, and of course sometimes
22 with you. And of course, you were always helpful to
23 her.

24 Q And let's go to the property in Huger that I
25 purchased, the 38 acres --

1 MR. DAN SLOTCHIVER: Objection, Your Honor.

2 BY MS. IRLAND:

3 Q -- and the 1 acre, do you remember that?

4 THE COURT: Hold on one second. We can't
5 relitigate matters that have already been adjudicated.
6 What we have today is whether or not there is a valid
7 will that can be probated for your mother's estate.
8 So I need you to narrow your line of questioning to
9 Mr. McCants to address the will in question. The will
10 in question is the 2009.

11 MS. IRLAND: Well, I can say it all in one
12 sentence, but I'm trying to get to the point of the
13 will and the problems with the will.

14 MR. DAN SLOTCHIVER: And my objection, Your
15 Honor, if I may, is that what she's trying to do,
16 because I know the facts, she's trying to allude to
17 who owns certain properties --

18 MS. IRLAND: No.

19 MR. DAN SLOTCHIVER: It's a whole different
20 matter than we're here for today.

21 MS. IRLAND: No.

22 MR. DAN SLOTCHIVER: The only matter we're
23 here for today is was there a will --

24 MS. IRELAND: No.

25 MR. DAN SLOTCHIVER: -- that was

1 appropriately destroyed or not. And I would ask that
2 she be limited to those issues. What I don't want to
3 do is have her try to take testimony that she could
4 twist and use without objecting, because I've got to
5 object at that point.

6 THE COURT: I understand.

7 MR. DAN SLOCHIVER: And I'm trying not to
8 stop the Court from hearing the matter, but we're
9 going beyond that.

10 THE COURT: Okay. All right. I'm going to
11 sustain in part his -- we cannot discuss the prior
12 rulings from the guardianship-conservatorship case
13 with respect to the properties. If you are -- if your
14 line of questioning is leading to something relevant
15 to the last will and testament that Mr. McCants
16 drafted, that I can allow. I can allow you to
17 establish that he had a working relationship with your
18 mother, that he knows you and he knows your mother,
19 but Mr. Slotchiver has already stipulated that he
20 doesn't object to that relationship. So if you can
21 just get to that line of question now.

22 MS. IRLAND: I'll get to my point and have
23 him oppose again.

24 BY MS. IRLAND:

25 Q When Dolly Coleman purchased the 33 acres,

1 from Mr. Williams, you remember that, right?

2 MR. DAN SLOTCHIVER: Objection to relevancy.
3 That's exactly what you instructed she not go into.

4 MS. IRLAND: No. I'm getting to it right
5 this minute if you'd just let me finish, and then she
6 can -- she can sustain --

7 THE COURT: Okay. I will stop you just --

8 Are you aware of that purchase, Mr. McCants?

9 THE WITNESS: Yes, I was involved in that
10 purchase, I was.

11 BY MS. IRLAND:

12 Q My point is what Mr. Williams told you, and
13 this goes to the will, because it's what my mother was
14 supposed to do and what was in the will and why she
15 wanted the will destroyed, and she knew that, and
16 that's my point. Do you remember what Mr. Williams
17 said about her purchasing the 33 acres?

18 MR. DAN SLOTCHIVER: Your Honor, same
19 objection. Mr. Williams testimony was presented at
20 the last hearing.

21 MS. IRLAND: No --

22 MR. DAN SLOTCHIVER: And now she's trying to
23 revisit that. And she's trying to go to the dead
24 man's statute.

25 MS. IRLAND: No.

1 MR. DAN SLOTCHIVER: As far as what her
2 mother wanted. What her mother wanted is generally
3 expressed in a will, and the will has been drafted by
4 a lawyer who's got 37 years of competency in drafting
5 that will. What people say to people and what they do
6 in their writings are not always the same thing.
7 That's why we have wills. But she's going beyond
8 that. She's asking questions that have nothing to do
9 with the matter we're before the Court today.

10 MS. IRLAND: It is. That's why she destroyed
11 the will.

12 THE COURT: I'm going to allow it. I'm going
13 to allow you a little bit of leeway, but get there
14 fast.

15 BY MS. IRLAND:

16 Q And that's -- do you remember?

17 A Can you repeat the question.

18 Q Mr. Williams, I purchased the first part, and
19 then my mother purchased the second part, the 33
20 acres. And Mr. Williams, what he said to you in
21 reference to my mother purchasing the property versus
22 me purchasing the property. I don't want to tell you
23 what he said, I want you to tell the Court. Was he
24 going to sell the property to her just like that, or
25 did he have a stipulation?

1 MR. DAN SLOTCHIVER: Same objection.

2 THE COURT: Noted.

3 THE WITNESS: I'm sorry, I don't recall what
4 Mr. Williams said.

5 BY MS. IRLAND:

6 Q Did you not bring any notes? Because you
7 take really good notes.

8 MR. DAN SLOTCHIVER: Asked and answered, Your
9 Honor.

10 THE COURT: Next question, or you can
11 rephrase it.

12 BY MS. IRLAND:

13 Q Do you remember Mr. Williams saying that his
14 wife on her death bed only wanted one person --

15 MR. DAN SLOTCHIVER: Objection.

16 BY MS. IRLAND:

17 Q -- to purchase the property?

18 MR. DAN SLOTCHIVER: She's leading the
19 witness now.

20 MS. IRLAND: I'm asking if he remembers that.

21 MR. DAN SLOTCHIVER: The objection is she's
22 leading --

23 MS. IRLAND: It's not a leading question.

24 I'm not -- I'm asking him the question.

25 THE COURT: Okay.

1 MR. DAN SLOTCHIVER: It's a leading question.
2 She had the right to have an attorney. She's had an
3 attorney before. It's a leading question. Because
4 you don't have an attorney doesn't allow you to do
5 things that you couldn't do with an attorney.

6 MS. IRELAND: I don't want that to happen
7 either.

8 MR. DAN SLOTCHIVER: And I'll object.

9 MS. IRELAND: But he cannot remember, so I'm
10 asking him the question, I'm not giving him the
11 answer.

12 THE COURT: You can't -- you can't ask
13 questions that are allowing you to essentially
14 testify, okay? So I mean, he's been asked if he
15 remembers, he says he doesn't remember. Is there
16 another direct question?

17 BY MS. IRELAND:

18 Q On the date that the will was destroyed, did
19 I have any undue influence on my mother to destroy
20 that will, or did she do it on her own?

21 MR. DAN SLOTCHIVER: Objection, Your Honor.
22 I don't believe he has -- first, the Court's already
23 ruled that on the date that this was done, there was
24 undue influence, there was mental capacity issues.
25 But secondly, I don't believe that he has the

1 foundation or the ability to give a medical opinion.
2 And this Court -- the Court's already heard medical
3 testimony about susceptible of influence, mental
4 incapacity. The Court has already made findings, and
5 now you're asking -- you know, we can look at the
6 Gunnells case that Judge Condon heard about two years
7 ago, you're familiar with it, that talked about undue
8 influence, that talked about the fact that lawyers
9 don't necessarily have the ability.

10 In fact, in that case the lawyer testified
11 that the client was perfectly fine, and the Court
12 found, no. And it went all the way to the Court of
13 Appeals, and they said lawyers don't have that
14 ability. We do the best we can, but we're trained to
15 create documents. We have certain things we see that
16 might be blatant and obvious, but we don't have that
17 ability. So I don't think it's a fair question to ask
18 Mr. McCants. I don't think it's a proper question to
19 ask him, and I would ask that it be stricken.

20 MS. IRLAND: It is a proper question.

21 THE COURT: Hold on a second. Mr. Michel
22 wanted -- he was standing, too, and y'all can't see
23 him.

24 MR. MICHEL: Just because we've called him
25 here as a witness -- I'm not objecting to Mr.

1 Slotchiver's objection, I'm just stating, since he's
2 here as a witness, I think he should be able to answer
3 that question to the best of his ability so as to
4 avoid the cloud later on, if you so see fit.

5 MR. DAN SLOTCHIVER: With all due respect to
6 Mr. Michel, it's not a question that a lawyer can
7 answer. He's asked him a medical testimony. The
8 Court's already ruled on this on the date, based on
9 the way the question was asked. But even if it was,
10 did you ever notice it, it's not a question that a
11 lawyer -- I think the only question you can ask -- I
12 don't think you can ask that question of a lawyer,
13 based on the Gunnells case and the prior cases.

14 THE COURT: Okay. So --

15 MS. IRLAND: Your Honor, I didn't ask a
16 medical question. I asked him if he -- can he state
17 whether or not I had any undue influence on my mother
18 destroying that will. He was present, my mother was
19 present, I was present.

20 THE COURT: So let me rule as we've got this
21 objection standing out there. I'm going to allow you
22 to answer the question. You've got the ability to
23 redirect. So go ahead. You can ask the question.
24 You can answer it.

25 THE WITNESS: I recall that I had received a

1 phone call and that Dolly wanted to come by to see me,
2 to stop by the office. And of course, she, during my
3 37 years of practice, it was not unusual for her to
4 stop or make an appointment and show up or come in
5 unannounced. And of course, she would bring me, you
6 know, some cookies and some vegetables, and different
7 things. And so she had called and said she wanted to
8 come by that day.

9 And so when she got there. She said, do I
10 have the will, her will. I said, yes, and of course,
11 over the course of my practice, I had probably
12 prepared at least three or four wills for Dolly. This
13 would be the 2009, was the last one that I prepared
14 for her. And of course, we keep those in a fireproof
15 locked -- or safe. So I retrieved the file from the
16 safe, and we walked -- you were in the waiting room,
17 sat in a chair. Dolly and I walked into the first
18 little conference room, and she just said, I want to
19 change my will. And I said, what do you want to
20 change? And she said, well, I'll get back with you
21 later.

22 And she said, do you have the will? And I
23 said, yes, right here. She said, well, I want to
24 destroy this one. I want to revoke this on or destroy
25 it. And she said, I'll get back with you, we'll do

1 another will, which was not an unusual request or
2 statement from Dolly.

3 BY MS. IRLAND:

4 Q Did she bring another will?

5 A Did she bring another will?

6 Q Uh-huh.

7 A She didn't have anything with her that day,
8 just her purse.

9 Q I mean later, did she bring another will?

10 A No. She never contacted me later to prepare
11 another will, she did not.

12 Q This happened in October and --

13 MR. DAN SLOTCHIVER: Asked and answered.

14 MS. IRLAND: Can I finish my sentence,
15 please.

16 THE COURT: Yes, let her finish, please.

17 BY MS. IRLAND:

18 Q And I do not recall the date, but it was in
19 October. Mom was approximately 83 years old. Did you
20 notice any incapacity?

21 MR. DAN SLOTCHIVER: Your Honor, same
22 objection we raised before. She's asked the same
23 question before, also.

24 MS. IRLAND: I have not. I have not asked
25 about incapacity. I asked about undue influence.

1 Now, I'm asking incapacity, because this Court has
2 already ruled and allowed a guardian who only had a
3 high school education to be an expert on dementia and
4 Alzheimer's. This is a gentleman that has known her
5 for years, and I think his knowledge of Ms. Dolly is
6 certainly more than a guardian who had only known her
7 for several months.

8 MR. DAN SLOTCHIVER: Your Honor, I'm not
9 aware of Carol Salinger (phonetic), I believe was the
10 guardian, only having a high school education, but
11 regardless of that, this Court has already determined
12 that there was lack of capacity --

13 MS. IRLAND: It's a fact.

14 MR. DAN SLOTCHIVER: -- based on medical
15 testimony. Lawyers cannot give medical testimony.
16 And I would ask that this question be stricken.

17 THE COURT: So I'm going to allow the
18 question to be asked, but with your objection that he
19 doesn't have the prerequisites in order to make that
20 determination, because no foundation for that's been
21 laid either, but you can ask him his opinion.

22 BY MS. IRLAND:

23 Q And that's what I'm asking, your opinion.

24 A I did not notice anything out of the ordinary
25 or different or unusual about Dolly that day.

1 Q Thank you very much. Do you have the torn
2 will with you?

3 A I do.

4 Q Can we see it?

5 A (Complies.)

6 THE COURT: What's your --

7 MS. IRLAND: I would just like to see it,
8 please.

9 THE COURT: All right. Mr. Slotchiver, have
10 y'all have you see it?

11 MR. DAN SLOTCHIVER: I don't need to see it,
12 Your Honor. I have not.

13 THE COURT: Mr. Michel, no?

14 THE WITNESS: Just by way of explanation,
15 typically, when I do a will, it's a will, living will,
16 healthcare power of attorney, and a general durable
17 power of attorney. So there may be four documents
18 there, not just one.

19 MS. IRLAND: Oh, okay.

20 THE WITNESS: But the will is one of those
21 torn documents.

22 THE COURT: Thank you.

23 MR. MICHEL: Your Honor, would it be helpful,
24 I think the witness just testified that that's more
25 than one document. Would it be helpful for the

1 witness to testify to what documents, for a clean
2 record, were torn up. I was under the impression it
3 was just one document. So that may be helpful. Any
4 objection from Mr. Slotchiver?

5 MR. DAN SLOTCHIVER: I would just object to
6 the relevancy of it, Your Honor, but other than that,
7 it doesn't matter, but I don't know how this is
8 relevant to the matter at hand, looking at documents
9 that have been destroyed. We all know the document
10 is.

11 THE COURT: Mr. McCants, can you look through
12 it and identify exactly what documents were destroyed
13 that day in October 2014 by Ms. Dolly.

14 THE WITNESS: Last will and testament,
15 healthcare power of attorney, and a declaration for
16 desire for natural death or a living will.

17 BY MS. IRLAND:

18 Q Did she have any trouble tearing that up?

19 A No.

20 Q No? That's pretty good for an 83 year old
21 woman.

22 MS. IRLAND: I'm good, Your Honor. Thank you
23 very much. I appreciate your --

24 MR. MICHEL: I don't know the order, but I
25 just have a few follow-up questions.

1 THE COURT: Sure.

2 MR. MICHEL: Is it my turn?

3 THE COURT: Yes.

4 REDIRECT EXAMINATION

5 BY MR. MICHEL:

6 Q Mr. McCants, you said she had redone wills
7 previously. Had she just come in and done another
8 will to revoke the prior will, or had she ever torn up
9 wills in the past, if you recall?

10 A I don't recall that she had ever come in --
11 obviously, she came in to do subsequent or update her
12 will, but that particular day, she said she wanted to
13 revoke this will, and she took it and tore it up and
14 put it back on the file, and that's why it just stayed
15 in the file. She said that she would get back with me
16 and we would do another will. And of course, I did
17 not hear from her. We did not do another will after
18 2009.

19 Q And can you -- was she instructed to tear it
20 up, by any chance, or how did she know to tear it up
21 as a revocation?

22 MR. DAN SLOTCHIVER: Objection on foundation.
23 I don't know if he knows the answer to that.

24 BY MR. MICHEL:

25 Q I'm just asking him, did you instruct her to,

1 or was that something she did on her own?

2 THE COURT: I'll allow it.

3 BY MR. MICHEL:

4 Q I'm just curious. If you don't recall, you
5 don't recall. I know it was many years ago.

6 A She said she wanted to revoke the will. She
7 wanted to do a new will and I don't recall if I
8 suggested that she tear it in half. I don't recall.

9 MR. MICHEL: Nothing further, Your Honor.

10 THE COURT: Okay.

11 MR. DAN SLOTCHIVER: Just a few follow-up.

12 THE COURT: Yes.

13 FURTHER CROSS-EXAMINATION

14 BY MR. DAN SLOTCHIVER:

15 Q Is it fair to say that someone coming to your
16 office who had already had you draft a will and other
17 legal documents, that it's not customary for them to
18 come to you and have you destroy those documents
19 without first saying, let's create new ones? In other
20 words, isn't it normal that you create a new document
21 that destroys the old one, as opposed to tearing up
22 the document saying I'll get back to you?

23 A I would say that it's the regular practice
24 that when people update their wills, they just --
25 those documents, that they just execute or sign a new

1 document, a new will. They don't say, would you
2 please go to the safe and pull that one out so that I
3 can destroy it or tear it in half.

4 Q And I'll get back to you?

5 A That's not customary.

6 Q I'm not familiar with it happening with us.
7 Do you know what conversations Ms. Coleman had with
8 Ms. Irland on the drive over to your office?

9 A No.

10 Q Are you familiar with the law as it deals to
11 undue influence, being that it arises over a period of
12 time, not just the moment? Are you familiar with
13 that?

14 A I'm not an expert on undue influence.

15 Q Okay. Fair enough. And you're not an expert
16 on lack of capacity, also, right? You're not
17 medically trained?

18 A That's correct, I'm not.

19 Q So --

20 MS. IRLAND: I have a little follow-up.

21 THE COURT: Hold on one second, Mr.
22 Slotchiver is not finished.

23 MS. IRLAND: Oh, he's not finished?

24 MR. DAN SLOTCHIVER: I wasn't done yet.

25 MS. IRLAND: Oh, okay.

1 BY MR. DAN SLOTCHIVER:

2 Q Based on your relationship with Ms. Coleman,
3 your lengthy relationship with Ms. Coleman that's been
4 testified to, was it surprising to you to learn today
5 that on the same day that she came to your office to
6 destroy these documents, that she went to a different
7 lawyer to prepare deeds for her?

8 A I was very surprised, yes.

9 MR. DAN SLOTCHIVER: Okay. Thank you, sir.
10 I have nothing further.

11 THE COURT: One second. All right.

12 MR. MICHEL: Did Ms. Irland have any
13 follow-up questions?

14 THE COURT: She does, yes. I just wanted to
15 make sure that it's -- it can't be a brand new subject
16 matter. It has to be in response to something that
17 has been asked on redirect. We can't -- this is just
18 the rules of Court. Okay. You can ask.

19 MS. IRLAND: Well, he's asking subjective
20 questions and asking for opinion. And that's what I
21 would like to know. And I have it, it has to do
22 with -- because he asked something, "is it usual for
23 someone?" I have an is it usual for someone, too.

24 THE COURT: Go ahead. You can ask it.

25 MS. IRLAND: But it's a different question.

1 THE COURT: That's okay. Let me hear it.

2 FURTHER CROSS-EXAMINATION

3 BY MS. IRLAND:

4 Q Would it be usual for someone to go to one
5 attorney and then -- and have a will that had been
6 drawn up online by the granddaughter and taken to the
7 lawyers office and then her name and everything put in
8 it, and then six months later, come to another
9 attorney doing another will, because the first will
10 didn't give her enough. In the second will, she got
11 almost everything. And would that be something that
12 someone would destroy a will over when they were able
13 to read it again and make a decision for themselves?

14 MR. DAN SLOTCHIVER: Your Honor --

15 BY MS. IRLAND:

16 Q Would that be unusual?

17 MR. DAN SLOTCHIVER: I would object to the
18 question. We've gone well beyond unusual related to
19 the will.

20 MS. IRLAND: So did he.

21 MR. DAN SLOTCHIVER: Now we've got would
22 somebody -- she's asking for is it unusual, and she's
23 asking him to draw a conclusion as to what would
24 happen at the end of the road. I had a hard time
25 following the question to begin with.

1 MS. IRLAND: It's the truth.

2 THE COURT: I'll overrule. If you can answer
3 it, answer it. If you cannot, let her know.

4 BY MS. IRLAND:

5 Q Did you understand the question?

6 A Well, I'll just say that I think it would be
7 unusual, and in my personal practice, if I know that a
8 client is basically going to another attorney the next
9 day or coming back to me or something that, what do
10 you want to call it, too many cooks in the kitchen or
11 whatever, but I just decline to represent someone who
12 does that. So I was not aware that Dolly went to Jack
13 Williams in Moncks Corner. Not that that hurt my
14 feelings, but that was five years after -- five years
15 after I prepared the will. But I'm not aware of any
16 other instances where something like that had
17 occurred.

18 Q What I'm saying is the first will 2008, was
19 made in Chandler's office. Six months later --

20 MR. DAN SLOTCHIVER: Your Honor, this has
21 been asked and answered. He gave an answer.

22 MS. IRLAND: No. He answered the question
23 about your instance. Then the will just, like I said,
24 didn't give Ms. Culp enough, so the 2009 will
25 virtually gave her a whole heck of a lot more. And

1 then came to you, with that will. And that was in a
2 six-month span.

3 A I do know --

4 Q 2008, 2009, six months later, another will
5 giving her more.

6 MR. DAN SLOTCHIVER: Same objection, Your
7 Honor.

8 THE COURT: Noted.

9 THE WITNESS: I do know that Dolly went to
10 Heyward Carter's office. And of course, I'm familiar
11 with and a colleague of Heyward, and I
12 recommended him. She said, what do you think about
13 Heyward Carter? And I said, he's a great lawyer,
14 he'll do a great job. So she went to see Heyward
15 Carter. And so I knew that she went to see Heyward
16 Carter. And I knew that she came back to me in 2009
17 and asked me to update the will again.

18 Q Yes. And the reason that is -- so you're
19 feelings are -- and I can tell you, that was my
20 decision to go to Jack Williams --

21 THE COURT: You can't -- ma'am, you can't --

22 MS. IRLAND: I know. I'm not testifying, I'm
23 just saying that --

24 THE COURT: But this is not a conversation.

25 MS. IRLAND: I know, I know.

1 THE COURT: It's not. And it's not funny
2 either.

3 MS. IRLAND: I know.

4 THE COURT: Because this is a Court of law.
5 You either ask a question and allow him to answer it,
6 or we have to move on. I can't have commentary.

7 MS. IRLAND: I'm sorry, I'm sorry, my bad.

8 THE COURT: Thank you. Any other questions?

9 MS. IRLAND: No.

10 THE COURT: Okay.

11 MR. MICHEL: No, Your Honor, I don't have
12 any.

13 THE COURT: Any redirect?

14 MR. DAN SLOTCHIVER: Nothing fresh, Your
15 Honor.

16 THE COURT: Mr. McCants, we appreciate your
17 time and you're excused.

18 THE WITNESS: Thank you, Your Honor.

19 MR. MICHEL: Can Mr. McCants be excused, or
20 did I miss that?

21 THE COURT: Yes, I let him go.

22 MR. MICHEL: Thank you so much. And did the
23 ripped up will stay into evidence or not?

24 THE COURT: I don't believe it was moved into
25 evidence. I think she just asked to see it. Do we

1 want to place it into evidence?

2 MR. MICHEL: I think that would take a burden
3 off of Mr. McCants if we did place it into evidence,
4 because that way he wouldn't have to be subject to
5 bringing it back. I'll let the parties --

6 MR. DAN SLOCHIVER: I'm okay with Mr.
7 McCants holding it, but if the Court wanted maybe the
8 will but not the others, but as an officer of the
9 Court, I'm certainly comfortable with him holding the
10 original documents.

11 MR. MICHEL: I would just request that the
12 original be placed into evidence]since that's why
13 we're here. And that will take a huge burden off of
14 Mr. McCants for later on.

15 THE COURT: I agree. Maybe we won't have to
16 bother Mr. McCants in the future.

17 MR. MICHEL: Yes.

18 THE COURT: We'll just place it into
19 evidence.

20 MR. MICHEL: And I'm okay with just the will.
21 I don't know if Ms. Irland wants anything else into
22 evidence.

23 THE COURT: Ms. Irland, there was a durable
24 power of attorney and a living will, declaration for
25 natural death, do you want all three placed into

1 evidence or just the will?

2 MS. IRLAND: That's fine, Your Honor.

3 MR. MICHEL: Your Honor, I've been handed the
4 entire packet.

5 THE COURT: Thank you, Mr. McCants.

6 MR. MCCANTS: Thank you, Your Honor.

7 THE COURT: We'll mark this as Petitioner's
8 1.

9 MR. MICHEL: Perfect, Your Honor.

10 (Petitioner's Exhibit No. 1 marked.)

11 THE COURT: All right. Any other witnesses,
12 Mr. Michel?

13 MR. MICHEL: Not on behalf of the personal
14 representative, Your Honor.

15 THE COURT: Okay. And what's your question,
16 Ms. Irland?

17 MS. IRLAND: He has brought up and introduced
18 about capacity, and I have just a few that I would
19 like placed into evidence so you can see them. And
20 what they are there is documents just from doctors
21 like my mom, she fell down the steps and cut her head.
22 And so on these things, the doctors go into talking
23 with her and her competency and neurological, and it's
24 documented. And I would like that to be placed into
25 evidence so that you look at that for her capacity.

1 And it's different doctors -- and I'm talking about
2 these things that happened in -- one is 2011, and one
3 is 2013, to -- because we're going -- you're going
4 into the line that she wasn't -- didn't have that
5 capacity. And these doctors might give some insight,
6 because she saw them for different reasons.

7 THE COURT: Okay. Mr. Slotchiver?

8 MR. DAN SLOTCHIVER: Your Honor, I'm going to
9 object. You don't get a second bite at the apple.
10 The Court has ruled on this. Not only do I not know
11 what these documents are, but even if I did, it would
12 be inadmissible, because the Court has already ruled
13 on capacity on that day. So know she's trying to go
14 into medical records that we haven't seen that are not
15 authenticated, they're not properly in front of the
16 Court, but the Court has already made a ruling that on
17 the same day, which we have now confirmed through Mr.
18 McCants and Mr. Sinclair is the same date the
19 other -- that the ruling took place or the same date
20 that the other transactions took place. So she's
21 trying to revisit that case, which has already been
22 litigated. And it would not be properly before the
23 Court.

24 MS. IRLAND: These are medical records from
25 the emergency room, and you're welcome to see them.

1 THE COURT: Do you want to look at them?

2 MR. DAN SLOTCHIVER: No. I don't think --

3 MS. IRLAND: I mean, you can't make this
4 stuff up. It's medical records.

5 MR. DAN SLOTCHIVER: For the purposes of my
6 objection, this Court has already ruled that she was
7 incapacitated on the day, and the Court's order says
8 that it's binding on all parties, which includes her.

9 THE COURT: So the Court is going to overrule
10 allowing those documents into evidence. The Court --
11 and I was looking on the system here to see if I could
12 tell you specifically, it's a very old case though,
13 going back to 2014, but this Court even prior to its
14 order in 2016 had already -- this order for 2016 in
15 the guardianship-conservatorship case was an order
16 receiving deeds. We had already had a finding of
17 incapacity for Ms. Coleman prior to this hearing.

18 So we cannot re-adjudicate the capacity or
19 incapacity of Ms. Coleman, because that was the entire
20 basis of the action that was brought in the
21 guardianship-conservatorship court back in 2014.
22 Okay? So that's overruled.

23 Are you ready to proceed with your next
24 witness, Mr. Slotchiver?

25 MR. DAN SLOTCHIVER: We have no witnesses

1 that we wanted to call.

2 THE COURT: Okay.

3 MR. DAN SLOTCHIVER: We wanted a closing
4 argument at some point, but that's it.

5 THE COURT: All right. Any witnesses, Mr.
6 Irland?

7 MS. IRLAND: No ma'am.

8 THE COURT: All right. So what I'd like to
9 do is if I can swear in Ms. Irland for purposes of her
10 sworn closing statement, since she's not going to
11 actually testify, I'll just go ahead and swear her in,
12 and then we can just move smoothly through closing
13 arguments.

14 (ATHENA L. IRLAND was duly sworn to tell the
15 whole truth and nothing but the truth.)

16 THE COURT: Thank you. Mr. Michel?

17 MR. MICHEL: On behalf of the personal
18 representative, we do not have a closing statement,
19 other than it may be helpful if you instruct the
20 parties as to what a closing statement involves, a
21 summary of the testimony, not their testimony. Thank
22 you.

23 THE COURT: Yes, I'll be happy to. So for
24 purposes of closing statements, this is the
25 opportunity to address the matter that is currently

1 before the Court, which is the status of whether Ms.
2 Dolly Lagare Coleman's estate is intestate which means
3 she died without a will, or is this a testate estate,
4 meaning she died with a will. And if your position is
5 that she died and departed this earth having left a
6 last will and testament, I need to understand the
7 basis of -- using the testimony we received here
8 today, what your basis is for that position.

9 And if you're on the opposite side, I need to
10 understand your position that it is an intestate
11 estate and why, based upon the evidence we've heard
12 here today. Okay? So it's not an opportunity to
13 testify, per se, as to telling me everything you want
14 me to know about the case, because you haven't been
15 called as a witness, but it is an opportunity to get
16 to the meat of the matter, which is did Ms. Dolly
17 depart this earth having left a last will and
18 testament, and if so, where's the evidence. And if
19 not, where's the evidence. Okay?

20 All right. Mr. Slotchiver?

21 MR. DAN SLOTCHIVER: Thank you, Your Honor,
22 I'll be very brief. I understand now more than I did
23 before the significance of not granting our motion for
24 summary judgement at the time, because it has given us
25 the ability to dot the Is and cross the Ts.

1 So what we do know now from the evidence
2 that's been presented today is that on the same date
3 that the Court had already determined that Ms. Coleman
4 was under the influence and lacking capacity, and Ms.
5 Irland abused her fiduciary responsibility based on
6 the confidential relationship with her mother. We
7 know that on the same date, based on the testimony of
8 Jack Sinclaire and his conversation with Lynn McCants,
9 and Lynn McCants agreed that there's no reason to
10 dispute that it's the same date, it all transpired on
11 the same date.

12 And that's significant, because on the same
13 date that all these things happened is what we're here
14 for today. So the question before the Court is: Was
15 the will properly destroyed? And if it was, then it
16 goes to intestacy; if it wasn't, then it doesn't. We
17 now know that she was incapacitated on the day that
18 she destroyed the will. We also know that very
19 unusual in the practice, and this Court can recognize
20 this, I'm sure. We certainly have seen it in ours --
21 or haven't seen this in ours is a scenario where
22 someone says I'm going to destroy everything, I'll get
23 back to you. And destroys everything. I mean not
24 just the will, but the power of attorney, the
25 declarat, everything was all destroyed, all on the

1 same date.

2 Mr. McCants testified that he was not
3 familiar with any of the other things that took place.
4 He was very surprised to learn that Dolly Coleman had
5 gone to a different deed lawyer, which was
6 interesting, because we've learned now, based on the
7 outbursts of Ms. Irland, that she's the one that
8 actually took her mother to the other lawyer who's not
9 the same lawyer who normally would prepare her deeds,
10 too. And we know that the result of that was to bring
11 her to somebody else to sign a deed giving her
12 property.

13 So I think it's very clear based on the
14 Court's prior ruling alone, even disregarding the
15 evidence, that on the date that it was destroyed,
16 there was a lack of capacity and undue influence. The
17 only question before the Court then was: Was it the
18 same day? We've now confirmed that it was in fact the
19 same day.

20 Was there anything new that Mr. McCants could
21 provide that shed light as to why in his particular
22 situation it would have been different than with the
23 other people, even regardless of the fact of the
24 findings of the Court. And what we find instead is
25 there was nothing new. He was surprised himself. He

1 wasn't familiar with it. He stated that had he known
2 that his client, on the same day, had gone to another
3 lawyer to destroy a document or gone to get deeds done
4 or had been adjudicated as he has been adjudicated,
5 any of those things, it would have given him pause
6 about what took place, because he already recognized
7 that it's not the normal thing that took place. But
8 he's not a doctor.

9 He testified he doesn't have experience in
10 undue influence. He was familiar with the Gunnells
11 case and the laws of undue influence. He's not in a
12 position to testify as to incapacity. So he testified
13 honestly that he did what he was presented with at the
14 time, but had he known the background, he would not
15 have done it, which is consistent with what we find
16 all the time.

17 So based on that, Your Honor, we believe that
18 the last will and testament that was created by Mr.
19 McCants, the 2009 will, speaks to the truth as to what
20 the testator desired to have happen. And we're asking
21 that that will be accepted, that that will be
22 probated, and that that is the law of the land with
23 reference to the estate and how we proceed. Thank
24 you, Judge.

25 THE COURT: Thank you. All right. Ms.

1 Irland?

2 MS. IRELAND: Yes, ma'am. I'll try to be
3 brief, because I don't know all the terms, but I just
4 want to clarify that now because -- you know, I did
5 not have a power of attorney, it's not that I violated
6 the fiduciary duty, now I violated a confidential
7 relationship. I have never done that before with my
8 mother. That is the reason my mother has always put
9 me as trustee on bank accounts --

10 MR. DAN SLOTCHIVER: Objection. She's
11 testifying now. It's gone beyond. She's actually
12 giving testimony.

13 MS. IRELAND: I think I'm giving a closing
14 statement. I'm not testifying.

15 MR. DAN SLOTCHIVER: She's testifying not
16 only about the facts, but she's even telling us what
17 her mother did. So she's violating -- and I know
18 there's always a lot of latitude that's always given
19 to pro se parties, but it comes to the point -- I'm
20 trying not jump up and down other than what I need to,
21 but I think that's something that needs to be
22 stricken.

23 THE COURT: All right. So just please try to
24 keep it to the subject matter before the Court today.
25 We can't go back and --

1 MS. IRLAND: It's part of the subject matter.
2 I did not have a power of attorney. That was my
3 mother, and I'd do anything for my mom that she needed
4 to have done, whether it was legal work or going to
5 visit someone or anything she needed. I was the one
6 that she would come to and we would do it together.

7 As for Jack Williams in Moncks Corner, her
8 using him, we've known Jack Williams since the '90s.
9 He's been an attorney for us --

10 MR. DAN SLOTCHIVER: Same objection.

11 MS. IRLAND: -- on another piece of land.

12 THE COURT: Objection noted.

13 MS. IRLAND: And his wife and grandchildren
14 have been out to the farm. So it wasn't a stranger
15 that I got, it was someone that we had used before.

16 MR. DAN SLOTCHIVER: Same objection. We're
17 not testifying, Your Honor. Outside of what's been
18 testified to.

19 MS. IRLAND: I'm just trying to answer things
20 that you have said. And he did not say -- Lynn
21 McCants did not say he would not have done it. It
22 would have given him pause, but if he knew the whole
23 situation, nothing would have given him pause.

24 MR. DAN SLOTCHIVER: That's not what he
25 testified to.

1 MS. IRLAND: But this has been done -- again,
2 there is a fraud committed, but it's not been done by
3 me. You don't have to look very far to find it.

4 MR. DAN SLOTCHIVER: I'll object to that
5 statement, Your Honor. I would ask that it be
6 stricken from the record. This is closing argument.

7 MS. IRLAND: Yes, it is and you can argue --

8 MR. DAN SLOTCHIVER: It's not appropriate for
9 Ms. Irland to cast dispersions against my client or
10 anybody else in the courtroom.

11 MS. IRLAND: Oh, was I talking about your
12 client, you think?

13 THE COURT: Okay --

14 MS. IRLAND: I didn't say a name.

15 THE COURT: Okay. Let's wrap it up.

16 MS. IRLAND: I didn't say a name, Your Honor.

17 THE COURT: I understand.

18 MS. IRLAND: Thank you very much. But here
19 today, we have an opportunity to set things right.
20 And, yes, I believe my mother had the capacity, had
21 the knowledge, went to the person that she had been to
22 for years, they discussed it, they took care of it.
23 And, yes, she was going to do another will, but he'll
24 object when I tell him it was only supposed to have
25 the three children involved and not anyone else.

1 MR. DAN SLOTCHIVER: And I do object. We're
2 now testifying --

3 MS. IRLAND: I'm done. Thank you, Your
4 Honor, I appreciate your --

5 THE COURT: Yes, ma'am. All right. I think
6 what would be a prudent thing to do at this juncture
7 would be for the Court to ask Mr. Slotchiver to
8 prepare a proposed order. Ms. Ireland, I would ask you
9 to prepare one, too. It's up to you whether you chose
10 to. That's what I normally do, I have people present
11 their -- how they would have me order.

12 MS. IRLAND: I would like to.

13 THE COURT: Okay. And I would like to
14 receive those within 20 days. Does that give you
15 enough time?

16 MR. DAN SLOTCHIVER: Yes, Your Honor.

17 MS. IRLAND: Yes, Your Honor.

18 THE COURT: Okay. And then the Court will
19 make a ruling. During that 20 days, it will give the
20 Court an opportunity to go back and fully review it's
21 very lengthy order from the
22 guardianship-conservatorship case from 2014. It will
23 give me an opportunity to review in full Mr.
24 Chandler's deposition transcript that was admitted
25 into evidence, and I will do my best to turn around a

1 ruling so that this doesn't continue to drag on.

2 While I have you all here, I just wanted to
3 thank Mr. Sinclaire. Mr. Sinclaire has gotten to know
4 this family before Ms. Dolly's passing, because he is
5 a person, not only is he a lawyer, but someone we
6 consider to be a valued professional guardian in our
7 court. And it's -- we don't have many lawyers that we
8 also appoint as guardians, but Mr. Sinclaire is one of
9 them. And to have that gotten the consent and
10 approval from this family that hardly agreed on
11 anything since 2014, but everyone agreed that Mr.
12 Sinclaire should serve in the role as personal
13 representative, I think also speaks volumes.

14 So I just wanted the opportunity to tell this
15 family and Mr. Sinclaire in front of the family that
16 we appreciate the service that you have given. I
17 think Ms. Dolly Coleman's life was enriched in her
18 final days because of knowing you, and I appreciate
19 you taking this role in the estate, as well.

20 So with that, we will conclude. I hope
21 everyone gets out of here safely, and I hope no one
22 had too much damage from these wind and rain and
23 lightning that rolled through. Looks like we might
24 have gotten lucky once again. But you all be safe out
25 there. We'll be back in touch soon, 20 days from

1 today.

2 You can get Sydney's e-mail address if you
3 don't already have it, and we'll be in touch. Thank
4 you all.

5 (The hearing concluded at 11:35 a.m.)

6 * * *

C-E-R-T-I-F-I-C-A-T-E

I, Kendra Kay Johnson, Professional Court Reporter and Notary Public for the State of South Carolina, certify that the foregoing hearing was held at 100 Broad Street, Charleston, South Carolina; that the foregoing pages constitute a true and accurate transcript of the proceeding.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 18th day of April, 2022.

Kendra Kay Johnson
Notary Public for South Carolina
My Commission Expires:
September 21, 2028

9

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Exhibits to Petition for Writ of Mandamus - Page 19

In addition, S.C. Code § 62-1-308(A) sets forth the rule as to appeals from the probate court. The statute specifically requires that all parties not in default be served with the Notice of Intent to Appeal within ten days of receiving notice of entry of the order:

Except as provided in subsection (1), appeals from the probate court must be to the circuit court and are governed by the following rules: (a) A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court. [Emphasis added]

Relevant Procedural History

Athena L. Irland brings this Appeal as a *pro se* litigant. Ms. Irland is the daughter of the late Dolly Legare Coleman (hereinafter, "Decedent") and has on two separate occasions been found by the Charleston County Probate Court to have exercised undue influence over Decedent while Decedent was incapacitated. (Orders, attached as Exhibit A and B). Respondent Isadore John Psaras is the son of Decedent; Respondent Christina D. Culp is a daughter of Decedent; and Respondent Brandy S. Culp is the granddaughter of Decedent. Respondents are all necessary parties to this appeal, each being a party to the underlying probate action as well as intestate beneficiaries and listed devisees under the subject wills. (Exhibit A at pp. 1 and 4). All Respondents are specifically identified as Respondents in Appellant's Notice of Intent to Appeal. In addition, none of the aforementioned Respondents are in Default.

Decedent died on March 21, 2019. Decedent was previously adjudicated as incapacitated in Charleston County Probate Court Case No. 2014-GC-10-0210. During the course of that case, Appellant was found to have exercised undue influence over Decedent with regard to the execution of two deeds of conveyance. As a result, the Court rescinded the subject deeds by Order dated

June 29, 2017 finding that Decedent lacked the requisite capacity on the date of execution (October 28, 2014) and that Appellant had exercised undue influence. (Order at Exhibit B). Appellant attempted to appeal this Order, however, on August 22, 2017 the South Carolina Court of Appeals dismissed the Appeal on jurisdictional grounds. (COA Order, attached as Exhibit C).¹

The present case involves the alleged revocation of Decedent's 2009 Will at Appellant's behest on October 28, 2014 (the same date that Decedent was previously found to have lacked capacity and Appellant was found to have exercised undue influence). As before, the Court found, after hearing testimony from the parties and witnesses, that Decedent lacked capacity to revoke the 2009 Will and that Appellant had exercised undue influence over Decedent. Specifically, the Court's July 13, 2022 Order states:

The Court finds that its ruling on June 29, 2017, that Decedent was unduly influenced by [Appellant] Irland and that Decedent lacked capacity to execute deeds of conveyance on October 28, 2014, which has not been overturned or amended, would logically extend to the alleged revocation of the 2009 Will on that same date under similar circumstances. The case law and statutory law cited in the June 29, 2017 Order are equally applicable here.

(Order at Exhibit A, p. 6, ¶ 26)

Appellant sought to appeal the Court's order by filing a Notice of Intent to Appeal with this Court on July 22, 2022. However, Appellant failed to serve Respondents Christina Culp and Isadore John Psaras with the Notice of Intent to Appeal. As noted above, Respondents are all necessary parties to this appeal, each being a party to the underlying probate action as well as intestate beneficiaries and listed devisees under the subject wills. (Exhibit A at pp. 1 and 4). In addition, Respondents were specifically identified as Respondents in Appellant's Notice of Intent to Appeal.

¹ Specifically, the Court of Appeals found that Appellant had failed to provide proof that the parties consented in writing or on the record to directly appeal the matter to the Court of Appeals.

Discussion

Appellant's failure to serve the Notice of Intent to Appeal on all requisite parties within the statutorily required period of time is fatal to her appeal. As noted above, Appellant failed to serve her Notice of Intent to Appeal on Respondents Isadore John Psaras and Christina D. Culp. S.C. Code § 62-1-308(A) specifically requires that all parties not in default be served with the Notice of Intent to Appeal within ten days of receiving notice of entry of the order.² -“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *USAA Property and Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 795, 377 S.C. 643 (2008), quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

This appeal must be dismissed because Appellant missed the statutory deadline to serve all Respondents with her Notice of Intent to Appeal. Because the service requirement is jurisdictional, this Court lacks jurisdiction to consider the appeal and must dismiss the case. Accordingly, Respondent respectfully requests that this Court grant her motion and dismiss this Appeal.

Conclusion

This appeal should be dismissed because Appellant failed to serve the Notice of Appeal on all requisite parties within the statutorily required period of time. Appellant's failure to serve the Notice of Intent to Appeal on all requisite parties within the statutorily required period of time is fatal to her appeal. Because the service requirement is jurisdictional, this Court lack jurisdiction to consider the appeal. Accordingly, the appeal must be dismissed.

² None of the Respondents in this case are in Default and, therefore, must be all be served with the Notice pursuant to the statute.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

BRANDY S. CULP

Charleston, South Carolina
September 6, 2022

9

Verdery v. Daniels

Annotate this Case

Thames (Verdery) v. Daniels
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of Doris W. Thames:

Doris W. Verdery, Individually as an Interested party, and as Attorney-in-fact for Doris W. Thames,
Appellant,

v.

Betty Jane Daniels and C. Covert Daniels, Respondents.

Appeal From Clarendon County
M. Duane Shuler, Circuit Court Judge

Opinion No. 3326
Heard October 12, 2000 - Filed March 26, 2001

AFFIRMED
A.F. Carter, III, of Carter Law Firm, of Orangeburg, for appellant.

Steven S. McKenzie, of Coffey, Chandler & Johnson, of Manning, for respondents.

STILWELL, J.: Doris W. Verdery brought this action seeking to set aside a power of attorney and a revocation of an earlier power of attorney, both executed by her mother, Doris W. Thames. Verdery alleges that on December 16, 1996, the date both documents were executed, Thames lacked mental capacity. The probate court dismissed Verdery's action, holding Thames was mentally competent when she executed the power of attorney in favor of Betty Jane Daniels and revoked the former power of attorney which appointed Verdery her attorney in fact. The circuit court affirmed. Verdery appeals, and we affirm.

BACKGROUND

Thames, who was in her late eighties at the time of trial, has been married to Harry A. Thames (Mr. Thames) since 1969. Verdery and Daniels are her daughters from a previous marriage, and Daniels' husband, C. Covert Daniels, is her son-in-law.

Thames had been living with her husband, but in the latter part of 1995 she began living at Verdery's home in Orangeburg. During March of 1996, Verdery attempted to have a guardian and a conservator appointed for her mother, apparently on the ground that her mother suffered from dementia and was

mentally incompetent. After reviewing the medical evidence, the probate court declined Verdery's request, concluding Thames was mentally competent.

In May of 1996, Thames, while still living with Verdery, executed a durable power of attorney in Verdery's favor. In the summer of that year, Mr. Thames brought a family court action seeking visitation with or custody of his wife. Under a consent order in that case, Thames remained in Verdery's home, but other family members, including her husband, were granted limited visitation. The order also prohibited family members from discussing or transacting business during these visits. The court later held Mr. Thames in contempt after he, Daniels, and Daniels' son, during a visit with Thames, took her to a bank where she withdrew money and refused to return her to Verdery's home. The family court's order included the following statements regarding Thames' competency:

The Defendant, Doris O. [sic] Thames, is not competent to manage her affairs. Dr. Vann Beth Shuler expressed her medical opinion that Defendant Thames was not competent. The Court further finds from Defendant Thames' testimony that she is not competent and has very little memory.

...

It appears that Defendant Thames is not competent and constantly gives contradictory statements.

Mr. Thames later brought an action in probate court to have a guardian appointed for Thames, alleging she was an "incapacitated person." The court appointed him guardian, noting that the parties' counsel stipulated that she was incapacitated. In its order, the probate court discussed in detail the difference between a guardian and a conservator. The court did not appoint a conservator.

Less than one month later, Thames executed the documents which are the subject of this lawsuit. In addition to asking that the documents be set aside, Verdery asked the court to recognize her as the attorney in fact for Thames, enjoin Daniels and her husband from interfering with Verdery's management of Thames' business affairs, order Daniels and her husband to make an accounting to Verdery regarding transfers of Thames' real and personal property, and award Verdery attorney's fees and costs.

DISCUSSION

While Verdery raises several grounds for appeal, her arguments essentially boil down to two main issues: (1) what is the applicable standard of review for an appellate court in an action to set aside a power of attorney and a revocation of a power of attorney for lack of mental capacity; and (2) based on the appropriate standard of review, did the circuit court err in affirming the probate court's finding that Thames was competent to execute the challenged documents on December 16, 1996?

I. Standard of Review

Verdery first argues the circuit court erred in concluding this was an action at law and thus applied the wrong standard of review. We agree.

The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. *Howard v. Mutz*, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (noting the circuit court may not disturb the probate court's findings of fact on appeal in an action at law unless there is no evidence to support them as compared to an equitable action in which the circuit court may make factual findings according to its own view of the preponderance of evidence). The question of whether an action to set aside a power of attorney and a revocation of a power of attorney on the ground of mental incompetency is at law or in equity has not been previously addressed in South Carolina. Therefore, we must examine a power of attorney, and the capacity required to execute and revoke one, in light of other existing legal authority to determine the nature of Verdery's cause of action.

Both Verdery and Daniels compare the current lawsuit to actions to set aside other legal instruments or transactions on the basis of a lack of mental capacity. Verdery argues that her cause of action is akin to an action to set aside a deed or petition signature on the basis of mental incompetence, which is an action in equity. Vereen v. Bell, 256 S.C. 249, 251-52, 182 S.E.2d 296, 297 (1971) (applying an equitable standard of review on appeal for an action to rescind and cancel a deed for lack of capacity); Ballenger v. City of Inman, 336 S.C. 126, 130, 518 S.E.2d 824, 827 (Ct. App. 1999) (applying an equitable standard of review on appeal for an action to set aside the signature on land annexation petition for lack of mental capacity). Likewise, an action to rescind a contract is in equity. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Daniels, on the other hand, equates the current action to a will contest, which is an action at law. Estate of Cumbee v. Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). This general principle applies even when the ground for setting aside the will is lack of mental capacity. Estate of Weeks v. Drawdy, 329 S.C. 251, 262, 495 S.E.2d 454, 460 (Ct. App. 1997) (applying a legal standard of review on appeal in an action to set aside a will on the sole ground of lack of capacity).

A durable power of attorney allows a person, the principal, to designate another as his or her attorney in fact to act on the principal's behalf as provided in the document even if the principal becomes mentally incompetent. S.C. Code Ann. § 62-5-501 (Supp. 2000); see also 3 Am. Jur. 2d Agency § 23 (1986) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." (footnotes omitted)).

With a durable power of attorney, a principal creates an agency in another that continues despite the principal's later physical disability or mental incompetency. See § 62-5-501; see also 3 Am. Jur. 2d Agency § 28 ("The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency."). Moreover, in order for the principal to create the agency relationship in the first instance, the principal must have the mental capacity to contract. 3 Am. Jur. 2d Agency § 12 ("A person who is not in a mental condition to contract and conduct his business is not in a condition to appoint an agent for that purpose."). Therefore, in order to execute or revoke a valid power of attorney, the principal must possess contractual capacity.

South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of the contract and its effect. In re: Nightingale's Estate, 182 S.C. 527, 542, 189 S.E. 890, 896 (1937) ("[A] mere infirmity of mind, if it does not amount to an incapacity to understand, at the time of the execution of a contract, the nature of the act done and the effect thereof, . . . does not render a person incapable of executing a valid and binding contract."); see also 53 Am. Jur. 2d Mentally Impaired Persons § 156 (1996) ("The test for lack of [contractual] capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests." (footnotes omitted)).

Other jurisdictions addressing this issue have found contractual capacity is required to execute a power of attorney. Younggren v. Younggren, 556 N.W.2d 228, 232 (Minn. Ct. App. 1996) (holding a person is competent when he signs a power of attorney if he has sufficient mental capacity to understand, to a reasonable degree, the nature and effect of his act); Testa v. Roberts, 542 N.E.2d 654, 658 (Ohio Ct. App. 1988) ("[For a power of attorney,] the test to be used to determine mental capacity is the ability of the principal to understand the nature, scope and the extent of the business she is about to transact.").

Because a person must possess contractual capacity to execute or revoke a valid power of attorney, we believe a cause of action to set aside such a document is more closely akin to an action to set aside a contract, deed, or petition than it is to a will contest. Additionally, the reasoning of courts from

other jurisdictions analogizing powers of attorney to contracts lends persuasive influence to this conclusion. (1) Moreover, "[p]ersons of unsound minds, like infants, are under the special protection of the courts of equity with respect to their persons, property, and legal transactions." *Shepard v. First Am. Mortgage Co.*, 289 S.C. 516, 518, 347 S.E.2d 118, 119 (Ct. App. 1986). Therefore, we hold that an action to set aside a power of attorney and an instrument revoking a power of attorney on the ground of a lack of mental capacity sounds in equity.

In an equitable action, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Greer v. Spartanburg Technical Coll.*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). However, this broad scope of review does not require the appellate court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses. *Greer*, 338 S.C. at 79, 524 S.E.2d at 858; see also *Dorchester County Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). In addition, the appellant still has the burden of convincing this court the trial judge committed error in his findings. *Greer*, 338 S.C. at 79, 524 S.E.2d at 858; see also *Dorchester County*, 324 S.C. at 452, 477 S.E.2d at 480. Even though the circuit court applied an erroneous scope of review, that does not end the inquiry because we are at liberty to find the facts in accordance with our own view of the preponderance of the evidence.

II. Thames' Competency

Although Verdery poses some twenty-two issues on appeal, they all hinge on the question of Thames' mental capacity as of December 16, 1996.

Having carefully reviewed the record, we find ample evidence to support the probate court's finding that Thames possessed the requisite mental capacity to execute the challenged instruments on the date in question. Where a transaction is challenged on the ground of mental incompetency, the individual's competency on the date of that transaction must be determined. *Grapner v. Atlantic Land Title Co.*, 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992). Furthermore, the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.* We agree with the circuit court and the probate court that Verdery failed to meet her burden.

At trial, Verdery relied primarily on the probate court's order appointing Thames' husband her guardian as evidence of her lack of mental capacity on the date in question. Verdery's reliance on this order is misplaced. In that action, counsel for the parties stipulated Thames was incapacitated and in need of a guardian. The probate court, however, discussed the difference between a guardianship and a conservatorship, including the respective duties of each. (2) Because the court appointed a guardian for Thames and not a conservator, the court's reference to her as incapacitated can only be seen as an adjudication of her physical condition. We do not view the probate court's order in this action as an adjudication of Thames' mental capacity.

Verdery also points to the family court's October 1996 contempt order as proof that Thames lacked mental capacity to revoke her old power of attorney and issue a new one. Although the family court's order makes several references to Thames as incompetent and unable to manage her affairs, such language was mere dicta since it was irrelevant to the court's decision to hold Thames' husband in contempt. Furthermore, the family court lacks jurisdiction to declare an adult incompetent because the probate court has exclusive jurisdiction over such matters. S.C. Code Ann. § 62-1-302(a)(2) (Supp. 2000).

Even if we were to consider these two orders as adjudications of Thames' mental incompetency, they still would not be dispositive in this case. An adjudication of incompetency is merely *prima facie* evidence of that fact. *Grapner*, 307 S.C. at 551, 416 S.E.2d at 618. A prior adjudication of an individual's incompetence does not conclusively bind the trial court in another action where the

person's competency is directly at issue. *Church v. Trotter*, 278 S.C. 504, 506, 299 S.E.2d 332, 333 (1983) ("In a contract setting, particularly, this Court has looked specifically to the condition of a party at the time of a transaction.").

In addition to the probate court and family court orders, Verdery offered the testimony of Dr. Vann Beth Meyers Shuler, who examined Thames upon a prior probate judge's request and found her mentally incompetent to make decisions regarding her welfare or finances. Doctor Shuler reported Thames' mental deficiencies were permanent, thus supporting Verdery's claim that Thames lacked capacity to execute the challenged documents. However, Dr. Shuler also testified Thames had been incompetent since the first time she saw her in February 1996. This testimony, if found to be credible, is in direct conflict with the finding of the probate court in March 1996 that Thames was mentally competent and would also invalidate the May 1996 power of attorney in Verdery's favor that Verdery now seeks to enforce. Verdery subpoenaed Thames to testify, but the trial court quashed the subpoena after hearing testimony from Thames' personal physician that the stress of testifying would be hazardous to Thames' physical health. (3)

Finally, Verdery herself testified that her mother lacked mental capacity to revoke the earlier power of attorney and to issue a new one on December 16, 1996. She also testified Daniels knew her mother lacked mental capacity to execute such instruments.

In contrast to Verdery's offer of proof, Daniels and her husband produced five witnesses who testified to Thames' mental capacity in December of 1996. Rebecca Bryant, a certified nursing assistant, and Dorothy Josey, a registered psychiatric nurse, visited Thames in her home in December 1996 to care for and examine her. Bryant testified that around Christmas of 1996, she saw Thames five times a week in visits lasting forty-five minutes to an hour. Bryant recalled Thames' mental state was "good" for her age when she saw her. Josey testified Thames was oriented to person, place, and time during her December 19 and 20, 1996 visits. Likewise, when Josey saw Thames on December 23 and 25, 1996, Thames was "cooperative and talkative" in addition to being oriented to time, place and person. Doctor Lea B. Givens, Thames' personal physician, saw Thames on December 12, 1996, and approximately thirteen other times between September 1993 and August 1997. While Dr. Givens said he had not conducted a detailed mental exam of Thames, he testified that each time he saw her, Thames was pleasant, answered his questions, and was oriented to time and place.

The other two witnesses, Angela Hester and Daniels, were present on December 16, 1996, when Thames revoked her prior power of attorney and executed a new one. Hester, a legal assistant at the law firm where Thames executed the challenged instruments, signed the documents as a witness. She specifically recalled explaining the documents to Thames and, when asked, Thames told Hester she understood. Daniels testified she went with her mother to the attorney's office and Thames "knew exactly what she was doing" when she signed the disputed documents on December 16, 1996.

Thus, under either a legal or equitable standard of review, we find the evidence contained in the record fully supports the probate court's finding that Thames possessed the requisite mental capacity to execute the documents in question on December 16, 1996.

The dispositive issues having been decided, any remaining issues on appeal need not be addressed. Rule 220(b)(2), SCACR.

For the reasons discussed, the order of the circuit court affirming the order of the probate court is
AFFIRMED.

ANDERSON and HOWARD, JJ., concur.

1. See *Testa*, 542 N.E.2d at 658 (recognizing a power of attorney is derived from the law of contracts); see also *Younggren*, 556 N.W.2d at 234 (upholding the trial court's determination that the rescission of

a power of attorney on grounds of mental incapacity was an equitable cause of action).

2. The court noted, "A guardian, unlike a conservator, is appointed to protect the person of the incapacitated person. This means . . . making provision[s] for the care, comfort and maintenance of the incapacitated person. . . . A conservator, on the other hand, is named to act for an incapacitated person in dealing with property and business affairs" See also S.C. Code Ann. §§ 62-5-301 to -313 (1987 & Supp. 2000); S.C. Code Ann. §§ 62-5-401 to -435 (1987 & Supp. 2000).

3. Although Verdery challenged the court's decision to quash Thames' subpoena at trial, she has not asserted this as error on appeal. The unappealed decision of the trial court, right or wrong, is the law of the case. *Town of Mount Pleasant v. Jones*, 335 S.C. 295, 298, 516 S.E.2d 468, 470 (Ct. App. 1999).

10

Dixon v. Dixon

362 S.C. 388 (S.C. 2005) • 608 S.E.2d 849
Decided Jan 18, 2005

No. 25925.

Heard June 23, 2004.

Decided January 18, 2005.

Appeal from the Circuit Court, Anderson County,
389 Ellis B. Drew, Jr. *389

Steven C. Kirven, of McNair Law Firm, P.A., of
Anderson, for Appellant.

Louisa Rice Lund, of Rice and Lund, of Anderson,
for Respondent.

392 *392

Chief Justice TOAL:

This Court certified this case pursuant to Rule 204(b), SCACR, to review the master-in-equity's decision declaring Stevan Fay Dixon (Son) the titleholder of his mother's home in fee simple absolute. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant Mabel Dixon (Mother) is eighty-four-years old and has lived alone in her home in Anderson, South Carolina for the past forty-seven years. She has two children: Stevan (Son), who resides in Anderson, and Nicki, who, at the time of trial, resided in Ohio. Other than a hearing
393 problem,¹ Mother has no health problems. *393

¹ Mother had a "mastoid operation." She testified that she could only hear out of one ear.

In October 1998, Mother conveyed her property to Son for a stated consideration of "Five (\$5.00) Dollars and other love and consideration." At the same time the deed was executed, Mother and Son also signed an agreement (Lifetime Agreement), prepared by Son, whereby he agreed to care for Mother and maintain her residence.² The Lifetime Agreement also provided that if the property were ever sold, the proceeds from the sale would be divided equally between Son and his half-sister, Nicki.

² The Lifetime Agreement was never recorded.

Mother testified that she has not always had a good relationship with Son. Nevertheless, Mother testified that because she felt he "had a change of personality," she decided to give him a limited power of attorney prior to the execution of the deed, in case she had to be hospitalized. Mother and Son also opened a joint checking account with a balance in excess of \$14,000 to be used in the event Mother was incapable of paying her bills. Son testified that he never withdrew funds from the account.

At some point, however, Mother decided that "the situation was not working out" and revoked Son's limited power of attorney.³ Apparently Mother believed Son was not helping her as he promised. Mother testified that (1) Son only paid 1/3 of the property taxes on the property and that she had to pay the remaining 2/3 of the amount owed; (2) she had to hire someone to take care of the yard; (3) she paid for the insurance on the property, not

Son; and (4) she had to pay someone to cut down two dead trees in the yard after Son refused to cut them down. Son disputes this testimony.

³ Mother gave the limited power of attorney to Peggy Dove, whom Son did not trust. Jessica Dixon, Son's daughter-in-law, also testified that Son was afraid Dove would "gain grandma's house, take it away from her, put her in a nursing home, sell it and get the money."

Son testified that in addition to paying the insurance and taxes on the house, he performed various tasks in the home, such as finding someone to fix the toilet. He also testified that he drove Mother to the grocery store and to the doctor's office. Mother claimed that she had to rely on Son for transportation because Son never returned her car after he took it to have the brakes
394 checked. On the contrary, Son *394 testified that Mother thought there was a problem with the brakes, so he drove it to his house in order to test them but did not find anything wrong with them. Son also testified that he does not believe that Mother is capable of driving safely.

Despite their rocky relationship, Mother decided to convey her home to Son. She later claimed that the only reason why she did so is because he convinced her that if she did not take the property out of her name, Medicaid would seize it if she failed to pay her medical expenses. Son claims that his half-sister gave Mother this idea and that he had nothing to do with the decision to take the property out of Mother's name. Son testified that he gave Mother the option to convey the property to him or to his half-sister, but he did not care who received title. Ultimately, Mother chose to give the property to Son.

After preparing the deed,⁴ Son drove Mother to a pawnshop, where Mother signed the deed and the Lifetime Agreement. Mother remembered executing the deed and the Lifetime Agreement and testified that she knew what she was doing when she signed the deed.

⁴ According to Son, he prepared the deed and the Lifetime Agreement as Mother instructed.

Approximately a year-and-a-half later, Son executed and delivered a document to Mother purporting to leave the home to her when he died. Son drafted this document after Mother expressed concerns about Son's wife, rather than Mother's daughter, inheriting an interest in the property.

After a confrontation in 2001, Mother asked Son to leave her home. Later, Mother changed the locks to the house, preventing Son from entering the home. Mother also requested that Son re-convey the title to the property to her. Son refused and Mother filed this action.

The master-in-equity declared Son the owner of the property in fee simple absolute. The master found there was "no evidence that the deed was the result of duress or coercion, or that [Son] exerted undue influence over [Mother] in the execution or procurement of the deed." Further, the master found that Mother "fully appreciated the nature of the conveyance and its legal effect," and she "recalled the location and circumstances
395 *395 of its execution, as well as the names of the witnesses." Therefore, the master determined that Mother failed to establish that the deed should be set aside. Mother appealed the master's decision, and pursuant to Rule 204(b), SCACR, this Court certified the case from the court of appeals.

Mother raises the following issues for review:

- I. Did the master err in refusing to set aside the deed for undue influence or failure of consideration?
- II. Did the master err in refusing to construe the transactions involved as to creating a life estate in Mother or imposing a trust for the benefit of Mother?

Son raised the following issue for review:

III. Did the master err in not barring Mother's claims under the statute of limitations?

LAW/ANALYSIS

Standard of Review

"An action to rescind a contract lies in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct.App. 1993). When reviewing an equitable action, this Court may determine the facts in accordance with its own view of the preponderance of the evidence. *Thornton v. Thornton*, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

I. Setting Aside the Deed

A. Failure of Consideration

Mother argues that the deed conveying the house to Son should be set aside because Son failed to take care of her according to the Lifetime Agreement, which was incorporated into the deed to provide additional consideration. We hold that even if the Lifetime Agreement was properly incorporated into the deed, the deed should not be set aside for failure of consideration.

We first determine whether the Lifetime Agreement was properly incorporated into the 396 deed. As a general rule, *396 when a deed is unambiguous on its face, we look only to the four corners of the document. *See Klutts Resort Realty Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity). If the vital terms of a contract are ambiguous, then, in an effort to determine the intent of the parties, the court may consider probative, extrinsic evidence. *South Carolina Dept. of Nat. Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001).

In the present case, the stated consideration is "five dollars and *other love and consideration*," which we find to be ambiguous. In addition, the Lifetime Agreement is probative of the parties' intent because the Lifetime Agreement and the deed were executed at the same time. This Court has held that when multiple documents are executed contemporaneously in the course of and as a part of the same transaction, the Court may consider and construe the instruments together in order to ascertain the intention of the parties and the terms of the agreement. *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25. Because the Lifetime Agreement and the deed were executed contemporaneously, and the Lifetime Agreement helps to explain the ambiguous phrase in the deed which recites consideration as: "five dollars and other love and consideration," we find that the Lifetime Agreement was incorporated into the deed as consideration for conveyance.

Having determined that the Lifetime Agreement provides additional "other consideration" under the deed, we next decide whether the consideration of the agreement failed warranting this Court setting the deed aside. When deciding whether there has been a failure of consideration, this Court has held that "the slightest consideration is sufficient to support the most onerous obligation. . . ." *First National Bank of South Carolina v. Wade*, 245 S.C. 426, 431, 141 S.E.2d 102, 104 (1965) (internal quotations and citations omitted). Moreover, absent fraud and deception, the Court will not "deprive [the contract] of validity." *Id. See also All v. Prillaman*, 200 S.C. 279, 292, 20 S.E.2d 741, 747 (1942) (holding that 397 *397 setting aside a deed is not the proper remedy for failure of consideration absent fraud or deceit).⁵

⁵ Mother does not argue any fraud or deception as part of her failure of consideration cause of action.

We find that the consideration did not fail, and that even if it had, the proper remedy would not be to set the deed aside. The agreement provided that Son would "maintain and care for" Mother's property, as well as, "at a time determined by [Mother] . . . care for [Mother's] needs as necessary." We find that Son cared for Mother and her property. Although Mother was not satisfied with the amount of care Son provided, we do not find that he failed to act in accordance with the terms of the Lifetime Agreement. Mother does not deny that Son was her main source of transportation. In addition, some time after the parties signed the Lifetime Agreement, Mother changed the locks to her home, preventing Son from caring for her in her home. We have held that a party who prevents a condition of a contract cannot seek relief by relying on the other party's resulting nonperformance. *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (1984).

Therefore, we hold that Mother's cause of action for failure of consideration is without merit and we affirm the master's decision on that issue.

B. Undue Influence

In the alternative, Mother argues that because she and Son were in a confidential relationship, Son had the burden of proving that he did not unduly influence her, and that he failed to meet that burden. We agree that Mother and Son shared a confidential relationship, but we do not find that Son failed to meet his burden.

1. Confidential Relationship

To show a "confidential relationship" existed between the grantor and grantee, the grantor must present adequate evidence that she has placed her "trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." *Brooks v. Kay*, 339 S.C. 479, 489, 530 S.E.2d 120, 125 (2000); *Middleton v. Middleton*, 300 S.C. 402, 404, 388 S.E.2d 639, 641 (1990); *Hudson v.*³⁹⁸ *Leopold*, *398 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). Once a contestant has proven a

confidential relationship existed at the time of conveyance, the burden shifts to the grantee to prove that the contestant's conveyance was not the product of undue influence. *Brooks*, 339 S.C. at 489, 530 S.E.2d at 125.

To begin, we find that Mother and Son were in a confidential relationship at the time of conveyance. First, the parties are related. Although this Court has declined to hold that a familial relationship, alone, is sufficient evidence of a confidential relationship,⁶ a familial relationship certainly *supports* an argument that a confidential relationship exists. Second, Mother gave Son a limited power of attorney, suggesting that she placed some trust and confidence in him to make decisions for her in case she had to be hospitalized. Third, after the deed was recorded, Mother and Son opened a joint bank account consisting entirely of Mother's money. This account was created by Mother for Son to use for her benefit upon her inability to access that money on her own. Fourth, Son prepared all of the documents in question, including the deed and the Lifetime Agreement. Moreover, Mother signed those documents without first consulting an attorney, trusting that Son had drafted them according to her wishes. Therefore, we hold that Mother and Son were in a confidential relationship.

⁶ *Hudson*, 288 S.C. at 196, 341 S.E.2d at 139.

2. Undue Influence

We now turn to whether Son satisfied his burden to prove that he did not unduly influence Mother to convey him the property. We recently described the nature of undue influence:

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the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition.⁷ *399
Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). The influence must be of such a degree that it prevents the grantor's exercise of judgment and free choice. *Id.* Moreover, a showing of general influence is not tantamount to undue influence. *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982). For this Court to void a conveyance of land, a contestant must show that the undue influence was brought directly to bear upon the conveyance. *Russell*, 353 S.C. at 219, 578 S.E.2d at 335.

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. Nennig*, 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, 98 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).

We find that Mother's free will was never overcome. At trial, the master found that Mother was "very clear about what she was doing," "fully appreciated the nature of the conveyance and its legal effect," and "recalled the location and circumstances of its execution, as well as the names of the witnesses." In addition, the record indicates that Mother is a strong-willed woman

who, by her own motivation, decided to convey the property to Son in an attempt to prevent a potential creditor from seizing her property.

Although it is questionable whether Mother made a good decision when she conveyed her property to Son, we find the decision was one of her own free will. Accordingly, we hold that Son proved that he did not unduly influence Mother.

II. Life Estate/Trust

Mother argues that if this Court does not set aside the deed, it should hold that Mother is the beneficiary of a trust or that she holds a life estate in the property in question, with a remainder to her two children. We disagree.

Mother raised this issue for the first time in a Rule 59, SCRPC, motion. We hold that this issue is not preserved for review. See, e.g., *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct.App. 2001) (holding that an issue first raised in a post-trial motion is not preserved for appellate review).

400 *400

III. Statute of Limitations

Son argues Mother's claims of undue influence and failure of consideration are barred by the statute of limitations set forth in South Carolina Code Ann. 15-3-530(1) and (7) (Supp. 2003). We hold that section 15-3-530 does not bar these claims.

We first turn to Mother's undue influence cause of action. Son argues that section 15-3-530(7), which applies to actions for fraud and those actions considered fraud by a court of chancery before 1870, serves to bar Mother's undue influence claim. We disagree.

First, Mother did not plead or prove the existence of fraud in this case; therefore, we hold section 15-3-530(7) does not apply. Second, a claim alleging undue influence is an equitable action. *Bullard v. Crawley*, 294 S.C. 276, 284, 363 S.E.2d 897, 902 (1987). Further, "[a]n action to rescind a contract lies in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103,

105, 427 S.E.2d 701, 702 (Ct.App. 1993). This Court has held that the statute of limitations does not apply to actions in equity. See *Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611 (1947); *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951) (holding that the Court's power to do equity transcends the limitations of the statute of limitations). Because Mother's undue influence claim is an action in equity, we hold that the statute of limitations is inapplicable.

We next turn to Mother's failure of consideration cause of action.⁸ Section 15-3-530(1) places a three-year statute of limitation on contract actions; however, the discovery rule applies to that section. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989), *overruled on other grounds* *Atlas Food Sys. and Servs. v. Crane Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). The discovery rule provides that the statute of limitations does not begin to run until a person using reasonable diligence knew or should have known the ⁴⁰¹ existence of the claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). A plaintiff should have known the existence of a claim if the facts and circumstances of an injury would put a person of common knowledge and experience on notice of that claim. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct.App. 2004).

⁸ We have held that, absent a showing of fraud or deceit, setting a deed aside is not the correct remedy for failure of consideration. *All*, 200 S.C. at 292, 20 S.E.2d at 747. The proper remedy, therefore, is damages, a remedy in law. Accordingly, Mother's failure of consideration cause of action is subject to the statute of limitations.

In the present case, the Lifetime Agreement was signed more than three years before Mother brought the underlying claims. Nevertheless, Mother's allegations that Son failed to provide her care were based upon facts not known to her at the time she signed the Lifetime Agreement. We find that Mother brought her claim within three years of the time that she discovered the incidents and facts supporting that claim. Therefore, we hold that the statute of limitations does not bar Mother's failure of consideration claim.

CONCLUSION

For the foregoing reasons, we affirm the master-in-equity's ruling, holding that Son is the titleholder of the property in fee simple absolute.

AFFIRMED.

MOORE, WALLER and BURNETT, JJ., concur.
PLEICONES, J., concurring in result only.

THE UNIVERSITY OF CHICAGO



Calhoun v. Calhoun

277 S.C. 527 (S.C. 1982) • 290 S.E.2d 415

Decided Apr 7, 1982

21687

528 April 7, 1982. *528

*Allen L. Ray, Conway, for appellant.**J. Reuben Long, Eldridge R. Inman, Robert N. Richardson, Jr., and Kenneth C. Inman, and D.W. Green, Jr., of Burroughs, Green Sasser, Conway, for respondents.*

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April 7, 1982.

HARWELL, Justice:

Appellant Lonnie Calhoun initiated this case in probate court by offering an instrument dated October 31, 1975, as the Last Will and Testament of Sam Johnson. The probate court admitted the instrument to probate in due or solemn form of law. Respondents appealed to the Court of Common Pleas where the case was tried *de novo* before a jury. The jury found that the will was properly executed according to law and that the testator had sufficient testamentary capacity to make the will; however, the jury found that the testator was under undue influence when he made and signed the will. At the appropriate stages, appellants moved for a directed verdict and a judgment N.O.V. or in the alternative for a new trial. Denying the motions, the trial judge declared the Last Will and Testament null and void. Appellants allege the evidence on undue influence was insufficient to submit to the jury. We agree.

Sam Johnson died testate in Horry County on June 12, 1978, at seventy years of age leaving an estate valued in excess of \$360,000. The proponents-appellants of the October 31, 1975 executed will are Lonnie L. Calhoun, Jr., a named executor, and Virginia J. Calhoun, the testator's sister and the prime beneficiary. The contestants-respondents include a son, Robert Johnson, a sister, Serena J. Tindal, and John Skipper, another named executor who was testator's former brother-in-law. Respondent Skipper petitioned the probate court to be removed as executor leaving appellant Lonnie Calhoun as the sole executor. Under the October 1975 will, respondent Johnson received five dollars, respondent Skipper received \$5,000.00, and respondent Virginia Calhoun received the residue of testator's estate. Under a

530 previous will respondent *530 Johnson was bequeathed one dollar, and the residue of the estate was bequeathed equally to appellant Virginia Calhoun, respondents Skipper and Tindal, and another sister who predeceased the testator. The respondents allege that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of the estate.

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. In determining whether the contestants sustained such burden, the evidence has to be viewed in the light most favorable to the contestants. *Hellams v. Ross*, 268 S.C. 284, 233

S.E.2d 98 (1977); *Havird v. Schissell*, 252 S.C. 404, 166 S.E.2d 801 (1969); *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946). In that light, we proceed to review the evidence relied upon by the respondents to prove the will was the product of undue influence. In addition, we recognize that by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so that it can be directly proved. However, the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not of the former. *Havird v. Schissell*, *supra*.

The testator died while confined to the Conway Nursing Center where he had been a patient for approximately three and a half years. It is undisputed that the testator was in a feeble physical condition during the last several years of his life. Respondents allege that on the date of the will's execution, the testator had a weakened mental capacity as well. However, the testator continued to transact his usual business affairs for a period of approximately three years subsequent to the will's execution. Witnesses described him as an honest, shrewd trader and hard worker who used profanity frequently, was gruff at times but who was also generous and kind. Four days prior to the will's execution, the testator's physician concluded that the testator "seems to know what
 531 his property is *531 and what he wants to do with it. He is oriented as to time, place and situation." The unquestionably reputable attorney who drafted the will was satisfied that the testator was sane when he executed the will. During the preparation and drafting of the will, the testator made at least three visits to his attorney's office where his attorney had the opportunity to observe him. At trial, the attorney testified:

Mr. Long, you know as well as I do, I think, that ever since I have been here practicing law there has been talk about contesting Sam's wills, somebody stole his will and somebody stole his

papers and one had done this and one had done that and that was the general talk and I knew or had reason to think that we would be in just such a situation as we are right here today.

To assure himself that his client was mentally stable before drafting his will, the attorney contacted his client's physician. After receiving the physician's reassurances, the attorney proceeded to draft the will.

We conclude that the probate court and the jury properly determined that the testator had sufficient testamentary capacity to execute a will on October 31, 1975. However, we conclude there was not sufficient evidence of undue influence to submit to a jury.

We have held that a disposition of property, though ever so capricious or unreasonable, will not be avoided on that ground alone. *Farr v. Thompson*, Cheves 37, 25 S.C.L. 15 (1839). It is not sufficient to condemn and avoid the will to find that there was influence, which affected the testator's disposition of his property. *Smith v. Whetstone*, *supra*. General influence is not enough. A mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized. *Mock v. Dowling*, 266 S.C. 274, 222 S.E.2d 773 (1976). It is not unlawful for a person, by honest intercessions and modest persuasions, to procure a will to be made in his behalf. *Smith v. Whetstone*, *supra*, and *Farr v. Thompson*, *supra*. This Court has also stated that
 532 "perhaps no man has *532 ever existed who was entirely so self-willed as to be wholly uninfluenced by the opinions and wishes of those with whom he was connected." *Woodward v. James*, 3 Strob. 552, 34 S.C.L. 288 (1849).

Undue influence, the influence necessary to void a will, "must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of

another, for that would be a very strong ground in support of a testamentary act; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear." *Floyd v. Floyd*, 3 Strob. 44, 34 S.C.L. 23 (1848). Even though one may have unreasonable likes and dislikes and may act unjustly and even cruelly toward his family in the disposition of his estate, still his will, when legally expressed, must be supported. Therefore, the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses. *Harris v. Berry*, 231 S.C. 201, 98 S.E.2d 251 (1957).

The respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present

when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a
533 subscribing witness, Mr. Holbert, kept it *533 in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

The record is devoid of any evidence that appellant Virginia Calhoun interfered with the making of the will. She may have been interested in the will and may have had more opportunities for persuasion than the respondents. However, this alone does not constitute undue influence.

Additionally, where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers the effect of the testimony bearing upon undue influence in a large measure destroyed. *Smith v. Whetstone, supra*. The evidence reflects that the testator had made several previous wills; therefore, he knew he could alter or revoke this one. The testator continued to transact other business until his death so that had he desired, he could have changed his will.

We conclude that the appellants' motion for a directed verdict should have been granted.

Reversed.

LEWIS, C.J., and LITTLEJOHN, NESS and GREGORY, JJ., concur.

12

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Michelle J. Hairston, Appellant,

v.

Kathleen McMillan, Individually and as Personal Representative of the
Estate of Normall O. Hudson, Deceased, Respondent.

In Re: Estate of Normall O. Hudson, Deceased.

Appeal From Horry County
Albert E. Wheless, Special Referee

Opinion No. 4657
Heard February 2, 2010 Filed March 15, 2010

AFFIRMED

James Thomas Young and John C. Thomas, both of Conway, for
Appellant.

Jeffrey E. Johnson and Jarrod M. McPherson, both of Conway, for
Respondent.

KONDUROS, J.: Michelle Hairston challenged the validity of her uncle's February 2006 will (the Will) on the grounds he was without testamentary capacity to execute the Will and the Will was the product of undue influence. The special referee found the Will to be valid. Hairston appealed. We affirm.

FACTS

Normall O. Hudson (Decedent) was released from the hospital into home hospice care on Friday, February 24, 2006. At that time, his niece, Michelle Hairston, and her father, Olin Parker, were in town to check on Decedent's condition. Decedent's companion, Kathleen McMillan, and her daughter, Nancy McMillan (Cookie), a health-care worker, were with him. McMillan and Cookie were primarily responsible, along with hospice, for Decedent's care. Hairston and Parker left town on Friday to return home. On Sunday, Cookie telephoned Kathleen Dingle, an attorney, regarding changes to Decedent's will. Dingle testified she spoke to Decedent on the phone, and he indicated he wanted to change his will, making McMillan the sole beneficiary; it had been on his mind.

Dingle went to Decedent's home on Monday and her office assistant accompanied her to serve as witness. Dingle testified Decedent recognized her and was glad to see her. She

further testified she asked Cookie and McMillan to leave while they discussed the will, and they went to the garage. According to the notes she dictated at that time, Dingle stated:

I went through with [Decedent] what his old will said, and he told me he wanted to change it after we went through the provisions of it. He told me he wanted to leave everything to Kathleen McMillan. He said it was his decision and his decision only. . . . He knew his address. He knew how long his wife, Lucy[,] had been deceased. He knew who his family members were. He was able to tell me who Olin and Michelle are. . . . I was comfortable with the fact that he knew what he was doing and that he wanted to do it.

The Will effectively revoked Decedent's 2001 will, which left everything to his nieces and nephews. Dingle also prepared that will.

Deposition testimony of Decedent's sister-in-law, Patsy Hudson, revealed she visited him on Sunday. She indicated he seemed lucid, had eaten a small breakfast, and read and understood the newspaper, particularly commenting on the death of actor Don Knotts.

McMillan testified Decedent seemed improved in the few days prior to his death. She admitted to giving him a glass of wine at his request on Friday.[1] She stated she was unaware of Decedent's desire to change his will and he requested Cookie call the attorney. She theorized he may have wanted to leave her assets to help her avoid going into a nursing home as they had discussed their mutual desires to avoid that in the past.

Cookie testified Decedent seemed to improve after his release from the hospital, eating a bit and having conversations. She also testified she did not administer some of the medications issued to him because they were to be administered on an as-needed basis and he did not need them until Monday night. Decedent died on Tuesday.

Dr. William Joel Meggs testified on behalf of Hairston as an expert in toxicology and internal medicine. He reviewed Decedent's medical records from his hospitalization and return home and opined that in his medical opinion, Decedent would not have had the capacity to make a will on February 27, 2006. His opinion was based on the maladies from which Decedent was suffering, which included renal failure, congestive heart failure, cirrhosis of the liver, atherosclerotic heart disease, and cerebral edema. Dr. Meggs further indicated the medicine prescribed for Decedent would have left him susceptible to undue influence, but no records were provided on how that medicine was administered upon his return home. Dr. Meggs also considered Decedent's mental status assessments. On February 24, he was confused with some speech and oriented to person, but not place or time. On February 27, when the will was executed, a social worker reported Decedent was confused when he attempted to provide a life history.[2] The following day of his death, his status was unresponsive.

Hairston testified she was not allowed to talk to Decedent on the telephone from the time she left him on Friday until his death. She also reported McMillan told her upon Decedent's death that she did not need to come; Decedent had left her [McMillan] everything and she was not needed. Hairston filed a petition contesting the Will. The special referee found the Will to be valid, and this appeal followed.

LAW/ANALYSIS

An action to contest a will is an action at law, and in such cases reviewing courts will not disturb the probate court's findings of fact unless a review of the record discloses no evidence to support them. In re Estate of Anderson, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct. App. 2009); Golini v. Bolton, 326 S.C. 333, 338-39, 482 S.E.2d 784, 787 (Ct. App. 1997).

I. Testamentary Capacity

Hairston contends the special referee erred in finding the Will valid in light of Dr. Meggs's testimony Decedent would not have possessed testamentary capacity at the time of the Will's execution. We disagree.

"[T]he party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence." In re Thames, 344 S.C. 564, 572, 544 S.E.2d 854, 858 (Ct. App. 2001). The test of whether a testator had the capacity to make a will is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property. In re Estate of Weeks, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). "[T]he legal test for determining whether or not a person has sufficient mental capacity to dispose of his property by will does not include the proviso that he must have a reasonable basis on which to found his like or dislike of the natural objects of his bounty." Id. "Further, the capacity to know or understand, rather than the actual knowledge or understanding, is sufficient." Id.

The degree of capacity necessary to execute a will is less than that needed to execute a contract. Id. at 264, 495 S.E.2d at 461. "[E]ven an insane person may execute a will if it is done during a sane interval" Id. In order to invalidate a will, a testator's insanity should be established at the time of execution, unless the insanity is of a permanent or chronic nature. Gaddy v. Douglass, 359 S.C. 329, 345, 597 S.E.2d 12, 21 (Ct. App. 2004).

"A person may execute a valid will, even if he or she is not competent to transact ordinary, everyday affairs." Speegle v. Oswald, 774 So. 2d 595, 597 (Ala. Civ. App. 2000). "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will." In re Nelson's Estate, 38 Cal. Rptr. 459, 466-67 (Cal. Ct. App. 1964).

Dr. Meggs testified Decedent was not competent at the time of executing the Will. However, he was not able to examine Decedent personally, but relied on medical records showing Decedent was experiencing some confusion and had been prescribed pain medication. In contrast, Dingle testified at the time of the execution of the Will, Decedent understood the extent of his estate, the potential beneficiaries of his estate, and what he was doing in changing his will. He also recognized Dingle and was able to converse with her in a lucid fashion. Furthermore, the deposition of Hudson reveals Decedent was lucid on Sunday, the date he first spoke with Dingle, ate a small breakfast and read the newspaper. Based on our standard of review, and bearing in mind the somewhat limited requirements for testamentary capacity, evidence in the record supports the special referee's finding Decedent was competent to execute the Will.

II. Undue Influence

Hairston next argues the special referee erred in finding the Will valid because she presented evidence McMillan and Cookie exerted undue influence on Decedent to make the Will. We disagree.

"The mere existence of influence is not enough to void a will as all influences are not unlawful. For influence to vitiate a will, it must destroy free agency and amount to force and coercion." Hembree v. Estate of Hembree, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993). "Circumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator." Id. Evidence of undue influence may include threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." Id. "A contestant must show that the influence was brought directly to bear upon the testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). "General influence is not enough." Id.

The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. Howard v. Nasser, 364 S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct. App. 2005). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. Id. "We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will." Id.

In the instant case, the record shows McMillan and Hairston both held powers of attorney for Decedent. This establishes a fiduciary relationship between McMillan and Decedent and raises the presumption of undue influence. However, other evidence in the record supports the special referee's finding no undue influence occurred. Decedent apparently expressed no concern for being left in the care of McMillan and Cookie, and he was happy to be home from the hospital. While he did not speak to Hairston in the days leading up to his death, he was seen by hospice workers, neighbors, and other relatives with whom he could have shared any concerns. At the time of the execution of the Will, Dingle asked McMillan and her daughter to be out of the house, providing Decedent a chance to confide in Dingle if he did not wish to change the Will. Furthermore, Dingle testified Decedent told her on the phone changing his will had been on his mind. Accordingly, we find McMillan presented evidence to rebut the presumption of undue influence.

Furthermore, Hairston presented no evidence of threats or force wielded against Decedent. Although Decedent did not speak to Hairston in the days immediately preceding his death, his visitation and communication were apparently not restricted overall. Additionally, Hairston contends Cookie and McMillan exerted control over Decedent's food and medicine and intimates they could have withheld it, giving them control over him. However, the record contains evidence to the contrary. Cookie, McMillan, and Patsy Hudson testified to Decedent eating better and more in the last days of his life. The prescriptions for Decedent were written for his comfort as needed, which supports Cookie's testimony regarding how she administered the medications. Consequently, evidence in the record supports the special referee's finding of no undue influence.

III. Viewing of Evidence

Finally, Hairston argues the special referee failed to view the evidence in the light most favorable to her as the contestant to the Will. We disagree.

While we acknowledge the special referee should have viewed the evidence in this fashion, Hairston's only argument is that the order did not contain a statement indicating the evidence was so considered. Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) (finding whether the contestants of a will met the required burden of proof must be determined by viewing evidence in the light most favorable to the contestants). Nothing in the record suggests the special referee did not view the evidence properly and the lack of an affirmative statement to that effect is not enough to warrant a reversal in light of the evidence in the record.

CONCLUSION

Based on the record before us, we cannot conclude the special referee erred in finding the Will valid. Accordingly, the decision of the special referee is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

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Haines v. Kerner

404 U.S. 519 (1972) · 92 S. Ct. 594
Decided Jan 13, 1972

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

No. 70-5025.

Argued December 6, 1971 Decided January 13,
1972

Prisoner's *pro se* complaint seeking to recover damages for claimed physical injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording him the opportunity to present evidence on his claims.

427 F.2d 71, reversed and remanded.

Stanley A. Bass, by appointment of the Court, 401 U.S. 1008, argued the cause for petitioner. With him on the briefs were *Jack Greenberg*, *James M. Nabrit III*, *William B. Turner*, *Alice Daniel*, and *Max Stern*.

Warren K. Smoot, Assistant Attorney General of Illinois, argued the cause for respondents *pro hac vice*. With him on the brief were *William J. Scott*, Attorney General, *Joel M. Flaum*, First Assistant Attorney General, and *James B. Zagel*, *Morton E. Friedman*, and *Jayne A. Carr*, Assistant Attorneys General.

Briefs of *amici curiae* were filed by *Charles H. Baron* for Boston College Center for Corrections and the Law, and by *Julian Tepper* and *Marshall J. Hartman* for the National Law Office of the National Legal Aid and Defender Assn.

PER CURIAM.

Petitioner, an inmate at the Illinois State Penitentiary, Menard, Illinois, commenced this action against the Governor of Illinois and other state officers and prison officials under the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3), seeking to recover damages for claimed injuries and deprivation of rights while incarcerated under a judgment not challenged here. *520 Petitioner's *pro se* complaint was premised on alleged action of prison officials placing him in solitary confinement as a disciplinary measure after he had struck another inmate on the head with a shovel following a verbal altercation. The assault by petitioner on another inmate is not denied. Petitioner's *pro se* complaint included general allegations of physical injuries suffered while in disciplinary confinement and denial of due process in the steps leading to that confinement. The claimed physical suffering was aggravation of a pre-existing foot injury and a circulatory ailment caused by forcing him to sleep on the floor of his cell with only blankets.

The District Court granted respondents' motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief could be granted, suggesting that only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries and concluding that petitioner had failed to show a deprivation of federally protected rights. The Court of Appeals affirmed, emphasizing that prison officials are vested with "wide discretion"

in disciplinary matters. We granted certiorari and appointed counsel to represent petitioner. The only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence on his claims.

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by
 521 lawyers, it appears *521 "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See *Dioguardi v. Durning*, 139 F.2d 774 (CA2 1944).

Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or
 522 decision of this case. *522

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rejected the Valles' claim that said training inadequacies were a "moving force" in the constitutional violation and that the city had been deliberately indifferent—that is, conscious of the fact that its policies were jeopardizing constitutional rights. The court pointed out that the SWAT captain who authorized the forcible entry had been trained in CIT tactics and that the on-site CIT officer later testified that if she had been asked at the time of the decision to forcibly enter the home, she would not have disagreed with the decision. Summing up, the court held that "it is difficult to show deliberate indifference in a case such as this one where the City has implemented at least some training" (*Valle*, p 542).

Discussion

Throughout the opinion, the court of appeals emphasized its consensus against endorsing municipal liability. Near the end of its opinion, the court asserted its wariness in relation to municipal liability findings, relating that the "court has been wary of finding municipal liability on the basis of a single incident to avoid running afoul of the Supreme Court's consistent rejection of respondeat superior liability" (*Valle*, p 543). This seems to be a question of administrability. Indeed, an appellate endorsement of municipal *respondeat superior* liability would be likely to lead to a civic liability free for all and many bankrupt municipalities.

However, the very existence of CIT tactics indicates that progress is being made at the ground level on the problems at the heart of this case. The court of appeals endorsed the basic aims of CIT training and even suggested that if more of the officers had been trained in CIT tactics, the tragedy might have been avoided (*Valle*, p 540). Research is under way to determine whether CIT improves outcomes in incidents in which the police encounter severely mentally ill clients (see Compton MT, Badora M, Watson AC, *et al*: A comprehensive review of extant research on crisis intervention team (CIT) programs. *J Am Acad Psychiatry Law* 36:47–55, 2008). At the very least, CIT training appears to improve rates of diversion to mental health services in those arrestees with severe mental illness (Compton *et al*, p 52). Forensic psychiatrists can, and we think should, advocate at the community level for improved acceptance and more comprehensive implementation of CIT training in their own municipal police forces.

Disclosures of financial or other potential conflicts of interest: None.

Testamentary Capacity

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The Presence of Mental Illness Does Not Preclude Testamentary Capacity

At issue in *In the Matter of the Estate of Berg*, 783 N.W.2d 831 (S.D. 2010), is whether a trial court erred in its finding that Mr. Berg, who had a history of schizophrenia, had the capacity to write a will and was not subject to undue influence in executing such.

Facts of the Case

After being discharged from the U. S. Army in 1943, Fred Berg had visual and auditory hallucinations, which were controlled by electroconvulsive therapy (ECT) for several years. He began refusing ECT and, in 1950, underwent a bilateral prefrontal lobotomy. After his lobotomy, Mr. Berg was able to engage in social and recreational activities for the remainder of his life.

In 1967, the Veterans Administration found that Mr. Berg lacked the capacity to contract or to manage his own affairs, including the disbursement of funds, and was incompetent "for the limited purposes of insurance and disbursement of benefits" (*Berg*, p 834). A court order appointed American National Bank and Trust Company as a guardian to dispense benefits.

In 1991, Mr. Berg was visited by his nephew Roger Berg (Roger), and a friendship began that lasted until Mr. Berg's death. Roger called his uncle regularly, and they saw each other one to two times per year for the next 16 years. The director of social services at Mr. Berg's nursing home noted that Mr. Berg would "light up" when Roger was expected for a visit and that he spoke about these visits with great enthusiasm. She also noted that very few other family members visited. Mr. Berg and Roger took several trips together. In 1995, Roger was given Mr. Berg's power of attorney.

In 1996, Roger became aware that Mr. Berg had \$500,000 in the bank but did not tell the rest of Mr. Berg's family. In 1997, upon Roger's recommendation, Mr. Berg met with an attorney to draft a will.

While Roger waited outside, Mr. Berg estimated his assets at \$100,000 and designated Roger and Mr. Berg's two sisters as objects of his bounty. Mr. Berg received a draft of the will. In 1998, Mr. Berg was taken to his lawyer's office by a staff worker from the nursing home to sign the will.

The director of social services at the nursing home reported that Mr. Berg claimed that the late actor Fred MacMurray was his father. She also reported that Mr. Berg was very intelligent and typically oriented in all three spheres. The activities director at Mr. Berg's nursing home noted that he enjoyed playing two-card bingo and participating in discussion groups on current topics. A staff member at the nursing home administered a Mini-Mental State Examination to screen for cognitive impairment the day after Mr. Berg signed his will, and he scored 28 of a possible 30.

Mr. Berg died on November 5, 2006. On April 10, 2007, Mr. Berg's brother's daughter, Carol Opdahl, filed a petition asserting that Mr. Berg lacked the capacity to execute his will. She also alleged undue influence by Roger and sought an equal distribution of Mr. Berg's estate. During the trial, Ms. Opdahl called on Dr. Manlove, a forensic psychiatrist, to testify on her behalf. Dr. Manlove opined that, because of his schizophrenia, Mr. Berg was more susceptible to undue influence than are those with no mental illness. He also opined that the record contained evidence that Mr. Berg was "probably" thought disordered and psychotic on the day that the will was made, given his static delusion that Fred MacMurray was his father. As a basis for his opinion, Dr. Manlove read medical records and read deposition transcripts given by Mr. Berg's nursing home personnel and his attorney. Dr. Manlove did not interview Mr. Berg's treating doctors or nursing staff personnel. Ms. Opdahl testified that she had known that, since 1954, Mr. Berg had been of "unsound mind" and had been "essentially a human robot." Ms. Opdahl had last visited Fred Berg in 1994, 12 years before his death.

Ruling and Reasoning

The trial court concluded that Mr. Berg's caretakers and companions over the last several years of his life knew him best and were more credible and persuasive regarding Mr. Berg's competency to execute his will than was Ms. Opdahl's expert witness. The trial court gave little credence to Ms. Opdahl's testi-

mony, as it was considered "mainly hearsay-upon-hearsay, conjecture, and speculation" (*Berg*, p 840).

The trial court concluded that Mr. Berg had testamentary capacity at the time his will was drafted and executed. It found that Mr. Berg was aware that he had a "sizeable" estate, that he knew to whom he wanted his money to go, and that there was no evidence of undue influence by Roger. The court also took note of Roger's decision to "formally disclaim before the will contest was filed" (*Berg*, p 841). Roger had renounced the inheritance, and it went to Mr. Berg's lone surviving sister.

Ms. Opdahl appealed this decision to the South Dakota Supreme Court asserting that the trial court erred in its conclusion that Mr. Berg had testamentary capacity and that Roger did not exert undue influence. The court found that the existence of undue influence was a question of fact for the trial court that had already been answered. The court concluded that Mr. Berg's static delusion that Fred MacMurray was his father "did not touch" his testamentary capacity, Mr. MacMurray was not named as an object of his bounty, and therefore the delusion did not materially affect the terms and provisions of the will. The court went on to say that "for purposes of testamentary capacity, we do not require the soundness of mind enjoyed by those in perfect health," (*Berg*, p 842) and "testamentary capacity is not determined by any single moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed" (*Berg*, p 842).

Discussion

Testamentary capacity refers to an individual's capacity to make a will and the testator enjoys the presumption of competence until proven otherwise. To have testamentary capacity, testators must know a reasonable approximation of the overall worth of their estate and which individuals are the "natural objects" of their bounty, usually blood relatives. In addition, the will must be executed in the absence of undue external influence. In a will that is contested, the burden of proof in most jurisdictions is "clear and convincing" and rests with the party alleging deficiency.

At issue in this case, as in all competencies, is whether the signs and symptoms of a mental disorder interfered with the abilities needed to competently perform a specific task or function, making a will.

The criteria for possessing testamentary capacity are conceived of as lying at a low level, perhaps the lowest level, of any legal demands on an individual.

As testamentary capacity frequently arises in cases of organic brain dysfunction (e.g. dementia and delirium), the testator may possess capacity during a lucid interval; incompetence (intestacy in this case) refers to a current condition and does not necessarily imply an enduring status. In the case of an individual with a chronic mental illness, that individual may possess testamentary capacity so long as the signs and symptoms of that mental illness do not materially affect the abilities required for such capacity.

Forensic psychiatrists conducting an examination on testamentary capacity are advised to be aware that collateral information in the postmortem examination may be biased, given the often heated nature of contested wills. It is also advisable to consider testamentary capacity as a functional ability that may or may not be influenced by a given diagnosis or diagnostic finding. As with other competencies (although with a lower standard), it is the particular manifestation of an illness that is relevant and not the illness itself. If a testamentary capacity evaluation is requested at the time that an individual is executing a will, it is useful to make a video recording of the evaluation. A video recording can present compelling information that may be relevant to a court's effort in the future to determine if the person possessed testamentary capacity at the time of writing the will.

Disclosures of financial or other potential conflicts of interest: None.

Sexually Violent Predator

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Defendants Undergoing a Commitment or Recommitment Trial Under the Sexually Violent Predators Act in California Are Not Required to be Mentally Competent as Part of Due Process

In *Moore v. Supreme Court*, 237 P.3d 530 (Cal. 2010), the Supreme Court of California reversed

the California Court of Appeal's ruling that the defendant had a constitutional right not to be tried as a sexually violent predator while mentally incompetent.

Facts of the Case

Ardell Moore was convicted twice for violent sexual offenses that included forcible oral copulation in 1978 and kidnapping and sexual assault in 1984. He was released from prison in 2000 and committed to Atascadero State Hospital as a sexually violent predator (SVP) under the Sexually Violent Predator Act. This case arose from his SVP recommitment hearing in which Mr. Moore was denied a motion to determine his mental competence to proceed by the Superior Court of Los Angeles County.

As a result of the 1978 charges, he was found to be a "mentally disordered sex offender" who was unamenable to treatment and was sent to prison to complete his sentence. In 1984, he was declared incompetent to stand trial and committed to Atascadero State Hospital, but later he was sentenced to 25 years in prison. During the commitment at Atascadero that started in 2000, he had many violations for sexual misconduct and rule violations that were outlined in the recommitment evaluations performed in January 2005 by Shoba Sreenivasan, PhD, and Elaine Finnberg, PhD. Their evaluations noted that Mr. Moore declined to participate in any of the five phases of intensive treatment that comprised the Sex Offender Commitment Program. Furthermore, Mr. Moore resisted taking medications that would decrease his sexual impulses. Both evaluators opined that he would be likely to engage in sexually violent criminal acts in the future without recommitment and treatment.

On February 5, 2007, Mr. Moore, through counsel, asked the county court judge to order an evaluation of his competence to participate in the recommitment proceedings and postpone the recommitment proceedings until a determination of competency could be made. Included in the defendant's request was an evaluation letter by Vianne Castellano, PhD, an evaluation not ordered by the court, in which Dr. Castellano opined that Mr. Moore "could not understand the nature and purpose of the proceedings, or cooperate in a rational matter with counsel or mental health experts" (*Moore*, p 535). The request for an evaluation and hearing regarding Mr. Moore's competence to pro-



Team Nellie Jan 24 2 min read

Banks vs. Goodfellow (1870): A Landmark Case in Testamentary Capacity

Updated: 5 days ago



Banks vs Goodfellow (1870)

In the realm of estate law, the case of Banks v. Goodfellow, decided in 1870 in the United Kingdom, stands as a seminal landmark. This legal battle not only laid the groundwork for determining testamentary capacity but also set a precedent that continues to influence decisions in similar cases to this day. In this blog, we will delve into the fascinating story and legal significance of Banks v. Goodfellow (1870).

The Case Background

Banks vs. Goodfellow (1870) revolved around the last will and testament of Mr. Samuel Goodfellow, a man of sound mind who wished to distribute his property according to his wishes. However, the will was challenged on the grounds of testamentary capacity, leading to a legal battle that would reshape the way courts assess an individual's mental capacity when creating a will.

The Legal Issue

The central question before the court was whether Mr. Goodfellow had the requisite mental capacity to create a valid will. The law at the time stated that to make a valid will, one must be of "sound mind, memory, and understanding." The challenge was to define and interpret these terms in a way that would be applicable to various testators with diverse mental states.

The Judgment

Chief Justice Cockburn, presiding over the case, delivered a landmark judgment that laid down a new legal test for testamentary capacity. He articulated the following principles:

1. **Understanding of Nature of Act:** The testator must understand the nature of making a will and its effects, including the distribution of their property.
2. **Understanding and Recollection of Assets:** They should have a clear understanding of the extent and value of their property and assets.
3. **Understanding of the Persons Affected:** The testator should be aware of those who might have a claim to their property and should make decisions that are not affected by delusion.
4. **Freedom from Disorder of Mind:** Lastly, they must be free from any disorder of the mind that might affect their judgment.

Impact and Legacy

Banks v. Goodfellow significantly impacted how courts assess testamentary capacity, providing a clear and practical framework that has been widely accepted and adopted in the legal world. It set a standard for evaluating the mental capacity of testators, ensuring that their wishes were protected from undue influence or impairment.

The case's enduring legacy can be seen in its influence on the legal frameworks of various countries. While the language used in modern statutes may differ, the core principles articulated by Chief Justice Cockburn continue to guide the determination of testamentary capacity in contemporary legal systems.

Conclusion

Banks v. Goodfellow (1870) remains a cornerstone in the field of estate law. It not only established a robust legal test for testamentary capacity but also emphasized the importance of protecting the intentions of testators while safeguarding against undue influence or mental incapacity. This landmark case continues to serve as a beacon of guidance for courts and legal professionals worldwide, ensuring that the sanctity of individuals' last wishes is upheld and respected for generations to come.

If you need advice regarding a testamentary capacity contact [nellie supports](https://www.nelliesupports.com)

STATEMENT OF ISSUES ON APPEAL

1. Judge Bently Price seemed confused as to the subject matter before the court on September 27, 2023.
2. Order dated September 13, 2023 Judge Bently Price reversed his decision granting the Appeal and ruled in favor of the Respondent dismissed Appellant's instead of gathering evidence supporting his original ruling granting the Appeal as instructed by the Supreme Court.
3. The Circuit erred in allowing arguments for motions during the hearing on September 27, 2023 not entered into evidence at the first hearing on October 27, 2022.

STATEMENT OF THE CASE

Before the court was the issue of Judge Price's Order dated July 14, 2023 (Appendix A) wherein he denied Petitioner's (Brandi Culp) motion to reconsider the circuit court's denial of Petitioner's motion to dismiss Respondant's (Athena Irland) appeal from Probate Court. In that same order, Judge Price granted Respondant's Petition for a rehearing.

However, Judge Price began the proceedings by asking, "All right, specifically, what motions are outstanding that need to be ruled on?" When, in fact, there were no motions before the court. The subject matter before the court was an Order from The Supreme Court of South Carolina (Appendix B) wherein Judge Price was directed to convene a hearing to, "consider all issues properly before the circuit court." Instead Judge Price argued that he had already ruled on Petitioner's motion (Transcript of Record September 27, 2023. (Appendix C) , pg.2 lines 9-11, pg3. lines 2-4, pg.4 lines 18-22) and was very agitated that he had to repeat himself in hearing a case that he had already ruled on. It seemed as though Judge Price was reinforcing the correctness his ruling. The fact is that Judge Price was not being asked to make a ruling, he was being told by the Supreme Court to support his existing ruling. Instead, it seems Judge Price was trying to shift blame of his failure to adequately perform his duties as a judge (possibly contributing to his being deemed unqualified according to a report released October 6, 2023 from the South Carolina Bar). Pg.5, lines 16-23 of the same transcript illustrates Judge Price's frustration of opposing counsel petitioning the Supreme Court to get an answer supporting his ruling.

Opposing counsel (Mr. Sanchez) went on to misrepresent facts in the case claiming Ms. Irland failed to follow procedures required for an appeal (pg8. lines 1-25, pg.9 lines 1-13). Keeping in mind Haines v. Kerner where pro se litigants are afforded some leeway in court proceedings, the record will show that Ms. Irland did, in fact follow correct procedure. Though it may not be recognized as such Ms. Irland filed a notice of appeal with a statement of issues and notices on July 22, 2022 (Appendix D).

STATEMENT OF FACTS

I, Athena Irland, am the youngest child of the decedent Dolly Coleman. Dolly Coleman lived solely with me at 186 Dolly Dimples Trail Huger, SC 29450 for approximately 10 years. Parcels of land measuring 38 acres and 1 acre were purchased by me in 1995. Included on the Deed was my husband at the time, Daniel Irland, and my mom Dolly Coleman.

In 1997 Dolly Coleman purchased an additional parcel of land measuring 33 acres. Collectively, the three parcels of land are referred to as “the property” located in Berkeley County.

Since 1995 I, Athena Irland, have lived on the the property, uncontested, managing a farm including but not limited to cows, goats, horses, and chickens. I fenced in the entire property.

Isadore John Psaras testified that the home he lived in on Palmeto St. In Mt. Pleasant was given to him by Dolly Coleman in 2008. He also testified that it was his understanding that Ms. Coleman intended to give me her interest in “the property”.

Even though Dr. Judith Rubano diagnosed Ms. Coleman with short term memory loss, she placed no restrictions on her and testified that her long term memory remained intact. Dr. Rubano also testified that she had no reason to believe that Ms. Irland was taking advantage of or otherwise abused, neglected or exploited.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Bently Price, Circuit Court Judge

Appellate Case No. 2023-001852

Brandy S. Culp

Respondent

V.

Athena Irland

Appellant

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order Denying and Dismissing Appeal from Probate Court. October 2, 2023
2. Form 4. Statement of Judgement Remanded. Appeal granted November 11, 2022.
3. Order denying Appellant's Motion For Reconsideration of Appeal from Probate Court
4. Reconsideration of Dismissal of Appeal from Probate Court October 11, 2023
5. Transcript of Motion October 27, 2022
6. Notice of Intent to Appeal July 22, 2022
7. Order of Probate Court, July 13 2022
8. Transcript of Hearing, Case# 2019-ES10_1368 April 7, 2022
9. Motion to dismiss Appeal September 6, 2022
10. Transcript of Record September 27, 2023
11. Order Dismissing Appeal August 22, 2017
12. Order Recinding Deeds September 6, 2022
13. Order denying Respondent Brandy Culp's Rule 59e Motion to Alter or amend Order and Granting Rule 221a Petition for rehearing, July 14, 2023 [sent prior, Appendix A]
14. The Supreme Court Order, September 3, 2023 [prior sent Appendix B]

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SC Court of Appeals



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Athena Irland)

Pro Se Plaintiff/Appellant,)

v.)

Isadore John Psaras, Christina D. Culp)
Brandy S. Culp,)

Defendants/Respondents.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2022-CP-10-3304**ORDER DENYING AND DISMISSING
APPEAL FROM PROBATE COURT**

THIS MATTER CAME before the Court pursuant to Respondent Brandy S. Culp's Rule 59(e) Motion to Alter or Amend Order and Rule 221(a) Petition for Rehearing, filed November 21, 2022 and subsequently heard on January 26, 2023. On July 14, 2023, this Court issued an Order granting Respondent's request for a hearing on the appeal. As set forth below, Ms. Irland's Appeal is hereby DENIED and DISMISSED with prejudice pursuant to her failure to perfect her appeal in compliance with S.C. Code § 62-1-308, et seq. and failure to set forth a basis for reversal of the Probate Court's underlying order.

1. An appeal from Probate Court is governed by S.C. Code Ann. § 62-1-308, which sets forth various procedural requirements to perfect an appeal.

2. An appellant who fails to follow the procedural requirements strips the court of appellate jurisdiction. *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004); *Great Games Inc. v. S.C. Dep't of Revenue*, 339 S.C. 70, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2005); see also Rule 260(a), SCACR (requiring dismissal of an appeal when an appellant fails to comply with the appellate court rules).

3. Here, the Court finds that appellant did not comply with the statutory requirements of S.C. Code Ann § 62-1-308, et seq., based on each of the following, independent grounds:

(a) Appellant did not file nor serve a Statement of Issues on Appeal within the time prescribed by S.C. Code § 62-1-308(b) (“Within forty-five days after receipt of written notice of the order, sentence or decree of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal (in a format described in Rule 208(b)(1)(B), SCACR), with proof of service and a copy served on all parties.”). Appellant’s Notice of Appeal, filed July 22, 2022, states Appellant received written notice of entry of the probate court order on July 14, 2022. Pursuant to subsection (b) of the statute, Appellant was required to file and serve a Statement of Issue on Appeal on or before August 29, 2022. A review of the public index in this case establishes that Appellant failed to meet either of these requirements.

(b) As a separate and independent basis for dismissal, Appellant did not file nor serve a Designation of Matter to Include in the Record on Appeal on any party as required by S.C. Code § 62-1-308(d). No such Designation even appears within the public index.

(c) As a separate and independent basis for dismissal, Appellant did not file nor serve an appellate brief as required by S.C. Code 62-1-308(e) (“At the same time the appellant serves his Designation of Matter to be Included in the Record on Appeal, the appellant shall serve one copy of his brief on all parties to the appeal, and filed with the clerk of the circuit court one copy of the brief with proof of service. The appellant’s brief shall be in a format described in Rule 208(b)(1), SCACR.”) A review of the public index in this case establishes that Appellant failed to meet any one of these statutory requirements.

(d) As a separate and independent basis for dismissal, Appellant did not file and serve a Record on Appeal on any party as required by S.C. Code § 62-1-308(f) (“[A]ppellant shall serve

a copy of the Record on Appeal (in a format described in subsection (c), (e), (f), and (g) of Rule 210, SCACR.”).

4. Finally, as a separate and independent basis for denial of the appeal, this Court finds that Appellant has failed to set forth any grounds and/or caselaw warranting reversal of the probate court’s underlying order, having failed to even brief her appeal as required by S.C. Code 62-1-308.

THEREFORE, it is ORDERED, ADJUDGED, and DECREED:

Appellant Athena Irland’s Appeal from Probate Court is hereby DENIED and DISMISSED WITH PREJUDICE.

The Honorable Bentley D. Price
Circuit Court Judge

September____, 2023
Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

FORM 4

EXHIBIT A

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1003304

Athena L Irland et al
PLAINTIFF(S)

Isadore John Psaras et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☒ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
☐ Affirmed; ☐ Reversed; ☒ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court on Appellant's appeal from Probate Court and Respondent's Motion to Dismiss the Appeal on October 27, 2022. The Court reviewed the record on appeal and considered arguments made by both parties. Respondent's Motion to Dismiss is DENIED and Appellant's appeal is GRANTED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/15/2022 .

Christina D Culp for Christina D Culp
Christina D Culp for Christina D Culp
Athena L Irland for Athena L Irland
Isadore John Psaras for Isadore John Psaras
Isadore John Psaras for Isadore John Psaras
Athena L Irland for Athena L Irland

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ELECTRONICALLY FILED - 2022 Nov 21 11:22 PM - CHATHAM COUNTY - COMMON PLEAS - CASE#2022CP100304



Charleston Common Pleas

Case Caption: Athena L Irland , plaintiff, et al VS Isadore John Psaras , defendant, et al
Case Number: 2022CP1003304
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2022-CP-10-3304

ATHENA IRLAND,
Appellant,
vs.
BRANDY S. CULP,
Respondent.

**ORDER DENYING APPEALLANT'S
MOTION FOR RECONSIDERATION OF
DISMISSAL OF APPEAL FROM
PROBATE COURT**

The Appellant filed a Motion for Reconsideration of Dismissal of Appeal pursuant to Rule 59(e), SCRCP, which was filed on October 11, 2023. The Motion is handwritten as the Appellant is pro se and cannot e-file.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v.

¹ Rule 59 is substantially the same as the Federal Rule. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Appellant’s Motion, the Court hereby DENIES Appellant’s Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

10

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

COURT OF COMMON PLEAS
2022-CP-10-03304

Athena L. Irland,

)

Appellant

) TRANSCRIPT OF RECORD

-vs-

)

) September 27, 2023

Brandy Culp,

)

Respondent

)

) Moncks Corner, South

) Carolina

B E F O R E:

The Honorable Bentley Price, Judge

A P P E A R A N C E S:

Athena Irland, Pro Se Appellant

Daniel Slotchiver, Esquire
Steve Slotchiver, Esquire
Jesse Sanchez, Esquire
Attorneys for the Respondent

Reported By:

Yvestre Torres, OCR
Circuit Court Reporter for the
Ninth Judicial Circuit

1 THE COURT: Thank you very much. All right.
2 All right, specifically, what motions are outstanding
3 that need to be ruled on?

4 MR. SANCHEZ: Your Honor, we're here on the
5 actual appeal itself. We have a few procedural issues
6 that we would like to take up. This is Ms. Ireland's
7 appeal from probate court. We're the Respondent;
8 we represent Ms. Brandy Culp, who's here ---

9 THE COURT: But my recollection is
10 I submitted a Form 4 on that appeal sending it back
11 to the probate court. And I contacted my old law clerk,
12 and she indicated that what she could find in her notes
13 was I ruled on it, did a Form 4, and y'all didn't like
14 it, and y'all said, y'all wanted to have more
15 information.

16 MR. SANCHEZ: Well, what happened ---

17 THE COURT: So, technically, I ruled
18 on the appeal, correct?

19 MR. SANCHEZ: No, sir. What happened was
20 we had a hearing on the motion to dismiss the appeal.
21 Your Honor issued an order ---

22 THE COURT: What did the order say?

23 MR. SANCHEZ: It was a Form 4 order, like
24 Your Honor stated. We filed a motion to alter ---

25 THE COURT: I'm asking you, what did my

1 order say?

2 MR. SANCHEZ: Your order granted the appeal
3 and remanded it to probate court.

4 THE COURT: So, I did rule on it.

5 MR. SANCHEZ: You ruled on the -- you ruled
6 on an appeal that was never presented to Your Honor.
7 There was never a brief filed in this case.

8 THE COURT: I'm not asking that.
9 The question is, I did rule on it, correct?

10 MR. SANCHEZ: You did not rule on that first
11 hearing, on the motion to dismiss. And then we had
12 a subsequent hearing before Your Honor, and that
13 subsequent hearing was on the motion to alter or amend
14 and for a petition for rehearing under the appellate
15 rules. Your Honor had a hearing on that issue. And
16 then, ultimately, issued an order which I have in my
17 hand here where it says, "A rehearing will be held only
18 on the issue of the appeal from probate court."

19 THE COURT: So, I did rule on that?

20 MR. SANCHEZ: You said that you would have
21 a hearing.

22 THE COURT: Okay. All right.

23 MR. SANCHEZ: That's what we're here for
24 today.

25 THE COURT: Okay. So when did you reach

1 out to my office and request a hearing on that?

2 MR. SANCHEZ: Well, Your Honor, we had
3 a hearing on this on January 26, 2023. And then at the
4 end of that hearing, which was 11 minutes, Your Honor
5 said you would have ---

6 THE COURT: I'm not worried about
7 the timeline and the timeframe of all that stuff.
8 Just please answer the question. When did you reach
9 out to my office and ask for a rehearing on that motion?

10 MR. SANCHEZ: After you actually issued
11 this order.

12 THE COURT: Okay. And what did my office
13 set up?

14 MR. SANCHEZ: Your office set up this
15 hearing.

16 THE COURT: I'm not talking about that.
17 I'm talking about -- you're talking about a year ago.
18 So when you file a motion for a reconsideration,
19 you have to file it with the Court, not with the clerk
20 of court. So my question is, y'all have taken this
21 to the Supreme Court and got a writ of mandamus for
22 me to rule on something that I've already ruled on.
23 I'm very clear about that.

24 If you wanted a rehearing on something else,
25 you have to file it with my court and reach out to my

1 staff and ask for a hearing. You will get that hearing
2 immediately. I usually do it the same week. When did
3 you reach out to my office and ask for the rehearing
4 to be scheduled?

5 MR. SANCHEZ: It would have been sometime
6 before ---

7 THE COURT: I didn't say it would have been.
8 I want to know the specific exact date because,
9 obviously, I have to keep the record straight for the
10 Supreme Court.

11 MR. SANCHEZ: Yes, Your Honor. But the fact
12 remains we had a hearing on this issue before Your
13 Honor.

14 THE COURT: Okay. And I ruled.

15 MR. SANCHEZ: You did not issue a ruling
16 until after the petition for writ of mandamus was filed.

17 THE COURT: Okay.

18 MR. SANCHEZ: And then in that ruling,
19 you said you were denying the motion to dismiss,
20 but you are also saying that you were granting the ---

21 THE COURT: In between the time that y'all
22 filed the writ of mandamus with the Supreme Court and
23 my initial ruling, when did you reach out to my office
24 to have it scheduled?

25 MR. SANCHEZ: Your Honor, we asked for it.

1 We already had the hearing; we had that actual hearing.
2 As I stated earlier, we had that hearing on January 26,
3 2023.

4 THE COURT: Okay.

5 MR. SANCHEZ: The hearing was scheduled.

6 THE COURT: Okay.

7 MR. SANCHEZ: Okay. And then Your Honor
8 said you would have a ruling by the end of day.

9 THE COURT: Okay.

10 MR. SANCHEZ: In that hearing, we asked
11 for a rehearing.

12 THE COURT: Okay.

13 MR. SANCHEZ: Okay. And then Your Honor
14 issued a ruling after the mandamus came down.

15 THE COURT: Before the mandamus, when did
16 you ask for a hearing on this appeal?

17 MR. SANCHEZ: It was -- okay. November
18 21st, 2022.

19 THE COURT: What did my law clerk say?

20 MR. SANCHEZ: I'm not aware that your law
21 clerk said anything, Your Honor.

22 THE COURT: Me either. So what was ---

23 MR. SANCHEZ: But we had a hearing on the
24 issue.

25 THE COURT: All right. All right.

1 What's before the Court?

2 MR. SANCHEZ: All right. So, Your Honor,
3 we're here on the appeal itself. As I stated,
4 Ms. Irland is the Appellant from probate court.
5 Mr. Slotchiver will address any substantive arguments
6 which she may present. But before we address the
7 substance of those arguments, we have to address a few
8 procedural issues which are critical to this appeal.

9 As Your Honor is aware, appeals in probate
10 court are handled differently than appeals from
11 magistrate court. Specifically, those appeals are ruled
12 under the probate statute, Section 62-1-308. I'm going
13 to go through those different sections and demonstrate
14 to the Court what has not been complied with, and I have
15 a copy of the statute if Your Honor would like me to
16 pass it up to you.

17 THE COURT: I'm okay.

18 MR. SANCHEZ: Okay. All right. So the
19 statute sets forth requirements which an Appellant must
20 meet in order to pursue an appeal. And the Supreme
21 Court has stated in both State v. Brown, which is a 2004
22 case, at 358 S.C. 382, and Great Games, Inc v. South
23 Carolina Department of Revenue, which is a 2000 case,
24 at 339 S.C. 79, that an Appellant who fails to follow
25 the procedural requirements strips the Court of

1 jurisdiction over the appeal. And so we have gone
2 through and made a list of all the elements which
3 Ms. Irland has not followed.

4 First, under South Carolina Code, Section
5 62-1-308(b), she's required to file a statement
6 of issues on appeal within 45 days of receiving notice
7 of the order. She's also required to serve it on us
8 and file a proof of service. The record shows, based
9 on her notice of appeal that she filed, that she
10 received notice of the order on July 14, 2022.

11 So 45 days later, lands on a Sunday,
12 so the following Monday, August 29th, 2022. She never
13 filed a statement of issues on appeal, as required
14 by the statute. She never served a statement of issues
15 on appeal on us, as required by the statute. She never
16 filed a proof of service, as required by the statute.

17 Then, she's supposed to file and serve
18 a designation of matter to be included in the record
19 on appeal, subsections C and D. She never did that.
20 Then, she's required to file and serve a copy of an
21 appellate brief, as required by 62-1-308(e). It's
22 been over a year since Ms. Irland has filed this appeal.
23 She's never filed an appellate brief, as required
24 by the statute. She has never filed and served a record
25 on appeal, as set forth under Section 62-1-308(f).

1 And the statute is clear that it must comply with
2 the appellate court rules.

3 So our position, Your Honor, is she hasn't
4 taken a single step to perfect this appeal. And based
5 off the Supreme Court's orders, or rulings, in State v.
6 Brown and Great Games, Inc v. South Carolina Department
7 of Revenue, she has failed to follow the procedural
8 requirements, and that strips the Court of jurisdiction
9 over the appeal. It is impossible for us to respond
10 to an appeal which has not been briefed in the first
11 place. The statute requires her to file a brief,
12 then in response to her brief, we would file a brief.
13 That has never been done.

14 So that's why we're here before Your Honor
15 today. We have no idea what Ms. Irland is going to
16 say in court, what her issues are. She hasn't briefed
17 anything; she hasn't put forth any case law; she hasn't
18 followed any of the statutory requirements for appeals,
19 as the legislature has set out under 62-1-308.

20 THE COURT: All right. Yes, ma'am.

21 MS. IRLAND: First, Your Honor, when you
22 stated that we were coming for a rehearing, that only
23 the things that were brought up in the original trial
24 could be presented today. So, I ask the Court not
25 to consider most of what he has said because when they

1 first filed their motion to reconsider, they based
2 it solely on two matters.

3 They based it on -- the first matter was
4 that -- the allegation that I failed to notify parties
5 under court rules, specifically Isadore Psaras and
6 Christina Culp. And they weren't notified because they
7 were no longer a party to this action, to a settlement
8 agreement executed on March 26, 2020, which says,
9 assigns all of his right, title, and interest in the
10 estate of Dolly Legare Coleman to Brandy Culp.

11 In addition to that, it relinquished their
12 right to title interest in estate. Section 5 of that
13 settlement agreement stated the undersigned parties,
14 each intends and hereby released from each other
15 and any and all other persons of and from all cases --
16 causes of action.

17 As to the argument of not being notified
18 in a timely manner, the court docket clearly shows
19 that I filed the necessary documents in compliance
20 with the court rules. On January -- I mean, excuse
21 me, on July 13th, 2022, the probate court ordered that
22 the estate of Dolly Coleman be administered as a testate
23 estate, having erroneously decided that Ms. Coleman
24 had a valid Will at the time of her death. The record
25 supports the fact that there was no Last Will and

1 Testament in effect at the time of death.

2 That being said, that was their main cause
3 of action against me in asking for that. And I proved
4 that with the Court -- giving the Court the mediation
5 agreement and the court order by Judge Kirchner showing
6 that she approved that settlement, that neither party
7 were a party to this action. And just putting their
8 name on there was not -- it was an error on my part,
9 I guess. But they also did it in references to e-mails,
10 leaving their names off because they're not a party
11 to this action.

12 The second thing they said that I -- the
13 45 days was supposed to be in August, and I also showed
14 in the first trial that I was in compliance of the 45
15 days because I had filed it. We had a holiday of Labor
16 Day, and I filed it the day after. In that section,
17 it states the different ways that it has to be done.
18 And it was my understanding from the date I did it,
19 which was the 13th of July, upon receiving, and I did
20 the issuances to the court on the intent to appeal.
21 And then within the 45 days, I sent the appeal. It was
22 not after 45 days, and that is on record from the first
23 hearing.

24 THE COURT: All right.

25 MR. SANCHEZ: Your Honor, to be clear,

1 her notice of appeal, which she filed on July 22nd,
2 2022, says that she received notice of the order on July
3 14, 2022. At 45 days, lands on a Sunday, the 46th day,
4 which is on a Monday, August 29, 2022. Your Honor,
5 may look through the record in this case and clearly
6 see that she did not file a statement of issues on
7 appeal, she did not file a proof of service, didn't
8 serve a statement of issues on appeal.

9 Beyond that, she did not file a designation
10 of matter to include in the record. She didn't file
11 a record, in accordance to the way that the statute
12 requires. She did not even file an appellate brief,
13 which is a statutory requirement, where she sets forth
14 her arguments in case law. There's been nothing filed
15 in accordance with the statute.

16 And again, I would say to this Court,
17 under the Supreme Court's rulings, that strips the Court
18 of jurisdiction over an appeal where the Appellant has
19 taken zero steps under the probate statutes to perfect
20 the appeal.

21 THE COURT: All right.

22 MS. IRLAND: I did file this with the court;
23 I did issuances, and then I filed -- this is my appeal
24 that I had filed.

25 THE COURT: All right.

1 MR. SLOCHIVER: Your Honor, I'm happy to
2 address the Appellant argument, once she's completed --
3 is she done at this point? I'm happy to proceed.

4 MS. IRLAND: Well, am I done forever today?
5 No. You can say what you want, and then I can respond,
6 if that's okay with the Court.

7 THE COURT: Are you finished presenting
8 your argument?

9 MS. IRLAND: Well, I have some -- I have
10 some paperwork to present to the Court, and I have
11 a copy for them.

12 THE COURT: All right.

13 MS. IRLAND: Do you want me to do that now?

14 THE COURT: Sure.

15 MS. IRLAND: And then I filed a, quote
16 on quote, you know, what he keeps saying is a brief
17 into that structural procedure. I might not have done
18 it in that structural procedure, but I did ask this
19 Court in my appeal to overturn it. I did not put
20 something in there for you to just sign and go away,
21 as I'm asking today, but this is the rehearing.
22 So that's why I presented it.

23 But I did put what I wanted done in the
24 appeal, but not in, you know, maybe a legal definition
25 of brief. But I did it -- I did do it, and I did do

1 my issuances, and I did do the appeal work, and I did
2 do it in the proper time.

3 THE COURT: All right.

4 MS. IRLAND: And I presented that to the
5 Court at the other hearing.

6 THE COURT: I recall.

7 MS. IRLAND: Thank you.

8 THE COURT: All right. Are there any other
9 issues that need to be placed on the record, apart from
10 just the procedural issues that y'all are suggesting
11 that she has not complied with?

12 MR. SLOTCHIVER: I don't believe -- if today
13 is her appeal, I don't believe there's been any facts
14 submitted, other than procedural responses from her.
15 But talking about the merits of the case itself and
16 the failings of Judge Kirchner -- the alleged failings
17 of Judge Kirchner, an order they haven't been addressed
18 with in court.

19 These are things that the brief would give
20 us notice of what the complaints are and the law to
21 support our positions. We don't have any of that before
22 us, nor has she addressed those with the Court.
23 She keeps focusing on the fact that she believes that
24 she noticed the right parties. We don't have any type
25 of briefing. She said that she gave a brief; we don't

1 have any briefs that we've received from her.

2 THE COURT: All right.

3 MR. SLOTCHIVER: Regardless whether they're
4 proper or not. So we still don't have the ability to
5 respond to the appeal because we haven't -- she hasn't
6 told us what she's appealing.

7 THE COURT: I understand. But are we going
8 forward on the appeal today, or are we not?

9 MR. SANCHEZ: Your Honor, that's what ---

10 THE COURT: Do you want to give her time
11 to file a brief, is that what you're asking?

12 MR. SANCHEZ: No, sir. We're asking ---

13 THE COURT: So why are you making
14 that argument that you don't know what to argue?
15 Are we arguing the appeal or not? He's indicated
16 that we're not.

17 MR. SANCHEZ: Well, I think what
18 Mr. Slotchiver had said is that Ms. Irland has
19 not presented an appeal to this Court. There's
20 no statement of issues on appeal. There's no ---

21 THE COURT: I understand all that, but there
22 is a valid motion before the Court that has to be ruled
23 on, and you're just saying that y'all don't know how
24 to respond because she hasn't filed the appropriate
25 documentation.

1 MR. SANCHEZ: Your Honor, the only thing
2 before this Court right now is a rehearing on the actual
3 appeal. There was never a hearing on the ---

4 THE COURT: Hold on. I asked you earlier
5 what was before the Court, and I asked you if it was
6 a rehearing, and you said, no, that I had not ruled
7 on the appeal. If it was a ---

8 MR. SANCHEZ: No, sir.

9 THE COURT: If it was a reconsideration,
10 then that's different.

11 MR. SANCHEZ: Respectfully, no, sir.
12 That is not what I said. What I said to the Court was
13 we are here because we filed a motion that was captioned
14 a motion to alter or amend a petition for rehearing,
15 citing both the Civil Procedure Court Rule and the
16 Appellate Court Rule. This Court came and said it
17 was denying the motion for reconsideration on the motion
18 to dismiss and that it would have a rehearing on the
19 issue of the appeal. That is what we're here for today.

20 THE COURT: Okay.

21 MR. SANCHEZ: This Court could never have
22 considered the appeal in the first place because she
23 never followed any of the steps.

24 THE COURT: That's the same thing that
25 you presented to me in the first hearing, though,

1 correct?

2 MR. SANCHEZ: From a procedural ---

3 THE COURT: And so I said I would give
4 you a rehearing on the appeal, correct?

5 MR. SANCHEZ: Right.

6 THE COURT: So why didn't you just contact
7 my office and ask for a rehearing? I don't understand
8 this.

9 MR. SANCHEZ: Your Honor, I think we might
10 be going in circles and maybe ---

11 THE COURT: No, we're not going in circles
12 at all. You just won't answer my question.

13 MR. SANCHEZ: Your Honor, I think I've
14 answered your question.

15 THE COURT: All right.

16 MR. SANCHEZ: Which is, we did ask your
17 clerk for a rehearing. We had a rehearing. You said
18 you would have an order to us by the end of day.
19 We communicated with your office half a dozen times,
20 which are documented. Eight months went by, we had
21 still not received a response, so we filed a petition
22 for writ mandamus.

23 THE COURT: All right.

24 MR. SANCHEZ: That's the timeline,
25 Your Honor.

1 THE COURT: I got it. All right. At this
2 time, I'm going to -- ma'am, do you want to make this
3 part of the record?

4 MS. IRLAND: Yes, sir.

5 THE COURT: All right. I'll deny the appeal
6 at this point in time. Prepare an order, have it to
7 my office tomorrow by four o'clock. Anything else that
8 needs to be addressed, taken up? What else do we need
9 to do?

10 MR. SANCHEZ: No, sir, Your Honor.

11 THE COURT: All right. For the future,
12 next time you need something from my office, we work
13 very hard and diligent to make sure that we get these
14 orders out. I pride myself on that. Please just
15 communicate with us, and we'll be happy to get you
16 a hearing. You do not need to contact the Supreme Court
17 to have me make a ruling on a motion to reconsider.
18 Fair enough?

19 MR. SANCHEZ: Thank you, Your Honor.

20 MS. IRLAND: Your Honor ---

21 THE COURT: Ms. Irland, I've heard enough.
22 If you need to file anything, I'll be happy to --
23 you can file whatever you would like. But for now,
24 the hearing is over. All right.

25 (End of Transcript of Record)

CERTIFICATE OF REPORTER

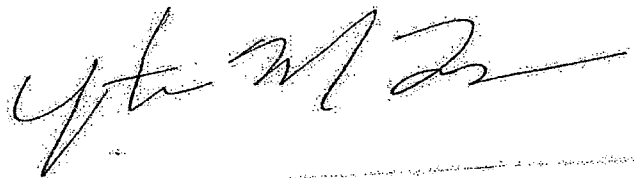
State of South Carolina)

County of Berkeley)

I, the undersigned, Yvestre Torres, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Berkeley County, South Carolina, on the 27th of September, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 27, 2023



Yvestre Torres

Circuit Court Reporter

1 they'll hand it to me.

2 MS. IRLAND: Okay. I was just telling you
3 which one it was, Your Honor. I'm sorry.

4 (Document is handed up to the Court.)

5 THE COURT: (Reviews document.)

6 MS. IRLAND: And Your Honor, if I could, he
7 was talking about page 4 of that hearing. Here is
8 page 5 and page 6 where the judge is discussing
9 with Mr. Michelle who was the attorney for the
10 state. And it also says here that they -- both
11 Johnny and Tina are out, if you'd like to see this.
12 This is page -- he said page 4. This is 5 and 6.

13 THE COURT: I have it right here.

14 MS. IRLAND: Okay.

15 MR. SANCHEZ: Your Honor, for the record, I
16 was referring to the order, not the transcript.

17 THE COURT: Judge Kirchner's order?

18 MR. SANCHEZ: Yes, sir.

19 MS. IRLAND: Well, this is the transcript that
20 she's confirming with Attorney Michelle.

21 THE COURT: (Reviews document.)

22 All right. All right. I took a look at the
23 order of Judge Kirchner. All right. Anything
24 further?

25 MS. IRLAND: Do you want to see this?

1 THE COURT: What is it?

2 MS. IRLAND: It's where the judge is talking
3 to the Attorney Michelle and the testimony which
4 also says that Christina Culp and Johnny Psaras
5 have settled and they are not a party.

6 THE COURT: I've seen it in the order.

7 MS. IRLAND: Okay.

8 THE COURT: All right. Anything further?

9 MR. SANCHEZ: Your Honor, may I just add a
10 couple of points? I just want to point out for the
11 Court that we actually moved for summary judgment
12 in front of Judge Kirchner. She denied it. Had a
13 full hearing on the issues, listened to everything,
14 and ultimately after considering all the issues,
15 determined that the same thing that had happened in
16 2017 happened again, which was on that specific
17 date the decedent lacked capacity and that
18 Ms. Ireland had exercised undue influence.

19 And I would just also add, Your Honor, that we
20 provided three distinct reasons why this appeal
21 should be dismissed, whereas Ms. Ireland has really
22 only addressed one -- one of those arguments.

23 THE COURT: I asked her that though.

24 MR. SANCHEZ: Thank you, Your Honor.

25 MS. IRLAND: Your Honor, his first issue of

1 the undue, that is not an issue for this. The
2 other thing, I -- I have followed the rules and
3 sent, like I said, my notice of appeal and the
4 appeal to the courts in the time frame that I was
5 supposed to.

6 THE COURT: All right. All right. I'll take
7 it under advisement. Y'all will have my answer by
8 the end of the day.

9 MS. IRLAND: Oh. Thank you very much.
10 (Proceedings conclude at 10:48 p.m.)

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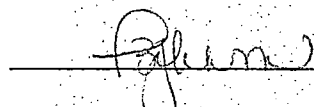
CERTIFICATE

23

I, the undersigned, Teresa B. Johnson, Official Court Reporter, do hereby certify that I transcribed the electronic recording of the remote hearing in this matter; and that the foregoing is a true transcript of said electronic recording.

I do further certify that I am not a relative, employee, attorney, or counsel of any of the parties connected with the action, nor am I financially interested in the action.

Dated: May 5, 2023



Teresa B. Johnson, CVR-M-CM, RVR, RVR-M
Official Court Reporter



The South Carolina Court of Appeals

IN RE: Matter of Dolly Dimples Legare Coleman,
through her conservator W. Ashley Thiem, Respondent,

v.

Athena Irland, Isadore Psaras, Brandy S. Culp, and
Christina Culp, Defendants,

Of whom Athena Irland is the Appellant.

Appellate Case No. 2017-001624

The Honorable Lenna S. Kirchner
Charleston County
Trial Court Case No. 2014GC1000210

ORDER

Appellant has failed to provide proof that the parties consented in writing or on the record to appeal directly to the Court of Appeals, as set forth in S.C. Code Ann. §62-1-308(1) (Supp. 2016), and letter of this Court dated August 2, 2017. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc:
Joseph Dawson, III, Esquire
Irish Ryan Neville, Esquire

FILED

August 22, 2017

12

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT)

COUNTY OF CHARLESTON)

CASE NO.: 2014-GC-10-0210)

IN RE: MATTER OF DOLLY
DIMPLES LEGARE COLEMAN,
THROUGH HER CONSERVATOR
W. ASHLEY THIEM,)ORDER RESCINDING
DEEDS)

Petitioner,)

-v-)

ATHENA IRLAND, ISADORE
PSARAS, BRANDY S. CULP, AND
CHRISTINA CULP,)

Respondents.)

Hearing Date:
Presiding Judge:
Petitioner's Attorney:
Respondent's Attorney:
Attorney/GAL:October 18, 2016
Lenna S. Kirchner
I. Ryan-Neville, Esq.
Joseph Dawson, III, Esq.
Lana Jamrosyk, Esq.

THIS MATTER comes before the Court upon the Verified Petition filed by Dolly Dimples Legare Coleman ("Mrs. Coleman") by and through her Conservator, W. Ashley Thiem, ("Petitioner" and/or "Conservator") on March 3, 2016. Petitioner seeks rescission of two deeds of conveyance executed by Mrs. Coleman on October 28, 2014 in favor of Respondent Athena Irland ("Respondent Irland" or "Ms. Irland") for lack of capacity, or in the alternative, for undue influence. A hearing on the matter was held on October 18, 2016. Present at the hearing were attorney Ryan Neville, appearing on behalf of Petitioner, and attorney Joseph Dawson, III, appearing on behalf of Respondent Athena Irland. Respondent Isadore "Johnny" Psaras was present and served as a witness for Ms. Irland. Respondent Brandy S. Culp was also present, but did not participate in the trial. Respondent Christina Culp was not present but served with proper


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notice of the hearing. This Order is binding on all parties to the above captioned matter.

At the start of the hearing, Respondent moved, pursuant to Rule 12(b)(6), for dismissal of the petition arguing the existence of another action pending in the Berkeley County Court of Common Pleas filed prior to this present action. Rule 12(b)(6), SCRCP. On February 6, 2015, a Notice of *Lis Pendens* was filed in Berkeley County Court of Common Pleas under 2015-LP-08-00003. On March 19, 2015, the associated Summons and Complaint was filed. *See* Case No. 2015-CP-08-00719. The aforementioned captions reflect the parties as Christina Culp and Brandy S. Culp vs. Athena Irland and Dolly Dimples Legare Coleman. Rule 12(b)(6) permits dismissal where another action is pending *between the parties for the same claim*. Rule 12(b)(6), SCRCP (*emphasis added*). Due to the actions not pending between the *same* parties, as reflected in the differing captions of the two cases, this Court denied Respondent's motion and proceeded to hear this matter.

Upon review of the file and after hearing testimony of the parties, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Dolly Dimples Legare Coleman ("Mrs. Coleman") is an 86 year old female adjudged to be an incapacitated person by clear and convincing evidence by this Court on February 9, 2015.¹
2. Petitioner is W. Ashley Thiem, of Thiem & McCutcheon, CPAs, P.A., the court appointed Conservator ("Conservator") for Mrs. Coleman, by Order dated September 1, 2015.
3. Respondents are the children and grandchild of Mrs. Coleman.

¹ Petitions were filed by Respondent Culp on December 22, 2014 and Respondents Irland and Psaras on January 5, 2015. Based in part on the report of a Designated Medical Examiner's finding of incapacity dated January 8, 2015, this Court issued Orders appointing a Temporary Guardian and Conservator on February 23, 2015 and a Permanent Guardian and Conservator on September 1, 2015.

4. During Mrs. Coleman's adult life, she acquired real property in South Carolina to include an undivided fee simple interest in certain real property located in Berkeley County described more fully as follows (hereinafter "Tract 1"):

ALL that certain piece, parcel or tract of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as "Tract 1, 1,450,798 sq. feet, or 33.31 acres" as shown on plat entitled: "PLAT SHOWING A RE-SURVEY AND SUBDIVISION OF A 72.31 ACRE TRACT OF LAND INTO TRACTS 1, 2, AND 3, SITUATED AS SHOWN ON HALFWAY CREEK ROAD NEAR GUERINS BRIDGE ROAD, IN BERKLEY COUNTY, SOUTH CAROLINA. THIS PROPERTY IS PRESENTLY OWNED BY CHARLES S. WILLIAMS, TRACTS 2 AND 3 ARE ABOUT TO BE CONVEYED TO ATHENA L. IRLAND, DANIEL J. IRLAND AND DOLLY L. COLEMAN," prepared by Charles F. Dawley, Jr., RLS, dated July 18, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Plat Cabinet L, Page 199. Said tract having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

SUBJECT to right of access to Tracts 2 and 3 over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat.

BEING the same property conveyed to Dolly L. Coleman by Deed of Charles S. Williams dated May 1, 1997 and recorded May 9, 1997 in the Office of the Register of Deeds for Berkeley County in Book 1064, at Page 319.

TMS NO.: 257-00-00-007, recorded 12/16/2017 at RP-11123-81. *ADK 7/24/18*

5. Mrs. Coleman also acquired an undivided one-third interest in certain real property in Berkeley County described more fully as follows (hereinafter "Tract 2"):

ALL that certain piece, parcel or tract of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as "Tract 2, 1,655,235 sq. feet, or 38.00 acres" as shown on plat entitled: "PLAT SHOWING A RE-SURVEY AND SUBDIVISION OF A 72.31 ACRE TRACT OF LAND INTO TRACTS 1, 2, AND 3, SITUATED AS SHOWN ON HALFWAY CREEK ROAD NEAR GUERINS BRIDGE ROAD, IN BERKLEY COUNTY, SOUTH CAROLINA. THIS PROPERTY IS PRESENTLY OWNED BY CHARLES S. WILLIAMS, TRACTS 2 AND 3 ARE ABOUT TO BE CONVEYED TO ATHENA L. IRLAND, DANIEL J. IRLAND AND DOLLY L. COLEMAN," prepared by Charles F. Dawley, Jr., RLS, dated July 18, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Plat Cabinet L, Page 199. Said tract having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TOGETHER with right of access over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat. SUBJECT to right of access to Tracts 3 over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat.

BEING the same 1/3 interest as conveyed to Dolly L. Coleman by Deed of Charles S. Williams dated August 2, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Book 709, at Page 40.

TMS NO.: 249-00-00-003, *Recorded 12/16/2014 at RP -11123 -76. HDA 7/24/18*

(collectively Tract 1 and Tract 2 hereinafter "the Farm").

6. On October 28, 2014, Mrs. Coleman executed two deeds conveying the Farm to Ms. Irland, each for FIVE and No/100th DOLLARS (\$5.00) and reserving a life estate in Tract 1. Said deeds were entered into evidence without objection and are incorporated by reference. Pet's Ex. 16 and 17.
7. The Conservator seeks to have these two deed rescinded arguing Mrs. Coleman lacked capacity to execute the deeds or, in the alternative, the executed deeds are the product of undue influence exerted by Mrs. Coleman's daughter, Respondent Irland, over Mrs. Coleman.
8. Prior to this action, Mrs. Coleman hired the law firm of Evans, Carter, Kunes & Bennett, P.A. ("the Firm") for estate planning purposes.
9. Mr. Andrew Chandler, Esquire ("Mr. Chandler"), an attorney at the Firm, testified on its behalf as follows:
 - a. The Firm previously prepared, and still possesses, Mrs. Coleman's original Last Will and Testament ("2008 Will"), dated October 20, 2008. A copy of said Will was entered into evidence without objection. Pet's Ex. 18.
 - b. Article 4 of the 2008 Will devises the real property in question, leaving Tract 1 to Mrs. Coleman's daughter Christina T. Culp and Tract 2 to her granddaughter Brandy S. Culp.
 - c. Respondent Irland is not a devisee of the Farm therein and therefore unable to take ownership under the terms of Mrs. Coleman's 2008 Will.

- 7
- d. On or about the 28th and 29th day of October 2014, Mrs. Coleman and Ms. Irland appeared at the Firm without an appointment, asking to see Attorney Heyward Carter. Mr. Carter was not available, and as a result, Mr. Chandler took the meeting.
- e. According to Mr. Chandler, Mrs. Coleman was pleasant upon greeting him and proceeded to ask about his wife and children. This seemed odd to Mr. Chandler as it was his first time meeting Mrs. Coleman and she would have no reason to know whether he was married, or had children. Mr. Chandler is, in fact, married, however, he has only one child. Mr. Chandler interpreted this as a possible sign Mrs. Coleman may lack capacity.
- f. When Mr. Chandler asked Mrs. Coleman why she had come to the Firm, Ms. Irland interjected, stating the two were there to get her Mother's original 2008 Will.
- g. Mr. Chandler asked that Ms. Irland allow her mother, Mrs. Coleman to answer the question as it was Mrs. Coleman who was the Firm's client.
- h. Ms. Irland became visibly and verbally upset when Mr. Chandler asked to interact solely and directly with Mrs. Coleman without any assistance from Ms. Irland.
- i. Mr. Chandler again asked Mrs. Coleman why she had come to the Firm and Mrs. Coleman was unable to answer the question and instead stared blankly at Ms. Irland. Ms. Irland, then interjected again, stating they were there to obtain the original of Mrs. Coleman's 2008 Will, in order to destroy it, because they were going to have it changed.
- j. Mr. Chandler, on behalf of the Firm, then informed Mrs. Coleman and Ms. Irland that he did not feel comfortable giving them the original 2008 Will for them to destroy it as Mrs. Coleman could not independently state why she wished to be given the 2008 Will. However, he would be happy to provide them the 2008 Will so long as it was per the instructions Mrs. Coleman had given the Firm in her Durable Power of Attorney. Mrs.

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Coleman's Durable Power of Attorney was admitted without objection as Petitioner's Exhibit 19.

k. Ms. Irland asked what the instructions were for obtaining the 2008 Will, and the Firm informed her that, per the Durable Power of Attorney, both Ms. Irland and Mrs. Coleman's granddaughter, Respondent Brandy Culp, would have to jointly sign for the release of the 2008 Will. Note: Ms. Irland testified that she had not previously seen the 2008 Will nor had knowledge of the referenced Durable Power of Attorney. *See* para 14j.

1. Mr. Chandler then offered to call Ms. Culp so that both she and Ms. Irland could sign for the release of the original 2008 Will. Ms. Irland became visibly upset, refused his offer, and the two women left the Firm.

10. The law firm of Williams & Hulst, LLC ("W&H"), more specifically, one of its owners, John B. "Jack" Williams ("Mr. Williams"), was hired to prepare the deeds conveying the Farm to Ms. Irland. Mr. Williams was not present for the hearing on October 18, 2016. However, prior to the start of the hearing, the parties met in chambers where they agreed the record would be left open until his deposition could be taken. Mr. Williams was deposed on November 14, 2016 where he testified as follows:

- a. Mr. Williams has been practicing law over forty years. Williams Dep. 5.
- b. Prior to the meeting on October 28, 2014, Mr. Williams had previously met Mrs. Coleman approximately 15 – 20 years ago in an unrelated matter. Williams Dep. 9.
- c. On October 28, 2014, Mrs. Coleman and Ms. Irland went together to W&H to discuss the preparation of deeds. Williams Dep. 13-14.
- d. Initially Mr. Williams met with both Mrs. Coleman and Ms. Irland. However, once the purpose of the meeting was made clear, Mr. Williams asked Ms. Irland to step outside in

order for him to speak with Mrs. Coleman alone. Williams Dep. 14-15. Mr. Williams then advised Mrs. Coleman regarding the meaning and purpose of transferring the property. Williams Dep. 15.

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- e. During the discussion with Mrs. Coleman regarding the transfer of property, Mr. Williams suggested Mrs. Coleman retain a life estate rather than transfer the property, herein referred to as Tract 1, in fee simple as originally discussed when meeting with Mrs. Coleman and Ms. Irland together and Mrs. Coleman agreed. Williams Dep. 16-17. Further, the reservation of a life estate "was not discussed, except between [Mr. Williams] and Mrs. Coleman." Williams Dep. 22.
 - f. Further, there was no mention that the Farm would be sold by Mrs. Irland after she received title to the Farm. Williams Dep. 22-23.
 - g. Mr. Williams testified that although he does not remember exactly how long the meeting on October 28, 2014 lasted, generally, meetings of that type are less than an hour. Williams Dep. 19.
 - h. Mr. Williams also testified with regard to his experience determining the competency of a particular person or witness during the course of his practice as follows:

Well, that's a question of determining competency, but yeah, I mean, if someone did not appear to understand what was going on or you know, was unable to communicate or whatever, yeah, I mean, from a practical standpoint, the answer is yes, I have.

Williams Dep. 7:13-18.

- i. Regarding Mr. Williams' observations of Mrs. Coleman's understanding of their conversation, Mr. Williams also stated:

There were no --- there was nothing *at that time* that gave me concern about her state of mind, her capability, but then again, that's just an observation, certainly not in a position to pass on that as an expert.

Williams Dep. 18:23-19:2 (emphasis added). *See also* Williams Dep. 25.

- j. When asked if Mr. Williams believed Mrs. Coleman understood the consequences of her actions, Mr. Williams replied "I do"... "Or I did at that time." Williams Dep. 17:7-9.
- k. During his deposition, Mr. Williams was given an opportunity to review documents entered into evidence without objection from Mrs. Coleman's treating physician, Dr. Judith M. Rubano ("Dr. Rubano"). Williams Dep. 24-31, 35-38.
 - i. Mr. Williams testified at the time the deeds were executed, he had no way of knowing of Dr. Rubano's diagnosis or any concerns expressed by Mrs. Coleman regarding her children and grandchild trying to get her to sell her property. Williams Dep. 25, Nov. 14, 2016. Further, Mr. Williams stated "it had been years since [he] had seen Mrs. Coleman, and obviously was not aware of any type of medical condition she may have [had at that time]." Williams Dep. 27:12-15.
 - ii. When asked if knowledge of Dr. Rubano's treatment of Ms. Coleman, her concerns and diagnosis would have changed the way Mr. Williams handled the closing on October 28th, Mr. Williams stated "Had I had these reports, at least as far as I'm concerned, my thought is there would *not have been a closing* then because of the questions that would have come up..." Williams Dep. 28:1-4 (*emphasis added*).
 - iii. According to Mr. Williams, if Dr. Rubano was of the opinion that Mrs. Coleman lacked capacity in 2012, and he knew of that opinion, he would not have closed the transaction. Williams Dep. 31:12-16.
- l. Mr. Williams was also presented a synopsis of Mr. Chandler's testimony regarding his meeting with Mrs. Coleman and Ms. Irland wherein Mr. Chandler stated he believed Mrs. Coleman lacked the necessary capacity to request her 2008 Will. Williams Dep. 31-33.

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- m. When asked whether Mr. Williams would reach out to an attorney that expressed concerns regarding the capacity of one who he was about to close a transaction with, Mr. Williams replied

Oh, yeah, most definitely. You know, if there's issues like that that could address the ability to process or whatever, most certainly would have contacted him. As I said, I had not had any contact with Mrs. Coleman for a while and was not aware of any prior incidence or even that she had a will.

Williams Dep. 32:20-33:1.

- n. Further, Mr. Williams added, "I would have talked with Mr. Chandler, but if it is – the situation is as its been represented, I would not have gone forward with the closing."

Williams Dep. 33:6-9.

- o. Finally, when asked if he knew then what he knows now, would he have gone forward with the closing, Mr. Williams replied, "Obviously, no." Williams Dep. 40:9-11.

11. Dr. Rubano was deposed both before and after trial,² during which time she testified regarding her interaction with, and treatment of, Mrs. Coleman. During the hearing, Dr. Rubano was admitted as an expert without objection. Her testimony is as follows:

- a. Dr. Rubano has regularly treats vulnerable adult or elderly patients. Rubano Dep. 7-8, Dec. 21, 2016.
- b. Dr. Rubano began treating Mrs. Coleman in the late 1990s or early, however, there were extended periods of time that Dr. Rubano was not actively involved in Mrs. Coleman's care. Rubano Dep. 20, Dec. 21, 2016.
- c. On January 9, 2009, Respondent Irland and Respondent Culp accompanied Mrs. Coleman

² Prior to the hearing, the parties met in chambers and agreed to admit the video deposition of Dr. Rubano without objection despite Attorney Dawson not being present during the deposition due to a clerical error and to hold the record open for 30 days during which time Respondent would be allowed to re-notice and cross-examine Dr. Rubano under deposition and/or enter any objections.

to an appointment reestablishing care with Dr. Rubano. During the appointment, both Respondent Irland and Respondent Culp expressed concerns regarding Mrs. Coleman's memory, mood, and behavior. See Pet.'s Ex. 3.

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- d. At a follow-up appointment with Dr. Rubano on May 29, 2009, Mrs. Coleman, unaccompanied during the visit, expressed concern stating her family was "using her" and attempting to get her to sell her [land]. Pet.'s Ex. 4. Mrs. Coleman was frustrated and upset because she did not want to sell the property. According to Dr. Rubano, Mrs. Coleman is "delightful. She's rather eccentric. And sometimes would kind of go on and talk about things, and [she] wasn't sure if there was any real validity to what she was complaining of." Rubano Dep. 12:13-17, Dec. 21, 2016.
 - e. Dr. Rubano received a letter from Respondent Culp dated October 18, 2010 wherein Respondent Culp reported that Mrs. Coleman was suffering "significant problems with memory. She is sometimes disoriented and she makes up stories to compensate for her confusion over daily tasks." See Pet.'s. Ex. 5. According to Dr. Rubano, this is a fair representation of patients with dementia. Rubano Dep. 24:6-7, Dec. 21, 2016.
 - f. During an office visit on October 18, 2010, Mrs. Coleman was prescribed Aricept for dementia based on family reports of lapses in her short-term memory. Pet.'s Ex. 6.
 - g. One month later, on November 15, 2010, Mrs. Coleman, unaccompanied, met with Dr. Rubano, during which she became tearful and expressed concerns that her daughter was taking advantage of her and "had drained her accounts, etc." Pet.'s Ex. 7. These comments were documented but not acted upon because Mrs. Coleman suffered from dementia and as a result, "her perception that someone was taking advantage of her may or may not have been true." Rubano Dep. 30:19-21, Dec. 21, 2016. Note: During Respondent Irland's

testimony, she admitted to signing checks in her mother's name in the months prior to this appointment.

- h. On April 21, 2011, Respondent Irland called stating Mrs. Coleman had stopped taking her medications and an office visit was scheduled for April 25, 2011. Pet's Ex. 10.
- i. On April 25, 2011, Dr. Rubano witnessed a shouting match between Mrs. Coleman and her daughter, Respondent Irland, regarding Mrs. Coleman's memory/dementia with Mrs. Coleman continuing to deny she suffered from any memory issues. Dr. Rubano noted a decline in Mrs. Coleman's appearance, increased her prescription for Aricept, and referred Mrs. Coleman to a memory clinic. Pet's Ex. 8 and 9.
- j. On April 4, 2012, Mrs. Coleman was accompanied to an appointment by Respondent Irland where it was reported that Mrs. Coleman was again off of her medications and noted that Mrs. Coleman's dementia was continuing to progress. Pet's Ex. 11 and 12.
- k. That Mrs. Coleman last saw Dr. Rubano in July of 2012 at which time she was still being treated for Dementia and noted reports that Mrs. Coleman's "[m]emory still poor and seems to be getting worse, she is more irritable and argumentative." Res'p Ex. 3.
- l. Dr. Rubano had the opportunity to review the Report of Designated Examiner, dated August 31, 2015³ which finds Mrs. Coleman, while pleasant, suffers from moderate dementia, able to make simple decisions but not process more complicated information as well as to have a "very dysfunctional family." Pet's Ex. 15.
- m. Dr. Rubano agreed with his report and testified to a reasonable degree of medical certainty that she would have made similar findings back in 2012, that Mrs. Coleman was not capable of disposing of property, real or personal, execute instruments, make purchases,

³ Findings based on observations from February 26, 2015 to April 18, 2015.

enter into contractual relationships, etc. Rubano Dep. 5:19-6:12, Dec. 21, 2016.

n. "Had I been asked, can Mom sell real estate? I would have said, no." Rubano Dep. 36:6-7, Dec. 21, 2016. *See also* Rubano Dep. 54:7-17, 22—55:2, Dec. 21, 2016.

o. Further, Mrs. Coleman, at the same time as lacking capacity, was also in a mental state or lack thereof, that left her susceptible to the influence of those around her, particularly one who was caring for her. Rubano Dep. 55:3-11, Dec. 21, 2016.

p. Mrs. Coleman also maintained a level of social gracefulness which made seeing her lack of capacity difficult. Rubano Dep. 55:12-17, Dec. 21, 2016.

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12. Carol Seltzer ("Ms. Seltzer") is a Social Worker and Professional Guardian that this Court appointed as Mrs. Coleman's Temporary Guardian on February 23, 2015. Ms. Seltzer was admitted as an expert based on her education and experience and she provided both factual and expert testimony based on her interaction with and observations of Mrs. Coleman and her family as well as her review of relevant case materials as follows:

- a. Upon first meeting Mrs. Coleman, she was well-groomed, pleasant, demonstrating very good social graces. However, Mrs. Coleman was unable to answer direct questions or recount details when asked. Instead, Mrs. Coleman would begin to tell stories of past events, often embellishing as is consistent with one lacking capacity.
- b. Information provided by Mrs. Coleman was often inaccurate, reflecting Mrs. Coleman's ability to be easily swayed and her tendency to place special trust and confidence in those around her.
- c. A ten-day evaluation of Mrs. Coleman after attacking a caregiver in her home resulted in confirmation of dementia diagnosis as well as a diagnosis of mood disorder.
- d. Interviews with family members (Respondents) highlighted numerous problems

between the parties with little or no communication occurring among them.

- e. Based on her observation of Mrs. Coleman which began in 2015, her experience over twenty years dealing with dementia patients, and review of Mrs. Coleman's medical records reflecting a diagnosis in 2009, she concurs with Dr. Rubano regarding the progression of the disease which would have resulted in Mrs. Coleman lacking mental capacity and resulting in susceptibility to undue influence in 2012. Further, such incapacity or susceptibility would not have been readily apparent to one not familiar with Mrs. Coleman due to her social graces.

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13. W. Ashley Thiem, the court appointed Conservator for Mrs. Coleman, testified regarding his interactions with Mrs. Coleman and her family:

- a. In meetings with Mrs. Coleman, he found her to be pleasant. However, the meetings were based on the facts and circumstances focused on finances rather than her medical or mental conditions.
- b. While compiling Mrs. Coleman's assets, Mr. Thiem met with various family members as each asset appeared to be controlled by a different person. During his investigation, Mr. Thiem discovered two missing assets: Tract 1 and Tract 2. Ex. 18 and 19. Mr. Thiem also found one of the properties was listed for 2.3 Million Dollars. Ex. 20.
- c. The real estate listing did not reflect the fact that Mrs. Coleman retained a life estate in the subject property, resulting in concerns around Mrs. Coleman's capacity at the time the deeds were executed.
- d. Further, Mrs. Coleman retaining the property is in her best interest as the property comprise her only assets and, as such, she would benefit from having the transfer rescinded to its prior ownership in the event the property was necessary to fund Mrs. Coleman's living and

medical expenses.

14. According to Mrs Coleman's daughter, Respondent Athena Irland:

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- a. In 1995, when the time the properties in question were purchased, there were three parcels of land in total, with a one-acre parcel which she purchased and on which her home is located; the second parcel, herein referred to as Tract 2 and consisting of 38-acres was purchased by herself, her then husband, and Mrs. Coleman, and finally what is referred to herein as Tract 1 and consisting of 33.31-acres, was purchased by Mrs. Coleman alone, despite Respondent Irland being able to afford to pay half the purchase price and the prior owner being reluctant to sell to Mrs. Coleman.
 - b. That in or around 1999, Mrs. Coleman moved a home onto Tract 1 and began living therein.
 - c. That it was always Mrs. Coleman intent for her interest in the Farm to go to Respondent Irland, the farm "wasn't a family farm, it's Athena's Farm," and it has always been her farm.
 - d. That in or around 2003, Respondent divorced and had her husband's name removed from the deed. It was around that time, her mother gave her Tract 1 but she failed to remove Mrs. Coleman's name from the property because, according to Respondent Irland, she lost the paperwork.
 - e. That her mother was of sound mind and body when she signed the deeds in 2010, admitting Mrs. Coleman suffered from short-term memory problems as early as 2009 but was not incapacitated until February of 2015.
 - f. That the two of them are "best friends," extremely close, and did everything together.
 - g. Mrs. Coleman executed a Durable Power of Attorney on June 27, 2011 in which Athena Irland was granted the power to convey property which she never exercised. Resp's Ex. 1.

- h. That she admits to signing her mother's name on checks and doing it in her same way absent Power of Attorney because she is Mrs. Coleman's daughter and will sign with Mrs. Coleman's permission.
- i. That she and Mrs. Coleman went to the Firm and was told that in order to get the original Will they would need to make an appointment, which they did for the following day. However, their attorney failed to show up and when Attorney Chandler would not give them the original, Mrs. Coleman got mad and they left.
- j. That she did not see a copy of the Will until 2014 and that it was also the first time she learned the Farm was not devised to her and she learned the Durable Power of Attorney had been revoked on July 24, 2013, noting that even if she still had the Durable Power of Attorney, she still would not have deeded the property to herself.
- k. That Mrs. Coleman made changes on a copy of the Will and wished to destroy the Original and to divide the property evenly between her three children, however, the Will was not changed because Mrs. Coleman was "kidnapped" by her sister in 2014 and "brainwashed."
- l. That she listed Tract 2 for sale because she ran out of money due to the costs associated with this litigation and would do anything, sell everything, for her mother, to keep her, to get her back. Respondent Irland also contends that she has always had her mother's best interest at heart and hadn't deeded it back to be used for her mother's care because it was not her intent.
- m. When asked why she simply didn't deed the property back to her mother, she replied, because its "MY FARM!" and that she would decide where the money would go.
15. Mrs. Coleman's son, Respondent Isadore Psarus ("Johnny") testified that at the time the deeds were executed, Mrs. Coleman was living with Respondent Irland, who was her primary

caregiver.

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- a. Resides in a home located at 638 Palmetto Street in the town of Mt. Pleasant which was given to him by Mrs. Coleman in 2008 for the sum of FIVE AND NO/100s DOLLARS (\$5.00).
 - b. Claims Mrs. Coleman gave to him and his sisters all the time and that it was his understanding that his mother had always intended to give the Farm to Athena.
 - c. Mr. Psarus was not present at the attorney's office when the meeting occurred, nor was he present when the deeds were executed and is unable testify as to anything leading up to the transaction.

16. The Guardian Ad Litem, Lana M. Jamrosyk, Esquire, did not testify but proffered from counsel table that, in her opinion, after meeting with Mrs. Coleman and the various family members, Mrs. Coleman was easily influenced and lacked the ability to understand the consequences of her actions. Further, it is in Mrs. Coleman's best interest to have both deeds rescinded and the Farm returned to Mrs. Coleman in the event that she needs the subject property to help defray future living and/or medical expenses.

CONCLUSIONS OF LAW

- 17. Pursuant to S.C. Code of Laws Ann. Section 62-5-402, jurisdiction and venue are proper.
- 18. Where a transaction is challenged on the basis of mental incompetency, the individual's competency on the date of that transaction must be determined. *Grapner v. Atlantic Land Title Co.*, 307 S.C. 5489, 551, 416 S.E.2d 617, 618 (1992). Furthermore, the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.*
- 19. Ample evidence supports a finding that Mrs. Coleman lacked the requisite mental capacity to

execute the challenged instruments on the date in question:

- a. Petitioner offered testimony of Mrs. Coleman's treating physician, Dr. Rubano, that Mrs. Coleman suffered from memory loss as early as 2009 and was treated for dementia in 2010 which, given its progressive nature, would result in Mrs. Coleman lacking capacity at the time the deeds were executed;
 - b. That Respondent Irland and other family members repeatedly expressed concerns regarding Mrs. Coleman's capacity as early as January 2009 and on numerous occasions thereafter;
 - c. Testimony from Mr. Chandler regarding his interaction with Mrs. Coleman on the same day the deeds were executed regarding Mrs. Coleman's inability to clearly communicate her desire to retrieve her 2008 Will;
 - d. Testimony from Mr. Williams regarding his interaction with Mrs. Coleman and the fact that in hindsight, he had not inquired as to her capacity and was not an expert in recognizing behavior associated with incapacity, particularly given the small amount of time spent interacting with her, and given her penchant for exhibiting social graces common in dementia patients;
 - e. Respondent offered no evidence to rebut Petitioner's assertions regarding allegations that Mrs. Coleman lacked capacity at the time the Deeds were executed but relied solely on her assertions, which are in direct conflict with reports made by her to Mrs. Coleman's treating physician for almost two years prior to the time the deeds were executed;
20. Based on the preponderance of evidence demonstrated by the Petitioner, Mrs. Coleman lacked capacity to execute said deeds on October 28, 2014.
 21. Petitioner also asserts Respondent Irland exercised undue influence over Mrs. Coleman.

Undue Influence must be of the kind of mental coercion that destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. *Russell v. Wachovia Bank, N.A.*, 355 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). To void a conveyance of land, a contestant must show that the undue influence was brought directly to bear upon the conveyance. *Id.* at 219.

22. 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. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005) citing *First Nat'l Bank of Appleton v. Nenning*, 92 Wis.2d 618, 285 N.W.2d 614, 623 (1979).

23. In contested deed cases a presumption of invalidity arises if the contestants of the deed present evidence that a confidential or fiduciary relationship existed between the grantor and the grantee. See *Middleton V. Suber*, 300 S.C. 402, 405, 388 S.E. 2d 639, 641 (1990)(recognizing that where a "confidential relationship" exists between a grantor and a grantee, the deed is presumed invalid and the burden is upon the grantee to establish the absence of undue influence); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986)("A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence thus shifting the burden of proof to the grantee to rebut the presumption").

24. A confidential relationship arises when the grantor has placed his trust and confidence in the grantee, and the grantee has exerted dominion over the grantor. *Page v. Lewis* 209 S.C. at 220. The essence of the relationship is the trust and confidence. *Bullard v. Crawley*, 294 S.C. 276, 281, 363 S.E.2d 897, 900 (1987) citing 15A C.J.S. *Confidential*, pp. 351-58 (1967). Mere friendship between the parties is not sufficient. The relationship must be one implying

confidence. *Id.* citing 25 Am. Jur.2d *Duress and Undue Influence* § 44 (1966). A confidential relationship does not necessarily arise when the grantor depends upon the grantee for the necessities of life. Some evidence is required that the grantor actually reposed trust in the grantee in the handling of his affairs. *McIntosh v. Dowdy*, 625 S.W.2d 162 (Mo.Ct.App.1981) (holding valid deed from grantor to the operators of nursing home in which grantor lived prior to death).

25. Here, the record shows that Mrs. Coleman was dependent upon Respondent Irland for many things. Petitioner introduced evidence that Respondent Irland was Mrs. Coleman's sole caregiver and that she took Mrs. Coleman to her appointments once she moved into her home. Further, there is also evidence that a relationship of trust and confidence existed between them. Respondent Irland had access to Mrs. Coleman's bank accounts as evidenced by her testimony in which she admitted writing checks on her mother's account and, finally, that Mrs. Coleman had designated Respondent Irland as her attorney-in fact. Petitioner has successfully shifted to the proponent the burden of rebutting the presumption.
26. Respondent failed to rebut the presumption of undue influence. Instead, the record is replete with information which belies Mrs. Coleman's intent. First, Respondent contends Mrs. Coleman always intended to give her the property and in fact did so in 2003, but that the instrument was never recorded because she lost it. However, according to her testimony, Respondent was close with Mrs. Coleman and they do everything together. Accordingly, if it was Mrs. Coleman's intent to transfer the property, she very easily could have done so in the eleven years since she purportedly executed an instrument removing her from the deed. Further, if Mrs. Coleman wished Respondent Irland to have the property in question, she would not have devised her interest in the two tracts to others under her 2008 Will.

27. Undue influence invalidates a deed procured by wrongful influence exerted over the grantor so as to destroy free agency and constrain a person to act against his will. *Page v. Lewis*, 209 S.C. 212, 39 S.E.2d 787, 799 (1946 supra). It is not material how much control is exercised, whether by physical force, threats, importunities, or any other form of mental or physical coercion, provided that it was exerted to destroy or overcome the free will of the grantor and to make the deed executed the expression not of his purpose, but that of some other person. *Baynard v. Ulmer*, 153 S.C. 100, 150 S.E. 610, 611 (1929).

28. The evidence supports a finding that Mrs. Coleman did not wish to have the property transferred to Respondent Irland, yet the undue influence exerted over Mrs Coleman by Respondent Irland was such that Mrs. Coleman's will was overcome and she nevertheless acquiesced and executed the deeds on October 28, 2014.

29. Due to Ms. Irland's breach of fiduciary duty to Mrs. Coleman, Mrs. Coleman is entitled to an award of damages against Ms. Irland.

30. Pursuant to S.C. Code of Laws Ann. Section 62-1-111, this Court may, as justice and equity require, award costs and expenses, including reasonable attorney's fees, to any party to be paid by another party or from the estate that is the subject of the controversy. Accordingly, Respondent Irland's willful and zealous pursuit of this property and steadfast refusal to deed the property back to her mother despite her supposed commitment to her mother's well-being, warrant this measure. As such, all costs associated with this action will be assessed against Respondent Irland to include reasonable attorneys' fees.

31. This Court finds no fault in Dr. Rubano not issuing an opinion in 2012 as to Mrs. Coleman's lack of capacity or susceptibility to influence, which would have arguably prevented this matter from arising, because she was not asked to do so by Mrs. Coleman, the Court, or any person

authorized to inquire or request such a finding from Dr. Rubano.

32. Furthermore, this Court finds no fault in Mr. Williams closing the subject transaction on October 28, 2014, which would have arguably prevented this matter from arising, because he did not know, nor have reason to know of the events that transpired at the Firm and/or Dr. Rubano's treatment of Mrs. Coleman.

Based on the foregoing, it is hereby:

ORDERED, ADJUDGED AND DECREED the subject deeds are rescinded as Mrs. Coleman lacked the requisite capacity on October 28, 2014 to execute said deeds; it is further

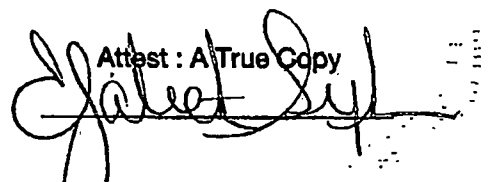
ORDERED, ADJUDGED AND DECREED the subject deeds are the product of undue influence exercised by Respondent Irland over Mrs. Coleman; it is further

ORDERED, ADJUDGED AND DECREED that Respondent Irland will be assessed the costs and expenses associated with this action, including reasonable attorneys' fees, once approved by the Court.

AND IT IS SO ORDERED.


Lenna S. Kirchner
Associate Judge of Probate
Charleston County

29th day of June, 2017
Charleston, South Carolina

Attest : A True Copy

Clerk Probate Court
Charleston County, South Carolina

ARGUMENTS

Transcript of Motion October 27, 2022 Court of Common Pleas Case# 2022-CP-10-03304

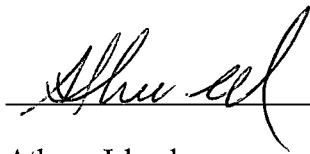
1. Pg. 4 line 25, pg 5 lines 1-6 are untrue statements by opposing counsel and does not apply.
2. Pg. 5 lines 14-20. 2 deeds were at issue. One deed transferred to me, Athena Irland. Another deed was to be transferred after the death of Dolly Coleman, my mother. I had absolutely no influence in her decision to transfer any property. I took her to the office of Attorney Jack Williams, whose services she had used before. I left the two of them to conduct business in private. When I returned to pick up my mom, Mr Williams invited me into a conference room where I was first informed of what was decided.
3. Pg. 5 lines 6-20. South Carolina has defined contractual capacity as a person's ability to understand at the time the contract is executed. A mere infirmity of mind, if it does not amount to an incapacity to understand at the time of execution of a contract, the nature of the act done and the effect thereof, does not render a person incapable of executing a valid and binding contract.
Verdery v Daniels (In re Thames) 344 S.C. 564. (Ct App. 2001)
4. Pg. 5 lines 16-22. Dr. J. Rubano had not seen Dolly Coleman as a patient for two and a half years. She based her opinion on what she believed to be the natural progression of the disease. No restrictions were placed on Ms. Coleman. Dr. Rubano stated that her short term memory was affected, not her long term memory; her long term memory was intact. Attorney Jack Williams testified that he observed nothing about Ms. Coleman gave him concern about her state of mind or mental capacity. It was made clear that I did not accompany my mom, Dolly Coleman, during her consult with Attorney Jack Williams wherein she conveyed 1/3 interest in the 38 acre parcel and a retention of a life estate in the 33 acre parcel.

5. Pg. 5 lines 21-22. The law was misapplied when Athena Irland was accused of exercising undue influence over Dolly Coleman regarding the properties and the 2009 will. There is no evidence on record to support this accusation. Athena Irland was not present during Ms. Coleman's meetings with Attorney Jack Williams or Attorney Lynn McCants.
6. Pg.5 line 25, pg.6 lines 1-3. Opposing counsel, Sanchez, mislead the court when he claims I did not file an appeal in time. He knew my attorney at the time, Joseph Dawson filed in the wrong court causing it to be dismissed. Mr. Dawson then filed in the correct court but it was too late and subsequently denied under Section 62-1-308(a)
7. Pg.7 lines 9-25. False premises, conjecture and baseless facts. The testamentary capacity of a person making contractual decision is quite different from executing a Will or destroying one. The testamentary capacity referring to an individual's ability to make or destroy a Will and the testator is presumed competent until proven otherwise. In the matter of The Estate of Berg 783 N.W. 2d 831 (S.D. 2010)
8. Pg.8 lines 6-18. All parties involved were served. Judge Bently Price was given evidence of the following:
 - A) Settlement Agreement reached at Mediation on March 16, 2020 between Brandi Culp, Christina Culp and Isadore John Psaras.
 - B) Letter (dated April 8, 2021) from Attorney David Michael stating that the Order from the Court reiterates that said Settlement be followed.
 - C) Order to Approve Settlement Agreement reached at mediation Case # 2019-ES-10-1368 by Probate Judge Lenna Kirchner, March 22, 2021. (Courts closed due to covid crisis)
9. Pg.9 lines 17-25. Though I am not an attorney, I did take steps, to the best of my ability, to follow applicable court rules in filing a Notice of Appeal and gave proper notice of service and am given some leeway in this matter according to Haines v

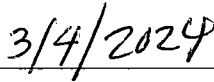
Kerner U.S. 404 U.S. 519 (1972) wherein the U.S. Supreme ruled that a Pro Se litigant is held to less stringent standards than formal pleadings drafted by lawyers.

CONCLUSION

Therefore, Appellant respectfully moves the court to uphold the order issued on July 14 2023 for a rehearing and rescind the subsequent order issued October 2, 2023. Or, in the alternative, remand the entire case back to the Probate Court for a rehearing.



Athena Irland
186 Dolly Dimples Trail
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Date

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

INITIAL BRIEF OF APPELLANT
Appellate Court

Case No. 2023-001852

Athena Irland

Appellant

V.

Brandy S. Culp

Respondent

PROOF OF SERVICE

I certify that I have served the Respondent an Initial Brief Of Appellant and all other related materials to the appeal. Copy sent through US Post Office on March 5, 2025.

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SOUTH CAROLINA COURT OF APPEALS

.....
Case No. 2023-001852

.....
Athena Irland

Appellant

v

Brandy Culp

Respondent

.....
Certificate of Counsel {Pro Se Litigant}

.....
I certify that all paperwork, Record on Appeal, Designation of
Matter, Authorities, etc are documents related to the Appeal.

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