STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
R. Scott Sprouse, Circuit Court Judge

RECEIVED
SEP 23 2016
SC Court of Appeals

Case Number 2016-000096

Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven
Appellants,

Vs.

Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker
Respondents.

CORRECTED RECORD ON APPEAL

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Anderson Law Firm, PC
124 Oakland Avenue
Rock Hill, South Carolina 29730
803-980-5252
Attorney for Appellants

Michael Brackett
Post Office Box 100261
Columbia, South Carolina 29202
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Attorney for Respondents

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The South Carolina Court of Appeals

Mary Jean Tucker, Swiger, by and through her Attorney-in-Fact, Carol DeHaven, Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of Vinton Willis Tucker, Respondents.

Appellate Case No. 2016-000096

ORDER

On May 5, 2016, Respondents filed a motion to dismiss this appeal arguing Appellant lacks standing to prosecute the appeal. On May 16, Appellant filed a motion for an extension of time to file her return, which Respondents opposed. Nevertheless, our records indicate Appellant filed a return to the motion to dismiss on May 20 and Respondents have filed a reply. Accordingly, we accept the return as filed. Additionally, after careful consideration of the parties' filings, we deny the motion to dismiss. However, nothing in this order prevents Respondents from raising the standing issue in their brief.

Stephanie P. McDonald

FOR THE COURT

Columbia, South Carolina

cc: B. Michael Brackett, Esquire
Syretta R. Anderson, Esquire

FILED
7/1/16

The South Carolina Court of Appeals

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven, Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of Vinton Willis Tucker, Respondents.

Appellate Case No. 2016-000096

ORDER

Respondents have filed a motion to dismiss, arguing Carol DeHaven engaged in the unauthorized practice of law when she personally served and filed a notice of appeal on behalf of her deceased mother's interests. DeHaven served as her mother's attorney-in-fact pursuant to a durable power of attorney, but that appointment terminated upon her mother's death. *See Dibble v. Thomas*, 301 S.C. 314, 316 n.1, 391 S.E.2d 729, 730 n.1 (Ct. App. 1990) ("It is universally recognized in this country that a power of attorney, unless coupled with an interest, is terminated by the death of the principal.'" (quoting *Godwin v. Wachovia Bank & Trust Co.*, 131 S.E.2d 456, 460 (N.C. 1963)). To the extent DeHaven argues she is her mother's executrix, we note that a personal representative who is not a lawyer cannot represent an estate on appeal. *See Brown v. Coe*, 365 S.C. 137, 142, 616 S.E.2d 705, 708 (2005) (stating our statute limiting the practice of law to licensed attorneys prevented a nonlawyer administratrix from filing a notice of appeal and preparing briefs on behalf of the estate). We deny Respondents' motion to dismiss. However, we require that Appellant retain counsel within thirty days of the date of this order or this appeal will be dismissed.

FOR THE COURT

FILED

4/11/16

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STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-46-00466

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven
PLAINTIFF(S)

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☒ **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:

FILED-RECD. YRK.
2015 DEC 29 PM 1:53
JEANNIE HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2752
Judge Code

12-22-15
Date

SCRCP Form 4C (03/2013)

5

For Clerk of Court Office Use Only

This judgment was entered on December 29, 2015, and a copy mailed first class or placed in the appropriate attorney's box on December 29, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Syretta R. Anderson 124 Oakland Avenue Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

B. Michael Brackett PO Box 100261 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
(Non-Jury)

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven,

Appellant,

vs.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

ORDER AFFIRMING DECISION OF PROBATE COURT

C.A. No. 2015-CP-46-00466

FILED-RECD
2015 DEC 29 PM 1:53
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

PRESIDING JUDGE: R. SCOTT SPROUSE
DATE OF HEARING: DECEMBER 08, 2015
APPELLANT'S ATTORNEY: SYRETTA R. ANDERSON
RESPONDENTS' ATTORNEY: B. MICHAEL BRACKETT

This matter was before the Court pursuant to an appeal of the Order of Probate Judge Carolyn W. Rogers of the York County Probate Court, dated February 2, 2015. The Appellant argues that the Probate Court erred when granting summary judgment to the Respondents because there was sufficient evidence in the record to create a genuine issue of material fact. I affirm.

FACTS

The Appellant, Mary Jean Tucker Swiger, is the sister of Vinton Willis Tucker (Decedent). The Respondents, Ben R. Smith and Margaret P. Kelly, are a nephew and niece (by marriage) of the Decedent. The Decedent was a longtime resident of North Carolina and was predeceased by his wife. When his health began to fail, he moved to an assisted living facility in York County, South Carolina in November of 2011. He remained a resident of York County, South Carolina until his death in May of 2012.

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While living in North Carolina, Decedent had a relationship at one point with a woman named Brenda Snow. He had his attorney in Charlotte prepare a will leaving his entire estate to Snow. This will was destroyed by Respondent Ben Smith per the instructions of the attorney who prepared it. Decedent executed a new will on January 14, 2012, during a brief stay at the Piedmont Medical Center in Rock Hill. It was handwritten by Respondent Margaret P. Kelly at the instruction of Decedent. The will in question leaves the estate in equal shares to Decedent's nieces and nephews on his deceased wife's side of the family.

The Appellant filed suit challenging the validity of the new will. The Probate Court considered four causes of action in the summary judgment hearing. The Probate Court granted summary judgment to the Respondents.

ISSUES

Did the Probate Court err in granting summary judgment because a genuine issue of material fact existed concerning the allegation of undue influence over the Decedent in the execution of his will?

A. Did the Probate Court err in not finding the existence of a confidential relationship?

B. Did the Probate Court err in not finding the existence of undue influence?

APPLICABLE LAW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and that the conclusions and inferences to be drawn from the facts are undisputed." *McClanahan v. Richland County Council* 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). In considering whether summary judgment should be granted, the Court must consider the evidence in a light most favorable to the non-moving party. *Id.* at 438, 567 S.E.2d at 242. If the Court

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finds evidence that creates a genuine issue of material fact, summary judgment should not be granted. Ordinarily, the Court considering the motion looks for the existence of evidence and does not go far into any analysis regarding the likelihood of success of the claim.

Our present case involves a challenge to a will on the ground of undue influence. For a will to be invalidated for undue influence, 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. Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an undue existing fiduciary relationship. *Russell v. Wachovia Bank, N.A.*, 353S.C.208, 578 S.E.2d 329 (2003).

The claimant in this type of case has a heightened standard of proof which, accordingly, changes the standard to be applied by the Court considering summary judgment. The standard of proof in an undue influence case is *unmistakable and convincing evidence*. There must be more than a scintilla of evidence to defeat a motion for summary judgment. The analysis required of the Court at the summary judgment hearing with the heightened standard of proof "necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." *George v. Fabri*, 345 S.C.440, 548 S.E.2d 868 (2001); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct.2505, 91L.Ed.2d 202 (1986); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003).

In *Russell*, the Court reiterated that summary judgment is proper where a verdict is not "reasonably possible." See *Bloom v. Ravoira*, 339 S.C. 101, 529 S.E.2d 710 (2000). Where the evidentiary standard is clear and convincing, as it is in our present case, the Court has much

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greater discretion to evaluate the sufficiency of the non-moving party's factual submissions as too insubstantial to overcome summary judgment. *Hancock v. Mid-South Management Co.*, 673 S.E.2d 801 (2009).

Historically, South Carolina courts have held that there is a presumption of invalidity in the preparation of deeds if there was a confidential relationship between the grantor and grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden shifts to the grantee to affirmatively show the absence of undue influence. This principle of law has been applied to will cases. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005); *Calhoun v. Calhoun*, 277, 290 S.E.2d 415 (1982). However, the challenger to a will never loses his ultimate burden of proof. If the proponent of the will comes forward with evidence to rebut the presumption, then said presumption is not a bar to summary judgment. *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (SC App. 2005).

DISCUSSION

The Order sets out the applicable law and facts in great detail. The Appellant's arguments center around three factual areas:

1. Restricted visitation.

The Order finds that there "was deposition testimony that family members restricted visitation with Brenda Snow...The restricted visitation occurred in a Charlotte, North Carolina hospital approximately one and one-half months prior to the execution of the January 14, 2012 last will." (Order, page 6).

The Appellant argues that the Order ignores evidence of restricted visitation in South Carolina. The pieces of evidence used to further this argument are the facility

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in South Carolina being given a picture of Snow and being informed that the hospital in North Carolina had restricted Brenda Snow from visiting the Decedent. There is no evidence of any attempted visitation by Snow in South Carolina or any other visitation prior to, or simultaneous with, the execution of a disputed will.

There was evidence of the Appellant's side of the family visiting with the Decedent over a month later while under the watch and supervision of the Respondents but this evidence is not relevant to the issue of whether the Decedent was under the undue influence of the Respondents on January 14, 2012.

2. Mistake by the Decedent.

There was some evidence in record that the Decedent made comments about providing for his "little girl." The Order discusses the testimony of a social worker who heard the comment on February 5, 2012. The "little girl" was never positively identified, although there is an assumption on the part of the witness that the Decedent was referring to Snow. The issue of testamentary capacity was not raised by the Appellant. The Order's finding that the Decedent had testamentary capacity on January 14, 2012 is not challenged.

The Appellant attempts to use the statements about the "little girl" to show that the Respondents tricked or coerced the Decedent into executing a will that was against his true intentions. While this evidence may raise suspicions when considered in the light most favorable to the Appellant, it falls far short of meeting her burden of proof, especially when considering the Decedent's dementia diagnosis. Each party acknowledges that the Decedent's cognizance varied on a daily basis. The

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unchallenged finding of the Probate Court was that Decedent had testamentary capacity on the day the will in question was executed.

3. Confidential Relationship.

The Appellant argues that the Respondents were in a confidential relationship that raised the presumption of invalidity of the will. The evidence that the Appellant uses to further her argument is that the Respondent Margaret Kelly acted as the scrivener for the Decedent regarding the will in question, that the Respondent Ben Smith had been given a Durable Power of Attorney by the Decedent while he was still in North Carolina, and that the Respondent Margaret Kelly was given a Health Care Power of Attorney by the Decedent afterwards (February 8, 2012). There also was some testimony that Kelly was close to the Decedent and did things for him. The Order embarks on a thorough analysis of the applicable law considered in light of the evidence, ultimately rejecting this argument. The evidence in the record falls short of the Appellant's burden of proof in this case. Even if the Court had reached the conclusion that a confidential/fiduciary relationship existed, there was ample evidence in the record rebutting the presumption of invalidity.

CONCLUSION

Certainly, there is some circumstantial evidence in the present case. However, after reviewing the evidence presented to the Probate Court for the summary judgment motion, I find it impossible to reach the conclusion that there is sufficient evidence in the record to create a

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genuine issue of material fact in light of the clear and convincing standard that exists in these type cases. Accordingly, the Order of Probate Court of York County is AFFIRMED.

December 22, 2015

Walhalla, South Carolina

R. Scott Sprouse
Circuit Court Judge

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STATE OF SOUTH CAROLINA

IN THE PROBATE COURT
CASE FILE NO.: 2012GC4600579

RECEIVED
2015 FEB -2 PM 2:50
JUDGE OF PROBATE
YORK COUNTY, SC

COUNTY OF YORK

IN THE MATTER OF ESTATE OF VINTON WILLIS TUCKER

COVER SHEET

Mary Jean Tucker Swiger, by her Attorney-in-Fact Carol De Haven
PETITIONER(S)

Ben R. Smith, et al.
RESPONDENTS

CHECK ONE:

[x] 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 _____

IT IS ORDERED AND ADJUDGED: [x] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 2nd day of February, 2015.

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 2nd day of February, 2015, and certified copies mailed first class this 2nd day of February, 2015, to attorneys of record or to parties (when appearing *pro se*) as follows:

Syretta Anderson, Esquire
1373 Ebenezer Road
Rock Hill, SC 29732

ATTORNEY FOR PETITIONER

Mike Brackett, Esquire
P. O. Box 100261
Columbia, SC 29202

ATTORNEY FOR RESPONDENTS

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FILED RECEIVED
2015 FEB -2 PM 2:49
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger, by her Attorney-in-Fact Carol DeHaven,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Order Granting Respondents' Motion for Summary Judgment

In her Petition for Formal Testacy and Appointment Petitioner is challenging the validity of the decedent Vinton Tucker's Last Will dated January 14, 2012. Five causes of action were initially alleged. Respondents answered and counterclaimed for formal testacy and appointment seeking to have said last will formally admitted to probate. Respondents first moved for summary judgment with respect to four of the causes of action and later amended the motion for summary judgment to include all five causes of action.

Respondents' motion for summary judgment was heard by the Court on December 30, 2014. Present were attorney Syretta Anderson, attorney for Petitioner; Carol DeHaven and Janet Loeffler, attorneys-in-fact for Petitioner Swiger; Respondents Ben Smith and Margaret Kelly, as co-personal representatives; and attorneys Mike Brackett and Adam Silvernail, attorneys for Respondents.

CERTIFIED TRUE COPY
PROBATE JUDGE, YORK COUNTY, SC

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Respondents moved to amend the caption of the case to substitute and identify the Petitioner as Mrs. Swiger's attorney-in-fact, appointed in and by a durable power of attorney, because Mrs. Swiger is mentally incapacitated. There was no objection. The motion was granted, and the caption is hereby amended as shown above.

Petitioner's attorney announced to the Court that Petitioner was withdrawing and dismissing the second cause of action in which the validity of the last will at issue was challenged on grounds related to will execution formalities. There being no objection, the second cause of action was dismissed at the hearing, with prejudice, and the dismissal is hereby formally entered.

Jurisdiction. In her first cause of action Petitioner alleges that South Carolina and the York County Probate Court do not have the requisite territorial jurisdiction to probate decedent's last will, citing S.C. Code Ann. § 62-1-301 and 302. The particular allegations are that on the date of his death the decedent did not own any real property in South Carolina (Petition, ¶15), did not own a vehicle that was registered in South Carolina (¶ 16), had lived his entire life in North Carolina (¶ 17), his move to York County was without the intent to change his domicile (¶ 22), and he was buried in North Carolina next to his predeceased spouse. (¶ 24). From the summary judgment evidence before the Court there is no dispute about the following facts: Mr. Tucker moved from Mecklenburg County, North Carolina to Westminister Towers, an assisted living facility in York County, South Carolina in December, 2011; he thereafter received his mail in York County; his attorney-in-fact, named in a durable power of attorney, resided in York County; much of his financial assets were located in or were accessible in York County; he owned tangible personal property located in York County when he died; and he was reported to

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have expressed a desire to return to his home but did not voice an objection when his family indicated to Westminister Towers staff that he intended to become a permanent resident at Westminister Towers and would not be returning to North Carolina.

The Court had good cause to accept jurisdiction of the estate when the estate was opened in May, 2012 based on the content of the Respondents' Application and the content of the death certificate. No challenge to territorial jurisdiction was raised until the Petitioner's Petition for Formal Testacy was filed in May, 2013. The South Carolina probate court's territorial jurisdiction is governed by S.C. Code Ann. § 62-1-301. It reads:

> Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

Although South Carolina courts seek precedent from South Carolina cases, South Carolina will look to the law of other jurisdictions for guidance when its case law is nonexistent or minimally helpful. This is especially so when the question is one of probate law and the other jurisdiction is a Uniform Probate Code jurisdiction. The South Carolina Probate Code provides that one of the policies of the Probate Code is "to make uniform the law among the various jurisdictions." S.C. Code Ann. § 62-1-102(b)(5). For this reason, the Montana Supreme Court's opinion in Estate of Strange, 184 P.3d 1029 (Mont. 2008) is instructive as precedent. Montana's Probate Code, like South Carolina's Probate Code, is based on the Uniform Probate Code.

In Estate of Strange , the Montana Supreme Court addressed the operation of its probate code territorial jurisdiction statute, § 72-1-201(2), MCA. That statute reads:

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§ 72-1-201. Territorial application

Except as otherwise provided in this code, this code applies to:
(1) the affairs and estates of decedents, missing persons, and persons to be protected in this state;
(2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state; and
(3) incapacitated persons and minors in this state.

This is Montana's version of S.C. Code Ann. § 62-1-301.

In Estate of Strange, the decedent owned real property in Arizona and Pennsylvania and had never resided in Montana. His son lived in Montana, and the decedent periodically visited his son in Montana. The decedent owned a "small amount of personal property" left with his son in Montana, including fishing gear, a rifle, and tools, all of minimal value. The decedent also had a bank account in Montana holding less than $10.00. The decedent's son, the Montana resident, was the decedent's attorney-in-fact pursuant to a power of attorney, and performed some asset management duties for his father from Montana. The son commenced the probate estate in the Montana court and was appointed personal representative pursuant to his nomination in the decedent's last will. The decedent's spouse subsequently filed a motion to dismiss the son's application and appointment arguing that the Montana court "lacked both venue and jurisdiction" under Montana statutes 72-3-112 and 72-1-201. The lower court granted the motion to dismiss on the ground that the decedent's assets in Montana were of small value and did not establish a significant connection to the State of Montana. On appeal, the Montana Supreme Court reversed the lower court because:

1. the statute [72-3-112, MCA] does not require that a decedent have a certain type or amount of property in Montana, and it does not require that the property in Montana be

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"substantive" or have a "significant connection" to Montana;

2. the probate code venue statute, 72-3-112, MCA (S.C. Code Ann. § 62-3-201) pertains to the propriety of a given county in Montana for probating a decedent's estate, and issues of venue do not include the propriety of Montana as a state to probate a decedent's estate.

3. the question of whether Montana is a proper state to open a probate estate is governed by its territorial jurisdiction statute, 72-1-201, MCA, and not by the venue statute.;

4. the probate code allows for multiple probate proceedings to be initiated in various states where a decedent had property, and allow for an initial filing in Montana if a decedent owned property there, followed by ancillary probate proceedings in other jurisdiction when necessary.

The facts and law in Estate of Strange are sufficiently analogous to the circumstances presented herein to cause the reasoning of the Montana Supreme Court, when applied to the facts of this case, to support a determination that this Court has territorial jurisdiction of the Tucker estate pursuant to S.C. Code Ann. § 62-1-301.

Undue Influence. Petitioner's third cause of action challenges the last will on the ground of undue influence. The specific grounds pled in the Petition are: that the decedent did not draft the document (¶ 31 a); that the document's author and the witnesses will benefit from the decedent's estate (¶ 31 b) and that the document's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (¶ 31 c).

In opposition to the motion for summary judgment, Petitioner offered deposition testimony of a Westminister Towers social worker who stated that on February 5, 2012 that Mr. Tucker was "cognitively clear" and talked about a will and leaving money to a "little girl who he

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loved very much" and about not including unidentified nieces and nephews in his will. Neither the little girl nor the nieces and nephews were identified by name or by a description to definitively identify who was being referred to. There was deposition testimony that family members restricted visitation by Brenda Snow, a care giver with whom Mr. Tucker had a short term relationship and whom the family and hospital staff suspected of ill treatment of Mr. Tucker. The restricted visitation occurred in a Charlotte, North Carolina hospital approximately one and one-half months prior to the execution of the January 14, 2012 last will.

Ben Smith, Mr. Tucker's attorney-in-fact, testified at deposition that on the advice of Mr. Tucker's attorney he tore up a different will of Mr. Tucker's and could not remember if he so informed Mr. Tucker.

The scrivener who wrote the subject last will in her handwriting, Margaret Kelly, was Mr. Tucker's niece by marriage and was named in Mr. Tucker's Declaration of a Desire for a Natural Death as his agent to enforce and/or revoke the declaration.

Undue influence 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 for support of the act; it must be such influence as could not be resisted; that it was done merely for the sake of peace; so that motive was tantamount to force and fear. Calhoun v. Calhoun, 290 S.E.2d 415 (S.C. 1982). A showing of general influence is not tantamount to undue influence. Dixon v. Dixon, 608 S.E.2d 849 (S.C. 2005); Mock v. Dowling, 222 S.E.2d 773 (S.C. 1976). Any reasonable influence obtained by acts of kindness is not undue influence. Smith v.Whetstone, 39 S.E.2d 127 (S.C. 1946) ("It is not influence merely, but undue influence, that is always alleged--something excessive and

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unlawful. It is not the influence of friendship or affection that can be complained of; nor the influence of argument or entreaty, nor the impression made by kindness or prudence, nor even the effect wrought by servile compliance or mean endurance of wrong. It must be something which destroys free agency [,]" citing Means v. Means, 5 Strob. 167, 36 S.C.L. 86). It is elementary that the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relatives or by one who thinks the testator used bad judgment or was misled. Mock v. Dowling, supra.

To justify the setting aside of a last will or power of attorney on the ground of undue influence, it must be shown that the grantor was unquestionably susceptible to undue influence as a result of old age, mental weakness, or some other cause, and there must be some clear evidence of opportunity and disposition on the part of the grantee or someone in his behalf to exercise such influence. Atkinson v. Belser, 255 S.E.2d 852 (S.C. 1979); Hemingway v. Small, 324 S.E.2d 335 (S.C. App. 1984).

For a contestant to meet the burden of proof for undue influence with only circumstantial evidence, the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subject to that of some other person so that the last will is that of the latter and not of the former. Byrd v. Byrd, 308 S.E.2d 788 (S.C. 1983). Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence to defeat the motion for summary judgment because the inquiry involved in a summary judgment motion on undue influence necessarily implicates the substantive evidentiary standard of proof the would apply at trial. Russell v. Wachovia Bank, 578 S.E.2d 329 (S.C. 2003.) (summary judgment in favor of the will's proponents and against the

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contestant's challenge on undue influence grounds was affirmed). Clear and convincing evidence means:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confession as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Anonymous (M-156-90) v. State Bd. of Medical Examiners, 473 S.E.2d 870 (S.C. App. 1996). Where the evidentiary standard is clear and convincing, as it is for undue influence, courts have greater discretion to treat the non-moving party's submissions as too insubstantial to overcome summary judgment. Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801 (S.C. 2009).

Being guided by the law set out above, the evidence and inferences to be drawn from that evidence do not, in the context of the summary judgment proceedings, clearly and convincingly create an issue of fact in regard to undue influence. With particular reference to the grounds alleged by the Petitioner, there is no requirement in the law that a testator must draft (handwrite or type) his own last will. The will must be in writing, S.C. Code Ann. § 62-2-502 (1), but who reduces it to writing is not addressed in the probate code. Merely agreeing to serve as the scrivener does not constitute undue influence in the absence of evidence of threat, force or coercion.

With respect to the argument that the scrivener benefitted from the will because she is named as a devisee, this raises the question whether a rebuttable presumption of undue influence arose. Professor Karesh's teaching notes say that there is no clear-cut holding in South Carolina that a will drawn by a beneficiary named in the will raises the presumption that the will was the

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result of undue influence. Coleman Karesh, Wills 25 (1977). The general common law appears to be that when a person who benefits from a will also engages in drafting the will, a rebuttable presumption of undue influence arises and shifts the burden to the proponent of the will to show that the will is not the product of undue influence. 3 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 29.95 (Bowe-Parker rev. 1960). This principle of law is illustrated in Pyle v. Sayers, 39 S.W.3d 774 (Ark. 2001). However, there are facts that preclude operation of the presumption. 3 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 29.97 (Bowe-Parker rev. 1960). Those facts include: (a) where the beneficiary who draws the will bears such a relation to the testator that such assistance seems natural, and the facts of execution do not otherwise suggest undue influence; (b) where the beneficiary who draws the will does so at the request of the testator, and because of her desire to carry out the testator's wishes; and (c) when the beneficiary is given no more in the will than other relatives who are related to the testator in the same degree. All of these exceptions apply in this case, but if any one of them is established, the presumption is not triggered. See 79 Am.Jur.2d Wills §378 in which it is said that a presumption of undue influence does not arise when the beneficiary who prepared the will acted at the request of the testator. The three persons who were then in the room with the decedent all confirmed that the decedent first raised the subject of his will and that Margaret Kelly wrote the will at the decedent's request and according to what decedent said he wanted in it. Other authorities holding that a presumption of undue influence does not arise in this circumstance are: Ritchey v. Jones, 97 So. 736 (Ala. 1923) (beneficiary drew the will in accordance with the testator's instructions); Sterling v. Dubin, 126 N.E.2d 718 (Ill. 1955) (testator dictated will to private secretary [who was a non-family beneficiary of the will] who

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transcribed it); In re Parker, 80 S.E. 1057 (N.C. 1914) (beneficiary participated in the execution of the will by summoning the attorney at the request of the testator); Soumie v. McLean, 382 P.2d 1 (Or. 1963) (It is to be expected that a testator will leave his estate to those in whom he trusts and who he infers will dispose of it wisely. It is also natural that when he requires assistance in the preparation of his will he may consult those very persons, that is, those in whom he has confidence. To impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence would in many instances defeat the will rather than probate it); Logan's Estate, 45 A. 729 (Pa. 1900); In re Holiday, 327 P.2d 456 (Okla. 1958).

Additionally, and alternatively, if such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing. In a summary judgment context, a rebuttable presumption raised by the motion's opponent can be rebutted by evidence offered by the motion's proponent. Bell v. Progressive Direct Ins. Co., 757 S.E.2d 399 (S.C. 2014). In Kitsap Bank v. Denley, 312 P.3d 711 (Wash.App. 2013) the Washington Court of Appeals held that a presumption of undue influence standing alone cannot defeat a summary judgment motion where undue influence must be proven by clear and convincing evidence and evidence in rebuttal is offered.

The third ground for undue influence alleged by Petitioner is that the will's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. The only evidence of restricted visitation was the restricted visitation for Brenda Snow, a care giver with whom Mr. Tucker had a short term relationship and whom the family and hospital staff suspected of ill treatment of Mr. Tucker. The restricted visitation occurred in a Charlotte, North Carolina hospital; was implemented by the hospital staff; all

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happening during Mr. Tucker's hospitalization - approximately one and one-half months prior to the execution of the January 14, 2012 last will.

The Court finds and concludes that the evidence and inferences therefrom do not clearly and convincingly create an issue of fact with respect to undue influence. No evidence was presented by the Petitioner as to restriction of visitation other than Brenda Snow several weeks prior to the execution of the last will; no evidence was presented of mental infirmity other than a vague and general diagnosis of mild dementia; there was no evidence that Mr. Tucker requested to revise his will; there was no evidence that concerns were expressed by Mr. Tucker to disinterested third parties, who apparently had unfettered access to Mr. Tucker, about Respondents' treatment of him or about the powers of attorney he executed naming Respondents as his agents. There was no evidence of force or threat by Respondents or others which substituted the judgment of the proponents of the will for Mr. Tucker's judgment and which overbore his testamentary intent, either at the time of the execution of the will or at any other time. The evidence before the Court shows that any influence that may have impacted Mr. Tucker's testamentary intent as expressed in his January 14, 2012 last will was within legal boundaries and does not constitute the type or extent of influence heretofore determined by the courts to be required for a finding of undue influence.

Testamentary Capacity. Petitioner's fourth cause of action alleges that Mr. Tucker lacked testamentary capacity when the last will was executed.

To make a will, the law requires that a person must be of sound mind and not be a minor. S.C. Code Ann. §62-2-501. The mental capacity necessary to meet the requirements of a sound mind is tested by (1) the ability of the testator to know his estate, (2) the objects of his

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affectations, and (3) to whom he wishes to leave it. Hellams v. Ross, 233 S.E.2d 98 (S.C. 1977); In re Estate of Weeks, 495 S.E.2d 454 (S.C. App. 1997). The test for mental capacity regarding wills is different from the mental capacity required for other transactions. Ordinarily, it requires less capacity to make a will than to make a contract or deed. McCollum v. Banks, 50 S.E.2d 199 (S.C. 1948). Mental capacity relates to the time of the execution of the will. If the decedent had capacity at the time of the execution of the will, a subsequent loss of capacity will not invalidate the will, and if he lacked capacity at an earlier time but possessed capacity at the time of execution of the will, the will is good. Coleman Karesh, Wills 23 (1977); McCollum v. Banks, supra. Where the contestants make a showing of insanity that is general or chronic, it is presumed that the condition continues, and it is incumbent on the proponents of the will to show that it was made during a lucid interval. Coleman Karesh, Wills 23 (1977). However, where the evidence shows that the mental deficiency is not permanent or chronic, the contestant has the burden of showing the existence of the impairment at the time of will execution and that the diminished capacity affected the execution of the will. Curry v. Sutherland, 614 S.E.2d 756 (Ga. 2005); In re Estate of Marsh, 2011 Ohio 5554 (Ohio App. 2011); Keasler v. Estate of Keasler, 973 S.W.2d 213 (Tenn.App. 1997.)

The evidence submitted to the Court revealed no dispute about the facts that Mr. Tucker may have been suffering from mild dementia, that he mentioned the disposition of his estate in a previous will, or that he dictated the handwritten will that is at issue herein. Respondents offered the deposition testimony of two physicians who interacted with Mr. Tucker in the emergency room very close in time to when the last will was dictated and signed.

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Dr. Jason Ratterree was the emergency room physician who was trying to find an explanation for decedent's loss of consciousness and who ordered the CT scan that revealed the abdominal aneurysm and who explained the aneurysm to the decedent. In relevant part, Dr. Ratterree testified at deposition as follows:

Q: All right. Let's start on page two, history of present illness, and I'll give you a second to glance over that if you want, if you want to, if it helps you.

A: Okay. I'm ready.

Q. All right. It says "The initiation of the medical screen-in exam January the 14th, 2012, . 1915 or 7:15 p.m., is that correct?

A: Correct.

Q: So would that have been generally the first contact you had . . . .

A: That's the minute I saw him.

Q: . . . . with Mr. Tucker? All right. And then when it says medical and surgical history obtained, did you, did you get this from Mr. Tucker?

A: What that is I order to start an HPI, there's some things you check on the record to get the computer to progress forward. You do them all, but it's, it's something that you do in the course of the whole visit, but it's printed up front.

Q: Okay. All right. Down at the bottom there, page two, history of present illness, you have several different components, I guess, of the exam, head, eyes, neck, cardio, on and on, and then you get over to the top of page three, there's an entry for psychiatry. Do you see that?

A: Correct.

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Q: And this would have been an entry that, that you made?

A: Correct.

Q: And it says what for the record?

A: "oriented in time, place, and person. Grossly appropriate mood and affect."

Q: All right. Now you as an emergency room physician, tell me what that means in layman's terms as far as his mental status.

A: He was totally normal.

Q: So he was competent?

A: He knew where he was at that time and did not appear to be having any abnormal behavior and was conversational with me.

Q: All right. So does this reflect your opinion at the time based on your interaction with him?

A: Yes.

Dr. Magdaline Marfo, a hospitalist at Piedmont Hospital, interviewed Mr. Tucker on January 14, 2012 at approximately 10:38 pm in the emergency room when Mr. Tucker was in the process of being discharged from the ER and being admitted to the hospital. She was discussing directly with Mr. Tucker his medical history and she testified at deposition in relevant part:

Q: Do your records reflect that anyone else was in the room with you other that you and Mr. tucker?

A: No. My records don't reflect that, no.

Q: All right. And do you have a recollection after having looked at your record of there being anybody else in the room?

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A: No.

Q: If a third party had been in the room and that third party was answering your questions for Mr. Tucker, would your record disclose that fact?

A: Yes.

Q: All right. So if there is no mention of a third party providing all this information to you, what does that mean to you if your record doesn't say that?

A: It means that the information was given to me by the patient himself.

....

Q: And then I want you to go down to the last entry there under physical examination under central nervous system. Is this [sic] a currently awake oriented answering all questions appropriately, is that an entry that you made based on your conclusions?

A: Yes.

Q: To a reasonable degree of medical certainty, those were your opinions at the time of Mr. Tucker's neurologic state or mental state; is that a fair statement?

A: Yes.

....

Q: Based on your recollection or your record or both, was Mr. Tucker able to effectively communicate his medical history with you?

A: Yes.

....

Q: Was Mr. Tucker able to follow your instructions and do what you asked him to do with respect to all the various physical examination components?

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A: Yes.

....

Q: Was there anything about Mr. Tucker's speech that caused you to question his mental status?

A: No.

....

Q: Was his overall affect and demeanor appropriate in your opinion under the circumstances that existed?

A: Yes.

The Petitioner offered the fact that Mr. Tucker's will was drafted by a family member in the emergency room after Mr. Tucker received news of a potentially fatal aneurysm, a circumstance not disputed by the Respondents and not indicative of a lack of testamentary capacity.

Under South Carolina law the threshold standard for testamentary capacity is low. South Carolina case law is replete with courts' determinations that a testator has capacity in situations much more egregious than Mr. Tucker's. See In Re Estate of Weeks, supra., in which the court stated that a person who has been deemed incapacitated to the extent that a guardian and/or conservator has been appointed by the court is not, by that fact alone, lacking testamentary capacity. See also Hairston v. McMillan, 692 S.E.2d 549 (S.C.App. 2010) in which a testator suffered with renal failure, congestive heart failure, cirrhosis of the liver, atherosclerotic heart disease and cerebral edema. He was discharged from the hospital on February 24 and signed a last will on February 27. On February 24, the day he was discharged from the hospital, his

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mental status was assessed as "confused with some speech and oriented to person, but not place and time." On February 27, the day the last will was signed, a social worker reported that "Decedent was confused when he attempted to provide a life history." A medical expert who reviewed the Decedent's medical records, testified that based on the records the Decedent was not competent. Notwithstanding this evidence, and based on testimony of those persons who were actually present when the will was signed, the trial judge found the testator to have had testamentary capacity. The trial court was affirmed on appeal, driven primarily by the fact that, as the Court of Appeals phrased it:

> 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),

and because of "the **limited requirements** for testamentary capacity." (Emphasis added.) Just because there may have been a diagnosis of "mild dementia" sometime in Mr. Tucker's past, and the word "dementia' appears in a medical record, that does not translate into lack of testamentary capacity. From the Weeks opinion:

> Not every weakness incident to the ravages of age unfits a person for making a will. So, an aged person is not incapacitated by failing or defective memory, or partial loss of memory, absent-mindedness, nervousness, failure to recognize old friends, relatives, or members of the testator's family, inability to recognize acquaintances, a liking for dwelling on happenings of the past, pain and suffering, vacillating judgment, childishness, untidy habits, slovenliness or untidyness [sic] in dress, eccentricities or peculiarities, as in habit or speech, even though they may indicate a failing mentality, or even delusions or hallucinations **if they do not affect the execution of the will....** (Emphasis added.).

Other statements of this principle include: In re Estate of Harms, 149 P.3d 557 (Mont. 2006) (mere affliction with Alzheimer's not enough to establish lack of capacity); Hanson v.

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McNamara, 2011 Mich.App. LEXIS 198 (Jan. 27, 2011) (noting that a diagnosis of Alzheimer's disease, alone, is not dispositive of testamentary capacity); Curry v. Sutherland, 614 S.E.2d 756 (Ga. 2005) (evidence insufficient to show 86 year old lacked capacity to execute will, despite word "dementia" in medical records; word did not indicate diagnosis or that testator suffered mental condition affecting mental capacity at the time of execution of the will); In re Estate of Marsh, 2011 Ohio 5554 (Ohio App. 2011) (proponents of last will were granted summary judgment on the issue of testamentary capacity notwithstanding that the contestant presented evidence that the testator had been diagnosed with Alzheimer's disease, struggled with substantial cognitive impairment, and doctors' statements recorded that testator needed assistance in everyday life, because a contestant must also show how those conditions affected the testator and must show that the condition actually affected the testator's capacity to execute the will); Keasler v. Estate of Keasler, 973 S.W.2d 213 (Tenn.App. 1997) (proponent of the contested last will was granted summary judgment, notwithstanding contestant's evidence of the testatrix' declining mental faculties and failure to recognize family members, because contestant's evidence showed that his mother's condition varied from day to day, but the evidence did not address capacity on the date the will was executed.)

Petitioner's showing, at best, was that Mr. Tucker may have been suffering with mild dementia on January 14, 2012, and that his mental status fluctuated, but Petitioner's showing did not address Mr. Tucker's capacity at the time of the will's dictation and execution. Respondents' evidence through the hospital physicians, and other deposed witnesses who were there at the time, strongly supports a finding of competency. Petitioner's evidence failed to address the critical issue of Mr. Tucker's mental capacity at the time he dictated and signed his will.

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Fraud. In her fifth cause of action Petitioner alleges that the will is invalid because of fraud. However, the only allegations of fraud are that the decedent did not draft the document (¶ 35 a) and that if the decedent did "make a mark" on the document, it did not appear to be a testamentary document when he made a mark. (¶ 35 b). Common law fraud in South Carolina requires proof of nine elements: (1) a representation, (2) the falsity of the representation, (3) the materiality of the representation, (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity, (5) the speaker's intent that the representation be acted on by the person hearing the representation, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §18-2. Each element must be proven by clear, cogent and convincing evidence. The failure to prove any element of fraud is fatal to a recovery for fraud. Id. As noted previously herein, where the evidentiary standard is clear and convincing, as it is for fraud, courts have greater discretion to treat the non-moving party's submissions as too insubstantial to overcome summary judgment. Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801 (S.C. 2009).

Petitioner did not present facts to clearly and convincingly show or prove each element of fraud. Additionally, Petitioner did not present evidence that Mr. Tucker was mistaken as to what he was signing.

For the reasons stated above, it is Ordered that:

a. Respondents' motion for summary judgment is granted.

b. Petitioner's Petition for Formal Testacy and Appointment is dismissed.

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c. Respondents' Counterclaim for Formal Testacy and Appointment is granted, and the appointment of the Respondents as co-personal representatives is formally granted.

d. The decedent's Last Will dated January 14, 2012 is formally admitted to probate.

e. It is no longer necessary that the Personal Representatives use a restricted account, and the previously-ordered restricted account may be closed.

IT IS SO ORDERED.

Carolyn W. Rogers
Judge of Probate

York South Carolin
February 2, 2015

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

FILED RECEIVED
2014 APR 14 AM 9:59
JUDGE OF PROBATE
YORK COUNTY, SC

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Order Denying Motion for Temporary Restraining Order and Granting Motion for Restricted Account in Lieu of Bond

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Petitioner's Motion for Temporary Restraining Order and to require the Personal Representatives to post bond was heard on March 26, 2014. Attending were Petitioner's attorney, Syretta Anderson; Respondent Co-Personal Representatives; and the Personal Representatives' attorney Mike Brackett. Although captioned as a Motion for Temporary Restraining Order, Petitioner's Motion is actually one for a preliminary or temporary injunction. A temporary restraining order is an order granted, usually ex parte, to maintain the subject of the controversy in status quo until a hearing can be held on the motion for a temporary injunction. 43 C.J.S. Injunctions § 10. Here, a hearing is being held prior to any order going into effect; consequently, this is a hearing for a temporary or preliminary injunction.

An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (S.C. 2004). To obtain an injunction, the

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plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). A preliminary injunction should be issued if the plaintiff shows that he or she will (1) suffer irreparable harm if the injunction is not granted, (2) is likely to succeed on the merits of her claim, and (3) there is no adequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (S.C. 2004).

The purpose of an injunction is the preservation of the status quo. A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 457, 626 S.E.2d 34, 38 (Ct. App. 2005) (quoting MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003).

(1). Irreparable injury. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App. 2003).

(2) Success on the merits. When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the

existence of such a right." Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. MailSource, supra., (citing Transcon.Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Helsel v. City of North Myrtle Beach, 307 S.C. 29,32, 413 S.E.2d 824, 826 (1992).

(3). Inadequate remedy at law. The purpose of an injunction is the preservation of the status quo. MailSource, supra.. "A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." Id.

The Motion for Temporary Restraining Order [Preliminary Injunction] asks the Court to (1) restrain the personal representatives from acting on behalf of the estate until a merits hearing can be held; (2) enjoin the personal representatives from expending estate funds without prior court approval; (3) enjoin the personal representatives from disposing of and/or "controlling" any estate asset; (4) requiring the personal representatives to post bond, all because "Petitioner fears that Respondents will misuse and squander the assets of the estate."

An injunction will not issue to allay the mere fears and apprehensions of individuals. 43 C.J.S. Injunctions § 21. This principle of law has been expressed in several ways in reported decisions:

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Mere apprehension of injury is insufficient basis for an injunction, Fuller v. Fuller, 124 S.E.2d 741 (Ga. 1962); injunction will not be issued merely to allay fears and apprehensions or to soothe anxieties of a party, Travenol Laboratories, Inc. v. Turner, 228 S.E.2d 478 (N.C.App. 1976); injunction cannot be based on mere possibilities, McDowell v. Judges Ex Officio, 219 S.E.2d 713 (Ga. 1975); injunctive relief is premised on injury actually threatened and practically certain, not one anticipated and merely possible, Duke Power Co. v. City of High Point, 317 S.E.2d 699 (N.C.App. 1984).

South Carolina law is in accord:

> The party seeking relief must show clear legal or equitable right, and a well-grounded apprehension of immediate injury to set right, in order to justify the granting of an injunction. The injury must also be irreparable,--not to be repaired by money. If adequate reparation could be made, then he should resort to the law side of the court. **Mere apprehensions and fears of the plaintiffs, unstained by facts establishing their probability, will not constitute a sufficient ground to warrant interference by injunction.**

Segars v. Parrott, 31 S.E. 677 (S.C. 1898). (emphasis added).

Accordingly, based on the record before the court, the requisites for issuance of a preliminary injunction have not been shown.

Petitioner also moved to require the posting of a bond. The last will that has been accepted for probate and that is the subject of the Petitioner's challenge, expressly waives bond. The Court did not require a bond when the Petition for Informal Probate and Appointment was executed. The Co-Personal Representatives object to the expense of bond at the insistence of a person who, it is argued, is not an interested person under the circumstances presented and who is unwilling to reimburse the estate for the cost of the bond if and when the will contest proves to be unsuccessful.

The Court will exercise its discretion to strike a reasonable middle ground. The Co-Personal Representatives are not required to post a bond, but they will transfer all funds being held in the estate bank account into a restricted account within seven (7) days of receipt of this Order. A fully executed restricted account agreement will be filed with the court, and all estate deposits will be deposited into the restricted account, except for $5,000 that can be held in a non-restricted account for payment of estate administration expenses. Funds can be transferred from the restricted account into the non-restricted account only with prior court approval.

The Co-Personal Representatives shall file and serve an interim estate accounting within thirty (30) days of receipt of this Order, and provide a copy to counsel for the Petitioner.

IT IS SO ORDERED.

April 14, 2014

Carolyn W. Rogers, Probate Judge

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE PROBATE COURT

IN THE MATTER OF VINTON WILLIS TUCKER)

CASE NUMBER: 2012ES4600579

*** ONLY COMPLETE IF FILING PETITION FOR FORMAL TESTACY AND/OR APPOINTMENT**

* _____
Petitioner
vs.
* _____
_____
_____
Respondent(s) (if applicable)

APPLICATION FOR (Check any that apply)	PETITION FOR
INFORMAL	FORMAL
☒ PROBATE OF WILL	☐ TESTACY
☒ APPOINTMENT	☐ APPOINTMENT

Applicant/Petitioner:	BEN R. SMITH, JR.	MARGARET P. KELLY
Address:	2024 FILBERT HWY. YORK, SC 29745	1290 COLE AVE. ROCK HILL, SC 29732
Telephone:	803-448-5096	803-325-8445

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. Give your relationship to the decedent, if any, and your interest in this proceeding.
NAMED AS CO EXECUTORS IN THE WILL AND NIECE AND NEPHEW

2. Decedent Information

Name: VINTON WILLIS TUCKER
Last Four Digits of Social Security Number: ***-**-6749
Date of Birth: 8/16/1918
Date of Death: 5/12/2012
Age at Date of Death: 93
Domicile at date of Death: ROCK HILL YORK (County) SC (State)

3. Venue for this proceeding is proper in this county because:

☒ Decedent was domiciled in this county at date of death.

☐ Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.

☐ Decedent has a right to take legal action in this county because:

4.a. Names and addresses of deviseesin the Will, including dates of birth of minors If there are no minors, so state.

Name	Date of Birth	Addresses	Relationship to Decedent
RUDOLPH PURSLEY		855 MEADOWLARK DR., ROCK HILL, SC	NEPHEW
ELNA PURSLEY DEVINNEY		1429 DEVINNEY RD., YORK, SC 29745	NIECE
ADA FORD PURSLEY		8 KNOB CREEK COURT, GREER, SC 29651	NIECE IN LAW
CAROLYN M. NOVAK		105 ESCAMBIA LANE #807, COCOA BEACH, FL 3293	NIECE

(use additional sheet if necessary)

4.b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minorsf there are no minors, so state. Intestate heirs are the persons who would inherit if the decedent left no will.

Name	Date of Birth	Addresses	Relationship to Decedent
MARGARET DUDLEY		38 RESERVOIR ROAD, HOULTON, ME 04730	NIECE
WAYNE SCOTT		38 RESERVOIR ROAD, HOULTON, ME 07430	NEPHEW
KEVIN SCOTT		38 RESERVOIR ROAD, HOULTON, ME 04730	NEPHEW

(use additional sheet if necessary)

5. Did decedent have any change of marital status or the birth or adoption of any children after execution of the Will, if one exists, or has any child of the decedent been born since his death, or is any birth of a child of the decedent anticipated? (This includes illegitimate children)

☒ NO ☐ YES If yes, please explain on page 3.

6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?

☒ NO ☐ YES If yes, please explain on page 3.

7. Has a guardian or conservator ever been appointed for this person?

☒ NO ☐ YES If yes, please explain on page 3.

8. Has a Personal Representative of the decedent been appointed prior to this date by a Court in this state or elsewhere?

☒ NO ☐ YES If yes, please state details, including name and address of such Personal Representative, on page 3.

9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?

☒ NO ☐ YES If yes, please state details, including name and address on page 3.

10. Have more than ten years passed since the decedent's death?

☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.

11. The decedent died with a personal estate of about the value of _____ and real estate of about the value of _____. (A full inventory and appraisment, form #350PC, must be filed within 90 days.) If decedent was a non-resident, please attach South Carolina Tax Commission form ET 101.

12. After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?

☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II.

II. IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the decedent's will:

- [x] The original is attached
- [ ] The original is in the Court's possession
- [ ] An authenticated copy of a will probated in another jurisdiction is attached
- [ ] An authenticated copy of a will not probated in another jurisdiction is attached
- [ ] The will is lost, destroyed, or otherwise unavailable; however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the will described above was validly executed?:

[x] YES [ ] NO If no, please explain on page 3.

3. The date of execution of the will was: 1/14/2012
codicil(s): _____

4. Are you aware of any instrument or document amending or revoking the will?

[x] NO [ ] YES If yes, please explain on page 3.

5. Have you exercised reasonable diligence to determine there is no instrument or document revoking the will?

[x] YES [ ] NO If no, please explain on page 3.

6. Do you believe the will defined in "1" above is the decedent's last will?:

[x] YES [ ] NO If no, please explain on page 3.

COMPLETE EXPLANATION(S) FOR QUESTIONS IN SECTION I AND II HERE.
(If more space is required, use additional sheet.)

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING.

1. The name(s) and address(es) of the proposed Personal Representative(s) is/are:

BEN R. SMITH, JR.	MARGARET P. KELLY
2024 FILBERT HWY.	1290 COLE AVE.
YORK, SC 29745	ROCK HILL, SC 29732

2. Priority for this appointment is:

- [x] named as Primary Personal Representative in Will
- [ ] named as Alternate Personal Representative in Will
- [ ] nominee of above Primary Personal Representative in Will
- [ ] nominee of above Alternate Personal Representative in Will
- [ ] surviving spouse of decedent who is devisee of decedent or nominee of said spouse
- [ ] other devisee of decedent (describe): _____ or nominee of said devisee
- [ ] surviving spouse of decedent or nominee of said spouse
- [ ] other heir of decedent (describe): _____
- [ ] creditor (Forty-five days after death must have passed), or nominee of creditor
- [ ] other (describe): _____

3. List below the names of any other persons, if any, having a prior or equal right of appointment (see priority above).

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief, and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 17 day of MAY 2012

Notary Public for South Carolina

My Commission Expires: 08-07-2017

Signature: _____

Name: BEN R. SMITH, JR.

Address: 2024 FILBERT HWY.
YORK, SC 29745

E-mail:

Telephone (O): 803-684-9996

(H): 803-448-5096

Signature: Margaret P. Kelly

Name: MARGARET P. KELLY

Address: 1290 COLE AVE.
ROCK HILL, SC 29732

E-mail:

Telephone (O):

(H): 803-325-8445

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be [x] GRANTED [ ] DENIED informally this 17th day of May 2012.

Carolyn W Rogers

CAROLYN W. ROGER PROBATE COURT JUDGE

ORDER OF FORMAL TESTACY

On hearing of the above petition, this Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.

The Court further finds that

☐ the decedent died intestate. The heirs are:

☐ the decedent died testate. IT IS HEREBY ORDERED, that the Last Will and Testament of the above-named decedent, dated , be admitted formally to probate.

Executed this day of ,

CAROLYN W. ROGERS, Probate Court Judge

SEE ATTACHED ORDER

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED, that the above Application/Petition for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this 17th day of May , 2012 .

Carolyn W Rogers

CAROLYN W. ROGERS , Probate Court Judge

QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Signature: [signature]
Name: BEN R. SMITH, JR.
Address: 2024 FILBERT HWY.
YORK, SC 29745
E-mail:
Telephone (O): 803-684-9996
(H): 803-448-5096

Signature: Margaret P. Kelly
Name: MARGARET P. KELLY
Address: 1290 COLE AVE.
ROCK HILL, SC 29732
E-mail:
Telephone (O):
(H): 803-325-8445

Attorney:
Address:
E-Mail:
Telephone (O):

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Additional Devisee and Heirs

IN THE MATTER OF VINTON WILLIS TUCKER,

CASE NUMBER 2012ES4600579

4a. Names and address of devisees, including dates of birth of minors

NAME	DOB	ADDRESS	RELATION
MARTHA DAVIS		103 COVERIDGE LANE, LONGWOOD, FL 32779	NIECE
MARGARET P. KELLY		1290 COLE AVE., ROCK HILL, SC 29732	NIECE
ELIZABETH HAIGLER		139 CASTLE ROAD, DALTON, GA 30720-8048	NIECE
BERNIE ARMSTRONG		7037 LAWYERS RD., CHARLOTTE, NC 28227	NEPHEW
JOHNNA YOUNG		256 KINGS GRANT RD., LUGOFF, SC 29078	NIECE
HENRY M. FARIS		318 HENDERSON RD., GREENVILLE, SC 29607	NEPHEW
EDWARD MOORE		5904 MUIRFIELD DR., GREENSBORO, NC 27405	NEPHEW
BEN R. SMITH, JR.		2024 FILBERT HWY., YORK, SC 29745	NEPHEW

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STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF: YORK)
) INVENTORY AND APPRAISEMENT
IN THE MATTER OF: VINTON WILLIS TUCKER) CASE NUMBER: 2012ES4600579

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JUDGE OF PROBATE
YORK COUNTY, SC

☒ ORIGINAL

☐ SUPPLEMENTAL #

Personal Representative (s): Ben R. Smith, Jr. & Margaret P. Kelly

Last Four Digits of Decedent's Social Security Number: XXX-XX-6749 Was there a will? ☒ YES ☐ NO

Decedent's Date of Death: May 12, 2012 Domicile at death: York (county) SC (state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisement of all real and personal property of this estate so far as the undersigned is informed: that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 5 day of January, 2013

Robert H. Beaty
Notary Public for South Carolina
My Commission Expires: 4-25-2017

Signature: Margaret P. Kelly
Name: Margaret P. Kelly
Address: 1290 Cole Avenue
Rock Hill, SC 29732
E-Mail:
Telephone (O):
(H): 803.328.9945

Attorney:
Address:
E-Mail:
Telephone:

Signature:
Name: Ben R. Smith, Jr.
Address: 2024 Filbert Highway
York, SC 29745
E-Mail:
Telephone (O):
(H):

For estates of decedents, the gross fair market valuation of all assets, regardless of situs, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental inventory should be utilized for correcting, adjusting or adding to an original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be indicated with the item or items he/she appraised.

Within ninety (90) days following appointment, a copy of the inventory and appraisement shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.

RECAPITULATION

	Non-Probate	Probate
Schedule A - Real Estate	$	$ 279,000.00
Schedule B - Stocks and Bonds		483,550.00
Schedule C - Notes Due Decedent and Cash		2,035,313.00
Schedule D - Insurance on Person's Life: Part 1 - Payable to Estate		0.00
Part 2 - Payable to Beneficiary	0.00	
Schedule E - Jointly Owned Property		0.00
Schedule F - Other Miscellaneous		23,000.00
Other Assets Payable to Estate		
Schedule G - Transfers during Decedent's life		0.00
Schedule H - Powers of Appointment	0.00	
Schedule I - Annuities and Retirement Accounts		13,558.00
TOTAL GROSS VALUE	$ 2,854,409.00	
ENCUMBRANCES	(0.00)	
TOTAL NET WORTH	$ 2,854,409.00	

NOTE: WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED.

SCHEDULE A - Real Estate (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description (Include county and state)	Tax Assessor's Fair Market Value for year of Decedent's Death	Appraised Value	Appraised Value of Decedent's Interest
1.	House & lot, 3119 Pinehurst Place,	306,400.00	279,000.00	279,000.00
	Mecklenburg County, NC; 28209			
	Tax Parcel 17509816; L14 BAM3534			

TOTAL SCHEDULE A
(also enter under recapitulation, page 1) $ 279,000.00

SCHEDULE B - Stocks and Bonds (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Face Value	Appraised Value
1.	Raymond James, Acct. 25617379		483,560.00

TOTAL SCHEDULE B
(also enter under recapitulation, page 1) $ 483,560.00

SCHEDULE C - Notes due to Decedent, and Money on hand and in banks (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Value
1.	First Citizens, CD	348,624.00
2.	First Citizens, ckg.	208.00
3.	Wells Fargo, CD	226,456.00
4.	SunTrust Bank, CDs	626,482.00
5.	SunTrust Bank, ckg.	59.00
6.	5th Third Bank, CD	528,430.00
7.	Bank of America, CD	325,048.00

TOTAL SCHEDULE C
(also enter under recapitulation, page 1) $ 2,055,313.00

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE D - Insurance (If none, so state.)

Part 1 - Life Insurance Payable to the Estate

Item No.	Description	Value

TOTAL PART 1
(also enter under recapitulation, page 1) $ 0.00

Part 2 - Life Insurance Payable to Beneficiaries

Item No.	Description	Beneficiary	Value

TOTAL PART 2
(also enter under recapitulation, page 1) $ 0.00

SCHEDULE E - Jointly owned Property (with right of survivorship) (If none, so state.)

NOTE: You must complete Schedule E if the Decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is included in the gross estate.

Percentage Includible:

1 - Joint interest held by decedent and spouse - the amount included is one-half (50%) of the value in all cases.

2 - Other joint interest - Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show that a part of the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

Item No.	Description	Joint Owner(s)	Percentage Includible	Appraised Value of Decedent's Interest

TOTAL SCHEDULE E
(also enter under recapitulation, page 1) $ 0.00

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE F - Miscellaneous Personal Property - (tangible personal property, employment bonus or award, interest in a partnership or unincorporated business, articles or collections having either artistic or intrinsic value, etc.) (If none, so state.) (For jointly owned property with right of survivorship, use schedule E.)

Item No.	Description	Value
1.	Household effects	5,000.00
2.	2005 Cadillac STS	18,000.00

TOTAL SCHEDULE F
(also enter under recapitulation, page 1) $ 23,000.00

NOTE: FOR SCHEDULES G, H, AND I, LIST VALUES ONLY IF PAYABLE TO ESTATE.

SCHEDULE G - Transfers During Decedent's Life - Transfers intended to take effect at death. United States Government Bonds "Payable on Death", Trust created by Decedent in which income for life was retained, power to revoke or other incidents of ownership retained, life insurance transfers. Lifetime transfers of real property in which decedent retains a life estate or other incidents of ownership.

Did Decedent make any transfers during lifetime as described above? ☐ YES ☒ NO

If "yes" please give date and type of transfer and list total amount payable to estate: (If more space is required, insert additional sheet of same size.)

TOTAL SCHEDULE G
(also enter amounts payable to estate under recapitulation, page 1) $ 0.00

(If more space is required, insert tax schedules or additional sheets of same size.)

STATE OF SOUTH CAROLINA.

IN THE PROBATE COURT

COUNTY OF YORK

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2013 MAY 10 PM 3:52
JUDGE OF PROBATE
YORK COUNTY, SC

MARY JEAN TUCKER SWIGER

SUMMONS

(Janet Loeffler, Carol DeHaven, Rebecca DeHaven as successors in interest)

Petitioner,

vs.

CASE NO. 2012 ES 4600579

BEN R. SMITH and MARGARET P. KELLY
(Personal Representatives of the Estate of Vinton Willis Tucker)

Respondent(s).

TO THE RESPONDENT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

Fort Mill, South Carolina

Petitioner/Attorney for Petitioner

Dated: May 10, 2013

Address: 2879 Highway 160 West #4322
Fort Mill, SC 29708

SCCA 401PC (9/11)

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STATE OF SOUTH CAROLINA

COUNTY OF: YORK

IN THE PROBATE COURT

FILED RECEIVED
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YORK COUNTY, SC

IN THE MATTER OF: ESTATE OF VINTON WILLIS TUCKER

CASE NUMBER: 2012 ES 4600570

*ONLY COMPLETE IF FILING PETITION FOR FORMAL TESTACY AND/OR APPOINTMENT

*MARY JEAN TUCKER SWIGER

(Janet Loeffler, Carol DeHaven, Rebecca DeHaven as successors in interest)

Petitioner

vs.

*BEN R. SMITH and MARGARET P. KELLY (Personal Representatives of the Estate of Vinton Willis Tucker)

Respondent(s) (if applicable)

APPLICATION FOR (check any that apply)

INFORMAL

- ☐ PROBATE OF WILL
- ☐ APPOINTMENT

***PETITION FOR** (check any that apply)

FORMAL

- ☒ TESTACY
- ☒ APPOINTMENT

Applicant/Petitioner: Mary Jean Tucker Swiger
Address: 28302 Burrell Drive, Unionville, VA 22567
Telephone: 540-854-6065

Applicant/Petitioner: Mary Jean Tucker Swiger
Address: 28302 Burrell Drive, Unionville, VA 22567

I ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. Give your relationship to the decedent, if any, and your interest in this proceeding.

Decedent is my brother and I am his sole surviving sibling.

2. Decedent Information

Name: Vinton Willis Tucker
Last Four Digits of Social Security Number: XXX-XX-6749
Date of Birth: August 16, 1918
Date of Death: May 12, 2012
Age at date of death: 93
Domicile at date of death: Mecklenburg (county) (state)

3. Venue for this proceeding is proper in this county because:

☐ Decedent was domiciled in this county at date of death.
☐ Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.
☒ Decedent has a right to take legal action in this county because:
Respondents have intitialed informal probate in York County using invalid document.

4.a. Names and addresses of devisees in the Will, including dates of birth of minors. If there are no minors, so state.

Name	Date of Birth	Address	Relationship to Decedent

(use additional sheet if necessary)

4.b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minors. If there are no minors, so state. Intestate heirs are the persons who would inherit if the decedent left no will.

Name	Date of Birth	Address	Relationship to Decedent
Margaret Scott		Houlton, Maine	Niece
Wayne Scott		Houlton, Maine	Nephew
Kevin Scott		Houlton, Maine	Nephew
James P. Tucker III		Fredericksburg, VA	Nephew

(use additional sheet if necessary)

5. Did decedent have any change of marital status or the birth or adoption of any children after execution of this will, if one exists, or has any child of the decedent been born since his death, or is any birth of a child of the decedent anticipated? (This includes illegitimate children.)

☒ NO ☐ YES If yes, please explain, on page 3

6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?

☒ NO ☐ YES If yes, please explain, on page 3.

7. Has a guardian or conservator ever been appointed for this person?

☒ NO ☐ YES If yes, please explain on page 3

8. Has a personal representative of the decedent been appointed prior to this date by a Court in this state or elsewhere?

☐ NO ☒ YES If yes, please state details, including name and address of such Personal Representative on page 3.

9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?

☒ NO ☐ YES If yes, please state details, including names and addresses on page 3

10. Have more than ten years passed since the decedent's death?

☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.

11. The decedent died with a personal estate of about the value of $2,500,000.00 and real estate of about the value of $300,000.00. (A full inventory and appraisement, Form #350PC, must be filed within 90 days.) If decedent was non-resident, please attach South Carolina Commission form ET-101.

12. After the exercise of reasonable diligence, are you aware of any unrevoked Will and/or Codicil(s), other than the one(s) attached hereto, relating to property in this State?

☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II

IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the decedent's Will:

☐ The original is attached
☐ The original is in the Court's possession
☐ An authenticated copy of a Will probated in another jurisdiction is attached
☐ An authenticated copy of a Will not probated in another jurisdiction is attached
☐ The Will is lost, destroyed or otherwise unavailable, however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the Will described above was validly executed?

☐ YES ☒ NO If no, please explain on page 3.

3. The date of execution of the Will was: ____
Codicil(s):

4. Are you aware of any instrument or document amending or revoking the Will?

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☒ NO ☐ YES If yes, pleas

5. Have you exercised reasonable diligen
Will?

☐ YES ☒ NO If no, please e

6. Do you believe the Will defined in "1" a

☐ YES ☒ NO If no, please e

COMPLETE EXPLANATION (
(If more space

See attached.

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING

1. The name(s) and address(es) of the proposed Personal Representative(s) is/are:

Mary Jeanne Tucker Swiger

2. Priority for this appointment is

- ☐ named as Primary Personal Representative in Will
- ☐ named as Alternate Personal Representative in Will
- ☐ nominee of above Primary Personal Representative in Will
- ☐ nominee of above Alternate Personal Representative in Will
- ☐ surviving spouse of decedent who is devisee of decedent or nominee of said spouse
- ☐ other devisee of decedent, (describe) ____ or nominee of said devisee
- ☐ surviving spouse of decedent or nominee of said spouse
- ☒ other heir of decedent (describe) Sister of Decedent and sole surviving sibling
- ☐ creditor (Forty-five days after death must have passed), or nominee of creditor
- ☐ other (describe): ____

3. List below the names of any other persons, if any, having a prior or equal right of appointment (see priority above).

N/A

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the the facts set forth in the fo
undersigned's knowledge, information and belief, and hereby sub... Court's jurisdiction in this matter, and hereby sub...

...10... day of ... day of

Mary Jeanne Tucker Swiger

Name: Mary Jean Tucker Swiger
Address: 23302 Burrell Dr.
... MD 22547
E-mail: ...@aol.com
Telephone (O): ...
(H): (540) 854-6065

...Carolina...
...EXP: 2022...

NOTARY PUBLIC SOUTH CAROLINA

Signature: [signature]
by Name: [illegible]
Address: [illegible]
E-mail: [illegible]
Telephone (O): [illegible]
(H): [illegible]

Hawkins Gate Rd.
La Plata, MD 20646

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be ☐ GRANTED ☐ DENIED informally this ___ day of _____, 20 _____.

Probate Court Judge

ORDER OF FORMAL TESTACY

On hearing of the above petition, this Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.

The Court further finds that

☐ the decedent died intestate The heirs are:

☐ the decedent died testate. IT IS HEREBY ORDERED that the Last Will and Testament of the above-named decedent, dated , be admitted formally to probate

Executed this day of , 20

, Probate Court Judge

SEE ATTACHED ORDER

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above Application/Petition for appointment be granted upon the filing of a bond as appropriate, qualification, and acceptance.

Executed this day of , 20

, Probate Court Judge

QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Signature: Mary Jean Tucker Swiger
Name: Mary Jean Tucker Swiger
Address: 22[illegible] Overhill Dr.
[illegible] 2567
E-mail: maryjeanloeffler@aol.com
Telephone (O):
(H): 540-754-6065

City Hauling [illegible] Mary Jean Tucker Swiger
Carlisle, PA 20646 [illegible] Attorney for Mary Jean
Tucker Swiger
E-mail: [illegible]
Telephone (O): 240-587-1226
(H): 240 349-2573

Attorney: Peter [illegible]
Address: [illegible]
E-mail: pete[illegible]
Telephone (O): [illegible]

4(b) Intestate Heirs Continued

Thomas P. Tucker	Fredericksburg, VA	Nephew
John Cookman	Sterling, VA	Nephew
Mike Cookman	Chicago, IL	Nephew
Jill Cookman	Sterling, VA	Niece
Mary Jean Tucker Swiger	Unionville, VA	Sister

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2011 MAY 10 PM 3:52

IN THE PROBATE COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

MARY JEAN TUCKER SWIGER,
(Janet Loeffler, Carol DeHaven, Rebecca DeHaven as successors in interest)

Petitioner,

vs.

BEN R. SMITH and MARGARET P. KELLY (Personal Representatives of the Estate of Vinton Willis Tucker)

Respondents.

PETITION FOR FORMAL TESTACY AND TO SET ASIDE INFORMAL PROBATE

In re THE ESTATE OF VINTON WILLIS TUCKER.

In re THE ESTATE OF VINTON WILLIS TUCKER.

COMES NOW Petitioner, MARY JEAN TUCKER SWIGER, (hereinafter "Petitioner") as sister of the decedent, Vinton Willis Tucker, by and through the undersigned counsel, to petitions the Probate Court pursuant to S.C. Code Ann. §62-2-401 to Order that the decedent was not domiciled in South Carolina, died intestate, that the alleged Will submitted to Informal Probate by the Respondents is void, that the ongoing informal probate shall be set aside, that Ben R. Smith and Margaret P. Kelly (hereinafter "Respondents") be restrained from acting as co-personal representatives while this action is pending, and that a special administrator be appointed to serve while this action is pending. In support of this petition, Petitioner alleges the following:

THE PARTIES

1. Petitioner is the sole surviving sibling of the Decedent, Vinton Willis Tucker, (hereinafter "Decedent") and is a citizen and resident of Orange County, Virginia.

2. Upon information and belief, Respondent, Ben R. Smith, is a resident of York County, South Carolina.

3. Upon information and belief, Respondent, Margaret P. Kelly, is a resident of York County, South Carolina.

4. At the time of his death, Decedent was a patient in Westminster Towers, Rock Hill, South Carolina.

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JURISDICTION AND VENUE

5. This Court has jurisdiction of this matter pursuant to S. C. Code Ann. §62-1-302(a)(1) and in that this petition for Testacy challenges the ongoing Informal Probate initiated by the Respondents for Probate.

6. This Court has jurisdiction of this matter pursuant to S. C. Code Ann. §62-1-301 in that the Respondents are fiduciaries in control of the Decedent's property.

7. Venue is proper pursuant to S. C. Code Ann. §62-1-303(a) in that the Respondents have been appointed by the this Court as Personal Representatives in the Informal Probate of the Decedent's estate.

FACTS

8. Decedent died on May 12, 2012 and a document purporting to be his Last Will and Testament was submitted to probate on May 17, 2012 in York County, South Carolina.

9. At the time of his death the Decedent was a resident of Charlotte, Mecklenburg County, North Carolina.

10. At the time of his death, the Decedent had two living siblings, no living parents, and no children.

11. The Petitioner is the sole surviving sibling of the Decedent, has priority under S. C. Code Ann. §62-3-203, and is unaware of the existence of any unrevoked testamentary instrument in the Decedent's possession when he died.

12. The Decedent died on May 12, 2012, the Petition for Formal Testacy has been timely made, and the Petitioner has standing as the sole surviving sibling of the Decedent to bring this action.

FIRST CLAIM FOR RELIEF
(Lack of Jurisdiction Over the Decedent's Estate)

13. Petitioner incorporates all of the foregoing paragraphs as if set forth fully herein.

14. S. C. Code Ann. §§ 62-1-301 and 62-1-302, this Court only has jurisdiction over the Decedent's estate if, on May 12, 2012, the date of the Decedent's death, (i) Decedent was domiciled in South Carolina, or (ii) Decedent's property was located in South Carolina.

15. Upon information and belief, the Decedent owned no real property in South Carolina when he died on May 12, 2012.

16. Upon information and belief, the Decedent owned a vehicle that was registered in North Carolina when he died on May 12, 2012.

17. Decedent was born in Mecklenburg County, North Carolina and except for Military Service, resided in North Carolina his entire life.

18. The only real property owned by the Decedent is located in Mecklenburg County, North Carolina and was his domicile since the 1950s.

19. Prior to the Decedent's death, he communicated regularly, wrote regularly, and received his siblings and their children regularly as visitors at his residence in Charlotte, NC.

20. In 2010, the Decedent broke his hip in Mecklenburg County, North Carolina and spent a year in a nursing home in Mecklenburg County, North Carolina.

21. Upon information and belief, in 2011, the Decedent returned to his residence in Mecklenburg County, North Carolina and began to suffer symptoms of dementia.

22. Upon information and belief, sometime in late 2011 or early 2012, the Decedent was moved from Mecklenburg County, North Carolina to Westminster Towers in York County, South Carolina by the Respondents, their relatives, or their agents, but did not intend to change his residency.

23. Upon information and belief, on May 12, 2012 the Decedent was resident of North Carolina when died in South Carolina.

24. Upon information and belief, the Decedent is buried in Charlotte, North Carolina next to his predeceased spouse, Edith Pursley Tucker.

SECOND CLAIM FOR RELIEF

(The Document Does Not Comply with the S.C. Probate Code)

25. Petitioner incorporates all of the foregoing paragraphs as if set forth fully herein.

26. Upon information and belief, the document does not comply with S. C. Code Ann. §62-2-501 in that the Decedent did not make the alleged document.

27. Upon information and belief, the document does not comply with S. C. Code Ann. §62-2-502 in that the Decedent did not sign the document.

28. Upon information and belief, the document does not comply with S. C. Code Ann. §62-2-502 in that the document is not properly witnessed.

29. Upon information and belief, the document does not comply with S. C. Code Ann. §62-2-503 in that the document is not properly attested or self proved.

THIRD CLAIM FOR RELIEF

(Undue Influence)

30. Petitioner incorporates all of the foregoing paragraphs as if set forth fully herein.

31. Upon information and belief, Respondents are attempting to probate a will created under undue influence as evidenced by the following:

a. Upon information and belief, the person who drafted the document was not the decedent.

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b. Upon information and belief the document's author and witnesses will benefit from estate of the Decedent.

c. Upon information and belief the document's author and witnesses threatened the Decedent by withholding visitation from the Decedent.

FOURTH CLAIM FOR RELIEF
(Lack of Capacity)

32. Petitioner incorporates all of the foregoing paragraphs as if set forth fully herein.

33. Upon information and belief, Respondents are attempting to probate a Will created by the Decedent when he lacked capacity as evidenced by the following:

a. Upon information belief, the Decedent was a man of considerable wealth and had the resources to pay for an attorney to draft a legal North Carolina Will.

b. Upon information and belief, the Decedent was a patient in a nursing home when this document was drafted.

c. Upon information and belief, the Decedent suffered from dementia and senility when this document was drafted.

d. Upon information and belief, the Decedent was under the influence of prescription medications when this document was drafted.

e. Upon information and belief, at the time this document was drafted, the Decedent did not know his estate, the objects of his affections, and to whom he wished to give his property.

FIFTH CLAIM FOR RELIEF
(Fraud)

34. Petitioner incorporates all of the foregoing paragraphs as if set forth fully herein.

35. Upon information and belief, Respondents are attempting to probate a Will created under fraudulent circumstances as evidenced by the following:

a. Upon information belief, the Decedent did not draft this document.

b. Upon information and belief, that if the Decedent did make a mark on this document, it did not appear to be a testamentary document when he made a mark.

WHEREFORE, Petitioner complaining against Respondents named above prays for judgment against the Respondent as follows:

a. That this Court inquire into the matters alleged herein;

b. That this Court schedule a hearing on the merits; and

c. That this Court issue an order that the Decedent died as a resident of North Carolina.

d. In the alternative; that this Court issue an order as to the testacy of the Decedent;

e. That this Court set aside the ongoing informal probate;

f. That this Court determine the heirs of the Decedent's estate;

g. That this Court order removal of Respondents as co-personal representatives of the estate;

h. That this court appoint the Petitioner or her successors in interest as Personal Representative of the Decedent's estate;

i. That this Court order that the document submitted to probate by the Respondents is void;

j. That this Court order a special administrator to oversee the estate while this matter is pending;

k. That his Court order Respondents to repay the estate any fees paid to them for their services as co-personal representatives; and

l. For such other and further relief as this Court deems just and proper. such other and further relief as this Court de

This the 14 day of May, 2013.

This the 14 day of May, 2013.

NOSAL & JETER, LLP

NOSAL &

By: _____

Peter J. Nosal
2879 Hwy. 160 W. #4322
Fort Mill, SC 29708
(803) 351 – 3597
pete@nosaljeterlaw.com

Attorneys for Petitioner

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STATE OF SOUTH CAROLINA)
)
YORK COUNTY)

VERIFICATION

MARY JEAN TUCKER SWIGER, being duly sworn, says that she has read the foregoing Summons, Form Petition for Testacy and Appointment, AND Petition for Formal Testacy and to Set Aside Informal Probate and is familiar with the contents thereof, and that the same is true of her own knowledge and belief.

Mary Jean Tucker Swiger

Sworn to and subscribed before me, this

10 day of

Notary Public: South Carolina

My Commission Expires: 1-30-2022

[Notary Seal]

PETER J. NOLL
NOTARY PUBLIC
SOUTH CAROLINA

Sworn to and subscribed before me, this

13 day of

Notary Public: South Carolina

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STATE OF SOUTH CAROLINA | IN THE PROBATE COURT

COUNTY OF YORK | 2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v. | Answer and Counterclaim

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Respondents, answering the Petition herein, allege that they:

1. Any allegation not expressly admitted herein is denied.

As to the Form #300 Allegations

2. With respect to Section I, no. 1, admitted.

3. With respect to Section I, no. 2, admitted, except as to the allegation that decedent was domiciled in Mecklenburg County, NC at the time of his death, and that allegation is denied.

4. Only so much of the allegations in Section I, no. 3 is admitted as alleges that Respondents have initiated informal probate in this court. The remaining allegations are denied.

5. Respondents have no information about the persons identified in Section I, no. 4b, and therefore deny same.

6. Admit Section I, nos. 5, 6 and 7.

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7. In answer to Section I, no. 8, the answer to the supplemental Petition hereinafter is incorporated herein by reference.

8. Admit Section I, nos. 9 and 10.

9. Deny Section I, no. 11.

10. Admit Section I, no. 12.

11. Admit Section II, nos. 1 and 4.

12. Deny Section II, nos. 2, 5 and 6.

13. Section II, no. 3 does not require an answer.

14. Deny Section III, nos. 1, 2 and 3.

As to Petition for Formal Testacy and To Set Aside Informal Probate

15. Deny the first paragraph of the Petition and deny that the appointment of a special administrator is required.

16. Upon information and belief, admit 1.

17. Admit 2 and 3.

18. Deny 4 and further allege that the decedent was a resident of Westminster Towers in Rock Hill, SC.

19. Admit 5 and 6.

20. Admit 7 and further allege that venue is proper pursuant to S.C. Code Ann. §62-3-201(a).

21. Admit 8 except as to the Last Will being "purported" and as to that allegation, it is denied.

22. Deny 9.

23. Upon information and belief admit 10.

24. Deny 11.

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As to the First Claim

25. Admit 12 except the allegation that status as a sole surviving sibling itself establishes standing, and as to that allegation, it is denied.

26. In answer to 13, all allegations of this answer hereinabove stated are repeated and realleged herein.

27. Admit 14 and 15.

28. Admit 16.

29. Deny 17.

30. Deny 18 as alleged.

31. Deny 19.

32. Deny 20.

33. Admit only so much of 21 as alleges that the decedent returned to his home for a period of time and deny the remaining allegations of 21.

34. Admit only so much of 22 as alleges the move to Westminster Towers in late 2011 and deny the remaining allegations of 22.

35. Admit 23.

36. Admit 24.

As to the Second Claim

37. In answer to 25, all allegations of this answer hereinabove stated are repeated and realleged herein.

38. Deny 26, 27, 28 and 29.

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As to the Third Claim

39. In answer to 30, all allegations of this answer hereinabove stated are repeated and realleged herein.

40. Deny 31 and all subparts.

As to the Fourth Claim

41. In answer to 32, all allegations of this answer hereinabove stated are repeated and realleged herein.

42. Deny 33 and all subparts.

As to the Fifth Claim

43. In answer to 34, all allegations of this answer hereinabove stated are repeated and realleged herein.

44. Deny 35.

Counterclaim for Formal Testacy and Appointment

45. Respondents incorporate by reference the allegations of their Petition for Informal Testacy and Appointment.

46. Decedent's Last Will dated January 14, 2012, was validly created and executed and expresses the testamentary intent of the Decedent.

47. Said Last Will should be admitted formally to probate and the Respondents' informal appointments as co-personal representatives should be ratified and converted to formal appointments.

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Wherefore, having answered and counterclaimed, Respondents pray that the Court:

a. dismiss the Petitioner's challenge to the Decedent's Last Will dated January 14, 2012;

b. formally admit said Last Will to probate;

c. formally appoint the Respondents as co-personal representatives; and

d. grant such other relief as the Court deems just and proper.

B. Michael Brackett
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Attorney for Respondents

May 30, 2013

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JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE YORK COUNTY PROBATE COURT
Mary Jean Tucker Swiger, Petitioner, v. Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker, Respondents.	Case. No.: 2012-ES-46-0579 **REPLY TO ANSWER AND COUNTERCLAIM**

COMES NOW the Petitioner, Mary Jean Tucker Swiger, who hereby responds to the Respondents' Answer and Counterclaims as follows:

1. The Petitioner re-alleges and incorporates herein by reference all allegations of her Petition not inconsistent herewith.

2. The Petitioner denies all allegations of the Respondents' that are not consistent with her Petition.

3. The Petitioner denies all allegations of the Answer and Counterclaims except as herein admitted, qualified, explained. To the extent any allegations or portion thereof is not expressly referred to and specifically answered, it is hereby denied and strict legal proof thereof is demanded.

WHEREFORE, having replied to the Answer and Counterclaim herein, Petitioner prays that the Petitioner be given relief as prayed for in her Petition and for such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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Syretta R. Anderson

Syretta R. Anderson
Khaled Law Firm, PC
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June 28, 2013
Rock Hill, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE YORK COUNTY PROBATE COURT
Mary Jean Tucker Swiger, Petitioner, v. Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker, Respondents.	Case No.: 2012-ES-46-0579 NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER

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JUDGE OF PROBATE
YORK COUNTY, SC

Now comes the Petitioner, by and through their undersigned attorney to request an Order from the Court temporarily restraining the Respondents from acting on behalf of the Estate of Vinton Willis Tucker until such time that a hearing can be held in this matter. In support of this motion, the Petitioners state the following:

1. Vinton Willis Tucker died on May 12, 2012.
2. An Application for Probate of Will and Appointment of Personal Representative of the Estate of Vinton Tucker (hereinafter Decedent) was approved by the Probate Court of York County South Carolina on May 17, 2012.
3. Respondents were appointed as Personal Representatives for the Estate on May 17, 2012.
4. Petitioner filed a Petition for Formal Appointment and Testacy and To Set Aside Informal Probate on May 10, 2013 wherein Petitioner requested the following relief:
    a. That this Court inquire into the matters alleged herein;
    b. That this Court schedule a hearing on the merits; and

MB

c. That this Court issue an order that the Decedent died as a resident of North Carolina;

d. In the alternative; that this Court issue an order as to the testacy of the Decedent;

e. That this Court set aside the ongoing informal probate;

f. That this Court determine the heirs of the Decedent's estate;

g. That this Court order removal of Respondents as co-personal representatives of the estate;

h. That this Court appoint the Petitioner or her successors in interest as Personal Representative of the Decedent's estate;

i. That this Court order that the document submitted to probate by the Respondents is void;

j. That this Court order a special administrator to oversee the estate while this matter is pending;

k. That this court order Respondents to repay the estate any fees paid to them for their services as co-personal representative; and

l. For such other and further relied as this court deems just and proper.

5. According to the Inventory and Appraisement filed with the Probate Court of York County South Carolina on June 7, 2012, the total net worth of Decedent's estate is $2,854,408.00.

6. Petitioner contests the validity of the will submitted to the Probate Court of York County South Carolina by Respondents.

7. Per the contested will submitted, Respondents are not required to post bond. Petitioner fears that Respondents will misuse and squander the assets of the estate.

WHEREFORE, the Petitioners pray for an order of this Court

1. Restraining the Respondents from acting on behalf of the Estate of Vinton Tucker until such time that a hearing can be held;
2. Requiring the Respondents to obtain the approval of the Probate Court prior to expending any estate funds;
3. Restraining the Respondents from disposing of and/or controlling any estate assets;
4. Requiring the Respondents to post bond equal to the amount of the estate assets; and
5. Any other relief deemed necessary by the Court, including any Ex Parte Orders as necessary.

Syretta R Anderson

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January 17 2014
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Respondents' Motion for Partial Summary Judgment

To: Syretta R. Anderson, Esquire, attorney for Petitioner.

Please take notice that Respondents, through their undersigned attorney, move the Court for an Order granting summary judgment in favor of Respondents on Petitioner's First, Second, Third and Fifth Causes of Action. This motion is made pursuant to Rule 56(b), SCRCP, on the grounds that there is no genuine issue of material fact with respect to the First, Second, Third and Fifth Causes of Action and the Respondents are entitled to judgment on those causes of action as a matter of law.

The First Cause of Action challenges the Court's subject matter jurisdiction.

Then Second Cause of Action challenges the validity of the January 14, 2012 Last Will on several formality grounds.

The Third Cause of Action challenges the validity of the Last Will on the ground of undue influence.

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The Fifth Cause of Action challenges the validity of the Last Will on the ground of fraud.

This motion will be supported by all matters of record herein, including written discovery and deposition transcripts. A Memorandum of Law in Support of the Motion will be filed and served prior to the hearing. There is no duty of prior consultation with respect to this motion.

September 23, 2014

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Attorney for Respondents

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Respondents' Amended Motion for Summary Judgment

To: Syretta R. Anderson, Esquire, attorney for Petitioner.

Please take notice that Respondents, through their undersigned attorney, amend their prior Motion for Partial Summary Judgment and now move the Court for an Order granting summary judgment in favor of Respondents on each of Petitioner's five causes of action. This motion is made pursuant to Rule 56(b), SCRCP, on the grounds that there is no genuine issue of material fact with respect to the Petitioner's causes of action and the Respondents are entitled to judgment on those causes of action as a matter of law.

The First Cause of Action challenges the Court's subject matter jurisdiction.

Then Second Cause of Action challenges the validity of the January 14, 2012 Last Will on several execution formality grounds.

The Third Cause of Action challenges the validity of the Last Will on the ground of undue influence.

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The Fourth Cause of Action challenges the validity of the Last Will on the ground of lack of testamentary capacity.

The Fifth Cause of Action challenges the validity of the Last Will on the ground of fraud.

This motion will be supported by all matters of record herein, including written discovery and deposition transcripts. A Memorandum of Law in Support of the Motion will be filed and served prior to the hearing. There is no duty of prior consultation with respect to this motion.

November 3, 2014

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Attorney for Respondents

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Respondents' Memorandum of Law in Support of Motion for Summary Judgment

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Petitioner[1] is challenging the validity of the decedent's Last Will dated January 14, 2012. Five causes of action have been alleged, and Respondents have moved for summary judgment with respect to all of the causes of action.

Summary Judgment

Summary judgment is not a "disfavored procedural shortcut, but rather ... an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. at 2548, 91 L.Ed.2d 265 (1986). The policy as expressed in South Carolina cases is that the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Curiel v. Hampton County E.M.S., 737 S.E.2d 854 (S.C.App. 2012). Summary judgment is proper

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[1] Petitioner is mentally incapacitated. If counsel for Petitioner does not move to amend the caption to identify Petitioner's attorneys-in-fact as parties, Respondents will do so.

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when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Osborne v. Adams, 550 S.E.2d 319 (S.C. 2001); South Carolina Elec. & Gas v. Town of Awendaw, 570 S.E.2d 542 (S.C. App. 2002) In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Osborne v. Adams, supra.; Cunningham v. Helping Hands, Inc., 575 S.E.2d 549 (S.C. 2003).

A fact is material if it is "outcome determinative" under the applicable law, that is, if its existence in a case will have some impact in deciding the facts of the case. Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160 (7th Cir. 1984); PPG Indus. V. Orangeburg Paint & Decorating Center, 375 S.E.2d 331, 332 (S.C. App. 1988). When the facts, and all reasonable inferences to be drawn from the underlying facts, are viewed in a light most favorable to the non-moving party, and the record nevertheless reveals that the opposing party would not prevail under any discernable circumstances, summary judgment is appropriate. Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). However, a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth specific facts showing a genuine issue for trial. Russell v. Wachovia Bank, 578 S.E.2d 329, 335 (S.C. 2003).

To survive a summary judgment motion by the defendant in a lawsuit, the plaintiff must offer some evidence that a genuine issue of material fact exists for each element of the claim at issue except for those elements that are either uncontested or agreed to by stipulation. Kase v. Ebert, 707 S.E.2d 456 (S.C. App. 2011). Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine

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issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 410 S.E.2d 537 (S.C. 1991). The party responding to a summary judgment motion may not rest on the allegations in his pleadings, but must set forth **specific facts** showing a genuine issue for trial. Burry & Son Homebuilders, Inc., v. Ford, 426 S.E.2d 313 (S.C. 1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain **specific probative facts** and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading.")

Materials used to support or oppose a summary judgment motion, such as affidavits, deposition testimony and documents, must set forth facts that would be admissible in evidence at trial. Hall v. Fedor, 561 S.E.2d 654 (S.C. App. 2002). To be considered on summary judgment, documents must have a proper evidentiary foundation, including authentication. Rule 901, SCRE. Rule 901(a) of the South Carolina Rules of Evidence states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Testimony of a witness with knowledge that "a matter is what it is claimed to be" is a method of authentication conforming to the requirements of Rule 901. Rule 901(b)(1), SCRE. Unsworn and unverified [unauthenticated] documents are not of sufficient evidentiary quality to be given weight in deciding a summary

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judgment motion. 49 C.J.S. Judgments § 262.

Where a heightened burden of proof is required, there must be more than a scintilla of evidence presented to defeat a motion for summary judgment. Turner v. Milliman, 708 S.E.2d 766 (S.C. 2011); Hancock v. Mid-South Mgmt. Co., Inc., 673 S.E.2d 801 (S.C. 2009). In that class of cases where plaintiff must demonstrate his right to relief by clear and convincing evidence, courts have more discretion to treat nonmovant's submissions as too insubstantial to resist summary judgment. This significant gatekeeping role requires the trial court to determine if a prima facie case has been presented by the nonmoving Plaintiff in opposing a defendant's motion for summary judgment. AJG Holdings, LLC v. Dunn, 706 S.E.2d 23 (S.C. App. 2011).

Policies Underlying Law's Requirements for Will Execution

Freedom of Testation. The very purpose for which freedom of testation is given is to facilitate a departure from inflexible laws of inheritance. 1 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 3.11 (Bowe-Parker rev. 1960). The power to make a will is a power that belongs to the testator, and there is no veto power of the court or jury. Id.

South Carolina appellate courts have remained vigilant in protecting citizens' freedom of testation by strictly enforcing the governing laws and exercising a healthy skepticism of efforts to second guess a testator's testamentary directions. Only in the most obvious and egregious cases have South Carolina appellate courts approved of a jury or trial judge setting aside a properly executed will. Any effort to invalidate a will must be viewed with suspicion and be judged according to the following considerations:

> A person has the right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil... He can show

> gratitude, affection or charity or he can be capricious with his own. . . As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affections and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy or ungrateful. A young person it has been said regards everyone as his friend, but as he grows older, he is wiser, more cynical, and his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic or uncongenial; others that he judged as unworthy he finds worthy and congenial.

Dicks v. Cassels, 84 S.E. 878 (1915).

> In this day of a complex society, individuals must sacrifice much and give up individual rights because of the interests of others. The government imposes many restrictions and requirements, but one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects. The right to make a will is the right to make it according to the testator's pleasure - judiciously or capriciously - justly or unjustly - at absolute discretion, subject only to the restraints upon the power of disposition which the law has imposed.

In Re Last Will and Testament of Smoak, 334 S.E.2d 806 (1985).

The right to make a will carries with it the right to disregard what the world considers a fair disposition of property. Hellams v. Ross, 233 S.E.2d 98 (1977).

First Cause of Action (Jurisdiction)

Petitioner alleges that South Carolina and the York County Probate Court do not have the requisite territorial jurisdiction to probate decedent's last will, citing S.C. Code Ann. § 62-1-301 and 302. The particular allegations are that on the date of his death the decedent did not own any real property in South Carolina (Petition, ¶ 15), did not own a vehicle that was registered in South Carolina (¶ 16), had lived his entire life in North Carolina (¶ 17), his move to York County was without the intent to change his domicile (¶ 22), and he was buried in North Carolina next to his predeceased spouse. (¶ 24).

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The sanity of a testator is presumed, Coleman Karesh, Wills 23 (1977), and decedent was never adjudicated to be incompetent or mentally incapacitated. On November 17, 2011, the decedent executed a durable power of attorney in Mecklenburg County, North Carolina, that was prepared by the decedent's North Carolina attorney, H. Edward Knox, the former mayor of Charlotte, NC.[2] By his Power of Attorney, the Decedent appointed Ben Rush Smith, one of the Respondents in this case, as his attorney-in-fact with authority to engage in various financial transactions and "to provide for my medical care, to sign consents for treatment, to review all medical information, to employ or discharge any health care facility or nursing residential facility." (Ben Smith deposition, Exhibit 3).

In late November, 2011 the decedent was admitted to Carolinas Medical Center in Charlotte, NC for what was reported to the hospital as a fall but what was thought by the medical staff to have been more than a fall, likely physical abuse by a care giver[3]. The care giver misrepresented to the hospital staff her relationship to the decedent, and she was not allowed to visit him.[4] Upon decedent's discharge from Carolinas Medical Center in December, 2011, the hospital staff recommended that decedent not be allowed to return to his home, for safety reasons, and that the care giver who was suspected of abuse not be allowed to contact him.[5] The decision was made by the attorney-in-fact, with input from other family members, to move the decedent into Westminster Towers in Rock Hill, SC where family could more readily monitor his situation, manage his care

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[2] Ben Smith deposition, Exhibit 3; Margaret Kelly deposition, p. 71, l. 7-24.

[3] M. Kelly deposition, p. 12, l. 5 to p. 14, l. 14.

[4] M. Kelly deposition, p. 70, l. 21 to p. 71, l. 6.

[5] M. Kelly deposition, p. 14, l. 15 to p. 15, l. 9.

and keep the former care giver away. There was no plan or intention for decedent to move back to North Carolina.[6]

While decedent was living at Westminister Towers, his attorney-in-fact, Ben Smith, resided in York County; the decedent's mail was directed to the attorney-in-fact's address in York County; the decedent's car was kept at the agent's address in York County; the decedent owned personal property that was in his room (clothes, furniture and personal effects) at Westminister Towers; and his money was held in national banks, most being accessible by his attorney-in-fact at bank branches in York County.[7]

The Montana Supreme Court addressed the issue of territorial jurisdiction in Estate of Strange, 184 P.3d 1029 (Mont. 2008.) Estate of Strange has value as precedent herein because Montana is a Probate Code jurisdiction, and the South Carolina Probate Code provides that one of the policies of the Probate Code is "to make uniform the law among the various jurisdictions." S.C. Code Ann. § 62-1-102(b)(5).

In Estate of Strange, the Montana Supreme Court addressed the operation of its probate code territorial jurisdiction statute, § 72-1-201(2), MCA. That statute reads:

§ 72-1-201. Territorial application

Except as otherwise provided in this code, this code applies to:
(1) the affairs and estates of decedents, missing persons, and persons to be protected in this state;
(2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state; and
(3) incapacitated persons and minors in this state.

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[6] M. Kelly deposition, p. 15, l. 23 to p. 16, l. 9; and Allison Matthews affidavit.

[7] B. Smith deposition, p. 24, l. 18 to p. 25, l. 19; M. Kelly Affidavit and filed Inventory and Appraisement.

By comparison, S.C. Code Ann. § 62-1-301 provides:

§ 62-1-301. Territorial application

> Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

These are corresponding probate code statutes, with South Carolina including two subjects, 4 and 5, that are not included in the Montana statute.

In Estate of Strange, the decedent owned real property in Arizona and Pennsylvania and had never resided in Montana. His son lived in Montana, and the decedent periodically visited his son in Montana. The decedent owned a "small amount of personal property" left with his son in Montana, including fishing gear, a rifle, and tools, all of minimal value. The decedent also had a bank account in Montana holding less than $10.00. The decedent's son, the Montana resident, was the decedent's attorney-in-fact pursuant to a power of attorney, and performed some asset management duties for his father from Montana. The son commenced the probate estate in the Montana court and was appointed personal representative pursuant to his nomination in the decedent's last will. The decedent's spouse subsequently filed a motion to dismiss the son's application and appointment arguing that the Montana court "lacked both venue and jurisdiction" under Montana statutes 72-3-112 and 72-1-201. The lower court granted the motion to dismiss on the ground that the decedent's assets in Montana were of small value and did not establish a significant connection to the State of Montana. On appeal, the Montana Supreme Court reversed the lower court because:

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- the statute [72-3-112, MCA] does not require that a decedent have a certain type or amount of property in Montana, and it does not require that the property in Montana be "substantive" or have a "significant connection" to Montana;
- the probate code venue statute, 72-3-112, MCA (S.C. Code Ann. § 62-3-201) pertains to the propriety of a given county in Montana for probating a decedent's estate, and issues of venue do not include the propriety of Montana as a state to probate a decedent's estate.
- the question of whether Montana is a proper state to open a probate estate is governed by its territorial jurisdiction statute, 72-1-201, MCA, and not by the venue statute.;
- the probate code allows for multiple probate proceedings to be initiated in various states where a decedent had property, and allow for an initial filing in Montana if a decedent owned property there, followed by ancillary probate proceedings in other jurisdiction when necessary.

This analysis of the operation of the Montana territorial jurisdiction statute applies as well to South Carolina's territorial statute. Territorial jurisdiction in South Carolina is governed by S.C. Code Ann. § 62-1-301, and pursuant thereto the estate was properly opened in South Carolina because:

1. the decedent resided and was domiciled in SC when he died,[8] and/or
2. he owned property located in York County when he died;[9] and/or
3. his fiduciary, attorney-in-fact Ben Smith, was then and is now a resident of York County and had authority and control of decedent's property, and was and is subject to the laws of

[8] M. Kelly deposition, p. 15, l. 23 to p. 16, l. 9; and Allison Matthews affidavit.

[9] See fn. 7.

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South Carolina.[10]

1. Domicile. "Domicile " means the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning." Roesler v. Roesler, 719 S.E.2d 275 (S.C.App. 2011). "The true basis and foundation of domicile is the intention, the quo animo, of residence." Id. The act and intent as to domicile, not the duration of the residence, are the determining factors." Ferguson v. Employers Mut. Cas. Co., 174 S.E.2d 768, 769 (S.C. 1970).

The mere fact that a person is of partially unsound mind does not necessarily preclude him from establishing his domicile, as the question must depend on the extent to which his reason has been impaired. 28 C.J.S. Domicile § 28 (1996). It may be stated that but a comparatively slight degree of understanding is required in order that his action may be recognized. Id. Restatement, Second, Conflict of Laws § 23(1) provides that a mentally deficient person [as opposed to a totally incompetent person] may acquire a domicile of choice if he has sufficient mental capacity to choose a home. When the decedent's move from North Carolina to South Carolina was made, even if the decedent was then experiencing partial and fluctuating mental capacity, he could nevertheless form the requisite intent to move to South Carolina where he thereafter intended to stay.[11]

Alternatively, and solely for purposes of argument, if the decedent was totally incapacitated, which is not admitted by the Respondents, Ben Smith, as attorney-in-fact for the decedent, had authority to change decedent's domicile pursuant to his authority to provide for the decedent's

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[10] B. Smith deposition p. 3, l. 12 to p. 4, l. 18.

[11] A review of the evidence with respect to decedent's mental status in December 2011 and January 2012 is found on pages 22-29 of this memorandum of law; see also Allison Matthews' affidavit.

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medical care and if the move was in the decedent's best interests.

A very thorough review of the common law of domicile is found in Acridge v. Evangelical Lutheran Good Samaritan Society, 334 F.3d 444 (5th Cir. 2003). Domicile was a central issue in this federal court case because the court had to first determine the existence, or not, of diversity jurisdiction. The decedent/husband in Acridge was domiciled in New Mexico where he lived with his wife. When husband's mental status deteriorated, wife placed him in a care facility in New Mexico. Wife thereafter became dissatisfied with the New Mexico facility and transferred husband to a care facility in Texas. At the time of the transfer, the evidence showed that husband was unable to care for himself, disoriented as to time and place, had little memory, and was virtually unaware of his surroundings. As a result of an attack by another resident at the facility, husband was mortally wounded. An action was filed in the federal district court in Texas. The defendants challenged the court's jurisdiction which hinged generally on whether the decedent/husband was domiciled in New Mexico or had effectively changed his domicile to Texas, and more particularly whether someone acting on an incompetent's behalf moves the incompetent to another state can by doing so change the incompetent's domicile.

The Acridge court made reference to the following authorities: Rishell v. Jane Phillips Episcopal Memorial Medical Center, 12 F.3d 171 (10th Cir. 1993) (where the incompetent will never again regain sufficient mental capacity to choose his own domicile, the law must allow another, vested with legal authority, to determine domicile for the best interests of that person); Restatement, Second, Conflict of Laws § 23 cmt. f (1988) (noting that a court-appointed guardian can shift the domicile of an incompetent to another state if this shift of domicile would be in the best interests of the incompetent and was not made to achieve some selfish purpose of the guardian); and Dakuras

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v. Edwards, 312 F.3d 256 (7th Cir. 2002). It was also noted in Dakuras that the Fourth Circuit takes the opposite approach by concluding that the best interests of the incompetent is not to be considered, Long v. Sasser, 91 F.3d 645 (4th Cir. 1996), a position criticized in Dakuras. The Acridge court agreed with the Seventh and Tenth Circuits and held that wife had the authority to change husband's domicile, so long as she was acting in his best interests.

Respondents will offer evidence that Ben Smith, as attorney-in-fact, moved the decedent to York County, SC because he could no longer safely live alone, he had been abused by a former care-giver, he needed to be removed from that former care giver for his own safety, and by being in York County, the attorney-in-fact could better satisfy his duties under the power of attorney to provide for the decedent's medical care. There was no intent or plan for the decedent to return to his home in North Carolina. Decedent moved into Westminster Towers in York County.[12] For tax year 2012, he filed a tax return with the State of South Carolina.[13]

2. Property. The Court need not rest jurisdiction solely on domicile if the decedent owned property located in York County when he died. S.C. Code Ann. § 62-1-301; Estate of Strange, supra. Property is defined in the Probate Code as including both real and personal property or any interest therein and means anything that may be the subject of ownership. §62-1-201(33).

The term "personal property" in its broadest legal significance, includes all property that is not real property. Colonial Life & Accident Ins. Co. v. South Carolina Tax Commission, 103 S.E.2d 908 (S.C. 1958); §12-37-10(2). Personal property is of two types: tangible and intangible. Hawkins v. City of Greenville, 594 S.E.2d 557 (S.C.App. 2004); 73 C.J.S. Property §15. Tangible personal

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[12] B. Smith deposition, p. 9, l. 9 to p. 10, l. 10; p. 11, l. 12 to p. 12, l. 13; M. Kelly deposition, p. 14, l. 15 to p. 16, l. 9; and Allison Matthews affidavit.

[13] M. Kelly affidavit.

property is defined as personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. S.C. Code Ann. §12-36-60. Intangible personal property is all property other than tangible property, S.C. Code Ann. §12-6-30(12), sometimes referred to as incorporeal property that cannot be seen or handled. 73 C.J.S. Property §15. Intangible personal property is defined in the tax code as incorporeal personal property including deposits in banks, negotiable instruments, mortgages, debts, receivables, shares of stock, bonds, notes, creditors, evidences of an interest in property, evidences of debt, and choses in action generally. S.C. Code Ann. §12-16-20(4).

The decedent owned and possessed property in York County when he died[14] Additionally, pursuant to decedent's power of attorney, Ben Smith, a resident and domiciliary of York County, SC, and as attorney-in-fact, had possession and authority over decedent's car, mail and bank accounts. The attorney-in-fact's possession or control of decedent's property in York County was legally equivalent to the decedent's possession. When acting within the scope of the powers authorized by the principal, the agent's acts are in legal effect equivalent to those of the principal. Crim v. E.F.Hutton, Inc., 381 S.E.2d 492 (S.C. 1989); Carver v. Morrow, 48 S.E.2d 814 (S.C. 1948); 2A C.J.S. Agency §145.

In addition to the assets identified on the Inventory and Appraisement, the decedent also owned and possessed contract rights with Westminster Towers, where he was a resident and domiciliary when he died, and contract rights with his agent, Ben Smith, pursuant to the power of attorney. These facts are sufficient to give this court territorial jurisdiction over the decedent's estate.

The location of his burial is irrelevant to the issue of his domicile while living.

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[14] M. Kelly affidavit,

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Second Cause of Action (Will Formalities)

The second cause of action raises issues with will execution formalities. It is important to note that neither the Petitioner nor anyone related to her or to her side of this case was present when the will was written, signed and witnessed. The decedent was transported to the Piedmont Hospital Emergence Room on January 14, 2012 after having a syncopal episode (temporary loss of consciousness). He actually regained consciousness at Westminister Towers prior to being placed in the ambulance.[15] Upon arrival at the ER, Dr. Ratterree was assigned to evaluate the decedent.[16] Dr. Ratterree testified at deposition that he has no independent recollection of the decedent and must rely on his ER records to recall events of January 14, 2012.[17] Dr. Ratterree's ER records show that he evaluated the decedent as being mentally competent at the time.[18] A CT scan was performed which revealed that decedent had an abdominal aortic aneurysm.[19] Decedent did not know of this serious condition prior to January 14, 2012.[20]

The decision was made to admit the decedent to the hospital, and those arrangements took some period of time during which decedent remained in the small ER examination room.[21] During this interval, the decedent expressed his wish to prepare a last will because his life expectancy was

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[15] Jane Bondurant, therapist at Westminister Towers, deposition p. 8, l. 13 to p. 12, l. 19.

[16] J. Ratterree, MD deposition, p.5, l. 7-13.

[17] J. Ratterree MD deposition, p. 6, l. 9 to 8, l. 3.

[18] J. Ratterree MD deposition p. 7, l. 3 to p. 12, l. 9.

[19] J. Ratterree MD deposition p. 12, l. 10 to p. 13, l. 2.

[20] M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3; p. 51, l. 2-10.

[21] J. Ratterree MD deposition, p. 14, l. 2 - 20.

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suddenly in question.[22] The will was handwritten by Margaret Kelly according to the oral directions of the decedent.[23] It was read to the decedent more than once, and the decedent expressed his approval of the will.[24] The will was signed by the decedent in the Piedmont Hospital emergency room while he was on his back in a reclined position.[25] The decedent's execution of the will was witnessed by three witnesses: Ronald (Steve) Kelly, Danny Kelly and Rebecca Kelly. [26] Ronald (Steve) Kelly is the husband of Margaret Kelly[27] who is one of the devisees named in the will. Danny Kelly and Rebecca Kelly are husband and wife, and they are neither related to the decedent nor named as devisees in the will[28]. Ronald Kelly and Danny Kelly signed as witnesses, and Rebecca Kelly signed as a notary public.[29]

¶ 26 of the Petition alleges that the decedent did not "make" the will, and that it does not comply with §62-2-501. Petitioner's attorney-in-fact testified at deposition that this objection is based on the fact that decedent did not personally write the will (the handwriting is not his) and that South Carolina does not recognize holographic wills.[30] As such, the ground alleged really raises §62-2-502 objections. Section 62-2-502 only requires that the will be in writing and that the testator

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[22] M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3.

[23] M. Kelly deposition, p. 41, l. 22 to p. 45, l. 18.

[24] M. Kelly deposition, p. 53, l. 4-15;

[25] M. Kelly deposition, p. 50, l. 7 to p. 51, l. 1.

[26] M. Kelly deposition, p. 54, l. 9 -15, and Rebecca Kelly deposition, Exhibit 4.

[27] Steve Kelly deposition, p. 6, l. 21-23.

[28] Danny Kelly deposition, p. 6, l. 17-24.

[29] Last Will

[30] Janet Loeffler deposition, p. 22, l. 3 to p. 23, l. 10.

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sign the will. Neither §62-2-501 nor § 62-2-502 requires that the testator personally write or type the will.

It is true that South Carolina does not recognize the holographic method of execution of a will. S.C. Code Ann. §62-2-501, Reporter's Comment. However, the last will at issue is not a holographic will. A holographic will is one that dispenses with witnesses but must be cast totally in the testator's handwriting. Id. On its face, the decedent's January 14, 2012 last will was witnessed and notarized, and deposition testimony corroborates this fact. A "holographic will" objection is wholly without merit.

¶ 27 of the Petition alleges that the decedent did not sign the last will. All witnesses to the will have testified at deposition that the decedent signed the will.[31]

¶ 28 of the Petition alleges that the last will is not properly witnessed as required by S.C. Code Ann. § 62-2-502. The statute requires that the will be signed by at least two individuals each of whom witnessed either the testator actually signing the document or the testator's acknowledgment of his signature of the will. On its face, the will was properly witnessed, and the deposition testimony of the witnesses confirms same.[32]

Section 62-2-504 provides that although Ronald Kelly is not a disinterested witness, because Margaret Kelly is his spouse, he is nevertheless competent to serve as a witness. However, the devise to Margaret Kelly, his spouse, would be void to the extent which the devise to her exceeds her intestate share unless there were two other disinterested subscribing witnesses, in which case the

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[31] Danny Kelly deposition, p. 8, l. 18 to p. 10, l. 16; Rebecca Kelly deposition, p. 16, l. 7 to p. 19, l. 16; Steve Kelly deposition, p. 29, l. 20 to p. 30, l. 13.

[32] See fn. 24, 25, 26 and 27.

devise to Margaret Kelly would be valid and effectual. **"If there are two disinterested witnesses to a will in addition to the interested witness, then the devise is valid and effectual, if otherwise effective."** S.C. Code Ann. § 62-2-504(a). This statute codifies the common law supernumerary witness doctrine. Danny and Rebecca Kelly were disinterested witnesses. Rebecca Kelly witnessed the execution of the will and signed as a notary, but her status as a notary was irrelevant because the will did not include the self-proving language of S.C. Code Ann. § 62-2-503. Therefore, Rebecca Kelly was a normal subscribing witness.[33]

¶ 29 of the Petition alleges that the last will is not properly attested or self proved and does not satisfy the requirement of § 62-2-503. This statute does not contain a requirement for validity. It provides for a permissible, not a mandated, "expediting feature for the proof of wills." S.C. Code Ann. §62-2-503, Reporter's Comment. Proof of the will may still be made in the old-fashioned way of presenting testimony from the witnesses as to the due execution of the will.

Although not expressly raised as an issue in the Petition, actually reading a legal document is not essential to its validity. It is sufficient if the signatory learns the contents of the document by having the document read to him or having the contents explained to his satisfaction prior to signing the document. Ralph King Anderson, Jr., South Carolina Requests to Charge-Civil, 2002, §19-23.

Third Cause of Action (Undue Influence)

The third cause of action alleges that the will is the product of undue influence as evidenced by three specific facts: that the decedent did not draft the document (¶ 31 a); that the document's author and the witnesses will benefit from the decedent's estate (¶ 31 b) and that the document's

[33] See fn. 28.

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author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (¶ 31 c).

Undue influence 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 for support of the act; it must be such influence as could not be resisted; that it was done merely for the sake of peace; so that motive was tantamount to force and fear. Calhoun v. Calhoun, 290 S.E.2d 415 (S.C. 1982). A showing of general influence is not tantamount to undue influence. Dixon v. Dixon, 608 S.E.2d 849 (S.C. 2005); Mock v. Dowling, 222 S.E.2d 773 (S.C. 1976). Any reasonable influence obtained by acts of kindness is not undue influence. Smith v. Whetstone, 39 S.E.2d 127 (S.C. 1946) ("It is not influence merely, but undue influence, that is always alleged--something excessive and unlawful. It is not the influence of friendship or affection that can be complained of; nor the influence of argument or entreaty, nor the impression made by kindness or prudence, nor even the effect wrought by servile compliance or mean endurance of wrong. It must be something which destroys free agency [,]" citing Means v. Means, 5 Strob. 167, 36 S.C.L. 86). It is elementary that the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relatives or by one who thinks the testator used bad judgment or was misled. Mock v. Dowling, supra.

To justify the setting aside of a last will or power of attorney on the ground of undue influence, it must be shown that the grantor was unquestionably susceptible to undue influence as a result of old age, mental weakness, or some other cause, and there must be some clear evidence of opportunity and disposition on the part of the grantee or someone in his behalf to exercise such influence. Atkinson v. Belser, 255 S.E.2d 852 (S.C. 1979); Hemingway v. Small, 324 S.E.2d 335 (S.C. App. 1984).

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For a contestant to meet the burden of proof for undue influence with only circumstantial evidence, the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subject to that of some other person so that the last will is that of the latter and not of the former. Byrd v. Byrd, 308 S.E.2d 788 (S.C. 1983). Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence to defeat the motion for summary judgment because the inquiry involved in a summary judgment motion on undue influence necessarily implicates the substantive evidentiary standard of proof the would apply at trial. Russell v. Wachovia Bank, 578 S.E.2d 329 (S.C. 2003.) (summary judgment in favor of the will's proponents and against the contestant's challenge on undue influence grounds was affirmed). Clear and convincing evidence means:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confession as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Anonymous (M-156-90) v. State Bd. of Medical Examiners, 473 S.E.2d 870 (S.C. App. 1996).

The first two grounds alleging undue influence are opposite sides of the same coin: on one side, the decedent did not draft his last will, and on the flip side, Margaret Kelly, a beneficiary named in the will, did draft the will.

1. As to the first alleged indicia of undue influence, there is no requirement in the law that a testator must draft his own last will. The will must be in writing, S.C. Code Ann. § 62-2-502 (1), but who reduces it to writing is not addressed in the probate code. Merely agreeing to serve as the scrivener does not constitute undue influence in the absence of evidence of threat, force or coercion.

2. It is assumed that the Petitioner meant to say that the scrivener (not the author) of the last will, and the two disinterested witnesses, will benefit from the estate. An author decides or

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originates the content of the writing, Webster's New World Dictionary, College Edition 98 (1968); a scrivener merely copies or writes what someone else determines to be the content. Webster's New World Dictionary, College Edition 1311 (1968). Margaret Kelly was a scrivener and not an author. The two disinterested witnesses, Danny and Rebecca Kelly, were not related by blood or marriage to the decedent, and were not named as devisees in the will. Margaret Kelly, the scrivener, was related to the decedent by marriage (decedent's predeceased spouse was Margaret Kelly's aunt) and is named as a devisee in the will; however, her interest under the will is exactly the same as the other eleven devisees. There is no evidence that the Petitioner was ever named a devisee in any last will executed by the decedent.

Professor Karesh's teaching notes say that there is no clear-cut holding in South Carolina that a will drawn by a beneficiary named in the will raises the presumption that the will was the result of undue influence. Coleman Karesh, Wills 25 (1977). The general common law appears to be that when a person who benefits from a will also engages in drafting the will, a rebuttable presumption of undue influence arises and shifts the burden to the proponent of the will to show that the will is not the product of undue influence. 3 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 29.95 (Bowe-Parker rev. 1960). This principle of law is illustrated in Pyle v. Sayers, 39 S.W.3d 774 (Ark. 2001). **However, there are facts that preclude operation of the presumption.** 3 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 29.97 (Bowe-Parker rev. 1960). Those facts include: (a) where the beneficiary who draws the will bears such a relation to the testator that such assistance seems natural, and the facts of execution do not otherwise suggest undue influence; (b) where the beneficiary who draws the will does so at the request of the testator, and because of her desire to carry out the testator's wishes; and (c) when the beneficiary is given no more in the will than other relatives who are related to the testator in the same degree. All

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of these exceptions apply in this case, but if any one of them is established, the presumption is not triggered. See 79 Am.Jur.2d Wills §378 in which it is said that a presumption of undue influence does not arise when the beneficiary who prepared the will acted at the request of the testator. The three persons who were then in the room with the decedent all confirmed that the decedent first raised the subject of his will and that Margaret Kelly wrote the will at the decedent's request and according to what decedent said he wanted in it. [34] Other authorities holding that a presumption of undue influence does not arise in this circumstance are: Ritchey v. Jones, 97 So. 736 (Ala. 1923) (beneficiary drew the will in accordance with the testator's instructions); Sterling v. Dubin, 126 N.E.2d 718 (Ill. 1955) (testator dictated will to private secretary [who was a non-family beneficiary of the will] who transcribed it); In re Parker, 80 S.E. 1057 (N.C. 1914) (beneficiary participated in the execution of the will by summoning the attorney at the request of the testator); Soumie v. McLean, 382 P.2d 1 (Or. 1963) (It is to be expected that a testator will leave his estate to those in whom he trusts and who he infers will dispose of it wisely. It is also natural that when he requires assistance in the preparation of his will he may consult those very persons, that is, those in whom he has confidence. To impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence would in many instances defeat the will rather than probate it); Logan's Estate, 45 A. 729 (Pa. 1900); In re Holiday, 327 P.2d 456 (Okla. 1958).

3. Absent a presumption, there is simply no evidence that coercion in any form was employed on January 14, 2012 to force the decedent then and there to sign the will by threatening to block or withhold visitation if he did not. Undue influence does not render a will invalid unless it operates at the time the will is made and causes its execution. 1 William J. Bowe & Douglas H.

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[34] Elizabeth Haigler deposition, p. 11, l. 18 to p. 13, l. 18; Steve Kelly deposition, p. 25, l. 24 to p. 27, l. 6; Margaret Kelly deposition, p. 41, l. 15 to p. 42, l. 14.

Parker, Page on the Law of Wills § 5.10 (Bowe-Parker rev. 1960), citing, among numerous other authorities, Gable v. Rauch, 27 S.E. 555 (S.C. 1897) (the undue influence of others upon the testator in the making of his will must have occurred at the time it was written, or prior to its execution.) In order to succeed on a cause of action to invalidate a will as a result of undue influence:

> ... the will contestant must not only provide competent evidence that such [undue] influence in fact existed, but must also offer evidence of the testator's state of mind *at the time the will was executed* that would tend to show his free agency was overcome by such influence.

Horton v. Horton, 965 S.W.2d 78, 87 (Tex.App. – Fort Worth 1998) (citing Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963)). A more recent statement of the legal principle is found in Wilson v. Dallas, 743 S.E.2d 746 (S.C. 2013) : "In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear **upon the testamentary act.**' "(emphasis in original.)

Fourth Cause of Action (Testamentary Capacity)

"The reported cases indicate that will contests waged on lack of capacity are generally unsuccessful. Contestant's lawyers lose cases based on testamentary capacity because they underestimate the law's bias in favor of sustaining wills at any price." Hon. Eunice L Ross and Thomas J. Reed, Will Contests, §6.1 (1992).

It has been said that last wills are normally the work of the elderly, and the elderly are not always acute. Thus, the law of testamentary capacity consists largely of concessions to the sickness, quirkiness, weakness, forgetfulness, crankiness, listlessness, and childishness of the old. To take these considerations into account, the law has fixed a standard of testamentary capacity adjusted to the mental weakness that accompanies physical failure and infirmity:

> A man's financial condition and his family relations and obligations may be, and frequently are, very different at the time of his death from what they were years, months, or even days and hours before. Ordinarily, a will made in the hey day of a man's intellectual competency and financial prosperity would speak a language entirely foreign to the changed circumstances that surround him when death comes "in the sere and yellow leaf." If a will is reasonably to subserve the very purpose of its making, the right to make it must be accorded to a testator when death is near. In the course of nature, at such a time, whether brought about by disease or old age, a person's mental capacity may be, and usually is, far below normal as compared with that particular individual's mental strength in the days of physical health and vigor. **Obviously the law's standard of testamentary capacity must be fixed in contemplation of the foregoing considerations.**

Matheson v. Matheson, 118 S.E. 312 (S.C. 1923), (Marion, concurring.) (Emphasis added.) The right to dispose of one's property to take effect after death is often the most efficient, and sometimes the only, means that the physically afflicted and the aged and infirm have to command the humanitarian attentions due to their infirmities or to their isolation and loneliness. Id.

To make a will, the law requires that a person must be of sound mind and not be a minor. S.C. Code Ann. §62-2-501. The mental capacity necessary to meet the requirements of a sound mind is tested by (1) the ability of the testator to know his estate, (2) the objects of his affectations, and (3) to whom he wishes to leave it. Hellams v. Ross, 233 S.E.2d 98 (S.C. 1977); In re Estate of Weeks, 495 S.E.2d 454 (S.C. App. 1997). The test for mental capacity regarding wills is different from the mental capacity required for other transactions. Ordinarily, it requires less capacity to make a will than to make a contract or deed. McCollum v. Banks, 50 S.E.2d 199 (S.C. 1948).

Regarding the first element of the test for testamentary capacity, it need only be proved that the testator had the capacity to recall what he or she owns, not to actually recall or remember the nature and extent of his or her property. Hon. Eunice L Ross and Thomas J. Reed, Will Contests, §6.4 (1992); In re Estate of Weeks, supra. and Matheson v. Matheson, supra. The capacity to devise a large estate is no different than the requisite capacity to devise a small estate. Id.

"Recalling the natural objects of one's bounty. . . encompasses the complex set of possible conscious and unconscious acts relating to the testator's immediate circle of family, friends, or associates." These considerations include the right or ability to hurt someone who had hurt the testator, to reward someone for being helpful or nice, or to motivate someone to offer love or assistance. Hon. Eunice L Ross and Thomas J. Reed, Will Contests, §6.3 (1992); Matheson v. Matheson, supra.

The third element of the test for testamentary capacity is normally defined as the "ability to form a rational plan for disposition ." Hon. Eunice L Ross and Thomas J. Reed, Will Contests, §6.5 (1992). Here, the decedent devised his estate to his nieces and nephews on his wife's side of the family.

Mental capacity relates to the time of the execution of the will. If the decedent had capacity at the time of the execution of the will, a subsequent loss of capacity will not invalidate the will, and if he lacked capacity at an earlier time but possessed capacity at the time of execution of the will, the will is good. Coleman Karesh, Wills 23 (1977); McCollum v. Banks, supra. Where the contestants make a showing of insanity that is general or chronic, it is presumed that the condition continues, and it is incumbent on the proponents of the will to show that it was made during a lucid interval. Coleman Karesh, Wills 23 (1977). However, where the evidence shows that the mental deficiency is not permanent or chronic, the contestant has the burden of showing the existence of the impairment at the time of will execution and that the diminished capacity affected the execution of the will. Curry v. Sutherland, 614 S.E.2d 756 (Ga. 2005); In re Estate of Marsh, 2011 Ohio 5554 (Ohio App. 2011); Keasler v. Estate of Keasler, 973 S.W.2d 213 (Tenn.App. 1997.)

To summarize, on the issue of testamentary capacity, it does not take much in the way of mental capacity to validly execute a last will. See In Re Estate of Weeks, supra., in which the court

stated that a person who has been deemed incapacitated to the extent that a guardian and/or conservator has been appointed by the court is not, by that fact alone, lacking testamentary capacity.

And, see Hairston v. McMillan, 692 S.E.2d 549 (S.C.App. 2010) in which a testator suffered with renal failure, congestive heart failure, cirrhosis of the liver, atherosclerotic heart disease and cerebral edema. He was discharged from the hospital on February 24 and signed a last will on February 27. On February 24, the day he was discharged from the hospital, his mental status was assessed as "confused with some speech and oriented to person, but not place and time." On February 27, the day the last will was signed, a social worker reported that "Decedent was confused when he attempted to provide a life history." A medical expert who reviewed the Decedent's medical records, testified that based on the records the Decedent was not competent. Notwithstanding this evidence, and based on testimony of those persons who were actually present when the will was signed, the trial judge found the testator to have had testamentary capacity. The trial court was affirmed on appeal, driven primarily by the fact that, as the Court of Appeals phrased it:

> 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).

and because of "the **limited requirements** for testamentary capacity." (Emphasis added.)

Just because there may have been a diagnosis of "mild dementia" sometime in Mr. Tucker's past, and the word "dementia' appears in a medical record, that does not translate into lack of testamentary capacity. From the Weeks opinion:

> Not every weakness incident to the ravages of age unfits a person for making a will. So, an aged person is not incapacitated by failing or defective memory, or partial loss of memory, absent-mindedness, nervousness, failure to recognize old friends,

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> relatives, or members of the testator's family, inability to recognize acquaintances, a liking for dwelling on happenings of the past, pain and suffering, vacillating judgment, childishness, untidy habits, slovenliness or untidyness [sic] in dress, eccentricities or peculiarities, as in habit or speech, even though they may indicate a failing mentality, or even delusions or hallucinations **if they do not affect the execution of the will....** (Emphasis added.)

Other statements of this principle include: In re Estate of Harms, 149 P.3d 557 (Mont. 2006) (mere affliction with Alzheimer's not enough to establish lack of capacity); Hanson v. McNamara, 2011 Mich.App. LEXIS 198 (Jan. 27, 2011) (noting that a diagnosis of Alzheimer's disease, alone, is not dispositive of testamentary capacity); Curry v. Sutherland, 614 S.E.2d 756 (Ga. 2005) (evidence insufficient to show 86 year old lacked capacity to execute will, despite word "dementia" in medical records; word did not indicate diagnosis or that testator suffered mental condition affecting mental capacity at the time of execution of the will); In re Estate of Marsh, 2011 Ohio 5554 (Ohio App. 2011) (proponents of last will were granted summary judgment on the issue of testamentary capacity notwithstanding that the contestant presented evidence that the testator had been diagnosed with Alzheimer's disease, struggled with substantial cognitive impairment, and doctors' statements recorded that testator needed assistance in everyday life, because a contestant must also show how those conditions affected the testator and must show that the condition actually affected the testator's capacity to execute the will); Keasler v. Estate of Keasler, 973 S.W.2d 213 (Tenn.App. 1997) (proponent of the contested last will was granted summary judgment, notwithstanding contestant's evidence of the testatrix' declining mental faculties and failure to recognize family members, because contestant's evidence showed that his mother's condition varied from day to day, **but the evidence did not address capacity on the date the will was executed.**)

During the evening of January 14, 2012, when the will herein was executed, those who were involved in one way or another with the will's execution, the scrivener and the witnesses, have testified that the decedent was mentally competent. The therapist at Westminister Towers who, a

few hours before the will was signed, discovered the decedent was unconscious testified at deposition that by the time the ambulance arrived to transport the decedent to the ER (approximately three hours before the will was signed), he had regained consciousness and was "awake, alert and answering appropriately."[35] Also, the two physicians who treated and interacted with the decedent at the hospital have testified at deposition that, based on the content of their medical records, the decedent was then and there mentally competent. Dr. Ratterree was the ER doctor who was trying to find an explanation for decedent's loss of consciousness and who ordered the CT scan, discovered the abdominal aneurysm and who explained the aneurysm to the decedent.[36] Dr. Ratterree testified that his first assessment of Mr. Tucker's mental status was that he was "oriented in time, place, and person. Grossly appropriate mood and affect. . . he was totally normal."[37] Dr. Magdaline Marfo, a hospitalist at Piedmont Hospital, interviewed the decedent on January 14, 2012 at approximately 10:38 pm when he was in the process of being discharged from the ER and being admitted to the hospital. She was discussing directly with Mr. Tucker his medical history and she testified at deposition that in her opinion, the decedent was then mentally competent.[38]

Whatever compromised mental status the decedent may have had was not of a permanent or chronic nature. In addition to the hospital doctors who interacted with the decedent and found him to have been mentally competent on January 14, 2012 while he was in the hospital, Dr. James Jewell, decedent's primary care physician at Westminister Towers, was given the opportunity to state an opinion about decedent's mental status on January 14, 2012. The colloquy at deposition was as

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[35] J. Bondurant deposition p. 18, l. 10 to p. 19, l. 18.

[36] J. Ratterree, MD deposition p. 12, l. 10 to p. 13, l. 14; and p. 8, l. 4 to p. 13, l. 14.

[37] J. Ratterree, MD deposition p. 9, l. 15 to p. 10, l. 25.

[38] M. Marfo, MD deposition p. 12, l. 2 to p. 20, l. 4.

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follows:

Q. would that surprise you that he [decedent] might be lucid and competent that evening [January 14, 2012]?

A. No, not necessarily.

Q. You're not saying then, that in your opinion, Mr. Tucker was incompetent twenty-four hours a day, seven days a week?

A. That's correct.

Q. He very well could have been lucid on certain days or at certain times of certain days and less lucid at others?

A. That's correct.

Q. Isn't it a [sic] case that that's fairly common for someone with what's been called mild dementia?

A. That's correct.

Q. Do you have enough information, as we sit here today [October 29, 2014] to give an informed opinion regarding Mr. Vinton Tucker's mental competency on January 14, 2012?

A. No.

(Dr. James Jewell deposition, p. 30, l. 9 to p. 31, l. 4).

Dr. Jewell admitted that he never administered a formal mental status exam of Mr. Tucker[39] and that he did not even see Mr. Tucker during his hospitalization in January, 2012.[40]

To close the loop, at various times shortly after January 14, 2012, the decedent was evaluated/assessed by Marcy Thomas, the social worker at Westminister Towers. One of her

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[39] Dr. Jewell deposition p. 28, l. 13 to p. 29, l. 2.

[40] Dr. Jewell deposition, p. 34, l. 1-5.

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responsibilities at Westminister Towers is to perform cognitive assessments of residents.[41]. She testified at deposition that Mr. Tucker's cognitive status changed from time to time, some days he was clear and understood what was said and other days not so much.[42] She witnessed Mr. Tucker's signature on a consent form on December 30, 2011, (two weeks prior to the will) and she was satisfied that he was competent at the time.[43] Mr. Tucker returned to Westminister Towers from Piedmont Hospital on January 20, 1012. [44] Ms. Thomas performed a formal medicare cognitive assessment on January 27, 2012, and she found him to be cognitively intact that day.[45] An assessment on February 2, 2012 found Mr. Tucker to be moderately impaired that day.[46] Ms. Thomas covered the period December 30, 2011 to February 2, 2012 and apparently did not find Mr. Tucker to lack testamentary capacity during that period.

Fifth Cause of Action (Fraud)

Petitioner alleges that the will is invalid because of fraud. However, the only allegations of fraud are that the decedent did not draft the document (¶ 35 a) and that if the decedent did "make a mark" on the document, it did not appear to be a testamentary document when he made a mark. (¶ 35 b). This is wholly insufficient to allege fraud and could have been a ground for a Rule 12 (b)(6)

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[41] She is trained to do the medicare assessments and has performed more than 500 such assessments. Marcy Thomas deposition, p. 51, l. 2 -25; and p. 29, l. 13 to p. 31, l. 5.

[42] Marcy Thomas deposition p. 13, l. 6 to p. 14, l. 18.

[43] Marcy Thomas deposition p. 16, l. 1 to p. 17, l. 7 and Exhibit 1.

[44] Marcy Thomas deposition p. 28, l. 3 - 13.

[45] Marcy Thomas deposition p. 29, l. 20 to p. 32, l. 8 and Exhibit 3. (Decedent scored a 13 out of a possible 15.)

[46] Marcy Thomas deposition p. 36, l. 11 to p. 37, l. l. 15 and Exhibit 3. (Decedent scored an 11 out of possible 15, the high end of moderately impaired scale.)

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dismissal.

It is not alleged that the decedent asked for the document to be drafted a certain way and that it was intentionally drafted to say something else and that fact was not made clear to the decedent. Rather, it is alleged that the mere fact that decedent did not draft the document somehow makes it fraudulent. As addressed hereinabove, there is no requirement in the law that the testator must draft his own will. The will must be in writing, S.C. Code Ann. § 62-2-502 (1), but who reduces it to writing is not addressed in the probate code. On its face, this ground is without merit.

Secondly, it is alleged that if decedent signed or made a mark on the document, it did not then appear to be a testamentary instrument. On its face, the first paragraph of the will reads: "I, Vinton Willis Tucker, being of sound mind and aware of my decisions, make this my last will and testament." (Emphasis added.) Neither the Plaintiff, nor a witness for her, was present at the time and place when the will was signed. Plaintiff has offered no evidence showing that she has first-hand knowledge of the facts relating to her allegations.

Common law fraud in South Carolina requires proof of nine elements: (1) a representation, (2) the falsity of the representation, (3) the materiality of the representation, (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity, (5) the speaker's intent that the representation be acted on by the person hearing the representation, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §18-2. Each element must be proven by clear, cogent and convincing evidence. The failure to prove any element of fraud is fatal to a recovery for fraud. Id.

"If, being capable, the testator has read the will, or the will has been correctly read to him, or if, although neither has occured [sic], it corresponds to his instructions, he is deemed to have

assented to every term, and probate as to any part cannot be denied." Coleman Karesh, Wills 26 (1977).

Fraud also requires a heightened burden of proof, so to defeat a summary judgment motion, the Plaintiff must present evidence to show that the heightened burden can be carried at the trial. The standard of proof in a [fraud] case is clear and convincing evidence, there must be more than a scintilla of evidence to defeat the motion for summary judgment because the inquiry involved in a summary judgment motion on [fraud] necessarily implicates the substantive evidentiary standard of proof the would apply at trial. Russell v. Wachovia Bank, 578 S.E.2d 329 (S.C. 2003.)[47]

Mistake. Although alleged as a fraud ground, ¶ 35 b can be read to allege a mistake as to the document signed, as opposed to a mistake as to contents, insofar as it is alleged that decedent made a mark on a document that did not appear to be a testamentary instrument when the mark was made. From Coleman Karesh, Wills 26 (1977):

> b. Mistake as to Document Signed. Where a testator signs a document which turns out to be a will, but which he supposed to be something else, or where he intended to execute his will but instead signed another's will, the *animus testandi* is lacking and the will is not entitled to probate. (citations omitted.)

There is no evidence that decedent thought he was signing something other than a will or that he signed a will that had been prepared for someone else. This allegation is rank speculation and wishful thinking.

[47] Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confession as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Anonymous (M-156-90) v. State Bd. of Medical Examiners, 473 S.E.2d 870 (S.C. App. 1996).

Conclusion

It is elementary that the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relatives or by one who thinks the testator used bad judgment or was misled. Mock v. Dowling, supra. The Petitioner has not shown **specific probative facts** showing a genuine issue for trial on any cause of action. Summary judgment should be granted in favor of the Respondents on all causes of action, and decedent's last will dated January 14, 2012 should be formally admitted to probate.

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December 22, 2014

December 22, 2014

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	CASE NUMBER: 2012ES460579
IN RE: Estate of Vinton Willis Tucker,	
Mary Jean Tucker Swinger,	
Petitioner,	PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT
versus	
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	
Respondents.	

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JUDGE OF PROBATE
YORK COUNTY, SC

Petitioner, by and through her attorney's in fact, challenge the validity of the will of the decedent, Vinton Willis Tucker. Petitioner submits this following in opposition to Respondent's motion for summary judgment:

Summary Judgment

Summary judgment is a drastic remedy. Thus, it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). Summary judgment is inappropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining

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whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

The courts remain extremely careful to not grant summary judgment where any "... triable issues exist." In these instances, "those issues must be submitted to the jury." Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002). Where the courts have found the existence of a conflict in evidence, thus creating a genuine issue of material fact, the courts have found that summary judgment is not proper. Byrd v. Byrd, 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983).

Jurisdiction

First Cause of Action

At the time of decedent's death, decedent had not changed his domicile. Even relying on the affidavit submitted by Respondents from Allison Matthews does not indicate that the decedent intended to change is domicile. The affidavit merely states that she did not witness decedent object to "his family's expression of intent." Unlike Ms. Matthews' affidavit wherein she could not expressly state the decedent's desire, Marcy Thomas testified at deposition that the decedent expressed to her that he had "hopes to go home, but he knows his family want to help him". [1]

[1] M.N. Thomas M. N. Thomas deposition. P. 55, l. 5 to l. 12.

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A person may have more than one residence, but only one domicile. *Black's Law Dictionary* 484 (6th ed. 1990). Generally, once domicile is established, it continues until replaced by a new domicile. Phyllis K. Fairbanks et al. *Multi-State Death Tax Problems of Estates and Trusts*, 21 Real Prop. Prob. & Tr. J. 527, 528 (1986). At the time of decedent's death, Westminster Towers remained a temporary residence. A residence that was chosen by the Respondents in their effort to keep decedent away from his former caregiver, Brenda Snow.[2] It is clear that Mr. Tucker's desire was to return to his home in the state of North Carolina where decedent resided until December 2011, five months before his death. The Respondents testified during the deposition that upon being discharged from the hospital, doctors and nurses wanted to keep decedent safe from Ms. Snow because Ms. Snow had visited decedent while he was at Carolinas Medical Center and that she provided the hospital staff "misinformation about who she was and what her connection was" in that Ms. Snow "claimed she was a relative, and she's not." For this reason, Respondents testified that the hospital staff told the family to take the decedent to South Carolina.[2] Ms. Snow, coincidentally is the person to whom the decedent drafted a will leaving all of his estate to months before the execution of the will on January 14, 2012.[3 and 4]

Petitioner does have sufficient knowledge with which to base an argument as to whether Ben Smith was in possession of decedent's vehicle in York County at the time of decedent's death. However, Petitioner does argue that Ben Smith, contrary to the Respondent's memorandum of law in support of summary judgment, did not testify that decedent was in possession of personal property in York County at the time of his death. When questioned

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[2] M. Kelly deposition, p 17, l. 12 to p. 19, l. 2
[3] M. Kelly deposition, p. 35, l. 19 to p. 36, l. 21.
[4] B. Smith deposition. p. 19, l. 6 to l. 14.

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whether Mr. Tucker had personal furnishings in his possession, such as a bed or a recliner in his room at Westminster Towers, Ben Smith testified "not to my knowledge."[5]

Petitioner improperly relies on Montana territorial jurisdictional laws when determine jurisdiction for South Carolina. South Carolina was not silent on the issue of territorial jurisdiction, South Carolina's territorial jurisdiction laws are aptly applied under § 62-1-301:

> Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

South Carolina also provided for nonresident decedents under Section 62-4-207.

> In respect to a nonresident decedent, the provisions of Article 3 [Sections 62-3-101 et seq.] govern (1) proceedings, if any, in a court of this State for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration. The initiation of a proceeding under Article 3 (Sections 62-3-101 et seq.) is the appropriate procedure for an ancillary administration relating to the real property of a nonresident decedent located in this State and is an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

Where a nonresident dies in South Carolina owning property located in South Carolina, as did the decedent, Mr. Tucker, § 62-4-207 indicates that § 62-3-101 would govern the ancillary administration. Section 62-3-101 provides that:

> The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates, including the exercise of the powers of the personal representative. Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or

[5] B. Smith deposition, p. 25, l. 13 to l. 16.

other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, subject to the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the personal representative under Sections 62-3-709, 62-3-710, and 62-3-711, and his personal property devolves, first, to his personal representative, for the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the personal representative under Sections 62-3-709, 62-3-710, and 62-3-711, and, at the expiration of three years after the decedent's death, if not yet distributed by the personal representative, his personal property devolves to those persons to whom it is devised by will or who are his heirs in intestacy, or their substitutes, as the case may be, just as with respect to real property.

Relying on § 62-4-207 and § 62-3-101, South Carolina courts do not automatically gain jurisdiction over nonresident decedents merely because the decedent owns property in this state. Ignoring South Carolina jurisdictional statute in favor of Montana would be improper. Here, decedent expressed his desire to return to North Carolina, at the time of decedent's death in May 2012 after having been a located at Westminster Towers for five months since December 2011, decedent was still not of permanent residency status as Westminster Towers, at the time of Decedent's death he owned real property in North Carolina, and at the very least, decedent owned a vehicle that was in possession of Ben Smith in South Carolina.

Compliance with the Probate Code

Second Cause of Action

Petitioner respectfully withdraws her argument that the will does not comply with the Probate Code as set forth in Petitioner's second claim for relief.

Undue Influence

Third Cause of Action

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"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "'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.'" In re Estate of Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). Respondents, Ben R. Smith and Margaret Kelly, possessed a confidential or fiduciary relationship with decedent. The Petitioner asserts that the decedent's will was a product of undue influence in that Respondents who were in an existing fiduciary relationship with decedent restricted his visitation and substituted influencer's wishes onto the decedent. On November 17, 2011, the decedent appointed Respondent, Ben Smith, as his durable power of attorney. Decedent executed the durable power of attorney in his state of domicile, North Carolina. Decedent's North Carolina attorney prepared the power of attorney documents. Within one month, on December 12, 2011, Ben Smith, removed Decedent from North Carolina to Westminster Towers in South Carolina where decedent died five months later. As power of attorney, Ben R. Smith, had control over the decedent's financial transactions and medical decisions. Where the son was the mother's power of attorney with the authority to manage all of her finances, the circuit court found the son to have been in a fiduciary relationship. In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (S.C. App., 1999).

The circuit court also found a fiduciary 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

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(1948); Hembree, 311 S.C. 192, 428 S.E.2d 3. The court relied on precedent from other jurisdictions which has found that "the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed." Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7. Based on these cases, the court recognized "[m]ost of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed . . ., nonetheless, we find no reason why this discrepancy should change our analysis." Id. In addition to Dixon, the court found secondary authority supports the application of the presumption to contested will cases. Concerning this issue, the Restatement of Property provides in relevant part:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. **The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.**
>
> Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003) (emphasis added).

Petitioner would assert that as there is the existence of a fiduciary relationship, the burden shifts to Respondents to show that undue influence does not exist. The 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 unmistakenly 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.

Upon being admitted into Westminster Towers in late 2011, any contact that decedent had with any family member beside the Respondents' family was monitored by Respondents. Respondents completely restricted decedent's visitation with decedent's former caregiver, Brenda Snow.[6] It appears to be uncontested by Respondents that decedent not only drafted a will giving all of his estate to Ms. Snow, but continued to express his desire to leave his estate to Ms. Snow.

In re Estate of Cumbee the court found evidence which indicates the disposition of Mrs. Cumbee's estate in the 1994 will did not comport with her expressed intentions. Five months before Mrs. Cumbee died she told 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 told her sister-in-law that her son had asked her to give him the home she owned, but she refused. Mrs. Cumbee executed the 1994 will in February of 1994, approximately seven months before her death and, two months before this conversation which indicated that the disposition of Mrs. Cumbee's estate in her will did not comport with her expressed intentions because five months before Mrs. Cumbee died she told her sister-in-law her desires that were in contrast to the will actually probated.

Similarly to In re Estate of Cumbee, decedent, Mr. Vinton Tucker expressed his desire to leave his estate to Brenda Snow in a conversation that he had with Margaret Kelly.[7] Respondent Ben Smith was also aware of the decedent's desire to leave his estate to Brenda Snow.[8] In addition, on February 5, 2012, weeks after signing the will on January 14, 2012, Marcy Thomas

[6] M. Kelly deposition, p. 70, l. 24 to p. 71, l. 6.
[7] M. Kelly deposition, p. 34, l. 9 to p. 36, l. 1.
[8] B. Smith deposition. p. 19, l. 6 to l. 14.

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testified that the decedent told her that his nieces and nephews "want(ed) to be included in his will" and that "this is why they are not in the will."[9] Marcy Thomas continued to testify that decedent was upset when his nephew approached him about leaving the contents of his will to his nieces and nephews. On this day when speaking about his desire to leave Brenda Snow his estate, decedent again stated that he "loved his little girl very much, and she took care of him and wanted her to have the money he designated for her to have."[10] The social worker at Westminster Towers, Marcy Thomas, who stated that she spent a considerable amount of time around decedent, determined that on this day, February 5, 2014, decedent "was having a very cognitively clear afternoon."[11] On January 14, 2012, Respondents substituted their desires and will onto that of the decedent.

On January 14, 2012, at approximately 6:30 p.m. decedent was found unresponsive at Westminster Towers.[12] At approximately 6:50 p.m. EMS arrived at Westminster to transport decedent to the hospital.[13] The personal representatives both consistently testified and responded to the pleadings that they had no knowledge that decedent had dementia.[14 and 15] However, upon being admitted to Piedmont Medical Center on January 14, 2014, Dr. Menes testified that his notes reflected that the family stated that the decedent had "intermittent dementia ranging from focal something and alert and oriented times one."[16] At approximately 8:00 p.m. about the same time that Margaret Kelly arrived at the hospital, which would have been about an hour after the

[9] M. N. Thomas deposition. p. 39, l. 10 to l. 18.
[10] M. N. Thomas deposition. p. 40, l. 3 to l. 16.
[11] M. N. Thomas deposition. p. 40, l. 17 to l. 21.
[12] J. Bondurant deposition. p. 16, l. 11 to l. 13.
[13] J. Bondurant deposition. p. 17, l. 1.
[14] M. Kelly deposition, p. 19, l. 4 to l. p. 24, l. 25.
[15] B. Smith deposition. p. 7, l. 18 to p. 8, l. 2.
[16] Dr. Menes deposition. p. 27, l. 25 to p. 28, l. 5.

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decedent was transported by ambulance to PMC, Margaret Kelly testified that the Dr. Ratterree came into the emergency room and stated that he had ran tests and would return within minutes with the results.[17]

Contrary to Mr. Bracket's memorandum of law in support of his motion for summary judgment, that "the three persons who were in the room with the decedent all confirmed that the decedent first raised the subject of his will," Margaret Kelly testified that no one was in the room with her when the decedent mentioned his will but her husband Ronald Kelly.[18] Margaret Kelly then testified that after learning that decedent had an aneurysm that may result in death that the decedent was "happy and cheerful."[19] In contrast, Dr. Menes described decedent as "oriented times two, meaning that he knew who he was, he knew where he was. Beyond that, I really couldn't say that he knew much."[20] Margaret Kelly testified that the decedent within minutes of hearing that he had an aneurysm the "size of a large orange" dictated word for word every single word that was written in the will that was executed on January 14, 2012.[21] Margaret Kelly testified that the decedent dictated the will to her within the span of approximately 30 minutes. Dr. Jewell testified that dementia patients often experience sundowning which affects patients more in the evening and when the patient is in unfamiliar situations, such as being admitted to the hospital, in that the patient is more agitated and confused.[22] Upon reading the will that was

[17] M. Kelly deposition, p. 28, line 15 to l. 16 and p. 40, l. 25 to p. 41, l. 14.
[18] M. Kelly deposition, p. 42, l. 4 to l. p. 43, l. 9.
[19] M. Kelly deposition, p. 51, l. 4.
[20] Dr. Menes deposition, p. 32, l. 10 to l. p. 15.
[21] M. Kelly deposition, p. 41, l. 18. and p. 46, l. 14 to p. 47, l. 23.
[22] Dr. Jewell deposition, p. 12, l. 1 to p. 13, l. 15.

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executed on January 14, 2014, Dr. Jewell testified that it he would be surprised the words on the will "would be his words on this paper."[23]

In Byrd v. Byrd, the court found where there existed a conflict in the evidence, it created a genuine issue of material fact, therefore summary judgment in favor of respondent was not proper. 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983) (finding in will contest case that issue of undue influence was properly submitted to the jury where: testator was physically and mentally infirm prior to and contemporaneous with the execution of the will; son, who was the principal beneficiary of the will and in a confidential/fiduciary relationship with testator, threatened to place testator in a nursing home and attempted to restrict visits between testator and his other children; and the will was executed less than six months prior to testator's death); Moorer, 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence in contested will case was properly submitted to the jury where there was evidence that testator's son was in a confidential/fiduciary relationship with his mother, mother was in fear of him, and he indicated an intention to procure for himself her estate). Here, Ben Smith testified that he tore up decedent's prior will where decedent willed his estate to Brenda Snow.[24] Ben Smith testified that he tore up the will at the direction of decedent's former attorney, Edward Knox, because according to Ben Smith, Mr. Knox instructed Ben Smith to tear up the will because Mr. Knox stated that a conflict of interest existed when Mr. Knox prepared the will for decedent because Mr. Knox had accepted money from Brenda Snow to assist her with her divorce.[25] Ben Smith also testified that he never told decedent about his conversation with Mr. Knox nor did Ben

[23] Dr. Jewell deposition, p. 19, l. 2 to l. 21.
[24] B. Smith deposition, p. 15, l. 19 to p. 16, l. 2.
[25] B. Smith deposition, p. 15, l. 3 to 18.

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Smith inform decedent that he destroyed the will.[26] Ben Smith did, however testify that within one week of destroying the original will that Ben Smith had in his possession because of his fiduciary relationship as Power of Attorney, he informed Margaret Kelly that he destroyed the will.[27]

Testamentary Capacity

Fourth Cause of Action

Petitioner asserts that decedent lacked testamentary capacity to execute the will at the time of execution on January 14, 2012. The mental capacity necessary to meet the requirements of a sound mind is tested by 1) the ability of the testator to know his estate, 2) the objects of his affections, and 3) to whom he wishes to leave it. Hellams v. Ross, 233 S.E.2d 98 (S.C. 1977); In re Estate of Weeks, 495 S.E.2d 454 (S.C. App. 1997). It is clear from the statements that decedent made to Margaret Kelly about his desire to leave his estate to Brenda Ross, from the statements that decedent made to Ronald Kelly about his desire to leave his estate to Brenda Ross, and his statement to Marcy Thomas that he desired to leave his estate to Brenda Snow and that he became upset when his nephew approached him about leaving his estate equally to his nieces and nephews that on January 14, 2012, decedent was not clear on the objects of his affections. Respondents erroneously rely on the fact that the will includes the list of nieces and nephews on the decedent's wife's side of the family to indicate that the decedent "had the ability to form a rational plan for disposition" Hon. Eunice L. Ross and Thomas J. Reed, Will Contests, § 6.5 (1992). In fact, as decedent before the execution of the January 14, 2012 execution and after the January 14, 2012 execution, continued to maintain his expressed desire and intent to

[26] B. Smith deposition, p. 16, l. 5 to 14.
[27] B. Smith deposition, p. 16, l. 21 to 25.

will his estate to Brenda Snow, someone other than his nieces and nephews on his wife's side, would indicate quite the opposite, that the decedent lacked the ability to form a rational plan for disposition.

A person's testamentary capacity is determined at the exact time of execution of the will. During the time immediately leading up to the actual execution of the will at approximately 9:00 p.m., the decedent had been transported from Westminster at approximately 6:50 p.m. for loss of consciousness for syncope episodes, had been admitted to the emergency room, administered a variety of tests, been "punched and pressed" by the doctor, but during the time the will was being dictated, which deposition testimony indicates took approximately 30 minutes, no one saw or had any contact with the decedent other than the Respondent and Respondent's husband.[28] Margaret Kelly further testified that from the time that Dr. Menes delivered the results of the test for the aneurysm at around 8:00 p.m. until the time that she wrote down the will as dictated by the decedent which took 30 minutes, until the time it took for Danny and Rebecca Kelly to arrive at the hospital, no one came into the hospital emergency room, not an orderly, not a nurse – no one.[29] Given the testimony of Margaret Kelly, no one other than interested persons, the scrivener, and persons summoned by the family members of the scrivener to witness the will had the opportunity to determine decedent's testamentary capacity during the exact time of execution.

Dr. Menes testified that after examining decedent on the morning after being admitted that the decedent "knew who he was, he knew where he was" beyond that, Dr. Menes "couldn't

[28] M. Kelly deposition, p. 51, l. 6 to 7.
[29] M. Kelly deposition, p. 54, l. 16 to p. 56, l. 9.

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say that he knew much"[30] While Dr. Ratterree testified that the decedent had an "appropriate mood and affect," Dr. Ratterree also admitted that his purpose during his examination of decedent was not to determine decedent's mental capacity.[31] Dr. Jewell testified that when decedent was admitted to Westminster Towers on 12/26/2011 he was diagnosed as having mild dementia with possible sundowning.[32] Dr. Jewell also testified that he did not think that that a person such as decedent having mild dementia with possible sundowning having been admitted into the hospital in the evening testified that decedent dictated the will to her.[33] Decedent lacked the testamentary capacity to have executed the will as submitted to probate by Respondents.

Fraud or Mistake

Fifth Cause of Action

All the facts and circumstances surrounding decedent's expressed desire to draft a will in favor of Brenda Snow would then give reason to indicate the basis of fraud wherein his expressed desires are not presented on the executed will. Relying on statements that decedent made to Margaret Kelly about his desire to leave his estate to Brenda Ross, statements that decedent made to Ronald Kelly about his desire to leave his estate to Brenda Ross, statements decedent made to Marcy Thomas after the signing of the will on January 14, 2012, that he desired to leave his estate to Brenda Snow would provide more than a scintilla of evidence that the existence of a will to the contrary of decedent's wishes would raise the implication of fraud. An executed will in stark contrast to all of the expressed wishes of the decedent coupled with Respondents blatant disregard for the decedent's wishes when Ben Smith destroyed a properly executed will without

[30] Dr. Menes deposition, p. 32, l. 11 to p. 32, l. 16.
[31] Dr. Ratterree deposition, p. 9, l. 15.
[32] Dr. Jewell deposition, p. 11, l. 21 to p. 121. 7.
[33] Dr. Jewell deposition, p. 19, l. 2 to l. 21.

the knowledge and without the direction of decedent would further provide implication of the existence of fraud. As the decedent, during a "very cognitively clear afternoon" on February 5, 2012, had no memory or mere recollection of signing a will on January 14, 2014, but did in fact remember being upset that decedent's nephew approached him urging him to equally divide up his estate among his nieces and nephews as opposed to giving his estate to Brenda Snow, this would imply that when decedent signed the document on January 14, 2014, he was not aware of what he was signing. On the same day, in the emergency room, decedent also signed the Declaration of Desire for Natural Death. This document was witnessed by Elizabeth Haigler and Danny Kelly.

Conclusion

In light of the foregoing, summary judgment would be inappropriate in this case, and Respondents' motion should be DENIED.

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December 29, 2014

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE PROBATE COURT

2012-ES-46-0579

IN RE THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

Respondents' Answers to Petitioner's First Set of Continuing Interrogatories

Respondents' Answers to Plaintiff's Interrogatories

INTERROGATORY NO. 1.

A. As to each of the occurrences described as follows, please state whether such an event occurred, and, to the best of your ability, provide the year, month and date of the occurrence:

1) The granting or revocation of any power of attorney by Decedent;

Answer: a Health Care Power of Attorney executed on or about February 8, 2012

A Durable Power of Attorney executed on or about November 11, 2011

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2) The formation or modification of any financial account naming Decedent in any capacity after Decedent had granted any power of attorney;

Answer: None. No accounts were changed.

3) The formation or modification of any financial account naming Respondent as beneficiary of a Payable on Death Account;

Answer: None. No POD accounts were created.

4) The change of any kind to any life insurance policy naming Decedent in any capacity after Decedent had granted any power of attorney;

Answer: None. There were no changes to insurance beneficiaries. All insurance benefits were used for funeral expense.

5) Any payment, distribution or loan directly from Decedent, from any account naming Decedent in any capacity, or from any life insurance policy or policies naming Decedent in any capacity, to any of Decedent's issue or any person or entity related to any of Decedent's issue, or to any person or entity on behalf of any such person or entity, in any amount equal to or exceeding One Thousand ($1,000) Dollars, or totaling or exceeding such amount in the aggregate in a twelve-month period, after Decedent had granted any power of attorney;

Answer: None.

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6) The creation or alteration of any will, trust agreement or testamentary trust by Decedent.

Answer: The last will that has been filed with the court for probate was executed on January 14, 2012. No trusts were executed.

B. If any account identified in this Interrogatory No. 1 was established as a joint account, payable on death account, or was later modified to be such an account, please make a statement describing with particularity the circumstances surrounding such formation or modification, including:

1) A brief description of each document signed in the formation of the account;

Answer: N/A

2) Identifying each person who signed each such document;

Answer: N/A

3) Describing the geographic location where each document was signed;

Answer: N/A

4) Identifying each person who was present during the signing of the documents;

Answer: N/A

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5) Stating at what time of the day the documents were signed, and what date the documents were signed.

Answer: N/A

* An estate account was opened after decedent's death.

C. If the Decedent signed, was present for the signing, was informed of the signing, or consented to the signing of any of the documents described in Part A of this Interrogatory No. 1, then please identify all medications that Decedent was prescribed at the time of such events, stating the medication, the dosage, and the prescriber of such medication, and describe Decedent's mental state at the time of any and all such events described in this part C.

Answer: Decedent was obviously present on January 14, 2012 when the last will was executed. Prescribed medications unknown. Decedent possessed testamentary capacity at the time.

INTERROGATORY NO. 2.

After Decedent granted any power of attorney to any person, identify all bills, invoices, statements of accounts, requests for reimbursements or other requests or demands for payment made to Decedent by any of Decedent's issue or related entities or persons in any amount for any reason

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whatsoever, whether orally or in writing, and identify the relationship between Decedent and such person requesting or demanding payment. Please include in response to this request any bill, statement, invoice or demand for payment satisfied by Decedent on behalf of any of his issue, or satisfied by Decedent on behalf of any entity or person related to Decedent's issue.

Answer: Only normal recurring expenses for the Decedent were paid.

INTERROGATORY NO. 3.

Give the names, addresses, and telephone numbers of all persons known or believed by Respondent(s) or counsel to possibly, probably or certainly be witnesses concerning each and every occurrence identified by Respondent in Interrogatory No. 1 and No. 2 hereof. As to each and every person identified in the first part of this Interrogatory No 2, please indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Answer: Regarding execution of the January 14, 2012 last will, the persons with knowledge are: Danny Kelly, Ronald Kelly, Rebecca Kelly (notary), Margaret Kelly. The niece and nephew devisees named in the January 14, 2012 last will had interactions with the Decedent over the years.

INTERROGATORY NO. 4.

For each person identified in Interrogatory No. 3 above, set forth a summary sufficient to inform the Petitioners of the important facts known to or observed by such witnesses, and te nature and extent of the issues upon which said witnesses intend to testify.

Answer: Danny Kelly, Ronald Kelly, Rebecca Kelly and Margaret Kelly were present in the room when the January 14, 2012, last will was prepared and signed. They can testify as to the decedent's expressed wishes with respect to the content of the last will and the decedent's mental status at the time. The matters known to the other niece and nephew devisees are presently unknown.

INTERROGATORY NO. 5.

Set forth in detail a complete description of Respondent(s) relationship with Decedent. Supply the names of persons who may corroborate the relationship, the approximate dates that Respondent(s) began the relationship and dates and times the Respondent (s) communicated with Decedent to include dates and times Respondent(s) visited the Decedent at his home in Charlotte, North Carolina and dates and times Respondent(s) visited with Decedent at Westminster Towers.

Answer: The Respondents are a niece and a nephew of Decedent's wife, Edith Pursley. Vinton and Edith were married in 1951. They were married in the home of Ben Smith, Sr. and Jane Pursley Smith, Edith's sister. The Smiths were the parents of Respondent Ben Smith, Jr. The Respondents were frequent visitors in the home of Vinton and Edith, and Vinton attended many Pursley family events. During the months when Vinton lived at Westminster Health and Rehab, he was visited almost daily by one or more of the Pursley family members, including Respondents.

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INTERROGATORY NO. 6.

Set forth in detail any medical condition or diagnoses of the Decedent known to Respondent(s). Identify and produce the evidence relied upon by the Respondent(s) to answer this Interrogatory.

Answer: in 2010, Vinton slipped and fell on ice at a friend's home and injured his back. He eventually recovered and moved to Summit Assisted Living in Charlotte. He became involved with a care giver who was initially hired as a maid or housekeeper. At some point, the care giver began living at Vinton's home. In November 2011, Vinton was hospitalized for injuries of unknown origin. The care giver said that Vinton had fallen, but doctors thought that the injuries were not consistent with a fall. The hospital social worker recommended that Vinton be moved into a care facility outside of Charlotte. Westminister Towers in Rock Hill offered what Vinton needed. His mental status would fluctuate, but he was alert and oriented most of the time. He suffered generally with heart and respiratory conditions, but Respondents are unaware of specific diagnoses.

INTERROGATORY NO. 7.

Identify and describe the specific evidence relied upon by the Respondents (whether documentary, oral or otherwise) to allege and prove that Decedent intended to remain at Westminster Towers until the date of his death.

Answer: Vinton was unable to live alone and he understood that. He was happy and comfortable at Westminster. Many members of the Pursley family were close by and could visit on a regular basis. Vinton seemed to have developed a good relationship with other residents, and he toured the facility with Westminster staff (Allison Matthews) in anticipation of taking an apartment when he was released from rehab.

INTERROGATORY NO. 8.

Set forth in detail the names of persons that Respondent(s), friends or family members of Respondents or anyone known to Respondents, contacted following the Decedent's death. Supply the method of contact (i.e.) Email, phone, letter, facsimile, text message, etc...) and provide a copy of such communication.

Answer: Respondents contacted the devisees and their families by phone. Liz Riley, Vinton's friend and neighbor in Charlotte, was contacted by phone. Vinton said that he had not notified his relatives of Edith's death in 2000 and did not want them notified of his death.

INTERROGATORY NO. 8 [sic].

Set forth in detail the names of persons that Respondent(s), friends or family members of Respondents or anyone known to Respondents, contacted concerning the funeral arrangements for Decedent. Supply the method of contact (i.e.) Email, phone, letter, facsimile, text message, etc...) and provide a copy of such communication.

INTERROGATORY NO. 9.

Set forth in detail the names of persons that Respondent(s) contacted concerning the sale of and disposition of Decedent's home in Charlotte, NC. Supply the method of contact (i.e.) Email, phone, letter, facsimile, text message, etc...) and provide a copy of such communication.

Answer: Jennifer Currie, a realtor in Charlotte with Allen Tate Realty, was contacted by phone about the sale of Vinton's Charlotte property.

INTERROGATORY NO. 10.

Set forth in detail the reasons why Respondent(s) or friends or family members of the Respondent(s) refused to leave Decedent alone with Petitioner's family during the Petitioner's family's visit to Westminster Towers. Identify, describe and produce the evidence relied upon by the Respondent(s) to answer this Interrogatory.

Answer: When Vinton received notice from Margaret Dudley that she and others were planing to visit during their travel to Florida, Vinton requested that he not be left alone with them because they were only interested in his money. He stated that these relatives only visited with him in years past so that they would have a free place to stay when they went to Florida.

INTERROGATORY NO. 11.

Identify the persons present during the removal of items, and/or cleaning, and/or disposition of contents of Decedent's home preceding or following Decedent's death. Set forth the dates and times of any such removal, cleaning, or disposition and provide a detailed inventory including disposition of the items removed.

Answer: Nothing was removed from Vinton's home before his death. The lawn was maintained by Willie Atkins, who was hired by the Respondents at the recommendation of neighbors on the street. Vinton expressed his intent to make gifts to the Respondents and other family members of things he no longer used, but no one accepted or took possession of anything before Vinton's death. On June 2, 2012, the Respondents and the other devisees met at the home and amicably divided the contents. No money was paid or collected and no monetary value was placed on anything. The house had not been improved or updated, and its contents were quite worn and outdated.

INTERROGATORY NO. 12.

Set forth in detail any statement which has been made by Respondents, or made by their counsel, to any person, whether orally or in writing, concerning Respondents' understanding of Decedent's wishes regarding distribution of Decedent's property after Decedent's death. Supply the name to whom the statement was made, the date of approximate date that the statement was made, and state the names and all known contact information of any persons who witnessed or received such

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statement(s).

Answer: The only communication by Respondents concerning their understanding of Vinton's wishes after Vinton's death was a communication with the Plaintiff. Ms. Swiger sent a note stating that she had painted a picture of Vinton's father holding him (Vinton) when Vinton was an infant. Respondent Margaret Kelly had the picture specially packaged and mailed to Ms. Swiger. Ms. Swiger did not thereafter communicate with the Respondents.

INTERROGATORY NO. 13.

Set forth in detail any statement made by Decedent of any person, whether orally or in writing, regarding Decedent's wishes regarding distribution of Decedent's property after his death. Supply the name to whom the statement was made, the date or approximate date that the statement was made, and state the names and all known contact information of any persons who witnessed such statement(s).

Answer: Statements were made to Respondents and other devisees at various times, but most notably, statements were made on January 14, 2012 in the presence of Danny Kelly, Ronald Kelly, Rebecca Kelly (notary), Margaret Kelly that were written down and signed by Vinton in the form of his last will.

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INTERROGATORY NO. 14.

Set forth a list of photographs, plats, sketches or other prepared documents in possession of Respondents that relate to the claim or defense in the case.

Answer: Appraisal of 3119 Pinehurst Place

Contract for sale of 3119 Pinehurst Place

Misc photos of Vinton and Edith

Plaintiff note dated May 26, 2012 and Margaret Kelly response dated September 19, 2012

Large photo of Pursley family event

Margaret Dudley card to Vinton postmarked April 3, 2012

Memo from Allison Matthews, Westminster Towers, dated May 20, 2012 re intent to remain at Westminister Towers

Durable POA dated November 17, 2011

Health Care POA dated February 8, 2012

Last will dated January 14, 2012

Death Certificate (no mention of mental status as primary or underlying cause of death)

Pages from visitor book at Westminister Towers

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INTERROGATORY NO. 15

Set forth a list of any and all exhibits which the Respondent intends to use at any hearing or trial pertaining to the above-captioned estate ("the Case"), and specify its use. i.e., direct, indirect, circumstantial, or demonstrative evidence, etc.

Answer: Decisions about trial exhibits are extremely premature at this point and have not been made.

INTERROGATORY NO. 16.

List the names and addresses of any expert witnesses whom Respondent proposes to use as a witness at a hearing or trial of the Case and provide a summary of the opinions which the expert is expected to give and a statement of the facts relied upon by the expert in reaching each opinion.

Answer: No experts have been retained, but Respondents reserve the right to retain experts and to supplement this answer accordingly.

INTERROGATORY NO. 17.

Please state completely and fully all representations, statements, declarations or admissions made by these Petitioners or anyone in Petitioner's family which you might attempt to make known to the judge or jury in any hearing or trial of this Case.

Answer: Decisions about trial evidence have not been made. Vinton usually spoke of his relatives in Maine as always wanting money. When the relatives visited Vinton in April 2012, one of the first things said by Margaret Dudley was "did you have to sell your house to stay in this

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nice place?" Followed shortly by the question "do you still have your Cadillac?" Vinton eventually had to ask the visitors to leave. Afterward, Vinton was visibly upset and agitated. Witnesses to these events are Steve Kelly, Adrienne Pursley, Johnna Young. When Margaret Dudley and her family returned from Florida, they decided not to stop for a visit because of Vinton's reaction to their first visit.

INTERROGATORY NO. 18.

State whether Respondent(s) have ever been involved in previous civil action, criminal action or charge, or bankruptcy proceeding as a party. As far as civil actions, state whether or not a lawsuit was initiated or if Respondents obtained a settlement prior to filing a lawsuit, the name and caption of any such action, the nature of any such action or pre-action settlement, the date of any such action or pre-action settlement, and injuries and damages complained of by the Respondent from any such action or pre-action settlement.

Answer: Ben Smith, Jr. was sued once by a customer of his store for a slip and fall. The case was dismissed in Mr. Smith's favor.

INTERROGATORY NO. 19.

Set forth the names and addresses of all insurance companies which have provided any performance bond or liability insurance coverage relating to this Case, and set forth the policy number(s) of the bond or liability policy(ies) involved and the amount(s) of bond or liability coverage provided in

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each policy.

Answer: None.

INTERROGATORY NO. 20.

Give the names, addresses, and telephone numbers of all persons known or believed by Respondent(s) or counsel that are financially obligated to the Decedent. Set forth the amount owed to the Decedent and the repayment terms of such amount.

Answer: No one known to the Respondents.

INTERROGATORY NO. 21.

Give the names, addresses and telephone numbers of any caregiver of Decedent's that is known to Respondent(s) or known to anyone in Respondent(s) family. Provide the dates and times of such service.

Answer: The only private care giver known to the Respondents was Brenda Snow. She was an employee of an assisted living facility who befriended Vinton and became a live-in care-giver who apparently wanted a relationship with Vinton. During Vinton's hospitalization in November 2011, hospital staff expressed their concern that Vinton's injuries may have been from abuse and Snow was denied access to Vinton.

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September 18, 2013

STATE OF SOUTH CAROLINA

In the Court of Appeals
[In the Circuit Court]

APPEAL FROM YORK COUNTY
Probate Court

Case Number 2015CP460466

Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven
Appellants,

Vs.

Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker
Respondents.

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Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999).....5

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STATEMENT OF CASE

Decedent, Vinton Tucker, died in York County, South Carolina on May 12, 2012. Decedent was 93 years old at the time of his death and had resided in Mecklenburg County, North Carolina for all of his life until December 2011 when he entered Westminster Towers. At the time of his death, Decedent was a patient at Westminster Towers located in York County, South Carolina.

On May 17, 2012, 5 days after Mr. Tucker's death, Respondents, Ben Smith and Margaret Kelly applied for Informal Probate of Will. The will that was submitted as the Last Will and Testament for Decedent was a will purportedly executed on February 14, 2012. Judge Carolyn Rogers of the York County Probate Court, approved Respondents' application for Informal Probate of Will and Appointment of Personal Representative on the same day, May 17, 2012.

At the time of Mr. Tucker's death, he had two living siblings, no living parents and no children. In fact, Decedent never had any children. Appellant, Mary Jean Tucker Swiger, is now the only living sibling of Decedent. Janet Loeffler and Carol Dehaven are Ms. Swiger's daughters and have been named as the attorney of fact for Ms. Swiger. Janet Loeffler and Carol Dehaven have been added as parties to this action as a result of Ms. Swigers' diminishing health condition. In the Application for Informal Probate of Will, Respondents did not include Mr. Tucker's siblings as intestate heirs. Because of Respondents failure to include Mr. Tucker's siblings as intestate heirs, Appellants and other family members were not immediately notified of Mr. Tucker's death. On June 7, 2012, Respondent's filed an Inventory and Appraisement with the York County Probate Court indicating that the total net worth of Decedent's estate was $2,854,408.00.

On May 10, 2013, Appellants filed a Summons and Petition for Formal Testacy and To Set Aside Informal Probate wherein Appellants argued that the court lacked jurisdiction over Decedent's estate, that the document did not comply with S.C. Probate Code, that Respondents exerted undue influence over Decedent, fraud, and lack of testamentary capacity. Thereafter, on January 22, 2014 Appellants filed a Notice of Motion and Motion for Temporary Restraining Order. Respondents filed a Return and Memorandum in Opposition to Petitioner's Motion for Temporary Restraining Order. The hearing was held on March 26, 2014 with the Honorable Carolyn Rogers presiding. By order of the York County Probate Court filed on April 14, 2014, the Court denied Appellant's motion for Temporary restraining order, but issued an order granting the Appellant's motion for a restricted account.

Respondents filed a Motion to Compel Appellant Mary Jean Swiger's attendance for depositions in York County South Carolina. Appellants argued that at the time of the scheduling of the depositions, Ms. Swiger's fragile and deteriorating health condition prevented her from traveling from Virginia to South Carolina to participate in depositions. Appellants further argued that Respondent's attorney had been notified of Ms. Swiger's inability to attend the scheduled deposition. The York County Probate Court by order filed August 21, 2014 granted Respondents' motion to compel and awarded costs to Respondents.

Respondents filed a Motion for Summary Judgment and an Amended Motion for Summary Judgment wherein they sought an order of the court granting the Respondents summary judgment on all causes of action filed by Appellants. The summary judgment hearing was scheduled for December 30, 2014 before Judge Rogers. Respondents delivered their Memorandum of Law in support of the motion for summary judgment via

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Federal Express to Appellant's attorney on December 23, 2015. On December 29, 2015, Appellant served Respondents' attorney and the court with a Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment. By order of the Court filed on February 2, 2015, Respondents' were granted Respondents' motion for summary judgment. This appeal follows.

ARGUMENT

1. THE PROBATE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLANTS.

Summary judgment is a drastic remedy. Thus, it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). Summary judgment is inappropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

The courts remain extremely careful to not grant summary judgment where any "... triable issues exist." In these instances, "those issues must be submitted to the jury." Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002). Where the courts

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have found the existence of a conflict in evidence, thus creating a genuine issue of material fact, the courts have found that summary judgment is not proper. Byrd v. Byrd, 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983).

Here, there were several issues of material facts that if the trial court had viewed the issues in the light most favorable to nonmoving party, the Appellants, then the court would have denied Respondents motion for summary judgment.

a. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF UNDUE INFLUENCE.

"A will contest based on alleged undue influence is most often adjudicated on the basis of circumstantial evidence" In re Last Will and Testament of Smoak, 286 S.C. 419, 424, 334 S.E.2.d 806, 809 (1985). "Generally in cases where a will has been set aside for undue influence, there has been the evidence **either** (emphasis added) of threats, force and/or restricted visitation or of an existing fiduciary relationship" Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). First, Appellants argued that upon being admitted into Westminster Towers in late 2011, any contact that decedent had with any family member other than the Respondents' family was monitored by Respondents (TR, page 46 lines 8 and 9; page 45 lines 1-4). Respondents argued that "if there was indeed restricted visitation while Mr. Tucker was in the hospital in Charlotte ... that was a restriction imposed by the hospital and not by anybody in Mr. Tucker's family and particularly not by the two Respondents in this case, either Margaret Kelly or Ben Smith" (TR, page 10, lines 21-25; page 11, line 1).

The record includes deposition testimony from Marcy Thomas, a social worker at Westminster Towers, who spent a considerable amount of time with Mr. Tucker. Ms. Thomas testified that included in Mr. Tucker's file was a picture of Brenda Snow and a

note that that Brenda Snow is not allowed to visit (Marcy Thomas' deposition, page 58 lines 20-25). In addition, Ms. Thomas indicated that this information was "given probably from Margaret and Ben (indicating the Respondents Margaret Kelly and Ben Smith). Because Ms. Thomas was aware "that they had concerns about Brenda" (Marcy Thomas' deposition, page 58 lines 8-12). It is significant that Brenda Snow's visitation was restricted because it appears undisputed by the testimony of the Respondents that Decedent cared for Ms. Snow and that he wanted to take care of her financially (Margaret Kelly's Deposition, page 34, lines 15 – 21; Ben Smith's Deposition, page 19, lines 6-14; Marcy Thomas' deposition, page 40, lines 9-16). In fact, Mr. Tucker contacted an attorney in North Carolina, Edward Knox, and drafted a will devising his entire estate to Brenda Snow.

Appellants continued to argue that in addition to restricting Brenda Snow's visitation that Respondents' also limited Appellants' visitation. Although Respondents deny restricting Brenda Snow or Appellants' visits, in Respondents' Answers to Petitioner's First Set of Continuing Interrogatories, Respondents' response to Interrogatory number 10, wherein Appellants ask, "Set forth in detail the reasons why Respondent(s) friends or family members of the Respondent(s) refused to leave Decedent alone with Petitioner's family during the Petitioner's family's visit to Westminster Towers. Identify, describe and produce the evidence relied upon by the Respondent(s) to answer this Interrogatory," Respondents respond as follows: "When Vinton received notice from Margaret Dudley (who is Mr. Tucker's niece on Appellants side of the family) that she and others were planning to visit during their travel from Florida, Vinton requested that he not be left alone with them because they were only interested in his money" (Respondents' Answers to Petitioner's First Set of Continuing Interrogatories,

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Interrogatory number 10). It was for this alleged reason that Respondents would not leave the room when Appellants' family members visited with Mr. Tucker. If true, and Mr. Tucker did in fact make this statement, this statement would provide some valid reason as to why Respondents limited Mr. Tucker's visitation. However, this alleged reasoning does not give rise to a statement of veracity because, Respondents continue to deny that they restricted Mr. Tucker's visitation. This denial is inconsistent with the record and the testimony. As such, whether Respondents restricted visitation is a material issue of genuine fact and in determining whether any triable issue of fact exists so as to preclude summary judgment and drawing all inferences in the light most favorable to the non-moving party, the Appellants, summary judgment is not appropriate *id.*

The second issue of material fact of dispute that exists thus warranting the lower court's denial of Respondent's motion for summary judgment, is the fact that the will submitted to probate by Respondents is inconsistent with the wishes of Decedent. Appellants argued that not only did Mr. Tucker execute a devising his estate to Ms. Snow, but Mr. Tucker continued to express his desire to leave his estate to Ms. Snow (TR page 48, lines 5-12).

In re Estate of Cumbee, the court found evidence which indicates the disposition of the decedents' estate in the 1994 will did not comport with her expressed intentions. Five months before Mrs. Cumbee died she told 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. In re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct.App.1999). Mrs. Cumbee told her sister-in-law that her son had asked her to give him the home she

owned, but she refused. Mrs. Cumbee executed the 1994 will in February of 1994, approximately seven months before her death and, two months before this conversation which indicated that the disposition of Mrs. Cumbee's estate in her will did not comport with her expressed intentions because five months before Mrs. Cumbee died she told her sister-in-law her desires that were in contrast to the will actually probated.

Similarly to In re Estate of Cumbee, decedent, Mr. Vinton Tucker expressed his desire to leave his estate to Brenda Snow in a conversation that he had with Margaret Kelly (Margaret Kelly's deposition, page 36 lines 18 – 21). Respondent Ben Smith was also aware of the decedent's desire to leave his estate to Brenda Snow (Ben Smith's deposition page 19, lines 6-14).

In addition, on February 5, 2012, weeks after signing the will on January 14, 2012, Marcy Thomas testified that the decedent told her that his nieces and nephews "want(ed) to be included in his will" and that "this is why they are not in the will." (Marcy Thomas' deposition, pages 39 lines 10 – 19). The record reflects that Marcy Thomas continued to testify that decedent was upset when his nephew approached him about leaving the contents of his will to his nieces and nephews. On this day when speaking about his desire to leave Brenda Snow his estate, decedent again stated that he "loved his little girl very much, and she took care of him and wanted her to have the money he designated for her to have" (Marcy Thomas' deposition, page 40 lines 3 – 16). The social worker at Westminster Towers, Marcy Thomas, who stated that she spent a considerable amount of time with Mr. Tucker, determined that on this day, February 5, 2014, decedent "was having a very cognitively clear afternoon" and "talked a lot about his will" (Marcy Thomas' deposition, page 63 lines 23 – 25 and page 64 lines 1-6).

Despite talking a lot about his will, Mr. Tucker only reaffirmed his intent to leave his estate to Brenda Snow.

On January 14, 2012, at approximately 6:30 p.m. decedent was found unresponsive at Westminster Towers. At approximately 6:50 p.m. EMS arrived at Westminster to transport decedent to the hospital (Dr. Jane Bondurant's deposition. p. 16, lines 11 – 13). The record reflects that both Ben Smith and Margaret Kelly, the Respondents, both consistently testified and responded to the pleadings that they had no knowledge that decedent had dementia (Margaret Kelly's deposition, page 19, line 4; page 24, line 25 and Ben Smith's deposition. page 7, line 18; page 8, line 2). However, upon being admitted to Piedmont Medical Center on January 14, 2014, the record reflects that Dr. Menes testified that his notes reflected that the family stated that the decedent had "intermittent dementia ranging from focal something and alert and oriented times one" (Dr. Menes' deposition page 27, line 25; page 28, line 5). At approximately 8:00 p.m. about the same time that Margaret Kelly arrived at the hospital, which would have been about an hour after the decedent was transported by ambulance to PMC, Margaret Kelly testified that the Dr. Ratterree came into the emergency room and stated that he had ran tests and would return within minutes with the results.

Contrary to Mr. Bracket's memorandum of law in support of his motion for summary judgment and statements made at the hearing, that "the three persons who were in the room with the decedent all confirmed that the decedent first raised the subject of his will," Margaret Kelly testified that no one was in the room with her when the decedent mentioned his will but her husband Ronald Kelly (Margaret Kelly's deposition, page 42, line 4; page 43, line 9).

Margaret Kelly then testified that after learning that Mr. Tucker had an aneurysm that may result in death that the decedent was "happy and cheerful" (Margaret Kelly's deposition, page 51, line 4). In contrast, Dr. Menes described decedent as "oriented times two, meaning that he knew who he was, he knew where he was. Beyond that, I really couldn't say that he knew much" (Dr. Menes' deposition, page 32, lines 10 - 15). Margaret Kelly testified that the decedent within minutes of hearing that he had an aneurysm the "size of a large orange" dictated word for word every single word that was written in the will that was executed on January 14, 2012 (Margaret Kelly's deposition, page 41, line 18; page 46, lines 14 - page 47, line 23).

Margaret Kelly testified that Mr. Tucker dictated the will to her within the span of approximately 30 minutes. Dr. Jewell testified that dementia patients often experience sundowning which affects patients more in the evening and when the patient is in unfamiliar situations, such as being admitted to the hospital, in that the patient is more agitated and confused (Dr. Jewell's deposition, page 12, line 1 to page 13, line 15). Upon reading the will that was executed on January 14, 2014, Dr. Jewell testified that it he would be surprised the words on the will "would be his words on this paper" (Dr. Jewell's deposition, page 19, lines 2 – 21).

Mr. Tucker's diagnosis of dementia and his mental state after being diagnosed with a potentially fatal aneurysm is significant not just to the issue of testamentary capacity, but it also significant to the issue of undue influence. The Supreme Court recognizes 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). In Nasser, the Appellants

in support of their claim of undue influence showed that Decedent was physically infirm as a result of a terminal illness prior to the execution of the will and the disposition of the Decedent's estate was significantly different from the Decedent's prior will, the Court found that sufficient evidence existed to give rise to the presumption of invalidity Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005).

In Byrd v. Byrd, the court found where there existed a conflict in the evidence, it created a genuine issue of material fact, therefore summary judgment in favor of respondent was not proper. 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983) (finding in will contest case that issue of undue influence was properly submitted to the jury where: testator was physically and mentally infirm prior to and contemporaneous with the execution of the will; son, who was the principal beneficiary of the will and in a confidential/fiduciary relationship with testator, threatened to place testator in a nursing home and attempted to restrict visits between testator and his other children; and the will was executed less than six months prior to testator's death); Moorer v. Bull, 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence in contested will case was properly submitted to the jury where there was evidence that testator's son was in a confidential/fiduciary relationship with his mother, mother was in fear of him, and he indicated an intention to procure for himself her estate).

Here, Ben Smith testified that he tore up decedent's prior will where decedent willed his estate to Brenda Snow (Ben Smith's deposition, page 15, line 19 - page 16, line 2). The record reflects that Ben Smith testified that he tore up the will at the direction of decedent's former attorney, Edward Knox, because according to Ben Smith, Mr. Knox allegedly instructed Ben Smith to tear up the will because Mr. Knox stated that

a conflict of interest existed when Mr. Knox prepared the will for decedent because Mr. Knox had accepted money from Brenda Snow to assist her with her divorce (Ben Smith's deposition, page 15, lines 3-18). Ben Smith also testified that he never told decedent about the alleged conversation with Mr. Knox nor did Ben Smith inform decedent that he destroyed the will. Ben Smith did, however testify that within one week of destroying the original will that he informed Margaret Kelly that he destroyed Mr. Tucker's will (Ben Smith's deposition, page 16, lines 22-25). So, it is clear that Ms. Kelly knew but failed to inform Mr. Tucker.

Mr. Tucker's diagnosis of dementia and his mental state after being diagnosed with a potentially fatal aneurysm is significant not just to the issue of testamentary capacity, but it also significant to the issue of undue influence. The Supreme Court recognizes 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). In Nasser, the Appellants in support of their claim of undue influence showed that Decedent was physically infirm as a result of a terminal illness prior to the execution of the will and the disposition of the Decedent's estate was significantly different from the Decedent's prior will, the Court found that sufficient evidence existed to give rise to the presumption of invalidity Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005).

b. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF A CONFIDENTIAL RELATIONSHIP.

The third issue of material fact of dispute that existed thus warranting the lower court's denial of Respondent's motion for summary judgment, is the fact that the

Respondents were in a confidential relationship with Mr. Tucker. "Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "'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.'" In re Estate of Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). Respondents, Ben R. Smith and Margaret Kelly, possessed a confidential or fiduciary relationship with decedent. The Petitioner asserts that the decedent's will was a product of undue influence in that Respondents who were in an existing fiduciary relationship with decedent restricted his visitation and substituted influencer's wishes onto the decedent. On November 17, 2011, the decedent appointed Respondent, Ben Smith, as his durable power of attorney. Decedent executed the durable power of attorney in his state of domicile, North Carolina. Decedent's North Carolina attorney prepared the power of attorney documents. Within one month, on December 12, 2011, Ben Smith, removed Decedent from North Carolina to Westminster Towers in South Carolina where decedent died five months later. As power of attorney, Ben R. Smith, had control over the decedent's financial transactions and medical decisions. Where the son was the mother's power of attorney with the authority to manage all of her finances, the circuit court found the son to have been in a fiduciary relationship. In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (S.C. App., 1999). Relying on the court's analysis in Cumbee, Ben Smith, as power of attorney over Mr. Tucker's finances was in a fiduciary relationship with Mr. Tucker.

Counsel for Respondents states that "there's no evidence that Margaret Kelly was in a confidential relationship" with Mr. Tucker (TR. Page 20 lines 1-3). Counsel continued to argue that "the allegation is that Margaret Kelly was in what the law calls a confidential relationship with Mr. Tucker and that he placed great trust and confidence in her and she did all this stuff for him. There's nothing in the record to show that (TR. Page 19 lines 1-5). When testifying that Mr. Tucker talked to Margaret Kelly about his finances, Ms. Kelly acknowledges that she and Mr. Tucker were close and that is the reason why it did not seem odd that he spoke to her about his finances (Margaret Kelly's Deposition, page 38 lines 20-25). Ronald Steven Kelly, Margaret Kelly's husband, also recognized that Mr. Tucker placed a special confidence in Ms. Kelly. When asked whom Westminster Towers called to notify that Mr. Tucker was taken to the hospital on January 14, 2012, Ronald Steven Kelly stated "Margaret, because she's the one that they usually call about him" (Ronald Steven Kelly's deposition, page 23 lines 16-18). In describing Margaret Kelly's special relationship with Mr. Tucker, Mr. Kelly testified that "He kind of was real close to Margaret, and he depended on her to kind of help her with things. She's done a lot of different things for him ..." (Ronald Steven Kelly's deposition, page 26 lines 17-20).

In fact because of the close relationship shared between Mr. Tucker and Margaret Kelly, Mr. Tucker executed a Health Care Durable Power of Attorney designating Margaret Kelly as his agent. As such, Appellants argue that both Ben Smith and Margaret Kelly, the Respondents, were in a fiduciary relationship with Mr. Tucker. As Respondents argue that neither Ben Smith nor Margaret Kelly were in a fiduciary relationship with Mr. Tucker, at the very least "there exists a conflict in the evidence, thus creating a genuine issue of material fact" and where there exists a genuine issue of

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material fact, Appellants argue that the probate court "improperly granted summary judgment in favor of Respondent(s)" Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005). The circuit court also found a fiduciary 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 court relied on precedent from other jurisdictions which has found that "the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed." Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7 (2005). Based on these cases, the court recognized "[m]ost of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed . . ., nonetheless, we find no reason why this discrepancy should change our analysis." Id. In addition to Dixon, the court found secondary authority supports the application of the presumption to contested will cases. Concerning this issue, the Restatement of Property provides in relevant part:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. **The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.**
>
> Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003) (emphasis added).

Appellants would assert that as there is the existence of a fiduciary relationship, the burden shifts to Respondents to show that undue influence does not exist. The 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 unmistakenly 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.

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CONCLUSION

Appellants argue that there are several issues of material facts that if the trial court had viewed the issues in the light most favorable to nonmoving party, the Appellants, then the court would have denied Respondents motion for summary judgment. In that Respondents' restricted the visitation of Brenda Snow and limited visitation that Mr. Tucker had with his blood relatives. Despite Respondents arguments that the only time that Brenda Snow's visitation was restricted was by the hospital in Charlotte, the record reflects that Ben Smith and Margaret Kelly provided a picture of Brenda Snow to the staff at Westminster Towers and told the staff that Brenda Snow shall not be allowed to visit Mr. Tucker. During this time, Mr. Tucker continued to express his affection for Ms. Snow and his desire to take care of her financially in his will.

Another issue of material fact that is of dispute is that Respondents substituted their desires to that of Mr. Tucker. It is clear from the record that in conversations leading up to January 14, 2012, that Mr. Tucker indicated that it was his desire to take care of Brenda Snow financially. In fact, Mr. Tucker contacted an attorney and did just that – executed a will a devised his estate to Ms. Snow. Mr. Tucker was never informed by Ben Smith that Ben Smith had destroyed that will. There is no testimony in the record of anyone else other than the Respondents, Ben Smith and Margaret Kelly, and their family members that indicates that Mr. Tucker had any desire to draft a will in favor of Respondents. The record does indicate that following the purported execution of the will on January 14, 2012, that Mr. Tucker did not appear to have any knowledge of signing a will. In fact, in a conversation with Marcy Thomas on February 5, 2012, Mr. Tucker expressed his frustrations that his nephew kept asking him to divide his estate equally

between the nieces and nephews. Mr. Tucker stated at that time that it was his intent to take care of his little girl, Brenda Snow. His intent never changed. He made this statement to Ms. Thomas on February 5, 2012, after the alleged execution of a will on January 14, 2012. More importantly, Mr. Tucker expressed his intent to a disinterested person, Ms. Thomas. Not only did Mr. Tucker state that he had no intention on dividing his estate equally between his nieces and nephews, but he reaffirmed his intent to give his money to Brenda Snow. Despite argument that there is no indication that the nephew is the Respondents, there is testimony in the record to reflect that there was no other nephews that had access to Mr. Tucker during the days, weeks and months leading up to his death other than the Respondents.

It is also of dispute that the Respondents were in a confidential relationship with Mr. Tucker. Respondents argue that no confidential relationship exists. Appellants argue that Mr. Tucker shared a special relationship with Ben Smith and Margaret Kelly. Mr. Tucker designated Ben Smith as his Durable Power of Attorney. In this role Ben Smith was granted the power to make all financial decisions as if he were Mr. Tucker himself. The record reflects that Margaret Kelly was the person that Westminster Towers called when there were issues with Mr. Tucker. Margaret Kelly's husband testified that his wife and Mr. Tucker were very close and that his wife would do a lot of things for Mr. Tucker. Ms. Kelly also admitted that Mr. Tucker spoke with her about his finances because they were close. So close in fact that Mr. Tucker designated Margaret Kelly as his Health Care Power of Attorney. As the issue of whether Respondents were in a confidential relationship with Mr. Tucker is a material fact in dispute, Appellants argue that summary judgment is inappropriate.

Summary judgment is a drastic remedy. Thus, it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). Summary judgment is inappropriate, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). For the reasons set forth herein, Appellants argue that the probate court erred in granting summary judgment to Respondents.

Respectfully submitted:

Syretta R. Anderson

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(803) 980-5252
ATTORNEY FOR APPELLANTS

FORM 1
NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM YORK COUNTY
In the Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2015-CP-46-00466

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven

Appellant

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of Vinton Willis Tucker

Respondents.

NOTICE OF APPEAL

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven appeals the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015. Appellant received written notice of entry of this order [judgment] on December 30, 2015.

January 19, 2016

Carol DeHaven

Carol DeHaven
6600 Hawkins Gate Rd
LaPlata, MD 20646
(240) 687-0220
Appellant Representing Self

Other Counsel of Record:
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STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Circuit Court

Case Number 2016-000096

Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven
Appellant,

Vs.

Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker

Respondents.

NOTICE OF APPEARANCE

Please take notice that I have been retained to represent the Appellant, Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven.

My current contact information is as follows:

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Respectfully Submitted,

Syretta R. Anderson

Syretta R. Anderson

April 28, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

Circuit Court Case No. 2015-CP-46-00466
On Appeal From the York County Probate Court

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger, by and through
her Attorney-in-Fact, Carol DeHaven ..... Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as
Personal Representatives of the Estate
of Vinton Willis Tucker ..... Respondents.

Respondents' Motion to Dismiss Appeal

Please take notice that Respondents, through their undersigned counsel, move the Court to dismiss the appeal herein on the following grounds:

(1) the Notice of Appeal has been signed, filed and served by Carol DeHaven, a non-lawyer resident of the State of Maryland who is acting solely in her capacity as attorney-in-fact for her principal, the true party-in-interest, Mary Swiger, and in so acting has engaged in the unauthorized practice of law. (See signature block on Notice of Appeal).

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(2) The appeal has not been properly and effectively perfected and, consequently, the Court lacks subject matter jurisdiction, specifically, the Notice of Appeal identifies only one Order for appeal, to wit: the Order of Judge Sprouse that decided the Appellant's appeal from a Probate Court Summary Judgment Order. The Notice of Appeal does not identify the Probate Court Summary Judgment Order as a subject of the appeal.

Ground 1. A nonlawyer attorney-in-fact, appointed under a durable power of attorney, may not act as an attorney on behalf of the principal.

This precise question has not been addressed by our courts, but analogous situations in South Carolina case law illustrate the principles governing the question. The power to regulate the practice of law rests exclusively with the South Carolina Supreme Court. S.C. Const. art. V, § 4; S.C. Code Ann. § 40-5-10 (2011); In re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992). S.C. Code Ann. § 40-5-80 (2011) provides that a person may prosecute or defend his own cause; however, S.C. Code Ann. § 40-5-310 (2011) provides that no person may either practice law or solicit the legal cause of another person or entity unless he or she is a member of the South Carolina Bar or is otherwise authorized to perform legal activities by action of the Supreme Court. South Carolina case law precedent holds that a nonlawyer personal representative of an estate cannot represent the estate on appeal. Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005), clarified S.C. , 620 S.E.2d 323 (2005); a nonlawyer may not prepare a legal document for others to present in family court, State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995); a nonlawyer cannot represent a corporation in circuit or appellate courts but may appear pro se in magistrate's court, Renaisance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999); prosecution of an appeal for a corporation by its nonlawyer president is the unauthorized practice of law, Travelers Ins. Co. (NC) v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct.App. 1997).

The question of an attorney-in-fact's appearance in court proceedings on behalf of the principal as constituting the unauthorized practice of law has been addressed by other jurisdictions: Jones v. Brooks, 97 A.3d 97 (D.C 2014), citing and relying on Ross v. Chakrabarti, 5 A.3d 135 (Md.App. 2010) and Haynes v. Jackson, 744 A.2d 1050 (Me. 2000) to hold that a valid power of attorney does not provide the right to practice law without meeting the requirements of the jurisdiction's bar; Fernando v. Sapukotana (In re Estate of Sapukotana), No. 2013-CA-01900-SCT, (Miss. December 17, 2015) (execution of a power of attorney does not authorize an unlicensed attorney-in-fact to practice law in Mississippi). See also In re Conservatorship of Riebel, 625 N.W.2d 480 (Minn. 2001) (the attorney-in-fact may make decisions concerning litigation for the principal but a nonlawyer attorney-in-fact is not authorized to act as a attorney to implement those decisions); Fravel v. Stark Cty. Bd. of Revision, 728 N.E.2d 393 (Ohio 2000) (person not admitted to the bar cannot represent another in court on the basis of a power of attorney assigning pro se rights); Christiansen v. Melinda, 857 P.2d 345 (Alaska 1993) (a principal cannot use a power of attorney as a device to license a layman to act as an attorney in a court of record).

In the above-captioned case, Carol DeHaven appeared solely in her capacity as attorney-in-fact for Mary Swiger. Ms. DeHaven, a nonlawyer, by her unauthorized practice of law has filed and served a Notice of Appeal. Respondents submit that the Notice of Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed. In Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005), the court addressed the question of whether the unauthorized practice of law renders the proceedings a nullity or if it is an amendable defect. The court made clear that its ruling in Brown was case and fact specific. It concluded that "on the facts and circumstances of this case" a notice of appeal filed and served by the nonlawyer personal representative would not trigger an outright dismissal of the appeal, and the appellant was given the

opportunity to retain an attorney. Of particular importance to the court in Brown was the unique fact that the nonlawyer personal representative had "represented the estate in three previous appellate proceedings [without objection] leading her to believe that such was acceptable." No such situation is presented herein. Appellant Swiger was represented by a licensed attorney in both the probate court and the circuit court proceedings. A notice of appeal is a critical legal document that is the very foundation for perfecting an appeal as illustrated by the facts that the 30-day deadline for serving the Notice of Appeal is fixed and definite and cannot be extended by the court. Rules 203(a) and (b)(1), and 263(b), SCACR, and that without a properly filed and served notice of appeal, the appellate court has no jurisdiction to entertain the appeal, and the appeal should be dismissed. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Where the essential legal document for the appeal is the product of the unauthorized practice of law, and is deficient as well (see ground no. 2 below), the very result sought to be avoided by requiring licensed attorneys, the court should be most reluctant to excuse this unauthorized practice of law.

Ground 2. Appellant's Notice of Appeal dated January 19, 2016, but purportedly served on January 15, 2016, expressly referred to the Order being appealed as "the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015." The Notice of Appeal filed with this Court and served on the undersigned was accompanied by only one Order - a copy of Judge Sprouse's December 22, 2016 Order Affirming Decision of Probate Court. See Rule 203(d)(1)(B)(ii), SCACR. The Order of the York County Probate Court dated February 2, 2015, being the order that is the subject of the appeal to circuit court that was decided by Judge Sprouse's Order dated December 22, 2015, was neither identified in the Notice of Appeal nor submitted with the Notice of Appeal. Admittedly, a copy of the probate judge's letter directing the preparation of the summary judgment order was attached to the Notice of Appeal, but this does not comply with requirements

of the appellate rules. Consequently, the Appellant has not timely perfected an appeal from the **trial court's final order** that granted summary judgment in favor of the Respondents. That order is now the law of the case.

A closely analogous issue was considered in Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). In Weatherford, the appellant's Notice of Appeal referred only to the order that denied the appellant's motion for reconsideration. However, this Court was lenient to the appellant in Weatherford and did not dismiss the appeal only because the underlying judgment order, although not referred to in the Notice of Appeal, was nevertheless attached to the Notice of Appeal that was submitted to the Court for filing. The circumstance that saved the appellant in Weatherford is not present in the above-captioned case. Failure to refer to the summary judgment order in the Notice of Appeal and failure to file with the Notice of Appeal a copy of the trial court's summary judgment order, as required by rule, cannot fairly be labeled as a mere clerical error.

The failure to timely serve and file a proper Notice of Appeal, meaning in this case to serve a Notice of Appeal from the probate court's February 2, 2015 summary judgment order, divests the appellate court of subject-matter jurisdiction and results in dismissal of the appeal. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Likewise, Rule 203(d)(3), SCACR, provides that if the Notice of Appeal, and by implication all required attachments to the Notice of Appeal, are not timely filed, "the appeal shall be dismissed. . ." (Emphasis added.)

Having not timely appealed from the final summary judgment order (including both service and filing of a notice of appeal with required accompanying documents), this Court lacks subject-matter jurisdiction, the probate court summary judgment is now the law of the case, and the appeal must be dismissed.

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Conclusion

The grounds argued above, either independently or jointly, call for the dismissal of this appeal.

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February 1, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

Circuit Court Case No. 2015-CP-46-00466
On Appeal From the York County Probate Court

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven ..... Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker ..... Respondents.

Respondents' Motion to Dismiss Appeal

Please take notice that Respondents, through their undersigned counsel, move the Court to dismiss the appeal herein on the ground that the purported Appellant has no standing or authority to prosecute the appeal thereby rendering the Notice of Appeal a nullity and depriving this Court of jurisdiction to entertain an appeal.

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Respondents previously moved to dismiss the appeal because the purported Appellant was the former attorney-in-fact for the Petitioner below and is now trying to prosecute the appeal as a pro se party and was thereby engaging in the unauthorized practice of law. (See Respondents' Motion to Dismiss Appeal filed on February 1, 2016, incorporated herein by reference). The February 1, 2016 Motion to dismiss Appeal disclosed the situation regarding Mrs. Swiger's death and the absence of a duly appointed personal representative or executor. By Order dated April 1, 2016, the Court acknowledged that Ms. DeHaven was not authorized to prosecute the appeal pro se but nevertheless allowed her 30 days to retain counsel. (See Order dated and filed April 1, 2016, incorporated herein by reference).

On April 28, 2016 attorney Syretta R. Anderson notified the Court that she had been retained "to represent the Appellant, Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven." This cannot be because (1) Mrs. Swiger is deceased, and (2) Ms. DeHaven is no longer attorney-in-fact for Ms. Swiger.

Ms. DeHaven represented to the Court in her Return to the Motion to Dismiss, filed February 12, 2016, that Mrs. Swiger died on October 6, 2015. This had the effect of terminating Ms. DeHaven's status as attorney-in-fact, a consequence expressly noted in the April 1, 2016 Order. There has been nothing filed with any Court related to this case indicating that a probable estate has been opened to administer Mrs. Swiger's estate and that a personal representative or executor or executrix has been appointed by the appropriate court to act on behalf of the estate.

The Notice of Appeal herein, filed on January 20, 2016, was not signed and/or filed and/or served by a person having authority at law or standing to do so. Respondents submit that the Notice of Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the

appeal to be dismissed. A notice of appeal is a critical legal document that is the very foundation for perfecting an appeal as illustrated by the facts that the 30-day deadline for serving the Notice of Appeal is fixed and definite and cannot be extended by the court. Rules 203(a) and (b)(1), and 263(b), SCACR, and that without a properly filed and served notice of appeal, the appellate court has no jurisdiction to entertain the appeal, and the appeal should be dismissed. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied.

This issue is controlled by Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 306 (1977). In Asbury, Mr. Walker petitioned the probate court that the last will be proved in solemn form, what is now known as a formal proceeding. Mr. Walker died ten months later, prior to a solemn form trial having been held. Approximately six months after Mr. Walker's death, the executor, now the personal representative, petitioned the probate court to revoke its order requiring proof of the will in solemn form on the ground that no "qualified contestant" existed. The probate court issued an order granting the executor's petition.

A Notice of Appeal was filed by "Ann Walker Asbury as Executrix of the Will and Estate of Hugh V. Walker and as sole heir under the will of Hugh V. Walker." However, at the time the Notice of Appeal was filed and served, no probate estate had been opened for Mr. Walker and Ms. Asbury had not been appointed as executrix. A hearing was held in circuit court, sitting as an appellate court, on the motion for dismissal of appeal, and at the time of the motion hearing an estate still had not been opened, and Mr. Walker's last will had not been filed for probate, and Ms. Asbury had not been appointed as executrix. The circuit court dismissed the appeal holding that Ms. Asbury had no standing to pursue the appeal. Six days after the circuit court hearing, Mr. Walker's will was accepted for probate, in which Ms. Asbury was named as executrix and sole devisee.

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Asbury appealed the circuit court's order dismissing the appeal. The South Carolina Supreme court affirmed the dismissal because:

1. Asbury was never a contestant or party to the probate court solemn form proceeding and has no individual right to appeal (the same is true with respect to Ms. DeHaven in the above-captioned appeal);
2. Neither Asbury nor anyone else had been appointed as executor of Mr. Walker's estate **"when the Notice of Appeal was filed;"** (also true with respect to the Notice of Appeal filed herein);
3. the failure to offer Mr. Walker's last will to probate and to thereby make its terms effectual with respect to the appointment of an executrix and the disposition of property to heirs or devisees was "fatal to this appeal." The Notice of Appeal was held to be a nullity because it was filed in a name that is not a legal entity.

The same defect exists herein. The Notice of Appeal filed on January 20, 2016 was filed by Carol DeHaven, identified therein as "Appellant Representing Self." (See signature block on Notice of Appeal.) Just as in Asbury, Ms. DeHaven was not a party to the proceedings below individually and in her own right. Consequently, and pursuant to Asbury, "she has no individual right to appeal," and at the time the Notice of Appeal was served and filed she had no derivative right to appeal.

Conclusion

For the reasons stated hereinabove, the purported Appellant has no standing to appeal; the Notice of Appeal is and was a nullity; this Court lacks appellate subject-matter jurisdiction; the probate court summary judgment, affirmed by the circuit court, is now the law of the case; and the appeal must be dismissed.

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May 4, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Circuit Court Case No. 2015-CP-46-00466

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger (deceased), Sister of Vinton Tucker, by and through her Substitute and Attorney-in-Fact, Carol DeHaven ..... Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker ..... Respondents

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Appellants Response to Respondents' Motion to Dismiss Appeal

Please take notice that the Appellants move the Court to dismiss the motion of the Respondents to Dismiss the Appeal. The Motion to Dismiss was received by the Appellants by post office general delivery the afternoon of February 5, 2016. Therefore, we are asking for the full ten days to respond to this motion. The Appellants request that Respondents attorney, Michael Brackett also send any legal documents to the following

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facsimile number that he has on file at present: 540.972.7683 and to the Attention of Janet Loeffler, as well as by postal service.

As to Ground 1. The Respondents are attempting to prevent this case from consideration by the Court of Appeals. Page 2, line 8 states that "this precise question has not been addressed by our courts, but...". Respondents are attempting to establish precedent by stating that a substitute cannot be the legal representative for the appellants. They have not offered any case law to establish their claim as apparently scant amounts exist. I have also not been able to find case law on this issue.

Part of the case history is as follows as to why substitution was allowed. This case has been before the Courts since May of 2013. The Respondents, through their Attorney, Michael Brackett, have delayed this matter going to trial first through making a motion to compel my mother to be brought to South Carolina for deposition and then through Summary Judgment. It took six months from the request to bring her for deposition, filing the motion to compel my mother to come for deposition, a hearing, and then the deposition itself to be complete. We filed her medical records and a letter from her neurologist to show we were acting in good faith. Nevertheless, we were ordered to bring her to South Carolina from Virginia by Judge Rogers. She never recovered from the strenuous nature of the trip. She exhibited severe neurological decline within a few hours of her time at the deposition. She was hospitalized shortly after her return and was never able to return home. It would have been to our benefit to have her give her testimony. Mr. Brackett knew from the deposition since she could only say one coherent statement (they stole my brother) and that my mother was legally incompetent. In fact, he was the one

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that had my name added to the case, and I was substituted by court order from Judge Rogers per his request. Now he is trying to say I cannot act as her in this case. Case law strongly supports an appellant or respondent representing themselves. I am not going to add to the length of this response unless desired by the court as case law is well known and established on personal representation. The question now is whether I am legally going to be considered as my mother and therefore able to represent myself. My mother died on October 6, 2015.

None of the case law that is submitted by the Respondents in the motion pertains to an Appellant being dead and the court ordered substitute not being allowed to stand in for the original Appellant. We are not implementing a case; we are continuing a case already in progress. It is not the intent of the law for a case to end because one of the parties dies before the case is completed. It is also not the intent of the law for a party who can no longer pay an attorney to not be able to have their say in court. We have had legal representation prior to this appeal. However, the ability to continue this case should not depend on unlimited funds by the appellant or by the Respondents using the strategy of making legal representation so costly through court avenues that we are forced to end our cause early, therefore giving them a favorable outcome. Mr. Brackett is paid through the estate; we have paid many thousands of dollars in this case because we believe the chain of events is so unusual and questionable that it deserves a jury trial. Also of note, I am a nurse practitioner with more than 37 years experience. My mother has two more additional daughters who are registered nurses with a combined experience of almost 50 years. They have worked emergency room, intensive care, and operating room. It is one

reason we know that the events claimed by the respondents are so unusual and we desire this case to be heard by a jury.

Continuing, Rule 25 (a)(1) allows for substitution based on incompetency or death. Carol DeHaven was substituted for Mary Jean Tucker Swiger by Judge Rogers in the ruling sent with the Notice of Appeal dated January 12, 2015. Since: 1. Carol DeHaven was substituted for Mary Jean Tucker Swiger, 2. our claim is not dismissed yet by the appeals court, 3. Since I may represent myself, the charge of practicing law without a license is nullified.

In response to page 2, line 4, Rule 203(B)(ii), specifies "a copy of the order(s) and judgment(s) to be challenged on appeal". Appellants maintain that by sending a "(do not know what to call it) document from Judge Rogers that pertains to the order and is very detailed about her findings serves as adequate notice of the order in dispute. Copies of the document that the respondents apparently refer to have been included in this response package. Therefore, the Probate Court Summary Judgment Order is included in this appeal.

See statements also in Ground 2, first paragraph.

Respondents are attempting to link that a Notice of Appeal and proper filing of an appeal must be done AND filed by an attorney or the appeal is not a legal document. They claim that since I am not an attorney, anything I file is not legal. First, this is not true if I am considered the legal substitute for my mother. In addition, Rule 203 does not state only a lawyer can file a Notice of Appeal in any section. Therefore, this claim should be nullified.

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Ground 2. Please consider above information presented in Ground 1.

Page 4 lists that only "one Order was sent" from Judge Sprouse dated December 22, 2015 and that since Judge Roger's order (first Summary Judgment Probate Court ruling) is considered a letter, it does not comply with requirements of appellate rules and the appeal should be dismissed. The motion does not identify what rule has been violated. In Appendix B of the Appeals Chart detailing the process and steps of appeal, Judge Sprouse's ruling is the latest and last ruling in the process. Rule 203(d)(1)(B)(ii) contains no requirement that a previous judge's ruling be included, only the rulings to be challenged on appeal. There is also no requirement that six copies be sent to the Appellant court in Rule 203. We disagree that the Notice of Appeal was improperly filed.

As to the failure to refer to the summary judgment order, I ask you to look at the Filing the Notice of Appeal number 2. The Orders/judgments are specifically listed. IF I have erred with the order of Judge Rogers, I will find the correct order that Mr. Brackett has stated exists (I do not have it) and correct it. Not submitting the correct order from Judge Rogers is a clerical error only. Update: I received the order and am enclosing it with this mailing, including six copies.

I state that I have filed the correct documents (both service and filing) and the final order from Judge Sprouse has been submitted within the thirty-day limit. Respondents' attorney received the service and filing document by facsimile on January 15, 2016 and then by mail on January 19, 2016. The Supreme Court of South Carolina received and stamped the filings on January 20, 2016 and gave it a case number (enclosed) and then referred the case to the South Carolina Court of Appeals. Respondent are contending that

the appellant has past timely filing and is too late to correct any filing problems identified by the Respondents. Since appellants filed the correct documents in the original filing, arguments that the Appellants filings are late are not substantiated.

What I hope will not happen is a series of motions by the Respondents attempting to find any legal loophole to keep this case from being heard in an attempt to wear us down and, as has already occurred, wear us down financially. It has been a long journey for us to get justice for our uncle. My mother charged me, and I promised her, I would see this case to the legal end. She was personally greatly hurt by the actions of the Respondents. She was "notified" of her brother's death by receiving the probate notice from the probate court. The first attempt to file the documents was done about five days after my uncle's death. They should have been having a funeral instead and honoring this man's upstanding life. They never sent a copy of the Will as she requested in writing at this first notice. After that and as she became more debilitated, every man that looked like her brother, she checked out to see if it was Vinton because he was "lost". Her last memories of him were of her looking for him and not being able to find him. I hope the court understands that much evidence has not been entered into the summary judgment proceedings because it was expected to go to trial. We did not want to subpoena people until it was time for trial. Obviously, we would not have spent a year in summary judgment if we had done so. We also want the Respondents actions to be weighed by a jury and not just through case law. A jury will determine if the actions of the Respondents were the actions of credible and honest people acting in good faith to my uncle as well as determine the legal standing of our case. If I had the money to continue this case with an

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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SC Court of Appeals

Circuit Court Case No. 2015-CP-46-00466

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger (deceased), Sister of Vinton Tucker, by and through her Substitute and Attorney-in-Fact, Carol DeHaven .....Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker .....Respondents

---

Appellants Certificate of Service

I, Carol DeHaven, as substitute for Mary Jean Tucker Swiger, do hereby certify that I have served the Respondents attorney, B. Michael Brackett, with a copy of Appellants Response to Respondents' Motion to Dismiss Appeal by United States Mail, postage prepaid and return address clearly on said envelope, on this tenth day of February, 2016 at the following address:

B. Michael Brackett
1333 Main Street, Suite 260 (29201)
Post Office Box 100261
Columbia, South Carolina 29201-3261

I also certify that the above listed Appellants Response has been sent by facsimile to the above listed office of Mr. Brackett at 803.461-2309 and to the Clerk of the Court,

South Carolina Court of Appeals, The Honorable Jenny Abbott Kitchings at 803.734.1839. To Ms. Kitchings I have also included six copies of Judge Rogers summary judgment order that I received on February 9, 2016.

Carol DeHaven 2/9/16

Carol DeHaven Date

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

Circuit Court Case No. 2015-CP-46-00466
On Appeal From the York County Probate Court

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven ..... Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker ..... Respondents.

Respondents' Amended Initial Brief

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Issues on Appeal:

1. **Appellant's Notice of Appeal dated January 19, 2016 and served January 15, 2016 [sic] is a nullity, which deprives this court of jurisdiction to entertain this appeal, because it was filed and served by a person (DeHaven, acting pro se) who has no standing or authority to prosecute the appeal.** (All Issues on Appeal) 13

2. **Appellant's January 19, 2016 Notice of Appeal identified only the Circuit Court's Order Affirming Decision of Probate Court as being the subject of the appeal, and did not identify the Probate Court's Summary Judgment Order as being a subject of the appeal, to the result that Appellant has not timely perfected an appeal from the trial court's final order, and that order is now the law of the case.** (All Issues on Appeal) 17

3. **Appellant's Issue on Appeal number 1 violates Rule 208(b)(1)(B), SCACR, in that it is a "[b]road general statement" that is conclusory in nature and does not identify a "concise and direct" issue for review, and said issue can, and should, disregarded by the Court.** (Appellant's Issue on Appeal No. 1) 18

4. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary**

judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation of restricted visitation. (Appellant's Issue on Appeal No. 2(i)) 19

5. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation that the challenged last will did not comport with the testator's expressed wishes.** (Appellant's Issue on Appeal No. 2(ii) and (iii)) 21

6. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding the changes made from prior wills.** (Appellant's Issue on Appeal No. 2(ii) and (iii)) 23

7. **Appellant's argument with respect to evidence of the testator's physical infirmity is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal No. 2(iii)). 24

8. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding that the testator was physically infirm.** (Appellant's Issue on Appeal No. 2(iii)) 25

9. **Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal No. 3) 25

10. **Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because even if sufficient evidence of a confidential relationship was presented to give rise to a presumption of undue influence, the circuit court's ruling that said presumption was rebutted by Respondents' evidence was not appealed and is the law of the case.** (Appellant's Issue on Appeal No. 3) 27

11. **Alternatively, had the Probate Court considered the rebuttable confidential relationship evidentiary presumption, it would not have been sufficient to withstand the summary judgment motion, and the Circuit Court was correct in so holding.** (Appellant's Issue on Appeal No. 3) 28

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Statement of Issues on Appeal

1. Appellant's Notice of Appeal dated January 19, 2016 and served January 15, 2016 [sic] is a nullity, which deprives this court of jurisdiction to entertain this appeal, because it was filed and served by a person (DeHaven, acting pro se) who has no standing or authority to prosecute the appeal. (All Issues on Appeal)

2. Appellant's January 19, 2016 Notice of Appeal identified only the Circuit Court's Order Affirming Decision of Probate Court as being the subject of the appeal, and did not identify the Probate Court's Summary Judgment Order as being a subject of the appeal, to the result that Appellant has not timely perfected an appeal from the trial court's final order, and that order is now the law of the case. (All Issues on Appeal)

3. Appellant's Issue on Appeal number 1 violates Rule 208(b)(1)(B), SCACR, in that it is a "[b]road general statement" that is conclusory in nature and does not identify a "concise and direct" issue for review, and said issue can, and should, disregarded by the Court. (Appellant's Issue on Appeal No. 1)

4. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation of restricted visitation. (Appellant's Issue on Appeal No. 2(i))

5. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation that the challenged last will did not comport with the testator's expressed wishes. (Appellant's Issue on Appeal No. 2(ii) and (iii))

6. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding the changes made from prior wills. (Appellant's Issue on Appeal No. 2(ii) and (iii))

7. Appellant's argument with respect to evidence of the testator's physical infirmity is not preserved for appellate review because it was not presented to and/or decided by the trial court. (Appellant's Issue on Appeal No. 2(iii))

8. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding that the testator was physically infirm. (Appellant's Issue on Appeal No. 2(iii))

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9. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because it was not presented to and/or decided by the trial court. (Appellant's Issue on Appeal No. 3)

10. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because even if sufficient evidence of a confidential relationship was presented to give rise to a presumption of undue influence, the circuit court's ruling that said presumption was rebutted by Respondents' evidence was not appealed and is the law of the case. (Appellant's Issue on Appeal No. 3)

11. The mere existence of a confidential relationship is not, standing alone, determinative of a summary judgment motion with respect to evidence of undue influence where the evidence also shows that the presumption of undue influence raised by a confidential relationship has been rebutted and that ruling has not ben appealed. (Appellant's Issue on Appeal No. 3)

Statement of the Case

Vinton Tucker executed a last will on January 14, 2012 in the Piedmont Hospital emergency room. (Last Will). Several days later he was discharged from the hospital and returned to Westminister Towers, an assisted living facility. He died on May 12, 2012. Pursuant to the terms of the January 14, 2012 last will, Respondents were appointed by the York County Probate Court to serve as co-personal representatives. On or about May 10, 2013, Appellant filed a Petition for Formal Testacy and Appointment in the York County Probate Court in which Appellant challenged

the validity of the January 14, 2012 last will. (Petition). Appellant alleged five cause of action:

1. that the York County Probate Court lacked the requisite territorial jurisdiction to probate the Decedent's January 14, 2012 last will; (attachment to Petition, p. 2-3);
2. that the January 14, 2012 last will was invalid due to deficiencies in will execution formalities; (attachment to Petition, p. 3)
3. that the January 14, 2012 last will was invalid because it was the product of undue influence; (attachment to Petition, p. 3-4)
4. that the January 14, 2012 last will was invalid because the Decedent lacked the requisite testamentary capacity; (attachment to Petition, p. 4)
5. that the January 14, 2012 last will was invalid due to fraud. (attachment to Petition, p. 4)

Respondents served their Answer and Counterclaim on May 30, 2013. (Answer and Counterclaim). Appellant served her Reply on June 28, 2013. (Reply).

Following pretrial discovery, Respondents moved for summary judgment on all causes of action. (Motion and Amended Motion for Summary Judgment). Respondents' amended motion for summary judgment was heard by the Probate Court on December 30, 2014. At the hearing, Appellant withdrew her second cause of action. (Summary Judgment Order, p. 2). By Order dated February 2, 2015 the Probate Court granted summary judgment in favor of the Respondents on the remaining four causes of action and formally admitted the January 14, 2012 last will to probate. (Order). Appellant did not file a Rule 59(e), SCRCP, motion for reconsideration.

Appellant filed and served her Notice of Appeal on February 12, 2015. On March 27, 2015 Respondents moved to dismiss the appeal on the ground that Appellant had not by then filed and served the statutorily mandated Statement of Issues on Appeal. On April 2, 2015 Appellant filed and

served a Motion for Extension of Time to File Statement of Issues on Appeal accompanied by her Statement of Issues on Appeal. By Order dated June 22, 2015, the Circuit Court denied Appellant's motion for extension and dismissed the appeal. On July 10, 2015, Appellant filed and served a Motion to Reinstate Appeal. By Order dated July 27, 2015 the Circuit Court granted the Appellant's motion and restored the appeal to active status.

Appellant's appeal to Circuit Court related solely to her third cause of action alleging undue influence. (Page 1 [statement of issues on appeal] from Appellant's Brief to Circuit Court). She did not appeal the other three causes of action decided adversely to her by the summary judgment order. **Significantly, Appellant did not appeal the finding and conclusion of the Probate Court that the decedent possessed the requisite testamentary capacity when his January 14, 2012 last will was written, executed and witnessed.**

By Order dated December 22, 2015 the Circuit Court, Judge Scott Sprouse presiding, affirmed the Probate Court's Summary Judgment Order. (Order). No Rule 59(e), SCRCP, motion was made.

Appellant's Notice of Appeal was served on January 15, 2016. Respondents' two motions to dismiss the appeal were denied. The first motion to dismiss was grounded on the fact that in filing and serving the Notice of Appeal *pro se*, Ms. DeHaven was engaged in the unauthorized practice of law. (Motion to Dismiss Appeal dated February 1, 2016). By Order dated April 1, 2016 the Court agreed that Dehaven could not prosecute the appeal *pro se*, but declined to dismiss the appeal and granted Appellant 30 days to retain counsel. (Order).

The second motion to dismiss appeal was grounded on a challenge to the Court's jurisdiction to entertain the appeal because DeHaven has no legal standing and authority to prosecute the appeal,

thereby rendering the Notice of Appeal a nullity, thereby depriving this Court of appellate jurisdiction. (Motion to Dismiss Appeal dated May 4, 2016). By Order dated July 1, 2016, the Court denied the motion, but invited the Respondents to address the standing issue in their appellate brief. (Order).

Standard of Review

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Bass v. Gopal, Inc., 395 S. C. 129, 133, 716 S.E.2d 910, 912 (2011). Summary judgment law as applied in undue influence situations is addressed hereinbelow.

Statement of the Facts

The evidence before the Probate Court for the summary judgment hearing included:

1. There was no evidence before the probate court that either the Appellant or anyone related to her or to her side of this case was present when the will was written, signed and witnessed on January 14, 2012.
2. The decedent was transported to the Piedmont Hospital Emergency Room on January 14, 2012 after having a syncopal episode (temporary loss of consciousness). He actually regained consciousness at Westminister Towers prior to being placed in the ambulance. (Jane Bondurant, therapist at Westminister Towers, deposition p. 8, l. 13 to p. 12, l. 19).
3. Upon arrival at the ER, Dr. Ratterree was assigned to evaluate the decedent. (J. Ratterree, MD deposition, p.5, l. 7-13).
4. During the evening of January 14, 2012, when the will was executed, those who were

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involved in one way or another with the decedent's medical care and the will's execution, the doctors, the scrivener and the witnesses to the will, have testified that the decedent was mentally competent. (particular citations to the record appear below).

5. The therapist at Westminister Towers who, a few hours before the will was signed, discovered the decedent was unconscious testified at deposition that by the time the ambulance arrived to transport the decedent to the ER (approximately three hours before the will was signed), he had regained consciousness and was "awake, alert and answering appropriately." (J. Bondurant deposition p. 18, l. 10 to p. 19, l. 18).

6. Also, the two physicians who treated and interacted with the decedent at the hospital have testified at deposition that, based on the content of their medical records, the decedent was then and there mentally competent. Dr. Ratterree was the ER doctor who was trying to find an explanation for decedent's loss of consciousness and who ordered the CT scan, discovered the abdominal aneurysm and who explained the aneurysm **to the decedent**. (J. Ratterree, MD deposition p. 12, l. 10 to p. 13, l. 14; and p. 8, l. 4 to p. 13, l. 14).

7. Dr. Ratterree testified that his first assessment of Mr. Tucker's mental status was that he was "oriented in time, place, and person. Grossly appropriate mood and affect. . . he was totally normal." (J. Ratterree, MD deposition p. 9, l. 15 to p. 10, l. 25).

8. Dr. Magdaline Marfo, a hospitalist at Piedmont Hospital, interviewed the decedent on January 14, 2012 at approximately 10:38 pm when he was in the process of being discharged from the ER and being admitted to the hospital. She was discussing directly with Mr. Tucker his medical history and she testified at deposition that in her opinion, the decedent was then mentally competent. " (M. Marfo, MD deposition p. 12, l. 2 to p. 20, l. 4).

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9. Decedent did not know of this serious condition prior to January 14, 2012. (M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3; p. 51, l. 2- 10).

10. The decision was made to admit the decedent to the hospital, and those arrangements took some period of time during which decedent remained in the small ER examination room. (J. Ratterree MD deposition, p. 14, l. 2 - 20).

11. During this interval, the decedent expressed his wish to prepare a last will because his life expectancy was suddenly in question. (M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3).

12. The will was handwritten by Margaret Kelly according to the oral directions of the decedent. (M. Kelly deposition, p. 41, l. 22 to p. 45, l. 18).

13. It was read to the decedent more than once, and the decedent expressed his approval of the will. (M. Kelly deposition, p. 53, l. 4-15).

14. The will was signed by the decedent in the Piedmont Hospital emergency room while he was on his back in a reclined position. (M. Kelly deposition, p. 50, l. 7 to p. 51, l. 1).

15. The decedent's execution of the will was witnessed by three witnesses: Ronald (Steve) Kelly, Danny Kelly and Rebecca Kelly. (M. Kelly deposition, p. 54, l. 9 -15, and Rebecca Kelly deposition, Exhibit 4).

16. Ronald (Steve) Kelly is the husband of Margaret Kelly (Steve Kelly deposition, p. 6, l. 21-23) who is one of the devisees named in the will.

17. The two disinterested witnesses to the will, Danny Kelly and Rebecca Kelly, are husband and wife, and they are neither related to the decedent nor named as devisees in the will (Danny Kelly deposition, p. 6, l. 17-24).

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18. Ronald Kelly and Danny Kelly signed as witnesses, and Rebecca Kelly signed as a notary public. (Last Will).

19. Margaret Kelly, the scrivener, was related to the decedent by marriage (decedent's predeceased spouse was Margaret Kelly's aunt) (Margaret Kelly deposition p. 5, l. 17 - 23) and is named as a devisee in the will; however, her interest under the will is exactly the same as the other eleven devisees who are all nieces and nephews. (Last Will). There is no evidence that the Appellant was ever named a devisee in any last will executed by the decedent.

Argument

Summary Judgment Law Re Undue Influence

Summary judgment is not a "disfavored procedural shortcut, but rather ... an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. at 2548, 91 L.Ed.2d 265 (1986). The policy as expressed in South Carolina cases is that the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Curiel v. Hampton County E.M.S., 401 S.C. 636, 737 S.E.2d 854 (Ct.App. 2012). 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. Rule 56, SCRCP; Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); South Carolina Elec. & Gas v. Town of Awendaw, 351 S.C. 491, 570 S.E.2d 542 (Ct. App. 2002). The Court may consider pleadings, pretrial discovery and affidavits in deciding summary judgment motions. Bryant v. Babcock Center, Inc., 353 S.C. 208, 638 S.E.2d 650 (2006).

In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Bass v. Gopol, Inc., supra.

In Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (S.C. 2003) the law of summary judgment is explained: "When opposing a summary judgment motion, the nonmoving party [Plaintiff herein] must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial,'" citing Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E.2d 537 (1991). The party responding to a summary judgment motion may not rest on the allegations in his pleadings, but must set forth specific facts showing a genuine issue for trial. Burry & Son Homebuilders, Inc., v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain specific probative facts and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading."). In this case, substitute sworn deposition testimony for affidavit.

Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a scintilla of evidence to withstand a motion for summary judgment. Bass v.

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Gopal, Inc., 395 S. C. 129, 716 S.E.2d 910 (2011). However, where a heightened burden of proof is required, there must be more than a scintilla of evidence presented to defeat a motion for summary judgment. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011); Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009).

In that class of cases where plaintiff must demonstrate his right to relief by clear and convincing evidence, courts have more discretion to treat nonmovant's submissions as too insubstantial to resist summary judgment. This significant gatekeeping role requires the trial court to determine if a prima facie case has been presented by the nonmoving Plaintiff in opposing a defendant's motion for summary judgment. AJG Holdings, LLC v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (Ct.App. 2011).[1]

Appellant's Burden of Proof. The burden of proof for an undue influence challenge is clear and convincing evidence. Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (2003). For a contestant to meet the burden of proof for undue influence with only circumstantial evidence, the circumstances must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so that the last will is that of the latter and not of the former. Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983); Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct.App. 2005).

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confession as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

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[1] This standard was expressly acknowledged and applied in the lower courts' orders.

Anonymous (M-156-90) v. State Bd. of Medical Examiners, 323 S.C. 260, 473 S.E.2d 870 (Ct. App. 1996), rev'd on other grounds, 496 S.E.2d 17 (S.C. 1998). The South Carolina Supreme Court has similarly defined clear and convincing evidence as " that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Clear and convincing evidence is required in civil cases where the wisdom of experience has demonstrated the need for greater certainty; where there is a special danger of deception; where the interests at stake are deemed more significant than ordinary. 32A C.J.S. Evidence § 1306 (1996).

Policies Underlying Law's Requirements for Will Execution

Freedom of Testation. The very purpose for which freedom of testation is given is to facilitate a departure from inflexible laws of inheritance. 1 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 3.11 (Bowe-Parker rev. 1960). The power to make a will is a power that belongs to the testator, and there is no veto power of the court or jury. Id.

South Carolina appellate courts have remained vigilant in protecting citizens' freedom of testation by strictly enforcing the governing laws and exercising a healthy skepticism of efforts to second guess a testator's testamentary directions. Only in the most obvious and egregious cases have South Carolina appellate courts approved of a jury or trial judge setting aside a properly executed will. Any effort to invalidate a will must be viewed with suspicion and be judged according to the following considerations:

> A person has the right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil. . . He can show

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> gratitude, affection or charity or he can be capricious with his own. . . As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affections and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy or ungrateful. A young person it has been said regards everyone as his friend, but as he grows older, he is wiser, more cynical, and his judgment more clarified, and he frequently finds that his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic or uncongenial; others that he judged as unworthy he finds worthy and congenial.

Dicks v. Cassels. 100 S.C. 341, 84 S.E. 878 (1915)

> In this day of a complex society, individuals must sacrifice much and give up individual rights because of the interests of others. The government imposes many restrictions and requirements, but one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects. The right to make a will is the right to make it according to the testator's pleasure - judiciously or capriciously - justly or unjustly - at absolute discretion, subject only to the restraints upon the power of disposition which the law has imposed.

In Re Last Will and Testament of Smoak, 286 S.C. 419, 334 S.E.2d 806 (1985).

The right to make a will carries with it the right to disregard what the world considers a fair disposition of property. Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98 (1977). It is elementary that the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relatives or by one who thinks the testator used bad judgment or was misled. Mock v. Dowling, 266 S.C. 274, 222 S.E.2d 773 (1976).

Issues on Appeal

1. **Appellant's Notice of Appeal dated January 19, 2016 and served January 15, 2016 [sic] is a nullity, which deprives this court of jurisdiction to entertain this appeal, because it was filed and served by a person (DeHaven, acting pro se) who has no standing or authority to prosecute the appeal.** (All Issues on Appeal)

This issue was the ground for Respondents' second motion to dismiss appeal. By Order dated July 1, 2016, the Court denied the motion, but invited the Respondents to address the standing issue in their appellate brief. Respondents hereby do so.

Respondents first moved to dismiss the appeal because the purported Appellant was the former attorney-in-fact for the Petitioner below and is now trying to prosecute the appeal as a pro se party and was thereby engaging in the unauthorized practice of law. (Respondents' Motion to Dismiss Appeal filed on February 1, 2016). The February 1, 2016 Motion to Dismiss Appeal disclosed the situation regarding Mrs. Swiger's death and the absence of a duly appointed personal representative or executor. By Order dated April 1, 2016, the Court acknowledged that Ms. DeHaven was not authorized to prosecute the appeal pro se but nevertheless allowed her 30 days to retain counsel. (Order).

On April 28, 2016 attorney Syretta R. Anderson notified the Court that she had been retained "to represent the Appellant, Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven." (Notice of Appearance). This could not be because (1) Mrs. Swiger was deceased, having died in October, 2015, and (2) Ms. DeHaven was no longer attorney-in-fact for Ms. Swiger. The Notice of Appearance does not identify Ms. DeHaven as personal representative of the Mary Swiger probate estate and does not identify the attorney as representing Ms. DeHaven in the capacity of personal representative.

Ms. DeHaven represented to the Court in her Return to the Motion to Dismiss, filed February 12, 2016, that Mrs. Swiger died on October 6, 2015. (Return) This had the effect of terminating Ms. DeHaven's status as attorney-in-fact, a consequence expressly noted in the April 1, 2016 Order. (Order). There has been nothing filed with any Court related to this case indicating that a probable

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estate has been opened to administer Mrs. Swiger's estate and that a personal representative or executor or executrix has been appointed by the appropriate court to act on behalf of the estate.

The Notice of Appeal herein, filed on January 20, 2016, was not signed and/or filed and/or served by a person having authority at law or standing to do so. Respondents submit that the Notice of Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed. A notice of appeal is a critical legal document that is the very foundation for perfecting an appeal as illustrated by the facts that the 30-day deadline for serving the Notice of Appeal is fixed and definite and cannot be extended by the court; Rules 203(a) and (b)(1), and 263(b), SCACR, and that without a properly filed and served notice of appeal, the appellate court has no jurisdiction to entertain the appeal, and the appeal should be dismissed. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied.

This issue is controlled by Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 306 (1977). In Asbury, Mr. Walker petitioned the probate court that the decedent's last will be proved in solemn form, what is now known as a formal proceeding. Mr. Walker died ten months later, prior to a solemn form trial having been held. Approximately six months after Mr. Walker's death, the executor, now known as a personal representative, petitioned the probate court to revoke its order requiring proof of the will in solemn form on the ground that no "qualified contestant" existed. The probate court issued an order granting the executor's petition.

A Notice of Appeal was filed by "Ann Walker Asbury as Executrix of the Will and Estate of Hugh V. Walker and as sole heir under the will of Hugh V. Walker." However, at the time the Notice of Appeal was filed and served, no probate estate had been opened for Mr. Walker and Ms. Asbury had not been appointed as executrix. A hearing was held in circuit court, sitting as an

appellate court, on the motion for dismissal of appeal, and at the time of the motion hearing an estate still had not been opened, Mr. Walker's last will had not been filed or accepted for probate, and Ms. Asbury had not been appointed as executrix. The circuit court dismissed the appeal holding that Ms. Asbury had no standing to pursue the appeal. Six days after the circuit court hearing, Mr. Walker's will was accepted for probate, in which Ms. Asbury was named as executrix and sole devisee.

Asbury appealed the circuit court's order dismissing the appeal. The South Carolina Supreme court affirmed the dismissal because:

1. Asbury was never a contestant or party to the probate court solemn form proceeding and has no individual right to appeal (the same is true with respect to Ms. DeHaven in the above-captioned appeal);
2. Neither Asbury nor anyone else had been appointed as executor of Mr. Walker's estate **"when the Notice of Appeal was filed;"** (also true with respect to the Notice of Appeal filed herein) (emphasis added);
3. the failure to offer Mr. Walker's last will to probate and to thereby make its terms effectual with respect to the appointment of an executrix and the disposition of property to heirs or devisees was "fatal to this appeal." The Notice of Appeal was held to be a nullity because it was filed in a name that is not a legal entity.

The same defects exist herein. The Notice of Appeal filed on January 20, 2016 was filed by Carol DeHaven, identified therein as "Appellant Representing Self." (See signature block on Notice of Appeal.) Just as in Asbury, Ms. DeHaven was not a party to the proceedings below individually and in her own right. Consequently, and pursuant to Asbury, "she has no individual right to appeal," and at the time the Notice of Appeal was served and filed she had no derivative right to appeal.

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2. **Appellant's January 19, 2016 Notice of Appeal identified only the Circuit Court's Order Affirming Decision of Probate Court as being the subject of the appeal, and did not identify the Probate Court's Summary Judgment Order as being a subject of the appeal, to the result that Appellant has not timely perfected an appeal from the trial court's final order, and that order is now the law of the case.** (All issues on Appeal).

Appellant's Notice of Appeal dated January 19, 2016, but purportedly served on January 15, 2016, expressly referred to the Order being appealed as "the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015." The Notice of Appeal filed with this Court and served on the undersigned was accompanied by only one Order - a copy of Judge Sprouse's December 22, 2016 Order Affirming Decision of Probate Court. See Rule 203(d)(1)(B)(ii), SCACR. The Order of the York County Probate Court dated February 2, 2015, being the order that is the subject of the appeal to circuit court that was decided by Judge Sprouse's Order dated December 22, 2015, was neither identified in the Notice of Appeal nor submitted with the Notice of Appeal. Admittedly, a copy of the probate judge's letter directing the preparation of the summary judgment order was attached to the Notice of Appeal, but this does not comply with requirements of the appellate rules. Consequently, the Appellant has not timely perfected an appeal from the **trial court's final order** that granted summary judgment in favor of the Respondents. That order is now the law of the case.

A closely analogous issue was considered in Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). In Weatherford, the appellant's Notice of Appeal referred only to the order that denied the appellant's motion for reconsideration. However, this Court was lenient to the appellant in Weatherford and did not dismiss the appeal only because the underlying judgment order, although not referred to in the Notice of Appeal, was nevertheless attached to the Notice of Appeal that was

submitted to the Court for filing. The circumstance that saved the appellant in Weatherford is not present in the above-captioned case. Failure to refer to the summary judgment order in the Notice of Appeal and failure to file with the Notice of Appeal a copy of the trial court's summary judgment order, as required by rule, cannot fairly be labeled as a mere clerical error.

The failure to timely serve and file a proper Notice of Appeal, meaning in this case to serve a Notice of Appeal from the probate court's February 2, 2015 summary judgment order, divests the appellate court of subject-matter jurisdiction and results in dismissal of the appeal. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Likewise, Rule 203(d)(3), SCACR, provides that if the Notice of Appeal, and by implication all required attachments to the Notice of Appeal, are not timely filed, "the appeal shall be dismissed. . . ." (Emphasis added.)

Having not timely appealed from the final summary judgment order (including both service and filing of a notice of appeal with required accompanying documents), this Court lacks subject-matter jurisdiction, the probate court summary judgment is now the law of the case, and the appeal must be dismissed.

3. **Appellant's Issue on Appeal number 1 violates Rule 208(b)(1)(B), SCACR, in that it is a "[b]road general statement" that is conclusory in nature and does not identify a "concise and direct" issue for review, and said issue can, and should, disregarded by the Court.** (Appellant's Issue on Appeal No. 1).

Appellant's issue on appeal no. 1 reads: "[t]he Probate Court erred in granting summary judgment to Respondents." Broad general statements may be disregarded by the appellate court.

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Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 209 (2d ed.2002), citing Sullivan Co. v. New Swirl, Inc, 313 S.C. 34, 437 S.E.2d 30 (1993) for the principle that broad general statements of issues made by an appellant seeking to overturn a grant of summary judgment may be disregarded by the reviewing court.

4. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation of restricted visitation.** (Appellant's Issues on Appeal No. 2(i))

Appellant argues that there was evidence in the record that Respondents restricted visitation with the Decedent by Brenda Snow and by the Petitioner and her family, and that the evidence was sufficient to overcome summary judgment. The evidence before the probate court was that Brenda Snow was a former care giver for the Decedent who was suspected of physically abusing the Decedent. The hospital in Charlotte, NC first restricted Brenda Snow's visitation in November and December, 2011 because of the evidence of abuse.

The probate court addressed the Brenda Snow situation on page 10 of the Order. (Summary Judgment Order, p. 10 - 11). The Order finds that there was no evidence of pre-will execution restricted visitation with respect to anyone other than Brenda Snow. (Summary Judgment Order, R. p. 10-11).

In response to a question from the probate judge asking the Appellant's attorney to identify "factual evidence in the record that any visitation was restricted to other heirs of the estate," and

without citing any particular evidence in the record, Appellant argued that there was restricted visitation for Petitioner's family (not a denial of visitation but a refusal to allow visitation with the Decedent outside the presence of the Respondents) in March, 2012, two months after the last will was executed. (SJ hearing transcript, p. 44, l. 21 to p. 46, l.2). No evidence was ever called to the probate court's attention. In Appellant's Initial Brief, she cites to her attorney's argument to the court at the summary judgment hearing. (Appellant's Brief, p. 6, l. 14-17). Arguments of counsel are not evidence. Law Firm of Paul L. Erickson v. Boykin, 375 S.C. 204, 651 S.E.2d 606 (Ct.App. 2007).

Appellant refers to Respondents' answer to Appellant's interrogatory no. 10 as being inconsistent with Respondent's denial that they restricted visitation with Petitioner's family. (Appellant's Initial Brief, p. 7, l. 20 to p. 8, l. 18). All of this misses the point. The restricted visitation being argued by the Appellant with respect to Appellant's family occurred, if at all, after the January 14, 2012 will was executed. Appellant admitted such at the summary judgment hearing. (SJ hearing transcript, p. 44, l. 21 to p. 45, l. 5). Evidence of undue influence, whether in the form of restricted visitation, threats, coercion, etc. necessarily must occur before the will is executed because the basis of the charge of undue influence is that the exercise of undue influence resulted in the contested will being executed. Stated another way, the contested will must be the product of the alleged undue influence. Appellant's allegation in her Petition is that "Respondents are attempting to probate a will created under undue influence." (Petition, ¶ 31) (emphasis added). A contestant must show that the undue influence was brought directly to bear upon the testamentary act. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013). Alleged influence exercised after the act of will execution cannot meet the requirement that the influence was brought to bear on the

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testamentary act. There was no evidence in the record before the probate court that the Petitioners' family was either denied visitation outright or was denied private visitation with the Decedent before the January 14, 2012 will was executed.

The probate court found that the Brenda Snow restricted visitation occurred in a Charlotte, North Carolina hospital; was implemented by the hospital staff; all happening during Mr. Tucker's hospitalization - approximately one and one-half months prior to the execution of the January 14, 2012 last will." (Summary Judgment Order, p. 10, 1.17 to p. 11, 1.2). None of these particular findings have been appealed. There having been no evidence of restricted visitation for the Appellant's family prior to the execution of the will, the Probate Court's and the Circuit Court's rulings on restricted visitation were correct.

5. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation that the challenged last will did not comport with the testator's expressed wishes. (Appellant's Issue on Appeal No. 2(ii) and (iii)).

The subject of a testator's intentions must begin with the principle of law that "[I]n the case of the execution of a will by a testator of sound mind, there is a presumption from the fact of execution in accordance with the legal formalities that the testator knew and understood the contents thereof (notwithstanding prior declarations). In re King's Will, 132 S.C. 63, 67, 128 S.E. 850, 851 (1925). The testator herein has been found to have had testamentary capacity.

Pre-will execution statements of the decedent regarding his testamentary intentions. A will

is revocable, and a testator has the power to revoke a will and to execute a new will which disposes of his property in a manner entirely different from his intention as manifest in his former will(s). 3 Bowe-Parker: Page on Wills § 29.109 (Rev. ed. 2004). A change in intention does not create a presumption of undue influence and does not prove undue influence. Id. The fact that the testator's disposition of his property was different from that which he had mentioned in a previous expression of purpose is insufficient of itself to raise an inference of undue influence. Grahlman's Will, 81 N.W.2d 673 (Iowa 1957). Where prior declarations of intent are inconsistent with a subsequent last will, there is always the danger that testator's earlier declarations were intentionally false on his part for the purpose of misleading someone.

Post-will execution declarations. Appellant argues that statements made by the Decedent after the January 14, 2012 will was executed demonstrate that the will was not consistent with his testamentary wishes. (Appellant's Initial Brief, p. 10, l. 1-17). The probate court's Order addressed this issue.

> In opposition to the motion for summary judgment, Petitioner offered deposition testimony of a Westminister Towers social worker who stated that on February 5, 2012 that Mr. Tucker was "cognitively clear" and talked about a will and leaving money to a "little girl who he loved very much" and about not including unidentified nieces and nephews in his will. Neither the little girl nor the nieces and nephews were identified by name or by a description to definitively identify who was being referred to.

(Summary Judgment Order, p. 5. l. 20 to p. 6, l. 3). Appellant's Brief does not identify any evidence in the record that the probate court overlooked that makes the probate court's findings on the issue reversible error. Further, the Circuit Court's Order addressed the subject to say that the testator's testamentary capacity on the date of the will's execution and evidence that his mental capacity fluctuated, on a daily basis, made post-execution statements or declarations unreliable for purposes

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of overcoming the clear and convincing evidence standard. (Order, p. 5, l. 9 to p. 6, l. 2.)

6. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding the changes made from prior wills.** (Appellant's Issue on Apeal No. 2(ii) and (iii))

A will is revocable, and a testator has the power to revoke a will and to execute a new will which disposes of his property in a manner entirely different from his intention as manifest in his former will(s). 3 Bowe-Parker: Page on Wills § 29.109 (Rev. ed. 2004). A change in intention does not create a presumption of undue influence and does not prove undue influence. Id. The fact that the testator's disposition of his property was different from that which he had mentioned in a previous expression of purpose is insufficient of itself to raise an inference of undue influence. Grahlman's Will, 81 N.W.2d 673 (Iowa 1957).

> A person has the right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil. He can show gratitude, affection or charity or he can be capricious with his own . As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affections and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy or ungrateful. A young person it has been said regards everyone as his friend, but as he grows older, he is wiser, more cynical, and his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic or uncongenial; others that he judged as unworthy he finds worthy and congenial.

Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915).

The whole purpose of executing a new will or codicil is to make a change to the existing will.

The fact that a new will changes a prior will, standing alone, says nothing about the existence or absence of undue influence. It must be remembered that it is an unappealed conclusion of the probate court that the Decedent possessed testamentary capacity on January 14, 2012.

7. **Appellant's argument with respect to evidence of the testator's physical infirmity is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal No. 2(iii)).

Appellant did not allege physical infirmity as a factor at issue in the case to establish undue influence. Appellant's third cause of action alleges that the will is the product of undue influence as evidenced by three specific facts: that the decedent did not draft the document (Petition ¶ 31 a); that the document's author and the witnesses will benefit from the decedent's estate (Petition ¶ 31 b) and that the document's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (Petition ¶ 31 c). Accordingly, the Probate Court's Summary Judgment Order does not expressly address or decide the issue of physical infirmity. Of course, the issue was impliedly considered because of the circumstances of the testator being in the emergency room at the relevant time. The Probate Court's summary of the undue influence factors considered in deciding the summary judgment motion as it did does not mention physical infirmity. (SJ Order, p. 11, l. 3-17). No Rule 59(e) motion was made to have the Probate Court to specifically address the impact, if any, of the testator's physical condition, as opposed to his mental condition.

There are four requirements to preserve an issue for appellate review. The issue must have been raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely

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manner, and (4) raised to the trial court with sufficient specificity. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 57 (2d ed. 2002). If a party raises an issue to the trial court but the issue is never ruled upon by the trial court, and the party fails to file a Rule 59(e) motion to alter or amend, the issue is not preserved for appeal. Id. at 58.

8. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding that the testator was physically infirm.** (Appellant's Issue on Appeal No. 2(iii)).

If the testator's physical condition had been raised and considered, it would not have changed the Probate Court's grant of summary judgment for the reasons given by the court. (SJ Order, p. 5, l. 15 to p. 11, l. 17).

9. **Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal).

Appellant's third cause of action alleges that the will is the product of undue influence as evidenced by three specific facts: that the decedent did not draft the document (Petition ¶ 31 a) [not raised in this appeal]; that the document's author and the witnesses will benefit from the decedent's estate (Petition ¶ 31 b) and that the document's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (Petition ¶ 31

c). [visitation has been addressed hereinabove]. It is the second allegation that Appellant is arguing. What ¶ 31 (b) alleges is not a cause of action; it is an evidentiary presumption of undue influence. (hereafter the beneficiary presumption). Appellant made no allegation about either or both of the Respondents being in a confidential relationship with the decedent, which, if true, would also trigger an evidentiary presumption. (hereafter the confidential relationship presumption).

The probate court's Order addressed the facts with respect to the beneficiary presumption of undue influence. (Summary Judgment Order, p. 8, l. 22 to p. 10, l. 16). Actually, only the scrivener, Respondent Kelly, is a beneficiary of the will. The witnesses and notary on the will are not beneficiaries.

Appellant apparently confuses the status of someone involved in the drafting of the will being a beneficiary of that will with the status of someone in a confidential relationship with the testator also being named as a beneficiary in a will. They are both evidentiary presumptions, but they arise on different facts. Obviously, a person who is not in a confidential relationship with a testator can nevertheless be involved in the drafting and/or execution of a will in which the person is named as a beneficiary. That was the issue that was presented to the probate court by the Petitioner and which was addressed and decided by the probate court. The issue of a confidential relationship was not alleged in the pleading and was not mentioned in or decided in and by the summary judgment order. In fact, the term "confidential relationship" does not appear in the Summary Judgment Order. (Order).

Appellant did not file a Rule 59(e) motion to ask the probate court to address and decide the matter of an alleged confidential relationship between the scrivener (Margaret Kelly individually) and the testator and the related matter of the confidential relationship presumption.

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There are four requirements to preserve an issue for appellate review. The issue must have been raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 57 (2d ed. 2002). If a party raises an issue to the trial court but the issue is never ruled upon by the trial court, and the party fails to file a Rule 59(e) motion to alter or amend, the issue is not preserved for appeal. Id. at 58.

That is the situation here. Even if it is conceded for the sake of argument that the issue of a confidential relationship presumption was raised to the probate court in the attorney's arguments at the summary judgment hearing, the court ruled only on the issue that had been raised by the Petition - the beneficiary presumption. Consequently, any issue related to a confidential relationship presumption is not preserved for further appellate court review.

10. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because even if sufficient evidence of a confidential relationship was presented to give rise to a presumption of undue influence, the circuit court's ruling that said presumption was rebutted by Respondents' evidence was not appealed and is the law of the case. (Appellant's Issue on Appeal No. 3).

As addressed in issue no. 7 above, the trial court did not decide the issue of confidential relationship. Nevertheless, the circuit court, as an appellate court, did address the issue and decided it adversely to Appellant on two grounds: (1) that Appellant's evidence failed to satisfy the required burden of proof, and (2) that even if a confidential/fiduciary relationship existed, the "presumption

of invalidity " was rebutted by Respondents' summary judgment showing. (Order, p.2, l.11-16 and p.6, l.3-16). Appellant has appealed the first ruling, but not the second. Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 80 (2d ed. 2002), citing Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996).

11. **Alternatively, had the Probate Court considered the rebuttable confidential relationship evidentiary presumption, it would not have been sufficient to withstand the summary judgment motion, and the Circuit Court was correct in so holding.**

The two evidentiary presumptions relied on by the Appellant are each rebuttable. The Probate Court ruled that the beneficiary presumption is a rebuttable presumption. (Summary Judgment Order, p. 9, l. 1-5). The Order goes on to say that the beneficiary presumption was not triggered in this case. (Summary Judgment Order, p. 9, l. 6 to p. 10, l. 8). And, the Order went one step further to say that even if triggered, the beneficiary presumption was effectively rebutted. (Summary Judgment Order, p. 10, l. 9-16). The key citations in the Order that support the probate court's ruling that rebuttable presumptions raised by the summary judgment motion's opponent can be rebutted by evidence offered by the motion's proponent are Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (2014), and Kitsap Bank v. Denley, 312 P.3d 711 (Wash.App. 2013) in which the Washington Court of Appeals held that a presumption of undue influence standing alone cannot defeat a summary judgment motion where undue influence must be proven by clear and convincing evidence. These facts and rulings with respect to the beneficiary presumption were not

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appealed by the Appellant and are now the law of the case.

The existence of a fiduciary or confidential relationship between a testator and beneficiary raises a presumption of undue influence. Hairston v. McMillan, 387 S.C. 439, 692 S.E.2d 549 (Ct.App. 2010). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. Id.; Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct.App. 2005); Rule 301, SCRE. The presumption merely shifts the burden of going forward with the evidence, not the burden of ultimate persuasion. Id. The proponent does not have to affirmatively disprove the existence of undue influence; the contestant always retains and bears the burden of proof to invalidate the will . Id. In discussing the operation of burden shifting per Howard v. Nasser, the Court of Appeals described the proponents' burden of going forward as having to "offer some evidence to establish the lack of undue influence." Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct.App. 2011.) "Some evidence" appears to be the functional equivalent of a scintilla of evidence. "Scintilla" is defined as a spark or trace. Black's Law Dictionary 1347 (7th ed. 1999). The presumption of undue influence seeks to correct the situation where,

> "in addition to the factor of confidential relations, there also appear the further facts of an **unnatural disposition making the person charged with the undue influence chief beneficiary**, and that such person generally dominated the testatrix."

Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948). (emphasis added.).

The unappealed evidence in the record that Mr. Tucker had testamentary capacity at the time of will execution is some evidence showing a lack of undue influence. The evidence that Margaret Kelly is not the "chief beneficiary" of the will is some evidence showing a lack of undue influence. The will leaves the estate assets to "the twelve first generation nieces and nephews of my late wife." (Last Will). Margaret Kelly is to receive a share equal to the other eleven shares. The unappealed

finding of the probate court that "the decedent first raised the subject of his will and that Margaret Kelly wrote the will at the decedent's request and according to what decedent said he wanted in it" is some evidence showing a lack of undue influence. The lack of any evidence of force or coercion on the part of the Respondents is some evidence showing a lack of undue influence.

In addressing the presumption of undue influence arising from the fact that a person who benefits from a will also engages in drafting the will, the probate court held that "if such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing." (Summary Judgment Order, p. 10, l. 9-16). The same applies to the rebuttable presumption raised by the existence of a confidential relationship. **The same evidence that rebutted the benefits-from-the-will presumption also serves to rebut the confidential relationship presumption.** If such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing. In a summary judgment context, a rebuttable presumption raised by the motion's opponent can be rebutted by evidence offered by the motion's proponent. Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (S.C. 2014). In Kitsap Bank v. Denley, 312 P.3d 711 (Wash. App. 2013) the Washington Court of Appeals held that a presumption of undue influence standing alone cannot defeat a summary judgment motion where undue influence must be proven by clear and convincing evidence.

Conclusion

Russell v. Wachovia Bank, supra. is very instructive with respect to applying summary judgment law to a cause of action for undue influence. In Russell, the trial court's grant of summary judgment in favor of the will's validity and against the contestants was affirmed on appeal

notwithstanding evidence in the record that at times the testator was confused; he could not regulate his own medication; the alleged influencers were disrespectful to testator; one of the alleged influencers monitored testator's telephone calls; they told testator what clothes to wear and would not allow testator to regulate the thermostat in his house. Nevertheless, because of the heightened burden of proof required for undue influence cases, summary judgment in favor of the will was affirmed because the contestants did not present unmistakable and convincing evidence that the alleged influencers utilized their relationship with the testator to substitute their will for his with respect to the content of his last will. The evidence relied on by the Appellant herein on the issue of undue influence is far less in quantity and quality than the evidence in Russell that was found to be deficient to overcome summary judgment. The Probate Court was thorough in its analysis. (SJ Order, p. 5, l. 15 to p. 11, l. 17).

No reversible error has been shown. The Probate Court's Summary Judgment Order, and the Circuit Court's order affirming the Probate Court on appeal, should be affirmed and the matter remitted to the probate court for completion of estate administration.

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July 22, 2016

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF YORK)

IN RE: The Estate of Vinton Willis Tucker

Mary Jean Tucker Swiger,
Petitioner,
vs.
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,
Respondents.

C/A #2012-ES-46-0579

COPY

TRANSCRIPT OF PROBATE HEARING
BEFORE THE HONORABLE
CAROLYN W. ROGERS

****

Tuesday, December 30, 2014
10:05 a.m. - 12:05 p.m.
York, South Carolina

APPEARANCES:

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Attorney for the Petitioner

Margaret Kelly; Ben Smith; Steve Kelly; Janet Loeffler; Carol DeHaven

JUDGE ROGERS: This is a hearing in the matter of the Estate of Vinton Willis Tucker. It's case number 2012-ES-46-00579. I'm not going to go through the litany of everything that's in the file because basically we're here .... I mean everything that's been, all the pleadings that have been filed .... cause we're here today on a Motion for Summary Judgment that has been filed by the respondents in this actions, and I would note in regard to that that I have the original motion that was filed for partial summary judgment on September 26th, 2014, that was amended to file a motion for .... it was amended to file amended motion for summary judgment on all five causes of action that was filed on .... let's see, that was actually .... yeah, that was November 6, 2014. Then a Notice of Hearing and Proof of Delivery of same was filed on December 11th, 2014. I have also most recently have received affidavits from Margaret Kelly, Allison Matthews, and the respondents memorandum of law. Those were filed on December 23rd, 2014, and then I received an e-mail and a fax of the petitioner's memo of law that came in yesterday, so I should have all of that. I don't know if you have an original, Ms. Anderson, that you want to hand up.

MS. ANDERSON: Your Honor ....

JUDGE ROGERS: I don't need it, but ....

MS. ANDERSON: Yeah. There should have been one sent in the mail. I would have brought one here, but I can get one delivered to the office.

JUDGE ROGERS: No, that's fine. Everything I have is fine. All right. Mr. Brackett's here with his clients, and Ms. Anderson is here, and I don't believe I know these ladies that are with you. I don't think they've been introduced to me.

MS. ANDERSON: Your Honor, this is the petitioner's daughters that are here, and they are attorney-in-fact for her. We have Carol DeHaven and ....

MS. LOEFFLER: Janet Loeffler.

MS. ANDERSON: .... Janet Loeffler. I ... They're here on behalf of their parent.

JUDGE ROGERS: All right, thank you, and Mr. Brackett, who is this sitting next to you?

MR. BRACKETT: I'm sorry, Your Honor, this is an associate in our office, Adam Silvernail.

JUDGE ROGERS: All right.

MR. BRACKETT: He's assisting me in the case.

JUDGE ROGERS: All right. I've seen his name on a couple of pieces of correspondence. Not in

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relation to this case, I don't think, but in others. So, Mr. Brackett, this is your motion, so if you wish to argue your motion.

MR. BRACKETT: Yes, if it please the Court, a couple of preliminary matters, Your Honor. I don't believe that there's any dispute that the petitioner, Ms. Swiger, is mentally incapacitated, and I would move that we substitute as the petitioner in the case .... I believe her attorney ... I believe both of the ladies here today are attorneys-in-fact under different instruments, and I don't know what they say, but I understand that Ms. Carol DeHaven, I believe, is an attorney-in-fact under a general durable power of attorney, and I would move that we would amend the caption to show Ms. Swiger by her attorney-in-fact Carol DeHaven. I don't know what her full name is, I'm sorry I don't have that, but just so we get the party correct.

JUDGE ROGERS: All right. Do you have any objection to that, Ms. Anderson?

MS. ANDERSON: I don't have an objection, and I have spoken with my clients about, about that process as well.

JUDGE ROGERS: That motion is granted.

MR. BRACKETT: Thank you. I would next ask

the Court to take judicial notice of the inventory and appraisement that have been filed in this estate. It becomes somewhat relevant in the jurisdictional matter we're going to talk about because it identifies the property that was owned by the decedent when he died, and it's already of course a part of the Court's file.

JUDGE ROGERS: Yes, of course I'll take judicial notice in my file, that sounds good.

MR. BRACKETT: And you have already mentioned the affidavits of Ms. Matthews and Margaret Kelly, and the Court also should have the original, single deposition transcripts of numerous witnesses, some filed by me, some filed by Ms. Anderson.

JUDGE ROGERS: I do in fact.

MR. BRACKETT: All right.

JUDGE ROGERS: Thank you.

MR. BRACKETT: There are ... there are now four Causes of Action to be addressed today. Ms. Anderson has withdrawn her second Cause of Action having to do with the will execution formalities, so that's not, no longer before the Court, as I understand the Memorandum of Law. Just I'd like to confirm that on the record.

MS. ANDERSON: That's correct.

MR. BRACKETT: Okay. Do you want to take the four or one at a time, or do you want me to address all four at once, and what's the Court's preference on that?

JUDGE ROGERS: I'm going to leave that to the attorneys. How do you prefer to do that in terms of how you wish to make your arguments?

MR. BRACKETT: I mean I can ....

MS. ANDERSON: I can do it either way.

MR. BRACKETT: I'm happy just to go straight through and argue our position on all four of those, and we can go from there.

JUDGE ROGERS: All right. Is that suitable?

MS. ANDERSON: I would prefer doing it that way as well, Your Honor.

JUDGE ROGERS: All right. Very good. Go ahead, Mr. Brackett.

MR. BRACKETT: Your Honor, with respect to Cause of Action Number One, that is a challenge to the jurisdiction of this Court on the basis that the decedent had insufficient contact with South Carolina and York County in particular for this Court to be able to exercise jurisdiction over his estate. The South Carolina Jurisdiction Statute is 62-1-301. It says this Court has jurisdiction over,

and then there are five separate categories of matters over which there is jurisdiction. Three of them apply in this case. Number one, the Court can exercise jurisdiction over the affairs and estates of decedents domiciled in this state. We take the position that Mr. Tucker was domiciled in this state through either his own choice to be here or alternatively through the choice of his attorney-in-fact who had the authority under the power of attorney to make decisions related to his medical care, his medical care providers, the, and I guess nursing homes or residential care facilities, and so the attorney-in-fact could make those decisions on behalf of Mr. Tucker and bring him to York County, South Carolina for those purposes which the evidence in the deposition records appear that's what happened. So he's here living at Westminster Towers when he died. We take the position first that he was domiciled here. He came here. There was no intention that he would leave and go back to North Carolina, and that makes him at least, that makes him a domiciliary of this county. The second ground under the statute is the Court can exercise jurisdiction over property of non-residents located in this state. Here we have the, we have the

inventory and appraisements identifying his property. We have the affidavit of Margaret Kelly identifying property that belonged to the decedent which he had with him at Westminster Towers in his living, in his room or apartment, whatever they call it there, and then we have deposition testimony from Mr. Ben Smith, the attorney-in-fact, that he had possession of certain other property of Mr. Tucker and that, and that Mr. Smith, the attorney-in-fact, was also a resident and domiciliary of York County, was then, is still now, and was subject to the laws of this state, so that qualifies under sub section two, and, and so there are three then. There's the domiciliary, there's the ownership of property, and there's the fact that property is in possession of York County resident as a fiduciary, who serves as fiduciary. Any one of those by itself is sufficient to confirm jurisdiction on the Court to, to supervise and administer this estate, and I would point out that we're now .... it's been two and a half years since Mr. Tucker died, and what, what the petitioner is now suggesting is that everybody go off to some other state and start over. It's really not necessary. Now with respect to the ownership of property in this state, I have cited an opinion from

Montana, the Estate of Strange, that addressed Montana's territorial jurisdiction statute, and I, I submit that that case is relevant here, it is precedent here because it is a code, probate code jurisdiction, and it's the policy of the probate code to make the laws uniform so that, so that whatever Montana, how Montana would construe its statutes would be relevant here, and the flip side of that would be true as well. The way South Carolina would decide those questions might be relevant in other states, so this Montana decision is I think directly on point, and it says that as long as you own any property, it doesn't have to be substantial, it doesn't have, there's no dollar amount associated with it, if you own property in the state, then you have, the Court can exercise jurisdiction over the estate. I would point out that in the Montana case the decedent in that case was clearly neither domiciled in Montana nor was he a resident of Montana when he died. His son was an attorney, was his attorney-in-fact who lived in Montana and who had possession of certain property of the decedent in Montana, and the Montana Court said that was sufficient under it's statute for the Montana Probate Court to exercise jurisdiction over

the estate. In, in our case, here in the Tucker case, we claim that Mr. Tucker was domiciled here, but alternatively if he was not domiciled here, he was clearly a resident here. He was, he was more than .... he had a higher level of connection with the State of South Carolina than the decedent did in the Montana case. Montana was a non-resident who just owned property. Here we have at worst a resident who owned property here. So under the authority of the Montana case, I believe the Court can exercise jurisdiction based purely on the location of the property in York County. Then lastly of course Ben Smith, the attorney-in-fact, possessed, had property belonging to the decedent in his possession. He lived in South Carolina, he lived in York County, and subject to the laws of this state. So those are the three bases for jurisdiction. The Second Cause of Action is the one that has now been withdrawn. The Third Cause of Action challenges the January 14, 2012, last will on the grounds of undue influence. I would point out to the Court that the allegation of the petition, of the petitioner's Complaint in this case alleges undue influence related solely to the issue of the person who drafted, the person who actually prepared

the document. It's on the basis that the decedent, that the decedent did not write his will, his own will, and that according to the allegation of the, of the Complaint that there were threats made to the decedent by withholding visitation. Now with respect to withholding visitation, there is no evidence in the record that there was ever a threat of any sort made to the decedent having to do with restricting visitation. In the Petitioner's Memorandum of Law, an assertion of fact is made that, that the respondents undertook to restrict visit with the decedent, and the cite to the record is to testimony from Margaret Kelly to the effect that when Mr. Tucker was in the hospital in Charlotte in November of 2011, two months before the will was signed, that there was restricted visitation, and if you look at the deposition testimony that Margaret Kelly gave, it was that the hospital restricted visitation by a caregiver who was suspected of having abused Mr. Tucker. If there was indeed restricted visitation while Mr. Tucker was in the hospital in Charlotte, according to the evidence of record, that was a restriction imposed by the hospital and not by anybody in Mr. Tucker's family and particularly not by the two respondents

in this case, either Margaret Kelly or Ben Smith, so this restricted visitation is .... it simply doesn't exist in the form that you must have for purposes of undue influence. Undue influence must relate to .... it must be an influence that exists when the will is signed. It should not be influenced necessarily at a prior date or a subsequent date. The question is was there undue influence in the form of, some form of coercion or threat that would have affected the testamentary act on January the 14th. There's absolutely no evidence of that in the record. There was no evidence of restricted visitation while he was in the hospital at Piedmont Hospital on January the 14th when the will was signed, so this idea of restricted visitation is a remote time imposed by someone other than members of his family. The fact that, the fact that Mr. Tucker, the decedent, did not personally write his will doesn't constitute undue influence. The, the objection made by the attorney-in-fact, and this would be found in the deposition of Ms. Loeffler, who was also an agent for the petitioner, was that the objection had to do with the fact that the will was totally in handwriting and that it wasn't the handwriting of Mr. Tucker. Now the Probate Code

.... I readily admit the will is not in his handwriting. The only writing in the will that belongs to Mr. Tucker are his signatures on pages one and two on the, on the sides of that document. But the Probate Code does not say that a will has to be in the handwriting or handwriting of the testator. It doesn't say that the will has to have been typed by the testator. It doesn't say anything to that at all. It simply has to be prepared according to some instruction that he's given, and he has to acknowledge that he agrees with it, that he accepts it, that it expresses his, his testamentary wishes, and then he signs it and it gets witnessed. So this idea of the fact that Margaret Kelly was the person who handwrote the will does not in and of itself constitute undue influence. Now the argument is made by the petitioners that the fact that Margaret Kelly handwrote the will gives rise to a presumption, a rebuttable presumption of undue influence. I've cited in my memorandum the law that says that's not the case. There are, there are exceptions to the triggering of a presumption of undue influence. All of, all of those exceptions apply in this case. Now let me say that .... give you just a brief timeline

of the events of January the 14th. Mr. Tucker is at Westminster Towers at approximately 5:00 p.m. that day, that's a Saturday, at 5:00 p.m., and all of this is in the record, there are references to it, cites to, you know, cites to various deposition transcripts to support this. Mr. Tucker is in his room. The physical therapist comes by to see him. She cannot arouse him. He is unconscious in his recliner. She calls .... the therapist calls for assistance. A nurse comes in. They call EMS to come get him, and by the time EMS arrives and they get him strapped on the gurney and ready to go into the ambulance, he has already regained consciousness and is answering questions appropriately and This is a condition according to the doctors called syncope, which is a temporary loss of consciousness. He is transported to the emergency room at Piedmont Hospital. He gets there approximately 7:00 o'clock, and he is seen by Dr. Jason Ratterree. He is the ER doctor who is sort of next in line when it comes time to assign a physician to Mr. Tucker. Dr. Ratterree has given a deposition, you have his transcript, he was the doctor who talked to Mr. Tucker and who was trying to determine the cause of his loss of consciousness. He was trying to figure

out if there was some reason that he can discern why he lost consciousness. In the course of his examination and interaction with Mr. Tucker that evening, Dr. Ratterree expressed his opinion that he found Mr. Tucker to be alert and oriented times three, time, place, person, sort of the standard shorthand for competency. They run a series of tests on Mr. Tucker. One of those is I believe it was a CT scan, if I remember, remember correctly. The CT scan uncovered the fact that Mr. Tucker had an abdominal aneurism. Don't know that that contributed to his unconsciousness, but that was a condition, a serious condition, which was discovered apparently for the first time that evening, and Dr. Ratterree testified about having discovered it and going back into the room with Mr. Tucker and other family members and explaining to Mr. Tucker what his options were, what this meant, what this diagnosis to this condition meant, and it was a serious matter. The decision, the decision was made that Mr. Tucker was going to remain in the hospital. He would be discharged from the emergency room and he would be admitted to a hospital room in the, in the hospital proper, and while all that was getting worked out, all the paperwork and what have you

being done, that was the time, according to the deposition testimony, where Mr. Tucker brought up the subject of preparing his will. He was in an examination room, an enclosed examination room, at the emergency room at Piedmont Hospital, and there were three family members present when he brought that up. There was Margaret Kelly, her husband Steve Kelly, and Margaret's sister, Elizabeth Hagler, and at Mr. Tucker's request, Steve Kelly went out to his car, got a legal pad, brought it back in, and Margaret began to write the will according to the direction given by Mr. Tucker. Ms. Hagler is in and out of the room, she's a smoker, and her explanation was that she would go in and out of the room, she would step out to smoke, and was not there the entire time that everything transpired because they knew they were going to need some witnesses. If he was going to actually sign a will that night, he was going to need witnesses. They called Mr. Kelly's brother and his wife, and that would be Danny Kelly and Rebecca Kelly, if I'm getting my names right, and they drove to the hospital for the purpose of assisting in whatever way they could with the witnessing of a will. Neither of those two witnesses are related by blood

or marriage to the decedent. They said the met him maybe one time at a family gathering sometime, but they're not anybody who, who is personally acquainted with the decedent. They were not named as devisees in the will. They are independent, third-party witnesses. The evidence is that after the will was written, it was read to Mr. Tucker at least twice, if not more often. It is .... that fact is confirmed by both of the independent witnesses who were in the room, Danny Kelly and Rebecca Kelly, that Mr. Tucker was asked more than once is this what you want, is this the way you want this, is this what you wanted to say. He acknowledged that it was and said let's get it signed, and so at that point the will is signed by Mr. Tucker. He's lying on his back in a slightly reclined position in a hospital bed, and he signs the will and it gets witnessed by Danny Kelly, Rebecca Kelly, and also Steve Kelly, but he, he becomes an unnecessary witness because Rebecca Kelly, although she signed as a notary, there was no self-proving language in the will, so she, she was converted, if you will, into a normal subscribing witness. After the will is prepared and signed, Mr. Tucker is seen by the hospitalist at Piedmont, the

person who is to take charge of him. As he leaves the emergency room and the care of Dr. Ratterree, he will then become a patient of the hospital and will be under the care of the, the folks there at the hospital. This is Dr. Marfo who testified about her having met with Mr. Tucker that evening to get his history and to gather whatever information they needed for the paperwork that would admit him to the hospital, and her testimony was that she found him to be alert and oriented times three. He then later is transferred up, moves up to a hospital room. So up, move here we have for a period of time, maybe four hours, 7:00 to 11:00 on that evening roughly, while Mr. Tucker is at the emergency room. We have a doctor who sees him, finds him competent. He then prepares a will, signs it, it was properly witnessed, and then we have a second doctor who sees him and finds him to be competent. We have the therapist who saw him before he went into the emergency room who said by the time the ambulance arrived, he was alert and answering questions appropriately. So during that window of time, the only evidence in the record is that he was competent. There is no evidence during that period of time of any threat or coercion directed to Mr. Tucker by any other member of the

family to force him into signing a will that he did not want to sign. There is no evidence of that. So if under the circumstances the fact that Margaret Kelly prepared the will at the request of Mr. Tucker, and there's no evidence to refute that, and the fact that the will contains the wishes of Mr. Tucker, who acknowledged that fact in the presence of two witnesses, and there's no evidence to refute that, indicates that there is, there is no undue influence existing, that the presumption against, the presumption of undue influence doesn't apply because the will was prepared at the request of Mr. Tucker which is one of the recognized exceptions to that presumption, and I have cited that law in the memorandum. I would point out that the petitioner's theory, according to their memorandum of law is that Ben Smith was a fiduciary, owing fiduciary duties to Mr. Tucker. I'll admit that, I'll acknowledge that, but it has nothing to do with undue influence because Ben Smith was not present on January the 14th, he wasn't there. He had nothing to do with the preparation of the will, the witnessing of the will, the signing of the will, nothing. He didn't show up to the hospital until the next morning. So then the allegation is that Margaret Smith or Margaret Kelly

was in a what the law calls a confidential relationship with Mr. Tucker and that he placed great trust and confidence in her and she did all this stuff for him. There's nothing in the record to show that. She was a concerned family member. There's nothing in the record that says she was in charge of his finances, that she made decisions for him, that she made medical decisions for him. Those were the .... those were Ben Smith's responsibilities as attorney-in-fact. Margaret Kelly was not an agent or an attorney-in-fact for Mr. Tucker. She was simply someone who was there in the room, and he asked her to prepare his will. I would note that in the memorandum, in petitioner's memorandum of law, there is the bare assertion that Margaret Kelly was party to a confidential relationship with Mr. Tucker, and there's not a cite to anything in the record to support that assertion. I would .... I can only assume that the petitioners think that under those circumstances, Mr. Tucker would, would call in, would want some nurse, some stranger, somebody he didn't know to be brought in to, to write his will when he has relatives standing right there in front of him. The law doesn't require that. I know that .... well, never mind,

I'll move on. With respect to the presumption, there's no evidence that Margaret Kelly was in a confidential relationship. I would point out that Margaret Kelly is not a principal beneficiary. The will leaves the estate to 12 named nieces and nephews of Mr. Tucker, and they are nieces and nephews on his pre-deceased wife's side of the family. Ms. Kelly, Margaret Kelly, is one of the 12. She gets no more than anybody else. If she was going to exercise undue influence, you'd think she'd ... and really wanted to favor herself, she could have done that, but that's not the way it worked out, and the only evidence in the record is that Margaret Kelly did what she did only because she happened to be there and she was asked. With respect to the Fourth Cause of Action, which is testamentary capacity, there is again testamentary capacity was, it has been testified to by two physicians who were there, one before the will was signed, one after the will was signed, only a matter of minutes, each confirming that he had testamentary capacity. The persons who were there in the room that evening, admittedly all family members, but you have Margaret Kelly, Ben, well, Ben Smith was not there. You have Margaret Kelly, her husband Steve

Kelly. You have Danny and Rebecca Kelly, the two witnesses, and you have Elizabeth Hagler, who is one of the devisees in the will. She is a, she is a niece. All of those persons confirm that on that evening when the will was signed, Mr. Tucker, according to his behavior, his conduct, his speech was competent. There is no one who saw him that evening who has anything in the record to say that he was not competent. Now testamentary capacity is, you know, it could be a moving target. A perfect memory is not required. Perfect 100 percent functioning mentally is not required. If it was, none of us would be able to make a will. The law bends over backwards to allow persons who are minimally confident to meet the definition of testamentary capacity and to have the opportunity to make a will. That this will was done in the hospital should not be a surprise. People who, such as Mr. Tucker, who learned that evening of his condition and suddenly mortality is staring him right in the face, that's the time when people who have, you know, people who haven't thought about it very much or very regularly suddenly last wills become more important at those moments in time, so there shouldn't be anything surprising about the

fact that, that he became much more interested in taking care of his testamentary business at that time and place under the circumstances that existed. Now there was some, some evidence in the record that he had been previously diagnosed with dementia. We have no more specifics other than that fact that there had been a diagnosis of mild dementia at some point in the past. That diagnosis by itself means nothing. Now the question is, according to the law, at the time the will was signed, did he have testamentary capacity. The diagnosis standing by itself does not speak to that. Now I have pointed out in the record a window of time that involves persons who were not in the room that evening. The social worker from Westminster Towers, her name is Marcie Thomas, I believe it is, identified a record that had been prepared at Westminster Towers that Mr. Tucker signed on December the 30th, two weeks before the will was signed, and Ms. Thomas served as a witness to Mr. Tucker's signature on December the 30th, and she confirmed in her deposition that she felt he was mentally competent at that time to understand that form and to sign the form or else she wouldn't have witnessed it. She also administered a Medicare cognitive assessment on

Mr. Tucker, I'm thinking it was January the 29th, approximately a week after he returned to Westminster Towers from the hospital, she administered a cognitive assessment that she's trained to do and found him to be cognitively intact on that day. She administered a second assessment, and these are administered according to a schedule that the Medicare folks require, but there was a second assessment approximately the first week of February of 2012, and this would have been now almost a month, not quite a month after the will was signed, and she found him to be ..... he was one point below the cognitive intact scale. If he had scored a 13, he'd be cognitively intact. He scored a 12 which placed him at the high end of the mildly impaired range, whatever it says on the form. So we've got now, have this window of time from December the 30th through January the 14th, the date the will was signed, taking us all the way in to early February. All the people say he was competent. All the evidence of people who saw him and interacted with him during that period of time said he was competent. There's no evidence in the record from anybody who saw him, or interacted with him, or spoke with him, or tested him, or assessed

him, or any of that that said he was incompetent. Dr. James Jewell is the medical director, if you will, of Westminster Towers, and he, he is the physician by default for residents of Westminster Towers who do, who do not have other physicians following their care. He was Mr. Tucker's physician during his time at Westminster Towers. In his deposition he states that whatever Mr. Tucker's mental status was, and notwithstanding that there was a diagnosis of dementia, that Mr. Tucker's condition was not chronic or permanent, it would fluctuate. He would have good days, bad days. He could have, you know, parts of days good and parts of days bad, and so when given the opportunity, I asked him directly, can you tell me do you have any information that he was incompetent, did not have testamentary capacity and was incompetent on January the 14th, and Dr. Jewell says no, he doesn't have, he didn't have the contact or the information that would allow him to say that he was in, that Mr. Tucker was incompetent, and he admitted, he readily admitted, Dr. Jewell did, that he did not see Mr. Tucker during the course of his hospitalization, so he wasn't there at all. He simply can't speak to what his mental condition was on January 14th, 2012.

So that is a, that is a highlight, if you will, if we just sort of go through and hit the high points of the testamentary capacity argument, and I can't emphasize enough that this has to be examined from the perspective of the conditions that existed on January the 14th. That is the time that is critical to this. The Fifth Cause of Action alleges fraud. I think it might I assume .... as I said in my memorandum, it may also allege, could be said to allege a mistake, that the so-called fraudulent circumstances, as identified in the petition itself, is that the decedent did not draft the will. Now again I acknowledge he did not write it in his own hand. It is not a holographic will. It hasn't been offered as a holographic will. South Carolina doesn't recognize those, but it's not a holographic document because it's witnessed, it's signed and witnessed. So the fact he didn't draft the document is in no way related to validity or invalidity. The second ground is that if the decedent made a mark on the document, it did not appear to be a testamentary document when he made the mark. I interpret that to say that he thought he was signing something other than a will, he didn't intend to sign a will, and so if he signed something, it obviously was with either

.... it was either the result of fraud that someone had misrepresented the document to him, or it was a mistake that he just didn't understand what the document was. Well, there's no evidence that he signed anything other than a healthcare power of attorney and a will on that particular evening. The evidence is that the will was read to him more than once. The will says in it that it's a will. It's a last will and testament. The witnesses who were there, the disinterested witnesses who were there, confirmed in their deposition testimony that the will was read to him and that he acknowledged that it said what he wanted it to say, so there is, there is no evidence .... at the time and place the will was prepared and signed, there is absolutely no evidence that he was signing under a mistaken belief or that somebody had misrepresented or misdescribed the document to him. Just no evidence of that. Now the only, the only thing I believe the petitioners can show is that this will expressed .... this, this will expressed an estate plan different than what Mr. Tucker may have mentioned to other people at different times, and that because it is inconsistent with something that he may have said to somebody at some time, that means that the document is invalid.

That simply cannot be the case. That argument would mean that when a person is asked about his will, which really is nobody's business anyhow, but if somebody asked Mr. Tucker about his will, that he was under some legal duty as if he were under oath to answer their question perfectly and honestly. The law doesn't require that of anyone. If a person's getting asked about his will and he wants to bring the conversation to a quick end, he can simply say, yeah, I'm leaving you the house having no intent to do it whatsoever, just to get the person to leave and leave him alone and quit talking about the will. Nobody knows the motivations behind what a person may say about his will. I could go to my mother today and say I'd like you to leave me all this stuff out there in the storage room and don't give it to my brother, and she may tell me, okay, fine, I'll do that having no intention of doing that at all. That's her right to do that. She's under no obligation to follow through with anything that may have been said in an off-the-cuff. That's why wills are required to be signed and witnessed. There's a formality of that that you don't have in a conversation at a family party. So this idea of his expressing his desires at some other time or place

just simply cannot carry the day or else wills are subject to being set aside for almost any reason, any offhand remark. So there's no, there's no fraud in the record that would cause this will to be in doubt. So unless the Court has any questions of me, I've finished with my arguments.

JUDGE ROGERS: Thank you, Mr. Brackett.

MR. BRACKETT: Thank you.

JUDGE ROGERS: Ms. Anderson, your turn.

MS. ANDERSON: Thank you, Your Honor, may it please the Court. Let's start off by saying that we request for the Court on behalf of the petitioners to deny the respondent's motion for summary judgment, and I'll start off with the first cause of action which is jurisdiction. Your Honor, South Carolina's statutes have controlling power over the domiciliary of the decedent here. They have a statute that's controlling here. We don't need to go to Montana. We don't need to go to Maryland. We have one here. Now what we have here is a 92-year-old man, 93-year-old man at the time of his death, that spent his whole life in North Carolina. He signed a power of attorney in November of 2011 giving, giving the power of attorney to Ben Smith. He did that with an attorney in North Carolina, in

Charlotte, North Carolina, where he had resided his whole life. Within one month of him signing that, he did end up at Westminster Towers in Rock Hill, South Carolina, and he maintained when talking to anyone his desire was to go back home. Now he had some property. I don't know whether or not what property he had in Westminster Towers. I know that the testimony reflects that Ben Smith, when asked what property he had, he was unaware of any property he did have. At some point there was something filed in the Court to indicate that there was some personal property was here, but Ben Smith, the power of attorney, was unaware of any personal property he had. The only person that seemed to be aware was Margaret Kelly, a person who has no confidential relationship with him at all, if you listen to opposing counsel's argument. So we have ..... and there's a car, I believe they said, a car that Ben Smith had in his possession in York County, but Mr. Tucker had a home that he had in North Carolina. He had lived his whole life in North Carolina. When he was a resident, when he was at Westminster Towers, he was there as a temporary resident when he went there. He was in short-term rehab, and he did not come to North Carolina, come to South Carolina to

die. Now he didn't come to South Carolina to stay here. That home, his home, was not placed on the market until a week after his death, and so upon him dying, the home was placed on the market by Margaret Kelly and Ben Smith, but that was after he died because his motive and his thing was to return home. Deposition testimony will basically reflect that. He actually said to Jane Bondurant at some point in time talking to her cause it seemed as if she had quite a bit of communication with him during his stay at Westminster Towers, and he said I plan to go home. I know my family wants to do what's right for me, but I plan to go home. Now if we're talking about a man, listening to opposing counsel, as a man who had, was, was competent, a man who had the ability to make his own decisions, he was saying he wanted to go home. He was, he resided in Westminster Towers for five months. Now the statute here, which would be controlling here, is where the Court's 62-1-301 talks about the affairs of estates and decedents, but Mr. Tucker was a non-resident decedent, and he had property in South Carolina, and the statute that controls here is 62-4-207 which basically says that there will be ancillary proceedings for the property that would be here in

South Carolina. You just don't go off to Montana and pick up another jurisdictional statute that seems a little bit more controlling. If that's the case, we can go to Virginia that says anyone who dies in the State of Virginia inside of a nursing home, the State of Virginia wouldn't have control .... would not have any controlling power over that person in the State of Virginia. We just can't go around to different states and pick up statutes that favor what our belief, our belief is. 62-4-207 says that we will have an ancillary proceeding if the property would be located here in South Carolina. Now it's a presumption that we've had, we've had this action going on for two and a half years and for us to jump up and try to change it to another state. My clients were not aware of Mr. Tucker's death until one year after he died. The personal representatives of Mr. Tucker's estate, Ben Smith and Margaret Kelly, stated that they did not give my client, which is his sister, any or any notification or give them any information about his death because according to them, Mr. Tucker said he didn't want anyone to know when he died, so they had no knowledge, and when they filed this petition on May .... they filed the petition on May 2013, it was

within days of a year deadline. So they did so after receiving some information from the Probate Court, they received something from the Probate Court and they called down here and they realized that he had in fact died, and that's the first time they had any knowledge, so to, to now say that we've been in this action for two and a half years, it would be prejudice to send it to North Carolina, just the fact that this action's been going on for two and a half years does not automatically give South Carolina jurisdiction over Mr. Tucker. The, the length of time is not what controls jurisdiction, and I'll ask the Court to consider, and what we have here is 62-4-207, and then section 62-3-101 which governs the ancillary administration which is what we have here. We have a person who died in the State of South Carolina. He was not domiciled in the State of South Carolina. You're only domiciled in one location, and his, and his location of domicile would, would have been in North Carolina. We're asking the Court to consider those statutes when considering jurisdiction here today. Moving on to undue influence ....

JUDGE ROGERS: Let me ask you a question. Let me interrupt you a moment, Ms. Anderson.

MS. ANDERSON: Yes, ma'am.

JUDGE ROGERS: I'm looking at a document in my file that indicates that there was an information to heirs and devisees that was sent to a Jean Swiger, a Jimmy Tucker and Elsie Cookman, John Cookman, Jill Cookman, Michael Cookman in May of 2012 right after Mr. Tucker passed away.

MS. LOEFFLER: That's true. We knew of his death.

MS. ANDERSON: Well, he was located up until his death.

MS. LOEFFLER: We did not know where he was.

JUDGE ROGERS: I just wanted to clear that up.

MS. ANDERSON: Yes, I do apologize.

MS. LOEFFLER: We did not know anything like that.

MS. ANDERSON: I don't want your clients to talk to you unless we have a little recess. Okay. All right. Go ahead.

MS. ANDERSON: Thank you, Your Honor. Moving forward for undue influence. Your Honor, it would be very easy to simplify the situation and make it seem as if there was no undue influence and there was no confidential relationship between Ms. Margaret Kelly and my clients. Ms. Kelly signed

every document that was there at the hospital when Mr. Tucker was not able to sign.

MR. BRACKETT: Objection. There's nothing in the record that says that.

Q: Miss ....

JUDGE ROGERS: Sustained.

Q: Margaret Kelly was a person who was next of kin to call when there was any issue regarding Mr. Tucker. Margaret Kelly is a person who he .... all the deposition testimony will reflect that anyone who had any information about Mr. Tucker, the go-to information about person would have been Margaret Kelly. That most of the people who we deposed that were there present one that day would say we talk ... through Margaret Kelly we found out information about Mr. Tucker. That when Mr. Tucker .... the person who he communicated with the most out of this family would have been Margaret Kelly. She signed his documents. She was the person who talked to the doctors. She was the person who communicated with the doctors when he went to the doctors. She's the person who Westminster Towers called when he went to the hospital. She's the person who the hospital called when he was there. So now imply that there's no confidential relationship would be .... it's

probably a bit much. Now what we have here is the court says that where there is a confidential relationship, there's a presumption of undue influence. Can't control that. That was what the statute said, I mean, the case law is there to say that. There is a confidential relationship that exists between Mr. Tucker and Margaret Kelly, and what we have here .... when we say undue influence, we say that it destroyed his free agency, that they basically substituted their own wishes onto the wishes of Mr. Tucker, and I say that because when Mr. Tucker was in his hospital room in November of 2011, Margaret Kelly's deposition testimony reflects that with respect to Brenda Snow, she's a person who was a caregiver of his who resided with him for short period of time in his home in North Carolina, and according to her testimony, the hospital in North Carolina said that they did not want her to visit, and when I asked her why was that, what gave them the impression that there was some reason for them not to visit, for her not to be able to visit, she said because Brenda Snow had provided misinformation to the hospital, and so I asked her what type information was that that was provided, misinformation, and she said that evidently Brenda

Snow had came to the hospital and had misrepresented to the hospital that she was a family member of Mr. Tucker's, as a person who evidently was a close confident of his, she resided in his home. If you listen to deposition testimony, it was a type of relationship that was more than just friendly, and when I asked how, why would you give that indication, one of the persons, I think it was Danny Kelly said or Ben Smith said it's because she was sitting on his lap and they were hugging. So it gives you an impression that there was more to that relationship with Brenda Snow than just a caregiver type relationship. So now she's in a ... now Mr. Tucker's in a hospital, and there was a lot of talk about him having injuries that were not consistent with the fall, but there was, there was no point in time that there was any type of charges that were filed against Brenda Snow. There was no complaint that was filed against her. There was nothing in the records to reflect that there was anything or any suspicion about Brenda Snow. But Margaret Kelly says to me that, during deposition, that the hospital social worker said to her get him out of the State of North Carolina and take him far from here so she will not be able to ever talk to him

again, and so I said to her, questioned her, because she misrepresented information to the hospital, is that the reason why, and she says I believe so. This information was provided to the persons at the hospital, if there was any information at all, by Margaret Kelly cause there's nothing in the, in the documents to reflect that there was any suspicions or any concerns about Brenda Snow or any concerns about whether or not he had been injured or whether or not his fall, his, his injuries were not consistent with a fall because they're a reporting agency, they would have to report that if that was the case.

JUDGE ROGERS: All right. Ms. Anderson, are you still on the jurisdictional issue?

MS. ANDERSON: No. I'm on undue influence.

JUDGE ROGERS: All right. Very good.

MS. ANDERSON: I do apologize. I just ....

JUDGE ROGERS: No. I knew you were headed on to undue influence, but I know there was some question about domicile and why Mr. Tucker was moved down here and it had something to do with Brenda Snow, so I just wasn't really too sure where we are on that.

MS. ANDERSON: Yeah, and with respect to that.

I think that's part of the reason. That is what I think. Deposition testimony will reflect that part of the reason why he was moved to South Carolina was to get him out of the state, the whole State of North Carolina, this big city of Charlotte, so that he would not be around Brenda Snow.

JUDGE ROGERS: Well, let me ask you a couple of questions.

MS. ANDERSON: Yes, Your Honor.

JUDGE ROGERS: I know there are facts that have been established that such things as there was a car in the possession of the fiduciary, that there were bank accounts that were national banking associations that were accessible from any state, that there was a 2012 tax return filed in South Carolina, that there were other issues such as... well, I would, I would point to judicial notice in my file that we have a death certificate indicating that he was domiciled in South Carolina. Do you disagree with any of these facts?

MS. ANDERSON: I don't disagree ....

JUDGE ROGERS: Because my job is to determine what the application of the law is to these various facts. Do you have any disagreement with these particular facts?

MS. ANDERSON: I don't disagree that he was, that he died in the State of South Carolina. I would, I would disagree with characterizing that as domiciled in South Carolina.

JUDGE ROGERS: Well, again, that's a legal issue, but do you have any question about the factual allegations?

MS. ANDERSON: I don't disagree with that, but, but with respect to bank accounts that would be accessible to any state in the, in the country ....

JUDGE ROGERS: I understand.

MS. ANDERSON: .... that wouldn't change the fact that any person could be domiciled in any number of states ....

JUDGE ROGERS: I agree.

MS. ANDERSON: .... it doesn't change that.

JUDGE ROGERS: Again that is a legal issue.

MS. ANDERSON: Absolutely, Your Honor.

JUDGE ROGERS: What I want to know is do you disagree with any of the facts that have been alleged as far as where he was, how long he was there, what he had in his room, you know, where the car was?

MS. ANDERSON: With respect .... well, I did mention earlier with respect to that, the items that

he had in his room. The .... Ben Smith's testimony reflected that he was unaware that he had anything in his room at all.

JUDGE ROGERS: Is there not testimony, factual testimony of the items? Is there not an affidavit from Margaret, Margaret Kelly stating that he had certain items in his room?

MS. ANDERSON: There's an affidavit that ....

JUDGE ROGERS: Have you presented any opposing affidavits to that?

MS. ANDERSON: And I, and I did .... in my memorandum of law I did say, did say in there that we did not have any knowledge to be able to object to that. I don't want to say that that was not necessarily true. If there's a .... if she provided an affidavit, I have no notice, I have no knowledge to say that there was, those items were not there. I can say that in her role as a confident, she has more information than the person who's a fiduciary here, but I did not, I was not able to say that, so I did not want to mislead the Court. I can't say that there was not .... that property was not located in Westminster Towers. I, I don't have, I don't have any way to know that, knowing that. Mr. Ben Smith did indicate that the car was in his

possession at his home. I have no way .... I don't object to that because I have no way of knowing that that car was not there. I just state to the Court that despite that property being in South Carolina ....

JUDGE ROGERS: I understand.

MS. ANDERSON: .... it didn't change the fact ....

JUDGE ROGERS: That's what I'm going to be deciding.

MS. ANDERSON: Yes, Your Honor.

JUDGE ROGERS: All right.

MS. ANDERSON: Do you have any other questions with respect to ....

JUDGE ROGERS: Not to jurisdiction.

MS. ANDERSON: .... jurisdiction. Moving forward with the undue influence, if I can get myself back on track.

JUDGE ROGERS: And I'm sorry for interrupting. Just take your time.

MS. ANDERSON: No, no, no. I've moved on very quickly. To the undue influence with respect to the issue of moving him here, moving Mr. Tucker here because of the, the concerns, the hospital in North Carolina as a reporting agency, there was no report

that was made, no report was filed because of any concerns about what Brenda Snow may have done or what concerns she was there, but Margaret Kelly did indicate that the reason why there was no .... she didn't tell the hospital that she felt that there was something going on, that Brenda Snow had done something to Mr. Tucker, had injured him in any way, and she didn't mention that in her deposition. When I asked her, she said that their concern was that she had provided misinformation, and that misinformation was the fact that Brenda Snow communicated to the hospital that she was in fact a relative. So when he come here to Westminster Towers, the deposition testimony reflects that Margaret Kelly gives to the persons at Westminster Towers a photo of Brenda Snow telling, telling the Westminster Towers that she is not to visit at any point in time, she's not to be allowed to visit at any point in time. What we do know about the wishes of Mr. Tucker is that Mr. Tucker did draft a will in favor of Brenda Snow. In fact he had that will drafted by his attorney, Edward Knox in North Carolina, and we know this, and this information came out during depositions, because Ben Smith says that he called Edward Knox. He must have had some

suspicions about another, a will that had been drafted. He called Edward Knox, and he says me being the power of attorney, I would call Edward Knox, and I called him. He found out he had a will, and I was a little foggy on this. I'm not sure how he found out he had a will because Ben Smith had the will in his possession, but he says he called Edward Knox, and he says that Edward Knox did say, yes, yes, I did draft a will, yes, Brenda Snow's in the will, and what I want you to do is to tear that will up, and so Ben Smith does in fact, and he said maybe he asked him why because the question was why did he do that, and Ben Smith says because Edward Knox tells Ben Smith on the telephone that there was a conflict in him drafting that will. When I asked why was that a conflict, Ben Smith says in his deposition, deposition testimony the conflict was that Edward Knox had taken money from Brenda Snow to assist her with her divorce, and because he had taken that money from Brenda Snow to assist him with her, with her divorce, he believed that there was a conflict, and I asked Ben Smith what did he do then. He said he destroyed the will, and so I asked him what did Mr. Tucker say to you when you told him you destroyed the will, and he said he didn't say

anything because he never told him. I said at any point in time did you ever tell Mr. Tucker that you had destroyed that will, and he said no, I don't believe I did. I asked him who did you tell that you destroyed the will, and he said he told Margaret Kelly, and I said what did she say, and he said she, she agreed with me that that was the right thing to do. So what we do know is undisputed, is a fact, he had a will. He didn't just talk about giving his money to someone else. He just didn't tell other people in passing. No one came to him and asked him about a will and he just blew them off about I'm going to give, give you the car. He actually drafted a will in favor of Brenda Snow, and whatever happened at his home to give rise to suspicion about what Brenda Snow did, the person who did, who didn't, who singularly did not follow with that assumption or those thoughts was Mr. Tucker because he had a will out there giving her his property, giving her his estate.

JUDGE ROGERS: Let me interrupt you again, Ms. Anderson. Is there any factual evidence in the record that any visitation was restricted to other heirs of the estate?

MS. ANDERSON: There was .... after, after the

will was drafted, I believe in March of 2012 which would have been a couple months prior to, a couple months prior to Mr. Tucker's death in May, we had a cousin that came, that traveled down to see him that ....

MR. BRACKETT: Objection. There's nothing in the record. I don't have, don't have an affidavit or anything from ....

MS. ANDERSON: The deposition, deposition testimony reflected that at that point in time that someone came to visit him.

JUDGE ROGERS: What deposition?

MS. ANDERSON: It would have been .... I beg the Court's indulgence and I will find that information.

JUDGE ROGERS: Okay.

MS. ANDERSON: Your Honor, if, if it's not here, and if I can't find it readily in deposition testimony, and I will look for it, it is reflected in the pleadings that .... and, and summary judgment, is what we're hearing that all that information does come into, does come into the Court's consideration, that there was a visit from a family member in March of 2012, and that was after the will that was drafted, but no, at no point in

time before then, but I will look for that information, Your Honor.

JUDGE ROGERS: All right. I don't recall seeing it in the pleadings, but I could have overlooked it. All right. What other factors, facts, Ms. Anderson, show the existence of undue influence?

MS. ANDERSON: With, with respect to the restriction for, for Ms. Brenda Snow that restricted her visits, and Mr. Tucker continued to express his desire for Ms. Snow to have his assets in his will. After the drafting on January 14th, Mr. Tucker had a conversation, conversation with Marcie Thomas, and she says in her deposition that he was having a cognitively, cognitively clear afternoon. He says to her .... the reason why she was having a meeting with him is because he, she questioned the documents that he signed in the hospital. She didn't know that he signed a will. When I asked her was she aware that he actually had signed, had signed a will, she was not aware of that, but she did know that he had also signed the living will in the hospital, and she was concerned about that because she says in her testimony that up until that point, he had said that he wanted you to fight, fight,

fight, is what she said, 100 percent for his, for him if he wanted to live till he was a 100, so on this particular day on February the 5th, she had this conversation with him, and she says and he, and Mr. Tucker tells Ms. Marcie Thomas that he was upset because he had a nephew that came to him asking him about drafting a will in favor of dividing it up between his nieces and nephews, and I asked her did you know that he drafted a will, and she said, no. Did he give her any indication that he had signed a will, and she said, no, she had no knowledge of that, but it would appear on February the 5th, which would have been a couple weeks after the signing of the will on January the 14th, that he in fact had no knowledge of signing that will. He was expressing his, his anger or he was upset, expressing that he was upset, that he had a nephew that came to him and asked him to divide up his estate between his nieces and nephews. Now there was a question in the deposition testimony from opposing counsel at that point in time to meaning to imply maybe he was talking about a nephew from his side of the family, but there's no facts to indicate that he had any communication at all with any nephew from his side of the family. The only facts that we have in, in

this case are, are here, that all his communication was with the nieces and nephews that became part, part on that will, and so I believe, Your Honor, in the, in the, in the information here and the testimony reflects that there was some undue influence, that they, that they did .... that at some point in time the wishes of the person representing, the wishes of Margaret Kelly, the wishes of Ben Smith were substituted for the wishes of Mr. Tucker because at no point in time did Mr. Tucker ever state that he wanted to give his, his estate to the, to anyone other than Brenda, Brenda Snow until that day on January the 14th which leads me to here. I have a timeline as well, Your Honor. The deposition testimony reflects that the ambulance was called at 6:50 p.m. on that Saturday, January the 14th, 6:50 p.m. ambulance was called. He was .... Mr. Tucker was then taken by ambulance to the hospital. He arrived there shortly after 7:00 o'clock. They administered a few tests. Margaret Kelly did appear. No, she didn't come to the hospital, but Ronald Kelly, her husband, and Elizabeth Hagler, and they got to the hospital around 8:00 o'clock. So from 7:15 when he arrived at the hospital and took the tests, this man who had

dementia, that was clear, the doctor, the records reflect he had dementia, although the records will also reflect that Margaret Kelly and Ben Smith in their deposition testimony stated they had no knowledge of him having dementia, but the record also reflects that he did have it, and this man at 7:15 p.m. was at the hospital. They ran a few tests. Margaret Kelly appeared at 8:00 o'clock, and what we're asked to believe based on the testimony here is that at 8:00 o'clock after being, after receiving results that he had a 7.7 centimeter aneurysm, at 8:00 o'clock that he saw Dr. Ratterree, that from 8:00 o'clock until the time this, this will was drafted, from the time this will was signed, not one person came into that hospital room. Not one person. Not an orderly, not a nurse, not a doctor, not one person other than Ben Smith, other than Ronald Kelly. I do apologize, not Ben Smith. Ronald Kelly, Margaret Kelly, Elizabeth Hagler, Danny Kelly, and Rebecca Kelly. So we have the time that it took for this will to be dictated and drafted, and while we're on dictated, the .... Margaret Kelly testified that Mr. Tucker dictated to her verbatim this will. When I asked her every word that came off this will was his words, and she said

yes, all of the words that came off this will, every .... she didn't write any of those words herself, but this whole will, this two-page will, starting with I, Vinton Willis Tucker, being of sound mind and aware of my decisions was, was dictated by Mr. Tucker. This person who had worked on the railroad all his life, who had no legal background that we could see from, from the, from the information that we have of deposition testimony, there's no legal background he has. Dr. Jewell even states in his testimony that he would find it very surprising that someone given his age and given the circumstances surrounding this hospital stay and given his lack of knowledge about a, a will to be able to, and inclined in a hospital bed, be able to dictate this two-page will. What we have on that day is that he also signs a, a living will, and the deposition testimony from the persons that were present on that day is really foggy on the signing of that living will. No where .... you ask them do you remember when that was signed, he said I don't remember when that was signed. Do you remember witnessing that, this is your signature. No one really remembers witnessing it, but what is clear on that day is that every single person in that hospital room can say,

can state with exact, with exactness that Margaret Kelly read that will to, to Mr. Tucker, that he was .... it was, it's questionable whether or not he was lying on his back or slightly inclined, there's different testimony determining whether or not he was on his back or slightly inclined, but they can actually say that she read that will, Margaret Kelly read the will to Mr. Tucker and that he indicated that's what he wanted and that the will was then signed. When I asked the persons who were present at the, at the hospital did they speak to anyone or what did they do to prepare for the depositions, every person said they didn't do anything to prepare for depositions. They said they just came to depositions and they, they appeared at deposition and didn't talk to anyone except Danny Kelly, and Danny Kelly states in his deposition, deposition that a week prior to depositions, he spoke with his wife, Rebecca Kelly, and with Margaret Kelly, and Ronald Kelly concerning the depositions and the case for 15 or 20 minutes. Now that fact stayed out of the communication of all the deposition testimony leading up to that. When I asked Rebecca Kelly who, who did she communicate with prior to depositions, how did she prepare for depositions, she said she

didn't prepare at all. When I asked Margaret Kelly, she didn't prepare at all. Ronald Kelly, no one prepared for the deposition until Danny Kelly stated that yes, he had in fact had a meeting with Margaret Kelly, with Danny Kelly, with Rebecca Kelly, and with one other person about the depositions that were coming up, Your Honor. Now it would be very easy to act as if these events didn't occur and that Mister .... it, it was, it was obvious to, in depositions that Mr. Tucker did not feel comfortable telling Margaret Kelly that he did not want to continue to reside in, in South Carolina, but he did tell Jane Bondurant that. He did say he desired to go home, but he knows his family wants to help him. He maintained that. Now we don't have ... there's no one who was in the room with him, but the, but the testimony that they provided about the events that occurred in that room would give rise to believe that there's something else that occurred other than what they're stating because what we have is that we have a living will that was also signed that was, that was inconsistent with what the wishes were of Mr. Tucker leading up into that day. We have Mr. Tucker's own statement that he had no knowledge of a will ever having been drafted, that

despite the suspicions surrounding Brenda Snow, Mr. Tucker continued to want her to visit with him. He continued to profess his love or his, not his love. He continued to profess his desire to make sure that he gave her his will. He gave her the objects of his will. So with respect to undo influence, Your Honor, I do believe that the confidential relationship would shift that burden to show that there's no undue influence to the respondents. I also would ask the Court to consider at this point that because of the, the circumstances surrounding the signing of that will on January the 14th, the fact that that will was signed, if there was a will in fact at all signed in that hour that it was dictated by this person who was dying presumably within 30 minutes the persons who were there to witness the will came to the, to the hospital, and with one, and within that one hour, not one person other than the persons that were there to witness the will or the persons who were benefitting from the will had any contact at all with Mr. Tucker. No one. Now Dr. Ratterree did state that it don't .... he did state that he was not there at all. He wasn't. His purpose was not there to determine whether or not Mr. Tucker was mentally competent.

He was .... that was not his reason for being there. He, he stated that in his deposition. Dr. Marfo in her deposition I have here did not state that he was times, was oriented times three. In fact she stated that when I .... she said that this note says you talked with him for quite a while, and this is my question. You said he was alert and oriented times two. Now is that to person and time so he didn't know where he was, and Dr. Marfo said he probably. I wrote person and time, so he must not have known, they get confused sometimes, and that's inconsistent with being oriented times three. In fact she said he was oriented times two. There's no question that a person in his state, I think the testimony here reflects, that his, his mental status fluctuated from time to time. What doesn't fluctuate is the fact he's 92 years old that he just had been, he just had had episodes of passing out, that he had just been diagnosed with a condition that may lead to his death, that he was in the hospital within minutes after hearing that, that he dictated, according to the testimony a will, and he listed all the names of 12 people in this will. That he literally dictated this word for word. That's inconsistent with the facts that we have here, Your

Honor. So I would ask the Court to see and considering based on circumstances here ....

JUDGE ROGERS: Let me ask you this. What is consistent? Tell me what the inconsistency is.

MS. ANDERSON: It's, it's inconsistent with what Dr. Jewell said would be a person of 92 years old who is in the hospital with his lack of legal knowledge, with having mild dementia. It's inconsistent that he would be able to draft, to, to dictate a will of this nature. That's inconsistent with that statement. It's, it's, it's not consistent with his wishes that he, he had, that he expressed leading up to January 14th, and then following January 14th, it's inconsistent with the wishes that he, that he expressed. I'm not here to say, Your Honor, that my clients stated that he had any desire to give the, the money to them or to give them their estate. He did, however, express his desire to give his estate to Brenda Snow, and he not only expressed that prior to going into the hospital, he expressed that when he, when he came home from the hospital, and he obviously drafted a will that he had no knowledge had been destroyed. So I think the inconsistencies here are exactly why we're here, this will. The will is inconsistent.

It's inconsistent had he drafted a will, and I agree. A person at any point in time can have, have a desire to change their will, but no person has, has, has .... there's no law here that gives any person the right to destroy a will without first having that direction from the person who drafted it, and that's what we have here, Your Honor. So there are inconsistencies, and they're surrounding around that January 14th time when that will was actually signed and executed because what we have here is statements from the persons that were present, and the only thing that they say that they actually remember about that night, if you read the testimony, is a lot of I don't know. They don't remember when the declaration of .... when the living will was .... the declaration of a desire for natural death was signed. It was in fact signed that night. There's no real .... it's real foggy about the events surrounding that signing, but what is clear is that everyone remembers that that will was read and that it was, it was signed, and that's inconsistent with the .... with what we have here, Your Honor.

JUDGE ROGERS: You made a comment about something that lead me to believe you might be

implying that he did not sign this will, and that kind of gets to your fraud argument and your mistake argument. If you .... do you want to go ahead and cover that?

MS. ANDERSON: I can cover that, Your Honor. It .... what .... based on the, what we have here, the information that we have here from this .... and we did, we did withdraw the portion about the formation of the will, I did withdraw that after ....

JUDGE ROGERS: I saw that.

MS. ANDERSON: .... reviewing that.

JUDGE ROGERS: I saw that.

MS. ANDERSON: It's, it's our belief that and based on the evidence, evidence that we have here is that in order for that will to have been signed that night with Mr. Tucker not having any knowledge of it, would have been that he didn't realize he was signing it. He had .... when he was ....

JUDGE ROGERS: What facts do you have that support that?

MS. ANDERSON: He didn't know he was signing. He didn't know there was a will that was drafted.

JUDGE ROGERS: But what fact do you have to

supporting that?

MS. ANDERSON: I, I don't have .... Your Honor, I don't have any facts to support that. I do have the testimony of Marcie Thomas that indicated that when she asked him if he signed a will, he had no knowledge of signing it, but he did say he had a nephew that had approached him about drafting a will in favor ....

JUDGE ROGERS: I get back to my question. What fact do you have that establishes he didn't know what he was signing the night that he signed this document? I mean you don't dispute that this is his signature, correct?

MS. ANDERSON: I don't. I have to .... I reviewed that with my clients. I don't necessarily refute that that's his signature. I can say that he signed two documents on that night. He had no knowledge of signing that will, and he had no knowledge that he drafted a will in favor of his nieces and nephews. So the fact that he had no knowledge that he had signed a will would give me, would give indication I believe to the Court.

JUDGE ROGERS: You're basing the fact that he had no knowledge that he signed this will on what?

MS. ANDERSON: On the fact that he told Marcie

Thomas in his communication with her. When I .... and I have to pull that testimony out for Your Honor. On February the 5th I think that Ms. Marcie Thomas had a conversation with him, and she said it was because of her concerns over the documents that he had signed in the hospital. She said it was uncommon for a living will to be signed in the hospital, and for that reason, this is what her testimony here was, for that reason the social worker and some of the other persons at the Westminster Towers wanted to make sure that he understood exactly what it was he had signed, and so she communicated with him, and during that communication with him on that day, the ... and I asked her did she know that a will had been signed, and she said, no, she was not aware the will had been signed, but neither was he, and I'll have to find that. And while I'm looking for that, Your Honor, I do see a question here. Was there some question about the full-code status, whether he wanted to do a non, a non-resuscitate order or whether he wanted the opposite of that, and she says based on my notes, I very clearly remember, and based on my notes, Mr. Tucker always wanted to be a full code. He, and he always, he always said he

wanted to fight and live until he was a hundred, and whatever happened, he wanted us to have .... whatever, and whatever happened, he wanted us to fight to save, to save him, and that was inconsistent to what he signed on that night, but let me find the statements that he had with respect to the will. I do apologize, Your Honor.

JUDGE ROGERS: That's okay.

MS. ANDERSON: If I wasn't looking, if I wasn't looking for it, I would have found it. I do apologize.

JUDGE ROGERS: That's fine. That's fine.

MS. ANDERSON: Okay. Here it says when I questioned her, you just mentioned you did write it in here on your entry about the will that Mr. Tucker, Mr. Tucker talked about, but then as you were talking with Mr. Brackett about your communication with Mr. Tucker, you indicated that then that he, he also talked to you at other times about his will. He said just about simple pleasantries and things about his will and that nature, and she said, Ms. Marcie Thomas answers, "I don't recall any specific conversations. I just know that on the day that he talked about it a whole lot. It was probably .... I'm sure that he

mentioned it other times, but not in a significant way like he was really talking about it on that day. Did he indicate to you that he had recently signed a will," was the question that I asked. "I don't know anything about his will or what he signed or didn't sign. When you mentioned that he had signed some documents in the emergency room, what documents did you think he had signed?" And she said "My understanding of that was that it was for healthcare power of attorney."

JUDGE ROGERS: Isn't that really more what she thought and not what he thought?

MS. ANDERSON: Yes, but I'm just leading up to that point.

JUDGE ROGERS: Okay.

MS. ANDERSON: When she, when she says okay. This goes into the conversation about nieces and nephews, and you said you had no knowledge of anyone other than nieces and nephews. Did you meet any of the nieces or nephews aside from the .... and I asked her which nieces and nephews did you actually meet or, or do you, do you recall meeting. And she said "I know Margaret and I know Ben, and if I remember correctly, there was a gentleman from Greenville that was a cousin who's a doctor maybe,

and that's all I'm aware of. He said he had a nephew that came to him and asked him about his will, and he said, he was a little bit upset about that. Did he indicate he was able to do what he wants?" She says .... I think it goes back into the testimony here, but what he, what he states in, what he states through the testimony, and I got to go back to Mr. Brackett's portion of it, was that he stated to her in her deposition testimony that he could do what he wanted to do with his money, and that he objected to the fact that the nephew had asked him to divide .... and Marcie Thomas's actual .... her notes is actually what reflects what he actually stated .... that the nephew approached him about dividing the contents, contents of his will equally between his nieces and nephews, and he said he didn't want to do that.

JUDGE ROGERS: Hold on one second. We don't have a good setup here for people that come and go.

MR. BRACKETT: For the record could I ask for the page and line numbers?

JUDGE ROGERS: You may.

MS. ANDERSON: I'm on page 62, and I just got finished reading off the bottom of ....

JUDGE ROGERS: Well, I'm still not hearing

anything that indicates that he told anybody that he didn't sign this will.

MS. ANDERSON: Your Honor, and I don't think there's anything in the record that will reflect that he told anyone he did not sign the will. I think what the record will reflect is that he maintained his desire to give the, the contents of his will to Brenda Snow, and if he maintains he was .... that he could continue to want to give the contents of his will to Brenda Snow, that would give reason to believe that he did not sign another will, or at least he felt that there was a will in place that he had drafted.

JUDGE ROGERS: Well, we're talking about a couple different things here. We're talking about undue influence, we're talking about fraud, and I think what we're talking about ....

MS. ANDERSON: I thought you asked me ....

JUDGE ROGERS: .... is fraud and whether he said that he, that he indicated to anyone, if there's a fact that supports his saying that he never signed this will.

MS. ANDERSON: There is no fact to support that he did not sign the will, Your Honor.

JUDGE ROGERS: Okay. All right.

MS. ANDERSON: But, but with respect to fraud and mistake, that goes hand in hand.

JUDGE ROGERS: Well, is there any fact indicating he was mistaken about signing it?

MS. ANDERSON: Well, Your Honor ....

JUDGE ROGERS: Is there any fact that shows that he indicated he did not sign that?

MS. ANDERSON: There .... Your Honor, I believe the fact that after signing whatever he signed on February the, on January the 14th, on February the 5th when he indicated that he was upset that his nephew had came to him to divide the contents of his will ....

JUDGE ROGERS: Do we even know what nephew this is?

MS. ANDERSON: No. Because Marcie Thomas was not aware of what, of what nephew it was.

JUDGE ROGERS: So it could have been a nephew from the other side of the family?

MS. ANDERSON: And that, and that's a communication that was .... I think that's what was kind of, was, was tried to have been brought out during the deposition testimony except that I think it's a fact that there was no nephew that had contacted Mr., Mr. Tucker. He had ....

JUDGE ROGERS: Except for this fact we're talking about?

MS. ANDERSON: Except for .... no, there was no .... there, there's no fact .... there's no testimony or evidence to reflect that Mr. Tucker had any communication at all. He had limited communication with the ....

JUDGE ROGERS: Well, except that Marcie Thomas is saying, or whatever her name is ....

MS. ANDERSON: Marcie Thomas.

JUDGE ROGERS: .... that a nephew came up and, you know, that he indicated that there was a nephew, so anyway, we don't need to belabor it. I don't need to belabor that point. Go ahead.

MS. ANDERSON: Your, Your Honor, he, he did truly sign something on that day. He signed a living will, and there was a will that was signed that was dated January 14th, but on February the 5th, he actually did not have any knowledge of that because he said he had a nephew that came to him that wanted him to divide his will up equally, and he was upset about that. He said he wanted to give his estate to his little girl which he had actually done. You know it's not a situation here that he had not actually went through the motions to draft a

will in favor of the person whom he has maintained he wanted, wanted to draft up a will in favor of. We had a person who actually did that. We also have a person who had no knowledge that that will was destroyed. So with respect to mistaken fraud, when I was .... my, my point to the Court there is no fact to that, and, and oftentimes with respect of fraud and fraud and mistakes, there's no actual facts that reflect that. You base that on circumstantial evidence of all the information that you gather, and there's not very likely of all the information in all the cases I've read, that there would be fraud as blatant. If that's the case, there wouldn't be anybody who would commit any fraud. It's actually ....

JUDGE ROGERS: The elements of fraud are very clear.

MS. ANDERSON: Yes. The elements of fraud are very clear, Your Honor.

JUDGE ROGERS: And do you have facts that support any one of these elements of fraud?

MS. ANDERSON: And that's the reason why I said it's a fraud or mistake. There's no, there's no .... what I .... we spoke to my client's concern about this issue. There is .... there are little

facts with respect to whether or not fraud actually exists or not, but there are many facts to indicate that his wishes were not expressed in that will because he maintained that consistently. We're not talking about a person who was so private that he did not give, make his wishes know. That whether or not there was concerns about this person, whether or not the relationship that he had with this person was not the, the best relation to have, he continued to maintain that that's the person he wanted to have the contents of his will. That was the person who he had stated he wanted to have his contents of his will. He stated that before he went to the hospital, he said it after he went to the hospital, and in fact he drafted a will to that effect, Your Honor. So no, there is no fact to indicate that the fraud might exist, but there will be some fact to indicate that mistake possibly exists because if in fact he drafted a will that he was aware of and he was competent to do so, if you listen to testimony to do so on that day, then he would have remembered that, and he would not still be saying he wanted to give his estate to his, to, to the little girl that he had, he called Brenda Snow. If he in fact remembered that, and we're talking about a person

who they're saying that is competent to do so, he's competent to be able to give his estate to whomever he wanted to. He didn't have .... that fact escaped him on that day.

JUDGE ROGERS: Do you attribute that more to your arguments about undue influence rather than to your arguments about, about capacity or fraud?

MS. ANDERSON: I, I attribute that fact to undo influence and to mistakes, so I think that it actually .... I, I don't think that with respect to these particular facts, Your Honor, that they can be taken, they can be isolated and taken separately.

JUDGE ROGERS: Now I grant you that, you know. A lot of times these, these types of things can't be proven with direct evidence, it's got to be circumstantial evidence. So are you saying that the only circumstantial evidence you have is that there was possibly a prior will that left every thing to this Brenda Snow person and that he indicated to Marcie Thomas that he was unaware that he didn't still have that will in effect? Is that what your argument is?

MS. ANDERSON: I, I think that's part of the argument, Your Honor, that he, that he had no knowledge that the will had, that the will was, was

destroyed, that the, the respondents did isolate him from Brenda Snow without having any basis to isolate him, that we did not get into the fact of whether or not the .... he had a visitor from his side of the family that he was not allowed to speak with on his own because, according to the respondents, he was afraid. He did not want her to speak with him at all because he, he was afraid that .... what he said that she was, the only reason why they wanted to come to visit with him is when they came through on their trip to Florida. Something of that nature is what Margaret Kelly testified.

JUDGE ROGERS: Who are you talking about?

MS. ANDERSON: Margaret Kelly testified that the reason why he did not to be alone with his family members was because the only reason why they came to visit with him on his, on the petitioner's side is because they came through to visit with him on a trip to Florida, and he felt, according to Margaret Kelly, that that was the only reason why they came to visit. So for this reason she said that he did not want to be alone with his family members, the testimony that Margaret Kelly states in her testimony. Now there are a number of reasons why I believe undue influence exists, and part of it

would be because of the will. Part of it, a big part of it is because of the will. Part of it also is because that while in the hospital, she did restrict that visitation despite the fact that he maintained he wanted this person to be a part of his life, they restricted visitation. That is a major part of it, and I think with respect to undue influence, that's a big part of what has to be shown to indicate whether or not undue influence is there, and Your Honor, with respect to summary judgment, summary judgment is a drastic type of measurement. It's a measurement that happens when there is no issue, there's no, there's no, there's no contested facts, and I don't believe that's the situation here. What we have here are many contested facts. We have a situation. We have a person who drafted a will that was destroyed without his knowledge. We have a situation where we have a man who continued to maintain that his desire was to give his contents, contents of his will to someone else whom he was not able to do that because that will would have, was, was already destroyed at that point. I think that given the actions of the respondents, that that would give rise to the Court to believe that there are some genuine issues of material fact

that need to be addressed by a jury and that to not give them the opportunity at this point, Your Honor, I believe would be inappropriate. Thank you.

JUDGE ROGERS: Thank you, Ms. Anderson. Any follow-up, Mr. Brackett?

MR. BRACKETT: Yes, Your Honor. On the issue of jurisdiction and Mr. Tucker's move to South Carolina, petitioners essentially describe every step of that process as being sinister, that it was a part of an overall plan to, to get Mr. Tucker down in South Carolina so that they could have their way with him. Now the evidence, the evidence in the record is that he appointed Ben Smith as his attorney-in-fact in November and that durable power of attorney says "I authorize my attorney-in-fact to provide for my medical care, to sign consents for my medical treatment, to review all medical information, to employ or discharge any healthcare facility or nursing residential facility." Signed on November the 17th of 2011. Testimony is that when he left the hospital in Charlotte, he went to a rehab place, also in Charlotte, for approximately 10 days, and then he was taken to, he was brought to Westminster Towers pursuant to the attorney-in-fact's discretion to place him in an appropriate nursing residential

facility for his, for what the attorney-in-fact felt was in his best interest based upon the knowledge that had been gained while he was in, while Mr. Tucker was at the Charlotte hospital. So when an agent acts in the best interest of his, of his principal pursuant to authority of a power of attorney, the act taken by the agent is viewed in the eyes of the law as having been the act of a principal. Now I would point to Ms. Marcie Thomas's deposition transcript page 11.

JUDGE ROGERS: Are we still on jurisdiction?

MR. BRACKETT: Yes, ma'am. "He came into our short-term rehab on December the 12th of 2011." That's when he first went to Westminster Towers, he went into short-term rehab, and then the question was asked "As I understand it, he remained or he eventually became a resident here after the rehab was over, is that correct?" Her answer, this is the social worker, "Right." Question. "When did he actually transition from rehab to being a resident. He moved upstairs for long-term care on February 10, 2012." So the social worker described him as a resident, not as a temporary patient of some sort, but described him as a resident. And then you look at the affidavit of Allison Matthews, she actually

took him on a tour with his family. Mr. Tucker was on the tour, and the point was when the family said, yeah, he's going to be here, you know, he plans to stay here, we're not going anyplace else, when you would expect Mr. Tucker to have spoken up and said, no, that's not right, I'm, I'm going home, he didn't. He didn't respond at all to that which is a form of acquiescence, a form of admission, if you will. So he was .... steps were being taken in the spring of 2012 that he would, he would get a more permanent room, and that never happened because of his, the fact that he deteriorated fairly quickly after that. So on the question of jurisdiction, he was a resident at Westminster Towers which makes him a resident of York County, if not a domiciliary since he, there was no expressed intent. And who in that situation never says, you know, I'd like to go home. Who never .... they all say it.

MS. ANDERSON: Objection. That calls for speculation.

JUDGE ROGERS: All right. Sustained.

MR. BRACKETT: With respect to the events of this, this undue influence stuff and the fact that a, that a will that left property to Brenda Snow had been destroyed, there's no evidence in the record of

when that will was destroyed. We don't know whether it was destroyed before January 14 or after January 14. Now if it was destroyed before January 14, then it was cured by the fact that he executed a subsequent will. The execution of the subsequent will by its own terms revoke all prior wills, and you find that, Your Honor, on the first page of the will, the third paragraph down. "This will is to take precedence over any and all wills which I may have signed in the past." So if it was .... if the Brenda Snow will was, was torn up and destroyed after this will, it doesn't matter. It had already been revoked by the execution of the January 14 will. This Brenda Snow will is a distraction, trying to claim that it somehow has some role to play here when the evidence would .... it just indicates otherwise. This is the latest expression. The January 14 will is the latest, formal expression that meets the terms for the execution of a last will that Mr. Tucker gave regarding his estate. Now mention has been made of this February 5th meeting between Mr. Tucker and Ms. Thomas, and let me just direct the Court to certain portions of Ms. Thomas's deposition. I thought I had circled them all. All right. Now what, what Ms. Thomas's deposition says

is that when he came back from the hospital, he had executed a new healthcare power of .... I'm sorry, a new living will, all right, that granted I think it was Margaret Kelly the authority to make healthcare decisions. That was executed, according to Margaret Kelly's deposition, that was a requirement of the people at the hospital. The people at the hospital brought that form to the room and asked that it be signed, that they have a current, don't know why, but that they have a current healthcare power of attorney on file, and so that form, that healthcare power, was signed the same evening that the will was signed on January the 14th. Then when Mr. Tucker returned to Westminster Towers on January the 20th, the people there somehow learned of this new healthcare power that had been signed in the hospital, and they wanted to clarify. They were somehow worried about any document that gets signed in a hospital, and they wanted to check with Mr. Tucker about that power of attorney, and so the meeting between the social worker and Mr. Tucker on February the 5th had to do with the healthcare power of attorney. It had nothing to do with his will. On page 37, line 16, "then we go to your notes for February 5, 2012. Apparently you were talking to

him about a new power of attorney." Her answer was "yes. Did he bring up the power of attorney or did somebody here on staff bring it up? How did the subject get raised?" Her answer, "According to my note, the nursing staff reported a concern because he had come back from the hospital with a new healthcare power of attorney and the nurses were concerned about that. That prompted me to go down and talk with him about that." There was ... let me go down. "So during your conversation then," now I'm on page 38, "so during your conversation then on February 5 with Mr. Tucker about this power of attorney, did you conclude that he was cognitively intact enough to effectively talk to you or to communicate his thoughts about that subject." Answer. "He talked to me about it. He seemed to understand what I was saying. He knew I was talking about Margaret, and he talked a lot about his will. I remember talking to him. I don't think he signed anything on that day." That day, I would argue, was February 5th. "I don't think I took anything in there for him to sign. It was just to discuss that document," i.e., the power of attorney. "And like I wrote on there, he recognized his name but he said, but he just said he didn't remember signing it,"

meaning the power of attorney. He had been in the hospital. Then .... "now you made a note here, resident also spoke at length of nieces and nephews in his will." This is on February 5th. "Did he say which nieces and nephews he was referring to?" Answer. "He didn't. He just talked about his nieces and nephews." All right. And then he goes on to say "They want to be included in the will, he said. This is why they are not in my will." So the nieces, so the question was "So the nieces and nephews he was talking about were nieces and nephews that as he understood it, were not in his will." Ms. Anderson then objected. And then following the objection, Ms. Thomas said "I have not seen his will. I don't know what he is talking about. Then you make reference to a statement, he loved his little girl very much and she took care of him and wanted her to have the money he designated for her to have. Did he indicate who his little girl, who was his little girl?" And then she says "It was from my understanding someone named Brenda." Now that was a conclusion that Marcia Thomas reached out of thin air, we don't know. Mr. Tucker never said Brenda's name. "From my understanding she was a caregiver of his that he cared about. He said he

had left her," and I think they make reference to that as well, "and that he had at some point had named her in his will." Now when he said he had left her, what does that mean? That he no longer had a relationship with her? That he left her when he left Mecklenburg County? It very well could be. It's as reasonable an explanation as anything else. So here we have, here we have a conversation off the record between Mr. Tucker and a social worker at Westminster Towers approximately three weeks after his will was signed, and he has no obligation to talk to her about the will. He could tell her anything he wanted to tell her about the will, and it's not binding on anybody. He was there to talk about, she was there to talk about a power of attorney. He doesn't say here I never signed a will. The subject of whether he had signed a will on January 14th never came up. He was not asked did you sign a will while you were in the hospital. Question was not asked, and he made no statement one way or the other. So then he signed another power of attorney on February the 8th. Social worker witnessed it. Felt he was competent to sign a power of attorney on February the 8th, and of course competency to sign a power of attorney is

contractual capacity. It's a higher standard to sign a power of attorney than it is to sign a will. So here we ....

JUDGE ROGERS: Is this a healthcare power of attorney or just a general durable power of attorney?

MR. BRACKETT: This was a healthcare power. The evidence from Ms. Loeffler's deposition, she's one of the agents, was that the plaintiff and the petitioner in this case, Ms. Swiger, had not seen Mr. Tucker face-to-face since 2004. It had been eight years since they laid eyes on each other, and Ms. Loeffler admitted that that was the last time she had seen Mr. Tucker. It's pretty obvious that Mr. Tucker's side of the family had a much more sporadic, tenuous sort of relationship with Mr. Tucker than did the local relatives who he knew through his late wife. That would explain the will. So somebody who says I haven't seen him in eight years and I'm really disappointed now when he didn't name me in his will. Really? The evidence was his wife had died in about 2000. He'd, he'd been a widower since 2000, but yet they don't, apparently don't keep in touch, and now they express shock and surprise and outrage that they're not named in the

will. So unless the Court has any other particular questions, I'm ....

JUDGE ROGERS: I'm going to give Ms. Anderson an opportunity to say one, one last salvo, and then I'll tell you what I'm going to do.

MS. ANDERSON: Thank you, Your Honor. If it please the Court. Very briefly. My clients haven't expressed outrage they weren't named in the will. That's never been stated. That was some rhetoric I think Mr. Brackett just threw in there. There wasn't an outrage they expressed. I think when they, when they started delving into the events that occurred, that lead up to Mr. Tucker's death, and when they started communicating with, with other family members and realizing that he did express desire to give money to Brenda Snow and that his visitation was restricted with her and that he very likely probably died with a broken heart from having not seen her, I think they were a little upset. They didn't visit with him regularly. I, I do know there are letters in the, in the record that shows that he communicated by letter with his sister quite frequently, and they, they did communicate by letter. I don't, I don't believe that they visited with, with each other as his sister was in another

part of the country and he was here, but that was not her outrage. In the statements that Mr. Brackett read for, for the Marcie Thomas conversation he had, Mr. Tucker did not even remember signing anything at that hospital. He didn't remember signing a living will, he didn't remember signing a power of attorney, he didn't remember signing anything, and that was on a day that he was .... when she was talking to him, a person who had had many communications with him, she said that he was cognitively clear on that afternoon, and he didn't remember signing anything, and that was why she was there, but despite just being there to talk to him about the healthcare power of attorney that he had signed, he wanted to talk about his will. Now that wasn't unsolicitated communi, communication, and it doesn't appear from her testimony or it didn't appear from the notes that she reflected that, that we have that we subpoenaed, that she asked him about his will. It seemed as if he was just talking about his will. There's no, there's no, nothing even from listening to Mr. Tucker communicating and talk, there hasn't been much communication at all with Mr. Tucker and his sister's side of the family, so to now imply

that it was a nephew that somehow had communicated with him about being in the will as be, would be farfetched because clearly the evidence shows that the nephew on his side of the family and the communication on his side of, on his side of the family, the petitioner's side, was very, very limited. In fact not having had any communication in years. So to now imply that he's in the hospital and that the person he's talking about that had approached him, the nephew that approached him could have possibly been someone from the petitioner's side would probably .... is a bit farfetched. With respect to the confidential relationship, Mr. Tucker signed a healthcare power of attorney in favor, and listing Margaret Kelly as that healthcare power of attorney. Now if they were not in a confidential relationship prior to that, I would argue that they are now at least in a fiduciary relationship which would then place that burden of proof on the respondents, Your Honor, of showing that there's no undue influence.

JUDGE ROGERS: Thank you.

MR. BRACKETT: Burden .... excuse me. The burden of proof does not shift. The burden of proof never shifts. It's only the burden of showing ....

going forward with evidence.

JUDGE ROGERS: I understand.

MR. BRACKETT: Okay.

JUDGE ROGERS: Not the burden of persuasion. It's the burden of going forward with the evidence. I understand that distinction on summary judgment particularly. And I agree with Ms. Anderson that it is a drastic remedy, summary judgment is a drastic remedy, and even if there is no dispute as to the facts, there could be a dispute as to inferences that can be dropped in those facts, but here's what I'm going to do. On the First Cause of Action, which is jurisdiction, I don't think there's any dispute as to the particular facts that have been alleged. I believe that .... I know South Carolina is loath to look at the states, other states' laws, but that doesn't mean that we can't look to other jurisdictions to find support for particular viewpoints, and I find that Mr. Brackett's arguments are convincing that there is really no issue of fact as to what the circumstances of his residency in South Carolina are, and I think applying a lot of the facts that it's

clear that he was a resident, if not a domiciliary, of South Carolina, and we're not going to change jurisdiction at this point in time anyway to another state. I think it makes perfectly good sense to continue on with this, so that particular part of the motion for summary judgment is granted. On the issue of .... let me go over to capacity. Let me go over to fraud. I don't hear the facts here indicating that there is any real issue about fraud or even mistake, as a matter of fact, and even mistake so I'm going to grant Mr. Brackett's motion for summary judgment as to the fraud issue as well. Frankly, you know, I'm, I'm very confused about what the petitioner's connection with Ms. Brenda Snow is or what possible interest they have in what Brenda Snow's potential ability to inherit would be, and I know, Ms. Anderson, you're just saying that .... you're making that argument because you're indicating that there was an indication that there was undue influence going on, but there's also no evidence in this case that, that he made any attempt after January to do anything about the will that was signed in January. But I don't

see, I don't see anything in regard to facts that are supportive of a fraud allegation, so again I'm going to grand the motion for summary judgment on that. I'm going to grant the motion for summary judgment on the issue of capacity. I haven't heard any facts that indicate that he didn't have capacity on this date, under these circumstances to sign this document. I don't find that the language of this will is particularly complicated or artful. I know I read Dr. Jewell's deposition where he indicated that he wasn't totally convinced that this could be word for word from Mr. Tucker's lips, but on the other hand, I also, also think Dr. Jewell indicated that was not something that he could necessarily determine, that that would be up to a judge. So on the issue of capacity, I'm going to grant the motion for summary judgment. I'm going to take under advisement the issue of undue influence. I want to think about that for a little bit before I make a decision on whether, again based on the fact that there is, that summary judgment is considered to be a drastic remedy and that I can take into account

inferences that may be drawn from the particular facts, and I know that oftentimes in these situations it is circumstantial evidence that has to come into play, it is not direct evidence. And I just would remind, the attorneys know this, but I would just say this for the benefit of the, the parties, a grant or denial of summary judgment, well, a denial of summary judgment, is not an adjudication on the merits. It doesn't mean that if I ultimately deny summary judgment on undue influence and you all come back on the issue of undue influence, that I wouldn't rule against the concept of undue influence being applicable, but, and I haven't decided whether I'm going to grant summary judgment on the issue of undue influence or not. I do want to mull that over a little bit before I make a determination and probably take a good look at Ms. Thomas's deposition as well. And of course the second cause of action has gone away anyway as far as the formalities of execution is concerned. Mr. Brackett?

MR. BRACKETT: May I comment on one thing, Your Honor. We did not talk about an argument, and

it has to do with respect as to undue influence. That is, that is a cause of action that requires clear and convincing evidence.

JUDGE ROGERS: Yes, I know.

MR. BRACKETT: And so the, the way the Court weighs the facts and the disputes, it has to be under a different evidentiary standard.

JUDGE ROGERS: I understand.

MR. BRACKETT: Okay. Thank you, Your Honor.

JUDGE ROGERS: I understand completely that the facts that are to be presented by the party, the non-moving party, have to rise to that same level of proof. I understand that.

MR. BRACKETT: Thank you.

JUDGE ROGERS: All right. Anything else, Mr. Brackett?

MR. BRACKETT: Do you want to wait and just do one comprehensive order?

JUDGE ROGERS: Yes, sir.

MR. BRACKETT: Okay.

JUDGE ROGERS: Let's do that, and I should have something for you all within the next few days. Ms. Anderson, anything else?

MS. ANDERSON: Nothing further, Your Honor. Thank you.

JUDGE ROGERS: All right. Thank you very much for being here.

MS. ANDERSON: Thank you.

(The hearing concluded at 12:05 p.m.)

CERTIFICATE

This is to certify that the foregoing transcript of hearing, consisting of eighty-eight (88) pages, is a true and correct transcript of the testimony given at said hearing; said hearing was reported by the method of voice writer with backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of January, 2015.

Judy R. Urso
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 1-24-21

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
County of York	)	2012-DR-46-0579
Vinton Willis Tucker, Plaintiff,	)	
vs.	)	TRANSCRIPT OF RECORD
Ben Smith, et al. Defendants.	)	

December 8th, 2015

York, South Carolina

BEFORE:

THE HONORABLE R. SCOTT SPROUSE, JUDGE.

APPEARANCES:

SYRETTA ANDERSON, ESQ.
Attorney for the Plaintiff

MICHAEL BRACKETT, ESQ.
Attorney for the Defendants

AMINAH R. HARDY
Official Court Reporter

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EXHIBITS

No.	Description	Page

(No exhibits were marked.)

PROCEEDINGS

THE CLERK: This is the case of Mary Jean Tucker Swiger versus Ben R. Smith and Margaret R. Kelly, the personal representatives of the estate of Vincent Tucker, case number 2015-CP-46-466.

THE COURT: All right. This is an appeal from the probate court of York County. I will look at the record here. I want to make sure I see all -- the attorneys have e-mailed me several documents, but I want to make sure I have everything that -- I see there's a record on appeal with the transcript. I have each party's brief. Have some supplemental materials. Is there anything that either party wishes to submit that hasn't already been submitted to the Court?

MR. BRACKETT: Your Honor, there is a motion pending to amend the respondent's -- Mike Brackett representing the respondents -- to amend my designation for the record and to supplement the record with certain pages. Ms. Anderson has indicated this morning that she has no objection to that. Those pages are identified. Let me see if she has anything to say.

MS. ANDERSON: No, I don't have anything, and we spoke prior to the hearing. I indicated I had no objection to the entry of those designated items in the motion.

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MR. BRACKETT: Those pages, Your Honor, are attached as exhibits to the motion.

THE COURT: And I see that, Mr. Brackett. This would be attached as Exhibit A.

MR. BRACKETT: A, B, C, and D.

THE COURT: And Ms. Anderson has no objection to that. Are there any other items that either party wishes to provide to the Court before I hear argument?

MS. ANDERSON: Your Honor, I do have a something additional. I drafted a document that would allow you to kind of follow my argument and find the pages. If I didn't know if the Court would take the -- the ruling under advisement. In the event the ruling was under advisement, I wanted to make sure the items that I referred to are easily referenced by the Court. So I did draft something that the Court can take a look at if the Court would take this case under advisement, and I have this here and will hand a copy of it to Mr. Brackett as well.

THE COURT: Okay.

MS. ANDERSON: May I approach, Your Honor?

THE COURT: Yes, ma'am.

MR. BRACKETT: Your Honor, just for the record this appears to be, in essence, a supplement to the appellant's brief. The appellant has already filed an initial brief and a reply brief. Of course, I don't have the

opportunity to respond to the reply brief just based on the way the rules work, and certainly I haven't had -- and nor will I have an opportunity to reply to this unless the Court would grant me that later. But absent that, I would object to any sort of supplement of the brief today, because the brief that I submitted was in response to the initial brief.

THE COURT: All right. I'm going to take this under advisement and Mr. Brackett, I'll give you the opportunity to reply. This appears -- Ms. Anderson submitted to the Court with her brief a summary of her arguments, which I believe you have a copy of. If there's anything different in this, I'll give you time to reply to that.

MS. ANDERSON: Just very briefly, I do believe that Mr. Brackett did respond to the reply brief. When Mr. Brackett sent the motion to have the inclusion of a designation of matters item, he also sent in with that a final brief. And my cursory review of that indicates there's a couple pages that are added to -- there's an additional argument that was added despite the rule saying not to include a final brief. There was an initial argument that was added in that motion, Your Honor, in the form of a final brief.

THE COURT: I will -- Ms. Anderson, I'll allow you to put your arguments in. I'll consider that and I'll give

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Mr. Brackett and opportunity to respond. And I will take this under advisement. There's a lot of materials to go over, but I wanted today to hear your arguments and make sure I have all of the record and documents that you wish the Court to review.

All right. Ms. Anderson, I'll hear from you first.

MS. ANDERSON: Thank you, Your Honor, may it please the Court. Your Honor, my name is Syretta Anderson. I represent the appellants in this action. The appellants are the bloodline relatives of the decedent. They're behind me to the right. They're the nieces of the decedent. At the time of the decedent's death, he was survived by two siblings. They have both since passed and the two nieces behind me were the daughters of one of those siblings.

We're here today, Your Honor, because my clients, appellants, believe the probate court erred when it granted summary judgment to the respondent as it relates to undue influence. Your Honor, summary judgment is not appropriate where further inquiry into the facts of the case are desirable to clarify the application of law. It's one of those drastic remedies that should only be applied in drastic cases. I believe -- I think about summary judgment as being the death penalty of civil cases, and it basically just killed this case without an

opportunity for any of the facts to be reviewed by a jury or any -- in total just at the summary judgment hearing.

In determining whether any triable issues of fact exist so as to preclude summary judgment, the evidence and all the inferences drawn therefrom should be taken in light most favorable to the nonmoving party, and here the nonmoving party were the appellants. We believe with respect to undue influence, where most often it's proven by circumstantial evidence that there are four separate issues that were overlooked by the Court and ruled against on, and those separate issue are as follows, Your Honor.

Restricted visitation, we believe that the will does not comport with the expressed intentions of the decedent. We believe that with respect to the condition of -- the medical condition of the decedent, he was physically infirm. The Court is clear that when the decedent is physically infirm and the probate will does not comport with the prior will, that leads to presumption of invalidity. And we also believe the persons that were present in the room when the will was purported to have been executed was in a confidential relationship with the decedent, thereby making that will -- the presumption is undue influence exists, shifting that burden of proof to the respondents.

With respect to restricted visitation, Your Honor, we

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would argue that the probate court erred when it found that restricted visitation did not occur. And for a little small background, the decedent lived his whole life in Charlotte, North Carolina. He was brought to Rock Hill, South Carolina in the last few months of his death. He was taken to the Westminster Towers, where he stayed until he died in 2012. He moved to Westminster Towers in Rock Hill in December of 2011. Prior to coming to Rock Hill, he had been diagnosed with having mild dementia. He had been the hospital quite some time. The record will reflect that the respondent stated that someone in the hospital indicated that they should not allow Brenda Snow to vicinity. Now -- because they suspected some ill treatment because of some bruising that he had. The hospital, being a mandatory reporter, did not report any -- anything to the police, did not report -- anything to anyone else. Brenda Snow was the decedent's care giver at the time, and there was no report in the file. There's no report in all the medical records we received. The respondents were not able to give any names of any persons who gave them this indication to not allow Brenda Snow to visit. All we have in the record is the testimony from the respondents indicating that the hospital in Charlotte, North Carolina told them to restrict her visitation.

I'll go into why Brenda Snow's name is so significant in a second, but the restricted visitation that they argue occurred in Charlotte, North Carolina was the advice of doctors. As I said just briefly, with the hospital being a mandatory reporters, if there was any indication the caregiver had given some ill treatment to a person that resulted in him being in the hospital, that would have been in some charts; that would have been in the record; that would have -- the doctors would have been required to make some type of report, and we have none of that. All we have the statements of the respondents saying that the doctors indicated to them they should restrict the visitation of Brenda Snow. They also indicated that the doctors told them to move the decedent out of North Carolina to Rock Hill, South Carolina which, in fact, they did.

He was in Westminster Towers. Upon arriving to Westminster Towers, the respondents gave to the people at Westminister Towers a photo of the decedent. And they indicated when they gave the photo of Brenda Snow to the people at Westminister Towers, do not allow her to visit. They didn't give any indication why. The record reflects that that was -- there was no indication why they should not allow him -- allow her to visit, was just she should not be allowed to visit. Now, the record does reflect

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that very much. The respondent have stated that. The record reflects that Marcy Thomas, a social worker at the Westminister Towers at the time indicated that she knew that the person, Brenda Snow, was not allowed to visit. And the only persons that did visit were the respondents at Westminister Towers.

So we do believe it's clear that restricted visitation was present whereby the Court should have at least considered undue influence as it related to the restricted visitation. But what happened was the Court ruled -- Your Honor, bear with me one moment. The Court ruled in the summary judgment hearing that on page 10 that the only record -- the only evidence in the record -- and that would be the last paragraph on page 10, the only evidence that restricted visitation was a restricted visitation for Brenda Snow, a caregiver with whom Mr. Tucker had a short-term relationship and whom the hospital staff suspected of ill treatment of Mr. Tucker.

But restricted visitation occurred in Charlotte, North Carolina, hospital, was implemented by the staff, all happened during Mr. Tucker's hospitalization approximately one and a half months prior to the execution of the January 14, 2012, last will. And we believe, Your Honor, the record reflects otherwise. The record reflects that there was restricted visitation in Rock Hill, South

Carolina, and, in fact, Marcy Thomas testified that a picture was given to Westminister Towers and it was included in the decedent's file to not allow Brenda Snow to visit, and that would have occurred prior to the execution of the January 14, 2012, will, and the very least would have given rise to the presumption of there is a conflict with the evidence or the facts. The presumption there would mean that the presumption given most favorable to the appellants would be that there was some restricted visitation in Rock Hill, South Carolina because the record reflects that much. So we believe the Court erred on finding that there was no restricted visitation in Rock Hill, South Carolina because the record says otherwise.

We also believe the court erred in finding that the hospital staff were the people that restricted visitation, because there's nothing on the record to indicate the hospital staff restricted visitation. We've subpoenaed documents from the hospital. We've -- we have a file full of court documents -- I mean of hospital records for the decedent, and not one of those document indicate that anyone restricted any visitation for the decedent as it relates to Brenda Snow other than the respondents. So we believe with that one issue with respect to restricted visitation, we believe the court -- the probate court

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erred in finding restricted visitation did not occur. Or the very at least would find that it was not enough -- conflict in the evidence to defeat the summary judgment. The second issue that we believe --

THE COURT: Let me ask you before you go into the next issue on this issue. What is your argument regarding how the probate judges set this forth under the law about a clear and convincing standard on this? Talk to me about your position regarding the restricted visitation in that context.

MS. ANDERSON: Your Honor, as far as -- a clear and convincing standard is what you have to prove when you have circumstantial evidence. We believe it was very clear that the restricted visitation did occur in Rock Hill, South Carolina. The evidence in the record, the testimony in the record is clear that that occurred in Rock Hill, South Carolina. It's not clear that it occurred in North Carolina. It's not clear because the only testimony we have are from the respondents, who have reason to fabricate the facts, but the record does not reflect there's been any visitation that occurred in North Carolina because we have documents from the hospital. We subpoenaed those records. There's nothing to indicate in there that anyone made any report to the hospital to -- as a mandatory reporter to any police, to any agency where

the caregiver would have had to report to, there's no indication at all in the record to indicate that any visitation was restricted in North Carolina other than the statement of the respondents. Yet the order states that there's no evidence that any restricted visitation occurred except for in Charlotte, North Carolina.

Even if that were true, Your Honor, we would argue that the order states one and a half months earlier than the will. Even if the restricted visitation only occurred in Charlotte, North Carolina just one and a half month prior, we argue that restricted visitation still would have had an effect on that day one and a half months later, but that's not the case here. We also have restricted visitation in Rock Hill, South Carolina.

Now, the respondents did admit that the visitation was restricted in North Carolina, but what they did not admit to was that they were the persons responsible for that. There was nothing else in the record to indicate anyone else was responsible for it other than the respondents. So we believe, Your Honor, as it relates to clear and convincing evidence, it's clear and undisputed by any of the persons that will testify by the respondents that they did provide a photo to Westminister Towers, they did, in fact, indicate to Westminister Towers they did not want Brenda Snow to visit, and we believe that is clear

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and convincing evidence that our restricted visitation did occur.

THE COURT: Thank you. Go ahead. I -- as I have questions as we go along I'm going to ask you to answer those. Go ahead.

MS. ANDERSON: Thank you, Your Honor. I can get to scatterbrained from time to time, so I do appreciate that. The second issue, Your Honor, is the will does not comport with the expressed intentions of the decedent. And we believe the court erred in that respect as well. The Court found on page 7 of the order and page 8 of the record in the last paragraph, last sentence of the first incomplete paragraph, that, "It is elementary the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relative or by one who think the testator used bad judgment or was misled." The courts have found where the decedent's will does not comport with the decedent's expressed intentions, the Court determined -- and the court in re: State of Comte (phonetic) evidence existed of undue influence making the will invalid.

We're arguing here, Your Honor, that the decedent made multiple statements to many different people that it was in the expressed intention to devise the estate to Brenda Snow. He made the statement and it's in the

record. He made the statement to Margaret Kelly. He made the statement to Marcy Thomas, who is the social worker. In fact, what he said to Marcy Thomas was that he loved his little girl very much and she took care of him and wanted her to have the money he designated for her to have.

There's nowhere in the record, Your Honor, that indicates that he made any desire or any intention to give any of his estate to anyone other than the little girl, who he referred to Brenda Snow as his little girl. There's nowhere in record that indicates there's any other intention, any other expressed intention to give his money to anyone else other than Brenda Snow. And the record is replete with that evidence, yet the probate court disregarded that and just basically said that he can give his money to whom he wishes to give his money to, where case law is very clear where the decedent's will does not comport with the expressed intentions that when evidence existed of undue influence, making the will invalid. And we believe with respect to that issue, Your Honor, there's evidence in the record in the record of appeal that indicates that the only intentions ever made to anyone else was to give his money to Brenda Snow.

Now, Brenda Snow was the caregiver of Mr. Tucker, of the decedent. He -- she evidently spent some time with

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him, cared for him at his home in North Carolina. Family members met her. The respondents met her, even indicating they knew she was very fond over her (sic). They saw her sitting on his lap and they hugged and they kissed and she was a little bit younger than him. But it was clear that his intention was to give his estate to this woman, who he referred to as his little girl. He made that statement to the respondents and he made that statement to Marcy Thomas as well. And where the Court erred was that they disregarded the case law where it indicates that the will does not comport with the expressed intentions of the decedent, that gives the presumption of undue influence, thereby making the will invalid. And we believe the Court erred when it determined that the decedent can just give his estate to whomever he wishes without in regard to facts of the case.

Now, the Court also indicated that -- we believe erred on this as well, Your Honor. That there was no indication of who the decedent was talking about when he referred to little girl. But he didn't talk about someone else, anyone other than Brenda Snow. We believe the Court erred on that as well, Your Honor. The Court stated on page 6 of the order that neither the little girl nor the nieces or nephews were identified by name or by description to definitively identify who was being

referred to, and this would be in the first full sentence on page 6 of the order, page 7 of the record.

And Your Honor, we believe that it's clear who the decedent was referring to by the record of the testimony of the respondents, that anyone -- when I asked Marcy Thomas, who was a social worker at Westminister Towers, who did she believe he was referring to when he talked about his little girl, she indicated Brenda Snow. When I talked to Margaret Kelly and asked her who did the decedent refer to when he was saying little girl, who exactly was the little girl, she said Brenda Snow. When I talked to Ben Smith and asked him the same question, he said Brenda Snow. So there was no question that the record's replete with evidence that indicates that when the decedent mentioned little girl, that it was clearly talking about Brenda Snow.

In any event, "little girl" would not mean all the nieces and nephews, which is who took under the will, the will that was eventually sent to probate and was probated is listed -- it's on the page 287 indicates that he -- a will was devised, devised his whole estate to his nieces and nephews on his wife's side, 12 or 13 of them, to be exact. At any rate, "little girl" does not mean 12 and 13 nieces and nephews on the wife's side. It says "little girl" and the record reflects when he was talking about

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little girl, he was saying Brenda Snow. And if you're taking the facts and you're drawing the inferences that would be favorable to the nonmoving party, you would have to agree that the record being so clear that the person that decedent referred to as "little girl" was Brenda Snow. That at least would give the presumption of undue influence, at least to be able to defeat a summary judgment being grant as it was undue influence.

So with that respect, Your Honor, as it relates to will not comporting with the expressed wishes of the decedent, we believe the Court erred on that issue as well, Your Honor. I will then move to my third point. Do you have any questions as it relates to that second aspect --

THE COURT: I think I understand your argument on -- I'll call that the "little girl" issue.

MS. ANDERSON: Thank you. With respect to the third issue, we believe the decedent was for physically infirm and the probate will did not comply with the prior will -- not the express intention portion of it, but the probate -- the order -- the will did not comply with the prior will, and the record reflects very much so that the decedent was infirm physically. Now, I believe what happened with the probate court it is confused somewhat of the physical infirmity argument with testamentary capacity

and found that the decedent had testamentary capacity, which was not the argument as it related to physically infirm.

We do argue that the decedent was not at his best at his moment. He may have had testamentary capacity, but we lost that on summary judgment. That wasn't the argument as it related to undue influence. The argument related to undue influence physical infirmity is that -- I beg the Court's indulgence -- was that the Court in Nasser (phonetic) found where the accident was physically infirm prior to the execution of the will and the disposition of the decedent's estate was significantly different from the decedent's prior will, the Court found that sufficient evidence existed to give rise to the presumption of invalidity.

We believe the decedent was physically infirm. He had just been admitted to the hospital after he had been suffering syncope, which is periods of passing out. He had passed out at some point during the time he had been at Westminister Towers and had he had been rushed to the hospital. That was his second hospital stay in about a week's time frame. He had been diagnosed with mild dementia, which the Court recognizes and pretty much dismisses. He had been diagnosed with mild dementia in November or December of 2011, just a few months prior to

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the purported execution of that will on January 14th, 2012. He was 92 years of age, and he had just learned that he was suffering from potentially life-threatening condition, an aneurysm that was the size of 7.7-centimeters. We believe the decedent definitely is a person who was physically infirm.

Now, to go a step further, I want to make sure that I knew what the definition was "infirm" was, make sure I wasn't reading see more into the facts. So I brought this dictionary, and defines "infirm" as not physically or mentally strong, especially through age or illness. And synonyms that were used for infirm were frail, weak, feeble, debilitated, decrepit, disabled, or ill. And we believe because of his physical infirmness and because the will did not comport with the prior will he had made, we believe that the Court erred on this aspect as well.

There is no evidence that was presented -- the Court stated that there was no evidence presented of mental infirmity other than a vague and general diagnosis of mild dementia. The record is replete with evidence of infirmity. He was at the hospital in the emergency room when he was -- when the will was purported to have been executed. He was 92 years old. He had been -- he was rush to the hospital by ambulance. He had mild dementia. He had -- he was just diagnosed with a life-altering,

life-changing diagnosis, potentially life -- what -- he die from that illness. There's no other person to determine -- defined better that to fit the definition of infirmity than the decedent.

Now, with respect to his prior will, Your Honor, we found through discovery that the decedent had drafted a prior will when he was living Mecklenburg County, North Carolina. He was with the -- Brenda Snow. He contacted the attorney, Edward Knox, in North Carolina to have a will drafted where he devised his estate to Brenda Snow. He gives this will to Ben Smith, who is one of the respondents, who is his nephew for safekeeping to hold. Ben Smith testified he never read the will, but he does also testify that he tore the will up. He said he destroyed the will at the request of the attorney. He said the attorney called him and said, "I believe that I shouldn't have drafted that will, that it may have been a conflict of interest to draft that will because I had to help Brenda Snow with her divorce. So now thinking about it, I think you should tear that will up." So he did, in fact, tear the will up.

So I said to him, "What was on the will?" He said, "I don't know what was on the will." I said, "When did you tell Mr. Tucker you tore the will up?" He said, "I don't believe I did. I don't remember." So we have a

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will that had it had Ben Smith's name it, it probably wouldn't have been torn up. But we have a will that was destroyed that the decedent had no knowledge that was destroyed, but it was destroyed. The probate court stated that because it was destroyed, he had an opportunity -- the decedent had an opportunity to do another will had he chosen to. But the record doesn't reflect that he had an knowledge at all that the will had been destroyed. All the record reflects is the will was destroyed. The record also reflects that the respondent, Ben Smith, the nephew, told Margaret Kelly, one of the other respondents, the niece, that he had torn the will up, but no one ever remembers telling the decedent. So the time of his death, he believed that he had -- that will was still in effect. The -- if he had no knowledge that the will was ever torn up, only knowledge he would have had is the will was still in effect.

So we believe as it relates to the physical infirmity and the will not comporting with the prior will of the decedent, the court erred in that respect and --

THE COURT: Let me stop you there. You're not arguing lack of testamentary capacity?

MS. ANDERSON: That's correct, Your Honor.

THE COURT: Okay. All right. I understand your argument. Go ahead.

MS. ANDERSON: Your Honor, that is correct. We are not arguing lack of testamentary capacity. We are arguing, however, his mental condition what gives rise to the physical infirmness (sic). Where the Court has stated in Nasser where the decedent was physically infirm prior to execution of the will and the disposition of the decedent's estate was significantly different from the decedent's prior will, the Court found that sufficient evidence existed to give rise to the presumption of invalidity. That's what we're arguing as it relates. We believe his health condition, albeit may not change his testamentary capacity, does affect undue influence argument, and we believe the Court erred when it basically determined that he had testamentary capacity in the argument of the undue influence.

Your Honor, the Court also erred -- and this is another argument, part of the last argument with respect to Brenda Snow where the Court said there was no way to tell whether or not Brenda Snow was the little girl. Marcy Thomas about a week or so after the purported will was executed on January 14th, met with the decedent at Westminister Towers. She was a little concerned because he had also drafted a healthcare power of attorney on that day, and she wanted to make sure he understood what he was signing when he was in the hospital. He never gave any

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mention that he drafted a will -- that a will was drafted on that day. There was no mention at all of the will being drafted. But what he did say -- what Marcy Thomas did say and what the record is replete with is full pages of Marcy Thomas' testimony indicating that the decedent talked a lot about his will on that day. And what he said to Marcy Thomas on that day is that, "I'm a little frustrated that my nieces and nephews keep coming to me wanting me to divide my estate up equally between my nieces and nephews." So I asked her, myself or Mr. Brackett, who was he talking about nieces and nephews? Did he identify the person he was talking about? She said, "No, I don't know who he was talking about." But she said, "I want" -- that's when he made the statement, "I want my little girl to have the money that I designated for her to have. I don't want to divide my -- equally between my nieces and nephews. This is my money." That's her testimony. That's in the record.

The Court ignored that and the Court stated that -- the same time they said the little girl, the Court stated that -- the Court stated neither the little girl nor the nieces and nephew were identified by name or description to sufficiently identify who was being referred to. That is, again, the first full sentence of page 6 of the order, page 7 of the record.

I think it's very clear from the testimony the only people that had any contact with the decedent was, in fact, the respondents. The only nieces and nephews -- actually I think that's part of the argument was that my client's, the bloodline nieces and nephews had not really had any contact with him at all. In fact, they had not laid eyes on him for four years prior to the execution of that will. They lived out of town in Ohio somewhere and Virginia. They're spread out. The siblings were older and they didn't get to visit often.

So part of the argument at the summary hearing, which is in the record was that the appellants had not seen the nieces and nephews on his blood side had not seen the decedent at all four years prior. So if you believe that part of the argument, which respondents believe, that's part of their argument. Part of their argument is that the appellants are coming forth and they're a little angry that they're the bloodline relatives and they're a little angry that the will does not designate them in the will.

But what we're saying is that's not before the Court. What is before the Court is that they did not visit the decedent for four years prior to the execution of that will. No nieces and nephews other than the nieces and nephews on -- that were actually in the will. So the Court dismissed that and said there's no way to identify.

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We would argue that the logical inference from him saying -- from the decedent saying "my nieces and nephews wanted me to divide my estate up equally. I'm not going to do that. I'm going to give it to my little girl," the most logical reference from that, given in the favor of the appellants, the nonmoving party would be that the nieces and nephew he was talking about was on the respondent's side because those are the only people who had seen him. The only people that had any contact with him, the only people that -- they hadn't restricted any other visitation.

I do believe the record also shows that in March, which would have been the visit after the execution of the will, one of the cousins, the nieces of the decedent actually came to visit him, and this would have been weeks after the execution of the will. But what the record also shows is that on that day, they did not allow -- the respondents did not allow her to visit with the decedent alone. They were -- they insisted on being in the room. And when through discovery -- and this is part of the record as well -- when asked why was that, the response was the decedent told them that all they wanted was my money. They don't want -- all they want is my money. Only reason they come down here to visit me is because they want my money, which is completely crazy to say,

because at that point, they had not even seen him in four year. They just kind of randomly came down to visit him. Didn't know he was in Westminister Towers when they came by to visit, and during that visitation, the respondents would not leave the room and basically said, "We won't go anywhere. We want to sit right here," and they did, in fact, sit there for the time they visited. So they did limit that visitation, albeit after the execution of that will. But their whole goal was to make sure no one else had contact with him besides the nieces and nephews that were listed in the will.

As it relate to his physically infirmity, Your Honor, one of the issues that came up at the summary judgment hearing was the will that was sent to probate, the one listed on page 287. Now, if you look at this will, this will is not particularly complex language. If you did wills for a living, if part of your business was to draft wills, this will would not be a significantly complex will. But if you don't generally draft wills and if you're 92 years old and you're in the hospital and you have been diagnosed with mild dementia and you have been rushed to the hospital an hour earlier and you had just been diagnosed with having a potentially life-threatening illness, this will would be a fairly complex will to have to dictate. And the record reflects that Margaret Kelly,

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the niece of the decedent on his -- by marriage, and the person who wrote the will and one of the persons who take under the will testified that the decedent dictated word by word every aspect of this will. So within a span of 30 minutes, she says, without having to make any other corrections, this is the will that she -- that the decedent, while he lay flat on his back in the hospital room, dictated to her word for word. And I asked her, "Do you mean that he said, 'I wish to leave all my worldly possessions and property to my 12 first generations nieces.' He made those statements?" And she said, Yeah, every single word in that will was dictated to the decedent -- from the decedent to her and she wrote it down within a span of 30 minutes.

And knowing that, knowing that's part of the testimony, none of that really adds up with the facts of the case of the decedent being 92 years of age in the hospital, having been rushed to the hospital for passing out and diagnosed with mild dementia. He worked for 20 years on the railroad. I'm not saying he wasn't significantly intelligent, but he had worked his whole life on the railroad, never doing any type of legal work, and that is what he produced on that last day for the execution of the will.

So we do argue, Your Honor, that as it relates to

physical infirmity, the facts of the case, the record reflects that the decedent was, in fact, physically infirm; that the will that was probate -- that was sent to probate did not comport with the prior will, and as such gives rise of undue influence and a presumption the will is invalid.

My last argument, Your Honor, as it relates to this case is that confidential relationship that the respondent shared with the decedent. Your Honor, the courts are clear that a presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor. We believe that there was a fiduciary relationship with the decedent. We believe the court erred when it did not find that a confidential relationship existed. The -- at the summary judgment hearing, which is in the order from the summary judgment. It's page 161 on the record of appeal, beginning on page -- line Number 1, the counsel stated there's no evidence that Margaret Kelly was in a confidential relationship. He continued to argue that the allegation is that Margaret Kelly was in what the law calls a confidential relationship with Mr. Tucker, and he placed great trust and confidence in her, and she did all the stuff for him, so there's nothing in record to show that. And we would argue otherwise, Your Honor.

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The record reflects that Margaret Kelly was not only his niece by marriage, but she was a person that the hospital called on when they needed a person for next-of-kin. She was a person who was in the hospital on the day of January 14 that signed records for him, documents for him admitting him into the hospital. She was also his healthcare power of attorney. Ben Smith, one of the other respondents, is also in a confidential relationship. He is the durable power of attorney. When questioned by myself during depositions, Margaret Kelly's husband stated that -- when describing Margaret Kelly's relationship with the decedent, he said that they have a special relationship with Mr. Tucker. He's kind of real close to Margaret and he depended on her to kind of help her -- to kind of help with things. She's done lot different things for him.

But there's nowhere -- the record is full of evidence to indicate that Margaret Kelly and Ben Smith were in a confidential relationship with this decedent. And where there is a confidential relationship, what it does is it shifts the burden to prove that undue influence does not exist to the respondents, the proponents of the will. In State versus Comte (phonetic) whereby Brown -- Pearson was quoting it. It said, "The confidential or fiduciary relationship exists when one imposes a special confidence

in another. So that the latter, in equity and good conscious, is bound to act in good faith and with due regard to the one imposing the confidence." And we believe there was a confidence place the Margaret Kelly. She was in the role with the decedent, and to argue that she was not in position at this point would be ridiculous. She was in a confidential relationship in the decedent.

Now, in the brief I believe the argument was the confidential relationship issue is not properly preserved for the Court for today because the probate court did not rule on this issue in the order. And Your Honor, to that, we say that is not true. The order albeit craftily worded to make sure that it appeared that this was this issue was not addressed, worded by Mr. Brackett, it was, in fact, addressed. If you look at page 10 of the order, page 11 of the record, starts in quotes down -- the first parenthesis, down at the first full sentence, it says, "It is to be expected that the testator would leave his estate those in whom he trusts, and who he infers would dispose of it wisely. It's also natural that when he requires assistance in the preparation of his will, he may consult those very persons; that is, those in whom he has confident. Additionally" -- it's the first sentence of the first full paragraph -- "Additionally, and alternatively if such an evidentiary presumption was

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triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the respondents' evidentiary showing."

Now, Your Honor, the argument that the confidential relationship was not appropriately preserved for this appeal, we would argue does not exist and it was properly preserved and is ripe for the Court's decision for today. There was no other argument that was brought upon by the appellants in the arguments in the brief and arguments of summary judgment hearing. In the -- in the motion in opposition to the proposal of the respondents prior to the summary judgment hearing, there was no other argument that was made by the appellants as it relates to confidential relationships besides the one that we argued that the respondents were in a confidential relationship, thereby giving rise to the presumption of undue influence and shifting the burden to the respondent. There was no other argument beside the one we're making here that should have been addressed by the Court, and it was properly addressed by the Court here on page 10.

And so we believe, Your Honor, that with respect to the four issues that we have previously stated that taking the facts most -- and making reasonable inferences therefrom in the most -- light most favorable to the nonmoving party that summary judgment should not have been

granted as it relates to undue influence, Your Honor. Thank you.

THE COURT: Thank you, Ms. Anderson.

Mr. Brackett?

MR. BRACKETT: Thank you, Your Honor, may it please the Court. Mike Brackett representing the respondents. Couple of preliminary things. To my knowledge, there's been no demand for a jury trial in this case, so a summary judgment order does not take this case away from any jury. And on Ms. Anderson's behalf, she was not the attorney for the petitioner when this case was commenced. So it was the prior lawyer who commenced the case that did not ask for a jury trial.

There's no evidence in the record that the petitioner or her family have ever been named in a prior will to take the decedent's assets. No evidence that he ever considered any of the people who are contesting his will now to be beneficiaries of his estate. Significantly, no appeal has been taken from the probate court's ruling that when his January 2012 will was signed, Mr. Tucker possessed testamentary capacity. That is a very important factor in the entire scope and breadth of this case. He had testamentary capacity. That is now established at this point in time as the law of the case pursuant to that order.

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Now, undue influence requires clear and convincing evidence because it is always a circumstantial evidence type of case. The probate court made proper notice of that standard and what it meant. It included the definition in the order. It is -- what the probate court did not say was that there was no evidence of undue influence. The probate court acknowledged throughout the order that there were -- there was evidence that would give an indication that might meet the classic -- some of the classic factors or indicia of undue influence, but that evidence was legally insufficient to satisfy the clear and convincing standard. That's what the court said.

And I don't dispute that there are in the record bits and piece of evidence that if you just look at it alone, you can say well that's some evidence. Each one may be able to amount to a scintilla, if you use that term, but taken together they don't get you up to the level -- the clear and convincing is the highest civil standard that we employ. And so it's up there for a reason. And that is when it comes to setting aside a person's last will for -- where a challenge has been brought by someone who is unhappy with that will, you've got a heavy burden to carry. That was the law. That was the policy that the probate court recognized and applied to the case.

Now, Ms. Anderson said she had four arguments that she made today. The statement of issues on the appeal only identifies three. And admittedly I have a little bit of difficulty trying to follow what the four were and which three she actually identified in her appeal, and which one was maybe not there but argued today. I'll leave that to the Court. I'll do the best I can to help with that.

Her first issue was on appeal was that it was improper to grant the summary judgment on undue influence because there was evidence of restricted visitation. Because that evidence was in the record, it was somehow improper for the court to grant summary judgment over that. Now, the answer to that is no, it wasn't. It wasn't improper. The Court addressed restricted visitation. There was evidence that Brenda Snow was restricted from visiting Mr. Tucker when he was in the hospital in Charlotte, North Carolina in November and early December 2011, a month and a half before the will was signed. There is no evidence in the record that Brenda Snow tried to visit him in the hospital. We don't know whether she showed up one day knocking on the door and was sent away. The only evidence in the record was because of the suspicious nature of some of Mr. Tucker's injuries that mistreatment -- maltreatment was suspected.

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They restricted Brenda Snow and would not permit her to visit if she were to show up. We don't know if she ever did.

The probate court found in the order that that was a fact, that the restricted visitation was implemented by hospital staff. That finding has not been appealed. There's a lot of findings in that order that really will haven't been appealed in this case. And if that hasn't been appealed, then again, that law is -- that finding I believe would be binding here. But that's just -- I'm just saying that's what the probate court found.

With respect to Brenda Snow, there is no evidence that she ever attempted to visit Mr. Tucker when he was at Westminster Towers in Rock Hill, South Carolina after his move there in December approximately a month before the will was signed. And although there is evidence that restricted visitation was desired, because of the same reason the hospital restricted it, there's no evidence that Brenda Snow tried to visit and was turned away. That is -- and then even if we concede restricted visitation, the law requires that that restriction somehow impact the execution of the will on January the 14th. The undue influence must have brought to bear on Mr. Tucker at the time and place where he put pen to paper. The record is devoid of any evidence that Brenda Snow restricted

visitation or attempts to restrict her visitation had anything to do with the will that was prepared and signed on January the 14th. It's just not there. It's a stretch. It is a claimed inference, which is a real stretch.

But again, you got to meet the clear and convincing standard. With respect to visitation for others, now, the briefs argue that petitioner and members of her family were not allowed to visit privately with Mr. Tucker. Not that they were kept away, but that they could not have private conversation with him. The only evidence in the record of restricted visitation in that sense was what Ms. Anderson spoke of that happened in March of 2012, two months after the will was signed, members of their family traveling on their way to Florida stopped by to see Mr. Tucker and they were -- they could not visit alone with Mr. Tucker.

Now, even if that's restricted visitation, what does that have -- what does that have to do with the execution of the will two months prior? It has none. Because the law says the will has to be the result of undue influence. It's sort of a proximate cause linear analysis. The undue influence has to be existing, ongoing, to the end that the will was the result of the undue influence. They've got it flipped around. Somehow because they weren't denied a

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private meeting in March, that somehow renders invalid the will he did in January. No. That's not the law.

The second issue that I can identify in the appellant's statement of issues and in the brief is that the January 2012 will is inconsistent with the wishes or intent of the decedent. There's a reason why a will is required to be in writing, and there are will execution formalities that are absolutely required. It's because a person's testamentary intent cannot and should not be determined by oral statements or the recollected oral statement a testator made at some other point in time, whether it's prior to or after. Because those statements are dependent upon memory, the hearer's ability to recall exactly what was said, if anything, and most importantly -- because quite frankly, what is in his will is nobody else's business and a testator has no legal duty to tell anybody else out there what's in his will. He has every right, basically if he wants to, to mislead people, "Yeah, I know -- yeah. I'll remember you in my will," just to satisfy them and get them out right now. And he may say that, but has absolutely no intent to do it, but he doesn't want to hurt their feelings right now.

So that's why the will has to be in writing, signed, and witnessed. That is the best way known to the law to establish what his testamentary intent was at the key

moment in time, regardless of what he says at any other time. He could have said every day of the week for the prior seven days, "I'm going to leave my assets to A, I'll leave them to A, I'll leave them to A," and if he changes his mind -- which he has every right to do -- he can sign a will that says, "I'm leaving it to B, C, D, and E." He had testamentary capacity when he did that too, if you recall, on January 14th. All of this is included in the probate court's -- the probate court acknowledged all of these things. I'll get to the conclusion in a minute.

Evidence of the -- this destroyed will. Whatever of the -- this destro will if it existed that predated the January 12th -- I'm sorry -- January 2014, will, was never produced at pretrial discovery. We don't know the full terms of that will other than general statements that's Brenda Snow was named in it. It's not -- hasn't been established in the record whether that will was destroyed before or after January 14th, 2012. We don't know that. If it was destroyed before, then Mr. Tucker solved that by having executed his new will. He made sure he had an estate plan in place. All right. Nothing wrong with that. That gets done every day of the week where people destroy old wills and sign new ones.

If the prior will -- the alleged prior will was in existence on January the 14th, 2012, and if he had

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testamentary capacity and the will was valid, then whatever will was in existence before was revoked by the January 14th, 2012, and it says in that will that he was revoking all prior wills. Pretty standard language. So this prior will, which I'm not sure how that fits into the issues on appeal, but the prior will is a red herring. It has nothing to do with the fact that he executed a will on January 14th, 2012, that would have revoked it anyhow.

So confidential relationship, this is the third issue on appeal as I understand the appellant's filings in the case. First, I argue that is not preserved for appellate review. There are two presumptions that we're arguing here today apparently. One is the presumption of undue influence that arises when a beneficiary of a will is involved in the preparation or execution of that will. I've identified that as my brief as the beneficiary presumption. And that was the presumption that the court addressed in its order. And if you look at the petition in the case, the petitioner's petition got this whole ball rolling, paragraph 31 contains the allegations of undue influence, 31 A, B, and C. 31 B says the will was the product of undue influence because the scrivener and the witnesses will benefit from the will. That's the way it's alleged. It doesn't say there was a confidential relationship. It's says it's invalid because they will

benefit from the will. Translation: Because they are beneficiaries of the will. That was what was argued to the probate court. That is what was addressed in the probate court's order.

The probate judge held found that Number 1 that -- that's an evidentiary presumption. That's not even a cause of action. It is a rebuttable presumption, and the probate judge held that first, that presumption was not trigged in this case. Even though they were beneficiaries, the law says that there are certain situations where you might be a beneficiary but that presumption is not triggered, and the Court then analyzed it, set out the case law, and say these exceptions apply here. And then the Court went one step further and said, "Even if the presumption had been triggered, it had been sufficiently rebutted by evidence offered by the proponents of the will," and then she goes through -- the judge went through and included in there the facts and the law that says this presumption would have been rebutted. And the there's case law out there -- not from South Carolina, but case law out there that says one of these evidentiary presumptions standing alone can't defeat summary judgment.

THE COURT: But that's my question. Address the issue of the rebuttable presumption in context with the

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existence of evidence in a summary judgment context, considering the light most favorable to the petitioner in the case.

MR. BRACKETT: Again, we're under the umbrella of clear and convincing evidence. So let's just say evidence is offered that a beneficiary will was somehow involved in the preparation of signing the will. And this presumption -- we'll assume for this argument this presumption was triggered. Then that shifts the burden of going forward with the evidence. It doesn't shift the ultimate burden of persuasion. The burden to prove undue influence always rests with the contestant. It never shifts. But it requires then that the proponent, that the -- in this case us -- we have to offer some evidence, not much, a scintilla, but some evidence that would rebut the presumption.

If that evidence is brought forward, the presumption disappears. It goes away. It has no further application to the case. And in this case, the fact that he had testamentary capacity on the day he signed his will, that is some evidence that there was no undue influence. And the fact that -- and there were other things that mentioned in the order. There were other facts. Each of those standing alone would have been sufficient to defeat the presumption and make that presumption go away. And

that's what the Court found. The Court found the presumption really had no role to play in the analysis of this case because one, it wasn't triggered at all, and Number 2, if it was triggered, it was sufficiently rebutted and it disappeared. And there was no need the consider it further.

Now, that was what the Court included in it's order. What is being argued now in this appeal is a similar but different evidentiary presumption, and that is the presumption that arises by a confidential relationship between the person who stands in the confidential relationship with the testator and that person receiving an unnatural disposition that makes him the -- him or her the primary beneficiary of the will. That circumstance gives rise to this presumption. It too is a rebuttable presumption.

Now, in this case, Margaret Kelly, a niece, was described as a relative who was looking after Mr. Tucker. She was not the attorney-in-fact Ben Smith, respondent Ben Smith was Mr. Tucker's attorney-in-fact. Ben Smith was not present at the hospital when the will was done. He wasn't there at all. Had nothing to do with it. So we have the situation where Margaret Kelly, not an attorney-in-fact, not a formal fiduciary, if you will. Somebody who assisted Mr. Tucker with his affairs. Even

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if she's deemed to be a confidential relationship, it too is rebuttable, and the same rules apply. That presumption can be rebutted by the proponent coming forth with some evidence that there was no undue influence exercised, and once that happens, the presumption disappears.

Well, my first point is that confidential relationship presumption was not addressed by the probate court. It's not in the order. It is then -- in order to make it into the order, it's incumbent on the other side to file a Rule 59 motion, and say, "Judge, I think you overlooked this confidential relationship presumption, and I'd like for you to rule on it." Short of doing that, that issue is not reserved for further appeal, and there was no Rule 59 motion in this case.

But even if there had been, my ultimate argument, my second argument is it really doesn't matter because it was rebutted. Evidence of his testamentary capacity, the fact that petitioner had never been in a prior will, all the things we talking about before -- I don't want to rehash all of it -- but there was sufficient evidence in the record as found by the probate court to rebut that presumption as well. So for either of those two reasons, this confidential relationship issue really has no place in the appeal.

Now, this case I believe Your Honor is controlled

primarily by the Russell v. Wachovia case. This is a case involving Judge Russell's estate, decided by our Supreme Court in 2003. It was a will contest case that also involved the trust, not relevant for this matter. It was a will contest case brought by Judge Russell's adult daughter against several grandchildren who lived with Judge Russell in his home, and who it was alleged unduly influenced him to sign a will that was being probated. And there was evidence in the record and I've got a copy of the record --

THE COURT: I was going to ask you about that. I was looking for it.

MR. BRACKETT: I've got that for you. There was evidence in this case that the grandchildren were, as described by the Supreme Court, boorish and churlish. I don't know that's the right word. They behaved very badly. And this was evidence in the case Judge Russell couldn't manage his own medication, that he was confused. They wouldn't let him choose what clothes he wore. It went on and on about what the grandchildren did, and the Supreme Court applied the law that I've argued to you, and that is under clear and convincing -- there could still be some evidence in there, some indicia that might lead one to think there was undue influence, but it's got to rise to that high threshold level, and it didn't. So the

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Supreme Court upheld the trial court's grant of summary judgment in the case, notwithstanding the evidence of bad conduct on behalf of the grandchildren.

That case demonstrates very well the interplay a between the evidence of undue influence in a will contest case and the requirement for clear and convincing evidence. That's what the probate court relied on. The probate court said that although you may have some evidence -- there are some things out there that yes, would qualify as some evidence, but it simply doesn't rise to the level where I can set aside Mr. Tucker's last will when he had testamentary capacity and all of the every evidence is unrefuted.

Keep in mind neither petitioner nor any member of her family was there in the hospital room when that will was done. They have no direct evidence at all. The only eyewitness testimony, so to speak, came from the witnesses, the two people who witnessed the will and the notary and, of course, Ms. Margaret Kelly who is not his attorney-in-fact. She was -- the Court found her to be a scrivener. She wrote the thing, and Mr. Tucker signed it at a time he had testamentary capacity.

At no time thereafter -- there is no evidence that he ever expressed any interest in executing a new will, which the law would say that means he's satisfied with that one.

If he had capacity and he knew at the time -- maybe he forgot later on. He had mild dementia. He had good days and bad days. That was noted in the court's order. All you have to prove is that when the will was done, when it was signed, he was having a good day. He was lucid and had the requisite understanding. All the medical testimony from the doctors, all of them said he had -- he was competent then. Later on, if he gets confused one day and says something, that does not affect the validity of a will he signed earlier at the time when he had capacity. These are the problems you get into where you take bits of pieces of evidence and try to look at those in a vacuum and determine if that will was the product of undue influence, and the probate court said no. It's not.

So that we believe that the probate judge got it right. We would ask the court to affirm that probate court order.

THE COURT: Thank you, Mr. Brackett. Ms. Anderson, anything in reply to --

MS. ANDERSON: Yes, Your Honor. Your Honor, as it relates to the testamentary capacity, that argument continuously kind of keeps creeping up. We're not arguing here that the decedent did not have prior testamentary capacity on the day of January 14th, 2014. Our argument is that because of his medical condition, because of his

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physical state, he fits the definition of being physically infirm, thereby -- and then coupled with the fact his will did not comport with his prior will, giving rise to the presumption of undue influence as part of the argument. It's not arguing that he's not -- we did argue originally that testamentary capacity existed and the probate court ruled that he had testamentary capacity at that time. That portion was not appealed.

THE COURT: All right. How do you answer his argument that if he -- if the decedent had testamentary capacity on January 14th, 2012, that -- the prior will is irrelevant.

MS. ANDERSON: Your Honor, all the case law indicates that undue influence and testamentary capacity are not friends. They -- you don't have to prove testamentary capacity or not prove or disprove testamentary capacity in order for undue influence to succeed. They're two separate issues.

THE COURT: Okay.

MS. ANDERSON: And so when the Court ruled -- the case law just didn't come up out of the blue. When the Court ruled that the decedent was physically infirm and his will did not comport with the prior will, the Court didn't rule and also he didn't have testamentary capacity. That was the undue influence case. And so there's --

we're acting as if these cause of actions are just friends, and if you prove one, you automatically get the other one. If you prove the other one -- that's not really how it works. They're two separate actions, and testimony capacity came up three or four time in oppose counsel argument and testamentary capacity is not the argument. And that's why part of the reason the probate court got it wrong is because they keep believing that testamentary capacity is an argument that we're going on here.

We believe there's some issues with this mental status, absolutely. We believe he had mild dementia. We believe that the court -- the record reflects he had dementia --

THE COURT: The Court made a finding that he had mild dementia.

MS. ANDERSON: Yes. And we believe the dementia coupled with the aspect of his health; the court recognized that age is even one of the factors. Age is never a factor, necessarily a factor in testamentary capacity. His weakness was a factor as it relates to undue influence. His weakness never has an effect on testamentary capacity. But the testamentary capacity argument is if he could not even raise his hand to write his name, an X would suffice. So testamentary capacity is

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not what we're arguing here, and I believe what's being confused and what's being kind of jumbled up so the arguments can get so jumbled is that testamentary capacity was -- has already been ruled upon by the Court.

Now the court in Nasser ruled that -- found that the person, the decedent had sound mind. He was of sound mind, but then still ruled that undue influence existed because he -- the decedent was physically infirm and the prior will did not comport with the will that was sent to probate.

Now, the opposing counsel stated that the decedent solved everything when he executed that new will. We would argue differently. Nothing was really solved. He didn't -- there's no knowledge that he knew the other will was nonexistent. There's not -- and the courts are very clear. We can't just say that he can tell everybody he wants to give money to certain people and the will come out and it be totally opposite. The case law says -- that's part of the reason the case law there. There's case law to say that when the will does not comport with the expressed intentions of the decedent, there are people bringing those wills back to court saying we're finding undue influence based on certain the factors that exist around that will.

I didn't make that up. That's what the case law

says. So it's not true that a decedent, a person can just tell anybody and everybody they want to give specific items to that person. When they do that, we give rise to the case law saying if you have made expressed intention to give your -- you devise your estate in one way and then your will submitted to probate doing the total opposite, this gives rise to undue influence. I didn't make it up. That's what the case law says.

So not to imply -- it's true a person can give, can devise their estate in any way they wish. But where they have stated many times they have desire to give it to a separate way and then it goes the opposite way, that's how we give rise to the case law. So I believe the probate court did get it wrong. I believe the confidential relationship is properly before the Court. It was -- the undue influence argument was in the petition. Not every aspect of the undue influence argument is on the petition, but undue influence argument is in the petition. It was also in the memorandum of opposition to the opponent's argument. It was argued very clearly in the record on the record -- on the probate hearing, and then ruled upon by the probate court. I believe it's ripe to be here before the Court. And the Court in Nasser found that where there's a confidential relationship, that the presumption then shifts to the proponent of the will.

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Thank you, Your Honor.

THE COURT: Thank you, Ms. Anderson.

Anything in response? I'll give you the last word.

MR. BRACKETT: I'm not arguing testamentary capacity is a separate ground. Testamentary capacity is relevant to undue influence because it is one of the factors, the mental condition of the testator, just as his physical condition is a factor to be considered when determining susceptibility to undue influence. I'm just saying if he had testamentary capacity, that is evidence to rebut a presumption of undue influence. Did he have the requisite capacity required by law?

Secondly, it is relevant to her argument that the will that's being challenged changed a prior testamentary document or was inconsistent with something he said later, and the point there is if he had testamentary capacity on the day he signed the will, then that is the best evidence of what his testamentary intent was at that magic moment. So testamentary capacity finds its way into all these issues. And it is absolutely relevant, although it's not argued here as a separate ground.

THE COURT: All right. I thank counsel for both sides for very thorough arguments. I'm going to take this matter under advisement. I will consider the record. Mr. Brackett again, like I stated at the beginning of the

hearing, if you would like to respond to any new arguments that may have been made in the argument by the appellant this morning, please do so within ten days.

MR. BRACKETT: All right. Thank you.

THE COURT: And send Ms. Anderson a copy of that, and I'll consider this, and the record is closed.

MS. ANDERSON: Your Honor, I have a case for Nasser I keep referring to. I don't have a copy but it's --

THE COURT: Yes, ma'am, if you give me a copy that it would be most helpful.

(Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

I, Aminah R. Hardy, Official Court Reporter for the 16th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 8th day of December, 2015.

August 21st, 2016

Aminah R. Hardy

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF YORK) C/A #: 2012-ES-46-0579

IN RE:
THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly,
As Personal Representatives of the
Estate of Vinton Willis Tucker,

Respondents.

DEPOSITION OF
MARCY NAFF THOMAS
****
Wednesday, March 5, 2014
2:27 p.m. - 3:32 p.m.

The deposition of MARCY NAFF THOMAS was taken on behalf of the Respondents at Westminster Towers, 1330 India Hook Road, Rock Hill, South Carolina, on the 5th day of March, 2014 before Sara L. Quattlebaum, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

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'12, can you just give me a general description of Mr. Tucker's mental status?

A: I need you to clarify that.

MS. ANDERSON: Object to the question. She would have to be trained for that.

Q: Well, you assess -- you do cognitive assessments. So let me ask it this way. Do you -- do you keep yourself attuned to the cognitive status of most of the residents that you come in contact with as a part of your duties as a social worker?

A: I think that typically it's not unusual that we're making a very informal assessment all the time when we're talking to people. As far as the formal cognitive assessment that you're talking about, that's dictated on a schedule by Medicare.

Q: Okay. Let's talk then about your informal assessment of Mr. Tucker's mental status in December and January. How would you generally describe that for me?

A: Well again, I can only say exactly what I noted; that was two years ago.

Q: Sure.

A: And based on what I have read in my notes,

which I think you have a copy of, his cognitive status changed from time to time. There were some days where I have noted that I felt like he was clear and understanding what I was saying. There were other days that I have noted that I didn't feel that he was understanding me, and it would be necessary to come back and meet with him at another time.

Q: So he would have days or parts of days where he was competent and days or parts of days when he was incompetent. Is that a fair statement?

A: I don't have the background or the ability to decide whether someone is competent or incompetent. I work more along whether they are cognitively intact at a certain time or not. And there were times where I felt like he was cognitively intact. And then there were other times that he clearly wasn't.

Q: How do you define cognitively intact? We may be talking about the same stuff but using different terms. But what do you mean when somebody is cognitively intact?

A: Well, what I can tell you specifically is like on an assessment that I did with him, his first one that I did on January 27 --

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Q: We'll talk about that in a minute.
A: Yeah, he scored 13 out of 15 based on this little thing that says he's cognitively intact on that particular day.
Q: Okay. Well, we'll approach it this way.
A: Okay.
Q: His initial paperwork -- his admission paperwork indicated that he had some cognitive issues; did it not?
A: It did. Yes.
Q: All right. And so that would be something that you would know about and would take into account when you are dealing with him?
A: Not just with him but anybody under care.
Q: Sure. Any resident who --
A: Yes.
Q: Okay. And so that would be -- his cognitive ups and downs would be something you would have to be sensitive to whenever you're explaining things to him or asking him to sign something; is that right?
A: Yes.
(Respondent's Exhibit Number 1 was marked for identification purposes.)
Q: I'm going to ask about -- just going to try to

take this in chronological order. I've marked this form as Exhibit 1. Is this a regular form used here at Westminster?

A: Yes.

Q: And do you recognize the handwriting to the upper half of the page.

A: Yes.

Q: Is that yours?

A: Uh-huh (affirmative response).

Q: Is the signature on the left-hand side, three quarters of the way down next to the asterisk, is that Vinton Tucker's signature?

A: I would assume that that's -- I don't keep a record of his signature, but normally when I have this document and someone like Vin requested his information, then we would go to the person, explain what it is for and they would sign it.

Q: Is that your signature as a witness?

A: Uh-huh (affirmative response).

Q: So is it fair to assume then or conclude that you witnessed Mr. Tucker signing this form on December 30, 2011?

A: Uh-huh (affirmative response).

Q: That's a yes for the record.

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A: Yes.
Q: So is it the case then, Ms. Thomas, that on that particular occasion, you felt Mr. Tucker was cognitively intact enough that he could understand this form, and he could sign it himself?
A: Yes.
Q: Now, you knew at the time that he had a power of attorney that named some family members as his agents. Were you aware of that?
A: I don't. I don't remember specifically. I think he had a financial durable power of attorney or something like that, but I do't know. I don't remember exactly.
Q: So you felt comfortable enough about Mr. Tucker's cognitive status on this particular day that he could sign a legal release form?
A: Uh-huh (affirmative response). Yes.
Q: Now, the records indicate that Mr. Tucker went to Piedmont Medical Center on January 14, 2012. It wasn't his first visit. I'm not suggesting that he was one of -- but on that particular day, he was transported there by EMS. Are you aware of the general circumstances involved in what happened to him that day?

that right?

A: Right. Uh-huh.

Q: So this doesn't have anything to do with anybody interacting with Mr. Tucker, this has to do with making arrangements for that room.

A: Right.

Q: And then we get to January 20 when he returns to the facility.

A: Yes.

Q: So you didn't see him at all during his hospitalization from the 14th to the 20th of January?

A: No.

Q: Now, your next note appears to be February 1, 2012.

A: Uh-huh (affirmative response).

Q: And tell me what this note -- what's in this note about your meeting with Mr. Tucker on that day? I tell you what. Let's back up a second before we do that. Again, I'm trying to keep all this in chronological order if I can.

(Respondent's Exhibit Number 3 was marked for identification purposes.)

Q: I'm giving you what we've marked as Exhibit 3.

A: Right.

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Q: At the top of the page, it says DIMS iterview for MDS 3.0. I tell you, how you guys understand all this jargon is beyond me. What does that mean?

A: Now that you're asking me the letters for them, they have totally gone out of my head. MDS is medical data set. That's a Medicare document where all of the groups of people; nursing, therapy, social services activities compile information into this MDS document. It's submitted to Medicare for payment purposes, reimbursement; that sort of thing.

Q: All right. So this is a Medicare form. And is this the form that you received special training on doing the cognitive assessment?

A: Yes.

Q: All right. And by the way, there are two others underneath. Pages 2 and 3 are different assessments. But we will talk about those in a minute. Page 1 of this exhibit appears to be a cognitive status interview or an assessment that you did on Mr. Tucker on January 27, 2012; is that right?

A: Yes.

Q: And again, did this have anything to do with

his being discharged from rehab and moving into a different part of the building? Is there something magic about othis date that this thing relates to?

A: The dates are dictated by Medicare. There is a series of assessments that have to be done. Normally the first one is seven days after they admit, seven days after that, seven days after that and then 30 days, 30 days. There is a very specific schedule.

Q: Okay. All right. So tell me, how did you assess Mr. Tucker? Does he come to your office or do you go to his room?

A: I go to his room.

Q: Okay. Is it just the two of you in the room, no distractions from third parties?

A: I didn't make any note. When I go into someone's room to do this, if they have visitors or something, I will ask the resident is it okay with you if they stay. And if they prefer that whoever leave, they leave. I don't typically make a note on that.

Q: Do you have any idea how many of these cognitive assessments you've done on people here?

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A: I could not even venture to guess because I'm the only one who does them for the most part. So a lot.

Q: More than 500? I'm just picking a number here.

A: I'm sure I've done more than 500.

Q: And this is used to determine someone's eligibility for Medicaid or Medicare?

A: Medicare. And not their eligibility, but it's a reimbursement that we get for the facility because we're Medicare certified. We do it also because oftentimes with senior citizens when they go in the hospital, it's very disorienting for them, and it kind of confuses them. And so we keep track of their cognitive status when they're here to make sure that there is nothing aggravating going on that's causing that to be worse. If it is worse, then the nursing staff takes that information and tries to figure out what's going on.

Q: All right. The numbers down the left-hand margin; is that your handwriting?

A: Yes.

Q: So you completed the form. And you give a numerical score for whatever his response is to these particular questions or items?

A: Yes.
Q: And this report indicates he scored a 13 on January 27, 2012?
A: Yes.
Q: And according to the chart over there, lower right-hand corner, that means he was cognitively intact that day?
A: He was able to do this, yes.
Q: According to the --
A: When they say cognitively intact, it is yes.
Q: You say that as though you sometimes disagree with the score.
A: Well, I just -- I see all kinds of all -- it's all personalized per person. This is usually pretty accurate. Based on this, that's how he was that day.
Q: All right. And just from a purely personal point of view, did you agree with that score that day? Did you think he was cognitively intact on that day?
A: If I don't think so, I make a note of that as an exception really more than the rule.
Q: Do you regive the test? If the score comes out, and you say, that can't possibly be right. Do you go back and give the test quickly and do

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being discussed at that time.

A: Right.

Q: So he might have been having one of those down times cognitively --

A: Yes.

Q: -- on that particular day or at least that particular time.

A: Yes.

Q: That's accurate?

A: Yes.

Q: All right. The next event would be Page 2 of Exhibit 3. This one. And that would be a cognitive assessment that you did on February 2nd, essentially one week after the first assessment.

A: Yes.

Q: On this one he scored an 11, if I add that up right.

A: Yes.

Q: That's your handwriting --

A: Yes.

Q: -- filling in the numbers?

A: Uh-huh (affirmative response).

Q: So he scored an 11, which is the high end of moderately impaired?

A: Right. That was just because he did not know the year, and you get a lot of points for knowing the year.

Q: Okay. And this would be one day after you had met with him in the room, and you had some thoughts about his --

A: Yes.

Q: -- about his cognitive status on that day?

A: Uh-huh (affirmative response).

Q: So this would be consistent with what you had noted the day before; is that right?

A: Yes.

Q: So other than just not knowing what year it was, you think he did okay on this one?

A: Yes.

Q: Okay. Then we go to your notes for February 5, 2012. Apparently you were talking to him about a new power of attorney?

A: Yes.

Q: Now, did he bring up the power attorney or did somebody here on staff bring it up? How did this subject get raised?

A: According to my note, the nursing staff reported a concern because he had come back to the hospital with a new healthcare power of

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don't think he signed anything on that day. I don't think I took anything in there for him to sign. It was just to discuss that document. And like I wrote on there, he recognized his name, but he just said he didn't remember signing it. He had been in the hospital.

Q: Right. That was his name on the power of attorney?

A: Yes. On the healthcare power of attorney.

Q: Healthcare power of attorney. Now, you made a note here, "Resident also spoke at length of nieces and nephews in his will." Did he say which nieces and nephews he was referring to?

A: He didn't. He just talked about his nieces and nephews.

Q: All right. And then he goes on to say, "They want to be included in the will." He said, "This is why they are not in my will." So the nieces and nephews he was talking about were nieces and nephews that, as he understood it, were not in his will?

MS. ANDERSON: That calls for speculation, objection.

Q: Well, just based on your note, would that seem to be he's talking about nieces and nephews that are not in his will?

A: I have not seen his will so I don't know what he is talking about.

Q: All right. Okay. And then you make reference to a statement, he loved his little girl very much, and she took care of him and wanted her to have the money he designated for her to have. Did he indicate -- who is his little girl?

A: It was, from my understanding, I think that Josalyn maybe made a note when they first came in, her name was Brenda. And from my understanding, she was a care giver of his that he cared about. And he had said he had left her, and I think they make reference to that, as well, that he had at some point had named her in his will.

Q: Then you say further, about six lines down on the next page here, and it's still on February 5th, social worker, and that would be you, felt that resident was having a very cognitively clear afternoon.

A: Uh-huh (affirmative response).

Q: So from February 1st until February 5th his cognitive status would have improved in your estimation?

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A: Apparently I didn't go back and have any other discussions about that on that day, no.

Q: You mentioned something about a friend of his, a care giver, and you said you got that information from someone else. Do you remember that person's name again?

A: Josalyn, the other social worker, made a note about Brenda. And what I recall about that was information that we were given probably from Margaret and Ben about Brenda. I never met her or saw her. I just know that they had concerns about Brenda. And that's all I know.

Q: They -- who are you referring to when you said they?

A: Margaret and Ben.

Q: And do you know what the concerns were?

A: I don't.

Q: Do you ever recall of any restrictions on visitations?

A: I noticed in his chart there is a picture of her that they just had requested that she not be able to come and visit. I remember that from the picture. And Josalyn made that note in here as well that she not be allowed to visit.

Q: And you didn't do one of these Medicare assessments on him on that day; did you?
A: No.
Q: But he was cognitively clear on that day just basing your personal assessment of him.
A: Right.
Q: And communicating with him on that day?
A: Right.
Q: I'm assuming you didn't do a transcript of his conversation?
A: No.
Q: So there is probably some other words that he stated that was not in here?
A: It's possible.
Q: Probably -- it's possible. Is it likely that he said it in more words than he -- you highlighted -- what you --
A: I really don't know. I just make my note based on what transpired. I don't keep a written transcript of every word with him.
Q: This is a personal statement. Do you normally put personal information into your -- like this is -- it's more goes kind of further into beyond his medical condition. Do you normally put personal statements in your social work --

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in your social work practice notes?

A: Yeah, I think that's what would differentiate us from nursing. They keep track of the medical stuff. We keep track of psycho-social, that kind of thing.

Q: And back in -- you say you were working part time back then; is that correct? And you just increased your hours to 30 hours and went from 10 to 20 to 30?

A: Yes.

Q: And back in 2012, at this time frame, do you remember how many hours you may have been working?

A: 20.

Q: 20 hours during this time?

A: Uh-huh (affirmative response).

Q: And how many -- did you have an opportunity to observe the family members with Mr. Tucker?

A: Probably. I know he was here for awhile. I think that I did.

Q: You say probably. Are you not really sure about that?

A: Well, I mean, I don't make a note every time I see somebody with a family member.

Q: I see. But do you --

CONSENT FOR RELEASE OF RESIDENT INFORMATION

I hereby authorize Westminster Health & Rehab Center to release specified information regarding

Vinton Tucker to Ben Smith

Resident Name

This information shall include All current, pertinent medical records.

I understand this information will be used for POA to maintain records of Res. Care

I understand what information is being released and why.

I understand signing this release is voluntary.

I understand that I may revoke this release at any time; however, information may have already been released prior to my notifying Westminster Health & Rehab Center.

I release Westminster Health & Rehab Center from legal liability that may arise from release of information.

X Vinton W Tucker — Resident

Nancy Thomas, MSSW — Witness — 12/30/11 — Date

OR

Resident Representative — Witness — / / — Date

Resident Name: Vinton Tucker Room #: 107

Record #: 2476 Physician Name: Jewell

C:\My Files\Forms\Consent

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SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Jewell	107	2476

Date	Time	Notes Should Be Signed
12/12/11		Res POA completed pwk for res admission to STR. Jocelyn Sanderson LBSW
12/13/11		Res admitted to rm 107 from CMC main for STR. Payor source Railroad Mcare & BCBS supplement. Admit dx include: syncope, fall, hx CHF, anemia, thrombocytopenia, cognitive dysfunction. Res confused, unable to sign. Res nephew/POA completed pwk. Full code status requested. DC plan hopefully LTC. Res family shared information regarding visitor by name Brenda Snow who is not allowed to visit. SW es distributed notice to depts & put on res chart. Res name will not be listed on phone/visitor list. Jocelyn Sanderson, LBSW
1/3/12		Care plan mtg. held today. Several of Res family members attended the meeting. All goals, problems, approaches reviewed c Res and family. OT reports that Res is making good progress. He is at supervision level c ADL's. He uses a walker c supervision from staff. All members of CP team that Res has cleared up significantly cognitively.

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Truton	Jewell	107	2476

Date	Time	Notes Should Be Signed
1/3/12		cont. Res reports having a good appetite and enjoys most of the food. Res DC plan is uncertain at this time. His family doesn't feel like he will be able to go home. SWer spoke c Res and he hopes to go home, but knows his family wants to help. SWer took family to speak c Marketing Dir re: ALF II. Marcy Thomas, MSSW
1/8/12		Res spoke c Res POA/family to notify of LCD 1/26/12. Res will DC on 1/27/12. SWer told family of TX's recommendation that Res go to IL instead of LTC. Medicare team feels that Res can manage IL due to his marked improvement. They do recommend assistance from Homelridge. Res family would like to speak c Res before the staff do, and they plan to have that talk on Mon. 1/9/12. They will contact Marketing for tour for Res. Marcy Thomas, MSSW
1/11/12		Res sent to PMC via EMS. His POA was in facility and signed DL & SNF-ABN c LCD 1/19/12. SWer explained this could change depending on results of ER visit. Marcy Thomas MSSW

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Jewell	107	2476

Date	Time	Notes Should Be Signed
1/12/12		Res family into see SW re: dc plan. Res family toured ILF today & questioned res dc to an IL setting c 24(S). SW clarified for res family Medicaid guidelines & ref plateau in progress made. Res family does not want to drive 24(S) for res, requests more clarification on what type & amount of supervision needed. Res family has placed res on ALF wait list but have expressed interest in keeping res on WMT campus. SW toured facility on ILC floor but shared w/ that Res may be too high functioning & possibly decline in ILC. SW spoke c TX, who say res has had a past few days & they would like a few days to observe res to determine if dc date might be extended. Original dc set for 1/27 & this wk date changed to 1/20. Therapy to assess & f/u c SW on dc date. Therapy may feel res is ALF appropriate. Res family asked for recommendation on local ALFs if Res unable to get bed in WMT ALF. Res family expressed satisfaction c WMT & voice that WMT "reputation exceeds itself." SW to cont to follow &

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton			

Date	Time	Notes Should Be Signed
		follow up c res family upon further clarification from Indigo. Jocelyn Henderson, LBSW
1/18/12		SWer called Res family to notify that Res belongings needed to be packed up to make a private room available for another Res. Res family stated that Res would be ready to return in a day or two. SWer told her Res would be returning to a semi private room and put back on the waiting list for private room. Marcy Thomas, MSSW
1/20/12		Res admitted to RM 107 from PMC for STR. Payor source is Medicare A & BCBS of NC for supplement. Admit dx include: syncope, orthostatic hypotension, bradycardia, chronic renal insufficiency, peripheral vascular disease c 7cm abdominal aortic aneurysm, hypothyroidism, history of paroxysmal afib, anemia, hyperlipidema, thrombocytopenia. Res is currently a full code. SWer will discuss with family. Previous pw copied. DC plans are not known at this time.
'12		Late entry: Res out to PMCER & admitted on 1/15/12. Jocelyn Henderson LBSW

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Duvall	107	2476

Date	Time	Notes Should Be Signed
1/20/12		Res admitted to RM 107 from PMC for STR. Payor source is Med A/BCBS NC for supplement. Admit dx: syncope, orthostatic HTN, bradycardia, chronic renal insufficiency, peripheral vascular disease; 7 cm AAA, hypothyroidism, hx paroxysmal afib, anemia, hyperlipidemia, thrombocytopenia. Res currently full code but SBC SWCS to f/u & discuss w family. Previous pwk copied. DC plans uncertain at this time (Kellyn Sanderson LBSW)
2/1/12		SWer met c Res in his room today, per HCA request. Res had voiced concerns to others about his current Dx. SWer spoke c Res for quite a while. Res was found to be a/ox 2 (person, time). He knew the month and the day of the week. SWer tried to discuss Dx and Res right to access his medical information. While Res did talk about health concerns, his speech was disorganized and ramblings. SWer did not feel Res truly understood what SWer was discussing. SWer explained that Res family opted for him to be "full code" status at first admission because of ↓ cognitive

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SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Winston	Jewell	107	2476

Date	Time	Notes Should Be Signed
		status. Res appeared to understand, but when SWer defined DNR as full code and explained that we wanted to make sure we were carrying out his wishes, he continued giving misc health information that did not relate to the conversation. Res said he would "go along w the family" but then said "if a legal determination was made about his death, he would want to be left in peace." He could not repeat his wishes when SWer tried to clarify. It was the opinion of this SWer that Res was not capable of understanding fully the conversation in order to change his code status. SWer will notify Res POA. Marcy Thomas, MSSW.
2/5/12		SWer went to speak w Res after nursing staff reported concerns about new POA paperwork that was delivered over weekend. SWer asked Res to verify who the new HC POA was and he did verify knowing the lady as her niece and that he did recognize the signature as his own. He did feel that his writing looked very

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Jewell	107	2476

Date	Time	Notes Should Be Signed
2/5/12	cont.	shaky and he had no memory of signing the documents, nor did he recognize the names of the witnesses. The documents were signed on 1/14/12, during Res most recent hospital stay. SWer explained to Res what the HCPOA + Living will documents meant. After a lengthy discussion, it did appear to SWer that Res indeed did not wants to be intubated for life sustaining purposes. He did say, however, that if he was found in his room and had no heart beat, pulse, or respirations, he would want them to "fight, fight, fight" to save his life. SWer explained that this would keep him under "full code" status, and he again said he would want them to fight for him. Res also spoke at length about nieces and nephews and his will. He understands that they want to be included in his will. He said "this is why they are not in my will." He clearly stated that he "loved his 'little girl' very much and she took good care of him" and he "wanted her to have the money he designated her to have in

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SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Jewell	107	2476

Date	Time	Notes Should Be Signed
		transfer to a private room when one is available. Res also signed new HCPOA naming his niece as primary HCPOA. Swk was present and explained the document for Res to understand what he was signing. Marcy Thomas, MSSW
2/9/12		Care plan mtg. held today c Res HCPOA & her husband in attendance. All goals, problems, approaches reviewed. Res hemoglobin continues to be low. Res family is going to appt c Dr. Shah and will ask about whether needs another transfusion. Res mood seems a little down, probably due to not feeling well. Res will DC to Unit 2 for LTC on 2/10/12. Activities to make sure Res gets connected c other male Res upstairs. Marcy Thomas MSSW

SOCIAL PROGRESS NOTES

Last Name	First Name	Attending Physician	Room No.	Hosp. No.
Tucker	Vinton	Jewell	107	2476

Date	Time	Notes Should Be Signed
2/5/12	Cont.	his will." Res stated how upset he was when one nephew came and asked for his money to be divided evenly. Res stated he "worked hard, along c his wife to earn and save that money, and he should be able to do c it what he wants." SWer felt that Res was having a very cognitively clear afternoon, c only slight confusion noted at times. SWer to follow up c Res family re: what appears to be family names as witnesses of HC POA HCA also noted that living wills cannot be signed while a Res is in a medical facility. Marcy Thomas, MSW
2/5/12		Res denial letter and SNF ABN were signed and returned today. Marcy Thomas, MSW
2/8/12	Late Entry	On 2/3/12 swker spoke with Res dtr-in-law and son on the phone about the DC date. Also discussed DC plans with dtr in law. Lisa Hall, BSW
2/8/12		Res family and POA came in to sign new admit agreement for admission to Unit 2. Family understand that Res will DC on 2/9/12. They signed DC c ICD 2/7/12 on 2/5/12. He will have to go to a semi-private room first, and will

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
COUNTY OF YORK	) Case No. 2012-ES-46-0579
Mary Jean Tucker Swiger,	)
	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)

DEPOSITION OF MARGARET KELLY

ROCK HILL, SOUTH CAROLINA

OCTOBER 22, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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to know that, because I don't know exactly when she moved in.

Q. How long was she living there? Do you not know that?

A. I know that it was until she said that he had had a fall, and she called the emergency and the ambulance came and got him and took him to Carolinas Medical Center.

Q. And was that in November, 2011?

A. It was the end of November, 2011, right around Thanksgiving.

Q. And was that when he was hospitalized?

A. It was.

Q. And why was he hospitalized?

A. Because he had injuries in a large part of his body.

Q. And where was he hospitalized, at that point in time?

A. Carolinas Medical Center in Charlotte.

Q. How long was he there?

A. About ten days.

Q. And did he have a primary care physician in North Carolina?

A. Did he have what?

Q. A primary care physician in North Carolina.

A. I don't know about that.
Q. So, at any point in time, when he was in the facility in North Carolina, you never spoke with one of his doctors.
A. I did not. I did not.
Q. Do you know of anyone else in your family that may've spoken with any doctor?
A. I do not know that.
Q. So you don't know, or is it possible they did?
A. I have no knowledge of that.
Q. And you stated that the doctors indicated his injuries were not consistent with a fall.
A. (Indicating yes)
Q. And did the doctor indicate --
A. Yes.
MR. BRACKETT: That was a yes, by the way?
THE WITNESS: Yes.
MS. ANDERSON: Thank you.
BY MS. ANDERSON:
Q. Did the doctors say what the injuries were consistent with?
A. He was very, very bruised, and they just felt like it was more than a fall; that maybe -- They never really said, but they used the

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word abuse or indicated that he felt -- they felt like it was more than a fall, and it could've been some kind of abuse.

Q. Was that in any of the -- Did you see that that was in any of his discharge papers; that that statement or that word abuse was in any of the discharge papers?

A. I don't remember that.

Q. What doctor was that that said --

A. I have no idea.

Q. You said it was they. Were there a number of different people that said that to you?

A. The nurses, as well, and I don't know their names. I just didn't need to know that.

Q. Describe how it was that Vinton came to South Carolina.

A. hen he was there, in Charlotte, then they said that he needed to -- he'd been there ten days. They had given him blood transfusions and had done everything they really could do because there was nothing really significantly wrong, except just a lot of bruises on his body. So they said that he would not be able to return home, because they didn't feel like he was going to be safe there any longer; and that

the caregiver that had been with him did not seem to be appropriately caring for him, in their opinion, and that he needed to go to some other place and he needed to be, you know, kept in a place where he would be very safe. And so the recommendation was made by, you know, the family of us that Rock Hill would be good because there are four cousins that live in York County.

Q. Okay. But was there a social worker or someone at the hospital that indicated that you should take him to South Carolina?

A. There was a social worker. I don't remember her name.

Q. A social worker in the hospital?

A. In the hospital.

Q. That said, take him to South Carolina.

A. Take him so that he can't be located by this caregiver that had been with him at home.

Q. Were there any charges filed against the caregiver?

A. No.

Q. And you took him from Charlotte, North Carolina to South Carolina. What was the reason --

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A. Westminster Towers.
Q. What was the reason for the move? Why -- What was the purpose? Was there any plan for him to return to North Carolina?
A. No, not once he got to South Carolina; that he was pleased and happy and liked everything about it and made it known early on that he liked to be there and that's where he intended to stay.
Q. So, in November, 2011, he had just been discharged from Summit Place in August or September, he was driving his car.
A. Oh, yes.
Q. And he was functioning, according to you -- fine, and he was driving his car.
A. Yes.
Q. And at some point in November, he has a fall -- or an injury that's not consistent with a fall.
A. (Indicating yes)
Q. And then he desires to move from North Carolina to South Carolina. At what point -- Was there any other injury, other than the bruising to his body, that would mean that he

- so she wouldn't find him anymore.
A. That's the point they made to us.
Q. Did you know that Vinton had dementia?
A. No. There was no sign of dementia.
Q. No sign of dementia?
A. No.
Q. No doctor ever told you that he had dementia?
A. Nobody ever told me he had dementia.
Q. And were you aware of any medication that he was taking?
A. I was not.
Q. Did you or someone in your family tell a doctor that he had dementia?
A. I don't remember telling a doctor that he had dementia. He might've talked in -- with some confusion, if he was wakened or if he was, you know, recovering from something.
Q. And I'm going to show you here -- a report from, looks like, care provider Dr. Menes, where it states in here that the review of symptoms -- and it says that family states that he has intermittent dementia ranging from focal alert and oriented x1. What family member would've stated that?

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Q. -- who told Dr. Menes that Vinton had dementia?
A. I didn't tell him that. I --
MR. BRACKETT: You just have to answer.
BY THE WITNESS:
A. No.
Q. So there was no doctor or no report that you've ever read that stated that Vinton had dementia.
A. I'm not saying I haven't seen that on some information, but it wasn't supplied by me. Now, my sister spent the night with me that night, and she was -- My sister is Elizabeth Haigler, and she was with us that next morning, as best I can recall. I don't know why she wouldn't have been with us that night -- that morning, on the 15th.
Q. And did she speak with Dr. Menes?
A. Not at all.
Q. But the only person that you know spoke to Dr. Menes was yourself, Ben Smith and your husband, and that was all in a group.
A. That was in the room. My husband, you know, didn't say that, I didn't say that. I don't remember Ben saying that.

Q. So when you got there, there was nurses and other people in the room, and then you were by yourself.
A. No. No. My husband was with me.
Q. Who else was with you?
A. My husband was there. My sister was there.
Q. Who went to dinner with you?
A. My sister and my husband.
Q. So Libby was there.
A. Yes.
Q. And your husband, Ronald Steven Kelly, was there.
A. (Indicating yes)
Q. And no one else in the family was there.
A. No.
Q. And that was around 8:00 o'clock.
A. Around 8:00 o'clock.
Q. And you were in the emergency room.
A. Yes.
Q. And Vinton was - How did the conversation come up about his Will?
A. It was right after Dr. Ratterree came in and told him about the aneurysm that he had found on the CT scan, the size of it and the shape of it and --

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Q. Okay. And how did Vinton seem to take that news?
A. Well, he took it seriously, because Vinton had always been a very healthy person, a very active and involved person. And he took the news seriously and was surprised, because he had no idea. And the doctor just presented that information and so then, when the doctor walked out of the room, that's when Uncle Vinton mentioned that he thought it was time for him to write his Will and would I be willing to put it down on paper the way he wanted it.
Q. And do you recall asking one of Vinton's neighbors to witness the Will, at any point in time?
A. No.
Q. Did anyone in your family ever ask one of his neighbors to witness a Will?
A. No.
Q. Are you sure about that?
A. You mean about that night? Didn't.
Q. At any point in time, when you were at Vinton's home, where family was at Vinton's home, did anyone in your family ask one of

A. I saw him so many times and so regularly, and such -- You know, it was just the way the relationship was between him and my cousins.
Q. And how did it make you feel?
A. How did it make me feel? Well, I don't remember how it made me feel. I would've just accepted it as information. I wouldn't have had a feeling about it.
Q. And so it was your understanding he had drafted a Will, and what was your understanding of what was in the Will?
A. He didn't tell me anything about what was in the Will.
Q. You said that Brenda was in the Will.
A. Brenda was the caregiver, at that time, that had become attracted to him, and he liked her -- seemed to like her a lot.
Q. And what was your understanding -- When he said to you, I drafted a Will and Brenda was in it, what was your understanding of what else was in that Will?
A. I don't want to say what I assumed, because he didn't tell me. You know, he just -- I can't say what I assumed.
Q. So did you have any other communication with

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what he wanted, at that point in time.
Q. Even though you were trying your best to make sure that she could not contact him?
A. Well, that was his -- That was the information we were given by the people at the Carolinas Medical, that he was not going to be safe around her, they did not feel, because he was, you know, bruised up a lot.
Q. So, at no point in time after the time you talked to him at his home, did you ever talk to him ever again about a Will?
A. I didn't talk to him about a Will. I don't know.
Q. Did he talk to you about a Will?
A. No, he talked to me about how much he cared for her and that he, you know, wanted to look after her. That's the way he put it.
Q. So, he talked to you about how much he cared for her. Are you talking about Brenda Snow?
A. Yes.
Q. And how much he wanted to look after her?
A. Yes.
Q. And did he ever talk to you about how much he wanted to look after you?
A. That's a strange question.
Q. Maybe. Please answer it.

Q. He just -- Out the blue, he said, I just got some money.
A. Well, he said -- Yeah, that's pretty much what he said. He said, you know, I have funds. And he'd already, you know, said that once before, so --
Q. When did he say that? How much before?
A. You know, I don't remember that. I don't remember the sequence of events with that.
Q. So he said to you that he had some money?
A. Yeah.
Q. And was anyone else in the room when he said he had some money?
A. I don't remember anybody else around or not remember anybody around.
Q. Do you remember what you were talking about when he just said he had some money?
A. I don't remember that. That's years and years ago.
Q. Would it seem odd that he would just come out the blue and just said he --
A. No, not --
Q. -- had money?
A. Not when you're as close to him as I was.
Q. Okay. Did he say that when he was in the

money?
A. No. No.
Q. During the time in the hospital, did he ever mention what he wanted to do with his home after he passed?
A. After he was in the hospital?
Q. Yes.
A. No.
Q. During the time that he was in the hospital, did he ever mention what he wanted to do with the contents of his home?
A. When he was in the hospital?
Q. Yes.
A. No.
Q. During the time that he was in the hospital, at Westminster Towers, did he ever mention to you that he wanted to change his Will?
A. When he was at Westminster? Is that what you said?
Q. Yes, ma'am.
A. No. It was the event of the aneurysm that the doctor gave him that night that I think made him realize the seriousness of his situation.
Q. So he mentioned -- So at 8:00 o'clock -- Do

you know what time Dr. Ratterree came in and told you about the aneurysm?

A. Dr. Ratterree came by and said that he had ordered tests and that he would be back in a little bit with the results of the test; and that for me to be sure and stay in the room or near the room, so that he could give us -- give me the results -- and my sister was with me and my husband was there -- give them the results of the test, and then he would also tell them. And then that's what happened.

Q. Okay. So how long did you wait before you got the results of the test?

A. It wasn't a very long time, 4 minutes, 5 minutes.

Q. And then the results of the test determined that --

A. He had an aneurysm that was 7.7 centimeters, the size of a large orange. And the doctor displayed that with his hands to him.

Q. And what did you do after that?

A. What did I do after --

Q. After you heard the news that he had an aneurysm that was 7.7 centimeters.

A. Well, it was not -- We just discussed it. But he was feeling well and he was feeling

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fine, and he said, You know, I know it's time for me to do something about writing a Will. That's what he said.

Q. He already a Will. He wanted to rewrite a Will or he wanted to write a new Will?

A. He just said, I want to write -- I knew he was indicating a new Will.

Q. And what did you do after he said that?

A. Then he said, would you be willing to write down what I tell you to write down exactly? I tell you to write down exactly. And I said, I will.

Q. Okay. And so then he told you -- And did you do so then he write the Will?

A. I wrote the Will.

Q. And was anyone there with you when you wrote the Will?

A. My husband, Steve, was there.

Q. Where was Libby, at that point?

A. Where was Libby? Libby was outside the door. She just kind of came and went. You know, by living so far away, she didn't get to see Vinton as often as I did, but she was still very close to Vinton and communicated a lot with Vinton. But she didn't continue to just hang around or stay in the room.

Q. Where did she go?
A. Outside in the -- to the waiting room or outside the door or outside.
Q. So the person that was in the room with you, at that point, was yourself and --
A. My husband.
Q. And he said to you, will you write down everything that I say?
A. Yes. That's correct.
Q. Do you know what Vinton did for a living?
A. I know that he was with the railroad for 20 years, in his early life, after he got out of the military. And then I know that he worked for an estimating firm in Charlotte, a construction company.
Q. Okay. And where did you get the paper from to write the Will?
A. My husband brought some magazines and a legal pad to make notes on, because he didn't know how long he was going to be there. So he had a tablet, and I just reached and got that tablet and then I -- You know, when Vinton was ready to talk, you know, we just were -- when he was there and he was ready to do this.
Q. Where did he get the notepad from?

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A. He brought it with him.
Q. From where?
A. From home. This was a customary thing for him to do, is to have magazines and note paper, especially when he didn't know if he was going to be there -- When we were called there, we didn't know how long we'd be there, and that kind of thing.
Q. So, when you got called from home, he got a notepad with him?
A. We got called from -- coming from dinner. He had the notepad in the car, and he brought it in with him, with magazines.
Q. So, when you go to dinner, he generally takes notepads with him?
A. Yes. He keeps them in the car.
Q. So he always has them in the car.
A. Yes. Well, I mean, generally. Generally, he has notepads and magazines in the car.
Q. So he had the notepad with him.
A. (Indicating yes)
Q. And while you were in the emergency room --
A. (Indicating yes)
MR. BRACKETT: That's yes?
BY THE WITNESS:

A. Yes. Yes.
Q. And just yourself and -- Do you know what time it is now, when he starts talking about the Will?
A. I would say it was, you know, had to be close to -- between 8:30 and 9:00.
Q. And you're there, Ronald Kelly's there, and then Libby's there outside somewhere in the hallway.
A. She went in and out.
Q. And what is Libby to you, again?
A. Sister.
Q. Sister. Okay. So you asked Ronald to give you the pad.
A. (Indicating yes)
Q. And then you started writing.
A. As soon as Vinton was ready to begin to talk, then I wrote what he said.
Q. Was he taking any medication?
A. I didn't know of any medication.
Q. At any point in time, you didn't see them administering him any medication?
A. No, there was no medication administered when I was there.
Q. You said they were running in and out doing

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tests. Were they --

A. No, they -- After the test results came back, I didn't see anybody else coming and going in the room.

Q. At all?

A. At all.

Q. So no one else was in there.

A. No.

Q. Okay. He starts to talk to -- He starts to tell you what to write down.

A. Yes, he did.

Q. Have you ever drafted a Will before?

A. No.

Q. And so you didn't know what to put in the Will.

A. I only knew what my Will had and -- but that's all I had, and that was many years ago. So I knew what he was telling me, and I wrote it.

Q. So when was the last -- You said you had a Will drafted many years ago.

A. A number of years ago.

Q. So it was many years before 2012?

A. Yes.

Q. So you didn't have any working knowledge of

what the Will was supposed to say.
A. I didn't.
Q. Okay. So you were just writing down what Vinton said.
A. Yeah. He might've had the knowledge -- He had the knowledge, because that's what I put whatever he said.
Q. And so Vinton told you every last word to put on here.
A. He did.
Q. And he was able to tell you -- He put, my late wife's first generation nieces and nephews, and he listed every -- Did he list those names?
A. He listed them out. He knows them all.
Q. He knows them all.
A. He's known them forever.
Q. And he even had the wherewithal to say, the wife of Raymond Pursley, my deceased nephew. He said all that, as well.
A. Yes.
Q. And you just wrote it all down.
A. I wrote exactly what he told me to write.
Q. And then what did you do?
A. Well, my husband had stepped out to call his brother and his wife --

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A. He went to college.
Q. And he was worked on a railroad.
A. He was with the railroad. I don't know what his capacity was, in the railroad. Then he joined the military, at some point. I guess, before the railroad. I'm not sure about that.
Q. And it looks like he had a little bit of problems witnessing -- signing his signature. Did it seem like he had a problem -- Because, like, the signature here looks a little different than when he signed other places. Did he have a problem -- Did it seem like he exhibited a problem when he was signing his name?
A. He didn't have any problem at all. He was just holding the pad. I sort of helped to hold the pad. But he had one hand on the pad and then he was just -- he was writing it, and that's the way he wrote it.
Q. Okay.
A. He wasn't having a problem. He was -- Except just the position he was in, sitting in a hospital bed and, you know, just writing on a pad that was more upright than down. I mean, it wasn't a real comfortable position, but

that's the way it was.
Q. When you were talking to him, did he seem -- How did he seem to you?
A. Oh, he was happy and cheerful, and he had no pain. And, you know, when the doctor examined him, he, you know, punched and pressed and, you know, he was feeling really well and he felt good. But he was surprised about the aneurysm, and he just didn't expect that. That was a shock for him.
Q. You said he was happy?
A. (Indicating yes)
Q. And what were the other things? He was feeling really good?
A. Really good; he was cheerful.
Q. He was cheerful.
A. (Indicating yes) He was often cheerful.
Q. And so you don't recall how long it took you to dictate --
A. I don't recall --
Q. -- write this down.
A. -- how many minutes it took for me to write that.
Q. Were there any changes? Did he have to kind of change it up to make sure that he said

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Will.
A. I just know --
Q. Don't remember that.
A. I just know the distance, and I just know how long it would take for them to get from their home to the hospital.
Q. When they got there to the hospital, were you still drafting the Will?
A. No, I had finished. I'd finished, and I had -- I read it to Vinton to be sure that it was exactly, and it was exactly. When they got there, I read it to them. I re-read it in their presence and his presence. And he was -- He agreed that that was the Will that he wanted.
Q. And when Ronald called Danny, do you know what Ronald told Danny was the reason why they were coming?
A. To witness a Will that Vinton wanted written, or was having written, or asked me to write.
Q. Did Vinton ask any questions?
A. Of me? No.
Q. When you were reading the Will or when you were drafting the Will?
A. No. He didn't ask me any questions.

Q. And when Danny Kelly got into the room, how long did it take for you to read the Will to them and then how long did it take after that?
A. Not long at all. I just -- I read it through, with Vinton listening, they were listening, and I just read it. It didn't take long; minutes.
Q. And when did Vinton sign the Will?
A. When Danny and Becky got there.
Q. Okay.
A. And Steve was there. Steve was a witness. Danny was a witness. Becky was there for the notary purposes, but she was also there the entire time.
Q. And during this time, from the time that you drafted the Will and they came, was there anyone -- Did anyone come in the room, from the point in time that Vinton said, let's talk about the will and you got the paper out to draft it, and Libby left out of the room, and you drafted the two-page Will, and then Ronald called Danny? Was there any point in time that people were coming in and out of the room?
A. There was never another person that came in

family events?
A. That's correct.
Q. Just describe that, in general, please.
A. All right. We were always close and always getting together and attended weddings and funerals and birthday parties and just numerous events, continuously, during the year. And we made a special note of Vinton's birthday. Every August 16th, we had a gathering, a party, or whatever, at a home or at a restaurant or somewhere to celebrate his birthday. And after Aunt Edith died, then we continued to do this. And I think everybody kind of became even more and more close to Vinton and close to each other. And I actually wrote a family directory so that we could all stay in touch and everybody would know what was happening at all times. And people sent information to me, and I shared that with them.
Q. All right. When Vinton was at the Carolinas Medical Center in November of 2011, --
A. Yes.
Q. -- was Brenda Snow placed on some sort of a list, or were her visits eventually

restricted there?
A. They were very restricted there. Because, once they found out that she was claiming to be a cousin or she was claiming to be a niece, then they said that she's no longer accepted to visit.
Q. All right. Now, there's a Power of Attorney that we've been provided, dated November 17th, 2011, where Vinton appointed Ben Smith as his agent. Are you aware of that document?
A. I'm aware of that.
Q. And it's dated November 17th, 2011.
A. Yes.
Q. And was that prior to Vinton going into the Carolinas Medical Center?
A. Yes. Yes, approximately two weeks prior.
Q. And, on the second page, it says it was drawn by H. Edward Knox, in Charlotte. Who is Mr. Knox. Do you know?
A. I know that he's an attorney in Charlotte, and he used to be the former mayor of Charlotte.
Q. He was the mayor of Charlotte.
A. Yes.
Q. And so he allowed -- He apparently allowed

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
COUNTY OF YORK	) Case No. 2012-ES-46-0579
Mary Jean Tucker Swiger,	)
	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)

DEPOSITION OF BEN R. SMITH

ROCK HILL, SOUTH CAROLINA

OCTOBER 22, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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with the nurses?

A. Just to find out how he was doing, and that's about it, you know.

Q. And when you talked to nurses, did you talk to nurses -- Where were you when you talked to nurses? What location was he?

A. Kind of right out in the hallway, on the way out to the front door.

Q. Was that when he was at Summit Place?

A. Summit Place, yeah.

Q. And did you talk to nurses any other places?

A. When he was in the hospital in Charlotte.

Q. In Charlotte?

A. Yeah.

Q. Did you ever talk to nurses when he was in the hospital in Rock Hill?

A. No.

Q. Did you know that he had dementia?

A. No.

Q. So you would not have been able to provide any information to a doctor that he had dementia.

A. No.

Q. And so, if a doctor had indicated that the family had stated that he had dementia, that

information would not have come from you.

A. No, it did not.

Q. Did you know whether or not he had a primary care physician in North Carolina?

A. No.

Q. And do you know who Brenda Snow is?

A. Yes.

Q. Did you have any opportunity to meet her?

A. I had, yeah.

Q. And where did you meet her?

A. At Vinton's home.

Q. And how was that meeting that you met her?

A. We just went to visit, my wife and I, and she was there.

Q. And what was your understanding of what was her relationship with Vinton?

A. Well, eventually -- She was supposed to come and clean house, but it developed into more than that.

Q. And how did you know she was supposed to come clean house?

A. When he left the -- That's where he met her. He met her at Summit, I think.

Q. Okay.

A. And when he moved home, he needed somebody to

Q. Is he?
A. Yeah.
Q. How do you know that?
A. Because, being Power of Attorney, I called him and asked him did he draw the Will up, and he said that he did. And he said for me to tear it up, because it was a conflict of interest, because he accepted money from Brenda -- from Vinton for representing him in a divorce -- of her getting a divorce in Charlotte, so it was a conflict of interest.
Q. The Will was a conflict of interest?
A. Because he wrote the Will up, and he got money from -- to pay for Brenda's divorce.
Q. Brenda Snow's divorce?
A. Huh?
Q. He paid money for Brenda Snow's divorce?
A. Yeah.
Q. Did you do that? Did you tear it up?
A. Did I what?
Q. You said that Edward Knox asked you to tear it up, because --
A. Yeah, --
Q. -- it was conflict --
A. -- yeah, he did.

Q. Did you tear it up?
A. Yeah, he told me to.
Q. Where did you find it at?
A. I maybe had it in my house. I don't remember.
Q. Okay. And what did Vinton say, when you told him?
A. I'm not sure I told him, to be truthful with you.
Q. So how did you come to meet Edward Knox?
A. I didn't meet him. I just called him on the telephone.
Q. So did Vinton ever find out that that Will was ever torn up?
A. Not to my knowledge.
Q. Did you read the Will?
A. I don't know. I don't recall I did, no.
Q. Why did you have it at your house?
A. I don't remember.
Q. Did anyone else have a copy?
A. Not to my knowledge, no.
Q. Did anyone else know that you had torn it up?
A. I maybe told Margaret Kelly.
Q. And what did Margaret Kelly say?
A. She agreed with me as to what Knox had told us -- told me.

else, besides your wife?
A. Not to my knowledge. He maybe did.
Q. Did he make that statement while he was in Westminster Towers?
A. I don't recall he did, no.
Q. So, if Vinton made a comment that he wanted to give his money to someone he referred to as a little girl, who would you say that he was referring to?
A. I think he probably was talking about Brenda.
Q. Because he had given his money to a little -- He had drafted a Will to give his money to Brenda. Is that correct?
A. That's true.
Q. Did you go to the hospital on January 14, 2012?
A. I'm sure I did.
Q. Do you remember how you came to know that he was in the hospital?
A. Someone called me. I'm not sure who it was.
Q. And do you remember what time you got to the hospital?
A. I don't.
Q. Can you remember how long you stayed at the hospital?

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF YORK) C/A #: 2012-ES-46-0579

IN RE:
THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly,
As Personal Representatives of the
Estate of Vinton Willis Tucker,

Respondents.

DEPOSITION OF
JANE BONDURANT
****

Wednesday, March 5, 2014
1:30 p.m. - 2:08 p.m.

The deposition of JANE BONDURANT was taken on behalf of the Respondents at Westminster Towers, 1330 India Hook Road, Rock Hill, South Carolina, on the 5th day of March, 2014 before Sara L. Quattlebaum, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

Treatment Encounter Note. And it says the date of service is January 14, 2012. And it represents itself to having been electronically signed by you; is that correct?

A: Yes.

Q: What is the purpose of creating a record such as this?

A: It is a verification that first and foremost the encounter was made and then what occurred during the encounter, predominantly for billing purposes but also documentation of the facts as they occurred during the visit.

Q: Now, was this January 14, 2012, was this the first time you had seen Mr. Tucker for physical therapy or was this one in a number of --

A: As far as I can remember, I had not seen Mr. Tucker previously. He was a resident in this building where we are, and I routinely worked in outpatient services. So I did not routinely see people that were residents on the short-term rehab floor.

Q: Okay. Now, this record indicates that you had already made one visit to Mr. Tucker for a therapy session sometime earlier in the day. Can you tell from looking at this what time you

might have seen him earlier in the day?

A: No, I can't. Routinely it's -- if somebody -- we routinely don't do split sessions, but if the person has a low tolerance to activity, that's when we routinely split sessions. So I anticipate that it was in the morning, but I can't verify that.

Q: Okay. Now, I'm particularly interested in the last paragraph of this particular note having to do with a second session where you went to Mr. Tucker's room. So I take it that morning would have been the first time you saw Mr. Tucker.

A: Uh-huh (affirmative response).

Q: And then you said that afternoon would have been the second time. Now does this note cover both of those sessions?

A: Yes, it does.

Q: All right. Now, with respect to the first session, was there anything about -- well, strike that. Bad question.

If you go to visit a resident for physical therapy, and you have reason to believe that resident is incapacitated, mentally incapacitated as having difficulty

understanding your directions, cannot comply with what you ask, things of that nature, was it your practice to make note of that in one of these treatment encounter notes?

A: It is, if they have trouble.

Q: If there's no mention of those sorts of problems in one of these notes, is it your intent as the creator of the note to say that there was no significant problem with his mental competency?

A: Right.

Q: Now, when you arrived for the second session on January 14, 2012, why don't you just kind of walk me through what happened?

A: Okay. When I came in to see the gentleman, he was sleeping in the chair. So I assumed, simply because his eyes were closed and he didn't, you know, look or turn when I entered the room. And I just assumed he was sleeping. So I, you know, start just tried to wake the gentleman up. So that's going to be first my voice and then by tapping like, you know, tap him on the leg because you don't want to startle somebody and then progress up. But when I couldn't get him to arouse, then you

start thinking is he just asleep or is there something more I need to be concerned about. And the final bit in here speaks about shaking and a sternal road. A sternal rub is when you take your knuckles and you rub it on the person's sternum right here. So that's a very not pleasant experience. And we just usually use that in times when we're concerned is the individual arouseable or is something else going on. So that's what a sternal rub is. So when I couldn't get him to arouse to any of those things, then it just happened that at that time a CNA came in who was a certified nursing assistant. So I asked her to get the nurse. And so then I began to take the gentleman's pulse and make sure his breathing and all that was intact and fine at that point. So we wanted to be sure that it has just simply been, you know, a pass-out situation, that we wanted to get his legs elevated. So they assisted me to get him back into bed, and we in turn elevated his legs. And he, you know, when we got him down to starting to come around, but it wasn't kind of making sense as sort of I equate it to somebody who is groggy and they're

trying to wake up. But then he did, you know, right as the paramedics were getting there, he was able to be aroused and then he could speak appropriately. And with that too, you know, when I say appropriate, what I mean by that more so than just saying correctly is that when I ask somebody a question, they can respond to me correctly, but they may be quizzical in their response. For example, if I ask you your name, you know, you were just coming out of a pass-out situation or whatever, and you said, Mike Brackett, you know, I'm going to get a different connotation than if you said Mike Brackett? You know, it's correct, but yet it doesn't -- I wouldn't think as a professional that you were definitive and, you know, fully knowledgeable of what the scoop was. But he answered appropriately, you know, and seemed to do fine.

Q: But do you recall the names of the CNA or the nurse who assisted you?

A: I don't.

Q: Okay. Now, who called EMS? Was it you or somebody else?

A: It wasn't' me. So I don't know who.

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read it differently, but it says resident unresponsive?

A: Uh-huh (affirmative response). Yes.

Q: And it says therapy person Jane in the room with him. So that would be you?

A: That would be me.

Q: Do you know that signature right after that at the end of that line? It looks like it's Marsh or Marshall?

A: I'm sorry, I don't.

Q: I can't read that. All right. Then there's an entry for 6:30, remains unresponsive even to sternal rub. Dr. Jewell notified. And Dr. Jewell, he's sort of -- he's the doctor for this facility, Westminster?

A: Medical Director.

Q: And EMS was called at 6:30 according to this note. So you would have been in the room with him at or around 6:30 when the EMS was called?

A: Uh-huh (affirmative response).

Q: Is that right?

A: Yes.

Q: And then 6:40 answering simple questions. Oh, vital signs, that's what that means.

A: Uh-huh (affirmative response).

been placed back in bed because I go through my note in the order of which things occurred. So it shows positioned in bed, legs elevated. And then a repeat sternal rub elicited verbalization. So he started mouthing something, you know, verbiage, but it wasn't distinguishable. And then he began to speak coherently and was answering questions appropriately.

Q: All right. Who was asking the questions?

A: I was asking the questions.

Q: And what sort of questions did you -- if you remember what you asked him, that's fine.

A: I don't.

Q: If you have sort of your standard questions when you're trying to get somebody to respond, what would you have asked him that led you to conclude he was answering appropriately.

A: Basic orientation questions would be what I would normally ask somebody. That would be, you know, when you see an oriented, alert and oriented times three. That means person, place and time. So you're going to ask them those sorts of questions. Tell me what your name is. You know, tell me where you are. Can you tell

me what year it is? And then you can proceed from there. And you can also ask, you know, who the president is. That's another common one. Or, in addition, if you ever see an oriented times four, the fourth one will be to the circumstances. Like tell me what happened. Tell me why you're here. What brought you in today, you know, those sorts of things.

Q: All right. And so in response to your own questions, not something somebody else said but in response to your own personal interaction with him, he answered your questions, you say appropriately?

A: Uh-huh (affirmative response). Yes.

Q: And was that his status when you last saw him? When you left the room, his status was that he was awake, alert and answering appropriately?

A: Yes.

Q: Have you seen Mr. Tucker since then?

A: I have not.

Q: All right. He returned to Westminster a week later and remained. So you didn't run into him at all or any therapy after that?

A: Not that I'm aware of.

Q: All right. Thank you. That's all I have.

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF YORK) C/A #: 2012-ES-46-0579

IN RE:
THE ESTATE OF VINTON WILLIS TUCKER

Mary Jean Tucker Swiger,

Petitioner,

v.

Ben R. Smith and Margaret P. Kelly, As Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

DEPOSITION OF

KEITH MENES, M.D.

****

Wednesday, March 5, 2014
10:26 a.m. - 11:15 a.m.

The deposition of KEITH MENES, M.D. was taken on behalf of the Respondents at Piedmont Medical Center, 222 S. Herlong Avenue, 1st Floor Physicians Conference Room, Rock Hill, South Carolina, on the 5th day of March, 2014 before Sara L. Quattlebaum, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

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how much do you understand? It's probably very little even with a picture.

Q: Do you find that those sorts of patients will follow your recommendation? They figure you're the best source of information and they will generally, as a default, they will go along with what you recommend?

A: Yeah.

Q: Did you get the sense that that's what Mr. Tucker was doing?

A: Yes.

Q: Or was he actually processing some information and deciding how he wanted to go forward?

A: It was my impression that he was -- he couldn't process the information. But had he been alert and oriented times four, I think he would have been able to process the information.

Q: All right. Did Mr. Tucker communicate to you that he saw things that weren't there?

A: I have no idea.

Q: If he did that, would your note say something about it?

A: It would typically say something about it.

Q: All right.

A: And there's also that mention that he had --

the review of systems where he says intermittent dementia ranging from focal something and alert and oriented times one.

Q: And intermittent, is that your word?

A: Yeah, that was the family, the family's words.

Q: And so from a medical standpoint, does that tell you that he has good times and bad times?

A: Yeah.

Q: That he might be incapacitated -- he might have lack of capacity at certain times and maybe very lucid and competent at other times?

A: Uh-huh (affirmative response). Yeah.

Q: Okay. Did Mr. Tucker report to you during the meeting that he heard sounds that you didn't hear?

A: Not that I really recall.

Q: Was there anything about Mr. Tucker's speech, speech pattern that caused you to think he was incompetent?

A: No.

Q: Was he incoherent?

A: No.

Q: Was he disoriented?

A: No, not from my recollection.

Q: And if any of these conditions were present,

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A: Am I suppose to answer it?
MS. ANDERSON: And please note the objection for the record.
A: Can you restate that again?
Q: Do you have an opinion, based on your record and any recollection you have and any other record you may have looked at, do you have an opinion of Mr. Tucker's mental status as of January 15, 2012, the morning when you were --
A: Again, based on this, he was alert and oriented times two meaning he knew who he was, he knew where he was. Beyond that, I really couldn't say he knew much. He didn't know what time of the day, time of the year. Didn't know what the situation was. So that was as good as it got.
Q: When you say he didn't know what the situation was, what do you mean?
A: He doesn't know why he's in the hospital. He doesn't know why he has this bump here that's pulsating in his belly. He doesn't know why he has these bruises. Typically people would understand -- oh, I just bumped myself here. You know, that that -- so that's where you have to understand the context. And for my

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
COUNTY OF YORK	) Case No. 2012-ES-46-0579
Mary Jean Tucker Swiger,	)
	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)

DEPOSITION OF JAMES JEWELL, M.D.

ROCK HILL, SOUTH CAROLINA

OCTOBER 29, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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Q Read down here where it says possible sundowning; mild dementia with some possible sundowning.

A With possible sundowning, yes, correct.

Q What would that mean? Him having mild dementia what would that -- What would he be able to do at that point?

A With mild dementia, he would still be up and about and active, physically doing well that way. His mind, he would not be able to think as well. His cognitive function would be declining at that point. By cognitive function, I'm saying his reasoning ability, his ability to make decisions and things that like would be impaired to some extent. He might even possibly having some memory problems at that point where he is not able to remember, especially short-term things. He could probably remember long-term things well, but his short-term memory would be going. Then with the possible sundowning, that's saying that he would -- In the evenings, again, he might become more agitated, more confused, I guess, would be a way to put that, in the evenings. That's kind of a common thing we

will see with dementia patients, that they will have some sundowning.

Q If he had sundowning, Mr. Tucker, would that affect him more in situations that were not familiar to him. Would that be affected more so in an unfamiliar situation?

A I think in general dementia patients, if they're in a situation that's unfamiliar to them -- Let's say they're just admitted to the nursing home or something, it's an unfamiliar environment. They tend to be more confused at those times. If they go to the hospital, they tend to be more confused and that type of thing. So I guess my answer is, yes, to your question.

MS. ANDERSON - I would offer into evidence the notes that were taken -- It's a copy from admission on 12-13-11 through 1-14-12, at the top, as Exhibit 1.

MR, BRACKETT - I reserve my objections until the time of trial. I will just state right now that I object for lack of foundation and authentication and all that stuff.

Whereupon - Document marked as

it.

Q Having read the Last Will and Testament of Vinton Tucker and knowing that Vinton Tucker was diagnosed with dementia with possible sundowning, knowing what you know about dementia and knowing what you know about possible sundowning, would a person who is not a lawyer primarily practicing in probate law and estate planning, would a person who is 93 years of age, who had just been admitted to the hospital two or so hours prior, would a person be able to dictate this Will within 30 minutes?

A I would be surprised that given the situation you're explaining that Mr. Tucker -- that these would be his words on this paper. It's very legalistic in my opinion that way. I don't think he would be able to say things precisely in this manner. Now, whether he could have said something less flowery that way, possibly. I don't think these words would be his exact words. That would be my opinion.

MS. ANDERSON - Give me a few seconds.

Whereupon - A recess was taken.

MS. ANDERSON - I would like to offer into evidence the Last Will and

Q What is your go to medical treatise for questions related to dementia? If some situation pops up, and you need to go look at a resource someplace, and you've got it on a shelf in your office, what is that treatise?

A I can't think of one that I could specifically name for you right now.

Q Is there one that you go to more than others?

A Most of the things I have to look up are things I look up in medications per se, like a PDR type thing or something like that, specific medications.

Q Did you ever do a formal assessment of Mr. Vinton Tucker's mental status?

A I have to ask you what you mean by formal.

Q Did you administer a mini mental status exam or any similar type of exam yourself?

A Probably not.

Q If you did, would your notes, would your computer notes at your office reflect that?

A If I had, they would.

Q And you reviewed those notes before you came here today, and you don't recall seeing any reference to any ---

A I don't recall. Usually, mini mentals are

administered by the social workers at the facilities.

Q Assume for purposes of my question that Mr. Tucker was taken to Piedmont Hospital at approximately 7:00 p.m. on January 14, 2012.

A Okay.

Q He stayed in the emergency room until approximately midnight and then was discharged from the ER and was admitted to a patient room in the hospital.

A Okay.

Q During the course of that roughly five hours, he was seen by Doctor Jason Ratterree. Do you know Doctor Ratterree, the ER doctor at Piedmont?

A No.

Q And he also interacted with Doctor Marfo, a hospitalist at Piedmont. Do you know her?

A Not personally. I think I've seen her name on things, but I don't know her.

Q Also assume for purposes of this question that both Doctor Ratterree and Doctor Marfo completed the standard -- They filled out the standard sort of records that they make for those sorts of events, and each of them

determined that Mr. Vinton Tucker was competent.

A Okay.

MS. ANDERSON - I object. Calls for speculation.

BY MR. BRACKETT

Q Assume for the question.

A Okay.

Q Now, would that surprise you, knowing what you know about -- Whatever you've expressed about Mr. Tucker, would that surprise you that he might be lucid and competent that evening?

A No, not necessarily.

Q You're not saying then, that in your opinion, Mr. Tucker was incompetent twenty-four hours a day, seven days a week?

A That's correct.

Q He very well could have been lucid on certain days or at certain times of certain days and less lucid at others?

A That's correct.

Q Isn't it a case that that's fairly common for someone with what's been called mild dementia?

A That's correct.

Q Do you have enough information, as we sit here

today, to give an informed opinion regarding Mr. Vinton Tucker's mental competency on January 14, 2012?

A No.

MR. BRACKETT - Thank you. That's all.

MS. ANDERSON - I just have a few follow up questions.

Further Examination: (By Ms. Anderson)

Q Just because you don't have any recollection of seeing Mr. Tucker, would that you mean that you did not see him?

A I think the answer to that is no.

Q If you're listed as the physician on the Westminster Tower document, is it safe to assume that you visited with Vinton Tucker?

A Correct.

Q At some point you did, in fact, did have a meeting with Mr. Tucker?

A Yes.

Q If he had been admitted to Westminster Towers from December 2011 until May of 2012, can we assume at that point you visited with him more than one time?

A I would assume I would have seen him two or three times during that time frame based on as

long as he hadn't been discharged to hospitals and stuff like that. Roughly, I would say at least two or three times I should have seen him.

Q Understanding all of what you've been asked today trying to get a picture of what is going on here, if a person has been oriented times one or oriented times two, would that person even, under those circumstances, having been admitted to the hospital, using Mr. Brackett's scenario, admitted to the hospital at seven o'clock p.m. for episodes of syncope, having mild dementia and having been admitted to the hospital at seven o'clock. At nine o'clock, would that person -- Is it likely, even given periods of lucidness, is it likely that person would be able to dictate a Will with this type of language that I hand to you, Exhibit 2.

A Again, I would be surprised this language would be coming from the person. Again, I guess it would depend on the person themselves, whether they were legalese oriented that way. I'm not saying that they wouldn't necessarily understand what was here. I would be very surprised if they came up with these words that

way. I'm not saying that they don't necessarily understand it, but just wouldn't come up with that themselves.

MS. ANDERSON - Thank you Dr. Jewell. No further questions.

Further Examination: (By Mr. Brackett)

Q Syncope is not necessarily a competency problem, is it? Isn't that a physical loss of consciousness issue?

A Correct. Syncope is simply passing out. I would say it that way. Competency -- I probably shouldn't go into this, but I will for just a second. As a physician, I don't decide competency. That's for a judge to decide. That's my understanding. You as lawyers can correct me on that. I can examine a patient and decide whether or not I feel they can make an informed decision on something, whether they can give informed consent for like surgery or whatever. Competency, I don't think a physician can say a person is competent or incompetent. I think that -- I was always explained to that was a judge's thing. I know we use the term competency loosely and tend to say those types of things.

Q Do you recall ever seeing Mr. Tucker when he was in the hospital?

A No. I didn't.

Q You didn't?

A I know I did not.

Q So if he spent a week at Piedmont Hospital, you would not have seen him that week?

A That's correct.

Q Can you describe Mr. Tucker for me?

A He was an elderly gentleman. I think he was fairly tall and thin, not a real heavy man. I think he had kind of grey-ish hair, but that describes a lot of my patients I'm afraid. That's about all I can say. I'm admitting I don't remember him real well, no, I do not.

MR. BRACKETT - Thank you. That's all.

MS. ANDERSON - Nothing further.

WHEREUPON - Deposition concluded at 4:25 P.M.

Signing of Transcript of Deposition By

Witness Reserved

Shirley Dallas-Gerrald, CVR-CM
Notary Public/Court Reporter

(Recorded deposition tapes retained fifteen days from date of certification or until transcript has been signed in cases when signature is not waived.)

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
COUNTY OF YORK	) Case No. 2012-ES-46-0579
Mary Jean Tucker Swiger,	)
	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)
	)

DEPOSITION OF STEVE KELLY

ROCK HILL, SOUTH CAROLINA

OCTOBER 22, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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deposition?
A. I dressed and came over here.
Q. What is your address?
A. It's 1290 Cole -- C-O-L-E Avenue, Rock Hill, South Carolina 29732.
Q. And you've been residing there for how long?
A. About 18 years.
Q. Are you employed?
A. Self-employed, and I'm about three-fourths retired.
Q. And what do you do as self-employed?
A. I draw house plans now.
Q. You draw --
A. I draw house plans.
Q. Oh, you draw house plans.
A. For people to build houses by, when they have contractors do the work.
Q. And is that what you did, primarily, before you became partly retired?
A. Yes.
Q. And you're married, you mentioned, to Margaret Kelly?
A. That's correct.
Q. And what is your relationship to Vinton Tucker?

A. I don't know.
Q. Was that you who got the phone call?
A. No.
Q. Who got the phone call?
A. It was Margaret or Libby. I don't know which.
Q. Okay.
A. I know we were at dinner and there was a phone call and we said we got to go, Uncle Vinton is sick.
Q. Would Libby have gotten the phone call?
A. I don't know who got the phone call.
Q. Who can you --
A. It probably was Margaret. The people at Westminster would probably call Margaret. I feel sure that's the case. I'm not positive that's the case who got called, but I would think it would be Margaret, because she's the one that they would usually call about him.
Q. And let me ask you one other question about that. Did you witness Vinton tear up the Will that he had after --
A. I don't know anything about that Will or what happened to the Will or anything.
Q. But you do know that -- You said that you heard Edward Knox tell Vinton to tear the

certain things happened, I can't tell you that, because I wasn't worried about the time. More worried about Uncle Vinton.

Q. When you got into the hospital, where was Vinton?

A. Vinton was in an examining room in the emergency area of the hospital, at Piedmont Medical.

Q. And was anyone else there when you got into the room?

A. When we got to the room, there was, I think, two other people with the hospital that was in the room with him, at the time we got -- when we walked into the room.

Q. And then --

A. And it was kind of an open sort of room with big glass and all.

Q. But there was no other family members in the room when you got there?

A. Well, I think the three of us, Libby, Margaret and myself, got there, and I don't think -- I didn't see any other family members then, no.

Q. And how did Vinton -- At what point in time did someone mention a Will on that night?

A. Vinton mentioned it after the doctors had talked to him about the aneurysm and told him, Vinton, this thing could rupture at any time and you're not going to make it. You might last a long time. It's a slow-growing thing, as best we got. The slow-growing was either said then or the next morning. But they indicated to him they couldn't tell him when it was going to become really serious, but they were worried about it, really worried about it. And so that kind of registered with him pretty good that he had a real problem.

Q. And, at what point in time, after you heard the news, did he mention a Will?

A. I don't think it was very long after that he talked -- he asked Margaret -- He kind of was real close to Margaret, and he depended on her to kind of help him with things. She's done a lot of different things for him and --

Q. Like what?

A. Well, even to the point of he would ask her -- if he needed certain kinds of clothes, he'd tell her what he needed, and she would get it for him. So he kind of depended on her to

kind of look after things for him. So he asked her, would you help me write a Will? She said, I'll help you write a will. Let me get some paper. And so she wound up doing the writing of the Will for him, as he told her what to say.

While was doing that, we talked about, you're going to need a witness, and we know that people in the hospital will not witness for you. That's always been my understanding that don't ask doctors and nurses to be a witness. So I said, well, if we got to have some witnesses, I'll call Danny and Becky, because that's probably the closest people we can get to come over here.

Q. Okay.

A. So I went out and called Danny and Becky and told them, we need you to come to the hospital. Uncle Vinton is working on a Will, and I know we're going to have to witness it.

Q. And where did the language come from that was on the Will?

A. Well, from Uncle Vinton.

Q. And Uncle Vinton --

A. He's the one that dictated it to Margaret

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE PROBATE COURT

IN RE: The Estate of Vinton Willis Tucker

Mary Jean Tucker Swiger,

Petitioner,

vs.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

C/A #2012-ES-46-0579

COPY

DEPOSITION OF DR. JASON RATTERREE

****

Wednesday, September 17, 2014
2:20 p.m. - 2:55 p.m.

The deposition of **DR. JASON RATTERREE**, taken on behalf of the Respondents, at the law offices of Foodman, Hunter & Karres, 10800 Sikes Place, Suite 105, Charlotte, North Carolina on the 17th day of September, 2014, before Judy R. Urso, Certified Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

to do?

A: Yes.

Q: I mean you don't, you don't have to consult and get permission from somebody else to be making those decisions?

A: No.

Q: And how does a particular patient manage to get linked up with you in the emergency room? Is it just you happen to be available when, when this patient's next in line?

A: Correct. There are three of us there, and it's sort of, you know, next one up whenever you can see a patient.

Q: All right. Okay.

MR. BRACKETT: Let's mark that, please.

(Respondents' Exhibit Number One was marked for identification purposes.)

Q: Dr. Ratterree, I'm going to show you Exhibit One. In the upper right-hand corner it indicates that there are 30 pages. These are medical records that were provided by whoever keeps the medical records at Piedmont on Mr. Vinton Tucker, and the numbering was done by the hospital, not by me. On page one of 30, up toward the upper left it says "Physician caring for patient, Jasper Ratterree, MD." Is that

.... if it doesn't say that it happened in the record, it didn't happen. Is that your experience?

A: Yes.

Q: I'd like for you if you would, let's just sort of walk through this, and I'll tell you the, the issue at hand has to do with Mr. Tucker's mental status generally at the time of when he was in the emergency room and when he was later admitted to the hospital, later that evening, so, so that's sort of just to give you some context of what we're talking about here. If you look on page one of 30 .... and by the way, does all the information on these 30 pages come from you, or do other staff members contribute?

A: Oh, other staff members, yeah.

Q: Can you determine from looking at it what stuff you placed in the record and what stuff other ....

A: Oh, it's, it's initialed, yeah.

Q: Okay. And do you certify the entire record?

A: Just my part of it.

Q: All right. Where .... first page where it says triage, was .... maybe I ought to approach it this way. What .... how can I tell from reading the document, reading these medical records what, which information you placed in the record and which

information other staff people placed in the record?

A: Mine would start on page two right at HPI.

Q: History of present illness?

A: Yes. Correct.

Q: Okay. Now and that would run over to, to where?

A: To page three. It stops at orders.

Q: Okay.

A: And then it would pick back up on page 26, a progress note.

Q: All right. Let's start on page two, history of present illness, and I'll give you a second to glance over that if you want, if you want to, if it helps you.

A: Okay. I'm ready.

Q: All right. It says "The initiation of the medical screen-in exam January the 14th, 2012, 1915 or 7:15 p.m., is that correct?

A: Correct.

Q: So would that have been generally the first contact you had ....

A: That's the minute I saw him.

Q: .... with Mr. Tucker? All right. And then when it says medical and surgical history obtained, did you, did you get this from Mr. Tucker?

A: What that is in order to start an HPI, there's some

things you check on the record to get the computer to progress forward. You do them all, but it's, it's something that you do in the course of the whole visit, but it's printed up front.

Q: Okay. All right. Down at the bottom there, page two, history of present illness, you have several different components, I guess, of the exam, head, eyes, neck, cardio, on and on, and then you get over to the top of page three, there's an entry for psychiatry. Do you see that?

A: Correct.

Q: And this would have been an entry that, that you made?

A: Correct.

Q: And it says what for the record?

A: "oriented in time, place, and person. Grossly appropriate mood and affect."

Q: All right. Now you as an emergency room physician, tell me what that means in layman's terms as far as his mental status.

A: He was totally normal.

Q: So he was competent?

A: He knew where he was at that time and did not appear to be having any abnormal behavior and was conversational with me.

Q: All right. So does this reflect your opinion at the time based on your interaction with him?

A: Yes.

Q: And so you're conversing with him and explaining things to him, and you thought his responses were appropriate?

A: Correct.

Q: Is that a fair statement?

A: Yes.

Q: All right. If you had any idea at the time, if you had any thought that Mr. Tucker may have been mentally incompetent, would your record reflect that?

A: What do you mean mentally incompetent?

Q: Well, that he's not answering your questions. He seems to be in some altered state or something that he's ...

A: Correct. That would immediately been put down.

Q: And if someone else was giving you information other than Mr. Tucker, would your notes have reflected that, that, that the information's coming from some third party?

A: You have to click that at the top part of the chart which is not clicked.

Q: All right.

A: I mean that would, that would be up at that top under medical and surgical history obtained and I think obtained from somebody else.

Q: Okay. Would there be any other place in your record, in any of these 30 pages that would, that would relate to Mr. Tucker's mental status at the time he was under your care?

A: If I would have made further comment, it would have been under these progress notes, but I didn't.

Q: You ordered .... did you order a CT scan or an MRI?

A: CT.

Q: CT scan. Okay. And what did, what did .... what was the purpose of the CT scan? What were you looking for?

A: He, as I'm reading here, he had fainted, and we were really looking for internal bleeding because his hemoglobin had declined quite a bit.

Q: Okay. And as a result of the CT scan, and I take it the CT scan is read by a ....

A: Radiologist.

Q: .... radiologist? Would that have been Dr. Soderstrom?

A: Correct.

Q: Okay. And I direct your attention to page 25 indicating that Mr. Tucker was found to have a

distal abdominal aortic aneurysm?

A: Correct.

Q: You see that? Does that help you remember this guy? I mean I know you see, you see people in all sorts of conditions. I'm just curious whether ....

A: I actually remember her as the, as the memory.

Q: You're pointing, you're pointing to Ms. Kelly?

A: Correct. More than I .... you know, the case is coming back, but I do remember talking, you know, with Ms. Kelly.

Q: All right. And do you recall who, who broke the news to Mr. Tucker that he had this aortic aneurysm?

A: I'm trying to remember whether I told her first and then we both went in, but I talked to him about it.

Q: All right.

A: But as far as I can remember.

Q: Do you have any recollection of whether he, he knew he had this condition previously, or was this, was this something that he was learning for the first time?

A: I can't remember that.

Q: All right. So other, other than the aneurysm, do your records reflect any other particular condition that would have caused him to be in your emergency room that day?

A: Other than the syncope and low hemoglobin, no.

Q: Can you tell at what time he was I guess discharged from the emergency room and admitted to the hospital?

A: It's usually right here, but I cannot tell. Let's see. The only thing I have is this last vital signs at 2339 which they have to do right before the patient leaves the ER. Here it is right here. Left the ER at 0001, Sunday, January 15th. That's midway down on 29.

Q: Okay. So his moving from the ER up to a regular hospital room would have been approximately midnight?

A: Correct.

Q: Saturday night? Sunday morning?

A: Correct.

Q: All right. And after, after he leaves the ER, once he's discharged and moves on, do you then have any continuing responsibilities with him?

A: No.

Q: Now did you know a Dr. Marfo at the time?

A: Yes.

Q: And what was, what was her relationship to the hospital or the ER or where did she work?

A: She was our night hospitalist. They have people who

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF YORK) C/A #: 2012-ES-46-0579

IN RE:)
THE ESTATE OF VINTON WILLIS TUCKER)
)
Mary Jean Tucker Swiger,)
)
Petitioner,)
)
v.)
)
Ben R. Smith and Margaret P. Kelly,)
As Personal Representatives of the)
Estate of Vinton Willis Tucker,)
)
Respondents.)

DEPOSITION OF

MAGDALENE MARFO, M.D.

****

Wednesday, March 5, 2014

9:29 a.m. - 10:18 a.m.

The deposition of MAGDALENE MARFO, M.D. was taken on behalf of the Respondents at Piedmont Medical Center, 222 S. Herlong Avenue, 1st Floor Physicians Conference Room, Rock Hill, South Carolina, on the 5th day of March, 2014 before Sara L. Quattlebaum, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

A: Yes.

Q: And tell me about the mechanics of how this works, about how do you create a record for somebody like Mr. Tucker who has come -- who you have seen in the emergency room.

A: Okay. So the patient is evaluated by the emergency room physician. And, you know, a decision is made that the patient needs to be admitted. So then I come in and I go and see the patient -- Mr. Tucker. And I talk with him. I do a history and a physical.

Q: All right.

A: So I talk with him and I examine him. And then after that I do a dictation, I perform the dictation. And then it gets transcribed.

Q: All right. And then do you review it before it gets finally approved? I mean, do you review the transcribed record for accuracy?

A: Not on that same day, but later on.

Q: But eventually you review it and sign off on it?

A: Yes.

Q: Now, based on your answer to me just now, it sounds as though you were not the first doctor to see Mr. Tucker that day, that there may have

been an emergency room physician?

A: Yes.

Q: Do you know who that would be?

A: No, I wouldn't.

Q: Do you recall seeing another hospital record that would indicate or disclose who the first ER doctor was who saw Mr. Tucker?

A: Yes, the emergency room records.

Q: Okay.

A: Yes.

Q: All right. So for you -- all right. Let's talk then about Mr. Tucker, specifically. The information that you show here about admitting diagnoses, where did that information come from? Did you come up with that yourself or was that already in existence someplace and you just plugged it in?

A: No. I come up with it myself.

Q: Okay. All right. Now, the first one there that you listed as -- I think that is pronounced syncope?

A: Yes.

Q: Is that correct?

A: Yes.

Q: And tell me what the means medically, if you

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can put it in layman's terms.

A: Yes. It means passing out.

Q: All right. Just losing consciousness?

A: Yes.

Q: All right. Does it mean a temporary loss of consciousness or can it last a long time?

A: It usually means temporary.

Q: Okay. Then under presenting complaint you wrote, "syncopal episodes times several minutes."

A: Yes.

Q: Do you know, did that information come from Mr. Tucker?

A: Yes.

Q: So were you having a conversation -- based on your record, were you having a conversation with Mr. Tucker?

A: Yes.

Q: And was this taking place in an examination room or in a hospital room or still in the ER? Where were you physically on the premises when you were having this conversation?

A: I was in the emergency room in one of the examining rooms in the emergency room where Mr. Tucker was.

Q: Do your records reflect that anyone else was in the room with you other than you and Mr. Tucker?

A: No. My records don't reflect that, no.

Q: All right. And do you have a recollection after having looked at your record of there being anybody else in the room?

A: No.

Q: If a third party had been in the room and that third party was answering your questions for Mr. Tucker, would your record disclose that fact?

A: Yes.

Q: All right. So if there is no mention of a third party providing all this information to you, what does that mean to you if your record doesn't say that?

A: It means that the information was given to me by the patient himself.

Q: Okay. Now, under history of present illness there is a big paragraph there and a lot of stuff in there.

A: Uh-huh (affirmative response).

Q: A lot of it having medical -- relevance to medical things. Did all that information come

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from Mr. Tucker or are you now looking at some other source of information?

A: Well, typically I review the emergency room records. And then I talk with the patient. And then I formulate my history of present illness.

Q: Now, as I read this history of present illness, it appears that he -- Mr. Tucker had a CT scan, not only of his brain, but also of his, I guess, abdominal region.

A: Yes.

Q: And that would have been ordered by a physician other than you?

A: Yes.

Q: Would that have been ordered by the emergency room physician or by somebody else?

A: Typically it would have been the emergency room physician.

Q: All right. And what is this -- strike that. All right. Does your record recall that you had a conversation with Mr. Tucker about the abdominal aneurism that had been uncovered by the CT scan?

A: No. My record doesn't state that.

Q: All right. Had he already been admitted to the

hospital when you saw him or was it you who sort of put that into motion?

A: Yes, I put that into motion. He hadn't been already admitted.

Q: Okay. All right. And how do you get assigned -- how did you get assigned to see Mr. Tucker? If there is an ER doctor and he's ordered a CT scan, how does it happen that you, then, get assigned to Mr. Tucker? How does that work?

A: The hospital's group have some physicians in the community who met. And he was coming under one of the physicians. He was coming from the nursing home. And we admit for the nursing home physician. So that's how I come to get assigned to him.

Q: And the nursing home physician is identified as Dr. Jewell; is that correct?

A: Yes. Yes.

Q: Okay. All right. Now, if you go to Page 2 of your record, under social history, can you tell me as best you can determine where that information in the social history section came from?

A: It would come from both -- from both the -- from both the emergency room record, the

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nursing home record and then my talking with the patient.

Q: Okay. So at the time of your first meeting with Mr. Tucker, did you have available to you medical records from the nursing home, from Westminster Tower?

A: I do not recall. Sometimes we do and sometimes we don't.

Q: All right. Would you have had -- at that time would you have already had some medical records from the ER doctor that had seen him previous to you?

A: Yes.

Q: And what sort of record would you normally have available to you from the prior doctor?

A: From the emergency room doctor?

Q: Yes.

A: From the time the patient arrives in the emergency room and he is being evaluated by the physician, he puts down his own medical history. The nurses put down the medical history, they put down all the blood tests that are done and other tests that are done, medications that are given.

Q: Do you have any way of determining from this

record approximately how long you would have been interacting with Mr. Tucker at that time?

A: No.

Q: Would this have taken 30 minutes, an hour?

A: Without -- yeah, more than 30 minutes, yeah. From five minutes to an hour usually for the history and physical.

Q: If the date that you -- date and time that you dictated the record, which is at January 14, 2012 at 10:38 p.m., if you are going off of the dictation time, what would your estimate be for how much time passed between the time you did your stuff with Dr. Tucker (sic) and the time you dictated it into the system, what would the normal time elapsed be?

A: I would say maybe an hour and a half to two hours, yes.

Q: Okay. All right. So let's go back then to Page 2 under review of symptoms. I notice you say here, patient said, patient denies, patient denies. Was Mr. Tucker providing that information to you?

A: Yes.

Q: So you are recounting here what Mr. Tucker did and said to you in your presence?

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A: Yes.
Q: All right. And if somebody else in the room were providing that information to you, would your record indicate that?
A: Yes.
Q: Then under physical examination, now all these things under physical examination, were these procedures administered by you or did you have a nurse or a tech or somebody else in the room doing this? Or were these things you did personally?
A: These things I did personally.
Q: All right. And then I want to go down to the last entry there under physical examination under central nervous system. Is this a currently awake oriented answering all questions appropriately, is that an entry that you made based on your conclusions?
A: Yes.
Q: To a reasonable degree of medical certainty, those were your opinions at the time of Mr. Tucker's neurologic state or mental state; is that a fair statement?
A: Yes.
Q: All right. What's -- when you finished your

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
COUNTY OF YORK	) Case No. 2012-ES-46-0579
Mary Jean Tucker Swiger,	)
	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)
	)

DEPOSITION OF DANNY J. KELLY

ROCK HILL, SOUTH CAROLINA

OCTOBER 22, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

DALLAS REPORTING
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803-328-9640/ TOLL FREE 1-877-871-6363

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Q. So, at no point in time did you speak with your wife earlier about the deposition.
A. Nope.
Q. How did you prepare for today's deposition?
A. I just came over here.
Q. And is your address 466 South Shiloh Road?
A. That's correct.
Q. And how long have you -- Have you been residing there 25 years?
A. I've been there that long, at least.
Q. And where are you employed?
A. Rock Hill School District.
Q. And how long have you been employed there?
A. Fifteen years.
Q. Fifteen years. And what is your title?
A. I'm a plumbing technician.
Q. And you are married to Rebecca Kelly; is that correct?
A. That's right.
Q. And what is your relationship to Vinton Tucker?
A. What is what?
Q. Your relationship to Vinton Tucker.
A. I have no relation.
Q. Have you ever met him?

STATE OF SOUTH CAROLINA	) IN THE YORK COUNTY
	) PROBATE COURT
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	)
Petitioner,	)
	)
vs.	)
	)
Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,	)
	)
Respondents.	)

DEPOSITION OF ELIZABETH PURSLEY HAIGLER

ROCK HILL, SOUTH CAROLINA

OCTOBER 22, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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A. Yes.
Q. And where was Vinton?
A. He was in one of the emergency room little examination rooms.
Q. Did you speak to any of the nurses about Vinton when you arrived at the hospital?
A. No.
Q. Did you observe anyone else speaking to the -- I mean, the nurses or anyone, when you arrived at the hospital?
A. I saw medical people coming and going.
Q. Did anyone talk to him?
A. I was not in the room the whole time.
Q. Where were you?
A. I would go outside. I smoke, so I would go outside, periodically, and have a cigarette and walk around.
Q. And were you in the room when Vinton started talking about his Will?
A. Yes.
Q. And what did he say?
A. That he was ready to do a Will. But, prior to that, he had been told by the doctor that he had this large-size abdominal aneurysm. Well, Margaret and I were told that first,

and then the doctor followed us --

Q. So you did talk to the doctor.

A. I listened to what the doctor said. I won't say I actually had -- I was there with Margaret when the doctor told us about this aneurysm.

Q. And how long, after he was told about the aneurysm, did Vinton mention the Will?

A. I don't know a specific time.

Q. Was it a long period of time?

A. I don't understand. What do you mean a long period of time? Hours or minutes or --

Q. Hours or minutes or --

A. I don't remember how much time.

Q. And what was Vinton's state? When he was told that he had an aneurysm, how did he appear?

A. He appeared to be like surprised, that he had no idea that he had the aneurysm, and I think he was just very -- kind of surprised and a little shocked to know that he had that medical condition.

Q. And then he went in to talk about his Will; is that correct? He started talking about his Will?

A. Yes.

Q. And what did he say he wanted to do?
A. He just said to Margaret, he said, I think I need to do a will, and will you do it for me? Will you write it for me, or something, those words.
Q. Okay. And then who wrote the Will?
A. Margaret.
Q. And where did the language come from?
A. What did the --
Q. The language off the Will. The Will has been marked as -- Have you seen a copy of the Will?
A. I have seen it briefly.
Q. And the Will is Exhibit 4, and is already placed into evidence, and that's a copy of the Will. And who wrote the will? Who wrote the Will?
A. Margaret.
Q. And where did the language come from for the Will?
A. Just basic information that she had.
Q. From where?
A. I don't really know.
Q. So you didn't hear -- Who gave the language for the Will? Was there anyone there to

STATE OF SOUTH CAROLINA

COUNTY OF YORK

AFFIDAVIT

Personally appeared before me the undersigned witness who being duly sworn deposes and says that:

1. I am Allison Matthews. From December, 2011 to May, 2012, I worked in the Marketing Department at Westminster Towers in Rock Hill, SC.

2. Vinton Tucker was at Westminster Health & Rehab from December 13, 2011 to May 10, 2012 with an exception of a brief hospital stay of 6 days in January.

3. He and his family toured Westminster Towers Independent Living Apartments. It was his family's expressed intention for him to become a permanent resident but his health failed and he died in May, 2012. Mr. Tucker did not object to or contradict his family's expression of intent.

Allison Matthews

Sworn to before me this 18

Day of December, 2014

B Christensen

Notary for South Carolina

York, SC

My Commission Expires: 4-8-2021

B Christensen

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FOR REGISTRATION J. DAVID GRANBERRY
REGISTER OF DEEDS
MECKLENBURG COUNTY, NC
2011 NOV 22 02:39:55 PM
BK:25905 PG:493-495 FEE:$26.00

INSTRUMENT # 2011134066



2011134066

STATE OF NORTH CAROLINA

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that, pursuant to the provisions of Chapter 32A of the North Carolina General Statutes, I, VINTON W. TUCKER of North Carolina, make, constitute and appoint BEN RUSH SMITH of 2024 Filbert Highway, York, South Carolina 29745 to act as my true and lawful attorney-in-fact for me and in my name and place. My attorney-in-fact shall have to power to draw checks upon my bank accounts that I may now or hereafter have in any banking institution; to deposit or withdraw funds which I now or may hereafter have in any checking or savings account; to enter any safety deposit box which I may have at any bank or any other place; to sell any stock certificate or to sell any stock or other personal property that I may now or hereafter own; to borrow money in my name; to secure any loan by any security instrument; to file tax returns; to sell and convey real estate upon such terms and conditions as my attorney sees fit; and to execute leases and rent any property that I may now or hereafter own, giving and granting upon my said attorney full power and authority to do any and every act that I could do if personally present and hereby ratifying and confirming all that said attorney shall do or cause to be done by virtue hereof. My attorney-in-fact shall keep full and accurate records of all transactions for me as my agent and of all my property and the disposition thereof, and shall render to me, if competent, or to my nearest living relative if I shall be incompetent or incapacitated, at least annually, inventories and accounts of all transactions of my attorney done in my behalf; and to the extent that I am able to do so, I hereby relieve my attorney of the responsibility and duty of filing any reports with any court. I further authorize my attorney-in-fact to provide for my medical care, to sign consents for treatment, to review all medical information, to employ or discharge any health care facility or nursing residential facility. This Power of Attorney shall not be affected by my subsequent incapacity or mental incompetence and shall remain in effect until death or until it is revoked by written instrument.

This Durable Power of Attorney will replace any existing Power of Attorney which may be in existence as of this date.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17 day of Nov, 2011.

Vinton W Tucker (SEAL)
VINTON W. TUCKER

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

On this 17 day of November, 2011, personally appeared before me the said named VINTON W. TUCKER, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged that he executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

Brandon M. Cooper
Notary Public

My commission expires: June 17, 2015

BRANDON M COOPER NOTARY PUBLIC UNION COUNTY, N. C. My Comm. Exp. June 17, 2015

My commission expires: June 17, 2015

DRAWN BY AND MAIL TO:
H. Edward Knox
Knox, Brotherton Knox and Godfrey
P. O. Box 30848
Charlotte, North Carolina 28230-0848

DRAWN BY AND MAIL TO:
H. Edward Knox
Knox, Brotherton Knox and Godfrey
P. O. Box 30848
Charlotte, North Carolina 28230-0848

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STATE OF SOUTH CAROLINA)
) DURABLE POWER OF ATTORNEY FOR HEALTH CARE FOR
COUNTY OF)
_____

1. DESIGNATION OF HEALTH CARE AGENT

I, Winton W Tucker, hereby appoint:
(Principal)

Margaret P. Kelly
(Agent)

1290 Cole Ave, Rock Hill, SC 29732
(Address)

Home Telephone 803 325-8445 Work Telephone 803 984-2681 8445
as my agent to make health care decisions for me as authorized in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence.

3. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below. Accordingly, unless specifically limited by Section E, below, my agent is authorized as follows:

A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;

B. To authorize or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause my death;

C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;

D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a

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facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my Agent, or to seek actual or punitive damages for the failure to comply.

E. The powers granted above do not include the following powers or are subject to the following rules or limitations: _____

4. ORGAN DONATION. (INITIAL ONLY ONE)

My agent may _____; may not NWP consent to the donation of all or any of my tissue or organs for purposes of transplantation.

5. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL).

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

6. STATEMENT OF DESIRES AND SPECIAL PROVISIONS.

With respect to any Life-Sustaining Treatment, I direct the following: (INITIAL ONLY ONE OF THE FOLLOWING 4 PARAGRAPHS):

NWP (1) GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

_____(2) DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

b. if I am in a state of permanent unconsciousness.

OR

_____(3) DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

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_____(4) DIRECTIVE IN MY OWN WORDS: _____

_____

_____

7. STATEMENT OF DESIRES REGARDING TUBE FEEDING.

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that. (INITIAL ONLY ONE)

VWT I do not want to receive these forms of artificial nutrition and hydration, and they may be withheld or withdrawn under the conditions given above.

OR

_____ I do want to receive these forms of artificial nutrition and hydration.

IF YOU DO NOT INITIAL EITHER OF THE ABOVE STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO ACT TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

8. SUCCESSORS:

If an agent named by me shall die, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named.

A. First Alternate Agent: (Ben Smith)
Address: 617 Filbert Hwy York S.C. 29745
Telephone: (803) 684-9896

B. Second Alternate Agent: Edward Moore
Address: 5904 Muirfield Dr., Greensboro, NC 27405
Telephone: 336-279-8228
(C) 336-662-6790

9. ADMINISTRATIVE PROVISIONS.

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

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10. UNAVAILABILITY OF AGENT.

If at any relevant time the agent or Successor agents named herein are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate court, or surrogate make those decisions in accordance with my directions as stated in this document.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on this 8th day of February

My current home address is: 831 Mc Daw Drive
Rock Hill, SC 29732

Signature: Vinton W Tucker
Print Name: VINTON W TUCKER

WITNESS STATEMENT

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence.

I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his/her decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1:
Signature: Marcy Thomas, MSSW Date: 2/8/12
Print Name: Marcy Thomas Telephone: 803-984-7177
Residence Address: 1136 McKinnon Dr.
RH, SC 29732

Witness No. 2:
Signature: Dana L Adams Date: 2/8/12
Print Name: Dana L Adams Telephone: 803-329-4603
Residence Address: 229 Campsite Rd,
Rock Hill, SC 29732

I, Vinton Willis Tucker, being of sound mind and aware of my decisions, make this my last will and testament.

I wish to leave all of my worldly possessions and property to the twelve first generation nieces and nepheus of my late wife Edith Pursley Tucker to be divided equally.

I want Ben R. Smith and Margaret Pursley Kelly to be appointed as co-executors of my estate. They should be compensated by the estate at the going rate. They shall not be required to give bond.

I direct my executors to settle all of my debts in a timely manner.

This will is to take precedence over any and all wills which I may have signed in the past.

The names of my late wifes nieces and nepheus are listed on the reverse side of this document.

VWT

VINTON Willis Tucker

witness

witness

Sworn before me this 14th day of January 2012. Edward Kelly

It was in the presence of and witnessed
Vinton Wells Tucker sign both this, his last
will and testament

Edward Kelly Notary Public
for SC

Names of my late wifes first generation
Nieces and nephews

Rudolph Pursley
Elna Pursley DeVinney
Ada Ford Pursley - wife of Raymond Pursley - deceased nephew
Carolyn Novak
Martha Davis
Margaret Kelly
Elizabeth Haigler
Bernie Armstrong
Johnna Young
Henry M. Faris
Edward Moore
Ben R. Smith, Jr.

Witness: Nancy Kelly
Witness: Ronald A. Kelly
Vinton Wells Tucker

Sworn to before me this 14th day of January
2012 Edward Kelly, Notary Public for SC
My Commission expires 2-17-2014

FILED/RECEIVED
2012 MAY 17 PM 3:08
JUDGE OF PROBATE
YORK COUNTY, SC

This instrument prepared by:
J. Michael Sharman, Virginia State Bar Number 29651
Commonwealth Law Offices, P.C.
246 E. Davis Street, Suite 200
Culpeper, Virginia 22701

DURABLE GENERAL POWER OF ATTORNEY

I, Mary Jeanne Tucker Swiger, of Unionville, in the County of Orange, Virginia, appoint my daughter, Janet Loeffler to serve as my agent (attorney-in-fact) under this general power of attorney. I hereby revoke all powers of attorney I have granted before this date.

I. Durability

This power shall not terminate on disability of the principal, and such disability shall not affect the authority herein granted.

II. Inducement to and Protection of Third Parties

To induce any third party to recognize the authority of my agent to act on my behalf hereunder, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument may act hereunder, and that limitation, amendment, revocation or termination hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such revocation or termination shall have been received by such third party, and I for myself and for my heirs, executors, legal representatives and assigns, hereby agree to indemnify and hold harmless any such third party from and against any and all claims or liability that may arise or be asserted against such third party by reason of such third party having relied on the provisions of this instrument. Any person who deals with my agent shall have no responsibility or duty to inquire into, determine, or assure the proper disposition or application of funds or property in any transaction with my agent.

Without limiting the generality of the foregoing paragraph, and as an amplification of my intention to save any third party harmless from any and all loss, and to induce any third party, including but not limited to any bank, seller, vendor, purchaser, securities broker, real estate broker, custodian, lender, securities or other transfer agent, taxing authority, or governmental agency, to rely upon the agency conferred in this instrument, I warrant and represent that any such third party may, in the absence of actual knowledge to the contrary, rely upon any affidavit which my agent may make regarding but not limited to:

A. the present, effective existence of my agent's powers under this instrument, and that none of the same has been limited, revoked, or modified;

B. the scope of my agent's authority under this instrument,

C. my legal capacity to execute, acknowledge, seal and deliver this instrument, and the fact that I executed, acknowledged, sealed and delivered the same in accordance with law, and

M. J. T. S.

D. in accordance with the authority conferred under paragraph number 15 of this instrument, the lawful substitution of any person or entity to act as agent for me or the appointment of any person or entity to act as ancillary agent for me, shall incur no liability to me, my estate, or my heirs, successors, or assigns for permitting my agent to exercise any power granted to my agent.

III. General Grant Of Authority

I confer upon my agent the full, complete and general authority to do all such acts, matters and things in relation to all or any part of, or interest in, my property, affairs or business of any kind or description in the Commonwealth of Virginia, or elsewhere, now or at any time in the future, that I could do if acting personally.

I intend that this general grant of authority be construed broadly so as to confer the greatest possible grant of authority upon my agent.

IV. Specific Grants of Authority

In amplification and not in limitation of the general grant of authority I have conferred upon my agent, my agent is possessed with the authority to exercise the following powers in addition to all others on my behalf:

1. to request, receive, possess, sue for, and recover from all persons, corporations, associations or other entities (i) each and every parcel of realty and article of personal property that I own or am entitled to possess, and (ii) each and every sum of money, right or interest, due and owing, or that may become due and owing, to me on any and every account, claim, contract or tort; or, in my agent's discretion, to arbitrate or compromise therefor;

2. to accept on my behalf any service of legal process issued in any suit in which I may be named a party, and to defend my interest in any such suit;

3. to satisfy, or reject and defend against, claims that may be asserted against me, or against any of my property or interests; or, in my agent's discretion, to arbitrate or compromise therefor;

4. to establish, add to, withdraw from, or close my accounts or deposits in banks or other financial institutions;

5. to sign any check, deed, contract, pleading, retirement or disability election, or any other documents;

6. to borrow money in my name on such terms as my agent may deem appropriate, and to execute notes and any documents necessary to give any lender a security interest in any or all of my real and/or personal property in connection with any loan;

M.J.T.S.

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7. to sell or lease any part or parts of my real or personal estate, or any interest that I may have in any real or personal estate, wherever situated, upon such terms as my agent may deem appropriate, and to make all necessary deeds and conveyances thereof, with all necessary covenants, warranties and assurances, and to sign, seal, acknowledge and deliver the same; and to purchase real or personal property for my use as my agent deems appropriate;

8. to buy or sell stocks, bonds, Treasury securities, or other investments on my behalf without regard to the "prudent investor" rule; to establish, utilize and terminate accounts with brokers of securities, and to engage, employ, and terminate the services of such financial and investment factors, advisors, and consultants as my agent may deem helpful; and to authorize and terminate managing agency accounts with third party and corporate fiduciaries;

9. to enter any safe deposit box that I may be the lessee of, or otherwise entitled to enter, and to remove or add to its contents, and the lessor shall not be liable or responsible for such actions by my said attorney or attorneys;

10. to borrow against or obtain the cash surrender value of any of my life insurance policies, and to transfer the ownership of any policies to the primary beneficiaries named therein;

11. to create revocable inter vivos trusts for my benefit (with my agent or another as trustee), to add assets to existing trusts created by my agent or me, and to amend, limit, or revoke trusts created by my agent or me to the same extent I could if acting personally;

12. to make gifts to the person who may be my spouse at the time of such gift(s), and to any lineal descendant of mine, or to any spouse of any descendant of mine, including any descendant or any spouse of such descendant of mine who may serve as my agent under this instrument, for any purpose or for no purpose, without limitation as to the amount of such gifts, provided that any donee who shall serve as my agent, or as a descendant of my agent, or as a spouse of my agent, shall be a permissible donee only if (a) I have not excluded and disinherited such donee as a beneficiary of my estate in my will as it is written at the time of such gift(s), or (b) any gift to such donee shall be approved by at least one adult beneficiary under my will (or one adult who is a presumptive heir of mine if there is no will of mine in existence at the time of such gift) who would be directly and adversely affected by such gift, it being my intention not to create a general power of appointment under section 2041 or section 2514 of the Internal Revenue Code or otherwise;

13. to have access to my will, and to all documents in the hands of any person, including my attorneys, physicians, accountants, and spiritual advisors (notwithstanding any privilege or right of secrecy or confidentiality which may exist between me and any attorney, physician, accountant, or spiritual advisor of mine) and, in addition to and not in limitation of the permissible donees described in the next preceding clause of this instrument, to make gifts to beneficiaries named in my will by way of total or partial satisfaction of bequests, legacies or devises made to such beneficiaries as my will is written at the time of such gift(s);

14. to represent me before any office of the Internal Revenue Service, the Virginia Department of Taxation or any other state taxation department or division, in connection with

M.J.T.S.

any individual income tax or gift tax matter, for the years 1986 through 2041, to receive confidential information and to perform any and all acts that I can perform with respect to said tax matters, including the power to prepare, amend, amplify, execute and deliver on my behalf and in my stead IRS Form 2848, and to appoint my herein named agent or any other persons thereunder as my agent and representative, and to execute on my behalf all other tax forms and returns (including, but not limited to U.S. Forms 1040 and 709, Virginia Form 760 and all other forms that may be filed in connection with any of them or any other state or local department of taxation), and the power to receive and negotiate checks in payment of any federal, state, or local tax refund or other payment;

15. to substitute any person or entity to act as agent for me, and to appoint any person or entity to act as ancillary agent for me, in any jurisdiction (and to limit, suspend, or revoke such appointments), and to grant unto any such substitute or ancillary agent such of the powers granted herein to my agent as my agent may specifically delegate in writing (with such restrictions or limitations thereon as my agent may deem appropriate);

16. to initiate any litigation that may be necessary in order to require third parties to recognize the validity of this power of attorney and to seek damages, including punitive damages, for injury to me or my estate because of any nonrecognition;

17. to consent to and direct provision of medical care and services, including without limitation any and all acts necessary to admit or discharge me from the care and custody of physicians, hospitals, nursing homes, convalescent centers, and homes for adults, and to direct provision, limitation, withholding, or termination of all procedures, including life prolonging procedures, to the fullest possible extent under the Constitution of the United States and the provisions of section 54.1-2986 of the Code of Virginia of 1950, as amended, as now or hereafter enacted, regardless of whether I am physically located in the Commonwealth of Virginia at the time my agent may consent to or direct the termination of such services, it being my intention to provide my agent with sufficient authority to take any step necessary to provide or withhold any care, even though my agent's decision may cause my death;

18. to disclaim any interest in real or personal property to the same extent I could disclaim the same;

19. to make an anatomical gift of my body or to make anatomical gifts of any portion thereof upon my death, and to revoke any such gift or gifts at any time or from time to time, pursuant to the authority of section 32.1-290.1 of the Code of Virginia of 1950, as amended;

20. to change my domicile or place of residence, or both, for any reason, or for no reason, at any time and from time to time;

21. to employ or otherwise engage or contract, on reasonable terms, companions, geriatric care managers, assistants, nurses, or other persons, including but not limited to my children or grandchildren, or any member of my or their families, to provide health or companionship services for me that may be helpful in assisting me in the enjoyment of life,

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regardless of whether I remain in my own or another person's private home, or if I am admitted to any congregate care facility; and

22. to represent me in connection with medical services reimbursed or provided by, or not reimbursed or provided by, any health insurer, health care provider, health maintenance organization, and my agent shall have complete access to my medical records and full authority to advocate in any administrative, court, or setting on my behalf, and may consent on my behalf to arbitration, mediation, or any other alternative dispute resolution process.

V. Agent's Duties

I intend that my agent be aware of the following responsibilities under Virginia law, which are restated here by way of example and not by way of exclusion or limitation:

A. my agent must use due care to act in my best interest in accordance with the terms of this instrument;

B. my agent is liable for any breach of legal duty owed to me as a fiduciary under Virginia law;

C. my agent must not allow my agent's property to be commingled with my property;

D. my agent must keep a record of all receipts, disbursements, and significant actions taken under this instrument; and

E. upon my personal demand, or upon the demand of any other agent personally appointed by me to account to me or any other agent appointed by me, for all receipts, disbursements, and significant actions taken under this instrument.

VI. Miscellaneous

A. I intend that this power be effective to transfer title to any of my property, real or personal, now or hereafter owned by me in any jurisdiction.

B. I intend to avoid the necessity of guardianship or conservatorship proceedings by the creation of an agency in this instrument. I authorize but do not require my agent to resist any such proceeding as an expense of the agency hereby created. I intend that the agency created by this instrument survive the appointment of any guardian, conservator, or similar fiduciary for me, and that the powers conferred in this agency not be limited, subsumed, or otherwise impaired by the appointment of any such fiduciary. If my intent to avoid any such protective proceeding is defeated, in any proceeding to appoint a guardian, conservator, or other similar fiduciary for me I nominate and request that the court appoint no person or entity other than Janet Loeffler, and I further request that any accounting, inventory or other financial reporting incident to such appointment or service be made in camera and without public disclosure.

M.J.T.S.

C. My agent shall be reimbursed for all expenses he incurs on my behalf. My agent is entitled to reasonable compensation calculated pursuant to the rules governing fiduciary compensation in the Commonwealth of Virginia, but if I have entered into any collateral agreement concerning compensation with my agent, such agreement shall be conclusive with respect to such compensation. My agent may retain my property in her possession for any debt in her favor against me or my estate.

D. I intend that any authority granted to my agent shall be construed and when necessary limited so as to prevent my agent from being taxed on my income (unless my agent is my spouse) and to prevent my assets from being considered as subject to a "general power of appointment" by my agent, as that term is defined by the Internal Revenue Code.

E. If any provision of this instrument is held unenforceable or invalid, such unenforceability or invalidity does not affect other provisions or applications of this instrument that can be given effect without the invalid provision or application and to this end the provisions of this instrument are severable.

F. As used in this power of attorney, the male gender shall include the female and neuter, and the singular shall include the plural, and vice versa.

VII. Non-Disclosure

Pursuant to the provisions of section 11-9.6 of the Code of Virginia of 1950, as amended, it is my intention that, except as specifically provided for herein, my agent shall **never** be required to make disclosure or inspection of my affairs, or her actions as my agent, either under this instrument or otherwise, to any third party. I authorize my agent to refuse any request for disclosure or inspection, and he has the sole discretion to determine the scope, if any, of disclosure or inspection he may wish to permit. I authorize my agent as an expense of the agency to resist any proceeding to compel such disclosure or inspection. Any such resistance shall be conclusively held as having been made in obedience to my instructions, for good cause, and in good faith, and my estate shall indemnify and save my agent harmless from any expense, including without limitation attorney fees, incurred or imposed as a result of resisting any demand for disclosure or inspection, or any proceeding to compel any such disclosure or inspection. Without limitation of the foregoing sentences in this paragraph, I specifically intend that my agent shall never be required to make disclosure of her actions or permit inspection of my affairs under this instrument, pursuant to section 11-9.1, section 11-9.6, section 37.1-134.22 of the Code of Virginia of 1950, as amended, or any other statute.

Witness the following signature and seal this 7th day of July, 2009.

Mary Jeanne Tucker Swiger (SEAL)
Mary Jeanne Tucker Swiger
Principal

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Mary Jeanne Tucker Swiger is known to me; I believe her to be of sound mind and capable of entering into this instrument and directive; and I am not her spouse or blood relation, or a health care provider engaged in her medical care or custody. Mary Jeanne Tucker Swiger stated in my presence that she understood that this instrument, in addition to all other attributes, is an advance health care directive and authorization to make anatomical gifts on her behalf.

Witness J. Michael Sharman

Witness Lynn Lineberger

COMMONWEALTH OF VIRGINIA

COUNTY OF CULPEPER, to wit:

The foregoing instrument was personally acknowledged before me this 7th day of July, 2009, by Mary Jeanne Tucker Swiger, the above designated Principal.

Kristin Kramer Fox
NOTARY PUBLIC #719 7844

My commission expires: May 31, 2012

Prepared by
J. Michael Sharman, Virginia State Bar Number 29651
Commonwealth Law Offices, P.C.
246 E. Davis Street, Suite 200
Culpeper, Virginia 22701
(540) 727-1007
Fax: (540) 727-7917

COUNTY OF CULPEPER, to wit:
personally ackn
NOTARY
My commission expires: May 31, 2012
Prepared by
J. Michael Sharman, Virginia State Bar Number 29651
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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
R. Scott Sprouse, Circuit Court Judge

RECEIVED
SEP 23 2016
SC Court of Appeals

Case Number 2016-000096

Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven
Appellants,

Vs.

Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker
Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Corrected Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 19, 2016

Syretta R. Anderson
Anderson Law Firm, PC
124 Oakland Avenue
Rock Hill, SC 29730
803-980-5252
Attorney for Appellants