

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
IN RE: MATTER OF DOLLY)
DIMPLES LEGARE COLEMAN,)
THROUGH HER CONSERVATOR)
W. ASHLEY THIEM,)

IN THE PROBATE COURT
CASE NO.: 2014-GC-10-0210

ORDER RESCINDING
DEEDS

Petitioner,

-v-

ATHENA IRLAND, ISADORE)
PSARAS, BRANDY S. CULP, AND)
CHRISTINA CULP,)

Respondents.)

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SC Court of Appeals

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Hearing Date: October 18, 2016
Presiding Judge: Lenna S. Kirchner
Petitioner's Attorney: I. Ryan Neville, Esq.
Respondent's Attorney: Joseph Dawson, III, Esq.
Attorney/GAL: Lana Jamrosyk, Esq.

THIS MATTER comes before the Court upon the Verified Petition filed by Dolly Dimples Legare Coleman ("Mrs. Coleman") by and through her Conservator, W. Ashley Thiem, ("Petitioner" and/or "Conservator") on March 3, 2016. Petitioner seeks rescission of two deeds of conveyance executed by Mrs. Coleman on October 28, 2014 in favor of Respondent Athena Irland ("Respondent Irland" or "Ms. Irland") for lack of capacity, or in the alternative, for undue influence. A hearing on the matter was held on October 18, 2016. Present at the hearing were attorney Ryan Neville, appearing on behalf of Petitioner, and attorney Joseph Dawson, III, appearing on behalf of Respondent Athena Irland. Respondent Isadore "Johnny" Psaras was present and served as a witness for Ms. Irland. Respondent Brandy S. Culp was also present, but did not participate in the trial. Respondent Christina Culp was not present but served with proper

notice of the hearing. This Order is binding on all parties to the above captioned matter.

At the start of the hearing, Respondent moved, pursuant to Rule 12(b)(6), for dismissal of the petition arguing the existence of another action pending in the Berkeley County Court of Common Pleas filed prior to this present action. Rule 12(b)(6), SCRCP. On February 6, 2015, a Notice of *Lis Pendens* was filed in Berkeley County Court of Common Pleas under 2015-LP-08-00003. On March 19, 2015, the associated Summons and Complaint was filed. *See* Case No. 2015-CP-08-00719. The aforementioned captions reflect the parties as Christina Culp and Brandy S. Culp vs. Athena Irland and Dolly Dimples Legare Coleman. Rule 12(b)(6) permits dismissal where another action is pending *between the parties for the same claim*. Rule 12(b)(6), SCRCP (*emphasis added*). Due to the actions not pending between the *same* parties, as reflected in the differing captions of the two cases, this Court denied Respondent's motion and proceeded to hear this matter.

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

FINDINGS OF FACT

1. Dolly Dimples Legare Coleman ("Mrs. Coleman") is an 86 year old female adjudged to be an incapacitated person by clear and convincing evidence by this Court on February 9, 2015.¹
2. Petitioner is W. Ashley Thiem, of Thiem & McCutcheon, CPAs, P.A., the court appointed Conservator ("Conservator") for Mrs. Coleman, by Order dated September 1, 2015.
3. Respondents are the children and grandchild of Mrs. Coleman.

¹ Petitions were filed by Respondent Culp on December 22, 2014 and Respondents Irland and Psaras on January 5, 2015. Based in part on the report of a Designated Medical Examiner's finding of incapacity dated January 8, 2015, this Court issued Orders appointing a Temporary Guardian and Conservator on February 23, 2015 and a Permanent Guardian and Conservator on September 1, 2015.

4. During Mrs. Coleman's adult life, she acquired real property in South Carolina to include an undivided fee simple interest in certain real property located in Berkeley County described more fully as follows (hereinafter "Tract 1"):

ALL that certain piece, parcel or tract of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as "Tract 1, 1,450,798 sq. feet, or 33.31 acres" as shown on plat entitled: "PLAT SHOWING A RE-SURVEY AND SUBDIVISION OF A 72.31 ACRE TRACT OF LAND INTO TRACTS 1, 2, AND 3, SITUATED AS SHOWN ON HALFWAY CREEK ROAD NEAR GUERINS BRIDGE ROAD, IN BERKLEY COUNTY, SOUTH CAROLINA. THIS PROPERTY IS PRESENTLY OWNED BY CHARLES S. WILLIAMS, TRACTS 2 AND 3 ARE ABOUT TO BE CONVEYED TO ATHENA L. IRLAND, DANIEL J. IRLAND AND DOLLY L. COLEMAN," prepared by Charles F. Dawley, Jr., RLS, dated July 18, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Plat Cabinet L, Page 199. Said tract having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

SUBJECT to right of access to Tracts 2 and 3 over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat.

BEING the same property conveyed to Dolly L. Coleman by Deed of Charles S. Williams dated May 1, 1997 and recorded May 9, 1997 in the Office of the Register of Deeds for Berkeley County in Book 1064, at Page 319.

TMS NO.: 257-00-00-007.

5. Mrs. Coleman also acquired an undivided one-third interest in certain real property in Berkeley County described more fully as follows (hereinafter "Tract 2"):

ALL that certain piece, parcel or tract of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as "Tract 2, 1,655,235 sq. feet, or 38.00 acres" as shown on plat entitled: "PLAT SHOWING A RE-SURVEY AND SUBDIVISION OF A 72.31 ACRE TRACT OF LAND INTO TRACTS 1, 2, AND 3, SITUATED AS SHOWN ON HALFWAY CREEK ROAD NEAR GUERINS BRIDGE ROAD, IN BERKLEY COUNTY, SOUTH CAROLINA. THIS PROPERTY IS PRESENTLY OWNED BY CHARLES S. WILLIAMS, TRACTS 2 AND 3 ARE ABOUT TO BE CONVEYED TO ATHENA L. IRLAND, DANIEL J. IRLAND AND DOLLY L. COLEMAN," prepared by Charles F. Dawley, Jr., RLS, dated July 18, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Plat Cabinet L, Page 199. Said tract having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

TOGETHER with right of access over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat. SUBJECT to right of access to Tracts 3 over Tract 1 through the "50' INGRESS-EGRESS EASEMENT" as shown on the above referenced plat.

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BEING the same 1/3 interest as conveyed to Dolly L. Coleman by Deed of Charles S. Williams dated August 2, 1995 and recorded August 4, 1995 in the Office of the Register of Deeds for Berkeley County in Book 709, at Page 40.

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(collectively Tract 1 and Tract 2 hereinafter "the Farm").

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6. On October 28, 2014, Mrs. Coleman executed two deeds conveying the Farm to Ms. Irland, each for FIVE and No/100th DOLLARS (\$5.00) and reserving a life estate in Tract 1. Said deeds were entered into evidence without objection and are incorporated by reference. Pet's Ex. 16 and 17.
 7. The Conservator seeks to have these two deed rescinded arguing Mrs. Coleman lacked capacity to execute the deeds or, in the alternative, the executed deeds are the product of undue influence exerted by Mrs. Coleman's daughter, Respondent Irland, over Mrs. Coleman.
 8. Prior to this action, Mrs. Coleman hired the law firm of Evans, Carter, Kunes & Bennett, P.A. ("the Firm") for estate planning purposes.
 9. Mr. Andrew Chandler, Esquire ("Mr. Chandler"), an attorney at the Firm, testified on its behalf as follows:
 - a. The Firm previously prepared, and still possesses, Mrs. Coleman's original Last Will and Testament ("2008 Will"), dated October 20, 2008. A copy of said Will was entered into evidence without objection. Pet's Ex. 18.
 - b. Article 4 of the 2008 Will devises the real property in question, leaving Tract 1 to Mrs. Coleman's daughter Christina T. Culp and Tract 2 to her granddaughter Brandy S. Culp.
 - c. Respondent Irland is not a devisee of the Farm therein and therefore unable to take ownership under the terms of Mrs. Coleman's 2008 Will.

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- d. On or about the 28th and 29th day of October 2014, Mrs. Coleman and Ms. Irland appeared at the Firm without an appointment, asking to see Attorney Heyward Carter. Mr. Carter was not available, and as a result, Mr. Chandler took the meeting.
 - e. According to Mr. Chandler, Mrs. Coleman was pleasant upon greeting him and proceeded to ask about his wife and children. This seemed odd to Mr. Chandler as it was his first time meeting Mrs. Coleman and she would have no reason to know whether he was married, or had children. Mr. Chandler is, in fact, married, however, he has only one child. Mr. Chandler interpreted this as a possible sign Mrs. Coleman may lack capacity.
 - f. When Mr. Chandler asked Mrs. Coleman why she had come to the Firm, Ms. Irland interjected, stating the two were there to get her Mother's original 2008 Will.
 - g. Mr. Chandler asked that Ms. Irland allow her mother, Mrs. Coleman to answer the question as it was Mrs. Coleman who was the Firm's client.
 - h. Ms. Irland became visibly and verbally upset when Mr. Chandler asked to interact solely and directly with Mrs. Coleman without any assistance from Ms. Irland.
 - i. Mr. Chandler again asked Mrs. Coleman why she had come to the Firm and Mrs. Coleman was unable to answer the question and instead stared blankly at Ms. Irland. Ms. Irland, then interjected again, stating they were there to obtain the original of Mrs. Coleman's 2008 Will, in order to destroy it, because they were going to have it changed.
 - j. Mr. Chandler, on behalf of the Firm, then informed Mrs. Coleman and Ms. Irland that he did not feel comfortable giving them the original 2008 Will for them to destroy it as Mrs. Coleman could not independently state why she wished to be given the 2008 Will. However, he would be happy to provide them the 2008 Will so long as it was per the instructions Mrs. Coleman had given the Firm in her Durable Power of Attorney. Mrs.

Coleman's Durable Power of Attorney was admitted without objection as Petitioner's Exhibit 19.

k. Ms. Irland asked what the instructions were for obtaining the 2008 Will, and the Firm informed her that, per the Durable Power of Attorney, both Ms. Irland and Mrs. Coleman's granddaughter, Respondent Brandy Culp, would have to jointly sign for the release of the 2008 Will. Note: Ms. Irland testified that she had not previously seen the 2008 Will nor had knowledge of the referenced Durable Power of Attorney. *See* para 14j.

1. Mr. Chandler then offered to call Ms. Culp so that both she and Ms. Irland could sign for the release of the original 2008 Will. Ms. Irland became visibly upset, refused his offer, and the two women left the Firm.

10. The law firm of Williams & Hulst, LLC ("W&H"), more specifically, one of its owners, John B. "Jack" Williams ("Mr. Williams"), was hired to prepare the deeds conveying the Farm to Ms. Irland. Mr. Williams was not present for the hearing on October 18, 2016. However, prior to the start of the hearing, the parties met in chambers where they agreed the record would be left open until his deposition could be taken. Mr. Williams was deposed on November 14, 2016 where he testified as follows:

- a. Mr. Williams has been practicing law over forty years. Williams Dep. 5.
- b. Prior to the meeting on October 28, 2014, Mr. Williams had previously met Mrs. Coleman approximately 15 – 20 years ago in an unrelated matter. Williams Dep. 9.
- c. On October 28, 2014, Mrs. Coleman and Ms. Irland went together to W&H to discuss the preparation of deeds. Williams Dep. 13-14.
- d. Initially Mr. Williams met with both Mrs. Coleman and Ms. Irland. However, once the purpose of the meeting was made clear, Mr. Williams asked Ms. Irland to step outside in

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order for him to speak with Mrs. Coleman alone: Williams Dep. 14-15. Mr. Williams then advised Mrs. Coleman regarding the meaning and purpose of transferring the property. Williams Dep. 15.

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- e. During the discussion with Mrs. Coleman regarding the transfer of property, Mr. Williams suggested Mrs. Coleman retain a life estate rather than transfer the property, herein referred to as Tract 1, in fee simple as originally discussed when meeting with Mrs. Coleman and Ms. Irland together and Mrs. Coleman agreed. Williams Dep. 16-17. Further, the reservation of a life estate "was not discussed, except between [Mr. Williams] and Mrs. Coleman." Williams Dep. 22.
 - f. Further, there was no mention that the Farm would be sold by Mrs. Irland after she received title to the Farm. Williams Dep. 22-23.
 - g. Mr. Williams testified that although he does not remember exactly how long the meeting on October 28, 2014 lasted, generally, meetings of that type are less than an hour. Williams Dep. 19.
 - h. Mr. Williams also testified with regard to his experience determining the competency of a particular person or witness during the course of his practice as follows:

Well, that's a question of determining competency, but yeah, I mean, if someone did not appear to understand what was going on or you know, was unable to communicate or whatever, yeah, I mean, from a practical standpoint, the answer is yes, I have.

Williams Dep. 7:13-18.

- i. Regarding Mr. Williams' observations of Mrs. Coleman's understanding of their conversation, Mr. Williams also stated:

There were no --- there was nothing *at that time* that gave me concern about her state of mind, her capability, but then again, that's just an observation, certainly not in a position to pass on that as an expert.

Williams Dep. 18:23-19:2 (emphasis added). *See also* Williams Dep. 25.

- j. When asked if Mr. Williams believed Mrs. Coleman understood the consequences of her actions, Mr. Williams replied "I do"... "Or I did at that time." Williams Dep. 17:7-9.
- k. During his deposition, Mr. Williams was given an opportunity to review documents entered into evidence without objection from Mrs. Coleman's treating physician, Dr. Judith M. Rubano ("Dr. Rubano"). Williams Dep. 24-31, 35-38.
- i. Mr. Williams testified at the time the deeds were executed, he had no way of knowing of Dr. Rubano's diagnosis or any concerns expressed by Mrs. Coleman regarding her children and grandchild trying to get her to sell her property. Williams Dep. 25, Nov. 14, 2016. Further, Mr. Williams stated "it had been years since [he] had seen Mrs. Coleman, and obviously was not aware of any type of medical condition she may have [had at that time]." Williams Dep. 27:12-15.
- ii. When asked if knowledge of Dr. Rubano's treatment of Ms. Coleman, her concerns and diagnosis would have changed the way Mr. Williams handled the closing on October 28th, Mr. Williams stated "Had I had these reports, at least as far as I'm concerned, my thought is there would *not have been a closing* then because of the questions that would have come up..." Williams Dep. 28:1-4 (*emphasis added*).
- iii. According to Mr. Williams, if Dr. Rubano was of the opinion that Mrs. Coleman lacked capacity in 2012, and he knew of that opinion, he would not have closed the transaction. Williams Dep. 31:12-16.
- l. Mr. Williams was also presented a synopsis of Mr. Chandler's testimony regarding his meeting with Mrs. Coleman and Ms. Irland wherein Mr. Chandler stated he believed Mrs. Coleman lacked the necessary capacity to request her 2008 Will. Williams Dep. 31-33.

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- m. When asked whether Mr. Williams would reach out to an attorney that expressed concerns regarding the capacity of one who he was about to close a transaction with, Mr. Williams replied

Oh, yeah, most definitely. You know, if there's issues like that that could address the ability to process or whatever, most certainly would have contacted him. As I said, I had not had any contact with Mrs. Coleman for a while and was not aware of any prior incidence or even that she had a will.

Williams Dep. 32:20-33:1.

- n. Further, Mr. Williams added, "I would have talked with Mr. Chandler, but if it is – the situation is as its been represented, I would not have gone forward with the closing."

Williams Dep. 33:6-9.

- o. Finally, when asked if he knew then what he knows now, would he have gone forward with the closing, Mr. Williams replied, "Obviously, no." Williams Dep. 40:9-11.

11. Dr. Rubano was deposed both before and after trial,² during which time she testified regarding her interaction with, and treatment of, Mrs. Coleman. During the hearing, Dr. Rubano was admitted as an expert without objection. Her testimony is as follows:

- a. Dr. Rubano has regularly treats vulnerable adult or elderly patients. Rubano Dep. 7-8, Dec. 21, 2016.
- b. Dr. Rubano began treating Mrs. Coleman in the late 1990s or early, however, there were extended periods of time that Dr. Rubano was not actively involved in Mrs. Coleman's care. Rubano Dep. 20, Dec. 21, 2016.
- c. On January 9, 2009, Respondent Irland and Respondent Culp accompanied Mrs. Coleman

² Prior to the hearing, the parties met in chambers and agreed to admit the video deposition of Dr. Rubano without objection despite Attorney Dawson not being present during the deposition due to a clerical error and to hold the record open for 30 days during which time Respondent would be allowed to re-notice and cross-examine Dr. Rubano under deposition and/or enter any objections.

to an appointment reestablishing care with Dr. Rubano. During the appointment, both Respondent Irland and Respondent Culp expressed concerns regarding Mrs. Coleman's memory, mood, and behavior. *See* Pet.'s Ex. 3.

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- d. At a follow-up appointment with Dr. Rubano on May 29, 2009, Mrs. Coleman, unaccompanied during the visit, expressed concern stating her family was "using her" and attempting to get her to sell her [land]. Pet.'s Ex. 4. Mrs. Coleman was frustrated and upset because she did not want to sell the property. According to Dr. Rubano, Mrs. Coleman is "delightful. She's rather eccentric. And sometimes would kind of go on and talk about things, and [she] wasn't sure if there was any real validity to what she was complaining of." Rubano Dep. 12:13-17, Dec. 21, 2016.
 - e. Dr. Rubano received a letter from Respondent Culp dated October 18, 2010 wherein Respondent Culp reported that Mrs. Coleman was suffering "significant problems with memory. She is sometimes disoriented and she makes up stories to compensate for her confusion over daily tasks." *See* Pet.'s. Ex. 5. According to Dr. Rubano, this is a fair representation of patients with dementia. Rubano Dep. 24:6-7, Dec. 21, 2016.
 - f. During an office visit on October 18, 2010, Mrs. Coleman was prescribed Aricept for dementia based on family reports of lapses in her short-term memory. Pet.'s Ex. 6.
 - g. One month later, on November 15, 2010, Mrs. Coleman, unaccompanied, met with Dr. Rubano, during which she became tearful and expressed concerns that her daughter was taking advantage of her and "had drained her accounts, etc." Pet.'s Ex. 7. These comments were documented but not acted upon because Mrs. Coleman suffered from dementia and as a result, "her perception that someone was taking advantage of her may or may not have been true." Rubano Dep. 30:19-21, Dec. 21, 2016. Note: During Respondent Irland's

testimony, she admitted to signing checks in her mother's name in the months prior to this appointment.

- h. On April 21, 2011, Respondent Irland called stating Mrs. Coleman had stopped taking her medications and an office visit was scheduled for April 25, 2011. Pet's Ex. 10.
- i. On April 25, 2011, Dr. Rubano witnessed a shouting match between Mrs. Coleman and her daughter, Respondent Irland, regarding Mrs. Coleman's memory/dementia with Mrs. Coleman continuing to deny she suffered from any memory issues. Dr. Rubano noted a decline in Mrs. Coleman's appearance, increased her prescription for Aricept, and referred Mrs. Coleman to a memory clinic. Pet's Ex. 8 and 9.
- j. On April 4, 2012, Mrs. Coleman was accompanied to an appointment by Respondent Irland where it was reported that Mrs. Coleman was again off of her medications and noted that Mrs. Coleman's dementia was continuing to progress. Pet's Ex. 11 and 12.
- k. That Mrs. Coleman last saw Dr. Rubano in July of 2012 at which time she was still being treated for Dementia and noted reports that Mrs. Coleman's "[m]emory still poor and seems to be getting worse, she is more irritable and argumentative." Res'p Ex. 3.
- l. Dr. Rubano had the opportunity to review the Report of Designated Examiner, dated August 31, 2015³ which finds Mrs. Coleman, while pleasant, suffers from moderate dementia, able to make simple decisions but not process more complicated information as well as to have a "very dysfunctional family." Pet's Ex. 15.
- m. Dr. Rubano agreed with his report and testified to a reasonable degree of medical certainty that she would have made similar findings back in 2012, that Mrs. Coleman was not capable of disposing of property, real or personal, execute instruments, make purchases,

³ Findings based on observations from February 26, 2015 to April 18, 2015.

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enter into contractual relationships, etc. Rubano Dep. 5:19-6:12, Dec. 21, 2016.

n. “Had I been asked, can Mom sell real estate? I would have said, no.” Rubano Dep. 36:6-7, Dec. 21, 2016. *See also* Rubano Dep. 54:7-17, 22—55:2, Dec. 21, 2016.

o. Further, Mrs. Coleman, at the same time as lacking capacity, was also in a mental state or lack thereof, that left her susceptible to the influence of those around her, particularly one who was caring for her. Rubano Dep. 55:3-11, Dec. 21, 2016.

p. Mrs. Coleman also maintained a level of social gracefulness which made seeing her lack of capacity difficult. Rubano Dep. 55:12-17, Dec. 21, 2016.

12. Carol Seltzer (“Ms. Seltzer”) is a Social Worker and Professional Guardian that this Court appointed as Mrs. Coleman’s Temporary Guardian on February 23, 2015. Ms. Seltzer was admitted as an expert based on her education and experience and she provided both factual and expert testimony based on her interaction with and observations of Mrs. Coleman and her family as well as her review of relevant case materials as follows:

a. Upon first meeting Mrs. Coleman, she was well-groomed, pleasant, demonstrating very good social graces. However, Mrs. Coleman was unable to answer direct questions or recount details when asked. Instead, Mrs. Coleman would begin to tell stories of past events, often embellishing as is consistent with one lacking capacity.

b. Information provided by Mrs. Coleman was often inaccurate, reflecting Mrs. Coleman’s ability to be easily swayed and her tendency to place special trust and confidence in those around her.

c. A ten-day evaluation of Mrs. Coleman after attacking a caregiver in her home resulted in confirmation of dementia diagnosis as well as a diagnosis of mood disorder.

d. Interviews with family members (Respondents) highlighted numerous problems

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between the parties with little or no communication occurring among them.

e. Based on her observation of Mrs. Coleman which began in 2015, her experience over twenty years dealing with dementia patients, and review of Mrs. Coleman's medical records reflecting a diagnosis in 2009, she concurs with Dr. Rubano regarding the progression of the disease which would have resulted in Mrs. Coleman lacking mental capacity and resulting in susceptibility to undue influence in 2012. Further, such incapacity or susceptibility would not have been readily apparent to one not familiar with Mrs. Coleman due to her social graces.

13. W. Ashley Thiem, the court appointed Conservator for Mrs. Coleman, testified regarding his interactions with Mrs. Coleman and her family:

- a. In meetings with Mrs. Coleman, he found her to be pleasant. However, the meetings were based on the facts and circumstances focused on finances rather than her medical or mental conditions.
- b. While compiling Mrs. Coleman's assets, Mr. Thiem met with various family members as each asset appeared to be controlled by a different person. During his investigation, Mr. Thiem discovered two missing assets: Tract 1 and Tract 2. Ex. 18 and 19. Mr. Thiem also found one of the properties was listed for 2.3 Million Dollars. Ex. 20.
- c. The real estate listing did not reflect the fact that Mrs. Coleman retained a life estate in the subject property, resulting in concerns around Mrs. Coleman's capacity at the time the deeds were executed.
- d. Further, Mrs. Coleman retaining the property is in her best interest as the property comprise her only assets and, as such, she would benefit from having the transfer rescinded to its prior ownership in the event the property was necessary to fund Mrs. Coleman's living and

medical expenses.

14. According to Mrs Coleman's daughter, Respondent Athena Irland:

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- a. In 1995, when the time the properties in question were purchased, there were three parcels of land in total, with a one-acre parcel which she purchased and on which her home is located; the second parcel, herein referred to as Tract 2 and consisting of 38-acres was purchased by herself, her then husband, and Mrs. Coleman, and finally what is referred to herein as Tract 1 and consisting of 33.31-acres, was purchased by Mrs. Coleman alone, despite Respondent Irland being able to afford to pay half the purchase price and the prior owner being reluctant to sell to Mrs. Coleman.
 - b. That in or around 1999, Mrs. Coleman moved a home onto Tract 1 and began living therein.
 - c. That it was always Mrs. Coleman intent for her interest in the Farm to go to Respondent Irland, the farm "wasn't a family farm, it's Athena's Farm," and it has always been her farm.
 - d. That in or around 2003, Respondent divorced and had her husband's name removed from the deed. It was around that time, her mother gave her Tract 1 but she failed to remove Mrs. Coleman's name from the property because, according to Respondent Irland, she lost the paperwork.
 - e. That her mother was of sound mind and body when she signed the deeds in 2010, admitting Mrs. Coleman suffered from short-term memory problems as early as 2009 but was not incapacitated until February of 2015.
 - f. That the two of them are "best friends," extremely close, and did everything together.
 - g. Mrs. Coleman executed a Durable Power of Attorney on June 27, 2011 in which Athena Irland was granted the power to convey property which she never exercised. Resp's Ex. 1.

- h. That she admits to signing her mother's name on checks and doing it in her same way absent Power of Attorney because she is Mrs. Coleman's daughter and will sign with Mrs. Coleman's permission.
- i. That she and Mrs. Coleman went to the Firm and was told that in order to get the original Will they would need to make an appointment, which they did for the following day. However, their attorney failed to show up and when Attorney Chandler would not give them the original, Mrs. Coleman got mad and they left.
- j. That she did not see a copy of the Will until 2014 and that it was also the first time she learned the Farm was not devised to her and she learned the Durable Power of Attorney had been revoked on July 24, 2013, noting that even if she still had the Durable Power of Attorney, she still would not have deeded the property to herself.
- k. That Mrs. Coleman made changes on a copy of the Will and wished to destroy the Original and to divide the property evenly between her three children, however, the Will was not changed because Mrs. Coleman was "kidnapped" by her sister in 2014 and "brainwashed."
- l. That she listed Tract 2 for sale because she ran out of money due to the costs associated with this litigation and would do anything, sell everything, for her mother, to keep her, to get her back. Respondent Irland also contends that she has always had her mother's best interest at heart and hadn't deeded it back to be used for her mother's care because it was not her intent.
- m. When asked why she simply didn't deed the property back to her mother, she replied, because its "MY FARM!" and that she would decide where the money would go.
15. Mrs. Coleman's son, Respondent Isadore Psarus ("Johnny") testified that at the time the deeds were executed, Mrs. Coleman was living with Respondent Irland, who was her primary

caregiver.

- a. Resides in a home located at 638 Palmetto Street in the town of Mt. Pleasant which was given to him by Mrs. Coleman in 2008 for the sum of FIVE AND NO/100s DOLLARS (\$5.00).
- b. Claims Mrs. Coleman gave to him and his sisters all the time and that it was his understanding that his mother had always intended to give the Farm to Athena.
- c. Mr. Psarus was not present at the attorney's office when the meeting occurred, nor was he present when the deeds were executed and is unable testify as to anything leading up to the transaction.

16. The Guardian Ad Litem, Lana M. Jamrosyk, Esquire, did not testify but proffered from counsel table that, in her opinion, after meeting with Mrs. Coleman and the various family members, Mrs. Coleman was easily influenced and lacked the ability to understand the consequences of her actions. Further, it is in Mrs. Coleman's best interest to have both deeds rescinded and the Farm returned to Mrs. Coleman in the event that she needs the subject property to help defray future living and/or medical expenses.

CONCLUSIONS OF LAW

17. Pursuant to S.C. Code of Laws Ann. Section 62-5-402, jurisdiction and venue are proper.
18. Where a transaction is challenged on the basis of mental incompetency, the individual's competency on the date of that transaction must be determined. *Grapner v. Atlantic Land Title Co.*, 307 S.C. 5489, 551, 416 S.E.2d 617, 618 (1992). Furthermore, the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.*
19. Ample evidence supports a finding that Mrs. Coleman lacked the requisite mental capacity to

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execute the challenged instruments on the date in question:

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- a. Petitioner offered testimony of Mrs. Coleman's treating physician, Dr. Rubano, that Mrs. Coleman suffered from memory loss as early as 2009 and was treated for dementia in 2010 which, given its progressive nature, would result in Mrs. Coleman lacking capacity at the time the deeds were executed;
 - b. That Respondent Irland and other family members repeatedly expressed concerns regarding Mrs. Coleman's capacity as early as January 2009 and on numerous occasions thereafter;
 - c. Testimony from Mr. Chandler regarding his interaction with Mrs. Coleman on the same day the deeds were executed regarding Mrs. Coleman's inability to clearly communicate her desire to retrieve her 2008 Will;
 - d. Testimony from Mr. Williams regarding his interaction with Mrs. Coleman and the fact that in hindsight, he had not inquired as to her capacity and was not an expert in recognizing behavior associated with incapacity, particularly given the small amount of time spent interacting with her, and given her penchant for exhibiting social graces common in dementia patients;
 - e. Respondent offered no evidence to rebut Petitioner's assertions regarding allegations that Mrs. Coleman lacked capacity at the time the Deeds were executed but relied solely on her assertions, which are in direct conflict with reports made by her to Mrs. Coleman's treating physician for almost two years prior to the time the deeds were executed;

20. Based on the preponderance of evidence demonstrated by the Petitioner, Mrs. Coleman lacked capacity to execute said deeds on October 28, 2014.

21. Petitioner also asserts Respondent Irland exercised undue influence over Mrs. Coleman.

Undue Influence must be of the kind of mental coercion that destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. *Russell v. Wachovia Bank, N.A.*, 355 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). To void a conveyance of land, a contestant must show that the undue influence was brought directly to bear upon the conveyance. *Id.* at 219.

22. Undue influence in the execution of an *inter vivos* conveyance is proved in the same way that undue influence is proved in the execution of a will. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005) citing *First Nat'l Bank of Appleton v. Nanning*, 92 Wis.2d 618, 285 N.W.2d 614, 623 (1979).

23. In contested deed cases a presumption of invalidity arises if the contestants of the deed present evidence that a confidential or fiduciary relationship existed between the grantor and the grantee. *See Middleton V. Suber*, 300 S.C. 402, 405, 388 S.E. 2d 639, 641 (1990)(recognizing that where a “confidential relationship” exists between a grantor and a grantee, the deed is presumed invalid and the burden is upon the grantee to establish the absence of undue influence); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986)(“A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence thus shifting the burden of proof to the grantee to rebut the presumption”).

24. A confidential relationship arises when the grantor has placed his trust and confidence in the grantee, and the grantee has exerted dominion over the grantor. *Page v. Lewis* 209 S.C. at 220. The essence of the relationship is the trust and confidence. *Bullard v. Crawley*, 294 S.C. 276, 281, 363 S.E.2d 897, 900 (1987) citing 15A C.J.S. *Confidential*, pp. 351-58 (1967).

Mere friendship between the parties is not sufficient. The relationship must be one implying

confidence. *Id. citing 25 Am. Jur.2d Duress and Undue Influence* § 44 (1966). A confidential relationship does not necessarily arise when the grantor depends upon the grantee for the necessities of life. Some evidence is required that the grantor actually reposed trust in the grantee in the handling of his affairs. *McIntosh v. Dowdy*, 625 S.W.2d 162 (Mo.Ct.App.1981) (holding valid deed from grantor to the operators of nursing home in which grantor lived prior to death).

25. Here, the record shows that Mrs. Coleman was dependent upon Respondent Irland for many things. Petitioner introduced evidence that Respondent Irland was Mrs. Coleman's sole caregiver and that she took Mrs. Coleman to her appointments once she moved into her home. Further, there is also evidence that a relationship of trust and confidence existed between them. Respondent Irland had access to Mrs. Coleman's bank accounts as evidenced by her testimony in which she admitted writing checks on her mother's account and, finally, that Mrs. Coleman had designated Respondent Irland as her attorney-in fact. Petitioner has successfully shifted to the proponent the burden of rebutting the presumption.

26. Respondent failed to rebut the presumption of undue influence. Instead, the record is replete with information which belies Mrs. Coleman's intent. First, Respondent contends Mrs. Coleman always intended to give her the property and in fact did so in 2003, but that the instrument was never recorded because she lost it. However, according to her testimony, Respondent was close with Mrs. Coleman and they do everything together. Accordingly, if it was Mrs. Coleman's intent to transfer the property, she very easily could have done so in the eleven years since she purportedly executed an instrument removing her from the deed. Further, if Mrs. Coleman wished Respondent Irland to have the property in question, she would not have devised her interest in the two tracts to others under her 2008 Will.

27. Undue influence invalidates a deed procured by wrongful influence exerted over the grantor so as to destroy free agency and constrain a person to act against his will. *Page v. Lewis*, 209 S.C. 212, 39 S.E.2d 787, 799 (1946 supra). It is not material how much control is exercised, whether by physical force, threats, importunities, or any other form of mental or physical coercion, provided that it was exerted to destroy or overcome the free will of the grantor and to make the deed executed the expression not of his purpose, but that of some other person. *Baynard v. Ulmer*, 153 S.C. 100, 150 S.E. 610, 611 (1929).

28. The evidence supports a finding that Mrs. Coleman did not wish to have the property transferred to Respondent Irland, yet the undue influence exerted over Mrs Coleman by Respondent Irland was such that Mrs. Coleman's will was overcome and she nevertheless acquiesced and executed the deeds on October 28, 2014.

29. Due to Ms. Irland's breach of fiduciary duty to Mrs. Coleman, Mrs. Coleman is entitled to an award of damages against Ms. Irland.

30. Pursuant to S.C. Code of Laws Ann. Section 62-1-111, this Court may, as justice and equity require, award costs and expenses, including reasonable attorney's fees, to any party to be paid by another party or from the estate that is the subject of the controversy. Accordingly, Respondent Irland's willful and zealous pursuit of this property and steadfast refusal to deed the property back to her mother despite her supposed commitment to her mother's well-being, warrant this measure. As such, all costs associated with this action will be assessed against Respondent Irland to include reasonable attorneys' fees.

31. This Court finds no fault in Dr. Rubano not issuing an opinion in 2012 as to Mrs. Coleman's lack of capacity or susceptibility to influence, which would have arguably prevented this matter from arising, because she was not asked to do so by Mrs. Coleman, the Court, or any person

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authorized to inquire or request such a finding from Dr. Rubano.

32. Furthermore, this Court finds no fault in Mr. Williams closing the subject transaction on October 28, 2014, which would have arguably prevented this matter from arising, because he did not know, nor have reason to know of the events that transpired at the Firm and/or Dr. Rubano's treatment of Mrs. Coleman.

Handwritten notes:
12/12/17
10/29/2017

Based on the foregoing, it is hereby:

ORDERED, ADJUDGED AND DECREED the subject deeds are rescinded as Mrs. Coleman lacked the requisite capacity on October 28, 2014 to execute said deeds; it is further

ORDERED, ADJUDGED AND DECREED the subject deeds are the product of undue influence exercised by Respondent Irland over Mrs. Coleman; it is further

ORDERED, ADJUDGED AND DECREED that Respondent Irland will be assessed the costs and expenses associated with this action, including reasonable attorneys' fees, once approved by the Court.

AND IT IS SO ORDERED.

[Signature]
Lenna S. Kirchner
Associate Judge of Probate
Charleston County

29th day of June, 2017
Charleston, South Carolina

Attest : A True Copy
[Signature]
Clerk Probate Court,
Charleston County, South Carolina