EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2015-CP-10-6502

MIKELL M. HENDERSON, Petitioner, vs. MIKELL R. SCARBOROUGH, Individually and as Personal Representative of the Estate of Mary Ross Hanahan, and Joseph Ross Henderson, Respondents. In Re: Estate of: Mary Ross Hanahan	)	**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S ACTION TO TRY TITLE TO REAL ESTATE**

THIS MATTER comes before the Court on May 18, 2017, pursuant to Respondent's Motion for Summary Judgment filed on September 13, 2016, as to Petitioner's Action to Try Title to Real Estate. Petitioner was present and represented by Adam Silvernail, Esq. Respondent was present and represented individually by Shirrese B. Brockington, Esq. Respondent Estate is also represented by Joseph Mendelsohn, Esq.; however, Mr. Mendelsohn was not present.

Based upon careful review of the pleadings, Requests to Admit propounded to Petitioner and Petitioner's Responses to Requests to Admit, deposition testimony, exhibits, Memoranda, properly submitted supporting evidence, and arguments of counsel, Respondent's Motion for Summary Judgment as to Petitioner's Action to Try Title to Real Estate is hereby **granted.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mary Ross Hanahan, ("Decedent"), mother of Petitioner, Mikell Henderson, and maternal aunt of Respondent, Mikell Scarborough, deceased testate on October 23, 2014. Ms. Hanahan was survived by her son, Petitioner, Mikell Henderson, a second son, J. Ross Henderson, and her nephew, Respondent, Mikell Scarborough. Ms. Hanahan left a Last Will and Testament dated November 2, 1998, and a Codicil dated October 19, 2012, all of which were admitted to probate in the Charleston County Probate Court. Respondent Mikell Scarborough was named Personal Representative in the Codicil and was appointed by the Probate Court to serve in that capacity.

On September 2, 2015, Petitioner Mikell Henderson, filed his Summons and Petition against his cousin naming several causes of action. One was an Action to Try Title to Real Estate relative to the MRH Family, LLC whereby Petitioner sought to have the creation and funding of the LLC declared void, *ab initio,* and the real estate returned to his mother's estate. The Court notes that under the Last Will and Testament of Decedent, Petitioner is the primary beneficiary of his mother's estate.

In support of his position, Petitioner alleges his mother lacked the requisite mental capacity to sign documents on December 30, 2012, creating the MRH Family, LLC, including the Operating Agreement and a deed which transfers title of various tracts of real estate to the LLC. In the alternative, Petitioner alleges that the documents creating and funding the LLC were the product of undue influence by the Respondent on Ms. Hanahan, and thus the LLC should be declared void, *ab initio,* and the real estate returned to his mother's estate. In the twenty (20) months since the filing of the Petition, the parties have engaged in exchange of discovery, including the taking of depositions of Petitioner, Respondent, and several witnesses.

On September 13, 2016, Respondent moved for summary judgment and a hearing was held on May 18, 2017. This Motion was initially supported by the following exhibits: 1) Operating Agreement of MRH Family, LLC prepared by H. Christopher Moss, CPA-Attorney; 2) the recorded Deed from Decedent to the LLC transferring the relevant real estate prepared by Howard Yates, Esq.; 3) a second recorded Deed from Decedent to her son, J. Ross Henderson, transferring separate real estate also prepared by Howard Yates, Esq.; and 4) Statement of Mary Ross Hanahan Concerning 2012 Land Transfers. Respondent later supplemented this Motion by filing the Affidavit of H. Christopher Moss, the CPA-Attorney. Petitioner filed a Motion to Object to consideration of the Affidavit but this Motion was withdrawn by Petitioner at the Summary Judgment motion hearing.

Prior to the hearing Respondent supplemented his Motion with a Supplemental Memorandum in Support of the Creating and Funding of the MRH Family, LLC which included excerpts from deposition testimony of Petitioner, Respondent and witnesses Christopher Moss and Howard Yates. Petitioner also filed a Memorandum in Opposition to Respondent's Motion for Summary Judgment.

STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is a drastic remedy to be "cautiously invoked" so that no person will be improperly deprived of a trial of the dispute factual issues, Baughman v. American Telephone & Telegraph Co., 10 S.E.2d 537 (1991), and should be cautiously granted only when it is shown that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; See also McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493, (Ct. App. 1998). "The Court must construe all ambiguities,

conclusions and inferences arising from the evidence against the moving party; however, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue." City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994). Where the underlying burden of proof is by a preponderance of the evidence, South Carolina courts are clear that the non-moving party need only produce a "mere scintilla" of evidence to withstand summary judgment. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); Hancock v. Mid-South Management Co., 381 S.C. 326, 330-331, 673 S.E.2d 801, 802-803 (2009). However, in cases involving a heightened burden of proof, something more is required. Turner, 392 S.C. as 122, 708 S.E.2d at 769; Hancock, 381 S.C. at 331, S.E.2d at 803.

PETITIONER HAS NOT DEMONSTRATED A GENUINE ISSUE AS TO A MATERIAL FACT

Petitioner advances two distinct theories in his Action to Try Title to Real Estate as to why the creation and funding of the MRH Family, LLC should be declared void, *ab initio,* and the real estate returned to the Decedent's estate. The first theory is that Mary Ross Hanahan lacked the requisite mental capacity to understand her acts due to her life-long struggle with mental illness, including bipolar disorder which led to periods of depression and inaction, as well as a diagnosis of dementia in 2005. The second theory is the exertion of undue influence on Ms. Hanahan by her nephew, Respondent, to include him in her estate plan by giving Respondent a 30% interest in the LLC. The Court addresses each of these in turn.

A. As to lack of capacity of the Decedent.

As evidence, Petitioner contends that, for a period of about five (5) years before her death in 2014, Ms. Hanahan was unable to retrieve phone messages, manage her medications, had

stopped reading books, was forgetful, and had written a check to pay a home security alarm servicer which was "nonsensical." Petitioner further cites that Ms. Hanahan did not drive herself places and the family would "need to take the car." On September 6, 2012, Dr. Kay Durst, Ms. Hanahan's regular physician noted "the dementia is reported to have been present for several months. Her mental status appears to be gradually deteriorating."

Petitioner further argues that Mr. Moss and Respondent were longtime social acquaintances, that the idea of the LLC came from Respondent, and Mr. Moss had performed work for Respondent personally and for other family members. At the initial meeting with Mr. Moss on December 6, 2012, Ms. Hanahan did not tell Mr. Moss that she had existing estate planning documents (the Will and Codicil), and there was no discussion with her regarding overall estate plans. Further, there was no discussion regarding Ms. Hanahan's health or capacity and Mr. Moss testified that, had he been aware of the diagnosis of dementia, that he would not have proceeded with the transactions.

Petitioner further argues that Attorney Howard Yates, who prepared the deeds considered Respondent to be his client, that he had not met or spoken with Ms. Hanahan prior to December 30, 2012, when the two deeds and the Statement Concerning Land Transfers was signed, and that the deeds were prepared before Ms. Hanahan saw them. Petitioner further points out that the house and lot owned by his mother were not included in the properties to be placed in the LLC, and that these are the same properties devised to Respondent under the 2012 Codicil, which Petitioner has also challenged.

In response, Respondent presented the documents already cited as well as deposition testimony of Petitioner, Mr. Moss and Attorney Yates which is set forth herein. Respondent

presented also the medical reports of Ms. Hanahan's primary care physician, Dr. Kay Durst, and her psychiatrist, Dr. Piave Lake.

I find that on December 6, 2012, almost two (2) years prior to her death, Ms. Hanahan consulted with CPA-Attorney, H. Christopher Moss, regarding steps that could be taken to reduce her estate tax liability as the estate tax exemption law governing such matters was changing and Ms. Hanahan's estate would be at risk for payment of substantial estate taxes due to her ownership interest in numerous and diverse parcels of real estate. Mr. Moss recommended that a family LLC be created which would take title to various real properties owned by Ms. Hanahan through gift deeds. Valuation of the parcels would be based upon appraisals and then discounted for lack of marketability, thus reducing Ms. Hanahan's taxable estate.

Of particular note, Petitioner's deposition testimony reflects in an email between himself and Respondent that he spoke with his mother and confirmed that she "wanted to go ahead with creating the LLC" and "for Mikell Scarborough to take care of the deeds to her properties." Additionally, on December 6, 2012, Petitioner also spoke with Mr. Moss and Respondent regarding creation of the MRH Family LLC, and discussed a power of attorney that was needed.

Mr. Moss prepared the Power of Attorney on December 6, 2012. Ms. Hanahan appointed Respondent as the sole agent. Ms. Hanahan signed the Power of Attorney before Mr. Moss and a second witness, who also served as notary public. Although Petitioner now alleges that his mother lacked the necessary mental capacity to execute documents relative to the LLC, Petitioner has not challenged the validity of the December 6, 2012 Power of Attorney nor did he contact the second witness on the document with regard to its execution prior to the filing of this action.

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There are three (3) members of MRH Family, LLC, to wit, 1) Petitioner, 2) MRSMIE, LLC, an entity created and owned solely by Respondent, and 3) Ms. Hanahan. The Operating Agreement was prepared by Mr. Moss. It is dated December 30, 2012, and was signed by all three members. Petitioner received a 68% interest; MRSMIE, LLC, which Respondent was the sole member received a 30% interest; and Ms. Hanahan retained a 2% interest. The value of the real estate at issue prior to the formation of the LLC was approximately $6,000,000, based on appraisals, which value was discounted to $2,914,000, as reflected on the gift tax return.

In granting Respondent's Motion for Summary Judgment and finding that Ms. Hanahan had sufficient mental capacity to execute the Operating Agreement of MRH Family, LLC and its related documents and that such were not the product of undue influence by Respondent, I have considered the following facts.

For the initial meeting of December 6, 2012, Mr. Moss prepared a "Summary 5 Action Steps" Power Point presentation and reviewed it with Ms. Hanahan which explained what steps could be taken to reduce her estate tax liability. As part of the presentation, Mr. Moss had initially suggested a 75%-80% ownership by her son, Mikell Henderson which would result in much less to Respondent. **However, Ms. Hanahan stated to Mr. Moss that Mikell Scarborough was like a son to her and insisted that Mikell Scarborough receive a 30% interest in the family corporation.** Also at that meeting, Mr. Moss informed Ms. Hanahan of his fee of $5,000, which was not questioned by his client.

Additionally, I find that Mr. Moss prepared the MRH Family, LLC Operating Agreement and went over it extensively with Ms. Hanahan on December 30, 2012, and, significantly, that

she understood the provisions. Further, Ms. Hanahan was aware that, by creating the estate plan, her estate would save a substantial amount on paying very high estate taxes.

I find that Petitioner admits he reviewed the Operating Agreement but had no particular questions regarding it other than noting there were two page fives. Petitioner did not question Mr. Moss about the percentages of ownership or voice any concern about his mother's ability to understand what was going on and did not question Mr. Moss's fee. Petitioner does not dispute his mother signed the document. Further, Petitioner testified that he was fine that his cousin received the 30% interest. Petitioner is a licensed attorney who has practiced law and is an educated man; Petitioner did not seek any independent advice about the formation of the LLC from any other attorney or CPA.

Further, although Petitioner stated he believed that his brother (J. Ross Henderson) would have an ownership interest in the LLC, Petitioner initially did not discuss it with his mother and understood her reluctance in not including him. Petitioner later raised the exclusion of his brother from having an ownership interest in the LLC to his mother but she did not respond to him.

I find that on December 6, 2012, Ms. Hanahan did discuss the issue of giving property to her older son, Ross, with Mr. Moss and with Respondent. Initially, Ms. Hanahan did not want to give any real estate to Ross, but after much discussion, she agreed to convey to Ross the two parcels she planned to bequeath to him in her 1998 Last Will and Testament.

I find that the appropriate deed of transfer to the MRH Family, LLC, of the selected real estate was prepared by real estate attorney, Howard Yates, Esq. and executed by Ms. Hanahan on December 30, 2012. Attorney Yates and Mr. Moss served as witnesses and Attorney Yates served as notary public.

In addition, Attorney Yates prepared a separate deed, also dated December 30, 2012, which Ms. Hanahan executed in favor of her older son, Joseph Ross Henderson, and gifted him the two tracts that were left to him under her Last Will and Testament. The two deeds were recorded on December 31, 2012, within 1 minute of each other. However, it should be noted, that although Petitioner claims Ms. Hanahan did not have capacity to sign documents, Petitioner is not challenging the second deed that conveys the parcels to his brother executed by Ms. Hanahan that same day (December 30, 2012), and recorded within one (1) minute of the LLC deed.

Attorney Yates also prepared a separate Statement of Intent as to Land Transfers signed by Ms. Hanahan by which she acknowledged that she was making the transfers to the LLC to save on estate taxes. Further, the document stated that Ms. Hanahan understood that her nephew, Mikell Scarborough, would benefit from the creation of the LLC. She also acknowledged that she was making the gift of other real estate to her son, Ross, and was signing all documents freely and without undue influence.

I find that Petitioner testified he had no knowledge of how the deeds were executed or where they were signed and had no knowledge of whether or not Respondent was present. Petitioner acknowledges that he did not raise the issue of his mother's alleged lack of mental capacity to sign the documents at the time they were executed in December 2012.

I further find that while Petitioner cites his mother's dementia, mental illness and declining physical health as grounds for his mother's alleged lack of capacity, the September 6, 2012, report of Dr. Kay Durst states that as to Dr. Durst's psychiatric observations of Ms. Hanahan on that day that she (Ms. Hanahan) was "negative for anxiety, depression, and sleep

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disturbances" and has "appropriate affect and demeanor, normal speech pattern and grossly normal memory."

Of further note, in Petitioner's Responses to Respondent's First Requests to Admit dated June 13, 2016, Petitioner admits that on October 16, 2012, well after the report of September 6, 2012, that Kay Durst, MD, treating physician of Ms. Hanahan states in her medical records that "she (Ms. Hanahan) is doing well overall" and Ms. Hanahan "states that she feels no issue" and is "in no apparent distress." **Petitioner did not dispute Dr. Durst's report in his deposition testimony.**

Additionally, I find that in his Responses to Respondent's First Requests to Admit dated June 13, 2016, Petitioner admits that on October 18, 2012, that Piave Pitisci Lake, MD, treating psychiatrist of Ms. Hanahan, states in her medical records that "she (Ms. Hanahan) has a neat appearance; her thought process is "normal", her thought content is "normal", she has "full orientation as to place, time, person", her speech is "normal"; her memory is "wnl (within normal limits); she shows "no gross deficit" in either insight or judgment. **Petitioner did not dispute Dr. Lake's report in his deposition testimony.**

The law is well settled in this State, that a grantor with sufficient mental ability to comprehend what he is doing and understand the nature of the act and its consequences, has capacity to make a deed. Mathias v. Mathias, 206 S.C. 276, 33S.E.2d 626 (S.C. 1945).

I find that while alleging Ms. Hanahan lacked capacity, it is notable that during the course of this case, Petitioner **has not produced**, by affidavit or by deposition testimony of any medical provider or caregiver, **any evidence** that Ms. Hanahan suffered from any mental deficiency or mental or physical defect that would affect her ability to understand the nature of

the creation of the MRH Family, LLC, the Operating Agreement, the pertinent deeds, or the Statement regarding Land Transfers. Conversely, Ms. Hanahan's mental status is stated to be within normal limits as set forth in the two doctors' reports of October 2012, just weeks before the creation and funding of the LLC.

The LLC has been managed by Respondent from its inception and his 5 year term ends in December 2017. Petitioner inherits Ms. Hanahan's 2% interest in the LLC under the terms of her Last Will and Testament. Petitioner admits he received distributions from Respondent from income generated by the LLC of $10,000 in 2013 and $8,000 in 2014. Petitioner further admits that Schedule K-1s have been issued for those years and that he has relied on those K-1s in preparation of his own personal tax returns.

Petitioner further acknowledges that, if the LLC were declared void *ab initio* and the real estate in the LLC placed back into his mother's estate, of which Petitioner is the sole beneficiary of the residuary, that the value of the estate would far exceed the tax exemption amount in effect at time of death (in 2014) and that the estate would be taxed on approximately $3.0 Million. Petitioner states that he would owe taxes and "there is nothing I can do about it." **This would defeat the underlying reason for creation of the MRH Family, LLC and would render null and void Ms. Hanahan's efforts to save her estate and Petitioner from paying millions of dollars in estate taxes.**

In summary, I find that Petitioner participated in the LLC planning discussions in early December 2012. He signed the Operating Agreement and did not express any concern about his mother signing. He was aware that deeds would be needed to transfer title of the properties to the LLC. Petitioner did not raise any question to anyone regarding his mother's capacity. Further, I

find that Petitioner's position is inconsistent. To say that one document conveying title to an entity (the LLC) is not valid and another document that conveys title to an individual, (Petitioner's brother) both executed the same day, before the same witnesses, is not credible and is not legally or factually persuasive.

I conclude that Petitioner has thus failed to create a genuine issue of any material fact as to the lack of capacity of Ms. Hanahan relative to the creation of the MRH Family, LLC and its related documents in December 2012, which include the Operating Agreement of December 30, 2012, the deed conveying the various parcels of real estate into the LLC, and the Statement of Mary Ross Hanahan Concerning Land Transfers. The Court concludes that there exists no triable issue of material fact and Respondent is entitled to judgment as a matter of law. Summary Judgment is thereby granted in favor of Respondent on the Action to Try Title to Real Estate.

B. As to Undue Influence.

Petitioner's second theory is that the creation and funding of the MRH Family, LLC should be declared void, *ab initio,* due to alleged undue influence exerted by Respondent on his aunt. Petitioner points to the confidential relationship that Respondent had with his aunt and the fact that he managed her assets so as to provide sufficient income to meet her needs while Petitioner paid the day-to-day bills in a timely fashion on behalf of his mother. Petitioner alleges that the confidential relationship between Respondent and his aunt gives rise to a presumption of undue influence and such presumption must be rebutted by the alleged influencer.

The Court rejects Petitioner's assertion that Respondent exercised any undue influence on his aunt with regard to the creation and funding of MRH Family, LLC because Respondent was not present when the relevant deeds and Statement of Mary Ross Hanahan Concerning 2012

Land Transfers was signed by his aunt before Mr. Moss and Attorney Yates. I find that Attorney Yates accompanied Respondent to Ms. Hanahan's house on December 30, 2012. Attorney Yates had tax maps with him that day, which are drawings that depict where the properties were located, as was his custom. Mr. Yates met with Ms. Hanahan at the residence and

"had Mikell go out or go away from earshot or sight so that I could talk to her about this and to make sure that I felt comfortable that she had an intent to sign these documents. ....and she was adamant that this is what she wanted."

Ms. Hanahan, Respondent and Attorney Yates then travelled to Mr. Moss's office for the documents to be executed and Attorney Yates again asked Respondent

"to leave the room and Mikell went in to the hallway outside of the office completely. I .... wanted to make sure that this was what she wanted to do and that she understood what she was doing....nobody is pushing you... she was adamant. I detected no evidence of incapacity or forgetfulness at all."

I find that Attorney Yates, as well as Mr. Moss, were with Ms. Hanahan a little over 2 hours during these various discussions and execution of the documents in question. Ms. Hanahan signed the deeds and Statement before Mr. Moss and Attorney Yates. In the Statement, Ms. Hanahan acknowledges that she has had the opportunity to consult with Mr. Moss and her nephew, that she wishes to avoid substantial estate taxes, that her nephew would have an interest in the MRH Family, LLC and that she would retain a 2% interest. Ms. Hanahan also acknowledges that she desired to convey certain real property to her son, Ross Henderson. More importantly, Ms. Hanahan states that she has not been placed under any duress or influence by any one and that she was free or not free to sign the document.

At no point did Mr. Moss question Ms. Hanahan's mental capacity and ability to comprehend and understand the documents that she was signing, and, in fact, stated that "She was very sharp that day."

Further, Attorney Yates *"was of the opinion that she was under no disability or constraint or any undue influence. I made doggone certain that; Mikell is not here, this is between us, you don't have to do this if you don't want to."*

I also find that Attorney Yates was unaware of any diagnosis of dementia of Ms. Hanahan or history of mental illness and saw no evidence of this in his meeting with her. He found Ms. Hanahan to be "vibrant and very congenial." Mr. Yates had no communication with Petitioner at all.

The unanimous decision of the South Carolina Supreme Court in *Russell vs. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329 (2003), is remarkably on all fours with the issues relative to the granting of summary judgment in this case. *Russell* states and applies legal concepts, as listed below, that have been applied in numerous other cases. It is particularly significant in the present case that the South Carolina Supreme Court in *Russell* applied these concepts to facts for which there was substantially more evidence to support an attack on a Will, and still held, unanimously, that summary judgment should be granted.

Legal principles stated in *Russell* include the following:

1) Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 353 S.C. at 217.

2) Since the burden of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment. *Id.* at 218.

3) In order for a Will to be void due to undue influence, the contestant must show that the influence was brought directly to bear upon the testamentary act (the making of the Will). *Id.*

4) The mere existence of influence is not enough to vitiate a Will. *Id.* at 217.

5) 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 have not done if he had been left to his own judgment and volition. *Id.*

6) The evidence must show that the free will of the testator was taken over by someone acting on the testator's behalf. *Id.*

7) Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker. *Id.*

The Supreme Court found it significant that none of the contestants was present when the Will was discussed or when the Will was executed; this fact, along with application of the cited legal principles, prompted the holding that the Will was the product of the free and unfettered act of the testator. *Id.* at 219.

The South Carolina Supreme Court's holding in *Russell* was thus that the trial judge was correct in ruling that the contestants had not presented unmistakable and convincing evidence that the parties who had allegedly exercised influence had indeed utilized their relationship with the testator to substitute their will for his. *Id.* at 220. The South Carolina Supreme Court affirmed the trial court's granting of summary judgment. *Id.*

In Smith v. Jones, Appellate Case No. 2013-002810, Op. No. 5462, filed 12/21/2016. Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a

matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.* (quoting *Town of Hollywood v. Floyd,*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 588-89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. *Id.*

On August 7, 2013, the circuit court held a hearing on the summary judgment motion. At the hearing, Smith informed the circuit court she had scheduled several depositions for September 11, 2013, and asked the circuit court to grant a continuance and defer summary judgment until she had an opportunity to conduct them. Smith argued the depositions of several of the Testator's caregivers would demonstrate the Testator thought she was going to Lee's office to execute only a healthcare power of attorney and was taken there by Jones's daughter, Becky, "under the guise of a brunch." According to Smith, the evidence would show the Testator would not have allowed Lee to draft a will for her, because she believed Lee improperly handled the will of her deceased son, Wayne. Smith also contended the Testator did not realize she was executing a will, and the Testator told people the Hoefer Will was her will.

The circuit court rejected Smith's request for additional time to conduct depositions, orally granted Jones's summary judgment motion, and requested Jones prepare an order. The

circuit court determined no genuine issue of material fact existed because no affidavits were submitted from caregivers or others demonstrating "there was some type of influence that overcame [the Testator's] will" when she executed the Lee Will.

On August 29, 2013, Smith filed a supplemental memorandum in opposition to summary judgement and an affidavit from her counsel concerning the need for a continuance. In the affidavit, Smith's counsel asserted summary judgement was premature because the parties had not had a full and fair opportunity to complete discovery. According to counsel, the parties initiated discovery as soon as the matter was filed and everyone involved had been diligent in prosecuting the case. Counsel stated the case was filed on April 1, 2013; the first round of depositions was held on May 1, 2013; the second round of depositions was held on May 17, 2013; and the third round of depositions was scheduled for September 11, 2013. Counsel explained that before the September 11, 2013 depositions, he "wanted to have an opportunity to thoroughly review the depositions taken in May and analyze the elements of proof, applicable law[,] and other issues prior to the next round of fact witness [depositions]." Counsel listed the testimony he expected the September 11, 2013 depositions to elicit and explained he expected the scheduled depositions to support Smith's fraudulent inducement claims.

On October 8, 2013, Smith submitted to the circuit court copies of the September 11, 2013 examinations under oath (EOUs) of Mary Alice Tompkins, Sharon Graham, Rachell Pringle, Janet Altman, Hoyt Leggette Smith, and Karen Deas McCall. With the EUOs, Smith's attorney submitted a letter explaining his client requested he depose the witnesses even though the circuit court granted Jones's summary judgment motion. The letter stated the EUOs supported the arguments Smith made at the summary judgment hearing. Jones objected to the EUOs:

"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). "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." *Id.* "Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed." *Id.* at 217, 578 S.E.2d at 333-34. Furthermore, the "mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013).

No evidence in the record, including information contained in the EUOs, indicate the Testator was the victim of threats, force, or restricted visitation.[1] Smith indicated she was the primary caregiver for the Testator in October of 2011 as Jones was frequently busy caring for her young grandchildren. While our courts have found a parent and child may have a fiduciary relationship with one another, Jones was not with the Testator when she made the Lee Will and no allegations were made that Jones coerced the Testator or substituted her judgment for that of the Testator. Lee and Sloan both attest to the Testator's willingness and capacity to execute the Lee will, and both attorneys indicate they met privately with the Testator when discussing her will. Additionally, Smith admits the Testator had the opportunity to change the Lee Will had she so desired. Accordingly, we conclude Jones demonstrated the absence of a genuine issue of material fact as to Smith's undue influence claim, and Smith failed to produce contrary evidence beyond mere allegations.

Not all influences are undue, the contestants must show that the influencer has overcome the testator's free will and judgment. See Calhoun v. Calhoun, 277 S.C. 527, 531-32, 290 S.E.2d 415, 418 (1982); In Re: Estate of Anderson, 381 S.C. 568, 573, 674 S.E.2d 176, (Ct. App. 2009).

An issue of fact would exist only if Petitioner presented unmistakable and convincing evidence that Respondent Scarborough brought undue influence directly to bear upon his aunt's acts in signing the documents needed for the LLC to be completed and funded. Two independent witnesses, both professionals with either a legal and/or accounting background, are clear in their testimony that Ms. Hanahan understood what she was signing on December 30, 2012 (the MRH Family, LLC Operating Agreement, two deeds, one (1) to the LLC and one (1) to her other son, and the Statement concerning the 2012 Land Transfers), **all outside the**

presence of Respondent. It is notable that Petitioner has not submitted any affidavits which contradict or refute the affidavit or deposition testimony of Mr. Moss or of Attorney Yates. Petitioner has produced no evidence of any act or action by Respondent that demonstrates Ms. Hanahan was coerced by him, that Respondent destroyed the free agency of his aunt or overtook her free will, or that Respondent otherwise exerted improper influence to get his aunt to sign the LLC documents in question.

In order to survive summary judgment, the law requires Petitioner to produce something more than a scintilla of evidence in support of his allegations of undue influence. However, Petitioner has been unable to carry this burden, citing no specific facts, contested or otherwise, giving rise to a reasonable inference that Respondent overcame his aunt's desire and intention as to the utilization of an LLC for estate tax savings purposes and including Respondent as a member of the entity.

I conclude that, even when viewed in the light most favorably to Petitioner, Petitioner's arguments are supported by little more than his own suspicions and beliefs, and would require the Court to supplement the record with its own speculations. Petitioner has failed to create a genuine issue of any material fact as to the exercise of any undue influence by Respondent on Ms. Hanahan relative to the creation of the MRH Family, LLC and its related documents in December 2012, which include the Operating Agreement of December 30, 2012, the deed conveying the various parcels of real estate into the LLC, and the Statement of Mary Ross Hanahan Concerning Land Transfers. The Court concludes that there exists no triable issue of material fact and Respondent is entitled to judgment as a matter of law. Summary Judgment is hereby granted in favor of Respondent on the Action to Try Title to Real Estate.

AND IT IS SO ORDERED!

~~HON.~~ **BROOKS GOLDSMITH**
Circuit Court Judge

May 3, 2017
~~Charleston, SC~~

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

CASE NO. 2015-CP-10-6502

MIKELL M HENDERSON

Petitioner,

vs

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

MIKELL R SCARBOROUGH, Individually and as Personal Representative of the Estate of Mary Ross Henderson, and Joseph Ross Henderson,

Respondents.

In Re: Estate of
Mary Ross Henderson

This matter comes before the court upon Respondent's Motion For Summary Judgment As To Codicil of October 19, 2012. After considering memorandum submitted by both sides as well as oral argument, I find genuine issues of material fact exist and thus deny said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that said Motion For Summary Judgment is HEREBY DENIED.

May 30, 2017

BROOKS P GOLDSMITH, CIRCUIT JUDGE