THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas



The Honorable Roger M. Young, Sr.
Circuit Court Judge

APPELLATE CASE NO. 2017-001131

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Glenn Gunnells, Individually and as the Personal Representative of the Estate of Helen B. Gunnells.....Appellant,

v.

Cathy G. Harkness.....Respondent.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

This matter arises from a Will dispute in the Charleston County Probate Court. Respondent Harkness, acting pro se, filed a Petition in Charleston County Probate Court on July 28, 2014 seeking to set aside the Will of Helen Gunnells dated July 3, 2013 which had been submitted for probate. She alleged that the Will was procured by the undue influence of her brother, Glenn Gunnells. Glenn Gunnells had been informally appointed as Personal Representative of the Estate on February 25, 2014. Appellant Gunnells, individually, and as Personal Respresentative of the Estate of Helen Gunnells, filed a timely answer denying the allegations of undue influence. Harkness later retained counsel and an Amended Complaint was filed on April 16, 2015 which re-alleged undue influence. An Amended Answer denying same was filed.

A non-jury trial was held before the Honorable Irvin G. Condon, Probate Judge for Charleston County, on March 1-3, 2016. Judge Condon issued an "Order Voiding the Last Will & Testament Dated July 3, 2013 and Admitting the Last Will & Testament Dated November 7, 2006 to Probate" on May 12, 2016. Appellant Gunnells filed a Motion to Reconsider on May 31, 2016 which was denied by Judge Condon in an Order dated August 25, 2016.

Appellant Gunnells thereafter filed an appeal to Circuit Court on August 26, 2016. The appeal was argued before the Honorable Roger Young, Circuit Court Judge for Charleston County, on March 3, 2017. Judge Young issued a written Order denying the appeal on April 11, 2017.

This appeal followed, Notice of Intent to Appeal being filed on May 12, 2017.

## STATEMENT OF FACTS

Helen Beatrice Gunnells ("Helen" or "Testatrix") died on February 7, 2014 in Charleston County, South Carolina. She was the widow of Aiken Arden Gunnells ("Arden") who predeceased her on June 8, 2013. The Gunnells had three (3) children: Appellant Glenn Gunnells ("Glenn"), Cathy Harkness ("Cathy") and Belinda Davis ("Belinda").

Cathy historically had a very good relationship with her mother and often took her shopping, to doctors' visits, etc. (Tr. Vol. I, p. 24, lines 5-11; p. 64, lines 1-25). Cathy and her brother Glenn, however, never got along. (Tr. Vol. I, p. 57, lines 23-25). Glenn was a former used car salesman who stopped working in 2000 and lived thereafter on Social Security disability payments of $1,138.00 per month. (Tr. Vol. II, p. 148, line 21). He was considered by his sister, Belinda, to be "a control freak, drug and alcohol abuser, a user of people, conniving." (Tr. Vol. I, p. 74, lines 9-10).

Arden and Helen Gunnells executed Wills on November 7, 2006, leaving everything to each other and alternatively to the children in equal shares should one spouse predecease the other.

In the Spring of 2012, Arden was diagnosed with cancer. Shortly thereafter, Glenn moved into his parents' home to help care for them. About the same time, Cathy moved back to Charleston from Myrtle Beach to help care for her parents, too. She moved into an apartment nearby. She sold her Corvette and purchased an SUV because it was easier for her mother to get in and out of when she drove her places. (Tr. Vol. I, p. 102, lines 15-22).

During Arden's battle with cancer, there was friction between Glenn, Cathy and Belinda about various things. At one point, when Belinda took steps to make sure she could consult with Arden's doctor at the hospital, Glenn wrote the girls an email stating: "Let it be known, nothing

will be signed or initialed till I look at it, exclamation point three times. Let it be written so let it be done, two exclamation points. All has been done and notified, several exclamation points." (Tr. Vol. I, p. 66, lines 17-21).

On June 8, 2013, Arden Gunnells died. Shortly after Arden's death, Glenn told Cathy that she was no longer allowed to call or visit her mother and that he would call the police on her if she attempted to do so. (Tr. Vol. I, p. 107, lines 9-13). Jack Brantley, Helen's brother, noticed a decided change in his communications with his sister, Helen, once Arden died. "[s]he did not talk as freely to me as she did in—in the previous days." (Tr. Vol. I, p. 19, lines 1-2). Helen's close friend of many years, Helen Carroll, also noticed a huge difference. (Carroll Depo. p. 20, lines 5-19).

On July 3, 2013 (26 days after Arden's death), Helen was taken to the office of Suzanne Klok, Esquire in Mt. Pleasant, SC where she executed a new Will designating Glenn as her sole beneficiary. Attorney Klok had no previous relationship with Helen Gunnells and the visit on July 3, 2013 was the only time she ever spoke to her. Attorney Klok had previously represented Glenn, however, and it was Glenn who set up the appointment and drove his mother to and from the lawyer's office. (Tr. Vol. II, p. 73, lines 16-25 and p. 75, lines 5-20).

There was one occasion after Arden's death that Helen Carroll visited with Helen Gunnells when Glenn was not present to supervise the visit. At that time, Helen Gunnells told her longtime friend that Glenn had made her sign a new Will although she did not want to. (Carroll Depo. p. 18, lines 11-21).

Throughout the time that Glenn lived with his mother, after Arden's death, she was entirely dependent on him. She could not drive or leave the house. Being on total disability himself, he was seldom away from her during the day. He totally took over the house, setting up

his bedroom in what was once the living room (Tr. Vol. I, p. 20, lines 8-9) and he installed surveillance cameras to monitor the property (Tr. Vol. I, p. 20, lines 18-23).

Helen's health was not good physically, mentally, or emotionally. She was extremely upset by Arden's death (Chanson Depo., p. 15, line 17 – p. 16, line 15). On the same day that she executed the "new" Will at Attorney Klok's office, she also saw her doctor who described her as "visibly upset" "crying" and "distraught." (Chanson Depo., p. 35, lines 12-24). Helen's health gradually deteriorated until her death on February 4, 2014. Glenn took the "new" Will to the Charleston County Probate Court soon thereafter and was appointed Personal Representative.

Acting pro se, Cathy filed a Petition to Set Aside the "new" Will. The Petition was filed in July of 2014 and served in early August. Knowing that the Will was disputed, Glenn nevertheless took steps to sell the home on Capri Drive (the only asset of any value according to the Inventory & Appraisement he filed with the Probate Court) in December 2013 and distributed the assets to himself. (Tr. Vol. II, p. 164, line 6 – p. 165, line 17).

## STANDARD OF REVIEW AND GENERAL APPLICABLE LAW

An action to contest a Will is an action at law. Golini v. Bolton, 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997). The standard of review is articulated in In re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999): "If the proceeding in the Probate Court is in the nature of an action at law; the circuit court and this Court may not disturb the probate judge's findings of fact unless a review of the record discloses there is no evidence to support them." An appellate court should therefore consider the evidence in a light most favorable to the Respondent. The appellate court is "not at liberty to pass upon the veracity of the witnesses" and determine the case based on how it thinks the evidence should have been weighed by the trial court. Graham v. Whitaker, 282 S.C. 393 at 398, 321 S.E.2d 40 at 41 (S.C. 1984). Rather, "the

findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Associates Ltd. v. City of Greenville, 266 S.C. 81 at 86, 221 S.E.2d 773 at 774 (1976).

A Will obtained through undue influence is not a valid Will. Undue influence exists when there has been coercion which destroys the free will of the testatrix causing her to dispose of her assets in a way contrary to the exercise of her own free will. In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999).

Some factors considered by the Court in earlier cases include (but are not limited to, the following):

1) The Testatrix was infirm in some respects and therefore susceptible to influence. Byrd v. Byrd, 279 S.C. 425, at 427, 308 S.E.2d 788 at 789 (1983);

2) The beneficiary had a fiduciary relationship with the Testatrix. Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012). Indeed, the existence of a fiduciary relationship raises a presumption of undue influence. Howard v. Nasser, 364 S.C. 279, 289-90, 613 S.E.2d 64, 69 (Ct. App. 2005);

3) An unnatural disposition making the person charged with the undue influence the chief beneficiary. Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64, 69 (Ct. App. 2005);

4) Whether the contested Will made disposition drastically different from those in prior Wills. In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999);

5) Motive and opportunity by the beneficiary to influence the Testatrix. Calhoun v. Calhoun, 277 S.C. 527, 90 S.E.2d 415 (1982);

6) Whether the Testatrix had unhampered ability to change the Will at a late date. Hembree v. Estate of Hembree, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993);

7) Whether threats, force or restricted visitation existed. Russell v. Wachovia Bank N.A., 353 S.C. 208, 578 S.E.2d 329 (S.C. 2003).

## ARGUMENT

### I. The Probate Court was correct in weighing the testimony of attorney and paralegal who witnessed the execution of the Will in the context of other evidence in the case.

The disputed Will was prepared by Attorney Suzanne Klok and witnessed by Ms. Klok and her paralegal, Ms. Annmarie Voytko. Both testified that they did not detect any undue influence. Appellant essentially argues that the testimony of Ms. Klok and Ms. Voytko should outweigh all of the other evidence presented in the case as a matter of law. As noted above, the appellate court is "not at liberty to pass upon the veracity of witnesses" and determine how it thinks the evidence should have been weighed by the trial judge. Graham v. Whitaker, 282 S.C. 393 at 398, 321 S.E. 2d 40, at 41 (S.C. 1984). Rather, "the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81 (1978) at 86, 221 S.E.2d 773 at 774 (1976).

The trial judge's Order is 17 pages long and it goes into great detail about the way the trial judge analyzed the broad gambit of factual testimony. Some of the most salient facts that the Court relied on to "outweigh" the isolated testimony of Ms. Klok and Ms. Voytko include the following:

A) Ms. Klok had been Glenn's attorney at a closing on June 6, 2013 and had no relationship with Helen Gunnells prior to the day she changed her Will on July 3, 2013. Despite Glenn's sworn testimony at his deposition that he had taken his mother to meet with Ms. Klok 2 or 3 times prior to signing the Will, Ms. Klok testified there was only a single meeting. Glenn

made the appointment for the meeting, drove his mother to and from the meeting, and waited outside the building while Helen Gunnells met with Ms. Klok. (Order, p. 11/Tr. Vol. II, p. 73, lines 16-25 and p. 75, lines 5-20).

B) Helen Carroll, one of Helen Gunnells' oldest and closest friends, testified by video deposition. She recounted a visit with Helen Gunnells after Arden's death in which Helen Gunnells told her she had changed her Will because Glenn made her do so. Helen said to Ms. Carroll "I had no choice." When Glenn came home, Testatrix "clammed up." (Order, p. 5/Carroll Depo. p. 18, lines 8-22).

C) Dr. Rhonda Chanson was Testatrix's doctor and she met with Helen Gunnells on the day she changed her Will. Dr. Chanson described Helen Gunnells as "visibly upset", "crying" and "distraught." (Chanson Depo. p. 35, lines 9-24). Although she believed she was competent, she could offer no opinion as to whether she was emotionally stable enough to consummate the Will on July 3, 2013. (Order, p. 13-14/Chanson Depo. p. 38, lines 1-4).

D) Numerous witnesses detailed the fact that Glenn limited access to his mother by other family members after Arden died. These included:

i) Cathy Harkness – who related that Glenn told her he would have her arrested for "harassment" if she tried to contact her mother. (Order, p. 9/Tr. Vol. I, p. 107, lines 9-12).

ii) Belinda Davis – who related a number of incidents in support of her contention that Glenn was a "control freak", an alcoholic and substance abuser and "a user of people." (Order, p. 7-9/Tr. Vol. I, p. 74, lines 7-10). She described an incident in which Glenn physically pushed her out of the house when she tried to visit her mother. (Tr. Vol. I, p. 108, lines 3-9).

iii) Jack Brantley – the youngest brother of Helen Gunnells. Mr. Brantley was very close to his sister. He noticed a huge change in her demeanor toward him after Arden died. She became "...very hesitant to talk to me" which was a dramatic change in their relationship. (Tr. Vol. I, p. 33, lines 8-9/Order, p. 4).

In an email to Cathy dated July 22, 2013, Mr. Brantley said that his sister "...does not talk to me about things like she did when Arden was living, but only nondescript things..." (Tr. Vol. I, p. 38, lines 13-14). Mr. Brantley thoroughly contradicted Glenn's assertion that he sought help from Cathy and Belinda with their mother. Indeed, Glenn made it clear to Mr. Brantley "he didn't want them there." (Tr. Vol. I, p. 38, line 17 and Order, p. 4).

As noted by the trial judge, Mr. Brantley "is a retired Lieutenant Colonel who served as City Administrator for Waynesboro, Georgia for 23 years. He is now 83 years old and continues to serve on the Board of Elections in Waynesboro, Georgia." (Tr. Vol. I, p. 12, lines 11-21 and Order, p. 3). As such, he was a very credible witness. The trial court highlighted numerous points from Mr. Brantley's testimony that were relevant to the Court's weighing of the evidence presented and that directly contradicted Glenn's contentions. (Order, p. 4-5).

E) Appellant Glenn Gunnells was simply not credible. His most significant lie was probably his testimony at his deposition that he took his mother to see Ms. Klok 2 or 3 times prior to July 3, 2013 when she executed the Will when, in fact, he only took her there the one time on July 3, 2013. (Tr. Vol. II, p. 155, line 16 – p. 157, line 16). Next, Mr. Brantley flatly contradicted Glenn's assertion that he asked Mr. Brantley to get the girls to help with his mother. Mr. Brantley not only testified that this was untrue but he produced an email generated on July 22, 2013 (well before this dispute) that thoroughly demonstrated Glenn's assertion was false. (Order, p. 12/Tr. Vol. I, p. 37, lines 3-22 and p. 38, lines 8-23).

Helen Carroll likewise contradicted Glenn's assertion that she quit visiting because of her own health concerns and inability to drive (Order, p. 6), but rather because Glenn and Helen had become so "cold." (Carroll Depo. p. 20, lines 5-11).

Respondent has highlighted the above because it generally reflects evidence from non-interested parties and so, by its nature, has greater weight in the Court's evaluation. Suffice it to say, there was substantial evidence for the Court to weigh against the isolated 2 to 3 hour meeting with Ms. Klok and Ms. Voytko, which Appellant argues is dispositive of the analysis.

## II. The Circuit Court's affirmation was correct.

The Appellant asserts that the original Order of the trial court, the trial court's subsequent Order Denying Appellant's Motion to Reconsider and the Circuit Court's Order affirming the Probate Court's rulings all fail to give proper deference to the testimony of Ms. Klok and Ms. Voytko and indeed "acted as if they hadn't testified at all."

This assertion is simply not correct. The trial court specifically addressed the testimony of Ms. Klok and Ms. Voytko in its original order. (Order, p. 13). In its subsequent Order Denying Appellant's Motion to Reconsider, the trial court stated that Appellant contends that the Court "failed to consider" the testimony of attorney Suzanne Klok and her paralegal. To the contrary, this Court's Order expressly acknowledges and contemplates the testimony of Attorney Klok and Ms. Voytko. (Order, p. 6). Likewise, the Circuit Court specifically addressed Appellant's contention in Section II (3) of its Order. (Order p. 6).

Like the Probate Court, the Circuit Court has simply refused to accept that the testimony of Ms. Klok and Ms. Voytko should be considered in a vacuum and to the exclusion of all other evidence presented in the case. This affirmation was proper.

## III. The Probate Court was entitled to weigh evidence that occurred after the signing of the Will.

Appellant alleges that Respondent Harkness presented evidence at trial that the Probate Court should not have considered and committed reversible error by doing so. This evidence is identified as things that happened after July 3, 2013. Appellant only identifies one specific instance of such evidence, "Appellant's alleged maladministration of the Estate." Respondent believes this evidence was properly considered and relevant to Appellant's honesty and credibility which was obviously an extremely important aspect of the case. In this regard, Respondent presented evidence that Glenn Gunnells, as Personal Representative of the Estate: 1) misrepresented the value of the house on the Inventory & Appraisement; 2) failed to list household items on the Inventory & Appraisement; 3) directly pocketed money he obtained from selling the Estate's personal property assets; and 4) directly deposited the assets from the sale of the home into his personal account after litigation challenging the Will had been filed. (Tr. Vol. II, p. 157-165).

## IV. The Probate Court did not rely on irrelevant facts in making its determination of undue influence.

In this section, Appellant lists a variety of evidentiary points that he asserts the Court improperly considered. As noted above, the weight of the evidence is not a proper subject for review. Appellant therefore casts each item as "totally irrelevant" in order to invite review.

The evidentiary matters that Appellant alleges are entirely irrelevant are as follows:

A) The testimony of Testatrix's longtime friend, Helen Carroll, who said Testatrix told her she signed the July 3, 2013 Will because Glenn forced her to do so.

It is hard to imagine more relevant evidence. The testimony of Helen Carroll in large part speaks for itself. Respondent would point out that her testimony was by video so the trial

court had the opportunity to observe her demeanor.

The relevant portion of the transcript is as follows. The context is that Respondent's lawyer has handed the witness her statement.

* * *

Q. Does that help refresh your memory about whether she talked to you about a Will?

A. Yeah.

Q. Okay. What – and what did she tell you about a Will?

A. She said that - - she didn't say too much, but she said that Glenn told her she had to.

Q. Had to do what now?

A. Sign the Will.

Q. Okay. And how did she seem to feel about it?

A. She didn't want to.

Q. Okay. And your statement says, Helen, I had no choice. Is that her talking to you?

A. Yeah, uh-huh.

(Carroll Depo. p. 18, lines 8-22).

* * *

The Probate Court's conclusion therefore was supported by Ms. Carroll's testimony, and there is nothing irrelevant about the evidence she provided.

B) Ms. Carroll testified that she knew Glenn to have an alcohol problem because he slurred his words.

Ms. Carroll was competent to form such an opinion. Also, her opinion was only cumulative to the testimony of Belinda Davis, Glenn's sister, on this point (he is an alcoholic and abuser of substances (Tr. Vol. I, p. 74, lines 9-10) and that of Cathy Harkness ("Glenn stayed out for almost 20 years on a drunken stupor." (Tr. Vol. I, p. 138, lines 17-18).

C) The fact that Cathy and Belinda went to DSS because they were concerned about how their mother was doing under Glenn's care.

As the old saying goes "Actions speak louder than words." The fact that Cathy and Belinda sought help in getting access to their mother was clearly indicative of the fact that their visitation was restricted. Likewise, they went to see a lawyer, Robert Polk, for help but he was too expensive. Again, their action is indicative of their level of concern about Glenn's control of their mother and the fact that he was denying them visitation. It also contradicted Glenn's position in Court that he actively sought their help in caring for their mother.

D) The Probate Court gave weight to Cathy's selling her sports car to get an SUV to allow her to transport her mother to doctors' visits.

At trial, Glenn testified that Cathy refused to help with his parents at all.

* * *

Q. So your position is that Cathy and Linda just didn't show any love to your mama or your daddy, did they?

A. That's right.

Q. And that was for like a seven year period basically before they died?

A. That's right.

(Tr. Vol. II, p. 153, lines 16-22).

* * *

The fact that she moved to Charleston and sold her car to accommodate her mother's infirmities directly contradicted his assertion and was therefore relevant.

E) Uncontroverted evidence that Respondent sued her mother almost immediately after her father's death.

This was a big part of Appellant's argument at trial. The trouble is that the context and content of the suit worked against Appellant. Cathy was forced to sue her mother to get back a number of personal items that she could not get returned after Glenn denied her access to the house. The testimony of Mr. Jack Brantley confirmed that Cathy was only trying to get what was hers and that Glenn refused to cooperate. Because Testatrix owned the house where the personal property was located, Cathy was forced to sue her mother (as opposed to Glenn). The suit was successful and the items were returned only after going to court. (Tr. Vol. I, p. 112, line 5 – p. 114, line 24). Respondent believes the lawsuit actually demonstrates how controlling and unreasonable Glenn had become.

F) Appellant met Ms. Klok on one previous occasion.

This was relevant to show that Helen Gunnells had no prior relationship with Ms. Klok although Glenn had actually used her as an attorney previously. Its relevance is obvious.

G) Ms. Davis was an absent child.

Ms. Davis was absent at times helping with her family who lived out of state but she had great knowledge of many relevant aspects of the case. She had a good relationship with her mother and Glenn over many years, much of which was relevant.

H) An independent witness confirmed Testatrix did not want to interact with her daughter.

Again, Appellant cites a single piece of evidence offered out of context and the existence

of which only goes to the weight of the evidence as a whole.

Lastly, as to each of the contentions enumerated above, as noted by the Circuit Court it is not enough to simply show a mistake in admission of evidence. There must be prejudice which caused the trial court to act in a way "inconsistent with substantial justice." (Order, p. 2 citing SCRCP 61). Respondent submits that the evidence was properly admitted and considered. To the extent any evidence was improperly admitted or considered, however, then it was harmless error.

## V. There was evidence of threats and restricted visitation that supported the Probate Court's findings.

At each level, Appellant has asserted there was absolutely no evidence of threats or restricted visitation despite the clear and unequivocal evidence in the record to the contrary.

Cathy testified that shortly after her father's death, Glenn threatened to have her arrested for harassment if she called or attempted to visit her mother. (Tr. Vol. I, p. 107, lines 9-12).

On June 26, 2013, Belinda and Cathy went by to see Testatrix at which point Glenn pushed Belinda out of the house and threatened to call the police. (Tr. Vol. I, p. 108, lines 3-9, p. 69, lines 14-22). Numerous witnesses confirmed this incident, including those called by Appellant.

Testatrix Helen Gunnells told her brother, Jack, "...that Glenn did not like for her to talk to Cathy." (Tr. Vol. I, p. 33, lines 18-19).

Mr. Brantley himself would ask his sister common questions about her health and be told "let me let you talk to Glenn." (Tr. Vol. I, p. 18, lines 10-11). When he suggested that she call Cathy about an operation Cathy had on her leg, Testatrix's response was "she said that Glenn did not like for her to talk to Cathy." (Tr. Vol. I, p. 33, lines 18-19).

This evidence has been brought to Appellant's attention numerous times during the

review process and each time, Appellant reasserts that there is "no evidence" despite being given proof to the contrary.

## VI. The Probate Court did not give weight to "medical conclusions" of Dr. Chanson that were unsupported by the record.

Appellant's argument states that the Probate Court made "medical conclusions" not supported in the record. Appellant fails to identify a single such conclusion, however, and so it is impossible for Respondent to respond.

## VII. The Probate Court properly considered the testimony of Dr. Chanson.

The thrust of Appellant's argument is that "Respondent failed to illicit any testimony from any witness that any medication was ever withheld." First of all, the Court's finding was that it was "not properly administered," as opposed to "withheld" as mischaracterized by Appellant.

Dr. Chanson testified extensively about the importance of her prescription for potassium: "...low potassium can cause a number of different issues to include muscle spasms, cardiac issues, and a number of other things." (Chanson Depo., p. 57, lines 22 – p. 58, line 1). Nevertheless, when Ms. Gunnells came in for her appointment on February 6, 2014, Dr. Chanson's office confirmed "She never received the potassium prescription" (Chanson Depo., p. 61, lines 9-10) which she had prescribed on January 2, 2014. This information would have been provided by Glenn and/or his mother.

Next, Dr. Chanson's notes repeatedly referenced problems with getting the drug Remeron administered, a drug to help with dementia. Dr. Chanson prescribed it 2 times by direct email to the pharmacy but was later told by Glenn and Mrs. Gunnells, she still wasn't taking it. Dr. Chanson therefore handwrote a prescription to give to Glenn because the patient was having

trouble getting the medication. Despite the Remeron being first prescribed in September 2013, Glenn never called to report any difficulties getting the prescription. He would just show up at the next appointment and say he wasn't able to get it filled. Remeron is first mentioned as a prescribed drug on September 9, 2013, which was to replace Celexa (Chanson Depo., p. 39, lines 22-25). However, at the visit on December 16, 2013, there was still a question as to whether Helen was getting her Remeron or not (Chanson Depo., p. 48, lines 9-19) and so Dr. Chanson put in her notes that she "strongly recommend that she restart her Remeron." On January 2, 2014, the Remeron issue was still unresolved and that is when Dr. Chanson hand wrote the prescription and gave it to Glenn (Chanson Depo., p. 50, line 14 – p. 51, line 13). This was despite the fact that Dr. Chanson followed up after the December 16, 2013 visit, where she "strongly recommended recontinuing the Remeron," (Chanson Depo. p. 52, lines 5-9) with a phone call on December 18th to make sure there were no problems getting the prescription.

Of note is Glenn's representation to Dr. Chanson at the visit on December 16, 2013 that "it's difficult for her son to bring her into the office frequently because of his ongoing work schedule and other responsibilities." (Chanson Depo., p. 49, lines 3-6). Glenn himself confirmed that he has been on total disability since 2000 so his excuse for not getting his mother to appointments is obviously false.

The cross examination of Dr. Chanson is admittedly a bit tedious, yet it is clear that Mrs. Gunnells was not getting her dementia medication – Remeron – according to the history provided by Glenn and Testatrix to Dr. Chanson. Appellant's assertion (once again) that there is "no evidence" about "any" misadministration of prescriptions is simply not correct.

**VIII. The Probate Court properly considered the testimony of Helen Carroll.**

Helen Carroll was an elderly lady and knew Helen Gunnells for about 40 years. (Carroll Depo. p. 7, line 12). Her testimony was taken by video deposition. How her testimony should be evaluated is totally in the discretion of the trial court. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (S.C. 1984).

To the extent Appellant has objected to the single phrase "I had no choice," that statement is only cumulative to the earlier testimony in which she said concerning the signing of the July 3, 2013 Will that "Glenn told her she had to" and "She didn't want to." (Carroll Depo. p. 18, lines 14-19).

**IX. The Probate Court's Order Denying Appellant's Motion to Reconsider was proper.**

Appellant's exception IX is so general that it is difficult to respond to. No specific failure of the Probate Court is addressed. Rather, the exception is essentially "The legal and factual conclusions the Probate Court arrived at are simply not supported by the evidence and testimony. The Court simply states that "the record speaks for itself" but gives no legal or factual basis for its conclusions." (Appellant's Brief, p. 31).

Appellant's assertion is simply not true. The original Order is almost 17 pages long and details the legal basis and factual conclusions at length. The Order Denying the Motion to Reconsider is 7 pages and specifically references Petitioner's Memorandum in Opposition to Motion to Reconsider. Pages 2-4 of the Memorandum set out numerous quotations from the record that directly contradicted Appellant's assertion that there was no evidence in the record to support certain factual findings. This portion of the Memorandum is clearly the object of the assertion "the record speaks for itself." Appellant thus mischaracterizes the Probate Court's assertion as vague and overly general when, in fact, it was full of page and line references to the

trial record.

In short, the Probate Court's Orders were well documented as to the record and thoroughly based on existing law. Appellant's exception is without merit.

## CONCLUSION

For the reasons outlined above, Respondent prays that the appeal be denied and that the judgment of the Probate Court be affirmed.

Respectfully submitted,

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November 15, 2017
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In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Sr.
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**CERTIFICATE OF COUNSEL**

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The undersigned attorney hereby certifies that the Respondent's Designation of Matter to be Included in the Record on Appeal and the Respondent's Initial Brief in the above referenced case contain all materials proposed to be included in the case and not any other materials.

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November 15, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr.
Circuit Court Judge

APPELLATE CASE NO. 2017-001131



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Glenn Gunnells, Individually and as the Personal Representative of the Estate of Helen B. Gunnells.....Appellant,

v.

Cathy G. Harkness.....Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Respondent's Designation of Matter to be Included in the Record on Appeal and the Respondent's Initial Brief in the above referenced case have been served upon counsel of record by mailing a copy by U. S. Mail to the following:

Robert B. Varnado, Esquire
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November 15, 2017
Charleston, South Carolina

# LAW OFFICES OF DONALD H. HOWE, LLC

*Attorneys at Law*

November 15, 2017



Honorable Jenny Abbott Kitchings
Clerk, S. C. Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Glenn Gunnells, Individually and as the Personal Representative of the Estate of Helen B. Gunnells, Appellant v. Cathy G. Harkness, Respondent
Appellate Case No. 2017-001131

Dear Ms. Kitchings:

Please find enclosed Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal along with a Certificate of Service in the above case. Please let me know if you need anything else.

Thank you for your assistance.

With kindest regards, I am

Yours sincerely,

Donald H. Howe

DHH/gbh
Enclosure
cc: Robert B. Varnado, Esquire
Alexis M. Wimberly, Esquire
Julie C. Jackson-Bailey, Esquire
Michelle J. Weil, Esquire

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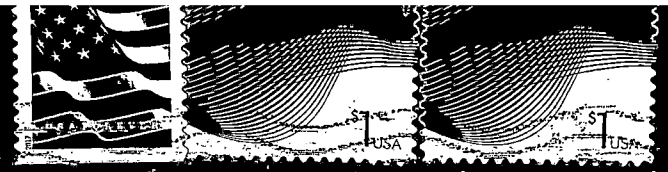


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